

Overcoming Impunity: Pathways to Accountability in Latin America

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Abstract¹

How and why do democratic governments overcome amnesty laws and cultures of impunity to allow for trials for past human rights violations? To confront this question, we first identify widespread agreement on four key factors associated with the degree of accountability in a new democracy: civil society demand, domestic judicial leadership, the absence of veto players and international pressure. We then outline the interactions among those factors that lead to four distinct scenarios of overcoming amnesty, from the failure to do so (obstinate amnesties) to successful democratic displacement of amnesties and the proliferation of trials. Because Latin America has had great variation in these accountability pathways, we use it as a test region to examine the dynamic interaction of the four key factors in overcoming impunity. We conclude by considering this new dynamic interaction framework outside Latin America.

Keywords: Latin America, amnesty, prosecutions, impunity, civil society

Introduction

How and why do democratic governments overcome amnesty laws and cultures of impunity to allow for trials for past human rights violations? This article

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confronts this question. To do so, we first explore the factors associated with the prevention or advancement of accountability, drawing from the theoretical and empirical approaches to transitional justice, that is, the set of processes designed to address the violent or authoritarian past. We identify widespread agreement on four key factors associated with the degree of accountability in new democracies: civil society demand, domestic judicial leadership, the absence of veto players and international pressure. Next, we outline distinct scenarios regarding overcoming amnesty and advancing accountability, ranging from those situations in which obstinate amnesties remain firmly in place to situations in which amnesties have been democratically displaced by trials. Because Latin America has great variation in the degree to which amnesties have been overcome, we use it as a test region to examine the dynamic interaction of the four key factors. We conclude by presenting a new framework for understanding how and why new democracies overcome impunity, and we reflect on the broader implications of our findings.

Theoretical and Empirical Approaches to Overcoming Impunity

Our survey of the transitional justice literature, and our own analysis of success in some Latin American cases, reveals four broad explanatory factors for why some countries hold perpetrators of past human rights violations accountable while others do not. In this section we define those factors and identify indicators of their strength or weakness. In the next section we consider the dynamic interaction among these factors and the implications for overcoming impunity.

Civil Society Demand

While civil society is a ‘fashionable and contested concept’ in the academic literature,² we use the term to refer to those domestic nongovernmental organizations (NGOs), individual activists and other social groups, including human rights, victim, student, neighborhood and trade union organizations, that play an active role in generating the conditions necessary to push governments to reckon with past atrocities. Many scholars assume a central role for civil society in ‘restructuring the public space.’³ More specifically, scholars note the importance of civil society in pushing for accountability and overcoming impunity through their demand for trials.⁴ In explaining the rise of accountability

² David A. Crocker, ‘Transitional Justice and International Civil Society: Toward a Normative Framework,’ *Constellations* 5(4) (1998): 500.

³ Guillermo O’Donnell and Philippe C. Schmitter, *Transitions from Authoritarian Rule, Vol. 4: Tentative Conclusions about Uncertain Democracies* (Baltimore, MD: Johns Hopkins University Press, 1986).

⁴ David Becker, ‘Civil Society and Transitional Justice: Possibilities, Patterns and Prospects,’ *Journal of Human Rights* 2(3) (2003): 297–313; Mara Loveman, ‘High-Risk Collective Action: Defending Human Rights in Chile, Uruguay, and Argentina,’ *American Journal of Sociology* 104(2) (1998): 477–525; Kathryn Sikkink, ‘The Age of Accountability: The Global Rise of Individual Criminal Accountability,’ in *Amnesty in the Age of Human Rights Accountability: Comparative and*

around the world, for example, Ellen Lutz and Kathryn Sikkink point to the importance of private lawyers.⁵ In her subsequent solo-authored work, Sikkink emphasizes key individual activists and their linkages to domestic and international human rights organizations as advancing the accountability demand.⁶ Cath Collins similarly contends that challenges to impunity and the promotion of accountability depend on the interaction between domestic civil society actors and local judicial institutions.⁷

An important manifestation of civil society is the push for legal accountability. It is unlikely that lawyers would take on such criminal cases without demand from victims and survivors of past atrocity. Diverse civil society actors play an important role in deciphering how international expectations can blend with local practice.⁸ High-profile mobilization by civil society actors even before the end of the dictatorship and continuing into democracy is crucial to this process. The weekly marches of the mothers and grandmothers in Buenos Aires' Plaza de Mayo and the *escraches* by the sons and daughters of the disappeared have become emblematic of forceful demands for justice in Argentina.⁹ Individual-level studies of attitudes toward transitional justice and reconciliation illustrate that victimizing experiences tend to span generations.¹⁰ In some cases, civil society groups have carried out their own truth-gathering processes to raise attention to past atrocity and to advance justice processes, such as the Vicariate of Solidarity in Chile or the Catholic Church's Recovery of Historical Memory Project in Guatemala.¹¹ These efforts attempt to catalyze, substitute or complement official truth processes to advance widespread knowledge of abuses and support the demand for justice.

The capacity of civil society groups to demand accountability may depend on prior activism against authoritarian rule. Organizational strength, cohesiveness and visibility may increase perception of efficacy in influencing policy making

International Perspectives, ed. Francesca Lessa and Leigh A. Payne (Cambridge: Cambridge University Press, 2012).

⁵ Ellen Lutz and Kathryn Sikkink, 'The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America,' *Chicago Journal of International Law* 2(1) (2001): 1–34.

⁶ Sikkink, *supra* n. 3.

⁷ Cath Collins, *Post-Transitional Justice: Human Rights Trials in Chile and El Salvador* (University Park, PA: Pennsylvania State University Press, 2010).

⁸ Aaron P. Boesenecker and Leslie Vinjamuri, 'Lost in Translation? Civil Society, Faith-Based Organizations and the Negotiation of International Norms,' *International Journal of Transitional Justice* 5(3) (2011): 345–365.

⁹ Marguerite Guzmán Bouvard, *Revolutionizing Motherhood: The Mothers of the Plaza de Mayo* (Wilmington, DE: Scholarly Resources, 1994); Susana Kaiser, 'Escraches: Demonstrations, Communication and Political Memory in Post-Dictatorial Argentina,' *Media, Culture and Society* 24(4) (2002): 499–516.

¹⁰ Paloma Aguilera, Laia Balcells and Héctor Cebolla-Boado, 'Determinants of Attitudes Toward Transitional Justice: An Empirical Analysis of the Spanish Case,' *Comparative Political Studies* 44(10) (2011): 1397–1430.

¹¹ Louis Bickford, 'Unofficial Truth Projects,' *Human Rights Quarterly* 29(4) (2007): 994–1035.

that continues into the democratic period.¹² Where civil society actors lack a strong organizational base or a critical mass of support in the democratic era, they are likely to calculate that the cost of mobilizing will not render justice benefits. New generations, moreover, may prove more deeply divided over the past than those directly or indirectly involved in the opposition, thereby weakening cohesion. Some may hope to promote a national identity associated with modern rule of law and criminal sanctions for past wrongdoing, while others may feel it necessary to turn the page in order to eschew a national identity connected to brutality and an old security force. Civil society demand thus depends on resolving divided opinions over past violence and sustaining or building organizational strength in the new democracy to promote accountability.

Those characteristics will likely lead to a visible and cohesive, or strong, civil society demand for accountability capable of shaping domestic and international opinion in favor of, and pressuring judicial forces to act on, ending impunity. Civil society forces that emerge during authoritarian rule and continue to mobilize for justice during the democratic transition and beyond have sufficient organizational strength, media attention, international and domestic linkages to governmental institutions and NGOs and widespread domestic resonance to be able to effectively make claims for justice and to have those claims reflected in political and legal circles. Civil society forces that lack this prior engagement face difficult barriers in achieving the organizational strength, cohesion and visibility needed to make strong accountability demands.

