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Law and Politics in the Inter-American System: The Amnesty Cases

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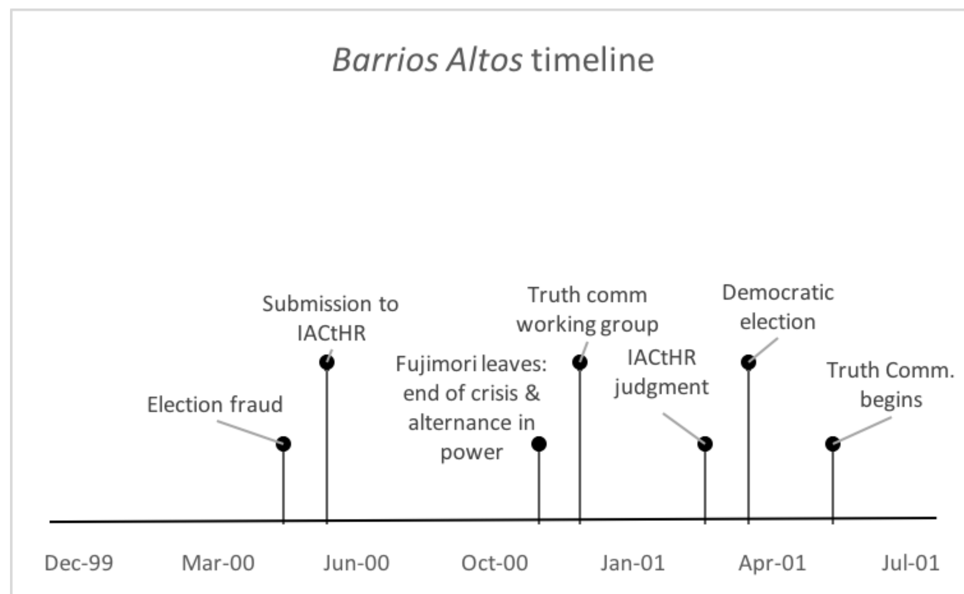
Online Appendix

This appendix contains more detailed accounts of the five cases in which the Inter-American Court of Human Rights ruled directly on the compatibility of national amnesty laws with the American Convention on Human Rights. Each case study is divided into two sections. The first covers the background to the case and the timing of its progress at the Commission. The second part describes the Court's handling of the case and its judgment.

Barrios Altos v. Peru (2001)



The Commission

The *Barrios Altos* case involved the massacre of 15 persons by a Peruvian Army death squad in November 1991. The massacre occurred during the Peruvian government's brutal campaign against the insurgent groups, Shining Path and the Tupac Amaru Revolutionary Movement. In combating the guerrillas, the government employed arbitrary detention and extrajudicial killings; took over the judiciary; conducted trials by anonymous ("faceless") judges; prosecuted civilians in military courts; and curbed the mass media (Villarán de la Puente 2007). President Alberto Fujimori reinstalled himself in power

through the "self-coup" of April 1992 and a pair of 1995 amnesty laws terminated all judicial proceedings against anyone implicated in human rights violations between 1980 and 1995. In this context, the families of the victims of the Barrios Altos massacre were unable to obtain justice through domestic judicial means.

The *Barrios Altos* petition was filed at the Commission on 30 June 1995 by the Coordinadora Nacional de Derechos Humanos (National Human Rights Coordinator), an umbrella organization that provided legal defense to victims of human rights violations. In the first years after the filing of the petition, the domestic political context in Peru was unfavorable to the Commission's activities. The public supported Fujimori because, despite his authoritarianism, he had managed to stabilize the economy and cripple the insurgent groups. On 7 January 1999 the Commission proposed a friendly settlement but Peru asked the Commission to declare the case inadmissible because domestic remedies had not been exhausted. In July 1999 Fujimori attempted to withdraw Peru from the jurisdiction of the IACtHR, but both the Commission and the Court rejected this move (Mosquera 2012).

However, by then support for Fujimori's regime had eroded. Since his 1995 reelection with 60 percent of the vote, Fujimori's public approval rating declined steadily to between 30 and 40 percent by 1999 (Levitsky 1999). Fujimori ran for a constitutionally prohibited third term and in the May 2000 election resorted to fraud, triggering broad domestic and international condemnation. During this period, as Fujimori's position weakened, the Commission submitted the *Barrios Altos* case to the Court (10 June 2000). In November 2000, in the wake of a corruption scandal involving a high official in the National Intelligence Service, Fujimori resigned and left the country. Under the transition government that replaced Fujimori, Peru affirmed its acceptance of the jurisdiction of the IACtHR (January 2001) and acknowledged the state's responsibility for human rights violations committed during the Fujimori regime (Burt 2009). The Court issued its judgment in *Barrios Altos* in March 2001.

The progress of the *Barrios Altos* case generally matches our expectations regarding the timing of Commission submissions relative to the development of a more favorable domestic context. We argued that the Commission could wait to submit an amnesty case to the Court until the domestic political setting showed concrete signs of the presence of supportive domestic constituencies. That broad expectation is met: the Commission submitted the *Barrios Altos* case to the Court in June 2000, when Fujimori's position was weakened by declining public support and by the backlash to his government's election rigging in May 2000. In terms of the specific markers that would identify a favorable domestic context – end of the crisis, alternance in power, and transitional justice mechanisms – the Commission submission to the Court slightly preceded the increasingly foreseeable transition. Within five months, Fujimori would be gone and a pro-rights, pro-IACtHR transition government would be in place. More specifically, massive scandals involving Fujimori and the head of his National Intelligence Service, Vladimiro Montesinos, in a drugs-for-arms deal with Colombia's main armed insurgent group, the FARC, and

videotape of Montesinos bribing a member of congress to switch to Fujimori's party brought the government to the point of collapse. The Montesinos bribe video went public in September 2000 and Montesinos fled to Panama. Fujimori abandoned Lima for Japan in November.

