

JUST A MATTER OF TIME? EXPANDING THE TEMPORAL JURISDICTION OF THE INTER-AMERICAN COURT TO ADDRESS COLD WAR WRONGS



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INTRODUCTION

During the latter half of the 20th century, the Cold War in the global north spawned several hot wars in the global south, as the competing ideologies of capitalism and communism collided. In consequence, many governments employed increasingly violent and repressive measures to control their populations and quash the rising tide of Marxist revolution. These measures often constituted widespread and systematic abuses of fundamental human rights by governments against their own people.¹

In the wave of democratic transition following the fall of the Berlin Wall and disintegration of the Soviet Union, Latin American states meted out varying measures of justice to the perpetrators of human rights abuses.² The transitional justice strategies of Latin American regimes have fluctuated from nearly comprehensive to nearly completely absent.

During this long transitional period, the Inter-American System for human rights has developed from an obscure tool of political lip-service to a powerful regional barrier to governmental abuse. Few would have thought, after the first ten years of the Inter-American Court (in which it did not issue a single contentious opinion) that two decades later, it would effectively strike down Chilean amnesty laws,³ demand an investigation into the acts of a Peruvian dictator,⁴ authoritatively establish the truth of state-sponsored massacres,⁵ and compensate thousands of victims for injuries perpetrated by government agents.⁶

Thus, the Inter-American Court has risen to play a fundamental role in the process of transitional justice⁷ in Latin America.⁸ Nonetheless, the Court's role has been severely restricted by its temporal

jurisdiction. According to the Vienna Convention on the Law of Treaties, as well as the general legal principle of non-retroactivity,⁹ a treaty like the Inter-American Convention cannot be applied to events which occurred prior to the State's consent to be bound by the treaty.¹⁰ Because many states only recognized the Court's contentious jurisdiction once they had returned to democratic rule and ended their civil wars, many of Latin America's most serious cases of abuse lie outside of the Court's temporal reach.

This article will examine how the temporal limitations on the Court's jurisdiction have affected its jurisprudence, and how the Court has interpreted the American Convention on Human Rights to extend its reach into the past. In particular, it will examine three judicial tools employed by the Court which have broadened its temporal jurisdiction. These three tools are the use of contextual considerations, the continuing violations doctrine, and the autonomous events doctrine. But first, a brief explanation is due with respect to the parameters of the Court's jurisdiction as established by the Inter-American Convention.

I. THE TEMPORAL JURISDICTION OF THE INTER-AMERICAN COURT

Essentially, the jurisdiction of the Inter-American Court relies upon the consent of states parties. This article refers to the date on which the State expresses such consent as the "critical date". However, the "critical date" should not be confused with the date on which the state ratifies the American Convention on Human Rights and recognizes it as binding international law. In the Inter-American system, not only must State Parties

sign and ratify (or accede to) the American Convention; they must also file a separate declaration in which they expressly recognize the jurisdiction of the Court.¹¹ Once a state has ratified the Inter-American Convention, it is internationally bound by the human rights norms included therein; once a state has recognized the Court's jurisdiction, the Court can review the state's compliance with those norms.¹² It is this second step, in which the state files an affirmative declaration, which is considered the "critical date" for the Court's jurisdiction.

Following a state's recognition of the Court's jurisdiction, the Court's power of judicial review is prospective, and should conform to the Vienna Convention on the Law of Treaties, which states:

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.¹³

Prospective review drastically limits the Court's power to examine cold war abuses. As stated in the introduction, the vast majority of the abuses which accompanied the period of upheaval in Latin American occurred before states recognized the Court's contentious jurisdiction. In fact, nearly all of the 21 states which recognize the Court's contentious jurisdiction only did so once democracy had been restored and civil wars had ended.¹⁴ Thus, the Court's ability to compel a program of transitional justice is greatly restricted. Yet the Court has employed the jurisprudential tools at its disposal to extend its temporal jurisdiction as much as possible.

II. EXPANDING TEMPORAL JURISDICTION:

Contextual Considerations by the Court

First, and most basically, the Court will generally consider a factual context that surrounds the alleged violation, even if that context occurred before the state's critical date. These contextual considerations do not provide the basis for legal consequences; they only provide background for a proper understanding of the factual situation of the petitioner and the state. The Court has distinguished between determining the truth of the facts alleged and its ability to declare a violation as a direct result of those facts. As the Court stated in *Serrano Cruz Sisters v. El Salvador*:

When pronouncing on the facts or events related to judicial guarantees and protection following [the critical date...] at times the Court must make reference to the subject matter investigated. This should not be understood as a pronouncement on the State's responsibility for acts that occurred prior to [its recognition of the Court], since the Court lacks the jurisdiction to do so.¹⁵

This type of contextualization is basic to judicial structures, and has very little impact on the jurisdiction *ratione temporis* of the Court. For example, the Court may examine facts which the parties have expressly accepted as true,¹⁶ as well as notorious or uncontroverted events.¹⁷ Without this authority to take into account what the parties already accept as true, absurd results would flow. For example, in a case in which the victim of an extrajudicial execution was born prior to the competence of the Court, the Court would have to find that it lacked jurisdiction, since it could not determine that the individual was ever born. Thus, the Court does not operate in a temporal vacuum, but rather, must always take into account the past as accepted by the parties. However, as described below, (*infra*, section IV) a fine line separates determining "context" from determining facts from which legal consequences may flow.

III. EXPANDING TEMPORAL JURISDICTION:

Continuing Violations Doctrine

The concept of the "continuing violation" is the second tool which the Court employs to extend its reach into the past. The Court has recognized that violations of the Convention can be continuous from its very first case. In *Velásquez Rodríguez v. Honduras*¹⁸ the Court characterized the disappearance of the victim by state agents as a continuous violation of several articles of the Convention. However, because the Court's temporal jurisdiction was not in question in *Velásquez*, the Court's assessment in that case should be understood as *dicta*.¹⁹ It was not until *Blake v. Guatemala* that the potential implications of the continuing violations doctrine would materialize.

