The judicial development of a norm on the permissibility of amnesties under international law

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A thesis submitted in fulfilment of the requirements of the University of Durham for the degree of Doctor of Philosophy, 2023

ABSTRACT

The use of amnesties in transitional justice remains a contentious issue. The fight against immunity at an international level have left little room for the application of amnesties for international crimes and human rights abuses. Nevertheless, amnesty measures continue being applied in many jurisdictions and the permissibility of conditional amnesties enacted as part of wider processes of reconciliation remains under debate. With no treaty provision explicitly proscribing the application of amnesties and article 6(5) of the Additional Protocol II to the Geneva Conventions encouraging the granting of 'the broadest possible amnesty to persons who have participated in the armed conflict', much of the attention has focused on the interpretation that courts and human rights bodies have drawn from human rights treaties. However, international courts and human rights bodies have almost exclusively dealt with unlimited and unconditional amnesties. There is still uncertainty about whether conditional amnesties for serious human rights violations are permissible under international law.

This thesis examines two core questions. Firstly, what has been the influence of judicial dialogue in shaping a norm on the permissibility of amnesties for serious human rights violations under international law? And secondly, what are the standards developed by domestic courts, international tribunals, and human rights bodies to evaluate the permissibility of conditional amnesties for serious human rights violations?

This research analyses a sample of 368 decisions adopted by courts and human rights bodies in the last three decades that discuss the legality of amnesties. Using a complexity theory approach, it examines the role of judicial decisions in shaping the contours of a norm on amnesties under international law. The study reveals how the judicial discussion of the permissibility of amnesties under international law has followed dynamics of path dependence, where initial decisions adopted in the aftermath of autocratic regimes in Latin America have strongly determined the following treatment of amnesties in completely different contexts. However, the increasing number of interactions among judicial and quasi-judicial bodies have led to the formation of several communities or clusters. Thus, while the idea of a general prohibition of amnesty has become mainstream in the human rights movement, some courts

have adopted more nuanced approaches that leave room for the possibility of well-crated amnesties as an exceptional mechanism of transitional justice in certain contexts. The thesis concludes by developing a framework for the judicial examination of future amnesties.

STATEMENTS AND DECLARATIONS

Declaration

This thesis is the result of my own work. Material from the published or unpublished work of others which is used in the thesis is credited to the author in question in the text.

Statement of Copyright

Signature: Jinú Carvajalino Guerrero
Date: 28 April 2023

ACKNOWLEDGEMENTS

I would like to express my heartfelt gratitude to everyone who has contributed to the completion of this thesis. Firstly, I am deeply thankful to my supervisors, Dr Matthew Nicholson and Dr Annika Jones, for their unwavering support, guidance, and encouragement throughout my doctoral journey. Their insightful feedback and constructive criticism have been invaluable in shaping this thesis. Particularly at the end when I was losing motivation and confidence, Annika and Matt's generosity showed me the kind and supportive side of academia. I am also extremely grateful to Professor David Byrne who not only helped me seeing problems through the lens of complexity theory, but also took the time to show me the history of the north of England. My thanks also go to Dr Anashri Pillay and Dr Henry Jones who helped me to develop my argument with insightful and challenging questions during my progression reviews. I feel privileged to have had the opportunity to work with such exceptional mentors.

I feel very lucky to have had two excellent examiners in Dr Nicola Palmer and Professor Catherine O'Rourke, who I thank for engaging with my work in such a detailed manner and providing me with a stimulating and inspiring viva. Their words of encouragement have helped me to build my confidence back, and for that I am grateful.

Writing a PhD is isolating in itself, but doing it during lock down made it the most challenging project of my life. Completing this research would have not been possible without the love and support of my family and friends. I have no words to express my gratitude and love to my partner and best friend, Phoebe Green, who was always there for me, and has been a constant source of inspiration. I could not have made it this far without her encouragement, and the love of her family who embraced me with warmth and support.

Despite the distance, my family in Colombia has been very close to my heart during this journey. Many thanks to my dad, Hernando Carvajalino, for the daily chats and keeping me updated with all the gossip back home; to my mum, Martha Guerrero, for the spiritual guidance, and to my brother, Dante Carvajalino, for the unconditional love.

I would also like to extend my thanks to my colleagues, friends, and family members who have supported me in various ways during this journey. All my gratitude to my friends in Colombia that make me feel like I have never left the country, and to my friends in the UK who are always available for a drink and a good chat. Your support and encouragement have been invaluable. Special thanks to Dr Felix Torres and Dr Maja Davidovic, my PhD buddies. who shared my concerns and worries, always listening and validating my feelings when it felt that no one else understood the challenges of doing a PhD.

Finally, I am very grateful to the University of Durham for welcoming me and funding this research through the Durham Doctoral Studentship.

Thank you all for your invaluable contributions to this thesis.

TABLE OF CONTENTS

LIST OF FIGURES

LIST OF TABLES

LIST OF ABBREVIATIONS

APII	Additional Protocol II to the Geneva Conventions
ACHPR	African Charter on Human and Peoples' Rights
ACoHPR	African Commission on Human and Peoples' Rights
ACHR	American Convention on Human Rights
CT	Complexity theory
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CIL	Customary International Law
DCCAH	Draft of the Convention on Crimes Against Humanity
ECHR	European Convention on Human Rights
ECoHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
ECCC	Extraordinary Chambers in the Courts of Cambodia
GC	Geneva Conventions
HRW	Human Rights Watch
IACoHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
IACPPED	Inter-American Convention on the Forced Disappearances of Persons
ICRC	International Committee of the Red Cross
ICPPED	International Convention for the Protection of All Persons from Enforced Disappearance
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICC	International Criminal Court
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
ICJ	International Court of Justice
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ICL	International Criminal Law
OHCHR	Office of the United Nations High Commissioner for Human Rights
SCSL	Special Court for Sierra Leone
STL	Special Tribunal for Lebanon
TJ	Transitional Justice
UN	United Nations
UNCAT	United Nations Committee Against Torture
UNCEDAW	United Nations Committee on the Elimination of Discrimination against Women
UNCHR	United Nations Commission on Human Rights
UNHRC	United Nations Human Rights Committee
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UDHR	Universal Declaration of Human Rights

CHAPTER 1. Introduction

In 2010, the then Secretary-General of the United Nations (UN), Ban Ki-moon, stated that '[t]he old era of impunity is over. In its place, slowly but surely, we are witnessing the birth of a new age of accountability'.[1] Criminal prosecutions became essential for the redress of human rights abuses, while amnesty laws were treated as mechanisms of impunity.[2] Broadly speaking, amnesties are exceptional legal measures enacted by states to prevent criminal prosecutions and/or civil suits against certain individuals or categories of persons in respect of specific criminal conducts that have been committed.[3] Amnesties have been associated with impunity, because they limit the capacity of states to bring the perpetrators of violations to account, by accusing, prosecuting and, if found guilty, punishing them.[4]

Amnesties are not new tools. Josepha Close traces their origins to ancient civilisations in Egypt, Athens, Rome and China, and examines their extensive use in European societies throughout the 19th and 20th centuries.[5] Initially they considered a matter of domestic law. However, over the past three decades international legal actors have strongly questioned the compatibility of amnesties for serious crimes with international human rights standards. In 2004, the Secretary General of the UN suggested to the Security Council that they '[r]eject any endorsement of amnesty for genocide, war crimes, or crimes against humanity, [and] ensure that no such amnesty previously granted is a bar to prosecution before any United Nations-created or assisted court'.[6] Later, in 2009 the Office of the United Nations High Commissioner

[1] Ban Ki-moon, 'The age of accountability' (*United Nations, Secretary General,* 27 May 2010) <https://www.un.org/sg/en/content/sg/articles/2010-05-27/age-accountability> accessed 15 May 2022.
[2] Karen Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (2015) 100 Cornell LRev 1069, 1070.
[3] The definition of amnesties can differ substantially between different jurisdictions. For the purpose of this thesis, the definition has been developed from the academic literature, including elements from different definitions. See: OHCHR, 'Rule-of-Law Tools for Post-Conflict States: Amnesties' (2009) UN Doc HR/PUB/09/1, 5; Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Hart Publishing 2008) 5; Louise Mallinder and Kieran McEvoy, 'Rethinking amnesties: atrocity, accountability and impunity in post-conflict societies' (2011) 6 Contemporary Social Science 107, 111; Mark Freeman, *Necessary evils: amnesties and the search for justice* (CUP 2009) 13.
[4] Diane Orentlicher, 'Promotion and Protection of Human Rights: Impunity' (8 February 2005) UN Commission on Human Rights, Report of the independent expert to update the set of principles to combat impunity (Sixty-first session E/CN4/2005/102/Add1) 1, 6.
[5] Josepha Close, *Amnesty, Serious Crimes and International Law: Global Perspectives in Theory and Practice* (Routledge 2019) 11-45.
[6] Secretary General of the UN, 'The rule of law and transitional justice in conflict and post-conflict societies' (23 August 2004) Report to the UN Security Council, S/2004/616*, para 64.

for Human Rights concluded that amnesties for war crimes, genocide, crimes against humanity, and gross violations of human rights were incompatible with international law and the UN policy.[7]

Amnesties are now considered extremely controversial, with scholars and activists arguing that they are no longer a legitimate measure to address situations of violence or human rights violations.[8] Particularly focused on self-amnesties enacted in the aftermath of military dictatorships or authoritarian regimes in Latin America, human rights bodies adopted a stringent position prohibiting amnesties for gross human rights violations.[9] Even, initiatives like the South African Truth and Reconciliation Commission in 1995, empowered to grant amnesty in exchange for full disclosure of the crimes committed, were labelled as a 'model from another era' that would hardly survive international scrutiny under current legal standards.[10]

However, amnesties continue to be negotiated and implemented by states around the globe.[11] States contemplate amnesties as an important tool of negotiation. Very recently, at the end of 2019, US government officials suggested the possibility of granting amnesty to Nicolás Maduro, president of Venezuela since 2013, if he decided to voluntarily leave power.[12] And, before the recent escalation in hostilities, Ukrainian and Russian delegates held peace talks in Paris in 2019 and discussed the adoption of a national amnesty law as a mechanism to guarantee the retreat of Russian troops from the Donetsk and Lugansk regions.[13]

In fact, Louise Mallinder's Amnesty Law Database shows that, in the last two decades, amnesty measures covering international crimes have continued to be issued worldwide.[14]

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[7] OHCHR, 'Rule-of-Law Tools for Post-Conflict States: Amnesties' (n 3) 44.

[8] See: Ben Chigara, *Amnesty in International Law: The legality under international law of national amnesty laws* (Longman 2002); Leila Nadya Sadat, 'Exile, Amnesty and International Law' (2006) 81 Notre Dame LRev 955; Juan E. Mendez and Garth Meintjes, 'Reconciling Amnesties with Universal Jurisdiction' (2000) 2 International Law FORUM du droit international 76; Juan E. Mendez, 'Foreword' in Francesca Lessa and Leigh Payne (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (CUP 2012); Kathryn Sikkink, 'The Age of Accountability: The Global Rise of Individual Criminal Accountability' in Francesca Lessa and Leigh A. Payne (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (CUP 2012); Hugo A. Relva, 'Three Propositions for a Future Convention on Crimes Against Humanity' (2018) 16 JICJ 857.

[9] See: Anja Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (OUP 2009).

[10] HRW, *Selling Justice Short: Why Accountability Matters for Peace* (Human Rights Watch 2009) 7; OHCHR, 'Rule-of-Law Tools for Post-Conflict States: Amnesties' (n 3) 33.

[11] See: Louise Mallinder, 'Amnesties, Conflict and Peace Agreement - ACPA dataset' (*University of Edinburgh,* 2016) <https://www.peaceagreements.org/amnesties/> accessed 14 January 2021.

[12] See: 'U.S. Offers Amnesty to Venezuelan Leader, if He Leaves Power' (*New York Times,* 18 August 2019) <https://www.nytimes.com/2019/08/28/world/americas/us-amnesty-venezuela-maduro.html> accessed 19 August 2021.

[13] Michail Vagias, 'Amnesties, The Gaddafi Admissibility Appeal Decision and the Minsk Agreements' (*Opinio Juris,* 12 March 2020) <http://opiniojuris.org/2020/03/12/amnesties-the-gaddafi-admissibility-appeal-decision-and-the-minsk-agreements/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+opiniojurisfeed+%28Opinio+Juris%29> accessed 19 August 021.

[14] Louise Mallinder, 'Atrocity, Accountability, and Amnesty in a 'Post-Human Rights World'?' (2017) 18 Transitional Justice Institute Research Paper 4, 10. Recent amnesty laws that have been agreed or granted for international crimes include:

Moreover, some scholars have argued that, in exceptional circumstances, amnesties can be important peace-making tools that facilitate transitions and put an end to situations of violence.[15] The reality of internal conflicts is that, when the parties remain strong, amnesties are one of the only tools to negotiate a peaceful transition to democracy. In Colombia, for instance, the government negotiated one of the most comprehensive and detailed peace agreements.[16] After more than 50 years of hostilities, in 2016 the guerrilla FARC-EP and the Colombian government decided to negotiate putting an end to one of the longest conflicts in the world.[17] During the peace negotiations, amnesties played a key role to convince combatants to demobilise. However, the strong condemnation of and opposition to amnesties from human rights bodies and international organisations was looming in the background.[18] Taking inspiration from South Africa, Colombia developed a complex transitional justice framework that combined limited and conditional amnesties with alternative mechanisms of accountability like a truth commission, reparations, and criminal prosecutions for the people who bear most responsibility for international crimes and serious violations of human rights.[19]

1.1. Situating the debate on the permissibility of amnesties under international law

The growing number of prosecutions for human rights violations in domestic courts, the creation of international criminal tribunals, and the activation of the universal jurisdiction in the late 1990s by European courts prosecuting crimes in Latin American countries, signalled a change in the importance of individual criminal accountability to redress human rights abuses.[20] At a domestic level, courts started speaking the language of international law in the fight against impunity measures.[21] A 'justice cascade' saw an increasing number of domestic

Afghanistan in 2009, Libya in 2012, Myanmar in 2008, Yemen in 2011, Philippines in 2014, and Ukraine in 2015 (Louise Mallinder, 'The End of Amnesty or Regional Overreach: Interpreting the Erosion of South America's Amnesty Laws' (2016) 65 ICLQ 645, 676).

[15] See: Louise Mallinder, 'Amnesties' Challenge to the Global Accountability Norm? Interpreting Regional and International Trends in Amnesty Enactment' in Francesca Lessa and Leigh A. Payne (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (CUP 2012); Mallinder, *Amnesty, Human Rights and Political Transitions* (n 3); Freeman, *Necessary evils* (n 3); Charles P. Trumbull, 'Giving Amnesties a Second Chance' (2007) 25 Berkeley JIntL 283.

[16] Christine Bell, 'Lex Pacificatoria Colombiana: Colombia's Peace Accord in Comparative Perspective' (2016) 110 AJIL Unbound 165, 166.

[17] Courtney Hillebrecht, Alexandra Huneeus and Sandra Borda, 'The Judicialization of Peace' (2018) 59 Harvard IntlLJ 279, 280.

[18] Alexandra Huneeus and Rene Urueña, 'Introduction to Symposium on the Colombian Peace Talks and International Law' (2016) 110 AJIL Unbound 161, 162; Diego Acosta Arcarazo, Russell J. Buchan and Rene Ureña, 'Beyond Justice, Beyond Peace? Colombia, the Interests of Justice, and the Limits of International Criminal Law' (2015) 26 CrimLF 291, 306.

[19] See: *Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace* (12 November 2016) <https://www.peaceagreements.org/viewmasterdocument/1845> accessed 19 April 2022.

[20] Sikkink, 'The Age of Accountability' (n 8).

[21] Naomi Roht-Arriaza and Lauren Gibson, 'The Developing Jurisprudence on Amnesty' (1998) 20 Human Rights Quarterly 843.

courts revoking amnesty laws in Latin America.[22] At an international level, an 'anti-impunity turn' in the human rights movement saw international courts and human rights bodies starting to favour criminal accountability for human rights abuses and breaches of humanitarian law.[23] The Inter-American System and UN bodies, in particular, adopted a strong stance against domestic amnesties.[24]

Initially focused on amnesty measures enacted in the Southern Cone, human rights bodies concentrated on the problems of blanket amnesties and self-amnesties.[25] The term 'blanket amnesty' is loosely used to describe amnesties that are unconditional, unlimited, or both.[26] Unconditional amnesties are measures that are applied automatically to a group of people without requiring any condition, commitment, or action from the beneficiaries. Unlimited amnesties, also called general or broad amnesties, are those that do not have a clear scope of application in terms of crimes, time, geography, and/or persons covered.[27] Usually linked to blanket amnesties are self-amnesties, which refer to measures enacted unilaterally by a government, frequently military dictatorships or autocratic regimes, to shield their agents from prosecution.[28]

However, amnesties vary in scope and nature.[29] At the opposite end of the spectrum from blanket amnesties, we have conditional and limited amnesties. Conditional amnesties describe the measures that are accompanied by other mechanisms of accountability and impose conditions or obligations on the applicants so they benefit from such measures.[30] Examples of conditions are telling the truth, contributing to reconciliation, assisting the search and investigation of disappearances, providing reparations to victims, among many others.[31] Limited amnesties are those that have a narrow and well-defined scope, for instance, excluding

[22] See: Ellen Lutz and Kathryn Sikkink, 'The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America' (2001) 2 Chicago JIntlL 1; Sikkink, 'The Age of Accountability' (n 8).
[23] See: Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (n 2); Karen Engle, 'A Genealogy of the Criminal Turn in Human Rights' in Karen Engle, Zinaida Miller and D. M. Davis (eds), *Anti-Impunity and the Human Rights Agenda* (CUP 2017); Mattia Pinto, 'Awakening the Leviatan through Human Rights Law: How Human Rights Bodies Trigger the Application of Criminal Law' (2018) 34 Ultrecht Journal of International and European Law 161.
[24] Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (n 2).
[25] See: *Consuelo et al. v. Argentina*, IACoHR, Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311, Report 28/92, OEA/Ser.L/V/II.83 (2 October 1992); *Mendoza et. al. v. Uruguay*, IACoHR, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375, Report 29/92, OEA/Ser.L/V/II.83 (2 October 1992); *OR, MM and MS v. Argentina*, UNCAT, Communication No. 1/1988, 2/1988 and 3/1988, CAT/C/WG/3/DR/1, 2 and 3/1988 (23 November 1989); *Hugo Rodríguez v. Uruguay*, UNHRC, Communication No. 322/1988, CCPR/C/51/D/322/1988 (19 July 1994).
[26] Freeman, *Necessary evils* (n 3) 17.
[27] Mendez and Meintjes, 'Reconciling Amnesties with Universal Jurisdiction' (n 8) 84.
[28] Mallinder, *Amnesty, Human Rights and Political Transitions* (n 3) 6. See also: Louis Joinet, 'Study on amnesty laws and their role in the safeguard and promotion of human rights' (21 June 1985) UN Commission on Human Rights, Report by Special Rapporteur (Thirty-eighth session E/CN4/Sub2/1985/16) para 31.
[29] See: Mallinder, *Amnesty, Human Rights and Political Transitions* (n 3).
[30] ibid 153. See also: Ruti Teitel, *Transitional Justice* (OUP 2000) 54; Yasmin Naqvi, 'Amnesty for war crimes: Defining the limits of international recognition' (2003) 85 IRRC 583, 618.
[31] Freeman, *Necessary evils* (n 3) 164.

from their application certain crimes, targeting the amnesty at specific categories of people, or clearly specifying the effects of the amnesty.[32] Finally, in contrast with self-amnesties, negotiated amnesties are those discussed and agreed between opposing parties in a conflict or situation of violence as part of a process of transition to peace and reconciliation. This are usually mutual amnesties that benefit both state agents and their opponents, as a compromise to achieve conflict resolution. However, truly negotiated amnesties are part of a process of dialogue and agreement between different actors in conflict and not simply a way to mask self-amnesties by including other beneficiaries.[33]

International courts and human rights bodies have almost exclusively dealt with unlimited and unconditional amnesties.[34] The jurisprudence on the legality of conditional and limited amnesties that require perpetrators to participate in broader processes of accountability is scarce.[35] Therefore, the discussion about the permissibility of carefully crafted amnesties enacted as part of a wider process of transitional justice with alternative forms of accountability remains open.[36] There is still uncertainty about whether a model like the one followed by Colombia would survive international scrutiny and, more generally, whether conditional amnesties for serious human rights violations are permissible under international law.

1.2. Research questions and methodology of the thesis

With no treaty explicitly proscribing the application of amnesties and article 6(5) of the Additional Protocol II to the Geneva Conventions encouraging the granting of 'the broadest possible amnesty to persons who have participated in the armed conflict', much of the attention has focused on the interpretation that courts and human rights bodies have drawn from human rights treaties.[37] This thesis aims to contribute to this body of literature, updating the analysis of the jurisprudence on amnesties and the standards developed by courts. There are no recent studies systematically analysing the standards of domestic courts, international tribunals and

[32] Mallinder, *Amnesty, Human Rights and Political Transitions* (n 3) 76.
[33] ibid.
[34] Louise Mallinder, 'Amnesty and International Law' (*Oxford Bibliographies*, 2018) <https://doi.org/10.1093/OBO/9780199796953-0172> accessed 19 April 2022.
[35] ibid.
[36] Following Ruti Teitel's definition, transitional justice is initially understood as mechanisms of 'justice associated with periods of political change, characterised by legal responses to confront the wrongdoings of repressive predecessor regimes'. (Ruti Teitel, 'Transitional justice genealogy' (2003) 16 Harvard Human Rights Journal 69, 69)
[37] Freeman, *Necessary evils* (n 3) 32; Mark Freeman and Max Pensky, 'The Amnesty Controversy in International Law' in Francesca Lessa and Leigh A. Payne (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (CUP 2012) 44; Diane Orentlicher, 'Immunities and Amnesties' in Leila Nadya Sadat (ed), *Forging a Convention for Crimes Against Humanity* (CUP 2011) 218; Carsten Stahn, *A Critical Introduction to International Criminal Law* (CUP 2018) 159.

human rights bodies on amnesties. Relevant studies do not account for developments in the discussion of the permissibility of amnesties under international law in the last ten years.[38] This research particularly concentrates on examining the standards developed by judicial and quasi-judicial bodies for the application of conditional amnesties, including the interactions between international bodies and domestic courts. Much of the literature has focused on determining the permission or prohibition of amnesties under international law.[39] Here, the focus is on how the judicial standards have developed and what can that tell us about the current status of amnesties. With that in mind, this research tackles two closely intertwined questions:

1. What has been the influence of judicial dialogue in shaping a norm on the permissibility of amnesties for serious human rights violations under international law?
2. What are the standards developed by domestic courts, international tribunals, and human rights bodies to evaluate the permissibility of conditional amnesties for serious human rights violations?

With the growing body of international and domestic decisions that continue to discuss the permissibility of amnesties, there is a need for an integrated analysis. This thesis reviews a substantial number of cases and presents a systematic reading of the standards developed by domestic courts, international tribunals, and human rights bodies on the application of amnesties. The purpose is not to advocate either in favour or against the use of amnesties but to reflect on the standards established by judicial and quasi-judicial bodies. This research does not adopt a normative approach, but a socio-legal methodology, offering a reading of the norm on amnesties as interpreted by courts and human rights bodies in order to contribute to a better understanding of the current status of amnesties under international law.

This study analyses a sample of 368 decisions adopted by judicial and quasi-judicial bodies in the last three decades that discuss the legality of amnesties. The decisions include pronouncements of regional human rights courts and quasi-judicial bodies,[40] international

[38] Mallinder, *Amnesty, Human Rights and Political Transitions* (n 3); Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (n 9); Lisa J. Laplante, 'Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes' (2009) 49 Virginia JIntlL 915; Christina Binder, 'The Prohibition of Amnesties by the Inter-American Court of Human Rights' (2011) 12 German LJ 1203.

[39] See: Close, *Amnesty, Serious Crimes and International Law* (n 5); Freeman, *Necessary evils* (n 3); Freeman and Pensky, 'The Amnesty Controversy in International Law' (n 37).

[40] The European Court of Human Rights, the European Commission of Human Rights, the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights, and the African Commission on Human and Peoples' Rights.

criminal courts,[41] UN monitoring bodies,[42] and domestic courts (e.g. municipal and national courts in criminal, constitutional and public law jurisdictions).[43] The selected decisions were issued between 1990 and 2021, covering what Kathryn Sikkink has called the 'justice cascade' or what Karen Engle has called 'the anti-impunity turn in the human rights movement', a period that saw an increase in courts demanding criminal accountability for human rights violations.[44]

This analysis focuses on the considerations of the permissibility of amnesty laws made by judicial and quasi-judicial bodies, as well as the practices relating to cross-referencing to the decisions of other tribunals to support their reasoning. The study follows the categorisation made by courts and human rights bodies, including all pronouncements that refer to the concept of 'amnesty' without questioning the nature of the measure under scrutiny. Thus, the research includes decisions on the permissibility of specific amnesty laws, general considerations on amnesty as a legal institution, and arguments about the application of amnesties even when the court decided that the specific measure under examination did not amount to amnesty.

The research uses a mixed methods approach that combines legal analysis with qualitative and quantitative methods. The first part of the research is conceptual, discussing the ambiguities surrounding the permissibility of amnesties under international law (see Chapter 2) and the increasing importance of judicial decisions in shaping the development of international law and, particularly, a norm on the legality of amnesties (see Chapter 3). This provides the basis for the analysis of judicial decisions in the second part of the thesis (see Chapters 4, 5 and 6). The analysis combines content analysis of judicial decisions, focused on identifying patterns of reasoning and decision-making; network analysis, deploy to map the interactions through cross-referencing practices between domestic courts, international tribunals, and human rights bodies; and legal interpretation, used to identify the standards for the application of amnesties. All this, relies on a complexity theory approach or lens as a framework for understanding the role of judicial decisions in shaping the contours of a norm on amnesties under international law.[45]

[41] The International Criminal Court, the International Criminal Tribunal for the former Yugoslavia, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the Special Tribunal for Lebanon.
[42] The United Nations Human Rights Committee, the United Nations Committee Against Torture, and the United Nations Committee on the Elimination of Discrimination against Women.
[43] The study includes decisions of municipal courts in 25 countries (see Section 3.5 for more detail).
[44] See: Sikkink, 'The Age of Accountability' (n 8); Lutz and Sikkink, 'The Justice Cascade' (n 22); Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (n 2); Engle, 'A Genealogy of the Criminal Turn in Human Rights' (n 23).
[45] The methodology of the case study on judicial interactions is explained in greater depth in Section 3.5

1.3. Argument of the thesis

Judicial and quasi-judicial bodies are still actively discussing the permissibility of amnesties under international law. This research demonstrates that domestic courts, international tribunals and human rights bodies have engaged in a rich practice of interactions, increasingly cross-referencing each other with little or no reference to formal sources of international law. Some scholars, courts and UN bodies have interpreted this judicial dialogue as evidence of an international agreement on the prohibition of amnesties for gross human rights violations.

For instance, discussing the inclusion of a clause prohibiting amnesties in the *Draft articles on Prevention and Punishment of Crimes Against Humanity,* Hugo Relva argued that the contemporary practice of states and the 'nearly uniform interpretation given by international, regional and national courts and tribunals, as well as by UN organs, bodies and experts, confirms that such a general prohibition would reflect a rule of customary international law'.[46] Similarly, the Pre-Trial Chamber of the ICC concluded in 2019 that 'there is a strong, growing, universal tendency that grave and systematic human rights violations – which may amount to crimes against humanity by their very nature – are not subject to amnesties or pardons under international law'.[47]

This thesis argues that there is some nuance in the way domestic courts, international tribunals and human rights bodies have discussed the permissibility of amnesties. A systematic reading of a sample of 368 decisions reveals a more complex discussion that reflects diverse approaches to the use of amnesties in situations of transitional justice. Exploring the arguments of courts and human rights bodies, the thesis contends that the complexity of the judicial dialogue in the discussion of the permissibility of amnesties has enriched the international debate. Rather than an international agreement on the prohibition of amnesties grounded upon a shared understanding of justice and accountability, the interactions of judicial and quasi-judicial bodies are better read in light of the dynamics of self-organisation and path dependence observed in complex systems.

[46] Relva (n 8) 868.
[47] *Prosecutor v. Saif Al-Islam Gaddafi*, ICC, Situation in Libya, Decision on the 'admissibility challenge by Dr. Saif Al-Islam Gaddafi pursuant to articles 17(1)(c) and 20(3) of the Rome Statute', ICC-01/11-01/11 (5 April 2019) para 61.

Judicial interactions reflect a complex dialogue that follows the dynamics of self-organisation and the emergence of heterarchies.[48] The increasing number of interactions among judicial and quasi-judicial bodies have led to the formation of several communities or clusters. While the idea of a general prohibition of amnesty has become mainstream in the human rights movement, some courts have adopted more nuanced approaches that leave room for the possibility of well-crated amnesties as an exceptional mechanism of transitional justice in certain contexts. Regional and legal regime trends have been a key factor in the approach that domestic and international tribunals have adopted in the analysis of amnesties. However, there have also been relevant interactions between individual courts forming alliances or bridges across regions and legal regimes. The lack of hierarchies and central control in international law has allowed for the formation of heterarchies and multiple communities, in which judicial bodies gravitate around different ideas of accountability. The formation of bridges or alliances between courts has been instrumental for courts to explore different models of transitional justice and multiple approaches to the use of amnesties.

The judicial discussion of the permissibility of amnesties under international law has followed dynamics of path dependence, where initial decisions adopted in a very specific context have strongly determined the following treatment of amnesties in completely different situations.[49] The influence of early decisions rejecting blanket amnesties, in the aftermath of autocratic regimes in Latin America, pulled domestic and international courts towards a general rejection of amnesties. However, in more recent years, transitional justice ideas have influenced the trajectory of the discussion on amnesties, opening courts to the permissibility of conditional and negotiated amnesties accompanied by alternatives mechanisms of accountability. This thesis identifies three moments in the discussion: a first stage of exploration with divergent decisions on the permissibility of amnesties in different contexts; a second phase of consolidation in which the anti-impunity movement led judicial and quasi-judicial bodies to ban the use of amnesties; and a third moment of 'flexibilization', in which courts are considering the possibility of well-crafted amnesties enacted in exceptional circumstances of transitional justice.

[48] Self-organisation refers to 'the process by which interactions of component agents result in bottom-up emergence of a system without the need for any external controller or guiding hand'. Order emerges spontaneously from the interactions of the legal actors and, as such, is the product of many local decisions with no hierarchical structure. See: Steven Wheatley, *The idea of international human rights law* (OUP 2019) 49; Thomas E. Webb, 'Tracing an Outline of Legal Complexity' (2014) 27 Ratio Juris 477, 486.

[49] Path dependence means 'that an outcome or decision is shaped in specific and systematic ways by the historical path leading to it'. It means explaining present phases, in relation to past developments or decisions. See: Oona A. Hathaway, 'Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System' (2003) 28 Iowa LRev 101, 103; David Byrne and Gill Callaghan, *Complexity Theory and the Social Sciences: The state of art* (Routledge 2014) 196.

The thesis is not concerned with a historical reconstruction of the discussion of amnesties, but rather focuses on understanding the current moment of uncertainty and ambiguity. The thesis departs from the position of those who argue that, because of the inconsistencies in the pronouncements, judicial decisions give no indication of the crystallisation of a rule on amnesties. However, it also disputes the existence of an international judicial agreement on the prohibition of amnesties. Embracing the diversity in the judicial approaches to amnesties, and pointing at the challenges that the examination of conditional amnesties will bring in the future, the thesis proposes a framework for the judicial examination of amnesties in future processes. Recent changes in the judicial approach to amnesties suggests a flexible approach, in which the interpretation of the obligations to criminally prosecute and punish human rights abuses in transitional justice may vary depending on the characteristics and the context in which the amnesty is framed.

1.4. Contributions to knowledge and significance of the thesis

The thesis is a unique and original exploration of judicial interactions applied to the discussion of amnesties and standards of justice in transitional justice. The knowledge contributions of this thesis are numerous. Firstly, it offers new insights into the role of judicial decisions in shaping international norms. Building upon the literature on judicial dialogue, the thesis adopts a sociolegal approach, reconstructing the network of interactions (cross-referencing practice) between domestic courts, international tribunals, and human rights bodies in the analysis of amnesties. Bringing some ideas from complexity theory, the thesis demonstrates the influence of judicial interactions on the development of international law when there is limited international agreement or rational deliberation. While some authors have conceptualised international law as a complex system, this is the first research focused on judicial interactions and grounded on empirical data.[50] The contribution, however, does not lie in proposing complexity theory as a completely new approach, but in uncovering some of the complex dynamics through which judicial and quasi-judicial bodies influence the development of norms.[51]

This is significant, because it contributes to the understanding of judicial dialogue and the influence of judicial decisions in shaping international law despite the lack of agreement.

[50] See: Wheatley, *The idea of international human rights law* (n 48); Webb, 'Tracing an Outline of Legal Complexity' (n 48); Jamie Murray, Thomas E. Webb and Steven Wheatley (eds), *Complexity Theory and Law: Mapping an Emergent Jurisprudence* (Routledge 2018).

[51] The contribution to the literature on the role of judicial decisions in shaping international law is developed in Chapter 3.

Self-organisation reveals how courts and human rights bodies form clusters or communities of courts that allow them to have a bigger collective impact. Anne-Marie Slaughter's influential work on the understanding of judicial dialogue has been relevant for the understanding of the formation of a global network of courts that deliberate on the development of international problems (e.g., the standards of accountability and the protection of human rights).[52] A complexity approach and a focus on the dynamics of self-organisation helps to uncover the formation of multiple communities that dispute or resist those global standards and advance different approaches. However, judicial interactions are also influenced by dynamics of path dependence. Despite the lack of a formal theory of precedent, early decisions on amnesty have been highly influential in the decision making of more recent decisions. Much of the emphasis on the importance of judicial decisions in international law has been put on the capacity to integrate or bring coherence to the system. Judicial dialogue theories have focused mostly on international agreement and rational persuasion. A complexity approach is significant in revealing the dynamics of change in judicial dialogue, by identifying the trajectory of the discussion and the moments of instability that open the door to radical change.

Secondly, the thesis contributes to the literature on the permissibility of amnesties under international law, by revealing how the decisions of domestic courts, international tribunals and human rights bodies have shaped the development of a norm on amnesties. The research offers an updated analysis of the standards developed by domestic courts, international tribunals, and human rights bodies for the application of amnesties. This research focuses on explaining how international and national tribunals are navigating the uncertainties in relation to the status of amnesties under international law, and shaping the contours of that norm while dealing with different situations of conflict. It offers a systematic reading of a significant number of cases, advancing on our understanding of the permissibility of amnesties under international law.[53]

Whilst scholars have extensively debated the permissibility of amnesties, there is a gap in the analysis of recent judicial developments. This thesis position itself in the middle of those who argue that judicial decisions reflect an international agreement on the prohibition of amnesties, and those who claim that no rule has emerged because of inconsistencies in judicial practice or because judicial decisions are only a secondary source of international law.[54] It

[52] See: Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2004); Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44 Harvard IntlLJ 191; Anne-Marie Slaughter, 'Judicial Globalization' (2000) 40 Virginia JIntlL 1103.
[53] The contribution to the literature on amnesties is developed in Chapter 2.
[54] Freeman and Pensky, 'The Amnesty Controversy in International Law' (n 37) 58.

contends that judicial decisions have played an important role in shaping international law. Nonetheless, a systematic reading of the case law and the judicial interactions suggests a more nuanced approach to amnesties and identifies a recent turn that signals to increasing flexibility in the use of amnesties in exceptional circumstances.

This is significant because most judicial pronouncements have focused on the non-permissibility of problematic amnesties, so there is still an open question about the way international and domestic judicial bodies will approach well-crafted amnesties. This thesis identifies the areas of ambiguity around the legality of amnesties and develops a framework for courts to consider the permissibility of conditional amnesties. With this, it sheds some light on the way courts may examine conditional and limited amnesties, like the one adopted recently in Colombia, in the coming years. Ultimately, the thesis contributes to complicate the debate on amnesties by revealing the diversity of approaches in the way courts and human rights bodies have discussed the subject. However, while it complicates the discussion by bringing some nuance and moving the debate away from simplistic dichotomies or broad statements about the prohibition or permissibility of amnesties, it facilitates the work of future judges that will have to deal with more complex amnesties. By mapping the judicial interactions and the trajectory of the discussion of the permissibility of amnesties, this thesis aims to provide a starting point for domestic and international judges to examine limited, negotiated, conditional amnesties that do not completely eliminate alternative mechanisms of accountability.

It is important to note here that this thesis is not a defence or justification of amnesties in any way. There is no doubt that the use of amnesty laws in certain contexts has allowed for impunity to prevail, removing people responsible for heinous crimes from justice. Having grown up in Colombia and worked in the justice sector during the peace negotiations, one of my aims is to contribute to the differentiation between problematic amnesties and negotiated measures that genuinely facilitate peace agreements and effectively contribute to processes of reconciliation.

1.5. Thesis outline

The thesis is divided into two parts. The first part provides a theoretical and methodological framework for the discussion of amnesties and the role of judicial decisions in the development of international law. Chapter 2 argues that the ambiguities surrounding the permissibility of amnesties under formal sources of international law have created significant room for judicial development. The chapter identifies a gap in the literature, which has not

discussed the role of judicial decisions in shaping the development of a norm on the permissibility of amnesties under international law, and justifies why it is important to research about it.

Chapter 3 links the discussion of the permissibility of amnesties with theories of judicial dialogue. The chapter argues that the rich number of decisions and interactions in the discussion of amnesties calls for a systematic analysis of a wide range of decisions adopted by judicial and quasi-judicial bodies. Human rights scholars and practitioners tend to read decisions on amnesty in a coherent manner that signals a general agreement on their incompatibility with international law. However, decisions on amnesty show a multiplicity of arguments, nuances in approaching the question about their status under international law, and diversity of interactions that vary from one court to another. This raises a question about how to understand the role of judicial decisions in the formation and development of a rule on amnesties under international law when there is disagreement, limited dialogue, and considerable diversity in approaches. Building upon the theory of judicial dialogue, the chapter introduces the methodology and argues that incorporating some ideas from complexity theory is helpful in understanding the role of judicial interactions in shaping a norm on the permissibility of amnesties for serious human rights violations under international law. This chapter introduces the theoretical framework that informs the analysis of judicial decisions on the permissibility of amnesties in the following chapters.

The second part of the thesis analyses the sample of decisions from courts and human rights bodies. Despite some references to key decisions in early chapters, it is in the last three chapters that the thesis examines the judgments in more detail. Chapter 4 develops a systematic analysis of the decisions and interactions between court and human rights bodies in the discussion of amnesties under international law. The chapter shows that the permissibility of amnesties continues to be discussed by judicial and quasi-judicial bodies. Identifying the influence of early decisions rejecting amnesty laws enacted in Latin America, the chapter traces how judicial dialogue has expanded vertically and horizontally to place boundaries on the application of amnesties. However, the chapter argues that a systematic reading of judicial decisions hardly reflects an international agreement on the prohibition of amnesties. Regional and regime trends explain some of the developments in the discussion of amnesties, but some of the latest decisions of judicial and quasi-judicial bodies have nuanced their position and reflect a diversity of approaches to the use of amnesties during periods of transitional justice in different contexts.

Chapter 5 explores the diversity in arguments and considerations made by courts when assessing the permissibility of amnesties. Using a complexity theory approach, this chapter builds upon the literature on judicial dialogue, advancing the understanding of the role of judicial decisions in shaping international law and the contours of a norm on amnesties. Mapping the network of judicial interactions, the chapter shows how the formation of bridges or alliances between courts has been instrumental for courts to explore diverse models of transitional justice and different approaches to the use of amnesties. This challenges the narrative of a growing agreement on the prohibition of amnesties, reflecting a diversity of approaches in the assessment of the permissibility of amnesty laws. Despite the lack of agreement on a general prohibition on amnesties, the chapter identifies points of agreement and areas of uncertainty that will allow a general framework to develop the judicial examination of amnesties in the final chapter.

Chapter 6 critically examines the trajectory of the judicial discussion of the permissibility of amnesties under international law. The argument is that the status of amnesties under international law has followed dynamics of path dependence, where initial decisions adopted in a very specific context have strongly determined the following treatment of amnesties in completely different situations. The influence of the anti-impunity turn in human rights, and early decisions rejecting blanket amnesties in the aftermath of autocratic regimes in Latin America, have pulled domestic and international courts towards rejecting amnesties in most cases. However, recent developments in transitional justice have percolated the approach of courts and human rights bodies to amnesties, pulling the system in a different direction. In recent years, domestic and international courts have been more open to the possibility of well-crafted amnesties. As result, there are areas of ambiguity and uncertainty around the permissibility of amnesty for serious human rights violations and the treatment that domestic and international courts will give to conditional, negotiated, and limited amnesties when they are accompanied by other mechanisms of accountability in transitional justice contexts. Acknowledging the diversity of approaches adopted by courts and human rights bodies in the examination of amnesties, this chapter concludes by proposing a framework for the judicial examination of amnesties in future processes. The judicial discussion of the permissibility of amnesties suggests a flexible approach, in which the interpretation of the obligations to criminally prosecute and punish human rights abuses in transitional justice varies depending on the characteristics and the context in which the amnesty is framed.

CHAPTER 2. The judicial discussion of the permissibility of amnesties under international law

The view that international law prohibits amnesties for international crimes and other serious human rights violations has gained support in the last decades.[1] In 2009, the Office of the United Nations High Commissioner for Human Rights (OHCHR) concluded that 'amnesties that prevent the prosecution of individuals who may be legally responsible for war crimes, genocide, crimes against humanity and other gross violations of human rights are inconsistent with states' obligations under various sources of international law as well as with United Nations Policy'.[2] However, no treaty dealing with human rights law, humanitarian law or international criminal law explicitly proscribes the application of any kind of amnesty.[3]

The only references to amnesties in the international treaty law system are included in article 6(4) of the International Covenant on Civil and Political Rights (ICCPR), regarding cases of death sentence,[4] and article 6(5) of the Second Additional Protocol to the Geneva Conventions (hereinafter Additional Protocol II or APII), relating to the Protection of Victims of Non-International Armed Conflicts.[5] The provision of the ICCPR focuses on cases of imposition of capital punishment, while the APII applies more broadly to situations of post-conflict justice.[6] Article 6(5) of the APII not only addresses the use of amnesties but encourages them: '[a]t the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict …'[7]

[1] See: William Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (OUP 2012) 173; Hugo A. Relva, 'Three Propositions for a Future Convention on Crimes Against Humanity' (2018) 16 JICJ 857.
[2] OHCHR, 'Rule-of-Law Tools for Post-Conflict States: Amnesties' (2009) UN Doc HR/PUB/09/1, Foreword by Navanethem Pillay.
[3] Mark Freeman, *Necessary evils: amnesties and the search for justice* (CUP 2009) 32; Mark Freeman and Max Pensky, 'The Amnesty Controversy in International Law' in Francesca Lessa and Leigh A. Payne (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (CUP 2012) 44; Diane Orentlicher, 'Immunities and Amnesties' in Leila Nadya Sadat (ed), *Forging a Convention for Crimes Against Humanity* (CUP 2011) 218; Carsten Stahn, *A Critical Introduction to International Criminal Law* (CUP 2018) 159.
[4] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 Mach 1976) 999 UNTS 171. Ratified by 173 states.
[5] Second Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts – Protocol II (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609. Ratified by 169 states.
[6] Schabas, *Unimaginable Atrocities* (n 1) 177.
[7] Second Protocol Additional to the Geneva Conventions (n 5).

In this context, the discussion of the prohibition of amnesties under international law has been mostly grounded on the interpretation of non-amnesty-specific treaty obligations and the crystallisation of norms of customary law.[8] The ambiguities surrounding the permissibility of amnesties under formal sources of international law have created significant room for judicial development.[9] Hugo Relva has argued that international courts and human rights bodies have reached an international agreement on the prohibition of amnesties for international crimes or serious human rights violations under international law, grounded in states' obligations to prosecute those crimes and to provide an effective remedy to victims.[10] Conversely, Louise Mallinder has argued that the practice of domestic courts is not consistent enough for the crystallisation of a rule on amnesties.[11] Meanwhile, Mark Freeman has stressed the status of judicial decisions simply as auxiliary source of international law.[12] Therefore, states preserve discretionary powers to enact amnesty laws as a last resort to guarantee peace, reconciliation, truth recovery and reparation in the aftermath of situations of generalised violence.[13]

This chapter builds upon the literature on amnesties by focusing on the role of judicial decisions in shaping the discussion of the legality of amnesties under international law. It argues that domestic courts, international tribunals and human rights bodies have had an active role in shaping the emergence of a norm on amnesties. This chapter argues that examining the standards developed by judicial and quasi-judicial bodies is key to understanding the permissibility of amnesty laws. The chapter addresses a gap in the literature, which has not discussed the role of judicial decisions in shaping the development of a norm on the permissibility of amnesties under international law, and justifies why it is important to investigate about it. While this chapter is not an in-depth analysis of the standards that have been developed, it will set the stage for further analysis about the role of judicial decisions in the formation of norms of international law,[14] and a systematic analysis of the standards discussed by judicial and quasi-judicial bodies in the application of amnesties.[15]

Section one of the chapter provides an overview of the role of judicial and quasi-judicial bodies in fighting impunity for human rights abuses. Building upon what has been called in the

[8] Freeman, *Necessary evils* (n 3) 36.
[9] Schabas, *Unimaginable Atrocities* (n 1) 183.
[10] Relva (n 1).
[11] Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Hart Publishing 2008) ch 5. See more recently: Josepha Close, *Amnesty, Serious Crimes and International Law: Global Perspectives in Theory and Practice* (Routledge 2019) ch 5.
[12] Freeman, *Necessary evils* (n 3) 47.
[13] More generally on this view see: Freeman, *Necessary evils* (n 3).
[14] See Chapter 3.
[15] See Chapters 4 to 6.

literature a 'justice cascade' or an 'anti-impunity turn' in the human rights movement, this section argues that the accountability v. impunity debate has led courts to develop a strong position against amnesties. The following three sections of the chapter analyse the three main arguments against amnesties, arguing that courts and human rights bodies have been at the core of such developments: (i) the interpretation of the obligation to prosecute treaty-based crimes like torture, genocide, war crimes in international conflicts, and forced disappearance; (ii) the scope of obligation to prosecute custom-based crimes like crimes against humanity and war crimes in non-international conflicts; and (iii) the interpretation of the right to an effective remedy of victims of human rights abuses, linking criminal trials to the rights to justice, truth and reparations. Finally, the chapter concludes by identifying a gap in the literature, which has not systematically analysed the standards developed by courts and human rights in the application of amnesties, nor enquired about judicial interactions.

The chapter concludes that despite some clarity about the illegality of certain amnesties enacted as mechanisms of impunity, most notably unlimited, unconditional, blanket and self-amnesties for international crimes, there is some ambiguity about the compatibility of conditional, limited and negotiated amnesties with international law, even when they are enacted for serious human rights violations. A systematic analysis of the decisions on amnesty from domestic courts, international tribunals, and human rights bodies will provide insights into how courts have shaped the standards for the application of amnesty laws, and also into the norm on the permissibility of conditional amnesties.

2.1. Courts and human rights bodies leading the anti-impunity turn in human rights

The view that international law prohibits the use of amnesties for international crimes and serious violations of human rights has gathered support in the last three decades. The growing number of prosecutions for human rights violations in domestic courts, the creation of international criminal tribunals, and the activation of the universal jurisdiction in the late 1990s by European courts prosecuting crimes in Latin American countries, signalled a change towards the importance of individual criminal accountability in redressing human rights abuses.[16]

[16] Kathryn Sikkink, 'The Age of Accountability: The Global Rise of Individual Criminal Accountability' in Francesca Lessa and Leigh A. Payne (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (CUP 2012).

Domestic courts started speaking the language of international law. Examining the decisions of municipal courts in Chile, El Salvador, Guatemala, Honduras, Peru, South Africa, Argentina, and Hungary, Naomi Roht-Arriaza and Lauren Gibson observed the growing importance of a discourse of accountability and the fight against impunity when assessing amnesty measures.[17] Ellen Lutz and Kathryn Sikkink called that shift towards accountability the 'justice cascade'.[18] This meant 'a dramatic shift in the legitimacy of the norms of individual criminal accountability for human rights violations and an increase in actions (prosecutions) on behalf of those norms'.[19] Analysing the transnational justice networks that sparked the activation the universal jurisdiction in the US and Europe to prosecute authoritarian regimes in Latin America, scholars noted a ripple effect leading to an increase in criminal investigations for human rights violations at a domestic level, and greater judicial acceptance of the principle of universal jurisdiction.[20]

The 'anti-impunity turn' in the human rights movement was also important at the international level.[21] Karen Engle observes that supporting human rights today means favouring criminal accountability for those individuals who have violated international human rights or humanitarian law, and opposing amnesty laws that might preclude such accountability.[22] Criticising a strong anti-impunity focus, Engle observes how the decisions of international and regional judicial and quasi-judicial human rights bodies, particularly from the Inter-American System, have agreed upon the states' obligation to criminally investigate, prosecute and punish individuals who commit war crimes, crimes against humanity, and genocide, as well as other serious human rights violations.[23]

This anti-impunity discourse generated a remarkable reversal in the attitude of the international legal community toward national amnesties, framing them as one of the most egregious forms of impunity.[24] Criminal accountability arose as the main element in transitional justice, while alternative accountability mechanisms, like truth commissions, were

[17] Naomi Roht-Arriaza and Lauren Gibson, 'The Developing Jurisprudence on Amnesty' (1998) 20 Human Rights Quarterly 843.
[18] Ellen Lutz and Kathryn Sikkink, 'The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America' (2001) 2 Chicago JIntlL 1.
[19] Sikkink, 'The Age of Accountability' (n 16) 19.
[20] Lutz and Sikkink, 'The Justice Cascade' (n 18); Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (University of Pennsylvania Press 2006).
[21] See: Karen Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (2015) 100 Cornell LRev 1069; Karen Engle, 'A Genealogy of the Criminal Turn in Human Rights' in Karen Engle, Zinaida Miller and D. M. Davis (eds), *Anti-Impunity and the Human Rights Agenda* (CUP 2017); Mattia Pinto, 'Awakening the Leviatan through Human Rights Law: How Human Rights Bodies Trigger the Application of Criminal Law' (2018) 34 Ultrecht Journal of International and European Law 161.
[22] Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (n 21) 1070.
[23] ibid.
[24] Max Pensky, 'Amnesty on trial: impunity, accountability, and the norms of international law' (2008) 1 Ethics & Global Politics 1, 7.

viewed as complementary to trials.[25] This approach began to consider amnesties as a barrier to improvements in human rights and, in consequence, inappropriate for addressing past human rights abuses.[26] The justice v. peace debate translated into an accountability v. impunity debate, in which amnesties were usually situated in the domain of impunity.[27] Amnesty laws were seen as a failure to deal with the past through trials and to end the cycle of human rights violations;[28] the spoilers' strategy to prevent human rights prosecutions[29] and, ultimately, the 'illegal social evil' that perpetuates a culture of impunity.[30]

The dichotomy created between amnesties and accountability has led some scholars to conclude that amnesty laws are a breach of the states' obligations to prosecute international crimes and to provide remedies for human rights violations.[31] The absence of explicit clauses on amnesties in human rights treaties, has left ample room for courts and human rights bodies to discuss their compatibility with international law via the interpretation of non-amnesty-specific obligations. Domestic courts, international tribunals and human rights bodies have examined the legality of amnesties through the interpretation of the obligations to prosecute treaty-based crimes, the duty to prosecute custom-based crimes, and the interpretation of the right to an effective remedy for human rights violations.

Article 38 of the Statute of the International Court of Justice (ICJ) relegates the place of judicial decisions to 'subsidiary means for the determination of rules of law'.[32] They are not a formal source of international law, but an authoritative declaration of what the law is.[33] Article 38 of the ICJ Statute clearly distinguishes primary sources (treaties, custom and general

[25] Louise Mallinder, 'Atrocity, Accountability, and Amnesty in a 'Post-Human Rights World'?' (2017) 18 Transitional Justice Institute Research Paper 4, 7.
[26] Tricia D. Olsen, Leigh A. Payne and Andrew G. Reiter, 'Conclusion: Amnesty in the Age of Accountability' in Leigh A. Payne and Francesca Lessa (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (CUP 2012) 337.
[27] Kathryn Sikkink and Leigh Payne, for example, have adopted this approach in their research project *Transitional Justice Research Collaborative*. Their 'Amnesty Coding Manual' broadly defines amnesties as 'any legislative, constitutional, or executive provision granting impunity for human rights violations. This includes both institutional measures preventing prosecution for such crimes and pardoning those convicted of human rights violations' (Kathryn Sikkink and Leigh Payne, *Amnesty Coding Manual* (Transitional Justice Research Collaborative 2014) 3). See also: Antje du Bois-Pedain, 'Post-Conflict Accountability and the Demands of Justice: Can Conditional Amnesties Take the Place of Criminal Prosecutions?' in Nicola Palmer, Phil Clark and Danielle Granville (eds.), *Critical Perspectives In Transitional Justice* (OUP 2012) 459.
[28] Olsen, Payne and Reiter, 'Conclusion' (n 26) 338.
[29] Hun Joon Kim and Kathryn Sikkink, 'Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries' (2010) 54 International Studies Quarterly 939, 958.
[30] Alonso Gurmendi, 'So, You Pardoned a War Criminal…' (*Opinio Juris*, 28 May 2019) <http://opiniojuris.org/2019/05/28/so-you-pardoned-a-war-criminal/> accessed 24 January 2020.
[31] See: Ben Chigara, *Amnesty in International Law: The legality under international law of national amnesty laws* (Longman 2002); Nadya Sadat, 'Exile, Amnesty and International Law' (2006) 81 Notre Dame LRev 955; Lisa J. Laplante, 'Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes' (2009) 49 Virginia JIntlL 915; Relva (n 1); Juan E. Mendez and Garth Meintjes, 'Reconciling Amnesties with Universal Jurisdiction' (2000) 2 International Law FORUM du droit international 76.
[32] Statute of the International Court of Justice, Annex to the Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.
[33] Hersch Lauterpacht, *The Development of International Law by the International Court* (CUP 1982) 22.

principles) and subsidiary means of determining the law (judicial decisions and academic writings). This reflects a traditional view that only state consent creates international law, while decisions and writings of non-state actors simply provide important evidence of the content of international law without constituting sources.[34]

In practice, however, judicial decisions play a more central role in the identification and formation of international law.[35] Despite the persistent predominant role of states, courts and human right bodies, among other non-state actors, also engage in a dialogue with one another over the making and shaping of international law.[36] In that dialogue, legal actors propose the existence, content or application of particular norms of international law, and other actors react to confirm or contest those assertions.[37] Judicial decisions have the potential to influence the development of the law by clarifying the content of unwritten law, whether by custom or general principles, interpretating treaties, or filling gaps in the law by relying on analogous reasoning, etc.[38]

The decisions of international courts, domestic tribunals and human rights bodies have proved to be key in the formation and development of a norm on the permissibility of amnesties under international law. The following sections explore each of these arguments and demonstrate that judicial and quasi-judicial bodies have shaped the discussion on the legality of amnesties. The aim here, rather than analysing the compatibility of amnesties with the international obligation of states to prosecute and provide effective remedy, is to justify the importance of analysing judicial decisions and how they have shaped discussions on the permissibility of amnesties, with particular focus on conditional amnesties.

2.2. Amnesties and the obligation to prosecute treaty-based crimes

As mentioned in the introduction, there are few references to amnesty in multilateral treaties and none prohibit or discourage them.[39] The view that international law prohibits amnesty measures for serious crimes has been grounded upon non-amnesty-specific clauses,

[34] Anthea Roberts, 'Comparative International Law? The role of national courts in creating and enforcing international law' (2011) 60 ICLQ 57, 63.
[35] ibid 63.
[36] Anthea Roberts and Sandesh Sivakumarani, 'The theory and reality of the sources of international law' in Malcom Evans (ed), *International Law* (5th edition edn, OUP 2018) 109.
[37] ibid 109.
[38] Christian J. Tams and Antonios Tzanakopoulos, 'Barcelona Traction at 40: The ICJ as an Agent of Legal Development' (2010) 23 LJIL 781, 784.
[39] See: Schabas, *Unimaginable Atrocities* (n 1) 182.

most prominently, the obligation to investigate and prosecute individuals for crimes of international concern.[40]

By definition, amnesties prevent criminal prosecution and punishment, making their application incompatible with treaty obligations in this regard.[41] The corpus of human rights and humanitarian treaty law includes general obligations to investigate, prosecute and punish, or extradite.[42] Even though the nature and scope of the obligation differ in each treaty, the general obligation to ensure individual criminal accountability is clear.[43]

2.2.1. Obligation to prosecute genocide

The Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter Genocide Convention) was the first human rights treaty adopted by the UN in December 1948.[44] The Convention defines genocide as 'acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group', and declares it a 'crime under international law' which 'states undertake to prevent and to punish' (article 1). Besides, it prescribes that the persons responsible shall be tried by a competent tribunal (article 6) and punished (article 4), obliging state parties to enact legislation to provide effective penalties for those acts (article 5).

The Genocide Convention does not include an obligation to extradite, leaving such duty primarily in the hands of a competent tribunal of the state in the territory of which the act was committed. However, article 6 explicitly accepts the jurisdiction of international tribunals and does not preclude the exercise of universal jurisdiction by other national courts to prosecute acts of genocide, which has been recognised as customary law.[45]

According to the terms of the treaty, state parties assumed a general obligation to punish acts of genocide, whether committed in times of war or peace. The drafting history of the

[40] The Updated Set of principles to combat impunity prepared by Diane Orentlicher defines serious crimes under international law as 'grave breaches of the Geneva Conventions of 12 August 1949 and of Additional Protocol I thereto of 1977 and other violations of international humanitarian law that are crimes under international law, genocide, crimes against humanity, and other violations of internationally protected human rights that are crimes under international law and/or which international law requires States to penalize, such as torture, enforced disappearance, extrajudicial execution, and slavery'. See: Diane Orentlicher, 'Promotion and Protection of Human Rights: Impunity' (8 February 2005) UN Commission on Human Rights, Report of the independent expert to update the set of principles to combat impunity (Sixty-first session E/CN4/2005/102/Add1).
[41] Orentlicher, 'Immunities and Amnesties' (n 3) 219.
[42] Olsen, Payne and Reiter, 'Conclusion' (n 26) 338; Laplante (n 31) 942.
[43] Freeman and Pensky, 'The Amnesty Controversy in International Law' (n 3) 46.
[44] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277. Ratified by 152 states.
[45] See: Attorney-General of the Government of Israel v. Eichmann, Supreme Court of Israel, Criminal Case No. 40/61 (29 May 1962). See also: Anja Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (OUP 2009) 155; Diane F. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 Yale LJ 2537, 2565.

Genocide Convention does not refer to amnesties explicitly.[46] However, the insistence on 'punishment' has been interpreted as indicator of the incompatibility between blanket amnesties that prevent criminal prosecutions without further conditions or limits, and the states' obligations to prosecute and punish genocide under the Convention.[47]

2.2.2. Obligation to prosecute grave breaches of the Geneva Conventions

The four Geneva Conventions adopted in 1949 establish a series of obligations to provide effective penal sanctions for grave breaches of the rules of war in international conflicts**,** and prosecute the persons responsible or extradite them.[48] In articles 50 / 51 / 130 / 147, the four Geneva Conventions identify the grave breaches that should be criminalised by states, including wilful killing, torture, inhuman treatment, and serious injury to body or health.[49] Articles 49 / 50 / 129 / 146 compel states to 'enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches', establishing the obligation to bring the persons responsible before its own courts or hand them over for trial by another state party:

> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.[50]

This obligation to either prosecute or extradite to another state party for the purpose of criminal prosecution (known as the *aut dedere aut judicare* principle), leaves little room for amnesties to be extended to cover those grave breaches of the Geneva Conventions.[51] Moreover, courts in Chile have interpreted that the Geneva Conventions prohibit enacting self-

[46] On the drafting history of the Genocide Convention see: Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff Publishers 2008); William A. Schabas, *Genocide in International Law: The crime of crimes* (CUP 2009).
[47] See: Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (n 45) 156; Close, *Amnesty, Serious Crimes and International Law* (n 11) 117; Michael Scharf, 'The letter of the law: The scope of the international legal obligation to prosecute human rights' (1996) 59 Law and Contemporary Problems 41, 64; Orentlicher, 'Settling Accounts' (n 45) 2601.
[48] First Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Second Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Third Geneva Convention (III) Relative to the Treatment of Prisoners of War; and Fourth Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 March 1949, entered into force 21 October 1950) 75 UNTS 31/85/135/287 (Geneva Conventions). Ratified by 196 states.
[49] The text of the articles is almost identical in the four Conventions.
[50] Geneva conventions (n 48)
[51] Close, *Amnesty, Serious Crimes and International Law* (n 11) 119.

amnesties under the terms of articles 51 / 52 / 131 / 148, which do not allow a state party 'to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article'.[52]

Michael Scharf argues that the obligation to prosecute grave breaches of the Geneva Conventions is 'absolute', meaning 'that state parties can under no circumstances grant perpetrators immunity or amnesty from prosecution for grave breaches'.[53] Nonetheless, the scope of the obligation to prosecute or extradite for grave breaches of the Geneva Conventions is limited to the list of war crimes identified in articles 50 / 51 / 130 / 147. Arguably, this leaves some discretion to states regarding the application of amnesties for other breaches of international humanitarian law.[54] Besides, these provisions apply exclusively to international conflicts, raising a question about the compatibility of amnesties with states' obligations to prosecute war crimes in non-international armed conflicts. This is important because a significant number of amnesties have been enacted in the context of internal civil conflict, invoking article 6(5) of the Additional Protocol II relating to the protection of victims of non-international armed conflicts.[55]

2.2.3. Obligation to prosecute Torture

The obligations to prosecute or extradite are also embedded in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter Convention against Torture).[56] The Convention defines torture as 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person … by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'.[57] It compels state parties to adopt effective legislative, administrative, judicial or any other measures to prevent acts of torture under its jurisdiction (article 2), and pursuant to article 4, '1. Each State Party shall ensure that all acts of torture are offences under its criminal law … 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature'.

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[52] See: *Caso contra Osvaldo Romo Mena*, Corte de Apelaciones de Santiago de Chile, Rol 38.683-94 (30 September 1994) para 9; *Caso contra Juan Manuel Contreras Sepúlveda y otros (desaparición de Diana Frida Arón Svigilsky en Villa Crimaldi)*, Corte de Apelaciones de Santiago de Chile, Rol No. 2.182-98 (14 May 2004) para 79; *Caso contra Claudio Abdón Lecaros Carrasco y otros - Episodio San Javier*, Corte Suprema de Chile, Rol 2.182-98 (27 July 2007) para 21.
[53] Scharf, 'The letter of the law' (n 47) 124.
[54] Close, *Amnesty, Serious Crimes and International Law* (n 11) 120.
[55] Second Protocol Additional to the Geneva Conventions (n 5). This will be examined in more detail in Section 2.3.
[56] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85. Ratified by 173 states.
[57] ibid article 1.

Developing the *aut dedere aut judicare* principle, states are required to exercise jurisdiction over such acts (article 5) or extradite the suspected torturers for the purpose of prosecution (article 7). Amnesties were not discussed during the drafting process of the Convention against Torture; therefore, the discussion of the prohibition of amnesties for torture has focused on the interpretation of the obligation to prosecute such acts.[58] Some commentators have noted that the language of the Convention against Torture falls short in comparison with the language of the Genocide Convention.[59] Rather than the obligation to punish, the Convention Against Torture develops the duty to 'submit the case to its competent authorities for the purpose of prosecution'.[60] Moreover, article 16 of the Convention extends the obligation to prevent torture to other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture in terms of article 2, but does not include an equal obligation to prosecute.

However, the UN monitoring bodies have been vocal against amnesty laws, insisting on the incompatibility between amnesties and the states' obligations to prosecute torture. In 1992, the Human Rights Committee (UNHRC) noted that some states had been granting amnesty measures for acts of torture, and, interpreting the prohibition of torture under the ICCPR, concluded that they 'are generally incompatible with the duty of states to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future'.[61] The argument of a general prohibition on amnesties regarding torture and other inhuman treatment was echoed by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Prosecutor v. Furundžija* (1998).[62] Initially focused on identifying the prohibition of torture as a rule of customary law, the Tribunal concluded that such prohibition not only ripened into customary international law, but it has evolved into a peremptory norm of *jus cogens*.[63] This meant, according to the ICTY, that the prohibition of torture is non-derogable, making null and void *ab initio* amnesty laws condoning torture or absolving its perpetrators.[64]

Likewise, the Committee Against Torture (UNCAT) has stated on several occasions that amnesty laws are against the spirit of the Convention against Torture. In a General

[58] See: Close, *Amnesty, Serious Crimes and International Law* (n 11) 134.
[59] Orentlicher, 'Settling Accounts' (n 45) 2604; Mallinder, *Amnesty, Human Rights and Political Transitions* (n 11) 127; Close, *Amnesty, Serious Crimes and International Law* (n 11) 134.
[60] Convention against Torture (n 56) article 7.
[61] *General Comment No. 20 [44]: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, UNHRC, 44th session (10 March 1992) para 15.
[62] *Prosecutor v. Anto Furundžija*, ICTY, Case No. IT-95-17/1-T (10 December 1998).
[63] ibid para 153.
[64] ibid para 155.

Comment on article 2 of the Convention, the UNCAT underlined the absolute nature of the prohibition of amnesties.[65] Consequently, the Committee considered that 'amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability'.[66] Later in a General Comment on article 14, the UNCAT called upon states 'to remove any amnesties for torture or ill-treatment' arguing that they pose impermissible obstacles for victims to obtain redress.[67] In many occasions the Committee has urged states to repeal amnesty laws that benefit perpetrators of torture in Chile, Algeria, Colombia, and Sierra Leone, among others.[68]

2.2.4. Obligation to prosecute enforced disappearance

More recently, the obligations to investigate, prosecute or extradite cases of enforced disappearance were embedded in articles 3, 6 and 11 of the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED).[69] The ICPPED establishes the widespread or systematic practice of enforced disappearance as a crime against humanity under international law (article 5). Using a similar formula to the Convention Against Torture, the ICPPED focuses on the obligation to adopt legislation to make enforced disappearance a punishable crime, with no direct obligation to punish perpetrators (unlike the Convention on Genocide or the Inter-American Convention on the Forced Disappearances of Persons).[70] Nonetheless, Anja Seibert-Fohr has noted that the entire convention relies heavily on prosecution.[71] State parties have obligations to take appropriate measures to investigate acts of enforced disappearance and bring those responsible to justice (article 3), to adopt legislation to

[65] *General Comment No. 2: Implementation of Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by State parties*, UNCAT, CAT/C/GC/2 (24 January 2008) para 5.
[66] ibid.
[67] *General Comment No. 3: Implementation of Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by State parties*, UNCAT, CAT/C/GC/3 (19 November 2012) para 41.
[68] See: *Consideration of Reports Submitted by State Parties under Article 19 of the Convention: Chile*, UNCAT, CAT/C/CR/32/5 (14 June 2004); *Consideration of Reports Submitted by State Parties under Article 19 of the Convention: Indonesia*, UNCAT, CAT/C/IDN/CO/2 (2 July 2008); *Consideration of Reports Submitted by State Parties under Article 19 of the Convention: Algeria*, UNCAT, CAT/C/DZA/CO/3 (26 May 2008); *Concluding observations on the initial report of Sierra Leone*, UNCAT, CAT/C/SLE/CO/1 (20 June 2014); *Consideration of Reports Submitted by State Parties under Article 19 of the Convention: Colombia*, UNCAT, CAT/C/COL/CO/4 (4 May 2010). These decisions will be subject to further analysis in Chapters 4 and 5.
[69] International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3. Ratified by 68 States.
[70] The Inter-American Convention on the Forced Disappearances of Persons, adopted a decade earlier, includes a specific obligation to prosecute in article 1(b): 'To punish within their jurisdictions, those persons who commit or attempt to commit the crime of forced disappearance of persons and their accomplices and accessories'. However, the reach of the IACPPED is much more limited, being only ratified by 15 Latin American countries. See: Inter-American Convention on the Forced Disappearances of Persons (adopted 9 June 1994, entered into force 28 March 1996) 33 ILM1429. Ratified by 15 states.
[71] Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (n 45) 176.

make enforced disappearance an offence under its criminal law (article 4), to make it punishable by appropriate penalties (article 7), and to take the necessary measures to hold the perpetrators criminally responsible (article 6). Besides, it develops upon the *aut dedere aut judicare* principle obliging states to prosecute or extradite persons responsible for acts of enforced disappearance (article 11).

Like other treaties proscribing international crimes, the ICPPED does not include any provision regarding the application of amnesties for enforced disappearance. Nonetheless, the drafting process of the ICPPED started with a non-binding Declaration on the Protection of All Persons from Enforced Disappearance adopted by the UN in 1992, which included a specific clause prohibiting amnesty laws in article 18(1): 'Persons who have or are alleged to have committed [acts of forced disappearance] shall not benefit from any amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction'.[72] During the negotiations of the ICPPED, a clause with a provision prohibiting amnesties modelled on article 18 of this declaration was included and discussed.[73] While some delegations considered its inclusion would be a step forward in the development of international law, other delegations strongly opposed to it, leading to the exclusion of such provision and any other reference to amnesties from the Convention.[74] The exclusion of a clause on amnesties from the draft of the ICPPED is an indication that states have deliberately decided not to ban the use of amnesties at a treaty level. Hence, the question about the permissibility of amnesties was left open and no provision on amnesties was adopted, suggesting that an *opinio juris* on the prohibition of amnesties has not been reached.[75]

2.2.5. Amnesties and the prohibition of statutes of limitations

Unlike amnesties, statutes of limitations have been explicitly banned in several treaties. Article 29 of the Rome Statute of the International Criminal Court (hereinafter Rome Statute or ICC Statute) directly establishes that 'the crimes within the jurisdiction of the Court [genocide, crimes against humanity, war crimes, and crimes of aggression] shall not be subject

[72] Declaration on the Protection of all Persons from Enforced Disappearance, Resolution adopted by the UN General Assembly, Forty-seventh Session, U.N. Doc. A/ RES/47/133 (18 December 1992).
[73] See: Draft International Convention on the Protection of all Persons from Forced Disappearance, annex to the Report of the sessional working group on the administration of justice, UNCHR, Fiftieth Session, E/CN.4/Sub.2/1998/19 (19 August 1998) Article 17.
[74] For a more detail discussion of the negotiation and drafting process of the ICPPED see: Close, *Amnesty, Serious Crimes and International Law* (n 11) 138.
[75] Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (n 45) 183.

to any statute of limitations'.[76] Article 1 of the Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity also restricts the application of statutes of limitations to war crimes and crimes against humanity.[77] Besides, pursuant of article 4, state parties undertake the obligation to adopt 'any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment of the crimes referred … and that, where they exist, such limitations shall be abolished'.[78] Finally, a similar clause has been included in article 6.6 of the draft of the Convention on Crimes Against Humanity.[79] Even though the Convention on Crimes Against Humanity is in drafting stages and the Convention on the Non-applicability of Statutory Limitations has not had widespread adoption, Antonio Cassese has argued that a prohibition of statutes of limitations, at least for genocide, crimes against humanity and torture, has crystallised under customary international law.[80]

In practice, amnesties have a similar effect to the statutes of limitations, in terms of restricting criminal prosecution and preventing criminal punishment for certain crimes. Therefore, it has been argued that the prohibition of statutory limitations can be extended to amnesties by analogy, otherwise it would be logically inconsistent to forbid statutory limitations for serious crimes, while allowing amnesties for the same crimes.[81] Although the prohibition of statutory limitations and the prohibition of amnesties could be argued following a similar reasoning, the explicit prohibition of the latter does not necessarily include a similar restriction on the former.[82] Mark Freeman has contested such analogy, arguing that amnesties are exceptional and *ad hoc* measures enacted as part of transitional mechanisms to secure peace and reconciliation, so their legal nature is different.[83] This seems to be confirmed by the way states have treated both legal measures, discussing them separately during the negotiation phase and only including explicit prohibitions for statutory limitations.

The discussion of amnesties has been present during the drafting and negotiation processes of other treaties. In the negotiations of the Rome Statute, the amnesty question was raised in the discussion of the admissibility criteria in article 17 and the *ne bis in idem* principle

[76] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3. Ratified by 123 parties.
[77] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (Adopted 26 November 1968, entered into force 11 November 1970) 754 UNTS 73. Ratified by 55 states.
[78] ibid.
[79] Draft articles on Prevention and Punishment of Crimes Against Humanity (2019), Adopted by the International Law Commission at its seventy-first session, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/74/10).
[80] Antonio Cassese and others, *Cassese's International Criminal Law* (OUP 2013) 315.
[81] Sikkink, 'The Age of Accountability' (n 16) 29; Relva (n 1) 874.
[82] Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (n 45) 172.
[83] Freeman, *Necessary evils* (n 3) 41; Freeman and Pensky, 'The Amnesty Controversy in International Law' (n 3) 50.

in article 20.[84] As mentioned before, during the drafting of the ICPPED, a clause prohibiting amnesties was initially discussed.[85] More recently, in the discussion of the draft of the Convention on Crimes Against Humanity, led by the International Law Commission, international organisations like Amnesty International have suggested including an explicit prohibition of amnesties.[86] Nonetheless, unlike the prohibition of statutes of limitations included the aforementioned treaties, states have demonstrated an explicit resistance to a general provision prohibiting the use of amnesty measures.[87]

2.2.6. The obligation to prosecute human rights abuses and the question of conditional amnesties

The corpus of human rights treaties reflects a principle of justice that requires criminal accountability for the most serious crimes. The application of blanket amnesties for crimes like genocide, torture, war crimes in international conflicts, and enforced disappearance are incompatible with explicit obligations to prosecute individuals and constitute a breach of international law.[88] State parties to those treaties have an affirmative duty to prosecute such crimes as are considered serious violations of international law.[89] Unlimited, unconditional and self-amnesties enacted as a mechanism of impunity that prevents any type of accountability, are in contradiction with the letter and spirit of those commitments.

The picture is somewhat different regarding the use of conditional amnesties enacted as part of genuine attempts to achieve peace. In 2005, the Working Group on Enforced or Involuntary Disappearances discussed article 18 of the non-binding Declaration on the Protection of All Persons from Enforced Disappearance, which included the prohibition of amnesties that was later removed from the ratified version of the ICPPED that entered into force.[90] Considering the problem of impunity for disappearances, the group reiterated 'that States should refrain from making or enacting amnesty laws that would exempt the perpetrators

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[84] On the drafting history of the Rome Statute see: Close, *Amnesty, Serious Crimes and International Law* (n 11) 217-222; Darryl Robinson, 'Serving the interest of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) 14 EJIL 481; Mahnoush H. Arsanjani, 'The International Criminal Court and National Amnesty Laws' (1999) 93 ASIL, Proceedings of the Annual Meeting 65.

[85] See: Draft International Convention on the Protection of all Persons from Forced Disappearance (n 73).

[86] See: Relva (n 1); Orentlicher, 'Immunities and Amnesties' (n 3).

[87] Freeman, *Necessary evils* (n 3) 33; Mallinder, 'Atrocity, Accountability, and Amnesty in a 'Post-Human Rights World'?' (n 25) 12.

[88] Michael Scharf, 'From the eXile Files: An Essay on Trading Justice' (2006) 63 Washington and Lee LRev 339, 351; Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (n 45) 186.

[89] Charles P. Trumbull, 'Giving Amnesties a Second Chance' (2007) 25 Berkeley JIntL 283, 290.

[90] See: Working Group on Enforced or Involuntary Disappearances, *Report of the Working Group on Enforced or Involuntary Disappearances on Civil and Political Rights, including the Question of: Disappearances and Summary Executions* (Sixty-second session, E/CN.4/2006/56, 27 December 2005).

of enforced disappearance from criminal proceedings and sanctions'.[91] However, the Working Group concluded that such restriction is not absolute:

> Notwithstanding the above, article 18 of the Declaration, when construed together with other provisions of the Declaration, allows limited and exceptional measures that directly lead to the prevention and termination of disappearances, as provided for in article 3 of the Declaration, even if, prima facie, these measures could appear to have the effect of an amnesty law or similar measure that might result in impunity.[92]

This raises a question about the compatibility of conditional and limited amnesties with treaty obligations to prosecute, when they are enacted as genuine mechanisms of peace and reconciliation during transitional justice in combination with alternative mechanisms of accountability.[93] As the Working Group on Enforced or Involuntary Disappearances concludes, 'in exceptional circumstances, when States consider it necessary to enact laws aimed to elucidate the truth and to terminate the practice of enforced disappearance, such laws may be compatible with the Declaration as long as such laws are within the following limits [and conditions]'.[94] This is in line with the Belfast Guidelines on Amnesty and Accountability that differentiate between legitimate and illegitimate amnesties.[95] The application of unconditional or illegitimate amnesties enacted as a mechanism of impunity to preclude judicial investigations and protect people responsible for gross crimes would breach such treaty provisions when there are no other policies or mechanisms to redress such violations.[96] However, conditional and limited amnesties, articulated with other mechanisms of accountability, allow states to implement different strategies to offer justice and accountability while guaranteeing peace, truth, and reconciliation.[97]

The fact that states have not included a clause banning the use of amnesties, unlike the clear restriction on statutes of limitations that some treaties have included, also warrants

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[91] ibid para 49.1.
[92] ibid para 49.4.
[93] Freeman, *Necessary evils* (n 3) 41.
[94] Working Group on Enforced or Involuntary Disappearances, *Report of the Working Group* (90) para 49.8.
[95] Transitional Justice Institute, *The Belfast Guidelines on Amnesty and Accountability* (University of Ulster 2013) Guideline 4. The role of amnesties. See also: Louise Mallinder, 'Explanatory Guidance on the Belfast Guidelines on Amnesty and Accountability', *The Belfast Guidelines on Amnesty and Accountability* (University of Ulster 2013).
[96] Transitional Justice Institute, *The Belfast Guidelines on Amnesty and Accountability* (n 95) Guideline 4. The role of amnesties.
[97] ibid Guideline 5. Linking Amnesty with Accountability. One of the core points of the Belfast Guidelines is linking amnesties to accountability: 'Amnesties can be designed to complement or operate sequentially with judicial and non-judicial accountability processes in a way that furthers a state's multiple obligations and objectives'. See also Mallinder and McEvoy, who argue that the legalistic view of amnesties as equating to impunity and retribution as accountability is inaccurate and misleading. They suggest a definition of accountability that is not limited to criminal prosecutions, but includes other mechanisms of accountability in which amnesties may have a role to enhance alternative mechanisms of justice and to contribute to peacemaking (Louise Mallinder and Kieran McEvoy, 'Rethinking amnesties: atrocity, accountability and impunity in post-conflict societies' (2011) 6 Contemporary Social Science 107).

caution in the interpretation of a general prohibition on amnesties. As explained before, states have debated the inclusion of specific clauses on amnesty during the negotiation of a few treaties but have decided to maintain their discretionary powers to enact such exceptional measures under extreme circumstances.[98] Moreover, the explicit decision of states to remove a prohibition on amnesties in the ICPPED suggests that states deliberately decided not to exclude the possibility of enacting all kind of amnesties in cases related to enforced disappearance. Arguably, this reasoning cannot be extended to other treaties imposing the duty to prosecute international crimes like the Genocide Convention, the Convention Against Torture and the Geneva Conventions, where no clause on amnesty was debated. Nonetheless, it suggests the possibility that some states do not see their obligation to prosecute as categorically incompatible with their prerogative to enact conditional and limited amnesties for international crimes in exceptional situations.[99]

Louise Mallinder has noted that '[a]scertaining the international legal status of amnesties is further complicated by the fact that international courts have only had to grapple with broad, unconditional amnesties for international crimes'.[100] The international jurisprudence on the legality of conditional and limited amnesties that require perpetrators to participate in broader processes to guarantee peace, truth, accountability and reparations is scarce.[101] However, as the section below on the right to an effective remedy will explain, in recent years, courts have started to discuss the permissibility of such amnesties.

2.3. Amnesties and the obligation to prosecute crimes against humanity and war crimes in non-international armed conflicts

Treaty-based obligations to prosecute genocide, grave breaches of the Geneva Conventions, torture, and enforced disappearance would only bind state parties to the relevant conventions. Hence, customary law is also regularly invoked as a source of the prohibition of amnesties under international law. This is particularly important in relation to crimes against humanity and war crimes in non-international conflicts. Because there is no treaty directly addressing the obligations of states regarding the prevention, investigation and prosecution of

[98] Freeman, *Necessary evils* (n 3) 33; Close, *Amnesty, Serious Crimes and International Law* (n 11) 139.
[99] Close, *Amnesty, Serious Crimes and International Law* (n 11) 140.
[100] Louise Mallinder, 'Amnesty and International Law' (*Oxford Bibliographies,* 2018) <https://doi.org/10.1093/OBO/9780199796953-0172> accessed 19 April 2022.
[101] ibid.

those crimes, the prohibition of amnesties for war crimes in non-international conflicts and crimes against humanity under international law has been grounded in customary international law.[102]

2.3.1. Encouraging amnesties at the end of non-international armed conflicts

The Additional Protocol II to the Geneva Conventions, adopted in 1977, supplements the shared article 3 in the protection of victims of non-international armed conflicts.[103] The aim of the APII is to extend the rules of the law of armed conflicts to internal wars, and to establish minimal guarantees for the protection of persons who did not take part, or have ceased to take part, in the internal conflict.[104] Article 6(5) of the Additional Protocol II includes a clause encouraging states, at the end of hostilities, to grant the broadest possible amnesty to persons who have participated in the armed conflict.[105]

Article 6(5) of the APII has been considered a tool of transitional justice and pacification.[106] During the discussions of the draft of article 6, states made clear that such provision was merely a recommendation, and several delegations stressed that the power to grant amnesties falls exclusively withing the discretionary power of the domestic authorities.[107] This clause was used by domestic courts in the 1990s to uphold amnesties enacted at the end of non-international conflicts in El Salvador, South Africa, Chile, and Colombia.[108]

More recently, the International Committee of the Red Cross (ICRC) suggested a narrow reading of article 6(5) of APII to the Geneva Conventions. In its compilation of customary norms of international humanitarian law, published in 2005, the ICRC formulated Rule 159 in the following terms:

> At the end of hostilities, the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in a non-international armed

[102] Scharf, 'From the eXile Files' (n 88) 360.
[103] Second Protocol Additional to the Geneva Conventions (n 5).
[104] Close, *Amnesty, Serious Crimes and International Law* (n 11) 124.
[105] Second Protocol Additional to the Geneva Conventions (n 5).
[106] Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers 1987) 1402.
[107] For a full analysis of the negotiation history of the article 6 of the Additional Protocol II see: Close, *Amnesty, Serious Crimes and International Law* (n 11) 123-133; Schabas, *Unimaginable Atrocities* (n 1) 178-180.
[108] See: Roht-Arriaza and Gibson, 'The Developing Jurisprudence on Amnesty' (n 17) 864. El Salvador: *Revisión de constitucionalidad Ley de Amnistía General para la Consolidación de la Paz*, Corte Suprema de Justicia de El Salvador – Sala de lo Constitucional, No. 10-93 (20 May 1993). South Africa: *The Azanian Peoples' Organization (AZAPO) and others v. The President of South Africa and others*, Constitutional Court of South Africa, Case CCT 17/96 (25 July 1996). Chile: *Caso contra Osvaldo Romo Mena*, Corte Suprema de Chile, Rol 5.566 (26 October 1995). Colombia: *Constitucionalidad del Protocolo Adicional II a los Convenios de Ginebra*, Corte Constitucional de Colombia, C-225/95 (18 May 1995).

conflict, or those deprived of their liberty for reasons related to the armed conflict, **with the exception of persons suspected of, accused of or sentenced for war crimes**.[109]

To support this interpretation, the ICRC referenced examples of state practice and the interpretation given by the delegation of the Soviet Unition in the sense that such 'provision could not be construed to enable war criminals, or those guilty of crimes against humanity, to evade punishment'.[110] Therefore, human rights advocates have argued that such interpretation is also applicable by analogy, *mutatis mutandi*, to exclude crimes against humanity.[111] William Schabas argues that during the negotiation phase, 'evidence … that the drafters of article 6(5) of Protocol II meant to exclude serious violations of international humanitarian law is actually very slender'.[112] Josepha Close has criticised the lack of discussion of the *travaux préparatoires* and the intervention of other delegations that manifested a more favourable position towards amnesties at the end of non-international conflicts in order to facilitate reconciliation.[113] Nonetheless, the narrow interpretation advance by the ICRC has been upheld in recent decisions by human rights courts in the discussion of amnesties enacted in El Salvador and Croatia.[114]

2.3.2. The obligation to prosecute under customary law

The obligation to prosecute crimes under customary international law remains under debate, particularly around the duty to investigate, prosecute and punish crimes against humanity. According to Antonio Cassese, there is a general rationale that international crimes constitute an attack of universal values, so the requirement to provide justice should trump the principle of state sovereignty and the need to respect the states' discretion.[115] Nonetheless, 'no customary rule having a general purport has yet emerged imposing upon states the obligation to prosecute and punish the alleged authors of any international crime'.[116]

While there is a growing consensus in international law that the prohibition of international crimes (e.g. genocide, torture, and even crimes against humanity) have attained

[109] ICRC, 'Study on Customary Rules of International Humanitarian Law' (*IHL Database*, 2005) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule159> accessed 24 January 2020. Rule 159: Amnesty (emphasis added).
[110] ibid. Exception.
[111] Relva (n 1) 865; Juan E. Mendez, 'Foreword' in Francesca Lessa and Leigh Payne (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (CUP 2012) xxii.
[112] Schabas, *Unimaginable Atrocities* (n 1) 178.
[113] Close, *Amnesty, Serious Crimes and International Law* (n 11) 131.
[114] *Massacres of El Mozote and surrounding areas v. El Salvador*, IACtHR, Merits, Reparations and Costs, Series C No. 252 (25 October 2012) para 284; *Marguš v. Croatia*, ECtHR, Judgment, Application No. 4455/10 (13 November 2012) para 220.
[115] Cassese and others, *Cassese's International Criminal Law* (n 80) 311.
[116] ibid 312.

jus cogens status, it is contested whether that such prohibition includes a positive obligation to prosecute such crimes.[117] Anja Seibert-Fohr argues that there is a difference 'between a substantive norm proscribing certain conduct and a procedural norm obliging States to prosecute or extradite persons accused of such crimes'.[118] Therefore, it is disputed whether the recognition of the *jus cogens* status of international crimes necessarily means that the duties to investigate, prosecute and punish have simultaneously attained an equivalent status. [119] There is strong evidence to argue that treaty-based obligations to prosecute genocide, torture and war crimes are reflected in customary law.[120] The situation is less clear regarding crimes against humanity and war crimes in non-international armed conflicts.

In recent years, some scholars and human rights advocates have increasingly considered the prohibition of amnesty laws for international crimes under customary law.[121] Hugo Relva, legal advisor for Amnesty International, has argued that a prohibition of amnesty for crimes against humanity is already a rule under customary law.[122] Advocating for the inclusion of a clause with such a prohibition in the draft of the Convention on Crimes Against Humanity prepared by the International Law Commission,[123] he argues that there is wide state practice and accepted *opinio juris* banning the use of amnesties for crimes against humanity under customary international law.[124]

Transitional justice scholars have challenged this assertion. Focusing on state practice, Mark Freeman has argued that '[a]mnesties are as prevalent today as at any time in modern history'.[125] Tricia Olsen, Leigh Payne and Andrew Reiter concluded that their Transitional Justice Data Base shows a persistence in the use of amnesties.[126] In fact, the persistence of amnesties despite the increase of criminal prosecutions suggests that in many contexts they

[117] Louise Mallinder, 'The End of Amnesty or Regional Overreach: Interpreting the Erosion of South America's Amnesty Laws' (2016) 65 ICLQ 645, 669-670.
[118] Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (n 45) 253.
[119] Scharf, 'From the eXile Files' (n 88) 365-366; Dov Jacobs, 'Puzzling Over Amnesties: Defragmenting the Debate for International Criminal Tribunals' in Larissa van den Herik and Carsten Stahn (eds), *The Diversification and Fragmentation of International Criminal Law* (Brill | Nijhoff 2012) 305, 341.
[120] Cassese and others, *Cassese's International Criminal Law* (n 80) 312; Close, *Amnesty, Serious Crimes and International Law* (n 11) 141.
[121] Gerhard Werle, *Principles of International Criminal Law* (2nd edn, TMC Asser Press 2009) 77; Tom Vander Beken, Gert Vermeulen and Tom Ongena, 'Belgium, concurrent national and international criminal jurisdiction and the principle 'ne bis in idem" (2002) 73 Dans Revue internationale de droit pénal 811, 888; Chris van den Wyngaert and Tom Ongena, 'Ne bis in idem Principle, Including the Issue of Amnesty' in Antonio Cassese, Paola Gaeta and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 727.
[122] Relva (n 1) 862.
[123] Draft articles on Prevention and Punishment of Crimes Against Humanity (n 79).
[124] Relva (n 1) 868.
[125] Freeman, *Necessary evils* (n 3) 4.
[126] Tricia D. Olsen, Leigh A. Payne and Andrew G. Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (United States Institute of Peace Press 2010).

coexist.[127] Meanwhile Renée Jeffery, concentrating on the particular case of Asia, argues that states continue to rely on unrestricted amnesties in peace negotiations.[128] Louise Mallinder has linked this to the question about the prohibition of amnesties under customary law. Analysing 398 amnesty laws enacted between 1979 and 2011, Mallinder argues that despite many developments in human rights law and international criminal law, including the creation of the ICC and the United Nations' policy to refrain from recognizing amnesty laws for serious crimes under international law, states continue to enact amnesties around the globe.[129] For instance, 'although the number of new amnesty laws excluding international crimes has increased, so too has the number of amnesties including such crimes'.[130] Between 2010 and 2015, there were twice as many amnesty laws including international crimes as there were amnesty laws excluding them.[131] Therefore, along the same lines, Josepha Close concludes that, despite some evidence of *opinio juris,* the practice of states in rejecting the applicability of amnesties to serious crimes 'has not been general or consistent, undermining the view that an amnesty ban has emerged under customary international law'.[132]

2.3.3. The role of judicial decisions in shaping customary norms

Article 38 of the Statute of the ICJ, considered to reflect customary law on sources of international law,[133] relegates the place of judicial decisions to 'subsidiary means for the determination of rules of law'.[134] Judiciary decisions are not a formal source of international law, but an authoritative declaration of what the law is.[135] Taking an orthodox approach, Article 38 of the ICJ Statute clearly distinguishes primary sources (treaties, custom and general principles) from subsidiary means of determining the law (judicial decisions and academic writings). This reflects the traditional view that only state consent creates international law,

[127] Francesca Lessa and others, 'Persisten or eroding impunity? The divergent effects of legal challenges to amnesty for past human rights violations' (2014) 47 Israel LRev 105, 109.
[128] Renée Jeffery, *Amnesties and Peace Agreements: The Asia-Pacific in Global Comparative Perspective, 1980–2015* (CUP 2021) 71.
[129] Louise Mallinder, 'Amnesties' Challenge to the Global Accountability Norm? Interpreting Regional and International Trends in Amnesty Enactment' in Francesca Lessa and Leigh A. Payne (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (CUP 2012) 81.
[130] ibid 95.
[131] Mallinder, 'Atrocity, Accountability, and Amnesty in a 'Post-Human Rights World'?' (n 25) 10.
[132] Close, *Amnesty, Serious Crimes and International Law* (n 11) 140, 179. See also: Louise Mallinder, 'Peacebuilding, the Rule of Law and the Duty to Prosecute: What Role Remains for Amnesties?' (2012) 11 Transitional Justice Institute Research Paper 1, 15; Trumbull, 'Giving Amnesties a Second Chance' (n 89) 291; Schabas, *Unimaginable Atrocities* (n 1) 188.
[133] Roberts, 'Comparative International Law?' (n 34) 61. See also: Ian Brownlie, *Principles of Public International Law* (OUP 2008).
[134] Statute of the International Court of Justice (n 32).
[135] Lauterpacht, *The Development of International Law by the International Court* (n 33) 22.

while decisions and writings of non-state actors simply provide important evidence of the content of international law without constituting sources.[136]

The unwritten nature of customary rules and general principles of international law give courts what Hersch Lauterpacht describes as great judicial discretion and freedom of appreciation.[137] The declaration and identification of a rule of customary law is difficult to differentiate from a process of creation. Highlighting the indeterminacy of international law, Eyal Benvenisti argues that '[r]ecourse to the doctrines of customary international law, *jus cogens* and *erga omnes* obligations allow judges considerable discretion to make new law while couching it in existing practices or fundamental norms'.[138] In practice, scholars, practitioners and other courts naturally gravitate towards judicial decisions in search of guidance, particularly considering the nature of international law, where a degree of indeterminacy and inconsistency is generally accepted.[139] By authoritatively declaring what the law is, international courts take part in the creation of that law.[140]

When legal actors cannot balance the decision against a text or an author, judicial reasoning provides certainty, often invoked as evidence of the existence of unwritten law.[141] Moreover, the practice of international law has shown that once a respected tribunal identifies a rule of customary law, other courts, states, organisations, and academics frequently cite the finding without carrying out the analysis themselves.[142] In practice, the combination of judicial decisions identifying and applying custom, coupled with the implicit acquiescence of other legal actors that do not protest, or their explicit acceptance by citing those decisions, is taken as an indication of the crystallisation of customary international law.[143]

Decisions of domestic courts play an ambiguous role in the doctrine of sources of international law. On the one hand, article 38 of the ICJ Statute refers to 'judicial decisions' as subsidiary means for the determination of rules of international law. Interestingly, the Statute does not differentiate between the decisions of international and domestic courts,[144] hence the

[136] Roberts, 'Comparative International Law?' (n 34) 63.
[137] Lauterpacht, *The Development of International Law by the International Court* (n 33) 368.
[138] Eyal Benvenisti, 'The Conception of International Law as a Legal System' (2008) 83 Tel Aviv University Law Faculty Papers 1, 5.
[139] Gleider Hernandez, 'Interpretative Authority and the International Judiciary' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (OUP 2015) 166, 179.
[140] Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (OUP 2012) 27.
[141] Hernandez (n 139) 166.
[142] Roberts and Sivakumarani, 'The theory and reality of the sources of international law' (n 36) 112.
[143] ibid. See also: *Prosecutor v. El Sayed*, Special Tribunal for Lebanon, Appeals Chamber, Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, CH/AC/2010/02 (10 November 2010) para. 47.
[144] Philippa Webb, 'Immunities and Human Rights: Dissecting the Dialogue in National and International Courts' in Ole Kristian Fauchald and André Nollkaemper (eds), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Hart 2012) 245, 257. The ICTY, however, has argued that international tribunals "should

decisions of national tribunals may provide subsidiary means for the determination of rules of law under article 38(1)(d) of the ICJ Statute.[145] On the other hand, it has been widely accepted that the decisions of domestic courts are evidence of state practice, *opinio juris*, or both, in the formation of customary international law.[146] In this way, national courts' decisions are also relevant in proving the existence of custom under article 38(1)(b) of the ICJ Statute.[147]

The indeterminacy of customary international law has left room for courts and quasi-judicial bodies to interpret and debate the permissibility of amnesties.[148] The argument supporting the crystallisation of a prohibition of amnesties under customary law is, to a great extent, linked to the idea of a 'justice cascade', which saw an increasing number of domestic courts rejecting amnesty laws (as expressions of state practice), and the general consensus by municipal and international tribunals that such measures are not compatible with the obligation to prosecute human rights violations (as expression of *opinio juris*).[149] While the next section will consider the anti-impunity turn in international courts and human rights bodies, the focus here is on the role of domestic courts.