Congress named opposition legislator Valentín Paniagua interim president, representing an alternance in power, with elections to be held the following year (they took place in April 2001) (Burt 2009, 388). The Paniagua government in December 2000 set up a working group of government officials and civil society representatives to plan a truth commission. Two of its members were Justice Minister Diego García-Sayán, who chaired the group, and Women's Affairs minister Susana Villarán. Both came from Peru's human rights community. García-Sayán was the founding director of the Andean Commission of Jurists and played an important role in the Salvadoran Truth Commission, while Villarán had been executive director of the Coordinadora (which filed the Barrios Altos petition at the Commission). The truth commission came into being in June 2001 (Burt 2009). In other words, the IACtHR heard and decided the *Barrios Altos* case after Fujimori had departed and after a truth commission process was underway. Figure 2 charts the relevant events (note that the time axis is greatly compressed, into a period of months, as compared with the other figures). The bottom line is that the timing of the *Barrios Altos* case broadly fits with our expectations, even though the submission to the Court occurred not after but as the key events were unfolding.

The Court

The judgment in *Barrios Altos* marked the first time that the IACtHR ruled directly on a national amnesty law. The decision was a watershed in at least two respects. First, it established a strict standard, holding that amnesty laws (with some nuances to be explored below) were in themselves incompatible with the American Convention. Second, for the first time, the Court ruled a national law to be devoid of legal effect.

Recall that the Commission had submitted the *Barrios Altos* petition to the Court in June 2000, the month after Fujimori won, through large-scale electoral fraud, a constitutionally prohibited third term as president. By the time the Court held its hearing on the case in March 2001, Fujimori had fled Peru (November 2000) and a transition government was in place in Lima. The transition government had affirmed its acceptance of IACtHR jurisdiction (which Fujimori had attempted to revoke) and had accepted international responsibility for the rights violations identified by the Commission (Burt 2009). In other words, the government in Peru was committed to democracy and human rights and viewed the Inter-American Court not as an antagonist but as a source of support for the transition. The presence of a receptive government in Lima may have suggested to the Court that the time was right for a dramatic ruling on amnesties. In fact, the Commission representative at the hearing invoked the state's willingness, declaring, "[W]e would like ... to request the Honorable Court that ... by virtue of the State's acquiescence, it

should not only establish the specific violations of the articles of the Convention in which the State incurred ..., but also … specifically establish ... the incompatibility of amnesty laws with the provisions of the American Convention, and ... the obligation of the State to annul amnesty laws."[1]

The Court did just that, on the basis of the principles outlined above and grounded in Articles 1, 2, 8 and 25. The Court stated:

> The Court considers that it should be emphasized that, in the light of the general obligations established in Articles 1(1) and 2 of the American Convention, the States Parties are obliged to take all measures to ensure that no one is deprived of judicial protection and the exercise of the right to a simple and effective recourse, in the terms of Articles 8 and 25 of the Convention. Consequently, States Parties to the Convention which adopt laws that have the opposite effect, such as self-amnesty laws, violate Articles 8 and 25, in relation to Articles 1(1) and 2 of the Convention. Self-amnesty laws lead to the defenselessness of victims and perpetuate impunity; therefore, they are manifestly incompatible with the aims and spirit of the Convention.[2]

Crucially, the Court unanimously decided "[t]o find that Amnesty Laws No. 26479 and No. 26492 are incompatible with the American Convention on Human Rights and, consequently, lack legal effect."[3]

Regarding the scope of the Court's ruling on amnesties, two interpretations are possible. The first is that the Court ruled out all amnesties: "This court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible" because they prevent the investigation and punishment of violations of non-derogable rights.[4] But in the following three paragraphs, the judgment declares that "self-amnesty" laws violate the Convention and refers to "the manifest incompatibility of self-amnesty laws and the American Convention on Human Rights."[5] The separate opinions of Judge A. A. Cançado Trindade and Judge Sergio García Ramírez emphasize the illegality of self-amnesty laws.[6] Subsequent IACtHR judgments would clarify that not just self-amnesties but all amnesties for serious human rights violations are incompatible with the American Convention.

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[1] *Barrios Altos v. Peru* (2001), para. 36.
[2] *Barrios Altos v. Peru* (2001), para. 43.
[3] *Barrios Altos v. Peru* (2001), para. 51.
[4] *Barrios Altos v. Peru* (2001), para. 41.
[5] *Barrios Altos v. Peru* (2001), para. 42-44.
[6] *Barrios Altos v. Peru* (2001), para. 5 ff; *Barrios Altos v. Peru* (2001), para. 1 ff.

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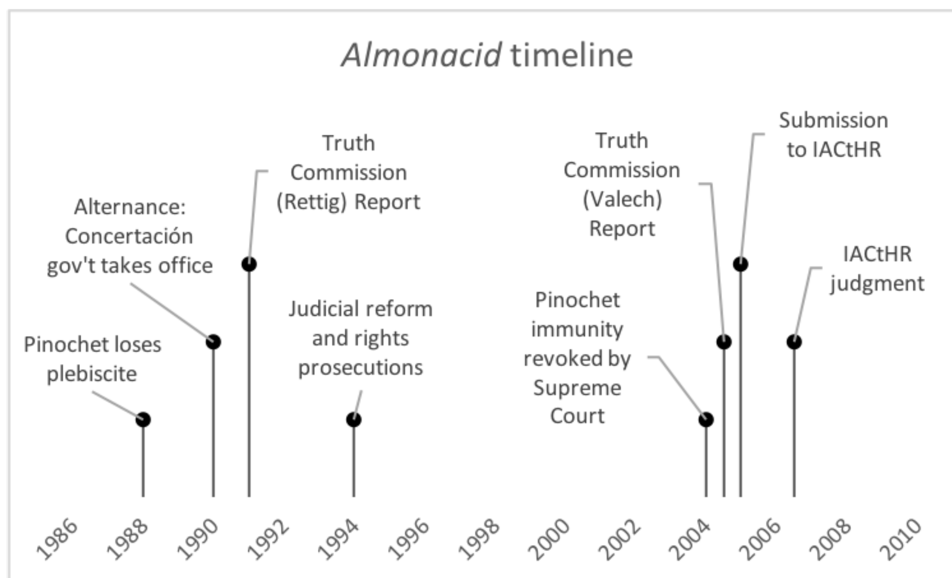
But the concurring opinion of Judge García Ramirez addresses a second means of distinguishing among types of amnesties, that between self-amnesties and amnesties "that are the result of a peace process." Self-amnesties are "promulgated by and for those in power" to confer impunity for rights violations and are impermissible. But amnesties that are part of a peace process can "contribute to re-establishing peace and opening new constructive stages in the life of a nation." Peace-process amnesties, García Ramírez argues, can be permissible under certain conditions: that they have a "democratic base" and that they exclude "the most severe human rights violations," including extrajudicial killing, forced disappearance, genocide, torture, and certain crimes against humanity.[7] These types of violations cannot be subject to impunity because they are categorically prohibited by non-derogable norms of international human rights law. Though these ideas concerning peace-process amnesties did not appear in the Court's judgment, they have reappeared in subsequent cases and seem to indicate that the Court keeps the door open to peace-process amnesties that meet certain conditions.