Absence of Veto Players

The existing literature examines the importance of potential veto players – those actors who oppose accountability for, or investigation into, past human rights violations – in promoting and sustaining impunity and blocking accountability. Early transitologists predicted that if the push for accountability for past human rights abuses moved too far too fast, it would likely provoke a backlash by spoilers who would reimpose authoritarian rule as a response to the demand for accountability.¹³ Subsequent scholars have noted the potential importance of veto players in limiting a state's transitional justice response.

Scholarship on civil–military relations, for example, has focused on disagreement and conflict between militaries and political leaders in new democracies.¹⁴ Human rights issues are a particular point of contention. David Pion-Berlin examines civilian–military bargaining over the jurisdiction of military officers

¹² Tricia D. Olsen, Leigh A. Payne and Andrew G. Reiter, 'An Exploratory Analysis of Civil Society and Transitional Justice,' in *Assessing and Strengthening Civil Society Worldwide*, ed. Wolfgang Dorner and Regine List (New York: CIVICUS and Bloomsbury Press, 2012).

¹³ For example, O'Donnell and Schmitter, *supra* n 2.

¹⁴ Paul Zagorski, *Democracy vs. National Security: Civil–Military Relations in Latin America* (Boulder, CO: Lynne Rienner, 1999).

accused of human rights violations in Chile, Argentina and Bolivia.¹⁵ Military court systems also play a key role, as one of the first steps in this process is often a legal battle over the jurisdiction of the crimes.¹⁶ In other cases, former authoritarian actors and supporters mobilize into broad ‘uncivil movements’ that use political violence as a deliberate strategy to push for their interests following transitions.¹⁷ Former security agents involved in past repression or public supporters of authoritarian rule also run for and win elected office, and thus are in a position dramatically to influence transitional justice decisions.¹⁸

Indirectly, such veto players may also dampen civil society demand for accountability by intimidating victims-survivors and their supporters. The indirect role of veto players in blocking accountability is not only a perception; without directly controlling the judiciary or the state, they may still have a strong influence over judicial and policy decisions regarding accountability. When strong and visible, they present an alternative argument that influences decision makers: peace and stability may depend on impunity and turning the page and not on holding perpetrators accountable for past human rights abuses.

While these veto players often emerge from the forces of right-wing repression or their supporters, this is not always the case. Sometimes the combatants on the other side – the left – veto investigations and prosecutions for past violence. In Brazil and Uruguay, for example, former combatants of guerrilla groups now hold government posts and reject the move toward accountability. The newly formed Movement for Amnesty and Fundamental Rights in Peru, comprised of former supporters of the rebel group Shining Path, supports a broad amnesty law along with those on the other end of the political spectrum – supporters of the authoritarian leader Alberto Fujimori, who tried to eliminate Shining Path. Pro-amnesty groups may wish to avoid accountability for their own human rights violations. Alternatively they may accept that the capacity to move forward and end violence depends on upholding the pact of silence and forgetting. They may anticipate that prosecutions would plunge the country anew into violent conflict – a worse option than impunity. Bystanders may also support impunity and block accountability for the same reason, that is, that little would be gained, and security and stability could be lost by pursuing prosecutions. Recent research illustrates that transitional justice mechanisms are at times created to appeal to a variety of actors to avoid igniting those who might oppose such measures.¹⁹

¹⁵ David Pion-Berlin, ‘Informal Civil–Military Relations in Latin America: Why Politicians and Soldiers Choose Unofficial Venues,’ *Armed Forces and Society* 36(3) (2010): 526–544.

¹⁶ Brett J. Kyle and Andrew G. Reiter, ‘Dictating Justice: Human Rights and Military Courts in Latin America,’ *Armed Forces and Society* 38(1) (2012): 27–48.

¹⁷ Leigh A. Payne, *Uncivil Movements: The Armed Right Wing and Democracy in Latin America* (Baltimore, MD: Johns Hopkins University Press, 2000).

¹⁸ Brett J. Kyle, ‘Recycling Dictators: Ex-Authoritarians in New Democracies’ (PhD diss., University of Wisconsin–Madison, 2013).

¹⁹ Jamie Rowen, ‘Mobilizing Truth: Agenda Setting in a Transnational Social Movement,’ *Law and Social Inquiry* 37(3) (2012): 686–718.

In sum, veto players can block accountability demands from victims, human rights organizations and the legal community. Advancing accountability thus depends in part on the absence or weakness of such players. When we refer to ‘strength’ in this category, we mean the absence of veto players who divide society. ‘Weakness’ would be the presence of veto players with strong influence in the media, politics and the judiciary. These veto players use public declarations or acts to express their unwillingness to accept any change to amnesty laws and movement toward greater accountability for past human rights violations.

Domestic Judicial Leadership

Judiciaries in posttransition contexts often operate in divided societies, with strong supporters for accountability and strong supporters of amnesty. Scholars have reflected on the value of judicial reform that emphasizes strong and independent courts, ensuring that all actors adhere to the rule of law to engender a new societal faith in the justice system.²⁰ Some show a positive relationship between democratic rule of law and the protection of human rights,²¹ and they hold that the furtherance of democratic values by the judicial branch is vital to the stability of new democratic regimes.²² Scholars, particularly those working on Latin America, emphasize the importance of judicial independence (or autonomy), namely the ability of civilian courts to make decisions without pressure from other branches of government²³ and the military,²⁴ and for lower courts to make rulings without interference from higher courts.²⁵ Finally, scholars also examine the role of courts as political actors, focusing on the interaction of civilian courts with the executive²⁶ and the legislature²⁷ in particular.

An independent judiciary aware of the democratic principles of the right to redress and human rights norms may prove willing to challenge impunity. Over

²⁰ For example, Pedro C. Magalhães, ‘The Politics of Judicial Reform in Eastern Europe,’ *Comparative Politics* 32(1) (1999): 43–62.

²¹ For example, Tom Farer, ‘Consolidating Democracy in Latin America: Law, Legal Institutions and Constitutional Structure,’ *American University International Law Review* 10(4) (1995): 1295–1329; Siri Gloppen, Roberto Gargarella and Elin Skaar, eds., *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies* (London: Cass Publishers, 2004).

²² Linn Hammergren, *The Politics of Justice and Justice Reform in Latin America: The Peruvian Case in Comparative Perspective* (Boulder, CO: Westview Press, 1998).

²³ For example, Javier Couso, ‘The Judicialization of Chilean Politics: The Rights Revolution that Never Was,’ in *The Judicialization of Politics in Latin America*, ed. Rachel Sieder, Line Schjolden and Alan Angell (New York: Palgrave Macmillan, 2005).

²⁴ Brett J. Kyle and Andrew G. Reiter, ‘Militarized Justice in New Democracies: Explaining the Process of Military Court Reform in Latin America,’ *Law and Society Review* 47(2) (2013): 375–407.

²⁵ Julio Ríos-Figueroa, ‘Judicial Independence: Definition, Measurement, and Its Effects on Corruption: A Study of Latin America’ (Ph.D. diss., New York University, 2006).

²⁶ For example, Gretchen Helmke, ‘The Logic of Strategic Defection: Court-Executive Relations in Argentina under Dictatorship and Democracy,’ *American Political Science Review* 96(2) (2002): 291–303; Lisa Hilbink, *Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile* (Cambridge: Cambridge University Press, 2007).