In 1998, Naomi Roht-Arriaza and Lauren Gibson argued that a detailed study of the decisions of domestic courts 'will be one element in discerning to what degree customary law obligations are emerging in the accountability'.[150] Analysing the case law of municipal courts dealing with amnesty laws in Chile, El Salvador, Guatemala, Honduras, Peru, South Africa, Argentina, and Hungary, they concluded that international-law-based rules and ideas of accountability were permeating into the jurisprudence of national court.[151] More recently, Roht-Arriaza focused her attention on Latin American courts.[152] Analysing the role of national tribunals in the prosecution of international crimes, and using domestic judicial decisions as

apply a stricter level of scrutiny to national decisions than to international judgments, as the latter are at least based on the same corpus of law as that applied by international courts, whereas the former tend to apply national law, or primarily that law, or else interpret international rules through the prism of national legislation." (*Prosecutor v. Kupreškić et al.,* ICTY, Case No. IT-95-16-T (14 January 2000) para. 542).

[145] Roberts, 'Comparative International Law?' (n 34) 62.

[146] ibid 62. See also: Hersch Lauterpacht, 'Decisions of Municipal Courts as a Source of International Law' (1929) 10 British Year Book of International Law 65, 66.

[147] As Roberts points out, "[a] domestic court decision on international law amounts to State practice, though the weight attributed to it may depend on the court's hierarchical status. National court decisions must also be weighed against State practice generated by other branches of government. Where a court decision coincides with or does not contradict the views of the legislature and executive, it will represent strong evidence of State practice" (Roberts, 'Comparative International Law?' (n 34) 62).

[148] Freeman and Pensky, 'The Amnesty Controversy in International Law' (n 3) 52.

[149] See: Harmen van der Wilt, 'State Practice as Element of Customary International Law: A White Knight in International Criminal Law?' (2019) 20 International Criminal Law Review 784. Harmen van der Wilt argues that, despite the conceptual differentiation between state practice and *opinio juris*, the boundaries between the two have become blurred. In search of customary law, international tribunals have resorted to case the law of domestic courts as evidence of both, state practice and *opinio juris*.

[150] Roht-Arriaza and Gibson, 'The Developing Jurisprudence on Amnesty' (n 17) 845.

[151] ibid 845.

[152] Naomi Roht-Arriaza, 'After Amnesties are Gone: Latin American National Courts and the new Contours of the Fight Against Impunity' (2015) 37 Human Rights Quarterly 341, 344.

evidence of state practice and *opinio juris,* Naomi Roht-Arriaza argues that the majority of judges in Argentina, Uruguay and Peru found that amnesty laws violated the state's international obligations. Similarly, judges in countries like Chile and El Salvador, despite avoiding invalidating legislative measures enacting amnesties, have modified their scope so that they do not cover acts constituting international crimes.[153] So states in Latin America are facing a great challenge: 'how to negotiate peace in a world where amnesties for crimes against humanity and war crimes—for all actors, not just state actors—are off the table'.[154]

In collaboration with other scholars, Kathryn Sikkink has examined the phenomena of a 'justice cascade' in several studies.[155] In 2001, Sikkink and Ellen Lutz introduced the concept in an article examining the impact of the activation of the universal jurisdiction, by domestic courts in the US and Europe, for human rights abuses committed in Latin America.[156] They describe 'a broader human rights advocacy network working in the context of a broad shift in international norms towards greater protection for human rights'.[157] This shift was, in part, led by transnational justice networks in which some of the biggest casualties were self-amnesty decrees passed by Latin American autocrats to protect themselves before leaving office, or blanket amnesties granted by post-dictatorship regimes in the transition to democracy.[158] Nonetheless, the consequences of the justice cascade are extending beyond the region.[159] From a political science perspective, Sikkink's research has focused on the effect of criminal trials during transitional processes and the improvement of human rights.[160] However, her studies have helped to consolidate the idea of a new age of accountability, in which amnesties are considered incompatible with international law by human rights bodies, international criminal tribunals, and domestic courts.[161]

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[153] ibid 352.
[154] ibid 369.
[155] See: Lutz and Sikkink, 'The Justice Cascade' (n 18); Kim and Sikkink, 'Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries' (n 29); Sikkink, 'The Age of Accountability' (n 16).
[156] Lutz and Sikkink, 'The Justice Cascade' (n 18). A similar argument was developed by Naomi Roht-Arriaza assessing the impact of the Pinochet case in the use of universal jurisdiction between the 1990s and the early 2000s. See: Roht-Arriaza, *The Pinochet Effect* (n 20).
[157] Lutz and Sikkink, 'The Justice Cascade' (n 18) 3.
[158] ibid 31.
[159] ibid 32.
[160] See: Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (Norton 2011); Kim and Sikkink, 'Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries' (n 29); Hun Joon Kim and Kathryn Sikkink, 'How do human rights prosecutions improve human rights after transition?' (2013) 7 Interdisciplinary Journal of Human Rights Law 69; Kathryn Sikkink and Carrie Booth Walling, 'The Impact of Human Rights Trials in Latin America' (2007) 44 Journal of Peace Research 427.
[161] Sikkink, 'The Age of Accountability' (n 16).

2.3.4. Is there still a justice cascade?

Echoing the arguments of a justice cascade, Relva makes reference to a wide range of judicial decisions in concluding that a 'nearly uniform interpretation given by international, regional and national courts and tribunals, as well as by UN organs, bodies and experts, confirms that such a general prohibition [of amnesties] would reflect a rule of customary international law'.[162] However, Relva's article is not, and does not aspire to be, a systematic analysis of judicial decisions on amnesties.

The debate on amnesties has continued in recent years, with domestic and international courts still discussing its permissibility. Therefore, it is worth asking about the current status of the justice cascade and judicial trends in the analysis of amnesties. This is particularly relevant to examining the permissibility of conditional amnesties. Early studies dealt mostly with unconditional and self-amnesties that were deemed clearly problematic. As Charles Trumbull argues, the 'justice cascade' prescribes that states provide some form of accountability for serious human right violations. However, the precise content of such duty remains unclear and state practice is too inconsistent to identify the exact obligation.[163] In recent years, courts have considered more openly the possibility of conditional amnesties in transitional justice, and this renews the question about the permissibly of certain amnesty laws, even for serious human rights violations, under international law. Hence, there is still some caution in claiming the 'crystallisation' of a prohibition of amnesties under customary international law.[164]

Despite the emphasis of much of the literature on amnesties in examining judicial decisions, there are no analyses of interactions and cross-references. As argued in Chapter 3, reconstructing the network of interactions will be essential in tracing the relationships, identifying communities of courts, and evaluating the influence of specific tribunals and decisions in the development of a norm on amnesties under international law.

[162] Relva (n 1) 868.
[163] Trumbull, 'Giving Amnesties a Second Chance' (n 89) 302.
[164] *Prosecutor v. Saif Al-Islam Gaddafi*, ICC Appeals Chamber, Situation in Libya, Judgment on the appeal of Mr Saif Al-Islam Gaddafi against the decision of the Pre-Trial Chamber I entitled 'Decision on the admissibility challenge by Dr. Saif Al-Islam Gaddafi pursuant to articles 17(1)(c) and 20(3) of the Rome Statute', ICC-01/11-01/11 (9 March 2020) para 96; *Prosecutor v. Morris Kallon and Brima Bazzy Kamara*, SCSL, Decision on challenge to jurisdiction: Lomé Accord Amnesty, Cases No. SCSL-2004-15-AR72 and SCSL-2004-16-AR72 (13 March 2004) para 71.

2.4. Amnesties and the interpretation of the right to an effective remedy

An obligation to ensure 'effective remedy' in the event of human rights violations has been incorporated into several universal and regional human rights instruments, including the ICCPR,[165] the American Convention on Human rights (hereinafter ACHR or American Convention),[166] the European Convention on Human Rights (hereinafter ECHR or European Convention),[167] and the African Charter on Human and Peoples' Rights (hereinafter ACHPR or African Charter).[168] According to the Basic Principles and Guidelines on the Right to a Remedy and Reparation adopted by the General Assembly of the UN,

> In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him.[169]

Consequently, the right to an effective remedy includes: (a) equal and effective access to justice; (b) adequate, effective and prompt reparation for harm suffered; and (c) access to relevant information concerning violations and reparation mechanisms.[170] However, none of these treaties includes provisions on how perpetrators of human rights violations should be dealt with.[171] No general prohibition of amnesty exists in universal or regional human rights treaties in relation to the right to an effective remedy. In fact, the topic was not even discussed in the drafting process.[172]

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[165] See: article 2.3: 'Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity …' International Covenant on Civil and Political Rights (n 4).

[166] See: article 25.1: 'Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention …' American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) OAS Treaty Series 36. Ratified by 24 American states.

[167] See: article 13: 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity' European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) ETS No. 005. Ratified by 47 European states.

[168] See: article 1: 'The Member States of the Organisation of African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them'. African Charter on Human and Peoples' Rights (adopted and entered into force 21 October 1986) 21 ILM 59. Ratified by 54 African states. Despite not including an explicit clause addressing the right to an effective remedy in the African Charter on Human and Peoples' Rights, such right has been interpreted as included in article 1 of the Charter. See: Godfrey Musila, 'The right to an effective remedy under the African Charter on Human and Peoples' Rights' (2006) 6 African Human Rights Law Journal 442, 448.

[169] UN General Assembly, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (21 March 2006) A/60/509/Add1 para 4.

[170] ibid para 11.

[171] Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (n 45) 11.

[172] Close, *Amnesty, Serious Crimes and International Law* (n 11) 181.

The content of the right to an effective remedy has been mostly developed through treaty interpretation by human rights courts and quasi-judicial bodies.[173] In what Engle has called the anti-impunity turn, human rights law has aimed to pressure states to respond criminally to human rights violations.[174] Examining situations with large-scale impunity, the Inter-American institutions have developed a tough doctrine on how states need to react to serious human rights violations, and a stringent view on the form of accountability that is envisaged.[175] Alexandra Huneeus has referred to this as the 'quasi-criminal jurisdiction of the human rights courts', which in recent years has equated criminal prosecutions to remedy.[176] Studies uncovering the anti-impunity turn in the human rights movement have used the decisions on amnesty as evidence of the shift towards the increasing demand for criminal prosecutions for human rights violations and, consequently, the prohibition of amnesty laws.[177]

The decisions of the Inter-American System of Human Rights have been seminal in the interpretation of the right to an effective remedy and development of a jurisprudence on amnesty, influencing cases in both the European and African human rights systems, as well as decisions of the UN Bodies.[178] The turn has two important moments. First, much of the literature agrees on the importance of the *Velásquez Rodríguez v. Honduras* case.[179] In one of its first contention cases, the Inter-American Court of Human Rights (hereinafter IACtHR or Inter-American Court) interpreted the victims' right to an effective remedy, concluding that it includes states' obligations to investigate, prosecute and ensure the effective punishment of human rights violators.[180] The case was brought before the IACtHR because of the enforced disappearance of student and political activist, Ángel Manfredo Velásquez Rodríguez, by members of the Armed Forces of Honduras. Ultimately, the IACtHR concluded that the State holds responsibility not only when the act can be directly imputable to it, but also when there is 'lack of due diligence to prevent the violation or to respond to it as required by the Convention'.[181] The state, concluded the Court, 'has a legal duty to take reasonable steps to

[173] Mallinder, *Amnesty, Human Rights and Political Transitions* (n 11) 263.
[174] Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (n 21) 1079.
[175] Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (n 45) 51.
[176] Alexandra Huneeus, 'International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts' (2013) 107 AJIL 1, 6.
[177] See: Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (n 45); Engle, 'A Genealogy of the Criminal Turn in Human Rights' (n 21); Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (n 21); Pinto (n 21).
[178] Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (n 21) 1079.
[179] *Velásquez Rodríguez v. Honduras*, IACtHR, Merits, Series C No. 4 (29 July 1988). See: Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (n 45) 53; Mallinder, *Amnesty, Human Rights and Political Transitions* (n 11) 270; Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (n 21) 1080; Huneeus, 'International Criminal Law by Other Means' (n 176) 8; Close, *Amnesty, Serious Crimes and International Law* (n 11) 188; Pinto (n 21) 167; William W. Burke-White, 'Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation' (2001) 42 Faculty Scholarship at Penn Law 461, 519.
[180] *Velásquez Rodríguez v. Honduras*, IACtHR (n 179) para 174.
[181] *Velásquez Rodríguez v. Honduras*, IACtHR (n 179) para 172.

prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation'.[182]

This approach signalled an anti-impunity stance, initiating the turn in the human rights movement towards criminal law, with criminal accountability as a central point in redressing human rights violations.[183] This approach was later followed by specific decisions on amnesty by other regional and universal human rights bodies, building upon the right to an effective remedy and the obligation to prosecute under human rights law. Both the Inter-American Court and the Inter-American Commission on Human rights (hereinafter IACoHR or Inter-American Commission) developed a clear position banning amnesties for human rights violations. The Inter-American Commission, in several decisions adopted between 1992 and 2000, condemned amnesty laws enacted in Argentina, Uruguay, Chile, El Salvador, and Peru.[184] The Inter-American Court, with a well-developed case-law, outlawed blanket and self-amnesties in Peru, Chile, Uruguay, Brazil, and El Salvador.[185]

2.4.1. Assessing the influence of the decisions of the Inter-American System

Much of the focus of the literature investigating the role of judicial decisions in shaping the permissibility of amnesties under international law has focused on the Inter-American System. Lisa Laplante, for instance, argues that the IACtHR has closed the door to the theory of 'qualified amnesties' in transitional justice, which accepts the possibility of nations to resort to conditional amnesties for other serious human rights violations.[186] She considers that no

[182] *Velásquez Rodríguez v. Honduras*, IACtHR (n 179) para 174. These considerations were repeated almost word-by-word in other cases against Honduras. See, for instance: *Godínez Cruz v. Honduras*, IACtHR, Merits, Series C No. 5 (20 January 1989) para 182-184.
[183] Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (n 21) 1080; Pinto (n 21) 167.
[184] See: *Consuelo et al. v. Argentina*, IACoHR, Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311, Report 28/92, OEA/Ser.L/V/II.83 (2 October 1992); *Mendoza et. al. v. Uruguay*, IACoHR, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375, Report 29/92, OEA/Ser.L/V/II.83 (2 October 1992); *Masacre Las Hojas v. El Salvador*, IACoHR, Case 10.287, Report 26/92, OEA/Ser./L/V/II.83 (24 September 1992); *Monsignor Oscar Arnulfo Romero and Galdámez et al. v. El Salvador*, IACoHR, Case 11.481, Report 37/00, OEA/SerL/V/II.106 (13 April 2000); *Garay Hermosilla et al. v. Chile*, IACoHR, Case 10.843, Report 36/96, OEA/SerL/V/II/95 (15 October 1996); *Meneses Reyes et al. v. Chile*, IACoHR, Cases 11.228, 11.229, 11.231 and 11.182, Report 34/96, OEA/SerL/V/II/95 (15 October 1996); *Hugo Bustios Saavedra v. Peru*, IACoHR, Case No 10.548, Report 38/97, OEA/SerL/V/II.98 (16 October 1997); *Estiles Ruíz Dávila v. Peru*, IACoHR, Case No 10.491, Report 41/97, OEA/SerL/V/II.98 (19 February 1998); *Basilio Laureano Atachahua v. Peru*, UNHRC, Communication No. 540/1993, CCPR/C/56/D/540/1993 (16 April 1996).
[185] See: *Barrios Altos v. Peru*, IACtHR, Merits, Series C No. 75 (14 March 2001); *La Cantuta v. Peru*, IACtHR, Merits, Reparations and Costs, Series C No. 162 (29 November 2006); *Almonacid Arellano et al. v. Chile*, IACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 154 (26 September 2006); *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, IACtHR, Preliminary Objections, Merits, Reparations, and Costs, Series C No. 219 (24 November 2010); *Gelman v. Uruguay*, IACtHR, Merits and Reparations, Series C No. 221 (24 February 2011); *El Mozote v. El Salvador*, IACtHR (n 114). The decisions of international courts and human rights bodies are analysed in more detail in Chapter 4.
[186] Laplante (n 31) 918.

amnesty is lawful under human rights law and, focusing on the *Barrios Altos v. Peru* case, she argues that the Inter-American Court presents a good example of how an international human rights decision can dramatically impact state practice, setting a new precedent for the region, leading other Latin American countries to annul amnesty laws.[187] More broadly, Laplante concludes that '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'.[188]

Christina Binder and Jorge Contesse have paid special attention to the symbiotic relationship between the Inter-American human rights system and the decisions of domestic courts in Latin American countries challenging the use of amnesties.[189] Examining the impact of the case law of the IACtHR on amnesties in the decisions of domestic courts in Latin America, Binder argues that there is a 'veritable dialogue' that developed between the Inter-American Court and domestic courts.[190] Exploring the arguments of specific cases in different countries, she concludes that in the field of amnesties, domestic jurisprudence shows a considerable impact from or a 'spill-over effect' of the Inter-American Court's judgments in their interpretation of amnesty laws.[191] However, not all courts in Latin America have reached decisions in the same way. Pointing at the decisions of courts in Brazil and Uruguay, Mallinder argues that the judicial rejection of amnesties 'is not universal across the region, nor does it represent a rejection of all forms of amnesty'.[192] Some caution is required, in not overstating the explanatory or normative force of events in South America in order to claim a global trend.[193]

These studies have paid some attention to the influence of the decisions of Latin American Courts in other jurisdictions and, more generally, in the evolution of international law.[194] For instance, Laplante highlights how the decisions of the Inter-American Court in *Barrios Altos v. Peru* has been widely referenced as authority by domestic courts in rejecting amnesty laws, while Mallinder notes the citation of the decisions of the Argentine Supreme Court made by the IACtHR and the Extraordinary Chambers of the Courts of Cambodia.[195]

[187] ibid 919.
[188] ibid 983.
[189] See: Christina Binder, 'The Prohibition of Amnesties by the Inter-American Court of Human Rights' (2011) 12 German LJ 1203; Jorge Contesse, 'The final word? Constitutional dialogue and the Inter-American Court of Human Rights' (2017) 15 I•CON 414; Jorge Contesse, 'The international authority of the Inter-American Court of Human Rights: a critique of the conventionality control doctrine' (2018) 22 IJHR 1168.
[190] Binder (n 189) 1227.
[191] ibid 1225.
[192] Mallinder, 'The End of Amnesty or Regional Overreach' (n 117) 670.
[193] ibid 678.
[194] ibid 670
[195] Laplante (n 31) 980; Mallinder, 'The End of Amnesty or Regional Overreach' (n 117) 670.

Nonetheless, there are no studies focused on the interactions or cross-referencing practices between international tribunals, domestic courts and human rights bodies.

Despite reference to the influence of the decisions on amnesty made by the Inter-American Court in other jurisdictions, most studies have focused on comparative analysis of the different approaches by human rights bodies.[196] In particular, scholars have drawn on the comparison between the standards developed in the Inter-American, European, and UN human rights systems for the right to an effective remedy and the duty to prosecute.[197] The question about interactions remains unexplored. Chapter 3 expands on the justification and significance of mapping interactions and measuring the influence of the decisions of judicial and quasi-judicial bodies in order to advance in the understanding of the permissibility of amnesties, as well as the role of judicial decisions in shaping the development of international law. Chapters 4 to 6, in turn, analyse in more depth the standards developed by different tribunals and human rights bodies, engaging with substantial arguments in the literature on the matter.

2.4.2. The right to an effective remedy and the question about conditional amnesties

In 2008, Mallinder published one of the most in-depth analyses of decisions adopted by national courts, international tribunals and human rights bodies discussing the permissibility of amnesties.[198] At the time, her study concluded that international courts have disregarded blanket, unconditional amnesties for perpetrators of international crimes; however, courts should take a more nuanced approach when examining conditional amnesties designed to promote peace and reconciliation when they are accompanied by selective prosecutions or alternatives forms of justice.[199]

The right to an effective remedy is not limited to a specific mechanism of criminal accountability, but includes a broader definition of accountability that includes memory reconstruction, truth telling, restorative justice and guarantees of non-repetition, among others.[200] In some cases, amnesties have been used to improve the capacity of states to focus their resources and prosecute the most responsible, complementing selected or prioritised

[196] Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (n 21) 1079
[197] Josepha Close, 'Crafting an international norm prohibiting the grant of amnesty for serious crimes: convergences and divergences in the case-law of international courts' (2016) 8 Queen Mary LJ 109; Close, *Amnesty, Serious Crimes and International Law* (n 11) ch 6; Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (n 45).
[198] Mallinder, *Amnesty, Human Rights and Political Transitions* (n 11) ch 5, 6 and 7.
[199] ibid 247-248.
[200] Louise Mallinder, 'Can Amnesties and International Justice be Reconciled?' (2007) 1 The International Journal of Transitional Justice 208, 221.

criminal investigations with other forms of accountability.[201] Amnesties enacted during reconciliation processes do not always mean a breach of the obligation to provide a remedy for human rights abuses. In certain circumstances, amnesties could be used to guarantee a more effective non-judicial remedy in the context of massive human rights violations. Amnesties preclude the prosecution of offenders, but not necessarily investigatory proceedings, civil remedies or alternative forms of reparations, hence not all amnesties would go against a literal interpretation of the right to remedy included in human rights conventions.[202]

Indeed, in some of their most recent decisions, the European, Inter-American and African human rights bodies have included some transitional justice considerations in their reasoning. Despite having adopted a strong position against amnesties in early decisions, the IACtHR in a recent concurring opinion to the *El Mozote Massacres v. El Salvador* case (2012), signed by five out of the seven judges, opened the door to the possibility of considering and accepting amnesties in situations of peace negotiations as a necessary mechanism for peace and reconciliation.[203] In the *Marguš v. Croatia case* (2014), the Grand Chamber of the ECtHR acknowledged the growing tendency of courts to reject amnesties for serious crimes under international law, but signalled the possibility of giving deference to certain amnesties on a case-by-case basis when there is a higher public interest in peace, and the amnesty contributes to reconciliation.[204] Likewise, in the *Thomas Kwoyelo v. Uganda* case (2018), the ACoHPR asserted that there is a lack of clear guidance for the application of amnesties when pursuing peace and justice in times of transition from violence to peace.[205] Later, the African Commission went even further and considered that, in exceptional cases, conditional amnesty could be justifiable and proportional limitations acceptable under international law.[206]

These recent decisions, which will be analysed in more detail in Chapter 5, suggest a shift in the way courts are assessing the permissibility of conditional, limited and negotiated amnesties enacted as part of peace processes, accompanied by alternative mechanisms of accountability focused on bringing peace, truth, reconciliation, and reparations. While the position of courts and human rights bodies regarding unconditional amnesties and self-amnesties is to reject them as mechanisms of impunity, incompatible with treaty obligations to prosecute international crimes and provide an effective remedy for human rights violations,

[201] See: *Constitucionalidad Acto Legislativo 01 de 2012 Marco Jurídico para la Paz,* Corte Constitucional de Colombia, C-579/13 (28 August 2013).
[202] Close, *Amnesty, Serious Crimes and International Law* (n 11) 183.
[203] *El Mozote v. El Salvador*, IACtHR (n 114) Concurring opinion Judge García Sayán.
[204] *Marguš v. Croatia*, ECtHR, Judgment by Grand Chamber, Application 4455/10 (27 May 2014) para 131, 139.
[205] *Thomas Kwoyelo v. Uganda,* ACoHPR Communication 431/12 (17 October 2018) para 284.
[206] ibid para 287.

there is some uncertainty about the compatibility of conditional amnesties with international treaties when they are enacted as part of a broader mechanism of accountability.

2.5. Conclusion: Addressing a gap in the literature

The absence of treaty provisions on amnesty in human rights treaties has left ample room for the judicial discussion of the permissibility of amnesties under international law. During the last 30 years, domestic courts, international tribunals, and human rights bodies have extensively discussed the legality of amnesties. The increasing number of prosecutions for international crimes and human rights abuses at a domestic level (the 'justice cascade'), and the trend to require criminal prosecutions for human rights abuses as a core part of the right to an effective remedy (the 'anti-impunity turn'), have signalled a general rejection of amnesty measures. The opposition to amnesties, and the view that they are incompatible with international law, has grown in recent decades. However, as Schabas argues, '[i]t seems unlikely that this could be crystallized in a treaty or convention. But a definitive statement by an authoritative body like the International Court of Justice is certainly a plausible development at some point in the future'.[207]

Leaving the substantial discussion of the standards developed by judicial and quasi-judicial bodies on the application of amnesties for the following chapters, this chapter has shown how the literature on amnesties has discussed the relevance of judicial decisions in shaping international law. Courts and human rights bodies have been particularly active in the interpretation of the obligations to prosecute human rights abuses and provide effective remedy. Likewise, the decisions of domestic courts have been used as evidence of *opinio juris* and state practice to argue for the crystallisation of a norm prohibiting amnesties.

This thesis aims to contribute to this body of literature, in part by updating the analysis of the jurisprudence on amnesties and the standards developed by courts. There are no recent studies systematically analysing the standards of domestic courts, international tribunals and human rights bodies on amnesties. Relevant studies by Mallinder (2008), Seibert-Fohr (2009), Laplante (2009) and Binder (2011) do not account for the most recent developments in the discussion of the permissibility of amnesties under international law.[208] Chapter 3 shows how

[207] Schabas, *Unimaginable Atrocities* (n 1) 193.
[208] See: Mallinder, *Amnesty, Human Rights and Political Transitions* (n 11); Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (n 45); Laplante (n 31); Binder (n 189).

domestic courts and international bodies have continued discussing the legality of amnesties under international law, bringing new insights into the debate.

This research concentrates in particular on examining the standards developed by judicial and quasi-judicial bodies for the application of conditional amnesties. Much of the literature has focused on determining the permission or prohibition on amnesties under international law. Here, the focus is on how the judicial standards have changed and what that can tell us about the current status of amnesties. In 2008, Mallinder concluded that,

> [i]n future years, judges in national courts will possibly pursue a more restrictive approach to amnesty laws, requiring that any measure that suspends punishment for those who have committed human rights violations, war crimes or political crimes, be accompanied by alternative measures to promote the rights of the victims and comply with the state's international obligations. This is particularly likely if the process of transnational judicial dialogue continues among national courts and international human rights monitoring bodies.[209]

This research explores the standards developed by domestic and international judicial bodies in recent decades, offering an in-depth assessment of the treatment of conditional amnesties and their permissibility under international law. Moreover, this study offers a new approach focused on mapping the influence of interactions and cross-referencing practices between courts across geographical regions and legal regimes. So far, most studies have focused on the development of the jurisprudence on amnesties in specific human rights systems, mostly the Inter-American and European systems.[210] Other scholars have concentrated more broadly on analysing the jurisprudence of international human rights bodies and international criminal tribunals (including regional human rights bodies),[211] while a few investigations have focused on the decisions of municipal courts at a domestic level.[212]

Building upon the ideas of judicial dialogue, Chapters 4-6 will show that mapping the interactions between domestic courts, international tribunals, and human rights bodies across

[209] Mallinder, *Amnesty, Human Rights and Political Transitions* (n 11) 246.
[210] For the discussion of amnesties at the Inter-American Human Rights System see: Laplante (n 31); Binder (n 189); Mallinder, 'The End of Amnesty or Regional Overreach' (n 117); Contesse, 'The final word?' (n 189); Contesse, 'The international authority of the Inter-American Court of Human Rights' (n 189). For the discussion of amnesties at the European Human Rights System see: Miles Jackson, 'Amnesties in Strasbourg' (2018) 38 OJLS 451; Louise Mallinder and others, *Investigations, Prosecutions, and Amnesties under Articles 2 & 3 of the European Convention on Human Rights* (Queen's University Belfast 2015).
[211] See: Close, *Amnesty, Serious Crimes and International Law* (n 11); Close, 'Crafting an international norm prohibiting the grant of amnesty for serious crimes' (n 197); Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (n 45); Relva (n 1); Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (n 21); Engle, 'A Genealogy of the Criminal Turn in Human Rights' (n 21); Pinto (n 21).
[212] See: Roht-Arriaza and Gibson, 'The Developing Jurisprudence on Amnesty' (n 17); Roht-Arriaza, 'After Amnesties are Gone' (n 152); Mallinder, *Amnesty, Human Rights and Political Transitions* (n 11); Lutz and Sikkink, 'The Justice Cascade' (n 18).

different regimes is essential to understanding the development of the standards on the permissibility of amnesties under international law.

CHAPTER 3. The complexity of judicial dialogue

International and domestic courts have become influential actors in the international law arena. Judicial decisions made by international tribunals and domestic courts have an important role in the formation and interpretation of international law, which a narrow reading of article 38 of the Statute of the International Court of Justice (ICJ) fails to acknowledge.[1] From different perspectives, traditional and liberal approaches to international law have discussed the increasing role of judicial decisions as a source of international law. However, the fundamental question about the influence of international and domestic courts in the development of international law has been approached mostly from a theoretical perspective, rather than through empirical research.[2] This chapter builds upon the literature on the role of judicial decisions in shaping international law and proposes a framework for the analysis of the judicial discussion of a rule on amnesties. In particular, the chapter explains how the ideas of courts as 'agents of legal development'[3] and 'judicial dialogue'[4] have influenced the arguments of those claiming a general prohibition of amnesties for gross human rights violations under international law. However, it argues that both perspectives fail to fully explain the role of judicial decisions in shaping the permissibility of amnesties.

Louise Mallinder and William W. Burke-White, in separate analyses, have hinted at the possibility of trans-judicial dialogue and cross-fertilization leading to 'a convergence of norms and practices in the enforcement of amnesty laws'.[5] Human rights scholars and practitioners tend to read decisions on amnesty in a coherent manner that signals a general agreement on

[1] See: Anthea Roberts and Sandesh Sivakumarani, 'The theory and reality of the sources of international law' in Malcom Evans (ed), *International Law* (5th edition edn, OUP 2018) 109.
[2] Urška Šadl and Henrik Palmer Olsen, 'Empirical Studies of the Webs of International Case Law: A New Research Agenda' (2014) 8 iCourts Working Paper Series 1, 3.
[3] See: Christian J. Tams and Antonios Tzanakopoulos, 'Barcelona Traction at 40: The ICJ as an Agent of Legal Development' (2010) 23 LJIL 781; Antonios Tzanakopoulos and Christian J. Tams, 'Introduction: Domestic Courts as Agents of Development of International Law' (2013) 26 LJIL 531.
[4] See: Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44 Harvard IntlLJ 191; Christopher McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights' (2000) 20 OJLS 499, 502.
[5] William W. Burke-White, 'Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation' (2001) 42 Faculty Scholarship at Penn Law 461, 532. See also: Mallinder, *Amnesty, Human Rights and Political Transitions* (n 7) 237.

their incompatibility with international law.[6] However, there has been limited empirical analysis of judicial dialogue in general and, in particular, no studies focusing on amnesties. Decisions discussing the permissibility of amnesty laws show a multiplicity of arguments, nuances in approaching the question about their status under international law, and diversity of interactions that vary from one court to the other.[7] This raises a question about how to understand the role of judicial decisions in the formation and development of a rule on amnesties under international law when there is disagreement, limited dialogue, and a diversity of approaches. This chapter proposes a framework for such an analysis.

Building upon the theory of judicial dialogue, the chapter argues that bringing some ideas from complexity theory is helpful in understanding the role of judicial interactions in shaping a norm on the permissibility of amnesties for serious human rights violations under international law. The chapter contends that using a complexity approach to analyse the dynamics of judicial interactions in the discussion of amnesties allows a better conceptualisation of the role of judicial and quasi-judicial bodies in the emergence and change of international norms. Connecting the theory of judicial dialogue with the ideas of self-organisation, emergence, and path dependence, developed to analyse natural and social complex systems, the chapter proposes a methodological framework for assessing the influence of judicial decisions in shaping international law without overstating the impact of individual decisions or overemphasising the existence of an international agreement.

The purpose of this chapter is to introduce the methodology and the theoretical framework that will inform the analysis of judicial decisions on the permissibility of amnesties in the following chapters. Therefore, this chapter does not engage yet with the analysis of specific decisions, but outlines the discussion at a theoretical level. The aim here, nevertheless, is not to propose a new theory on the role of judicial decisions in shaping international norms, but to build upon the literature on judicial dialogue bringing some ideas from complexity theory. Connecting the literature on judicial dialogue to the ideas from complexity theory allows new insights into the understanding of judicial interactions as a collective process that shapes international law. This approach offers a robust theoretical and methodological framework for explaining the role of judicial interactions in the formation and interpretation of international law. Rather than presupposing a process of rational and global deliberation based

[6] Hugo A. Relva, 'Three Propositions for a Future Convention on Crimes Against Humanity' (2018) 16 JICJ 857, 868; Naomi Roht-Arriaza, 'After Amnesties are Gone: Latin American National Courts and the new Contours of the Fight Against Impunity' (2015) 37 Human Rights Quarterly 341, 348; Diane Orentlicher, 'Immunities and Amnesties' in Leila Nadya Sadat (ed), *Forging a Convention for Crimes Against Humanity* (CUP 2011) 218.
[7] Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Hart Publishing 2008) ch 5-7.

upon shared values, a complexity approach proposes focusing on the spontaneous emergence of rules of international law from the relatively simple interactions of legal actors, and the process of self-organisation and adaptation through which international law develops without central control.[8]

The first section of this chapter explains the shift in the way international law sees the role of international and domestic courts, challenging the idea of judicial decisions as mere auxiliary means to determine the rules of law. The second section reflects on the idea of courts as agents of legal development, and on how traditional approaches to sources of international law have increasingly acknowledged the influence of specific courts or decisions in the development of certain norms. Applying a traditional approach to the analysis of amnesties, the section argues that this approach tends to overestimate the influence of individual courts or decisions in the crystallisation of a prohibition of amnesties. The third section analyses the theory of judicial dialogue that moves from an individual approach to the role of judicial decisions to a collective approach that places the focus on the increasing number of interactions between international and domestic tribunals. The section argues that scholars grounding the prohibition on amnesties on the idea of judicial dialogue, or on an international agreement of courts on the standards of justice, tends to overestimate the agreement among courts. The fourth section argues that the focus on an international agreement misses a question on how judicial standards for the application of amnesties have changed and evolved. Incorporating elements from complexity theory into the analysis of judicial dialogue, this section explains how the ideas of path-dependence, self-organisation and emergence that characterise complex systems, give us some insights into how international tribunals, domestic courts, and human rights bodies are influencing the trajectory of international law on the permissibility of certain amnesties. The fifth section develops the methodological approach deployed for the analysis of judicial decisions on amnesties that will inform the next three chapters.

The conclusion of the chapter is that, in order to fully assess the influence of judicial decisions on the development of a rule on the permissibility on amnesties, it is not enough to focus on specific landmark decisions, but in is essential to analyse the interactions and dialogues between international courts, domestic tribunals, and human rights bodies. In this analysis, a complexity theory approach can complement the theories of judicial dialogue by providing a framework for analysing how legal norms emerge from local decisions, and how international norms not only emerge from those interactions but also change over time.

[8] Steven Wheatley, *The idea of international human rights law* (OUP 2019) 50.

3.1. Judicial decisions as more than an auxiliary source of international law

This question about the function of international courts, whether they are expected to make and develop the law or merely apply it, has drawn the attention of scholars for long time.[9] The main function of international courts has traditionally been limited to the settlement of concrete disputes in a state-centred international legal system.[10] This view finds support in the consensual nature of the international legal order, which prevails today.[11] According to this view, the consent of states continues to be the main source of law and legitimacy.[12] The contractual conception of international law and the relevance of state consent, explains the demotion of judicial decisions to auxiliary means for determining the law. Article 38(1)(d) of the Statute of the ICJ relegates the place of judicial decisions to 'subsidiary means for the determination of rules of law'.[13] Rather than a formal source of international law in its own right, judicial decisions are an authoritative declaration of what the law is.[14] Despite, technically only applying to the ICJ, this article is considered to reflect customary law and reflect the sources of international law more generally.[15] A traditional perspective sees courts, particularly domestic tribunals, as recipients of international law, called upon to strictly apply rather than develop it.[16] Following this, Mark Freeman warns that international law precludes reliance on the decisions of judicial or quasi-judicial bodies as a primary or exclusive basis for drawing conclusions about the permissibility of amnesties.[17]

In practice, nevertheless, judicial decisions have a much more important role in the formation of international law than a textual reading of article 38 of the Statute of the ICJ suggests.[18] For example, judicial decisions have the potential to clarify the content of unwritten law, both custom and general principle; advance a particular interpretation of a norm; and fill gaps in the law through analogous reasoning, among others.[19] Despite not being a formal source of international law, the practice of domestic and international courts contributes greatly to the

[9] Tams and Tzanakopoulos, 'Barcelona Traction at 40' (n 3) 782.
[10] Armin von Bogdandy and Ingo Venzke, 'On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority' (2012) 10 Amsterdam Center for International Law Research Paper 1, 14.
[11] *Case of the S.S. 'Lotus'*, PCIJ, Judgment No. 9 (7 September 1927)18; *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, ICJ, Advisory Opinion, Declaration of Judge Simma (22 July 2010) para. 2.
[12] von Bogdandy and Venzke, 'On the Functions of International Courts' (n 10) 4.
[13] Statute of the International Court of Justice, Annex to the Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.
[14] Hersch Lauterpacht, *The Development of International Law by the International Court* (CUP 1982) 22.
[15] Anthea Roberts, 'Comparative International Law? The role of national courts in creating and enforcing international law' (2011) 60 ICLQ 57, 61. See also: Ian Brownlie, *Principles of Public International Law* (OUP 2008).
[16] Tzanakopoulos and Tams, 'Introduction' (n 3) 537.
[17] Mark Freeman, *Necessary evils: amnesties and the search for justice* (CUP 2009) 48.
[18] Roberts, 'Comparative International Law?' (n 15) 63.
[19] Tams and Tzanakopoulos, 'Barcelona Traction at 40' (n 3) 784.

formation and development of international law.[20] In fact, the distinctions between law application, interpretation and development are difficult to maintain in the practice of courts.[21]

As reflected in the previous chapter, the law-making power of judicial decisions is particularly evident in the identification and declaration of custom and principles of international law by domestic and international tribunals;[22] in the use of judicial decisions as evidence of *opinio juris* and state practice in the determination of customary law; and in the interpretation of treaties as a way to create or advance the scope of a rule of international law.[23]

The unwritten nature of customary norms and general principles gives judicial bodies great judicial discretion, making it difficult to differentiate the process of identification and declaration of the law from a process of creation.[24] When legal actors cannot contrast the decision against a text or an author, judicial reasoning becomes a source of certainty, often invoked as evidence of existence of unwritten law.[25] The practice of international law has shown that once a respected tribunal identifies a rule of customary law, international bodies, as well as other courts, states, organisations, and academics frequently cite the findings without carrying out the analysis themselves.[26] The combination of judicial decisions identifying and applying custom, coupled with the implicit acquiescence of other legal actors that do not challenge that custom, or their explicit acceptance by citing those decisions, is taken as an indication of the crystallisation of customary international law.[27]

The decisions of domestic courts play a dual role in the doctrine of sources of international law. Domestic courts not only participate in international law by contributing to determining and interpreting what the law is, but also have the power to create law as an expression of the state practice and the state appreciation of its international obligations (*opinio juris*).[28] This adds to the complexity of the role of judicial decisions in international law,

[20] ibid 783.
[21] André Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY' in Gideon Boas and William A. Schabas (eds), *International criminal law developments in the case law of the ICTY* (Martinus Nijhoff 2003) 294.
[22] This analysis is focused on customary international law because the discussion about the legality of amnesties under international law has been developed mostly in terms of treaty and customary law. For the discussion on the importance of judicial decisions in the determination of general principles of criminal law see: *Prosecutor v. Kupreškić et al.,* ICTY, Case No. IT-95-16-T (14 January 2000) para. 537.
[23] Nollkaemper, 'Decisions of National Courts as Sources of International Law' (n 21) 296.
[24] Eyal Benvenisti, 'The Conception of International Law as a Legal System' (2008) 83 Tel Aviv University Law Faculty Papers 1, 5.
[25] Gleider Hernandez, 'Interpretative Authority and the International Judiciary' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (OUP 2015) 166, 166.
[26] Roberts and Sivakumarani, 'The theory and reality of the sources of international law' (n 1) 112.
[27] ibid. See also: *Prosecutor v. El Sayed*, Special Tribunal for Lebanon, Appeals Chamber, Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, CH/AC/2010/02 (10 November 2010) para 47.
[28] Lauterpacht, *The Development of International Law by the International Court* (n 14) 20. See also: Antonios Tzanakopoulos, 'Judicial Dialogue as A Means of Interpretation' in Helmut Philipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (OUP 2016) 72, 89; Roberts, 'Comparative International Law?' (n 15) 59; Nollkaemper, 'Decisions of National Courts as Sources of International Law' (n 21) 284.

because they can be read in different lights, both as law enforcers and as law creators. [29] Both functions are ingrained in the doctrine of sources and prioritising one does not erase the other, as international law is confronting that tension and ambiguity continually.[30] Domestic courts are not simply obedient appliers of international law, they participate in the development of the law by giving space to national concerns and attitudes about the proper evolution of international law.[31] This is particularly relevant when analysing decisions on amnesties, where domestic courts are increasingly encouraged to apply international law and act as guarantors of the rule of law when governments enact mechanisms of impunity to protect themselves. However, the idea of domestic courts selflessly promoting the coherence of the global system is inconsistent with the reality of limited information and political influences.[32]

Another way in which judicial decisions have developed a law-making function in international law is through treaty interpretation. Similarly to the doctrine on sources, the rules of interpretation contained in articles 31 and 32 of the Vienna Convention on the Law of Treaties (hereinafter VCLT or Vienna Convention), which reflect customary international law,[33] link treaty interpretation to state consent.[34] In theory, the purpose of interpretation is 'to establish the meaning of the text that the parties intended it to have in relation to circumstances with reference to which the question of interpretation has arisen'.[35] The practice of international law has shown that in the process of interpretation, the content and nature of an obligation can change.[36] The indeterminacy of international law gives a powerful normative function to the reasoning and decision-making of judicial decisions when establishing the meaning of a particular norm.[37] Besides, the decentralized structure of international law allows for a multiplicity of interpretations to coexist.[38] Courts, international organizations, legal scholars and states' representatives, as interpreters, 'negotiate the content of legal commitments in struggles over what the law means'.[39] Hence, a norm of international law can be modified via

[29] Roberts, 'Comparative International Law?' (n 15) 91.
[30] ibid.
[31] Olga Frishman and Eyal Benvenisti, 'National Courts and Interpretive Approaches to International Law' in Helmut Philip Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (OUP 2016) 317, 324.
[32] ibid 325.
[33] *LaGrand case (Germany v. United States of America)*, ICJ, Merits (27 June 2001) para. 101; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, ICJ, Preliminary Objections (17 March 2016) para. 33.
[34] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) UN 1155, I-18232.
[35] Malgosia Fitzmaurice, 'The practical working of the law of treaties' in Malcom Evans (ed), *International law* (OUP 2018) 138, 152.
[36] Roberts and Sivakumarani, 'The theory and reality of the sources of international law' (n 1) 110.
[37] Hernandez, 'Interpretative Authority and the International Judiciary' (n 25) 172.
[38] Roberts and Sivakumarani, 'The theory and reality of the sources of international law' (n 1) 111.
[39] Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (OUP 2012) 18.

interpretation, for instance when the interpretation of one actor is accepted by others and a new shared understanding of the law emerges.[40]

The decisions of courts possess what Gleider Hernandez calls 'centrifugal normative force'.[41] Judicial decisions do not merely enjoy persuasive authority because of the quality of their reasoning, but in practice have a greater normative status within the legal system than other interpreters.[42] Placing judicial decisions at the same level as the teaching of the most highly qualified publicist in Article 38(1)(d) of the Statute of the ICJ, argue Gerald Fitzmaurice and Robert Jennings, does not reflect the reality of judicial practice, which clearly places greater value on the courts' opinions.[43] Despite the absence of hierarchical or centralised judiciary structure, other courts and international legal actors do tend to read and follow previous judicial reasoning. The normative force of judicial decisions is increased when dealing with unwritten sources of law, where the text and reasoning of the court becomes the parameter of interpretation.

3.2. Courts as agents of legal development

One of the indications of the fragmentation of international law has been the emergence of special regimes or branches of international law, which are part of the international legal system but have developed their own legal standards.[44] This has been accompanied by the proliferation of international tribunals, hybrid courts and quasi-judicial bodies interpreting and applying the ever-expanding corpus of treaties and norms of international law.[45] In the case of amnesties, during the 1990s the Inter-American Court of Human Rights (hereinafter IACtHR or Inter-American Court), the Inter-American Commission of Human Rights (hereinafter IACoHR or Inter-American Commission) and the United Nations (UN) monitoring bodies were the most active in their condemnation of amnesty laws. More recently, other human rights

[40] Roberts and Sivakumarani, 'The theory and reality of the sources of international law' (n 1) 111.
[41] See: Hernandez, 'Interpretative Authority and the International Judiciary' (n 25).
[42] ibid 168.
[43] Robert Yewdall Jennings, 'The judiciary, international and national, and the development of international law' (1996) 45 ICLQ 1, 9; Gerald Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law' in Frederik Mari Asbeck (ed), *Symbolae Verzijl* (Martinus Nijhoff 1958) 153.
[44] For a full discussion of the fragmentation of international law see the report of the International Law Commission Study Group: Martti Koskenniemi, 'Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission (2006) UN Doc A/CN.4/L.682. See also: Anthony E. Cassimatis, 'International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law' (2007) 56 ICLQ 623.
[45] Marjan Ajevski, 'Fragmentation in International Human Rights Law: Beyond Conflict of Laws ' (2014) 32 Nordic Journal of Human Rights 87, 88.

bodies, including the European Court of Human Rights (hereinafter ECtHR or European Court) and the African Commission on Human and Peoples' Rights (hereinafter ACoHPR or African Commission), and international criminal tribunals, including the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the International Criminal Court (ICC), have participated more actively in the discussion, adopting decisions on the permissibility and opposability of amnesties.

However, there has been a growing interest in the application and enforcement of international law by domestic courts, which challenges a strictly dualistic view of the relationship between international law and municipal law.[46] With the consolidation of the anti-impunity stance and the centrality of criminal accountability as a mechanism to redress human rights violations at an international level, domestic courts have increasingly used the international obligations of states to evaluate the permissibility of amnesty laws.[47] The decisions of international tribunals, domestic courts and human rights bodies are becoming increasingly relevant in tracing the development of international law.

3.2.1. The limitations of judicial decisions as source of international law

It is difficult to consider judicial decisions as a source of international law in their own right for at least two reasons. Firstly, as explained before, despite the increasing importance of judicial decisions in the development of international law, courts tend to link the reference to other courts' decisions to the interpretation of treaties or the identification of customary law. In fact, courts and tribunals predominantly refer to the use of external judicial decisions as auxiliary means of supplementing their own interpretations of a given rule.[48] It is not unusual that courts and tribunals make clear that a reference to an external judicial decision is grounded in the underlying formal source that the court is interpreting or identifying, and emphasise that external judicial decisions may not constitute direct sources of law.[49] In a formal sense, to be binding upon states, the interpretation advanced by judicial bodies must be anchored in a formal source.[50]

[46] Jennings, 'The judiciary, international and national, and the development of international law' (n 43) 4.
[47] Naomi Roht-Arriaza and Lauren Gibson, 'The Developing Jurisprudence on Amnesty' (1998) 20 Human Rights Quarterly 843, 884.
[48] Aldo Zammit Borda, 'The Use of Precedent as Subsidiary Means and Sources of International Criminal Law' (2013) 18 Tilburg LRev 65, 70.
[49] *Prosecutor v. Kupreškić* (n 22) para 540. See also: Borda (n 48) 69.
[50] Tams and Tzanakopoulos, 'Barcelona Traction at 40' (n 3) 783.

However, as Aldo Zammit Borda has noted, there are cases in which courts have relied heavily, and even sometimes exclusively, on the legal reasoning or findings of the decisions of other judicial bodies to reach a decision according to the law, with no direct examination of the norms in question.[51] Moreover, the practice of international law has shown that once a respected tribunal identifies a rule of customary law, other courts, states, organisations, and academics frequently cite the finding without carrying out the analysis themselves.[52] This dynamic has been criticised by Mark Freeman in the case of amnesties, where he noted that 'supranational courts have not been thorough in their investigation of the amnesty practices of states. Instead, they have tended to rely on the pleadings before them, or on the conclusions of prior cases, no matter how perfunctory or insufficient in their assessment of state practice and irrespective of whether made only in obiter'.[53]

In some of these cases, where courts rely on the decisions of other courts, it is difficult to establish whether judicial decisions are being used as direct source or merely as means to identify a primary norm.[54] In such cases, courts are clearly developing international law. Nonetheless, it would be difficult to argue that judicial decisions have become a source of law in their own right. By interpreting and applying norms of international law to the particular circumstances of each case, courts and tribunals develop, adapt, modify, interpret, limit or even fill gaps in the law as a legitimate judicial function.[55] However, courts are not permitted to formulate a norm that is not grounded on a formal source, whether treaty, custom or principle of international law.[56] As Borda concludes, courts 'have the power to legitimately develop the law in a particular area, as long as their interpretations and clarifications are seen to emanate reasonably and logically from existing and previously ascertainable law'.[57]

The second counterargument to the idea of judicial decisions as source of international law is that the analysis of its influence cannot be conducted prospectively.[58] The role of a decision as a source of international law is given by its subsequent use or application by legal actors, particularly other judicial bodies. In some cases, courts seem to go beyond their role in the interpretation of treaties or the identification or interpretation of rules of customary law or

[51] Borda (n 48) 70.
[52] Roberts and Sivakumarani, 'The theory and reality of the sources of international law' (n 1) 112.
[53] Freeman, *Necessary evils* (n 17) 48. More generally on the lack of raw data as evidence of state practice and *opinio juris* to support the crystallisation of customary international law by judicial institutions: Monica Hakimi, 'Making Sense of Customary International Law' (2020) 118 Michigan Law Review 1487, 1509
[54] Borda (n 48) 70.
[55] ibid 78.
[56] Robert Yewdall Jennings, 'The Judicial Function and the Rule of Law in International Relations' in Roberto Ago (ed), *International Law at the Time of its Codification* (A. Giuffrè 1987) 145.
[57] Borda (n 48) 80.
[58] Tams and Tzanakopoulos, 'Barcelona Traction at 40' (n 3) 786.

general principles of law.[59] But the influence of such decisions only transpires in the analysis of the subsequent impact or adoption of such a decision by other courts. In this sense, it is difficult to claim the normative value of judicial decisions as a source, until they have already shaped the law.[60]

3.2.2. Judicial bodies as legal agents

Acknowledging the importance of international courts in the development of international law, particularly the ICJ, Hersch Lauterpacht has suggested that courts are agencies that contribute to the development of international law.[61] Recognising the role of international and domestic courts in the development of international law, but without going as far as attributing a law-making function, the idea of 'agency' attempts to capture the capacity of courts as legal actors that influence processes of legal development.[62] Building upon this idea, Christian Tams and Antonios Tzanakopoulos propose a shift from the question about international courts as law-makers, to an idea of international courts as 'agents' or 'actors' participating in the process of legal development.[63] From this perspective, even with limited formal influence as a source of international law, judicial decisions can have great informal impact.[64] Despite not having formal binding authority, the decisions of national and international courts mutually influence each other.[65] Despite not making law directly, courts participate as 'powerful agents of legal development' in a broader process in which states and other legal actors ultimately corroborate or reject the law-making function of courts in specific cases.[66]

In the case of amnesties, the decisions of the Inter-American Court and the Inter-American Commission have been considered key actors in the development of the prohibition of amnesties. In particular the decisions on *Velásquez Rodríguez v. Honduras* and *Barrios Altos v. Peru* have been isolated as cases that were strongly influential for the development of an international position on amnesties. Lisa Laplante, for instance, argues that the IACtHR's decision in *Barrios Altos v. Peru* had a broad impact on the decision of domestic courts in the

[59] Nollkaemper, 'Decisions of National Courts as Sources of International Law' (n 21) 293.
[60] Tams and Tzanakopoulos, 'Barcelona Traction at 40' (n 3) 786.
[61] See: Lauterpacht, *The Development of International Law by the International Court* (n 14).
[62] Tzanakopoulos and Tams, 'Introduction' (n 3) 536.
[63] Tams and Tzanakopoulos, 'Barcelona Traction at 40' (n 3) 785. See also: Lauterpacht, *The Development of International Law by the International Court* (n 14) 5.
[64] Tzanakopoulos and Tams, 'Introduction' (n 3) 539.
[65] Nollkaemper, 'Decisions of National Courts as Sources of International Law' (n 21) 295.
[66] Tams and Tzanakopoulos, 'Barcelona Traction at 40' (n 3) 800.

region, preventing amnesty laws having full effect, and 'could cause monumental changes in transitional justice schemes'.[67] Naomi Roht-Arriaza argues that in *Barrios Altos v. Peru* as well as in *Almonacid Arellano v. Chile*, the Inter-American Court has developed an expanding jurisprudence banning the use of amnesties, and in that process 'has set the standard followed by many judges in the region'. [68] In turn, Karen Engle traces the origins of the anti-impunity turn to the *Velásquez Rodríguez v. Honduras* case.[69] Underlining the following jurisprudence of the IACtHR rejecting amnesties in Peru, Chile, Uruguay, Brazil and El Salvador, she concludes that,

> [t]he IAC[t]HR has clearly taken the lead on jurisprudence on amnesties. At least parts of the line of cases reviewed above have often been cited in other regional human rights courts and commissions as well as in domestic jurisdictions outside of the Americas. For example, both the African Commission on Human and Peoples' Rights (notwithstanding AZAPO) and the European Court of Human Rights (ECHR) have used the IAC[t]HR decisions to find amnesty laws incompatible with their respective conventions.[70]

Part of the evidence of the influence of the decisions of the IACtHR on the permissibility of amnesties is the fact that 'national courts widely cited the Court's decisions in this arena'.[71] In that sense, courts' decisions play a central role in shaping international law, and one decision can change the course of international law in specific areas. Nonetheless, judicial decisions do not have an intrinsic value. The relevance of a judicial decision in shaping and developing international law will be determined by the way states and other actors build practice around them.[72]

3.3.3. The problem of cherry-picking decisions discussing amnesties

A critical question in the assessment of the use of judicial decisions in the identification of a norm on the permissibility of amnesties under international law is whether the selection of cases meets requirements of consistency and generality.[73] The ideas of subsequent practice (as means of treaty interpretation), state practice (as an element of customary law) and

[67] Lisa J. Laplante, 'Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes' (2009) 49 Virginia JIntlL 915, 982.
[68] Roht-Arriaza, 'After Amnesties are Gone' (n 6) 348.
[69] Karen Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (2015) 100 Cornell LRev 1069, 1080.
[70] ibid 1103.
[71] Roht-Arriaza, 'After Amnesties are Gone' (n 6) 349.
[72] Tams and Tzanakopoulos, 'Barcelona Traction at 40' (n 3) 800.
[73] Nollkaemper, 'Decisions of National Courts as Sources of International Law' (n 21) 285.

commonality between legal systems (as requisite for the identification of general principles) requires a wide and representative selection of case-law.[74] However, as André Nollkaemper argues, there are several examples of international courts referencing only a handful of decisions.[75]

Analysing cases from other jurisdictions is difficult because of accessibility and language barriers, as well as limitations of time and resources for examining the extensive case law on a specific matter. This presents two main challenges when assessing the influence of judicial decisions in the development of international law, particularly when arguing the crystallisation of a norm of customary law. The first is a risk of selection bias or 'cherry-picking' decisions that favour one argument. The increasing number of decisions from domestic courts and international tribunals restricting the application of amnesties has been interpreted as evidence of a judicial trend prohibiting them.[76] However, focusing only on those decisions when arguing for a general prohibition on amnesties means overlooking the reasoning of a significant number of courts that have upheld these measures in exceptional circumstances.

Freeman and Mallinder have been highly critical of scholars that argue for the crystallisation of a norm of customary international law prohibiting amnesties by deliberately excluding cases in which amnesties have been adopted successfully. An example of this is the frequent omission of broad amnesties adopted in a wide range of countries including Spain, Brazil, Mozambique, Nigeria, Uruguay, South Africa, Sri Lanka and Uganda, among others.[77] Moreover, Mallinder criticises the practice of courts like the IACtHR, for 'cherry-picking' decisions that support its position, leaving aside 'evidence that contrasts with it, such as the continued willingness of States in other parts of the world to enact amnesty'.[78] Decisions adopted by national courts in Uruguay, El Salvador and Brazil upholding amnesty laws are usually overlooked to establish a uniform judicial trend banning those measures.[79]

This results in a second risk; that of over-estimating the role of certain individual decisions. Much of the discussions of courts as agents of legal development either focus on the

[74] ibid 296.
[75] ibid.
[76] See: ICRC, 'Study on Customary Rules of International Humanitarian Law' (*IHL Database*, 2005) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule159> accessed 24 January 2020. Rule 159: Amnesty; Relva (n 6); Laplante (n 67); Roht-Arriaza, 'After Amnesties are Gone' (n 6).
[77] See: Freeman, *Necessary evils* (n 17) 27; Louise Mallinder, 'Amnesties' Challenge to the Global Accountability Norm? Interpreting Regional and International Trends in Amnesty Enactment' in Francesca Lessa and Leigh A. Payne (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (CUP 2012) 92-93.
[78] Louise Mallinder, 'The End of Amnesty or Regional Overreach: Interpreting the Erosion of South America's Amnesty Laws' (2016) 65 ICLQ 645, 660-661.
[79] ibid 670.

influence of the ICJ or on specific examples of landmark decisions like the *Pinochet* case at the UK House of Lords (regarding international immunities) or the *Simon* case at the Argentinean Supreme Court (regarding domestic amnesties).[80] Another example is the *Prosecutor v. Furundžija* case at the International Criminal Tribunal for the Former Yugoslavia (ICTY), usually referenced in order to support the prohibition of amnesties under international customary law.[81] In this case, the Trial Chamber of the ICTY ruled that the prohibition of torture, as a norm of *jus cogens*, implies an obligation to prosecute people responsible, and any amnesty for such acts would be incompatible with international law.[82] Even though this conclusion was *obiter dictum* to the case because it was not essential or connected to a legal principle fundamental in its resolution, the decision has been extensively cited by other courts and commentators to argue for the prohibition of amnesties.[83]

3.3.4. A systematic and relational approach

Louise Mallinder and Katherine O'Rourke point out that in transitional justice research, '[w]here empirical research was conducted, it was primarily single-country case studies or small-n comparative studies'.[84] Due to the number of decisions and the variety of arguments, it is difficult to isolate the impact of individual decisions or specific courts as 'agents of change' without risking an oversimplification of the development of a rule on amnesties and an overestimation of the impact of particular decisions. The significant number of decisions and interactions in the discussion of amnesties call for a systematic analysis of the wide range of decisions adopted by judicial and quasi-judicial bodies.

Studies on amnesty have developed substantial comparative analysis on the treatment of amnesties in different human rights systems and the different approaches adopted by courts and quasi-judicial bodies. In separate analyses, Louise Mallinder,[85] Anja Seibert-Fohr,[86] and Josepha Close[87] have discussed the jurisprudence and decisions of the Inter-American,

[80] Tams and Tzanakopoulos, 'Barcelona Traction at 40' (n 3) 785; Antonio Cassese and others, *Cassese's International Criminal Law* (OUP 2013) 314.
[81] *Prosecutor v. Anto Furundžija*, ICTY, Case No. IT-95-17/1-T (10 December 1998).
[82] ibid para 155.
[83] Freeman, *Necessary evils* (n 17) 51; Mark Freeman and Max Pensky, 'The Amnesty Controversy in International Law' in Francesca Lessa and Leigh A. Payne (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (CUP 2012) 59.
[84] Louise Mallinder and Catherine O'Rourke, 'Databases of Transitional Justice Mechanisms and Contexts: Comparing Research Purposes and Design' (2016) 10 International Journal of Transitional Justice 492, 493.
[85] Mallinder, *Amnesty, Human Rights and Political Transitions* (n 7) ch 6.
[86] Anja Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (OUP 2009).
[87] Josepha Close, 'Crafting an international norm prohibiting the grant of amnesty for serious crimes: convergences and divergences in the case-law of international courts' (2016) 8 Queen Mary LJ 109; Josepha Close, *Amnesty, Serious Crimes and International Law: Global Perspectives in Theory and Practice* (Routledge 2019) ch 6.

European, African, and Universal Human Rights Systems. However, none of the literature has analysed the interactions between courts and the use of external decisions on amnesty. While these analyses have compared differences in the approaches to assess the permissibility of amnesties in each human rights system, little attention has been paid to the cross-referencing practices and the influence of external decisions. This is important because, as explained in the previous section, the lack of intrinsic value of a judicial decision as a source of international law means that the influence of courts in the more general development of international law can only be assessed by measuring the impact of those decisions on the practice of other legal actors.

The relevance of judicial decisions in the interpretation of treaties and the formation of customary law does not emerge from aggregating how many courts have adopted the same decisions. A relational approach highlights the relevance of judicial interactions in the analysis of customary law and treaty interpretation, proposing to move beyond that aggregate analysis to study court decisions in relation to other courts and legal actors.[88] Thinking international and domestic tribunals as a global community of courts, Anne-Marie Slaughter's influential work reframes the influence of judicial decisions in developing international law as a process of 'judicial dialogue'.[89]

3.3. A global community of courts

The processes of globalisation that have facilitated global interactions, the quick development of technology that has connected legal actors more effectively, and the pressing concern of human rights protection as a global endeavour, has led scholars and practitioners to rethink international law as an interconnected network.[90] The idea of a unitary state has declined, and domestic actors are increasingly interacting at an international level.[91] Among others, municipal courts are venturing into international territory, engaging with international

[88] Ruti Teitel and Robert Howse, 'Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order' (2009) 41 New York University Journal of International Law and Politics 959, 961.
[89] See: Anne-Marie Slaughter, 'Judicial Globalization' (2000) 40 Virginia JIntlL 1103; Slaughter, 'A Global Community of Courts' (n 4); Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2004).
[90] Anne-Marie Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 University of Richmond LRev 99, 130. See also: Margaret E. Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Cornell University Press 1998).
[91] Slaughter, *A New World Order* (n 89) 31.

law and encountering their foreign counterparts, forming several networks with other national courts and international tribunals.[92]

3.3.1. Judicial interactions

The increasing interaction between national and international courts manifests itself in different ways. First, in a process of constitutional cross-fertilisation, where domestic courts are actively looking at the work of alien courts when deciding issues like privacy rights, free speech and the death penalty.[93] Domestic courts are not only interacting more, but are remarkably self-reflective about the way they are engaging in open debates about the use of other judicial decisions as 'persuasive authority'.[94] Likewise, domestic courts are starting to read international law in light of the practice of other courts applying those same rules in their jurisdictions.

Second, the increasing centrality of human rights in the development of international law has increased the overlap between domestic and international jurisdictions. The idea of universal human rights means that fundamental rights are not only protected at a constitutional level, but also at an international level.[95] The interpretation and application of human rights treaties permeates national jurisdictions, leading to international and domestic courts thinking of themselves as a genuine global community of courts and law.[96] Domestic and international courts are increasingly engaging in a dialogical approach that develops human rights law as a collective project.[97]

Finally, as consequence of economic globalisation, there is a third process of judicial interaction based on cooperation and conflict due to the increase of transnational litigation.[98] This has responded, at least in part, to a move in the last three decades towards a single global economy in which borders are increasingly weakened, and a multiplicity of legal systems in which litigants can choose among different forums to resolve a dispute.[99]

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[92] ibid 31.
[93] ibid 66. See also: Paolo G. Carozza, '"My Friend is a Stranger": The Death Penalty and the Global Ius Commune of Human Rights' (2003) 81 Texas LRev 1031, 1082.
[94] Slaughter, *A New World Order* (n 89) 70; Claire L'Heureux-Dube, 'The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court' (1998) 34 Tulsa LRev 15, 17
[95] Slaughter, *A New World Order* (n 89) 80.
[96] ibid 80.
[97] Christopher McCrudden, 'Judicial Comparativism and Human Rights' in Esin Örücü and David Nelken (eds), *Comparative Law: A Handbook* (Hart Publishing 2007) 391-393. See also: Carozza, 'My Friend is a Stranger' (n 93).
[98] Slaughter, *A New World Order* (n 89) 85.
[99] ibid 86.

3.3.2. Judicial dialogue and a community of courts

As result of more interaction, a judicial comity is forming wherein judges are 'beginning to think of one another as participants in the same dispute resolution system often less willing to defer to one another out of the comity of nations and more willing to examine how well the system actually works, and to act accordingly'.[100] Slaughter characterises this as a global community of courts or a system of loosely composed networks of national and supranational judges.[101] This is, a community based upon dialogue, rather than deference or conflict, where the value of judicial decisions is not grounded on precedent but on persuasive authority.[102] Understanding themselves as autonomous actors in the international system, courts interact beyond borders, speaking a common language and engaging in a common enterprise.[103]

Although this argument has been developed mostly in terms of a system of global governance, it helps with the conceptualisation of the sources of international law and the development of international norms.[104] Shifting the emphasis of sovereignty away from ideas of separation, independence and autonomy of states, and towards the capacity to participate in the global forum, paves the way for the understanding of international law as a system built upon 'connection rather than separation, interaction rather than isolation, and institutions rather than free space'.[105]

3.3.3. A judicial community with shared values

Liberal and global constitutionalism approaches to international law have connected around the idea of judicial dialogue.[106] This concept, however, has a strong normative dimension. Expanding on the idea of a global community of courts, Jenny Martinez argues that 'the overriding purpose of the emerging international judicial system should be to promote the "federalism of free nations" –a decentralized system of cooperative relations among nations

[100] Slaughter, 'A Global Community of Courts' (n 4) 193-194.
[101] Slaughter, *A New World Order* (n 89) 101. See also: Slaughter, 'A Global Community of Courts' (n 4) 192; Slaughter, 'Judicial Globalization' (n 89) 1104.
[102] Slaughter, 'A Global Community of Courts' (n 4) 193.
[103] Slaughter, 'A Typology of Transjudicial Communication' (n 90) 136.
[104] Slaughter, *A New World Order* (n 89) 10.
[105] ibid 267.
[106] On the relationship between liberal approaches and the ideas of a global constitutional order see: Burke-White, 'Reframing Impunity' (n 5) 477. See also: Slaughter, *A New World Order* (n 89) 245; Teitel and Howse, 'Cross-Judging' (n 88) 963.

that, where possible, advances goals of democracy and respect for individual rights and that courts participating in the system should act in ways that further these goals'.[107]

This suggests an 'embryonic constitutional order' in which, according to Erika De Wet, 'the different national, regional and functional (sectoral) regimes form the building blocks of the international community ('international polity') that is underpinned by a core value system common to all communities and embedded in a variety of legal structures for its enforcement'.[108] Hence, even without a *grundnorm* in international law, there is a common understanding of a global legal system where international law offers enough common values and a vocabulary to allow positive conversation, interaction, and mutual influence between different tribunals.[109]

The prevalence of human rights at the centre of international law in the last decades, argue Ruti Teitel and Robert Howse, suggests a turn towards the idea of a 'humanity law' that constitutes the 'dynamic unwritten constitution' of today's international legal order.[110] The function of judicial bodies moves towards what Armin von Bogdandy and Ingo Venzke call an 'international public authority' of international courts, which is not limited to the traditional role of dispute-resolution.[111] In this context, courts not only apply, interpret and develop international law, but also protect the community's core values and interests, deciding in the name of the international community. [112] Judicial and human rights bodies develop a normative framework increasingly shaped by considerations of humanity, which is human-centred rather than state-focused.[113] The development of international law is a collective endeavour in which courts have a role in providing coherence and integrating the legal system.[114] Judicial cross-referencing or judicial interaction has a collective role in the formation and interpretation of international law.

[107] Jenny S. Martinez, 'Towards an International Judicial System' (2003) 56 Stanford LRev 429, 461.
[108] Erika De Wet, 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order' (2006) 19 LJIL 611, 612.
[109] Teitel and Howse, 'Cross-Judging' (n 88) 965.
[110] ibid 969.
[111] Armin von Bogdandy and Ingo Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification' (2012) 23 EJIL 7, 8.
[112] von Bogdandy and Venzke, 'On the Functions of International Courts' (n 10) 19; von Bogdandy and Venzke, 'In Whose Name?' (n 111) 22.
[113] Robert Howse and Ruti Teitel, 'Cross-judging revisited' (2014) 46 New York University Journal of International Law and Politics 867, 872.
[114] McCrudden, 'Judicial Comparativism and Human Rights' (n 97) 382.

3.3.4. The collective influence of courts in shaping international law

This notion of judicial dialogue entails three important consequences in the understanding of the role of courts regarding the creation and development of international law. Firstly, there is a shift in focus, away from the influence of individual courts or specific decisions and towards the collective role of judicial interactions in shaping international law. As Philippa Webb has noticed in the analysis of immunities, dialogue has played a key role in the way courts look to each other's practice to determine the current state of the customary international law: '[j]udicial dialogue can serve to strengthen (by following another court's position) or weaken (by rejecting another court's position) state practice. By studying this dialogue we can identify factors that encourage interaction, discourage exchange, or have a neutral effect'.[115] A high level of judicial interactions in certain areas of law, which certainly include immunities and amnesties where domestic and international courts have cross-referenced and engaged in in-depth critical analysis of each other's decisions, makes it necessary to study not only individual key decisions on the topic, but also the interactions between different tribunals in that respect. Judicial dialogue and juridical interactions have become a means for analysing state practice and assessing the status of customary international law.[116]

Judicial dialogue also challenges the idea of the role of judicial decisions in shaping international law solely as an expression of state consent. Even though state consent remains central in the creation of international law, the idea of judicial dialogue places the value of court decisions in their persuasive reasoning rather than in the pure authority of the tribunal.[117] In von Bogdandy and Venzke's words, the influence or 'law-making effect of judicial decisions, in particular in their general and abstract dimension that goes beyond the individual case, does not only depend on the *voluntas* but also on its *ratio*'.[118] As Christopher McCrudden argues, there is a difference between judicial 'binding authority' and 'persuasive authority'. [119] The lack of institutional hierarchy in international law places emphasis on the persuasive authority of judicial decisions. Thinking international law as a community of legal actors, the

[115] Philippa Webb, 'Immunities and Human Rights: Dissecting the Dialogue in National and International Courts' in Ole Kristian Fauchald and André Nollkaemper (eds), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Hart 2012) 246.
[116] ibid 262.
[117] von Bogdandy and Venzke, 'On the Functions of International Courts' (n 10) 10.
[118] ibid 10.
[119] McCrudden, 'A Common Law of Human Rights?' (n 4) 502.

persuasive power of judicial decisions materialises in the interaction between international tribunals, domestic courts and other legal actors.

The third significant consequence of judicial dialogue is that courts develop an additional function of protecting the international community's core values and interests. Judicial bodies not only decide in the name of states, but also in the name of the international community as a whole.[120] Instead of thinking of international law as centred on state consent or state practice, global constitutional approaches urge a view of international law in terms of certain values or shared ideas of justice. This has an impact in the interpretation of treaties and the identification of customary law, where courts are not simply compelled to evaluate the intentions and behaviour of states, but also the common interests of the international legal system. With a plurality of judicial and quasi-judicial bodies, this is not achieved through institutional integration in a single higher court, but rather though dialogue and coordination between courts.[121]

3.3.5. The value of judicial dialogue as a way to integrate the international legal system

The judicial function of integrating and giving coherence to the interpretation of international law is derived from the principle of systemic integration framed in article 31(3)(c) of the VCLT.[122] This clause establishes that, together with the context, legal actors interpreting a treaty should take into account 'any relevant rules of international law applicable in the relations between the parties'.[123] Developing the idea of international law as legal 'system', the principle of systemic integration suggest that international obligations should be interpreted in relation to what the International Law Commission called in its report on fragmentation, their 'normative environment'.[124] This means situating rules in the context of other rules and principles that might have bearing upon a case, reading all sources of international law and different international legal regimes together. [125]

[120] von Bogdandy and Venzke, 'On the Functions of International Courts' (n 10) 19.
[121] Teitel and Howse, 'Cross-Judging' (n 88) 965.
[122] Campbell Mclachlan, 'The principle of systemic integration and article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279; Teitel and Howse, 'Cross-Judging' (n 88) 988.
[123] Vienna Convention on the Law of Treaties (n 34).
[124] Koskenniemi, 'Fragmentation of International Law' (n 44) para 413. See also: Jean d'Aspremont, 'The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order' in Ole Kristian Fauchald and André Nollkaemper (eds), *The practice of international and national courts and the (de-)fragmentation of international law* (Hart 2012) 148.
[125] Koskenniemi, 'Fragmentation of International Law' (n 44) para 479; Cassimatis (n 44) 634.

This is particularly important if we think about international law as 'a decentralized and spontaneous institutional world whose priorities and objectives are often poorly expressed'.[126] The principle of systematic integration calls for an interpretation that, to the greatest extent possible, gives rise to a single set of compatible obligations.[127] Under this perspective, courts are not simply interpreters and appliers of rules in a specific dispute, but are in fact guardians of the very coherence of those rules and the wider interests of the political community as a whole.[128]

With the increasing application of international law in domestic jurisdictions, and the growing relevance of domestic courts in the application of international law,[129] the principle of systemic integration has also gained relevance in the way national courts interpret international law.[130] As Jean d'Aspremont argues, domestic judges, often ill-equipped to make sense of conflicting international obligations contracted by their governments, tend to rely on the interpretation that other tribunals make of international law.[131] In this process, national courts have acquired an increasingly interpretative relevance in the application of international law.[132] They are an important link between national law and international law. Reading treaties in their own context, the principle of systemic integration aims to give courts an interpretative methodological tool to facilitate judicial dialogue and build bridges across legal cultures.[133]

Linking this to the idea of judicial dialogue, Geir Ulfstein argues that this principle builds upon the hope that 'the difficulties represented by conflicting and inconsistent jurisprudence may be alleviated by 'systemic interpretation' of the relevant treaties and by mutual acceptance of the precedential value of judgments by other courts and tribunals, both international and national'.[134] The principle of systemic integration requires that courts applying international law consider relevant decisions of other international and domestic tribunals.[135] By virtue of the principle of systemic integration, courts are not simply interpreting the meaning of what states have consented, but are participating in an active dialogue in search

[126] Koskenniemi, 'Fragmentation of International Law' (n 44) para. 480.
[127] d'Aspremont, 'The Systemic Integration of International Law by Domestic Courts' (n 124) 148.
[128] Hernandez, 'Interpretative Authority and the International Judiciary' (n 25) 167.
[129] Frishman and Benvenisti, 'National Courts and Interpretive Approaches to International Law' (n 31) 317; d'Aspremont, 'The Systemic Integration of International Law by Domestic Courts' (n 124) 144.
[130] d'Aspremont, 'The Systemic Integration of International Law by Domestic Courts' (n 124) 152.
[131] ibid 147.
[132] Michael Waibel, 'Interpretive Communities in International Law' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (OUP 2015) 157.
[133] Michael Waibel, 'Principles of Treaty Interpretation Developed for and Applied by National Courts?' in Helmut Philipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (OUP 2016) 18.
[134] Geir Ulfstein, 'International Courts and Judges: Independence, Interaction, and Legitimacy' (2014) 46 New York University Journal of International Law and Politics 849, 851.
[135] Martinez, 'Towards an International Judicial System' (n 107) 487.

for the meaning of the normative framework of international law as a whole. This interpretative enterprise finds meaning via persuasion, where 'the accepted meaning of any term at a particular point in time will be that which attracts and achieves dominance over all other alternative understandings within the relevant interpretive community'.[136]

3.3.6. A judicial agreement on the prohibition of amnesties?

In the Latin American context, for instance, judicial dialogue has been formalised under the 'conventionality control' doctrine in the Inter-American Human Rights System.[137] This principle holds that national courts must exercise a sort of 'control' between domestic legal provisions applied to specific cases and the ACHR, according to the interpretation guidelines made by the Inter-American Court.[138] Following this, the judgments of the IACtHR concerning amnesty laws have been implemented by the state parties to the disputes before the Inter-American Court, for instance in Peru and Chile, but have also been referenced in the case law developed by courts in other countries like Argentina and Colombia.[139] Pointing to this, Cristina Binder argues that the Inter-American Court and domestic courts developed a 'veritable dialogue' in the legal analysis of amnesty laws,[140] in what other scholars have framed as a *ius constitutionale commune* in human rights for Latin America.[141]

More globally, as explained in Chapter 2, the 'justice cascade' of domestic courts prosecuting human right abuses despite the enactment of amnesty laws by governments, and the 'anti-impunity turn' in human rights bodies condemning the use of amnesties, has been read as an indication of the trajectory of international law towards the general prohibition of amnesties for serious human rights abuses.[142] In a similar way to the idea of a global normative trend against the death penalty, the regulation of amnesties is formulated as a transnational

[136] John Tobin, 'Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation' (2010) 23 Harvard Human Rights Journal 1, 7.
[137] See: Jorge Contesse, 'The final word? Constitutional dialogue and the Inter-American Court of Human Rights' (2017) 15 I•CON 414, 415.
[138] *Almonacid Arellano et al. v. Chile*, IACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 154 (26 September 2006) para. 124.
[139] Christina Binder, 'The Prohibition of Amnesties by the Inter-American Court of Human Rights' (2011) 12 German LJ 1203, 1218-1225.
[140] ibid 1227.
[141] See: Armin von Bogdandy, Hector Fix-Fierro and Mariela Morales, *Ius constitucionale commune en América Latina: Rasgos, potencialidades y desafíos* (Instituto de Investigaciones Jurídicas, Serie doctrina jurídica 2014).
[142] See: Kathryn Sikkink, 'The Age of Accountability: The Global Rise of Individual Criminal Accountability' in Francesca Lessa and Leigh A. Payne (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (CUP 2012); Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (n 69).

project that involves transnational NGOs, organized victims' advocacy groups, domestic and international courts, and so on.[143]

Building upon the idea of a judicial international agreement, Relva concludes that the 'the nearly uniform interpretation given by international, regional and national courts and tribunals, as well as by UN organs, bodies and experts, confirms that such a general prohibition [on amnesties] would reflect a rule of customary international law'.[144] Similarly, the Pre-Trial Chamber of the ICC recently concluded in one of its decisions in the case of *Prosecutor v. Saif Al-Islam Gaddafi* that,

> there is a strong, growing, universal tendency that grave and systematic human rights violations – which may amount to crimes against humanity by their very nature – are not subject to amnesties or pardons under international law. … the Chamber shall apply and interpret the Statute consistently with internationally recognized human rights. The latter, as mirrored in the jurisprudence of the different human rights bodies, supports the Chamber's position in this respect. International criminal tribunals have also revealed their position with respect to the prohibition of amnesties for international crimes.[145]

However, this reading of the case law on amnesties overstates the existence of an international agreement around international obligations. Arguments suggesting an international agreement prohibiting amnesties tend to avoid mentioning cases upholding amnesties. There is a similar risk of selection bias in the identification of judicial decisions that support the prohibition of amnesties while downplaying the relevance of decisions that challenge such agreement.[146] Moreover, judicial decisions include considerations about the implementation of different amnesties in a wide range of contexts; nevertheless, with the focus on international agreement, much of that nuance is lost in the broader discussion about the legality or illegality of amnesties under international law.[147]

Divergence in the reading and interpretation of international law makes it impossible to reconstruct rules of international law through a process of aggregation, adding up judicial decisions as evidence of state practice or *opinio juris*. Moreover, contradicting interpretations of international law rest, in many cases, on diverging visions of the international legal order as

[143] Max Pensky, 'Amnesty on trial: impunity, accountability, and the norms of international law' (2008) 1 Ethics & Global Politics 1, 26.
[144] Relva (n 6) 868.
[145] *Prosecutor v. Saif Al-Islam Gaddafi*, ICC, Situation in Libya, Decision on the 'admissibility challenge by Dr. Saif Al-Islam Gaddafi pursuant to articles 17(1)(c) and 20(3) of the Rome Statute', ICC-01/11-01/11 (5 April 2019) para 61.
[146] Mallinder, *Amnesty, Human Rights and Political Transitions* (n 7) 237; McCrudden, 'A Common Law of Human Rights?' (n 4) 507.
[147] Close, 'Crafting an international norm prohibiting the grant of amnesty for serious crimes' (n 87) 120.

a whole and are not limited to the content of a single rule.[148] In other words, divergence in the understanding and interpretation of international law by different courts also reflects some discrepancy in ideas of justice. Jean d'Aspremont argues that, even when domestic courts are called to play a role in the integration of international law, via the application of the principle of systemic interpretation when applying international law, this can lead to contradicting interpretations and diverging understandings of what integration looks like.[149] Courts have limited resources, capacity and knowledge to assume the impossible task of integrating international law and offering a coherent interpretation of conflicting or vague obligations. Judicial dialogue promotes the integration of international law via judicial interactions and the iterative reading of external decisions. Nevertheless, those relationships also foster diversity in the understanding of international norms. There is a risk of oversimplification and of assuming the integration of international law by proposing universally accepted global values that courts are reading differently.[150] In many cases, courts reading each other are pulling the trajectory of international law in different directions.

3.4. Uncovering the complexity of judicial interactions

The idea of an international agreement on the prohibition of amnesties and the increasing number of cross-references between courts suggests the emergence of a global community of courts that is developing international law through a transnational dialogue. Much of the emphasis of judicial dialogue theories has been on answering normative questions about whether it is legitimate. Empirical questions about the extent to which it happens, and where and how it influences the development of international law have been less explored. [151] As Christopher McCrudden suggests, this requires a citation analysis that explores the practice of judicial cross-referencing to fully explore the interactions between courts.[152] More recently, Urška Šadl and Henrik Palmer Olsen reached a similar conclusion: 'the central question of the role of international case law in the globalized world remains unanswered: by what means do international courts shape international law through their case law? This process has so far not been systematically examined'.[153]

[148] d'Aspremont, 'The Systemic Integration of International Law by Domestic Courts' (n 124) 146.
[149] ibid 160.
[150] ibid 164.
[151] McCrudden, 'A Common Law of Human Rights?' (n 4) 532.
[152] ibid.
[153] Šadl and Olsen, 'Empirical Studies of the Webs of International Case Law' (n 2) 3.

The following chapters will develop an empirical analysis of the cross-referencing practices between international tribunals, domestic courts, and human rights bodies, in order to assess the influence of judicial dialogue in the development of a norm on the permissibility of amnesties under international law. Testing the argument of an international judicial agreement on the prohibition of amnesties for serious human rights violations, this thesis presents a detailed analysis of the arguments for upholding or overturning amnesties, the citation networks formed by judicial and quasi-judicial bodies, and the influence of judicial interactions in shaping the trajectory of international law on the matter.

3.4.1. Judicial dialogue and complexity theory

Building upon the ideas of judicial dialogue, this section argues that complexity theory can answer these questions by bringing new insights to better capture the dynamics of judicial dialogue. This does not mean a new approach to judicial interactions; the argument here is that some ideas from complexity theory can complement or augment the notion of judicial dialogue and allow a better understanding of the influence of judicial decisions in the development of a norm on the permissibility of amnesties. Approaching the judicial dialogue or judicial interactions between domestic courts, international tribunals and human rights bodies as a complex system allows us to better understand how judicial bodies influence the development of international law.

Complexity theory was initially developed in the natural sciences as a way of understanding how 'patterns of order could emerge without a guiding hand or central controller'.[154] Although there is not a unique definition of complex systems, we can initially think of them as 'large network of [interconnected and interactive] components, with no central control and simple rules of operation, giving rise to complex collective behaviour, sophisticated information processing, and adaptation via learning or evolution'.[155] The starting point of complexity theory is an ontological distinction between complicated and complex systems.[156] We can find simple systems, like a bicycle, and *more* complicated systems, like a car or a plane, where the difference is in degree. Complicated systems can be analysed by separating and

[154] Wheatley, *The idea of international human rights law* (n 8) 5. For the historical development of complexity theory see: John H. Holland, *Complexity: A Very Short Introduction* (OUP 2014); M. Mitchell Waldrop, *Complexity: The Emerging Science at the Edge of Order and Chaos* (Touchstone 1992); Melanie Mitchell, *Complexity: A Guided Tour* (OUP 2009); Roger Lewin, *Complexity: Life at the Edge of Chaos* (Macmillan Maxwell International 1992).
[155] J. B. Ruhl and Daniel Martin Katz, 'Measuring, Monitoring, and Managing Legal Complexity' (2015) 101 Iowa LRev 191, 203.
[156] Roberto Poli, 'A Note on the Difference Between Complicated and Complex Social Systems' (2013) 2 CADMUS 142, 143.

understanding their constitutive components. However, when we talk about language, the immune system or the brain, there is a difference in the nature of those systems that cannot be equated to the way complicated systems work. Examining the behaviour of an individual ant or a group of ants is not enough to understand the development of the colony, or analysing the activity of individual neurons hardly explains thoughts, feelings, and the other important large-scale brain activities.[157] Complex systems cannot be understood by studying only their components, but rather by focusing on the interactions between the individual elements of the system and their reaction to events on the outside.[158]

Focusing on different areas of international law, scholars have identified the complexity of the interactions between domestic and international courts. Jenny Martinez, almost two decades ago, suggested that 'the international judiciary is an evolving, complex, and self-organizing system … dancing on the edge of chaos'.[159] Phillipa Webb, on the other hand, concluded that rather than being pure dialogue, judicial interactions discussing immunities under international law are much more fluid and chaotic.[160] However, none of these researchers expanded on the ideas of complexity or chaos.

In the 1990s, J.B. Ruhl was one of the few scholars bringing these ideas into the study of the law.[161] More recently the conceptualisation of the law as a complex system has gained traction in different legal disciplines.[162] In 2012, the theme of the 106th Annual Meeting of the American Society of International Law was titled 'Confronting Complexity'. However, despite David D. Caron's invitation to view international law through the lens of complexity, most

[157] Mitchell (n 154) 4-6.
[158] Wheatley, *The idea of international human rights law* (n 8) 46.
[159] Martinez, 'Towards an International Judicial System' (n 107) 443-444.
[160] Webb, 'Immunities and Human Rights' (n 115) 264.
[161] See: J. B. Ruhl, 'Complexity theory as a paradigm for the dynamic law-and-society system: A wake-up call for legal reductionism and the modern administrative state' (1996) 45 Duke LJ 851; J. B. Ruhl, 'The Fitness of Law: Using Complexity Theory to Describe the Evolution of Law and Society and Its Practical Meaning for Democracy' (1996) 49 Vanderbilt LRev 1407; J. B. Ruhl, 'Thinking of Environmental Law as a Complex Adaptive System: How to clean up the environment by making a mess of environmental law' (1997) 34 Houston LRev 101; J. B. Ruhl, 'Thinking Mediation as Complex Adaptive System' (1997) 3 Brigham Young University LRev 777. For similar approaches see: Glenn Harlan Reynolds, 'Chaos and the Court' (1991) 91 Columbia LRev 110; Thomas Earl Geu, 'Chaos, Complexity, and Coevolution: The Web of Law, Management Theory, and Law Related Services at the Millennium' (1998) 66 Tennessee LRev 137; Robert E. Scott, 'Chaos Theory and the Justice Paradox' (1993) 35 William and Mary LRev 329.
[162] Most notably see: Jamie Murray, Thomas E. Webb and Steven Wheatley (eds), *Complexity Theory and Law: Mapping an Emergent Jurisprudence* (Routledge 2018); Julian Webb, 'Law, Ethics, and Complexity: Complexity Theory and the Normative Reconstruction of Law' (2005) 52 Cleveland State LRev 227; Julian Webb, 'When 'Law and Sociology' is not Enough: Transdisciplinarity and the Problem of Complexity' in Michael Freeman (ed), (OUP 2006); Jamie Murray, 'Complexity theory and socio-legal studies' (2008) 29 Liverpool LRev 227; Thomas E. Webb, 'Tracing an Outline of Legal Complexity' (2014) 27 Ratio Juris 477; Eric Kades, 'The Laws of Complexity and the Complexity of Laws: The Implications of Computational Complexity Theory for the Law' (1997) 49 Rutgers LRev 403; Mark Chinen, 'Complexity theory and the horizontal and vertical dimensions of state responsibility' (2014) 25 EJIL 703; Donald Hornstein, 'Complexity Theory, Adaptation, and Administrative Law' (2005) 54 Duke LJ 913.

papers did not engage with complexity theory.[163] With a few exceptions, there has been limited development of the complexity theory approach in international law scholarship.[164]

Joost Pauwelyn and Steven Wheatley are arguably the legal scholars that have advanced most significantly the conceptualisation of international law as a complex adaptive system, the former focusing on foreign investment law and the international arbitration system, and the latter analysing international human rights law.[165] In his most recent book, *The idea of International Human Rights Law*, Wheatley's argument is that,

> we can productively think about international law as a complex, self-organizing system that results from the communication acts of states and non-state actors in the form, for example, of diplomatic communications, the judgments of courts and tribunals, the texts of law-making treaties and General Assembly resolution, and the writings of publicists, and that by looking to the insights from complexity theory, we can make better sense of the workings of the international law system.[166]

This thesis builds upon the work of Pauwelyn and Wheatley on the discussion of international law as a complex system. The argument here, is not that complexity theory offers a new theory of international law. Rather, focusing on judicial interactions in the discussion of amnesties, the argument is that the complexity approach contributes to the understanding of the dynamics of judicial dialogue and the role of court decisions in the development of international law. In fact, whilst the vocabulary of complexity theory might be new to international lawyers, the complex phenomena that complexity theory focuses on should be familiar for most scholars and practitioners.[167] As Ruhl and Katz have argued, when we consider the definition of a complex system given above, it is not difficult for anyone with training in law to see the resemblance to the legal system.[168] However, complexity theory offers a new way of thinking about judicial interactions and a new language for describing the

[163] David D. Caron, 'Opening Welcome and Remarks: Confronting Complexity' (2012) 106 Proceedings of the Annual Meeting (ASIL) 21

[164] See: Chinen, 'Complexity theory and the horizontal and vertical dimensions of state responsibility' (n 162); Steven Wheatley, 'The Emergence of New States in International Law: The Insights from Complexity Theory' (2016) Chinese JIntlL 579; Steven Wheatley, 'Explaining change in the United Nations system: The curious status of Security Council Resolution 80 (1950)' in Jamie Murray, Thomas E. Webb and Steven Wheatley (eds), *Complexity Theory and Law: Mapping an Emergent Jurisprudence* (Routledge 2018); Jean Frédéric Morin, Joost Pauwelyn and James Hollway, 'The Trade Regime as a Complex Adaptive System: Exploitation of Environmental Norms in Trade Agreements' (2017) 20 Journal of International Economic Law 365;

[165] See: Joost Pauwelyn, 'At the edge of chaos?: Foreign Investment Law As A Complex Adaptive System, How It Emerged And How It Can Be Reformed' (2014) 29 ICSID Review 372; Wheatley, *The idea of international human rights law* (n 8).