Almonacid Arellano v. Chile (2006)



The Commission

In *Almonacid Arellano*, the Commission submitted the case to the Court after favorable conditions emerged in Chile. Pinochet stepped down in 1989 after losing the October 1988 plebiscite on his continued rule. A democratically elected government took

[7] *Barrios Altos v. Peru* (2001), para. 10-15.

office in 1990. The new government, under President Patricio Aylwin, immediately created a Truth and Reconciliation Commission, which published its report (the "Rettig Report") in 1991 (Collins 2010, 74). A significant judicial overhaul, which included the installation of 11 new Supreme Court judges, took place under President Eduardo Frei (1994 – 1998), and the courts began to hear human rights cases from the dictatorship era (Skaar 2011, 103). Still, when the Inter-American Commission received the *Almonacid Arellano* petition in September 1998, Pinochet remained as head of the army and the amnesty for human rights violations (Decree Law 2.191) of 19 April 1978 still seemed politically untouchable. In fact, it was not until 2005 that the Commission submitted an application to the Court in the *Almonacid Arellano* case, by which time crucial shifts had occurred in Chile.

Most broadly, by 2005, recent governments of Chile, all from the center-left Concertación, had demonstrated a strong commitment to justice and reparations for the families of the victims of the military regime. The Human Rights Program, within the Interior Ministry, was created to assist victims of human rights abuses and their families to gain access to justice. In its work before Chilean courts, it had without exception opposed the application of the amnesty law to claims brought by victims or their families (Chile 2005, 10 - 11). Chilean courts had consistently refused to allow the amnesty law to block human rights claims filed by victims of the military regime. In fact, the Supreme Court had voided all decisions dismissing claims on the basis of the amnesty law (Chile 2005, 16 - 17). The Santiago Court of Appeals revoked Pinochet's lifetime immunity in June 2000 and the Supreme Court upheld that decision in August. The Supreme Court in 2004 also upheld the indictment of Pinochet for 20 disappearances. Hundreds of cases against military personnel were opened in Chilean courts between 1998 and 2001, many of them having been filed previously but lain dormant, and the government appointed 60 special judges (March 2001) to handle the human rights investigations underway and being filed. By the mid-2000s, dozens of trials had produced convictions (Skaar 2011, 106-113). Finally, in 2004, a second truth commission, the Comisión Nacional sobre Prisión Política y Tortura, published its report (the "Valech Report") (Collins 2010, 94).

Against this backdrop of major changes in the Chilean context, the Commission submitted the *Almonacid* case to the Court in July 2005. That submission took place after all of the major indicators of a decisive shift in the domestic political context had occurred: the Pinochet regime had left power, opposition parties had won elections (alternance), and transitional justice mechanisms (both truth commissions and trials) had begun. In short, the Commission's timing in the *Almonacid* case matches our expectations, as illustrated in the next figure.

The Court

In *Almonacid Arellano*, the Court confronted a post-transition, democratic government that was taking action to address the atrocities of the Pinochet era. Chile vigorously argued that its own domestic measures were generating justice for victims and

their families and rendering the amnesty law moot. First, Chile pointed out that its Human Rights Program, within the Interior Ministry, was created to assist victims of human rights abuses and their families to gain access to justice. The Human Rights Program, in its work before Chilean courts, had without exception opposed the application of the amnesty law to claims brought by victims or their families (Chile 2005, 10 - 11).

Second, Chile argued that its courts had consistently refused to allow the amnesty law to block human rights claims filed by victims of the military regime. In fact, the Supreme Court had voided all decisions dismissing claims on the basis of the amnesty law (Chile 2005, 16 - 17). The jurisprudence of Chilean courts had led to the "juridical inefficacy" of the amnesty law, which had not posed an obstacle to the investigation of claims of human rights abuses, or to the prosecution and punishment of those responsible (Chile 2005, 14; Chile. Ministerio de Relaciones Exteriores 2006, 18, 21 - 26). The bottom line was that "the judicial and practical effects of the Decree Law have been annulled" (Chile 2005, 10). Third, Chile connected its own progress in eliminating the effects of the amnesty law to the broader "frame of a process of permanent evolution . . . that has advanced as the Chilean transition to democracy has also been consolidating" (Chile 2005, 10). In other words, Chile's domestic efforts to nullify the effects of the amnesty law, without actually removing it from the books, were part of the country's democratic transition, with which the Court should not tinker.

Finally, the Court was also aware that two Chilean truth commissions had already completed their work, most recently in 2003 (the truth commissions are mentioned in the Court's judgment). In addition, recent governments of Chile, all from the center-left Concertación, had demonstrated a strong commitment to justice and reparations for the families of the victims of the military regime.

Given the measures taken within Chile, the Court could reasonably have concluded that its objective – to render the amnesty law inoperable – was in fact being achieved in good faith by domestic Chilean means. The Court could have ruled narrowly, simply affirming that the amnesty law could not be applied to the Almonacid case or others like it. Instead, it declared Chile's amnesty law void: "Therefore, the Court . . . declares unanimously that . . . Insofar as it was intended to grant amnesty to those responsible for crimes against humanity, Decree Law No. 2.191 is incompatible with the American Convention and, therefore, it has no legal effects."[8] Even though the Chilean government and courts were not applying the amnesty law, the fact that it remained on the books constituted a violation of the Convention because, first, Art. 2, "imposes the legislative obligation to annul all legislation which is in violation of the Convention, and secondly, because the criterion of the domestic courts may change, and they may decide to reinstate the application of a provision which remains in force under the domestic legislation."[9]

[8] *Almonacid Arellano et al. v. Chile* (2006), para. 171.
[9] *Almonacid Arellano et al. v. Chile* (2006), para. 121.