In *Blake*, the Court considered the disappearance and murder of an American journalist by the Guatemalan military. Guatemala recognized the Court's contentious jurisdiction on March 9, 1987, and explicitly filed a "declaration"²⁰ that "cases in which the Court's competence is accepted relate exclusively to events that occurred after the date on

which the declaration is presented.²¹ Although the military abducted and killed Mr. Blake two years prior to the critical date, neither the truth of his death nor his remains were discovered until 1992.²²

Guatemala asserted a preliminary objection based on lack of jurisdiction *ratione temporis* and requested the equivalent of summary judgment.²³ The state argued that all of the events at issue had occurred prior to the critical date.²⁴ The Court agreed that the deprivation of Mr. Blake's liberty and his murder were completed in March 1985,²⁵ and could not be considered to have continued *per se* past the critical date.²⁶ However, the Court found that the government authorities or agents "committed subsequent acts which implied complicity in, and concealment of, Mr. Blake's arrest and murder" which occurred past the critical date.²⁷ Moreover, the Court found that although the state knew of Mr. Blake's death, it did not inform the family or help them to dispose of the remains.²⁸ Most importantly, from the perspective of the victim's family, the time during which Mr. Blake was considered "disappeared" extended past the critical date. As a result, the Court found that Guatemala had violated the rights of Mr. Blake's family to due process and effective judicial recourse²⁹ (under articles 8 and 25 of the Convention³⁰)

In several cases following Blake, the Court has found the state liable for a violation of the Convention due to its conduct prior to the critical date which extended by act or omission beyond the critical date.³¹ However, not all violations of the Convention may be considered continuous. The Court has limited the continuing violations doctrine to certain types of state conduct. For example, as demonstrated in the Blake case and others,³² forced disappearances continue in time until the individual (or, more likely, his or her remains) is discovered and the family is notified. Likewise, in the case of *Yean and Bosico Children v. Dominican Republic*, the Court found that the denial of the right to nationality under article 20³³ was a continuing violation for which the State could be held responsible.

But the Court has found that other violations of the Convention are consummated upon their commission and are not continuous. For example, in *Alfonso Martín del Campo Dodd v. Mexico*, the Court held that torture (a violation of the right to personal integrity under article 5 of the Convention) was not a continuous violation because:

[e]ach act of torture is consummated or terminated within itself, the perpetration thereof not extending over time, for which

reason the alleged act, or acts, of torture to the detriment of Mr. Martín-del-Campo falls short of the Court's jurisdiction in that it is an instantaneous act and because of the fact that it occurred prior to [the critical date]. In like manner, the [effects] of torture alleged by the representatives of the alleged victim and his next of kin are not equivalent to a continuous offence.³⁴

When the facts in Blake, *Yean and Bosico Children* and *Alfonso Martín del Campo Dodd*, are compared, the Court's disparate conclusions make sense. First, torture is different from a forced disappearance or the denial of nationality because the state conduct at issue ceases to exist with the physical or psychological act. Forced disappearances, like the denial of citizenship, may still be effectively terminated by the state. So long as the State stands in relationship to the victim such that it continues to deny Convention rights to him or her, it continues to violate the Convention. Second, the "effects" of torture, alleged in *Alfonso Martín del Campo Dodd*, are conceptually different from the torture itself. Of course, reparations may address the effects and provide redress for the suffering caused by torture or any other violation of the Convention. But the Court must have temporal jurisdiction not only over the moment in which reparations might redress a violation, but also over the violation itself.

This approach, which distinguishes continuous violations from instantaneous acts based upon the type of violation at issue, can also be seen in the Court's jurisprudence with respect to violations of the right to property, under article 21 of the Convention.³⁵

Whether a violation of the right to property is considered "continuous" seems to depend on the type of property right involved. First, in the case of *Cantos v. Argentina*, the Court refused to consider the Commission's claims that the state's denial of the petitioner's property rights before the state's acceptance of the Court's jurisdiction extended beyond the date of acceptance. In rather terse language, the Court found that:

The Commission argues that some of the facts of which the State is accused are ongoing illicit acts; that is, the illicit acts continue to exist today. The Court does not consider it necessary to examine here the legal theory of ongoing illicit acts[.]³⁶

In contrast, in the case of *Moiwana Community v. Suriname*, the Court found the state liable for a violation of the right to property of a maroon tribe, based on a massacre and forced

displacement which occurred a year before the critical date.³⁷ Clearly, the petitioners in *Moiwana Community* were much more sympathetic as plaintiffs than the petitioner in *Cantos*. Mr. *Cantos* was a wealthy businessman deprived of tangible and intangible business property,³⁸ while the *Moiwana* are a threatened tribal group composed of runaway African slave descendants who were deprived of their ancestral lands.³⁹

A more principled distinction might lie in the Court's analysis of the reasons that indigenous property rights should be protected.⁴⁰ Although the Court's reasoning in *Moiwana* did not distinguish *Cantos* explicitly, it did emphasize that a connection with land was inherent in the *Moiwana* cosmological vision.⁴¹ According to the Court, a government that dispossesses an indigenous or tribal group of its lands has deprived the group of one of the fundamental elements of its identity.⁴² Because their survival depends upon their right to their lands, this right may be said to arise directly from their status as an indigenous or tribal people.⁴³ Such status is without temporal limitation; it can be neither created nor destroyed by the state.⁴⁴ As a result, the violation of rights inherent to that status may be deemed to arise continuously. In contrast, it was not Mr. *Cantos*' status that gave rise to his right to the property he claimed. Rather, he had acquired his property rights through ordinary market interactions governed by domestic law. These interactions provided temporal limits for when his rights accrued, and when they were violated or terminated. The deprivation of his rights, therefore, could be understood as temporally limited, while indigenous property rights may be understood as temporally infinite. As a result, the different results in *Cantos* and *Moiwana* may be reconciled by an understanding of the differing nature of the property rights at issue.