[166] Wheatley, *The idea of international human rights law* (n 8) 48.

[167] ibid 45.

[168] Ruhl and Katz, 'Measuring, Monitoring, and Managing Legal Complexity' (n 155) 203.

development of international law by looking to the insights developed in the study of other complex systems.[169]

3.4.2. Complexity theory as theoretical framework

In the following chapters, this thesis analyses the judicial dialogue discussing the permissibility of amnesties through the lens of complexity theory. Complexity theory is used here as a general frame of reference or theoretical framework for the analysis of judicial interactions.[170] This does not require the provision of a full account of international law as a complex system nor the prescription of a specific method of analysis.[171] It rather means analysing judicial dialogue in a way that is congruent with the complexity of the socio-legal reality of judicial cross-referencing and its influence on the development of international norms.[172] Following Sylvia Walby, this thesis does not see complexity theory as a single unified theory to be adopted holistically, but rather as a conceptual framework for interpreting and explaining the dynamics of judicial interactions.[173] Hence, the analysis in the next chapters exploits some concepts from complexity theory as explanatory tools that aim to strenghten our understanding of judicial dialogue.

Like theories of judicial dialogue, the complexity approach builds on the importance of focusing on interactions in order to trace the development of international norms. For this, it is relevant to look both at the interactions between judicial actors and at the interactions with the legal system as a whole.[174] Rather than an aggregate of rules, both theories converge in seeing international law as an interconnecting system or network of actors that interact and self-organise, producing legal communications as rules that both emerge from those interactions and regulate them at the same time.[175]

What complexity theory adds to the idea of judicial dialogue is a way of conceptualising the role of interactions in the emergence and change of international norms. The concept of

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[169] Wheatley, 'Explaining change in the United Nations system' (n 164) 92.
[170] See the difference between general and restricted approaches to complexity in: Edgar Morin, 'Restricted Complexity, General Complexity' (2005) Presented at the Colloquium 'Intelligence de la complexit´e: ´epist´emologie et pragmatique' at Cerisy-La-Salle, France. Translated from French by Carlos Gershenson; Jamie Murray, Thomas E. Webb and Steven Wheatley, 'Encountering law's complexity' in Jamie Murray, Thomas E. Webb and Steven Wheatley (eds), *Complexity Theory and Law: Mapping an Emergent Jurisprudence* (Routledge 2018).
[171] Paul Cilliers, *Complexity and postmodernism: Understanding complex systems* (Routledge 1998) 141.
[172] On complexity theory as a theoretical framework see: David Byrne and Gill Callaghan, *Complexity Theory and the Social Sciences: The state of art* (Routledge 2014).
[173] Sylvia Walby, 'Complexity theory, systems theory, and multiple intersecting social inequalities' (2007) 37 Philosophy of Social Science 449, 456.
[174] See: Byrne and Callaghan, *Complexity Theory and the Social Sciences* (n 172) 22.
[175] Wheatley, *The idea of international human rights law* (n 8) 53.

emergence is concerned with explaining how a complex system can develop novel properties through the interactions of the component elements.[176] Following the proposition 'the whole is greater than the sum of its parts' in the analysis of complex systems, it is not sufficient to have a complete knowledge of each component or actor to understand the behaviour of the whole system.[177] Changes are nonlinear, in the sense that they are unpredictable because the outputs are not proportional to the inputs. In other words, 'we can have changes in effects which are disproportionate to the changes in the causal elements'.[178] Therefore, complex patterns emerge from relatively simple or individual interactions between local actors.[179]

The complexity of international norms is hardly contained in one decision or synthetised by one court. The analysis of judicial dialogue, and judicial interactions on the permissibility of amnesties, starts by mapping as many decisions as possible to trace patterns of behaviour, interactions and reasoning. Complexity theory is a systems theory in the sense that it focuses on understanding and explaining those emergent patterns.[180] While tracing the importance of individual decisions and local interactions, the emphasis is on their impact in the development of the international legal system as a whole. Even though it is impossible to include every existing decision on amnesties, a systematic analysis of a significant majority of cases avoids bias in the selection of decisions and the identification of a norm on amnesties. The methodological implications of this will be developed in the next chapter.

3.4.3. The judicial discussion of amnesties through the complexity lens

Challenging the idea of an international agreement on the prohibition on amnesties, this thesis makes an in-depth analysis of the judicial decisions discussing the permissibility of amnesty measures. Adopting a complexity theory approach, the research discusses three main points that the literature on amnesties has overlooked. Firstly, the extension of the interactions between courts and human rights bodies discussing the permissibility of amnesties, and whether those interactions can be characterised as judicial dialogue. Slaughter defines dialogue as communication between two or more courts that is effectively initiated by one and responded to by the others, with the awareness of participating in such a reciprocal dynamic.[181] In many

[176] ibid 50.
[177] Morin, 'Restricted Complexity, General Complexity' (n 170) 6; Holland (n 154) 2.
[178] Byrne and Callaghan, *Complexity Theory and the Social Sciences* (n 172) 9.
[179] Ruhl and Katz, 'Measuring, Monitoring, and Managing Legal Complexity' (n 155) 206.
[180] For a full account about the relationships and differences between complexity theory and other system theories like legal autopoiesis see: Webb, 'Tracing an Outline of Legal Complexity' (n 162) 477–495; Thomas E. Webb, 'Exploring System Boundaries' (2013) 24 Law Critique 131; Wheatley, *The idea of international human rights law* (n 8) 38-45.
[181] Slaughter, 'A Typology of Transjudicial Communication' (n 90) 112-113.

cases, however, courts may consider external decisions of other tribunals, but there is hardly an actual exchange of views. Tzanakopoulos suggests that it might be more accurate to talk about parallel monologues, where courts influence, react to, or even criticise one another, but without necessarily engaging in a reciprocal dialogue.[182] In the case of amnesties, an empirical analysis of the nature and extension of judicial dialogue explains the real influence of court decisions in the development of a rule on amnesties.

Mapping the judicial interactions and cross-referencing practices in the discussion of the permissibility of amnesties, Chapters 4 and 5 explore this point by evaluating the extension and quality of judicial dialogue between international tribunals, human rights bodies, and domestic courts. As it will be demonstrated, rather than reflecting a global community of courts, those judicial interactions reflect the dynamics of self-organisation typical of complex systems in which actors are deciding with limited and incomplete information forming multiple communities and establishing parallel and changing hierarchies.[183] With no central control, a complexity approach is essential in understanding how order emerges from the interactions of judicial and quasi-judicial bodies: 'organisation is the product of many local decisions, there is no central hub which controls the organisation of the system. Control is distributed throughout the interacting parts'.[184] Mapping those interactions allows us to uncover the emergence of several communities of courts and divergent understandings of the role of amnesties in the redressing of human rights violations.

The second point is the level of agreement or disagreement in the analysis of amnesties. As it has been argued early in this chapter, the argument that there is an international judicial consensus on the prohibition of amnesties tends to overestimate the level of agreement and to 'cherry pick' decisions that confirm such a position while downplaying the importance of decisions upholding amnesties. This thesis enquiries about the reasoning and the different approaches adopted by domestic and international courts in the assessment of the permissibility of amnesties in a diversity of contexts. In practical terms, 'international law is domesticated in different ways in different legal systems'.[185] When national courts attempt to interpret and enforce international law, 'they often end up creating hybrid international/national norms'[186] Thus, the ideas of an international agreement on amnesties and the argument of a general

[182] Tzanakopoulos, 'Judicial Dialogue as A Means of Interpretation' (n 28) 74.
[183] See: Paul Cilliers, 'Boundaries, Hierarchies and Networks in Complex Systems' (2001) 5 International Journal of Innovation Management 135, 142.
[184] Webb, 'Tracing an Outline of Legal Complexity' (n 162) 486.
[185] Roberts, 'Comparative International Law?' (n 15) 74. See also: Tzanakopoulos, 'Judicial Dialogue as A Means of Interpretation' (n 28) 82.
[186] Roberts, 'Comparative International Law?' (n 15) 61.

prohibition based upon listing judicial decisions rejecting amnesties, as reflecting state practice and *opinio juris*, seems to miss the disparities and disconnections in the multiplicity of understandings that courts have of international law.[187]

In his characterisation of international law as a complex system, Wheatley argues that an international norm 'exists independently from those component agents that brought it into being. The formation of customary international law relies, for example, on state practice, but it is not identified by simply amalgamating the various instances of that practice'[188] Chapter 5 relies on the concept of emergence to explain the possibility of a norm on the permissibility of amnesties without relying too much on the idea of an international agreement on the matter. Following Paul Cilliers, '[i]nstead of throwing away everything that does not fit into the scheme, one should try to find meaningful relationships among the different discourses. In this regard the connectionist model provides us with an extremely important insight'.[189] To a certain extent, the idea of a consensus is limiting.[190] Grounding a norm on amnesties on an international agreement overlooks diversity in the ways that courts have analysed amnesty laws enacted in different contexts. By focusing on judicial interactions, this thesis argues that judicial and quasi-judicial bodies have shaped the contours of a norm on amnesties as a collective process of emergence that does not reflect complete agreement. Courts decide based on contingent and local knowledge. However, collections of judicial interactions influence the development of emergent meta-level principles of the legal system, such as human rights or the prohibition of amnesties.[191]

The third point relates to change. Much of the attention in the discussion about the permissibility of amnesties has been focused on the crystallisation or non-crystallisation of a norm banning the use of amnesties. In comparison, little emphasis has been placed on the evolution of judicial reasoning in examining the permissibility of amnesties. In 2008, Mallinder pointed out the fact that most courts and human rights tribunals have examined blanket amnesties, and the prospect of states becoming more innovative in the design of transitional justice mechanisms would lead to courts examining the permissibility of amnesties in a more complex light.[192] In the process of updating the analysis of the standards developed by courts for the application of amnesties, and tracing the dynamics of interactions between courts, it is

[187] ibid 80.
[188] Wheatley, *The idea of international human rights law* (n 8) 51.
[189] Cilliers, *Complexity and postmodernism* (n 171) 118.
[190] ibid.
[191] Webb, 'Tracing an Outline of Legal Complexity' (n 162) 486.
[192] Mallinder, *Amnesty, Human Rights and Political Transitions* (n 7) 292.

also relevant to trace changes in the more general development of a norm on the permissibility of amnesties under international law.

Complexity theory is also fundamental here in explaining the dynamics of change in the way courts have been discussing the permissibility of amnesties under international law. Chapter 6 argues that the judicial discussion about the standards for the application of amnesties has followed the dynamics of path dependence typical of complex systems. Despite the lack of any binding force of judicial decisions under international law, judicial dialogue has meant that courts and human rights bodies are reading each other and following the considerations of previous decisions. Path dependence means that early decisions on amnesty have strongly influenced following decisions and, more generally, the trajectory of the development of international law.[193] This is not simply to say that history matters, but rather that the dynamics of path dependence show how once a certain trajectory or legal paradigm becomes locked in, changes become more difficult.[194] This is why early decisions rejecting blanket self-amnesties in the Southern Cone have influenced subsequent judicial trends in the rejection of amnesties. The 'justice cascade' discussed in Chapter 2 is an expression of that path, which some human rights scholars and practitioners have interpreted as an inexorable trajectory to the prohibition of all kinds of amnesties.

Sometimes, however, the system is pulled away from its expected trajectory by strange attractors. Attractors, in complexity theory, are 'magnetic forces that draw complex systems towards them, or unseen powers that box the system into one part of its state space'.[195] In international law, Steven Wheatley has identified the power of ideas, like 'sovereignty', 'self-determination' and 'human rights', as attractors that have determined the trajectory of the development of international law.[196] Tracing the decisions of domestic and international bodies on the permissibility of amnesty, Chapter 6 maps the influence of the ideas of accountability and the 'anti-impunity turn' in human rights discourse in the 1990s. More recently, the inclusion of transitional justice considerations in the examination of amnesties is evidence of a change in the judicial position on amnesties.

[193] Oona A. Hathaway, 'Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System' (2003) 28 Iowa LRev 101, 103.
[194] Wheatley, *The idea of international human rights law* (n 8) 56.
[195] ibid 62.
[196] ibid 62. See also: Ruhl, 'Complexity theory as a paradigm for the dynamic law-and-society system' (n 161) 855; Webb, 'Tracing an Outline of Legal Complexity' (n 162) 490.

3.5. Methodology: A systematic and complex reading of the decisions on amnesty

As explained in the introduction, this thesis is concerned with two main questions: (i) What has been the influence of judicial dialogue in shaping a norm on the permissibility of amnesties for serious human rights violations under international law? (ii) What are the standards developed by domestic courts, international tribunals, and human rights bodies to evaluate the permissibility of conditional amnesties for serious human rights violations? These questions are mainly descriptive, in the sense that they are focused on what the role of judicial decisions is in international law, rather than what it ought to be.[197] Thus, this research proposes a socio-legal approach focused on analysing the content of the decisions and the cross-references made in the texts to evaluate the interactions between judicial and quasi-judicial bodies. Accordingly, the methodology combines content analysis of judicial decisions, network analysis and legal analysis, using complexity theory as theoretical framework to analyse and interpret the results.

3.5.1. Mapping relevant decisions

The first step is to identify as many decisions discussing the permissibility of amnesties as possible, with the purpose of mapping the full corpus of cases on the matter, to the extent that this was possible.[198] This purposely reduces the possibility of selection biases, cherry-picking decisions that reflect a particular type of argument, or the use of partial decisions to illustrate the common features of those cases. The identification process starts with the review of the literature on amnesties and the identification of cases referenced by scholars. This is complemented by open searches in databases, search engines and institutional websites to add cases missed by the literature and to update the search to include recent decisions up to December 2021.[199] Then, in the process of reading the decisions and reconstructing the cross-referencing networks, additional pronouncements are added.

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[197] Joshua B. Fischman, 'Reuniting 'is' and 'ought' in empirical legal scholarship' (2013) 162 University of Pennsylvania Law Review 117.

[198] The concept of 'cases' refers to the units of observation or analysis, that in this study are judicial decisions. Therefore, the terms 'decision' and 'case' are used as synonyms. In law, 'case' may also refer to legal disputes that are brought before a judicial body to adjudicate. For this second meaning the term 'legal case' is used, which may include one or more decisions.

[199] The search of decisions was made, first, in some of the biggest legal databases including LexisNexis, WestLaw, HeinOnline, and Vlex Global. This was accompanied with direct searches from the institutional records available online (through the official websites of courts and human rights bodies). Finally, this was complemented by general searches in Google. The search criteria were: 'amnesty', 'amnesty law', 'amnesties'. To reduce the number of irrelevant results, the search was filtered by excluding results related to 'amnesty international'. When appropriate, the search was also made in Spanish ('amnistía', 'ley de amnistía', 'amnistías'), and Portuguese ('anistia', 'Lei da anistia', 'anistias').

This research identified 484 decisions adopted by national courts, international tribunals, and human rights bodies between 1990 and 2021 that include any discussion of the application of amnesties as a mechanism to overcome situations of conflict, violence or systematic violations of human rights. In light of the research questions, the identification of cases to narrow down the scope of the study follows three considerations regarding the content of the decision, the authority making the decision, and the date of the decision.[200]

Firstly, this study focuses on decisions discussing the permissibility of amnesties for serious violations of human rights. To avoid confusion, this analysis follows the language of the decisions, including any case related to amnesty according to the terms used by the tribunal or human rights body. This includes decisions on the legality of specific amnesty laws, general considerations of amnesty as a legal institution, and arguments about the application of amnesties even when the court decided that the specific measure under scrutiny did not amount to amnesty. However, following the definition of amnesties given in the introduction, this analysis is concerned with amnesties used as a legal instrument to prevent criminal prosecutions against certain individuals responsible for violent or political crimes. Consequently, it excludes amnesties applied in the context of other areas of law (e.g. tax law).

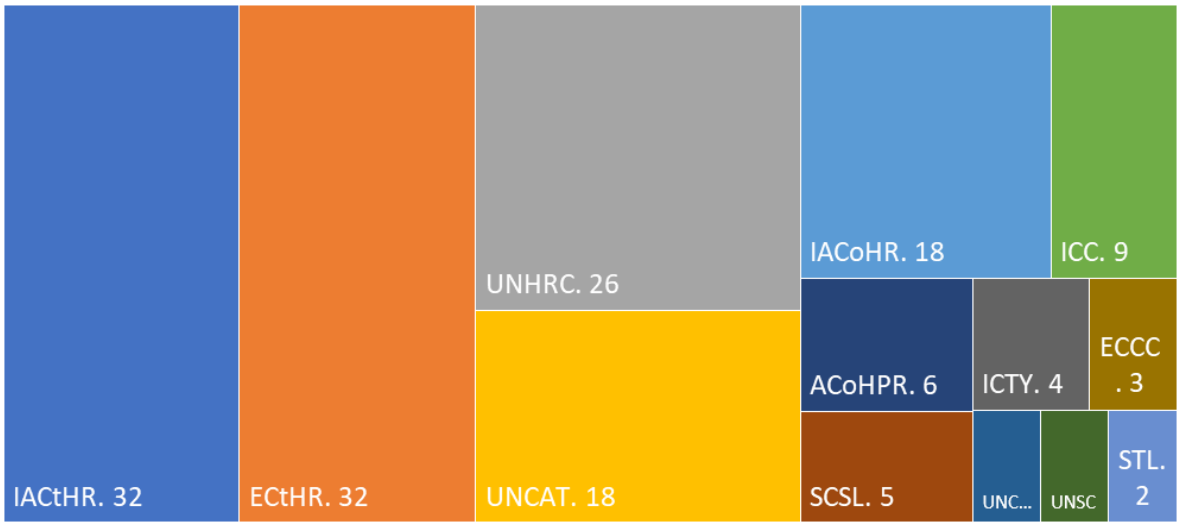
Secondly, the analysis focuses on the decisions or pronouncements of judicial and quasi-judicial bodies. This includes international courts (ICJ, ICC), regional human rights bodies (ECtHR, IACtHR, IACoHR, ACoHPR), UN monitoring bodies (UNHRC, UNCERD, UNCEDAW, UNCAT), ad hoc tribunals (ICTY, ICTR), hybrid or internationalised criminal tribunals (SCSL, ECCC, STL) and domestic courts (e.g. municipal and national courts in criminal, constitutional and public jurisdictions). Overall, the majority of decisions found come from courts with jurisdiction in Latin America (54%), followed by courts with jurisdiction in Europe (23%), Africa (7%), Asia (3), and North America (1%). Additionally, 12% of the decisions are from tribunals and UN human rights bodies with international jurisdiction.

Out of the 484 relevant decisions identified, 163 are from international courts, hybrid courts, and human rights bodies. As shown in Figure 1, most of these decisions were adopted by regional human rights bodies including the IACtHR (32 decisions), the IACoHR (18), the ECtHR (32), and the ACoHPR (6). UN bodies like the UNHRC (26), UNCAT (18) and UNCEDAW (2) have also contributed with a significant number of pronouncements on different amnesties enacted around the world (30%). International and internationalised criminal tribunals including the ICC (9), the SCSL (5), the ICTY (4), the ECCC (3) and the

[200] Mark A. Hall and Ronald F. Wright, 'Systematic Content Analysis of Judicial Opinions' (2008) 96 California Law Review 63, 101.

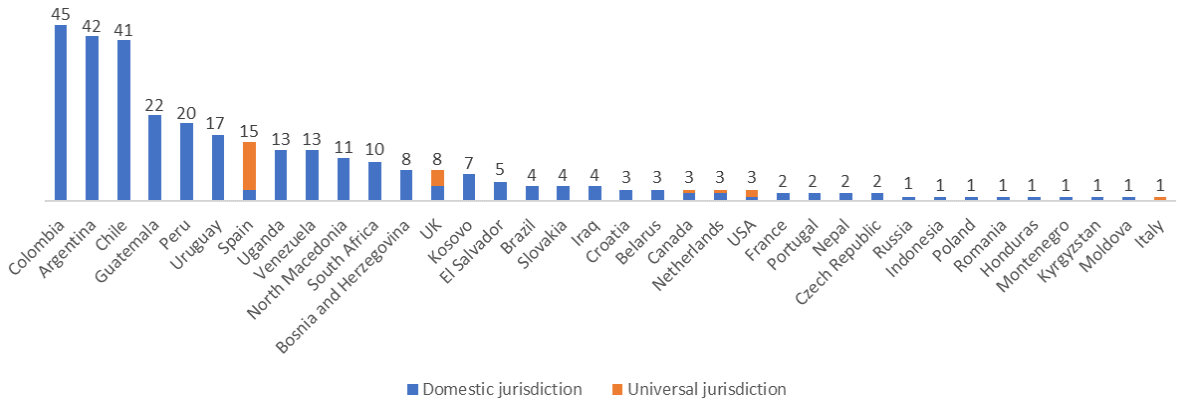
STL (2), have discussed the application of amnesties to a lesser extent (14%), but their interest has increased in more recent years, particularly with the latest decisions adopted by the ICC in the case of *Saif Al-Islam Gaddafi*.

Figure 1. Number of decisions on amnesty adopted by international courts, hybrid tribunals, and human rights bodies



The other 321 decisions are from domestic courts in 36 countries (see Figure 2). Most decisions are from courts in Latin America (210), but there are also important decisions from courts in Europe (27), Africa (23), Asia (8) and North America (6). The countries with most decisions are Colombia (45), Argentina (42), Chile (41), Guatemala (22), Peru (20), Uruguay (17), Uganda (13), Spain (15), Venezuela (13), North Macedonia (11), and South Africa (10). Countries like El Salvador (5), Brazil (4), Nepal (2), Portugal (2) and Slovakia (4), despite not having many decisions on amnesties, have made important pronouncements that have influenced courts in other parts of the world. Out of the 321 domestic cases, 21 decisions are from courts in Europe and North America exercising universal jurisdiction. In this regard, the most active courts have been the Spanish tribunals (12) regarding the prosecution of army commanders and former dictators in Latin America.

Figure 2. Number of decisions on amnesty adopted by domestic courts per country



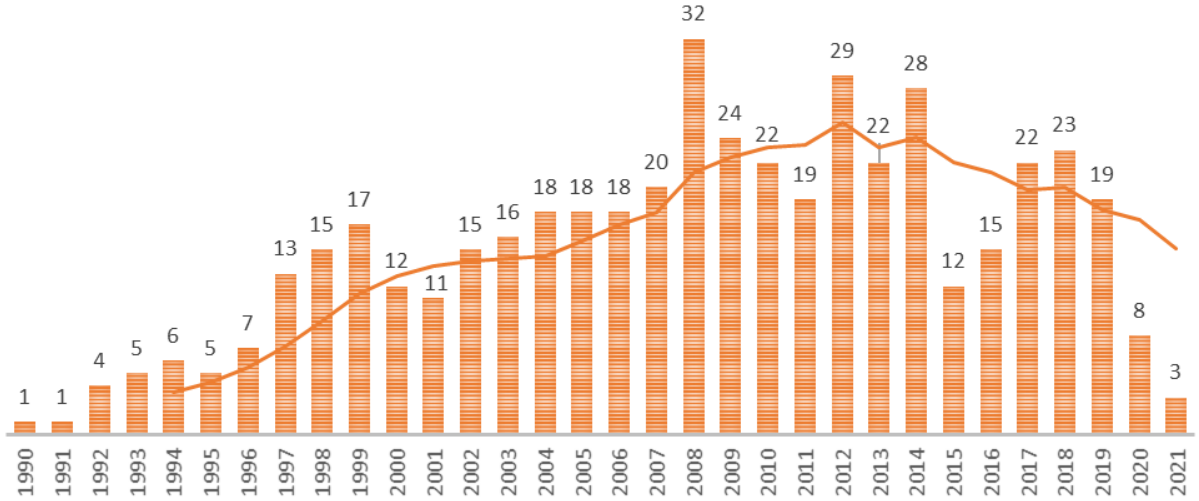
The third consideration to delimitate the sample of cases is the time frame, covering only from 1990 to 2021. Even though the use of amnesties can be traced much further back than the 1990s, it was during this period that domestic courts and international bodies became more interested in examining their use and legitimacy under international law.[201] This time frame covers the justice cascade and the anti-impunity turn that saw courts moving towards a more prominent idea of criminal accountability for human rights violations, which accelerated in the 1990s.[202] Consequently, the discussion of amnesties by courts has been much richer during this period. Moreover, because this research is concerned with the cross-referencing practices of courts, it makes sense to consider this period in which the access and use of the internet transformed the way in which courts interact across jurisdictions. This period presents a richer landscape of interactions for the analysis of judicial dialogue. Additionally, the selected period has been chosen to match the time frame of the data available from the *Amnesties, Conflict and Peace Agreement (ACPA) dataset* (January 1990 to September 2016) created by Professor Louise Mallinder, which both informs this analysis and to which this thesis aims to contribute with the systematisation of judicial decisions.[203]

Viewed per year (see Figure 3), it is easy to see the sharp increase in decisions discussing the permissibility of amnesties since the early 1990s, peaking in 2008 with 32 decisions. This is consistent with the trend identified in the literature as a 'justice cascade' where criminal prosecutions began to be considered as an essential component in redressing

[201] See: Close, *Amnesty, Serious Crimes and International Law* (n 87) ch. 1-3.
[202] See Section 2.1.
[203] See: Louise Mallinder, 'Amnesties, Conflict and Peace Agreement - ACPA dataset' (*University of Edinburgh,* 2016) <https://www.peaceagreements.org/amnesties/> accessed 14 January 2021.

human rights violations.[204] Since then, there has been a slight decline in the number of pronouncements per year. Nevertheless, the discussion of the legality of amnesties remains relevant with 102 (21%) decisions adopted since 2015.

Figure 3. Number of decisions on amnesty per year of issue



3.5.2. Sample of decisions for analysis

After mapping the 484 decisions initially identified as relevant in the discussion of amnesties, a sample of 368 cases (76%) is selected based on the criteria of relevance and diversity. The idea is to focus the content analysis on the most relevant and representative decisions covering a wide range of amnesties in different parts of the world.

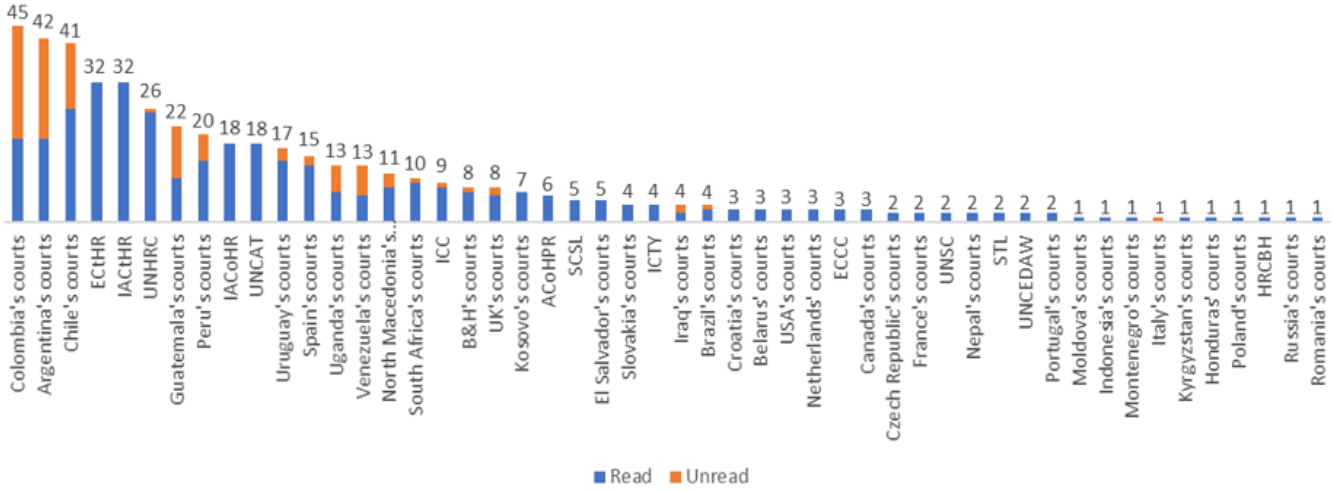
The criterion of 'relevance' has two dimensions. On the one hand, it refers to the focus of the decision on the analysis of amnesties. This means prioritising the cases where there is an in-depth discussion of amnesties, and where those considerations are central to the reasoning of the court. In other words, the sample focuses on the decisions in which the discussion of the permissibility of amnesties is richer. On the other hand, the study considers the importance of cases referenced and discussed by other courts. Because of the focus of this study on judicial cross-referencing, the sample is designed to cover most of the case law on amnesties discussed by other judicial and quasi-judicial bodies, while also complementing the analysis with decisions not included in previous studies.

[204] See: Ellen Lutz and Kathryn Sikkink, 'The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America' (2001) 2 Chicago JIntlL 1; Sikkink, 'The Age of Accountability' (n 142); Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (n 69).

The criterion of 'diversity' means prioritising the inclusion of decisions from all jurisdictions, regions, countries, courts and years. Using the literature and the most recent cases, attention is focused on selecting the core cases from each jurisdiction, and then including other decisions until reaching a point of saturation or repetitiveness where other cases would not add much more relevant detail to the analysis.

Consequently, the sample of decisions read includes cases from 14 international courts, human rights bodies and internationalised tribunals, and decisions from domestic courts in 25 countries. As shown in Figure 4, the sample of cases covers most of the jurisdictions identified in which courts have discussed the legality of amnesties.[205] Out of the 116 cases identified as potentially relevant in the discussion of amnesties and not included in the sample, 95 are from courts in Colombia, Argentina, Chile, Guatemala, Peru, Uganda, and Venezuela. This is because they already account for an important number of decisions included in the sample (101) and, from a general overview of their reasoning, it is clear that the decisions excluded are either repetitive or do not discuss the legality of amnesties at length.

Figure 4. Number of decisions on amnesty identified by type of courts and proportion of cases read as part of the sample



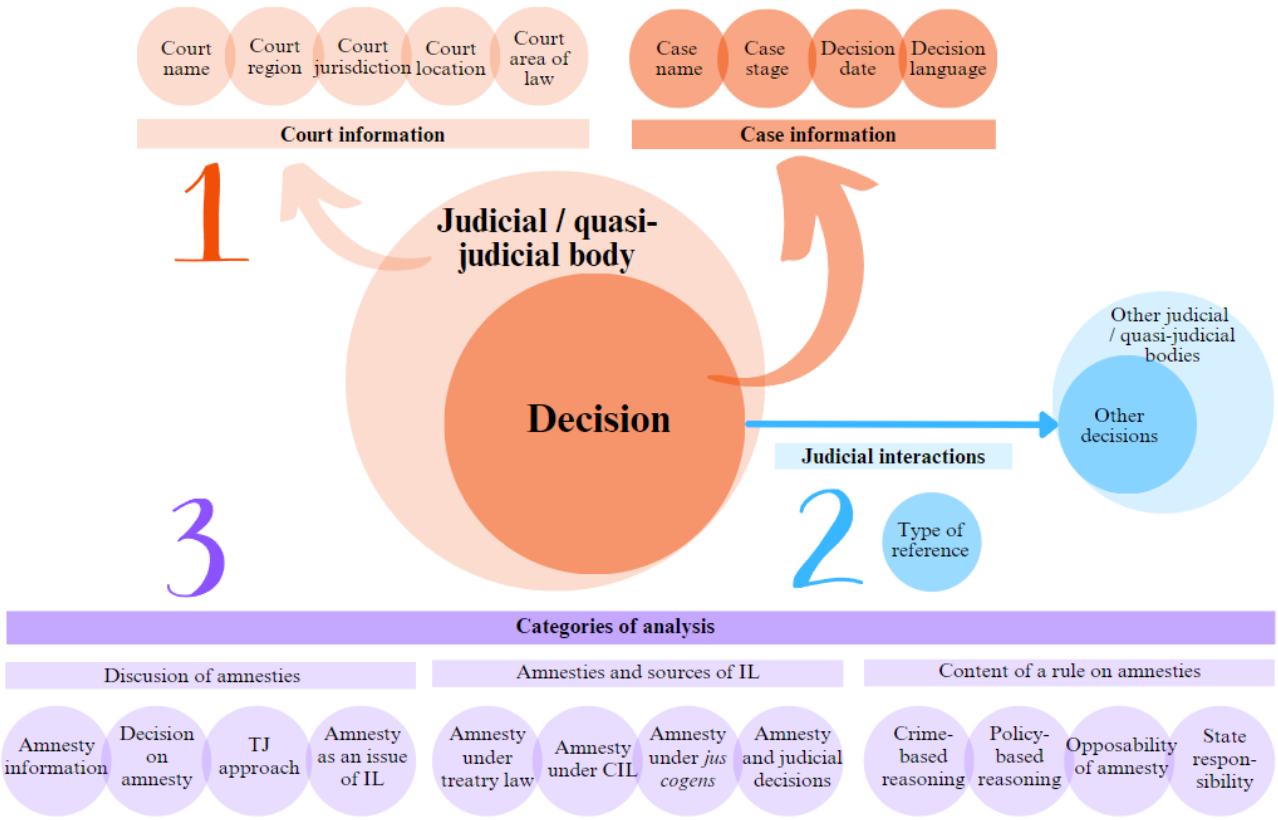
3.5.3. Codification of decisions

The decisions are read and coded using Nvivo[206] and, following the software's structure, the information is systematised around three categories (see Figure 5).[207] First, the

[205] The sample of cases included decisions from all courts except cases from Italy because the only decision found had no translation available.
[206] See: https://www.qsrinternational.com/nvivo-qualitative-data-analysis-software/home accessed 4 August 2022.
[207] See an explanation of the three types of nodes used to systematised information in Nvivo in the first part of the Codebook included in Appendix 2.

basic information of the decision (e.g. name of the case, date of the decision, etc.) and of the court or quasi-judicial body that issued it (e.g. name of the court, jurisdiction, location, etc.). This information is useful, for instance, to detect regional and temporal patterns in the decisions, and to identify clusters of courts interacting or deciding similarly. The second point is the references made by courts and human rights bodies to other decisions. Mapping these cross-references allows to reconstruct and illustrate the networks of interactions between different courts in the discussion of amnesties. The third component is the analysis of the reasoning of courts and quasi-judicial bodies in each decision. Attending to the research questions, the categories aimed to capture the discussion of courts on the permissibility of amnesties (e.g. characteristics of the amnesty, decision on amnesty, approach adopted by the tribunal, etc.), the analysis of a prohibition of amnesties under international law (including considerations under treaty law, customary international law, *jus cogens* and the use of judicial decisions as source), and discussions around the content of a rule on amnesty (e.g. considerations based on the type of amnesty, crimes covered, and other policy matters).[208]

Figure 5. Diagram with the categories of analysis used to read the decisions



[208] See the full list of categories and the definitions in the second part of the Codebook included in Appendix 2.

The development of the categories of analysis follows a grounded theory approach.[209] The analysis of cases is an iterative process of reading the decisions and (re)formulating the categories for the understanding of judicial interactions and the development of the standards for the application of amnesties. The categories of analysis are constructed by studying and systematising the empirical observations from reading the cases, the generation of grounded (middle-range) theories or preliminary hypotheses, and the testing of those hypotheses through the in-depth reading of all the decisions in the case study.[210] The coding process consists of a dialogue with the data to achieve an adequate description of the case-law on amnesties and evidence-based answers to the research questions.[211]

3.5.4. Methods of analysis

Using the complexity theory as theoretical framework, the research adopts a mixed method of analysis. It combines network analysis to reconstruct the interactions between judicial and quasi-judicial bodies, content analysis of judicial decisions for a systematic reading of the arguments on amnesty, and a doctrinal legal analysis to examine the judicial standards for the application of amnesties under international law. These methods are not exclusive to a complexity approach. The contribution of complexity theory, thus, lies in providing a framework for understanding the dynamics observed in the analysis of judicial decisions and uncover the complexity of the judicial dialogue on the discussion of amnesties.

Social network analysis is used to map and analyse the relationships or links between judicial decisions and courts across the world. Addressing the question on the extent and characteristics of the judicial dialogue in the discussion of amnesties, network analysis is used to reconstruct the connections between courts and human rights bodies.[212] The network structure consists of 'nodes', that in this case are the decisions on amnesty, and 'edges' that

[209] Barney G. Glaser and Anselm L. Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine Transaction 1967).
[210] Nick Emmel, *Sampling and choosing cases in qualitative research: A realist approach* (SAGE 2013) 12.
[211] David Byrne, *Interpreting Quantitative Data* (SAGE 2002) 148.
[212] See other studies using social network analysis in international law see: Wolfgang Alschner, 'The Computational Analysis of International Law' in Rossana Deplano and Nicholas Tsagourias (eds), *Research Methods in International Law: A Handbook* (Elgar 2019); Wolfgang Alschner and Damien Charlotin, 'The Growing Complexity of the International Court of Justice's Self-Citation Network: Institutional Achievement or Access-to-Justice Concern?' (2016) 58 University of Cambridge Faculty of Law Legal Studies Research Paper Series 2; Urška Šadl and Henrik Palmer Olsen, 'Can Quantitative Methods Complement Doctrinal Legal Studies? Using Citation Network and Corpus Linguistic Analysis to Understand International Courts' (2017) 30 LJIL 327; Yannis Panagis and Urška Šadl, 'The Force of EU Case Law: A Multi-dimensional Study of Case Citations' in Antonino Rotolo (ed), *Legal Knowledge and Information Systems* (JURIX: The Twenty-Eighth Annual Conference 2015); Ryan Whalen, 'Legal networks: the promises and challenges of legal network analysis' (2016) Michigan State Law Review 539.

trace the cross-references between decisions and represent judicial interactions.[213] Examining how, when and why a court cites the decisions of other bodies, and mapping those interactions, is a good measure of judicial dialogue grounded in empirical evidence.[214] Tracing that practice is helpful to reveal patterns in the law and communication between courts, which would otherwise remain hidden to a traditional legal understanding.[215] The identification of references is made manually in the reading of each decision and the networks are built using Gephi.[216]

The value of network analysis is twofold. Primarily, it helps to map and draw the interactions and relationships between judicial actors. There is great value in the simplicity and explanatory capacity of illustrating judicial interactions through graphical representation. A second reason for adopting network analysis is that the development of this approach in other disciplines, comes with a vast toolkit of mechanisms to measure and characterise the network of decisions.[217] For instance, the clustering coefficient and the measure of modularity are important in identifying the formation of clusters of judicial and quasi-judicial bodies in the following sections.[218] Understanding cross-referencing practices and the formation of networks is important in identifying the dynamic formation of communities of courts in the examination of amnesties, and in evaluating the value that judicial and quasi-judicial bodies are assigning to the decisions of their counterparts in the discussion of the permissibility of amnesties under international law.

Content analysis is used as a method for systematically reading and analysing the text of the decisions.[219] It involves a process of systematising the information from judicial decisions into categories or themes based on valid inference and interpretation.[220] The process of identification of decisions, sampling and coding followed the steps explained in Sections 3.5.1 to 3.5.3, using Nvivo.[221]

Content analysis has two main benefits for this study. On the one hand, it allows a systematic approach to the analysis of judicial decisions. Rather than selecting particular cases that eloquently state rules of law or illustrate a trend, this study is grounded in the analysis of a wide range of decisions in order to evaluate the influence of famous cases, but also of other

[213] Alschner, 'The Computational Analysis of International Law' (n 212) 208.
[214] Alschner and Charlotin, 'The Growing Complexity of the International Court of Justice's Self-Citation Network' (n 212) 3.
[215] Šadl and Olsen, 'Empirical Studies of the Webs of International Case Law' (n 2) 9.
[216] See: https://gephi.org/ accessed 4 August 2022.
[217] Alschner, 'The Computational Analysis of International Law' (n 212) 6. See also: Ruhl and Katz, 'Measuring, Monitoring, and Managing Legal Complexity' (n 155) 221.
[218] Byrne, *Interpreting Quantitative Data* (n 211) 105.
[219] Hall and Wright, 'Systematic Content Analysis of Judicial Opinions' (n 200) 67.
[220] Yan Zhang and Barbara M. Wildemuth, 'Qualitative Analysis of Content by' in Barbara M. Wildemuth (ed), *Applications of Social Research Methods to Questions in Information and Library Science* (Libraries Unlimited 2009) 309.
[221] See: https://www.qsrinternational.com/nvivo-qualitative-data-analysis-software/home accessed 4 August 2022.

marginal decisions. Following the idea of international law as a complex system, a partial analysis of judicial decisions or the study of a handful of landmark cases on amnesties is inadequate for fully understanding the emergence of standards for the application of amnesties that result from the interactions of courts and human rights bodies.[222] On the other hand, content analysis emphasises the value of replicability.[223] Influenced by the centrality of methodological rigor to social sciences, this methodology relies on the replicability of the process of analysis by using categories of analysis that can be traced, repeated, and verified.[224]

Doctrinal legal analysis complements these approaches through a hermeneutic process of reading and interpreting the content of the judicial opinions and the development of a norm on the permissibility of amnesties. Network and content analysis are perfectly compatible and, in fact, contribute nicely to an in-depth analysis of the legal reasoning behind certain decisions.[225] Considering the symbiotic relationship between judicial interactions and legal argumentation, this research thus relies on a mixed method that integrates the different types of analysis described above.[226] Following Hall and Wright, content analysis, network analysis and doctrinal approaches complement each other in what they call a 'triangulation' of methods, that is, 'exploring whether different approaches offer similar conclusions, each approach rigorous in its own way, but each illuminating different dimensions'.[227]

In practice, doctrinal legal analysis is relevant for two parts of the study. First, at the initial stage of reading the cases and legal standards. A preliminary legal analysis of the decisions and the literature on amnesties provides a framework for developing the categories of analysis.[228] At a second stage, doctrinal analysis informs the interpretation and reading of the cases in order to identify and trace the trajectories of the development of a norm on amnesties under international law. Because data does not speak for itself, doctrinal legal analysis is used to read the decisions, analysing the information gathered through the content and network analyses, and interpreting its implications for the development of international law.

[222] On the analysis of complex systems see: Byrne, *Interpreting Quantitative Data* (n 211) 7.
[223] Hall and Wright, 'Systematic Content Analysis of Judicial Opinions' (n 200) 66.
[224] ibid 100. The categories of analysis can be seen in the Codebook in Appendix 2.
[225] ibid 121.
[226] See: Šadl and Olsen, 'Empirical Studies of the Webs of International Case Law' (n 2) 6; Šadl and Olsen, 'Can Quantitative Methods Complement Doctrinal Legal Studies?' (n 212) 331.
[227] Hall and Wright, 'Systematic Content Analysis of Judicial Opinions' (n 200) 100.
[228] See: Byrne, *Interpreting Quantitative Data* (n 211) 5.

3.5.5. Limitations

This analysis has two limitations that is important to address. The first limitation is that this study is working with a narrow definition of judicial interactions as formal cross-referencing between decisions. Of course, courts and judges interact in diverse manners. This research does not capture other type of judicial interactions, for instance, networking through participating in conferences, sharing education, or inviting colleagues to visit their courts.[229] By focusing on cross-referencing practices, this research accounts for a narrow landscape of a richer phenomenon.[230]

However, it is worth noting that courts express themselves mostly through decisions and cross-references to other courts' decisions is the most straight forward evidence of interactions. This can be seen, for instance, in Phillipa Webb's definition of judicial dialogue, that in her own research, 'refer[s] to the citation, discussion, application, or rejection of decisions of other courts by a judge or judges.'[231] In fact, cross-references are the most traceable evidence of interactions. As Michael Bommarito, Daniel Katz and Jon Zelner point out, '[c]itation data have the advantage of constituting a well-defined set where the nature of nodes and edges is reasonably well specified.'[232] This restricts the possibility of speculation. Besides, the analysis of judicial cross-referencing is rich enough to justify focusing on it. This does not mean that other types of interactions are not relevant. It simply provides a reason to focus on judicial cross-referencing as a good indication of judicial interactions.[233]

The second limitation is a practical one. Despite an attempt to include the complete universe of judicial decisions on amnesty, this is almost an impossible endeavour. This study only includes decisions electronically available through institutional and academic databases. Because the analysis is focused on the reasoning and cross-references made by judges in the text of the decision, this study does not include decisions that, for example, have been reported on the news but are not available to read online. To address this limitation, part of the mapping

[229] Slaughter, 'A Global Community of Courts' (n 4) 215.
[230] Pamela Quinn, 'Advancing the Conversation: Non-judicial Voices and the Transnational Judicial Dialogue', in Holly Cullen, Joanna Harrington and Catherine Renshaw (Eds.) Experts, Networks and International law (CUP 2017) 47, 49.
[231] Webb, 'Immunities and Human Rights' (n 115) 245.
[232] Michael J. Bommarito II, Daniel Martin Katz and Jon Zelner, 'Law as a Seamless Web? Comparison of Various Network Representations of the United States Supreme Court Corpus (1791-2005)', *Proceedings of the 12th International Conference on Artificial Intelligence and Law* (ICAIL 2009) 234, 234.
[233] Quinn (n 230) 48.

process included different searching techniques, as explained in section 3.5.1, after which there were only a handful of decisions not available online.[234]

Likewise, this study comprises decisions originally written in Spanish, English, and Portuguese, and decisions in other languages that were translated to English. This includes translated versions that were available online, and decisions found in other languages which were translated using the Google translation function in the browser.[235] Because of these limitations, there might be relevant decisions not included in this study because there are no translated versions available. However, the search found the great majority of cases identified by other judicial decisions and by the literature on amnesties are included in the study.

3.6. Conclusion: Judicial dialogue through the complexity lens

The literature on sources of international law has acknowledged the increasing role of judicial decisions in shaping international law. Traditional approaches, despite maintaining a theory of sources focused on state consent, have moved from the idea of judicial decisions simply as subsidiary means for the determination of rules (in the literal sense of article 38 of the ICJ Statute), to recognising international courts, and to a lesser extent domestic tribunals, as agents of legal development.

With this shift, traditional approaches to international law recognise the influence and impact of judicial decisions in the formation and development of rules. This recognition, however, is limited and centred on the influence of individual decisions on the development of certain areas of law. Citing the usual examples of landmark decisions of the ICJ, the ECtHR, or domestic courts in the US and the UK, traditional approaches have focused on the influence of specific decisions, without recognising the significance of the increasing interactions and cross-referencing practices between courts.

Liberal and global constitutionalism theories, although different, converge on the idea of judicial dialogue as a key to understanding the increasing influence of courts in the development of international law. This move has been important in understanding the

[234] Most notably, the decision of the Suriname's High Court in the case against President Desi Bouterse in 2015 (see: https://www.voanews.com/a/suriname-high-court-says-presidents-murder-trial-to-resume/3086288.html) or the decision of the Supreme Court of Nepal in the case *Suman Adhikari v. Nepal Government* in 2020 (see: https://trialinternational.org/latest-post/supreme-court-of-nepal-holds-its-grounds-in-the-fight-against-impunity/).

[235] The Google translate function was used in 20 out of the 368 cases read to identify judicial decisions and map cross-references to other pronouncements. These decisions mainly informed the quantitative part of the analysis developed in the next chapters.

collective impact of international and domestic tribunals on the shaping of rules of international law. The increasing accessibility of other courts' decisions has given tribunals the ability to read and reference a great number of decisions. Courts are not deciding in isolation and, therefore, the influence of certain decisions cannot be entirely individualised and explained in terms of specific decisions.

These approaches have had a significant influence in the understanding of the prohibition of amnesties. Human rights scholars tend to claim an international consensus on a general prohibition on amnesties, arguing that judicial decisions reflect an agreement on the matter. However, there has not been a recent systematic analysis of judicial interactions between courts discussing the permissibility of amnesties. Arguments supporting and rejecting the crystallisation of a norm on amnesties tend to overemphasise the agreement on a prohibition of amnesties (by focusing on decisions rejecting amnesties) or to overemphasise the inconsistency of state practice (by highlighting decisions that upheld these types of measures). The case-law on amnesties, nonetheless, is nuanced and reflects rich cross-referencing practices. This thesis asserts the need for an empirical analysis of the judicial dialogue that assesses the extent of the interactions between courts in the discussion of amnesties, as well as a systematic analysis that covers as many decisions as possible.

Building upon the ideas of judicial dialogue, this chapter has argued that a complexity theory approach contributes to (a) the mapping of judicial interactions and (b) the understanding of the role of judicial decisions in shaping a norm on the permissibility of amnesties. Rather than focusing on the ideas of rational deliberation and persuasion that are central to the theories of judicial dialogue, a complexity theory approach focuses on the spontaneous emergence of rules of international law from the relatively simple interactions of legal actors, and on the process of self-organisation and adaptation through which international law develops without any central control or teleology.

Challenging the idea of an international agreement on the prohibition on amnesties, this chapter introduced three concepts borrowed from complexity theory that complement ideas of judicial dialogue and the methodology that will inform the analysis of judicial decisions in the following chapters. An examination of the dynamics of self-organisation, emergence, and path dependence, typical in complex systems, is essential in uncovering the complexities of judicial dialogue and evaluating the real influence of judicial interactions in the discussion of the permissibility of amnesties under international law.

CHAPTER 4. An empirical study of judicial dialogue

There is a feeling among human rights scholars and practitioners that the debate on amnesties is a closed matter.[1] Considering the influence of the decisions of the Inter-American System on Human Rights, the United Nations (UN) monitoring bodies, and domestic courts in the Southern Cone challenging amnesties enacted in the aftermath of military dictatorships, human rights scholars and advocates tend to read the case law as a coherent body of decisions that have collectively developed upon the prohibition of amnesties for serious human rights abuses under international law.[2]

However, much of this analysis has been developed through a partial reading of decisions from international courts and, to a lesser extent, domestic courts. There is no systematic study of judicial interactions and their impact in the development of a rule of international law on amnesties.[3] The practice of domestic tribunals, international courts and quasi-judicial bodies is much more complex and nuanced. In fact, a careful search for judicial decisions discussing the permissibility of amnesty reveals that the status of certain amnesties under international law continues to be discussed by domestic and international courts.

Besides, tribunals are increasingly referencing each other and, following Anne-Marie Slaughter's predictions, are establishing a transnational judicial dialogue. Following the argument in the previous chapter that connected the ideas of judicial dialogue with a complexity theory approach, the following chapters develop a systematic analysis of the decisions of international courts, domestic tribunals, and human rights bodies, to evaluate the extension and quality of the dialogue in the discussion of the standards for the application of amnesties under international law.

[1] Louise Mallinder, 'Atrocity, Accountability, and Amnesty in a 'Post-Human Rights World'?' (2017) 18 Transitional Justice Institute Research Paper 4, 9.

[2] See: Naomi Roht-Arriaza, 'After Amnesties are Gone: Latin American National Courts and the new Contours of the Fight Against Impunity' (2015) 37 Human Rights Quarterly 341; Naomi Roht-Arriaza and Lauren Gibson, 'The Developing Jurisprudence on Amnesty' (1998) 20 Human Rights Quarterly 843; Christina Binder, 'The Prohibition of Amnesties by the Inter-American Court of Human Rights' (2011) 12 German LJ 1203; Karen Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (2015) 100 Cornell LRev 1069; Hugo A. Relva, 'Three Propositions for a Future Convention on Crimes Against Humanity' (2018) 16 JICJ 857.

[3] More generally, there are not many empirical studies on judicial interactions. Urška Šadl and Henrik Palmer Olsen, 'Empirical Studies of the Webs of International Case Law: A New Research Agenda' (2014) 8 iCourts Working Paper Series 1, 3.

Analysing 368 decisions, this chapter explores the arguments and interactions between courts and human rights bodies when considering the permissibility of amnesties. The chapter shows that the legality of amnesties under international law continues to be discussed by international and domestic courts, particularly in relation to the possibility of conditional amnesties. Identifying the influence of early decisions rejecting amnesty laws enacted in Latin America, the chapter traces how judicial dialogue has expanded vertically and horizontally to establish boundaries for the application of amnesties. However, the chapter argues that a systematic reading of the decisions adopted by different judicial and quasi-judicial bodies reflects little international agreement on the prohibition of amnesties in the way that some human rights scholars, courts and UN bodies have claimed. Regional and regime trends explain some developments in the discussion of amnesties, but some of the latest decisions of judicial and quasi-judicial bodies reflect a diverse range of approaches to the use of amnesties during periods of transitional justice in different contexts.

The first section of this chapter identifies and maps the decisions of domestic and transnational courts and human rights bodies discussing the permissibility of amnesties. It provides an overview of the characteristics of the cases examined, and shows how the judicial discussion of amnesties remains live and relevant. Section 2 argues that the decisions on impunity laws enacted in the aftermath of authoritarian regimes in Latin America initiated a dialogue between the Inter-American System of Human Rights and UN bodies that created a synergy that has radically opposed amnesty laws. Section 3 shows how the dialogue between international bodies and domestic courts in South America reinforced the rejection of amnesties. This was facilitated by the conventionality control developed by the Inter-American Court, and a constitutional trend in South America to incorporate human rights standards into domestic law as part of a constitutional block. Section 4 contends that, at an international level, there has been a rich dialogue between regional human rights bodies, and across human rights and international criminal regimes, focused on discussing the permissibility of amnesties under international law. The influence of the pronouncements of the Inter-American and UN bodies has been evident. However, other transnational bodies have been more cautious in opposing amnesties and have remained open to the possibility of conditional amnesties under exceptional circumstances.

The chapter concludes by demonstrating that judicial dialogue has strongly influenced the discussion on the permissibility of amnesties under international law. Early decisions on amnesty laws enacted in Latin America, as mechanisms of impunity, have dictated the terms of the broader debate on the legality of amnesties by developing a strong prohibition on this

kind of measure. However, more recent decisions have been more cautious in rejecting all types of amnesties, adding some uncertainty to the current status of international law.

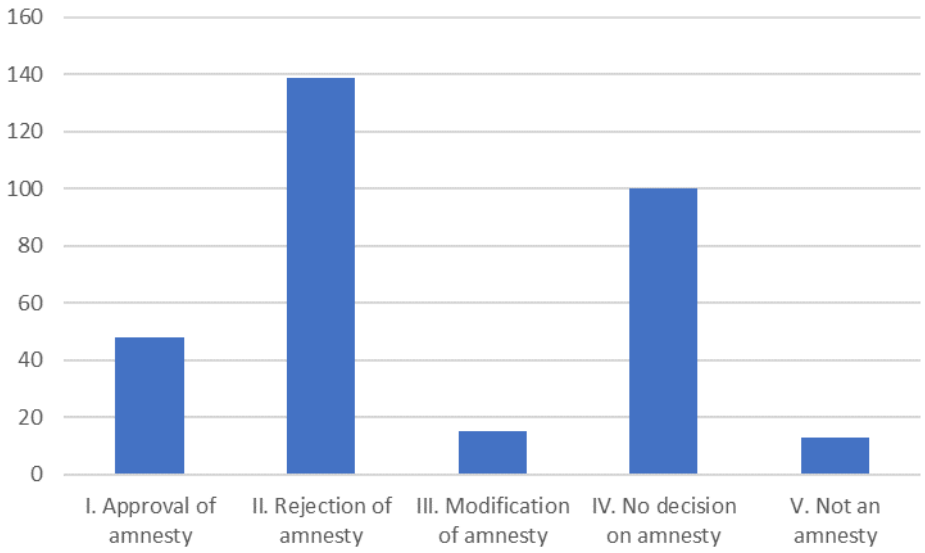
4.1. An overview of decisions on amnesty

Following the methodology set out in Section 3.5, this chapter discuss the judicial dialogue between international courts, human rights bodies and domestic tribunals in the sample of 368 decisions discussing the permissibility of amnesties. In 65 of those decisions, however, courts and quasi-judicial bodies only make brief mentions of amnesty and do not engage in a full discussion of their permissibility. Thus, the following analysis of judicial decisions is based on the 303 decisions that substantially engage with the discussion of the permissibility of amnesties.[4] Thus, this analysis compiles information from 303 decisions adopted by domestic courts, international tribunals and human rights bodies in cases relating to 83 amnesty measures.[5] This includes 136 decisions from international bodies, and 167 decisions of municipal courts (13 of those exercising universal jurisdiction).

The outcomes of these decisions regarding the application of the amnesty are shown in Figure 6. In 48 pronouncements, the decisions are to approve the amnesty, meaning that the court uphold the validity of the amnesty, finding it permissible under constitutional and/or international law, or granting its application to a specific case. In 139 decisions, the amnesty is rejected, that is, the courts directly overturn the validity of the amnesty, decides not to apply it in a specific case, or gives orders to invalidate it. In 15 cases, the decision is to modify the amnesty by limiting its scope or by instructing to change it. In 100 cases, there is no decision on the legality of the specific amnesty. Finally, 13 decisions conclude that the measure analysed does not constitute an amnesty.

[4] See Appendix 1 for a full list of the decisions analysed.
[5] After reading and coding the sample of 368 decisions, it transpired that only 303 pronouncements discuss the legality of amnesties in a relevant way.

Figure 6. Decisions of courts and human rights bodies on the applicability of the amnesty



In general terms, the number of decisions rejecting the amnesty measure is considerably higher than those upholding the amnesty. However, there is a significant number of decisions that discuss the permissibility of amnesties but do not adopt a decision regarding the legality of a specific measure. This includes, for example, pronouncements of the Human Rights Committee (UNHRC) and the Committee Against Torture (UNCAT) that do not refer to a specific amnesty, but make general observations about their incompatibility with international law.[6] It also includes decisions of international and domestic courts that consider the permissibility of amnesty measures in abstract terms. Examples include the decisions in *Prosecutor v. Anto Furundžija* by the International Criminal Tribunal for the Former Yugoslavia (ICTY) and *Abdülsamet Yaman v. Turkey* by the European Court of Human Rights (hereinafter European Court or ECtHR), which have been influential in the discussion of amnesties by international courts, but do not refer to a specific measure.[7] Likewise, in Colombia, the Constitutional Court has discussed the permissibility of amnesties when examining the constitutionality of the Additional Protocol II to the Geneva Conventions and

[6] See: *General Comment No. 20 [44]: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, UNHRC, 44th session (10 March 1992); *General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UNHRC, 80th session, CCPR/C/21/Rev.1/Add.13 (29 March 2004); *General Comment No. 2: Implementation of Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by State parties*, UNCAT, CAT/C/GC/2 (24 January 2008); *General Comment No. 3: Implementation of Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by State parties*, UNCAT, CAT/C/GC/3 (19 November 2012).

[7] See: *Abdülsamet Yaman v. Turkey*, ECtHR, Judgment, Application No. 32446/96 (2 November 2004); *Prosecutor v. Anto Furundžija*, ICTY, Case No. IT-95-17/1-T (10 December 1998).

the Rome Statute.[8] In Venezuela, the constitutional clause limiting amnesties in article 29 is analysed in different pronouncements, even when the measure under examination was not an amnesty law.[9] This is evidence of the importance of a content analysis of the decisions, beyond the operative part of the judgements.

Judicial and quasi-judicial bodies have examined the permissibility of amnesties from different perspectives. In the last three decades, international law has seen an unprecedented increase in the number of overlapping international agreements, treaties, and institutions.[10] In his 2006 report on fragmentation for the International Law Commission, Martti Koskenniemi identifies at least three ways in which fragmentation manifests: substantive fragmentation of different specialised legal regimes; institutional fragmentation with the proliferation of judicial and quasi-judicial bodies, and regionalism, with geography and political projects of integration accounting for different approaches to international law.[11] Dov Jacobs argues that the discussion of amnesties by courts and human right bodies reflects different layers of fragmentation.[12] This includes what he calls 'horizontal fragmentation' in terms of the interactions between legal regimes and between different regional systems of human rights; 'vertical fragmentation', which refers to the interactions between international and domestic jurisdictions, and 'pluridisciplinary fragmentation', which highlights amnesties as political agreements that have not only legal implications, but also historical, philosophical, sociological, and economical dimensions.[13]

The absence of a specific clause on amnesties, as discussed in Chapter 2, has led courts and human rights bodies to discuss their permissibility using diverse legal lenses. As a mechanism of transitional justice, following the report of the Secretary-General of the UN, the permissibility of amnesties involves norms of public international law, international human

[8] See: *Constitucionalidad del Protocolo Adicional II a los Convenios de Ginebra,* Corte Constitucional de Colombia, C-225/95 (18 May 1995); *Constitucionalidad del Estatuto de Roma*, Corte Constitucional de Colombia, C-578/02 (30 July 2002).
[9] See: *Demanda de constitucionalidad artículo 376 del Código Orgánico Procesal Penal*, Tribunal Supremo de Justicia de Venezuela – Sala Constitucional, Exp. No. 2005-0480 (7 December 2005); *Acción de amparo interpuesta por María Lenys Pascatillo Urpin y otros*, Tribunal Supremo de Justicia de Venezuela – Sala Constitucional, Exp. No. 05-1899 (13 April 2007).
[10] Laura Gómez-Mera, 'International Regime Complexity' (2021) Oxford Research Encyclopedia of International Studies 3. See also: Martti Koskenniemi, 'Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission (2006) UN Doc A/CN.4/L.682; Alexander Orakhelashvili, 'The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?' (2008) 19 EJIL 161; William A. Schabas, 'Synergy or Fragmentation?: International Criminal Law and the European Convention on Human Rights' (2011) 9 JICJ 609; Anthony E. Cassimatis, 'International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law' (2007) 56 ICLQ 623.
[11] Koskenniemi, 'Fragmentation of International Law' (n 10). See also: Marjan Ajevski, 'Fragmentation in International Human Rights Law: Beyond Conflict of Laws ' (2014) 32 Nordic Journal of Human Rights 87.
[12] Dov Jacobs, 'Puzzling Over Amnesties: Defragmenting the Debate for International Criminal Tribunals' in Larissa van den Herik and Carsten Stahn (eds), *The Diversification and Fragmentation of International Criminal Law* (Brill | Nijhoff 2012) 305.
[13] ibid.

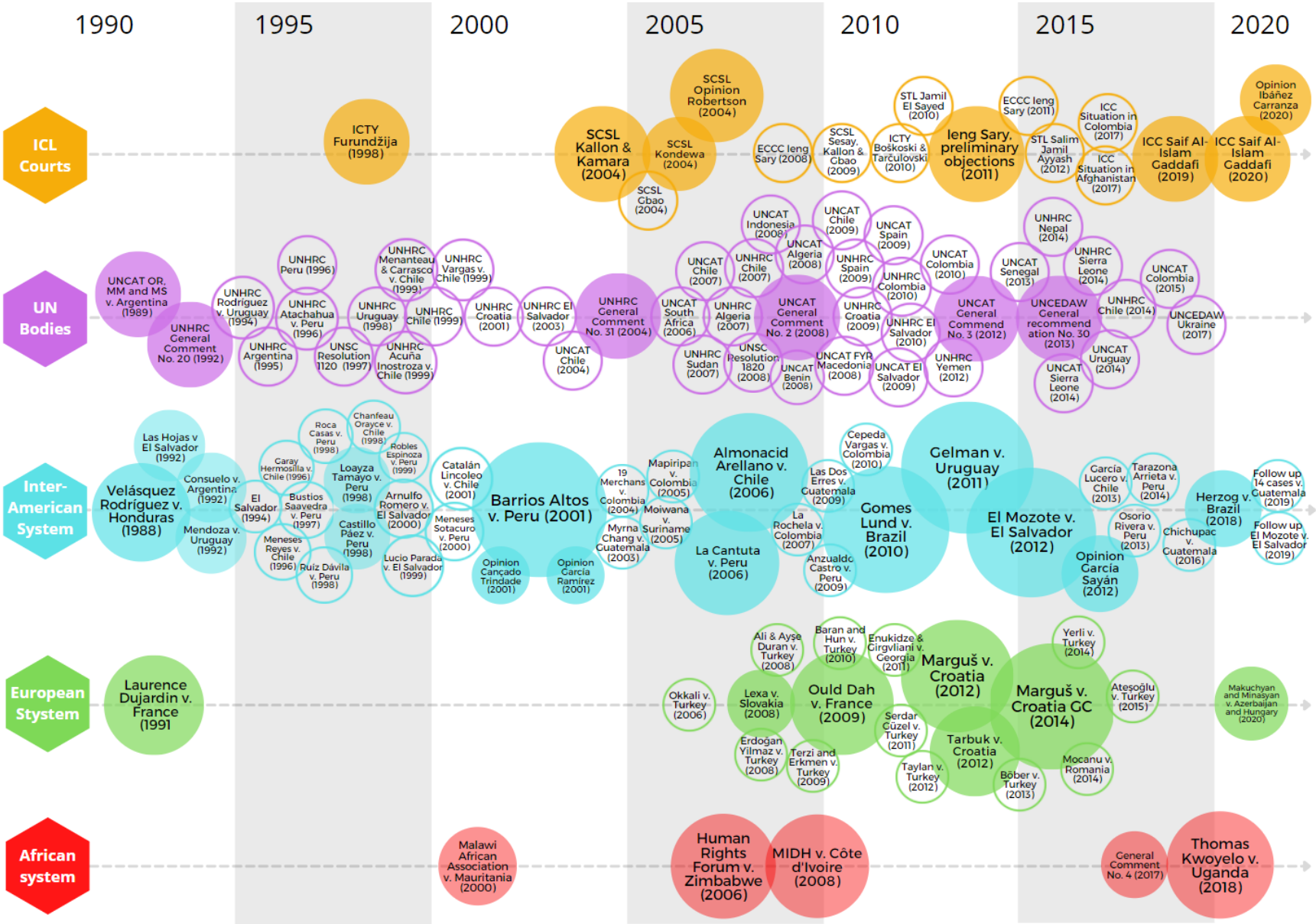
rights law, international criminal law, and international humanitarian law.[14] The different dimensions of fragmentation have invited to horizontal, vertical and pluridisciplinary dialogues with courts looking at each other's decisions in search of guidance.

As shown in Figure 7, regional human rights bodies have been very active in the discussion of amnesties.[15] The Inter-American Commission of Human Rights (hereinafter Inter-American Commission or IACoHR) and the Inter-American Court of Human Rights (hereinafter Inter-American Court or IACtHR) have been particularly prolific in this regard with 48 decisions combined; however, in the last 15 years the European Court (26) and the African Commission on Human and Peoples' Rights – ACoHPR (5) have also issued substantial decisions examining the permissibility of amnesties. UN monitoring bodies have been key players in the development of a norm on amnesties, with the UNHRC (21) and the UNCAT (17) mainly focused on situations of impunity in Latin America until 2004, and more recently expanding their interest to amnesty laws in other countries. Finally, international criminal courts including the ICTY (3), the International Criminal Court – ICC (6), the Extraordinary Chambers in the Courts of Cambodia – ECCC (3), and the Special Court for Sierra Leone – SCSL (4) have discussed the possibility of amnesties to prevent the exercise of their jurisdiction, but have also included considerations of the general permissibility of amnesties under international law.

Most international courts and human rights bodies discuss the permissibility of amnesties under customary law and *jus cogens* norms*;* human rights treaty obligations to prosecute and provide effective remedy for serious crimes; the specific reference to the use of amnesties under international humanitarian law pursuant of article 6(5) of the Additional Protocol II to the Geneva Conventions; and the opposability of amnesties to the jurisdiction of international criminal tribunals.[16] Human rights bodies have focused on the obligations of states under treaty law, while international criminal courts have centred on jurisdictional issues. In their dialogue with other institutions, however, it is not uncommon that courts and human rights bodies engage in the discussion of amnesties from all different perspectives.

[14] Secretary General of the UN, 'The rule of law and transitional justice in conflict and post-conflict societies' (23 August 2004) Report to the UN Security Council, S/2004/616*, para 9.
[15] The analysis of judicial networks and cross-referencing practices will be developed in Chapter 5.
[16] See Chapter 2.

Figure 7. Timeline of landmark decisions on amnesty adopted by international courts and human rights bodies



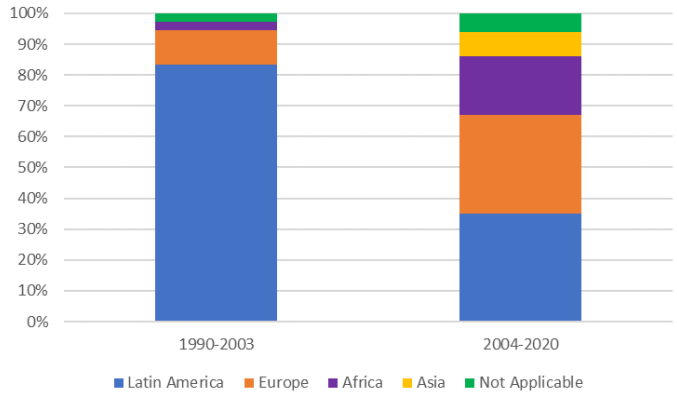
At an international level, regional variations can be seen in the approaches adopted by the different regional bodies of human rights. For instance, Josepha Close has noted differences between the European and the Inter-American Courts of Human Rights, where the former has placed some emphasis on the public interest of the state, while the latter has outright rejected any type of amnesty.[17] Regionally, much of the attention of international bodies discussing amnesties has been on measures enacted in Latin America. Out of the 136 decisions by international bodies examined for this study, 48% of them concern cases in Latin America, 26% in Europe, 15% in Africa, 6% in Asia, and 5% of decisions are not focused on a specific country. Between 1990 and 2003, most pronouncements on amnesties (30 in total) were made by the IACtHR, the IACoHR, the UNHRC and the UNCAT regarding the situations of impunity in the Southern Cone, Peru, and El Salvador. During that period, only five judgments concern cases in other continents, most notably isolated decisions adopted by the ACoHPR, the ECoHR and the ICTY.[18]

However, in recent years, human rights bodies and ICL tribunals have actively discussed the status of amnesties in other parts of the world. Figure 8 shows how, after 2004, international bodies have expanded their interest in amnesties not limited to the Latin American context. Before 2004, 83% of the cases of international bodies discussing the permissibility of amnesties refer to Latin American countries; after 2004, that number is 35%, with international courts and human rights bodies also interested in cases in Europe (32%), Africa (19%), and Asia (8%). The discussion of amnesties does not only continue to concern courts and quasi-judicial bodies, but has also become focused on mechanisms enacted in different parts of the world. In the last eight years alone, it is worth mentioning the review of the Amnesty Act in Uganda by the ACoHPR (2018),[19] the examination of the General Amnesty Act in Croatia by the ECtHR (2014),[20] the warnings issued by the IACtHR (2019) about amnesty laws being

[17] Josepha Close, 'Crafting an international norm prohibiting the grant of amnesty for serious crimes: convergences and divergences in the case-law of international courts' (2016) 8 Queen Mary LJ 109.
[18] *Malawi African Association and others v. Mauritania*, ACoHPR, Communication No. 54/91, 61/91, 98/93, 164/97-196/97, and 210/98, 17th session (11 May 2000); *Laurence Dujardin and others v. France*, ECoHR, Admissibility, Application No. 16734/90 (2 September 1991); *Prosecutor v. Furundžija*, ICTY (n 7).
[19] *Thomas Kwoyelo v. Uganda*, ACoHPR Communication 431/12 (17 October 2018).
[20] *Marguš v. Croatia*, ECtHR, Judgment by Grand Chamber, Application 4455/10 (27 May 2014).

discussed by the legislative bodies in Guatemala[21] and El Salvador,[22] and the discussion of the General Amnesty Law enacted in Libya by the ICC (2019 and 2020).[23]

Figure 8. Comparison between percentage of decisions adopted by international bodies before and after 2004 by region where the case is focused.



The increasing interest and role of domestic courts in the application of international law has also made domestic courts key players in the development of international standards for the application of amnesties.[24] Even though amnesties have been discussed in many cases purely as a matter of domestic law, an increasing number of courts and judges have included considerations of international law in their reasoning. Out of the 167 decisions of domestic tribunals, 52 examine the permissibility of amnesties exclusively under domestic law, whilst 102 include considerations of international law in their reasoning, and 13 decisions are the result of the activation of universal jurisdiction.

As shown in Figure 9, the great majority of decisions on amnesty available are from domestic courts in Latin America. Out of the 167 judgments analysed, 63% are from Latin American countries, 27% from Europe, 6% from Africa, 2% from Asia, and 2% from North America. As explained before, this is one of the limitations of the study, which only includes

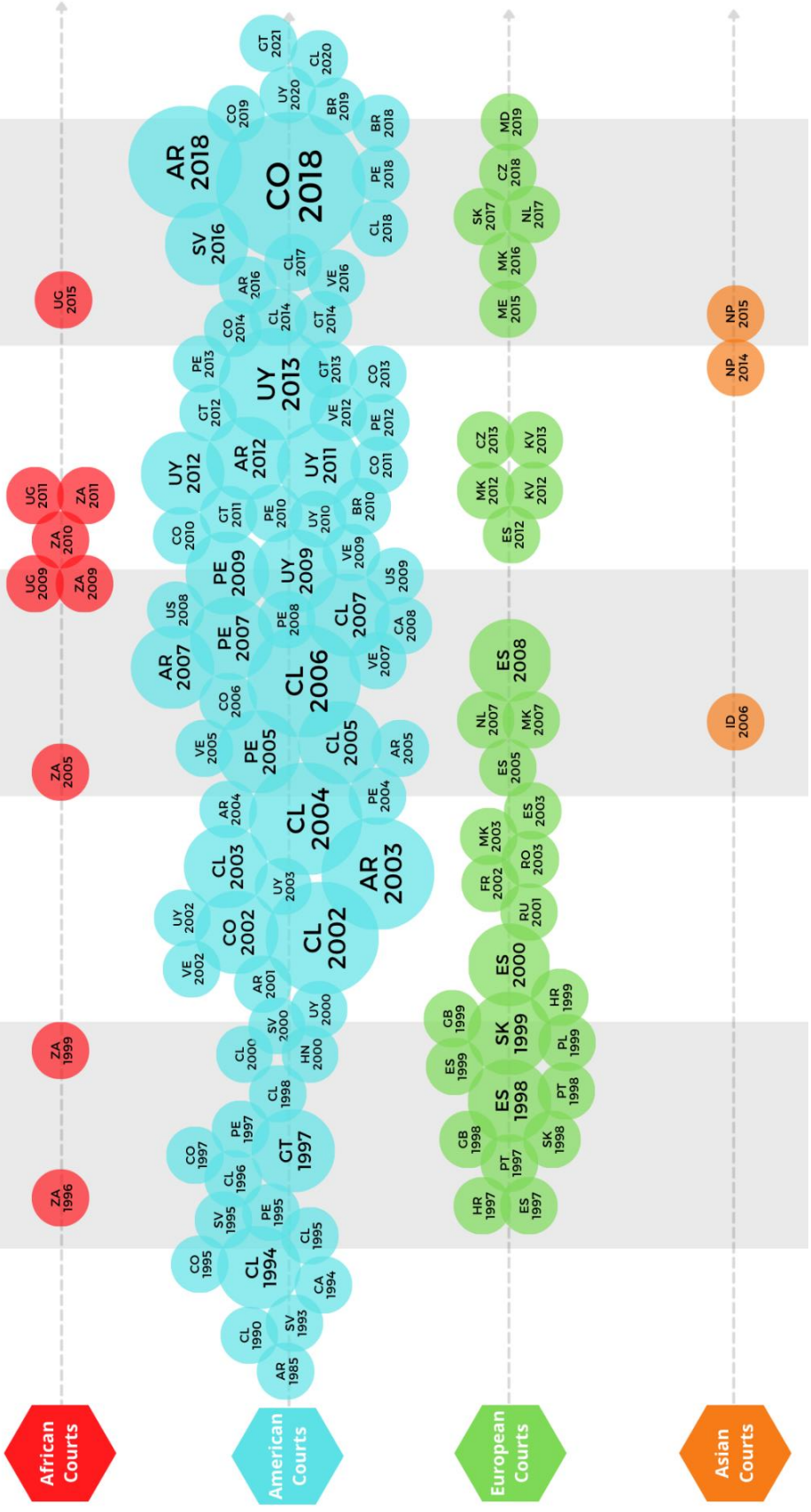
[21] *Members of the Village of Chichupac and neighboring communities of the Municipality of Rabinal, Molina Theissen case and other 12 cases v. Guatemala*, IACtHR, Provisional measures and monitoring (12 March 2019).
[22] *Massacres of El Mozote and surrounding areas v. El Salvador*, IACtHR, Provisional measures and monitoring (3 September 2019).
[23] *Prosecutor v. Saif Al-Islam Gaddafi*, ICC, Situation in Libya, Decision on the 'admissibility challenge by Dr. Saif Al-Islam Gaddafi pursuant to articles 17(1)(c) and 20(3) of the Rome Statute', ICC-01/11-01/11 (5 April 2019); *Prosecutor v. Saif Al-Islam Gaddafi*, ICC Appeals Chamber, Situation in Libya, Judgment on the appeal of Mr Saif Al-Islam Gaddafi against the decision of the Pre-Trial Chamber I entitled 'Decision on the admissibility challenge by Dr. Saif Al-Islam Gaddafi pursuant to articles 17(1)(c) and 20(3) of the Rome Statute', ICC-01/11-01/11 (9 March 2020).
[24] See generally: Eyal Benvenisti and George W. Downs, 'National Courts, Domestic Democracy, and the Evolution of International Law' (2009) 20 EJIL 59; Yuval Shany, 'National Courts as International Actors: Jurisdictional Implications' (2008) 22 Hebrew University International Law Research Paper 1.

decisions available in Spanish, English, or Portuguese. However, these numbers are consistent with the analyses of other scholars who have highlighted the centrality of Latin American courts in the discussion of amnesty laws.[25] This has facilitated the judicial dialogue with the Inter-American Commission and Court, as well as among domestic courts in the region.[26]

However, this study departs from the literature on amnesties in two significant ways. First, this analysis presents an updated reading of the decisions of domestic courts discussing the permissibility of amnesties. Out of the 167 judgments analysed, 77 are from between 2009 and 2021. Since Mallinder's 2008 analysis of the approach of national courts to the implementation of amnesties, the most complete of its kind to date, there has been a substantial number of pronouncements.[27] Secondly, this study offers the first systematic reading and mapping of decisions on amnesty, revealing the importance and influence of decisions in other parts of the world by identifying several trends in the discussion of amnesties. For instance, decisions by courts in South Africa, Uganda, Indonesia and Nepal, as well as more recent decisions in Colombia and El Salvador, include considerations of transitional justice to nuance their position on the permissibility of conditional amnesties under international law.

[25] See: Roht-Arriaza and Gibson, 'The Developing Jurisprudence on Amnesty' (n 2); Roht-Arriaza, 'After Amnesties are Gone' (n 2); Louise Mallinder, 'The End of Amnesty or Regional Overreach: Interpreting the Erosion of South America's Amnesty Laws' (2016) 65 ICLQ 645.
[26] See: Binder (n 2).
[27] Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Hart Publishing 2008) ch 5.

Figure 9. Timeline of decisions on amnesty adopted by domestic courts expressed by country (size indicates number of decisions in a year)[28]



[28] The codes used in the graph follow the UN's code list. See: https://unece.org/trade/cefact/unlocode-code-list-country-and-territory accessed 2 August 2022.

4.2. Judicial dialogue around impunity in Latin America: genealogy of the judicial prohibition on amnesties

This section analyses the role of judicial and quasi-judicial decisions since the 1990s in the development of a prohibition of amnesties under international law. Despite early pronouncements supporting the use of amnesties in transitional processes in Haiti and El Salvador, the UN radically changed its position during the 90s.[29] Focusing on impunity laws enacted in the Southern Cone in the aftermath of authoritarian regimes, UN bodies, the Inter-American Commission and the Inter-American Court of Human Rights have adopted a stringent position on how states party to the American Convention should react to serious human rights violations and which form of accountability is acceptable.[30] Seeing amnesties as mechanisms of impunity, they argue that such measures violate the states' obligations to prosecute serious crimes, the victims' rights to effective remedies for human rights violations, and the non-derogability of human rights.

4.2.1. The criminal turn in human rights: criminal trials as effective remedy in the Inter-American System

The case law of the Inter-American Human Rights System is usually the starting point for claiming the prohibition of amnesties under international human rights law.[31] As explained in Section 2.4, in *Velásquez Rodríguez v. Honduras*, the IACtHR concluded that the obligations of the states under the ACHR to prevent and respond to human rights violations include 'to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation'.[32] In a clear example of the role of courts as agents of legal development, this decision initiated the anti-impunity turn in human rights, placing the duties to prosecute and to carry out criminal investigations at the centre of the states' obligations

[29] Yasmin Naqvi, 'Amnesty for war crimes: Defining the limits of international recognition' (2003) 85 IRRC 583, 618; Carsten Stahn, 'United Nations peace-building, amnesties and alternative forms of justice: A change in practice?' (2002) 84 IRRC 191, 193; Michael P. Scharf, 'Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?' (1997) 31 Texas IntlLJ 1.
[30] Anja Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (OUP 2009) 51. See also: Christine Bell, 'The "New Law" of Transitional Justice' in Kai Ambos, Judith Large and Marieke Wierda (eds), *Building a Future on Peace and Justice* (Springer-Verlag Berlin Heidelberg 2009) 113.
[31] Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (n 2) 1084.
[32] *Velásquez Rodríguez v. Honduras*, IACtHR, Merits, Series C No. 4 (29 July 1988) para 174.

regarding the prevention of and protection against human rights abuses.[33] The individual right to criminal justice as an effective remedy for human rights violations has made punishment a central element of transitional efforts in searching for peace.[34]

In the following years, the IACoHR adopted several decisions that began to consider the permissibility of amnesties. Citing the language of the Inter-American Court in *Velásquez Rodríguez v. Honduras*, the Commission repeated the state's duty to prosecute and punish human rights violators, extending its application to the case of amnesties.[35] In 1992, the IACoHR evaluated amnesty laws enacted in Argentina, Uruguay and El Salvador framing the states' obligation to investigate and punish human rights abuses as part of the victims' right to an effective remedy under articles 1.1 (Obligation to Respect Rights), 8.1 (Right to a Fair Trial) and 25.1 (Right to Judicial Protection) of the ACHR.[36] Using similar reasoning in all three cases,[37] the Commission considered that the violation was grounded in the 'legal consequences of the passage of the laws and the Decree, in that it denied the victims their right to obtain a judicial investigation in a court of criminal law to determine those responsible for the crimes committed and punish them accordingly'.[38] The IACoHR connected the duty to investigate human rights abuses with the victims' right to participate in judicial procedures as an effective remedy,[39] considering that these are 'the appropriate means to investigate the commissions of the crimes denounced, determine criminal liability and impose punishment on those responsible'.[40] However, in those initial cases, the Inter-American Commission did not expand on the duties to prosecute and punish and limited its decisions to reproducing the language of the Court in the case against Honduras.[41] Moreover, it did not expand on the differences between the amnesty measures and complementary provisions enacted in each context.[42]

Examining the amnesty measures enacted in Chile and Peru, the Inter-American Commission elaborated on the duty to prosecute and punish. In a group of cases about the

[33] See: Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (n 2); Karen Engle, 'A Genealogy of the Criminal Turn in Human Rights' in Karen Engle, Zinaida Miller and D. M. Davis (eds), *Anti-Impunity and the Human Rights Agenda* (CUP 2017); Mattia Pinto, 'Awakening the Leviatan through Human Rights Law: How Human Rights Bodies Trigger the Application of Criminal Law' (2018) 34 Ultrecht Journal of International and European Law 161.
[34] Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (n 30) 96.
[35] *Consuelo et al. v. Argentina*, IACoHR, Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311, Report 28/92, OEA/Ser.L/V/II.83 (2 October 1992) para 40; *Mendoza et. al. v. Uruguay*, IACoHR, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375, Report 29/92, OEA/Ser.L/V/II.83 (2 October 1992) para 5; *Masacre Las Hojas v. El Salvador*, IACoHR, Case 10.287, Report 26/92, OEA/Ser./L/V/II.83 (24 September 1992) para 9.
[36] *Consuelo v. Argentina*, IACoHR (n 35) para 40; *Mendoza v. Uruguay*, IACoHR (n 35) para 43-44.
[37] For an in-depth analysis of the early decisions of the IACoHR on amnesties see: Douglass Cassel, 'Lessons from the Americas: Guidelines for international response to amnesties for atrocities' (1996) 59 Law and Contemporary Problems 197.
[38] *Consuelo v. Argentina*, IACoHR (n 35) para 50.
[39] *Consuelo v. Argentina*, IACoHR (n 35) para 32; *Mendoza v. Uruguay*, IACoHR (n 35) para 40; *Masacre Las Hojas v. El Salvador*, IACoHR (n 35) para 10.
[40] *Mendoza v. Uruguay*, IACoHR (n 35) para 40.
[41] Cassel (n 37) 213; Mallinder, *Amnesty, Human Rights and Political Transitions* (n 27) 265.
[42] Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (n 30) 88.

enforced disappearance of people during the military dictatorship of Augusto Pinochet in Chile, the IACoHR condemned the self-amnesty law passed in 1978.[43] Focusing on the nature of the Decree-Law 2191, the Commission considered that the self-amnesty was incompatible with the state's obligation to investigate and punish human rights violations and the victims' right to an effective remedy under the standards set in *Velásquez Rodríguez v. Honduras*.[44] Moreover, the IACoHR considered that the de facto government lacked legal legitimacy, so a self-amnesty law would be equally illegitimate.[45] Because the amnesty was enacted before the signature of the ACHR and there was a transition to a democratic government in Chile, the violation lay in the failure of the state to rescind the amnesty law, which remained in effect after the ratification of the ACHR and, in consequence, the incapacity to investigate and identify the persons responsible, bring them to trial and punish the perpetrators.[46] The recommendations of the Commission included 'amending' the domestic legislation and investigating the crimes with the idea of 'identifying the guilty parties, establishing their responsibilities and effectively prosecuting them, thereby guaranteeing to the victims and their families the right to justice that pertains to them'.[47]

Following a similar line of argument, the IACoHR considered the self-amnesty laws enacted in 1995 by the government of Alberto Fujimori in Peru.[48] In these cases, the Commission considered that the legal framework issued by Fujimori's government created a 'state policy of impunity' casting 'a blanket of impunity over the armed forces or any non-military perpetrator, enabling them to commit any atrocity in the name of their cause, and such a climate breeds inevitable excess and contempt for the rule of law'.[49] In the eyes of the IACoHR, this created expectations of impunity that eroded public trust in the judicial system and the exercising of the victims right to justice.[50] The Commission recommended derogating the amnesty measures and instructed the state to 'immediately carry out a new, serious,

[43] *Garay Hermosilla et al. v. Chile*, IACoHR, Case 10.843, Report 36/96, OEA/SerL/V/II/95 (15 October 1996); *Meneses Reyes et al. v. Chile*, IACoHR, Cases 11.228, 11.229, 11.231 and 11.182, Report 34/96, OEA/SerL/V/II/95 (15 October 1996); *Alfonso René Chanfeau Orayce et al. v. Chile*, IACoHR, Cases 11.505, 11.532, 11.541, 11.546, 11.549, 11.569, 11.572, 11.573, 11.583, 11.585, 11.595, 11.652, 11.657, 11.675, and 11.705, Report 25/98, OEA/SerL/V/II.98 (7 April 1998); *Samuel Alfonso Catalán Lincoleo v. Chile*, IACoHR, Case 11.771, Report 61/01, OEA/Ser/L/V/II.111 (16 April 2001).
[44] *Garay Hermosilla v. Chile*, IACoHR (n 43) para 59, 77.
[45] ibid para 59.
[46] *Meneses Reyes v. Chile*, IACoHR (n 43) para 51; *Chanfeau Orayce v. Chile*, IACoHR (n 43) para 101.
[47] *Garay Hermosilla v. Chile*, IACoHR (n 43) para 111.
[48] *Hugo Bustios Saavedra v. Peru*, IACoHR, Case No 10.548, Report 38/97, OEA/SerL/V/II.98 (16 October 1997); *Estiles Ruíz Dávila v. Peru*, IACoHR, Case No 10.491, Report 41/97, OEA/SerL/V/II.98 (19 February 1998); *Martín Javier Roca Casas v. Peru*, IACoHR, Case 11.233, Report 39/97, OEA/SerL/V/II.98 (19 February 1998); *Rodolfo Robles Espinoza and Sons v. Peru*, IACoHR, Case 11.317, Report 20/99, OEA/SerL/V/II.95 (23 February 1999); *Manuel Meneses Sotacuro and Félix Inga Cuya v. Peru*, IACoHR, Case 10.904, Report 46/00, OEA/SerL/V/II.106 (13 April 2000).
[49] *Hugo Bustios Saavedra v. Peru*, IACoHR (n 48) para 48.
[50] *Estiles Ruíz Dávila v. Peru*, IACoHR (n 48) para 34. The UNHRC arrived to similar conclusions in 1996. See: *Consideration of Reports Submitted by State Parties under Article 40 of the Covenant: Peru*, UNHRC, CCPR/C/79/Add.67 (25 July 1996); *Basilio Laureano Atachahua v. Peru*, UNHRC, Communication No. 540/1993, CCPR/C/56/D/540/1993 (16 April 1996).

impartial and effective investigation of the facts' in order to identify the people responsible and, through the criminal procedures, punish them.[51]

Later, examining the General Amnesty Law signed in 1993 by El Salvador, the Commission concluded that such law not only impeded the obligation to investigate human rights violations, but also affected victims' rights to reparation and to know the truth.[52] Considering the impact in the Salvadoran society of the extrajudicial execution of Monsignor Oscar Arnulfo Romero by official agents and members of death squads in 1980, the IACoHR concluded that the General Amnesty not only violated the right of the victim's relatives to know about the events in question, but also the collective right to truth of the society as a whole.[53] Thus, the IACoHR concluded that the work of Truth Commissions cannot substitute for the judicial process, nor replace the state's obligations to investigate the violations, identify those responsible, and impose sanctions.[54] Thus, the Inter-American Commission recommended to the state carrying out 'a thorough, rapid, complete, and impartial investigation into the grave incidents denounced in the present case, and to bring to trial and punish all of the responsible persons, despite the decreed amnesty'.[55] As Mallinder has noted, the demand to 'punish all' reflects an evolution in the language of the Commission,[56] particularly when compared with its first decisions in 1992, which recommended states to 'adopt the measures necessary to clarify the facts and identify those responsible'.[57] Equating amnesties to *de facto* impunity, the IACoHR concluded that peace 'must be built on the basis of justice, the investigation of human rights violations and the punishment of those responsible'.[58]

4.2.2. Synergy between UN bodies and the Inter-American System

The position of UN monitoring bodies has been similar to those early decisions from the Inter-American System.[59] The first pronouncements of UN bodies were focused on the

[51] *Estiles Ruíz Dávila v. Peru*, IACoHR (n 48) para 36(i); *Martín Javier Roca Casas v. Peru*, IACoHR (n 48) para 121(i).
[52] *Report on the Situation of Human Rights in El Salvador*, IACoHR, OEA/Ser.L/II.85 (11 February 1994) section II.4; *Lucio Parada Cea et al. v. El Salvador*, IACoHR, Case 10.480, Report 1/99, OEA/SerL/V/II.102 (12 January 1999) para 149.
[53] *Monsignor Oscar Arnulfo Romero and Galdámez et al. v. El Salvador*, IACoHR, Case 11.481, Report 37/00, OEA/SerL/V/II.106 (13 April 2000) para 144.
[54] ibid para 149. See also: *Lucio Parada Cea v. El Salvador*, IACoHR (n 52) para 143.
[55] *Lucio Parada Cea v. El Salvador*, IACoHR (n 52) Recommendations. See also: *Monsignor Arnulfo Romero v. El Salvador*, IACoHR (n 53) Recommendations.
[56] Mallinder, *Amnesty, Human Rights and Political Transitions* (n 27) 275. It is important to note, however, that the Truth Commission in El Salvador identified and publicly named the persons responsible for the most serious human rights abuses, which could partly explain the demand to 'punish all' the persons responsible.
[57] *Consuelo v. Argentina*, IACoHR (n 35) para 52.3; *Mendoza v. Uruguay*, IACoHR (n 35) para 54.3.
[58] *Monsignor Arnulfo Romero v. El Salvador*, IACoHR (n 53) para 162.
[59] Jessica Gavron, 'Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court' (2002) 51 ICLQ 91, 98.

