

# RETHINKING AMNESTIES AND THE FUNCTION OF THE DOMESTIC JUDGE

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Received: 29 September 2022 | Last Revised: 6 March 2023 | Accepted: 13 March 2023

## Abstract

The award of amnesties or pardons has been used time and again to facilitate the attainment of peace after a civil war. However, this practice has been condemned by human rights and other international bodies as incompatible with the duty of states under human rights law to investigate, prosecute and punish human rights violations and the victims' rights of access to justice and to the truth. Due to this incompatibility, the function of the domestic (constitutional) judge is none other than to strike down amnesty legislation as null and void. This appears to be the prevailing narrative in contemporary human rights discourse. The present contribution takes issue with this narrative. It takes the position that the international effect of regional human rights jurisprudence has been to condition, as opposed to wholesale outlaw, the use of amnesties as a post-conflict peace-building tool. It defends the view that while blanket amnesties are increasingly considered incompatible with victims' rights today, that does not mean that all amnesties are prohibited. From this perspective, this article argues that the proper function of domestic constitutional courts in the performance of the constitutionality control of amnesty legislation should take a different shape; instead of querying whether to strike down or to uphold amnesty legislation in its entirety, Constitutional Courts should condition amnesties to criteria – such as their position as part of a broader transitional justice package including truth telling and compensation – and monitor their implementation on a case-by-case basis.

**Keywords:** Amnesties; Human Rights; Incompatibility; National Judge.

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## I. INTRODUCTION

In the 1980s, the Republic of El Salvador was embroiled in a civil war between the government of El Salvador and the *Frente Farabundo Marti para la Liberacion Nacional* (FMLN). From 11-13 December 1981, the Atlacatl Battalion of the Salvadoran military forces launched a coordinated attack against the cantons of El Mozote and nearby places, killing more than 1000 civilians and torturing and raping many more.<sup>1</sup> Years later, negotiations between the warring parties under the auspices of the United Nations with the support of the government of Colombia, Mexico, Spain and Venezuela, led to the emblematic Chapultepec Peace Agreement<sup>2</sup> and a series of other agreements ('the Mexico Agreements')<sup>3</sup> collectively known as the Salvadoran Peace Accords. These agreements purported to conclude the El Salvador civil war that lasted more than a decade and to pave the way for an enduring peace. Among others, Article 2 of the Mexico Agreements provided for the establishment of a Truth Commission, with the task of "investigating serious acts of violence that have occurred since 1980 and whose impact on society urgently demands that the public should know the truth."<sup>4</sup>

Article 5 of the Chapultepec Agreement further provided that the Truth Commission would put an end to any indication of impunity for acts committed by officers of the armed forces, because:

"acts of this nature, regardless of the sector to which their perpetrators belong, must be the object of exemplary action by the law courts so that the punishment prescribed by law is meted out to those found responsible."<sup>5</sup>

The Truth Commission was given six months to complete its work.<sup>6</sup> In its final report, the Commission explained to the UN Security Council that during

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<sup>1</sup> President of El Salvador Mauricio Funes, Statement on January 16, 2012. See: *Massacres of El Mozote and Surrounding Areas v. El Salvador*, Judgment on Merits, Reparations and Costs, Inter-American Court of Human Rights (2012), para. 23.

<sup>2</sup> UN. Department of Public Information, "El Salvador Agreements: The Path to Peace," United Nations Digital Library, published January 16, 1992.

<sup>3</sup> *Ibid.*, 13-31.

<sup>4</sup> *Ibid.*, 29-30.

<sup>5</sup> *Ibid.*, Art. 5. See further: Belisario Betancur, Reinaldo Figueredo Planchart, and Thomas Buergenthal, "From Madness to Hope: The 12-Year War in El Salvador: Report of the Commission on the Truth for El Salvador" (Report presented for President of the Security Council at El Salvador, 1993). The Report is publicly available as an Annex to the Letter dated 29 March 1993 addressed to the President of the Security Council, 1 April 1993.

<sup>6</sup> Betancur, Planchart, and Buergenthal, "From Madness to Hope," 19.

its operation, different types of pressure were applied to it. In the beginning, it received hints “from the highest level” to name names and establish responsibility on the individual level; towards the conclusion of its mandate, it received new hints “from the highest level” to the exact opposite direction, i.e. to avoid naming names, in order to facilitate national reconciliation.<sup>7</sup> In the final report, the Commission proceeded to name names where sufficient corroboration was possible.<sup>8</sup>

Mere days after the Truth Commission’s Report, Salvadorean President Cristiani and his party adopted legislation granting a blanket amnesty to all individuals accused in the Commission’s report of involvement in serious acts of violence.<sup>9</sup> Days later, the Inter-American Commission responded to the adoption of this law by a letter to the President of El Salvador. In its missive, the Commission decried the adoption of the amnesty legislation as a possible failure to comply with Salvador’s international obligations under the Peace Agreements and the American Convention on Human Rights.<sup>10</sup> The Government of El Salvador responded a few months later by a letter addressed to the Commission, where it stated that:

“We believe that this law for total and absolute amnesty, passed by the Legislative Assembly, needs the support of the international and national community in order to turn this painful page in our history and look to a brighter future for our children and the nation.”<sup>11</sup>

The Inter-American Commission in both the 1994 Special Report on El Salvador and in its subsequent Annual Report found that the adoption of the law was in violation of El Salvador’s international commitments under the

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<sup>7</sup> Ibid., 14.

<sup>8</sup> Ibid., 52-53.

<sup>9</sup> “El Salvador: Decreto No. 486 de 1993 - *Ley de amnistía general para la consolidación de la paz* [General Amnesty Law for the Consolidation of Peace],” UNHCR, published March 20, 1993. Article 1 provided in part “full, absolute and unconditional amnesty to all those who participated in any way in the commission, prior to January 1, 1992, of political crimes or common crimes linked to political crimes or common crimes in which the number of persons involved is no less than twenty.”

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

American Convention.<sup>12</sup> Subsequent reports of the Inter-American Commission,<sup>13</sup> and judgments of the Inter-American Court<sup>14</sup> repeated this conclusion in cases arising from complaints brought by victims whose access to El Salvadorean justice was frustrated by the amnesty law.

This situation continued for approximately a quarter of a century, when in 2016 the Constitutional Chamber of the Supreme Court of El Salvador declared the 1993 General Amnesty Law for the Consolidation of Peace unconstitutional.<sup>15</sup> Even though the legal basis for the ruling was Additional Protocol II to the Geneva Conventions, the Inter-American Commission welcomed this “historic ruling as a milestone in the road to truth, justice and reparation in El Salvador”. It underscored that:

“States, for their part, have an *unwaivable legal duty* to take reasonable steps to prevent human rights violations, to use the means at their disposal to carry out a serious investigation of violations committed within their jurisdiction, to identify those responsible and impose upon them the appropriate punishment, and to ensure the victim adequate compensation. (emphasis added)”<sup>16</sup>

However, this historical ruling was not the end of the matter. On the contrary, new legislative initiatives in the Salvadorean Parliament ensued, proposing another blanket amnesty.<sup>17</sup> The proposal met with international condemnation

<sup>12</sup> *Ibid.*, 77. “The very sweeping General Amnesty Law passed by El Salvador’s Legislative Assembly constitutes a violation of the international obligations it undertook when it ratified the American Convention on Human Rights, because the law makes possible a ‘reciprocal amnesty’ without first acknowledging responsibility (despite the recommendations of the Truth Commission); because it applies to crimes against humanity, and because it eliminates any possibility of obtaining adequate pecuniary compensation, primarily for victims.” This conclusion was reiterated and reinforced in the Michael Reisman, “The Annual Report of the Inter-American Commission on Human Rights Chapter VI by the President of the IACHR” (Report presented for the Committee on Juridical and Political Affairs of the Permanent Council of the OAS at El Salvador, 1994).

<sup>13</sup> *Parada Cea et al. v. El Salvador*, No. 10.480 (Inter-American Commission of Human Rights 1999); *Ellacuria S.J. et al. v. El Salvador*, No. 10.488 (Inter-American Commission of Human Rights 1999), paras. 200-22; *Monsenor Oscar Arnulfo Romero and Galdamez v. El Salvador*, No. 11.481 (Inter-American Commission of Human Rights 1999), para. 671.