A. The Failure to Provide Effective Recourse for Human Rights Abuses as a Continuing Violation

Whatever the Court's reasoning for determining which violations of the Convention may be deemed "continuous", it is clear that the most complex and far-reaching consequences of the "continuing violations" doctrine arise in the context of the state's failure to investigate and prosecute human rights abuses.

The Inter-American Court has made important jurisprudential strides with respect to affirmative due process guarantees over the past quarter century. Specifically, the Court has found that

articles 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection)⁴⁵ of the American Convention require the state to provide effective recourse for the violation of substantive rights of the Convention by effectively investigating, prosecuting and punishing those responsible for human rights abuses.⁴⁶ This right to effective recourse extends both to the individual who suffered from the substantive violation as well as his or her family.⁴⁷

The Court has established that the denial of an effective recourse is a continuing violation of the American Convention.⁴⁸ In *Moiwana Community*, Suriname ratified the American Convention and recognized the Court's jurisdiction a year after the massacre and forced displacement of the petitioners' families by government troops.⁴⁹ Nonetheless, the Court found that Suriname's duty to provide an effective recourse for the events, as well as the Court's jurisdiction to examine Suriname's compliance with that duty, arose on the critical date:

In the case sub judice, the Court distinguishes between alleged violations of the American Convention that are of a continuing nature, and those that occurred after November 12, 1987. With respect to the former, the Tribunal observes that the perpetration of a massacre in 1986 has been alleged; in consequence, an obligation arose for the State to investigate, prosecute and punish the responsible parties. In that regard, Suriname initiated an investigation in 1989. Yet, the State's obligation to investigate can be assessed by the Court starting from the date when Suriname recognized the Tribunal's competence. Thus, an analysis of the State's actions and omissions with respect to that investigation, in light of Articles 8, 25 and 1.1 of the Convention, falls within the jurisdiction of this Court.⁵⁰

The effects of this line of jurisprudence are potentially far reaching. Because states are obligated to investigate violations prior to their recognition of the Court's jurisdiction, many past abuses are swept into the Court's jurisdiction under the obligation to provide effective recourse.

Given *Moiwana Community*, which first established that the duty to investigate is continuous, are any events immune from the Court's jurisdiction with respect to the state's duty to investigate? If Suriname can be held liable for failing to investigate events that occurred before it recognized the Court's jurisdiction, what is the limit to the Court's temporal reach? For example, can the failure to investigate abuses of slavery in Brazil be examined? The genocide of Amerindians

during the Conquest? Could the Court compel an investigation of all the abuses perpetrated by Latin American states at the height of the Cold War? Although the Court did not place any temporal limits upon the state's obligation to investigate the past in *Moiwana Community*, more recent case law may indicate the Court's disposition to establish such limits.

B. Limits on the Duty to Provide Effective Recourse for Crimes of the Past

I. Date of State Ratification as a Temporal Limitation

First, the Court has suggested that the state's obligation to investigate may be limited to violations of the American Convention which occurred subsequent to the state's ratification of the instrument.⁵¹ In *Vargas Areco v. Paraguay*, the parents of a young boy who was extrajudicially executed by the military alleged several due process violations.⁵² However, the extrajudicial execution occurred several years prior to the state's recognition of the Court's jurisdiction.⁵³ The Court explained:

In the present case, the Court finds that the obligation to investigate the violations of the right to life and to personal integrity arose from facts which occurred prior to [the state's recognition of the Court's jurisdiction]. Although it is impossible for the Court to pronounce upon these violations, it is important to note that the obligation to investigate them was pending on the date of the state's recognition of the Court's jurisdiction.

In this respect, it should be noted that the State ratified the American Convention on August 24, 1989, that is to say, several months prior to the death of the child *Vargas Areco* [...]. Therefore, the state was obligated, from that date to fulfill all of its obligations which arose from the Convention, even though the Tribunal might not have had the jurisdiction to adjudicate alleged violations of it by the State.⁵⁴

Thus, the Court emphasized that that the state had already voluntarily bound itself to the norms of the Convention at the time of the events. As a result, it was obligated to investigate events which violated those norms, and the Court was competent to evaluate that investigation once the state recognized the Court's jurisdiction. Inversely, the Court's position in *Vargas Areco* implies that the State is not obligated to investigate events which occurred prior to the State's ratification of the American Convention, or, at any rate, the Court

lacks the jurisdiction to examine the State's obligation to investigate such events. This limitation on the Court's jurisdiction is substantial; the American Convention did not come into force until 1978,⁵⁵ and many states did not ratify until much later.⁵⁶ Nonetheless, the Court's holding in *Vargas Areco* is tempered by its earlier holding in *Moiwana*, in which Suriname was found responsible for failing to investigate events which occurred prior to the State's ratification of the Convention. As a result, the effect of the Court's dicta in *Vargas Areco* remains unclear.

2. The Special Case of Crimes Against Humanity

The Court has also suggested that the state's duty to investigate prior events may depend upon their quality as crimes against humanity. In *Almonacid Arellano v. Chile*, the Court considered the Chilean amnesty law of April 18, 1978 which provided impunity to those who committed abuses during the early days of the Pinochet dictatorship.⁵⁷ The Commission alleged that the law violated due process because it relieved the state of its duty to investigate and sanction those responsible for the extrajudicial execution of Mr. *Arellano* on September 17, 1973.⁵⁸

As in *Moiwana Community*, the Court found that the state was obligated to investigate and prosecute events which occurred well before the state's ratification of the Convention or its acceptance of the Court's jurisdiction.⁵⁹ However, the Court emphasized that the extrajudicial execution of Mr. *Arellano*, in the context of the systematic abuses of the Pinochet regime of those years, constituted a crime against humanity, which was against the law of jus cogens.⁶⁰ In the end, the Court found that the state had violated articles 8 and 25 for failing to investigate and prosecute those responsible for Mr. *Arellano's* death, and that this failure was rooted in the application of the amnesty law.⁶¹

Implicit in the Court's opinion was the suggestion that the State's duty to investigate Mr. *Arellano's* death stemmed from its character as a crime against humanity, but that otherwise the Court would have lacked the jurisdiction to consider the State's compliance with that duty.⁶² At first blush, this reasoning may seem inconsistent with *Moiwana Community*. In that case, the Court held the state liable for failing to investigate events which occurred prior to the state's ratification of the Convention, without mention of crimes against humanity. Yet, the massacre of the *Moiwana* certainly constituted a crime against humanity, even

if the Court did not characterize it as such.⁶³ Thus, *Moiwana Community and Almonacid Arellano* may be read consistently.