Southern Cone, creating a synergy with the decisions of the IACoHR in rejecting the amnesty laws enacted in countries like Uruguay, Argentina, Chile, and Peru. In *OR, MM and MS v. Argentina* (1989), for example, the UNCAT briefly examined the Full Stop and Due Obedience Laws, concluding that it did not have jurisdiction to analyse a possible violation because the events took place before the ratification of the Convention against Torture.[60] Nonetheless, it claimed that Argentina 'is morally bound to provide a remedy to victims of torture' and expressed concern about the fact that the democratically elected post-military government enacted the Final Point Law and Due Obedience Law only 18 days before the Convention against Torture entered into force, which the Committee deemed 'to be incompatible with the spirit and purpose of the Convention'.[61]

In parallel, the UNHRC evaluated amnesty laws in Uruguay and Argentina, concluding that they were incompatible with the obligations of state parties under the ICCPR.[62] In *Hugo Rodríguez v. Uruguay*, the UNHRC expressed concern about the amnesty measures contributing 'to an atmosphere of impunity which may undermine the democratic order and give rise to further grave human rights violations'.[63] In its *General Comment No. 20* in 1992, the UNHRC adopted a radical stance against amnesties.[64] Interpreting article 7 of the ICCPR, concerning the prohibition of torture, the Human Rights Committee declared that,

> amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.[65]

The argument of a general prohibition on amnesties regarding torture and other inhuman treatment was echoed by the ICTY in *Prosecutor v. Furundžija* (1998).[66] Using the *General Comment No. 20* of the UNHRC as evidence, the ICTY considered that the prohibition of torture has not only ripened into customary international law, but it has evolved into a

[60] *OR, MM and MS v. Argentina*, UNCAT, Communication No. 1/1988, 2/1988 and 3/1988, CAT/C/WG/3/DR/1, 2 and 3/1988 (23 November 1989) para 9.
[61] ibid para 9.
[62] *Hugo Rodríguez v. Uruguay*, UNHRC, Communication No. 322/1988, CCPR/C/51/D/322/1988 (19 July 1994); *Consideration of Reports Submitted by State Parties under Article 40 of the Covenant: Uruguay*, UNHRC, CCPR/C/79/Add.90 (6 April 1998); *Consideration of Reports Submitted by State Parties under Article 40 of the Covenant: Argentina*, UNHRC, CCPR/C/79/Add.46 (5 April 1995).
[63] *Hugo Rodríguez v. Uruguay*, UNHRC (n 62) para 12(4). Similar considerations were made about the situations of impunity in Peru and Chile. See: *Basilio Laureano Atachahua v. Peru*, UNHRC (n 50); *Report on Peru*, UNHRC (n 50); *Menanteau and Carrasco v. Chile*, UNHRC, Communication No. 746/1997, CCPR/C/66/D/746/1997 (26 July 1999); *Consideration of Reports Submitted by State Parties under Article 40 of the Covenant: Chile*, UNHRC, CCPR/C/79/Add.104 (30 March 1999).
[64] *General Comment No. 20 [44]*, UNHRC (n 6).
[65] ibid para 15.
[66] *Prosecutor v. Furundžija*, ICTY (n 7).

peremptory norm of *jus cogens*.[67] This meant, according to the ICTY, that the prohibition of torture is non-derogable, making null and void *ab initio* amnesty laws condoning torture or absolving its perpetrators.[68] This position was reinforced by the UNCAT in *General Comment No. 2* (2008).[69] Repeating that the prohibition of torture is absolute and non-derogable, the Committee stated that 'amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability'.[70]

Much like the Inter-American Commission, the UNHRC and the UNCAT have developed their position against the permissibility of amnesties as a violation of the right to an effective remedy of the victims. In *Basilio Laureano Atachahua v. Peru,* the UNHRC argued that such a right includes the obligation to 'open a proper investigation', 'provide for appropriate compensation', and 'bring to justice those responsible' notwithstanding any amnesty measure adopted domestically.[71] Amnesty laws, the UNCAT concluded later, 'pose impermissible obstacles to a victim in his or her efforts to obtain redress and contributes to a climate of impunity. The Committee therefore calls on States parties to remove any amnesties for torture or ill-treatment'.[72]

Since then, UN bodies have moved closer to consolidating a general prohibition on amnesties for other human rights abuses through other general comments, as well as recommendations and observations to specific countries.[73] In its *General Comment No. 31*

[67] ibid para 153.
[68] ibid para 155.
[69] *General Comment No. 2,* UNCAT (n 6).
[70] ibid para 5.
[71] *Basilio Laureano Atachahua v. Peru*, UNHRC (n 50) para 10.
[72] *General Comment No. 3,* UNCAT (n 6) para 41.
[73] See, among others: *Consideration of Reports Submitted by State Parties under Article 40 of the Covenant: Chile*, UNHRC, CCPR/C/CHL/CO/5 (18 May 2007); *Consideration of Reports Submitted by State Parties under Article 19 of the Convention: Chile,* UNCAT, CAT/C/CHL/CO/5 (23 June 2009); *Concluding observations on the sixth periodic report of Chile*, UNHRC, CCPR/C/CHL/CO/6 (13 August 2014); *Consideration of Reports Submitted by State Parties under Article 40 of the Covenant: El Salvador*, UNHRC, CCPR/C/SLV/CO/6 (18 November 2010); *Consideration of Reports Submitted by State Parties under Article 19 of the Convention: El Salvador*, UNCAT, CAT/C/SLV/CO/2 (9 December 2009); *Concluding observations on the third periodic report of Uruguay*, UNCAT, CAT/C/URY/CO/3 (10 June 2014); *Consideration of Reports Submitted by State Parties under Article 40 of the Covenant: Colombia*, UNHRC, CCPR/C/COL/CO/6 (4 August 2010); *Concluding observations on the fifth periodic report of Colombia*, UNCAT, CAT/C/COL/CO/5 (29 May 2015); *Consideration of Reports Submitted by State Parties under Article 40 of the Covenant: Croatia*, UNHRC, CCPR/C/HRV/CO/2 (4 November 2009); *Consideration of Reports Submitted by State Parties under Article 40 of the Covenant: Sudan*, UNHRC, CCPR/C/SDN/CO/3 (29 August 2007); *Consideration of Reports Submitted by State Parties under Article 40 of the Covenant: Algeria*, UNHRC, CCPR/C/DZA/CO/3 (12 December 2007); *Consideration of Reports Submitted by State Parties under Article 19 of the Convention: Algeria*, UNCAT, CAT/C/DZA/CO/3 (26 May 2008); *Consideration of Reports Submitted by State Parties under Article 19 of the Convention: Benin*, UNCAT, CAT/C/BEN/CO/2 (19 February 2008); *Consideration of Reports Submitted by State Parties under Article 19 of the Convention: The Former Yugoslav Republic of Macedonia*, UNCAT, CAT/C/MKD/CO/2 (21 May 2008); *Consideration of Reports Submitted by State Parties under Article 19 of the Convention: Indonesia*, UNCAT, CAT/C/IDN/CO/2 (2 July 2008); *Consideration of Reports Submitted by State Parties under Article 40 of the Covenant: Yemen*, UNHRC, CCPR/C/YEM/CO/5 (23 April 2012); *Concluding observations on the third periodic report of Senegal*, UNCAT, CAT/C/SEN/CO/3 (January 17, 2013); *Concluding observations on the initial report of Sierra Leone*, UNHRC,

(2004), [74] the UNHRC expanded the prohibition of amnesties to other violations that not only include torture, but also similar cruel, inhuman and degrading treatment, summary and arbitrary killings, and enforced disappearances.[75] More recently, the UNCEDAW added gender-based violations. [76] Moreover, the UNHRC emphasised that amnesties are particularly problematic when benefiting state agents: 'where public officials or State agents have committed violations of the Covenant rights referred to in this paragraph, the States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties and prior legal immunities and indemnities'.[77]

Developing this position as a general policy, the Office of the United Nations High Commissioner for Human Rights has directed United Nations peace negotiators and staff not to 'encourage or condone amnesties regarding war crimes, crimes against humanity, genocide or gross violations of human rights or foster amnesties that violate relevant treaty obligations of the parties, or that impair victims' right to a remedy, or victims' or societies' right to the truth'.[78] Because the decisions of the IACoHR and UN bodies are not binding, states continue to ignore their recommendations; nonetheless, in the words of Lisa Laplante, these interactions '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'.[79]

4.2.3. The Inter-American Court case against self-amnesties

Drawing upon these pronouncements, the Inter-American Court developed a consistent jurisprudence rejecting several amnesties enacted in Latin America. In 1998 the IACtHR referred explicitly to an amnesty law for the first time. Initially in decisions on reparations, the Court briefly examined the Peruvian self-amnesty laws and warned that such measures 'might prevent the identification of the individuals responsible for crimes of this kind, since it obstructs

CCPR/C/SLE/CO/1 (17 April 2014); *Concluding observations on the initial report of Sierra Leone*, UNCAT, CAT/C/SLE/CO/1 (20 June 2014); *Concluding observations on the second periodic report of Nepal*, UNHRC, CCPR/C/NPL/CO/2 (15 April 2014); *Consideration of Reports Submitted by State Parties under Article 40 of the Covenant: Spain*, UNHRC, CCPR/C/ESP/CO/5 (5 January 2007); *Consideration of Reports Submitted by State Parties under Article 19 of the Convention: Spain*, UNCAT, CAT/C/ESP/CO/5 (9 December 2009); *Concluding observations on the eighth periodic report of Ukraine*, UNCEDAW, CEDAW/C/UKR/CO/8 (9 March 2017).

[74] *General comment No. 31 [80]*, UNHRC (n 6).

[75] ibid para 18.

[76] *General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations*, UNCEDAW, CEDAW/C/GC/30 (1 November 2013) para 81.

[77] *General comment No. 31 [80]*, UNHRC (n 6) para 18.

[78] OHCHR, 'Rule-of-Law Tools for Post-Conflict States: Amnesties' (2009) UN Doc HR/PUB/09/1, 44.

[79] Lisa J. Laplante, 'Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes' (2009) 49 Virginia JIntlL 915, 939.

investigation and access to the courts'.[80] The majority of the court did not engage with the analysis of the amnesty, but the concurring opinions consider the permissibility of amnesty in more depth. Judges Cançado Trindade and Abreu Burelli followed the UN position, arguing that self-proclaimed amnesties pertaining to violations of human rights are incompatible with the duty of states to investigate those violations, rendering impossible the vindication of the rights to truth and to the realisation of justice.[81] Conversely, Judge García Ramírez argued that a distinction must be made between self-amnesty that leads to impunity and amnesties that are the result of a peace process, with a democratic base and reasonable scope. In a counter-majoritarian position, he suggested that amnesty laws that strike a complex and delicate balance between the struggle against impunity and the goal of promoting national reconciliation might be admissible under international law.[82]

In 2001 the IACtHR fully engaged for the first time with the analysis of the permissibility of amnesties under the ACHR. For many, *Barrios Altos v. Peru* (2001) is the decision that started the crystallisation of a prohibition on amnesty under international law.[83] Analysing self-amnesty laws passed during Fujimori's regime, the Inter-American Court followed the Commission's interpretation and decided that the state had failed to comply with its obligations to respect and ensure human rights under Articles 1(1) and 2, and to provide judicial protection and access to justice pursuant of articles 8(1) and 25 of the ACHR.[84] More specifically, the IACtHR considered that amnesty provisions are inadmissible because they are designed to eliminate responsibility and 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.[85] The Court did not engage in a balancing of public interests in justice, peace and reconciliation, but rejected amnesties outright.[86] States facing transitional justice have a non-derogable obligation to punish human rights abuses.[87]

Despite initially grouping 'all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility' as equally inadmissible,[88] the IACtHR later emphasised the prohibition of self-amnesties. Focusing on the laws enacted in

[80] *Castillo Páez v. Peru*, IACtHR, Reparations and Costs, Series C No. 43 (27 November 1998) para 105; *Loayza Tamayo v. Peru*, IACtHR, Reparations and Costs, Series C No. 42 (27 November 1998) para 168.
[81] *Castillo Páez v. Peru*, IACtHR (n 80) Joint Concurring Opinion Judges Cançado Trindade and Abreu Burelli, para 1-2.
[82] *Castillo Páez v. Peru*, IACtHR (n 80) Concurring Opinion Judge García Ramírez, para 6, 9.
[83] Laplante (n 79) 919.
[84] *Barrios Altos v. Peru*, IACtHR, Merits, Series C No. 75 (14 March 2001) para 51.
[85] ibid para 41.
[86] Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (n 30) 100.
[87] *Barrios Altos v. Peru*, IACtHR (n 84) para 41.
[88] ibid para 41. In concurring opinion, judge García Ramírez suggested again to differentiate self-amnesty from amnesty enacted as part of a peace process, that may have democratic base and reasonable scope. See: *Barrios Altos v. Peru*, IACtHR (n 84) Concurring Opinion Judge García Ramírez, para 10.

Peru, the Court concluded that, '[s]elf-amnesty laws lead to the defencelessness of victims and perpetuate impunity; therefore, they are manifestly incompatible with the aims and spirit of the Convention'.[89] In a following decision interpreting this judgment, the IACtHR added that the '[e]nactment of a law that is manifestly incompatible with the obligations undertaken by a State Party to the Convention is per se a violation of the Convention for which the State incurs international responsibility'.[90] Therefore, the effects of the decision are general in nature, and applied to other cases precluded because of the self-amnesty.[91] These considerations were repeated in *La Cantuta v. Peru* (2006).[92] Rather than giving orders to the state to repeal or annul the measures, the IACtHR indicated that self-amnesty laws designed to avoid justice had lacked effect from the beginning.[93] In these circumstances, such decisions constitute a 'fictitious' or 'fraudulent' *res judicata*, so the decision of the Inter-American Court has direct effect, investigations can be reopened, and the double jeopardy principle does not apply.[94]

Later in *Almonacid Arellano v. Chile* (2006), the IACtHR studied the failure of the Chilean state to investigate and punish crimes committed during the military dictatorship of Augusto Pinochet, based on the Amnesty Decree of 1978.[95] The IACtHR considered that Chile granted 'a self-amnesty, since it was issued by the military regime to avoid judicial prosecution of its own crimes'.[96] However, more than the nature of the self-amnesty, the Court focused on the *ratio legis* of the measure created to shield perpetrators of grave human rights abuses from prosecution.[97] In this case, the Court followed its own precedent from *Barrios Altos* and added three considerations to the prohibition on amnesty. First, it characterised the murder of Luis Alfredo Almonacid Arellano as a crime against humanity and concluded that amnesty laws are not permissible for such crimes. Second, it emphasised that truth commissions are 'no substitute for the duty of the State to reach the truth through judicial proceedings'.[98] Third, it developed for the first time the conventionality control doctrine:

> The Court is aware that domestic judges and courts are bound to respect the rule of law, and therefore, they are bound to apply the provisions in force within the legal system. But when a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This

[89] *Barrios Altos v. Peru*, IACtHR (n 84) para 43.
[90] *Barrios Altos v. Peru*, IACtHR, Interpretation of the Judgment of the Merits, Series C No. 83 (3 September 2001) para 18.
[91] ibid para 18.
[92] *La Cantuta v. Peru*, IACtHR, Merits, Reparations and Costs, Series C No. 162 (29 November 2006).
[93] Binder (n 2) 1212.
[94] *La Cantuta v. Peru*, IACtHR (n 92) para 153.
[95] *Almonacid Arellano et al. v. Chile*, IACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 154 (26 September 2006).
[96] ibid para 120.
[97] Binder (n 2) 1211.
[98] *Almonacid Arellano v. Chile*, IACtHR (n 95) para 150. See also: *La Cantuta v. Peru*, IACtHR (n 92) para 224.

> forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their inception. In other words, the Judiciary must exercise a sort of "conventionality control" between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention.[99]

The Chilean government accepted the incompatibility of self-amnesty laws with the ACHR but argued that it was a reality under domestic law that the Congress refused to change, so it could only implement mechanisms to avoid its negative effects.[100] The IACtHR applauded the fact that domestic courts have not applied the self-amnesty in many cases since 1998 but considered that the state has a general obligation to annul all legislation that is in violation of the ACHR.[101] While condemning the Chilean state as a whole, the IACtHR empowered and obliged domestic courts to apply the ACHR directly and follow the interpretations of the Court.[102] Moreover, in case of conflict between domestic legislation and the ACHR, the Inter-American Court considered that national judges shall give preference to the convention's norms, giving domestic judges authority to bypass domestic legislatures by directly applying international law.[103] As discussed in the following sections, this doctrine would become a key feature of the dialogue between the Inter-American System of Human Rights and domestic courts in the rejection of amnesty laws in the region.[104]

4.2.4. Ratio legis and the expansion of the prohibition on amnesties

In the following years, the IACtHR strengthened its stance against amnesties. After focusing on blanket and self-amnesties in Chile and Peru, with the examination of similar measures in other countries the Court expanded the prohibition to include negotiated and democratically ratified amnesties. In *Gomes Lund v. Brazil* (2010),[105] the IACtHR faced the

[99] ibid para 124.
[100] ibid para 85.
[101] ibid para 121.
[102] Jorge Contesse, 'The international authority of the Inter-American Court of Human Rights: a critique of the conventionality control doctrine' (2018) 22 IJHR 1168, 1170.
[103] ibid 1170.
[104] See: Jorge Contesse, 'The final word? Constitutional dialogue and the Inter-American Court of Human Rights' (2017) 15 I•CON 414; Contesse, 'The international authority of the Inter-American Court of Human Rights' (n 102); Binder (n 2).
[105] *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, IACtHR, Preliminary Objections, Merits, Reparations, and Costs, Series C No. 219 (24 November 2010).

Amnesty Law promulgated in 1973 and upheld by the Federal Supreme Court in 2010.[106] Despite being issued during the military dictatorship, the Court considered that the Brazilian amnesty was not a self-amnesty in a strict sense because it also applied to members of guerrilla groups.[107] Carrying out a comprehensive revision of the decisions on amnesty adopted by international bodies and domestic courts in other countries of Latin America, the Court concluded that,

> all of the international organs for the protection of human rights and several high courts of the region that have had the opportunity to rule on the scope of amnesty laws regarding serious human rights violations and their compatibility with international obligations of States that issue them, have noted that these amnesty laws impact the international obligation of the State to investigate and punish said violations.[108]

Thus, the IACtHR considered that the prohibition of amnesty extended to all 'amnesties of serious human rights violations and is not limited to those which are denominated "self-amnesties"'.[109] Besides, the Inter-American Court took the opportunity to apply the conventionality control doctrine more directly. Criticising the decision of the Brazilian Federal Supreme Court, the IACtHR concluded that the judicial power in Brazil is internationally obliged to take into account the ACHR and the Inter-American Court's interpretation when examining the constitutionality of the amnesty law.[110]

Examining the Uruguayan amnesty law (also known as 'the Expiry Law'), the IACtHR continued with the expansion of the prohibition on amnesties in *Gelman v. Uruguay* (2011), repeating that the scope of its decisions is not limited to self-amnesties.[111] The Expiry Law was promulgated in 1986 by the democratic government that followed the civic-military dictatorship in Uruguay, and it was challenged by referendum twice, in 1989 and 2009, failing to reach a majority to revoke the measure on both occasions. The Inter-American Court dismissed this as irrelevant, considering that to evaluate the legality of the measure, 'more than the adoption process and the authority which issued the Amnesty Law, [the Court] heads to its *ratio legis*: to leave unpunished serious violations committed in international law'.[112] Thus, it

[106] *Arguição de Descumprimento de Preceito Fundamental 153 (Lei Anistia)*, Supremo Tribunal Federal do Brasil, ADPF 153 (28 April 2010).
[107] Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (n 2) 1094.
[108] *Gomes Lund v. Brazil*, IACtHR (n 105) para 170.
[109] ibid para 175.
[110] ibid para 176.
[111] *Gelman v. Uruguay*, IACtHR, Merits and Reparations, Series C No. 221 (24 February 2011) para 229.
[112] ibid.

concluded that the democratic approval of amnesty laws does not automatically legitimise it under international law.[113]

More recently, the IACtHR extended the prohibition to general amnesties negotiated as part of a peace agreement to put an end to non-international conflicts. In the *Massacres of El Mozote v. El Salvador* (2012), the Court analysed for the first time an amnesty that was applied in the context of a peace settlement between the Salvadoran government and the Farabundo Martí National Liberation Front.[114] The IACtHR built upon its own precedent on the incompatibility of amnesties with human rights standards, but also examined the permissibility of the amnesties at the end of non-international conflicts under article 6(5) of the APII to the Geneva Conventions.[115] The IACtHR acknowledged that '[a]ccording to the international humanitarian law applicable to these situations, the enactment of amnesty laws on the conclusion of hostilities in non-international armed conflicts are sometimes justified to pave the way to a return to peace'.[116] However, following the interpretation of the International Committee of the Red Cross, it argued that the obligation to prosecute war crimes and crimes against humanity puts limits to the permissibility of amnesties.[117]

Complementing this with the analysis of the amnesty in light of the peace agreement, the IACtHR concluded that the Law of General Amnesty for the Consolidation of Peace did not respect the guidelines of the Peace Accord.[118] The general amnesty explicitly contradicted what the parties to the armed conflict themselves agreed,[119] perpetuating 'a situation of impunity owing to the absence of investigation, pursuit, capture, prosecution and punishment of those responsible for the facts, thus failing to comply with Articles 1(1) and 2 of the Convention'.[120] The Court focussed its analysis on the *ration legis* and the effect of the measure, concluding that general amnesties covering war crimes and crimes against humanity violate the ACHR and other international instruments.

Throughout these cases, which are the backbone of the case law on amnesty in the Inter-American Human Rights System, the IACtHR has been consistent in rejecting amnesty measures. This precedent has also been reinforced in other decisions that are not centred in

[113] ibid para 238.
[114] *Massacres of El Mozote and surrounding areas v. El Salvador*, IACtHR, Merits, Reparations and Costs, Series C No. 252 (25 October 2012) para 284.
[115] ibid para 284.
[116] ibid para 285.
[117] ibid para 286.
[118] ibid para 287.
[119] ibid para 292.
[120] ibid para 296.

amnesty.[121] Most recently, in *Herzog v. Brazil (2018),* the Court repeated that the prohibition of amnesty is not grounded upon procedural considerations or the authority that issued the amnesty law, but the consequence of leaving unpunished serious violations of international law committed by the military regime.[122] Additionally, in follow-up decisions to cases in Guatemala and El Salvador, the IACtHR warned that legislative initiatives to grant general amnesties in those countries would be in direct violation of the ACHR and the international obligations on both states. [123] There seems to be consensus in the Latin American and the UN Systems about the prohibition of amnesties for crimes against humanity and war crimes, particularly when they are self-amnesties or when the *ratio legis* of the measure is to secure impunity for the perpetrators.

4.3. The 'vertical' expansion of the judicial dialogue

Slaughter's typology of judicial dialogue identifies three types of interactions. Vertical dialogue describes communications between national and supranational courts.[124] Horizontal dialogue refers to communications that take place 'between courts of the same status, whether national or supranational, across national or regional borders'.[125] Mixed vertical-horizontal dialogue covers several different kinds of interactions between domestic and supranational bodies.[126] Even though the language is outdated and it is somewhat problematic to refer to a relationship that is not vertical in the hierarchical sense, this typology is useful for an initial

[121] See: *Myrna Mack Chang v. Guatemala*, IACtHR, Merits, Reparations and Costs, Series C No. 101 (25 November 2003) para 276; *19 Merchants v. Colombia*, IACtHR, Merits, Reparations and Costs, Series C No. 109 (5 July 2004) para 262; *Moiwana Community v. Suriname*, IACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 124 (15 June 2005) para 167; Mapiripan Massacre v. Colombia, IACtHR, Merits, Reparations and Costs, Series C No. 134 (15 September 2005) para 304; *The Rochela Massacre v. Colombia*, IACtHR, Merits, Reparations and Costs, Series C No. 163 (11 May 2007) para 294; *Anzualdo Castro v. Peru*, IACtHR, Preliminary Objection, Merits, Reparations and costs, Series C No. 202 (22 September 2009) para 161; *Las Dos Erres Massacre v. Guatemala*, IACtHR, Preliminary Objection, Merits, Reparations and Costs, Series C No. 211 (24 November 2009) para 129; *Cepeda Vargas v. Colombia*, IACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 213 (26 May 2010) para 216; *García Lucero et al. v. Chile*, IACtHR, Preliminary Objection, Merits and Reparations, Series C No. 267 (28 August 2013) para 150; *Osorio Rivera and family members v. Peru*, IACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 274 (26 November 2013) para 213; *Rochac Hernández et al. v. El Salvador*, IACtHR, Merits, Reparations and Costs, Series C No. 285 (14 October 2014) para 212; *Tarazona Arrieta et al. v. Peru*, IACtHR, Preliminary Objection, Merits, Reparations and Costs, Series C No. 286 (15 October 2014) para 157; *Members of the Village of Chichupac and neighboring communities of the Municipality of Rabinal v. Guatemala*, IACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 328 (30 November 2016) para 247; among others.

[122] *Case of Herzog et al. v. Brazil*, IACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 353 (15 March 2018) para 175.

[123] *Members of the Village of Chichupac and other cases v. Guatemala*, IACtHR (n 21); *El Mozote v. El Salvador*, IACtHR, 2019 (n 22).

[124] Anne-Marie Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 University of Richmond LRev 99, 106.

[125] ibid 103.

[126] ibid 111.

characterisation of judicial interactions. This section shows how domestic courts in Latin America engaged in an active dialogue with the Inter-American System, enhancing the reach of the decisions of the IACtHR and its position against amnesties.

From the reading of domestic decisions on amnesty in Latin America, 501 external citations were identified. This accounts for the references to the decisions of other courts and human rights bodies in the discussion of the permissibility of amnesties.[127] The majority of references were to the Inter-American System of Human Rights, with 369 citations of decisions from the IACtHR, 27 from the IACoHR, 31 from UN human rights bodies, 25 from other transnational courts, and 49 from domestic courts in other countries. The influence of the Inter-American Court in municipal courts is not only quantitative, but also qualitative. Domestic courts in Argentina, Chile, Peru, Uruguay, and Venezuela, have appealed to the decisions of the IACtHR to revoke domestic amnesties.

This synergy can be explained by three main factors. The first factor is the nature (or absence) of the transitional process in authoritarian regimes that implemented amnesties with the purpose of shielding people in power from justice. Courts have arisen as protectors of the rule of law in periods of military dictatorships, autocratic regimes and concentration of power. The second factor is the development of the conventionality control doctrine, which imposes obligations on courts to apply the ACHR and follow the authoritative interpretation of the IACtHR. The third factor is the doctrine of the block of constitutionality that has been incorporated in many countries of the region, giving constitutional status to human rights treaties under domestic law.

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

In the aftermath of authoritarian regimes in Argentina, Uruguay, Peru, and Chile, courts strengthened their independence and deepened their protection of the separation of powers and the rule of law. Courts have found different ways to eschew the application of amnesty measures. Understanding themselves as autonomous actors in the international system, national courts have interacted with judicial bodies beyond their borders, speaking a common language and engaging in a common enterprise.[128]

[127] In order to analyse the judicial interactions in the discussion of amnesties, the study only registered the references made in the relevant sections. Citations made in relation to other subject matters were not included.
[128] Slaughter, 'A Typology of Transjudicial Communication' (n 124) 136.

In Argentina and Uruguay, courts have been vocal about the terms of the amnesty violating the separation of powers. The Supreme Court in Argentina argued that, with the expedition of the Full Stop Law (Law 23.492/1986) and Due Obedience Law (Law 23.521/1987), the executive power assumed discretionary powers from the legislative branch to issue amnesty laws, and limited the powers of the judicial branch to decide on the criminal responsibility of individuals, in a way that is incompatible with the separation of powers contained in article 29 of the Argentinean Constitution.[129] Similarly, the Supreme Court of Uruguay acknowledged that the state has discretionary powers to grant amnesty under article 85(14) of the Uruguayan Constitution.[130] However, appealing to the nature of the law, which limits the punitive powers of the state and acts more as a statute of limitations, the Supreme Court concluded that the Expiry Law was not an amnesty law.[131] The Court considered that such law violates the separation of powers because the declaration of the prescription of a crime depends on the decision of the judiciary in a case-by-case basis.[132]

In Peru, the judiciary reacted quickly against the expedition of the general self-amnesty covering all crimes committed by military members and civilians during what was called 'the war on terrorism' between 1980 and 1995 (Law 26.479). In a case against Santiago Enrique Martin Rivas, Julio Salazar Monroe and other members of the Death Squad (*Saquicuray's case*), Criminal Judge No. 16 of Lima decided not to apply the amnesty law only few months after their expedition.[133] Judge Saquicuray appealed to international law to argue that self-amnesties are incompatible with international and constitutional obligations to investigate and punish human rights violations, as well as obligations to provide victims with effective remedies and access to justice.[134] In reaction, the Fujimori administration passed a bill obliging courts to apply the amnesty laws (Law 26.492). In 1997 the Constitutional Tribunal was called to review the constitutionality of the general self-amnesty laws.[135] Despite acknowledging the faculty to grant amnesty as a constitutional discretion of the congress, the Tribunal was highly critical of the law, arguing that blanket amnesties were problematic and affect the right to truth

[129] *Caso contra Julio Héctor Simón y otros*, Corte Suprema de Justicia de la Nación de Argentina, Recurso de hecho, S. 1767. XXXVIII, Causa No. 17.768, Fallo 328:2056 (14 June 2005); *Caso contra Santiago Omar Riveros (Caso Julio Lilo Mazzeo y otros)*, Corte Suprema de Justicia de la Nación, Casación e inconstitucionalidad, M. 2333. XLII, Fallo 330:3248 (13 July 2007); *Caso contra Julio Héctor Simón y Juan Antonio del Cerro (caso Simón o caso Poblete)*, Juzgado Nacional en lo Criminal y Correccional Federal No. 4 de Argentina, Juez Gabriel Cavallo, Causa No. 8686/2000 (6 March 2001) 124.
[130] *Sabalsagaray Curutchet, Blanca Stela – Excepción de inconstitucionalidad Ley 15.848*, Suprema Corte de Justicia de Uruguay, Sentencia No. 365 (19 October 2009) 25.
[131] ibid 25.
[132] ibid 28.
[133] *Caso contra Santiago Martín Rivas and others*, Juzgado Penal No. 16 de Lima - Peru, Juez Antonia Saquicuray Sánchez (16 June 1995).
[134] ibid 2.
[135] *Demanda de inconstitucionalidad Ley No. 26479 y Ley No. 26492*, Tribunal Constitucional de Perú, Exp. No. 013-96-I/TC (28 April 1997).

of victims and the society as a whole.[136] The Constitutional Tribunal suggested that the amnesty laws were unconstitutional, but decided not to adopt a decision on merits because it considered that the amnesty laws had had effect before the creation of the Tribunal in 1996.[137] Many domestic proceedings were terminated, including the two massacres of Barrios Altos and La Cantuta, so the cases made their way up to the inter-American Court.[138]

In Chile, despite being reluctant to revoke the self-amnesty, the Supreme Court and other municipal courts have found ways to avoid the application of the amnesty decree. In the aftermath of the military dictatorship, the Congress failed to achieve the necessary majorities to modify the decree No. 2191 issued by General Pinochet, granting blanket amnesty for crimes committed between 1973 and 1978, which mostly benefited members of the military regime. Despite attempts by the successor government of Patricio Aylwin to change the law, the amnesty remained valid.[139] The amnesty was then challenged before the courts. The Court of Appeals of Santiago advanced the argument that the country was experiencing an armed conflict during the dictatorship and, building upon the state's international obligations, the self-amnesty was incompatible with the Geneva Conventions and the ACHR.[140] Consequently, the Court of Appeals ordered the judge to continue with the investigation and prosecution of *Osvaldo Romo Mena*.[141] The Supreme Court was initially reluctant to revoke the self-amnesty, overturning the decisions of the Court of Appeals and upholding the application of the amnesty.[142] The Chilean Supreme Court validated the constitutionality of the amnesty, arguing that the state had discretionary powers to enact amnesties and international treaties were not applicable because they were not yet incorporated into Chilean legislation by the time the crimes took place.[143]

In 1998, however, the Supreme Court changed its precedent in a landmark case about the enforced disappearance of *Pedro Poblete Córdova* by members of the National Intelligence Directorate (DINA).[144] The complaint argued that the general amnesty had been applied without identifying the persons responsible for his disappearance. The Supreme Court invoked

[136] ibid para 3, 9.
[137] ibid Decision.
[138] Contesse, 'The international authority of the Inter-American Court of Human Rights' (n 102) 1180.
[139] Roht-Arriaza and Gibson, 'The Developing Jurisprudence on Amnesty' (n 2) 248.
[140] *Caso contra Osvaldo Romo Mena*, Corte de Apelaciones de Santiago de Chile, Rol 13.597-94 (26 September 1994) para 8; *Caso contra Osvaldo Romo Mena*, Corte de Apelaciones de Santiago de Chile, Rol 38.683-94 (30 September 1994) para 8.
[141] *Osvaldo Romo Mena* Rol 13.597-94, Corte de Apelaciones de Santiago de Chile (n 140).
[142] See: *Caso contra Manuel Contreras*, Corte Suprema de Chile, Recurso de inaplicabilidad de amnistía, Rol 553-78 (24 August 1990); *Caso contra Osvaldo Romo Mena*, Corte Suprema de Chile, Rol 5.566 (26 October 1995); *Caso contra Osvaldo Romo Mena*, Corte Suprema de Chile, Rol 5.476-94 (30 January 1996).
[143] *Osvaldo Romo Mena* Rol 5.566, Corte Suprema de Chile, 1995 (n 142); *Osvaldo Romo Mena* Rol 5.476-94, Corte Suprema de Chile, 1996 (n 142).
[144] *Caso por la desaparición de Pedro Poblete Córdova por miembros de la Dirección de Inteligencia Nacional (DINA)*, Corte Suprema de Chile, Rol 469-98 (9 September 1998).

the obligation in the Geneva Convention to investigate and punish grave breaches of humanitarian law.[145] The Court avoided a discussion of the legality of the amnesty, focusing on its terms. It decided not to apply the amnesty to the case based upon two main arguments. First, it considered the text of the amnesty, which states that it applies to 'every person who has participated in a criminal offence…'[146] In this case, the persons who participated in the disappearance of Poblete Córdova had not been identified, so no one could benefit from the amnesty according to the law's own terms.[147] The state has an obligation to at least investigate the facts of the case and identify the persons responsible before granting amnesty. Second, the Supreme Court concluded that crimes like forced disappearance and illegal detention are continuous crimes that are not covered by the temporal scope of the amnesty.[148]

Subsequently, the Chilean courts found ways to avoid the application of the amnesty.[149] Without invalidating the amnesty decree, the Supreme Court and the Court of Appeals of Santiago followed the arguments of the Poblete case to eschew the application of the amnesty in other cases.[150] This was similar to the situation in Argentina, where, before the invalidation of the Full Stop and Due Obedience Laws in the *Simón case* in 2005, courts were already finding ways to avoid their application.[151]

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[145] ibid para 8.

[146] Article 1 of the Decree-Law 2.191/98 puts it in the following terms in Spanish: "Concédese amnistía a todas las personas que, en calidad de autores, cómplices o encubridores hayan incurrido en hechos delictuosos, durante la vigencia de la situación de Estado de Sitio …"

[147] *Pedro Poblete Córdova* Rol 469-98, Corte Suprema de Chile (n 144) para 6-7.

[148] ibid para 11.

[149] After the Pedro Poblete Córdova the majority of courts have decided to reject the application of amnesty in Chile. However, there are some examples of decisions upholding its application. See for instance: *Caso contra Claudio Abdón Lecaros Carrasco y otros - Episodio San Javier*, Corte de Apelaciones de Santiago de Chile, Rol 2.182-98 (15 May 2006).

[150] See: *Caso contra Augusto Pinochet Ugarte*, Corte Suprema de Chile, Decisión de desafuero, Rol. 2.182-98 (8 August 2000); *Caso contra miembros de la Dirección Nacional de Inteligencia (DINA)*, Corte Suprema de Chile, Recurso de Casación, Rol No. 1379/2001, Resolución No. 10070 (10 July 2002); *Caso por cuerpos encontrados en el Fuerte Arteaga del Ejército*, Corte Suprema de Chile, Recurso de casación, Rol No. 1359/2001, Resolución No. 13080 (26 August 2002); *Caso contra miembros de la Patrulla de Carabineros*, Corte Suprema de Chile, Recurso de casación, Rol No. 4054/2001, Resolución No. 2222 (31 January 2003); *Caso contra miembros de la Dirección Nacional de Inteligencia (DINA)*, Corte Suprema de Chile, Recurso de casación, Rol No. 2231/2001, Resolución No. 14628 (28 August 2003); *Caso contra miembros de la Dirección Nacional de Inteligencia (DINA)*, Corte Suprema de Chile, Recurso de casación, Rol No. 695/2003, Resolución No. 27857 (22 December 2005); *Caso contra miembros de la Dirección Nacional de Inteligencia (DINA)*, Corte Suprema de Chile, Recurso de casación, Rol 1813/2014, Resolución No. 205597 (2 September 2014); *Caso contra Fernando Laureani Maturana y Krassnoff Marchenko (desaparición de Miguel Ángel Sandoval en Villa Crimaldi)*, Corte de Apelaciones de Santiago de Chile, Rol No. 11821-2003 (5 January 2004); *Caso contra Juan Manuel Contreras Sepúlveda y otros (desaparición de Diana Frida Arón Svigilsky en Villa Crimaldi)*, Corte de Apelaciones de Santiago de Chile, Rol No. 2.182-98 (14 May 2004); *Caso contra Fernando Laureani Maturana y Krassnoff Marchenko (desaparición de Miguel Ángel Sandoval en Villa Crimaldi)*, Corte Suprema de Chile, Rol No. 517-2004 (17 November 2004); *Caso contra Juan Manuel Contreras Sepúlveda y otros (desaparición de Diana Frida Arón Svigilsky en Villa Crimaldi)*, Corte Suprema de Chile, Rol No. 3215/2005 (30 May 2006).

[151] See for instance: *Caso contra Jorge Rafael Videla y otros*, Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal de Buenos Aires, Argentina, Causa No. 13-84 (9 December 1985); *Caso contra Jorge Rafael Videla*, Corte Suprema de Justicia de la Nación, Incidente de excepción de cosa juzgada y falta de jurisdicción, V. 34. XXXVI (21 August 2003); *Caso contra Alfredo Ignacio Astiz*, Corte Suprema de Justicia de la Nación de Argentina, extradición, A. 1553. XXXIX (11 December 2003); *Caso contra Enrique Lautaro Arancibia Clavel*, Corte Suprema de Justicia de la Nación de Argentina, Recurso de hecho, A. 533. XXXVIII, Causa No. 259, Fallo 327:3312 (24 August 2004).

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

The decisions of the Inter-American Court have had a direct impact in the decision making of domestic courts.[152] Particularly in countries where the IACtHR decided on the incompatibility of the amnesty with the ACHR, municipal courts have used those pronouncements to limit or revoke the legal effects of the measures. In countries like Chile and Brazil, despite the amnesty measures remaining valid, courts have referenced the case law of the IACtHR (particularly *Barrios Altos v. Peru*, *Almonacid Arellano v. Chile* and *Gomes Lund v. Brazil*) to limit the application of the measure in specific cases.[153] In other countries, including Peru, and El Salvador, the decisions of the IACtHR (namely *Barrios Altos v. Peru,* and *Massacres of El Mozote v. El Salvador*) have been instrumental in the decision making of domestic courts to invalidate the amnesties.[154]

As explained above, in *Almonacid Arellano v. Chile,* the IACtHR began to develop the conventionality control doctrine.[155] In practice, the doctrine demands that domestic courts disregard or even revoke domestic regulations that fail to comply with the ACHR and the Court's authoritative interpretation.[156] Under the conventionality control doctrine, domestic legislation that is incompatible with the American Convention lacks legal effects. This has two effects: it engages national courts in a decentralised control of that compatibility, and it gives direct effect to judgments of the IACtHR that are authoritative interpretations of the ACHR.[157] The doctrine formalises the idea of judicial dialogue or conversation on the protection of human rights between national authorities and international bodies.[158]

In Peru, the decisions of the Inter-American Court had a significant influence in the cases against Santiago Enrique Martín Rivas for his responsibility in the Barrios Altos and La Cantuta massacres.[159] After deciding not to revoke the laws, in 2005 the Constitutional Tribunal

[152] Binder (n 2) 1225.
[153] See cases in Chile: *Caso contra Paulino Flores Rivas y otros (Caso Molco)*, Corte Suprema de Chile, Rol No. 559-2004 (13 December 2006); *Caso contra Víctor Raúl Pinto Pérez*, Corte Suprema de Chile, Rol No. 3125-04 (13 March 2007); *Caso contra Cesar Manriquez Bravo y otros (Operación Colombo)*, Corte de Apelaciones de Santiago de Chile, Rol No. 2182-98 (30 May 2017); *Caso contra Orlando Astete Sánchez*, Corte de Apelaciones de Valparaiso, Chile, Rol No. 345-2017 (3 July 2018). See cases in Brazil: *Ministério Público Federal v. Antônio Waneir Pinheiro Lima*, Apelação Criminal- Turma Espec. I - Penal do Brasil, Previdenciário e Propriedade Industrial, No. CNJ 0500068-73.2018.4.02.5106 (14 August 2019).
[154] See decision in El Salvador: *Revisión de constitucionalidad Ley de Amnistía General para la Consolidación de la Paz*, Corte Suprema de Justicia de El Salvador – Sala de lo Constitucional, No. 44-2013/145-2013 (13 July 2016). See decision in Peru: *Recurso de Amparo por Santiago Enrique Martín Rivas – Barrios Altos*, Tribunal Constitucional de Perú, Exp. No. 4587-2004-AA/TC (29 November 2005).
[155] *Almonacid Arellano v. Chile*, IACtHR (n 95) para 124.
[156] Contesse, 'The final word?' (n 104) 416.
[157] Binder (n 2) 1204.
[158] Contesse, 'The final word?' (n 104) 417; Contesse, 'The international authority of the Inter-American Court of Human Rights' (n 102) 1170.
[159] See: *Santiago Enrique Martín Rivas – Barrios Altos*, Tribunal Constitucional de Perú (n 154); *Recurso de Amparo por Santiago Enrique Martín Rivas – La Cantuta*, Tribunal Constitucional de Perú, Exp. No. 679-2005-PA/TC (2 March 2007).

adopted a stronger position against the amnesties. In the decision on the *Barrios Altos* case (2005), the Tribunal argued that there was a systematic plan to grant impunity to state officials in Peru.[160] Directly applying the precedent of the IACtHR in *Barrios Altos v. Peru*, the Tribunal concluded that the general self-amnesty laws were framed in that systematic plan and such mechanisms are incompatible with the international obligations of Peru.[161] Later, in a decision on the *La Cantuta case* (2007), the Tribunal expanded on these arguments and, referencing several decisions of the IACtHR on Peru, concluded that the amnesty lacks legal effects and do not constitute *res judicata* when it is enacted with the sole purpose of covering up crimes against humanity and letting perpetrators avoid justice.[162] Following these decisions, Peruvian courts have reopened cases for human rights abuses and have rejected the application of the self-amnesty laws, expanding upon the situation of systematic impunity in which those laws were framed.[163]

In El Salvador, the General Amnesty Law was challenged before the Constitutional Chamber of the Supreme Court in 1993 and 2000.[164] On both occasions, the Supreme Court upheld the constitutionality of the General Amnesty Law, arguing that the state had discretionary powers to enact amnesties, as a mechanism of public interest for addressing situations of violence.[165] In 2016, however, the General Amnesty Law was challenged for the third time.[166] With the decision of the IACtHR in 2012 in *El Mozote v. El Salvador*, the Supreme Court changed its position and argued that the amnesty law needs to follow international standards.[167] Amnesty laws, used as mechanisms of transitional justice, can facilitate transition to peace, but they can also become an obstacle for justice and reconciliation.

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[160] *Santiago Enrique Martín Rivas – Barrios Altos*, Tribunal Constitucional de Perú (n 154) para 81.
[161] ibid para 61.
[162] *Santiago Enrique Martín Rivas – La Cantuta*, Tribunal Constitucional de Perú (n 159) para 53.
[163] *Recurso de Amparo por Julio Rolando Salazar Monroe – Barrios Altos*, Tribunal Constitucional de Perú, Exp. No. 03938-2007-PA/TC (5 November 2007); *Caso contra Wilmer Yarlequé Ordinola and Alberto Segundo Pinto Cárdenas (Masacres de La Cantuta y Barrios Altos)*, Corte Superior de Justicia de Lima – Primera Sala Penal especial, Exp. No. 09-2008-1SPE/CSJL (3 July 2008); *Causa contra Alberto Fujimori*, Corte Suprema de Justicia de Perú – Sala Penal Especial, Sentencia de primera instancia, Exp. No. A.V. 19-2001 (7 April 2009); *Causa contra Alberto Fujimori*, Corte Suprema de Justicia de Perú – Sala Penal Transitoria, Recurso de nulidad, Exp. No. A.V. 19-2001-09 (7 April 2009); *Recurso de Amparo por Roberto Contreras Matamoros*, Tribunal Constitucional de Perú, Exp. No. 00218-2009-PHC/TC (11 November 2010); *Caso contra Vladimiro Montesinos y otros – Grupo Colina*, Corte Suprema de Justicia de Perú – Sala Penal Permanente, Exp. No. 4104-2010 (20 July 2012); *Caso contra Vladimiro Montesinos y otros – Grupo Colina*, Corte Suprema de Justicia de Perú – Sala Penal Permanente, Exp. No. 4104-2010 (20 March 2013); *Control de convencionalidad al indulto concedido a Alberto Fujimori*, Corte Suprema de Justicia de Perú - Juzgado Supremo de Investigación Preparatoria Control de Convencionalidad, Exp. No. 00006-2001-4-5001-SU-PE-01 (3 October 2018).
[164] See: *Revisión de constitucionalidad Ley de Amnistía General para la Consolidación de la Paz*, Corte Suprema de Justicia de El Salvador – Sala de lo Constitucional, No. 10-93 (20 May 1993); *Revisión de constitucionalidad Ley de Amnistía General para la Consolidación de la Paz*, Corte Suprema de Justicia de El Salvador – Sala de lo Constitucional, No. 24-97/21-98 (26 September 2000).
[165] *Constitucionalidad Ley de Amnistía General*, Corte Suprema de Justicia de El Salvador 1993 (n 164) 5; *Constitucionalidad Ley de Amnistía General*, Corte Suprema de Justicia de El Salvador 2000 (n 164) 18.
[166] *Constitucionalidad Ley de Amnistía General*, Corte Suprema de Justicia de El Salvador 2016 (n 154).
[167] ibid 12.

Following this, the Supreme Court placed emphasis on the prohibition of amnesty for war crimes and crimes against humanity, general or unconditional amnesties, and self-amnesties.[168] Referencing the case law of the IACtHR against El Salvador, the Supreme Court declared that the General Amnesty Law was not constitutional because it provided for a blanket and unconditional amnesty that violated the victims' rights to effective remedies and the obligations to investigate and punish human rights violations.[169]

Courts in Brazil have probably upheld the amnesty most decisively.[170] In fact, they have been cited as an example of the lack of general practice in the region banning amnesty laws.[171] In 2010, Brazil's Supreme Federal Tribunal validated the self-amnesty enacted in 1979 by the government of João Figueiredo to facilitate the transition to a democratic system, arguing that congress had discretionary powers to enact amnesties and decide their scope by including state agents.[172] This decision was the object of analysis and repudiation by the IACtHR in the *Gomes Lund* and *Herzog v. Brazil* cases. As explained before, the IACtHR considered that this judicial decision upholding the amnesty was incompatible with the conventionality control doctrine that calls upon courts to apply the ACHR domestically.

After the Gomes Lund decision, federal prosecutors in Brazil tried to comply with the IACtHR opening cases for crimes against humanity notwithstanding the self-amnesty.[173] Brazilian judges and courts, including the Supreme Federal Tribunal, have refused those attempts. [174] In a recent 2019 decision, the 2nd Regional Federal Tribunal based in Rio de Janeiro decided to overrule the amnesty granted to Antônio Waneir Pinheiro Lima, a retired army sergeant, accused of kidnapping and raping Inês Etienne Romeu during the dictatorship at the torture centre known as the 'House of Death'.[175] The Regional Tribunal applied the conventionality control doctrine and argued that the ACHR has direct application in Brazil.[176] Referencing the *Gomes Lund* and *Herzog cases*, the tribunal considered that even though the amnesty was previous to the ratification of the ACHR by Brazil, the state had failed to

[168] ibid 13-18.
[169] ibid 25, 40.
[170] Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (n 2) 1109.
[171] Mallinder, 'The End of Amnesty or Regional Overreach' (n 25) 657.
[172] *Lei Anistia*, Supremo Tribunal Federal do Brasil (n 106).
[173] Emilio Peluso Neder Meyer and Fabrício Bertini Pasquot Polido, 'Brazil in the Dock: The Inter-American Court of Human Rights Rulings Concerning the Dictatorship of 1964-1985' (*VerfBlog on Matters Constitutional*, 2018) <https://verfassungsblog.de/brazil-in-the-dock-the-inter-american-court-of-human-rights-rulings-concerning-the-dictatorship-of-1964-1985/> accessed 2 September 2021.
[174] Following its own precedent, the Supreme Federal Tribunal granted amnesty to Agnese Fayad for crimes that amount gross human rights violations. See: *Reclamação 18.686 Rio De Janeiro - Tutela de urgência Ricardo Agnese Fayad*, Supremo Tribunal Federal do Brasil, RCL 18.686/RJ (23 November 2018).
[175] *Ministério Público Federal v. Antônio Waneir Pinheiro Lima*, Apelação Criminal- Turma Espec. I - Penal do Brasil, Previdenciário e Propriedade Industrial, No. CNJ 0500068-73.2018.4.02.5106 (14 August 2019).
[176] ibid 13.

investigate the crimes and provide effective remedies to the victims in the following years.[177] The decision openly contradicted the pronouncement of the Supreme Tribunal and referred to the decisions of courts in other Latin American countries, criticising the role that Brazilian judges have had in the aftermath of the dictatorship.[178]

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

The doctrine of the constitutionality block in Latin American Countries has complemented the conventionality control doctrine and reinforced the incorporation of international human rights standards into the domestic constitutional framework. In fact, Jorge Contesse has called this a form of 'bottom-up conventionality control'.[179] While the IACtHR developed the conventionality control to bridge its work with domestic tribunals, national courts have relied on the block of constitutionality theory to directly apply international human rights law. Under this doctrine, international human rights treaties are incorporated into the constitutional framework and, therefore, are enforceable by courts under domestic law and become parameters for examining the constitutionality of other legal measures.[180] In Argentina and Colombia, despite the IACtHR not having a decision on the legality of the amnesty measures enacted in these countries, courts have used the constitutionality block doctrine to apply the standards developed by the Inter-American Court in their judgments.[181]

The constitutionality block was invoked in the *Simón case*, where the Argentinean Supreme Court argued that congress has the discretion to grant amnesty under article 75(20) of the Constitution, but that faculty is limited by international treaties under article 75(22).[182] Applying this doctrine, the Supreme Court evaluated the amnesty laws in light of the ACHR and the authoritative interpretation made by the IACtHR (in cases against Honduras and Peru) and the IACoHR (in its observations on Argentina).[183] It concluded that amnesty laws enacted to secure impunity, issued by the same government in the form of self-amnesty or by following

[177] ibid 31.
[178] ibid 36.
[179] Contesse, 'The international authority of the Inter-American Court of Human Rights' (n 102) 1179.
[180] Manuel Eduardo Góngora Mera, 'La difusión del bloque de constitucionalidad en la jurisprudencia latinoamericana y su potencial en la construcción del ius constitutionale commune latinoamericano' in Armin von Bogdandy, Hector Fix-Fierro and Mariela Morales (eds), *Ius Constitutionale Commune en América Latina* (Instituto de Investigaciones Jurídicas, Serie doctrina jurídica 2014).
[181] Binder (n 2) 1222.
[182] *Julio Héctor Simón*, Fallo 328:2056, Corte Suprema de Justicia de la Nación de Argentina (n 129) para 16.
[183] ibid para 18-27.

administrations, are incompatible with international treaties.[184] Following the IACtHR in *Barrios Altos v. Peru*, the Supreme Court concluded that the amnesty laws were invalid and lacked legal effect.[185] In practice, the Argentinean courts gave binding effect to rulings against other states.[186]

This was later corroborated in 2007, in cases challenging the presidential pardons given to members of the military juntas between 1989 and 1990.[187] In these decisions, the Supreme Court relied on the Inter-American Court's reasoning in *Almonacid Arellano v. Chile*, citing the non-prescriptible nature of crimes against humanity and the international obligations to investigate and punish such crimes. In a clear example of the reach and influence of the decisions of the IACtHR in the region, the Supreme Court concluded that 'the uncontroversial doctrine developed in the 'Barrios Altos' and 'Almonacid', obliges the Argentinean state to invalidate the presidential pardons'.[188] This precedent has been repeated in more recent cases that continue not to apply the amnesty laws, uphold more recent legislation derogating impunity laws, and limit the application of amnesties for crimes against humanity.[189]

In Uruguay, the Supreme Court of Uruguay used the block of constitutionality doctrine in the famous *Sabalsagaray case* to examine the Expiry Law.[190] The Supreme Court acknowledged that the state has discretionary powers to grant amnesty under article 85(14) of the Uruguayan Constitution.[191] However, appealing to the nature of the law, which limits the punitive powers of the state and acts more as a statute of limitations, the Supreme Court concluded that the Expiry Law was not an amnesty law in a strict sense.[192] The Court considered that such a law violates the separation of powers because the declaration of the prescription of a crime depends on the decision of the judiciary on a case-by-case basis.[193]

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[184] For a full analysis of the reasoning of the Supreme Court in the *Simon* case see: Christine A. E. Bakker, 'A Full Stop to Amnesty in Argentina' (2005) 3 JICJ 1106.
[185] *Julio Héctor Simón*, Fallo 328:2056, Corte Suprema de Justicia de la Nación de Argentina (n 129) para 31.
[186] Contesse, 'The international authority of the Inter-American Court of Human Rights' (n 102) 1182.
[187] *Caso contra Jorge Rafael Videla y otros*, Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal de Argentina, Incidente de inconstitucionalidad de los indultos dictados por el decreto 2741/90 del Poder Ejecutivo Nacional (15 April 2007); *Santiago Omar Riveros (Caso Julio Lilo Mazzeo)* Fallo 330:3248, Corte Suprema de Justicia de Argentina (n 129).
[188] *Santiago Omar Riveros (Caso Julio Lilo Mazzeo)* Fallo 330:3248, Corte Suprema de Justicia de Argentina (n 129) 21. Personal translation.
[189] See: *Caso contra Luciano Benjamín Menéndez y otros (Caso Las Palomitas - Cabeza de Buey)*, Corte Suprema de Justicia de la Nación de Argentina, M. 1232 XLIV, Fallo 335:1876 (26 September 2012); *Caso contra Jorge Rafael Videla y otros (Caso de la Operación Cóndor)*, Tribunal Oral en lo Criminal Federal No. 1 de Buenos Aires, Argentina, CFP 13445/1999/TO1, Causas No. 1.504, 1.951, 2.054, 1.976 (9 August 2016); *Caso contra Marcos Leví y otros*, Corte Suprema de Justicia de la Nación de Argentina, CSJ 1874/2015/RH1 (18 September 2018); *Caso contra Juan Antonio Zaccaría y otros*, Corte Suprema de Justicia de la Nación de Argentina, CSJ 3747/2014/RH1 (18 December 2018); *Caso contra Rufino Batalla (Carlos Hidalgo Garzón)*, Corte Suprema de Justicia de la Nación de Argentina, FLP 91003389/2012/TO1/93/1/RH11 (4 December 2018).
[190] *Sabalsagaray*, Suprema Corte de Justicia de Uruguay (n 130).
[191] ibid 25.
[192] ibid 25.
[193] ibid 28.

Besides, appealing the 'block of constitutionality' doctrine under article 72 of the Uruguayan constitution, the Supreme Court argued that international human rights treaties have constitutional hierarchy under domestic law.[194] Thus, referencing decisions from the IACtHR, the IACoHR, the UNHRC and Argentinean courts, the Uruguayan Supreme Court concluded that the Expiry Law constituted a mechanism of impunity that restricted the access of victims to effective remedy analogous to the self-amnesty laws applied in Argentina, Chile and Peru.[195] Therefore, it declared that the Expiry Law was unconstitutional. This was a landmark case in the case law of the Supreme Court of Uruguay, which has been repeated in many following cases.[196]

In Colombia, the decision *C-370/06* of the Constitutional Court examined the Law 975 of 2005, known as Peace and Justice enacted for the demobilisation of paramilitary groups in Colombia.[197] The Court concluded that this was not a law on amnesty because it did not release individuals from criminal liability, but provided for alternative reduced prison sentences.[198] Invoking the block of constitutionality that gives international human rights treaties constitutional hierarchy under article 93 of the Colombian Constitution, the Court review the standards of justice set by ACHR. Referencing the cases of the IACtHR against Peru and Guatemala among others, the Constitutional Court concluded that amnesty laws for international crimes are incompatible with human rights standards in that they fail to provide effective remedies.[199] This was also acknowledged by the Supreme Court that in the *Segovia Massacre case* highlighted that amnesties cannot be granted for international crimes with the purpose of shielding someone from justice.[200] However, the Constitutional Court concluded that it is necessary in transitional justice to ponder different constitutional rights that may clash; neither the right to justice nor the right to peace is absolute and overrules the other.[201] When amnesties are enacted to consolidate a peace process, they could be enacted at the end of

[194] ibid 43.
[195] ibid 48.
[196] See: *Caso contra José Nino Gavazzo Pereira y Jose Ricardo Arab Fernández*, Juzgado Penal 19 de Turno de Uruguay, Sentencia No. 036, Ficha 98-247/2006 (26 March 2009); *Caso contra Juan Carlos Blanco Estradé*, Juzgado Letrado de Primera Instancia en lo Penal de Primer Turno de Uruguay, Sentencia No. 4/2010 (21 April 2010); *Caso contra José Nino Gavazzo Pereira y Jose Ricardo Arab Fernández*, Suprema Corte de Justicia de Uruguay, Sentencia No. 1501, Ficha 98-247/2006 (6 May 2011); *Caso contra Jorge Silveira y otros*, Suprema Corte de Justicia, Sentencia No. 1501/2011 (20 July 2011); *Caso contra Juan Carlos Blanco Estradé*, Suprema Corte de Justica de Uruguay, Sentencia No. 899/2012 (5 November 2012); *Caso contra Juan Ricardo Zabala y otros*, Juzgado Letrado de Primera Instancia en lo Penal de Primer Turno de Uruguay, Juez Juan Carlos Fernández Lecchini, IUE 87-289/1985, Sentencia No. 402/2012 (6 March 2012); *Caso contra J. N. G. P.*, Juzgado Letrado de Primera Instancia en lo Penal de Primer Turno de Uruguay, IUE 87-289/1985, Sentencia No. 12/2020 (22 April 2020).
[197] *Constitucionalidad de la Ley de Justicia y Paz (Ley 975/05)*, Corte Constitucional de Colombia, C-370/06 (18 May 2006).
[198] ibid 220.
[199] ibid 242-261.
[200] *Caso contra César Pérez García - Masacre de Segovia*, Corte Suprema de Justicia de Colombia – Sala Penal, Rad. No. 33.118 (May 13, 2010).
[201] *C-370/06*, Corte Constitucional de Colombia (n 197) 292.

hostilities as long as they do not affect the access to justice of the victims and provide for other forms of accountability.[202]

More recently, in 2019 the Guatemalan Congress discussed two bills, No. 5377 and 5257, which proposed a modification to extend the National Reconciliation Law granting amnesty for international crimes by considering them related to the armed conflict. Referencing the pronouncement of the IACtHR in the follow-up decision to 14 cases against Guatemala and more generally its case law on amnesty, the Constitutional Court declared the initiative invalid in 2021.[203] Repeating its considerations of the discretionary powers of the state to grant amnesty, it considered that international human rights treaties and the authoritative interpretation of the IACtHR form part of the block of constitutionality that limits those powers.[204] The Constitutional court identified three limits to amnesty measures, which can only be granted for political crimes or related offences: the amnesty must be based upon considerations of public interest, and gross violations of human rights and crimes against humanity cannot be covered.[205] Based on this, the Court concluded that the initiative was incompatible with the international obligations of the Guatemalan state to protect human rights, the international standards for granting amnesties, the right of victims to access justice, and the obligation of the state to comply with the decisions of the IACtHR.[206]

4.3.4. The activation of the universal jurisdiction regarding crimes committed in Latin America

The trend of national courts in Latin America revoking or deciding not to apply domestic amnesties was mirrored by the activation of the universal jurisdiction by European and North American courts seeking to prosecute some of the people responsible, who had benefited from amnesty measures in Chile, Argentina and Uruguay, and managed to leave those countries. The rationale is that amnesty laws are domestic in nature and do not have universal effect, so they are not applicable in other jurisdictions.[207] Considering the superior status of *jus cogens* over domestic legislation, an amnesty does not extinguish liability under international

[202] ibid 277.
[203] *Constitucionalidad de la Iniciativa de ley 5377 que reforma Decreto 145-96 - Ley de Reconciliación Nacional*, Corte de Constitucionalidad de Guatemala, Expedientes acumulados No. 682-2019 y 1214-2019 (9 February 2021) 47-49. Reference to *Members of the Village of Chichupac and other cases v. Guatemala*, IACtHR (n 21).
[204] *Iniciativa de ley 5377*, Corte de Constitucionalidad de Guatemala (n 203) 35.
[205] ibid 46.
[206] ibid 61. Reference to *Members of the Village of Chichupac and other cases v. Guatemala*, IACtHR (n 21).
[207] Carsten Stahn, 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court' (2005) 3 JICJ 695, 700; Carsten Stahn, *A Critical Introduction to International Criminal Law* (CUP 2018) 159-268.

law, even if it provides immunity under domestic law.[208] The principle of universal jurisdiction opened the door for certain crimes to be investigated and prosecuted by international and other domestic courts, regardless of the existence of amnesty laws. Universal jurisdiction gives the courts of any country the 'authority to investigate and judge international crimes no matter where committed and by whom'.[209] It allows states to bring criminal proceedings for international crimes perpetrated outside their territory, with the rationale that certain crimes 'are so harmful to international interests that states are entitled – and even obliged – to bring proceedings against the perpetrator, regardless of the location of the crime and the nationality of the perpetrator or the victim'.[210] Universal jurisdiction provides a system of decentralized enforcement, which complements rather than replaces domestic prosecution by the territorial state or state of nationality of the perpetrator.[211]

The Spanish courts have been the most active on this front, investigating the crimes committed by Leopoldo Fortunato Galtieri,[212] Adolfo Scilingo,[213] Miguel Ángel Cavallo,[214] and another 98 members of the army during the Argentinean dictatorship;[215] the human rights abuses committed by Augusto Pinochet during the Chilean military dictatorship,[216] and the acts of genocide committed against the Mayan population during the Guatemalan civil war,[217] among other cases. In all these decisions, the Spanish Courts considered that domestic amnesties were not opposable to the exercise of the universal jurisdiction by courts in other countries.[218]

In the *Galtieri* case, the Spanish Audiencia Nacional referred to the decisions of the Inter-American Commission and the UNHRC, which concluded the incompatibility of the

[208] Charles P. Trumbull, 'Giving Amnesties a Second Chance' (2007) 25 Berkeley JIntL 283, 305.
[209] Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (University of Pennsylvania Press 2006) xii.
[210] Xavier Philippe, 'The principles of universal jurisdiction and complementarity: how do the two principles intermesh?' (2006) 88 IRRC 375, 377.
[211] Kathryn Sikkink, 'The Age of Accountability: The Global Rise of Individual Criminal Accountability' in Francesca Lessa and Leigh A. Payne (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (CUP 2012) 27.
[212] *Caso contra Leopoldo Fortunato Galtieri*, Audiencia Nacional Española, Juzgado No. 5, Auto con Orden de prisión provisional incondicional (25 March 1997).
[213] *Caso contra Adolfo Scilingo*, Audiencia Nacional Española, Sala de lo Penal – Pleno, Auto de competencia, Rollo de apelación 84/98, Sumario 19/97 (4 November 1998).
[214] *Caso contra Miguel Ángel Cavallo*, Audiencia Nacional Española, Juzgado No. 5, Auto de procesamiento, Sumario 19/97-L (1 September 2000); *Caso contra Miguel Ángel Cavallo*, Audiencia Nacional Española, Juzgado No. 5, Auto de solicitud de extradición, Sumario 19/97-L (12 September 2000).
[215] *Caso contra 98 Militares Argentinos*, Audiencia Nacional Española, Juzgado No. 5, Sumario 19/97-L (2 November 1999).
[216] *Caso contra Augusto Pinochet*, Audiencia Nacional Española, Sala de lo Penal – Pleno, Auto de competencia, Rollo de apelación 173/98, Sumario 1/98 (5 November 1998).
[217] *Decisión de jurisdicción para investigar crímenes cometidos en Guatemala*, Tribunal Supremo de España, Sentencia No. 327/2003, Recurso de casación No. 803/2001 (25 February 2003); *Recurso de Amparo promovido por Rigoberta Menchú Tumn y otros*, Tribunal Constitucional de España, STC 237/2005 (26 September 2005).
[218] *Leopoldo Fortunato Galtieri*, Audiencia Nacional Española (n 212) para 5. See also: *98 Militares Argentinos*, Audiencia Nacional Española (n 215); *Adolfo Scilingo*, Audiencia Nacional Española (n 213) para 8.

Argentinean amnesty laws with international Human rights treaties, in order to argue that such legislation does not affect their jurisdiction.[219] In addition, the court argued that the non-opposability of amnesties to universal jurisdiction is grounded in treaty-based obligations to prosecute or extradite crimes like genocide, as well as the Spanish domestic law that regulates the universal jurisdiction.[220] However, the Audiencia Nacional was cautious about the validity of the amnesty under domestic law, and decided to issue an international arrest warrant for his detention and extradition from any part of the world except Argentina.[221]

Along the same line of argument, French, Dutch and British courts have concluded that domestic amnesties do not bar the exercise of universal jurisdiction in cases related to crimes in Chile (*Regina v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet* in 1998),[222] as well as cases in other parts of the world.[223] North American courts have joined European courts in the activation of universal jurisdiction, referring to the issue of amnesties only tangentially to dismiss its opposability to the exercise of universal jurisdiction.[224] Despite the initiative of alien domestic courts in investigating crimes covered by amnesties in Latin America, they have been clear that the excersice of universal jurisdiction does not affect the legality of the amnesty under domestic law. [225] In only a few decisions have the courts gone further to assert a more general prohibition of self-amnesties and amnesties for human rights violations under international law.[226]

4.4. The 'horizontal' expansion of the judicial dialogue

The discussion of the permissibility of amnesties has also flourished in horizontal dialogues across regions, with interactions between different regional human rights systems,

[219] *Leopoldo Fortunato Galtieri*, Audiencia Nacional Española (n 212) para 5.
[220] ibid.
[221] ibid Decision.
[222] *R v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet,* [1998] UKHL 41 (25 November 1998); *R v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet,* [1999] UKHL 17 (24 March 1999).
[223] See: *Ely X v. Cour d'appel de Nîmes*, Cour de Cassation of France, Chamber Criminelle, No. 02-85.379 (23 October 2002); *Case against the former officer of the Afghan Military Intelligence Service Khad-e-Nezami*, District Court in the Hague, Netherlands, Criminal Law Section, 09/750001-06 (25 June 2007); *Public Prosecutor v. Guus Kouwenhoven*, Court of Appeal in 's-Hertogenbosch, Netherlands, 09/750001-05 (21 April 2017).
[224] See: *Teófila Ochoa Lizarbe et al v. Telmo Ricardo Hurtado Hurtado*, District Court, Southern District of Florida, US, Case No. 07-21783-CIV-JORDAN (4 March 2008); *Ana Chavez and others v. Nicolas Carranza*, Court of Appeals for the Sixth Circuit, US, Case No. 06-6234 (17 March 2009).
[225] *Ana Chavez v. Nicolas Carranza*, Court of Appeals for the Sixth Circuit, US (n 224); *R v. Bartle, Ex Parte Pinochet* (n 222) Lord Lloyd of Berwick's opinion; *R v. Bartle, Ex Parte Pinochet* (n 222) Lord Goff of Chieveley's opinion.
[226] *Public Prosecutor v. Guus Kouwenhoven*, Court of Appeal in 's-Hertogenbosch, Netherlands (n 223).

namely the Inter-American, the European and the African Systems of Human Rights. Despite the initial leadership of the Inter-American Commission and Court of Human Rights, in the last decade the European Court and the African Commission on Human and Peoples' Rights have also discussed in more depth the permissibility of amnesties. Likewise, the horizontal dialogue between transnational institutions has developed across legal regimes with rich interactions between human rights bodies and international criminal law tribunals.

4.4.1. The centrality of the Inter-American Human Rights System and UN bodies

Reading 136 decisions of transnational bodies, it was possible to identify 932 citations of other decisions from transnational institutions. From this, 507 were internal references to other decisions of the same court or body, and 425 were external citations of the pronouncements of other institutions. Examining the cross-reference patterns, the centrality of the Inter-American System and UN bodies is manifest. As shown in Table 1, more than 70% of the references from the European and African regional human rights bodies are to the Inter-American System and, to a lesser extent, to UN monitoring bodies. Likewise, even though the Inter-American Court has been prolific in the citation of other international bodies, the great majority of references are to the decisions of the Inter-American Commission or to UN Committees. Mirroring this, despite not cross-referencing much, UN bodies have only paid attention to the decisions of the Inter-American System. International criminal tribunals on the other hand, have also been looking at the decisions of human rights bodies, with particular emphasis on the European and the Inter-American Systems.

Table 1. Cross-references in the discussion of the permissibility of amnesties[227]

		Target										
		African System	ECCC	European System	Inter-American System	ICC	ICJ	ICTY	SCSL	STL	UN	**Total**
Source	African System			5	9			1			5	**20**
	ECCC	3		5	15		3	3	6		15	**50**
	European System	0	1		22		1	5	2		9	**40**
	Inter-American System	8	1	15	86*		1	10	13		61	**195**
	ICC	7	2	16	26		1	6	2		12	**72**
	ICJ											**0**
	ICTY			3			1		2		2	**8**
	SCSL	1			6		4	4			2	**17**
	STL			5	6		3				2	**16**
	UN				7						0*	**7**
	Total	**19**	**4**	**49**	**177**	**0**	**14**	**29**	**25**	**0**	**108**	**425**

Not all decisions engage at the same level with cases in other jurisdictions. Of the 136 decisions examined, only 46 cited pronouncements of other international bodies. These decisions act as bridges or points of interaction between courts. Looking at individual decisions, it is important to analyse both inward and outward citation. Following Olfgang Alschner and Damien Charlotin's methodology, outward citation counts for the citing judgment, while inward citation counts for a decision being cited.[228] This separation is helpful in identifying cases that act as hubs and cases that act as authorities in the discussion of the permissibility of amnesties. Urška Šadl and Henrik Palmer Olsen define an authority 'as a case that is widely cited by other cases'.[229] By number of citations, Table 2 is evidence that the decisions of the Inter-American System, particularly *Velásquez Rodríguez v. Honduras*, *Barrios Altos v. Peru*, and *Almonacid Arellano et al. v. Chile*, as well as early pronouncements of the UNHRC, have had a strong influence in the decision making of other tribunals. However, the impact of individual decisions from other courts is also noticeable, for instance, *Prosecutor*

[227] The table only includes external references to other human rights bodies or courts. The Inter-American System and the UN include various bodies. That is why they also include cross-citations between bodies of the same system. Namely, between the IACtHR and the IACoHR, and the UNCAT and the UNHRC.
[228] Wolfgang Alschner and Damien Charlotin, 'The Growing Complexity of the International Court of Justice's Self-Citation Network: Institutional Achievement or Access-to-Justice Concern?' (2016) 58 University of Cambridge Faculty of Law Legal Studies Research Paper Series 2, 14-15.
[229] Šadl and Olsen, 'Empirical Studies of the Webs of International Case Law' (n 3) 12.

v. Anto Furundžija at the ICTY and *Abdülsamet Yaman v. Turkey* at the ECtHR have been subject to substantial analysis.

Table 2. Top 10 of international cases with the most number of citations by other transnational institutions

Case name	Inward citations	Case name	Outward citations
Velásquez Rodríguez v. Honduras, IACtHR (1988)	19	*Prosecutor v. Ieng Sary*, ECCC (2011)	44
Prosecutor v. Anto Furundžija, ICTY (1998)	16	*Gelman v. Uruguay*, IACtHR (2011)	33
General Comment No. 20 [44], UNHRC (1992)	15	*Massacres of El Mozote v. El Salvador*, IACtHR (2012)	32
Barrios Altos v. Peru, IACtHR (2001)	13	*Prosecutor v. Saif Al-Islam Gaddafi* (Separate Opinion Judge Ibáñez Carranza), ICC – Appeals Chamber (2020)	29
General comment No. 31 [80], UNHRC (2004)	9	*Gomes Lund v. Brazil*, IACtHR 2010)	24
Abdülsamet Yaman v. Turkey, ECtHR (2004)	8	*Prosecutor v. Saif Al-Islam Gaddafi*, ICC – Pre-Trial Chamber (2019)	23
Almonacid Arellano et al. v. Chile, IACtHR (2006)	8	*Marguš v. Croatia*, ECtHR - Grand Chamber (2014)	19
Malawi African Association and others v. Mauritania, ACoHPR (2000)	8	*Prosecutor v. Jamil El Sayed*, STL (2010)	16
Advisory Opinion OC-13/93, IACtHR (1993)	7	*Alfonso René Chanfeau Orayce v. Chile*, IACoHR (1998)	15
Hugo Rodríguez v. Uruguay, UNHRC (1994)	7	*Zimbabwe Human Rights NGO Forum v. Zimbabwe*, ACoHPR (2006)	14

A hub decision is 'a case that cites many authorities'.[230] Some of these cases play an important role in consolidating the trajectory of the development of the permissibility of amnesties. Some of the later decisions from the IACtHR have conducted impressive analysis of the state of the international case law in amnesties (see: *Gelman v. Uruguay, Massacres of El Mozote v. El Salvador*, and *Gomes Lund v. Brazil*). Likewise, and perhaps more surprisingly, international criminal courts including the ICC and the ECCC have also reviewed and engaged with an important number of decisions on amnesty that are not limited to international criminal law, but also establish conversations with international human right standards.

[230] ibid 12.

The following sections show how the position of the Inter-American System and the UN bodies against amnesties have strongly influenced the decision making of international tribunals in other regions. However, there are differences that reflect some fragmentation in the debate and a range of approaches to the permissibility of amnesty laws.

4.4.2. Amnesties at the European System of Human Rights

The European System of Human Rights has faced fewer cases dealing with amnesties than its counterparts in Latin America. European bodies have adopted a slightly different approach, framing the discussion of the permissibility of amnesties as part of a more general debate about states' discretion and measures based upon public interest. The first decisions of the European System discussed the permissibility of amnesties only tangentially, focusing on the standards set by the ECHR. In more recent judgments, the European Court of Human Rights (ECtHR) started to look at the decisions of the Inter-American System, establishing a dialogue with other human rights bodies. However, the European Court has brought some nuance to the debate on amnesties, avoiding outright rejection of any type of amnesty. The ECtHR has emphasised the relevance of criminal investigations into gross human rights violations as a necessary measure to ensure accountability and to safeguard the public confidence in the rule of law.[231] Instead of a victim-centred approach, grounded in the right to a remedy, like the one adopted by the Inter-American System, the ECtHR has suggested the examination of amnesties as a balancing act that also needs to consider the protection of public interest or values.[232] Thus, the European Court has adopted a more flexible approach taking into account the crimes covered by the amnesty and the context within which the measure was issued.[233]

In *Abdülsamet Yaman v. Turkey* (2004) the ECtHR studied the case of a victim of arbitrary detention, torture and degrading treatment by state agents who later benefitted from laws that limited liability.[234] The Court considered that this violated article 3 of the ECHR and created a climate of impunity. Without examining the compatibility of amnesties with international law more generally, the European Court formulated a broad rule rejecting the use of amnesty and other mechanisms that limit the criminal liability of state officials:

[231] Josepha Close, *Amnesty, Serious Crimes and International Law: Global Perspectives in Theory and Practice* (Routledge 2019) 199.
[232] Schabas, 'Synergy or Fragmentation?' (n 10) 619.
[233] Close, *Amnesty, Serious Crimes and International Law* (n 231) 197.
[234] *Abdülsamet Yaman v. Turkey*, ECtHR (n 7).

> where a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance for the purposes of an 'effective remedy' that criminal proceedings and sentencing are not time-barred and that the granting of an amnesty or pardon should not be permissible.[235]

This clause has been profusely referenced and reproduced in several other cases against Turkey and other states. [236] Nonetheless, the position of the European System against amnesties is not as strong as this paragraph might suggest. In fact, in most of those decisions, the mention of the permissibility of amnesties has been limited to the reproduction of this paragraph. Meanwhile, in other decisions, the ECtHR has avoided an in-depth discussion of the legality of amnesty laws, even though the case was focused on this type of measure. In *Lexa v. Slovakia* (2008) the Court analysed the legal faculty of the new president of Slovakia to revoke the amnesty law known as Mečiar amnesty.[237] Despite referencing the decisions of the IACtHR and the SCSL on the incompatibility of amnesties with human rights standards, the ECtHR focused on the impossibility of modifying amnesty laws under the domestic law.[238] Ultimately, it accepted the Slovak Supreme Court's interpretation and concluded that the decision on amnesty was final, irrevocable, and not subject to review.[239] Another decision in which the ECtHR abstained from discussing the legality of amnesty is *Gutiérrez Dorado and Dorado Ortiz v. Spain* (2012).*[240]* In a decision on admissibility, the Court studied a case of enforced disappearance during the Spanish Civil War that was covered by the General Amnesty enacted in 1977 as part of the democratic transition. However, the ECtHR decided that the case was inadmissible because the applicants waited too long and failed to bring their case before the Court without undue delay.[241]

In decisions that have engaged more with the discussion of amnesties, the position of the European System has been much weaker than that of the Inter-American System. The

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[235] ibid para 55.
[236] *Okkali v. Turkey*, ECtHR, Judgment, Application No. 52067/99 (17 October 2006) para 76; *Ali and Ayşe Duran v. Turkey*, ECtHR, Judgment, Application No. 42942/02 (8 April 2008) para 69; *Erdoğan Yilmaz and others v. Turkey*, ECtHR, Judgment, Application No. 19374/03 (14 October 2008) para 56; *Terzi and Erkmen v. Turkey*, ECtHR, Judgment, Application No. 31300/05 (28 July 2009) para 33; *Baran and Hun v. Turkey*, ECtHR, Judgment, Application No. 30685/05 (20 May 2010) para 58; *Serdar Güzel v. Turkey*, ECtHR, Judgment, Application No. 39414/06 (15 March 2011) para 42; *Taylan v. Turkey*, ECtHR, Judgment, Application No. 32051/09 (3 July 2012) para 44; *Böber v. Turkey*, ECtHR, Judgment, Application No. 62590/09 (9 April 2013) para 33; *Yerli v. Turkey*, ECtHR, Judgment, Application No. 59177/10 (8 July 2014) para 61; *Ateşoğlu v. Turkey*, ECtHR, Judgment, Application No. 53645/10 (20 January 2015) para 25; *Enukidze and Girgvliani v. Georgia*, ECtHR, Judgment, Application No. 25091/07 (26 April 2011) para 274; *Mocanu and others v. Romania*, ECtHR, Judgment, Applications No. 10865/09, 45886/07 and 42431/08 (17 September 2014) para 326; *Makuchyan and Minasyan v. Azerbaijan and Hungary*, ECtHR, Judgment, Application No. 17247/13 (26 May 2020).
[237] *Lexa v. Slovakia*, ECtHR, Judgment, Application No. 54334/00 (23 September 2008).
[238] ibid para 97-99.
[239] ibid para 132.
[240] *Antonio Gutiérrez Dorado and Carmen Dorado Ortiz v. Spain*, ECtHR, Admissibility, Application No. 30141/09 (27 March 2012).
[241] ibid para 39.

European bodies have engaged in a balancing act that accounts for the obligation of states to investigate and punish human rights abuses, but also takes into consideration the legitimate interests of states in resolving internal conflicts.[242] In *Laurence Dujardin v. France* (1991) the then European Commission of Human Rights (ECoHR) assessed the admissibility of a case concerning the killing of four disarmed gendarmes in the territory of New Caledonia in 1988, after the National Assembly adopted a bill establishing a general amnesty that halted criminal investigations.[243] The ECoHR considered that an amnesty law does not contravene the ECHR unless it is enacted as part of a general practice aimed at the systematic prevention of prosecution of the perpetrators of such crimes.[244] The Commission concluded that this was not the case and declared the application aiming to revoke the amnesty inadmissible. Highlighting the public interest in putting an end to conflict, and respecting the state's discretion to deal with situations of violence, the ECoHR observed that,

> the amnesty law, which is entirely exceptional in character, was adopted in the context of a process designed to resolve conflicts between the various communities of the islands … The State is justified in adopting, in the context of its criminal policy, any amnesty laws it might consider necessary, with the provision, however, that a balance is maintained between the legitimate interests of the State and the interests of individual members of the public in having the right to life protected by law.[245]

This approach was reiterated in *Tarbuk v. Croatia* (2012).[246] The court studied the case of Dušan Tarbuk, who was arrested on suspicion of having committed the criminal offence of espionage and later freed upon application of the General Amnesty Act of 1996. He lodged a civil action against the state to get compensation, but in 1999 Croatia passed a law which provided that no compensation was to be granted when the criminal proceedings had been discontinued because of a pardon or amnesty. Highlighting the position of the ECoHR in *Dujardin v. France*, the European Court decided that states have ample discretion to enact amnesty when they pursue a legitimate interest: 'the State is justified in enacting, in the context of its criminal policy, any amnesty laws it might consider necessary, with the proviso, however, that a balance is maintained between the legitimate interests of the State and the interests of individual members of the public'.[247]

[242] Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (n 30) 151.
[243] *Laurence Dujardin v. France*, ECoHR (n 18).
[244] ibid 243.
[245] ibid 244.
[246] *Tarbuk v. Croatia*, ECtHR, Judgment, Application No. 31360/10 (11 December 2012).
[247] ibid para 50.

Dealing with international crimes, the ECtHR considered the general trend of Inter-American and UN bodies in restricting the application of amnesties under international law. However, it maintained a flexible approach that left some room for considerations of public interest in peace and reconciliation. In *Ould Dah v. France* (2009)[248] the ECtHR examined the activation of the universal jurisdiction by French courts against Captain Ely Ould Dah, a Mauritanian national, despite the amnesty law enacted in 1993 by Mauritania. The ECtHR decided that French courts had jurisdiction to prosecute the case despite the amnesty law because torture does not admit derogation and amnesty laws do not ban the exercise of universal jurisdiction.[249] Explicitly agreeing with the position of the UNHRC and the ICTY, the European Court argued that 'an amnesty is generally incompatible with the duty incumbent on the States to investigate such acts'.[250] The obligation to prosecute crimes of torture 'should not therefore be undermined by granting impunity to the perpetrator in the form of an amnesty law that may be considered contrary to international law'.[251] The Court placed emphasis on the incompatibility of amnesty measures with international obligations regarding the investigation and prosecution of torture under article 3 of the ECHR in agreement with *Abdülsamet Yaman v. Turkey*. Diverting from a general prohibition of amnesties, however, the ECtHR addressed the possibility of a tension between the need to prosecute criminals and a country's determination to promote reconciliation in society.[252] Despite this, the Court concluded that these considerations do not apply to the case because 'no reconciliation process of this type has been put in place in Mauritania'.[253]

In *Marguš v. Croatia* (2012)[254] the European Court studied the complaint filed by Fred Marguš, a commander in the Croatian Army, who committed war crimes in 1991 and benefited from amnesty laws enacted in 1992 and 1996. The applicant argued that a ruling from 2007 violated the ne bis in idem principle according to article 4 of Protocol No. 7 to the ECHR. The ECtHR referred to its own precedent in the cases against Turkey and *Ould Dah v. France,* concluding that the obligation to prosecute torture could be extended to intentional killings and war crimes.[255] Therefore, an amnesty granted for war crimes against the civilian population

[248] *Ould Dah v. France*, ECtHR, Admissibility, Application No. 13113/03 (17 March 2009).
[249] ibid 16-17.
[250] ibid 17.
[251] ibid.
[252] ibid.
[253] ibid.
[254] *Marguš v. Croatia*, ECtHR, Judgment, Application No. 4455/10 (13 November 2012).
[255] ibid para 73.

amounted to a fundamental defect in the proceedings.[256] The Court extended the prohibition of amnesty under international law in the following terms:

> Granting amnesty in respect of 'international crimes' – which include crimes against humanity, war crimes and genocide – is increasingly considered to be prohibited by international law. This understanding is drawn from customary rules of international humanitarian law, human rights treaties, as well as the decisions of international and regional courts and developing State practice, as there has been a growing tendency for international, regional and national courts to overturn general amnesties enacted by Governments.[257]

Such a position moves the ECtHR closer to the UN's and the Inter-American Systems' position claiming a broad prohibition on amnesties for international crimes, but in 2014 the *Marguš v. Croatia* case was reconsidered by the Grand Chamber.[258] The ECtHR started by underlining its own precedent set in *Ould Dah v. France* and other cases against Turkey that rejected amnesty granted to state agents charged with crimes involving torture or ill-treatment.[259] The Court pointed out the fact that so far no international treaty explicitly prohibits the granting of amnesty in respect of grave breaches of fundamental human rights.[260] Thus, a prohibition on amnesty is grounded in the obligations to investigate and punish serious crimes included in human rights treaties as interpreted by human rights bodies. Looking extensively at the IACtHR case law, and particularly its interpretation of article 6(5) of the Additional Protocol II to the Geneva Conventions in The *Massacres of El Mozote v. El Salvador*, the ECtHR considered that crimes against humanity and war crimes are excluded from the possibility of amnesty in non-international armed conflicts.[261] Following this, the ECtHR concluded that the 'growing tendency in international law is to see such amnesties as unacceptable because they are incompatible with the unanimously recognised obligation of States to prosecute and punish grave breaches of fundamental human rights'.[262] However, in the same paragraph, the ECtHR nuanced this position again by acknowledging that this was not a difficult case because the state failed to implement other transitional justice mechanisms for reconciliation that might affect the Court's decision in future cases:

[256] ibid para 75. This was reinforced in *Z and others v. Croatia* where the European Court was explicit in arguing that 'the ne bis in idem principle did not apply to amnesties for war crimes' (see: *Z and others v. Croatia*, ECtHR, Admissibility, Application No. 57812/13 (21 April 2015) para 25).
[257] *Marguš v. Croatia*, ECtHR, 2012 (n 254) para 74.
[258] *Marguš v. Croatia*, ECtHR, 2014 (n 20).
[259] ibid para 126.
[260] ibid para 131.
[261] ibid para 131.
[262] ibid para 138-139.

> Even if it were to be accepted that amnesties are possible where there are some particular circumstances, such as a reconciliation process and/or a form of compensation to the victims, the amnesty granted to the applicant in the instant case would still not be acceptable since there is nothing to indicate that there were any such circumstance.[263]

The European Court has shown more openness than other human rights bodies to the permissibility of amnesty in certain circumstances, as noted by William Schabas, adopting a relatively flexible position where rights are balanced with other legitimate objectives rather than treated as absolutes.[264] The ECtHR seems to suggest that amnesties could be possible where there are is a reconciliation process.[265] However, there is still uncertainty in relation to how it would deal with amnesties during genuine transitional justice processes.[266] Despite acknowledging the trend of other tribunals rejecting amnesties that cover international crimes, the ECtHR has left some room for amnesties to be upheld on a case-by-case basis when they pursue a legitimate interest of the state in peace and reconciliation.[267]

4.4.3. Amnesties at the African System on Human and Peoples' Rights

The African System has examined the permissibility of amnesties in four cases. In dialogue with both, the Inter-American and the European systems, the African Commission on Human and Peoples' Rights (ACoHPR) has adopted a position that combines a strong rejection of blanket and unconditional amnesties, while also pointing to the lack of guidance for the application of amnesties when pursuing peace and reconciliation in transitional contexts.