²⁷ Matías Iaryczower, Pablo T. Spiller and Mariano Tommasi, ‘Judicial Lobbying: The Politics of Labor Law Constitutional Interpretation,’ *American Political Science Review* 100(1) (2006): 85–97.

time this type of judicial leadership may emerge as new generations of legal practitioners shift away from the old authoritarian order and become independent from the executive.²⁸ These judicial leaders may be more susceptible to international reputational effects of condemnation of laws and practices. Independent and democratic judicial leaders will be more likely to take up the civil society demand for justice.²⁹ They may also react to existing amnesty laws' failure to comply with domestic constitutional law or the international and regional treaties and conventions the country has ratified. Legal professionalism, legal responsiveness and reputational effects will likely emerge over time. Where new generations of autonomous and democratic prosecutors and judges have emerged, successful challenges to amnesty laws will prove more likely, thereby allowing for prosecutions.

It is important to note that judicial leadership is distinct from rule of law. Even very conservative and dependent courts can be shaken up by maverick judges who act independently, promoting accountability and facing criticism from their judicial colleagues for doing so. At the same time even liberal democratic judicial systems render decisions contrary to that approach and block processes leading toward greater accountability. Thus, our expectation is that where there are judicial leaders behind accountability efforts, regardless of the nature of the courts and rule of law system, the likelihood of overcoming impunity is higher.

To assess the strength of judicial leadership, we identify those cases in which judges acted independently, defied established patterns regarding amnesty and made often controversial decisions that advanced the possibility of prosecutions. Our assessment of judicial leadership is drawn in part from our study of challenges to the amnesty laws made by civil society groups and their legal representatives. We evaluate when courts have either accepted or rejected legal claims against amnesty laws, facilitating an assessment of the strength or weakness of judicial leadership behind accountability.³⁰

International Pressure

Transitional justice scholars argue that international pressure, in a variety of forms, has a strong, though indirect impact on overcoming impunity and promoting trials.³¹ International governmental organizations (IGOs) and INGOs connected to domestic human rights organizations via transnational advocacy

²⁸ Hilbink, *supra* n 25.

²⁹ Elin Skaar, *Judicial Independence and Human Rights in Latin America: Violations, Politics, and Prosecution* (New York: Palgrave Macmillan, 2011).

³⁰ A forthcoming website will include the data on challenges to amnesty laws: <http://www.transitionaljusticeidata.com>.

³¹ Naomi Roht-Arriaza, 'The Role of International Actors in National Accountability Processes,' in *The Politics of Memory: Transitional Justice in Democratizing Societies*, ed. Alexandra Barahona de Brito, Carmen Gonzalez Enriquez and Paloma Aguilar (Oxford: Oxford University Press, 2001).

networks,³² for example, advocate for trials. These networks involve informational, symbolic and leverage strategies in promoting accountability for human rights abuses, often overcoming domestic actors' failure to promote change in the entrenched local culture of impunity. Key NGOs, such as Amnesty International and Human Rights Watch, have been prominent in advocating for justice for past human rights violations, particularly in Latin America. Since the late 1990s, the UN has taken the position that amnesties that prevent the prosecution of individuals charged with war crimes, genocide, crimes against humanity and other gross violations of human rights are 'inconsistent with States' obligations under various widely ratified treaties as well as United Nations policy, and may also be inconsistent with emerging principles of customary law.³³

In addition, pressure may result from international and foreign court rulings. International courts, such as the permanent International Criminal Court (ICC) or the *ad hoc* tribunals established by the UN in Rwanda and the former Yugoslavia, can disregard domestic amnesty laws and prosecute perpetrators of human rights violations. Courts of other countries can do the same, as shown by Spanish judge Baltasar Garzón's pursuit of a case against former Chilean dictator Augusto Pinochet and perpetrators in Argentina and Guatemala, despite the domestic legal standing of these countries' amnesty laws. While these courts cannot rule against the validity of a domestic amnesty law, they may have sufficient leverage and information and reputational effects (naming and shaming) to pressure states and judiciaries to hold their own perpetrators accountable.

Finally, international pressure may take a more direct form through legal obligations embedded in treaties and rulings by regional courts. Legally binding international agreements emerging in the post–World War II era outline a duty to prosecute, specifically the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Geneva Conventions.³⁴ Increasingly, actions like torture, disappearances and other violations of human rights are viewed not as legitimate state actions but as international crimes. In particular, since the seminal *Barrios Altos v. Peru* sentence by the Inter-American Court of Human Rights (IACtHR) in 2001, the legitimacy and validity of domestic amnesties, as well as statutes of limitations in cases of gross human rights violations, at the level of regional human rights bodies and the UN have been profoundly questioned.³⁵

³² Margaret E. Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Ithaca, NY: Cornell University Press, 1998); Jackie Smith, *Social Movements for Global Democracy* (Baltimore, MD: Johns Hopkins University Press, 2008).

³³ Office of the UN High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States – Amnesties* (2009).

³⁴ See, for example, Diane F. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,' *Yale Law Journal* 100(8) (1991): 2537–2615.

³⁵ Lisa J. Laplante, 'Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes,' *Virginia Journal of International Law* 49(4) (2009): 915–984.

Some scholars contend, therefore, that a justice cascade has emerged along with global human rights and accountability norms, the institutionalization and enforcement of those norms and the demand for the implementation of those norms by domestic and international human rights advocates.³⁶ According to these scholars, international pressure for prosecution has created a propitious environment for overcoming impunity and may be a crucial factor in explaining when and why states successfully overcome amnesties and pursue trials. In assessing the strength of international pressure, we examine the activity of IGOs and INGOs in promoting accountability. Some of this information is drawn from our study of challenges to amnesties. We also examine the use of relevant treaty obligations in arguments behind those challenges. We further assess international and foreign court rulings on the legality of amnesty provisions for each state.

Overcoming Impunity: Pathways to Accountability

The description of the four key factors in overcoming impunity – civil society demand, absence of veto players, domestic judicial leadership and international pressure – shows that each has an independent function. Yet it also shows that no factor alone is sufficient to overcome impunity. Instead, a dynamic interaction among these four factors explains the capacity to overcome impunity and initiate accountability. Given the peculiarities of the interaction, countries fall on a continuum from impunity to accountability (Figure 1). Where all four factors are weak, we would expect the impunity outcome, and where all four factors are strong, accountability is likely. In between, the strength of the factors varies, producing a range of outcomes in terms of pathways toward accountability or away from it.

On the accountability end of the continuum, amnesty laws no longer act as an impediment for trials, having been displaced through democratic processes (democratic displacement) as a result of the strength of the four factors. Civil society demand is crucial to pressuring the judiciary to end impunity. That is unlikely without judicial leaders willing to promote such demands. The weaker the veto players and their claim to impunity (where the absence of veto players is high), the greater the flexibility afforded to judicial leaders to promote civil society's justice demands. A high degree of international pressure tips the balance in favor of civil society demands over veto players' block on accountability while also reinforcing the legal arguments made by judicial leaders for ending impunity and promoting prosecution.

These four factors, however, are rarely all strong. On the opposite end of the spectrum, where all of these factors are weak, countries have proved incapable of overcoming amnesty laws, which obstinately persist, thereby preventing the pathway to accountability (obstinate amnesties). Powerful veto players will promote

³⁶ Lutz and Sikkink, *supra* n 4; Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (New York: Norton, 2011).

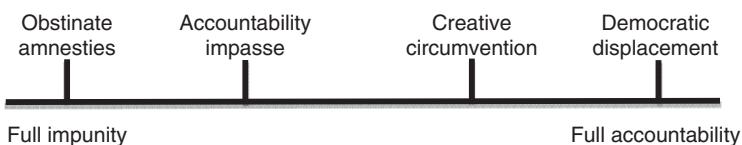


Figure 1. The Impunity–Accountability Continuum

impunity and have direct and indirect influence over judiciaries to block accountability efforts. Weak civil society demand cannot apply sufficient countervailing pressure to promote accountability. Weak international pressure is insufficient to name or shame. Thus little impetus exists for judicial leaders to back accountability.