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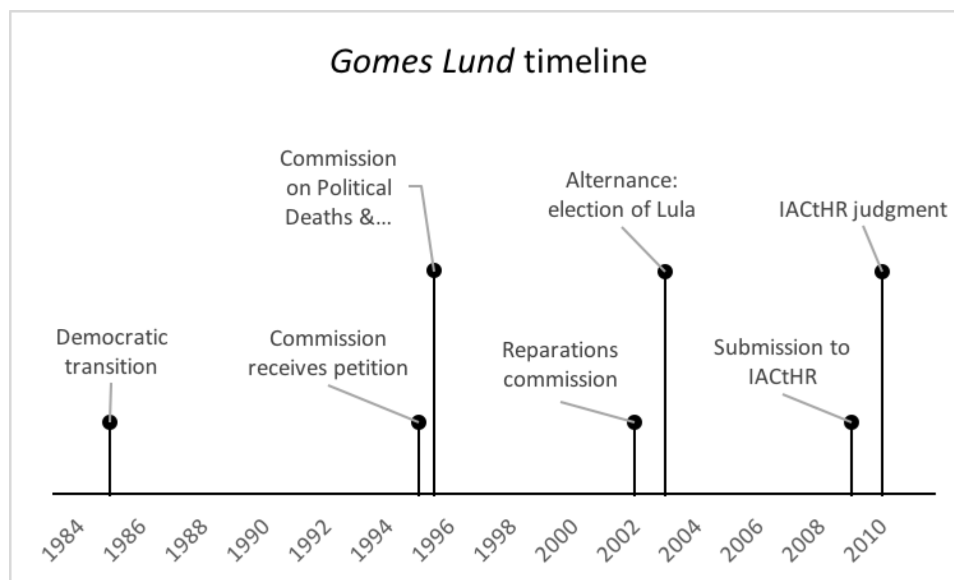
The judgment in *Almonacid* ignored one distinction and dismissed another. The Court notes that the Chilean amnesty law, Decree Law No. 2.191, "basically grants a self-amnesty, since it was issued by the military regime to avoid judicial prosecution of its own crimes." But the IACtHR finds amnesties in general, not just self-amnesties, incompatible with the American Convention because of their effects: amnesty laws "perpetuate impunity for crimes against humanity." They are therefore "overtly incompatible with the wording and spirit of the American Convention."[10] In so ruling, the Court also dismissed as a consideration the domestic legality or procedural origins of amnesty laws. The Court declared that "rather than the process of adoption and the authority issuing Decree Law No. 2.191," what mattered was the purpose of the law: "granting an amnesty for the serious criminal acts contrary to international law that were committed."[11] The principle that the domestic legality and political processes surrounding an amnesty are irrelevant would become crucial in the case *Gelman v. Uruguay*, in which the Court would rule that democratic approbation of an amnesty law cannot eliminate its illegality under the American Convention.

Gomes Lund et al. v. Brazil (2010)



The Commission

The military was in power in Brazil from 1964 to 1985. Under its rule, political participation was severely limited, torture was widespread, and some 300 people were victims of extrajudicial killing or disappearance (Kritz 1995, chap. 12). The military

[10] *Almonacid Arellano et al. v. Chile* (2006), para. 119.
[11] *Almonacid Arellano et al. v. Chile* (2006), para. 120.

dictatorship enacted the amnesty law in 1979 in preparation for the transition to democracy, which occurred in 1985 when the first civilian president in 20 years took office. Unlike the amnesties in Argentina and Chile, the Brazilian law responded to "popular demand." It "was supported by civil society because it was originally intended to pardon crimes of resistance committed by the politically persecuted who had been banished, exiled, and imprisoned," though it also provided amnesty for agents of the state responsible for human rights violations (Abrão and Torelly 2012, 153-154). Over the ensuing decades, the law attracted little attention in Brazilian society, in part because the Brazilian military remained a powerful veto player (Abrão and Torelly 2012) and in part because the issue of justice for the victims of the military regime never took hold among a large share of the Brazilian public (Mezarobba 2010; D'Araujo 2012). A major objective of the amnesty had been to forget the "excesses" of the dictatorship and in that it largely succeeded (Abrão and Torelly 2012).

The Commission received the petition in the *Gomes Lund* case in August 1995. The petition sought to establish the state's responsibility for the torture, disappearance, and death of 70 people in the early 1970s. Between the receipt of the petition at the Commission and its submission to the Court in March 2009, a number of shifts occurred in Brazil's domestic context, indicating the presence of constituencies that favored an end to impunity. Under President Fernando Henrique Cardoso (in office 1995 – 2003), the government established two commissions to address rights violations committed by the military government. The first, the Special Commission on Political Deaths and Disappearances (created in 1995), investigated the state's responsibility for those violations and the second (2002) offered reparations to victims of torture, arbitrary arrest, dismissals for political reasons, kidnapping, forced exile, and other abuses (Abrão and Torelly 2012).

The government of Luis Inácio Lula da Silva (2003 – 2011) reopened the collective memory, publishing in 2007 the report of the Special Commission on Political Deaths and Disappearances, the first official document "to accuse members of the security forces for crimes such as torture, rape, dismemberment, decapitation, concealing bodies and murder of opponents to the regime" (Mezarobba 2010, 19). The Inácio da Silva government also undertook reparations for victims of the military regime. In 2009 it launched a program dedicated to the "Right to Memory and Truth" and in 2010 it proposed a national truth commission (Abrão and Torelly 2012, 156). Pressure on the amnesty law was also coming from other quarters. In 2008 federal prosecutors asked the federal police to open an investigation into a pair of 1980 kidnappings and disappearances and the alleged involvement of both civilian and military agents of the dictatorship (Mezarobba 2010, 17). The Tribunal of Justice of Sao Paulo in 2008 condemned for the first time a state agent for human rights violations under the military regime in a case of kidnapping and torture (del Rio 2014). The Brazilian Bar Association asked the Federal Supreme Tribunal (FST) in 2008 to interpret the amnesty law so as to exclude public agents accused of crimes such as

rape, forced disappearance, and murder. However, the FST ruled that it could not review the amnesty law because it was primarily a political matter and recommended that the Brazilian Congress take up the issue (Mezarobba 2010; del Rio 2014). Brazil was beginning to confront the serious rights violations of the military dictatorship.