<sup>14</sup> Cases against El Salvador involving the amnesty laws from the jurisprudence of the Inter-American Court of Human Rights’ Cases: *Monsignor Romero* (1980), *Rochac Hernández et al.* (1980), *Contreras et al.* (1981), the Massacres at El Mozote and nearby places (1981), the Disappearance of the Serrano Cruz sisters (1982), the Massacre at Las Hojas (1983), and the Extrajudicial execution of six Jesuit priests and two women (1989).

<sup>15</sup> Judgment on Unconstitutionality 4-2013/145-2013 (Constitutional Chamber of the Supreme Court of El Salvador 2016). For (partial) English translation see: “El Salvador, Supreme Court Judgment on the Unconstitutionality of the Amnesty Law,” ICRC Casebook, accessed September 3, 2022.

<sup>16</sup> “IACHR Hails Determination of Unconstitutionality of Amnesty Law in El Salvador,” OAS, published July 25, 2016.

<sup>17</sup> Adolfo Parker, “Draft Amnesty Law of December 2018,” DPLF, accessed September 3, 2022. See further: “Three Years After the Annulment of the Amnesty Law: Victims of the Armed Conflict Defeat a Renewed Attempt at Codifying Impunity in El Salvador, but the Fight is Far from Over,” DPLF, accessed September 3, 2022.

and the President's veto.<sup>18</sup> What is more, victims organisations applied to the Inter-American Court of Human Rights and obtained a provisional measures decision ordering the suspension of the Salvadorean legislative process of the proposed new blanket amnesty law, pending new proceedings on the El Mozote massacre.<sup>19</sup> Ultimately, the draft law was defeated and the El Mozote massacre case opened 36 years after the event (1981) with requests for US records still featuring prominently in the public eye as late as 2020.<sup>20</sup>

However, to this day it remains uncertain whether the proceedings will ever be concluded and if so by which bench. In 2020, investigating Judge Jorge Guzmán Urquilla asked the Prosecutor General to open a criminal investigation on the President's and the Defence Minister's refusal to comply with a court order to disclose the military records of that period.<sup>21</sup> A decision issued by the Constitutional Chamber of the Supreme Court supporting the judge did nothing to alter the situation.<sup>22</sup> In 2021, the newly appointed Attorney General and the defence sought to remove the investigating judge on grounds of bias, due to a paper he wrote during his university studies on human rights violations during the civil war.<sup>23</sup> Within the same year, a new law on Judicial Career was adopted, lowering the age of retirement from 35 to 30 years of service for judges over the age of 60. At the time the law was passed, judge Guzmán Urquilla was 61.<sup>24</sup> Against this background it remains unclear whether criminal proceedings will ever take place for the El Mozote massacres.

<sup>18</sup> Ibid.

<sup>19</sup> *Massacres of El Mozote and Surrounding Areas v. El Salvador* (Inter-American Court of Human Rights 2019), para. 42.

<sup>20</sup> Kevin Sieff, "El Salvador Is Trying Suspects in the Notorious El Mozote Massacre. The Judge Is Demanding Crucial Evidence: U.S. Government Records," *Washington Post*, published March 14, 2020.

<sup>21</sup> Naomi Roht-Arriaza, "On El Salvador's 1981 El Mozote Massacre, President Bukele Sides with Impunity," *Just Security*, published October 28, 2020.

<sup>22</sup> Amparo Decision, No. 408-2020 (El Salvador Constitutional Chamber of the Supreme Court 2020).

<sup>23</sup> "More Attempts to Add Roadblocks on Road to Justice in El Mozote Case," *El Salvador Perspectives*, published April 19, 2021.

<sup>24</sup> Note that the adoption of a new law lowering the mandatory retirement age from 35 to 30 years and a 60-year-old age limit has also been denounced by victims organisations and the Inter-American monitoring bodies as another obstacle on the way to justice for the victims of El Mozote. See among others: "Reform to the Judicial Career Law Threatens El Mozote Investigation, Inter-American Court Requests Information from the Salvadoran State," CEJIL, published September 20, 2021; "IACHR and UN Expert Reject Legislative Reforms that Remove Judges and Prosecutors in El Salvador and Calls for Respect of Guarantees for Judicial Independence," OAS, published September 7, 2021; Peter Canby, "Is El Salvador's President Trying to Shut Down a Hearing on the Infamous El Mozote Massacre?" *The New Yorker*, published September 10, 2021.

The El Salvador debacle serves as a useful illustration of the extremely sensitive and complicated issues emerging from amnesties, especially when the latter are adopted as part of a peace agreement seeking to end an internal armed conflict. They give rise to situations where political, legal and ethical issues are sometimes inextricably intertwined.

At the center of this legal-political debacle sits the domestic – and particularly the constitutional – judge. Arguably, one of the greatest challenges a constitutional court judge may face during his or her tenure is a decision on the constitutionality of an amnesty law forming part of a peace process in the aftermath of a civil war. The stakes are the highest possible. Typically, petitioners – victims of horrific crimes or their relatives – ask the constitutional judge to lift the amnesty obstacle, grant them access to national criminal justice institutions and open investigations and – where appropriate – prosecutions against their wrongdoers. Eventually, the proceedings may also include reparation claims. The state, responding to the complaint, typically highlights that the constitutionality of an amnesty clause should be upheld as an essential part of post-conflict peace and a necessary concession to ensure the country's transition to a prosperous future.

Against this background, constitutional litigation on amnesty laws would appear to be nothing short of historical. Yet, in many jurisdictions, this historical impact may be dampened by subsequent rulings of human rights bodies. Since the 1990s, victims have complained to regional and international human rights bodies against national decisions upholding amnesties. Some of these bodies – and primarily the Inter-American Court of Human Rights – have found for the applicants. They declared amnesty laws incompatible with international human rights treaties under their purview, primarily due to the restrictions they impose on the victims' right of access to justice and the right to truth.<sup>25</sup>

This jurisprudence, combined with the practice of institutions such as the United Nations and UN human rights bodies, lend weight to the view that the dominant approach to amnesties today is their incompatibility with victims' rights and therefore their invalidity. In turn, this narrative suggests that the

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<sup>25</sup> Peter Canby, "Is El Salvador's President."

function of the constitutional judge in such litigations is binary. The judge must decide whether to uphold or to strike down the amnesty law. Human rights bodies strongly emphasize the second option as the only option compatible with the ‘unwaivable legal duty’ to investigate, prosecute and punish human rights violations.<sup>26</sup>

The present contribution takes issue with both this normative approach and its corresponding conceptualisation of the judicial function on the domestic level. While it remains sympathetic to the plight of victims and the imperative of recognition and reparation for the harm suffered, it takes the view that under contemporary international law, amnesties are not wholly outlawed. As a result, the treatment of constitutional complaints against amnesty laws calls for a more nuanced approach by the domestic judge. On that basis, this article suggests that the national judge should avoid a binary approach to the relevant litigation. Instead, the judge is called to perform a balancing exercise between the rights of victims with the prerogatives for peace. Viewed under this light, one way forward might be the interpretation and application of ‘blanket’ amnesty law subject to conditions inspired by human rights jurisprudence, in combination with a more nuanced, individualised and case-by-case application.

To make its point clear, part I of this paper will discuss the incompatibility thesis, present its normative foundations and its effects. Part II will turn to a critique of this approach and highlight that, contrary to the prevailing view in human rights discourse, the international restriction on amnesty is neither absolute nor universal. Part III will discuss ways forward in the adjudication of constitutional complaints on amnesty seeking to reconcile respect for victims’ rights with the exigencies of post-conflict peace building. In closing, certain concluding observations will recapitulate the key points in the discussion and its principal argumentation.

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<sup>26</sup> Ibid.

## II. THE INCOMPATIBILITY THESIS

In recent times, the award of unconditional amnesties has been increasingly perceived as ‘commanded forgetting’<sup>27</sup> and a sacrifice of justice on the altar of political pressures, instead of a legitimate peace-building tool.<sup>28</sup> Unavoidably, this reconceptualization of amnesty led to a judicial reaction first and foremost in the law and practice of the human rights bodies of the Inter-American system. They were the first to adopt the view that amnesties precluding prosecution and punishment for serious human rights violations are incompatible with human rights law.