Most cases involve neither the strength nor weakness of all four factors, but rather a mix that places countries on a spectrum from impunity to accountability. In the middle, we identify two scenarios where amnesties and trials coexist. Closer to the impunity side, amnesties continue to block most trials, but some nevertheless occur (accountability impasse). Amnesty is the norm and justice is the exception. In this scenario, civil society demand has to be sufficient to allow for some trials, but generally it will be blocked by the power of veto players. Some judicial leadership may also emerge, but not very forcefully. International pressure is likely to play the most important role in challenging impunity by reinforcing domestic demand for trials and the legal obligations behind such demands, as well as naming and shaming judiciaries to prosecute some perpetrators of past violations, but without succeeding in undermining or even circumventing the amnesty laws.

Another scenario where amnesties and trials coexist is closer to the accountability side of the spectrum. Here, amnesty laws retain legal standing but trials have emerged (creative circumvention). In this scenario, civil society demand and judicial leadership must be high enough to overcome the force of veto players. International pressure is crucial to reinforcing domestic demand and the legal challenges to the amnesty law.

In the next section we explore these scenarios using illustrations from Latin America. We use the criteria outlined above to assess the strength or weakness of civil society demand, the absence of veto players, judicial leadership and international pressure. Latin America has had the highest concentration of amnesty laws in the world – nearly half of the world's amnesty laws have been adopted in the region.³⁷ Yet Latin America is also the leader in terms of legal challenges to those amnesty laws (Table 1). The result of those challenges has led to two cases (Argentina and Uruguay) in which amnesty laws were revoked or democratically displaced. On the other hand, we have cases in which amnesty laws obstinately persist, due to the absence of challenges or when challenges attempt to erode them

³⁷ Tricia D. Olsen, Leigh A. Payne and Andrew G. Reiter, *Transitional Justice in Balance: Comparing Processes, Weighting Efficacy* (Washington, DC: US Institute of Peace Press, 2010).

Table 1. Challenges to Amnesty Laws by Region

Region	Number of Challenges
Latin America	184
Africa and Middle East	16
Europe	6
Asia	5

Source: www.transitionaljusticedata.com

but fail (Brazil). In some cases, these challenges have been successful in creatively circumventing amnesty laws, but those laws retain strong support and limit judicial processes (Chile and Peru). In other cases, challenges have led to some symbolic trials, but the amnesty law continues to create an accountability impasse (El Salvador).

The case studies show not only how the strength and dynamic interaction of these factors move countries closer to accountability but also how their weakness blocks that process. We further show that the pathways to accountability are not always linear or progressive. The region is thus ideal for understanding how some countries overcome impunity to hold perpetrators accountable for past human rights abuses.

Obstinate Amnesties

In the obstinate amnesty scenario, amnesties block accountability efforts. Brazil is the best example in Latin America of this scenario. The 1979 amnesty law was enacted before the end of the authoritarian regime.³⁸ The law initially received widespread support, as the left and human rights community promoted it as a mechanism to release political prisoners, encourage the return of exiles and restore political rights. But when it was finally enacted, the military regime used the law to shield its own forces from accountability.³⁹ After the transition, the amnesty was incorporated into the 1988 democratic constitution. Few criminal cases directly challenged the amnesty and these challenges have not originated from civil society. Rather, the Brazilian Lawyers Association initiated a high-profile domestic challenge in an appeal to the Brazilian Supreme Court in 2008 to make torture exempt from the amnesty. In April 2010, the Supreme Court rejected the appeal, citing the historical context of a bilateral, mutually beneficial amnesty that had served as a catalyst

³⁸ For the full text of the 1979 Brazilian amnesty, see, Lei No. 6, 683 de 28 de Agosto de 1979, *Diário Oficial da União Seção I*, Página 12265, <http://www2.camara.leg.br/legin/fed/lei/1970-1979/lei-6683-28-agosto-1979-366522-publicacaooriginal-1-pl.html> (accessed 6 December 2013).

³⁹ Daniel Arao Filho Reis, *O golpe e a ditadura militar: Quarenta anos depois (1964–2004)* (Bauru: Edusc, 2004).

for democratization.⁴⁰ Even the subsequent historic ruling by the IACtHR in November 2010 in the *Gomes Lund et al. v. Brazil* case, which declared the amnesty incompatible with the American Convention on Human Rights, failed to initiate further challenges. To date, not a single successful criminal trial for past abuses has occurred in Brazil.

That overview partially illustrates the theoretical model developed here. On one hand, there is widespread and historic consensus behind the amnesty law and general opposition among politicians (even those who were themselves victims of repression) and judicial figures to revoking or even circumventing the amnesty.⁴¹ The amnesty continues to be endorsed by both supporters of the authoritarian regime and by those individuals who left prison, returned from exile and had their political rights restored under the law. Many of them hold, or have held, government positions. Thus veto players are strong and deeply embedded within political and judicial institutions and civil society.

Weak civil society demand results in part from the widespread consensus around amnesty historically as well as the relatively small number of deaths and disappearances. With approximately 400 dead and disappeared, very few Brazilians have ties with victims, especially when compared to neighboring countries. Although the number of torture victims and those otherwise harmed by the dictatorship is quite high, these groups have not mobilized for justice.

Low civil society demand may be due to reparations programs, which are seen by some as ‘blood money’ to buy silence and maintain military impunity.⁴² But others view them as a form of accountability: acknowledgment of the state’s culpability in the atrocities and recognition of victims’ right to compensation. Material remedy may provide a greater sense of justice than putting individual perpetrators on trial for events that occurred over 30 years ago. The reparation process, moreover, has involved a form of truth gathering through official commissions of inquiry.⁴³

The victims of the military regime in Brazil tend to be identified as armed militants and not as ‘innocent victims.’ The perception is widespread that the military used strong-arm tactics against urban and rural guerrilla groups to protect the country from chaos. The view that both sides committed abuses, whether an accurate reflection of the facts or not, may further explain the lack of civil society demand for trials and the tolerance for impunity.

The attitude and behavior of the last two presidents further reflect a weak civil society demand for prosecutions. Both President ‘Lula’ da Silva and his successor President Dilma Rousseff faced repression as opposition and left-wing

⁴⁰ Nina Schneider, ‘Impunity in Post-Authoritarian Brazil: The Supreme Court’s Recent Verdict on the Amnesty Law,’ *European Review of Latin American and Caribbean Studies* 90 (2011): 39–54.

⁴¹ Glenda Mezarroba, ‘Between Reparations, Half Truths and Impunity: The Difficult Break with the Legacy of the Dictatorship in Brazil,’ *Sur: International Journal on Human Rights* 7(13) (2010): 7–26.

⁴² Ignacio Cano and Patrícia Salvão Ferreira, ‘The Reparations Program in Brazil,’ in *The Handbook of Reparations*, ed. Pablo de Greiff (Oxford: Oxford University Press, 2006).

⁴³ Ibid.

combatants (respectively) during the dictatorship. Neither was opposed to accountability for past human rights abuses but both retreated from a pro-accountability position. The military's saber-rattling in response to the possibility of weakening the amnesty law seems to have provoked Lula's reversal. The lack of support for accountability within her government and among her constituents seems to have altered President Rousseff's orientation.⁴⁴ These explanations, while unique to the Brazilian amnesty process, confirm the view that powerful veto players and weak civil society demand are likely to perpetuate impunity and delay or prevent accountability efforts altogether.