If *Almonacid Arellano* indicates that investigations of events prior to the Court's jurisdiction are only within its competence when they concern *jus cogens* offenses, it must be queried, at what point did crimes against humanity become prohibited *jus cogens*? In *Almonacid Arellano*, the Court highlighted the fact that the extrajudicial execution of Mr. Arellano was a *jus cogens* crime against humanity recognized in 1973.⁶⁴ But what if the execution had occurred in 1944? On the other hand, this limitation would probably, at the very least, provide a principled distinction for limiting the Court's jurisdiction to events which occurred subsequent to the London Charter of the Nuremberg Trials in August of 1945.⁶⁵

Read in conjunction with the Court's opinions in *Moiwana Community and Vargas Areco*, the Court's holding in *Almonacid Arellano* suggests that the Court seeks to impose at least some limits to its jurisdiction over the state's duty to investigate. Such limits will most likely restrict the State's duty to investigate to conduct which was already prohibited (either by the Convention or by *jus cogens*) at the time it occurred. These limits make sense, because the basic idea underlying *ratione temporis* restrictions on jurisdiction is to punish the state only for those acts for which it had notice were prohibited.

IV. EXPANDING TEMPORAL JURISDICTION:

Failure to Provide Effective Recourse for Human Rights Abuses as an "Autonomous Event"⁶⁶

A. The Limited Scope of the Autonomous Events Doctrine

The previous section examined how the doctrine of continuing violations allows the Inter-American Court to examine on events which occurred before the state's acceptance of the Court's jurisdiction. This doctrine has allowed the Court to examine violations of the rights to life (under article 4) in cases of forced disappearances, the right to nationality (under article 23), the right to property (under article 21) in cases of indigenous land deprivations, and finally, in cases of the denial of an effective recourse (under articles 8 and 25). This section will analyze how a second doctrine, which will be called here the doctrine of "autonomous

events", extends the Court's temporal jurisdiction in another way.

The "autonomous events" doctrine is important, but its importance should not be overstated. The doctrine only applies in cases in which the accused state has limited its temporal jurisdiction to exclude "continuing violations" from the Court's jurisdiction. Four states have done so: Chile, El Salvador, Nicaragua, and Argentina.⁶⁷ These states have accomplished this limitation by filing a declaration with their recognition of the Court's jurisdiction. Chile's declaration is representative in this respect:

[...] The Government of Chile places on record that this recognition of the competence and jurisdiction of the Commission^[68] applies to events subsequent to the date of deposit of this instrument of ratification or, in any case, to events which began subsequent to March 11, 1990 [the critical date].⁶⁹

By limiting the Court's jurisdiction to events which began subsequent to the critical date, states avoid litigation with respect to continuing violations.⁷⁰ Because the Court is the ultimate interpreter of the American Convention, it could have struck down this type of declaration as contrary to the object and purpose of the American Convention. Instead, it seems, the Court has chosen to kill them with paper cuts.⁷¹ Thus, the Court has found that the failure to provide effective recourse (under articles 8 and 25) can be divided into "autonomous events" which can be said to "begin" at a moment in time distinct from the investigations or judicial proceedings themselves. According the Court in *Almonacid Arellano*:

This Court has found that in the course of proceedings, autonomous events may arise which may constitute specific and independent violations of the right to effective recourse. For example, the decision of a judge to refuse to allow the defense to participate in the proceedings, meet confidentially with its client, timely access the case file, challenge evidence presented, present counter-evidence, or adequately prepare the case; the use of "faceless" judges and prosecutors, the submission of the accused to tortures or mistreatment in order to force a confession, the failure to communicate to an accused foreigner his or her right to consular assistance, and the violation of the principle of coherence or correlation between crime and punishment, among others.⁷²

The Court went on to find that the application of the Chilean amnesty law constituted an

autonomous event which the Court was competent to evaluate.⁷³ The Court held that the application of the law was an autonomous violation because it denied effective recourse to the victims of the Pinochet regime. At the same time, the Court admitted that the mere existence of the law violated the Convention from the moment Chile ratified the Convention, many years before the critical date, and continued to the present.⁷⁴ This holding demonstrates how the categories of “continuing violations” and “autonomous events” may overlap, since ordinarily the mere existence of the law would constitute a continuing violation of the Convention. It was the special circumstance of the Chilean declaration which excluded “continuing violations” from the Court’s temporal jurisdiction that prompted the Court to employ the autonomous events doctrine.

Likewise, in the Cantos case, the Commission claimed that the petitioner had been denied effective recourse throughout the domestic proceedings beginning in 1972.⁷⁵ However, the Court only examined those proceedings which occurred after the critical date.⁷⁶ This conclusion was based on Argentina’s declaration upon recognition of the Court’s jurisdiction,⁷⁷ which limited the Court’s temporal jurisdiction. Nonetheless, the Court found that it was competent to consider state acts within the context of the domestic proceedings which could be considered “per se” violations of the Convention.⁷⁸ In its examination of the proceedings, the Court found that the court costs imposed upon the petitioner as a result of his domestic lawsuits (which totaled \$125,100,688.60), were excessive. As a result, the Court found that the costs were an undue burden on access to justice and an autonomous violation of article 8 of the American Convention.⁷⁹

Cantos and Almonacid Arellano illustrate a stable position with respect to “autonomous events” that excludes from the Court’s jurisdiction any allegation which necessarily depends on a legal conclusion based on facts which occurred prior to the critical date. Only those allegations which could be considered in isolation as a violation of the American Convention, and without any factual context of the case, would remain within the court’s purview. In other words, according to the Court, an “autonomous event” may only be found when the state’s conduct violates the Convention as a matter of law. These types of violations are impervious to the temporal limitations made by the state, because they do not depend on prior acts or context; there is no factual context which could possibly justify the state’s actions.