In short, by the time the Commission submitted *Gomes Lund* to the Court – 14 years after receiving the petition – all of the key developments that we identified as indicators of a shift in domestic context had occurred: the end of the military government, the electoral victory of opposition parties (alternance), and the launching of transitional justice mechanisms. The following figure summarizes the timing of these events.

The Court

The Commission submitted its petition in *Gomes Lund* to the Court in March 2009, 30 years after the amnesty law had been promulgated and 14 years after the victims' petition had been filed with the Commission. By 2009, a number of important changes had taken place in Brazilian politics. President Luis Inacio da Silva ("Lula"), of the leftist Workers' Party, had been in power for six years. The Lula government had already published the 2007 report of the Special Commission on Political Deaths and Disappearances, the first official document "to accuse members of the security forces for crimes such as torture, rape, dismemberment, decapitation, concealing bodies and murder of opponents to the regime" (Mezarobba 2010, 19). The government had also undertaken reparations for victims of the military regime. In 2009 it launched a program dedicated to the "Right to Memory and Truth" and the following year it would propose a national truth commission (Abrão and Torelly 2012, 156). Pressure on the amnesty law was also coming from other quarters. In other words, as in Peru and Chile, the respondent state in an amnesty case had already taken steps to undo at least some of the effects of the amnesty laws. Still, none of the measures implemented by the Brazilian State undertook the prosecution of human rights crimes (Abrao and Torelly 2012, 164; Mezarobba 2011, 17). The IACtHR decision in *Gomes Lund* aimed to remove the legal basis for impunity from criminal accountability.

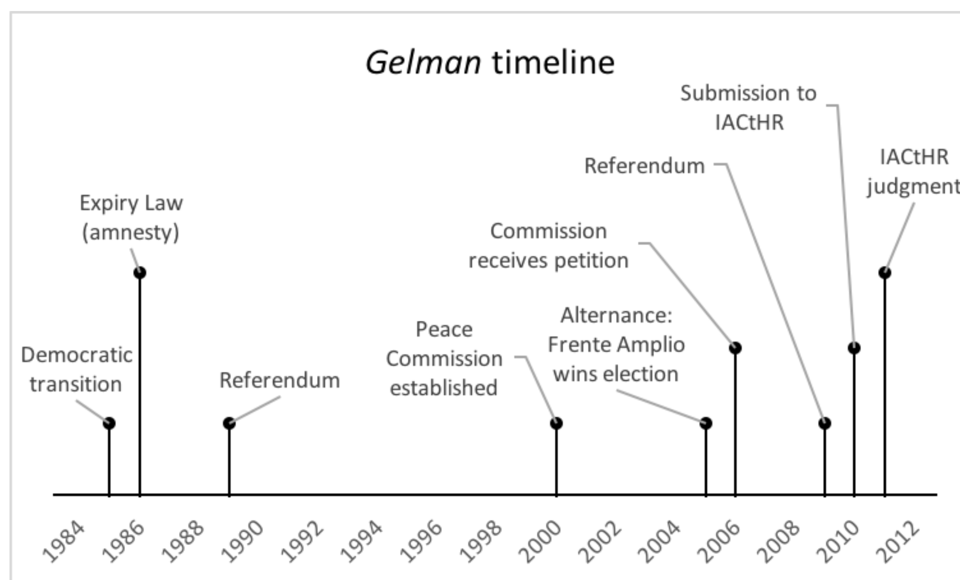
The judgment in *Gomes Lund* cited the same legal basis (Arts. 1, 2, 8, and 25) as the previous amnesty cases. The amnesty law

> prevented the next of kin in the present case from being heard before a judge, pursuant to that indicated in Article 8(1) of the American Convention and violated the right to judicial protection enshrined in Article 25 of the Convention given the failure to investigate, persecute, capture, prosecute, and punish those responsible for the facts, failing to comply with Article 1(1) of the Convention. In addition, in applying the provisions of the Amnesty Law preventing the investigation of the facts and the identification, prosecution, and possible punishment of the possible responsible of continued and

> permanent violations such as enforced disappearances, the State failed to comply with its obligation to adapt its domestic law enshrined in Article 2 of the American Convention.[12]

It also reached the same unanimous judgment: "The provisions of the Brazilian Amnesty Law that prevent the investigation and punishment of serious human rights violations are not compatible with the American Convention [and] lack legal effect . . ."[13] Finally, the judgment reaffirmed and made slightly more explicit the Court's holdings in *Almonacid* regarding self-amnesties and the domestic origins of amnesties. Violation of the American Convention is not limited to self-amnesties but is a feature of all "amnesties of serious human rights violations." And the domestic legality or political basis of amnesty laws is not the question, but rather their intended effects: " The non-compatibility of the amnesty laws with the American Convention in cases of gross violations of human rights[14] does not stem from a formal question, such as its origin, but rather from the material aspect as they breach the rights enshrined in Articles 8 and 25, in relation to Articles 1(1) and 2 of the Convention."[15]

Gelman v. Uruguay (2011)



[12] *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil* (2010), para. 172.
[13] *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil* (2010), para. 325.. Note that the IACtHR judgment here does not nullify the entire amnesty law but only those provisions of it that have the effect of fostering impunity.
[14] As we specify here, the Court's jurisprudence addresses amnesty laws tied to gross human rights violations. Elsewhere in the article, we refer to that category even if we omit for brevity the explicit reference to gross human rights violations.
[15] *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil* (2010), para. 175.