In its first reports on this issue, the Inter-American Commission took the view that amnesties are a matter of national law and their use or annulment rest with the legitimate institutions of national democracies.<sup>29</sup> However, soon thereafter, the 1988 *Velasquez Rodriguez* judgment issued by the Inter-American Court ruled that the duty to ‘ensure’ respect for human rights under Article 1(1) of the American Convention entails that states parties have a duty to investigate, prosecute and punish – where appropriate – human rights violations and provide remedies.<sup>30</sup>

The Inter-American Commission applied the *Velasquez Rodriguez* principles in its subsequent decisions on amnesties and found that the amnesty laws of Argentina, El Salvador and Uruguay were incompatible with the victims’ rights under Articles 1(1), 8 and 25 of the American Convention.<sup>31</sup> The democratic

<sup>27</sup> Paul Ricoeur, *Memory, History, Forgetting* (Chicago: University of Chicago Press, 2004), 451-452.

<sup>28</sup> Martha Minow, “Do Alternative Justice Mechanisms Deserve Recognition in International Criminal Law? Truth Commissions, Amnesties and Complementarity at the International Criminal Court,” *Harvard International Law Journal* 60, no. 1 (March 2019): 3, <https://harvardilj.org/>.

<sup>29</sup> In an often-quoted passage, the Inter-American Commission had noted in its 1985-1986 report that “only the appropriate democratic institutions usually the legislature-with the participation of all the representative sectors, are the only ones called upon to determine whether or not to decree an amnesty [or] the scope thereof, while amnesties decreed previously by those responsible for the violations have no juridical validity.”

<sup>30</sup> Judgment on Merits, *Velásquez-Rodríguez v. Honduras* (Inter-American Court of Human Rights 1988), para. 166 (on general duty to ‘respect’) and para. 176 (on impunity incurred due to the failure of the ‘state apparatus’ to act).

<sup>31</sup> Inter-American Commission on Human Rights, Report No. 34/91 (1991) Cases Nos. 10.147, 10.181, 10. 240, 10.262, 10.309, 10.311 (Argentina); Inter-American Commission on Human Rights, Report No. 22/92 (1992) Cases Nos. 10.029, 10.036, 10.305, 10.372, 10.373, 10.374 and 10.375 (Uruguay). From the literature, among many others, David Pion-Berlin, “To Prosecute or to Pardon? Human Rights Decisions in the Latin American Southern Cone,” *Human Rights Quarterly* 16, no. 1 (February 1994): 105-130, <https://doi.org/10.2307/762413>.



legitimacy argument underpinning the adoption of the amnesties – i.e. that they were measures endorsed by the local population in one way or another – did not sway the Commission.<sup>32</sup> As Gavron notes:

“Despite the fact that the Argentine laws were passed by a democratic government in the wake of an investigative commission and high level prosecutions; El Salvador, in conjunction with the UN, was establishing a truth commission, and the Uruguayan amnesty was approved by a democratic referendum, the Commission found that each one violated the Convention. It is clear that the position in 1992 was that an amnesty law, by its very nature, was incompatible with the ‘Full observance of the Human Rights set forth in the American Declaration on the Rights and Duties of Man and the American Convention on Human rights.’”<sup>33</sup>

The Inter-American Court of Human Rights followed suit. In its first judgment on point, the matter became considerably easier by the concessions of the new Peruvian government to the Inter-American Commission’s claims. Arguably, this enabled the Court to decide unanimously that:

“4. [...] Amnesty Laws No. 26479 and No. 26492 are incompatible with the American Convention on Human Rights and, consequently, lack legal effect.  
5. [...] the State of Peru should investigate the facts to determine the identity of those responsible for the human rights violations referred to in this judgment, and also publish the results of this investigation and punish those responsible.”<sup>34</sup>

The *Barrios Altos* ruling was repeated in the Court’s subsequent jurisprudence and constitutes to this day the emblematic *dictum* on the incompatibility of amnesties with human rights norms. However, this otherwise robust finding of law did not entail equally robust consequences in all three cases at that time. In its early jurisprudence the Commission took a more reserved approach on the

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<sup>32</sup> The Permanent Representative of Uruguay, in a formal Letter addressed to the President of the Organisation of American States (OAS) on May 7, 1993, criticised the Commission’s approach as one that showed “a lack of sensitivity” by the Commission towards referenda as expressions of direct democracy. See: Felipe González Morales, “The Progressive Development of the International Law of Transitional Justice: The Role of the Inter-American System,” in *The Role of Courts in Transitional Justice*, ed. Jessica Almqvist and Carlos Espósito (London: Routledge, 2013), 41-65.

<sup>33</sup> Jessica Gavron, “Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court,” *International & Comparative Law Quarterly* 51, no. 1 (January 2002): 98, <https://doi.org/10.1093/iclq/51.1.91>.

<sup>34</sup> Judgment on Merits, *Chumbipuma Acquirre et al. v. Peru (Barrios Altos)* (Inter-American Court of Human Rights 2001), paras. 4-5.

issue of remedies, stopping short of calling for criminal punishment of individuals covered by the amnesty and found to have been involved in the commission of human rights violations.<sup>35</sup>

In its subsequent jurisprudence, the focus shifted from the incompatibility issue – which was considered settled by *Barrios Altos* – to the question of remedies. This proved a critical point of discussion. In *Barrios Altos*, the Inter-American Court ruled that the amnesty legislation of Peru was null and void due to its incompatibility with the latter's human rights obligations and accepted Peru's unilateral promise of implementation.<sup>36</sup> The Inter-American Court accepted that this promise of the Government, in conjunction with judgments issued by the Peruvian Constitutional Court upholding its decision, meant that the Fujimori amnesty legislation would remain inapplicable within the Peruvian legal order, even though formally it was still in force.<sup>37</sup>

The question of remedies emerged acutely in the context of Chile. The question there concerned the keeping in effect Pinochet's blanket amnesty legislation long after Chile became a party to the American Convention on Human Rights.<sup>38</sup> In the case of the extrajudicial killing of Almonacid Arellano, the Inter-American Court noted with dismay that for over 16 years since the ratification of the American Convention, Chile remained in violation of its duty to adapt its national law to its human rights obligations as regards Pinochet's blanket amnesties, irrespective of the fact that on occasion the authorities did not give it effect.<sup>39</sup> The Court ruled that Chile had an international obligation to annul the amnesty legislation.<sup>40</sup>

<sup>35</sup> Note that in the most far-reaching set of recommendations – the ones on El Salvador – the Commission recommended judicial process to impose sanctions, but it did not expressly identify the sanctions as criminal. Gavron, "Amnesties in the Light," 91-117.

<sup>36</sup> *Chumbipuma Acquirre et al. v. Peru (Barrios Altos)* (Inter-American Court of Human Rights 2001), paras. 4-6; *Barrios Altos v. Peru* (Inter-American Court of Human Rights 2001), para. 5(a); *Barrios Altos v. Peru* (Inter-American Court of Human Rights 2005), para. B.

<sup>37</sup> This reflection is included in the Judgment on Reparations and Costs, *La Cantuta v. Peru* (Inter-American Court of Human Rights 2006), para. 162.

<sup>38</sup> On the Pinochet amnesty decree law no. 2191, see the critical remarks in Ben Chigara, *Amnesty in International Law: The Legality Under International Law of National Amnesty Laws* (Harlow: Longman, 2002).

<sup>39</sup> Preliminary Objections, Merits, Reparations, Judgment, *Arellano v. Chile* (Inter-American Court of Human Rights 2006), para. 121.

<sup>40</sup> *Ibid.*, paras. 121-22.