B. The Furthest Reaches of the Autonomous Events Doctrine

In the above examples, the Court found violations based on autonomous events which were more or less instantaneous (i.e., the application of the amnesty law or the imposition of excessive court costs). Questions arise, however, with respect to whether different stages of proceedings, which may lie partially or entirely within the Court’s jurisdiction, may be considered “autonomous events”.

For example, in Alfonso Martín del Campo *Dodd v. Mexico*, the Court held that it lacked jurisdiction over secondary proceedings, because the primary proceedings occurred completely outside the Court’s temporal jurisdiction.⁸⁰ Thus, it would seem, the Court reasoned that the “beginning” of the violation occurred prior to the Court’s jurisdiction and was excluded from the Court’s competence.

However, Alfonso Martín del Campo *Dodd* seems to have been directly overruled by *Serrano Cruz Sisters v. El Salvador*, in which the Court found that different stages in the investigative or judicial proceedings may be considered autonomous.⁸¹ In *Serrano Cruz Sisters*, the Court considered allegations that the state had failed to provide effective recourse in investigative and judicial proceedings related to the forced disappearance of two girls in 1982.⁸² El Salvador did not recognize the Court’s jurisdiction until 13 years after the disappearance, in 1995.⁸³ Although El Salvador had opened and closed an investigation in proceedings prior to the Court’s jurisdiction,⁸⁴ the Court found that the secondary proceedings begun after the date of the Court’s jurisdiction constituted an autonomous event over which it could exercise its jurisdiction.⁸⁵ Thus, it seems, the Court has determined that when one piece of the investigation or proceedings related to human rights abuses occurs within the Court’s temporal jurisdiction, the Court is competent to examine them. Paradoxically, this position could plausibly encourage states not to open new investigations into human rights abuses, since such an investigation, and the underlying facts, would come under the Court’s microscope.

Similarly, the “autonomous” nature of events is difficult to discern when the petitioner alleges a lack of due diligence or unjustified delay in the investigative or judicial proceedings over which the Court has jurisdiction. Concepts like “due diligence” depend on the totality of circumstances,

and when the circumstances of the case lie outside the Court's jurisdiction, difficult questions arise.

For example, in *Serrano Cruz Sisters* the Court analyzed the secondary proceedings to determine their compliance with the American Convention and found that the proceedings had been ineffective and hampered by inexplicable delay.⁸⁶

This analysis required an indirect examination of events which occurred prior to the Court's jurisdiction. First, in its analysis of the effectiveness of the investigation, the Court found that the domestic court⁸⁷ failed to take into account testimony by Red Cross officials concerning the circumstances of the girls' disappearance.⁸⁸ This testimony concerned events which occurred in 1982, many years before the Court's jurisdiction.⁸⁹ Therefore, although the Court did not examine events of 1982 directly in its analysis of the State's compliance with the duty to investigate, the Court did consider how the State responded to testimony by third parties (in this case the Red Cross) about events of 1982. This testimony affected the diligence required of the State in its investigation of the matter.⁹⁰ For the Court, it was important that the State had knowledge of credible allegations of Convention violations, but failed to investigate them. The fact that the allegations concerned events prior to its jurisdiction was irrelevant, since it was not the truth of the events, but rather, the State's response to their alleged occurrence.

Second, the Court examined the American Convention's requirement that states provide judicial recourse within a "reasonable time". The Court acknowledged that an evaluation of the reasonableness of the length of proceedings depended in part upon the complexity of the matter investigated. The evaluation of the complexity of the matter investigated could have required an indirect analysis of facts over which the Court lacked jurisdiction. But the Court avoided this analysis by placing the burden upon the state to explain how the complexity of the case had caused several long periods of procedural inaction. Because the State offered no such explanation, said the Court, the delays could not be deemed reasonable. As a result of these delays, the Court found the State responsible for a violation of the right to judicial recourse under the American Convention.

The Court's holding in *Serrano Cruz Sisters* marks the outer boundaries of the Court's expansion of its temporal jurisdiction. Allegations that investigations or proceedings were ineffective will generally depend upon the factual context of the matter investigated. Thus, the amount of diligence or process due depends upon the gravity

and circumstances of the underlying facts. In *Serrano Cruz Sisters*, the Court got at these facts indirectly, by evaluating the state's response to credible allegations of abuse. But upon determining the credibility of such allegations, the Court discreetly makes a finding of fact with respect to events which occurred prior to the critical date, from which legal consequences may flow for the state. Likewise, by making it the State's burden to establish that delays in proceedings were justified, the Court avoided a direct analysis of facts over which it lacked jurisdiction. Had the state justified the delay by producing evidence of the complexity of the events investigated, it would have become incumbent upon the Court to make a factual determination of the truth of the state's justification. Again, the Court would have been forced to reach a legal conclusion based upon facts which occurred prior to the critical date.

Seen from the perspective that the principle of non-retroactivity should preclude decisions on issues prior to the critical date, this position is dangerously close to the retroactive application of the Inter-American Convention. However, from an alternative perspective, the Court's mission is fundamentally about evaluating a state's behavior subsequent to the critical date. While this evaluation may require factual determinations about events prior to the critical date, the principle of non-retroactivity should not preclude such decisions; the principle of non-retroactivity should preclude findings of law prior to the critical date, not findings of fact. In *Serrano Cruz Sisters*, the finding of law was based upon El Salvador's diligence in providing an effective recourse subsequent to the critical date. Because the basis of the principle of non-retroactivity is that a state should not be held accountable for prohibited conduct if the state had no notice that the conduct was prohibited, this latter position makes more sense; the Court's findings of fact about events prior to the critical date (which inform an evaluation of the state's response to the events after the critical date) are unrelated to the state's notice with respect to prohibited conduct (in this case, the failure to diligently respond to alleged human rights abuses).