Initially, in *Malawi African Association and others v. Mauritania* (2000), the ACoHPR examined the admissibility of a case against Mauritania for the commission of state-sponsored human rights abuses between 1986 and 1992.[268] Evaluating whether the internal remedies had been exhausted, the Commission considered that the implementation of an amnesty law in 1993 rendered all internal remedies obsolete.[269] Pointing at the fact that the amnesty law was 'adopted with the aim of nullifying suits or other actions seeking redress', the ACoHPR concluded that 'while having force within Mauritanian national territory, [it] cannot shield that

[263] ibid para 139.
[264] Schabas, 'Synergy or Fragmentation?' (n 10) 622.
[265] *Marguš v. Croatia*, ECtHR, 2014 (n 20) para 139.
[266] Miles Jackson, 'Amnesties in Strasbourg' (2018) 38 OJLS 451, 463.
[267] Close, *Amnesty, Serious Crimes and International Law* (n 231) 206.
[268] *Malawi African Association v. Mauritania*, ACoHPR (n 18). Same situation of violence that originated the *Ould Dah v. France* case before the ECtHR.
[269] ibid para 85.

country from fulfilling its international obligations under the Charter'.[270] Therefore, the Commission declared the case admissible due to the lack of channels of remedy available in practical terms.[271]

Later, in two similar decisions, the ACoHPR analysed amnesty laws enacted in Zimbabwe and Ivory Coast. In *Zimbabwe Human Rights NGO Forum v. Zimbabwe* (2006), the ACoHPR faced a general amnesty implemented in 2000, in the aftermath of a Constitutional Referendum that sparked violence in Zimbabwe.[272] In *Mouvement Ivoirien des Droits Humains (MIDH) v. Côte d'Ivoire* (2008), the ACoHPR analysed an amnesty granted by the 2000 Constitution of Ivory Coast to perpetrators of the events which brought about the change of Government following a Coup d'Etat in 1999.[273] In both cases, the African Commission referenced some decisions of the IACtHR, the ECHR, the ICTY, and the UNHRC, considering that 'there has been consistent international jurisprudence suggesting that the adoption of amnesties leading to impunity for serious human rights has become a rule of customary international law'.[274] Placing emphasis on amnesty laws that grant 'total and complete immunity from prosecution' and 'foreclosed access to any remedy' without implementing alternative mechanisms of justice, the ACoHPR concluded that both amnesties were incompatible with articles 1 and 7(1) of the African Charter.[275] In the eyes of the Commission, these amnesties prevented victims from seeking redress and encouraged impunity.[276] However, it added that the violation materialised because the state failed to put in place 'alternative adequate legislative or institutional mechanisms to ensure that perpetrators of the alleged atrocities were punished, and victims of the violations duly compensated or given other avenues to seek effective remedy'.[277] Thus, as in the case of the ECtHR, the African Commission hinted at a different approach to amnesties when these are accompanied by alternative mechanisms of accountability.

In its most recent decision on amnesty, the ACoHPR examined the exclusion of Thomas Kwoyelo from the application of the Amnesty Act of 2000 in Uganda, despite being granted to

[270] ibid para 83.
[271] ibid para 85.
[272] *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, ACoHPR, Communication No. 245/2002, 39th Session (25 May 2006).
[273] *Mouvement Ivoirien des Droits Humains (MIDH) v. Côte d'Ivoire*, ACoHPR, Communication No. 246/2002, 5th extraordinary session (29 July 2008).
[274] *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, ACoHPR (n 272) para 201; *MIDH v. Côte d'Ivoire*, ACoHPR (n 273) para 91.
[275] *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, ACoHPR (n 272) para 215; *MIDH v. Côte d'Ivoire*, ACoHPR (n 273) para 98.
[276] See also: *General Comment No. 4 on the African Charter on Human and People's Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)*, ACoHPR, 21st extraordinary session (4 March 2017).
[277] *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, ACoHPR (n 272) para 215; *MIDH v. Côte d'Ivoire*, ACoHPR (n 273) para 98.

thousands of other Lord's Resistance Army fighters.[278] Given the nature of the petition, the ACoHPR focused on the violation of the right to equal protection before the law under article 3(2) of the ACHPR. The African Commission concluded that the applicant fulfilled the requirements in the Amnesty Act and the state failed to provide a reasonable justification for the differential treatment of Thomas Kwoyelo.[279] In *obiter dictum* considerations, headed as such at the end of the decision, the ACoHPR acknowledged the 'lack of clear guidance on ensuring compliance with the requirements of the African Charter when states resort to the use of amnesty as necessary means for pursuing the objectives of achieving peace and justice in times of transition from violence to peace'.[280]

The Commission differentiated between blanket or unconditional amnesties, understood as those that are granted without the beneficiaries having to satisfy any preconditions, and conditional amnesties, which are dependent on meeting certain preconditions including full disclosure of the truth and acknowledgement of responsibility.[281] Referencing the position of the IACtHR regarding blanket amnesties in Peru, the ACoHPR stressed that 'blanket or unconditional amnesties that prevent investigations … are not consistent with the provisions of the African Charter' and 'would be a flagrant violation of international law'. [282] However, the Commission considered the possibility of states in transition from conflict enacting well-crafted conditional amnesties, as long as they constitute 'justifiable and proportional limitations acceptable under international law'.[283] In the Commission's words:

> When they resort to amnesties as necessary measures for ending violence and continuing violations and achieving peace and justice, they should respect and honor their international and regional obligations. Most particularly, they should ensure that such amnesties comply with both procedural and substantive conditions. In procedural terms, conditional amnesties should be formulated with the participation of affected communities including victim groups. Substantively speaking, amnesties should not totally exclude the right of victims for remedy, particularly remedies taking the form of getting the truth and reparations. They should also facilitate a measure of reconciliation with perpetrators acknowledging responsibility and victims getting a hearing about and receiving acknowledgment for the violations they suffered.[284]

[278] *Kwoyelo v. Uganda,* ACoHPR (n 19).
[279] ibid para 181, 195.
[280] ibid para 284.
[281] ibid para 288.
[282] ibid para 293.
[283] ibid para 291.
[284] ibid para 293.

Looking at the decisions of the Inter-American System and the UN bodies, the African and European Systems have thus engaged in a dialogue discussing the permissibility of amnesties. The decisions regarding impunity laws in Latin America have undoubtedly influenced the discussion in the African and European Systems, rejecting the use of blanket amnesties for human rights abuses that amount to international crimes. However, the position of the European Court and the African Commission has been more cautious and nuanced. Both have opened the door to the possibility of conditional amnesties in exceptional circumstances when they have a legitimate interest in peace and reconciliation, and when they are complemented with alternative mechanisms of justice. Nevertheless, these considerations have been based on hypothetical situations and neither the African Commission nor the European Court has upheld a conditional amnesty as legal under international law, leaving a sense of uncertainty around the permissibility of certain amnesties.

4.4.4. Amnesties and international criminal tribunals

Judicial interactions have also facilitated dialogue between different legal regimes, with international, ad hoc and hybrid criminal tribunals examining the standards set by human rights bodies.[285] International criminal courts have been mainly concerned with the opposability of domestic amnesties to their jurisdiction. Regardless of whether the amnesty is valid, there is also the question of whether they can stop international or hybrid tribunals (constituted under international law) or domestic courts (exercising universal jurisdiction) from prosecuting those crimes.[286] However, some criminal courts have also taken a stance on the general compatibility of amnesties with international law.

As previously mentioned, the ICTY was the first international criminal tribunal that referred to the application of amnesties. Establishing the prohibition of torture as *jus cogens*, the ICTY argued in *Prosecutor v. Furundžija* that such a prohibition imposes obligations *erga omnes* to investigate, prosecute and punish, or extradite individuals accused of torture, who are present in a territory under its jurisdiction.[287] Amnesty laws are thus not opposable to the jurisdiction of international courts or tribunals from third states in exercise of universal jurisdiction.[288] This was applied in *Prosecutor v. Boškoski and Tarčulovski* (2010), where the

[285] For simplicity reasons, in the following pages the term 'international criminal courts or tribunals' groups the ICC, ad hoc tribunals like the ICTY, and hybrid or internationalised courts like the SCSL, the ECCC and the STL.
[286] Stahn, *A Critical Introduction to International Criminal Law* (n 207); Trumbull, 'Giving Amnesties a Second Chance' (n 208) 287.
[287] *Prosecutor v. Furundžija*, ICTY (n 7) para 156.
[288] ibid.

Appeals Chamber argued that an amnesty enacted by FYR Macedonia (now North Macedonia) was not opposable to the jurisdiction of the ICTY.[289]

In Sierra Leone, the Special Court for Sierra Leone (SCSL) considered the opposability of the amnesty granted by the Lomé Agreement to its jurisdiction in *Prosecutor v. Morris Kallon and Brima Bazzy Kamara* (2004).[290] Even though article 10 of the SCSL Statute explicitly included a provision limiting the opposability of amnesties to its jurisdiction, the Court considered that one of the essential questions was whether the Lomé Agreement was considered an international treaty, and whether international law bars the jurisdiction of the SCSL to prosecute crimes covered by the amnesty.[291] The SCSL argued that states have discretion to enact this type of law but cannot bar the universal jurisdiction of other states or international tribunals regarding international crimes.[292] The Special Court argued that there is not yet a general obligation for states to refrain from amnesty laws, therefore if a state passes this type of law they are not in breach of a customary rule. However, if a court of another state decides to prosecute persons accused of international crimes despite such amnesty, they are not in breach of international law either.[293] Consequently, the SCSL concluded that that the amnesty provision of the Lomé Peace Accord does not affect its jurisdiction.[294] Moreover, examining the permissibility of amnesties more generally, the Special Court considered that the prohibition of amnesty for international crimes has not yet crystallised, but considering the relevant conclusions of the Committee against torture, findings of the Human Rights Commission, and relevant judgments of the Inter-American Court 'such a norm is developing under international law'.[295]

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[289] *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, ICTY, Appeals Chamber, Case No. IT-04-82-A (19 May 2010) para 220.

[290] *Prosecutor v. Morris Kallon and Brima Bazzy Kamara*, SCSL, Decision on challenge to jurisdiction: Lomé Accord Amnesty, Cases No. SCSL-2004-15-AR72 and SCSL-2004-16-AR72 (13 March 2004). In 1999 the Government of Sierra Leone signed the Lomé Peace Agreement with the Revolutionary United Front (RUF), which included a clause in article 9 on pardon and amnesty. The Special Representative of the Secretary-General of the United Nations appended a hand-written disclaimer to the Lomé Agreement declaring that the UN did not recognise the validity of the amnesty in respect of war crimes, crimes against humanity or genocide. In 2000 the Government of Sierra Leone wrote to the UN Security Council requesting the creation of a Special Court for Sierra Leone, complaining that the RUF leadership have resumed their atrocities. The SCSL was established in 2002 by an agreement between the United Nations and the Government of Sierra Leone. For more detail see: William Schabas, 'Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone' (2004) 11 UC Davis Journal of International Law and Policy 145.

[291] *Prosecutor v. Kallon and Kamara*, SCSL (n 290) para 50. For a critique to the way the SCSL approached the issue in this case see: Antonio Cassese, 'The Special Court and International Law: The Decision Concerning the Lomé Agreement Amnesty' (2004) 2 JICJ 1130.

[292] *Prosecutor v. Kallon and Kamara*, SCSL (n 290) para 67.

[293] ibid para 71

[294] ibid para 88. See also: *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, SCSL, Judgment, Case No. SCSL-04-15-T (2 March 2009) para 54.

[295] *Prosecutor v. Kallon and Kamara*, SCSL (n 290) para 82.

Two months after the decision in the *Kallon and Kamara* case, the SCSL adopted a stricter approach to amnesty in *Prosecutor v. Augustine Gbao* (2004).[296] The Special Court reiterated its considerations on the non-opposability of the amnesty in the Lomé Agreement to the exercise of universal jurisdiction and the jurisdiction of the SCSL.[297] However, it also suggested that the prohibition of amnesty had crystallised already: 'There is, therefore, support for the statement that there is a crystallised international norm to the effect that a government cannot grant amnesty for serious crimes under international law'.[298] Contrary to its previous stance, the SCSL claimed a more general rejection of amnesty laws for crimes whose prohibition had the status of *jus cogens*.[299] Without providing much evidence for the change in position and support for the crystallisation of a prohibition of amnesties under customary law, the SCSL relied heavily on the considerations of the ICTY in *Furundžija*.[300]

In Cambodia, the Extraordinary Chambers in the Courts of Cambodia (ECCC) faced a challenge to its jurisdiction based on an amnesty law and a series of royal decrees in favour of Ieng Sary, former Deputy Prime Minister in the Government of Democratic Kampuchea, charged with genocide, crimes against humanity and war crimes.[301] In the *Decision on Ieng Sary's Rule 89 preliminary objections: ne bis in idem and amnesty and pardon* (2011), the Trial Chamber engaged in a substantial analysis of the status of amnesty laws under international law referencing 44 decisions from other international tribunals and human rights bodies.[302] The Extraordinary Chamber observed that Cambodia had ratified international treaties prohibiting torture, genocide and grave breaches of humanitarian law, so amnesty provisions could not relieve the state from its obligations to prosecute those crimes.[303] The lack of treaty provisions regarding the use of amnesty for other international crimes led the ECCC to examine customary international law. Following the conclusions of the SCSL and the state practice expressed through judicial decision from Latin American courts, the ECCC considered that 'state practice regards blanket amnesties for serious international crimes to be in breach of

[296] *Prosecutor v. Augustine Gbao*, SCSL, Decision on preliminary motion on the invalidity of the agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court, Case No. SCSL-2004-15-AR72 (25 May 2004). Three cases were decided on the same day, see also: *Prosecutor v. Moinina Fofana, SCSL*, Decision on Preliminary Motion on Lack of Jurisdiction: Illegal Delegation of Jurisdiction by Sierra Leone, Case No. SCSL-2004-14-AR72 (25 May 2004); *Prosecutor v. Allieu Kondewa*, SCSL, Decision on lack of jurisdiction / abuse of process: amnesty provided by the Lomé Agreement, Case No. SCSL-2004-14-AR72 (25 May 2004).
[297] *Prosecutor v. Augustine Gbao*, SCSL (n 296) para 8.
[298] ibid para 9.
[299] ibid para 10.
[300] ibid para 9.
[301] *Prosecutor v. Ieng Sary*, ECCC, Decision on Ieng Sary's Rule 89 preliminary objections (ne bis in idem and amnesty and pardon), 002/19-09-2007/ECCC/TC (3 November 2011).
[302] ibid.
[303] ibid para 39.

international norms'.[304] Acknowledging that state practice in relation to custom-based crimes was arguably insufficiently uniform to establish an absolute prohibition of amnesties, the ECCC concluded that internationalised and domestic courts needed to evaluate amnesties on a case-by-case basis assessing the implementation of alternative mechanisms of accountability.[305] In the Cambodian case, the ECCC highlighted that the amnesty might have contributed to combatants reintegrating into society and restoring peace in the country, having been instrumental as a negotiation tool for ending the conflict. Nevertheless, it failed to condition the benefit of amnesty or provide for other forms of accountability or alternative truth or reconciliation mechanisms.[306] Consequently, the ECCC considered that the scope of the amnesty excluded crimes of genocide, torture, and grave breaches to the Geneva Conventions, and 'accordingly does not debar the Trial Chamber's exercise of jurisdiction'.[307]

More recently, the ICC tackled the debate on amnesties for the first time in 2019.[308] In *Prosecutor v. Saif Al-Islam Gaddafi*, the Pre-Trial Chamber of the ICC considered the opposability of a domestic amnesty to its jurisdiction, and more generally, the status of amnesties under international law.[309] The defendant argued that in 2015 he was convicted by the Tripoli Criminal Court for substantially the same conduct investigated by the ICC. Then, in 2016, he was released from prison pursuant to an amnesty law. Based on this, he challenged the jurisdiction of the Court, arguing that he had already been prosecuted, triggering the analysis of the *ne bis in idem* principle and the permissibility of amnesty laws. The ICC quickly dismissed the argument of opposability, arguing that the amnesty did not render the existing judgment final and, therefore, did not produce *res judicata* under articles 17(1)(c) and 20(3) of the Rome Statute.[310] Moreover, referencing the decisions of other international criminal tribunals (including the ICTY, the SCSL, and the ECCC) as well as pronouncements of human rights regional and universal bodies (namely the IACtHR, the ECtHR, the ACoHPR and the UNHRC), the ICC concluded that 'there is a strong, growing, universal tendency that grave and systematic human rights violations – which may amount to crimes against humanity by

[304] ibid para 46, 49.
[305] ibid para 53.
[306] ibid para 54.
[307] ibid para 55.
[308] For a general discussion in the literature about possible approach that the ICC could adopt regarding the permissibility of amnesties under the Rome Statute see: Anja Seibert-Fohr, 'The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions' (2003) 7 Max Planck Yearbook of United Nations Law 553; Darryl Robinson, 'Serving the interest of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) 14 EJIL 481; Stahn, 'Complementarity, Amnesties and Alternative Forms of Justice' (n 207); Jacobs (n 12).
[309] *Prosecutor v. Saif Al-Islam Gaddafi*, ICC (n 23).
[310] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3. Ratified by 123 parties.

their very nature – are not subject to amnesties or pardons under international law'.[311] The Court considered that amnesties intervene with states' positive obligations to investigate, prosecute and punish perpetrators of crimes against humanity, and deny victims the right to truth, access to justice, and to request reparations.[312] Therefore, it concluded that the Libyan general amnesty law was incompatible with international law.[313]

The decision on admissibility was challenged by the defendant and the discussion on amnesty was taken to the Appeals Chamber, who examined the terms of the amnesty and its applicability to Mr Gaddafi.[314] Ultimately, it agreed with the Pre-Trial Chamber and confirmed the admissibility of the case, arguing that the crimes under investigation by the ICC were not covered by the amnesty law. The Appeals Chamber considered that this was enough to establish the jurisdiction of the Court and it was not necessary to expand on the compatibility of such amnesty with international law.[315] Nonetheless, it added that,

> international law is still in the developmental stage on the question of acceptability of amnesties. The Pre-Trial Chamber appears to have accepted this: rather than determining that this question was settled, it found 'a strong, growing, universal tendency that grave and systematic human rights violations – which may amount to crimes against humanity by their very nature – are not subject to amnesties or pardons under international law'. In these circumstances, the Appeals Chamber will not dwell on the matter further.[316]

The Appeals Chamber cautiously avoided the question of the prohibition of amnesty under international law, while suggesting that there remained some debate around the crystallisation of such a norm. This conclusion left clear ambiguities around the contours of a norm on amnesties under international law, but it also made clear that the ICC does not see a crystallisation of the prohibition of amnesties in the way that other international criminal tribunals have asserted in the past.

[311] *Prosecutor v. Saif Al-Islam Gaddafi*, ICC (n 23) para 61.
[312] ibid para 77.
[313] ibid para 61, 78.
[314] *Prosecutor v. Saif Al-Islam Gaddafi*, ICC Appeals Chamber (n 23).
[315] ibid para 87.
[316] ibid para 96.

4.5. Conclusions: judicial dialogue and the prohibition of amnesties

The permissibility of amnesties under international law continues to be discussed by domestic courts, international tribunals, and human rights bodies. The lack of explicit regulation in international treaties and the absence of consistency in state practice has left room for domestic and transnational bodies to shape the contours of a norm on amnesties. This 'creative ambiguity' has allowed judicial and quasi-judicial bodies to develop international law, while facing different type of amnesty measures, in multiple situations of conflict across the world.[317]

The influence of blanket amnesties in Latin America, however, is noteworthy. Enacted as mechanisms of impunity in the aftermath of authoritarian regimes, the judicial reaction to some of the most problematic amnesties triggered an anti-impunity turn in the human rights movement that started seeing criminal prosecutions not only as a component of the right to an effective remedy, but even the main form of redress. This turn was led by the Inter-American and the UN systems of human rights, which synergistically adopted a stringent stance against amnesties for human rights abuses. The idea of a prohibition on amnesties emerged from those early pronouncements, expanding itself from blanket and self-amnesties to other types of laws. After focusing on the prohibition of self-amnesties in *Barrios Altos v. Peru*, the IACtHR expanded the prohibition to other type of amnesties in *Gelman v. Uruguay*, and *Gomes Lund v. Brazil.*

This expansion was also facilitated by the judicial dialogue of the Inter-American and the UN institutions with domestic courts in Latin America and with other transnational bodies. Through the conventionality control and block of constitutionality doctrines, domestic courts engaged directly with the decisions of the Inter-American Court and amplified the reach of the prohibition of amnesties to other countries where the Court had not yet intervened. Likewise, the decisions of the Inter-American System have had significant influence on the decision making of other regional bodies in Africa and Europe, as well as international criminal tribunals.

With fewer decisions focused on the permissibility of amnesties, the ECtHR and the ACoHPR have extensively cited the case law of the Inter American Commission and Court to examine amnesty measures in other parts of the world. Highly critical of amnesty laws, the

[317] The term 'creative ambiguity' was adopted by Michael Scharf to describe the status of amnesties under the Rome Statute. It seems appropriate to describe the way courts have discussed amnesties under international law more generally. See: Michael Scharf, 'From the eXile Files: An Essay on Trading Justice' (2006) 63 Washington and Lee LRev 339, 367.

European and African bodies have followed a similar path to the UN and Inter-American institutions, generally rejecting amnesties for serious human rights violations that amount to international crimes. While there is a growing tendency to revoke blanket and self-amnesties, there is no unanimous agreement on the existence of an absolute ban of all kinds of amnesties.[318] In recent decisions, the ECtHR and the ACoHPR have nuanced their view on the permissibility of certain amnesties. In *Laurence Dujardin v. France, Tarbuk v. Croatia,* and *Marguš v. Croatia*, the European Court and Commission alluded to considerations of public interest to argue that some amnesty laws might be permissible in exceptional circumstances when there is a legitimate interest in peace and reconciliation. Meanwhile, the African Commission has strongly rejected blanket amnesties for serious human rights violations, but in *Thomas Kwoyelo v. Uganda* it opened the door to the possibility of well-crafted conditional amnesties as a mechanism of transitional justice that contributes to truth-recovery, reconciliation and genuine reparations.

Similarly, international criminal tribunals have looked to human rights bodies for guidance on the compatibility of domestic amnesties with international law, and their opposability to the jurisdiction of international tribunals. There is clear consensus on the non-opposability of amnesties to bar the jurisdiction of international criminal courts or limit the exercise of universal jurisdiction by alien domestic courts. The validity of an amnesty under municipal law does not have effect, at an international level, to restrict the jurisdiction of other courts to investigate and prosecute international crimes. There is more uncertainty around the crystallisation of a norm prohibiting amnesties. Examining the decisions of human rights bodies and, to a lesser extent, domestic courts, international criminal tribunals have been divided on asserting the crystallisation of such a rule. This is reflected in the latest decisions of the ICC in *Prosecutor v. Saif Al-Islam Gaddafi* where the Pre-Trial Chamber considered that there seems to be an international agreement on the prohibition of amnesties, while the Appeals Chamber concluded that 'international law is still in the developmental stage on the question of acceptability of amnesties'[319]

The analysis of the international jurisprudence in this chapter demonstrates that courts and human rights bodies are highly critical of amnesty measures. However, as Seibert-Fohr has noted, most amnesties under examination have been self-amnesties, blanket amnesties, or general amnesties with a broad scope.[320] Conditional amnesties like the ones enacted in South

[318] Close, 'Crafting an international norm prohibiting the grant of amnesty for serious crimes' (n 17) 109.
[319] *Prosecutor v. Saif Al-Islam Gaddafi*, ICC Appeals Chamber (n 23) para 96.
[320] Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (n 30) 218.

Africa or, more recently, in Colombia have not yet been the subject of international scrutiny. The lack of examination of conditional amnesties added to the recent decisions of the ECtHR and the ACoHR, and the concurring opinions of judges from the IACtHR and the ICC reflect some uncertainty about the compatibility of conditional amnesties with international law.

CHAPTER 5. Complex networks and communities of courts

Judicial dialogue has played a key role in the development of the standards for the application of amnesties. The case law of the Inter-American System and the influence of UN bodies has marked out the path for the development of a prohibition on amnesties. The previous chapter discussed the horizontal and vertical judicial dialogue that helped expand the restriction on amnesties, as well as more recent considerations on the possibility of conditional amnesties. Based on the analysis of 303 decisions, this chapter continues to explore the diversity in arguments and considerations made by courts when assessing the legality of amnesties. Using a complexity theory approach, this chapter builds upon the literature on judicial dialogue and advances the understanding of the role of judicial decisions in shaping international law and the contours of a norm on amnesties.

Judicial dialogue captures to a great extent how courts are increasingly interacting and forming a network of actors that influence the development of international law. Underneath the theorisation of judicial dialogue, however, lies a normative project that goes beyond judicial practice.[1] As explained in Section 3.3, judicial dialogue makes three normative assumptions. Firstly, it proposes a global community of courts. In parallel to a globalised market of goods, judicial dialogue suggests a free market of ideas where international law is globally discussed. Integration is not achieved by a centralised authority, but rather though dialogue and coordination between courts.[2] Secondly, authors proposing a global community of courts argue that judicial interactions are more grounded in persuasion than in legal authority.[3] This suggest that courts do not reference the decisions of other international or domestic tribunals because of their authority, but because of the persuasiveness of their reasoning.[4] Thirdly, courts are considered to have an additional function of protecting the international community's core

[1] See: Gerry Simpson, 'The Ethics of the New Liberalism' in Christian Reus-Smit and Duncan Snidal (eds), *The Oxford Handbook of International Relations* (OUP 2008).
[2] Ruti Teitel and Robert Howse, 'Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order' (2009) 41 New York University Journal of International Law and Politics 959, 965.
[3] Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44 Harvard IntlLJ 191, 193; Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2004) 70; Claire L'Heureux-Dube, 'The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court' (1998) 34 Tulsa LRev 15, 17
[4] Christopher McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights' (2000) 20 OJLS 499, 502.

values and interests.[5] Courts are not simply interpreters and appliers of rules in a specific dispute, but have the judicial function of integrating and giving coherence to the international legal system.[6]

This has nourished the idea of an international agreement on the prohibition of amnesties. It is easy to read the decisions of international courts, and some domestic tribunals revoking amnesty laws enacted as mechanisms of impunity, as a coherent body of cases advancing the protection of human rights. Examining the judicial interactions in the discussion of amnesties, the picture is less clear. Limited interactions, diverse communities, and different considerations of justice and human rights protection reflect a more fragmented dialogue. The argument here is that bringing some concepts from complexity theory allows a better understanding of the dynamics of judicial dialogue and the influence of courts in shaping an international norm on amnesties, without overemphasising the idea of a global community of courts agreeing on the standards for the protection on human rights based upon shared ideas of justice, accountability, and redress.

Exploring the nuances in the decisions of different courts and human rights bodies, the argument in this chapter is that regional and legal regime trends have been a key factor in the approach that domestic and international tribunals have adopted in the analysis of amnesties. However, there have also been relevant interactions between individual courts, forming alliances or bridges across regions and legal regimes. Rather than a global community of courts heading towards a strict prohibition of amnesties based upon persuasion and a common understanding of the protection of human rights, judicial interactions reflect a complex dialogue that follows the dynamics of self-organisation and the emergence of heterarchies. The increasing number of interactions among judicial and quasi-judicial bodies have resulted in the formation of several communities or clusters. While the idea of a general prohibition of amnesty has become mainstream in the human rights movement, some courts have left room for the possibility of well-crafted amnesties as an exceptional mechanism of transitional justice in certain contexts.[7]

The formation of bridges or alliances between courts has been instrumental in courts exploring different models of transitional justice and a range of approaches to the use of

[5] Armin von Bogdandy and Ingo Venzke, 'On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority' (2012) 10 Amsterdam Center for International Law Research Paper 1, 19.
[6] Jenny S. Martinez, 'Towards an International Judicial System' (2003) 56 Stanford LRev 429, 487; Eyal Benvenisti and George W. Downs, 'National Courts, Domestic Democracy, and the Evolution of International Law' (2009) 20 EJIL 59, 61.
[7] The Office of the UN Human Rights Commissioner alluded to the possibility of 'well-crafted' amnesties. However, it did not explain the meaning or characteristics of such amnesties. See: OHCHR, 'Rule-of-Law Tools for Post-Conflict States: Amnesties' (2009) UN Doc HR/PUB/09/1, 32.

amnesties. This challenges the narrative of a growing agreement on the prohibition of amnesties, reflecting a diversity of approaches in the assessment of the permissibility of amnesty laws. Mapping the connections and communities that emerge from cross-referencing practices, and exploring the patterns that emerge in the decision making of courts examining amnesties, this chapter proposes a way of reconciling judicial standards for the implementation of amnesty laws during transitional justice under international law. Despite the lack of agreement on a general prohibition on amnesties, the chapter identifies points of agreement and areas of uncertainty that will allow the development of a general framework for the judicial examination of amnesties in the next chapter.

The first section introduces the theoretical framework, explaining how the concepts of self-organisation and heterarchies, used to analyse complex systems, explain the judicial dialogue on the permissibility of amnesties. Section 2 maps the networks of interactions and the dynamics of judicial cross-referencing in the discussion of amnesties. Using a socio-legal approach grounded on the systematic reading of judicial decisions through a complexity theory lens, this section argues that interactions between judicial and quasi-judicial bodies are limited at an individual level, but significant at the network level. Section 3 argues that, rather than a global dialogue, most decisions reference a small number of other cases. However, there are some decisions that act as bridges across jurisdictions and facilitate the dialogue between regions and legal regimes. While individual interactions do not say much about the influence of judicial dialogue in the development of international law, at a system level, courts are forming multiple communities with different approaches to the permissibility of amnesties. Section 4 argues that this dynamic of self-organisation results in the formation of informal hierarchies among courts, which change over time. Section 5 discusses the nuances in the decisions of different bodies, demonstrating that, despite the lack of agreement on a general prohibition on amnesties, the reasoning of courts reveals some patterns that shape the contours of a norm on the permissibility of amnesties in exceptional circumstances.

The chapter concludes by showing how, rather than a global community of courts unified around a general prohibition of amnesties, judicial dialogue has resulted in the emergence of several communities of judicial and quasi-judicial bodies. Those conversations have nuanced the position of international and domestic tribunals around the permissibility of amnesties, putting in place some restrictions while also hinting at the possibility of well-crafted amnesties in certain contexts.

5.1. Self-organisation in the discussion of amnesties

One of the characteristics of international law is its horizontality or absence of institutional hierarchies.[8] The lack of a single legislature or centralised court leaves space for norm contestation and a multiplicity of ways of reading international norms. Despite significant disparities in power, information and influence, there is not one actor, state, corporation or international organisation that has control over the dynamics of the whole system.[9] As Anthea Roberts has argued, 'international law might better be viewed as an area of contestation between different visions of international law articulated by many different actors, including domestic courts'.[10] International norms are shaped through their interpretation and application by legal actors. This means, on the one hand, that the content of international law is constantly changing and developing.[11] On the other hand, actors interact and organise with no external controller.[12]

In complex systems, this is called *self-organisation* and refers to 'the process by which interactions of component agents result in bottom-up emergence of a system without the need for any external controller or guiding hand'.[13] Order emerges spontaneously from the interactions of the legal actors and, as such, is the product of many local decisions.[14] Self-organisation gives the system flexibility and a great capacity to adapt.[15]

Like judicial dialogue, complexity theory focuses on interactions and how international norms emerge from those interactions.[16] However, the idea of self-organisation is anti-foundationalist.[17] It does not presuppose underlying values that facilitate judicial dialogue, but enquires about them. Anne-Marie Slaughter's idea of a global community of courts is grounded in liberal values to guarantees a free space for rational dialogue and a shared understandings of community.[18] She proposes the values of equality, tolerance, autonomy, interdependence, liberty, and self-government, as a starting point for developing community principles that allow

[8] Campbell Mclachlan, 'The principle of systemic integration and article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279, 282.
[9] Thomas E. Webb, 'Tracing an Outline of Legal Complexity' (2014) 27 Ratio Juris 477, 485.
[10] Anthea Roberts, 'Comparative International Law? The role of national courts in creating and enforcing international law' (2011) 60 ICLQ 57, 80.
[11] Mclachlan, 'The principle of systemic integration and article 31(3)(c) of the Vienna Convention' (n 8) 282.
[12] Steven Wheatley, *The idea of international human rights law* (OUP 2019) 49.
[13] ibid.
[14] Webb, 'Tracing an Outline of Legal Complexity' (n 9) 486.
[15] Paul Cilliers, *Complexity and postmodernism: Understanding complex systems* (Routledge 1998) 89.
[16] Wheatley, *The idea of international human rights law* (n 12) 49.
[17] Cilliers, *Complexity and postmodernism* (n 15) 106.
[18] Slaughter, 'A Global Community of Courts' (n 3) 215.

dialogue.[19] Those values, in turn, allow for what Jenny Martinez calls an 'emerging international judicial system' that 'aspires to the "federalism of free nations": to provide an institutional framework for cooperation, to promote compliance with international law, and to reinforce rights-respecting democracy at the national level'.[20] These liberal democratic values are the condition of possibility as well as the purpose of judicial dialogue.[21]

Instead, this analysis adopts what Ingo Venzke calls an 'agnostic attitude', where universal morality is neither affirmed nor rejected.[22] The focus of the analysis is on how ideas of justice and shared values emerge from the interactions of legal actors and how they impact on the development of international law. Thus, principles are contested and do not evolve in a linear way towards an end-point, either upholding a liberal community of states or a global constitutional order. Rather, they emerge from dynamics of self-organisation where judges interact and adapt based on the feedback they get from other actors. This means that the standards developed at a systemic level are not determined by agreement or by the aggregation of judicial decisions, but emerge from patterns of relatively simple interaction between actors.[23] In fact, in many cases, each court ignores the dynamics of the system as a whole and responds to the information that is available to them, so they act with limited knowledge.[24] As in complex systems, information is stored in a distributed fashion, so different knowledge exists in different parts of the system.[25] Thus, complex systems are irreducible and cannot be understood by focusing on individual decisions or courts.[26]

Despite the influence of the IACtHR and the UN bodies, and the anti-impunity turn in the human rights movement that strongly condemned the use of amnesties, the discussion of amnesty measures in other parts of the world has been rich and nuanced. Expanding on the idea of self-organisation, the following sections reconstruct the networks of judicial interactions and the type of arguments advanced by courts when examining amnesties.

[19] Slaughter, *A New World Order* (n 3) 31. See also: Robert Howse and Ruti Teitel, 'Cross-judging revisited' (2014) 46 New York University Journal of International Law and Politics 867, 874; Martinez, 'Towards an International Judicial System' (n 6) 463.
[20] Martinez, 'Towards an International Judicial System' (n 6) 463.
[21] Alex Mills and Tim Stephens, 'Challenging the Role of Judges in Slaughter's Liberal Theory of International Law' (2005) 18 LJIL 1, 25.
[22] Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (OUP 2012) 62.
[23] Cilliers, *Complexity and postmodernism* (n 15) 5.
[24] ibid. See also: Webb, 'Tracing an Outline of Legal Complexity' (n 9) 485.
[25] Webb, 'Tracing an Outline of Legal Complexity' (n 9) 489.
[26] Cilliers, *Complexity and postmodernism* (n 15) 5.

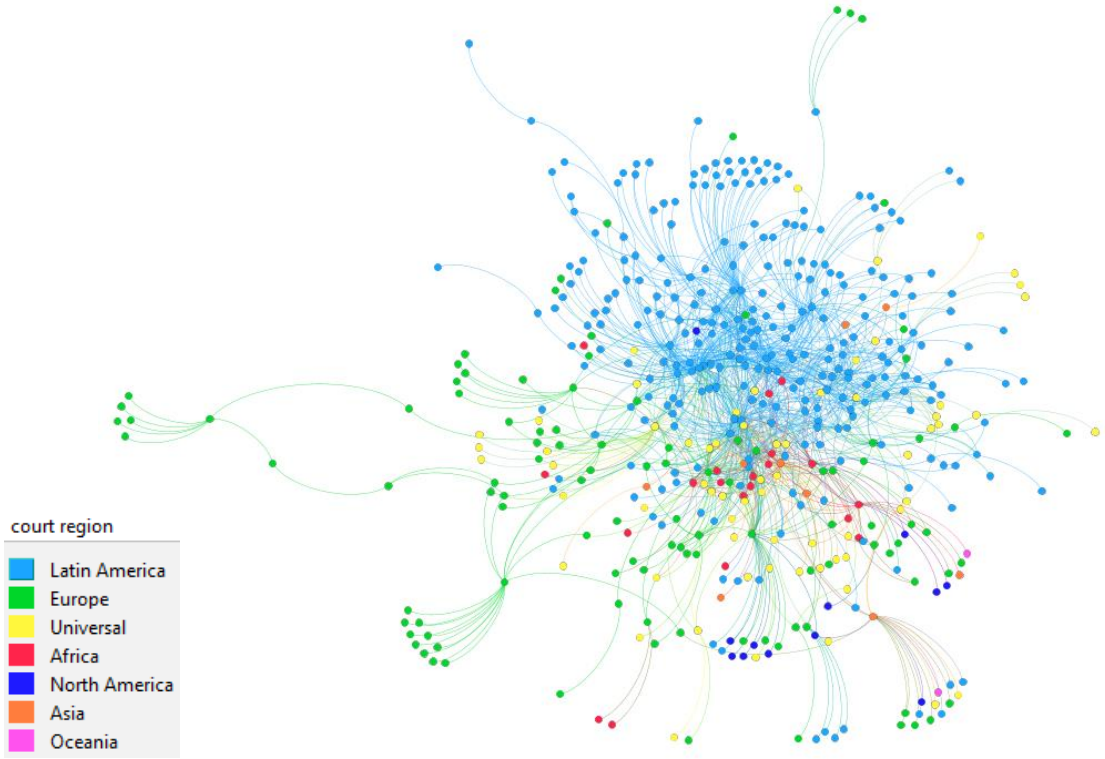
5.2. Citation networks

Tracing the interactions between courts and quasi-judicial bodies, of the 303 cases with relevant considerations on the legality of amnesties, 251 decisions made explicit reference to other judicial decisions, forming a network of 2,106 connections or references to 692 cases (327 of which are referenced twice or more).[27] Of the 2,106 references, 827 were self-references or citations of decisions of the same institution, while 1,279 were references to the decisions of other courts or bodies. This shows how courts and human rights bodies have been interacting and examining the decisions of other institutions. These are references made by domestic courts, international tribunals, or human rights bodies when discussing the legality of amnesties. Of course, some decisions discussed other topics and only considered the legality of the amnesty as a matter of *obiter dictum*. Because of this, the relationships between decisions were coded manually and the links only reflect interactions relevant in the discussion of the permissibility of amnesties.

Figure 10 shows the network of cases referring to the decisions of other courts or human rights bodies when discussing the legality of amnesties. Geographic regions play an important part in explaining the connections between courts in the discussion of amnesties. This is not surprising considering factors like language and the relationship of domestic courts with regional human rights bodies. The prominence of decisions adopted by courts and human rights bodies with jurisdiction in Latin America is also noticeable. However, there is an important number of decisions by bodies discussing the permissibility of amnesties in other regions. Coloured by the region of their jurisdiction, the activity of Latin-American Courts is noticeable. The top of the network reflects the interactions between decisions by the Inter-American System, domestic courts in Latin America, and a few pronouncements of the UN monitoring bodies (with universal reach). The bottom part shows a more diverse network with decisions by transnational and domestic courts with jurisdiction in Europe, Africa, Asia and North America, as well as some decisions by bodies with universal reach and Latin American institutions.

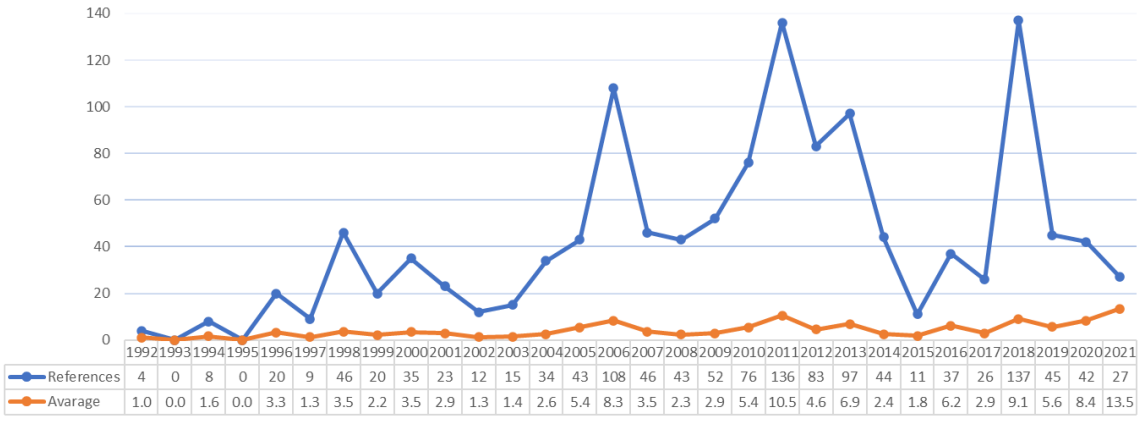
[27] Despite only including references made in the discussion of amnesties, many of the decisions referenced were to cases not related to amnesties. That is why there is a disparity between the number of cases initially identified as relevant for the discussion of amnesties (484) and the network of cases that resulted from mapping the cross-references (692).

Figure 10. Citation network of decisions on amnesty excluding self-references, coloured by region of the jurisdiction of the judicial or quasi-judicial body.



The evolution of the citation network over time shows how judicial dialogue has diversified. Analysing judicial cross-references in the discussion of amnesties by year, we see an important increase in the number of citations, particularly after 2003. As shown in Figure 11, there is a general upwards trend both in the total number of citations and, more importantly, in the average of references per decision. When discussing the permissibility of amnesties, courts and human rights tribunals are increasingly looking at the decisions of other bodies.

Figure 11. Number of references and average of references per decision by year.



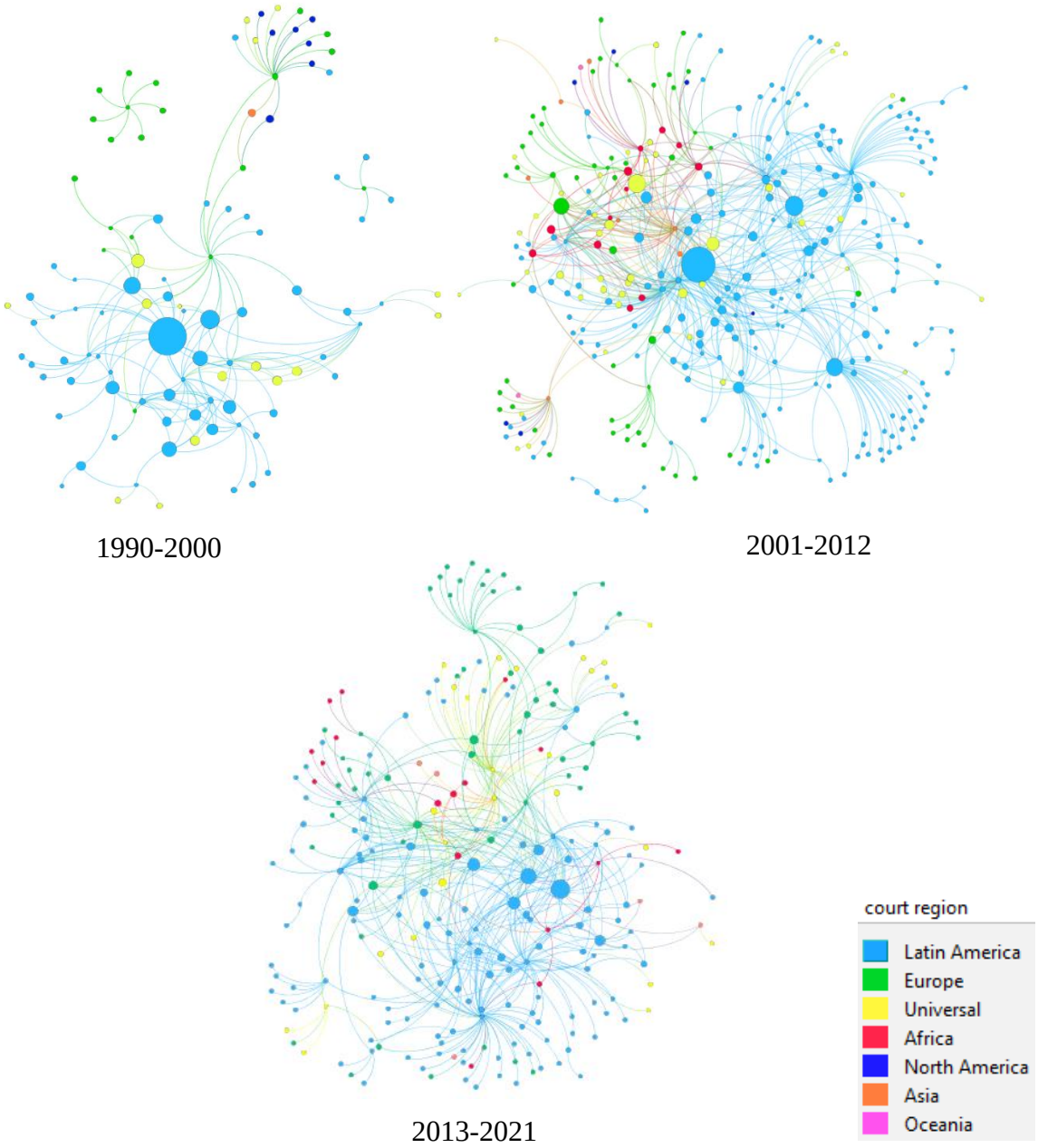
	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
References	4	0	8	0	20	9	46	20	35	23	12	15	34	43	108	46	43	52	76	136	83	97	44	11	37	26	137	45	42	27
Avarage	1.0	0.0	1.6	0.0	3.3	1.3	3.5	2.2	3.5	2.9	1.3	1.4	2.6	5.4	8.3	3.5	2.3	2.9	5.4	10.5	4.6	6.9	2.4	1.8	6.2	2.9	9.1	5.6	8.4	13.5

The increasing number of cross-references also entailed a diversification of interactions. As explained in Chapter 4, during the 1990s, courts and human rights bodies started examining the legality of amnesties enacted in the aftermath of authoritarian regimes in Latin America. Between 1990 and 2000 the discussion of the permissibility of amnesties under international law gained traction with the leadership of Inter-American human rights bodies, UN monitoring bodies, domestic courts in Latin America, and European national courts exercising universal jurisdiction. Gravitating around the standards set by the IACtHR on *Velásquez Rodríguez* for the protection of human rights, the IACoHR, the UNHRC, and the UNCAT started reviewing and critically assessing the impunity laws enacted in the aftermath of dictatorships or authoritarian regimes in Latin America.[28] This was mirrored by decisions from domestic courts that started questioning the legitimacy of those measures and found in the pronouncements of international bodies a good source of authority to advance that challenge.[29]

As shown in Figure 12, interactions were limited and mostly based on the fact that all judicial and quasi-judicial bodies were examining situations in the same countries. Decisions like *Prosecutor v. Anto Furundžija*, by the ICTY, would become more important in the following years when ICL tribunals joined the conversation on amnesties more actively.[30] During this period, courts and quasi-judicial bodies started to question the legitimacy of certain amnesties but did not directly address the main question about the legality of amnesties under international law. This question would be discussed in more depth for the first time by the IACtHR in *Barrios Altos v. Peru* in 2001.[31] This decision, along with the beginning of the operations of the ICC in 2002 gave way to a new phase of translating the anti-impunity norm into a prohibition of amnesty laws under international law.

[28] See: Section 4.2.
[29] See: Section 4.3.
[30] *Prosecutor v. Anto Furundžija*, ICTY, Case No. IT-95-17/1-T (10 December 1998). Referenced in: *Prosecutor v. Ieng Sary*, ECCC, Decision on Ieng Sary's Rule 89 preliminary objections (ne bis in idem and amnesty and pardon), 002/19-09-2007/ECCC/TC (3 November 2011); *ecutor v. Morris Kallon and Brima Bazzy Kamara*, SCSL, Decision on challenge to jurisdiction: Lomé Accord Amnesty, Cases No. SCSL-2004-15-AR72 and SCSL-2004-16-AR72 (13 March 2004); *Prosecutor v. Augustine Gbao*, SCSL, Decision on preliminary motion on the invalidity of the agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court, Case No. SCSL-2004-15-AR72 (25 May 2004); *Prosecutor v. Saif Al-Islam Gaddafi*, ICC, Situation in Libya, Decision on the 'admissibility challenge by Dr. Saif Al-Islam Gaddafi pursuant to articles 17(1)(c) and 20(3) of the Rome Statute', ICC-01/11-01/11 (5 April 2019), among others.
[31] *Barrios Altos v. Peru*, IACtHR, Merits, Series C No. 75 (14 March 2001)

Figure 12. Citation network of decisions partitioned by year of issue, with size indicating number of inward citations and coloured by region of the jurisdiction of the judicial or quasi-judicial body.



Between 2001 and 2012, there is an increase in judicial interactions, with new courts and human rights bodies discussing the permissibility of amnesties under international law. This period covers the core of the development of the case law of the Inter-American Court on amnesties, between 2001 in *Barrios Altos* and 2012 in *El Mozote Massacres*, and reflects the vertical and horizontal expansion of the judicial dialogue, which moved towards a general prohibition on amnesties. Figure 12 shows that the network of decisions during this period is still dominated by decisions from Latin American courts rejecting or limiting the use of

amnesties, which gravitate around the decisions of the IACtHR (*Velásquez Rodríguez, Barrios Altos, La Cantuta*, and *Almonacid Arellano*), the UNHRC (*General Comment No. 20* and *General Comment No. 31*), and the ICTY (*Furundžija*). However, other judgments from courts and quasi-judicial bodies with jurisdiction in Europe, Africa and, to a lesser extent, Asia, start becoming more relevant. The network increasingly referenced decisions from the ECtHR, the ACoHPR, the SCSL, and the ECCC, expanding the conversation and bridging the relationship between Latin American courts and domestic tribunals in Africa and Europe.[32]

Moreover, in different decisions, international tribunals made an important effort to compile the case law on amnesties. The IACtHR, in *Gomes Lund*, *Gelman*, and *El Mozote*, consolidated its case law banning any type of amnesties while referencing around 30 decisions from other bodies to demonstrate the general agreement on such a prohibition. Similarly, the ECCC in the *Ieng Sary* case, and the separate opinion of Justice Robertson to the decision of the SCSL in *Prosecutor v. Allieu Kondewa,* offered a reading of the status of amnesties under international human rights standards that pointed to the consolidation of a prohibition on blanket amnesties.

Most of the literature has discussed the decisions on amnesties adopted between the late 1990s and the early 2000s. In consequence, human rights scholars and practitioners have stressed the importance of decisions arguing a general prohibition on amnesties, focusing particularly on the case law of the IACtHR.[33] Nevertheless, after 2013, courts and human rights bodies have continued to discuss the legality of amnesties. As shown in Figure 12, the network of interactions of decisions issued since 2013 is more integrated and less clearly separated by a regional divide. Despite the prominence of decisions in Latin America (with the case law of the IACtHR remaining the most cited), there are increasing interactions between courts with jurisdiction in Africa, Europe and Asia. This is partly explained by some of the most recent decisions adopted by international bodies. Discussing the role of amnesties in different transitional justice processes in the world, these decisions have brought some nuance into the debate, diverging from a general prohibition of all amnesties. Examples of this include the decision of the Grand Chamber of the ECtHR in *Marguš v. Croatia*, the decision of the ACoHPR in *Thomas Kwoyelo v. Uganda*, the considerations of the ICC in *Prosecutor v. Saif Al-Islam Gaddafi*, and the concurring opinion to the decision of the IACtHR in *El Mozote v. El Salvador*.

[32] See: Section 4.4.

[33] See: Hugo A. Relva, 'Three Propositions for a Future Convention on Crimes Against Humanity' (2018) 16 JICJ 857; Christina Binder, 'The Prohibition of Amnesties by the Inter-American Court of Human Rights' (2011) 12 German LJ 1203; Karen Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (2015) 100 Cornell LRev 1069.

At a domestic level, there has also been a greater participation by courts from different jurisdictions. In previous phases, most of the debate on amnesties was grounded in the impunity laws enacted in the aftermath of military dictatorships in Argentina, Chile, Uruguay and Brazil, or the authoritarian regime of Fujimori in Peru. More recently, courts in countries like Colombia, El Salvador, Guatemala, Kosovo, Slovakia, Nepal and Uganda have engaged with the debate, analysing the legality of amnesties in other circumstances. For instance, the most recent peace process in Colombia has re-opened the door to a distinction between self-amnesties enacted by authoritarian regimes and conditional amnesties enacted as part of a negotiated peace process. Courts tackling questions about the role of amnesties in transitional justice, and the possibility of conditional, limited, and well-crafted amnesties, have been increasingly looking at the decisions of other courts in similar situations.

5.3. Communities of courts

Thinking of international law as a system has enabled courts to develop international law beyond the narrow concept of state consent, by filling lacunae, interpreting treaties, resolving conflicts between norms, and developing further the international legal system.[34] States and non-state actors constitute a community of actors that make and shape international law.[35] Stanley Fish adopted the concept of 'interpretative communities' in the context of literary theory.[36] Rather than attaching meaning to the text or to the reader, Fish argues that the interpretative authority lies in the community of actors that share a similar framework of understanding.[37] The interpretation and understanding of international law has a collective element that emerges though the interactions of legal actors.[38] An epistemic community of courts helps to link a fragmented legal system without the necessity of total unity or hierarchy.[39]

A global community of courts is more a desire than a reality. As Michael Waibel points out, 'the shared context is likely much more limited than is typically the case in a domestic

[34] Eyal Benvenisti, 'The Conception of International Law as a Legal System' (2008) 83 Tel Aviv University Law Faculty Papers 1, 4.
[35] Anthea Roberts and Sandesh Sivakumarani, 'The theory and reality of the sources of international law' in Malcom Evans (ed), *International Law* (5th edition edn, OUP 2018) 108.
[36] Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Duke University Press 1990).
[37] Ibid 141. See also: John Tobin, 'Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation' (2010) 23 Harvard Human Rights Journal 1, 8.
[38] Michael Waibel, 'Interpretive Communities in International Law' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (OUP 2015) 151.
[39] Teitel and Howse, 'Cross-Judging' (n 2) 966.

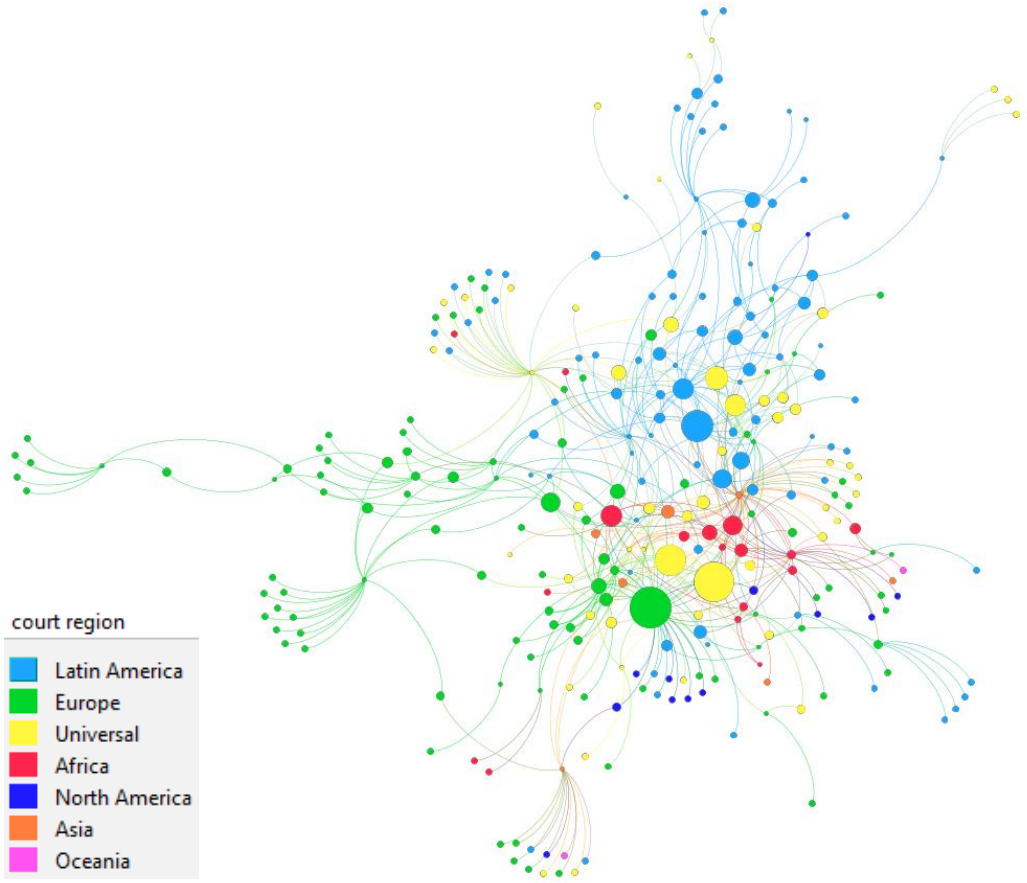
legal setting. No single interpretive community exists in international law, if it ever did'.[40] Depending on the subject matter and the moment in history, the composition of the community varies.[41] Thus, instead of a single community we have a multiplicity of communities that self-organise though interactions and change over time.

In the case of amnesties, the influence of the decisions of the IACtHR on other bodies is evident. Out of the 1279 connections identified in the discussion of amnesties, 768 (60%) references involve decisions of the Inter-American Court, with 251 mentions of judgments from other courts (outward citations), and 517 references made by other bodies of the decisions of the IACtHR (inward citations). Removing those decision from the network, it is possible to get a clearer picture of the judicial dialogue taking place between other courts and human rights bodies.

Figure 13 shows the emergence of at least three communities of courts discussing the permissibility of amnesties, which also reflect different approaches to the use of amnesties. The top of the network reflects the dialogue between domestic courts in Latin America and the Inter-American Commission on Human Rights, UN Bodies and, to a lesser extent, with domestic courts in Europe exercising universal jurisdiction for crimes committed in Chile, Argentina, Peru, and Guatemala. As explained in Chapter 4, most of these decisions focused on impunity measures enacted in the Southern Cone after military dictatorships, and almost unanimously restricted the use of amnesty measures. The bottom left of the network shows domestic courts in Europe interacting with the European Court of Human Rights and transnational bodies with universal jurisdiction. Following the approach of the ECtHR, domestic courts in Europe have examined amnesties with a strong emphasis on the discretionary faculties of the state to adopt this type of measures. However, they have also put some limitations on blanket or general amnesties for serious human rights violations following the decisions of the Inter-American System and UN monitoring bodies. The bottom right of the network reveals a more diverse dialogue, with courts with jurisdiction in Asian and African countries engaging with the decisions of universal bodies, as well as judgments in some Latin American and European courts. These interactions reflect a more nuanced approach to amnesties that diverges from a general prohibition on amnesties and considers the possibility of certain conditional amnesties. These arguments will be explored in more depth in Section 5.5.

[40] Waibel, 'Interpretive Communities in International Law' (n 38) 151.
[41] Roberts and Sivakumarani, 'The theory and reality of the sources of international law' (n 35) 109. Also see: Martti Koskenniemi, 'Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission (2006) UN Doc A/CN.4/L.682.

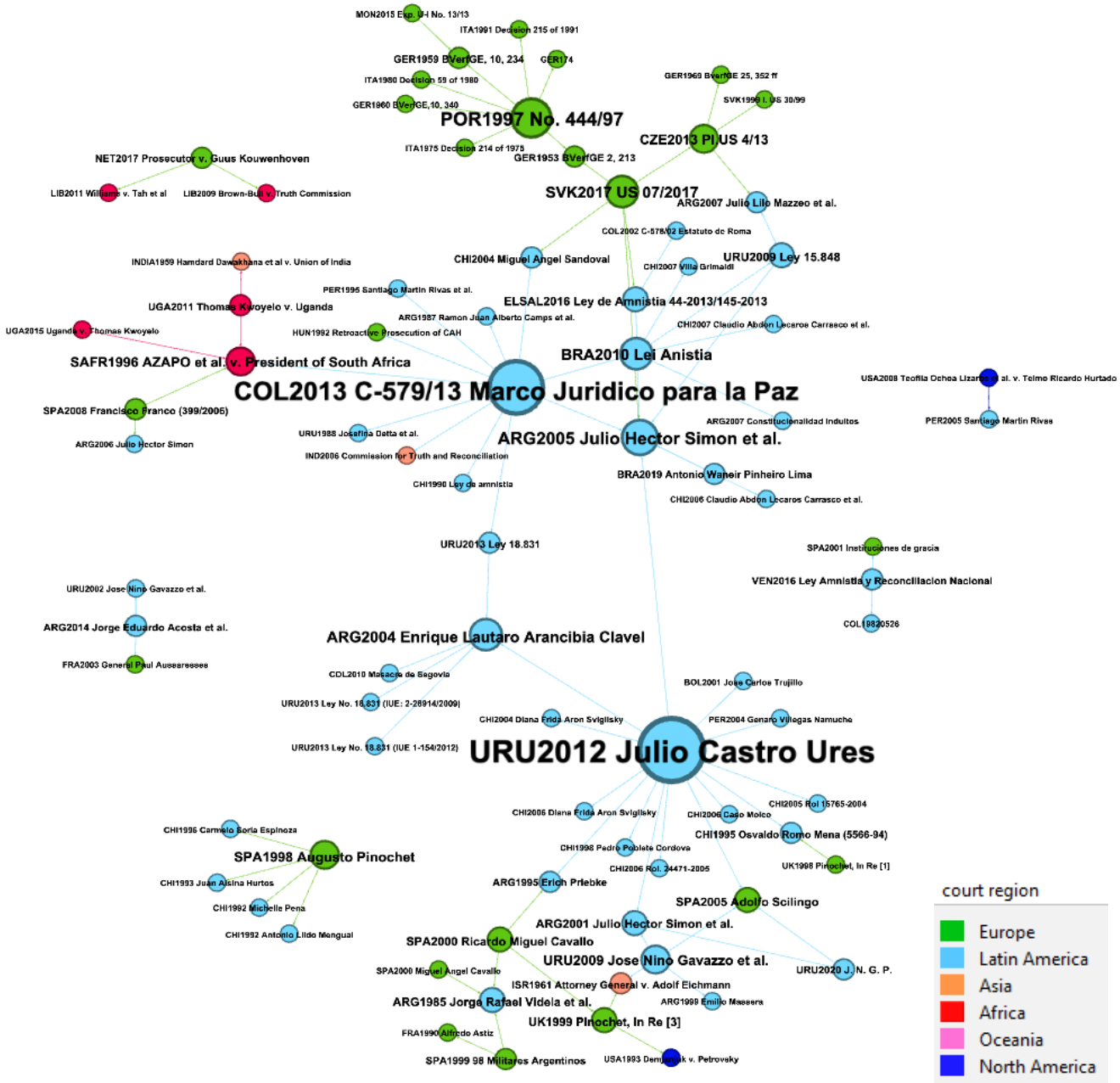
Figure 13. Citation network of decision excluding decisions of the IACtHR with size indicating number of inward citations and coloured by region of the jurisdiction of the judicial or quasi-judicial body



Many of the judicial interactions discussing the permissibility of amnesties are mediated by international bodies. The dialogue between domestic courts is still limited. However, Figure 14 shows in more detail the connections between domestic courts, which provide evidence of the formation of bridges or alliances between tribunals approaching the question on amnesties in a similar manner. Apart from confirming the centrality of the decisions from Latin American national courts, there are two groups of decisions interacting with other courts. On the one hand, courts from Chile, Argentina, Uruguay and Peru, interacting with European and North American courts exercising universal jurisdiction over crimes committed by nationals of those countries. On the other hand, there is a group of decisions from other Latin American countries, namely Colombia, El Salvador and Brazil, interacting with each other as well as with courts in South Africa, Uganda and Indonesia. In the dynamics of self-organisation typical of complex systems, courts tend to interact with other tribunals in

the same region, given the linguistic and contextual similarities. However, there are long-range interactions that can have great impact in the development of the system.[42]

Figure 14. Citation network of decisions issued by domestic courts with size indicating centrality[43] and coloured by region.



[42] Cilliers, *Complexity and postmodernism* (n 15) 4.

[43] Betweenness centrality in Gephi measures the times a node is part of the shortest path connecting all nodes. See: Ulrik Brandes, ' A Faster Algorithm for Betweenness Centrality' (2001) 25 Journal of Mathematical Sociology 163.

The interactions between courts in countries with similar transitional justice processes have provided space for courts to explore the permissibility of conditional, negotiated, and limited amnesties in the context of peace reconstruction. While some courts have gravitated around strengthening human rights standards of justice, other courts have placed emphasis on the role of amnesties as a mechanism for facilitating peace and reconciliation, and other tribunals have stressed the discretionary powers of states to make decisions in the public interest of the nation.

5.4. Heterarchies

The increasing interactions of courts have resulted in the formation of communities or clusters of courts. Despite the lack of formal hierarchies in international law, courts tend to gravitate around certain decisions. Examining the level of engagement with the decisions of other bodies, out of the 1,279 citations, 48% were simple references, through footnotes or a simple mention without expanding on the reasoning of the case; 34% of citations included a quotation; 13% included a brief summary of the case, and only 3% of references engaged critically with the reasoning of the decision referenced (with 2% of references not classified because they refer to the same legal case). Despite the emphasis of judicial dialogue theories on reasoning and persuasion, the decisions of other tribunals are mostly referenced, appealing to their authority.

Examining the case law on amnesties, the previous chapter highlighted the importance of early decisions from Inter-American and UN human rights bodies, which have influenced the judicial discussion of the permissibility of amnesties elsewhere. However, the dynamics of self-organisation and the identification of different communities of courts reveal the formation of heterarchies. Carole Crumley defines heterarchy as ‘the relation of elements to one another when they are unranked or when they possess the potential for being ranked in a number of different ways’.[44] In complex systems, hierarchies are not completely erased, but rather admit both temporal and spatial flexibility.[45] Because hierarchies are not that well-structured, ‘they interpenetrate each other, i.e. there are relationships which cut across different hierarchies. These interpenetrations may be fairly limited, or so extensive that it becomes difficult to typify

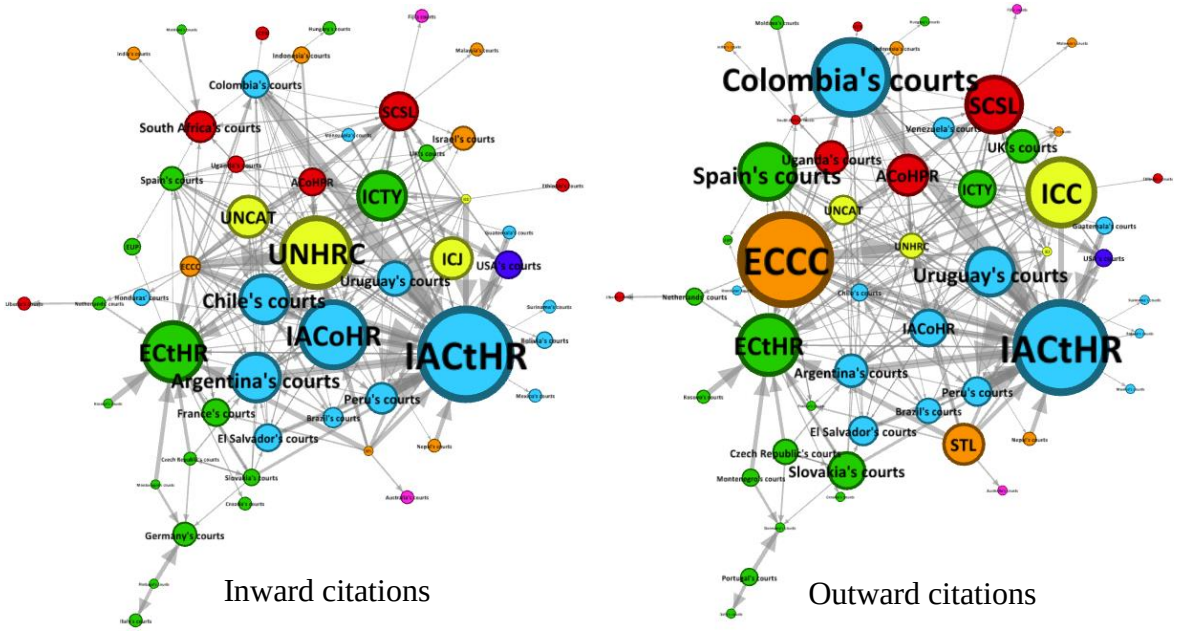
[44] Carole L. Crumley, 'Heterarchy and the Analysis of Complex Societies' (1995) 6 Archeological Papers of the American Anthropological Association 1, 3.
[45] ibid 4.

the hierarchy accurately in terms of prime and subordinate parts'.[46] Part of the adaptive ability of the system is grounded in the capacity to transform its hierarchies when they become too dominant or obsolete.[47] Thus, in the emergence of different communities of courts discussing the permissibility of amnesties, other courts and decisions have become a source of authority among specific groups of tribunals.

In the network of citations there are courts that act as authority, being cited and referenced by other judicial and quasi-judicial bodies.[48] Other courts serve as hubs, doing the work of compiling and synthesising the case law on amnesties by referencing the decisions of other tribunals.[49] Figure 15 shows how much of the conversation on amnesties has been mediated by the decisions of the IACtHR and the ECtHR, which have had a double role of authority, referenced by many other bodies, as well as hubs, reading and interpreting the decisions of other courts and human rights bodies. The IACoHR, the UNHRC, the UNCAT, and the ICTY, conversely, have been widely reference as authority, but their decisions rarely refer to the case law of other bodies. Other international like the ACoHPR, ECCC, the ICC, the SCSL and the STL have acted as hubs by extensively referencing the standards developed by other criminal courts or human rights bodies for the application of amnesties. Moreover, as explained in Chapter 4, Inter-American human rights institutions and UN bodies established a dialogue with domestic courts in countries like Argentina, Uruguay and Chile, generating a synergy in order to advance on the judicial restriction of amnesties. The *Simón case* from the Supreme Court of Argentina (11), the *Sabalsagaray case* from the Supreme Court of Uruguay (7), and the *Miguel Ángel Sandoval case* from the Supreme Court of Chile (6) are the most referenced domestic cases.

[46] Paul Cilliers, 'Boundaries, Hierarchies and Networks in Complex Systems' (2001) 5 International Journal of Innovation Management 135, 142.
[47] ibid.
[48] Urška Šadl and Henrik Palmer Olsen, 'Empirical Studies of the Webs of International Case Law: A New Research Agenda' (2014) 8 iCourts Working Paper Series 1, 12.
[49] ibid.

Figure 15. Citation network of courts



Other communities have formed based upon considerations of the states' discretion to enact amnesties when there are considerations of public interest. European domestic courts have been less strict in the analysis of amnesties in comparison to their counterparts in South America. Despite some decisions challenging the use of amnesties in Russia,[50] Romania,[51] Spain[52] and Poland,[53] most of the discussion relating to the legality of amnesty has usually been framed around two topics that bring some nuance into the debate. The first is the discretionary power of the state to enact this type of measure. This includes decisions in Portugal,[54] Spain,[55] Montenegro,[56] Kosovo,[57] North Macedonia,[58] Czech Republic,[59] and Slovakia.[60] The second is

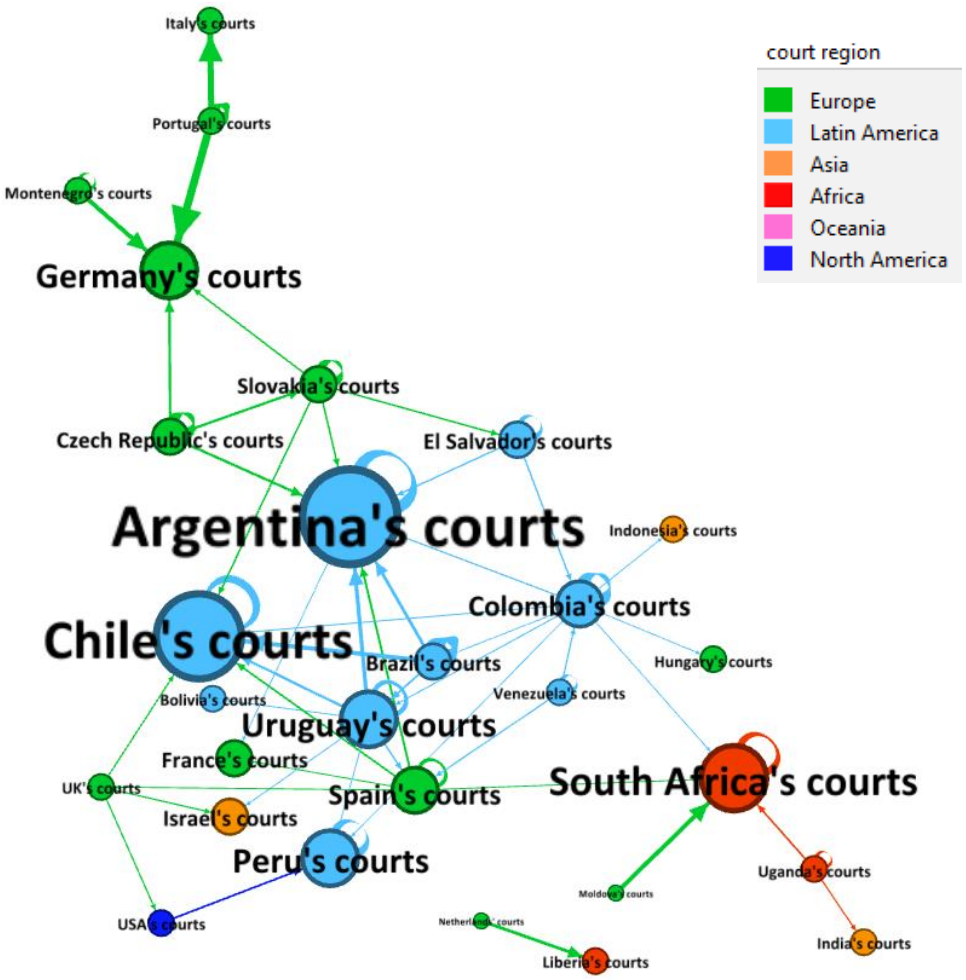
[50] *Constitutionality of the Decision of the State Duma of June 28, 2000*, Constitutional Court of Russia, N 11-P (5 July 2001).
[51] *Constitutionality of the provisions of article 8 of the Law No. 543/2002 relating to the pardon of certain penalties and the lifting of certain measures and sanctions*, Constitutional Court of Romania, Decision No. 86 (27 February 2003).
[52] *Caso contra Francisco Franco Bahamonde y otros*, Audiencia Nacional Española, Juzgado No. 5, Auto de competencia, Proceso abreviado 399/2006 (16 October 2008); *Caso contra Francisco Franco Bahamonde y otros*, Audiencia Nacional Española, Juzgado No. 5, Juzgamiento, Proceso ordinario 53/2008E (18 November 2008).
[53] *Constitutionality of article 9 of the Penal Code*, Constitutional Tribunal of Poland, Case No. P.2 / 99 (6 July 1999).
[54] *Case No. 444/97*, Constitutional Court of Portugal, Proc. No. 784/96 (25 June 1997); *Case No. 510/98*, Constitutional Court of Portugal, Proc. No. 299/96 (14 July 1998).
[55] *Caso contra Baltasar Garzón Real*, Tribunal Supremo de España – Sala de lo Penal, Sentencia No. 101/2012, Causa Especial No. 20048/2009 (27 February 2012) 20.
[56] *Constitutionality of the Law on Amnesty of Persons Sentenced for Criminal Offences Prescribed by the Law of Montenegro (Official Gazette No. 39/13)*, Constitutional Court of Montenegro, Case No. U-I No. 13/13, 17/13 and 19/13, MNE-2015-2-002 (24 July 2015).
[57] *Case KO61/12*, Constitutional Court of Kosovo, Confirmation of proposed constitutional amendments submitted by the President of the Assembly of the Republic of Kosovo, AGJ303/12 (31 October 2012).
[58] *Case U.no.19/2016*, Constitutional Court of North Macedonia, Constitutionality of the Law on Changing and Supplementing the Law on pardon, Official Gazette 12/2009 (16 March 2016).
[59] *Case Pl.US 4/13*, Constitutional Court of the Czech Republic, CZE-2013-1-002 (5 March 2013) para 28; *Case No. Pl.US 36/17*, Constitutional Court, CZE-2018-2-005 (19 June 2018).
[60] *Case ÚS 8/97*, Constitutional Court of Slovakia, SVK-1998-2-006 (24 June 1998); *Case I. ÚS 30/99*, Constitutional Court of Slovakia (28 June 1999); *Case II. ÚS 69/99*, Constitutional Court of Slovakia, SVK-1999-2-006 (15 July 1999).

the need to balance the obligation to investigate and punish human rights violations with considerations of public interest in putting an end to situations of violence. In particular, decisions in Montenegro,[61] Kosovo,[62] and Portugal,[63] have gravitated around the decisions of the ECtHR that develop standards for the legality of certain amnesties when they are enacted in pursuit of a legitimate interest of the state in peace, reconciliation, democracy or upkeeping the rule of law.

Courts in Colombia, Uganda, El Salvador and South Africa have been more peripheral, but have established relevant links in the discussion of amnesties as mechanisms of reconciliation (see Figure 16). The *Azapo case* from the Constitutional Court of South Africa (7), and the South African experience more generally, have been discussed by courts engaging more closely with the role of amnesties in transitional justice. Tribunals in Colombia are prolific in their references to international as well as domestic decisions, establishing bridges with other domestic courts while exploring arguments for the prohibition of amnesties, as well as the role of conditional amnesties in peace processes. Four of the decisions of the Colombian Constitutional Court make a great summary of the case law on amnesties, referencing an average of 40 decisions from other judicial and human rights bodies in each judgment.[64]

[61] *Constitutionality of the Law on Amnesty of Persons,* Constitutional Court of Montenegro (n 56).
[62] *Case KO108/13*, Constitutional Court of Kosovo, Constitutional review of the Law, No. 04/L-209, on Amnesty, AGJ471/13 (9 September 2013).
[63] *Case 444/97*, Constitutional Court of Portugal (n 54).
[64] See: *Constitucionalidad de la Ley de Justicia y Paz (Ley 975/05),* Corte Constitucional de Colombia, C-370/06 (18 May 2006); *Constitucionalidad Acto Legislativo 01 de 2012 Marco Jurídico para la Paz,* Corte Constitucional de Colombia, C-579/13 (28 August 2013); *Constitucionalidad del Proyecto de Ley Estatutaria de la Jurisdicción Especial para la Paz*, Corte Constitucional de Colombia, C-080/18 (15 August 2018); *Constitucionalidad de la Ley 1820 de Amnistía*, Corte Constitucional de Colombia, C-007/18 (1 March 2018).

Figure 16. Citation network of national courts



Judicial dialogue theories have been criticised for projecting a binary world divided into liberal and non-liberal states.[65] Part of the mission of judicial dialogue is to promote liberal democracy in order to secure a culture of compliance with international law and respect of human rights.[66] Such dialogue is mostly based on the idea of a neutral and equal forum for the exchange of ideas, in which liberal institutions freely participate, forming a network of governance that upholds western values. In that context, shared liberal values are the condition of possibility of judicial dialogue.[67] Thus, the vision of a global community of courts privileges judicial organs that respect liberal values like the separation of powers and the rule of law, while excluding tribunals that are considered illiberal or illegitimate under this notion of

[65] Mills and Stephens, 'Challenging the Role of Judges in Slaughter's Liberal Theory of International Law' (n 21) 17. See: Anne-Marie Slaughter, 'International Law in a World of Liberal States' (1995) 6 EJIL 503.
[66] Simpson, 'The Ethics of the New Liberalism' (n 1) 259. See: Martinez, 'Towards an International Judicial System' (n 6) 463.
[67] Mills and Stephens, 'Challenging the Role of Judges in Slaughter's Liberal Theory of International Law' (n 21) 13. See: Slaughter, *A New World Order* (n 3) 31; Howse and Teitel, 'Cross-judging revisited' (n 19) 874.

international law.[68] Consequently, as Gerry Simpson has noted, the liberal project gravitates around the centrality of US exceptionalism forging a 'world of liberty' and the experience of the European project of integration.[69] Similarly, Michael Waibel has shown that courts in a small number of typically Western jurisdictions form the dominant interpretive communities in international law; their interpretations of international law are much more likely to prevail than those of national courts in less influential states.[70]

The emergence of heterarchies in the discussion of amnesties has allowed for domestic courts from the global south to be protagonists in the development of international law on the matter. Amnesty is a legal institution enacted in transitional justice, usually applied in contexts of violence and human rights abuses. The concept of a community of courts defined by institutions considered to be independent and democratic according to western standards risks negating the experiences of the most affected states in the development of the standards for its application. War, poverty, and resistance rarely feature in the liberal project of judicial dialogue.[71] However, the discussion of amnesties has been shaped by those experiences. The next section will explore the different arguments about and approaches to the permissibility of amnesties, adding a qualitative dimension to the analysis of the relationships and alliances between domestic and regional courts that shapes their positions on the use of amnesties in transitional justice.

5.5. Different approaches to the permissibility of amnesties

While amnesties enacted at the end of periods of violence are common, there has been a wide range of mechanisms that differ from each other. The Chilean self-amnesty enacted by Pinochet in 1978, to grant impunity for the crimes committed during his regime, is radically different from an amnesty promulgated by a newly elected and democratic parliament conditioning its application to participating in truth telling and reconstruction process.[72] As suggested by Ronald Slye, along the continuum occupied at opposite ends by the Chilean and

[68] Simpson, 'The Ethics of the New Liberalism' (n 1) 259; Mills and Stephens, 'Challenging the Role of Judges in Slaughter's Liberal Theory of International Law' (n 21) 27.
[69] Simpson, 'The Ethics of the New Liberalism' (n 1) 265. See also: Mills and Stephens, 'Challenging the Role of Judges in Slaughter's Liberal Theory of International Law' (n 21) 14.
[70] Waibel, 'Interpretive Communities in International Law' (n 38) 156. See also: Antonios Tzanakopoulos, 'Judicial Dialogue as A Means of Interpretation' in Helmut Philipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (OUP 2016) 72, 92.
[71] Simpson, 'The Ethics of the New Liberalism' (n 1) 262.
[72] Ronald C. Slye, 'A Limited Amnesty? Insights from Cambodia' in Francesca Lessa and Leigh Payne (eds), *Amnesty in the Age of Human Rights Accountability* (CUP 2012) 292.

South African amnesties, there is a spectrum of possibilities and combinations of different formulas that states have enacted.[73] The judicial examination of amnesty legislation in different countries has enriched the discussion of their permissibility, with courts and human rights bodies focusing on specific elements of amnesty measures and using different approaches to transitional justice.

This section investigates different judicial approaches to amnesty. Chapter 4 showed how judicial dialogue expanded horizontally and vertically around the early developments of the Inter-American System and the UN position, resulting in significant restrictions on the use of amnesties. This chapter, however, has shown that the judicial dialogue on amnesties has not been homogenous. The previous sections demonstrated the formation of communities or alliances of courts discussing the permissibility of amnesties, and the emergence of heterarchies that result in courts gravitating around different decisions. The analysis in this section further explores the reasoning of the courts and human rights bodies, highlighting different conversations and approaches in the examination of amnesties. I argue here that despite the general trend in courts limiting the permissibility of amnesties enacted as mechanisms of impunity, tribunals are increasingly considering the possibility of conditional amnesties as a mechanism of transitional justice. Courts have neither radically outlawed nor clearly accepted the permissibility of conditional amnesties. However, in certain contexts, tribunals have highlighted the importance of differentiating between problematic amnesties and amnesties that genuinely facilitate peaceful transitions.

This section explores different discussions relating to the permissibility of amnesties and the standards developed by judicial and quasi-judicial bodies. On the one hand, the exploration shows how some courts have framed the examination of amnesties in the discussion of transitional justice, breaking away from the dichotomy between accountability and impunity. On the other hand, it investigates the position of courts and human rights bodies on the permissibility of conditional, negotiated, and limited amnesties.

5.5.1. Exploring different arguments to nuance the prohibition on amnesties

As explained in Chapters 2 and 4, the main arguments for restricting the permissibility of amnesties under international law are grounded on two considerations. The first is the obligation to prosecute international crimes and human rights violations under treaty law. In

[73] ibid.

161 decisions, domestic and international courts explicitly considered the incompatibility of amnesty measures with the international obligations of the state to investigate and prosecute abuses. Following the anti-impunity turn in the human rights movement, the second main argument has been the incompatibility of amnesties with the victims' right to an effective remedy. Particularly within the Inter-American System, the obligation to prosecute has been consolidated as a central element of the right of victims to obtain redress for human rights abuses. A total of 107 judgments considered the incompatibility of amnesties with the right to remedy. These arguments have been complemented by considerations of the non-derogability of certain human rights. In 68 decisions, judicial and quasi-judicial bodies determined that the implementation of an amnesty would effectively constitute a derogation of the rights of the victims to be free from torture, disappearance, genocide, and other non-derogable rights. Chapter 4 showed how the judicial dialogue around impunity measures enacted in Latin America led to a general prohibition on amnesties.

This section explores other arguments that courts have considered in the examination of amnesties. In many cases, these arguments were deployed to uphold the legality or grant the application of the amnesty. In other cases, despite deciding to revoke or not to apply the measure, the courts have included considerations on the possibility of enacting amnesties in a way that complies with international law. The focus here, therefore, is on those approaches that contrast with the position of UN bodies, the Inter-American System, and some domestic courts in South America, to expand on the standards developed by courts. There are a number of decisions that have brought some nuance into the debate by discussing amnesties enacted as a mechanism of transitional justice, which are shaping the contours of its permissibility in exceptional circumstances.

5.5.2. Public interests and the states' discretion to enact amnesties

Notwithstanding the activation of the universal jurisdiction to investigate and prosecute crimes in the Southern Cone despite domestic amnesties, Spanish courts have been more lenient with the Spanish amnesty of 1977. In fact, the Supreme Court not only validated the amnesty, but explicitly rejected the relevance of decisions from the IACtHR and UN human rights bodies. In 2008, judge Baltasar Garzón, famous for issuing an international warrant for the arrest of former Chilean dictator Augusto Pinochet, attempted to invalidate the Spanish

Amnesty Law enacted two years after the death of General Francisco Franco.[74] Arguing that there was an international consensus prohibiting self-amnesty, blanket amnesty and amnesty for international crimes,[75] Judge Garzón ordered the files to be returned to the lower court so that the crimes of the Francoist regime were properly investigated.[76] The Supreme Tribunal of Spain concluded that Judge Garzón failed in his interpretation of the amnesty.[77] The Tribunal argued that the international treaties that developed the obligations to investigate human rights violations and provide effective remedies were ratified after the Francoist dictatorship.[78] The Tribunal also determined that amnesty was a state discretion, approved democratically through the constitutional debate and political consensus that took place after the death of Franco.[79] The Tribunal argued that it was not a self-amnesty because the law had the approval of opposition parties and the amnesty did not limit its application to state agents. Highlighting the importance of the amnesty in the transitional process to democracy, and referencing similar cases in Germany and South Africa, the Supreme Tribunal upheld the amnesty, arguing that the 'forget and forgive' transitional justice model adopted by Spain was effective and legitimate.[80]

Similarly, in analogous decisions in 1997 and 1998, the Constitutional Court of Portugal ratified the constitutionality of the Law No. 9/96, which granted amnesty for politically motivated crimes committed between 1976 and 1991.[81] The Portuguese Constitutional Court declared the constitutionality of the amnesty, arguing that it was a political measure and that the state, as head of the legislative branch, had autonomy and discretionary powers to grant amnesties.[82] Referencing decisions from German and Italian Courts, the Portuguese Court argued that the legislator had discretion in choosing the boundaries of the field of application of amnesties, determining the criteria for differentiating between crimes covered and not covered by them.[83] In addition, it concluded that achieving peace is a legitimate objective in granting amnesty. The consolidation of democracy, political stability and social peace are means for the consolidation of the rule of law, giving the state legitimacy to enact exceptional measures like amnesty.[84]

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[74] *Francisco Franco*, Audiencia Nacional Española 399/2006 (n 52); *Francisco Franco*, Audiencia Nacional Española 53/2008E (n 52).
[75] *Francisco Franco*, Audiencia Nacional Española 399/2006 (n 52) 46.
[76] *Francisco Franco*, Audiencia Nacional Española 53/2008E (n 52) 138.
[77] *Baltasar Garzón*, Tribunal Supremo de España (n 55).
[78] ibid 18.
[79] ibid 20.
[80] ibid.
[81] *Case 444/97*, Constitutional Court of Portugal (n 54); *Case 510/98*, Constitutional Court of Portugal (n 54).
[82] *Case 444/97*, Constitutional Court of Portugal (n 54) 11.
[83] ibid 13.
[84] ibid.

The Constitutional Court of Montenegro explicitly referenced the decision of the ECtHR in *Tarbuk v. Croatia* and *Dujardin v. France*, to argue that amnesty laws could be considered legitimate if 'a balance is maintained between the legitimate interests of the State and the interests of individual members of the public'. [85] Observing the limits set by the constitution, the Constitutional Court granted ample discretion to the Parliament to determine the scope of the amnesty, as 'the highest representative body of the citizens of Montenegro elected at the last elections'.[86] Similar considerations were made by the Constitutional Court of North Macedonia.[87] Examining the Constitutionality of the Law on Amnesty of 1992, Official Gazette No. 70, the Court emphasised that according to the terms of the amnesty it did not apply to persons who committed crimes under the jurisdiction of the ICTY. However, it added that granting amnesty and determining its content and scope 'belongs to the competence of the Assembly of the Republic of Macedonia'.[88] Acts of amnesty, argued the Constitutional Court, are 'an act of good will of the state' with the purpose of establishing 'certain harmony … peace, and overcoming the crisis in the country'.[89] The amnesty was justified by the public interest of the state in peaceful transition, 'when other legal means cannot get a legal solution'.[90]

In contrast, the Constitutional Court of Slovakia placed some limits on the discretionary powers of the state to grant amnesties. Examining the Mečiar's amnesties, the Slovak Court analysed the faculty of the President to grant and revoke amnesties.[91] In several decisions, the Constitutional Court emphasised the constitutional faculty awarded to the President to issue amnesties, which cannot be delegated and cannot be revoked by subsequent leaders.[92] However, in its most recent decision in 2017, the Slovak Constitutional Court argued that any faculty to grant amnesties 'is within reasonable limits'.[93] Amnesty measures cannot contradict principles of democracy and rule of law.[94] Referencing the decisions of domestic courts in

[85] *Constitutionality of the Law on Amnesty of Persons,* Constitutional Court of Montenegro (n 56) para 7(1).
[86] ibid para 7(2).
[87] See: *Case U.no.169/2002,* Constitutional Court of North Macedonia, Constitutionality of the Law on Amnesty, Official Gazette No. 70/1992 (19 February 2003); *Case U.no.155/2007*, Constitutional Court of North Macedonia, Constitutionality of Article 1of the Law on Amnesty, Official Gazette No. 70/1992 (19 December 2007); *Case U.no.19/2016*, Constitutional Court of North Macedonia (n 58).
[88] *Case U.no.169/2002*, Constitutional Court of North Macedonia (n 87) para 6. See also: *Case U.no.19/2016*, Constitutional Court of North Macedonia (n 58) 7.
[89] ibid para 7.
[90] ibid.
[91] Mečiar's amnesties are a group of measures enacted by Prime Minister Vladimír Mečiar, acting as President, to discontinue criminal proceedings for the abduction of Michal Kováč's son, former President of Slovakia and political rival of Mečiar. This case reached the ECtHR who decided in 2008. See: *Lexa v. Slovakia*, ECtHR, Judgment, Application No. 54334/00 (23 September 2008).
[92] See: *Case ÚS 8/97*, Constitutional Court of Slovakia (n 60); *Case I. ÚS 30/99*, Constitutional Court of Slovakia (n 60); *Case II. ÚS 69/99*, Constitutional Court of Slovakia (n 60).
[93] *Case No. ÚS 07/2017*, Constitutional Court of Slovakia, SVK-2017-2-002 (31 May 2017) para III.1.
[94] ibid para III.2.