Weak judicial leadership may also explain the lack of trials in Brazil, due to the absence of institutional reform in the judiciary. During the dictatorship, the judiciary was filled with loyal legal practitioners and after 1985 there was no lustration or vetting processes. The last judge appointed during the dictatorship left office in 2003, 18 years after the transition.⁴⁵ Thus the judiciary has solidly backed the amnesty law even when pressured by some maverick lawyers and international actors.

International pressure in Brazil has also been weaker than in neighboring countries. We found only one effort by INGOs to challenge the amnesty law in Brazil, in contrast, for example, with nine in El Salvador and eight in Argentina. Regional and international courts challenged the amnesty law only four times, the lowest figure in the region (along with Honduras). International pressure is surprisingly weak, and Brazil has shown in the *Gomes Lund* and, most notably, the *Belo Monte Dam* cases its willingness to defy international pressure. Indeed, some members of the Inter-American Commission on Human Rights (IACtHR) worry that this defiance may prove as contagious as the earlier adherence to the IACtHR's ruling on amnesty laws, such as the *Barrios Altos* case, thereby weakening the capacity of the Commission and Court to promote accountability.⁴⁶ More important, when veto players are strong and civil society is weak, international pressure will face more difficulties in resonating with the judiciary and in reinforcing the courts' legal obligation to provide victims and survivors with justice for crimes committed against them.

In light of these factors, Brazil's amnesty law seems firmly intact and obstinate. All pathways for pursuing justice seem closed. Yet even in what appears to be an obstinate adherence to amnesty, some dynamics for change have begun to emerge on three fronts. First, President Rousseff's national truth commission, appointed in May 2012, has heightened awareness about past atrocities and spawned a number of city and institutional truth commissions to further that process.

⁴⁴ For more information on the Brazilian transitional justice process, see, Paulo Abrão and Marcelo Torelly, 'Resistance to Change Brazil's Persistent Amnesty and Its Alternatives for Truth and Justice,' in *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, ed. Francesca Lessa and Leigh A. Payne (Cambridge: Cambridge University Press, 2012).

⁴⁵ Ibid.

⁴⁶ Personal interview, anonymous member of the IACtHR, Washington, DC, 2 September 2010.

Second, the public discrediting of certain veto players in the armed forces has captured some media attention.⁴⁷ Third, one federal public prosecutor, Marlon Weichert, has adopted creative legal strategies to challenge the amnesty law in several lower court cases, which he hopes will promote judicial leadership behind weakening the amnesty law.⁴⁸

Accountability Impasse

El Salvador offers an example of the accountability impasse scenario. Following a decades-long civil war, the government and rebels negotiated a peace accord in 1992 that included a broad amnesty,⁴⁹ but ‘contemplated a process of eventual investigation and prosecution’.⁵⁰ The amnesty explicitly excluded specific crimes, including the 1989 murder of six Jesuit priests, their housekeeper and her daughter on the *Universidad Centroamericana ‘José Simeón Cañas’* (UCA) campus. Just a day after the legislature passed the amnesty law, a civilian court convicted Colonel Guillermo Alfredo Benavides and Lieutenant Yusshy René Mendoza in the Jesuit case and sentenced them to 30 years in prison.⁵¹

Yet the implementation of the peace agreement faced threats and delays from both sides of the conflict: the Farabundo Martí National Liberation Front (FMLN) and factions of the military and right-wing paramilitaries. During the first three years following the accord, paramilitaries assassinated dozens of FMLN members, including 40 candidates for the National Council and the group’s Electoral Secretariat.⁵² Moreover, attempts to investigate the past were challenged by political and military leaders, who publicly condemned the final report of the country’s UN-backed truth commission.⁵³

With security fears paramount, the government passed the 1993 General Amnesty Law for the Consolidation of Peace, which embodied the government’s

⁴⁷ See in particular the *Frente de Esculacho Popular* website (<https://fep.milharal.org/>) identifying the perpetrators of human rights violations during the dictatorship that the organization has ‘outed’ in public acts.

⁴⁸ Personal interview, Marlon Weichert, Porto Alegre, Brazil, 11–12 April 2012. See also, Transitional Justice in Brazil, ‘BBC Brasil Interviews Human Rights Defense Lawyer on the Legitimacy of the Amnesty Law,’ 16 July 2012, <http://transitionaljusticeinbrazil.com/2012/07/16/bbc-brasil-interviews-human-rights-defense-lawyer-on-the-legitimacy-of-the-amnesty-law/> (accessed 6 December 2013).

⁴⁹ Margaret Popkin, ‘El Salvador: A Negotiated End to Impunity?’ in *Impunity and Human Rights in International Law and Practice*, ed. Naomi Roht-Arriaza (Oxford: Oxford University Press, 1995); Rachel Sieder, ‘War, Peace and Memory Politics in Central America,’ in *The Politics of Memory: Transitional Justice in Democratizing Societies*, ed. Alexandra Barahona de Brito, Carmen González Enríquez and Paloma Aguilar (Oxford: Oxford University Press, 2001).

⁵⁰ Emily Braid and Naomi Roht-Arriaza, ‘De Facto and De Jure Amnesty Laws: The Central American Case,’ in *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, ed. Francesca Lessa and Leigh Payne (Cambridge: Cambridge University Press, 2012), 197.

⁵¹ Marjorie Miller, ‘2 Salvador Officers Get 30 Years for Slaying Priest,’ *Los Angeles Times*, 25 January 1992.

⁵² Richard Stahler-Sholk, ‘El Salvador’s Negotiated Transition: From Low-Intensity Conflict to Low-Intensity Democracy,’ *Journal of Interamerican Studies and World Affairs* 36(4) (1994): 1–59.

⁵³ Braid and Roht-Arriaza, *supra* n 49.

emphasis on ending violence rather than on prosecuting human rights violations. The law was even broader than its 1992 predecessor since it repealed provisions that would have allowed Salvadoran courts to hold specific individuals accountable. President Francisco Flores identified the amnesty as the only solution to support peace: ‘The prosecution of war crimes would have led to another war.’⁵⁴

In the two decades since, a weak civil society has made few efforts to challenge the amnesty law. Prosecutors have generally failed to take initiatives to question the legality or applicability of the amnesty law. The few legal challenges that have been made have lacked judicial leadership to advance them. Only three domestic courts have challenged the amnesty law (in 1993, 2000 and 2003) and the High Court has consistently upheld the constitutionality of the 1993 amnesty.⁵⁵ This is unsurprising given the state of El Salvador’s justice system following the civil war and the only partially successful attempts by the US and UN to implement significant judicial reforms in the two decades since.⁵⁶

Veto players, moreover, are very powerful. For the two decades following the war, the right-wing Nationalist Republican Alliance party dominated politics, holding the presidency from 1989 to 2009. The party had opposed the FMLN, and its leadership has been implicated in many abuses, including the assassination of Archbishop Óscar Romero in 1980. Those opposing accountability have thus had electoral support, power and influence in the executive and legislature. Presidents and legislators have repeatedly ignored condemnation of the amnesty law from the IACtHR, the IACHR and INGOs, and the government has refused to arrest or extradite officers to stand trial in Spain for their involvement in the 1989 Jesuit case.⁵⁷

On the other hand, El Salvador has faced more international court and governmental pressure than any other country in the region and the highest number of INGO challenges (18). These have been launched by a range of powerful international actors: the IACtHR, the IACHR, CEJIL and the Center for Justice and Accountability. Indeed, we contend that this international pressure may have made the difference in El Salvador between obstinate amnesty and at least some movement toward accountability. It is in this scenario of strong and widespread veto players and weak civil society demand that international pressure may be most likely to have some influence in promoting accountability.

