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Just a Matter of Time - Expanding the Temporal Jurisdiction of the Inter-American Court to Address Cold War Wrongs

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

Jeffrey B. Hall*

ABSTRACT

The Inter-American Court of Human Rights has risen in recent years to play an important role in promoting the rule of law and transitional justice. But, many of the most egregious human rights abuses in Latin America occurred during the Cold War at a time when many Latin American states had not yet recognized the Court's jurisdiction. In many cases, states have still refused to provide a proper reckoning for those abuses.

This Article explores how the Court has defined its own temporal jurisdiction in order to maximize its reach into the past and compel states to take transitional justice seriously. Specifically, the text explores how the Court has used (1) contextual findings, (2) the continuing violations doctrine, and (3) the autonomous events doctrine to rule upon human rights violations even when the state conduct at issue occurred prior to the date on which the State recognized the Court's jurisdiction.

The text concludes by assessing the Court's reasoning with respect to its temporal jurisdiction and examines the potential implications for the future of the Inter-American system.

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I. INTRODUCTION: THE INTER-AMERICAN COURT AS COLD WAR TRIBUNAL

DURING the latter half of the Twentieth Century, the Cold War in the global north spawned several hot wars in the global south. The competing ideologies of capitalism and communism collided. As a consequence, many governments in Latin America 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. In some states, transitional justice programs have been nearly comprehensive, while in others, they have been merely illusory.

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 that two decades later the Inter-American Court, that did not issue a single contentious opinion during its first ten years, would effectively strike down Chilean amnesty laws, demand an investigation into the acts of a Peruvian dictator, authoritatively establish the truth of state-sponsored massacres, and compensate thousands of victims for injuries perpetrated by government agents.

The Inter-American Court has risen to play a fundamental role in the process of transitional justice in Latin America. 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, a treaty like the Inter-American Convention cannot be applied to events which occurred prior to a


3. For purposes of this Article, transitional justice includes four elements defined by Juan Mendez: (1) investigation, prosecution, and punishment of the perpetrators of human rights abuses; (2) disclosure to the victims, their families, and society of all that can readily be established about the abuses; (3) adequate reparations to the victims; and (4) the separations of known perpetrators from law enforcement bodies and other positions of authority. See Juan E. Mendez, Accountability for Past Abuses, 19 Human Rights Q. 255, 261 (1997).


7. Summaries of reparations ordered by the Court can be found in the Annual Reports of the Court at http://www.corteidh.or.cr/informes.cfm (last accessed Aug. 3, 2007).

8. The European Court of Human Rights plays a similar role with respect to the States of the former Eastern Bloc, and has faced challenges similar to those of the Inter-American Court. See Tom Allen, Restitution and Transitional Justice in the European Court of Human Rights, 13 Colum. J. Eur. L. 1 (2006); Mikael Rask Madsen, From Cold War Instrument To Supreme European Court: The European Court Of Human Rights At The Crossroads Of International And National Law And Politics, 32 L. & Soc. Inquiry 137 (2007).

9. The General Commentary on Article 24 of the Vienna Convention on the Law of Treaties states “[t]he general rule [. . .] is that a treaty is not to be regarded as intended to have retroactive effects unless such an intention is expressed in the
state's consent to be bound by the treaty.\textsuperscript{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 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 in such a way that extends its reach into the past. In particular, this article 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.

\section*{II. THE TEMPORAL JURISDICTION OF THE INTER-AMERICAN COURT}

Essentially, the jurisdiction of the Inter-American Court relies upon the consent of state parties. This article refers to the date on which the state expresses such consent as the "critical date." The critical date, however, 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, in some cases, accede to) the American Convention, they must also file a separate declaration in which they expressly recognize the jurisdiction of the Court.\textsuperscript{11} Once a state has ratified the Inter-American Convention, it is internationally bound by the human rights norms included therein. But it is not until a state has recognized the Court's jurisdiction that the Court can review that state's compliance with those norms.\textsuperscript{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 bound by the general rules found in the Vienna Convention on the Law of Treaties, which states:

\begin{itemize}
\item \begin{itemize}
\item \begin{itemize}
\item [\textsuperscript{12}] This distinction between the State's obligation under international law and the Court's ability to review the State's compliance with that obligation is important in the context of the investigation of events prior to the Court's jurisdiction. \textit{See infra}, sections IV.B & V.
\end{itemize}
\end{itemize}
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.\textsuperscript{13}

Prospective review drastically limits the Court's power to examine Cold War abuses. The vast majority of the abuses which accompanied the period of upheaval in Latin America occurred before states recognized the Court's contentious jurisdiction. In fact, nearly all of the twenty-one states that recognize the Court's contentious jurisdiction only did so once democracy had been restored and civil wars had ended.\textsuperscript{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. The following three sections explore three of these tools.