However, the Court made clear that the duty did not fall solely on the shoulders of the political apparatus. Judges too had a duty to abide by the rulings of the Inter-American Court interpreting the Convention. In the Inter-American Court's own words:

“When the Legislative Power fails to set aside and / or adopts laws which are contrary to the American Convention, the Judiciary is bound to honor the obligation to respect rights as stated in Article 1(1) of the said Convention, and consequently, it must refrain from enforcing any laws contrary to such Convention.”<sup>41</sup>

The Inter-American Court went on to explain the predicate and effect of the obligation to comply with its rulings:

“The Court is aware that domestic judges and courts are bound to respect the rule of law, and therefore, they are bound to apply the provisions in force within the legal system. But when a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This *forces* them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and *that have not had any legal effects since their inception*. In other words, the Judiciary must exercise a sort of “conventionality control” between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention. (Emphasis added)”<sup>42</sup>

Although in terms of public international law and the law of state responsibility there is little to be gainsaid by the reminder that domestic judgments engage the international responsibility of a state *qua* actions of state organs, this paragraph appears to reshape the paradigmatic construction of the judicial function of the constitutional judge. The domestic judge is no longer called upon to assess the validity of an amnesty legislation based solely on the formal constitutional requirements governing the valid adoption of the legislation.<sup>43</sup> Through the

<sup>41</sup> Arellano v. Chile, para. 123.

<sup>42</sup> *Ibid.*, 124.

<sup>43</sup> Louise Mallinder and Kieran McEvoy, “Rethinking Amnesties: Atrocity, Accountability and Impunity in Post-Conflict Societies,” *Contemporary Social Science* 6, no. 1 (February 2011): 118, <https://doi.org/10.1080/17450144.2010.534496>.

obligation to conduct a 'conventionality control', domestic judges are 'forced', i.e. duty bound, to apply the decisions of the Inter-American Court on the question of amnesties and to declare amnesty legislation null and void *ab initio* regardless of or in addition to their constitutional mandate.

In its subsequent jurisprudence the Inter-American Court has following this approach more or less consistently. In some instances, it clothed its judgments with direct applicability, thus rendering obsolete both the need to annul amnesty legislation and the fear of wavering in its implementation.<sup>44</sup> In others, it did not spell out explicitly the requirement of annulment of national law but only described an effect, leaving the choice of means to the government.<sup>45</sup>

The sum of the Inter-American Court's jurisprudence is usefully summarized in *Anzualdo Castro v. Peru* along the following terms:

"The State shall not be able to argue or apply a law or domestic legal provision, present or future, to fail to comply with the decision of the Court to investigate and, if applicable, criminally punish those responsible for the facts. For this reason and as ordered by this Tribunal since the delivery of the Judgment in the case of *Barrios Altos v. Peru*, the State can no longer apply amnesty laws, which lack legal effects, present or future [...], or rely on concepts such as the statute of limitations on criminal actions, *res judicata* principle and the double jeopardy safeguard or resort to any other measure designated to eliminate responsibility in order to escape from its duty to investigate and punish those responsible."<sup>46</sup>

Following a review of this practice, Micus comes to the conclusion that:

"The granting of amnesty to the alleged authors of gross human rights violations, such as torture, summary executions, and forced disappearances, is contrary to the non-derogable rights laid down in the body of international law on human rights and in particular to some provisions of the American Convention on Human Rights. The I/A Court of consequently held that such amnesty laws are, "devoid of legal effects," and that state authorities

<sup>44</sup> Dinah Shelton, *Remedies in International Human Rights Law* (Oxford: Oxford University Press, 2015).

<sup>45</sup> Indicatively, Judgment on Merits and Reparations, *Gelman v. Uruguay* (Inter-American Court of Human Rights 2011), para. 11; Judgment on Preliminary Objections, Merits, Reparations, and Costs, *Gomez-Lund et al. v. Brazil* (Inter-American Court of Human Rights 2010), paras. 171-176; *Massacres of El Mozote and Surrounding Areas v. El Salvador* (Inter-American Court of Human Rights 2012), paras. 283-286.

<sup>46</sup> Judgment *Castro v. Peru* (Inter-American Court of Human Rights 2009), para. 182.

are obliged to initiate criminal proceedings against the alleged authors of those crimes.”<sup>47</sup>

The position of the monitoring organs of the American Convention on Human Rights was not isolated. The UN Secretary General,<sup>48</sup> the UN Human Rights Committee,<sup>49</sup> the UN Commission on Human Rights,<sup>50</sup> the Committee against Torture,<sup>51</sup> the International Criminal Tribunal for the Former Yugoslavia,<sup>52</sup> the Special Court for Sierra Leone,<sup>53</sup> the African Commission on Human Rights<sup>54</sup>, and the Extraordinary Chambers of the Courts of Cambodia<sup>55</sup> have all followed in their practice the position of the Inter-American institutions. This has prompted the UN High Commissioner for Human Rights to speak of a norm under customary law that prohibits amnesties for serious human rights violations.<sup>56</sup>

### III. CHALLENGING THE INCOMPATIBILITY THESIS: NOTHING MORE THAN A ‘WAVE’ *DE LEGE FERENDA*

Strong as the incompatibility thesis may be, it is far from unanimous or unequivocal. Jurisprudence and academic scholarship challenge its purported

<sup>47</sup> Annelen Micus, *The Inter-American Human Rights System as a Safeguard for Justice in National Transitions: From Amnesty Laws to Accountability in Argentina, Chile and Peru* (Leiden: Brill, 2015), 155.

<sup>48</sup> United Nations, “Report of the Secretary General to the UN Security Council, on the Establishment of a Tribunal for Sierra Leone” (Report presented for United Nations, October 4, 2000), paras. 22-24.

<sup>49</sup> Human Rights Committee, General Comment No. 20, U.N. Doc. HRI/GEN/1/Rev.1 no. 30 (1994), para. 15; Human Rights Committee, General Comment No. 31, CCPR/C/21/Rev.1/Add.1326 (26 May 2004), para. 18; Human Rights Committee Resolution 2004/72 Impunity, E/CN.4/RES/2004/7 (21 April 2004), para. 3; Human Rights Committee Resolution 2005/81 Impunity, E/CN.4/RES/2005/81 (21 April 2005), para. 3; Hugo Rodríguez v. Uruguay, Communication 322/1988, UN Doc. CCPR/C/51/D/322/1988 (9 August 1994), para. 12.

<sup>50</sup> Human Rights Committee Resolution 2004/72 Impunity, E/CN.4/RES/2004/7 (21 April 2004) and the subsequent Human Rights Resolution 2005/81 Impunity, E/CN.4/RES/2005/81 (21 April 2005). Paragraph 3 of the relevant Resolutions is the critical part.

<sup>51</sup> Committee against Torture, General Comment No. 2 (2007); Committee against Torture, General Comment No. 3 (2012).

<sup>52</sup> Prosecutor v. Furundžija, Judgment IT-95-17/1-T (International Criminal Tribunal for the former Yugoslavia 1998), para. 153; Prosecutor v. Mucić and Others, Judgment IT-96-21-T (International Criminal Tribunal for the former Yugoslavia 1998), para. 454; Prosecutor v. Kunarac, IT-96-23-T and IT-96-23/1 (International Criminal Tribunal for the former Yugoslavia 2001), para. 466.

<sup>53</sup> Decision on Challenge to Jurisdiction: Lomé Accord Amnesty. See: Prosecutor v. Kallon and Kamara, SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E) (Special Court for Sierra Leone), paras. 82-84.

<sup>54</sup> Communication 431/12, Kwoyelo v. Uganda (Inter-African Commission on Human and Peoples’ Rights 2018), para. 289. ‘Amnesties that preclude accountability measures for gross violations of human rights and serious violations of humanitarian law, particularly for individuals with senior command responsibility, also violate customary international law.’

<sup>55</sup> Decision on leng Sary’s Appeal against the Closing Order. See: Prosecutor v. Sary, 002/19 09-2007-ECCC/OCIJ (PTC75) (Extraordinary Chambers in the Courts of Cambodia 2011), paras. 199-201.

<sup>56</sup> United Nations Office of the High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States – Amnesties* (The Office of the High Commissioner for Human Rights, 2009), 12, 15, and 18.

prevalence and customary law pretenses as a view out of step with state practice and therefore aspirational at best. This becomes manifest particularly in human rights and international criminal jurisprudence outside the confines of the Inter-American system.

Arguably, nothing makes the ambivalence surrounding the incompatibility thesis as sharp as the glaring jurisprudential dissonance on point within chambers of the same international court. The examples of the European Court of Human Rights and the International Criminal Court are telling.