With the 2009 election of President Mauricio Funes from FMLN, traditional veto players face a loss of power and a corresponding responsiveness to international pressure. While not an FMLN combatant himself, Funes’ brother died in the conflict. Funes also has close connections with the UCA and spent his first day

⁵⁴ Ibid., 198.

⁵⁵ Ibid.

⁵⁶ Margaret Popkin, *Peace without Justice: Obstacles to Building the Rule of Law in El Salvador* (University Park, PA: Pennsylvania State University Press, 2000).

⁵⁷ Elisabeth Malkin, ‘El Salvador: Court Denies Spain Request for Extradition of Suspects in Killings,’ *New York Times*, 9 May 2012.

in office in a commemoration event for Archbishop Romero. Funes has removed some of the political barriers to investigation of past abuses, cooperated with Spain and with the IACtHR and IACHR on other cases and appointed new judges to the Supreme Court who are likely to have a more open mind to international human rights obligations.⁵⁸ Indeed, the Supreme Court is currently reviewing the constitutionality of the 1993 amnesty law in a case brought by Salvadoran NGOs. The previous court upheld its constitutionality in a 2000 decision.⁵⁹

Veto players have not disappeared, but Funes' political leadership and responsiveness to international and domestic demand for accountability may eventually push El Salvador from accountability impasse toward creative circumvention. Indeed, the December 2012 decision by the IACtHR compelling El Salvador to investigate the 1981 El Mozote massacre in the current political context may accelerate the movement along the accountability continuum by strengthening civil society demand and weakening veto players to promote leadership behind accountability in the judiciary.⁶⁰ In response, the Salvadoran attorney general, for the first time, recognized that crimes against humanity must be investigated with the possibility of prosecuting those responsible, specifically in the El Mozote massacre. The Supreme Court has also ordered the exhumations of the massacre victims to comply with the IACtHR's decision.⁶¹

The accountability impasse allows countries to appear to comply with international pressure for accountability. Showcase trials represent compliance without the country altering the legal support for, and practice of, impunity. Sacrificing a small number of perpetrators as scapegoats for authoritarian state violence or civil conflict may reduce international pressure for accountability. Indeed, it may provide the smoke and mirrors that hide pervasive impunity. On the other hand, the factors behind those showcase trials may continue to converge and become stronger over time to overcome barriers to accountability. El Salvador represents a case in which low to medium civil society demand has not yet succeeded in overcoming powerful veto players and their influence over the judiciary. Yet the election of Funes demonstrates that veto players have lost some of their support, creating more room for civil society. International pressure, moreover, has played a key role in opening up some possibilities for trials.

Creative Circumvention

Creative circumvention involves finding loopholes in the existing amnesty law, or mechanisms for bypassing it. In this scenario, trials and amnesties coexist: trials do not displace amnesties, but amnesties do not block trials. Chile is the most

⁵⁸ Amnesty International, *Annual Report: El Salvador 2011* (2011).

⁵⁹ Sergio Arauz, 'Sala de lo Constitucional admite demanda que pide anular Ley de Amnistía,' *El Faro*, 20 September 2013.

⁶⁰ I/A Court H.R., *Case of the Massacres of El Mozote and Neighboring Locations v. El Salvador*, Merits, Reparations and Costs, Judgment (25 October 2012), Series C No. 252.

⁶¹ Arauz, *supra* n 58.

emblematic example in the region. Following the 1989 transition, Pinochet remained commander-in-chief and later became senator for life. In addition, the military retained its privileged status and Pinochet handpicked many of the senators and Supreme Court justices. In response to early transitional justice efforts, veto players were strong and visible. Pinochet told the new government not to ‘touch a single hair of a single soldier’ or overturn the amnesty law of 1978 that was still in effect, at times backing his threats with armed soldiers in the streets.⁶²

Conditions began to change following the 1998 detention of Pinochet in London and efforts to extradite him to stand trial in Spain under the principle of universal jurisdiction.⁶³ There is perhaps no more obvious example of the importance of international factors behind creative circumvention. This case involved not only a foreign court under Spanish Judge Garzón and the British House of Lords and Home Secretary but exile communities in London and Madrid.⁶⁴ Other international factors contributed, particularly the decision by the IACtHR in the 2006 *Almonacid-Arellano* case that ruled the amnesty law invalid.⁶⁵ Despite the importance of these international forces in eroding the strength of the amnesty process, they do not alone explain creative circumvention.⁶⁶

For creative circumvention, judicial leadership is also a necessary factor to avoid the accountability impasse created by strong veto players. Judge Juan Guzmán is often identified as singularly important in the judicial process due to his domestic investigation of the Pinochet regime’s human rights violations and his efforts to hold Pinochet and others responsible for them. Guzmán found legal loopholes, particularly the use of disappearances as a permanent and ongoing crime that thus falls outside the timeframe of the amnesty decree, enabling investigations, trials and prosecutions. To date, 1,455 human rights cases have been opened in the country, although only 9 percent have been concluded.⁶⁷

Guzmán did not operate in a vacuum. He was certainly influenced by the information from an earlier truth commission and the mobilization of a strong Chilean human rights community. Some of these organizations predated the

⁶² Brian Loveman, ‘Misión Cumplida? Civil Military Relations and the Chilean Political Transition,’ *Journal of Interamerican Studies and World Affairs* 33(3) (1991): 40.

⁶³ For more information on the Peruvian process, see, Jo-Marie Burt, ‘Guilty as Charged: The Trial of Former Peruvian President Alberto Fujimori for Human Rights Violations,’ *International Journal of Transitional Justice* 3(3) (2009): 384–405.

⁶⁴ For more information on international involvement, see, Collins, *supra* n 6; Naomi Roht-Arriaza, ed., *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (Philadelphia, PA: University of Pennsylvania Press, 2005).

⁶⁵ I/A Court H.R., *Case of Almonacid-Arellano et al. v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Judgment (26 September 2006), Series C No. 154.

⁶⁶ David Pion-Berlin, ‘The Pinochet Case and Human Rights Progress in Chile: Was Europe a Catalyst, Cause or Inconsequential?’ *Journal of Latin American Studies* 36(3) (2004): 479–505.

⁶⁷ For up-to-date information, see, Instituto de Investigación en Ciencias Sociales, ‘Latest Human Rights Statistics for Chile,’ <http://www.icsi.cl/observatorio-derechos-humanos/cifras-causas-case-statistics/> (accessed 6 December 2013).

transition, such as the Association of Relatives of the Disappeared, the Association of Relatives of Politically Executed Persons, the Peace and Justice Service and the Vicariate of Solidarity that formed to document and advocate on behalf of the dead, disappeared and tortured and their families. These organizations remain tirelessly involved in the pursuit of justice and against impunity for human rights violations.⁶⁸ Domestic NGOs also benefitted from substantial support from INGOs, which increased after the transition. The work carried out by these groups to pressure for accountability involved 15 international and six domestic challenges – the highest number of domestic challenges (along with Guatemala) after Argentina and Uruguay, which annulled their amnesty laws.

Veto players have also weakened over time. Indeed, the election of torture victim President Michelle Bachelet in 2006 would otherwise suggest that these veto players are quite weak.⁶⁹ Even prior to Bachelet's election, the government sponsored truth commissions to investigate the past and united civil, military and political forces in the *Mesa de Diálogo*, indicating a weakness of veto players' influence over accountability processes.⁷⁰ Yet, at the same time, no top political leader has spearheaded a challenge to the amnesty law. And while veto players are less powerful and more diffuse, they retain some influence and visibility. Pro-Pinochet organizations and retired military officers continue to sponsor events and rallies that are attended by right-wing politicians.⁷¹ Moreover, a significant portion of the population continues to support the Pinochet regime.⁷² Some scholars explain this enduring support as an economic reaction, as Chile weathered the 1980s better than other countries in the region, and/or a much more conservative political tradition in the country.⁷³ Thus veto players lack the capacity to prevent creative circumvention of the amnesty law, but retain sufficient influence to prevent its annulment.