\section*{III. \begin{center} EXPANDING TEMPORAL JURISDICTION: CONTEXTUAL FINDINGS BY THE COURT \end{center}}

First and most basically, the Court will generally consider the factual context that surrounds an alleged violation, even if that context occurred before the state's critical date. These contextual findings 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 its power to determine the truth of the facts alleged from its power to declare a violation as a direct result of those facts. As the Court stated in \textit{Serrano-Cruz Sisters v. El Salvador:}

\begin{quote}
14. Of course, the criteria which correspond to "democratic rule" are highly debatable, and could provide ample material for a separate article. For the purposes of the rough estimate necessary for the present study, only two criteria were examined: the end of internal conflict and the presence of multiparty elections. Of the twenty-one states party to the American Convention which have recognized the Court's contentious jurisdiction, seventeen have experienced authoritarian rule or civil war in the past thirty years (in order by state name, and corresponding dates of return to democracy 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: twenty cases; Colombia: seven cases; Guatemala: eleven cases; Honduras: six cases). All historical data taken from the CIA World Factbook, except data on Nicaragua, Panama, and Paraguay taken from Microsoft Corporation. Central Intelligence Agency, \textit{World Factbook, available at}, https://www.cia.gov/library/publications/the-world-factbook/index.html; Microsoft Encarta Online Encyclopedia, http://encarta.msn.com. Data on state recognition of Court's jurisdiction taken from Basic Documents, \textit{supra} note 11, at 55.
\end{quote}
When ruling on the facts or acts that occurred after [the critical date], including those related to the alleged violations of judicial guarantees and judicial protection, the Court will sometimes have to refer to what is being investigated in that proceeding; however, it should not be understood that it is ruling on State responsibility for what happened prior to [the critical date], because it lacks jurisdiction to do so.\(^\text{15}\)

This type of contextualization is basic to judicial structures, and has very little impact on the jurisdiction \textit{ratione temporis} of the Court. For example, the Court may examine facts which the parties have expressly accepted as true,\(^\text{16}\) as well as notorious or uncontroverted events.\(^\text{17}\) 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 critical date, 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 or as dictated by common sense.

On the other hand, a fine line separates contextual findings and factual findings from which legal consequences may flow. This subtle distinction is explored further in section V below. First, however, it is appropriate to examine one of the most commonly recognized ways in which a court may reach events which occurred prior to the critical date.

**IV. EXPANDING TEMPORAL JURISDICTION: THE 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 \textit{Velásquez-Rodríguez v. Honduras},\(^\text{18}\) the Court characterized the disappearance of the victim by State agents as a continuous violation of several articles of the Convention. But, because the Court's temporal jurisdiction was not in question in \textit{Velásquez}, the Court's assessment in that case should be understood as dicta.\(^\text{19}\) It was not until \textit{Blake}
that the potential implications of the continuing violations doctrine materialized.

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" to the effect "that cases in which the Court's competence is recognized are exclusively those events that shall have taken place after the date that this declaration presented to the Secretary General of the Organization of American States." Guatemala's intent, apparently, was to exclude events which occurred during the country's tumultuous civil war. 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.

Guatemala asserted a preliminary objection based on lack of jurisdiction *ratione temporis* and requested the equivalent of summary judgment. The State argued that all of the events at issue had occurred prior to the critical date. The Court agreed that the deprivation of Mr. Blake's liberty and his murder were completed in March 1985, and that these events could not be considered to have continued per se past the critical date. 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. Moreover, the Court found that although the State knew of Mr. Blake's death, it did not inform his family or help them dispose his remains. 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 recourse under articles 8 and 25 of the Convention.