### 3.1. The ECHR Perspective: *Margus v. Makuchyan* and *E.G.*

Various chambers of the European Court of Human Rights faced the question of amnesties for international crimes. In *Yaman v. Turkey*, the Chamber found that Turkey violated the prohibition of torture and ill-treatment because police officers subjected the applicant to serious maltreatment while in police custody.<sup>57</sup> In its subsequent discussion on the question of effective remedy, the Chamber noted in *obiter* that:

“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.”<sup>58</sup>

It proceeded on this ground to find a violation of article 13 due to the prosecutor’s dilatory practice in the relevant investigation.<sup>59</sup>

In *Ould Dah*, the Fifth Section of the ECtHR declared inadmissible an application alleging that the applicant’s conviction by French courts for the crime of torture violated his human rights, on the basis that he benefited from Mauritania’s amnesty law covering torture by state officials during an internal conflict.<sup>60</sup> In rejecting his complaint, the Fifth Section applauded the stance of the French courts and noted that:

<sup>57</sup> *Yaman v. Turkey* Appl., No. 32446/96 (European Court of Human Rights 2004), paras. 47-48.

<sup>58</sup> *Ibid.*, para. 55.

<sup>59</sup> *Ibid.*, para. 57.

<sup>60</sup> Decision on Admissibility. See: *Dah v. France*, Appl., No. 13113/03 (European Court of Human Rights 2003).

“The prohibition of torture occupies a prominent place in all international instruments relating to the protection of human rights and enshrines one of the basic values of democratic societies. The obligation to prosecute criminals 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. In addition, the Court notes that international law does not preclude a person who has benefited from an amnesty before being tried in his or her originating State from being tried by another State [...]”<sup>61</sup>

On the other hand, other chambers of the Court distanced themselves from this approach. In *Tarbuk v. Croatia*,<sup>62</sup> the First Section of the Court discussed the application of the Croatian General Amnesty Legislation for crimes committed during the war in the 1990s. The Chamber considered the General Amnesty Act as ‘a sovereign act’.<sup>63</sup> It further reverted to earlier findings of the now defunct European Commission on Human Rights and held that:

“Even in such fundamental areas of the protection of human rights as the right to life, 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.”<sup>64</sup>

The time for the Grand Chamber to discuss amnesties came in 2013. In *Margus*, the applicant – a member of the Croatian army – was convicted by Croatian courts for numerous charges including murder and serious bodily harm committed in 1991. The conviction took place, even though on 24 September 1996 a General Amnesty Act was enacted, precluding proceedings for all criminal offences committed in the context of the war in Croatia (17 August 1990 – 23 August 1996) with the exception of war crimes and genocide.<sup>65</sup> Due to the amnesty legislation, charges on two killings and serious bodily harm were discontinued in the first set of criminal proceedings before the court of first instance, only to be brought again in the second set of proceedings as charges of war crimes.<sup>66</sup> By

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<sup>61</sup> Ibid.

<sup>62</sup> *Tarbuk v. Croatia*, Appl., No. 31360/10 (European Court of Human Rights 2012).

<sup>63</sup> Ibid., para. 48

<sup>64</sup> Ibid., para. 50.

<sup>65</sup> *Margus v. Croatia*, Appl., No. 4455/10 (European Court of Human Rights 2014), para. 16.

<sup>66</sup> Ibid., para. 122.

doing so, claimed the applicant, Croatia violated the *ne bis in idem* principle.<sup>67</sup> The Grand Chamber rejected the complaint and found for Croatia because the *ne bis in idem* principle was inapplicable. The Court was very careful in its *expose*:

“In the present case the applicant was granted amnesty for acts which amounted to grave breaches of fundamental human rights such as the intentional killing of civilians and inflicting grave bodily injury on a child, and the County Court’s reasoning referred to the applicant’s merits as a military officer. *A 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.* 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. (Emphasis added)”<sup>68</sup>

The fact that the *ne bis in idem* principle was not applicable was buttressed in the Joint Concurring Opinion of Judges Spielmann, Power-Forde and Nussberger. The judges explained that in this case, the applicant was not ‘finally acquitted’ on the originally discontinued charges because the amnesty ruling of the Court of First Instance contained no assessment of the applicant’s responsibility for any crime and therefore the decision was neither an ‘acquittal’ nor a ‘conviction’ for the purposes of Art. 4, Protocol 7 ECHR.<sup>69</sup> Judges Ziemele, Berro-Lefevre and Karakas, on the other hand, would have found the provision applicable but no violation on the substance. They read the judgment in a different light and expressed their view along the following lines:

“One could sum up by saying that today, under international law, amnesty may still be considered legitimate and therefore used so long as it is not designed to shield the individual concerned from accountability for gross human rights violations or serious violations of international humanitarian law. *The next step* might be an absolute prohibition of amnesty in relation to such violations. The Court’s decision in the case at hand may be read as already taking the approach proposed during the drafting of the ICC

<sup>67</sup> *Ibid.*, paras. 92-93.

<sup>68</sup> *Ibid.*, para. 139.

<sup>69</sup> *Ibid.*, para. 13.



Statute, to the effect that where proceedings concerning gross human rights violations result in an amnesty and are followed by a second set of proceedings culminating in a conviction, the *ne bis in idem* issue as such does not arise. (emphasis added)”<sup>70</sup>

Judges Sikuta, Wojtyczek and Vehabovic, in their own joint concurring opinion made clear that “stating that international law in 2014 completely prohibits amnesties in cases of grave breaches of human rights does not reflect the current state of international law.”<sup>71</sup> In their view:

“[t]he adoption of international rules imposing a blanket ban on amnesties in cases of grave violations of human rights is liable, in some circumstances, to reduce the effectiveness of human rights protection. [...] We must acknowledge that *in certain circumstances there may be practical arguments in favour of an amnesty that encompasses some grave human rights violations*. We cannot 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.”<sup>72</sup>

This ruling therefore read in the light of all these concurring opinions makes clear that the Grand Chamber of the ECHR did not preclude amnesties for serious human rights violations. The Grand Chamber acknowledged ‘a growing tendency’ but it did not rule that amnesties are incompatible with human rights protection under the Convention. In fact, the Grand Chamber appears to have left the door wide open for the adoption of any kind of amnesties, provided they were part of a reconciliation process and/or compensation scheme for the victims.<sup>73</sup>

Surprisingly, this rather clear statement of the Grand Chamber appears to have been subjected to subsequent interpretation by Sections of the Court that points in the opposite direction.<sup>74</sup> In *Makuchyan and Minasyan v. Azerbaijan and Hungary*, the applicants complained that Azerbaijan violated their right to life,

<sup>70</sup> Joint Separate Opinion of Judges Ziemele, Berro-Lefevre and Karakas. See: *Margus v. Croatia*, Appl., No. 4455/10, para. 5.

<sup>71</sup> *Ibid.*, para. 8.

<sup>72</sup> *Margus v. Croatia*, Appl., No. 4455/10, para. 9. Where “the grant of amnesty was contrary to the increasing tendency in contemporary international law [...]”.

<sup>73</sup> *Ibid.*, para. 139.

<sup>74</sup> The Chambers of the Court are not alone in that misinterpretation. See Separate Concurring Opinion of Judge Perrin de Brichambaut. See: *Prosecutor v. Gaddafi ICC-01/11-01/11-662-Anx.* (International Criminal Court 2019), para. 130.

by issuing a Presidential pardon to a person who killed the second applicant's relative and attempted the killing of the first applicant.<sup>75</sup> The facts of the case as summarized by the Chamber tell the story of two Armenian military officers who attended a NATO training course in Budapest in 2004. During the training, Azerbaijani military officer R.S. also participating in the training attacked and decapitated with an axe the relative of the second applicant while he was sleeping and tried to kill the first applicant.<sup>76</sup> After the conviction of the Azerbaijani officer by the Hungarian courts, Hungary eventually accepted to transfer the prisoner over to Azerbaijan to serve his sentence there. Upon his arrival, the President of Azerbaijan issued him a Presidential Pardon and the next day he was promoted to the rank of major in a public ceremony.<sup>77</sup> A few months later, he was provided a state flat and 8 year salary arrears.<sup>78</sup> The European Parliament condemned the pardon and 'glorious welcome' of R.S. as "a gesture which could contribute to further escalation of the tensions between two countries [...]."<sup>79</sup>

In the context of this case, the Fourth Section of the Court referred to *Margus* and held that:

"Pardons and amnesties are primarily matters of member States' domestic law and are in principle not contrary to international law, save when relating to acts amounting to grave breaches of fundamental human rights."<sup>80</sup>

The Chamber was particularly struck by the glorification of a convicted murderer and found that by granting impunity to R.S. for the crimes against the Armenian victims, the procedural limb of Article 2 ECHR was violated.<sup>81</sup>

The *Makuchyan obiter* was repeated in the 2021 judgment in *E.G. v. Moldova*.<sup>82</sup> The case concerned a sexual offence against the applicant and the misapplication

<sup>75</sup> *Makuchyan and Minasyan v. Azerbaijan and Hungary Appl.*, No. 17247/13 (European Court of Human Rights 2020), para. 4.