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The Commission

The armed forces in Uruguay deposed the elected president, Juan María Bordaberry, in 1973, in the midst of a violent campaign to eradicate the Tupamaros guerrilla group. The military regime disappeared hundreds of perceived enemies of the government (as compared to 10,000 in neighboring Argentina). However, the regime carried out a massive program of political arrests and detentions. Amnesty International estimated in 1976 that one in every fifty Uruguayans had been arrested and detained; torture of detainees was routine (Kritz 1995, chap. 11; Sikkink 2011, 80). Negotiations in 1984 between the military government and the main political parties laid the groundwork for a return to democratic elections, with the understanding that a new government would not prosecute human rights violations that occurred under the junta (Kritz 1995, chap. 11; Sikkink 2011, chap. 3). An elected civilian government took office the following year under the Colorado Party. The Colorados opposed criminal prosecutions for members of the armed services or security forces accused of human rights violations; its goal was "the imposition of national amnesia" (Lessa 2012, 127). The government enacted the Expiry Law (Ley de Caducidad de la Pretensión Punitiva del Estado) in 1986, essentially exempting military personnel from human rights prosecutions; decisions as to whether specific cases fell under the Expiry Law would be in the hands of the executive, not the judiciary (Lessa and Payne 2012, 130). The law passed with the support of the Blanco Party, which had generally opposed impunity (Kritz 1995, 38). The Blancos "feared, as did many Uruguayans, that the military would carry out a coup if they weren't protected from prosecution" (Sikkink 2011, 62). A citizen-sponsored referendum proposing to nullify the amnesty law took place in 1989; 54 percent voted against the proposal (Sikkink 2011, 80).

A first step toward accountability was the creation by President Jorge Battle of a Comisión para la Paz in 2000. Its report in 2003 constituted "the first official acknowledgment by the executive that state terrorism crimes, especially torture, disappearances and kidnapping of children" had occurred (Lessa and Payne 2012, 135). But Battle continued to apply the Expiry Law, including to the case of María Claudia Gelman in November 2003.

The 2004 election produced the first alternance in power since the return to democracy. The victory of the left Frente Amplio brought the first non-Colorado president, Tabaré Vázquez, into office in 2005. The Vázquez government ordered excavations at military sites to locate the remains of the disappeared. The courts started to open criminal proceedings against military and police officers accused of human rights violations (Lessa and Payne 2012). In October 2009, the Supreme Court of Justice declared key portions of the amnesty law unconstitutional, though it could do so only for the case at hand. A year later, the same court issued another ruling reiterating the unconstitutionality of the

amnesty law for 19 cases[16] and in February 2011 the Court declared the amnesty law void for a further twenty-five cases (Buriano 2011, 24). During this same period, former dictator Jose María Bordaberry was convicted (March 2010) for the 1976 assassination of two Uruguayan legislators, nine disappearances, and attacking the constitution (Lessa 2012). A second referendum on the Expiry Law was held in 2009, along with the presidential election. The initiative failed, receiving only 47.7 percent of the votes – the second time that Uruguayan voters had rejected a chance to revoke the amnesty law.

The Commission received the petition in the *Gelman* case in May 2006. It submitted the case to the Court in January 2010. At that point, Uruguay had passed important milestones in its domestic transition: the military regime was gone, an alternance in power had occurred, and some transitional justice mechanisms (the Peace Commission and the beginning of prosecutions for human rights violations under the dictatorship) had been activated. Our expectations regarding shifts in the domestic context and Commission referral of amnesty cases are met, though the 2009 referendum showed that a majority of voters was not ready to nullify the Expiry Law.

The Court

The amnesty at issue in *Gelman v. Uruguay* (the Expiry Law) differs from those in question in *Barrios Altos*, *Almonacid*, and (perhaps to a slightly lesser extent) *Gomes Lund* in that it was part of an internally negotiated political transition. That is, the political party (the *Partido Colorado*) that enacted the amnesty law had negotiated the political transition with the Uruguayan military regime. Moreover, the Expiry Law had been approved by voters in a referendum, not once but twice, in 1989 and 2009. The amnesty thus enjoyed some degree of political legitimacy. Yet Uruguay had also taken steps to move beyond the silence and impunity that had veiled serious human rights violations by the military regime. The opposition party Frente Amplio assumed power in 2005 and altered the government's stance vis-à-vis amnesty for past rights violations (as detailed above). In the same period, the Uruguayan courts were also chipping away at the Expiry Law. In other words, the domestic political context offered mixed signals. The referendum to nullify the Expiry Law failed in 2009, but both the executive and the judiciary were taking steps to end impunity.

In this context, the IACtHR received the Commission's application in *Gelman* (January 2010). The Court now had three strong precedents for nullifying the amnesty law, as well as the prospect that an IACtHR decision could strengthen the hand of the domestic anti-impunity forces in Uruguay. Accordingly, the IACtHR declared,

[16] *Gelman v. Uruguay* (2011), para. 150..

> Given its express incompatibility with the American Convention, the provisions of the Expiry Law that impede the investigation and punishment of serious violations of human rights have no legal effect and, therefore, can not continue to obstruct the investigation of the facts of this case and the identification and punishment of those responsible, nor can they have the same or similar impact on other cases of serious violations of human rights enshrined in the American Convention that may have occurred in Uruguay.[17]

As in the previous decisions, the Court held that the amnesty violated Articles 8 and 25, in conjunction with Articles 1(1) and 2, of the American Convention.[18]

The judgment also explicitly reinforced two key principles. First, the Court underscored that the incompatibility of amnesty laws was "not limited to those which are denominated, 'self-amnesties'."[19] Second, it emphasized that "[t]he fact that the Expiry Law of the State has been approved in a democratic regime and yet ratified or supported by the public, on two occasions, namely, through the exercise of direct democracy, does not automatically or by itself grant legitimacy under International Law."[20] The "incompatibility of the amnesty laws with the American Convention . . . does not stem from a formal question, such as its origin" but rather from their purpose, which is "to leave unpunished serious violations" of human rights.[21]

In *Almonacid*, *Gomes Lund*, and *Gelman*, the IACtHR staked out a strict and rather uncompromising position on amnesties for gross violations of human rights. The possibility, present in *Barrios Altos*, that self-amnesties were manifestly incompatible with the American Convention but that other types of amnesties might be permissible was decisively closed off. The practical effects of amnesty laws were not relevant; the mere existence of the amnesty law on the books violated the American Convention. Even democratically approved amnesties were impermissible. In short, the Court appeared to set aside considerations of domestic politico-legal context in favor of a strong doctrinal position that rendered amnesty laws *per se* illegal under the American Convention. As we show next, the last amnesty judgment appears to have reopened the door to consideration of an amnesty law's political context.

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[17] *Gelman v. Uruguay* (2011), para. 232.; as in *Gomes Lund*, the judgment did not void the entire amnesty law but only those provisions that created impunity for serious violations.
[18] *Gelman v. Uruguay* (2011), para. 244.
[19] *Gelman v. Uruguay* (2011), para. 229.
[20] *Gelman v. Uruguay* (2011), para. 238.
[21] *Gelman v. Uruguay* (2011), para. 229.