Creative circumvention, in short, depends on the same set of factors identified for democratic displacement: strong civil society demand, judicial leadership and international pressure. The strength of the veto players makes a difference in the two scenarios, as a comparison between Argentina and Chile suggests. What the creative circumvention scenario and Chile's particular journey illustrate are not

⁶⁸ Collins, *supra* n 6.

⁶⁹ The 2010 election of right-wing businessman Sebastián Piñera does not indicate the electoral strength of veto players either since Piñera has publicly distanced himself from Pinochet and irritated his right-wing colleagues for doing so. See, 'El día que Piñera buscó la venia de Pinochet para ser candidato presidencial,' *El Mostrador*, 10 September 2013; 'Reitera Piñera que nada justificó atropellos de dictadura Pinochet,' *Prensa Latina*, 10 September 2013.

⁷⁰ Here we refer to the National Commission on Truth and Reconciliation (1990–1991), National Corporation for Reparation and Reconciliation (1992–1996) and the National Commission on Political Prison and Torture (2003–2004; 2010–2011).

⁷¹ Pascale Bonnefoy, 'Hundreds Protest Screening of Pro-Pinochet Film in Chile,' *New York Times*, 10 June 2012.

⁷² Carlos Huneeus, *Chile, un país dividido: La actualidad del pasado* (Santiago: Catalonia, 2003). The *Centro de Estudios de la Realidad Contemporánea* opinion poll (<http://www.cerc.cl>) shows a significant but falling positive view of Pinochet (about 9%) and rising negative views (to over 50%).

⁷³ Cath Collins, 'Grounding Global Justice: International Networks and Domestic Human Rights Accountability in Chile and El Salvador,' *Journal of Latin American Studies* 38(4) (2006): 711–738.

only the capacity of judicial, civil society and international forces to overcome amnesty laws and delegitimize them but also the limitations of those forces in undermining the legality of amnesty laws when they are supported by segments of society.

Democratic Displacement

Finally, Argentina provides an illustration of the explanatory factors behind democratic displacement. In this scenario, democratic governments that endorsed blanket amnesties in early stages of the transition subsequently overturn them, removing the amnesty obstacle to prosecuting perpetrators of past human rights abuses. We show that despite the appearance of a linear path from impunity to accountability, Argentina illustrates movements toward and away from accountability over time. We also briefly discuss Uruguay as an example of how displacement of amnesty laws does not necessarily remove all obstacles to accountability.

Argentina's pathway began with the democratic displacement of the military regime's self-amnesty law and the prosecution of top officers, with the Argentine Congress overturning the self-amnesty in 1983. However, the initial opening to judicial accountability was gradually restricted and eventually foreclosed by the beginning of the 1990s. Two amnesty laws and subsequent pardons reversed the accountability process and reinstated a policy of impunity. Nevertheless, unrestricted prosecution has almost been achieved in the 21st century. Key civil society and international actors, as well as political leadership, played important roles in crucial political and economic moments in eventually leading to the democratic displacement of the amnesty laws.⁷⁴

After the 'ebb and flow'⁷⁵ of amnesties and trials in Argentina from the early 1980s to the end of the 1990s, momentum to repeal the laws surfaced. Responding to strong civil society pressure for accountability, in 2001 an appeals court confirmed a lower judge's sentence declaring the amnesty laws unconstitutional, referencing Argentina's international treaty obligations.⁷⁶ In 2003, newly elected President Néstor Kirchner endorsed the human rights groups' agenda of memory, truth and justice. The first measure proposed by the president was the legislative nullification of the amnesty laws in August 2003. The Supreme Court validated this nullification and declared the amnesties unconstitutional in 2005.

Kirchner's political leadership should be understood, at least partially, in the context of the precarious political circumstances in which he came to power.⁷⁷

⁷⁴ Sikkink, *supra* n 35.

⁷⁵ Par Engstrom and Gabriel Pereira, 'From Amnesty to Accountability: The Ebb and Flow in the Search for Justice in Argentina,' in *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, ed. Francesca Lessa and Leigh A. Payne (Cambridge: Cambridge University Press, 2012).

⁷⁶ Centro de Estudios Legales y Sociales, *Informe anual 2002* (2002).

⁷⁷ Engstrom and Pereira, *supra* n 74.

With a weak political mandate entering the presidential office,⁷⁸ Kirchner moved quickly to legitimize his government through public support for accountability.⁷⁹ As a result, the demand for justice became a salient issue in the domestic political arena and its embrace created legitimacy for Kirchner's party. Since trials recommenced in 2006, 515 individuals have been convicted for crimes against humanity and hundreds more have been charged.⁸⁰

To suggest that domestic political and judicial forces acted independently ignores the convergence of civil society and international forces in promoting change. Mobilized victims, human rights organizations and legal advocates recognized that the initial amnesty laws were not as watertight as previously assumed. They developed creative strategies at home and abroad that sought to circumvent and challenge their validity. At the domestic level, challenges to the amnesty laws were brought in 28 different cases, the highest number in the region. International pressure occurred in 16 cases, and international human rights standards set by international bodies and advocated by INGOs served as the core legal arguments used by domestic judges willing to weaken amnesties.⁸¹ In this light, although the amnesties were not judicially annulled until 2005, the high number of challenges by domestic judges (23) suggests that many were receptive to accountability claims and pushed forward the justice agenda within the judiciary.

The gradual weakening of the military, the primary veto player, also marked this process. Following the transition, the military retained enough political power to obstruct the accountability process through subsequent coup attempts.⁸² Once impunity was granted, President Carlos Menem successfully implemented profound reforms within the military. By the end of his second term in 1999, civilian control of the armed forces was fully achieved and a professionalization program was implemented, which led to the reduction of the armed forces' political influence.⁸³ As a consequence, the legislative and judicial annulment of the amnesties occurred after the military had lost its political influence. In addition, majoritarian political parties did not back impunity demands and therefore veto players lacked the capacity to defeat the legislative vote against the amnesties.

The weakness of the veto players cannot be overstated as a condition for democratic displacement. Had strong veto players prevailed, Argentina might have managed, like Chile, creatively to circumvent the amnesty laws but not annul them. Indeed, the case of Uruguay is instructive here. The persistence of veto

⁷⁸ Kirchner received only 22 percent of the vote in the first round of presidential elections, to Menem's 24 percent, but Menem was widely expected to lose the second round and withdrew, giving Kirchner the presidency.

⁷⁹ Terence Roehrig, 'Executive Leadership and the Continuing Quest for Justice in Argentina,' *Human Rights Quarterly* 31(3) (2009): 721–747.

⁸⁰ See, 'En 2013 se llegó a los 515 condenados por delitos de lesa humanidad,' 29 December 2013, <http://www.infojusnoticias.gov.ar/nacionales/en-2013-se-llego-a-los-515-condenados-por-delitos-de-lesa-humanidad-2760.html> (accessed 6 December 2013).

⁸¹ Engstrom and Pereira, *supra* n 74.

⁸² Payne, *supra* n 16.