<sup>76</sup> *Ibid.*, para. 9. The perpetrator explained in his oral statement that he did so because he lost relatives in the Nagorno-Karabakh conflict and because the victims allegedly mocked the Azeri flag; therefore, he chose to act on the anniversary of the beginning of the Nagorno-Karabakh region. *Ibid.*, para. 11.

<sup>77</sup> *Ibid.*, para. 20.

<sup>78</sup> *Ibid.*, para. 21.

<sup>79</sup> *Ibid.*, para. 42. See also "Resolution on Azerbaijan: The Ramil Safarov Case," European Parliament, published September 13, 2012.

<sup>80</sup> *Ibid.*, para. 160.

<sup>81</sup> *Ibid.*, paras. 172-173.

<sup>82</sup> *E.G. v. Moldova Appl.*, No. 37882/13 (European Court of Human Rights 2021).

of a domestic amnesty law by the Moldovan courts, because of which the co-perpetrator was enabled to flee and never face justice after the reversal of the case by the higher courts.<sup>83</sup> Specifically, the issue was that in the one year that elapsed between the ruling awarding the amnesty and the ruling reversing finally this decision, the suspect was released and allowed to flee.<sup>84</sup> It is in the cadre of these circumstances that the Second Section of the Court recalled verbatim the *Makuchyan obiter* and found that Moldova violated its positive obligations under Articles 3 and 8 ECHR.<sup>85</sup>

A careful reading of the *Makuchyan obiter* juxtaposed with paragraph 139 of the *Margus* ruling reveals that there is little reason to believe that *Makuchyan* properly invoked *Margus* as the predicate for its views on amnesties. While *Margus* allows room for amnesties, *Makuchyan* does not appear to do so. Admittedly, the wording of the *Makuchyan dictum* as repeated in *E.G.* is not commendable either for its clarity or for its justification. Neither the Fourth Section in *Makuchyan*, nor the Second Section in *E.G.* explained the reasoning underpinning this finding. Critically, the reference to *Margus* by itself is not sufficient to justify what appears to be a departure from the Grand Chamber's view.

In any event, it is noteworthy that *Makuchyan* did not concern an amnesty legislation applicable across the board to an unidentifiable number of persons, but a single, tailor-made presidential pardon. *E.G.* on the other hand related to a national law according to which 'a person condemned to a penalty of imprisonment of up to and including 7 years, who at the moment of the entry into force of the present law, has not reached the age of 21 years old, is exempted from the criminal penalty'.<sup>86</sup> Against this background, one might be justified to suggest that the Second Section's views on the incompatibility of amnesty legislation with the duty to prosecute and punish serious human rights abuses should not be given much weight. They would appear to depart from the views

<sup>83</sup> *Ibid.*, paras. 14-19.

<sup>84</sup> *Ibid.*, para. 45.

<sup>85</sup> *Ibid.*, paras. 49-50.

<sup>86</sup> *Ibid.*, para. 28.

of the Grand Chamber in *Margus* and such departure happened only in *obiter*. It remains to be seen whether it will influence subsequent Grand Chamber jurisprudence on point. One thing however is clear from all the above: there is still considerable controversy at the ECHR front on the question of amnesties. The guiding precedent remains *Margus* and the Grand Chamber's view that 'we are not there yet' as regards the incompatibility thesis.

### **3.2. The ICC Appeals Chamber and the 'Developmental Stage' of International Law on the Question of Amnesties**

The jurisprudence of the International Criminal Court offers further evidence of the ambivalence surrounding the incompatibility thesis. In the Situation in Libya, Saif Al-Gaddafi's defence team brought an admissibility challenge before Pre-Trial Chamber I, claiming that the case against him was inadmissible.<sup>87</sup> The accused claimed that he was convicted by the Libyan courts for essentially the same conduct as the one for which he stood accused before the ICC and that he was subsequently released from custody following the adoption of a national amnesty legislation.<sup>88</sup>

The Pre-Trial Chamber rejected the admissibility challenge. On the point of amnesty, the reasoning was ambivalent.

Somewhat confusingly, the Pre-Trial Chamber ruled in the beginning of the judgment 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."<sup>89</sup>

However, only a few pages later, after a review of the relevant human rights jurisprudence, the Chamber reasoned that:

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<sup>87</sup> Decision on the Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute, ICC-01/11-01/11-662. See: Prosecutor v. Gaddafi ICC-01/11-01/11-662 (International Criminal Court 2019).

<sup>88</sup> *Ibid.*, para. 5.

<sup>89</sup> *Ibid.*, para. 61.

“Granting amnesties and pardons for serious acts such as murder constituting crimes against humanity is incompatible with internationally recognized human rights. Amnesties and pardons intervene with States’ positive obligations to investigate, prosecute and punish perpetrators of core crimes. In addition, they deny victims the right to truth, access to justice, and to request reparations where appropriate.”<sup>90</sup>

As a result, the Pre-Trial Chamber ruled that:

“Thus, applying the same rationale to Law No. 6 of 2015 assuming its applicability to Mr Gaddafi leads to the conclusion that it is equally incompatible with international law, including internationally recognized human rights. This is so, in the context of the case sub judice, due to the fact that applying Law No. 6 of 2015 would lead to the inevitable negative conclusion of blocking the continuation of the judicial process against Mr Gaddafi once arrested, and the prevention of punishment if found guilty by virtue of a final judgment on the merits, as well as denying victims their rights where applicable.”<sup>91</sup>

The defendant appealed the decision before the Appeals Chamber. The Appeals Chamber ruled that the Libyan amnesty law did not apply to the case of Mr. Gaddafi according to the provisions of the law and the view of the Libyan Government.<sup>92</sup> As regards the Pre-Trial Chambers *dicta* on amnesties and their incompatibility with human rights law, the Appeals Chamber ruled that “that the Pre-Trial Chamber’s holdings on Law No. 6’s compatibility with international law were *obiter dicta*.”<sup>93</sup> Moreover, the Appeals Chamber took a decidedly different approach to the Pre-Trial Chamber’s categorical finding of incompatibility and ruled as follows;

“For present purposes, it suffices to say only 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

<sup>90</sup> Prosecutor v. Gaddafi ICC-01/11-01/11-662, para. 77.

<sup>91</sup> *Ibid.*, para. 78.

<sup>92</sup> *Ibid.*, paras. 93-94.

<sup>93</sup> *Ibid.*, para. 96.

or pardons under international law'. In these circumstances, the Appeals Chamber will not dwell on the matter further."<sup>94</sup>

The Appeals Chamber ruling thus appears to do two things with a single breath: on the one hand, it denudes of normative effect the Pre-Trial Chamber's reasoning on amnesties by declaring it – and the corresponding finding of incompatibility of the Libyan amnesty – a mere *obiter dictum*; on the other, it draws attention away from paragraphs 61-78 of the Appeals Judgment and highlights the early statement made by the Pre-Trial Chamber on the 'strong, growing, universal tendency' – which is not law yet. As a result, paragraph 96 of the Gaddafi decision makes it abundantly clear that, in contrast to the decision of Pre-Trial Chamber I on point, the ICC Appeals Chamber is not convinced that the present stage of development of international law prevents the adoption of amnesties precluding criminal prosecution for international crimes.

#### **IV. THE FUNCTION OF THE NATIONAL JUDGE IN THE FACE OF AMNESTY CHALLENGE: FROM A ZERO-SUM GAME TO A BALANCING EXERCISE**

Against this background, a critical question concerns the function of the judge in amnesty litigations. Should domestic judges – including constitutional judges – follow lock, stock and barrel the position exemplified by the Inter-American Court, and in the exercise of a 'conventionality control' strike down amnesty legislation due to its incompatibility with human rights norms?