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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, governed by the terms of the American Convention as a whole and, therefore, not subject to reservations." Alfonso Martín del Campo-Dodd Case, 2004 Inter-Am. Ct. H.R. (ser. C) No. 113, ¶ 68 (Sept. 3, 2004).
23. *Id.* at ¶ 22.
24. *Id.* at ¶ 23. Note that the State accepted responsibility for "the unwarranted delay in the application 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. *Blake* Case, *supra* note 22, at ¶ 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:
In several cases following *Blake*, the Court has found the State liable for violation of the Convention due to its conduct prior to the critical date which extended by act or omission beyond the critical date. But, not all

**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.

American Convention, *supra* note 11, at art. 8.

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.

American Convention, *supra* note 11, at art. 25.

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, 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 v. Dominican Republic, the Court found that the denial of the right to nationality under article 20 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.

When the facts in Blake, Yean, 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 of and provide redress for the suffering caused by torture or any other violation of the Convention. But the decisive issue, conceptually

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.
American Convention, supra note 11, at art. 20.
34. Alfonso Martín del Campo-Dodd, supra note 20, at ¶ 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.” Id. “It is maintained that the offence is continuous or permanent when its consummation extends over time.” Id.
speaking, is whether the state stands in an ongoing relationship with the plaintiff such that if the state changed its behavior, the violation would effectively cease.

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. 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 claim 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."[*]

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 forced displacement which occurred a year before the critical date. This decision would seem to contradict the Court's position in Cantos. Clearly, the petitioners in Moiwana Community were much

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.

American Convention, supra note 11, at art. 21.

36. Cantos Case, 2001 Inter-Am. Ct. H.R. (ser. C) No. 85, ¶ 39 (Sept. 7, 2001). 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." Id. at ¶ 39. 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 "[u]nless 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." Vienna Convention, supra note 10, at art. 28. 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. See id. art. 21.

37. Moiwana Cmty., supra note 31, at ¶ 164.
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 Community was 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 Community* 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 transactions governed by domestic law. These transactions established temporal limits for the accrual of his property rights; at one point he did not have such rights, and then, following a market transaction, he did. In contrast, the Moiwana property rights are inherent to their status as an indigenous people. As a result, the different results in *Cantos* and *Moiwana Community* may be reconciled by an understanding of the differing nature of the property rights at issue and in light of the Court's jurisprudence on tribal land rights.

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38. *Cantos*, *supra* note 36, at ¶ 2.
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 infra* section IV.
43. This status may be forfeited if the community ceases to practice their indigenous culture. *See* Sawhoyamaxa Indigenous Cmty. Case, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 131 (Mar. 29, 2006).
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 continues past the critical date. *See* De Becker v. Belgium, App. no. 214/56, 1962 Y.B. Eur. Conv. On H.R. 214 (Eur. Comm'n on H.R.).
A. The Failure to Provide Effective Recourse for Human Rights Abuses as a Continuing Violation

The preceding paragraphs explored some of the issues that arise with respect to the continuing violations doctrine in the context of forced disappearances, the right to citizenship, torture, and property. But it is clear that the most complex aspects of the "continuing violations" doctrine arise in the context of a state's failure to investigate and prosecute human rights abuses.

Over the past quarter century, the Inter-American Court has made important jurisprudential strides with respect to affirmative due process. Specifically, the Court has found that articles 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection) of the American Convention require a 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. This right to effective recourse extends both to the individual who suffered from the substantive violation as well as to his or her family.

The Court has established that the denial of effective recourse is a continuing violation of the American Convention. 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. Nonetheless, the Court found that Suriname's duty to provide an effective recourse for the


46. See *Acosta-Calderón Case*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 129, ¶ 92 (June 24, 2005). "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." *Id.* See also *Yatama Case*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 127, ¶ 167 (June 23, 2005); *Tibi Case*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 114, ¶ 130 (Sept. 7, 2004).


48. In *Alfonso Martín del 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. *Alfonso Martín del Campo-Dodd*, supra note 20, at ¶ 80. This holding, which implies that the denial of justice is not continuous, seems to have been overruled by *Moiwana Community*. See *Moiwana Cmty.*, supra note 31.