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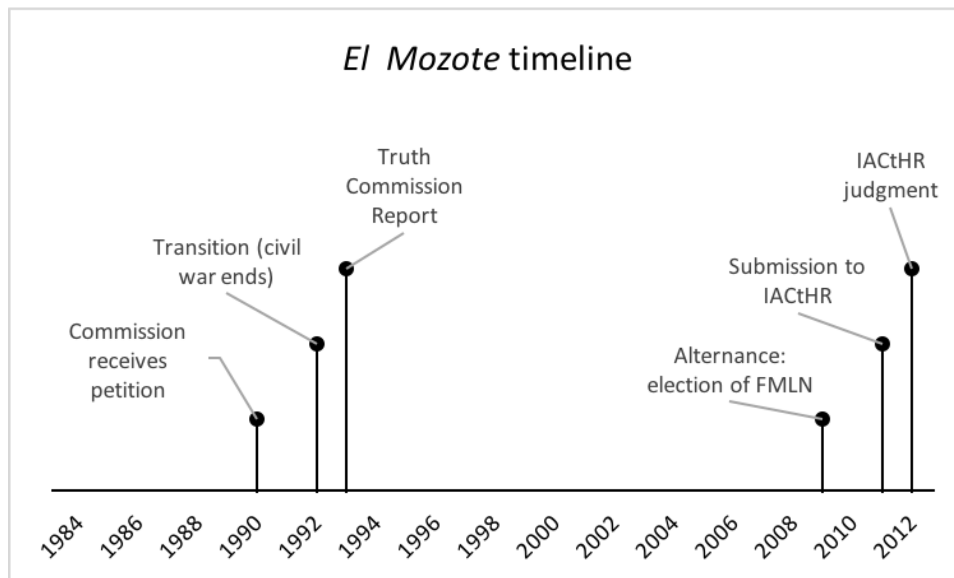
Massacres of El Mozote v. El Salvador (2012)



The Commission

The amnesty law in question in *El Mozote* differed from those in the previous cases in a crucial respect: it was enacted as part of a U.N.-sponsored peace process. The negotiations conducted under the auspices of the U.N. Secretary General brought to an end the twelve-year civil war (1980 – 1992) in El Salvador. The Salvadoran armed forces and their allied paramilitary "death squads" sought to destroy the armed insurgency of the Frente Farabundo Martí de Liberación Nacional (FMLN) using scorched earth tactics that produced massacres, disappearances, extrajudicial killings, and torture on a massive scale. The U.N. role was crucial not only in guiding the peace negotiations to a successful conclusion – the Peace Accord of January 1992 – but also in ensuring that the peace would bring a truth commission dedicated to uncovering the facts of the massive human rights violations that had occurred.

The Commission on the Truth for El Salvador published its report in March 1993, after receiving testimony from more than 25,000 people. The report attributed the vast majority of the rights violations (extrajudicial killings, disappearances, torture) to the military and security forces (68 percent) and paramilitary groups and death squads (24 percent) (Cuéllar Martínez 2007, 43). However, the Truth Commission report was not widely disseminated and President Alfredo Cristiani publicly dismissed it in his official response in March 1993, declaring that the country must "erase, eliminate, and forget the past in its entirety." He called for a "general and absolute amnesty, to turn that painful page of our history and seek a better future for our country" (quoted in Cuéllar Martínez 2007, 43). Within days, President Cristiani pushed through the sweeping Law of General Amnesty for Peace Consolidation (Legislative Decree No. 486). The new law overrode the

earlier and more limited National Reconciliation Law of 1992 and, crucially, did not exclude from the amnesty serious human rights violations (as the 1992 law did) (Alvira 2013, 129). The policy of "*borrón y cuenta nueva*" (erasure and clean slate) was strongly supported by ARENA, the conservative party that was closely aligned with the military and their civilian allies and that was in government from 1989 to 2009. But the FMLN also accepted the new amnesty (Collins 2010, 170) and much of the Salvadoran elite viewed it not only as positive but necessary (Popkin and Bhuta 1999, 8). The Supreme Court of Justice upheld the amnesty law on two occasions, in 1993 and 2000.[22]

The Salvadoran political context shifted significantly with the 2009 victory of the FMLN presidential candidate Mauricio Funes (the FMLN was by then the political party successor to the insurgent group that had fought against the rightist governments in the civil war). The 2009 election represented the first alternance in power since the end of the civil war. In January 2010, President Funes acknowledged the state's responsibility for the massacre at El Mozote and its obligation to clarify the facts and to prosecute those responsible.[23] In March 2011, the Commission submitted the *El Mozote* case to the IACtHR; it had received the petition in 1990.

To summarize, before the Commission sent *El Mozote* to the Court, El Salvador had experienced all three of the events that we identified as indicating a shift in the domestic political context toward greater openness regarding accountability. The civil war had ended in a U.N.-brokered peace accord, a truth commission had received testimony and issued its report, and, perhaps most crucially, the main opposition party had won an election in 2009.

The Court

At first glance, the *El Mozote* case appears to be a straightforward continuation of the strict anti-amnesty jurisprudence established in the previous four cases. In some ways, it is. The Court finds El Salvador responsible for violation of Articles 8 and 25 of the American Convention, in conjunction with Articles 1 and 2, for having failed to investigate serious violations and to prosecute and punish those responsible.[24] The Court rules that the "provisions of the Law of General Amnesty for the Consolidation of Peace that prevent the investigation and punishment of the grave human rights violations that were perpetrated in this case lack legal effects."[25] But *El Mozote* also presented to the Court issues that the previous cases did not directly address and the Court explicitly recognized an important distinction.

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[22] *Massacres of El Mozote v. El Salvador* (2012), para. 277, 278.
[23] *Massacres of El Mozote v. El Salvador* (2012), para. 19.
[24] *Massacres of El Mozote v. El Salvador* (2012), para. 300-301.
[25] *Massacres of El Mozote v. El Salvador* (2012), para. 296.