Chile, Argentina and El Salvador, the Slovak Court concluded that placing limits on the state faculty to grant amnesty is necessary to protect 'the principle of separation of powers, the principle of transparency and public control of the exercise of official authority, and the principle of legal certainty and the protection of citizens' confidence in the rule of law'.[95]

Generally, domestic courts in Europe have expanded more than tribunals in other regions on the discretionary powers of the state to enact amnesties in the aftermath of situations of violence, based on considerations of public interest. However, there are also examples of courts in Latin America and Africa. For example, the the Constitutional Court of Uganda faced a case presented by Thomas Kwoyelo, a mid-ranking LRA Official, who was detained in 2008 and was denied the benefit of the Amnesty Act of 2000 after making an official request.[96] Kwoyelo argued that other individuals in similar situation were granted amnesty, so his right to equal protection before the law under article 21 of the Ugandan Constitution was being violated.[97] The Constitutional Court decided in favour of Kwoyelo, arguing that the Parliament had constitutional discretion to enact such amnesty with the goal of bringing the rebellion to an end and finding peace.[98] The Ugandan Court noted that it had 'not come across any uniform international standards or practices which prohibit states from granting amnesty'.[99] Differentiating the Amnesty Act from self-amnesties and blanket amnesties, considered problematic by the Court, it concluded that the Ugandan amnesty was valid because it had similar conditions to the South African amnesty.[100] Asserting the legality of the amnesty, the Court concluded that Kwoyelo fulfilled the requirements of the amnesty, like many others that had already benefited from it, so the Director of Public Prosecutions violated his right to equal treatment.[101]

In 2015, the Ugandan Supreme Court issued a decision on the constitutional appeal brought by the Attorney General against the decision that granted amnesty to Kwoyelo.[102] The Supreme Court revoke the decision of the Constitutional Court and denied amnesty to Kwoyelo, arguing that the Director of Public Prosecutions had discretion to evaluate the

[95] ibid para IV.2.
[96] *Thomas Kwoyelo alias Latoni v. Uganda*, Constitutional Court of Uganda, Constitutional Petition No. 36/11, HCT-00-ICD-Case No. 02/10 (22 September 2011).
[97] Some estimate that around 26.000 people benefited from the Amnesty Act in Uganda. See: Paul Bradfield, 'Reshaping Amnesty in Uganda: The Case of Thomas Kwoyelo' (2017) 15 JICJ 827, 830.
[98] *Thomas Kwoyelo v. Uganda*, Constitutional Court of Uganda (n 96) 14.
[99] ibid 17.
[100] ibid 15-16.
[101] ibid 17. Interestingly, this case has become a landmark case in relation to the right to equal protection under the law in Ugandan constitutional law. See, for instance: *Jacqueline Kasha Nabagesera and others v. Attorney General*, High Court of Uganda at Kampala, MISC. CAUSE No. O33 of 2012 (24 June 2014).
[102] *Uganda v. Thomas Kwoyelo*, Supreme Court of Uganda at Kampala, Constitutional Appeal No. 1 of 2012 (8 April 2015).

eligibility criteria and the crimes covered.[103] Rather than the faculty of the legislature to enact amnesties, the focus of this decision was on the discretionary powers of the Director of Public Prosecutions to exclude Kwoyelo as beneficiary. In obiter dictum considerations, the Supreme Court of Uganda validated the amnesty but placed some limits on the scope of the amnesty, excluding grave breaches to the Geneva Conventions.[104] Examining the international standards for the application of amnesties, the Supreme Court considered that 'there are no uniform standards or practices in respect of amnesty. Each country may put in place appropriate mechanisms with regard to amnesty to solve or address a particular conflict situation it is facing. But there appears to be a minimum below which amnesty provisions may not be permitted in respect of grave crimes as recognized in international law'.[105] Placing some limits on the scope of the amnesty, the Court concluded that as long as the Amnesty Act is not interpreted as a blanket amnesty for all crimes, it 'is not inconsistent with the Constitution of Uganda nor with Uganda's international obligations'.[106]

Brazil, in turn, is the Latin American country that has upheld its amnesty most decisively, using arguments of separation of powers and public interest of the state. In 1979, during the last stages of the military dictatorship, the government of João Figueiredo enacted Amnesty Law No. 6.683 for crimes committed during the dictatorship that lasted for almost than 20 years. In 2010 Brazil's Supreme Federal Tribunal validated the amnesty, arguing that congress had discretionary powers to enact amnesty and decide its scope by including state agents.[107] One of the charges was that the amnesty law was incompatible with the new constitution of 1988. Nevertheless, the Tribunal argued that the amnesty should be interpreted in its own context, in light of the process of democratisation and reconciliation that took place in Brazil before the new constitution.[108] It added that international treaties were not applicable in evaluating the amnesty, because the law was enacted before the treaties were ratified by Brazil.[109] Besides, the Tribunal considered that courts in Brazil do not have the constitutional power to modify the amnesty, as such modification would have to be made by the legislative power.[110]

[103] ibid 32.
[104] ibid 63.
[105] ibid 63.
[106] ibid 65.
[107] *Arguição de Descumprimento de Preceito Fundamental 153 (Lei Anistia)*, Supremo Tribunal Federal do Brasil, ADPF 153 (28 April 2010).
[108] ibid para 39.
[109] ibid para 42.
[110] ibid para 45.

This decision was the object of analysis and repudiation by the IACtHR in the *Gomes Lund* and *Herzog cases*. As explained in Chapter 4, the IACtHR considered that this judicial decision upholding the amnesty was incompatible with the conventionality control doctrine that calls upon courts to apply the ACHR domestically. After the *Gomes Lund* decision, federal prosecutors in Brazil have tried to comply with the IACtHR, opening cases for crimes against humanity notwithstanding the self-amnesty.[111] Brazilian judges and courts, including the Supreme Federal Tribunal, have refused those attempts.[112] In a recent decision in 2019, the 2nd Regional Federal Tribunal based in Rio de Janeiro decided to overrule the amnesty granted to Antônio Waneir Pinheiro Lima, a retired army sergeant accused of kidnapping and raping Inês Etienne Romeu at the torture centre known as the 'House of Death' during the dictatorship.[113] The Regional Tribunal applied the conventionality control doctrine and argued that the ACHR had direct application in Brazil.[114] Referencing the *Gomes Lund* and *Herzog cases*, the tribunal considered that, even though the amnesty was prior to the ratification of the ACHR by Brazil, the state had failed to investigate the crimes and provide effective remedies to the victims in the following year.[115] The decision referred to the judgments of courts in other Latin American countries and openly contradicted the pronouncement of the Brazilian Supreme Tribunal, criticising the role that judges have had in the aftermath of the dictatorship.[116] Nevertheless, being a lower court, there remains some uncertainty about the future of the amnesty law in Brazil and the direction in which the Supreme Federal Tribunal and other regional courts will rule.[117]

Early decisions in El Salvador adopted a similar approach. In 1993, the General Amnesty Law for the Consolidation of Peace No. 486/1993 was challenged for the first time before the Constitutional Chamber of the Supreme Court.[118] The Court upheld the amnesty, arguing that the state had discretionary powers to enact amnesties as a mechanism of public

[111] Emilio Peluso Neder Meyer and Fabrício Bertini Pasquot Polido, 'Brazil in the Dock: The Inter-American Court of Human Rights Rulings Concerning the Dictatorship of 1964-1985' (*VerfBlog on Matters Constitutional*, 2018) <https://verfassungsblog.de/brazil-in-the-dock-the-inter-american-court-of-human-rights-rulings-concerning-the-dictatorship-of-1964-1985/> accessed 2 September 2021.
[112] *Reclamação 18.686 Rio De Janeiro - Tutela de urgência Ricardo Agnese Fayad*, Supremo Tribunal Federal do Brasil, RCL 18.686/RJ (23 November 2018).
[113] *Ministério Público Federal v. Antônio Waneir Pinheiro Lima*, Apelação Criminal- Turma Espec. I - Penal do Brasil, Previdenciário e Propriedade Industrial, No. CNJ 0500068-73.2018.4.02.5106 (14 August 2019).
[114] ibid 13.
[115] ibid 31.
[116] ibid 36.
[117] Alonso Gurmendi, 'At Long Last, Brazil's Amnesty Law Is Declared Anti-Conventional' (*Opinio Juris*, 16 August 2019) <http://opiniojuris.org/2019/08/16/at-long-last-brazils-amnesty-law-is-declared-anti-conventional/> accessed 02 September 2021.
[118] *Revisión de constitucionalidad Ley de Amnistía General para la Consolidación de la Paz*, Corte Suprema de Justicia de El Salvador – Sala de lo Constitucional, No. 10-93 (20 May 1993).

interest to deal with situations of violence.[119] That faculty lies with the legislative branch and courts cannot revoke or modify the law.[120] Additionally, the Salvadorean Supreme Court referred to article 6(5) of the Additional Protocol II to the Geneva Conventions, arguing that this clause authorised enacting amnesties at the end of hostilities.[121] These arguments were echoed by the Criminal Chamber in subsequent cases.[122]

The General Amnesty was challenged again in 2000.[123] The Supreme Court of El Salvador upheld the constitutionality of the amnesty again, but this time diverted from its 1993 decision, concluding that the amnesty needed to be interpreted in light of the Constitution. Echoing the arguments about the discretionary powers of the legislature to grant amnesty at the end of a conflict, the Court considered that the Constitution imposed some restrictions on the scope of amnesties. For instance, limiting the possibility of self-amnesty under article 244 of the Constitution[124] and amnesty for crimes that affect fundamental rights in which the criminal prosecution is an essential part of the reparation process.[125] Calling for the examination of the amnesty under international law, the Supreme Court considered that human rights treaties are not parameters for determining the constitutionality of amnesty measures, rejecting a block of constitutionality in the Salvadoran case.[126] However, the Court concluded that the Constitution offered a robust protection of fundamental rights that the interpretation of the General Amnesty Law must follow.[127]

In 2016, the General Amnesty Law was challenged for the third time.[128] In this decision, the Supreme Court changed its position regarding international human rights treaties and argued that the amnesty law needed to follow international standards.[129] Amnesty laws, used as mechanisms of transitional justice, could facilitate transition to peace, but they could also become an obstacle for justice and reconciliation. Following this, the Supreme Court placed emphasis on the prohibition of general or unconditional amnesties, self-amnesties, and amnesties for war crimes and crimes against humanity.[130] Referencing the case law of the

[119] ibid 5.
[120] ibid 7.
[121] ibid 9. This argument has also been developed by courts in South Africa and Colombia, among others, and will be analysed in more depth in the following section.
[122] See: *Caso contra Santos Guevara Portillo, Severiano Fuentes Fuentes y Ferman Hernández Arévalo*, Corte Suprema de Justicia de El Salvador – Sala de lo Penal, CPS02495.95 (16 August 1995).
[123] *Revisión de constitucionalidad Ley de Amnistía General para la Consolidación de la Paz*, Corte Suprema de Justicia de El Salvador – Sala de lo Constitucional, No. 24-97/21-98 (26 September 2000).
[124] ibid 31.
[125] ibid 34.
[126] ibid 25.
[127] ibid 24, 33.
[128] *Revisión de constitucionalidad Ley de Amnistía General para la Consolidación de la Paz*, Corte Suprema de Justicia de El Salvador – Sala de lo Constitucional, No. 44-2013/145-2013 (13 July 2016).
[129] ibid 12.
[130] ibid 13-18.

IACtHR, particularly *El Mozote v. El Salvador*, the Supreme Court declared that the General Amnesty Law was not constitutional because it provided for a blanket and unconditional amnesty that violated the victims' rights to effective remedies and the obligations to investigate and punish human rights violations.[131] However, while annulling the General Amnesty Law of 1993, the Court revived the National Reconciliation Law No. 147 of 1992, which granted a narrower amnesty that excluded as beneficiaries people responsible for serious crimes identified by the Truth Commission.[132]

5.5.3. Amnesties and transitional justice

Other courts in Africa, South America, and Asia have framed the question of the permissibility of amnesties within a broader discussion of the role of amnesty measures in transitional justice. More cautious in the characterisation of any amnesty as impunity, these tribunals have considered the legality of some amnesties that, enacted with other mechanisms of accountability, have facilitated peaceful transitions and put an end to non-international conflicts. These arguments are usually framed by considerations of international humanitarian law, most notably, the amnesty clause in article 6(5) of the Additional Protocol to the Geneva Conventions. Here, the influence of the South African experience and the interpretation of the Constitutional Court in the *Azanian People's Organization (AZAPO) v. The President of South Africa* case have been significant.[133]

South Africa's recent constitutional history is entrenched in a transitional justice process. After the end of the apartheid system in the early 1990s, the Promotion of National Unity and Reconciliation Act of 1995 created the Truth and Reconciliation Commission. The Commission was at the heart of the transitional process in South Africa, with the mandate of 'establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights' and 'facilitating the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective and comply with the requirements of this Act'.[134] This was in line with the epilogue of the interim Constitution of 1993, which prescribed that an amnesty should be granted in order to advance

[131] ibid 25, 40.
[132] ibid 25, 48.
[133] See: *The Azanian Peoples' Organization (AZAPO) and others v. The President of South Africa and others*, Constitutional Court of South Africa, Case CCT 17/96 (25 July 1996).
[134] *Promotion of National Unity and Reconciliation Act*, President of South Africa, Act No. 34 (26 July 1995) article 3(a) and (b).

the reconciliation process,[135] and the Constitution of 1996 that upheld such provision in schedule 6.22.[136]

In 1996, the Constitutional Court reviewed the constitutionality of the amnesty enacted as part of the Promotion of National Unity and Reconciliation Act in the *AZAPO* case.[137] The Court argued that the amnesty was part of the reconstruction and reconciliation process that facilitated the transition of South Africa and engendered the new Constitution, as part of a process where the negotiators 'made a deliberate choice, preferring understanding over vengeance, reparation over retaliation, ubuntu over victimisation'.[138] The decision highlighted the fact that there are no provisions on amnesty in international human rights treaties. Conversely, article 6(5) of the Additional Protocol II to the Geneva Conventions authorised broad amnesties at the end of non-international conflicts.[139] Making clear the conditional nature of the South African amnesty, the Constitutional Court differentiated it from blanket amnesties and concluded that it had an important function in the process of peace reconstruction: 'The amnesty contemplated is not a blanket amnesty against criminal prosecution for all and sundry, granted automatically as a uniform act of compulsory statutory amnesia. It is specifically authorised for the purposes of effecting a constructive transition towards a democratic order'.[140] The South African amnesty, concluded the Court, is constitutional as an instrument of reconciliation and the Parliament had discretionary powers to design such a mechanism according to the Constitution.[141]

This approach has been reinforced by the South African Constitutional Court in more recent decisions that tangentially discuss the application of the amnesty. For instance, in *Du Toit v. Minister for Safety and Security,* the Court added that 'the ultimate aim of the truth and reconciliation process justifies the severe limitation on rights that it causes. This was an extraordinary time and extraordinary measures had to be taken'.[142] In practical terms, the amnesty was an important tool in the South African process, without which the process would

[135] The epilogue of the interim Constitution of 1993 develops upon the objectives of *National Unity and Reconciliation:* 'This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex. The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society'. See: Constitution of the Republic of South Africa, Act No. 200 of 1993 (27 April 1994) preamble.
[136] Constitution of the Republic of South Africa, Act No. 108 of 1996 (4 February 1997).
[137] *AZAPO v. President of South Africa*, Constitutional Court of South Africa (n 133).
[138] ibid para 19.
[139] ibid para 30.
[140] ibid para 32.
[141] ibid para 50.
[142] *Wybrand Andreas Lodewicus Du Toit v. Minister for Safety and Security and others*, Constitutional Court of South Africa, Case No. CCT91/08 [2009] ZACC 22 (18 August 2009) para 27.

not have been agreed to by all parties, and most probably could not have taken place.[143] It is a compromise and a reciprocal process in which the victims are able to hear the truth, accepting that no criminal sanction will be forthcoming; while perpetrators have to make a full disclosure and come face to face with the victim, in order to avoid prosecution.[144] Considering transitional justice as a balancing act, the South African Court considered that reflecting upon and balancing conflicting rights is central to a democratic transition, so that no one is disproportionally affected or benefitted, while guaranteeing an adequate process of reconciliation.[145] More explicitly, in *The Citizen 1978 (PTY) LTD and others v. Robert John McBride* (2011) the Constitutional Court clarified that the amnesty requires alternative mechanisms of accountability and truth reconstruction.[146] Amnesty does not mean a declaration of innocence and does not restrict victims in their search for justice.[147]

The transitional process in South Africa has provoked academic debate about how effective and well desined it was.[148] The United Nations High Commissioner for Human Rights considers that the South African amnesty would not survive scrutiny under current international standards.[149] Ronald Slye has argued that the South African amnesty was the only 'just or accountable amnesty' enacted in the world.[150] The UNHRC and the UNCAT have praised the 'remarkable work' of the Truth and Reconciliation Commission in securing a peaceful transition and investigating gross human rights violations. In their reports, despite making recommendations to investigate cases of disappearance and torture, to prosecute perpetrators and to compensate victims, both Committees have avoided referring to the amnesty granted for serious human rights violations by the same Truth and Reconciliation Commission.[151]

As in the South African case, amnesties are at the core of the constitutional history of Colombia. The Political Constitution of 1991 emerged from a constitutional assembly formed by representatives of traditional political parties and demobilised guerrilla groups.[152] As part

[143] ibid para 55.
[144] ibid para 28.
[145] ibid para 30.
[146] *The Citizen 1978 (PTY) LTD and others v. Robert John McBride and others*, Constitutional Court of South Africa, Case No. CCT 23/10 [2011] ZACC 11 (8 April 2011) para 75.
[147] ibid para 59.
[148] See: Antje du Bois-Pedain, 'Post-Conflict Accountability and the Demands of Justice: Can Conditional Amnesties Take the Place of Criminal Prosecutions?' in Nicola Palmer, Phil Clark and Danielle Granville (eds.), *Critical Perspectives In Transitional Justice* (OUP 2012) 459; James L. Gibson, 'Truth, Justice, and Reconciliation: Judging the Fairness of Amnesty in South Africa' (2002) 46 American Journal of Political Science 540.
[149] OHCHR, *Rule-of-Law Tools for Post-Conflict States: Amnesties* (n 7) 33.
[150] Ronald C. Slye, 'The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law' (2002) 43 Virginia JIntlL 173, 246.
[151] See: *Concluding observations on the initial report of South Africa,* UNHRC, CCPR/C/ZAF/CO/1 (April 27, 2016); *Consideration of Reports Submitted by State Parties under Article 19 of the Convention: South Africa*, UNCAT, CAT/C/ZAF/CO/1 (7 December 2006).
[152] Constitución Política de Colombia, Asamblea Nacional Constituyente (4 July 1991).

of the constitutional process, transitory article 30 authorised the Government to grant amnesty to members of other guerrilla groups that agreed to demobilise.[153] In addition, the Constitution included a general clause in article 150(17) giving Congress the discretion to grant amnesty for political crimes and other related ordinary offences.[154]

In line with this, the Colombian Constitutional Court granted Congress broad discretion to enact amnesty for political offences and other related ordinary crimes, based on considerations of public interest.[155] In the decision *C-225/95*, for instance, the Court examined the constitutionality of the Additional Protocol II to the Geneva Conventions, concluding that granting amnesties under the Additional Protocol was not an obligation but a discretionary power of the state.[156] However, much like the Slovak and Salvadorean courts, while asserting the discretionary powers of congress to decide the limits on amnesty, the Colombian Court argued that amnesties cannot be unlimited and should respect constitutional and international standards.*[157]* Considering the impact of the jurisdiction of the ICC in future peace processes in Colombia, the Constitutional Court concluded in the *C-578/02* decision that the incorporation of the Rome Statute was constitutional, with the understanding that this does not affect the power of Congress to grant amnesty for political crimes.[158] Studying international human rights treaty law, the court concluded that both the Colombian Constitution and international law impose similar standards by prohibiting blanket amnesties, self-amnesties and any other amnesties enacted with the purpose of limiting the victims' right to access effective remedies.[159] However, it considered that amnesty laws may have an important role as mechanisms of transitional justice. Examining the principle of complementarity of the ICC, the Constitutional Court suggested that amnesties implemented with other mechanisms of accountability, and enacted as part of a legitimate effort to bring peace and reconciliation, may be interpreted as a genuine effort to bring justice to victims.[160]

Examining the *Peace and Justice* legal framework for the demobilisation of paramilitary groups in 2005, the Constitutional Court adopted a stringent position regarding

[153] ibid.
[154] ibid.
[155] *Constitucionalidad del Protocolo Adicional II a los Convenios de Ginebra*, Corte Constitucional de Colombia, C-225/95 (18 May 1995) para 43.
[156] ibid para 42.
[157] See: *Constitucionalidad del artículo 127 del Decreto 100 de 1980 – Código Penal*, Corte Constitucional de Colombia, C-456/97 (September 23, 1997); *Constitucionalidad del artículo 13 de la Ley 733/02*, Corte Constitucional de Colombia, C-695/02 (28 August 2002).
[158] *Constitucionalidad del Estatuto de Roma*, Corte Constitucional de Colombia, C-578/02 (30 July 2002) 215.
[159] ibid 101.
[160] ibid (n 8) 103.

the use of amnesties.[161] In the *C-370/06* case, the Colombian Court concluded that this was not a law on amnesty because it did not release individuals from criminal liability, but provided for alternative reduced prison sentences.[162] Invoking the block of constitutionality that gives international human rights treaties constitutional hierarchy under article 93 of the Colombian Constitution, the Court reviewed the standards of justice set by ACHR. Influenced by the decisions of the IACtHR, the Constitutional Court concluded that amnesty laws for international crimes are incompatible with human rights standards for providing effective remedies.[163] This was also acknowledged by the Supreme Court, which highlighted in the *Segovia Massacre case* that amnesties cannot cover international crimes and cannot be used with the purpose of shielding someone from justice.[164] However, the Constitutional Court concluded that in transitional justice it is necessary to consider different constitutional rights that may clash; neither the right to justice nor the right to peace is absolute, and neither overrules the other.[165] When amnesties are enacted in order to consolidate a peace process, they can be enacted at the end of hostilities as long as they do not affect the access to justice of the victims and provide for other forms of accountability.[166]

Other courts have also tried to find some balance between the obligations to prosecute human rights abuses and considerations of transitional justice in implementing realistic processes of demobilisation and reconciliation. In Nepal, the Supreme Court examined the Ordinance No. 2069/2012, which granted broad amnesty except for 'serious crimes', as part of the Comprehensive Peace Agreement signed between the Communist Party of Nepal (Maoist) and the Government.[167] Examining the terms of the amnesty, the Nepali Court argued that they were too vague, with no definition of 'serious crimes', allowing the Commission too much discretion in relation to gross human rights violations.[168] The Court also considered it problematic that there were no complementary mechanisms of accountability and transitional justice, such as confessions, truth reconstruction, or the potential to give voice to the victims in the application of the amnesty.[169] For these reasons, the Court ordered the modification of the ordinance to render it consistent with international humanitarian law and norms and

[161] See: *C-370/06*, Corte Constitucional de Colombia (n 64); *Constitucionalidad de la Ley de Justicia y Paz (Ley 975/05)*, Corte Constitucional de Colombia, C-575/06 (July 25, 2006).
[162] *C-370/06*, Corte Constitucional de Colombia (n 64) 220.
[163] ibid 240-261.
[164] *Caso contra César Pérez García - Masacre de Segovia*, Corte Suprema de Justicia de Colombia – Sala Penal, Rad. No. 33.118 (May 13, 2010).
[165] *C-370/06*, Corte Constitucional de Colombia (n 64) 292.
[166] ibid 277.
[167] *Madhav Kumar Basnet and others v. Government of Nepal*, Supreme Court of Nepal– Special Bench, Writ petition No. 069-WS-0057 and 069-WS-0058 (2 January 2014).
[168] ibid 24, 26.
[169] ibid 24-25.

principles of transitional justice.[170] Hence, the Court ordered a review of the process and a reconsideration of the amnesty to include alternative mechanisms of justice. One year later, however, the case was brought before the Supreme Court of Nepal again because the amnesty law was passed in disregard of the order of Mandamus issued by the Court in 2014.[171] The Nepali Court placed emphasis on the international obligation to investigate and punish serious violations of human rights.[172] The Court built upon the importance of balancing the prosecution of serious crimes with the creation of an environment for reconciliation through the implementation of mechanisms of truth seeking, reparations and guarantees of non-recurrence.[173] However, referencing the standards formulated by the IACtHR in *Velásquez Rodríguez* and *Barrios Altos*, it ended up adopting a more punitive position, placing criminal prosecutions at the core of the process.[174]

5.5.4. Designing amnesties as a balancing act

Judge García Sayán's concurring opinion in the *Massacres of El Mozote v. El Salvador*, signed by the majority judges of the Inter-American Court, acknowledged that during transitional justice, obligations to investigate, prosecute, and punish gross human rights violations, might clash with objectives of national reconciliation and a negotiated solution to a non-international armed conflict.[175] The opinion developed upon the early concurring opinions of judge García Ramírez in *Castillo Páez v. Peru*, *Barrios Altos v. Peru*, and *La Cantuta v. Peru*, differentiating blanket and self-amnesty from conditional and negotiated amnesty in the context of transitional justice and peace agreements.[176] Seeking truth, justice and reparations requires the combination of several components, both judicial and non-judicial, in order to find the balance between conflicting interests: 'the demands that arise from massive violations, the responses to the aftermath of the conflict, and the search for long-lasting peace, require both the States and society as a whole to apply concurrent measures that permit the greatest simultaneous attention to these three rights'.[177]

[170] ibid 26, 32.
[171] *Suman Adhikari and others (Victims of the armed conflict) v. Government of Nepal*, Supreme Court of Nepal – Special Bench, Order 069-WS-0057 (26 February 2015).
[172] ibid 54.
[173] ibid 45.
[174] ibid 55, 63.
[175] *Massacres of El Mozote and surrounding areas v. El Salvador*, IACtHR, Merits, Reparations and Costs, Series C No. 252 (25 October 2012) Concurring opinion Judge García Sayán, para 20.
[176] ibid para 7.
[177] ibid para 22.

The victims' rights to truth, justice and reparation are interdependent. When assessing the use of amnesties in peace negotiations, this concurring opinion proposes a new approach within the Inter-American System, which diverges from a focus on criminal sanctions without serious efforts to reconstruct the truth and build reconciliation, but which also warns against implementing truth and reparation mechanisms without justice or alternative mechanisms of accountability.[178] The use of amnesties is framed as a balancing act, where 'States must weigh the effect of criminal justice both on the rights of the victims and on the need to end the conflict'.[179] The opinion emphasised the value of peace agreements in ending situations of violence and putting an end to future serious human rights violations.[180] Thus, in the key closing passage of the opinion, Judge García Sayán concludes that 'in certain transitional situations between armed conflicts and peace, it can happen that a State is not in a position to implement fully and simultaneously, the various international rights and obligations it has assumed'.[181] In negotiated transitions, conditional amnesties are mechanisms for finding balance between those obligations, so that the satisfaction of some rights does not affect the exercise of others disproportionately.[182] However, those permissible trade-offs remain unclear.[183]

Developing upon the *ratio legis* approach to the permissibility of amnesties, the opinion draws a line between amnesties enacted during authoritarian regimes in order to shield people in power from justice (which the IACtHR condemned in *Barrios Altos*, *La Cantuta*, *Almonacid Arellano*, *Gomes Lund*, and *Gelman*), and amnesties that result from genuine peace negotiations with a legitimate interest in peace and reconciliation. The opinion placed amnesties in the context of transitional justice, where the right to justice is not an isolated component, 'but part of an ambitious process of transition towards mutual tolerance and peace'.[184] This allowed Colombia to negotiate the Final Agreement to End the Armed Conflict with the guerrilla FARC-EP and to combine the application of amnesties with selection and prioritisation strategies for the prosecution of international crimes, with complementary extrajudicial mechanisms to guarantee peace, truth and reconciliation.[185]

[178] ibid para 23.
[179] ibid para 27.
[180] ibid para 37.
[181] ibid para 38.
[182] ibid para 38.
[183] Christine Bell, 'The "New Law" of Transitional Justice' in Kai Ambos, Judith Large and Marieke Wierda (eds), *Building a Future on Peace and Justice* (Springer-Verlag Berlin Heidelberg 2009) 111.
[184] *El Mozote v. El Salvador*, IACtHR (n 175) Concurring opinion Judge García Sayán, para 38.
[185] *Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace* (12 November 2016) <https://www.peaceagreements.org/viewmasterdocument/1845> accessed 19 April 2022.

The Colombian Constitutional Court adopted a similar approach to the consideration of rights, determining that demands for justice cannot override the possibility of achieving peace.[186] In decisions *C-579/13* and *C-577/14*, the Constitutional Court evaluated the Legal Framework for Peace issued in 2012, used to negotiate the peace agreement. Reviewing the transitional processes implemented in other parts of the world, the Court considered that the use of amnesties had been considerably restricted under international law particularly in relation to blanket amnesty, self-amnesty, and amnesty for international crimes. Differentiating the Colombian peace process from the impunity laws enacted in the Southern Cone and other Latin American Countries, the attention of the Constitutional Court was focused on the types of crimes excluded from amnesty. Following the IACtHR decision on *El Mozote v. El Salvador* and the concurring opinion of judge García Sayán, the Constitutional Court highlighted the fact that humanitarian law accepts certain amnesties in the context of peace negotiations as long as they do not include war crimes, genocide and crimes against humanity.[187] However, the constitutional history of Colombia accepts amnesty for political crimes and other related offences, so the focus of the court was on which offences can be considered 'related' to political crimes. Ultimately, the Constitutional Court has advocated for a wide margin of appreciation for the congress to determine that link between political crimes and other ordinary offences.[188] Nevertheless, it also concluded that international crimes cannot be considered related to political crimes and covered by amnesty.[189]

In more recent decisions, the Constitutional Court applied these standards to the transitional framework that resulted from the peace agreement signed by the Colombian Government and the FARC-EP. Analysing the Amnesty Law 1820/2016, the decision *C-007/18* argued that humanitarian law permits certain amnesties at the end of conflict,[190] but they are limited in three ways: (i) prohibition of self-amnesty (unless they are part of a negotiated peace agreement, as in the Colombian case);[191] (ii) prohibition of general amnesties, because they cannot include international crimes; and (iii) prohibition of unconditional amnesties, because there is a minimum requirement to contribute to the fulfilment of the victims' rights to benefit from amnesty measures.[192] While self-amnesties, blanket amnesties

[186] *C-370/06*, Corte Constitucional de Colombia (n 64) 292
[187] *C-579/13*, Corte Constitucional de Colombia (n 64) 284.
[188] *C-370/06*, Corte Constitucional de Colombia (n 64) 292.
[189] *Constitucionalidad Acto Legislativo 01 de 2012 Marco Jurídico para la Paz*, Corte Constitucional de Colombia, C-577/14 (6 August 2014) 164. See also: OHCHR, *Rule-of-Law Tools for Post-Conflict States: Amnesties* (n 7) 25.
[190] *C-007/18*, Corte Constitucional de Colombia (n 64) para 138.
[191] The amnesty law avoided using the word 'amnesty' when referring to the measures that members of the armed forces would benefit from. Notwithstanding the use of the term 'special treatment' instead of amnesty for state agents, the legal effect is very similar.
[192] *C-007/18*, Corte Constitucional de Colombia (n 64) para 163.

and unconditional amnesties are clearly prohibited under international law, conditional amnesties that facilitate reconciliation might be accepted as long as they do not include gross human rights violations and guarantee alternative mechanisms of accountability and access to justice for victims.[193]

5.5.5. Conditional, negotiated, and limited amnesties

Much of the opposition to amnesties has been grounded on the *ratio legis* or the aim of the law to grant impunity and shield people in power from being held accountable for gross human rights violations. This is at the core of the expansion of the prohibition of amnesties at the Inter-American System of Human Rights, which went from banning self-amnesties to prohibiting any kind of amnesty that hinders the victims' rights to justice. There are, nonetheless, some ambiguities about the permissibility of amnesties enacted as part of a wider process of justice, peace, and reconciliation. Courts have hinted at the possibility of conditional, negotiated, and limited amnesties. International and domestic courts have mostly dealt with broad and unconditional amnesties for international crimes, rarely connected with other processes of truth, peace, and reconciliation.[194]

However, courts have considered the possibility of certain amnesties that are less problematic. Table 3 shows that many decisions have emphasised the problems of self-amnesties and blanket amnesties. This does not necessarily mean that courts and human rights bodies are accepting other types of amnesties, but it leaves some room for uncertainty about their permissibility. Moreover, a significant number of decisions have been more or less explicit about the legality of amnesties when they are well-designed.

[193] ibid para 395. See also: *Constitucionalidad del Decreto-Ley 277/17 que implementa Ley de Amnistía*, Corte Constitucional de Colombia, C-025/18 (11 April 2018); *C-080/18*, Corte Constitucional de Colombia (n 64).

[194] Louise Mallinder, 'Amnesty and International Law' (*Oxford Bibliographies*, 2018) <https://doi.org/10.1093/OBO/9780199796953-0172> accessed 19 April 2022.

Table 3. Number of decisions considering the characteristics of the amnesty

	Total decisions	Approving amnesty	Rejecting amnesty	Modifying amnesty	No decision
I. Prohibition based on policy considerations	**145**				
A. Prohibition of blanket amnesty	47	5	30	3	9
B. Prohibition when amnesty seeks to avoid justice	77	4	50	3	20
C. Prohibition of self-amnesty	53	7	35	3	8
D. Prohibition for public officials	41	3	17	1	20
E. Prohibition for most responsible	10	4	2	2	2
F. Democratic approval is not enough	9	0	9	0	0
II. Permission based on policy considerations	**55**				
A. Permission of conditional amnesty	20	11	5	2	2
B. Permission by using other mechanisms of justice	31	15	6	3	7
C. Permission by democratic approval	10	3	4	0	3
D. Participation of victims in the process	6	3	2	0	1
E. Permission when negotiation to end conflict	23	13	3	2	5

5.5.6. Conditional amnesties

Conditional amnesties are closely related to the use of amnesties in transitional justice. This means that '[i]ndividual offenders may be required to fulfil specified conditions before obtaining amnesty'.[195] They enable the voluntary disarmament of violent groups, while facilitating accountability for the fulfilment of other victims' rights to truth, reparations, and reconciliation. The *Belfast Guidelines on Amnesty and Accountability* identify as possible conditions:

> a) submitting individual applications b) surrendering and participating in disarmament, demobilisation and reintegration programmes c) participating in traditional or restorative justice processes d) fully disclosing personal involvement in offences, with penalties for false testimony e) providing information on third party involvement with respect to offences f) testifying (publicly or privately) in a truth commission, public inquiry or other truth-recovery process Individual offenders may be required to fulfil specified conditions before obtaining amnesty.[196]

The opposite of conditional amnesties are blanket amnesties granted with no conditions or obligation to contribute other mechanisms of accountability, as well as amnesties enacted with the purpose of securing impunity for a group of people. Although many cases do not differentiate between the scope and nature of amnesties, there is an important number of cases

[195] Transitional Justice Institute, *The Belfast Guidelines on Amnesty and Accountability* (University of Ulster 2013) Principle 11.
[196] ibid.

emphasising the problems of blanket and unconditional amnesties. As shown in Table 3. Number of decisions considering the characteristics of the amnesty, in 77 decisions, courts and human rights bodies stressed the prohibition of amnesties when they are implemented as a mechanism of impunity to shield autocratic regimes from justice. Similarly, 47 decisions placed emphasis on the prohibition of blanket amnesty. Mirroring this, 31 cases considered the permissibility of amnesties when accompanied by alternative mechanisms of justice and accountability. Meanwhile, 20 of the decisions considered that conditional amnesties are less problematic and might be permissible under certain circumstances.

Domestic courts in Colombia and South Africa have been vocal about the role of conditional amnesties in transitional justice. In both cases, the acceptance of amnesty measures has been linked to the participation of beneficiaries in other mechanisms of accountability, contributing to the reconstruction of truth and reparations. In the AZAPO case, the South African Constitutional Court made it clear that the accepted amnesty was not a blanket amnesty 'granted automatically as a uniform act of compulsory statutory amnesia', but required 'full disclosure of all facts to the Amnesty Committee' and only for crimes 'perpetrated during the prescribed period and with a political objective committed in the course of the conflicts of the past'.[197] Similarly, the Colombian Constitutional Court argued that amnesties enacted with the aim of consolidating peace are permissible at the end of conflicts, as long as they do not constitute an obstacle to justice.[198] Reviewing transitional processes in Africa and Asia, the Colombian Court noted a trend restricting blanket amnesties and requiring benefits to the effective contribution to and participation in the process of peace reconstruction.[199] More recently, examining the current transitional justice framework, the Court concluded that any measure that restricts the state's obligation to investigate, prosecute and punish cannot be unconditional, they are constitutionally valid only as long as they contribute to the termination of the conflict and the rights of the victims and the society to truth, reparations and non-repetition.[200]

However, the Indonesian Constitutional Court cautioned that the access to rights to truth and reparations in transitional justice cannot be dependent upon the amnesty. [201] Examining the constitutionality of the law No. 27, concerning the Commission for Truth and Reconciliation, the Indonesian Court argued that the law erred in prescribing that compensation and reparation

[197] *AZAPO v. President of South Africa*, Constitutional Court of South Africa (n 133) para 32.
[198] *C-370/06*, Corte Constitucional de Colombia (n 64) 287.
[199] *C-579/13*, Corte Constitucional de Colombia (n 64) 188-202.
[200] *C-007/18*, Corte Constitucional de Colombia (n 64) para 396.
[201] *Decision on the Petition for Judicial Review on Law of the Republic of Indonesia Number 27 Year 2004 concerning Commission for the Truth and Reconciliation*, Constitutional Court of Indonesia, No. 006/PUU-IV/2006 (7 December 2006).

for victims depended on the application of amnesty. Hence, the Court rejected the amnesty, arguing that '[a]mnesty shall not have legal consequences relating to the rights of the victims to obtain reparation, and further amnesty shall not be granted to those committed violations of human rights and international humanitarian law, which constitute offences, for which amnesty and other form of immunity are not justified'.[202] The Court observed that the provisions of the law rendered the amnesty incompatible with the constitution, but also impractical in terms of guaranteeing the rights of the victims to reparation, truth recovery and participation in a transitional justice process that had as consequence some problems of legal certainty.[203] Following this, the Constitutional Court declared that such a law lacked binding legal force. Nonetheless, it added that truth commissions are an alternative mechanism of accountability that have been 'accepted by the international practice, such as in South Africa, and have also been recognised by the customary law'.[204] Consequently, the Court considered that better-designed transitional mechanisms, including amnesty, could be implemented in the future: 'Many options can be selected for achieving such goals, among others, by achieving reconciliation in the form of legal policies (laws), which are in line with the 1945 Constitution and universally applicable human rights instruments, or achieving reconciliation through political policies on general rehabilitation and amnesty'.[205]

At an international level, there has been a recent change in the approach of regional human rights bodies, which have hinted at the permissibility of conditional amnesties. In *Marguš v. Croatia*, the ECtHR concluded that there is a growing tendency in international law to see amnesties as unacceptable.[206] However, in the same paragraph, the Court included a caveat acknowledging that this was not a difficult case because the state failed to implement other transitional justice mechanisms for reconciliation:

> Even if it were to be accepted that amnesties are possible where there are some particular circumstances, such as a reconciliation process and/or a form of compensation to the victims, the amnesty granted to the applicant in the instant case would still not be acceptable since there is nothing to indicate that there were any such circumstances.[207]

As explained in Section 4.4, the position of the ECtHR on amnesties has not entirely consolidated, so this decision signals a shift in the position of the European Court, opening the

[202] ibid 27.
[203] ibid 29-30.
[204] ibid 26.
[205] ibid 32.
[206] *Marguš v. Croatia*, ECtHR, Judgment by Grand Chamber, Application 4455/10 (27 May 2014) para 138-139.
[207] ibid para 139

door to the possibility of conditional amnesties linked to reconciliation processes.[208] In their joint concurring opinion, judges Šikuta, Wojtyczek and Vehabović expanded on this, arguing that international law has evolved rapidly, imposing tighter regulations on states' freedom with regard to amnesties, particularly in circumstances where such laws are enacted to guarantee impunity to perpetrators.[209] Nevertheless, there are circumstances in which amnesties have been instrumental in overcoming situations of grave human rights violations, restoring democracy and strengthening the rule of law. In certain circumstances, argued the judges, imposing a blanket ban on amnesties might reduce the effectiveness of human rights protection.[210] In exceptional cases, the European judges argued, 'there may be practical arguments in favour of an amnesty that encompasses some grave human rights violations'.[211] Thus, they concluded that the Court should not 'rule out the possibility that such an amnesty might in some instances serve as a tool enabling an armed conflict or a political regime that violates human rights to be brought to an end more swiftly, thereby preventing further violations in the future'.[212] This suggests a certain flexibility in allowing states a margin of manoeuvre to allow the different parties in conflict to find the most appropriate solutions, as long as they find the right balance between the public interest of the state in peace and individual rights to justice.[213] Complementing this, judge Wojtyczek has argued that the general approach to ban amnesties adopted by the ECtHR in *Abdülsamet Yaman v. Turkey* and later reproduced in many other cases, should be nuanced in light of the considerations made in *Marguš v. Croatia*.[214]

More explicitly, the ACoHPR concluded that blanket or unconditional amnesties are deemed incompatible with human rights and humanitarian rules in *Thomas Kwoyelo v. Uganda*.[215] The African Commission considered the possibility of states in transition from conflict enacting well-crafted conditional amnesties, as long as they constitute 'justifiable and proportional limitations acceptable under international law'.[216] Amnesties are permissible in exceptional circumstances when they are 'necessary measures for ending violence and

[208] For a more in-depth analysis on how the ECtHR might see the permissibility of amnesty laws in future cases see: Miles Jackson, 'Amnesties in Strasbourg' (2018) 38 OJLS 451.
[209] *Marguš v. Croatia*, ECtHR, 2014 (n 206) Joint concurring opinion judges Šikuta, Wojtyczek and Vehabović, para 8.
[210] ibid para 9.
[211] ibid.
[212] ibid.
[213] Josepha Close, 'Crafting an international norm prohibiting the grant of amnesty for serious crimes: convergences and divergences in the case-law of international courts' (2016) 8 Queen Mary LJ 109, 118.
[214] *Mocanu and others v. Romania*, ECtHR, Judgment, Applications No. 10865/09, 45886/07 and 42431/08 (17 September 2014) Partly dissenting opinion judge Wojtyczek.
[215] *Thomas Kwoyelo v. Uganda*, ACoHPR Communication 431/12 (17 October 2018) para 181, 288.
[216] ibid para 181, 291.

continuing violations, and achieving peace and justice …'[217] But they must be linked to the the victims' access to an effective remedy, for instance by fulfilling obligations to contribute to truth and reparations, and to the facilitation of the reconciliation process by acknowledging responsibility.[218]

This position was also developed by Judge Ibáñez Carranza at the Appeals Chamber of the ICC, who argued that the Court should have adopted a position regarding the permissibility of amnesties in *Prosecutor v. Saif Al-Islam Gaddafi*.[219] As discussed in Chapter 4, the Appeals Chamber considered that 'international law is still in the developmental stage on the question of acceptability of amnesties'.[220] Judge Ibáñez Carranza argued that 'there is well-established law, principles and standards confirming that *general* amnesties and equivalent measures for grave human rights violations, such as those caused by the commission of crimes under the jurisdiction of the Court, are incompatible with international law'.[221] Further examining the *ratio legis* of amnesty laws, the opinion advocated for a functionalist approach in which the compatibility of amnesties with international law should be stablished on a case-by-case bases, based on its effects.[222] If the amnesty results in impunity for perpetrators of international crimes amounting to serious human rights violations or grave breaches of international humanitarian law, then such a measure would be incompatible with international law.[223] In contexts of transitional justice, nonetheless, some forms of carefully crafted amnesties may be permissible in order to achieve peace and reconciliation.[224] For example, conditional amnesties for other crimes that do not constitute gross violations of human rights or grave breaches of international humanitarian law might be acceptable, as long as they do not result in impunity.[225] This could be achieved by guaranteeing alternative forms of accountability, that guarantee victims' rights and reconciliation post-hostilities.[226]

[217] ibid para 181, 293
[218] ibid para 181, 293.
[219] *Prosecutor v. Saif Al-Islam Gaddafi*, ICC Appeals Chamber, Situation in Libya, Judgment on the appeal of Mr Saif Al-Islam Gaddafi against the decision of the Pre-Trial Chamber I entitled 'Decision on the admissibility challenge by Dr. Saif Al-Islam Gaddafi pursuant to articles 17(1)(c) and 20(3) of the Rome Statute', ICC-01/11-01/11 (9 March 2020).
[220] ibid para 96.
[221] *Prosecutor v. Saif Al-Islam Gaddafi*, ICC Appeals Chamber (n 219) Separate concurring opinion by Judge Ibáñez Carranza, para 25. Emphasis added.
[222] ibid para 3.
[223] ibid para 42.
[224] ibid para 115.
[225] ibid para 124.
[226] ibid para 142.

5.5.7. Negotiated amnesties

The strong emphasis on the prohibition of self-amnesties has also raised some questions about the permissibility of negotiated amnesties. The strong opposition to amnesties by the IACtHR and the ECtHR in cases like *Barrios Altos v. Peru* and *Abdülsamet Yaman v. Turkey*, for example, are grounded in the nature of the laws enacted as a self-preservation measure to guarantee impunity and protection against future prosecutions.[227] In 53 of the decisions read for this study, judicial and quasi-judicial bodies placed emphasis on the problems of self-amnesties, while 41 cases criticised any measure covering public officials, even if they are enacted by subsequent governments. Many of these decisions dealt with amnesties enacted during transition from military dictatorships or authoritarian governments to democracy in South America (e.g., Argentina, Chile, Peru, Brazil, Uruguay). The *ratio legis* of amnesties in these contexts has been to shield themselves from justice, using self-amnesties as mechanisms of impunity for very serious crimes.

After focusing on rejecting self-amnesties in Peru and Chile, the IACtHR expanded the prohibition to other type of amnesties. Hence, the emphasis of courts on condemning blanket and self-amnesties does not entail an acceptance of other types of amnesties.[228] However, it does show that courts and human rights bodies see some amnesties as more clearly problematic, while the permissibility of other measures remains uncertain.

Reviewing the decisions of the Inter-American Court, Judge García Sayán's concurring opinion in *El Mozote v. El Salvador* points to the fact that previous cases 'all had in common that none of these amnesty laws was created in the context of a process aimed at ending, through negotiations, a non-international armed conflict'.[229] The problem with the Salvadoran amnesty, however, was that it was too broad and did not condition its application to other processes of accountability. As the Inter-American Court summarised, despite the 'reciprocal' nature of the amnesty, it was incompatible with the American Convention on Human rights because it applied without the need to first acknowledge responsibility; it covered crimes against humanity, and it did not grant pecuniary compensation for victims.[230] Consequently, the Inter-American Court concluded that the *ratio legis* of the amnesty was to,

[227] See: *Barrios Altos v. Peru*, IACtHR (n 31) para 42-44; *Abdülsamet Yaman v. Turkey*, ECtHR, Judgment, Application No. 32446/96 (2 November 2004) para 55.
[228] OHCHR, *Rule-of-Law Tools for Post-Conflict States: Amnesties* (n 7) 8.
[229] *El Mozote v. El Salvador*, IACtHR (n 175) Concurring opinion Judge García Sayán, para 9.
[230] *Report on the Situation of Human Rights in El Salvador*, IACoHR, OEA/Ser.L/II.85 (11 February 1994).

> leave in impunity all the grave crimes perpetrated against international law during the internal armed conflict, even though the Truth Commission had determined that they should be investigated and punished … explicitly contradict[ing] what the parties to the armed conflict themselves had established in the Peace Accord that determined the end of the hostilities.[231]

The considerations in *El Mozote* leave some leeway for the permissibility of negotiated amnesties in other contexts when they are narrowly applied and linked to processes of truth recovery, reparations, and reconciliation. Colombian courts used this framework to approve the amnesty law enacted as part of the Final Agreement between the Government and the guerrilla FARC in 2016.[232] Nevertheless, it remains unclear what treatment the IACtHR will give this amnesty when it is examined by the Inter-American System of Human Rights.

5.5.8. Limited or partial amnesties

The use of broad, general, or unlimited amnesties has been widely criticised by court and human rights bodies in different contexts. There are two main limits that judicial and quasi-judicial bodies have determined in order to narrow the application of amnesties. The first and most important limit relates to the crimes covered by amnesties. A great majority of judgments have placed limits on amnesties for international crimes and serious gross human rights violations. The language of judicial and quasi-judicial bodies varies, with some decisions drawing the limits in general terms to exclude international crimes (19), human rights violations (169) or *jus cogens* crimes (8), while other decisions have placed special emphasis on crimes against humanity (101), war crimes (64), genocide (42), and gender-based crimes (14). As explained in Chapter 2, treaty-based obligations to prosecute crimes of torture, genocide, enforced disappearance and war crimes place clear limits on the enactment of amnesties. Moreover, linking obligations to investigate, prosecute and punish human rights abuses to the victims' right to an effective remedy, human rights bodies have expanded the prohibition of amnesties to crimes against humanity, war crimes in non-international conflicts, and other serious human rights violations.

The expansion of the prohibition on amnesties is clearly traceable in the case law of the Inter-American Court. In *Barrios Altos*, for instance, the IACtHR considered the incompatibility of amnesties with the protection of human rights, making clear that such

[231] *El Mozote v. El Salvador*, IACtHR (n 175) para 292.
[232] See: *C-579/13*, Corte Constitucional de Colombia (n 64); *C-007/18*, Corte Constitucional de Colombia (n 64); *C-080/18*, Corte Constitucional de Colombia (n 64).

measures could not cover 'serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance …'[233] Later, in *Almonacid Arellano,* examining the characteristics of the extra-legal execution of Mr. Almonacid Arellano, the IACtHR concluded that 'crimes against humanity are crimes which cannot be susceptible of amnesty'.[234] More recently, in *El Mozote*, the Inter-American Court followed the interpretation of the ICRC that excludes war crimes from the application of article 6(5) of the Additional Protocol II, which allows for amnesties at the end of non-international conflicts.[235] More generally, the European Court of Human Rights in *Marguš (2012)* placed some clear limits on amnesty for 'international crimes – which include crimes against humanity, war crimes and genocide – … increasingly considered to be prohibited by international law'.[236]

Despite much opposition of human rights bodies and UN agencies to the application of amnesties for international crimes, states have continued enacting amnesties covering serious crimes and gross human rights violations.[237] Mallinder's database registers that the number of amnesties including them have increased over the past thirty years.[238] While some of these have been denounced and revoked by courts, mostly in South America, most of them remained unchallenged.[239]

In some jurisdictions, domestic courts have placed emphasis on the permissibility of amnesties for political crimes and related offences (48 decisions). Colombia, for example, has a long history of peace and demobilisation processes structured around amnesty measures for political crimes. The Political Constitution gave special treatment to political offences, grounded in the idea that such acts have an 'altruistic' goal to improve society.[240] In 2002, the Colombian Constitutional Court analysed a law prohibiting amnesty for crimes of terrorism, kidnapping and extortion. The Court concluded that the law was constitutional because it complied with the constitutional discretionary powers of congress to decide the limits on amnesty and respected international standards. The Constitutional Court asserted the special status of political crimes in Colombian constitutional history, so Congress cannot prohibit amnesty for political crimes. Nonetheless, it enjoys broad discretion to determine the ordinary

[233] *Barrios Altos v. Peru*, IACtHR (n 31) para 41.
[234] *Almonacid Arellano v. Chile*, IACtHR (n 95) para 114.
[235] *El Mozote v. El Salvador*, IACtHR (n 175) para 286
[236] *Marguš v. Croatia*, ECtHR, Judgment, Application No. 4455/10 (13 November 2012) para 74.
[237] Louise Mallinder, 'Amnesties' Challenge to the Global Accountability Norm? Interpreting Regional and International Trends in Amnesty Enactment' in Francesca Lessa and Leigh A. Payne (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (CUP 2012) 81.
[238] ibid 87.
[239] Louise Mallinder, 'The End of Amnesty or Regional Overreach: Interpreting the Erosion of South America's Amnesty Laws' (2016) 65 ICLQ 645, 673.
[240] *C-695/02*, Corte Constitucional de Colombia (n 157) para 4.

offences that can be considered related to those crimes for the purpose of amnesty.[241] Later, in a series of decisions evaluating the legal framework for the peace negotiations and the peace agreement between the Government and the FARC-EP, the Constitutional Court focused on what offences can be considered 'related' to political crimes. Following the IACtHR decision on *El Mozote v. El Salvador* and the concurring opinion of judge García Sayán, the Colombian Court highlighted that humanitarian law accepts certain amnesties in the context of peace negotiations as long as they do not include war crimes, genocide and crimes against humanity.[242] Consequently, the Constitutional Court advocated for the congress to have a wide margin of appreciation to determine the link between political crimes and other ordinary offences. Nevertheless, it drew some limits by arguing that international crimes can never be considered related to political crimes and covered by amnesty.[243]

As in the Colombian case, much of the discussion about amnesty in Central American countries has gravitated around what crimes can be considered ordinary offences related to political crimes.[244] In Guatemala, after several challenges, the Constitutional Court declared the constitutionality of National Reconciliation Law No. 145/1996, arguing that it complied with the standards set by the constitution to grant amnesties for political crimes and other related common offences.[245] The Guatemalan Court considered that the state had wide discretion to enact amnesties as a mechanism of transitional justice, limited only by the international obligations assumed by the state.[246] Article 8 of the National Reconciliation Law complied with this by excluding from amnesty crimes of genocide, torture, enforced disappearance and any other offences that do not admit the statute of limitations under international law (e.g. crimes against humanity and genocide).[247] Therefore, the amnesty has not been applied on the basis that it excludes international crimes, however, it has remained valid even for state agents responsible for crimes committed in response to political crimes or

[241] ibid para 7.
[242] *C-579/13*, Corte Constitucional de Colombia (n 64) 284.
[243] *C-577/14*, Corte Constitucional de Colombia (n 189) 164. See also: OHCHR, *Rule-of-Law Tools for Post-Conflict States: Amnesties* (n 7) 25.
[244] See: *Constitucionalidad Ley de Amnistía General*, Corte Suprema de Justicia de El Salvador 2000 (n 123) 33; *Demanda de inconstitucionalidad de los decretos 199/1987 and 87/1991 que concede amnistía*, Corte Suprema de Justicia de Honduras, No. 20-99 (27 June 2000) 11.
[245] *Revisión de constitucionalidad de la Ley de Reconciliación Nacional*, Corte de Constitucionalidad de Guatemala, Expedientes Acumulados No. 8-97 y 20-97 (7 October 1997). See also: *Recurso de amparo Sergio Manfredo Beltetón de León*, Corte de Constitucionalidad de Guatemala, Expediente No. 1505-96 (16 July 1997).
[246] *Constitucionalidad de la Ley de Reconciliación Nacional*, Corte de Constitucionalidad de Guatemala (n 245) 7.
[247] See: *Recurso de amparo Reyes Collin Gualip y otros (caso de la Masacre de las Dos Erres)*, Corte de Constitucionalidad de Guatemala, Expedientes Acumulados No. 655-2010 y 656-2010 (18 January 2011); *Recurso de amparo Héctor Mario López Fuentes*, Corte de Constitucionalidad de Guatemala, Expediente No. 1933-2012 (13 August 2013); *Caso contra José Efraín Ríos Montt*, Corte de Apelaciones del Ramo Penal de Guatemala, Narcoactividad y Delitos contra el Ambiente, Recurso de Apelación, No. 01076-2011-00015 (15 June 2012); *Recurso de amparo José Efraín Ríos Montt*, Corte de Constitucionalidad de Guatemala, Expedientes No. 3340-2013 (18 December 2014).

related offences perpetrated by the rebels.[248] In 2019, the Congress discussed two bills proposing a modification that would extend the National Reconciliation Law by granting amnesty for international crimes by considering them related to the armed conflict. The Guatemalan Constitutional Court was quick to quash the initiative, formulating three conditions for accepting the constitutionality of an amnesty: that the crimes covered by the amnesty are political or related; that the amnesty is based upon considerations of public interest; and that gross violations of human rights and crimes against humanity are excluded.[249]

Domestic courts in Europe, despite having a more relaxed attitude towards amnesties, have also established some limits in relation to the crimes that can be covered. Croatian courts, for instance, upheld the terms of the General Amnesty Act of 1996, which excluded war crimes and limited the application of the amnesty to criminal acts related to the armed conflict.[250] North Macedonian Courts endorsed the exclusion of the crimes under the jurisdiction of the ICTY from the amnesty law of 2002, and reiterated that such a measure is not opposable to the jurisdiction of the international tribunal.[251] The Constitutional Court in Kosovo acknowledged that amnesties are usual for offenses that are considered political, as well as for economic or ordinary crimes connected to a particular conflict.[252] In particular, Kosovar courts concluded that amnesty measures are usually permissible for crimes of a political nature, such as 'treason, sedition, subversion, rebellion, using false documents, forgery, anti-government propaganda, possessing illegal weapons, espionage, membership of banned political or religious organizations, desertion and defamation'.[253] However, crimes under international law, such as gross violations of human rights, including genocide, war crimes, crimes against humanity, torture and enforce disappearance, cannot be covered by amnesty.[254]

Similarly, after validating the legality of the amnesties enacted by Vladimir Mečiar in multiple decisions,[255] in 2017 the Slovak Constitutional Court drew some limits upon the state's discretion to enact amnesties.[256] These limits were based on the gravity of the act and the intensity of its impact on human rights and fundamental freedom, and the characteristics of

[248] *Constitucionalidad de la Ley de Reconciliación Nacional*, Corte de Constitucionalidad de Guatemala (n 245) 9.
[249] *Constitucionalidad de la Iniciativa de ley 5377 que reforma Decreto 145-96 - Ley de Reconciliación Nacional*, Corte de Constitucionalidad de Guatemala, Expedientes acumulados No. 682-2019 y 1214-2019 (9 February 2021) 46-49.
[250] *Case No. U-III-791-1997*, Constitutional Court of Croatia, Case against Antun Gudelj, CRO-2001-1-003 (14 March 2001) para 27; *Case No. U-III-543/1999*, Constitutional Court of Croatia, Case against G.P. from D. (26 November 2008) para 6(3).
[251] *Case U.no.169/2002*, Constitutional Court of North Macedonia (n 87) para 7. See also: *Case U.no.155/2007*, Constitutional Court of North Macedonia (n 87); *Case U.no.158/2011*, Constitutional Court of North Macedonia, Constitutionality of Article 1of the Law on Amnesty, Official Gazette No. 18/2002 (31 October 2012).
[252] *Case KO108/13*, Constitutional Court of Kosovo (n 62) para 116.
[253] ibid para 95.
[254] ibid.
[255] *Case ÚS 8/97*, Constitutional Court of Slovakia (n 60); *Case I. ÚS 30/99*, Constitutional Court of Slovakia (n 60); *Case II. ÚS 69/99*, Constitutional Court of Slovakia (n 60).
[256] *Case No. ÚS 07/2017*, Constitutional Court of Slovakia (n 93).

the offender.[257] Referencing the ECtHR, the IACtHR and domestic decisions from Chile, Argentina and El Salvador, the Court rejected the application of self-amnesties and the inclusion of serious human rights violations.[258]

The second consideration in limiting the application of amnesties has been the prohibition on benefitting the people most responsible for the systematic violation of human rights. This includes those people with higher rank or level of command, as well as those with the most actual responsibility for a particular act.[259]

Even though only 10 decisions expanded on this limitation, it has gained traction based upon practical considerations of the number of people that can be realistically prosecuted in the aftermath of a violent conflict, and the focus of the jurisdiction of international criminal tribunals on the persons who bear the greatest responsibility. In *Thomas Kwoyelo v. Uganda*, the ACoHPR placed emphasis on the incompatibility of 'amnesties that preclude accountability measures for gross violations of human rights and serious violations of humanitarian law, *particularly for individuals with senior command responsibility*' with international law.[260] Similarly, Judge Geoffrey Robertson argued in a separate opinion to the decision of the SCSL in *Prosecutor v. Allieu Kondewa*, that the norm of international law that has more clearly crystalised is the prohibition of amnesty for international crimes for the people that bear most responsibility:

> The stage I discern international criminal law to have reached is to have produced a rule that invalidates amnesties offered under any circumstances to persons most responsible for crimes against humanity (genocide and widespread torture) and the worst war crimes (namely those in Common Article 3 of the Geneva Conventions). In the sphere of international law, the acts of these perpetrators (if capable of proof beyond reasonable doubt) must always remain amenable to trial and punishment.[261]

The obligation to prosecute is more strict and powerful when dealing with political and military leaders that planned, ordered or encouraged the commission of a plurality of heinous acts by a different people or soldiers.[262] This is grounded in a principle of justice according to which those who bear the most responsibility are those who should face the strongest

[257] ibid 123.
[258] ibid 113.
[259] Bell, 'The "New Law" of Transitional Justice' (n 183) 116.
[260] *Kwoyelo v. Uganda,* ACoHPR (n 215) 289. Emphasis added.
[261] *Prosecutor v. Allieu Kondewa*, SCSL, Decision on lack of jurisdiction / abuse of process: amnesty provided by the Lomé Agreement, Case No. SCSL-2004-14-AR72 (25 May 2004) Separate opinion Justice Robertson, para 51.
[262] ibid para 49.

punishment.[263] This principle also relates to the repudiation of self-amnesties, which restrain people in power from using amnesty measures to shield themselves from justice.

The focus on people with the most responsibility also has a practical dimension. In García Sayán's concurring opinion in *El Mozote*, the majority of the Inter-American Court argued that focusing on prosecuting those that bear the *most* responsibility for the *most* serious violations opens the way 'to giving priority to the most serious cases as a way to handle a problem which, in theory, could apply to many thousands of those held for trial, dealing with less serious cases by other mechanisms'.[264] The significant number of crimes and individuals that need to be prosecuted in the aftermath of serious situations of violence makes a maximalist approach to punishing everyone impracticable: 'when everyone must be punished, no one ends up being punished'.[265] Combining mechanisms of justice that blend trials for high-level commanders and those directly responsible for the most heinous acts, while granting amnesties for lower-level offenders allows for a certain balance between the demands of justice and peace. However, finding this balance is difficult where the degree of responsibility for serious crimes is correlated with the capacity to contribute to the reconstruction of truth and the negotiation of a peaceful transition.[266]

These considerations gave leeway to Colombia's selectivity and prioritisation policies, which combined amnesties for low-ranking combatants, with criminal prosecutions focused on those who bore most responsibility.[267] Learning from the magnitude of previous peace process, in 2018 the Colombian Constitutional Court endorsed the Final Agreement for Peace that allows for the Special Jurisdiction for Peace to prioritise and select the most serious and representative cases in order to prosecute the people who bore the most responsibility.[268] Examining the transitional framework enacted by the Colombian Government, the Constitutional Court concluded that the obligations to investigate, prosecute and punish serious human rights violations and breaches of humanitarian law were not incompatible with genuine efforts to focus criminal trials on those most responsible.[269] While placing some limits on the

[263] ibid para 48.
[264] *El Mozote v. El Salvador*, IACtHR (n 175) Concurring opinion Judge García Sayán, para 29.
[265] Carlos Nino Carlos Nino, *Juicio al Mal Absoluto* (Ariel 2006) 258. Referenced in: *C-579/13*, Corte Constitucional de Colombia (n 64) 339.
[266] *El Mozote v. El Salvador*, IACtHR (n 175) Concurring opinion Judge García Sayán, para 30. See also: Transitional Justice Institute, *The Belfast Guidelines on Amnesty and Accountability* (n 195) principle 8; Bell, 'The "New Law" of Transitional Justice' (n 183) 117.
[267] *C-579/13*, Corte Constitucional de Colombia (n 64).
[268] Prioritisation is defined in terms of the order in which cases are going to be handled, while selection leave some discretion to renounce to prosecute some criminal acts. *C-080/18*, Corte Constitucional de Colombia (n 64) 239. See also: *C-007/18*, Corte Constitucional de Colombia (n 64); *C-025/18*, Corte Constitucional de Colombia (n 193).
[269] *C-025/18*, Corte Constitucional de Colombia (n 193) para 61.

scope of amnesties in order to avoid general measures of impunity, this approach brings some flexibility into the interpretation of the obligations to prosecute and punish.

5.6. Conclusions: the complexity of judicial interactions

Courts and human rights bodies have generally stressed the incompatibility of amnesties with international law when they are used as a mechanism of impunity in order to avoid justice. As shown in Chapter 4, the emphasis on the prohibition of self-amnesties and blanket amnesties has been consistent in the decisions of courts and quasi-judicial bodies since 1990. In the last decade, however, courts have enquired about the possibility of 'carefully crafted amnesties' that can help with the reintegration of violent groups and the reconciliation of societies in conflict.

Despite an ever-expanding judicial dialogue on the prohibition of problematic amnesties, influenced by the examination of self-amnesties in the aftermath of authoritarian governments in Latin America, this chapter has demonstrated the emergence of multiple communities of courts approaching the discussion of the permissibility of amnesties in other transitional justice contexts. Domestic courts in Africa, Asia and some Latin American countries have increasingly examined the use of amnesties in transitional justice as a practical instrument to incentivise disarmament and peace negotiations with violent groups that otherwise might opt for continued fighting. Notwithstanding the centrality of Inter-American and UN human rights bodies in the discussion of amnesties, a complexity analysis has revealed how domestic courts in different continents have established bridges of communication to challenge a general rejection of all amnesties under international law.

This analysis has shown how judicial dialogue has not been homogeneous. It rather reflects dynamics of self-organisation and the formation of heterarchies. More than a global community of courts, we see a diversity of interactions, alliances and pockets of conversations that challenge a universal understanding or agreement on the prohibition of amnesties.

Even though the implementation of problematic amnesties continues, and the role of courts has been primarily in limiting their effects, the consideration of well-crafted amnesties has also influenced the judgments of courts, which are increasingly discussing the possibility of conditional amnesties in the context of a wider transitional justice framework. The enactment of amnesties in negotiated peace processes in South Africa, Uganda, El Salvador

and, more recently, Colombia, has placed transitional justice and international humanitarian law (namely the interpretation of article 6(5) of the Additional Protocol II to the Geneva Conventions) at the forefront of the examination of amnesties.

Conditional amnesties are due to be examined under international law. Even though the UN has condemned the South African model as incompatible with current standards, international tribunals and domestic courts have placed some limits on the use of amnesties that have hinted at the permissibility of well-crafted amnesties enacted as part of genuine processes of reconciliation. Exploring the different perspectives from which judicial and quasi-judicial bodies have approached the question on the permissibility of amnesties, this chapter has identified the ambiguity around the use of conditional, limited and negotiated amnesties which courts and human rights bodies have not completely outlawed.

CHAPTER 6. The trajectory of a norm on amnesties

The trajectory of the discussion on the permissibility of amnesties by judicial and quasi-judicial bodies has consisted of three phases. The first is an initial phase of exploration with divergent decisions in different contexts. The second is a phase of consolidation of a prohibition on amnesties for serious crimes, highly influenced by the anti-impunity turn in human rights. The third is a phase of flexibilisation, during which courts have been considering the permissibility of certain amnesties enacted in exceptional circumstances as part of a broader process of transition to peace and democracy. This third phase has been influenced by the development of transitional justice in contexts of internal conflicts.

This chapter critically examines this trajectory of the judicial discussion of the permissibility of amnesties under international law. My argument is that the status of amnesties under international law has followed dynamics of path dependence, where initial decisions adopted in very specific contexts have strongly determined the following treatment of amnesties in completely different contexts. The influence of the anti-impunity turn in human rights, and early decisions rejecting blanket amnesties in the aftermath of autocratic regimes in Latin America, have pulled domestic and international courts towards rejecting amnesties in the majority of cases. However, recent considerations of alternative mechanisms of justice in transitional justice have influenced the approach of courts and human rights bodies to amnesties, pulling the system in a different direction. In recent years, domestic and international courts have been more open to the possibility of well-crafted amnesties. As result, there are areas of ambiguity and uncertainty in relation to the permissibility of amnesties for serious human rights violations and in relation to the treatment that domestic and international courts will give to conditional, negotiated, and limited amnesties when they are accompanied by other mechanisms of accountability in transitional justice contexts.

This chapter is not concerned with a historical reconstruction of the discussion of amnesties, but rather focuses on understanding the current phase of uncertainty and ambiguity. The complexity theory concept of ‘path dependence’ and the idea of human rights and transitional justice as ‘attractors’ are deployed to explore the present status of an emerging norm on the permissibility of amnesties. The chapter builds upon a systematic reading of the decisions

of courts and human rights bodies by proposing a framework for the judicial examination of amnesties under international law. The contribution of this chapter is to cast some light on how courts can navigate the uncertainties that surround the current status of amnesties under international law.

Here, the thesis departs from the position of those who argue that there is an international agreement on the prohibition of amnesties, as well as those who claim that no rule has emerged because of inconsistencies in judicial practice or because judicial decisions are only secondary sources of international law.[1] Embracing the diversity in approaches adopted by courts and human rights bodies in the examination of amnesties, this chapter proposes a framework for the judicial examination of amnesties in future processes. Judicial dialogue reflects little international agreement on the prohibition or permission of amnesties under international law. However, this does not entail that there are no standards for the application of amnesties. The concept of emergence in complexity theory allows to reconcile the diversity of individual considerations and decisions made by international and domestic courts, with standards emerging at a system level.

The scale of the discussion of a wide range of amnesties in different contexts by courts and human rights bodies makes the development of a rule on amnesties a complex process that is not reflected in individual decisions, but in the collective of pronouncements read as a whole. Unlimited, unconditional and self-amnesties covering international crimes and serious violations of human rights enacted as mechanisms of impunity are clearly prohibited and require a strict interpretation of the obligations of states to prosecute. Conditional, limited and negotiated amnesties, covering only political crimes and accompanied by other mechanisms of accountability, give states discretion to make decisions based on considerations of public interest. However, there is a wide range of amnesty measures in between. Rather than focusing on the agreement or the lack of consensus on the prohibition of amnesties, this chapter identifies patterns of decision-making that give a sense of the direction of the judicial development of a norm on amnesties.

The first section presents the theoretical framework, showing how the concepts of path dependence and attractors in complex systems explain the development of the discussion on the permissibility of amnesties. The second section traces the evolution of the judicial treatment of amnesties and the influence of early decisions on blanket and self-amnesties. The third section complements this by reconstructing the trajectory of the judicial approach to amnesties,

[1] Mark Freeman and Max Pensky, 'The Amnesty Controversy in International Law' in Francesca Lessa and Leigh A. Payne (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (CUP 2012) 58.

situating judicial interactions within the evolution of the broader debates on transitional justice, and identifying three main periods influenced by different ideas of justice. This section also characterises the current moment of uncertainty around the permissibility of conditional amnesties. The fourth section proposes a framework for courts and human rights bodies to examine the permissibility well-crafted amnesties in the future. Comparing the nature and characteristics of the amnesties that courts and human rights bodies have identified as relevant, the section presents a framework to assess whether a specific measure tends to promote impunity or accountability and, depending on that, identify the need for a stricter or a more flexible approach in the application of the international obligations to investigate, prosecute and punish.

The chapter concludes by arguing that the judicial examination of conditional amnesties in the future will bring some challenges that courts have thus far avoided. The judicial discussion of the permissibility of amnesties suggests a flexible approach in which the interpretation of the obligations to criminally prosecute and punish human rights abuses in transitional justice varies depending on the characteristics and the context in which the amnesty is framed.

6.1. Change, path dependence and attractors

Judicial dialogue theories have mostly focused on agreement, shared values and global governance, leaving aside questions about change and adaptation. The judicial discussion of amnesties has changed over time, which, as argued in previous chapters, makes the idea of a global agreement on the prohibition on amnesties, based upon a universal idea of human rights or humanity law, somewhat misleading. The values of the international legal system are not transcendent nor immanent, rather they emerge from the complex interactions of the actors in the system.[2] It is in part because of that ability to disobey the rules and rewrite the ideas of justice that international law is always transforming and adapting.[3] Analysing the dynamics of change in complex systems, scholars have developed the ideas of ‘path dependence’ and

[2] Generally on the emergence of values from the interactions of legal actors in complex legal systems see: Julian Webb, 'Law, Ethics, and Complexity: Complexity Theory and the Normative Reconstruction of Law' (2005) 52 Cleveland State LRev 227, 239; Thomas E. Webb, 'Tracing an Outline of Legal Complexity' (2014) 27 Ratio Juris 477, 484.
[3] J. B. Ruhl, 'Complexity theory as a paradigm for the dynamic law-and-society system: A wake-up call for legal reductionism and the modern administrative state' (1996) 45 Duke LJ 851, 867–868.

'strange attractors' to explain how legal actors change and adapt in response to internal and external phenomena.[4]

In simple terms, path dependence means 'that an outcome or decision is shaped in specific and systematic ways by the historical path leading to it.'[5] This means explaining current phases in relation to past developments or decisions.[6] Judgments adopted in early stages influence the decision-making of tribunals and human rights bodies. In a way, there is 'a causal relationship between stages in a temporal sequence, with each stage strongly influencing the direction of the following stage.'[7] This does not mean simply that history matters, but points to specific ways in which historical developments follow a path that it is resistant to change, not because of the aims and goals of courts, but because of historic constrains. For example, Oona Hathaway critically examined how the American common law system followed strong dynamics of path dependence, revealing how 'early resolutions of legal issues can become locked-in and resistant to change.'[8] This chapter adopts a similar approach in order to examine the development of the judicial discussion of a rule on amnesties. Unlike the common law system, there is no precedent or binding force of judicial decisions under international law; nevertheless, the decision making of courts reveals clear signs of path dependence.

This is relevant because once a system is 'locked in' under a legal paradigm, it can generate inefficiencies when faced with different situations and can thus fail to respond to changing circumstances. The emergence of a system involves a process of self-reinforcement in which the more frequently a decision is made, the more incentives there are for that choice to be maintained.[9] This self-reinforcement usually happens through positive feedback, where the decisions of domestic courts are praised for following the standards set for international bodies, and through increasing returns, where following previous decisions brings greater benefits, while departing from them is more costly in terms of requiring stronger argumentation and international examination by UN bodies. Moreover, rather than a linear progressive evolution, norms have long periods of stability and sporadic moments of radical change. Like punctuated equilibrium in evolutionary biology, opportunities for legal change 'are brief and

[4] Steven Wheatley, *The idea of international human rights law* (OUP 2019) 55; Steven Wheatley, 'The Emergence of New States in International Law: The Insights from Complexity Theory' (2016) Chinese JIntlL 579, 589; Ruhl, 'Complexity theory as a paradigm for the dynamic law-and-society system' (n 3) 863; Webb, 'Tracing an Outline of Legal Complexity' (n 2) 490.
[5] Oona A. Hathaway, 'Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System' (2003) 28 Iowa LRev 101, 103.
[6] David Byrne and Gill Callaghan, *Complexity Theory and the Social Sciences: The state of art* (Routledge 2014) 196.
[7] Hathaway, 'Path Dependence in the Law' (n 5) 103.
[8] ibid 105.
[9] Wheatley, *The idea of international human rights law* (n 4) 56.

intermittent, occurring during critical junctures when new legal issues arise (…)'[10] When the system faces significant perturbations, the stable regimen of the system is disrupted and there is a process of random fluctuations where the system can different paths out of certain transformative options at a crisis point.[11] In following sections I will argue that the discussion of amnesties is currently at one of these junctures where the prospect of conditional, limited and negotiated amnesties are challenging the paradigm of treating any amnesty as a mechanism of impunity incompatible with human rights standards.

In complex systems, changes are determined by attractors that pull away the system from its expected trajectory.[12] Steven Wheatley has argued that in the international legal system, built upon standards that emerge from patterns of communication and interaction, ideas can function as attractors.[13] Examining the history of international law, he argues that concepts like sovereignty, self-determination and, more recently, human rights have influenced the development and trajectory of international law.[14] Often, many attractors pull the system in different directions, so the system adapts in search for balance. As Paul Cilliers explains, 'a self-organising system will try to balance itself at a critical point between rigid order and chaos. It will try to optimise the number of attractors without becoming unstable.'[15] The system tries to avoid chaos because it would make it unpredictable and thus useless, but it also avoids too much stability because it would then lose its capacity to adapt.[16] Contrary to the autopoietic argument of self-preservation as the primary purpose of international law, attractors pull the international legal system in different directions, leading to permanent change and adaptation to new realities.[17]

There are three types of attractors that influence how the system adapts.[18] Fixed point attractors in international law are those ideas that have consolidated over time and influence the decision making of courts in a stable and predictable way.[19] For example, the idea of justice in

[10] Hathaway, 'Path Dependence in the Law' (n 5) 105. See also: Andrew W. Hayes, 'An Introduction to Chaos and Law' (1992) 60 UMKC Law Review 751; Robert Artigiani, 'Chaos and constitutionalism: Toward a post-modern theory of social evolution' (1992) 34 World Futures: Journal of General Evolution 131

[11] David Harvey and Michael Reed, 'The Evolution of Dissipative Social Systems' (1994) 17 Journal of Social and Evolutionary Systems 371, 385–386.

[12] Wheatley, *The idea of international human rights law* (n 4) 56.

[13] ibid 62.

[14] ibid 63. On ideas like attractors in domestic legal systems see: Ruhl, 'Complexity theory as a paradigm for the dynamic law-and-society system' (n 3) 855; Webb, 'Tracing an Outline of Legal Complexity' (n 2) 490.

[15] Cilliers, *Complexity and postmodernism: Understanding complex systems* 97.

[16] ibid.

[17] See: Anthony D'Amato, 'Groundwork for International Law' (2014) 108 AJIL 650, 652. For a critique to legal autopoiesis from a complexity theory approach see: Wheatley, *The idea of international human rights law* (n 4) 41; Thomas E. Webb, 'Exploring System Boundaries' (2013) 24 Law Critique 131; Jamie Murray, Thomas E. Webb and Steven Wheatley (eds), *Complexity Theory and Law: Mapping an Emergent Jurisprudence* (Routledge 2018).

[18] Ruhl, 'Complexity theory as a paradigm for the dynamic law-and-society system' (n 3) 863.

[19] ibid 864.

the law or, more specifically in international law, the goal of maintaining international peace or protecting human rights, could be interpreted as a fixed-point attractor. Limit cycle attractors are more dynamic and influence the trajectory of the system in repeating or cyclical fashion.[20] The universal periodic reviews conducted by the UN Human Rights Council, for instance, send recurring messages about the priority of states and international agencies in the protection of human rights. Strange attractors, associated with chaotic behaviour, are the forces or ideas that unexpectedly affect the system, pushing it out of its fixed or cyclical trajectory, and leading to a bifurcation point where the system can follow completely different, even contradictory, paths. At those moments, the legal system becomes unstable, unpredictable, and sensitive to small perturbations, such that one judicial decision can either be left in oblivion or can reshape the way the international legal system approaches an issue.[21]

6.2. The evolution of the judicial examination of amnesties

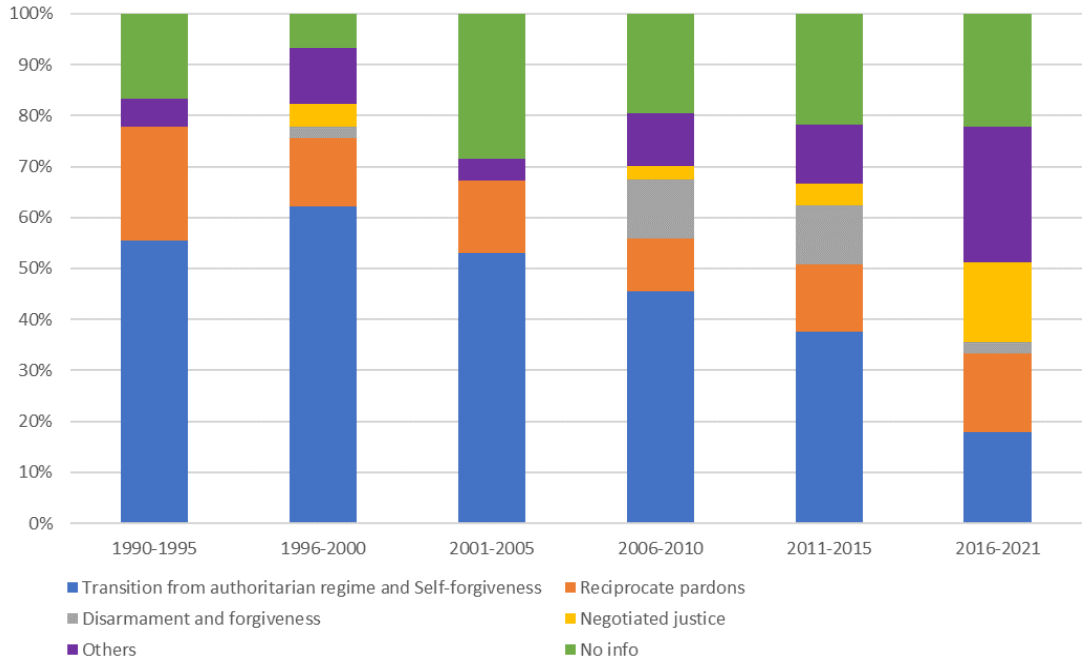
The judicial discussion of the permissibility of amnesties under international law has been strongly determined by the examination of impunity laws enacted in Latin America in the aftermath of military dictatorships or authoritarian regimes. Even though Mallinder's amnesty database has registered the continuous implementation of amnesties all over the world since 1990, Latin American courts have remained the most active in challenging these types of measures.[22] As discussed in Section 4.2, this move was accompanied and facilitated by several pronouncements made by UN human rights bodies and the Inter-American Court, which challenged the legitimacy of such measures, primarily in the Southern Cone.[23] Those early decisions marked the path of the subsequent development of a prohibition on amnesties that was adopted by other jurisdictions, by reading some of the key decisions in a way that seem less contested than they were.[24]

[20] ibid.
[21] ibid 864–865.
[22] Much of the classifications made in this chapter are based on the information systematised in the ACPA dataset. See: Louise Mallinder, 'Amnesties, Conflict and Peace Agreement - ACPA dataset' (*University of Edinburgh*, 2016) <https://www.peaceagreements.org/amnesties/> accessed 14 January 2021.
[23] See, among others: *Consuelo et al. v. Argentina*, IACoHR, Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311, Report 28/92, OEA/Ser.L/V/II.83 (2 October 1992); *Mendoza et. al. v. Uruguay*, IACoHR, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375, Report 29/92, OEA/Ser.L/V/II.83 (2 October 1992); *OR, MM and MS v. Argentina*, UNCAT, Communication No. 1/1988, 2/1988 and 3/1988, CAT/C/WG/3/DR/1, 2 and 3/1988 (23 November 1989); *Hugo Rodríguez v. Uruguay*, UNHRC, Communication No. 322/1988, CCPR/C/51/D/322/1988 (19 July 1994).
[24] Karen Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (2015) 100 Cornell LRev 1069, 1079

6.2.1. A debate marked by problematic amnesties

Figure 17 shows that, between 1990 and 2010, almost 60% of the amnesties reviewed by courts were implemented in the aftermath of military transitions or authoritarian regimes as mechanisms of impunity to shield people that were in power for many years. Amnesties enacted to facilitate the transition from Pinochet's dictatorship in Chile (1978), Fujimori's regime in Peru (1995), the Military Junta in Argentina (1986) and the civic-military dictatorship in Uruguay (1986) attracted much of the initial attention of international bodies and sparked reactions by domestic courts in those countries. After 2001, the focus of judicial decision on this type of amnesty decreased considerably, to the point that between 2016 and 2021, fewer than 20% of the decisions on amnesty examined for this study concerned self-amnesties enacted in the aftermath of authoritarian regimes. Conversely, courts have been increasingly analysing the legality of amnesties in other transitional processes. Examples include disarmament and forgiveness processes in Colombia (2005), Uganda (2000) and Sudan (2006); peace negotiations in South Africa (1995), Nepal (2014) and Colombia (2016); and agreements grounded on reciprocal pardons in El Salvador (1993), Guatemala (1996) and Sierra Leone (1999).

Figure 17. Changes over time in the type of amnesties examined by courts



This, in turn, meant that most judicial decisions between the 1990s and early 2000s focused on the analysis of problematic amnesties. As shown in Figure 18 and Figure 19, courts and human rights bodies focused at the beginning of this period on condemning unconditional amnesties, blanket amnesties, self-amnesties, and other similar measures enacted as mechanisms of impunity, with the objective of shielding people from justice. After 2005, tribunals started considering other types of amnesties more widely, including conditional amnesties and amnesties excluding international crimes, enacted as part of more comprehensive processes of transitional justice. The decline in the percentage of decisions examining unconditional and general amnesties after 2005 is noteworthy. While in the 1990s approximately 80% of the decisions were focused on unconditional amnesties, in the last decade that number decreased to fewer than 50%. Likewise, the percentage of decisions studying general amnesties decreased from around 60% in the early 1990s to 30% in recent years.

Figure 18. Changes over time in the percentage of decisions examining conditional and unconditional amnesties

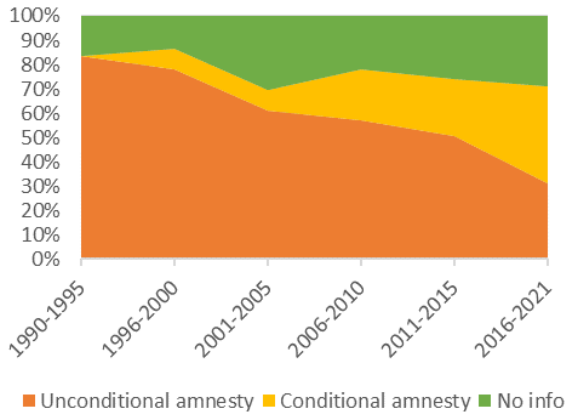
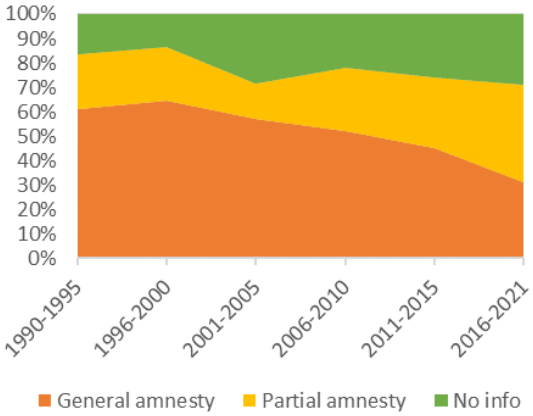


Figure 19. Changes over time in the percentage of decisions examining general and partial amnesties



Regionally, the trend is also significant. As shown in Figure 20 and Figure 21, while most decisions in Latin America referred to general and unconditional amnesties, recent judgments in Colombia (2016) and decisions regarding measures applied in other continents reflect a more diverse picture. In Africa, the majority of amnesties examined by courts were conditional and unlimited or general. Amnesties in Uganda (2000), Libya (2015) and, most notably, South Africa (1995) tended to cover serious human rights violations, but imposed clear conditions of truth telling, demobilisation, disarmament, and reparations. In Europe, conversely, most amnesties have been unconditional but limited. Amnesties in North Macedonia (2002), Croatia (1996), and Slovakia (1998) are specific in the crimes they cover or

impose clearer limits by excluding international crimes, while being less stringent with the requirement for beneficiaries to fulfil certain conditions. Meanwhile, in Asian countries like Nepal (2006, 2014), Cambodia (1994) and Indonesia (2004) there was a combination of general and limited amnesties with conditional and unconditional amnesties.

Figure 21. Percentage of decisions examining conditional and unconditional amnesties by region

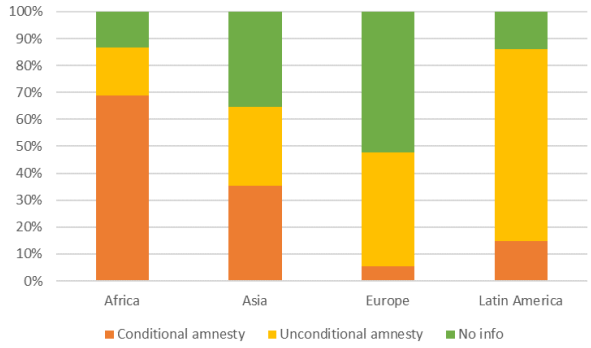
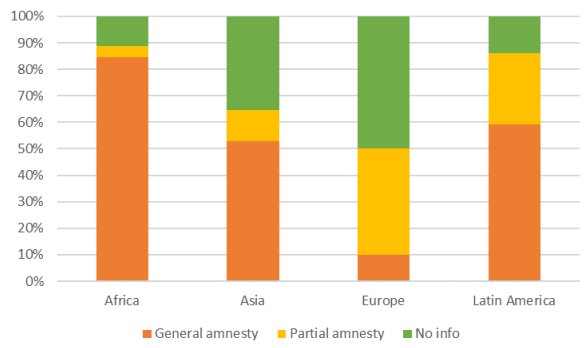


Figure 20. Percentage of decisions examining general and partial amnesties by region



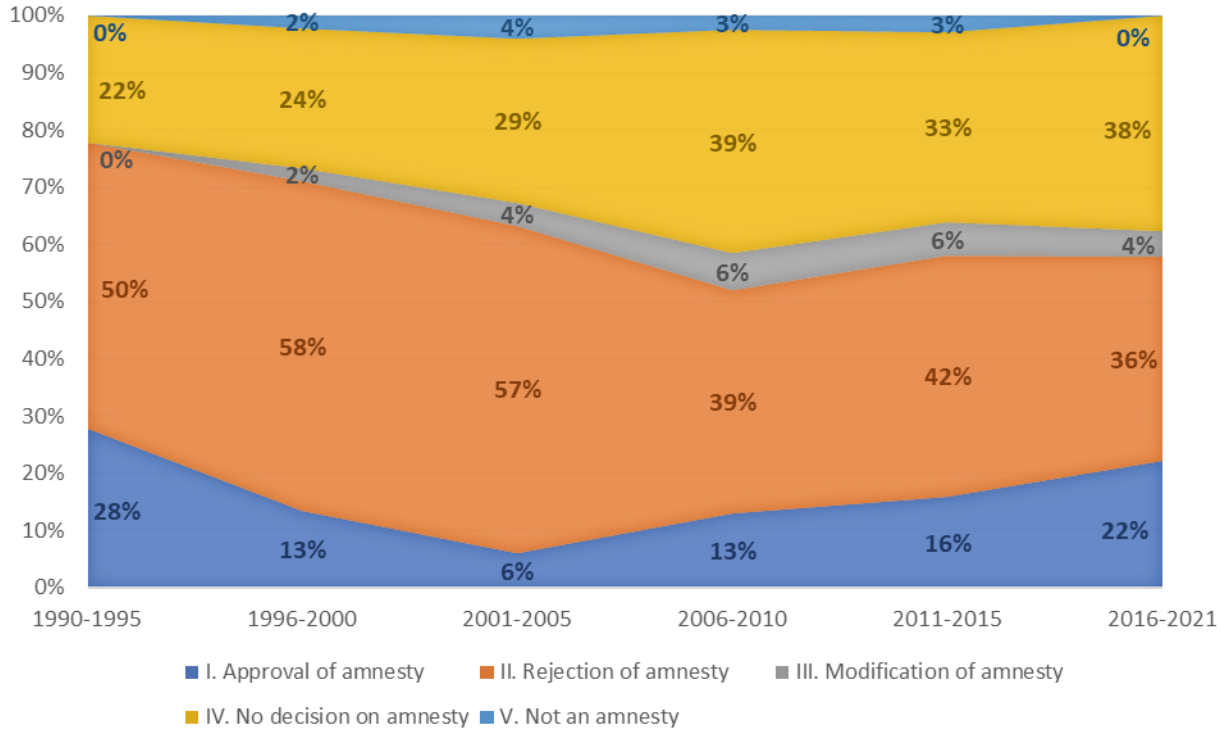
6.2.2. Changes in the way courts and human rights bodies are deciding on the permissibility of amnesties

In general, the early focus on problematic amnesties led to a significant tendency to reject all kind of amnesties. International bodies have been particularly strict in their opposition to amnesty measures. While only 4% of decisions of international bodies approved the examined amnesty, domestic courts approved them in 26% of the decisions. However, as shown in Figure 22, there have been changes in recent years in the percentage of decisions approving and rejecting amnesties. Between 1990 and 2005, the rate of decisions rejecting amnesties remained consistently above 50%, while the rate of decisions approving amnesties declined from 28% to 6%. Nevertheless, after 2010 the trend changed, and in more recent decisions the rate of rejection has reduced to 36%, while the approval rate reached 22%, with the recent judicial review of measures in Colombia and North Macedonia accounting for a great part of that shift.[25] It is also relevant to note that in the last 10 years the number of decisions discussing

[25] See, for instance: *Constitucionalidad de la Ley 1820 de Amnistía*, Corte Constitucional de Colombia, C-007/18 (1 March 2018); *Constitucionalidad del Decreto-Ley 277/17 que implementa Ley de Amnistía*, Corte Constitucional de Colombia, C-025/18 (11 April 2018); *Acción de tutela interpuesta por Jhon Jairo Mayorga Suárez*, Corte Constitucional de Colombia, T-365/18 (September 4, 2018); *Case U.no.11/2018*, Constitutional Court of North Macedonia, Constitutionality of the Law on Amnesty, Official Gazette 11/2018 (9 July 2018); *Case U.no.100/2019*, Constitutional Court of North Macedonia, Constitutionality of articles 1 and 2 of the Law on Amnesty, Official Gazette 233/2018 (4 December 2019).

the legality of amnesties without reaching a decision on the legality of a specific measure has also increased. This is mainly because, after the consolidation of a case law on amnesties, UN and regional human rights bodies have increasingly referred to the prohibition amnesties in abstract terms without examining specific measures.[26] Despite this, as discussed in Section 5.5, with the discussion of conditional, limited and negotiated amnesties, other judicial and quasi-judicial bodies have contributed to the debate by reflecting on the nuances of the discussion and the status of these types of measures under international law.