49. Basic Documents, supra note 11, at 59.
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.\(^5\)

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, could the failure to investigate abuses of slavery in Brazil be examined? Or the genocide of Amerindians during the Conquest? Could the Court compel an investigation of all the abuses perpetrated by a Latin American state at the height of the Cold War without regard to the critical date? With Moiwana Community as our only guide, the answer to these questions is probably ‘yes’. However, even though 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. Date of State Ratification as a Temporal Limitation on the Continuing Violations Doctrine

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.\(^5\) In Vargas-Areco v. Paraguay, the parents of a young boy who was extra-judicially executed by the military alleged several due process violations.\(^5\) However, the extrajudicial execution occurred several years prior to the state’s recogni-

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50. Moiwana Cmty., supra note 31, at ¶ 43.
51. Vargas Areco, supra note 31, at ¶ 84. Recall that the date of ratification often precedes the date of recognition of the Court’s jurisdiction.
52. Vargas Areco, supra note 31, at ¶ 2.
tion of the Court’s jurisdiction. The Court explained that the obligation to investigate the violations of the rights to life and 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. The court also explained that:

[In this respect, it should be noted] that the State ratified the American Convention on August 24, 1989, i.e. several months before the death of the minor Vargas-Areco . . . . Therefore, after that date, the State had the duty to fulfill all the obligations arising out of the Convention, even [though the Court 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 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. Conversely, 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 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 Community, 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.

V. EXPANDING TEMPORAL JURISDICTION: FAILURE TO PROVIDE EFFECTIVE RECORESE FOR HUMAN RIGHTS ABUSES AS AN “AUTONOMOUS EVENT”57

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 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

53. Vargas Areco was executed on December 30, 1989. Paraguay recognized the Court’s jurisdiction on March 26, 1993. See id. at ¶ 71.671.6; Basic Documents, supra note 11, at 59.
54. Vargas Areco, supra note 31, at ¶ 84-85.
56. See World Factbook, supra note 14.
57. The Court refers to this concept as either “Hechos Independientes” or “Actuaciones Autónomas” or “Hechos Autónomos.”
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, the denial of effective recourse under articles 8 and 25. This section will analyze how a second doctrine, which this article calls 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. These states accomplished this limitation by filing a separate declaration with their recognition of the Court’s jurisdiction. Chile’s declaration is representative in this respect:

“[T]he Government of Chile places on record that this recognition of the competence and jurisdiction of the Commission 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].”

By limiting the Court’s jurisdiction to events that begin subsequent to the critical date, states avoid litigation with respect to continuing violations. 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. 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 to the Court in Almonacid-Arellano:

58. Basic Documents, supra note 11, at 60, 62, 7065. Argentina’s temporal limitation states: “the obligations undertaken by virtue of this Convention shall only be effective as regards acts that have occurred after the ratification of the above-mentioned instrument.” Id. at 64. Because Cantos precedes other Court cases which suggest that the denial of effective recourse is a continuing violation, it is unclear whether it was Argentina’s temporal limitation or simply the fact that the proceedings began prior to the critical date which excluded the proceedings in Cantos. Recall that the Court also rejected Mr. Cantos’ claims with respect to alleged continuing violations of the Right to Property. See supra section IV. However, the Court did not state that it was the State’s temporal limitation that had precluded the argument. See Jo Pasqualucci, The Practice and Procedure of the Inter-American Court of Human Rights 112 (2003).

59. By limiting the Inter-American Commission’s ability to consider cases, Chile in effect limited the Court’s ability as well, since cases may only be brought to the Court by the Commission or another State Party. American Convention on Human Rights, supra note 11, art. 61.

60. Basic Documents, supra note 11, at 60.


62. There is considerable support for the position that this type of declaration should have been rejected outright. See Serrano-Cruz Sisters, supra note 15 (A.A. Cançado Trindade, J., dissenting); see also Jessica Tillson, Reservations and the Future of Inter-American Justice, 6 Chi.-Kent Int’l & Comp. L. 82, 98 (2006).
This Court deems that during the course of a proceeding separate facts might occur which constitute specific and independent violations arising from denial of justice. For instance, the decision of a judge not to allow the counsel for the defense to participate in the proceedings; the prohibition imposed on the counsel for the defense to interview their clients in private, to duly examine the record of the case, to forward evidence for the defense, to challenge incriminating evidence, and to prepare the arguments in due time; the intervention of "faceless" judges and prosecutors; the torture or ill-treatment inflicted on the defendant to exact a confession from him; the failure to inform foreign detainees of their right to consular assistance; and the violation of the principle of coherence or correlation between the charges and the judgment, among others.  