⁸³ *Ibid.*

players has slowed progress toward accountability despite the derogation of the amnesty law in 2011. Cases progressed slowly within the courts until February 2013, when the Supreme Court declared the crimes of the dictatorship to constitute common crimes, not crimes against humanity, and therefore subject to the statute of limitations, effectively shelving several prosecutions.⁸⁴ While some lawyers and judges continue to investigate cases, the Supreme Court judges have sent a clear message to their peers in favor of halting prosecutions, through these sentences as well as by transferring Judge Mariana Mota, who was investigating over 50 cases of past crimes, to civil competence.⁸⁵ In addition, Uruguay's political establishment has failed to wholeheartedly embrace the cause of accountability, resulting in an uncertain scenario in terms of justice outcomes.⁸⁶

Democratic displacement thus results from strength in all four factors, but it hinges critically on the absence of veto players. Indeed, both Argentina and Uruguay had previously displaced their amnesty laws, but the power of veto players in those key moments prevented progress toward full accountability. In the case of Argentina, new amnesty laws were enacted that were subsequently annulled. In the case of Uruguay, legal maneuvering has attempted to sidestep, or creatively circumvent, the derogation of the amnesty to avoid accountability. Both cases show that the pathway to accountability is not linear or progressive but rather may be stalled or even reversed.

Discussion

The transitional justice literature suggests that civil society demand, the absence of veto players, domestic judicial support and international pressure are all important in overcoming impunity in new democracies. Yet the relative strength of these factors and the varied accountability outcomes they produce have been largely ignored. This article presents a dynamic interaction theoretical framework for explaining variation among the four factors that contribute to accountability, stall that process and even reverse it.

Applying our analysis to the Latin American cases reveals three key findings. First, all four factors are important. While each factor plays a key functional role in overcoming impunity, no single factor is sufficient to bring about pathways to accountability. We find that the combined strength of these four factors is the strongest predictor of overcoming impunity. Second, it is rare that all factors are strong, thus limiting progress toward overcoming impunity. Particularly in the early years following a repressive dictatorship, civil society demand tends to be

⁸⁴ Jo-Marie Burt and Francesca Lessa, 'Recent Sentence by Uruguayan Supreme Court Obstructs Search for Truth and Justice,' Washington Office on Latin America, 28 February 2013, http://www.wola.org/commentary/recent_sentence_by_uruguayan_supreme_court_obstructs_search_for_truth_and_justice (accessed 6 December 2013).

⁸⁵ Francesca Lessa and Pierre Louis Le-Goff, 'Uruguay's Culture of Impunity Continues to Rear Its Head,' *Al Jazeera*, 22 February 2013, <http://www.aljazeera.com/indepth/opinion/2013/02/2013219105659440890.html> (accessed 6 December 2013).

⁸⁶ Francesca Lessa, *Memory and Transitional Justice in Argentina and Uruguay: Against Impunity* (New York: Palgrave Macmillan, 2013).

Table 2. Factors Contributing to Shift along Impunity–Accountability Continuum

Scenario	Civil Society Demand	Absence of Veto Players	Judicial Leadership	International Pressure
<i>Democratic Displacement</i>				
Argentina				
–Democratic displacement →	HIGH	HIGH	HIGH	MEDIUM
–Amnesty →	HIGH	LOW	MEDIUM	MEDIUM
–Creative circumvention →	HIGH	MEDIUM	HIGH	HIGH
–Democratic displacement	HIGH	HIGH	HIGH	HIGH
<i>Creative Circumvention</i>				
Chile				
–Amnesty →	HIGH	LOW	LOW	MEDIUM
–Creative circumvention	HIGH	MEDIUM	HIGH	HIGH
<i>Accountability Impasse</i>				
El Salvador				
–Amnesty →	LOW	LOW	LOW	LOW
–Accountability impasse	LOW	MEDIUM	LOW	HIGH
<i>Obstinate Amnesty</i>				
Brazil				
–Obstinate amnesty	LOW	LOW	LOW	MEDIUM

weak, strong veto players prevail and block accountability, international pressure may not emerge and judiciaries have not yet experienced generational shifts or reform to challenge impunity. The weakness of these four factors, we contend, predicts persistent or obstinate amnesties. Third, variation in the strength of these factors explains countries' placement along the continuum from impunity to accountability (Table 2). Strong veto players and weak judicial leadership are most likely to block full accountability, even where civil society and international pressure is strong, leading to accountability impasse. Where judicial leadership emerges, civil society demand combined with international pressure finds ways around persistent blanket amnesties to promote justice. Creative circumvention thus depends on the judiciary, but the judiciary in turn relies on civil society demand, international pressure and waning support for the old authoritarian leaders.

Further tests of our dynamic interaction framework are warranted, in particular to understand how applicable it may be outside of Latin America. While this is a question for future research that we encourage others to explore, we offer a few observations about the potential implications of our framework. First, Latin America's democratic history prior to authoritarian rule has meant relatively stronger civil society organizations than perhaps exist in regions with long histories of authoritarian rule only recently interrupted by democratic transitions. Indeed, we have found little evidence of successful civil society mobilization to challenge amnesty laws and overcome impunity outside the region. Latin America

has also experienced fewer major ethnic, racial and religious conflicts compared to other regions of the world. Social fragmentation may thus explain the reluctance to challenge amnesties elsewhere. In such a context, overcoming impunity may rely more heavily on other factors. Second, judicial leadership in Latin America takes place in a shared civil law system across the region. In the common law systems maintained by many British colonies across Africa and Asia, judges have more influence in determining laws, and we thus may find judicial leadership serving as an even more important factor in predicting the successful overturning of amnesty laws. Yet it is not clear how this factor would play out in Islamic law systems or countries with traditional forms of local justice.

Finally, the IACtHR has played a unique role in challenging amnesties in Latin American countries, compared to regional courts elsewhere. Yet a recent decision challenging the application of the Croatian amnesty law to benefit war crimes suggests that the European Court of Human Rights may be assuming greater leadership on accountability,⁸⁷ however, and other regional courts may follow suit with more time, experience and legitimacy. The experience of the International Criminal Court in Africa, however, potentially represents a challenge to our framework. The ICC's international pressure for accountability via indictments and arrest warrants has been supported by many NGOs, but it has also caused a backlash from many civil society groups and governments across Africa, leading some countries to refuse to cooperate with and even to withdraw from the Court. It is too early to tell if the ICC will cause an amnesty retrenchment or if it will spur domestic responses to accountability to counteract foreign intervention.

In sum, while Latin America is no doubt unique, preliminary evidence suggests that our dynamic interaction framework is applicable outside the region. Regional and contextual differences, however, are likely to render some factors more or less important than in Latin America, or to manifest themselves in new ways. We thus encourage future research in this area.

Conclusion

Overall, this study suggests that even where amnesties seem intractable, advocates of justice should continue to challenge them. Over time these challenges seem to pay off in terms of shifting power away from the supporters of amnesties and toward actors pushing for trials. Time is not the agent for this shift, but it allows for the positive and dynamic interaction among factors to increase the likelihood of accountability, that is, weakening veto players with increasing political and economic stability, a generational shift within the judiciary and international and domestic processes to erode the legitimacy and validity of amnesty laws. This in

⁸⁷ Svetlana Bezinyan and Steve Kostas, 'Case Watch: European Court Rules on Amnesty Double Jeopardy,' Voice: Open Society Foundations, 24 April 2013, <http://www.opensocietyfoundations.org/voices/case-watch-european-court-rules-amnesty-and-double-jeopardy> (accessed 6 December 2013).

turn suggests that the challenges to amnesties are as important as the emergence of conditions conducive to overturning amnesties. In the end, as judicial leadership and international pressure coalesce, strong civil society activism can weaken, circumvent or overturn amnesty laws with positive outcomes for justice, human rights and democracy.