Figure 22. Changes over time in the decision of courts regarding amnesties



The argument for a prohibition on amnesties has developed around five main legal arguments: (i) treaty obligations to investigate, prosecute and punish human rights abuses; (ii) treaty obligations to provide effective remedy to victims; (iii) the non-derogability of certain

[26] *General Comment No. 2: Implementation of Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by State parties*, UNCAT, CAT/C/GC/2 (24 January 2008); *General Comment No. 3: Implementation of Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by State parties*, UNCAT, CAT/C/GC/3 (19 November 2012); *Moiwana Community v. Suriname*, IACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 124 (15 June 2005); Mapiripan Massacre v. Colombia, IACtHR, Merits, Reparations and Costs, Series C No. 134 (15 September 2005); *The Rochela Massacre v. Colombia*, IACtHR, Merits, Reparations and Costs, Series C No. 163 (11 May 2007); *Böber v. Turkey*, ECtHR, Judgment, Application No. 62590/09 (9 April 2013); *Yerli v. Turkey*, ECtHR, Judgment, Application No. 59177/10 (8 July 2014); *Ateşoğlu v. Turkey*, ECtHR, Judgment, Application No. 53645/10 (20 January 2015).

human rights; (iv) the crystallisation of an analogous obligation to prosecute and punish human rights violations under customary law; and (v) the incompatibility of amnesties with *jus cogens* norms that prohibit serious crimes.[27]

Most courts and human rights bodies have argued that amnesties are incompatible with treaty-based obligations. Out of 303 cases examined, 161 decisions discussed the obligations to investigate, prosecute, and punish human rights violations, 107 cases alluded to the obligation to provide effective remedy to the victims of those violations, and 68 decisions claimed the incompatibility of amnesties with the non-derogability of certain human rights. Many decisions have considered all three arguments, but the argument about obligations to investigate and punish human rights remains at the core of the decision making of judicial and quasi-judicial bodies. While the argument based on the duty to prosecute human rights violations under treaty law has been used consistently over the years in more than 50% of the decisions, the argument based on the obligation to provide effective remedy to victims was used more frequently in early decisions, dropping from 50% in decisions adopted between 1990-1995 to 34% in judgments between 2011-2021. This is explained by two main reasons. The first is the increasing discussion of amnesties by international criminal courts and domestic courts exercising universal jurisdiction, which for obvious reasons focus on the obligations to prosecute and the principle of *aut dedere aut judicare.* The second is the consolidation of the anti-impunity turn in human rights, which places judicial remedies and the obligation to prosecute at the core of the states' obligations to respond to human rights abuses.

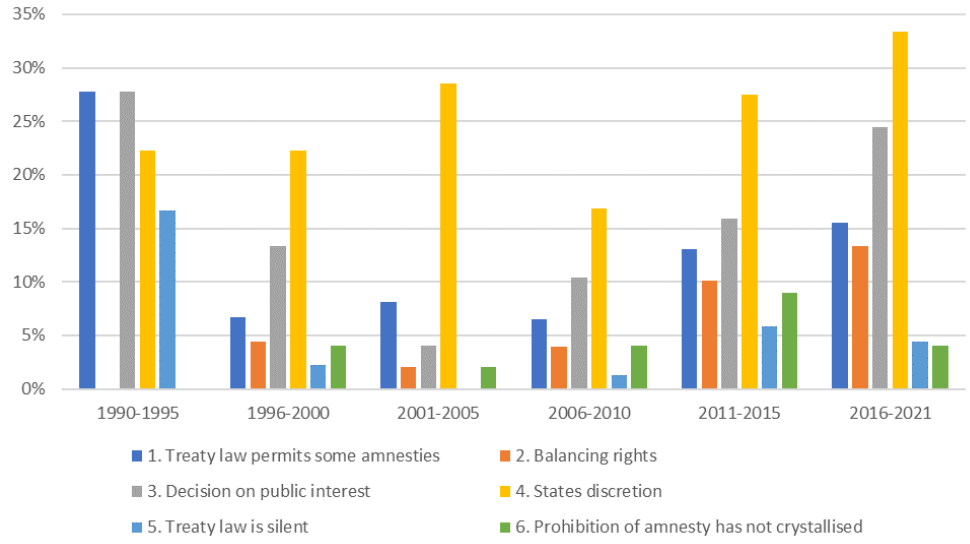
As discussed in Section 5.5, courts and human rights bodies have also considered arguments that support the permissibility of amnesties under international law. Out of the 303 decisions examined, 76 decisions considered that states have discretionary powers to enact amnesties in exceptional circumstances; 43 judgments pondered the public interests that legitimise states' adoption of this type of measure to guarantee peace and reconciliation; 33 decisions argued that treaty law permits amnesties at the end of non-international conflicts in the APII to the Geneva Conventions; and 19 decisions developed upon the states' obligations to balance rights to justice, peace, truth and reconciliation in transitional justice.

Figure 23 shows the evolution in the use of these arguments over time. While decisions in the early 1990s were more prone to argue that treaty law was silent about the use of amnesties, the argument has lost relevance in more recent pronouncements. Conversely, the discretionary powers of states to enact amnesties have been consistently invoked by courts.

[27] See Chapter 2 on the nature of the arguments, and Chapter 4 on how courts have discussed and established a judicial dialogue around those arguments.

Important in early decisions were arguments based on humanitarian treaty law approving the enactment of amnesties, and considerations of public interest legitimising states to adopt amnesties. After a decline between 1996 and 2010, these two arguments have gained importance in decisions issued in the last 10 years. In turn, the argument based on the states' obligation to balance conflicting rights in transitional justice was barely considered in early decisions on amnesty, but has become much more central in recent decisions.

Figure 23. Changes over time in the percentage of decisions considering arguments to support the permissibility of amnesties



Courts and human rights bodies have also discussed the permissibility of amnesties under customary international law (in 31 cases) and *jus cogens* (in 37 decisions). Both arguments have acquired more relevance in recent years. While the argument based on the crystallisation of a rule on amnesties under customary law remains contentious, the argument based on the prohibition of amnesties under *jus cogens* has had more traction. This is mainly explained by the importance given by other courts to the decision of the ICTY in the *Furundžija* case, which established for the first time the prohibition of torture as *jus cogens* and added that measures like amnesty would contradict international law.[28] Despite not providing much evidence or analysis of the emergence of a norm banning amnesties, this case has been referenced as authority in 22 of the 37 decisions of international and domestic bodies claiming the incompatibility of amnesties with *jus cogens* norms.

[28] *Prosecutor v. Anto Furundžija*, ICTY, Case No. IT-95-17/1-T (10 December 1998) para 155-156.

The assertion that a rule on amnesties has crystallised under customary law remains contended. Courts and human rights bodies assessed the permissibility of amnesties under customary international law in 31 of the 303 cases examined, with 17 decisions claiming a prohibition under customary law and 14 decisions arguing that such prohibition has not crystalised yet. Few decisions have provided much evidence for either of these assertions. In most cases, the prohibition or permission of amnesties under CIL has been asserted as a general claim[29] or developed based upon the reference of selected case law.[30] Recently the Pre-Trial Chamber of the ICC, for instance, drew upon the decisions of the European Court of Human Rights in *Marguš* and the ICTY in *Furundžija* to conclude a 'strong, growing, universal tendency that grave and systematic human rights violations (…) are not subject to amnesties or pardons under international law.'[31] Nevertheless, the Appeals Chamber did 'not dwell on the matter further' arguing that 'international law is still in the developmental stage on the question of the acceptability of amnesties.'[32] Contrary to Relva's conclusion that a crystallised prohibition of amnesties exists under customary international law, judicial bodies remain uncertain about the compatibility of certain amnesties with customary standards.[33]

6.2.3. Changes in the way courts and human rights bodies are addressing the question of amnesties

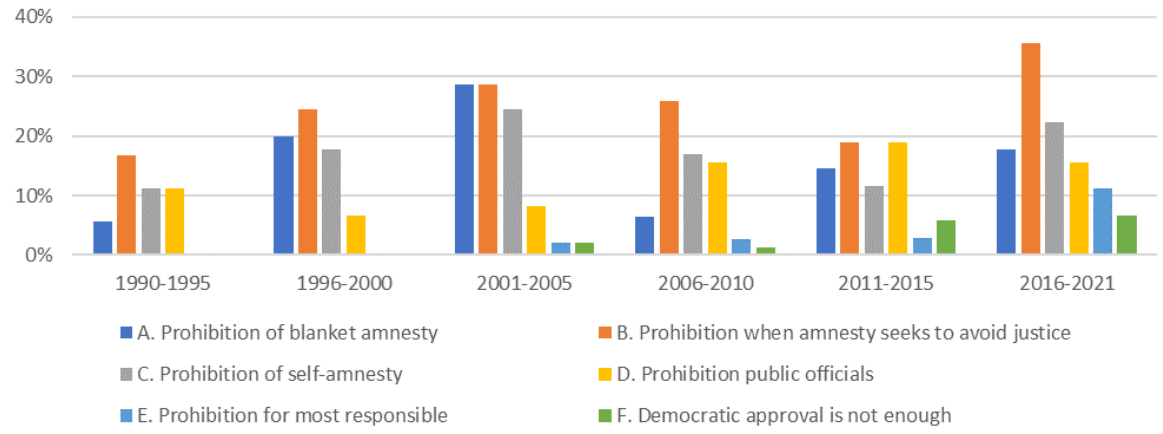
In the examination of the permissibility of amnesties, courts and human rights bodies have also made policy considerations in order to qualify the prohibition of amnesties under international law. Section 5.5 discussed how judicial and quasi-judicial bodies have nuanced their position regarding the permissibility of amnesties by focusing on the characteristics and functions of the amnesty measure in relation to transitional justice. This section demonstrates

[29] See, for instance: *Caso contra José Nino Gavazzo Pereira y Jose Ricardo Arab Fernández*, Juzgado Penal 19 de Turno de Uruguay, Sentencia No. 036, Ficha 98-247/2006 (26 March 2009) 82; *Demanda de constitucionalidad Ley de Amnistía y Reconciliación Nacional*, Tribunal Supremo de Justicia de Venezuela – Sala Constitucional, Exp. No. 16-0343 (April 11, 2016) 42; *Prosecutor v. Saif Al-Islam Gaddafi*, ICC Appeals Chamber, Situation in Libya, Judgment on the appeal of Mr Saif Al-Islam Gaddafi against the decision of the Pre-Trial Chamber I entitled 'Decision on the admissibility challenge by Dr. Saif Al-Islam Gaddafi pursuant to articles 17(1)(c) and 20(3) of the Rome Statute', ICC-01/11-01/11 (9 March 2020) para 96.
[30] See, for example: *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, ACoHPR, Communication No. 245/2002, 39th Session (25 May 2006) para 201-203; *Prosecutor v. Saif Al-Islam Gaddafi*, ICC, Situation in Libya, Decision on the 'admissibility challenge by Dr. Saif Al-Islam Gaddafi pursuant to articles 17(1)(c) and 20(3) of the Rome Statute', ICC-01/11-01/11 (5 April 2019) para 61-78.
[31] *Prosecutor v. Saif Al-Islam Gaddafi*, ICC (n 30) para 61. References to *Marguš v. Croatia*, ECtHR, Judgment, Application No. 4455/10 (13 November 2012) and *Prosecutor v. Furundžija*, ICTY (n 28).
[32] *Prosecutor v. Saif Al-Islam Gaddafi*, ICC Appeals Chamber (n 29) para 96.
[33] See: Hugo A. Relva, 'Three Propositions for a Future Convention on Crimes Against Humanity' (2018) 16 JICJ 857, 862.

the increasing consideration of policy arguments over time to contemplate the permissibility of amnesties under international law.

Figure 24 shows how courts have emphasised the prohibition of especially problematic amnesties. It is particularly noticeable how courts have placed emphasis on the prohibition of amnesties when they are used as a mechanism to avoid justice. In the language of the Inter-American Court, this is when the *ratio legis* of the amnesty is to secure impunity and leave unpunished serious violations under international law.[34] Domestic cases in Peru have argued extensively that Fujimori's amnesties were particularly problematic because they were part of a systematic plan to avoid justice and protect the people who took part in the authoritarian regime that he led.[35]

Figure 24. Changes over time in the percentage of decisions considering policy-based arguments that limit the application of amnesties

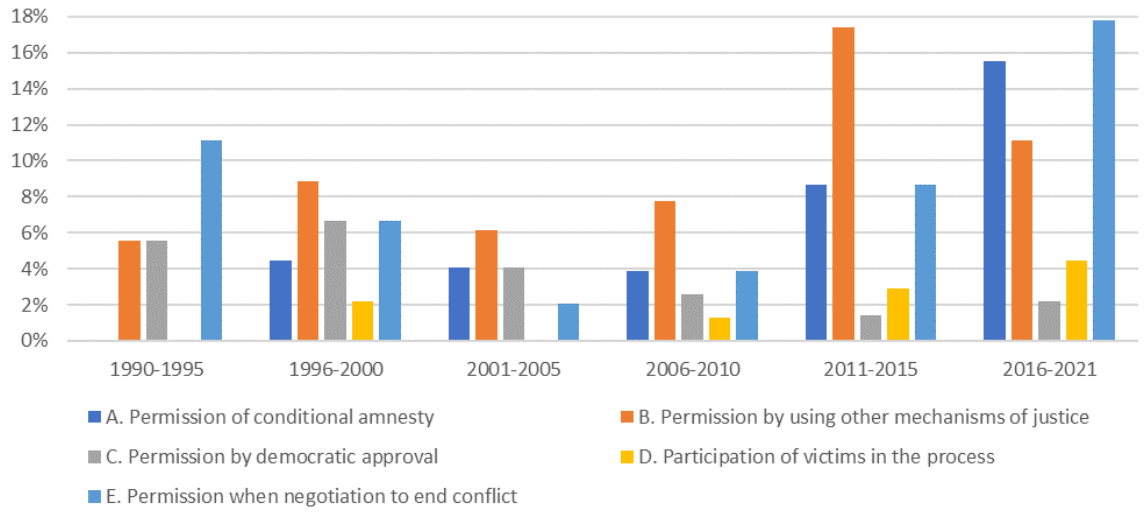


The emphasis on the prohibition of self-amnesties, blanket amnesties and amnesties for public officials has remained consistent in the decisions of courts and quasi-judicial bodies since 1990, and remains relevant in the judgments issued in the last decade. Before the decision of the Inter-American Court in *Barrios Altos*, courts and human rights bodies were mostly concerned with self-amnesties and blanket amnesties. Consistent with the increasing scrutiny of amnesties in other countries, the IACtHR expanded the prohibition on amnesties in the following years. More recently, however, judicial and quasi-judicial bodies have been questioned about the permissibility of conditional and limited amnesties enacted as result of

[34] *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, IACtHR, Preliminary Objections, Merits, Reparations, and Costs, Series C No. 219 (24 November 2010) para 175.
[35] *Recurso de Amparo por Santiago Enrique Martín Rivas – Barrios Altos*, Tribunal Constitucional de Perú, Exp. No. 4587-2004-AA/TC (29 November 2005) para 81-83.

different types of transitional justice. Hence, since 2012 courts have referred to the prohibition of self-amnesties and blanket amnesties as a way to differentiate these from the possibility of well-crafted conditional and limited amnesties enacted under different circumstances.[36] This shift is reflected in the increasing use of arguments that oppose a total prohibition on amnesties. Figure 25 shows the growth in the number of decisions discussing the permissibility of conditional amnesties, highlighting the importance of alternative mechanisms of justice accompanying amnesties, and acknowledging the role of amnesties when negotiating peace. The increasing trend has been particularly important after 2012 with the examination of amnesty laws in El Salvador by the Inter-American Court and in Croatia by the European Court.[37]

Figure 25. Changes over time in the percentage of decisions considering policy-based arguments that oppose a total prohibition on amnesties



6.3. The trajectory of the judicial discussion of amnesties as a mechanism of transitional justice

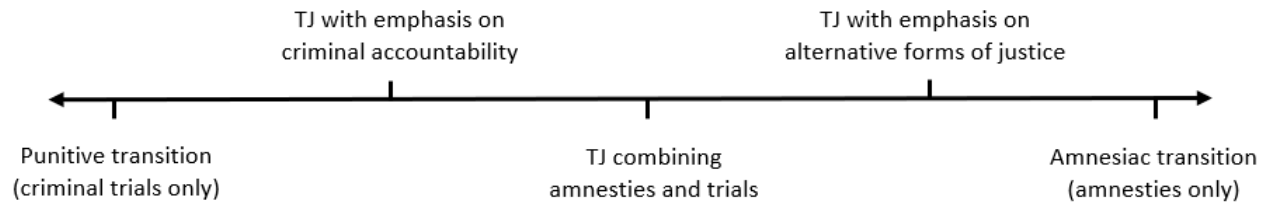
Amnesties have different functions in transitional justice. Depending on the framework adopted by courts and human rights bodies, the role of amnesties narrows down or expands in their interaction with other transitional mechanisms. Thus, the transitional justice framework

[36] See Section 5.5 for more detail about the different arguments used by courts to consider the permissibility of amnesties.
[37] See: *Massacres of El Mozote and surrounding areas v. El Salvador*, IACtHR, Merits, Reparations and Costs, Series C No. 252 (25 October 2012) Concurring opinion Judge García Sayán; *Marguš v. Croatia*, ECtHR, 2012 (n 31); *Z and others v. Croatia*, ECtHR, Admissibility, Application No. 57812/13 (21 April 2015).

adopted by judicial and quasi-judicial bodies has strongly influenced the reasoning and decision making that leads to the acceptance or rejection of amnesty measures. Out of the 303 decisions analysed, only in 94 (31%) of the tribunals considered a transitional justice framework to evaluate the role of amnesties in putting an end to situations of violence. Many of the judgments examined discussed the permissibility of amnesties in isolation or as an *obiter dictum* matter without expanding on their role in political transitions.[38] Therefore, not all decisions rely on a clear framework of transitional justice in analysing amnesties. Nevertheless, it is worth focusing on the approach of those 94 decisions that engaged in a substantial discussion of the permissibility of amnesties in depth, because they give a good indication of how courts have addressed the issue over time.

Olsen, Payne and Reiter have proposed that the amnesty-accountability dichotomy should be seen as a continuum on which different approaches can be mapped: the 'proponents' approach, which defends the importance of amnesties in transitional justice (amnesty only); the 'challengers' approach, which rejects amnesties and demands strong criminal accountability (trials only); and the 'contingent' approach, which supports the combination of mechanisms (trials and amnesty).[39] Using these categories in the reading of judicial decisions, this study identified five categories for classifying the standards of transitional justice that courts projected in their decisions (see Figure 26). Over time, courts and human rights bodies have tended to avoid extreme positions of amnesties only or criminal trials only, such that intermediate categories emerge, capturing the emphasis of courts on criminal accountability or alternative forms of justice.

Figure 26. Spectrum of transitional justice frameworks used by courts and quasi-judicial bodies in the analysis of amnesties.



[38] See Sections 4.2.4 and 4.4.2 for examples of decisions of the IACtHR and the ECtHR, respectively, that refer to the permissibility of amnesties but do not develop the analysis of those measures as mechanisms of transitional justice.
[39] Tricia D. Olsen, Leigh A. Payne and Andrew G. Reiter, 'Conclusion: Amnesty in the Age of Accountability' in Leigh A. Payne and Francesca Lessa (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (CUP 2012) 347-348. For a similar typology see: Rodrigo Uprimny, 'Las enseñanzas del análisis comparado: procesos transicionales, formas de justicia transicional y el caso colombiano' in Rodrigo Uprimny and others (eds), *¿Justicia transicional sin transición?: Verdad, justicia y reparación para Colombia* (Centro de Estudios de Derecho, Justicia y Sociedad 2006) 23.

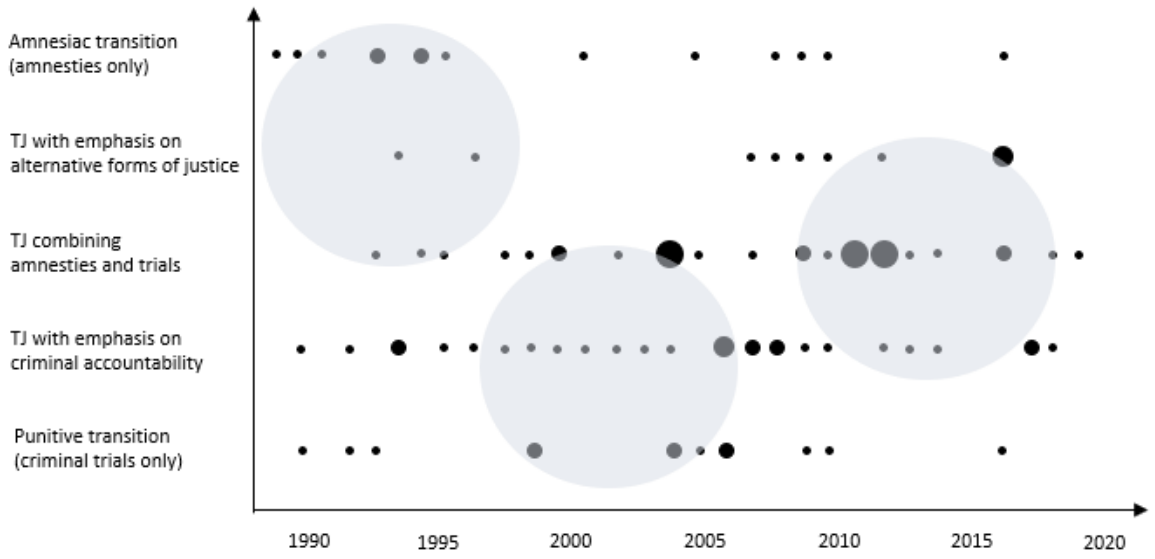
The ‘Punitive transition (criminal trials only)’ category groups 13 decisions, where tribunals considered that criminal prosecutions are the only way to overcome situations of violence and to redress gross human rights violations. The category ‘Transitional justice with emphasis on criminal accountability’ groups 28 decisions in which courts argued that transitional mechanisms to overcome situations of violence or serious human rights violations need to be erected around criminal trials. These decisions usually referred to the importance of other mechanisms of transitional justice, but consistently highlighted the centrality of criminal trials. The category ‘Transitional justice (combination of amnesties and trials)’ groups 31 decisions that considered a transitional justice framework combining criminal trials with other mechanisms to redress human rights violations. Criminal prosecutions remain important in these decisions, but not to the exclusion of other transitional mechanisms that complement each other. The category ‘Transitional justice with emphasis in alternative mechanisms of justice’ groups 10 decisions where courts argued in favour of and stressed the role of alternative mechanisms of justice, such that criminal prosecutions were only complementary and secondary to a more comprehensive set of measures including reparations, truth recovery, reconciliation, and guarantees of non-repetition. Finally, the category ‘Amnesiac transition (amnesties only)’ groups 14 decisions that highlighted the role of amnesties in facilitating transition from violence despite the lack of or without considering the existence of mechanisms of criminal accountability.

6.3.1. Phases in the judicial discussion of the permissibility of amnesties

Tracing the evolution of the approaches adopted by judicial and quasi-judicial bodies in the analysis of amnesties, it is possible to identify three phases that reflect a change in the way courts have been examining amnesties. As shown in Figure 27, between 1990 and 2002, there was an exploratory stage during which the position of courts and human rights bodies was not homogeneous. Individual decisions reflected a level of fragmentation in the reading of international human rights law (prohibiting amnesties), international humanitarian law (permitting amnesties), and public international law (granting states wide discretionary powers to decide). During the 1990s, some judicial decisions were still accepting amnesties as a necessary measure to overcome situations of violence without developing on the necessity to implement other mechanisms of justice. Out of the 14 decisions identified as adopting an amnesiac transitional model, more than half (57.1%) were issued between 1990 and 1998. These were mostly decisions from domestic courts in Chile, El Salvador, Guatemala and

Portugal.[40] In addition, the 1996 *Azapo* case in South Africa had a significant impact on the validation of amnesties under humanitarian law, although it proposed a much more robust framework of transitional justice with alternative forms of justice and reconciliation.[41] Conversely, at an international level, the IACoHR and the UNHRC stressed the importance of criminal prosecutions in pronouncements on Argentina, Uruguay, Chile, Peru and El Salvador.[42] Initially, human rights bodies did not develop a particular approach to transitional justice. However, they called upon countries in South America to annul self-amnesty measures and conduct criminal trials in the aftermath of authoritarian regimes. These pronouncements had a great impact on decisions adopted after 2000.

Figure 27. Decisions per year classified by the transitional justice framework used to evaluate the legality of the amnesty



[40] Chile: *Caso contra Manuel Contreras*, Corte Suprema de Chile, Recurso de inaplicabilidad de amnistía, Rol 553-78 (24 August 1990); *Caso contra Osvaldo Romo Mena*, Corte Suprema de Chile, Rol 5.566 (26 October 1995). El Salvador: *Revisión de constitucionalidad Ley de Amnistía General para la Consolidación de la Paz*, Corte Suprema de Justicia de El Salvador – Sala de lo Constitucional, No. 10-93 (20 May 1993); *Caso contra Santos Guevara Portillo, Severiano Fuentes Fuentes y Ferman Hernández Arévalo*, Corte Suprema de Justicia de El Salvador – Sala de lo Penal, CPS02495.95 (16 August 1995). Guatemala: *Revisión de constitucionalidad de la Ley de Reconciliación Nacional*, Corte de Constitucionalidad de Guatemala, Expedientes Acumulados No. 8-97 y 20-97 (7 October 1997). Portugal: *Case No. 444/97*, Constitutional Court of Portugal, Proc. No. 784/96 (25 June 1997).

[41] *The Azanian Peoples' Organization (AZAPO) and others v. The President of South Africa and others*, Constitutional Court of South Africa, Case CCT 17/96 (25 July 1996).

[42] See: *Consuelo. v. Argentina*, IACoHR (n 23); *Mendoza v. Uruguay*, IACoHR (n 23); *Report on the Situation of Human Rights in El Salvador*, IACoHR, OEA/Ser.L/II.85 (11 February 1994); *Garay Hermosilla et al. v. Chile*, IACoHR, Case 10.843, Report 36/96, OEA/SerL/V/II/95 (15 October 1996); *Meneses Reyes et al. v. Chile*, IACoHR, Cases 11.228, 11.229, 11.231 and 11.182, Report 34/96, OEA/SerL/V/II/95 (15 October 1996); *Hugo Rodríguez v. Uruguay*, UNHRC (n 23); *Consideration of Reports Submitted by State Parties under Article 40 of the Covenant: Argentina*, UNHRC, CCPR/C/79/Add.46 (5 April 1995).

In the early 2000s, there emerges a clearer trend towards a strict prohibition on amnesties led by the human rights movement with the development of the case law of the IACtHR at its centre. Domestic and international bodies began to place criminal accountability at the centre of any transitional justice process. This signified a clear change in the approach to transitional justice, making criminal accountability and trials an essential element in addressing human rights violations. This is coherent with the accountability turn identified in the human rights movement and the UN position that no transitional justice process is complete without criminal prosecutions.[43] This turn was led by the IACtHR case law in *Barrios Altos* (2001), *Almonacid Arellano* (2006), *La Cantuta* (2006), *Gomes Lund* (2010), *Gelman* (2011), and *El Mozote Massacres* (2012). As discussed in Section 4.3, this movement was followed by domestic courts in Argentina, Peru, Venezuela and Spain.[44] As explained in Section 4.2, at the international level, these approaches were also reinforced by the pronouncement of the UNHRC and UNCAT.[45] There was a synergistic relationship between the Inter-American institutions, UN bodies and domestic courts in Latin America, which led to a general rejection of amnesty laws.

More recently, especially after 2012, there has been an increasing number of decisions that include considerations of the role of amnesties as a mechanism of transitional justice and the possibility of well-crafted amnesties. Despite a significant number of decisions continuing to reject amnesty measures, some judgments have included considerations of transitional justice to moderate their position against amnesty. As argued in Chapter 5, domestic courts in Colombia, Nepal, Kosovo, Uganda, Guatemala, El Salvador and Indonesia have analysed amnesties in the wider context of transitional justice mechanisms that are not structured

[43] OHCHR, 'Rule-of-Law Tools for Post-Conflict States: Amnesties' (2009) UN Doc HR/PUB/09/1, 33.

[44] Argentina: *Caso contra Jorge Rafael Videla*, Corte Suprema de Justicia de la Nación, Incidente de excepción de cosa juzgada y falta de jurisdicción, V. 34. XXXVI (21 August 2003); *Caso contra Julio Héctor Simón y otros*, Corte Suprema de Justicia de la Nación de Argentina, Recurso de hecho, S. 1767. XXXVIII, Causa No. 17.768, Fallo 328:2056 (14 June 2005); *Caso contra Jorge Rafael Videla y otros*, Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal de Argentina, Incidente de inconstitucionalidad de los indultos dictados por el decreto 2741/90 del Poder Ejecutivo Nacional (15 April 2007). Peru: *Recurso de habeas corpus por desaparición Genaro Villegas Namuche*, Tribunal Constitucional de Peru, Exp. No. 2488-2002-HC/TC (18 March 2004). Venezuela: *Revisión constitucional de la investigación por la muerte de Fabricio Ojeda*, Tribunal Supremo de Justicia de Venezuela – Sala Constitucional, Exp. No. 11-1151 (21 June 2012). Spain: *Caso contra Francisco Franco Bahamonde y otros*, Audiencia Nacional Española, Juzgado No. 5, Auto de competencia, Proceso abreviado 399/2006 (16 October 2008); *Caso contra Francisco Franco Bahamonde y otros*, Audiencia Nacional Española, Juzgado No. 5, Juzgamiento, Proceso ordinario 53/2008E (18 November 2008).

[45] See: *Consideration of Reports Submitted by State Parties under Article 40 of the Covenant: El Salvador*, UNHRC, CCPR/C/SLV/CO/6 (18 November 2010); *Concluding observations on the second periodic report of Nepal*, UNHRC, CCPR/C/NPL/CO/2 (15 April 2014); *Consideration of Reports Submitted by State Parties under Article 19 of the Convention: Benin*, UNCAT, CAT/C/BEN/CO/2 (19 February 2008); *Consideration of Reports Submitted by State Parties under Article 19 of the Convention: Indonesia*, UNCAT, CAT/C/IDN/CO/2 (2 July 2008).

exclusively around criminal trials.[46] These courts have framed amnesties within a wider discussion of transitional justice that assesses the possibility combining amnesties with other measures to guarantee peace and reconciliation. Despite limiting the use of amnesties for international crimes and serious violations of human rights, courts have developed the argument of the importance of amnesties as an exceptional mechanism of transitional justice. This ambivalent position has also been reflected in some of the latest decisions adopted by regional and international tribunals, which are open to the possibility of well-crafted amnesties under extraordinary circumstances.[47]

6.3.2. Path dependence

The synergy between the Inter-American and the UN system of human rights in condemning situations of impunity in Latin America inadvertently set the stage for the human rights movement's focus on criminal accountability and initiated the phase characterised by the rejection of amnesties.[48] As Diane Orentlicher recalls, dictatorships in the Southern Cone was the focus of human rights and transitional justice scholars addressing the peace v. justice dichotomy in Latin America, and this influenced the approach of most professionals, who thus took a strong stance against impunity.[49] Criminal trials became the paradigm of accountability

[46] Colombia: *Constitucionalidad de la Ley 1424/10 - Justicia y Paz*, Corte Constitucional de Colombia, C-771/11 (13 October 2011); *Constitucionalidad Acto Legislativo 01 de 2012 Marco Jurídico para la Paz*, Corte Constitucional de Colombia, C-579/13 (28 August 2013); *C-007/18*, Corte Constitucional de Colombia (n 25); *C-025/18*, Corte Constitucional de Colombia (n 25). Nepal: *Madhav Kumar Basnet and others v. Government of Nepal*, Supreme Court of Nepal– Special Bench, Writ petition No. 069-WS-0057 and 069-WS-0058 (2 January 2014). Kosovo: *Case KO108/13*, Constitutional Court of Kosovo, Constitutional review of the Law, No. 04/L-209, on Amnesty, AGJ471/13 (9 September 2013). Uganda: *Uganda v. Thomas Kwoyelo*, Supreme Court of Uganda at Kampala, Constitutional Appeal No. 1 of 2012 (8 April 2015). Guatemala: *Recurso de amparo José Efraín Ríos Montt*, Corte de Constitucionalidad de Guatemala, Expedientes No. 3340-2013 (18 December 2014); *Constitucionalidad de la Iniciativa de ley 5377 que reforma Decreto 145-96 - Ley de Reconciliación Nacional*, Corte de Constitucionalidad de Guatemala, Expedientes acumulados No. 682-2019 y 1214-2019 (9 February 2021). El Salvador: *Revisión de constitucionalidad Ley de Amnistía General para la Consolidación de la Paz*, Corte Suprema de Justicia de El Salvador – Sala de lo Constitucional, No. 24-97/21-98 (26 September 2000); *Revisión de constitucionalidad Ley de Amnistía General para la Consolidación de la Paz*, Corte Suprema de Justicia de El Salvador – Sala de lo Constitucional, No. 44-2013/145-2013 (13 July 2016). Indonesia: *Decision on the Petition for Judicial Review on Law of the Republic of Indonesia Number 27 Year 2004 concerning Commission for the Truth and Reconciliation*, Constitutional Court of Indonesia, No. 006/PUU-IV/2006 (7 December 2006).

[47] *El Mozote v. El Salvador*, IACtHR (n 37) Concurring opinion Judge García Sayán; *Ould Dah v. France*, ECtHR, Admissibility, Application No. 13113/03 (17 March 2009); *Marguš v. Croatia*, ECtHR, Judgment by Grand Chamber, Application 4455/10 (27 May 2014); *Tarbuk v. Croatia*, ECtHR, Judgment, Application No. 31360/10 (11 December 2012); *Thomas Kwoyelo v. Uganda*, ACoHPR Communication 431/12 (17 October 2018); *Prosecutor v. Allieu Kondewa*, SCSL, Decision on lack of jurisdiction / abuse of process: amnesty provided by the Lomé Agreement, Case No. SCSL-2004-14-AR72 (25 May 2004) Separate opinion by Justice Robertson; *Prosecutor v. Ieng Sary*, ECCC, Decision on Ieng Sary's Rule 89 preliminary objections (ne bis in idem and amnesty and pardon), 002/19-09-2007/ECCC/TC (3 November 2011); *Prosecutor v. Saif Al-Islam Gaddafi*, ICC Appeals Chamber (n 29) Separate concurring opinion by Judge Ibáñez Carranza.

[48] Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (n 24) 1079.

[49] Diane Orentlicher, ''Settling Accounts' Revisited: Reconciling Global Norms with Local Agency' (2007) 1 IJTJ 10 11.

and with 'the shadow of Latin American self-amnesties, there was ample reason to see 'reconciliation' as a watchword for impunity.'[50]

During the early 2000s, the prohibition on amnesties entered into a dynamic of self-reinforcement, where expanding the prohibition was easier than narrowing it down. As shown in previous sections, the initial focus on problematic amnesties facilitated the judicial rejection of this type of measure. Following the dynamics of path-dependence, courts tended to receive positive feedback when rejecting amnesties. UN bodies, for instance, strongly criticised the decision of the Supreme Court of Uruguay that deemed constitutional the Expiry Law after the first referendum, as well as the Salvadoran Supreme Court's decision to uphold the Amnesty Act.[51] Meanwhile, Chilean courts were praised for finding ways to avoid applying the amnesty of 1978, and the Constitutional Court of Indonesia was championed for repealing the amnesty included in Law No. 27/2004 on the Truth and Reconciliation Commission.[52] Similarly, the conventionality control doctrine at the Inter-American System created a self-reinforcing dynamic in which states might be found in violation of the American Convention on Human Rights if their domestic courts did not follow the interpretation of the IACtHR on amnesties.[53]

This process involved a positive feedback loop, where courts were much less criticised by international organisations, human rights advocates, and UN bodies when they decided to revoke amnesty measures. Conversely, decisions approving amnesties were generally considered less legitimate, and consequently more vigorously challenged. Examples include Human Rights Watch's criticism of the decision of the Constitutional Court of Colombia, which approved the legal framework for the peace negotiations between the government and the guerrilla FARC,[54] as well as the re-evaluation of the UN position regarding South Africa, to the extent that the Office of the High Commissioner for Human Rights suggested in 2009 that 'it is doubtful whether [South Africa's amnesty] would survive scrutiny under the legal standard developed by such bodies as the Human Rights Committee and the Inter-American Commission on and Court of Human Rights.'[55] Courts deciding on amnesty faced increasing returns when following previous decisions, bringing greater international legitimacy, while departing from previous decisions was more costly in terms of international scrutiny.

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[50] ibid 13.
[51] See: *Hugo Rodríguez v. Uruguay*, UNHRC (n 23) para 6.3; *Consideration of Reports Submitted by State Parties under Article 19 of the Convention: El Salvador*, UNCAT, CAT/C/SLV/CO/2 (9 December 2009) para 15.
[52] *Consideration of Reports Submitted by State Parties under Article 19 of the Convention: Chile - Addendum*, UNCAT, CAT/C/CHL/5 (August 21, 2007) para 85; Report on Indonesia, UNCAT 2008 (n 45).
[53] See Section 4.3.
[54] Alexandra Huneeus and Rene Urueña, 'Introduction to Symposium on the Colombian Peace Talks and International Law' (2016) 110 AJIL Unbound 161, 162.
[55] OHCHR, *Rule-of-Law Tools for Post-Conflict States: Amnesties* (n 43) 33.

The anti-impunity turn in the human rights movement thus pulled the trajectory of the discussion of the permissibility of amnesties towards a strict prohibition. As shown in the previous section, during the 2000s judicial decisions entered into a phase of rejecting amnesties, while also assuming an additional function of protecting the international community's core values and interests. In the fight against impunity, judicial bodies assumed a constitutional role, deciding not only in the name of individual states, but also in the name of the international community as a whole.[56]

6.4. A framework for judicial bodies to examine amnesties under international law

Transitional justice scholars have long argued about the uncertainties surrounding the status of amnesties and their use in transitional justice under international law.[57] Despite the stringent approach of courts and human rights bodies, which tended to revoke amnesties in a range of contexts, transitional justice scholars have questioned the emergence of a norm completely banning their use, due to the uncertainties relating to treaty law and inconsistency in state practice.[58] In this section, I argue that courts are catching up with those arguments, including taking into account considerations of transitional justice when deciding on the permissibility of amnesties.[59]

In recent years, the decisions of the ECtHR in *Marguš v. Croatia,* the ACoHPR in *Thomas Kwoyelo v. Uganda*, the majority of judges of the IACtHR in the concurring opinion to *El Mozote v. El Salvador*, and the Appeals Chamber of the ICC in *Prosecutor v. Saif Al-Islam Gaddafi* have cast some doubt on the absolute prohibition of amnesties under international law. With the increasing discussion of other types of amnesties, domestic and international courts have begun to discuss the legitimacy of well-crafted amnesties as a transitional mechanism. Despite much attention on the decisions of domestic tribunals revoking amnesties in Latin America, courts in Brazil, Colombia, El Salvador, South Africa, Uganda, Nepal, Indonesia, Kosovo, Slovakia, Portugal and Spain, among others, have adopted decisions

[56] Armin von Bogdandy and Ingo Venzke, 'On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority' (2012) 10 Amsterdam Center for International Law Research Paper 1, 19.
[57] See, for instance: Mark Freeman, *Necessary evils: amnesties and the search for justice* (CUP 2009); Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Hart Publishing 2008).
[58] See Chapter 2.
[59] An example of this was the reference in *Marguš v. Croatia* by the Grand Chamber of the ECtHR to the intervention submitted by Louise Mallinder, William Schabas and Josepha Close, and other relevant transitional justice literature. See: *Marguš v. Croatia*, ECtHR, 2014 (n 47) n 6.

that consider the legitimacy of certain amnesties. Nevertheless, the way courts have nuanced their position on amnesties does not signal a clear acceptance of certain types of amnesties either. Continuing with the path dependence metaphor, the international legal system is at a bifurcation point in which the trajectory of its position on the legality of amnesties may follow different paths, and the development of a general prohibition on amnesties is not completely certain.

In 2009, Christine Bell provocatively suggested that uncertainty around transitional justice standards enables both 'the assertion of an obligation to combat impunity, while leaving some scope for flexibility in peace negotiations.'[60] The prohibition on blanket amnesty and self-amnesty has been important in limiting transitions based upon impunity.[61] However, even the UN has advised against a one-size-fits-all approach to transitional justice.[62] Peace negotiations and amnesty pose unsolvable dilemmas that need creative solutions on a case-by-case basis.[63] There is a need for flexibility to guarantee human rights standards, while allowing for peaceful negotiations to put an end to situations of conflict.[64]

So far, international courts and human rights bodies have focused mostly on problematic amnesties, while the examination of conditional amnesties has been treated in hypothetical terms. Thus, there remains a question about how they might begin to examinate conditional and limited amnesty measures enacted in conjunction with other mechanisms of accountability.[65] The following section suggests a framework for courts to approach the examination of future amnesties. Drawing upon the reading of decisions from domestic courts, international tribunals and human rights bodies, this chapter proposes that amnesties should be placed on a spectrum of possibilities that render the obligation of states to criminally prosecute human rights violations more or less strict, depending on the measures implemented. This entails a process of fine-tuning, where the characteristics and elements of the amnesty determine how strictly the obligations of states to prosecute and provide effective remedies should be interpreted.

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[60] Christine Bell, 'The "New Law" of Transitional Justice' in Kai Ambos, Judith Large and Marieke Wierda (eds), *Building a Future on Peace and Justice* (Springer-Verlag Berlin Heidelberg 2009) 105.
[61] ibid 124.
[62] Secretary General of the UN, 'The rule of law and transitional justice in conflict and post-conflict societies' (23 August 2004) Report to the UN Security Council, S/2004/616*, para 10.
[63] Orentlicher, ''Settling Accounts' Revisited' (n 49) 21.
[64] See: Bell, 'The "New Law" of Transitional Justice' (n 60) 123; Josepha Close, *Amnesty, Serious Crimes and International Law: Global Perspectives in Theory and Practice* (Routledge 2019) 255; Mallinder, *Amnesty, Human Rights and Political Transitions* (n 57) 407.
[65] Kieran McEvoy and Louise Mallinder, 'Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy' (2012) 39 Journal of Law and Society 410, 427.

6.4.1. Placing amnesties on a spectrum of possibilities

One of the main dichotomies framing the discussion about amnesties has been the debate about accountability vs. impunity. Amnesties are usually equated with impunity, while criminal trials are associated with accountability.[66] Nevertheless, as Mallinder and McEvoy have rightly pointed out, accountability has different dimensions in transitional justice.[67] The binary nature of the accountability v. impunity debate does not capture the complexity and nuances of conflict situations in which states have to balance the demands for justice with a society's collective interest in peace and reconciliation.[68] A symptom of the maturity of transitional justice as a field is breaking away from 'a tendency toward binary debates: peace versus justice, punishment versus reconciliation, retributive versus restorative justice, law versus politics, local versus international, individual versus collective'.[69] There is a spectrum of possibilities for addressing human rights violations and accountability can take many shapes when justice is balanced against other values like peace, truth, reconciliation, non-repetition, and transition to democracy.[70]

Rather than a dichotomy, drawing a continuum between accountability and impunity is useful for assessing the role that amnesties play in transitional justice when combined with other mechanisms.[71] The question is not simply about how to achieve accountability, but what type of accountability and how much accountability is possible, taking into account the conditions for a peaceful transition.[72]

Figure 28 proposes two axes of analysis when mapping amnesties. On the one hand, the analysis includes a spectrum of possibilities with total accountability at one end and total impunity at the other. On the other hand, the analysis also includes a scale of mechanisms that aim to achieve accountability, either by focusing on criminal trials or by implementing alternative mechanisms of justice. Despite being a subjective exercise, this allows, for instance, differentiation between different levels of impunity in the mechanisms implemented in Chile, Peru and El Salvador. Despite condemning amnesties implemented in the three countries,

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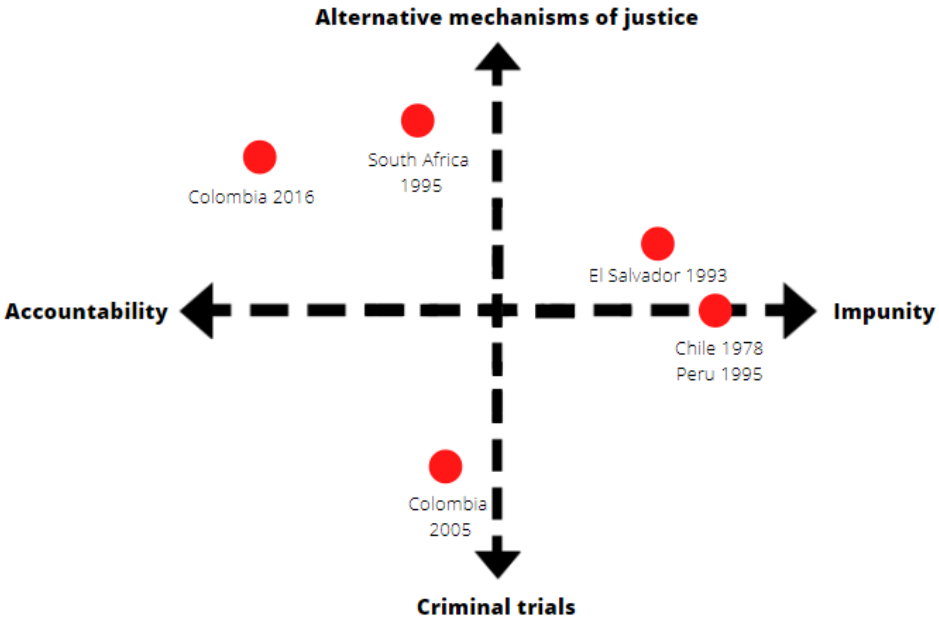
[66] *Velásquez Rodríguez v. Honduras*, IACtHR, Merits, Series C No. 4 (29 July 1988) para 174
[67] Louise Mallinder and Kieran McEvoy, 'Rethinking amnesties: atrocity, accountability and impunity in post-conflict societies' (2011) 6 Contemporary Social Science 107, 107.
[68] Lisa J. Laplante, 'Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes' (2009) 49 Virginia JIntlL 915, 984.
[69] Phil Clark and Nicola Palmer, 'Challenging Transitional Justice' in Palmer N, Clark P and Granville D (eds), *Critical Perspectives In Transitional Justice* (CUP 2012) 1, 6.
[70] Chandra Lekha Sriram, *Confronting Past Human Rights Violations: Justice vs Peace in Times of Transition* (Frank Cass 2004) 212.
[71] See: Transitional Justice Institute, *The Belfast Guidelines on Amnesty and Accountability* (University of Ulster 2013).
[72] Bell, 'The "New Law" of Transitional Justice' (n 60) 120.

courts clearly identified an institutional structure of impunity operating in Chile and Peru, while recognising the implementation of the Truth Commission for El Salvador. The spectrum also allows for a comparison between different forms of accountability, where the processes in Colombia in 2005 and in South Africa in 1995 arguably reached similar levels of accountability. But while South Africa decided to grant amnesties in exchange for truth and reconciliation, the Justice and Peace process in Colombia placed more emphasis on holding the paramilitary groups criminally responsible, to the detriment of a collective process of truth reconstruction and reconciliation. This approach also permits the evaluation of amnesties in the wider context of the transitional justice mechanisms that are being implemented. Therefore, the peace agreement in Colombia in 2015, despite including amnesties that benefited a large number of combatants, also provided for a comprehensive set of mechanisms of transitional justice that aimed to guarantee accountability while promoting peace, truth and reconciliation.

Figure 28. Example of the accountability – impunity spectrum.



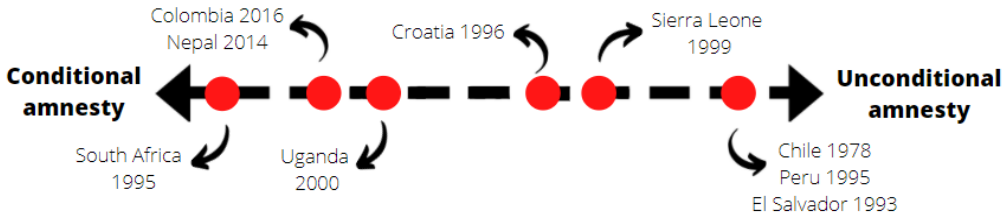
6.4.2. Mapping the characteristics of amnesties

So far, this thesis has discussed the characteristics of amnesties in terms of dichotomies: self-amnesties vs. negotiated amnesties; unlimited amnesties vs. limited amnesties; unconditional amnesties vs. conditional amnesties, and amnesties covering international crimes and human rights violations vs. amnesties for political crimes and other related common

offences. Such classifications have allowed courts and human rights bodies to focus on the most problematic amnesties, namely unconditional, unlimited, self-amnesties covering international crimes. However, this set of parameters allows for are a wide range of possibilities and diverse combinations.

For example, Figure 29 shows how different amnesties have included various set of conditions for their application. Highly conditional amnesties, like the one administered by the Truth and Reconciliation Commission in South Africa, clearly linked the benefit of amnesty with an effective contribution to the process of truth telling and reconciliation. Conversely, amnesties in Chile, Peru and El Salvador did not include any conditions for their application. In between, the Croatian amnesty has as a condition for its application the commitment of non-recidivism, and the Sierra Leonean amnesty has the condition to surrendering arms. More recently, Colombia created a two-tier system, with *de jure* amnesties applied without further analysis for less severe crimes, and amnesties that are conditional on the fulfilment of a strict set of obligations to contribute to the peace and reconciliation process.

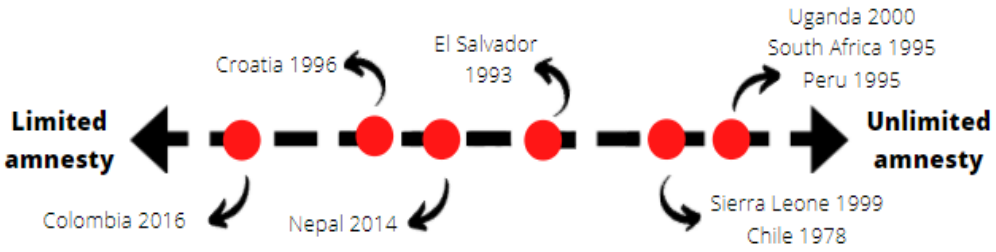
Figure 29. Example of conditional – unconditional amnesties on a spectrum.



Analysing the same amnesties according to their scope or the limits that they impose for their application, Figure 30 shows at one extreme the unlimited amnesties in Uganda, South Africa and Peru, which use general language and leave room for application to a wide range of crimes, for unspecified periods of time, benefiting a broad group of people. At the other extreme, the Colombian peace agreement narrowly limited the application of amnesties to an explicit set of crimes, benefitting a particular group of people that participated in the conflict. In the middle of the spectrum, we find an example from Croatia, where the amnesty imposed some limits including the exclusion of war crimes and geographical delimitations focusing on people who have residence on the temporarily occupied parts of the Vukovar-Srijem and Osijek-Baranja County. Also at the centre of the spectrum is the amnesty from El Salvador, the

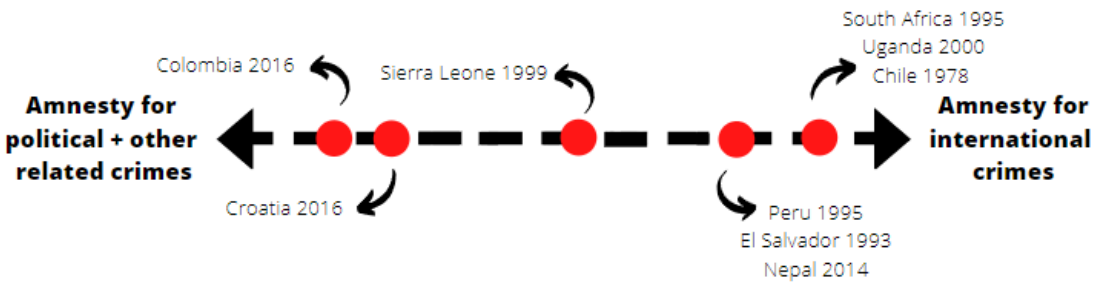
scope of which was focused on crimes committed by more than 20 people, excluding crimes reported by the Truth Commission.

Figure 30. Example of limited – unlimited amnesties on a spectrum.



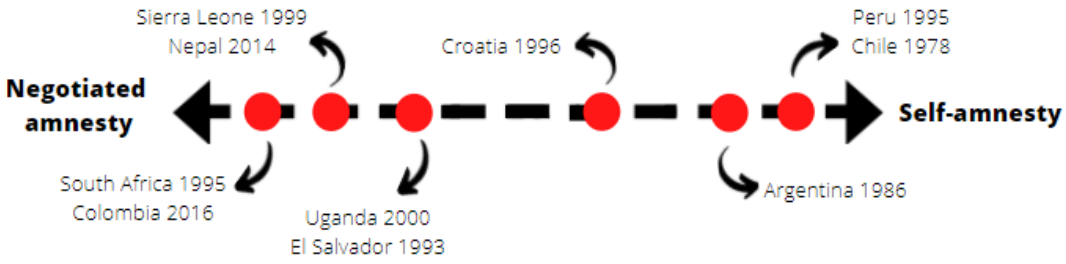
A related parameter is the type of crimes covered by the amnesty. Figure 31 shows, at one extreme, how amnesties in South Africa, Uganda, and Chile explicitly covered international crimes or have been silent in that regard, creating an ambiguity that allowed their application to all types of crimes. Similarly, amnesties in Peru, Nepal and El Salvador excluded specific crimes, but have been applied to international crimes and serious human rights violations. At the other extreme, more recent amnesties like those in Croatia and Colombia have been explicit in excluding violations to humanitarian law or, more generally, all international crimes and other serious human rights violations. These amnesties have mostly focused on political crimes and other common related crimes. In between, the Lomé Peace Agreement in Sierra Leone was intended to apply to international crimes, but the annotation of the UN representative excluding such crimes limited the scope of the amnesty.

Figure 31. Example of the classification of amnesties covering different type of crimes on a spectrum.



Finally, there is a wide range of transitional processes in which amnesties are enacted. Considering the wide use of self-amnesties, it is relevant to examine who the beneficiaries of the amnesty are, namely state actors, non-state actors or both, as well as the approval process of the amnesty: whether it resulted from a negotiation between the parties in conflict and other sectors of society, or was enacted by people in power to benefit themselves or specific sectors of society. Figure 32 shows at one extreme examples of self-amnesties including Peru, Chile, Argentina, Uruguay and Brazil. This includes amnesties enacted by the government to benefit their own authoritarian regime while still in power (as in the case of Alberto Fujimori in Peru and Augusto Pinochet in Chile), or to benefit previous regimes (as in the case of the Full Stop and Due Obedience laws in Argentina). At the other extreme, examples of negotiated amnesties include peace processes in Colombia, South Africa, Sierra Leone, Nepal, Uganda and El Salvador. Towards the middle, we have the amnesty in Croatia that resulted from the Dayton Peace Agreement, negotiated at a political level but with little involvement of the population in the ground.

Figure 32. Example of negotiated – self-amnesties on a spectrum.



6.4.3. Fine-tuning well-crafted and reasonable amnesties

International tribunals, domestic courts and human rights bodies have focused on the permissibility of amnesties that tend towards the problematic end of the spectrum. There is little doubt about the incompatibility of blanket and self-amnesties with international standards when their *ratio legis* or aim is to guarantee impunity for people in power. However, there is some uncertainty about the permissibility of conditional, limited and negotiated amnesties enacted as part of a broader transitional justice process. This allows for some flexibility in the way courts examine such measures in the future. Depending upon the characteristics of the amnesty and its relationship to alternative mechanisms of accountability, the judicial

interpretation of states' obligations to criminally prosecute human rights violations becomes more or less strict, allowing room for states' discretion and considerations of public interest when it is proven that amnesties are necessary to facilitate peaceful transitions.

According to the components of analysis described in the previous section, the first point of analysis consists of examining the amnesty in its context. Considering the amnesty in relation to other mechanisms of transitional justice, if they exist, is helpful in identifying the degree of accountability or impunity against which the amnesty is framed. Plotting this on a spectrum of possibilities facilitates comparison and the assessment of the level of accountability achieved by the mechanisms enacted as a whole, without having to classify all cases as either/or in terms of accountability versus impunity. Amnesties and criminal trials do not stand in opposition to each other. In certain transitional justice processes, they complement each other. For instance, by emphasising the focus of criminal prosecutions on the people most responsible, amnesties can act as a mechanism to avoid overwhelming the justice system and enhance accountability through the combination of different mechanisms of justice and reparation.[73]

The second point of analysis relates to the characteristics of the amnesty. There is a wide range of amnesties in play, which renders the discussion about the absolute prohibition or permissibility of amnesties rather reductionist. As discussed in Section 6.4.2., this research identified four key elements discussed by courts and human rights bodies, but there are other elements that can be taken into account, depending on the circumstances. Examples include the degree of focus on the people that bear the most responsibility, and the extent of democratic discussion and approval of the amnesty, among others. Drawing the spectrum of possibilities of each characteristic side by side is useful in providing an overall view and identifying the most problematic elements of each amnesty. This range of possibilities has made courts nuance some of their decisions, rejecting some amnesties while accepting others.

Depending on these parameters, the standards of justice take different shapes in each specific case. Figure 33 captures this by proposing the examination of amnesties as a process of fine-tuning or calibrating well-crafted and reasonable amnesties. When the indicators tend towards the right, the obligation to prosecute and punish becomes stricter. This means that criminal punishment becomes inescapable. When the indicators tend towards the left, the obligation to prosecute and punish is balanced with other values and obligations that percolate transitional justice mechanisms orientated to achieve peace and reconciliation. In this second

[73] See: Transitional Justice Institute, *The Belfast Guidelines on Amnesty and Accountability* (n 71).

scenario, states have more discretion to pursue their public interest in peace, and find their own formula for balancing different obligations to provide effective remedies for human rights abuses while guaranteeing an effective transition.

Figure 33. Example of a comparison between amnesty laws in Colombia, Peru, and South Africa

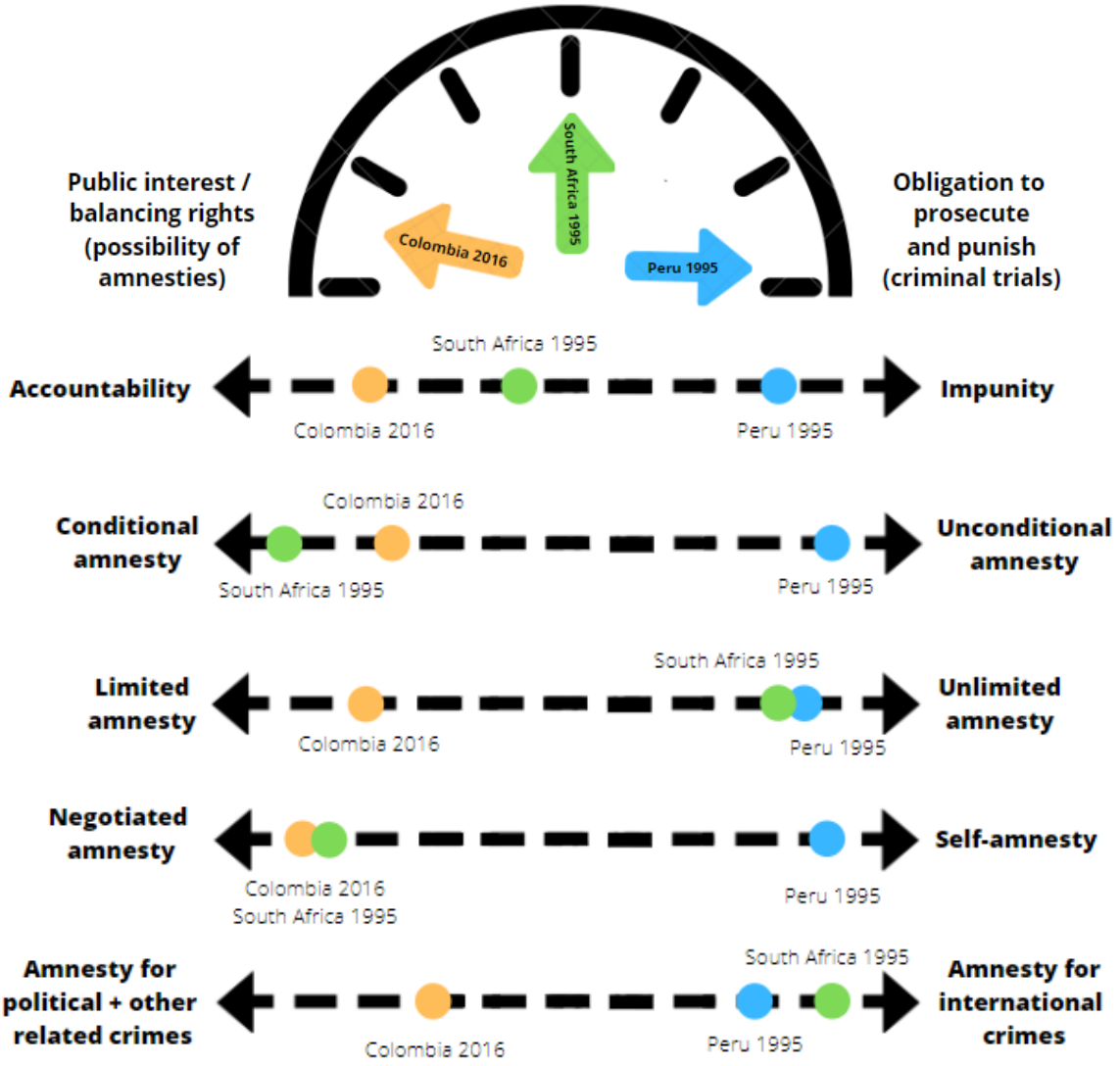


Figure 33 maps three different amnesties enacted in Peru (1995), South Africa (1995) and Colombia (2016). The Peruvian self-amnesty, as explained in Chapter 4, has been widely analysed by domestic and international courts, concluding that it was enacted as a wider effort from Fujimori's regime to guarantee impunity and block any attempt to hold the people in power accountable for crimes against humanity committed during his government. The characteristics of the amnesty show how problematic the mechanism implemented was, so the

obligation to prosecute and punish was interpreted in a strict manner, revoking the amnesty and concluding that it lacked legal effect.[74]

The South African amnesty was upheld by the Constitutional Court.[75] Despite accompanying the amnesty with alternative mechanisms of accountability and condition its application to the contribution to truth and reconciliation, some of the characteristics of the amnesty have been considered problematic. The Office of the United Nations High Commissioner for Human Rights, for instance, argued that the South African amnesty was not compatible with international standards.[76] The implementation of the amnesty as a mechanism to guarantee other transitional justice values allowed for a more flexible interpretation of the obligations to prosecute and punish. Despite the need to strengthen the mechanisms of accountability, considering the unlimited nature of the amnesty and the general inclusion of serious human rights violations, international standards do not prescribe a rejection of the amnesty in the same terms as the Peruvian Amnesty. The analysis of an amnesty would require a more balanced approach in which some criminal prosecutions are required, while leaving some room for the state to exercise discretion to achieve peace and reconciliation on its own terms.

The amnesty enacted in Colombia as result of the peace negotiations between the government and the guerrilla FARC is less problematic. The amnesty was crafted following international standards, while also framed in a more comprehensive institutional arrangement to guarantee not only justice, but also peace, truth, and reconciliation. As Christine Bell has noted, this agreement is one of the longest and most detailed peace accords, including a Truth Commission, a special criminal jurisdiction, and mechanisms for reparations and guarantees of non-repetition.[77] In a complex arrangement of conditional benefits, the agreement linked the application of amnesties, among other benefits, to the commitments to lay down arms, acknowledge responsibility, contribute to truth reconstruction, and provide reparations for victims.[78] With a more comprehensive approach to accountability, the examination of the Colombian amnesty requires a more flexible approach, where the fulfilment of a minimum

[74] *Barrios Altos v. Peru*, IACtHR, Merits, Series C No. 75 (14 March 2001); *La Cantuta v. Peru*, IACtHR, Merits, Reparations and Costs, Series C No. 162 (29 November 2006); *Santiago Enrique Martín Rivas – Barrios Altos*, Tribunal Constitucional de Perú (n 35); *Recurso de Amparo por Santiago Enrique Martín Rivas – La Cantuta*, Tribunal Constitucional de Perú, Exp. No. 679-2005-PA/TC (2 March 2007).
[75] *AZAPO v. President of South Africa*, Constitutional Court of South Africa (n 41).
[76] OHCHR, *Rule-of-Law Tools for Post-Conflict States: Amnesties* (n 43) 33.
[77] Christine Bell, 'Lex Pacificatoria Colombiana: Colombia's Peace Accord in Comparative Perspective' (2016) 110 AJIL Unbound 165, 166.
[78] Juana Inés Acosta-López, 'The Inter-American Human Rights System and the Colombian Peace: Redefining the Fight Against Impunity' (2016) 110 AJIL Unbound 178, 179.

standard of criminal prosecutions allows for wider discretion in how the state finds a balance between conflicting values and obligations.

International norms requiring the prosecution of gross crimes and serious human rights violations have been instrumental in enabling and empowering courts to contribute to overcoming situations of systematic impunity.[79] In the last decades, the anti-impunity language that has limited the use of amnesties has given judicial bodies a clear framework to work with in the search for justice. Thus, it is a risk to move entirely away from the language of a legal obligation to prosecute and punish all human rights abuses.[80] The transitional justice framework has allowed other courts to frame the discussion of amnesties within a wider discussion about the need to balance different obligations and rights in the pursue of peace and reconciliation in conflicting societies. The international obligations to prosecute and punish need to be read in conjunction with other state obligations to guarantee peace, to provide effective remedies that also include reparations, truth recovery and guarantees of non-repetition, and to promote transition to democracy and the rule of law. In this context, rather than a dichotomy between criminal prosecutions and amnesties, there is a scale of possibilities according to which the interpretation of the obligation to prosecute and punish becomes more or less strict depending on the combination of mechanisms implemented to fulfil and balance all the obligations of the state.

6.5. Conclusions: amnesties at a crossroads

The judicial opposition to amnesties has been strongly determined by the characteristics of the measures under initial scrutiny. The use of amnesties as impunity mechanisms in the aftermath of authoritarian regimes in Argentina, Chile, Uruguay, and Peru, among others, led domestic tribunals, international courts, and human rights bodies to challenge and restrict the application of these types of measures. Moreover, with the turn of the human rights movement towards criminal accountability, the trajectory of international law developed towards a general rejection of amnesties.

Following path dependence patterns, the early decisions of human rights bodies have exerted a strong influence on more recent decisions on amnesties. The initial rejection of

[79] Orentlicher, ''Settling Accounts' Revisited' (n 49) 22.
[80] ibid.

blanket and self-amnesties expanded and strongly influenced the restriction of other types of amnesties in different contexts. Generally, there is a presumption of amnesties as impunity.[81] Amnesties covering crimes of international interest are suspected of being incompatible with the international obligations of states.[82] However, as domestic and international tribunals have moved towards accepting the possibility of well-crafted amnesties, it is possible to rebut this presumption by proving that, on a case-by-case basis, the amnesty is framed in a wider process of transitional justice that provides alternative mechanisms of justice that guarantee accountability while contributing to other values like peace, truth recovery, and reconciliation. This has been tangentially accepted by international tribunals, which have signalled to the possibility of well-crafted amnesties under international law.[83]

This shift raises a question about how domestic and international tribunals may examine conditional, limited and negotiated amnesties in the future, such as the Colombian amnesty of 2016 that accompanied the peace agreement signed between the government and the guerrilla FARC. Framed in a robust institutional arrangement of transitional justice and with a broader understanding of accountability, the examination of the Colombian Amnesty will present some challenges for bodies like the Inter-American Court and Commission, which have thus far been emphatic in their rejection of amnesty measures. In recent years, some decisions have suggested a qualitative change in the international approach to amnesties, with a more flexible attitude. International law seems to be moving away from a ban on all amnesties and towards the possibility of well-crafted amnesties under exceptional circumstances to facilitate peaceful transitions.

Thus, this chapter has proposed the judicial examination of future amnesties as a fine-tuning or calibrating process. Mapping the characteristics of the amnesties and the mechanisms that accompany them, this process suggests situating them on a spectrum of possibilities. Comparing the nature and characteristics of the amnesties that courts and human rights bodies have identified as relevant, it is possible to assess if the specific measure tends to promote impunity or accountability. However, rather than representing a dichotomy, impunity and accountability are the extremes of a continuum upon which amnesties are situated at different points. Ultimately, the more problematic the amnesty, the stricter the interpretation of the obligation to prosecute and punish should be, while amnesties implemented as part of a wider process of transitional justice to promote accountability allow for states to pursue their public

[81] Anja Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (OUP 2009) 222.
[82] *C-007/18*, Corte Constitucional de Colombia (n 25) para 146.
[83] *Marguš v. Croatia*, ECtHR, 2014 (n 47); *Kwoyelo v. Uganda*, ACoHPR (n 47); *El Mozote v. El Salvador*, IACtHR (n 37).

interest in peace and reconciliation, finding their own way to balance conflicting rights in transitional justice.

CHAPTER 7. Conclusions

7.1. The role of judicial decisions in the discussion on the permissibility of amnesties under international law

This research has had two central objectives. The first objective was to assess the influence of judicial dialogue in shaping a norm on the permissibility of amnesties for serious human rights violations under international law. This thesis has shown that the absence of treaty provisions on amnesty in human rights treaties has left ample room for the judicial discussion of the permissibility of amnesties under international law.[1] Judicial decisions, thus, have gained importance in the development of a norm on amnesties in a way that is not reflected in article 38 of the Statute of the ICJ.

The literature on sources of international law has acknowledged the increasing role of judicial decisions in shaping international law. Traditional approaches, despite maintaining a theory of sources focused on state consent, have moved from the idea of judicial decisions simply as subsidiary means for the determination of rules, to recognising international courts, and to a lesser extent domestic tribunals, as 'agents of legal development'.[2] With this shift, traditional approaches to international law recognise the influence and impact of judicial decisions in the formation and development of international norms. This recognition, however, is focused on the influence of individual decisions in the development of certain areas of law.[3] The impact of judicial decisions, however, is not limited to specific pronouncements of courts that in certain instances have individually changed the trajectory of international law. Due to the number of decisions and the variety of arguments, it is difficult to isolate the impact of individual decisions or the influence of specific courts as 'agents of change' without risking an oversimplification of the development of a rule on amnesties and an overestimation of the impact of particular decisions.[4]

[1] See Chapter 2.
[2] See Section 3.2.
[3] See Section 3.2.2
[4] See Section 3.2.3.

This thesis has drawn upon judicial dialogue theories which highlight the collective impact of international and domestic tribunals in shaping rules of international law. The increasing accessibility to other courts' decisions, has given tribunals the possibility to read and reference a great number of decisions. Courts are not deciding in isolation and, therefore, the influence of certain decisions cannot be entirely individualised and explained in terms of individual decisions.[5] The concept of 'judicial dialogue' reflects a move from the individual value of judicial decisions based upon the authority of certain judicial bodies, to the collective role of judicial pronouncements grounded in its relationship with a community of courts.[6] Influenced by this, human rights scholars and practitioners tend to read decisions on amnesty in a coherent manner that signals a general agreement on their incompatibility with international law.[7]

The case-law on amnesties reviewed for this study reflects a diversity of approaches. Domestic and international courts are increasingly looking at each other to determine the permissibility of amnesties. Although this gives the impression of a global community of courts engaging in a wider dialogue, cross-referencing practices reveal that more than an international agreement on the prohibition on amnesties, courts are interacting in clusters forming bridges and communities that make judicial dialogue more decentralised and less hierarchical.[8] Regional and legal regime trends have been a key factor in the approach that domestic and international tribunals have adopted in the analysis of amnesties. However, there have also been relevant interactions between individual courts forming alliances across regions and legal regimes, including courts in Colombia, El Salvador, South Africa, Uganda and Indonesia.[9] The lack of hierarchies and central control in international law has allowed for the formation of heterarchies and multiple communities, in which judicial bodies gravitate around different ideas of accountability. The formation of bridges or alliances between courts has facilitated for courts to explore different models of transitional justice and multiple approaches to the use of amnesties.[10]

[5] See Section 3.3.
[6] See Section 3.3.1.
[7] See Section 3.3.6.
[8] See Section 3.4.
[9] See Section 5.3.
[10] See Chapter 5.

7.2. The flexibilization of the prohibition on amnesties

The second objective of this thesis has been to uncover the standards developed by domestic courts, international tribunals, and human rights bodies to evaluate the permissibility of conditional amnesties for serious human rights violations. By examining the reasoning and interactions between judicial and quasi-judicial bodies, this thesis has revealed that while unconditional amnesties and self-amnesties are clearly considered mechanisms of impunity incompatible with treaty obligations to prosecute and punish international crimes and provide an effective remedy for human rights violations, there is some uncertainty about the compatibility of other types of amnesties with international treaties and customary law when they are enacted as part of a broader mechanism of accountability. This thesis contributes to the literature by identifying those areas of uncertainty, revealing a shift in the way international bodies have been assessing the permissibility of conditional amnesties in recent years, and demonstrating how domestic courts in different parts of the world have not completely rejected the use of amnesty laws in transitional justice.

The legality of amnesties under international law continues being discussed by international and domestic courts, particularly in relation to the possibility of conditional amnesties.[11] Examining a sample of 368 decisions on amnesty, this thesis has shown how judicial dialogue has expanded vertically and horizontally to put limits to the application of amnesties.[12] The idea of a prohibition of amnesties emerged from early pronouncements adopted by UN and Inter-American human rights bodies examining blanket and self-amnesties enacted in the aftermath of authoritarian regimes in Latin America. This expansion was facilitated by the judicial dialogue of the Inter-American and the UN institutions with domestic courts in Latin America and with other transnational bodies. Through the conventionality control and block of constitutionality doctrines, domestic courts engaged directly with the decisions of the Inter-American Court and amplified the reach of the prohibition of amnesties to other countries where the Court had not intervened yet.[13] Likewise, the decisions of the Inter-American System have had great influence in the decision making of other regional bodies in Africa and Europe, as well as international criminal tribunals.[14] Following path dependence patterns, the early decisions adopted by domestic courts and human rights bodies in a very specific context have strongly determined the following treatment of amnesties in completely

[11] See Chapter 4.
[12] See Sections 4.2 to 4.4.
[13] See Section 4.3.
[14] See Section 4.4.

different situations.[15] Throughout this thesis, I have demonstrated how the influence of early decisions rejecting unconditional self-amnesties enacted in the aftermath of autocratic regimes in Latin America, pulled domestic and international courts towards a general rejection of amnesties. Consequently, judicial and human rights bodies have presumed that amnesties are mostly enacted as mechanisms of impunity. Amnesties covering crimes of international interest, are generally suspicious of being incompatible with the international obligations of states.

Despite an ever-expanding judicial dialogue on the prohibition of problematic amnesties in Latin America, cross-referencing practices also show the emergence of multiple communities of courts approaching the discussion on the permissibility of less problematic amnesties in other transitional justice contexts.[16] Domestic courts in African, Asian and in some Latin American countries have increasingly examined the use of amnesties in transitional justice as a practical instrument to incentivise disarmament and peace negotiations with violent groups that otherwise might prefer continuing fighting. Notwithstanding the centrality of Inter-American and UN human rights bodies in the discussion of amnesties, domestic courts in different continents have established bridges of communication to nuance a general rejection of all amnesties under international law.

Different communities of courts and human rights bodies gravitate around different decisions, forming a heterarchical structure where the authority and hierarchy of certain courts and decisions varies.[17] Even though the implementation of problematic amnesties continues, and the role of courts has been primarily limiting their effect, the consideration of well-crafted amnesties has also influenced the judgments of courts that are increasingly cross-referencing each other and discussing the possibility of conditional amnesties in the context of a wider transitional justice framework. This thesis has identified an area of ambiguity and uncertainty in relation to the permissibility of amnesties for serious human rights violations and in relation to the treatment that domestic and international courts will give to conditional, negotiated, and limited amnesties when they are accompanied by other mechanisms of accountability in transitional justice contexts.[18]

Indeed, in recent years transitional justice ideas have influenced the trajectory of the discussion on amnesties, opening courts to the permissibility of conditional and negotiated amnesties. As domestic and international tribunals have moved towards accepting the

[15] See Chapter 6.
[16] See Chapter 5.
[17] See Sections 5.3 and 5.4.
[18] See Section 5.5.

possibility of well-crafted amnesties, it is possible to rebut this presumption by proving that, on a case-by-case basis, the amnesty is framed in a wider process of transitional justice that provides alternative mechanisms of justice that guarantee accountability while contributing to other values like peace, truth recovery, and reconciliation. In recent decisions, human rights bodies have nuanced their view on the permissibility of certain amnesties. Significantly, the majority of the Inter-American Court in a concurrent opinion to the case of *El Mozote v. El Salvador* argued for the need to find a balance between conflicting rights in transitional justice and recognise the tensions between different components of transitional justice to allow states to find mechanisms of negotiation to achieve peace and reconciliation.[19] In *Laurence Dujardin v. France, Tarbuk v. Croatia,* and *Marguš v. Croatia*, the European Court and Commission alluded to considerations of public interest to argue that some amnesty laws might be permissible in exceptional circumstances when there is a legitimate interest in peace and reconciliation.[20] Meanwhile, the African Commission has strongly rejected blanket amnesties for serious human rights violations, but in *Thomas Kwoyelo v. Uganda* it opened the door to the possibility of well-crafted conditional amnesties as a mechanism of transitional justice that contributes to truth-recovery, reconciliation, and genuine reparations.[21]

7.3. A framework to examine amnesties and the complexity of international law

The overall aim of this thesis has been to contribute to the theorisation of the role of judicial decisions in shaping international law and to contribute to the ongoing discussion of the permissibility of amnesties as a mechanism of transitional justice. The significance of this research, as per my theoretical and methodological choices is twofold. First, the thesis has developed a framework for courts to assess future amnesties, by proposing the judicial examination of future amnesties as a fine-tuning or calibrating process.[22] Mapping the characteristics of the amnesties and the mechanisms that accompany them, this process suggested situating them in a spectrum of possibilities. Comparing the nature and characteristics of the amnesties that courts and human rights bodies have identified as relevant, it is possible to assess if the specific measure tends to promote impunity or accountability.

[19] *Massacres of El Mozote and surrounding areas v. El Salvador*, IACtHR, Merits, Reparations and Costs, Series C No. 252 (25 October 2012) Concurring opinion Judge García Sayán.
[20] *Laurence Dujardin and others v. France*, ECoHR, Admissibility, Application No. 16734/90 (2 September 1991); *Tarbuk v. Croatia*, ECtHR, Judgment, Application No. 31360/10 (11 December 2012); *Marguš v. Croatia*, ECtHR, Judgment by Grand Chamber, Application 4455/10 (27 May 2014).
[21] *Thomas Kwoyelo v. Uganda*, ACoHPR Communication 431/12 (17 October 2018).
[22] See Section 6.4.

Rather than a dichotomy, impunity and accountability should be considered as a continuum where amnesties can be situated at different levels depending on the specific design and process of application. Ultimately, the more problematic the amnesty the stricter the interpretation of the obligation to prosecute and punish should be, while amnesties inserted in wider process of transitional justice to promote accountability allow for states to pursue their public interest in peace and reconciliation, finding their own way to balance conflicting rights in transitional justice. Coming back to the examination of the Colombian amnesty of 2016, the thesis has shown how the examination of this measure will present some challenges for bodies like the Inter-American Court and Commission, that so far have been emphatic in rejecting amnesty measures. International law is moving away from a general ban for all amnesties to the possibility of well-crafted amnesties under exceptional circumstances to facilitate peaceful transitions.

This is significant because most judicial pronouncements have focused on the non-permissibility of problematic amnesties, so there is still an open question about the way international and domestic judicial bodies will approach well-crafted amnesties. This thesis has shed some light on how courts could examine conditional and limited amnesties in the coming years. There is little doubt that the use of amnesty laws in certain contexts has allowed for impunity to prevail, removing people responsible for heinous crimes from justice. However, this thesis has emphasised the need to differentiating between problematic amnesties and negotiated measures that genuinely facilitate peace agreements and effectively contribute to processes of reconciliation.

The thesis has also unveiled the complex dynamics of judicial dialogue and judicial interactions that shape international law. This research has contributed to the understanding of judicial dialogue, as a process of self-organisation and chaotic interactions that hardly reflect the emergence of one global community of courts. By focusing on real citation networks, this thesis has shown how the development of international norms is influence by the formation of clusters or communities of courts that dispute or resist those global standards and advance different approaches. Moreover, judicial interactions are also influenced by dynamics of path dependence. Despite the lack of a formal theory of precedent, early decisions on amnesty have been highly influential in the decision making of more recent decisions. While judicial dialogue theories have focused mostly on international agreement and rational persuasion, a complexity approach has been significant in revealing the dynamics of change and disagreement in judicial dialogue.

This is significant in terms of future research, because most of the literature applying complexity theory to the understanding of international law has done it at a theoretical level. This research has contributed to the conceptualisation of international law as a complex system, by grounding that conceptual framework in empirical analysis. The methodology used here, is also an invitation to continue exploring the complexity of judicial interactions in the development of other areas of law.

LIST OF REFERENCES

Abtahi H and Webb P, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff Publishers 2008)

Acosta-López JI, 'The Inter-American Human Rights System and the Colombian Peace: Redefining the Fight Against Impunity' (2016) 110 *AJIL Unbound* 178

Ajevski M, 'Fragmentation in International Human Rights Law: Beyond Conflict of Laws ' (2014) 32 *Nordic Journal of Human Rights* 87

Alschner W, 'The Computational Analysis of International Law' in Deplano R and Tsagourias N (eds), *Research Methods in International Law: A Handbook* (Elgar 2019)

____ and Charlotin D, 'The Growing Complexity of the International Court of Justice's Self-Citation Network: Institutional Achievement or Access-to-Justice Concern?' (2016) 58 *University of Cambridge Faculty of Law Legal Studies Research Paper Series* 2

Arcarazo DA, Buchan RJ and Ureña R, 'Beyond Justice, Beyond Peace? Colombia, the Interests of Justice, and the Limits of International Criminal Law' (2015) 26 *Criminal Law Forum* 291

Arsanjani MH, 'The International Criminal Court and National Amnesty Laws' (1999) 93 *American Society of International Law, Proceedings of the Annual Meeting* 65

Artigiani R, 'Chaos and constitutionalism: Toward a post-modern theory of social evolution' (1992) 34 *World Futures: Journal of General Evolution* 131

Bakker CAE, 'A Full Stop to Amnesty in Argentina' (2005) 3 *Journal of International Criminal Justice* 1106

Beken TV, Vermeulen G and Ongena T, 'Belgium, concurrent national and international criminal jurisdiction and the principle ‘ne bis in idem" (2002) 73 *Dans Revue internationale de droit pénal* 811

Bell C, 'The “New Law” of Transitional Justice' in Ambos K, Large J and Wierda M (eds), *Building a Future on Peace and Justice* (Springer-Verlag Berlin Heidelberg 2009)

____ 'Lex Pacificatoria Colombiana: Colombia’s Peace Accord in Comparative Perspective' (2016) 110 *AJIL Unbound* 165

Benvenisti E, 'The Conception of International Law as a Legal System' (2008) 83 *Tel Aviv University Law Faculty Papers* 1

____ and Downs GW, 'National Courts, Domestic Democracy, and the Evolution of International Law' (2009) 20 *European Journal of International Law* 59

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

Bommarito II MJ, Katz DM and Zelner J, 'Law as a Seamless Web? Comparison of Various Network Representations of the United States Supreme Court Corpus (1791-2005)', Proceedings of the 12th International Conference on Artificial Intelligence and Law (ICAIL 2009) 234

Borda AZ, 'The Use of Precedent as Subsidiary Means and Sources of International Criminal Law' (2013) 18 *Tilburg Law Review* 65

Bradfield P, 'Reshaping Amnesty in Uganda: The Case of Thomas Kwoyelo' (2017) 15 *Journal of International Criminal Justice* 827

Brandes U, ' A Faster Algorithm for Betweenness Centrality' (2001) 25 *Journal of Mathematical Sociology* 163

Brownlie I, *Principles of Public International Law* (OUP 2008)

Burke-White WW, 'Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation' (2001) 42 *Faculty Scholarship at Penn Law* 461

Byrne D, *Interpreting Quantitative Data* (SAGE 2002)

____ and Callaghan G, *Complexity Theory and the Social Sciences: The state of art* (Routledge 2014)

Caron DD, 'Opening Welcome and Remarks: Confronting Complexity' (2012) 106 *American Society of International Law, Proceedings of the Annual Meeting* 21

Carozza PG, '"My Friend is a Stranger": The Death Penalty and the Global Ius Commune of Human Rights' (2003) 81 *Texas Law Review* 1031

Cassel D, 'Lessons from the Americas: Guidelines for international response to amnesties for atrocities' (1996) 59 *Law and Contemporary Problems* 197

Cassese A, 'The Special Court and International Law: The Decision Concerning the Lomé Agreement Amnesty' (2004) 2 *Journal of International Criminal Justice* 1130

____ and others, *Cassese's International Criminal Law* (OUP 2013)

Cassimatis AE, 'International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law' (2007) 56 *International and Comparative Law Quarterly* 623

Chigara B, *Amnesty in International Law: The legality under international law of national amnesty laws* (Longman 2002)

Chinen M, 'Complexity theory and the horizontal and vertical dimensions of state responsibility' (2014) 25 *European Journal of International Law* 703

Cilliers P, *Complexity and postmodernism: Understanding complex systems* (Routledge 1998)

____ 'Boundaries, Hierarchies and Networks in Complex Systems' (2001) 5 *International Journal of Innovation Management* 135

Clark P and Palmer N, 'Challenging Transitional Justice' in Palmer N, Clark P and Granville D (eds), *Critical Perspectives In Transitional Justice* (CUP 2012) 1

Close J, 'Crafting an international norm prohibiting the grant of amnesty for serious crimes: convergences and divergences in the case-law of international courts' (2016) 8 *Queen Mary Law Journal* 109

____ *Amnesty, Serious Crimes and International Law: Global Perspectives in Theory and Practice* (Routledge 2019)

Contesse J, 'The final word? Constitutional dialogue and the Inter-American Court of Human Rights' (2017) 15 *I•CON* 414

____ 'The international authority of the Inter-American Court of Human Rights: a critique of the conventionality control doctrine' (2018) 22 *International Journal of Human Rights* 1168

Crumley CL, 'Heterarchy and the Analysis of Complex Societies' (1995) 6 *Archeological Papers of the American Anthropological Association* 1

D'Amato A, 'Groundwork for International Law' (2014) 108 American Journal of International Law 650

D'Aspremont J, 'The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order' in Fauchald OK and Nollkaemper A (eds), *The practice of international and national courts and the (de-)fragmentation of international law* (Hart 2012)

De Wet E, 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order' (2006) 19 *Leiden Journal of International Law* 611

Du Bois-Pedain A, 'Post-Conflict Accountability and the Demands of Justice: Can Conditional Amnesties Take the Place of Criminal Prosecutions?' in Palmer N, Clark P and Granville D (eds), *Critical Perspectives In Transitional Justice* (CUP 2012) 459

Emmel N, *Sampling and choosing cases in qualitative research: A realist approach* (SAGE 2013)

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

____ 'A Genealogy of the Criminal Turn in Human Rights' in Engle K, Miller Z and Davis DM (eds), *Anti-Impunity and the Human Rights Agenda* (CUP 2017)

Fish S, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Duke University Press 1990)

Fischman JB, 'Reuniting 'is' and 'ought' in empirical legal scholarship' (2013) 162 *University of Pennsylvania Law Review* 117

Fitzmaurice G, 'Some Problems Regarding the Formal Sources of International Law' in Asbeck FM (ed), *Symbolae Verzijl* (Martinus Nijhoff 1958)

Fitzmaurice M, 'The practical working of the law of treaties' in Evans M (ed), *International law* (OUP 2018)

Freeman M, *Necessary evils: amnesties and the search for justice* (CUP 2009)

____ and Pensky M, 'The Amnesty Controversy in International Law' in Lessa F and Payne LA (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (CUP 2012)

Frishman O and Benvenisti E, 'National Courts and Interpretive Approaches to International Law' in Aust HP and Nolte G (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (OUP 2016)

Gavron J, 'Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court' (2002) 51 *International and Comparative Law Quarterly* 91

Geu TE, 'Chaos, Complexity, and Coevolution: The Web of Law, Management Theory, and Law Related Services at the Millennium' (1998) 66 *Tennessee Law Review* 137

Gibson JL, 'Truth, Justice, and Reconciliation: Judging the Fairness of Amnesty in South Africa' (2002) 46 *American Journal of Political Science* 540

Glaser BG and Strauss AL, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine Transaction 1967)

Gómez-Mera L, 'International Regime Complexity' (2021) *Oxford Research Encyclopedia of International Studies*

Góngora Mera ME, 'La difusión del bloque de constitucionalidad en la jurisprudencia latinoamericana y su potencial en la construcción del ius constitutionale commune latinoamericano' in Bogdandy Av, Fix-Fierro H and Morales M (eds), *Ius Constitutionale Commune en América Latina* (Instituto de Investigaciones Jurídicas, Serie doctrina jurídica 2014)

Gurmendi A, 'At Long Last, Brazil's Amnesty Law Is Declared Anti-Conventional' (*Opinio Juris,* 16 August 2019) <http://opiniojuris.org/2019/08/16/at-long-last-brazils-amnesty-law-is-declared-anti-conventional/> accessed 02 September 2021

____ 'So, You Pardoned a War Criminal…' (*Opinio Juris,* 28 May 2019) <http://opiniojuris.org/2019/05/28/so-you-pardoned-a-war-criminal/> accessed 24 January 2020

Hakimi M, 'Making Sense of Customary International Law' (2020) 118 *Michigan Law Review* 1487

Hall MA and Wright RF, 'Systematic Content Analysis of Judicial Opinions' (2008) 96 *California Law Review* 63

Halperin S and Heath O, *Political Research: Methods and Practical Skills* (OUP 2012)

Harvey D and Reed M, 'The Evolution of Dissipative Social Systems' (1994) 17 *Journal of Social and Evolutionary Systems* 371

Hathaway OA, 'Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System' (2003) 28 *Iowa Law Review* 101

Hayes AW, 'An Introduction to Chaos and Law' (1992) 60 *UMKC Law Review* 751

Hernandez G, 'Interpretative Authority and the International Judiciary' in Bianchi A, Peat D and Windsor M (eds), *Interpretation in International Law* (OUP 2015)

Hillebrecht C, Huneeus A and Borda S, 'The Judicialization of Peace' (2018) 59 *Harvard International Law Journal* 279

Holland JH, *Complexity: A Very Short Introduction* (OUP 2014)

Hornstein D, 'Complexity Theory, Adaptation, and Administrative Law' (2005) 54 *Duke Law Journal* 913

Howse R and Teitel R, 'Cross-judging revisited' (2014) 46 *New York University Journal of International Law and Politics* 867

Human Rights Watch, *Selling Justice Short: Why Accountability Matters for Peace* (Human Rights Watch 2009)

Huneeus A, 'International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts' (2013) 107 *American Journal of International Law* 1

____ and Urueña R, 'Introduction to Symposium on the Colombian Peace Talks and International Law' (2016) 110 *AJIL Unbound* 161

International Committee of the Red Cross, 'Study on Customary Rules of International Humanitarian Law' (*IHL Database*, 2005) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule159> accessed 24 January 2020

Jackson M, 'Amnesties in Strasbourg' (2018) 38 *Oxford Journal of Legal Studies* 451

Jacobs D, 'Puzzling Over Amnesties: Defragmenting the Debate for International Criminal Tribunals' in van den Herik L and Stahn C (eds), *The Diversification and Fragmentation of International Criminal Law* (Brill | Nijhoff 2012)

Jeffery R, *Amnesties and Peace Agreements: The Asia-Pacific in Global Comparative Perspective, 1980–2015* (CUP 2021)

Jennings RY, 'The Judicial Function and the Rule of Law in International Relations' in Ago R (ed), *International Law at the Time of its Codification* (A. Giuffrè 1987)

____ 'The judiciary, international and national, and the development of international law' (1996) 45 *International and Comparative Law Quarterly* 1

Joinet L, 'Study on amnesty laws and their role in the safeguard and promotion of human rights' (21 June 1985) UN Commission on Human Rights, Report by Special Rapporteur (Thirty-eighth session E/CN4/Sub2/1985/16)

Kades E, 'The Laws of Complexity and the Complexity of Laws: The Implications of Computational Complexity Theory for the Law' (1997) 49 *Rutgers Law Review* 403

Keck ME and Sikkink K, *Activists beyond Borders: Advocacy Networks in International Politics* (Cornell University Press 1998)

Ki-moon B, 'The age of accountability' (*United Nations, Secretary General*, 27 May 2010) <https://www.un.org/sg/en/content/sg/articles/2010-05-27/age-accountability> accessed 15 May 2022

Kim HJ and Sikkink K, 'Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries' (2010) 54 *International Studies Quarterly* 939

____ 'How do human rights prosecutions improve human rights after transition?' (2013) 7 *Interdisciplinary Journal of Human Rights Law* 69

Koskenniemi M, 'Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission (2006) UN Doc A/CN.4/L.682

L'Heureux-Dube C, 'The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court' (1998) 34 *Tulsa Law Review* 15

Laplante LJ, 'Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes' (2009) 49 *Virginia Journal of International Law* 915

Lauterpacht H, 'Decisions of Municipal Courts as a Source of International Law' (1929) 10 *British Year Book of International Law* 65

____ *The Development of International Law by the International Court* (CUP 1982)

Lessa F, Olsen TD, Payne LA, Pereira G, and Reiter AG, 'Persisten or eroding impunity? The divergent effects of legal challenges to amnesty for past human rights violations' (2014) 47 *Israel Law Review* 105

Lewin R, *Complexity: Life at the Edge of Chaos* (Macmillan Maxwell International 1992)

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

Mallinder L, 'Can Amnesties and International Justice be Reconciled?' (2007) 1 *International Journal of Transitional Justice* 208

____ *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Hart Publishing 2008)

____ 'Peacebuilding, the Rule of Law and the Duty to Prosecute: What Role Remains for Amnesties?' (2012) 11 *Transitional Justice Institute Research Paper* 1

____ 'Amnesties' Challenge to the Global Accountability Norm? Interpreting Regional and International Trends in Amnesty Enactment' in Lessa F and Payne LA (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (CUP 2012)

____ 'Explanatory Guidance on the Belfast Guidelines on Amnesty and Accountability', *The Belfast Guidelines on Amnesty and Accountability* (University of Ulster 2013)

____ 'The End of Amnesty or Regional Overreach: Interpreting the Erosion of South America's Amnesty Laws' (2016) 65 *International and Comparative Law Quarterly* 645

____ 'Amnesties, Conflict and Peace Agreement - ACPA dataset' (*University of Edinburgh,* 2016) <https://www.peaceagreements.org/amnesties/> accessed 14 January 2021

____ 'Atrocity, Accountability, and Amnesty in a 'Post-Human Rights World'?' (2017) 18 *Transitional Justice Institute Research Paper* 4

____ 'Amnesty and International Law' (*Oxford Bibliographies*, 2018) <https://doi.org/10.1093/OBO/9780199796953-0172> accessed 19 April 2022

____ and McEvoy K, 'Rethinking amnesties: atrocity, accountability and impunity in post-conflict societies' (2011) 6 *Contemporary Social Science* 107

____ Moffett L, McEvoy K, and Anthony G, *Investigations, Prosecutions, and Amnesties under Articles 2 & 3 of the European Convention on Human Rights* (Queen's University Belfast 2015)

____ and O'Rourke C, 'Databases of Transitional Justice Mechanisms and Contexts: Comparing Research Purposes and Design' (2016) 10 *International Journal of Transitional Justice* 492

Martinez JS, 'Towards an International Judicial System' (2003) 56 *Stanford Law Review* 429

McCrudden C, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights' (2000) 20 *Oxford Journal of Legal Studies* 499

____ 'Judicial Comparativism and Human Rights' in Örücü E and Nelken D (eds), *Comparative Law: A Handbook* (Hart Publishing 2007)

McEvoy K and Mallinder L, 'Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy' (2012) 39 *Journal of Law and Society* 410.