CONCLUSION

From a comparative perspective, the tools used by the Inter-American Court in interpreting its jurisdiction are relatively well supported in international law. First, the ability of a court to take into account a historical context when making its judgments is logically inherent to the judicial process. Second, the doctrine of continuing

violations has been recognized by several international institutions,⁹¹ although the types of violations to which these institutions apply the doctrine vary.⁹² In particular, the European Court takes a strikingly different position with respect to the continuing nature of the duty to investigate and other issues related to the state's duty to provide effective recourse.⁹³ Third, although the European Court has not adopted something similar to the "autonomous events" doctrine, this fact is most likely rooted in the European Convention's prohibition on reservations of a general nature,⁹⁴ which precludes temporal limitations on its jurisdiction. As a result, the complex issues which arose in *Serrano Cruz Sisters* will likely not be seen in the European Court.

Finally, from a purely consequentialist perspective, the fewer limits on the Court's temporal jurisdiction, the better human rights will be protected in the hemisphere. As the Court has often stated, the American Convention must be interpreted in favor of the individual. On a continent where so many individuals have been affected by

state violence, a comprehensive program of transitional justice depends upon the investigation and prosecution of perpetrators of past crimes, and the compensation of victims for their injuries. The Court has found creative ways to use the state's duty to provide effective recourse for human rights abuses as the "hook" on which it hangs several legal conclusions based on factual situations which occurred prior to its jurisdiction. As a result, the Court basically compels states to pursue a transitional justice program, lest they violate the American Convention. Thus, the consequences of the Court's positions with respect to its temporal jurisdiction could have far-reaching impacts throughout Latin America, and force a reckoning that, in many states, has never really occurred.

Of course, the political restraints on the Court's work are obvious and need not be detailed here. Nonetheless, should the Court continue to grow in prestige, acceptance, and power, the effects of its extensive reach into the past will likely become more apparent.

and recognition of the Court's jurisdiction: Argentina: 1983, 1984; Bolivia: 1982, 1993; Brazil: 1985, 1998; Chile: 1990, 1990; Colombia: civil war ongoing, but recognized Court in 1985; Ecuador: 1979, 1984; El Salvador: 1992, 1995; Guatemala: 1996, 1987; Haiti: 2006, 1998; Honduras: 1982, 1981; Nicaragua: 1990, 1991; Panama: 1989, 1990; Paraguay: 1993, 1993; Peru: 2001, 1981; Dominican Republic: 1996, 1999; Suriname: 1987, 1987; Uruguay: 1985, 1985) Nonetheless, only four of these states have experienced such turmoil subsequent to their recognition of the Court's jurisdiction (Colombia, Guatemala, Haiti, Honduras, and Peru). It is unsurprising that these states have also been the Court's most frequent defendants (Peru: 20 cases; Colombia: 7 cases; Guatemala: 11 cases; Honduras: 6 cases). All historical data taken from the CIA World Factbook at <https://www.cia.gov/cia/publications/factbook.html> (last accessed March 23, 2007) except data on Nicaragua, Panama, and Paraguay taken from Microsoft® Encarta® Online Encyclopedia 2007 <http://encarta.msn.com> ©1997-2007 Microsoft Corporation. All Rights Reserved (last accessed March 23, 2007). Data on state recognition of Court's jurisdiction taken from Basic Documents, page 59.

15. *Case of the Serrano Cruz Sisters v. El Salvador*. Judgment of March 1, 2005. Series C N°. 120, para. 28. See also *Case of Nogueira de Carvalho et al. v. Brazil*. Judgment of November 28, 2006. Series C N°. 161, para. 67.
16. *Case of Nogueira de Carvalho v. Brazil*, *supra* note 15 para. 67.1-67.3; *Case of Almonacid Arellano v. Chile*, *supra* note 3, para. 82-82.23
17. *Almonacid Arellano v. Chile*, *supra* note 3, para. 82.3-82.23; *Case of the Serrano Cruz Sisters v. El Salvador*, *supra* note 15, para. 48.1; *Goiburú et al. v. Paraguay*, Merits, Reparations and Costs. Judgment of September 22, 2006. Series C N°. 153, para. 61.1-61.14.
18. *Case of Velásquez-Rodríguez v. Honduras*. Judgment of July 29, 1988. Series C N°. 4, para. 155.
19. Honduras filed its declaration of acceptance of the Court's jurisdiction on September 9, 1981, just three days before the disappearance of the victim. *Velásquez Rodríguez v. Honduras*, *supra* note 18, para. 3; Basic Documents 60.
20. The Court has characterized this type of statement as a "temporal limitation", not technically a reservation, because "the 'recognition of jurisdiction' of the Court is a

unilateral act of each State, conditioned by the terms of the American Convention as a whole and, as such, is not subject to reservations". See *Case of Alfonso Martín del Campo Dodd*. Preliminary Objections. Judgment of September 3, 2004. Series C N°. 113, para. 68.

21. Basic Documents, 68.
22. *Case of Blake v. Guatemala*. Judgment of January 24, 1998. Series C N°. 36, para. 52.
23. *Case of Blake v. Guatemala*. Preliminary Objections. Judgment of July 2, 1996. Series C N°. 27, para. 22
24. *Id.*, at para. 23. Note that the State accepted responsibility for "the unwarranted delay in the administration of justice" up until 1995 but denied that Mr. Blake had been kidnapped and killed by state agents.
25. *Id.*, at 33.
26. *Id.*
27. *Id.*, at 34
28. *Id.*
29. The Court also found that Guatemala violated the personal integrity (under Article 5 of the Convention) of Mr. Blake's family because of the pain they suffered as a result of the state's failure to investigate. See *Case of Blake v. Guatemala*, *supra* note 22, para. 116.
30. Together, Articles 8 and 25 of the American Convention form the normative framework for the Court's jurisprudence on the State's duty to provide due process. The text of Article 8 is the following:
 Article 8. Right to a Fair Trial
 1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.
 2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
 a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;
 b. prior notification in detail to the accused of the charges against him;

- c. adequate time and means for the preparation of his defense;
- d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
- e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;
- f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
- g. the right not to be compelled to be a witness against himself or to plead guilty; and
- h. the right to appeal the judgment to a higher court.