The crucial distinction, for our purposes, is that – in the Court's words – "contrary to the cases examined previously by this Court, the instant case deals with a general amnesty law that relates to acts committed in the context of an internal armed conflict."[26] That difference has important potential consequences for the IACtHR's amnesty jurisprudence. The Court had already decided cases from countries in which a civil war peace process involved an amnesty. In these previous cases, from Colombia,[27] El Salvador,[28] and Guatemala,[29] the amnesty laws were not alleged to have hindered the investigation, prosecution, and punishment of those responsible for the specific rights violations that were the subject of the petitions. Consequently, in its judgments the Court did not rule directly on the amnesty laws themselves, though it did sometimes reiterate its general amnesty jurisprudence in *obiter dicta* and it did stipulate in some orders that amnesties must not pose any obstacle to pursuing the investigation, prosecution, and punishment of the underlying crimes. *El Mozote*, then, was the first case in which the Court ruled directly on an amnesty connected to a civil war peace process.

The law that the IACtHR found incompatible with the American Convention was the 1993 "Law of General Amnesty for the Consolidation of the Peace." The 1993 amnesty law followed earlier relevant developments. An April 27, 1991 agreement between government and the main rebel group, the FMLN (Frente Farabundo Martí de Liberación Nacional), provided for the creation of a Truth Commission (Canton 2007, 173-174). The ensuing Peace Accord, negotiated under the auspices of the Secretary General of the United Nations and signed on 16 January 1992, explicitly incorporated the Truth Commission. A section on an "End to impunity" declared, "The Parties recognize the need to clarify and put an end to any indication of impunity on the part of officers of the armed forces, particularly in cases where respect for human rights is jeopardized. To that end, the Parties refer this issue to the Commission on the Truth for consideration and resolution."[30] The Salvadoran government enacted a 1992 National Reconciliation Law, which provided for a limited amnesty that excluded serious human rights violations. The Truth Commission presented its report at U.N. headquarters in New York in March 1993 and within days the conservative government of Alfredo Cristiani passed the sweeping Law of General Amnesty, which did cover serious rights violations.[31]

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[26] *Massacres of El Mozote v. El Salvador* (2012), para. 284.
[27] *19 Merchants v. Colombia* (2004); *Gutiérrez Soler v. Colombia* (2005); *"Mapiripán Massacre" v. Colombia* (2005); *Ituango Massacres v. Colombia* (2006); *Rochela Massacre v. Colombia* (2007); *Manuel Cepeda Vargas v. Colombia* (2010).
[28] *Serrano Cruz Sisters v. El Salvador* (2005); *Contreras et al. v. El Salvador* (2011).
[29] *Myrna Mack Chang v. Guatemala* (2003); *Carpio Nicolle et al. v. Guatemala* (2004); *Tiu Tojín v. Guatemala* (2008); *"Las Dos Erres" Massacre v. Guatemala* (2009); *Chitay Nech et al. v. Guatemala* (2010); *Río Negro Massacres v. Guatemala* (2012).
[30] Quoted in*Massacres of El Mozote v. El Salvador* (2012), para. 287..
[31] See the discussion of the Commission's role in *El Mozote* above.

The Court ruled that the provisions of the Law of General Amnesty that fostered impunity were without legal effect. Did this judgment mean that even amnesties enacted in the context of ending civil wars were invalid? It did not, for two reasons. First, the law targeted by the IACtHR ruling in *El Mozote* was not part of the U.N.-sanctioned peace process. Second, the IACtHR judgment explicitly addresses the question of amnesties enacted as part of a civil war settlement. The key is to pay attention to what amnesty the Court ruled impermissible. After reiterating its jurisprudence holding that amnesties that prevent the investigation and prosecution of serious human rights violations are incompatible with the American Convention, the Court then notes that, unlike the previous cases, *El Mozote* involved an amnesty law related to acts committed in an internal armed conflict. "Therefore," the Court declares, it is pertinent to analyze "the compatibility of the Law of General Amnesty for the Consolidation of Peace with the international obligations arising from the American Convention and its application to the case of the Massacres of El Mozote and Nearby Places . . . in light of the provisions of Protocol II Additional to the 1949 Geneva Conventions, as well as of the specific terms in which it was agreed to end hostilities."[32] According to international humanitarian law, "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." In fact, Protocol II Additional to the 1949 Geneva Conventions explicitly allows for them.[33] The Court thus acknowledges that amnesties in the context of civil war do not necessarily – in themselves – violate international humanitarian law.

However, the allowance for amnesties is not open-ended because, under international humanitarian law, "States also have an obligation to investigate and prosecute war crimes." The amnesties envisioned in Geneva Protocol II cannot "involve facts, such as those of the instant case, that can be categorized as war crimes, and even crimes against humanity."[34] The Court refers to the 1992 Peace Accord, which does not mention amnesty but does include a paragraph on "End to impunity," recognizing that cases of human rights violations "must be the object of exemplary action in the law courts so that the punishment prescribed by law is meted out to those found responsible."[35] The Court then turns to the 1993 Law of General Amnesty, which created impunity for those responsible for "grave crimes perpetrated against international law during the armed conflict."[36] The 1993 amnesty contradicted both the Peace Accords, which provided for an end to impunity, and the 1992 amnesty law, which excluded those who had participated in

[32] *Massacres of El Mozote v. El Salvador* (2012), para. 284.
[33] *Massacres of El Mozote v. El Salvador* (2012), para. 285.
[34] *Massacres of El Mozote v. El Salvador* (2012), para. 286.
[35] *Massacres of El Mozote v. El Salvador* (2012), para. 287.
[36] *Massacres of El Mozote v. El Salvador* (2012), para. 291-292.

serious human rights violations.[37] It was the 1993 amnesty law (or, rather, the provisions of it that created impunity) that the Court determined lacked legal effect.[38]

The key conclusion is this: the earlier (1992) amnesty law, which excluded serious rights violations, would likely have been acceptable to the Court because it was consistent with the Peace Accords and, more importantly, did not prevent the investigation, prosecution, and punishment of acts that violated non-derogable rights. Peace-process amnesties, it appears, can be compatible with the American Convention, provided they do not cover serious human rights violations. The implications of *El Mozote* and of Judge García-Sayán's separate opinion in the case will be explored further in the discussion of Colombia's amnesty laws and the Court's judgments in cases arising out of that country's internal conflict.

[37] *Massacres of El Mozote v. El Salvador* (2012), 292.
[38] *Massacres of El Mozote v. El Salvador* (2012), para. 318.

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