This view has not gone unnoticed and uncriticised in the relevant literature. The first point of criticism concerns the tension between democratically adopted amnesties and Inter-American court decisions. Specifically, it is argued that by invalidating directly national amnesty legislation through the creation and imposition of a 'super-right' of victims' access to justice and the 'conventionality

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<sup>94</sup> Ibid., Judge Ibanez Carranza, in her opinion entitled Separate and Concurring Opinion to this judgment, dissented strongly and unequivocally with the findings of the Appeals Chamber. In her view, the Appeals Chamber was wrong in both the classification of the *obiter dicta* (paras. 19, 24) and the view that there is no rule of international law on incompatibility. In her view, the Pre-Trial Chamber was correct in finding that amnesties for international crimes are not allowed under well-established rules of international law (paras. 139, 144). Interestingly, Judge Carranza failed to consider in her otherwise thorough opinion the views of the ECHR Grand Chamber in *Margus*.

control', the organs of the Inter-American system violate essential principles of democracy and give absolute priority to its own solutions that lack any democratic legitimacy in the relevant societies. As a result of its disregard for the democratic processes underpinning the adoption of amnesty legislation and its categorical rejection of any and all amnesties, even when adopted by parliament and approved by referenda,<sup>95</sup> the Inter-American Court has been classified as an aristocratic organ guilty of human rights absolutism.<sup>96</sup> Gargarella traces the origins of this approach to an international post-World War II 'obsession with rights', whose defining trait – probably owing to the rise in power of Hitler and Mussolini through democratic process – was that emphasis and priority shifted internationally from concern for democratic process to concern for strengthening human rights.<sup>97</sup> In Gargarella's view, this international 'obsession with rights' went hand-in-hand with a distrust of majoritarian democratic processes and is partly to blame for the Inter-American Court's focus on the *ratio legis*, at the expense of due consideration for the democratic legitimacy of the authority and the process that led to the adoption of the decision.<sup>98</sup>

A second line of criticism relates to the incompatibility of the choices made by the Inter-American Court with human rights law in general and the American Convention in particular. Authors following this school of thought suggest that both prosecutions and amnesties can be justified under international human rights law and find support in various human rights clauses. From that perspective, the absolute and *a priori* selection of one option (prosecution) over the other (amnesty) is said to constitute nothing more than the Inter-American Court's ideological preference – a preference presented as a universal truth, as opposed to what it actually is, i.e. the particular position of a specific

<sup>95</sup> Gavron, "Amnesties in the Light," 98.

<sup>96</sup> Ezequiel Malarino, "Judicial Activism, Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights," *International Criminal Law Review* 12, no. 4 (January 2012): 686, <https://doi.org/10.1163/15718123-01204003>.

<sup>97</sup> Roberto Gargarella, "Democracy's Demands," *American Journal of International Law Unbound* 112 (May 2018): 73-78, <https://doi.org/10.1017/aju.2018.33>.

<sup>98</sup> Gargarella, "Democracy's Demands," 77-78. Gargarella's emblematic example relates to the *Gelman v Uruguay* decision, where the Inter-American Court proceeded to order Uruguay to annul the Expiry law, even though it was democratically adopted and reaffirmed twice by popular referenda.

human rights organ.<sup>99</sup> This ties in with the well-known work of Kennedy and Koskenniemi, who take particular note of human rights jurisprudence predicated on allegedly universally accepted norms, only to camouflage choices particular to an institution.<sup>100</sup> Arguably, from this perspective, the Court with its amnesty jurisprudence attempts to present itself to domestic audiences as the neutral and emancipatory voice of universally accepted truths, in order to bolster the acceptance of its exercise in interventionist judicial activism.

The Court's amnesty approach and its consistency with the American Convention on Human Rights was strongly criticized by none other than the former President of the Inter-American Commission of Human Rights Felipe Gonzalez-Morales. In his view, the Court's position on the incompatibility of amnesties and the corresponding duty on states to revoke or annul them is not consistent with the Court's duty to engage in a balancing of rights. He draws attention to Article 32(2) ACHR, according to which:

“The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.”

From this provision, Gonzalez-Morales deduces a duty to balance rights in circumstances such as the one presented by amnesties. Morales finds that amnesty litigation essentially asks of human rights organs whether some rights should be limited (such as the victims' rights of access to justice), in order to create conditions that allow the free enjoyment of these rights.<sup>101</sup> In other words, there is conflict between the individual right of access to justice and the collective good of the protection of the democratic order.<sup>102</sup> These two should be balanced against each other without *a priori* determinations of prioritization.<sup>103</sup> While Morales stops short of disagreeing with the Court's conclusion on incompatibility, he appears to disagree with the bluntness of the Court's approach in this matter.

<sup>99</sup> Carvalho Veçoso, Fabia Fernandes, “The Inter-American View on Amnesties: Human Rights Absolutism?” *Revista Derecho del Estado* 35 (July 2015): 3, <https://doi.org/10.18601/01229893.n35.01>.

<sup>100</sup> Veçoso, Fernandes, “The Inter-American View,” 17-18. From the scholarship of Kennedy and Koskenniemi, see in particular: David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton: Princeton University Press, 2005), 23; Martti Koskenniemi, *The Politics of International Law* (London: Bloomsbury Publishing, 2011), 149.

<sup>101</sup> Felipe González. “The Progressive Development,” 53.

<sup>102</sup> *Ibid.*, 51.

<sup>103</sup> *Ibid.*, 51-53.



The third point of criticism stems from what is perceived to be the prioritization of inelastic legalistic formulas by human rights organs over broader, socially inclusive solutions drawing from the teachings of other fields of social sciences such as criminology. Mallinder and McEvoy have made clear that much of the incompatibility thesis is predicated upon a “unidimensional and legalistic” equation of amnesties with impunity, where punishment of perpetrators comes first and victim reparations and truth recovery second.<sup>104</sup> They query on the meaning of punishment and whether selective judicial punishment of the ‘big fish’ *qua* retribution – in the sense of pressing ‘the sharp knife’ of criminal punishment to distinguish the proper from the improper – is the best way to move forward in circumstances where extreme social and political violence have been embedded in the social fabric.<sup>105</sup> In their view, asking questions such as whom and what transitional justice are for would bring to light the complex needs of victims – needs that arguably far outweigh and outshine narratives of ‘punishing offenders’ and ‘bringing justice to victims’.<sup>106</sup> They argue for a deeper understanding of the relationship between amnesty and accountability, where truth commissions and other transitional justice mechanisms, including amnesties, would have a role to play.

Against this background, it would seem that the role of the constitutional judge is perhaps not as clear cut or unequivocal as the Inter-American Court and its adherents would like one to believe. It is true that a state undertakes international commitments by the ratification of international treaties and that judges – in their quality as state organs *par excellence* – through their actions or omissions may engage the international responsibility of that state when their decisions violate treaty obligations.<sup>107</sup> If a specific treaty precludes amnesties, the organs of a state party to the treaty have an international obligation to abide by it.

However, the problem emerges when no explicit provision is included in the treaty text and recourse is required to judicial interpretation deducing an

<sup>104</sup> Mallinder and McEvoy, “Rethinking Amnesties,” 122.

<sup>105</sup> *Ibid.*, 123.

<sup>106</sup> *Ibid.*

<sup>107</sup> See “Responsibility of States for Internationally Wrongful Acts” (Report presented for General Assembly as a part of the Commission’s Report, 2001).

obligation from a generally worded treaty provision or from general international law. It becomes even more complicated when a treaty explicitly provides for or encourages the adoption of amnesties.<sup>108</sup>

Against the background of the preceding analysis, it would seem that under customary international law, there is a wave of opinion in favour of the incompatibility thesis that has yet to crystallise into a norm of customary law status.