3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.

4. An accused person acquitted by a non-appealable judgment shall not be subjected to a new trial for the same cause.

5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

The text of Article 25 is the following:

Article 25. Right to Judicial Protection

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

2. The States Parties undertake:

- a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
- b. to develop the possibilities of judicial remedy; and
- c. to ensure that the competent authorities shall enforce such remedies when granted.

31. See, for example, *Case of the girls Yean and Bosico v. Dominican Republic*. Judgment of September 8, 2005. Series C N^o. 130, para. §130, *Case of the Moiwana Community v. Suriname*. Judgment of June 15, 2005. Series C N^o. 124, para. 39; *Case of Goiburú et al. v. Paraguay*, *supra* note 17, para. 94, *Case of Vargas-Areco v.*

Paraguay. Judgment of September 26, 2006. Series C N^o. 155, para. 79.

32. *Case of Goiburú et al. v. Paraguay*, *supra* note 17, para. 82, *Case of Molina-Theissen v. Guatemala*. Judgment of May 4, 2004. Series C N^o. 106.

33. Article 20 of the American Convention states: Article 20. Right to Nationality

- 1. Every person has the right to a nationality.
- 2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality.
- 3. No one shall be arbitrarily deprived of his nationality or of the right to change it.

34. *Case of Alfonso Martín del Campo Dodd v. Mexico*. Preliminary Objections. Judgment of September 3, 2004. Series C N^o. 113, para. 78. Moreover, in a footnote, the Court defined the difference between a “continuing violation” and an “instantaneous” one: “The offence is construed as instantaneous when the execution of its constituting elements marks the end of its consummation [...] It is maintained that the offence is continuous or permanent when its consummation extends over time.” *Id.*, footnotes 12 and 13.

35. Article 21 of the American Convention states that:

Article 21. Right to Property

- 1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
- 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.
- 3. Usury and any other form of exploitation of man by man shall be prohibited by law.

36. *Case of Cantos v. Argentina*. Preliminary Objections. Judgment of September 7, 2001. Series C N^o. 85, para. 39. It is important to note that Argentina issued a “temporal limitation” to its acceptance of the Court’s jurisdiction, stating that “the obligations undertaken by virtue of the Convention shall only be effective as regards acts that have occurred after the ratification of the above-mentioned instrument”. The Court went on to state that: it is sufficient that it confirm that, if any of the facts imputed to the State were of this nature, it would not be a ‘fact that had occurred after September 5, 1984’, the only

category of facts for which Argentina accepted the jurisdiction of this Court". It is difficult to distinguish the state's limitation from the general limitation on *ex post facto* treaty interpretation contained in Article 28 of the Vienna Convention on the Law of Treaties, which states "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party". Although clearly applicable to the Court in all contentious cases, this provision has not prevented the Court from examining continuing violations in other cases. As a result, the state's limitation does not seem to be the source of the Court's reasoning for refusing to apply the continuing violations theory to the context of property violations under Article 21.

37. *Case of the Moiwana Community v. Suriname*. Judgment of June 15, 2005. Series C N^o. 124, para. 164.
38. *Case of Cantos v. Argentina*, *supra* note 36, para. 2.
39. *Case of the Moiwana Community v. Suriname*, *supra* note 31, para 86.1-86.3.
40. Alternatively, as described below, the Court may have rejected Mr. Cantos claim based on Argentina's temporal limitation, which might have limited the Court's jurisdiction over continuing violations. See section IV below.
41. *Case of the Moiwana Community v. Suriname*, *supra* note 31, para 129-135. See also *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Judgment of August 31, 2001. Series C N^o. 79, para. 149, 151; and *Case of the Yakye Axa Indigenous Community v. Paraguay*. Judgment of June 17, 2005. Series C N^o. 125, para. 127-131.
42. *Case of the Moiwana Community v. Suriname*, *supra* note 31, para. 129-135.
43. This status may be forfeited if the community ceases to practice their indigenous culture. See *Case of Sawhoyamaya Indigenous Community v. Paraguay*. Judgment of March 29, 2006. Series C N^o. 146, para. 131.
44. The European Commission has taken a similar position with respect to the freedom of expression. According to the Commission, freedom of expression arises from an individual's status as a human being. As a result, even when

a court decision which denies freedom of expression to a particular individual occurred prior to the critical date, the violation continued past the critical date. See *De Becker v. Belgium* App. N^o. 214/56, decision of June 9, 1958.

45. For a summary of the development of the Court's due process jurisprudence, see Cecilia Medina Quiroga, *LA CONVENCION AMERICANA: TEORIA Y JURISPRUDENCIA*. (Universidad de Chile 2003) pp 265-340 and 357-380. See also *Case of La Cantuta v. Perú*. Judgment of November 29, 2006. Series C N^o. 162, §140; *Case of the Miguel Castro Castro Prison v. Perú*, *supra* note 4, para. 381; *Case of Goiburú et al. v. Paraguay*, *supra* note 17, para. 110.
46. See *Case of Acosta Calderón v. Ecuador*, Judgment of June 24, 2005. Series C N^o. 129, para. 92: "This Tribunal has established that the protection of the person before the arbitrary exercise of public power is the main objective of international human rights protection. In this sense, the non-existence of effective internal recourses makes a person defenseless. Article 25(1) of the Convention establishes, in ample terms, the obligation of the States to offer all people submitted to its jurisdiction an effective judicial recourse against acts that violate their fundamental rights". See also *Case of Yatama v. Nicaragua*. Judgment of June 23, 2005 (Only in Spanish). Series C N^o. 127, para. 167; *Case of Tibi v. Ecuador*. Judgment of September 7, 2004. Series C N^o. 114, para. 130.
47. *Case of Juan Humberto Sánchez v. Honduras*. Request of Interpretation of the Judgment of Preliminary Objections, Merits and Reparations. (Art. 67 American Convention on Human Rights). Judgment of November 25, 2003. Series C N^o. 102, para. §57; *Case of Bulacio v. Argentina*. Judgment of September 18, 2003. Series C N^o. 100, para. 78; *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala*. Reparations (Art. 63(1) American Convention on Human Rights). Judgment of May 26, 2001. Series C N^o. 77, para. 65.
48. In *Campo Dodd*, the Court determined that it lacked temporal jurisdiction to consider the "denial of justice" claims put forward by the Commission, because the judgment of the domestic court occurred before the Court's jurisdiction, even though the Commission argued that the alleged victim had submitted an appeal after the Court's jurisdiction. (See §80). This holding, which implies that the denial of justice is not continuous, seems to have been overruled by *Moiwana*.