Mclachlan C, 'The principle of systemic integration and article 31(3)(c) of the Vienna Convention' (2005) 54 *International and Comparative Law Quarterly* 279

Mendez JE, 'Foreword' in Lessa F and Payne L (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (CUP 2012)

____ and Meintjes G, 'Reconciling Amnesties with Universal Jurisdiction' (2000) 2 *International Law FORUM du droit international* 76

Meyer EPN and Polido FBP, 'Brazil in the Dock: The Inter-American Court of Human Rights Rulings Concerning the Dictatorship of 1964-1985' (*VerfBlog on Matters Constitutional,* 2018) <https://verfassungsblog.de/brazil-in-the-dock-the-inter-american-court-of-human-rights-rulings-concerning-the-dictatorship-of-1964-1985/> accessed 2 September 2021

Mills A and Stephens T, 'Challenging the Role of Judges in Slaughter's Liberal Theory of International Law' (2005) 18 *Leiden Journal of International Law* 1

Mitchell M, *Complexity: A Guided Tour* (OUP 2009)

Morin E, 'Restricted Complexity, General Complexity' (2005) *Presented at the Colloquium 'Intelligence de la complexit´e : ´epist´emologie et pragmatique' at Cerisy-La-Salle, France*. Translated from French by Carlos Gershenson.

Morin JF, Pauwelyn J and Hollway J, 'The Trade Regime as a Complex Adaptive System: Exploitation of Environmental Norms in Trade Agreements' (2017) 20 *Journal of International Economic Law* 365

Murray J, 'Complexity theory and socio-legal studies' (2008) 29 *Liverpool Law Review* 227

____ Webb TE and Wheatley S, 'Encountering law's complexity' in Murray J, Webb TE and Wheatley S (eds), *Complexity Theory and Law: Mapping an Emergent Jurisprudence* (Routledge 2018)

Musila G, 'The right to an effective remedy under the African Charter on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 442

Naqvi Y, 'Amnesty for war crimes: Defining the limits of international recognition' (2003) 85 *International Review of the Red Cross* 583

Nino C, *Juicio al Mal Absoluto* (Ariel 2006)

Nollkaemper A, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY' in Boas G and Schabas WA (eds), *International criminal law developments in the case law of the ICTY* (Martinus Nijhoff 2003)

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

Olsen TD, Payne LA and Reiter AG, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (United States Institute of Peace Press 2010)

____ 'Conclusion: Amnesty in the Age of Accountability' in Payne LA and Lessa F (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (CUP 2012)

Orakhelashvili A, 'The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?' (2008) 19 *European Journal of International Law* 161

Orentlicher D, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 *Yale Law Journal* 2537

____ 'Promotion and Protection of Human Rights: Impunity' (8 February 2005) UN Commission on Human Rights, Report of the independent expert to update the set of principles to combat impunity (Sixty-first session E/CN4/2005/102/Add1) 1

____ '‘Settling Accounts’ Revisited: Reconciling Global Norms with Local Agency' (2007) 1 *International Journal of Transitional Justice* 10

____ 'Immunities and Amnesties' in Sadat LN (ed), *Forging a Convention for Crimes Against Humanity* (CUP 2011)

Panagis Y and Šadl U, 'The Force of EU Case Law: A Multi-dimensional Study of Case Citations' in Rotolo A (ed), *Legal Knowledge and Information Systems* (JURIX: The Twenty-Eighth Annual Conference 2015)

Pauwelyn J, 'At the edge of chaos?: Foreign Investment Law As A Complex Adaptive System, How It Emerged And How It Can Be Reformed' (2014) 29 *ICSID Review* 372

Pensky M, 'Amnesty on trial: impunity, accountability, and the norms of international law' (2008) 1 *Ethics & Global Politics* 1

Philippe X, 'The principles of universal jurisdiction and complementarity: how do the two principles intermesh?' (2006) 88 *International Review of the Red Cross* 375

Pinto M, 'Awakening the Leviatan through Human Rights Law: How Human Rights Bodies Trigger the Application of Criminal Law' (2018) 34 *Ultrecht Journal of International and European Law* 161

Poli R, 'A Note on the Difference Between Complicated and Complex Social Systems' (2013) 2 *CADMUS* 142

Quinn P, 'Advancing the Conversation: Non-judicial Voices and the Transnational Judicial Dialogue', in Holly Cullen, Joanna Harrington and Catherine Renshaw (Eds.) *Experts, Networks and International law* (CUP 2017) 47

Relva HA, 'Three Propositions for a Future Convention on Crimes Against Humanity' (2018) 16 *Journal of International Criminal Justice* 857

Reynolds GH, 'Chaos and the Court' (1991) 91 *Columbia Law Review* 110

Roberts A, 'Comparative International Law? The role of national courts in creating and enforcing international law' (2011) 60 *International and Comparative Law Quarterly* 57

____ and Sivakumarani S, 'The theory and reality of the sources of international law' in Evans M (ed), *International Law* (5th edn, OUP 2018)

Robinson D, 'Serving the interest of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) 14 *European Journal of International Law* 481

Roht-Arriaza N, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (University of Pennsylvania Press 2006)

____ 'After Amnesties are Gone: Latin American National Courts and the new Contours of the Fight Against Impunity' (2015) 37 *Human Rights Quarterly* 341

____ and Gibson L, 'The Developing Jurisprudence on Amnesty' (1998) 20 *Human Rights Quarterly* 843

Ruhl JB, 'Complexity theory as a paradigm for the dynamic law-and-society system: A wake-up call for legal reductionism and the modern administrative state' (1996) 45 *Duke Law Journal* 851

____ 'The Fitness of Law: Using Complexity Theory to Describe the Evolution of Law and Society and Its Practical Meaning for Democracy' (1996) 49 *Vanderbilt Law Review* 1407

____ 'Thinking Mediation as Complex Adaptive System' (1997) 3 *Brigham Young University Law Review* 777

____ 'Thinking of Environmental Law as a Complex Adaptive System: How to clean up the environment by making a mess of environmental law' (1997) 34 *Houston Law Review* 101

____ and Katz DM, 'Measuring, Monitoring, and Managing Legal Complexity' (2015) 101 *Iowa Law Review* 191

Sadat LN, 'Exile, Amnesty and International Law' (2006) 81 *Notre Dame Law Review* 955

Šadl U and Olsen HP, 'Empirical Studies of the Webs of International Case Law: A New Research Agenda' (2014) 8 *iCourts Working Paper Series* 1

____ 'Can Quantitative Methods Complement Doctrinal Legal Studies? Using Citation Network and Corpus Linguistic Analysis to Understand International Courts' (2017) 30 *Leiden Journal of International Law* 327

Sandoz Y, Swinarski C and Zimmermann B (eds), *Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers 1987)

Schabas WA, 'Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone' (2004) 11 *UC Davis Journal of International Law and Policy* 145

____ *Genocide in International Law: The crime of crimes* (CUP 2009)

____ 'Synergy or Fragmentation?: International Criminal Law and the European Convention on Human Rights' (2011) 9 *Journal of International Criminal Justice* 609

____ *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (OUP 2012)

Scharf M, 'The letter of the law: The scope of the international legal obligation to prosecute human rights' (1996) 59 *Law and Contemporary Problems* 41

____ 'From the eXile Files: An Essay on Trading Justice' (2006) 63 *Washington and Lee Law Review* 339

____ 'Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?' (1997) 31 *Texas International Law Journal* 1

Scott RE, 'Chaos Theory and the Justice Paradox' (1993) 35 *William and Mary Law Review* 329

Seibert-Fohr A, 'The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions' (2003) 7 *Max Planck Yearbook of United Nations Law* 553

____ *Prosecuting Serious Human Rights Violations* (OUP 2009)

Shany Y, 'National Courts as International Actors: Jurisdictional Implications' (2008) 22 *Hebrew University International Law Research Paper* 1

Sikkink K, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (Norton 2011)

____ 'The Age of Accountability: The Global Rise of Individual Criminal Accountability' in Lessa F and Payne LA (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (CUP 2012)

____ and Payne L, *Amnesty Coding Manual* (Transitional Justice Research Collaborative 2014)

____ and Walling CB, 'The Impact of Human Rights Trials in Latin America' (2007) 44 *Journal of Peace Research* 427

Simpson G, 'The Ethics of the New Liberalism' in Reus-Smit C and Snidal D (eds), *The Oxford Handbook of International Relations* (OUP 2008)

Ganesh Sitamaran, 'The use and abuse of foreign lawn in constitutional interpretation' (2008) 32 *Harvard Journal of Law & Public Policy* 653

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

____ 'International Law in a World of Liberal States' (1995) 6 *European Journal of International Law* 503

____ 'Judicial Globalization' (2000) 40 *Virginia Journal of International Law* 1103

____ 'A Global Community of Courts' (2003) 44 *Harvard International Law Journal* 191

____ *A New World Order* (Princeton University Press 2004)

Slye RC, 'The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law' (2002) 43 *Virginia Journal of International Law* 173

____ 'A Limited Amnesty? Insights from Cambodia' in Lessa F and Payne L (eds), *Amnesty in the Age of Human Rights Accountability* (CUP 2012)

Sriram CL, *Confronting Past Human Rights Violations: Justice vs Peace in Times of Transition* (Frank Cass 2004)

Stahn C, 'United Nations peace-building, amnesties and alternative forms of justice: A change in practice?' (2002) 84 *International Review of the Red Cross* 191

____ 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court' (2005) 3 *Journal of International Criminal Justice* 695

____ *A Critical Introduction to International Criminal Law* (CUP 2018)

Tams CJ and Tzanakopoulos A, 'Barcelona Traction at 40: The ICJ as an Agent of Legal Development' (2010) 23 *Leiden Journal of International Law* 781

Teitel R, *Transitional Justice* (OUP 2000)

____ 'Transitional justice genealogy' (2003) 16 *Harvard Human Rights Journal* 69

____ and Howse R, 'Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order' (2009) 41 *New York University Journal of International Law and Politics* 959

Tobin J, 'Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation' (2010) 23 *Harvard Human Rights Journal* 1

Transitional Justice Institute, *The Belfast Guidelines on Amnesty and Accountability* (University of Ulster 2013)

Trumbull CP, 'Giving Amnesties a Second Chance' (2007) 25 *Berkeley Journal of International Law* 283

Tzanakopoulos A, 'Judicial Dialogue as A Means of Interpretation' in Aust HP and Nolte G (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (OUP 2016)

____ and Tams CJ, 'Introduction: Domestic Courts as Agents of Development of International Law' (2013) 26 *Leiden Journal of International Law* 531

UN General Assembly, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (21 March 2006) A/60/509/Add1

____ 'The rule of law and transitional justice in conflict and post-conflict societies' (23 August 2004) Report to the UN Security Council, S/2004/616*

Ulfstein G, 'International Courts and Judges: Independence, Interaction, and Legitimacy' (2014) 46 *New York University Journal of International Law and Politics* 849

Uprimny R, 'Las enseñanzas del análisis comparado: procesos transicionales, formas de justicia transicional y el caso colombiano' in Uprimny R and others (eds), *¿Justicia transicional sin transición?: Verdad, justicia y reparación para Colombia* (Centro de Estudios de Derecho, Justicia y Sociedad 2006)

Vagias M, 'Amnesties, The Gaddafi Admissibility Appeal Decision and the Minsk Agreements' (*Opinio Juris*, 12 March 2020) <http://opiniojuris.org/2020/03/12/amnesties-the-gaddafi-admissibility-appeal-decision-and-the-minsk-agreements/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+opiniojurisfeed+%28Opinio+Juris%29> accessed 19 August 021

Venzke I, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (OUP 2012)

Von Bogdandy A, Fix-Fierro H and Morales M, *Ius constitucionale commune en América Latina: Rasgos, potencialidades y desafíos* (Instituto de Investigaciones Jurídicas, Serie doctrina jurídica 2014)

Von Bogdandy A and Venzke I, 'In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification' (2012) 23 *European Journal of International Law* 7

____ 'On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority' (2012) 10 *Amsterdam Center for International Law Research Paper* 1

Waibel M, 'Interpretive Communities in International Law' in Bianchi A, Peat D and Windsor M (eds), *Interpretation in International Law* (OUP 2015)

____ 'Principles of Treaty Interpretation Developed for and Applied by National Courts?' in Aust HP and Nolte G (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (OUP 2016)

Walby S, 'Complexity theory, systems theory, and multiple intersecting social inequalities' (2007) 37 *Philosophy of Social Science* 449

Waldrop MM, *Complexity: The Emerging Science at the Edge of Order and Chaos* (Touchstone 1992)

Webb J, 'Law, Ethics, and Complexity: Complexity Theory and the Normative Reconstruction of Law' (2005) 52 *Cleveland State Law Review* 227

____ 'When 'Law and Sociology' is not Enough: Transdisciplinarity and the Problem of Complexity' in Freeman M (ed), (OUP 2006)

Webb P, 'Immunities and Human Rights: Dissecting the Dialogue in National and International Courts' in Fauchald OK and Nollkaemper A (eds), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Hart 2012)

Webb TE, 'Exploring System Boundaries' (2013) 24 *Law Critique* 131

____ 'Tracing an Outline of Legal Complexity' (2014) 27 *Ratio Juris* 477

Werle G, *Principles of International Criminal Law* (2nd edn, TMC Asser Press 2009)

Whalen R, 'Legal networks: the promises and challenges of legal network analysis' (2016) *Michigan State Law Review* 539

Wheatley S, 'The Emergence of New States in International Law: The Insights from Complexity Theory' (2016) *Chinese Journal of International Law* 579

____ 'Explaining change in the United Nations system: The curious status of Security Council Resolution 80 (1950)' in Murray J, Webb TE and Wheatley S (eds), *Complexity Theory and Law: Mapping an Emergent Jurisprudence* (Routledge 2018)

____ *The idea of international human rights law* (OUP 2019)

Wilt Hvd, 'State Practice as Element of Customary International Law: A White Knight in International Criminal Law?' (2019) 20 *International Criminal Law Review* 784

Working Group on Enforced or Involuntary Disappearances, *Report of the Working Group on Enforced or Involuntary Disappearances on Civil and Political Rights, including the Question of: Disappearances and Summary Executions* (Sixty-second session, E/CN.4/2006/56, 27 December 2005)

Wyngaert Cvd and Ongena T, 'Ne bis in idem Principle, Including the Issue of Amnesty' in Cassese A, Gaeta P and Jones JRWD (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002)

Zhang Y and Wildemuth BM, 'Qualitative Analysis of Content by' in Wildemuth BM (ed), *Applications of Social Research Methods to Questions in Information and Library Science* (Libraries Unlimited 2009)

APPENDIX 1. LIST OF DECISIONS

Inter-American Commission of Human Rights

Masacre Las Hojas v. El Salvador, IACoHR, Case 10.287, Report 26/92, OEA/Ser./L/V/II.83 (24 September 1992)

Consuelo et al. v. Argentina, IACoHR, Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311, Report 28/92, OEA/Ser.L/V/II.83 (2 October 1992)

Mendoza et. al. v. Uruguay, IACoHR, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375, Report 29/92, OEA/Ser.L/V/II.83 (2 October 1992)

Report on the Situation of Human Rights in El Salvador, IACoHR, OEA/Ser.L/II.85 (11 February 1994)

Garay Hermosilla et al. v. Chile, IACoHR, Case 10.843, Report 36/96, OEA/SerL/V/II/95 (15 October 1996)

Meneses Reyes et al. v. Chile, IACoHR, Cases 11.228, 11.229, 11.231 and 11.182, Report 34/96, OEA/SerL/V/II/95 (15 October 1996)

Alfonso René Chanfeau Orayce et al. v. Chile, IACoHR, Cases 11.505, 11.532, 11.541, 11.546, 11.549, 11.569, 11.572, 11.573, 11.583, 11.585, 11.595, 11.652, 11.657, 11.675, and 11.705, Report 25/98, OEA/SerL/V/II.98 (7 April 1998)

Lucio Parada Cea et al. v. El Salvador, IACoHR, Case 10.480, Report 1/99, OEA/SerL/V/II.102 (27 January 1999)

Monsignor Oscar Arnulfo Romero and Galdámez et al. v. El Salvador, IACoHR, Case 11.481, Report 37/00, OEA/SerL/V/II.106 (13 April 2000)

Samuel Alfonso Catalán Lincoleo v. Chile, IACoHR, Case 11.771, Report 61/01, OEA/Ser/L/V/II.111 (16 April 2001)

Hugo Bustios Saavedra v. Peru, IACoHR, Case No 10.548, Report 38/97, OEA/SerL/V/II.98 (16 October 1997)

Estiles Ruíz Dávila v. Peru, IACoHR, Case No 10.491, Report 41/97, OEA/SerL/V/II.98 (19 February 1998)

Martín Javier Roca Casas v. Peru, IACoHR, Case 11.233, Report 39/97, OEA/SerL/V/II.98 (19 February 1998)

Rodolfo Robles Espinoza and Sons v. Peru, IACoHR, Case 11.317, Report 20/99, OEA/SerL/V/II.95 (23 February 1999)

Manuel Meneses Sotacuro and Félix Inga Cuya v. Peru, IACoHR, Case 10.904, Report 46/00, OEA/SerL/V/II.106 (13 April 2000)

Inter-American Court of Human Rights

Velásquez Rodríguez v. Honduras, IACtHR, Merits, Series C No. 4 (29 July 1988)

Godínez Cruz v. Honduras, IACtHR, Merits, Series C No. 5 (20 January 1989)

Fairén Garbi and Solís Corrales v. Honduras, Merits, Series C No. 6 (15 March 1989)

Castillo Páez v. Peru, IACtHR, Reparations and Costs, Series C No. 43 (27 November 1998)

Loayza Tamayo v. Peru, IACtHR, Reparations and Costs, Series C No. 42 (27 November 1998)

Barrios Altos v. Peru, IACtHR, Merits, Series C No. 75 (14 March 2001)

Barrios Altos v. Peru, IACtHR, Interpretation of the Judgment of the Merits, Series C No. 83 (3 September 2001)

Myrna Mack Chang v. Guatemala, IACtHR, Merits, Reparations and Costs, Series C No. 101 (25 November 2003)

19 Merchants v. Colombia, IACtHR, Merits, Reparations and Costs, Series C No. 109 (5 July 2004)

Moiwana Community v. Suriname, IACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 124 (15 June 2005)

Mapiripan Massacre v. Colombia, IACtHR, Merits, Reparations and Costs, Series C No. 134 (15 September 2005)

Almonacid Arellano et al. v. Chile, IACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 154 (26 September 2006)

La Cantuta v. Peru, IACtHR, Merits, Reparations and Costs, Series C No. 162 (29 November 2006)

The Rochela Massacre v. Colombia, IACtHR, Merits, Reparations and Costs, Series C No. 163 (11 May 2007)

Anzualdo Castro v. Peru, IACtHR, Preliminary Objection, Merits, Reparations and costs, Series C No. 202 (22 September 2009)

Las Dos Erres Massacre v. Guatemala, IACtHR, Preliminary Objection, Merits, Reparations and Costs, Series C No. 211 (24 November 2009)

Cepeda Vargas v. Colombia, IACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 213 (26 May 2010)

Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil, IACtHR, Preliminary Objections, Merits, Reparations, and Costs, Series C No. 219 (24 November 2010)

Gelman v. Uruguay, IACtHR, Merits and Reparations, Series C No. 221 (24 February 2011)

Massacres of El Mozote and surrounding areas v. El Salvador, IACtHR, Merits, Reparations and Costs, Series C No. 252 (25 October 2012)

García Lucero et al. v. Chile, IACtHR, Preliminary Objection, Merits and Reparations, Series C No. 267 (28 August 2013)

Osorio Rivera and family members v. Peru, IACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 274 (26 November 2013)

Rochac Hernández et al. v. El Salvador, IACtHR, Merits, Reparations and Costs, Series C No. 285 (14 October 2014)

Tarazona Arrieta et al. v. Peru, IACtHR, Preliminary Objection, Merits, Reparations and Costs, Series C No. 286 (15 October 2014)

Members of the Village of Chichupac and neighboring communities of the Municipality of Rabinal v. Guatemala, IACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 328 (30 November 2016)

Case of Herzog et al. v. Brazil, IACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 353 (15 March 2018)

Members of the Village of Chichupac and neighboring communities of the Municipality of Rabinal, Molina Theissen case and other 12 cases v. Guatemala, IACtHR, Provisional measures and monitoring (12 March 2019)

Massacres of El Mozote and surrounding areas v. El Salvador, IACtHR, Provisional measures and monitoring (3 September 2019)

African Commission on Human and Peoples' Rights

Malawi African Association and others v. Mauritania, ACoHPR, Communication No. 54/91, 61/91, 98/93, 164/97-196/97, and 210/98, 17th session (11 May 2000)

Zimbabwe Human Rights NGO Forum v. Zimbabwe, ACoHPR, Communication No. 245/2002, 39th Session (25 May 2006)

Mouvement Ivoirien des Droits Humains (MIDH) v. Côte d'Ivoire, ACoHPR, Communication No. 246/2002, 5th extraordinary session (29 July 2008)

General Comment No. 4 on the African Charter on Human and People's Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), ACoHPR, 21st extraordinary session (4 March 2017)

Thomas Kwoyelo v. Uganda, ACoHPR, Communication No. 431/12, 23rd extraordinary session (17 October 2018)

European Commission of Human Rights

Laurence Dujardin and others v. France, ECoHR, Admissibility, Application No. 16734/90 (2 September 1991)

European Court of Human Rights

Abdülsamet Yaman v. Turkey, ECtHR, Judgment, Application No. 32446/96 (2 November 2004)

Okkali v. Turkey, ECtHR, Judgment, Application No. 52067/99 (17 October 2006)

Ali and Ayşe Duran v. Turkey, ECtHR, Judgment, Application No. 42942/02 (8 April 2008)

Lexa v. Slovakia, ECtHR, Judgment, Application No. 54334/00 (23 September 2008)

Erdoğan Yilmaz and others v. Turkey, ECtHR, Judgment, Application No. 19374/03 (14 October 2008)

Ould Dah v. France, ECtHR, Admissibility, Application No. 13113/03 (17 March 2009)

Terzi and Erkmen v. Turkey, ECtHR, Judgment, Application No. 31300/05 (28 July 2009)

Baran and Hun v. Turkey, ECtHR, Judgment, Application No. 30685/05 (20 May 2010)

Serdar Güzel v. Turkey, ECtHR, Judgment, Application No. 39414/06 (15 March 2011)

Enukidze and Girgvliani v. Georgia, ECtHR, Judgment, Application No. 25091/07 (26 April 2011)

Antonio Gutiérrez Dorado and Carmen Dorado Ortiz v. Spain, ECtHR, Admissibility, Application No. 30141/09 (27 March 2012)

Taylan v. Turkey, ECtHR, Judgment, Application No. 32051/09 (3 July 2012)

Marguš v. Croatia, ECtHR, Judgment, Application No. 4455/10 (13 November 2012)

Tarbuk v. Croatia, ECtHR, Judgment, Application No. 31360/10 (11 December 2012)

Böber v. Turkey, ECtHR, Judgment, Application No. 62590/09 (9 April 2013)

Marguš v. Croatia, ECtHR, Judgment by Grand Chamber, Application 4455/10 (27 May 2014)

Yerli v. Turkey, ECtHR, Judgment, Application No. 59177/10 (8 July 2014)

Mocanu and others v. Romania, ECtHR, Judgment, Applications No. 10865/09, 45886/07 and 42431/08 (17 September 2014)

Ateşoğlu v. Turkey, ECtHR, Judgment, Application No. 53645/10 (20 January 2015)

Z and others v. Croatia, ECtHR, Admissibility, Application No. 57812/13 (21 April 2015)

Makuchyan and Minasyan v. Azerbaijan and Hungary, ECtHR, Judgment, Application No. 17247/13 (26 May 2020)

United Nations Human Rights Committee

General Comment No. 20 [44]: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), UNHRC, HRI/GEN/1/Rev.1 (10 March 1992)

Thomas v. Jamaica, UNHRC, Communication No. 321/1988, Doc. CCPR/C/49/D/321/1988 (3 November 1993).

Hugo Rodríguez v. Uruguay, UNHRC, Communication No. 322/1988, CCPR/C/51/D/322/1988 (19 July 1994)

Consideration of Reports Submitted by State Parties under Article 40 of the Covenant: Argentina, UNHRC, CCPR/C/79/Add.46 (5 April 1995)

Basilio Laureano Atachahua v. Peru, UNHRC, Communication No. 540/1993, CCPR/C/56/D/540/1993 (16 April 1996)

Consideration of Reports Submitted by State Parties under Article 40 of the Covenant: Peru, UNHRC, CCPR/C/79/Add.67 (25 July 1996)

Consideration of Reports Submitted by State Parties under Article 40 of the Covenant: Uruguay, UNHRC, CCPR/C/79/Add.90 (6 April 1998)

Consideration of Reports Submitted by State Parties under Article 40 of the Covenant: Chile, UNHRC, CCPR/C/79/Add.104 (30 March 1999)

Menanteau and Carrasco v. Chile, UNHRC, Communication No. 746/1997, CCPR/C/66/D/746/1997 (26 July 1999)

Acuña Inostroza et al. v. Chile, UNHRC, Communication No. 717/1996, CCPR/C/66/D/717/1996 (16 September 1999)

María Otilia Vargas Vargas v. Chile, UNHRC, Communication No. 718/1996, CCPR/C/66/D/718/1996/Rev.1 (24 September 1999).

Consideration of Reports Submitted by State Parties under Article 40 of the Covenant: Croatia, UNHRC, CCPR/CO/71/HRV (30 April 2001)

Consideration of Reports Submitted by State Parties under Article 40 of the Covenant: El Salvador, UNHRC, CCPR/CO/78/SLV (22 August 2003)

General comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UNHRC, 80th session, CCPR/C/21/Rev.1/Add.13 (29 March 2004)

Consideration of Reports Submitted by State Parties under Article 40 of the Covenant: Chile, UNHRC, CCPR/C/CHL/CO/5 (18 May 2007)

Consideration of Reports Submitted by State Parties under Article 40 of the Covenant: Sudan, UNHRC, CCPR/C/SDN/CO/3 (29 August 2007)

Consideration of Reports Submitted by State Parties under Article 40 of the Covenant: Algeria, UNHRC, CCPR/C/DZA/CO/3 (12 December 2007)

Consideration of Reports Submitted by State Parties under Article 40 of the Covenant: Spain, UNHRC, CCPR/C/ESP/CO/5 (5 January 2009)

Consideration of Reports Submitted by State Parties under Article 40 of the Covenant: Croatia, UNHRC, CCPR/C/HRV/CO/2 (4 November 2009)

Consideration of Reports Submitted by State Parties under Article 40 of the Covenant: Colombia, UNHRC, CCPR/C/COL/CO/6 (4 August 2010)

Consideration of Reports Submitted by State Parties under Article 40 of the Covenant: El Salvador, UNHRC, CCPR/C/SLV/CO/6 (18 November 2010)

Consideration of Reports Submitted by State Parties under Article 40 of the Covenant: Yemen, UNHRC, CCPR/C/YEM/CO/5 (23 April 2012)

Concluding observations on the second periodic report of Nepal, UNHRC, CCPR/C/NPL/CO/2 (15 April 2014)

Concluding observations on the initial report of Sierra Leone, UNHRC, CCPR/C/SLE/CO/1 (17 April 2014)

Concluding observations on the sixth periodic report of Chile, UNHRC, CCPR/C/CHL/CO/6 (13 August 2014)

Concluding observations on the initial report of South Africa, UNHRC, CCPR/C/ZAF/CO/1 (27 April 2016)

United Nations Committee against Torture

OR, MM and MS v. Argentina, UNCAT, Communication No. 1/1988, 2/1988 and 3/1988, CAT/C/WG/3/DR/1, 2 and 3/1988 (23 November 1989)

Consideration of Reports Submitted by State Parties under Article 19 of the Convention: Chile, UNCAT, CAT/C/CR/32/5 (14 June 2004)

Consideration of Reports Submitted by State Parties under Article 19 of the Convention: South Africa, UNCAT, CAT/C/ZAF/CO/1 (7 December 2006)

Consideration of Reports Submitted by State Parties under Article 19 of the Convention: Chile - Addendum, UNCAT, CAT/C/CHL/5 (21 August 2007)

Consideration of Reports Submitted by State Parties under Article 19 of the Convention: Benin, UNCAT, CAT/C/BEN/CO/2 (19 February 2008)

Consideration of Reports Submitted by State Parties under Article 19 of the Convention: The Former Yugoslav Republic of Macedonia, UNCAT, CAT/C/MKD/CO/2 (21 May 2008)

Consideration of Reports Submitted by State Parties under Article 19 of the Convention: Algeria, UNCAT, CAT/C/DZA/CO/3 (26 May 2008)

Consideration of Reports Submitted by State Parties under Article 19 of the Convention: Indonesia, UNCAT, CAT/C/IDN/CO/2 (2 July 2008)

General Comment No. 2: Implementation of Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by State parties, UNCAT, CAT/C/GC/2 (24 January 2008)

Consideration of Reports Submitted by State Parties under Article 19 of the Convention: Chile, UNCAT, CAT/C/CHL/CO/5 (23 June 2009)

Consideration of Reports Submitted by State Parties under Article 19 of the Convention: Spain, UNCAT, CAT/C/ESP/CO/5 (9 December 2009)

Consideration of Reports Submitted by State Parties under Article 19 of the Convention: El Salvador, UNCAT, CAT/C/SLV/CO/2 (9 December 2009)

Consideration of Reports Submitted by State Parties under Article 19 of the Convention: Colombia, UNCAT, CAT/C/COL/CO/4 (4 May 2010)

General Comment No. 3: Implementation of Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by State parties, UNCAT, CAT/C/GC/3 (19 November 2012)

Concluding observations on the third periodic report of Senegal, UNCAT, CAT/C/SEN/CO/3 (17 January 2013)

Concluding observations on the third periodic report of Uruguay, UNCAT, CAT/C/URY/CO/3 (10 June 2014)

Concluding observations on the initial report of Sierra Leone, UNCAT, CAT/C/SLE/CO/1 (20 June 2014)

Concluding observations on the fifth periodic report of Colombia, UNCAT, CAT/C/COL/CO/5 (29 May 2015)

United Nations Committee on the Elimination of Discrimination against Women

General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, UNCEDAW, CEDAW/C/GC/30 (1 November 2013)

Concluding observations on the eighth periodic report of Ukraine, UNCEDAW, CEDAW/C/UKR/CO/8 (9 March 2017)

United Nations Security Council

Resolution 1120 about the Situation in Croatia, UNSC, S/RES/1120 (14 July 1997)

Resolution 1325 on women, peace, and security, UNSC, S/RES/1325 (31 October 2000)

Resolution 1674 on protection of civilians in armed conflict, UNSC, S/RES/1674 (28 April 2006)

Resolution 1820 on sexual violence during wars, UNSC, S/RES/1820 (19 June 2008)

Resolution 1314 on protection of children in situations of armed conflicts, UNSC, S/RES/1314 (11 August 2000)

International Criminal Court

Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, ICC, Situation in Uganda, Decision on the admissibility of the case under article 19(1) of the Statute, ICC-02/04-01/05 (10 March 2009)

Prosecutor v. Dominic Ongwen, ICC, Situation in Uganda, Trial judgment, ICC-02/04-01/15 (4 February 2021)

Situation in the Islamic Republic of Afghanistan, Office of the Prosecute of the ICC, Public redacted version of 'Request for authorisation of an investigation pursuant to article 15', ICC-02/17 (20 November 2017)

Situation in Colombia, Office of the Prosecute of the ICC, Situations under phase 3: admissibility (5 December 2017)

Prosecutor v. Saif Al-Islam Gaddafi, ICC, Situation in Libya, Decision on the 'admissibility challenge by Dr. Saif Al-Islam Gaddafi pursuant to articles 17(1)(c) and 20(3) of the Rome Statute', ICC-01/11-01/11 (5 April 2019)

Prosecutor v. Saif Al-Islam Gaddafi, ICC Appeals Chamber, Situation in Libya, Judgment on the appeal of Mr Saif Al-Islam Gaddafi against the decision of the Pre-Trial Chamber I entitled 'Decision on the admissibility challenge by Dr. Saif Al-Islam Gaddafi pursuant to articles 17(1)(c) and 20(3) of the Rome Statute', ICC-01/11-01/11 (9 March 2020)

Permanent Court of International Justice

Case of the S.S. 'Lotus', PCIJ, Judgment No. 9 (7 September 1927).

International Court of Justice

Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain), ICJ, Preliminary objections, Second Phase (5 February 1970).

LaGrand case (Germany v. United States of America), ICJ, Merits (27 June 2001).

Accordance with international law of the unilateral declaration of independence in respect of Kosovo, ICJ, Advisory Opinion, Declaration of Judge Simma (22 July 2010).

Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia) [2016] International Court of Justice, Preliminary Objections (17 March 2016).

The Gambia v. Myanmar, ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Request for the Indication of Provisional Measures, General List No. 178 (23 January 2020).

International Criminal Tribunal for the former Yugoslavia

Prosecutor v. Anto Furundžija, ICTY, Case No. IT-95-17/1-T (10 December 1998)

Prosecutor v. Zoran Kupreškić, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic, Vladimir Santic, also known as 'Vlado', ICTY, Case No. IT-95-16-T (14 January 2000)

Prosecutor v. Ljube Boškoski and Johan Tarčulovski, ICTY, Case No. IT-04-82-T (10 July 2008)

Prosecutor v. Radovan Karadžić, ICTY, Case No. IT-95-5/18-PT (8 July 2009)

Prosecutor v. Ljube Boškoski and Johan Tarčulovski, ICTY, Appeals Chamber, Case No. IT-04-82-A (19 May 2010)

Special Court for Sierra Leone

Prosecutor v. Morris Kallon and Brima Bazzy Kamara, SCSL, Decision on challenge to jurisdiction: Lomé Accord Amnesty, Cases No. SCSL-2004-15-AR72 and SCSL-2004-16-AR72 (13 March 2004)

Prosecutor v. Augustine Gbao, SCSL, Decision on preliminary motion on the invalidity of the agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court, Case No. SCSL-2004-15-AR72 (25 May 2004)

Prosecutor v. Allieu Kondewa, SCSL, Decision on lack of jurisdiction / abuse of process: amnesty provided by the Lomé Agreement, Case No. SCSL-2004-14-AR72 (25 May 2004)

Prosecutor v. Allieu Kondewa, SCSL, Separate opinion by Justice Geoffrey Robertson, Case No. SCSL-2004-14-AR72 (25 May 2004)

Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao, SCSL, Judgment, Case No. SCSL-04-15-T (2 March 2009)

Extraordinary Chambers in the Courts of Cambodia

Prosecutor v. Ieng Sary, ECCC, Decision on appeal against provisional detention order of Ieng Sary, 002/19-09-2007-ECCC/OCIJ(PTC03) (17 October 2008)

Prosecutor v. Ieng Sary, ECCC, Decision on Ieng Sary's appeal against the closing order, 002/19-09-2007-ECCC/OCIJ(PTC75) (11 April 2011)

Prosecutor v. Ieng Sary, ECCC, Decision on Ieng Sary's Rule 89 preliminary objections (ne bis in idem and amnesty and pardon), 002/19-09-2007/ECCC/TC (3 November 2011)

Special Tribunal for Lebanon

Prosecutor v. Jamil El Sayed, STL, Order assigning matter to pre-trial judge, Case No. CH/PRES/2010/01 (15 April 2010)

Prosecutor v. Salim Jamil Ayyash and others, STL, Decision on the defence challenges to the jurisdiction and legality of the tribunal, Case No. STL-11-01/PT/TC (27 July 2012)

Domestic courts in Argentina

Caso contra Jorge Rafael Videla y otros, Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal de Buenos Aires, Argentina, Causa No. 13-84 (9 December 1985)

Caso contra Julio Héctor Simón y Juan Antonio del Cerro (caso Poblete), Juzgado Nacional en lo Criminal y Correccional Federal No. 4 de Argentina, Juez Gabriel Cavallo, Causa No. 8686/2000 (5 March 2001)

Caso contra Jorge Rafael Videla, Corte Suprema de Justicia de la Nación de Argentina, Incidente de excepción de cosa juzgada y falta de jurisdicción, V. 34. XXXVI (21 August 2003)

Caso contra Alfredo Ignacio Astiz, Corte Suprema de Justicia de la Nación de Argentina, extradición, A. 1553. XXXIX (11 December 2003)

Caso contra Guillermo Suárez Mason y otros, Juzgado en lo Criminal y Correccional Federal No. 3 de Buenos Aires, Argentina, Causa No. 14,216/2003 (16 December 2003)

Caso contra Enrique Lautaro Arancibia Clavel, Corte Suprema de Justicia de la Nación de Argentina, Recurso de hecho, A. 533. XXXVIII, Causa No. 259, Fallo 327:3312 (24 August 2004)

Caso contra Julio Héctor Simón y otros (caso Poblete), Corte Suprema de Justicia de la Nación de Argentina, Recurso de hecho, S. 1767. XXXVIII, Causa No. 17.768, Fallo 328:2056 (14 June 2005)

Caso contra Jorge Rafael Videla y otros, Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal de Argentina, Incidente de inconstitucionalidad de los indultos dictados por el decreto 2741/90 del Poder Ejecutivo Nacional (25 April 2007)

Caso contra Santiago Omar Riveros (Caso Julio Lilo Mazzeo y otros), Corte Suprema de Justicia de la Nación, Casación e inconstitucionalidad, M. 2333. XLII, Fallo 330:3248 (13 July 2007).

Caso contra Rubén Oscar Franco y otros (caso 'Plan Sistemático'), Tribunal Oral en lo Criminal Federal No. 6 de Buenos Aires, Causa No. 1351 (17 September 2012)

Caso contra Luciano Benjamín Menéndez y otros (Caso Las Palomitas - Cabeza de Buey), Corte Suprema de Justicia de la Nación, M. 1232 XLIV, Fallo 335:1876 (26 September 2012)

Caso contra Jorge Rafael Videla y otros (Caso de la Operación Cóndor), Tribunal Oral en lo Criminal Federal No. 1 de Buenos Aires, CFP 13445/1999/TO1, Causas No. 1.504, 1.951, 2.054, 1.976 (9 August 2016)

Caso contra Rufino Batalla (Carlos Hidalgo Garzón), Corte Suprema de Justicia de la Nación, FLP 91003389/2012/TO1/93/1/RH11 (4 December 2018)

Caso contra Marcos Leví y otros, Corte Suprema de Justicia de la Nación, CSJ 1874/2015/RH1 (18 September 2018)

Caso contra Juan Antonio Zaccaría y otros, Corte Suprema de Justicia de la Nación, CSJ 3747/2014/RH1 (18 December 2018)

Domestic courts in Belarus

Decision No. D-104/2000, Constitutional Court (17 November 2000)

Decision No. D-135/2002, Constitutional Court (11 January 2002)

Decision No. D-186/2005, Constitutional Court (24 June 2005)

Domestic courts in Brazil

Arguição de Descumprimento de Preceito Fundamental 153 (Lei Anistia), Supremo Tribunal Federal, ADPF 153 (28 April 2010)

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

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

Domestic courts in Canada

R. v. Imre Finta, Supreme Court, 1 SCR 701 (24 March 1994)

Carrasco Varela v. Canada (Minister of Citizenship and Immigration), Federal Court, 2008 FC 436 (8 April 2008)

Domestic courts in Chile

Caso contra Manuel Contreras, Corte Suprema de Chile, Recurso de inaplicabilidad de amnistía, Rol No. 553-78 (24 August 1990)

Caso contra Osvaldo Romo Mena, Corte de Apelaciones de Santiago de Chile, Rol No. 13.597-94 (26 September 1994)

Caso contra Osvaldo Romo Mena, Corte de Apelaciones de Santiago de Chile, Rol No. 38.683-94 (30 September 1994)

Caso contra Osvaldo Romo Mena, Corte Suprema de Chile, Rol No. 5.566 (26 October 1995)

Caso contra Osvaldo Romo Mena, Corte Suprema de Chile, Rol No. 5.476-94 (30 January 1996)

Caso por la desaparición de Pedro Poblete Córdova por miembros de la Dirección de Inteligencia Nacional (DINA), Corte Suprema, Rol No 469-98 (9 September 1998)

Caso contra Augusto Pinochet Ugarte, Corte Suprema, Decisión de desafuero, Rol. 2.182-98 (8 August 2000)

Constitucionalidad del Estatuto de Roma, Tribunal Constitucional, Rol No. 346 (8 April 2002)

Caso contra miembros de la Dirección Nacional de Inteligencia (DINA), Corte Suprema, Recurso de Casación, Rol No. 1379/2001, Resolución No. 10070 (10 July 2002)

Caso por cuerpos encontrados en el Fuerte Arteaga del Ejército, Corte Suprema, Recurso de casación, Rol No. 1359/2001, Resolución No. 13080 (26 August 2002)

Caso contra miembros de la Patrulla de Carabineros, Corte Suprema, Recurso de casación, Rol No. 4054/2001, Resolución No. 2222 (31 January 2003)

Caso contra miembros de la Dirección Nacional de Inteligencia (DINA), Corte Suprema, Recurso de casación, Rol No. 2231/2001, Resolución No. 14628 (28 August 2003)

Caso contra Fernando Laureani Maturana y Krassnoff Marchenko (desaparición de Miguel Ángel Sandoval en Villa Crimaldi), Corte de Apelaciones de Santiago, Rol No. 11821-2003 (5 January 2004)

Caso contra Juan Manuel Contreras Sepúlveda y otros (desaparición de Diana Frida Arón Svigilsky en Villa Crimaldi), Corte de Apelaciones de Santiago, Rol No. 2.182-98 (14 May 2004)

Caso contra Fernando Laureani Maturana y Krassnoff Marchenko (desaparición de Miguel Ángel Sandoval en Villa Crimaldi), Corte Suprema, Rol No. 517-2004 (17 November 2004)

Caso contra Claudio Abdón Lecaros Carrasco y otros - Episodio San Javier, Juzgado de primera instancia, Rol No. 2182-1998 (14 January 2005)

Caso contra miembros de la Dirección Nacional de Inteligencia (DINA), Corte Suprema, Recurso de casación, Rol No. 695/2003, Resolución No. 27857 (22 December 2005)

Caso contra Claudio Abdón Lecaros Carrasco y otros - Episodio San Javier, Corte de Apelaciones de Santiago, Rol 2.182-98 (15 May 2006)

Caso contra Juan Manuel Contreras Sepúlveda y otros (desaparición de Diana Frida Arón Svigilsky en Villa Crimaldi), Corte Suprema, Rol No. 3215/2005 (30 May 2006)

Caso contra Paulino Flores Rivas y otros (Caso Molco), Corte Suprema, Rol No. 559-2004 (13 December 2006).

Caso contra Víctor Raúl Pinto Pérez, Corte Suprema, Rol No. 3125-04 (March 13, 2007)

Caso contra Claudio Abdón Lecaros Carrasco y otros - Episodio San Javier, Corte Suprema, Rol 2.182-98 (27 July 2007)

Caso contra miembros de la Dirección Nacional de Inteligencia (DINA), Corte Suprema, Recurso de casación, Rol 1813/2014, Resolución No. 205597 (2 September 2014)

Caso contra Cesar Manriquez Bravo y otros (Operación Colombo), Corte de Apelaciones de Santiago, Rol No. 2182-98 (30 May 2017)

Caso contra Orlando Astete Sánchez, Corte de Apelaciones de Valparaiso, Rol No. 345-2017 (3 July 2018)

Caso contra Orlando Astete Sánchez, Corte Suprema, Rol No. 18650-2018 (23 March 2020)

Domestic courts in Colombia

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

Constitucionalidad del artículo 127 del Decreto 100 de 1980 – Código Penal, Corte Constitucional de Colombia, C-456/97 (23 September 1997)

Constitucionalidad del Estatuto de Roma, Corte Constitucional de Colombia, C-578/02 (30 July 2002)

Constitucionalidad del artículo 13 de la Ley 733/02, Corte Constitucional de Colombia, C-695/02 (28 August 2002)

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

Constitucionalidad de la Ley de Justicia y Paz (Ley 975/05), Corte Constitucional de Colombia, C-575/06 (25 July 2006)

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

Constitucionalidad de la Ley 1424/10 - Justicia y Paz, Corte Constitucional de Colombia, C-771/11 (13 October 2011)

Constitucionalidad Acto Legislativo 01 de 2012 Marco Jurídico para la Paz, Corte Constitucional de Colombia, C-579/13 (28 August 2013)

Constitucionalidad Acto Legislativo 01 de 2012 Marco Jurídico para la Paz, Corte Constitucional de Colombia, C-577/14 (6 August 2014)

Constitucionalidad de la Ley 1820 de Amnistía, Corte Constitucional de Colombia, C-007/18 (1 March 2018)

Constitucionalidad del Decreto-Ley 277/17 que implementa Ley de Amnistía, Corte Constitucional de Colombia, C-025/18 (11 April 2018)

Constitucionalidad del Proyecto de Ley Estatutaria de la Jurisdicción Especial para la Paz, Corte Constitucional de Colombia, C-080/18 (15 August 2018)

Acción de tutela interpuesta por Jhon Jairo Mayorga Suárez, Corte Constitucional de Colombia, T-365/18 (4 September 2018)

Caso contra José Amilcar Rivas Palma, Corte Suprema de Justicia de Colombia – Sala Penal, Rad. No. 48.154 (17 September 2019)

Domestic courts in Croatia

Case No. U-III-791-1997, Constitutional Court, Case against Antun Gudelj, CRO-2001-1-003 (14 March 2001)

Case No. U-III-543/1999, Constitutional Court, Case against G.P. from D. (26 November 2008)

Domestic courts in the Czech Republic

Case No. Pl.US 4/13, Constitutional Court, CZE-2013-1-002 (5 March 2013)

Case No. Pl.US 36/17, Constitutional Court, CZE-2018-2-005 (19 June 2018)

Domestic courts in El Salvador

Revisión de constitucionalidad Ley de Amnistía General para la Consolidación de la Paz, Corte Suprema de Justicia de El Salvador – Sala de lo Constitucional, No. 10-93 (20 May 1993)

Caso contra Santos Guevara Portillo, Severiano Fuentes Fuentes y Ferman Hernández Arévalo, Corte Suprema de Justicia de El Salvador – Sala de lo Penal, CPS02495.95 (16 August 1995)

Revisión de constitucionalidad Ley de Amnistía General para la Consolidación de la Paz, Corte Suprema de Justicia de El Salvador– Sala de lo Constitucional, No. 24-97/21-98 (26 September 2000)

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

Decisión de extradición de Guillermo Alfredo Benavides Moreno, Corte Suprema de Justicia, 23-S-2016 (16 August 2016)

Domestic courts in France

Wladyslaw Sobanski v. George Boudarel, Cour de Cassation, Chamber Criminelle, No. 98-85.902 (7 September 1999)

Ely X v. Cour d'appel de Nîmes, Cour de Cassation, Chamber Criminelle, No. 02-85.379 (23 October 2002)

Domestic courts in Guatemala

Recurso de amparo Sergio Manfredo Beltetón de León, Corte de Constitucionalidad de Guatemala, Expediente No. 1505-96 (16 July 1997)

Revisión de constitucionalidad de la Ley de Reconciliación Nacional, Corte de Constitucionalidad de Guatemala, Expedientes Acumulados No. 8-97 y 20-97 (7 October 1997)

Recurso de amparo Reyes Collin Gualip y otros (caso de la Masacre de las Dos Erres), Corte de Constitucionalidad de Guatemala, Expedientes Acumulados No. 655-2010 y 656-2010 (18 January 2011)

Caso contra José Efraín Ríos Montt, Corte de Apelaciones del Ramo Penal de Guatemala, Narcoactividad y Delitos contra el Ambiente, Recurso de Apelación, No. 01076-2011-00015 (15 June 2012)

Recurso de amparo Héctor Mario López Fuentes, Corte de Constitucionalidad de Guatemala, Expediente No. 1933-2012 (13 August 2013)

Recurso de amparo José Efraín Ríos Montt, Corte de Constitucionalidad de Guatemala, Expedientes Acumulados No. 1523-2013 y 1543-2013 (22 October 2013)

Recurso de amparo José Efraín Ríos Montt, Corte de Constitucionalidad de Guatemala, Expedientes No. 3340-2013 (18 December 2014)

Constitucionalidad de la Iniciativa de ley 5377 que reforma Decreto 145-96 - Ley de Reconciliación Nacional, Corte de Constitucionalidad de Guatemala, Expedientes acumulados No. 682-2019 y 1214-2019 (9 February 2021)

Domestic courts in Honduras

Demanda de inconstitucionalidad de los decretos 199/1987 and 87/1991 que concede amnistía, Corte Suprema de Justicia de Honduras, No. 20-99 (27 June 2000)

Domestic courts in Indonesia

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

Domestic courts in Kosovo

Case No. KO 61/12, Constitutional Court of Kosovo, Confirmation of proposed constitutional amendments submitted by the President of the Assembly of the Republic of Kosovo, AGJ303/12 (31 October 2012)

Case No. KO 108/13, Constitutional Court of Kosovo, Constitutional review of the Law, No. 04/L-209, on Amnesty, AGJ471/13 (9 September 2013)

Domestic courts in Moldova

Constitutionality of article 5 of Law no. 188 of July 10, 2008 on amnesty in connection with the declaration of 2008 Year of Youth, Constitutional Court, Decision No. 10 (8 April 2019)

Domestic courts in Montenegro

Constitutionality of the Law on Amnesty of Persons Sentenced for Criminal Offences Prescribed by the Law of Montenegro (Official Gazette No. 39/13), Constitutional Court, Case No. U-I No. 13/13, 17/13 and 19/13, MNE-2015-2-002 (24 July 2015)

Domestic courts in Nepal

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

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

Domestic courts in the Netherlands

Case against the former officer of the Afghan Military Intelligence Service Khad-e-Nezami, District Court in the Hague, Criminal Law Section, 09/750001-06 (25 June 2007)

Public Prosecutor v. Guus Kouwenhoven, Court of Appeal in 's-Hertogenbosch, 09/750001-05 (21 April 2017)

Domestic courts in North Macedonia

Case No. U.no.169/2002, Constitutional Court, Constitutionality of the Law on Amnesty, Official Gazette No. 70/1992 (19 February 2003)

Case No. U.no.155/2007, Constitutional Court, Constitutionality of Article 1of the Law on Amnesty, Official Gazette No. 70/1992 (19 December 2007)

Case No. U.no.158/2011, Constitutional Court, Constitutionality of Article 1of the Law on Amnesty, Official Gazette No. 18/2002 (31 October 2012)

Case U.no.19/2016, Constitutional Court, Constitutionality of the Law on Changing and Supplementing the Law on pardon, Official Gazette 12/2009 (16 March 2016)

Case U.no.11/2018, Constitutional Court, Constitutionality of the Law on Amnesty, Official Gazette 11/2018 (9 July 2018)

Case U.no.100/2019, Constitutional Court, Constitutionality of articles 1 and 2 of the Law on Amnesty, Official Gazette 233/2018 (4 December 2019).

Domestic courts in Peru

Caso contra Santiago Martín Rivas y otros, Juzgado Penal No. 16 de Lima – Peru, Juez Antonia Saquicuray Sánchez (16 June 1995)

Demanda de inconstitucionalidad Ley No. 26479 y Ley No. 26492, Tribunal Constitucional de Peru, Exp. No. 013-96-I/TC (28 April 1997)

Recurso de habeas corpus por desaparición Genaro Villegas Namuche, Tribunal Constitucional de Peru, Exp. No. 2488-2002-HC/TC (18 March 2004)

Recurso de Habeas Corpus en procesos con Reos Libres, Tribunal Constitucional, Exp. No. 0275-2005-PHC/TC (9 February 2005)

Recurso de Amparo por Santiago Enrique Martín Rivas – Caso Barrios Altos, Tribunal Constitucional, Exp. No. 4587-2004-AA/TC (29 November 2005).

Recurso de Amparo por Santiago Enrique Martin Rivas – Caso La Cantuta, Tribunal Constitucional, Exp. No. 679-2005-PA/TC (2 March 2007)

Recurso de Amparo por Julio Rolando Salazar Monroe – Caso Barrios Altos, Tribunal Constitucional, Exp. No. 03938-2007-PA/TC (5 November 2007)

Caso contra Wilmer Yarlequé Ordinola y Alberto Segundo Pinto Cárdenas (Masacres de La Cantuta y Barrios Altos), Corte Superior de Justicia de Lima – Primera Sala Penal especial, Exp. No. 09-2008-1SPE/CSJL (3 July 2008)

Causa contra Alberto Fujimori, Corte Suprema de Justicia – Sala Penal Especial, Sentencia de primera instancia, Exp. No. A.V. 19-2001 (7 April 2009)

Causa contra Alberto Fujimori, Corte Suprema de Justicia de la República – Sala Penal Transitoria, Recurso de nulidad, Exp. No. A.V. 19-2001-09 (7 April 2009)

Recurso de Amparo por Roberto Contreras Matamoros, Tribunal Constitucional, Exp. No. 00218-2009-PHC/TC (11 November 2010).

Caso contra Vladimiro Montesinos y otros – Grupo Colina, Corte Suprema de Justicia – Sala Penal Permanente, Exp. No. 4104-2010 (20 July 2012)

Caso contra Vladimiro Montesinos y otros – Grupo Colina, Corte Suprema de Justicia – Sala Penal Permanente, Exp. No. 4104-2010 (20 March 2013)

Control de convencionalidad al indulto concedido a Alberto Fujimori, Corte Suprema de Justicia - Juzgado Supremo de Investigación Preparatoria Control de Convencionalidad, Exp. No. 00006-2001-4-5001-SU-PE-01 (3 October 2018)

Domestic courts in Poland

Constitutionality of article 9 of the Penal Code, Constitutional Tribunal, Case No. P.2 / 99 (6 July 1999)

Domestic courts in Portugal

Case No. 444/97, Constitutional Court, Proc. No. 784/96 (25 June 1997)

Case No. 510/98, Constitutional Court, Proc. No. 299/96 (14 July 1998)

Domestic courts in Romania

Constitutionality of the provisions of article 8 of the Law No. 543/2002 relating to the pardon of certain penalties and the lifting of certain measures and sanctions, Constitutional Court, Decision No. 86 (27 February 2003)

Domestic courts in Russia

Constitutionality of the Decision of the State Duma of June 28, 2000, Constitutional Court, N 11-P (5 July 2001)

Domestic courts in Slovakia

Case No. ÚS 8/97, Constitutional Court, SVK-1998-2-006 (24 June 1998)

Case No. I. ÚS 30/99, Constitutional Court (28 June 1999)

Case No. II. ÚS 69/99, Constitutional Court, SVK-1999-2-006 (15 July 1999)

Case No. ÚS 07/2017, Constitutional Court, SVK-2017-2-002 (31 May 2017)

Domestic courts in South Africa

The Azanian People's Organization (AZAPO) and others v. The President of South Africa and others, Constitutional Court of South Africa, Case CCT 17/96 (25 July 1996)

Darryl Garth Stopforth v. The Minister of Justice and others, Supreme Court of Appeal of South Africa, Case No. 317/97 (27 September 1999)

The State v. Basson, Constitutional Court of South Africa, Case No. CCT 30/03 (9 September 2005)

Wybrand Andreas Lodewicus Du Toit v. Minister for Safety and Security and others, Constitutional Court of South Africa, Case No. CCT91/08 [2009] ZACC 22 (18 August 2009)

Ryan Albutt v. Centre for the Study of Violence and Reconciliation, and others, Constitutional Court, Case No. CCT 54/09 [2010] ZACC 4 (23 February 2010)

The Citizen 1978 (PTY) LTD and others v. Robert John McBride and others, Constitutional Court of South Africa, Case No. CCT 23/10 [2011] ZACC 11 (8 April 2011)

Domestic courts in Spain

Caso contra Francisco Franco Bahamonde y otros, Audiencia Nacional Española, Juzgado No. 5, Auto de competencia, Proceso abreviado 399/2006 (16 October 2008).

Caso contra Francisco Franco Bahamonde y otros, Audiencia Nacional Española, Juzgado No. 5, Juzgamiento, Proceso ordinario 53/2008 E (18 November 2008).

Caso contra Baltasar Garzón Real, Tribunal Supremo de España – Sala de lo Penal, Sentencia No. 101/2012, Causa Especial No. 20048/2009 (27 February 2012).

Caso contra Leopoldo Fortunato Galtieri, Audiencia Nacional Española, Juzgado No. 5, Auto con Orden de prisión provisional incondicional (25 March 1997).

Caso contra Adolfo Scilingo, Audiencia Nacional Española, Sala de lo Penal – Pleno, Auto de competencia, Rollo de apelación 84/98, Sumario 19/97 (4 November 1998).

Caso contra 98 Militares Argentinos, Audiencia Nacional Española, Juzgado No. 5, Sumario 19/97-L (2 November 1999).

Caso contra Miguel Ángel Cavallo, Audiencia Nacional Española, Juzgado No. 5, Auto de procesamiento, Sumario 19/97-L (1 September 2000).

Caso contra Miguel Ángel Cavallo, Audiencia Nacional Española, Juzgado No. 5, Auto de solicitud de extradición, Sumario 19/97-L (12 September 2000).

Caso contra Augusto Pinochet, Audiencia Nacional Española, Sala de lo Penal – Pleno, Auto de competencia, Rollo de apelación 173/98, Sumario 1/98 (5 November 1998).

Decisión de jurisdicción para investigar crímenes cometidos en Guatemala, Tribunal Supremo de España, Sentencia No. 327/2003, Recurso de casación No. 803/2001 (25 February 2003).

Recurso de Amparo promovido por Rigoberta Menchú Tumn y otros, Tribunal Constitucional de España, STC 237/2005 (26 September 2005).

Domestic courts in Uganda

John Ogil v. Attorney General, High Court of Uganda at Gulu, HCT-02-CV-CS-0094 (30 April 2009)

Thomas Kwoyelo alias Latoni v. Uganda, Constitutional Court of Uganda, Constitutional Petition No. 36/11, HCT-00-ICD-Case No. 02/10 (22 September 2011)

Jacqueline Kasha Nabagesera and others v. Attorney General, High Court of Uganda at Kampala, MISC. CAUSE No. O33 of 2012 (24 June 2014)

Uganda v. Thomas Kwoyelo, Supreme Court of Uganda at Kampala, Constitutional Appeal No. 1 of 2012 (8 April 2015)

Domestic courts in the United Kingdom

R v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet, [1998] UKHL 41; [2000] 1 AC 61; [1998] 4 All ER 897; [1998] 3 WLR 1456 (25 November 1998)

Pinochet, Re [1999] UKHL 52 (15 January 1999)

R v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet, [1999] UKHL 17 (24 March 1999)

The Queen (on the application of Marina Schofield) v. Secretary of State for the Home Department, [2021] EWHC 902 (16 April 2021)

Domestic courts in Uruguay

Caso por la desaparición de Elena Quinteros, Tribunal de Apelaciones en lo Civil de Sexto Turno, Acción de amparo, Ficha No. 91/2000, Sentencia No. 98 (31 May 2000)

Caso contra Juan Carlos Blanco Estradé, Juzgado Letrado de Primera Instancia en lo Penal de Primer Turno, Juez Eduardo Cavalli, Sentencia interlocutoria No. 991 (18 October 2002)

Caso contra Juan Carlos Blanco Estradé, Tribunal de Apelaciones en lo Penal de Tercer Turno, LJU Caso 14639, Resolución No. 165 (31 March 2003)

Caso contra José Nino Gavazzo Pereira y Jose Ricardo Arab Fernández, Juzgado Penal 19 de Turno, Sentencia No. 036, Ficha 98-247/2006 (26 March 2009)

Sabalsagaray Curutchet, Blanca Stela – Excepción de inconstitucionalidad Ley 15.848, Suprema Corte de Justicia, Sentencia No. 365 (19 October 2009)

Caso contra Juan Carlos Blanco Estradé, Juzgado Letrado de Primera Instancia en lo Penal de Primer Turno, Sentencia No. 4/2010 (21 April 2010)

Caso contra José Nino Gavazzo Pereira y Jose Ricardo Arab Fernández, Suprema Corte de Justicia, Sentencia No. 1501, Ficha 98-247/2006 (6 May 2011)

Caso contra Jorge Silveira y otros, Suprema Corte de Justicia, Sentencia No. 1501/2011 (20 July 2011)

Caso contra Juan Ricardo Zabala y otros, Juzgado Letrado de Primera Instancia en lo Penal de Primer Turno, Juez Juan Carlos Fernández Lecchini, IUE 87-289/1985, Sentencia No. 402/2012 (6 March 2012)

Caso contra Juan Carlos Blanco Estradé, Suprema Corte de Justica, Sentencia No. 899/2012 (5 November 2012)

Excepción de inconstitucionalidad Ley 18.831 (artículos 1, 2 y 3), Suprema Corte de Justicia de Uruguay, IUE 2-109971/2011, Sentencia No. 20 (22 February 2013)

Excepción de inconstitucionalidad Ley 18.831 (artículos 1, 2 y 3), Suprema Corte de Justicia de Uruguay, IUE 1–154/2012, Sentencia No. 187/2013 (13 March 2013)

Excepción de inconstitucionalidad Ley 18.831 (artículos 1, 2 y 3), Suprema Corte de Justicia de Uruguay, IUE 2-28914/2009 (13 March 2013)

Caso contra J. N. G. P., Juzgado Letrado de Primera Instancia en lo Penal de Primer Turno, Juez Juan Carlos Fernández Lecchini, IUE 87-289/1985, Sentencia No. 12/2020 (22 April 2020)

Domestic courts in the United States of America

Teófila Ochoa Lizarbe et al v. Telmo Ricardo Hurtado Hurtado, District Court, Southern District of Florida, Case No. 07-21783-CIV-JORDAN (4 March 2008)

Ana Chavez and others v. Nicolas Carranza, Court of Appeals for the Sixth Circuit, Case No. 06-6234 (17 March 2009)

Domestic courts in Venezuela

Solicitud de interpretación del artículo 29 de la Constitución, Tribunal Supremo de Justicia de Venezuela – Sala Constitucional, Exp. 02-2154 (9 December 2002)

Demanda de constitucionalidad artículo 376 del Código Orgánico Procesal Penal, Tribunal Supremo de Justicia de Venezuela – Sala Constitucional, Exp. No. 2005-0480 (7 December 2005)

Acción de amparo interpuesta por María Lenys Pascatillo Urpin y otros, Tribunal Supremo de Justicia de Venezuela – Sala Constitucional, Exp. No. 05-1899 (13 April 2007)

Acción de amparo interpuesta por Johan Manel Ruiz Machado, Tribunal Supremo de Justicia de Venezuela – Sala Constitucional, Exp. No. 09-0923 (10 December 2009)

Revisión constitucional de la investigación por la muerte de Fabricio Ojeda, Tribunal Supremo de Justicia de Venezuela – Sala Constitucional, Exp. No. 11-1151 (21 June 2012)

Demanda de constitucionalidad Ley de Amnistía y Reconciliación Nacional, Tribunal Supremo de Justicia de Venezuela – Sala Constitucional, Exp. No. 16-0343 (11 April 2016)

APPENDIX 2. CODEBOOK

Nvivo is structured around three types of nodes: [1] case nodes; [ii] theme nodes, and [iii] relationship nodes. Thus, the analysis of judicial decisions about amnesty follows the same structure.

A. *Case nodes*: units of observation -> judicial decisions (one decision is one case).[1] Case nodes then will be grouped by courts and jurisdictions so the analysis will be mainly in two different levels:

- Judicial decisions
- Courts

Each court decision has a unique ID that matches the file with the text of the decision, the coded information, and the analysis.

Case nodes can be characterised using descriptive information. This is achieved through classifications in Nvivo. The classification is made in two levels: judicial decisions and courts. For instance, the information of 'country' is related to the court, while the information about 'date' is linked to the judicial decision. Nonetheless, Nvivo allows to 'aggregate' this information so the characteristics of the court can be assigned to the judicial decision, and vice versa.

[1] If a process has more than one decision that is relevant (e.g. one by Trial Chamber and another one by Appeals Chamber), each decision will be a case. When there is a separate opinion by one or more judges, either dissenting or concurring, that will be treated as a separate decision because the arguments and analysis usually differ and identifying the reference to that specific opinion will be relevant.

Case nodes classification

Judicial decision	
Attributes	**Values**
ID	(*) Case ID
Legal case name	(*) Case name
Case date	(*) DD/MM/YYYY
Case stage	(i) Admissibility, (ii) Merits, (iii) Appeal, 2nd instance, cassation, (iv) Follow up, (v) Dissenting, separate opinion.
Case status	(i) Referenced, (ii) Analysed

Court	
Attributes	**Values**
ID	(*) Name of international court, (*) Country - domestic courts
Jurisdiction	(i) International, (ii) Domestic, (iii) Universal.
Area of law	(i) ICL, (ii) IHRL, (iii) Criminal / (iv) Constitutional, (v) Administrative, (vi) Transitional Justice.
Region	(i) Universal, (ii) Africa, (iii) Latin America, (iv) North America, (v) Europe, (vi) Oceania, (vii) Asia
State	(*) Country

B. Theme nodes: themes or topics used to codify information. The theme nodes reflect descriptive or analytical categories that aim capture the legal reasoning of the decisions regarding the legality of amnesties under international law.

The theme nodes are structure around two topics. First, issues related to the amnesty under review. Second, the reasoning of the tribunal to evaluate the legality of that amnesty. The information about the amnesty was extracted from the judicial decision, but it was complemented with external sources (particularly, Mallinder's *Amnesties, Conflict and Peace Agreement (ACPA) dataset*).

Theme nodes about the amnesty

Parent node	Child nodes
Amnesty name	(*) Name of the amnesty
Amnesty date	(*) DD/MM/YYYY
Amnesty country	(*) Country
Amnesty region	(i) Africa, (ii) Latin America, (iii) North America, (iv) Europe, (v) Oceania, (vi) Asia
Amnesty TJ process	(i) Imposed justice
	(ii) Self-forgiveness

	(iii) Agreed transition
	(iv) Negotiated justice
	(v) No transitional justice
Amnesty democratic process	(i) Non-democratic approval
	(ii) Democratic approval
Amnesty recipients	(i) State actors
	(ii) Non-state actors
	(iii) State and non-state actors
	(iv) Individuals
Amnesty scope	(i) General amnesty
	(ii) Partial amnesty by inclusion
	(iii) Partial amnesty by exclusion
Amnesty international crimes	(i) Silence
	(ii) Explicit inclusion
	(iii) Explicit exclusion
	(iv) Ambivalence
Amnesty nature	(i) Unconditional amnesty
	(ii) Conditional amnesty

Theme nodes about the legal reasoning of the decision

Parent node 1	**Parent node 2**	**Child nodes**
Decision legal case	Reasoning	(i) Ratio decidendi
		(ii) Obiter dictum
	Decision on amnesty	(i) Approval
		(ii) Rejection
		(iii) Modification
		(iv) Not an amnesty
		(v) No decision
Decision Sources	Treaty law	(i) Obligation to prosecute
		(ii) Victims' right to remedy
		(iii) Decision on public interest
		(iv) Balancing rights
	Customary law	(i) CIL prohibits amnesties
		(ii) CIL does not prohibit amnesties
	Jus Cogens	(i) Jus cogens includes obligation to prosecute
		(ii) Jus cogens does not include obligation to prosecute
Decision approach	Transitional justice models	(i) Punitive transition (criminal trials only)
		(iii) Transitional justice with emphasis on criminal accountability
		(iv) Transitional justice (combination of amnesties and trials)
		(v) Transitional justice with emphasis on alternative mechanisms of justice.
		(vii) Amnesiac transition (amnesties only)
	Prohibition based on crimes	(i) General prohibition: No crimes identified
		(ii) Prohibition: Crimes of genocide

Decision legality of amnesties		(iii) Prohibition: Treaty-based CAH
		(iv) Prohibition: Custom-based CAH
		(v) Prohibition: War crimes
		(vi) Prohibition: HR violations
		(vii) Prohibition: Jus cogens crimes
		(viii) Prohibition: Gender-based crimes
	Permission based on crimes	(i) General Permission: No crimes identified
		(ii) Permission: Crimes of genocide
		(iii) Permission: Treaty-based CAH
		(iv) Permission: Custom-based CAH
		(v) Permission: War crimes
		(vi) Permission: HR violations
		(vii) Permission: Jus cogens crimes
		(viii) Permission: Gender-based crimes
	Prohibition based on policy considerations	(i) Prohibition: blanket amnesty
		(ii) Prohibition of self-amnesty
		(iii) Prohibition: amnesties avoid justice
		(iv) Prohibition: most responsible
	Permission based on policy considerations	(i) Permission: democratic approval
		(ii) Permission: Conditional amnesty
		(iii) Permission: Other mechanisms of justice
Decision consequences	Opposability	(i) Amnesties are opposable to other jurisdictions
		(ii) No res judicata
		(iii) Not opposable to universal jurisdiction
		(iv) Not opposable to international criminal jurisdiction
	State responsibility	(i) State responsibility
		(ii) No state responsibility
		(iii) No considerations on state responsibility

C. Relationship nodes: Connections between two cases. Relationships in Nvivo are made up of three parts: "from", "to" and the "type" of relationship. Considering the difficulty to trace informal relationships, this only registers formal cross-references. There are three types of relationships:

Association between judicial decisions that refer to a same case:

Judicial decision 1 —reference— judicial decision 2 (E.g. Barrios Altos case, where the IACtHR references the case decided by the national courts in Peru.

Unidirectional interactions between judicial decisions:

Judicial decision 1 —reference→ judicial decision 2 (E.g. Barrios Altos case, where the IACtHR references the Furundžija case at the ICTY.

Unidirectional and bidirectional interactions between courts:

Court 1 —Reference→ Court 2 (E.g. Colombian courts referencing Nepalese courts).

Court 1 ←Reference→ Court 2 (E.g. the IACtHR and the ECtHR referencing each other).

The type of relationship is divided in two categories.[2] One, more objective, is the type of reference, differentiating between footnotes, quotations and more in-depth discussions of other cases.[3] The second category, more interpretative, tries to capture the argumentative use of that reference.

Relationship nodes

Relationship node	Value
Type of reference	Simple reference
	Quotation reference
	Discussion reference
Argumentative use of reference	Reference by aggregation
	Reference by authority
	Reference by persuasion

[2] See: Ryan Whalen, 'Legal networks: the promises and challenges of legal network analysis', (2016) *Michigan State Law Review* 539, 555.

[3] Annika Jones, 'Judicial cross-referencing in the sentencing practice of international(ized) criminal courts and tribunals', in Róisín Mulgrew and Denis Abels (Ed.) *Research handbook on the international penal system* (Edward Elgar Publishing 2016) 167, 181.

D. Definitions

1. Case nodes (classification).
   1.1. Case ID: Unique number/name to identify the case. This will be useful to link the case read and any possible citation of if in other cases.
      1.1.1. Case name: Name of the case as stated in the decision. If there is no information about the name of the case in the text of decision, I will use the name of the parties to name it.
      1.1.2. Case date: Date in which the decision was made (format: 'YYYY/MM/DD').
      1.1.3. Case stage: Type of decision that the court is making. Decision on admissibility, jurisdiction, merits, appeal, etc.
      1.1.4. Case status: Binary option if the decision has been read and analysed, or simply referenced in another decision.
   1.2. Court ID: Name of the court making the decision, as stated in the decision. When coding decisions of domestic courts, I will group them as 'Country – domestic courts' (e.g. Uganda – domestic courts).
      1.2.1. Court jurisdiction: Jurisdiction of the court, either international, domestic or universal.
      1.2.2. Court area of law: Area of law in which the analysis of the court is framed: 'International criminal law'; 'International human rights law', 'Domestic criminal law'; 'Domestic constitutional law'.
      1.2.3. Court region: Region in which the court is located. In light of the *Geographic Regions* classified by the UN Statistics Divisions[1] I will use seven categories: 'Africa'; 'Latin America and the Caribbean'; 'Northern America'; 'Asia'; 'Europe'; 'Oceania'; 'Universal'. Courts like the SCSL, the ECCC, the ICTY, and the ICTR will be assigned to the specific country and region. Regional bodies like the ECtHR, the ECJ, the IACtHR, the IACoHR, the ACtHPR, and the ACoHPR will only be assigned to their region. International courts like the ICJ and he ICC and quasi-judicial bodies like the UNHRC, the UNCERD, the UNCEDAW, and the UNCAT will be marked as 'Universal' region.
      1.2.4. Court state: Country in which the court has jurisdiction. This applies for domestic courts, ad hoc tribunals and internationalised courts with jurisdiction

[1] UN Statistics Divisions, 'Geographic Regions' *available at*: https://unstats.un.org/unsd/methodology/m49/ [accessed 06 October 2020].

in one country. International courts with universal or regional jurisdiction are left 'NA'. Courts exercising international jurisdiction will be marked with the country in which they have ordinary jurisdiction. Countries that have disappear will be marked with the name of the country used in the text of the case or officially used at the time of the decision.

2. Theme nodes about the amnesty:

2.1. Amnesty name: Name of the amnesty as stated in the decision. If there is no information about the name of the amnesty this will be identified using the *Amnesties, Conflict and Peace Agreement (ACPA) dataset.*

2.2. Amnesty date: Date in which the amnesty was signed or enacted (format: 'YYYY/MM/DD').

2.3. Amnesty country: State(s) by which the amnesty was applied. Possibly more than one state when the amnesty was enacted following an international conflict that involved more than one country.

2.4. Amnesty region: Region in which the state that enacted the amnesty is located. Same regions identified for the category 'Court region' apply.

2.5. Amnesty TJ process: Characteristics of the transitional justice process in which the amnesty has been framed:[2]

(i) 'Imposed justice': Transitional justice process based upon the imposition of a new notion of justice and criminal accountability imposed by a new sovereign power or the victorious part in a conflict.

(ii) 'Self-forgiveness': Transitional justice process in which the people in power enact the transitional mechanisms to avoid responsibility for their own crimes in order to facilitate the transition of power.

(iii) 'Agreed transition': Agreements between previous and future governments, in which the latter commits to enact amnesties in benefit of the former.

(iv) 'Negotiated justice': Transitional justice process negotiated between opposing parts in a conflict (usually state force and armed non-state actors) to put an end to violence.

[2] See: Rodrigo Uprimny, 'Las enseñanzas del análisis comparado: procesos transicionales, formas de justicia transicional y el caso colombiano', in Rodrigo Uprimny, María Paula Saffon, Catalina Botero and Esteban Restrepo (Ed.) *¿Justicia transicional sin transición?: Verdad, justicia y reparación para Colombia* (Centro de Estudios de Derecho, Justicia y Sociedad 2006) 17, 33.

(v) ‘No transitional justice’: Amnesties enacted without a transitional justice process.

2.6. Amnesty democratic process: Democratic approval of the transitional process in which the amnesty is framed.

(i) ‘Non-democratic approval’: The amnesty or the transitional justice process as a whole has been passed without public consultation.

(ii) ‘Democratic approval’: The amnesty or the transitional justice process as a whole has had some sort of democratic validation. E.g. Referendum, plebiscite, etc.

2.7. Amnesty recipients: Group of people that would benefit from the amnesty.

(i) ‘State actors’: The amnesty benefits elected or unelected public servants like members of the military, heads of state, etc. Additionally, I will include in this category

amnesties that benefit paramilitary groups that might be considered non-state actors but enjoyed the official or informal support of state agents.

(ii) ‘Non-state actors’: The amnesty benefits people associated with a certain collective, a guerrilla group or a political group.

(iii) ‘State and non-state actors’: The amnesty benefits people in both groups: ‘State officials’ and ‘Non-state actors’.

(iv) ‘Individuals’: The amnesty only benefits individuals. The inclusion criteria are not attached to the membership or relation with a group.

2.8. Amnesty scope: Scope of the amnesty regarding the crimes that it would cover. Initially, I am interested in differentiating general amnesties and partial amnesties.

(i) ‘General amnesty’: Amnesty that has no specific delimitation regarding the crimes or acts it will cover.

(ii) ‘Partial amnesty by inclusion’: Amnesty that limit its scope by specifying the crimes or acts it will cover.

(iii) ‘Partial amnesty by exclusion’: Amnesty that limit its scope by naming the crimes or acts it will not cover.

2.9. Amnesty international crimes: Specific inclusion or exclusion of international crimes in the scope of the amnesty. By international crimes, in this section, I will include the crimes included in the Rome Statute: genocide, war crimes, crimes against humanity and the crime of aggression. I will be led by the language of the amnesty and the court decisions, so I will not make any legal qualification. I will also include in this category

when the amnesty refers to particular crimes like ‘torture’, ‘extrajudicial killing or extrajudicial execution’, ‘enforce disappearance’, ‘serious human rights violations’, ‘grave breaches to the Geneva Conventions’.

(i) ‘Silence’: It is clear that the amnesty does no refer to international crimes.

(ii) ‘Explicit inclusion’: The amnesty explicitly covers at least one of these crimes.

(iii) ‘Explicit exclusion’: The amnesty explicitly excludes all international crimes. Here, instead of an exhaustive list of the crimes excluded from the amnesty, I will look for general language of exclusion. For instance, ‘international crimes’ or ‘human rights violations’. If the exclusion is only for ‘crimes against humanity’, ‘war crimes’ or more specific crimes I will include the amnesty in the next category.

(iv) ‘Ambivalence’: The amnesty explicitly covers some of these crimes, but also excludes other crimes.

2.10. Amnesty nature: This refers to the distinction between conditional and unconditional amnesties.

(i) ‘Unconditional amnesty’: Amnesty that does not have any condition attached to it once the eligibility criteria are met.

(ii) ‘Conditional amnesty’: Amnesty that require the recipients to take certain action or abstain from it with the possibility of losing the benefits in case of breaching those conditions.

3. Theme nodes about the legal reasoning of the decision:

3.1. Decision reached on the legal case.

3.1.1. Decision reasoning: The issue of amnesty is central to decide the legal dispute.

(i) ‘Ratio decidendi’: The considerations on amnesties are part of the reasoning to decide the case.

(ii) ‘Obiter dictum’: The considerations on amnesties are made as additional observations, remarks and opinions, that do not determine the outcome of the decision.

3.1.2. Decision on amnesty: Decision reached by the court regarding the validity of the amnesty.

(i) ‘Approval’: The court upholds the validity of the amnesty.

(ii) ‘Rejection’: The court overturns the validity of the amnesty or gives orders to the government/legislative/state to invalidate it.

(iii) ‘Modification’: The court upholds the validity of the amnesty but gives orders to the government/legislative/state to change it.

(iv) ‘No decision’: The court makes no legal decision about the legality of the amnesty.

(v) ‘No amnesty’: The court decides that the measure analysed does not constitute an amnesty.

3.2. Use of sources in the decision.

3.2.1. Treaty law: The court evaluates the legality of amnesties under treaty law.

(i) ‘Obligation to prosecute’: The court considers that amnesties are prohibited under treaty law because they violate states obligations to prosecute.

(ii) ‘Victims’ right to remedy’: The court considers that amnesties are prohibited under human rights law because they violate the victims’ right to an effective remedy.

(iii) ‘Decision on public interest’: The court considers that amnesties could be consider legal under treaty law when there are considerations of public interest that justify their implementation.

(iv) ‘Balancing rights’: The court considers that amnesties could be consider legal under treaty law when states face conflicting obligations during processes of transitional justice.

3.2.2. Customary international law: The court evaluates the legality of amnesties under customary international law.

(i) ‘CIL prohibits amnesties’: The court considers that there is a rule of customary law prohibiting amnesties.

(ii) ‘CIL does not prohibit amnesties’: The court considers that such rule has not developed.

3.3. General approach of the decision.

3.3.1. Transitional justice models. Typologies of transitional justice processes reflected in the approach adopted by the court in making its decision.

(i) Punitive transition (criminal trials only): Transitions from situations of violence or gross human rights violations need to be erected around criminal trials.

(ii) Transitional justice with emphasis in criminal accountability: Model of transitional justice that contains different mechanisms, including criminal trials as a central component.

(iii) Transitional justice (combination of amnesties and trials): Model of transitional justice that combines criminal trials with other mechanisms to redress human rights violations.

(iv) Transitional justice with emphasis in alternative mechanisms of justice: Model of transitional justice built around alternative mechanisms of justice that can include criminal trials, but this are not central to the process.

(v) Amnesiac transition (amnesties only): Transitions from situations of violence or gross human rights violations facilitated by the use of general amnesties.

3.4. Decision on the legality of amnesties:

3.4.1. Prohibition based on crimes. The prohibition of amnesties is determined by the crimes it does or does not cover.

(i) 'General prohibition': General prohibition of amnesties with no mention to particular crimes.

(ii) 'Crimes of genocide': Amnesties are prohibited when covering crimes of genocide.

(iii) 'Treaty-based CAH': Amnesties are prohibited when covering treaty-based crimes against humanity (e.g. torture, enforced disappearance). This distinction will be useful for when the amnesty refers to particular crimes like the examples given. When the amnesty refers to crimes against humanity in general, both categories related to crimes against humanity will be selected.

(iv) 'Custom-based CAH': Amnesties are prohibited when covering custom-based crimes against humanity.

(v) 'War crimes': Amnesties are prohibited when covering war crimes or grave breaches to the Geneva Conventions.

(vi) 'HR violations': Amnesties are prohibited when covering serious violations of human rights. Considering that most crimes against humanity also constitute serious violations of human rights, this category is reserved only for when the decision of the court refers exclusively to serious violations of human rights without making clear if they constitute international crimes.

(vii) ‘Jus cogens crimes’: Amnesties are prohibited when covering crimes that constitute *jus cogens* violations. Considering that most breaches to *jus cogens* are included in previous categories, this one is reserved only for when the decision of the court refers explicitly to *jus cogens* violations without making clear which type of crime is referring to.

(viii) ‘Gender-based crimes’: Amnesties are prohibited when covering gender-based crimes.

3.4.2. Permission based on crimes: Specific considerations about crimes that could be cover by an amnesty under international law. Same definitions apply (see: 3.4.1).

3.4.3. Prohibition based on policy considerations:

(i) ‘Prohibition: blanket amnesty’: General amnesties (also known as ‘blanket amnesties’) are prohibited under international law.

(ii) ‘Prohibition of self-amnesty’: Self-amnesties are prohibited under international law.

(iii) ‘Prohibition: amnesties avoid justice’: Amnesties are prohibited under international law when they are enacted with the purpose of avoiding justice.

(iv) ‘Prohibition: most responsible’: Amnesties are prohibited under international law when they cover the persons who appear to be the most responsible for the commission of international crimes.

3.4.4. Permission based on policy considerations:

(i) ‘Permission: democratic approval’: Amnesties could be permitted when they have been approved through a democratic process of consultation.

(ii) ‘Permission: conditional amnesty’: Amnesties could be permitted when they include conditions like demobilisation, participate in the processes of disarmament, demobilisation and renouncement to violence, release hostages, contribute to peace participating in processes of transitional justice and other alternative mechanisms of reconciliation, inform on comrades, commit to truth telling, contribute to reparations, and guarantee the non-repetition of acts of violence, penalties for recidivism.

(iii) ‘Permission: other mechanisms of justice’: Amnesties could be permitted when accompanied by other transitional justice measures to guarantee justice, peace, truth and non-repetition

3.5. Decision consequences:

3.5.1. Opposability: Independently from the status of the particular amnesty under international law, the court evaluates its opposability.

(i) 'Amnesties are opposable': Amnesties can limit the exercise of other courts' jurisdiction under international law.

(ii) 'No res judicata': Amnesties do not constitute *res judicata* in international law.

(iii) 'Not opposable to universal jurisdiction': Amnesties do not bar the exercise of universal jurisdiction for international crimes.

(iv) 'Not opposable to international criminal jurisdiction': Amnesties do not bar the activation of the international criminal jurisdiction.

3.5.2. State responsibility: The court takes into consideration when making its decision the responsibility of the state for breaching international law.

(i) 'State responsibility': Enacting the amnesty makes the state responsible for breaking international law.

(ii) 'No state responsibility': Enacting an amnesty does not make the state internationally responsible.

(ii) 'No considerations': The court does not take into consideration the responsibility of the state under international law for enacting the amnesty.

4. Relationship nodes

4.1. Reference: Case referenced in the decision under analysis using the 'Case_ID'. I will only include cases that are referenced directly in relation to the issue of amnesties or the standards for their application. I will also include treaties and other legal documents that are not binding under international law. This includes documents prepared by the UN or academic texts.

4.2. Reference type: Type of reference included in the decision.

(i) 'Simple reference': Reference of the case as a simple mentioning, in-text reference or footnote.

(ii) 'Quotation reference': Reference of the case as a quotation or paraphrasing.

(iii) 'Discussion reference': Reference of the case in a critical way, discussing it and including an evaluation of the reasoning or decision.

4.3. Reference use:[3] Argumentative use of other cases.

(i) 'Reference by aggregation': "The aggregated information approach collects jurisdictions that adhere to a particular position, aggregates them into a larger total, and uses numerical consensus to indicate the validity of the widely held position."[4]

(ii) 'Reference by authority': "[A]uthoritative borrowing, involves a judge using a foreign law decision as binding precedent on his court. The basic idea of authoritative borrowing is captured in the distinction between what Professor Schauer has called substantive reasons and content independent reasons for following a rule. A substantive reason for following a rule is a reason grounded in an inherent value of the practice—among other things, the practice could be efficient, desirable, or fair (…) In contrast, content independent reasons are reasons for following a rule that derive solely from the fact of another stating the rule."[5]

(iii) 'Reference by persuasion': "Persuasive reasoning involves a judge considering the argumentation or logic of a foreign decision and using that argument in his decision. The foreign case is not authoritative, but merely provides an example of an intelligent person reasoning through a legal problem— perhaps similar to an academic article that seeks to analyze a problem and suggest an answer. In other words, the substance of the reasoning and not the identity of the source provides the reason for adopting the argument."[6]

[3] See: Ganesh Sitamaran, 'The use and abuse of foreign lawn in constitutional interpretation', (2008) 32 *Harvard Journal of Law & Public Policy* 653.
[4] Ganesh Sitamaran, 'The use and abuse of foreign lawn in constitutional interpretation', (2008) 32 *Harvard Journal of Law & Public Policy* 653, 681.
[5] Ganesh Sitamaran, 'The use and abuse of foreign lawn in constitutional interpretation', (2008) 32 *Harvard Journal of Law & Public Policy* 653, 677.
[6] Ganesh Sitamaran, 'The use and abuse of foreign lawn in constitutional interpretation', (2008) 32 *Harvard Journal of Law & Public Policy* 653, 676. See also: Yannis Panagis and Urška Šadl, 'The Force of EU Case Law: A Multi-dimensional Study of Case Citations', in Antonino Rotolo (Ed.) *Legal Knowledge and Information Systems* (JURIX: The Twenty-Eighth Annual Conference 2015) 71, 72.