Beyond the jurisprudential contestations between the Inter-American Court and the European Court of Human Rights, state practice seems to be far from unequivocal on the point of the prohibition of amnesties. Writing in 2007, Mallinder notes that since the 1999 statement of the UN Secretary General declaring the award of amnesties incompatible with the duty of states to prosecute international crimes,<sup>109</sup> at least 24 new national amnesties were awarded, granting amnesty for international crimes.<sup>110</sup> In 2015, the UN Security Council unanimously endorsed the February 2015 Minsk Agreement, aspiring to create peace in Eastern Ukraine.<sup>111</sup> Paragraph 5 of that Agreement provided for amnesties prohibiting prosecution for any offence connected to the events in Donetsk and Luhansk.<sup>112</sup> Obviously, it would seem that at least the UN

<sup>108</sup> See for example the Amnesty Declaration of the Treaty of Lauzanne 1923, which provides for the mutual obligation of the Signatory Powers to grant amnesties. See: Carnegie Foundation, *The Treaties of Peace 1919-1923, Vol. II* (New York: Carnegie Endowment for International Peace, 1924); Cambridge University Press, "Agreements Relating to Algerian Independence," *International Legal Materials* 1, no. 2 (October 1962): 214-30, <https://doi.org/10.1017/S0020782900061234>. Whereas, Article 6(5) Additional Protocol II to the 1949 Geneva Conventions mentions that States Parties "shall endeavour to grant the broadest possible amnesty to persons who participated in an armed conflict." See, Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, "Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1)," OHCHR, adopted June 08, 1977.

<sup>109</sup> United Nations, "Report of the Secretary," para. 22.

<sup>110</sup> Louise Mallinder, "Can Amnesties and International Justice Be Reconciled?" *The International Journal of Transitional Justice* 1, no. 2 (July 2007): 214, <https://doi.org/10.1093/ijtj/ijm020>.

<sup>111</sup> "Letter from the Permanent Representative of the Russian Federation (Ukraine)," UNSCR, published February 17, 2015, <http://unscr.com/en/resolutions/2202>.

<sup>112</sup> *Ibid.*, Annex 1. See also: "Package of Measures for the Implementation of the Minsk Agreements," United Nations Peacemaker, published February 12, 2015. Ensure pardon and amnesty by enacting the law prohibiting the prosecution and punishment of persons in connection with the events that took place in certain areas of the Donetsk and Luhansk regions of Ukraine. The footnote entitled 'Notes' to the agreement further specifies that such measures include "Exemption from punishment, prosecution and discrimination for persons involved in the events that have taken place in certain areas of the Donetsk and Luhansk regions [...]."

Security Council was not convinced of the Secretary General's 2012 call to reject endorsement of amnesty for serious crimes.<sup>133</sup>

Domestic judges enjoy a greater margin in the appreciation of the legality of domestic amnesty legislation than the incompatibility thesis enthusiasts would have one believe. The use of this room for judicial determination would be influenced by various parameters flowing from domestic and international law. One thing remains clear: the function of the judge remains a performance of a balancing exercise among the competing interests.

The outcome of the balancing exercise cannot be prejudged or predetermined. Invariably, it would depend on the legal conceptualisation of the juxtaposed values or rights. To give an example, Morales suggests that questions of amnesties should be addressed by looking into Dworkin's and Alexy's theories on rights. This leads him to theorise that in the instance of amnesties of international crimes there is no conflict of rights present before the judge, insofar as amnesties do not represent an established human right but rather a collective good or general principle, namely the preservation of democratic governance in transition. Therefore, there is no reason to condition or not apply the rights of the victims. In the alternative, Morales entertains the idea that there may exist on the normative plane a conflict between a collective good (peaceful democratic transition via amnesty) and an established right (access to justice). In the contest between the two, using Alexy's normative hierarchy, collective goods are afforded a subordinate position to established rights and therefore the former have to give way to the later in case of conflict.

Morales' conclusions as to the outcome of a contest between amnesties and victims' rights of access to justice on the basis of Dworkin's and Alexy's views are predicated on an understanding of amnesties as a common good or a value, as opposed to an entrenched human right. From this classification, the conclusion derives that an established right of access to justice must be awarded priority.

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<sup>133</sup> Ban Ki-Moon, "Remarks to Security Council Meeting on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Settings" (Report presented for President of the Security Council of United Nations, 2012). "I also encourage the Council to reject any endorsement of amnesty for genocide, war crimes, crimes against humanity or gross violations of human rights and international humanitarian law."

However, one might wonder whether this outcome would still stand following a different conceptualisation of amnesty.

Concretely, in amnesty litigation, the constitutional judge will more often than not be called upon to decide on the validity of amnesty legislation following a complaint by a victim after the adoption of the relevant legislation. The moment however that the amnesty legislation is adopted, the accused may well have a claim of legal certainty under the principle of legality, insofar as the amnesty does not constitute any more an abstract general good, but a specific rule of law granting them favourable criminal treatment – a *lex mitior*. Viewed from this angle, one might argue that the adoption of amnesty legislation does not pit the abstract value of ‘peaceful democratic transition’ against the victims’ rights of access to justice, but rather the concrete right of the accused to legal certainty and *lex mitior* as an aspect of legality against the victims’ rights of access to justice. From this perspective, the constitutional judge would have to resolve a conflict of rights under the rules of their own legal order, drawing inspiration from relevant legal theory. Clearly, this exercise is not subject to abstract pre-determinations, but would require careful balancing and individualised scrutiny.

## V. CONCLUSION

This article discussed the question of the incompatibility of amnesties with international law and the corresponding implications for the function of the domestic judge. It queried whether a domestic judge is duty-bound under general international law to disregard and set aside amnesty legislation adopted as a post-conflict peace building tool.

The article takes the view that, barring specific treaty commitments, general international legal standards prohibiting the award of amnesties in these circumstances have yet to crystallize. Customary law does not appear at the present stage of its development to preclude amnesties in that context. Accordingly, this article suggests that the function of a domestic judge in amnesty litigation is not a predetermined finding of invalidity, but a balancing exercise seeking to reconcile the various domestic and international norms and interests at play.

To complete its examination, the article considered the reasons underpinning the resistance to the incompatibility thesis and its consequences for the function of the domestic judge. As regards the reasons, it explained that the incompatibility thesis does not sit well with many constitutional lawyers. From their perspective, when an amnesty has been clothed with democratic legitimacy through genuine democratic process, judges – especially international judges – seeking to upend such amnesty legislation violate essential principles of democratic governance with dangerous side-effects for societies in transition. It also does not sit well with many international lawyers, where some see behind the incompatibility thesis instances of human rights absolutism and others a failure of international courts to engage in balancing of rights in case of conflict as prescribed by their founding instruments. Finally, criminologists and social scientists challenge the view that amnesty equals impunity and the twin supposition that punishment of wrongdoing is the primary consideration for victims. They hold that a genuine investigation into the needs of victims would reveal a need to reconsider prioritizing domestic prosecutions to the detriment of peace-building, reparation and reconciliation measures, including truth telling and compensation schemes.

This article started with a discussion of the El Mozote case. It is only fitting that it closes by reverting to it, with one final remark. In spite of the numerous interventions of the Inter-American Commission and the Inter-American Court, today, 41 years after the massacre, justice in the sense of criminal prosecutions has yet to be delivered in El Salvador. Judge Guzman has retired and the discussion in El Salvador has shifted from identification of perpetrators and criminal proceedings to identification and reparation for the victims.<sup>144</sup> Obviously, no believer in the rule of law can celebrate the non-enforcement of judicial decisions by the executive and the inability of domestic judges to see justice through as a success story. That said, however, there was no popular uprising forcing the

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<sup>144</sup> The Government of El Salvador passed a law on 29 June 2022 to facilitate the documentation requirements for victim status of individuals or their relatives victimised by the El Mozote massacres and correspondingly their access to financial compensation schemes. See: "Asamblea aprueba ley que permitirá a sobrevivientes de la masacre de El Mozote recibir compensación económica [Assembly Approves Law that Will Allow Survivors of the El Mozote Massacre to Receive Financial Compensation]," National Assembly of El Salvador, published June 29, 2022.

government's hand either. From that perspective, perhaps El Mozote goes a long way to show that promoting one particular way for addressing past atrocities over others cannot be externally forced but remains a choice firmly in the hands of the domestic societies. If international organs fail to heed domestic needs and demands – and amnesty legislation may sometimes be emblematic of such needs and demands – international institutions risk losing their standing and ultimately their international audience.

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