- 118; See also Jessica Tillson, *Reservations and the Future of Inter-American Justice*, 6 CHI.-KENT J. INT'L & COMP. L. 82, 98 (2006).
72. *Case of Almonacid Arellano v. Chile*, *supra* note 3, para. 48.
73. *Case of Almonacid Arellano v. Chile*, *supra* note 3, para. 48-49.
74. *Id.*, at para. 50, 121.
75. *Case of Cantos v. Argentina*, merits, *supra* note 70, para. 44c.
76. *Case of Cantos v. Argentina*. Preliminary Objections. Judgment of September 7, 2001. Series C N^o. 85, para. 39.
77. Basic Documents, 62
78. *Case of Cantos*, preliminary objections, *supra* note 75, para. 40, *Case of Cantos*, merits, *supra* note 70, para. 25.
79. *Case of Cantos*, merits, *supra* note 70, para. 54.
80. *Case of Alfonso Martín del Campo Dodd v. Mexico*, *supra* note 43, para. 81. It is important to note that *Dodd* preceded *Moiwana*. As a result, the Court did not consider the denial of justice as a continuing violation. For this reason, it was not necessary that Mexico declare a temporal limitation in its recognition of the Court (similar to that of Chile, El Salvador, Nicaragua or Argentina) in order to avoid the Court's jurisdiction over the domestic proceedings.
81. Interestingly, *Serrano Cruz Sisters* followed *Alfonso Martín del Campo Dodd* by just 3 months.
82. *Case of the Serrano Cruz Sisters v. El Salvador*, *supra* note 70, para. 48.2.
83. Basic Documents, 59.
84. *Case of the Serrano Cruz Sisters v. El Salvador*, *supra* note 70, para. 48.22-48.23
85. *Id.*, at para. 66-74.
86. *Id.*, at para. 65, 106.
87. El Salvador's legal system is based largely upon civil law in which the judge directs the investigation.
88. *Case of the Serrano Cruz Sisters v. El Salvador*, *supra* note 70, para. 97, 98.
89. *Case of the Serrano Cruz Sisters v. El Salvador*, *supra* note 70, para. 48.18, 48.47.
90. Moreover, although the Court was impeded from issuing its own binding assessment of the events of 1982, its analysis provided it with the opportunity to include the vivid Red Cross testimony in its final judgment, thus giving an implicit recognition to the petitioners, and subtly acknowledging the truth of the facts at the heart of the case.
91. PERMANENT COURT OF INTERNATIONAL JUSTICE, *Phosphates in Morocco Case* (Italy v. France), P.C.I.J., Series A/B N^o. 74 (1938); HUMAN RIGHTS COMMITTEE, *Ivan Somers v. Hungary*, Comm. N^o. 566/1993 (July 29, 1996) U.N. Doc. CCPR/C/53/D/1993 (1996); HUMAN RIGHTS COMMITTEE, *Patrick Holland v. Ireland*, Comm. N^o. 593/1994, (November 22, 1996), U.N. Doc. CCPR/C/58/D/593/1994 (1996); EUROPEAN COURT ON HUMAN RIGHTS, *Montion v. France*, App. N^o. 11192/84, EComHR, decision of May 14, 1987; EUROPEAN COURT ON HUMAN RIGHTS, *Posti and Rahnko v. Finland*, App. N^o. 27824/95, decision of September 24, 2002; INTERNATIONAL LAW COMMITTEE, *Draft Articles on State Responsibility*, Article 14, UN GA Res. 56/83, UN Doc. A/Res/56/83/Annex
92. See Kerem Alt Parmak, *The Application of the Concept of Continuing Violation to the Duty to Investigate, Prosecute and Punish under International Human Rights Law*, TURKISH YEARBOOK OF HUMAN RIGHTS (1994-2004). For example, in apparent contrast to the Inter-American court's decision in *Cantos*, the European Court considers property deprivation to be a continuous violation. See *Louzidou v. Turkey* (Merits) judgment of December 18, 1996; *Papamichalopoulos and others v. Greece*, judgment of June 24, 1996, and *Iatridis v. Greece*, judgment of March 25, 1999. In addition, the European Commission has found that a domestic court decision issued before the critical date which restricted an individual's freedom of expression was a violation that continued past the critical date. See *De Becker v. Belgium*, App. N^o. 214/56, decision of June 9, 1958. The Human Rights Committee has found in order for property violations to be deemed "continuous" a fresh violation or affirmation of the prior conduct must occur after the critical date. See *Evan Drake and Carla Maria Drake v. New Zealand*, Comm. N^o. 601/1994, decision of April 3, 1997, U.N. Doc. CCPR/C/59/D/601/1994, para. 8.2
93. Parmak, *supra* note 91.
94. CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS AS AMENDED BY PROTOCOL N^o. 11 WITH PROTOCOL NOS. 1, 4, 6, 7, 12 AND 13, Article 57: "Reservations. 1. Any State

may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that

any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.[...]"