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. 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. 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.

B. THE FURTHEST REACHES OF THE AUTONOMOUS EVENTS DOCTRINE

In Almonacid-Arellano, the Court found violations based on autonomous events which were more or less instantaneous, i.e. the application of the amnesty law. The Court's position is more complex, however, with respect to events whose temporal autonomy is unclear.

1. Autonomous Events Doctrine and Different Procedural Stages

For example, in Alfonso Martín del Campo-Dodd, the Court held that it lacked jurisdiction to examine the due process provided by the state in secondary proceedings, because the primary proceedings occurred completely outside the Court's temporal jurisdiction. Thus, it would seem,
the Court reasoned that the “beginning” of the alleged violation was the institution of the proceedings. All of the constituent stages were excluded from the Court’s purview because the proceedings began prior to the Court’s jurisdiction.

But, Alfonso Martín del Campo-Dodd seems to have been directly overruled by Serrano-Cruz Sisters, in which the Court found that different stages in the investigative or judicial proceedings may be considered autonomous. In Serrano-Cruz, 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. El Salvador did not recognize the Court’s jurisdiction until thirteen years after the disappearance, in 1995. Although El Salvador had opened and closed an investigation proceeding prior to the Court’s jurisdiction, the Court found that the secondary proceedings began after the date of the Court’s jurisdiction, and this constituted an autonomous event over which it could exercise its jurisdiction. 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.

2. The Lack of Due Diligence and the Failure to Provide Speedy Recourse as “Autonomous” violations of the American Convention

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” and “expeditiousness” depend on the totality of circumstances of a particular case. Difficult questions arise when some of the circumstances of the case lie outside the Court’s jurisdiction.

For example, in Serrano-Cruz, 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.

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67. Interestingly, Serrano-Cruz Sisters followed Alfonso Martin del Campo-Dodd by just 3 months.
68. Serrano-Cruz Sisters, supra note 15 at ¶ 48.2.
69. Basic Documents, supra note 11, at 59.
71. Id. at ¶¶ 66-74.
72. Id. at ¶¶ 65, 106.
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 court failed to take into account testimony by Red Cross officials concerning the circumstances of the girls' disappearance. This testimony concerned events which occurred in 1982, many years before the Court's jurisdiction. 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 however consider how the State responded to testimony by third parties (in this case the Red Cross) about the events of 1982. Implicitly, the Court found that the Red Cross testimony was credible, and the testimony affected the diligence required of the State in its investigation of the matter. 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, the Court said that 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 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, 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

73. El Salvador's legal system is based largely upon civil law in which the judge directs the investigation.
74. Serrano-Cruz Sisters, supra note 15, at ¶¶ 97-98.
75. Id. at ¶¶ 48.18, 48.47.
76. 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.
77. Serrano-Cruz Sisters, supra note 15, at ¶ 107.
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 disputed facts which occurred prior to the critical date.

Lest it appear that Serrano-Cruz was an anomaly in the Court’s jurisprudence, it is important to point out that the Court used similar reasoning in the recent case of García Prieto et al. v. El Salvador, in which the Court quoted heavily from Serrano Cruz. And more cases appear to be on the way.78 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.

VI. 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,79 although the types of violations to which these institutions apply the doctrine vary.80 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. 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, which precludes temporal limitations on its jurisdiction. As a result, the complex issues of which arose in Serrano-Cruz 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. In this sense, it is encouraging to see the Court using the means at its disposal to broaden its reach. In particular, the Court has found creative ways to use 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. This power has already had, and will continue to have, effects on states as they reckon with Cold War-era wrongs. But as the Court comes of age and grows in prestige, it will likely face scrutiny for positions such as those taken in Serrano-Cruz and García Prieto. Thus, the Court will have to find the proper balance between victims' demands for justice for past wrongs, and the Court's own need for legitimacy, so that it may prevent future ones.

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81. See Parmak, supra note 80.
82. "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." Convention for the Protection of Human Rights and Fundamental Freedoms Protocol No. 11 art. 57, Nov. 1, 1998, E.T.S. No. 5.