Leiden Journal of International Law (2020), **33**, pp. 667–687
doi:10.1017/S092215652000028X

ORIGINAL ARTICLE

INTERNATIONAL LAW AND PRACTICE

The control of the Inter-American Court of Human Rights over amnesty laws and other exemption measures: Legitimacy assessment

Juan Pablo Perez-Leon-Acevedo*

PluriCourts, Faculty of Law, University of Oslo; Faculty of Humanities & Social Sciences, University of Jyväskylä (Finland)
Email: pe.le.ace@gmail.com

Abstract

In 2001, the Inter-American Court of Human Rights (IACtHR) seminally found self-amnesty laws on serious human rights violations to be null and void. However, later national reactions showed that this supranational control has faced challenges. Such supranational judicial authority has been exercised where amnesty laws and other exemption measures blocked judicial cases, democratic referendums upheld legislation, and peace-making processes existed.

This article seeks to determine whether the traditionally interventionist jurisprudence of the IACtHR on amnesty laws/exemption measures has been legitimate under global constitutionalism standards. The standards considered are: human rights, namely, rights of victims of mass atrocities; consistency or coherence of this jurisprudence with international, regional and national practices; and democratic legitimacy and/or accountability considerations.

Victim rights have underlain the IACtHR's jurisprudence on amnesty laws and similar measures. Importantly, developments on victim rights are not exclusive to the IACtHR as case law of other supranational human rights bodies evidences. Among human rights courts and bodies, the IACtHR has exercised the highest level of control over amnesty laws/exemption measures, even nullifying national legislation. However, the IACtHR's case law shares common principles with UN/regional jurisprudential developments and domestic practices in terms of inadmissibility of amnesties and other exemption measures in cases of serious abuses. Unlike the European Court of Human Rights (ECtHR), the IACtHR has not deferred to sovereign state appreciation (conventionality control doctrine). Nevertheless, the IACtHR has arguably begun to move towards more 'moderated' approaches. This is advisable under democratic legitimacy considerations.

Keywords: amnesties; control; democracy; Inter-American Court of Human Rights

1. Introduction

In 2001, the IACtHR, in *Barrios Altos* v. *Peru*, was the first international level court that found national legislation, namely, self-amnesty laws on serious human rights violations, to be null and void.[1] Overall, human rights practitioners and scholars lauded this as a seminal development.

*Post-Doctoral Fellow/Lecturer (University of Jyväskylä); Guest Researcher (PluriCourts, University of Oslo). Article funded by the Research Council of Norway: Project Number 223274 – PluriCourts: The Legitimacy of the International Judiciary; and the Max Planck Society (Max Planck Institute for Comparative Public Law and International Law). Article prepared when the author was a fellow at PluriCourts, Law Faculty, University of Oslo.

[1] *Barrios Altos v. Peru*, Judgment of 14 March 2001, Series C., No. 75.

However, later national reactions to IACtHR case law have shown that such a supranational control has faced important legitimacy and legal challenges across Latin America.

To some extent, the IACtHR has arguably 'moderated' its approach by considering and balancing competing interests in subsequent cases that involved amnesty laws and similar exemption measures, e.g., statutes of limitations and presidential pardons. Such judicial authority has been exercised when national legislation ((self)-amnesty laws) or similar measures blocked judicial cases (Peru, Chile, Brazil, Guatemala, Suriname), democratic referendums upheld legislation (Uruguay), and peace-making processes existed (Colombia, El Salvador, Guatemala).

The main research question of this article is to determine whether the traditionally interventionist IACtHR's jurisprudence on amnesty laws/exemption measures is legitimate under global constitutionalism standards. This assessment is conducted under three selected criteria identified in global constitutionalism literature and relevant practice: human rights, coherence/consistency, and democratic accountability. These criteria have been adapted to this article.

The present article generally argues that the IACtHR's jurisprudence on amnesty laws and other exemption measures is legitimate under human rights and coherence/consistency as global constitutionalism standards. It is overall sustained that the IACtHR has been a zealous guardian of the fulfilment of the state obligations towards victims' rights to access and participate in criminal justice related to atrocity cases. Additionally, it is sustained that the IACtHR's practice on exemption measures is not isolated but, conversely, it is to an important extent consistent with a number of developments in other legal regimes, namely, other human rights systems, international criminal law, and domestic practices. However, the legitimacy of such jurisprudence is seemingly less clear under democratic accountability considerations as a global constitutionalism standard. It is argued herein that this is mainly due to the fact that the IACtHR has neglected the context in which exemption measures were adopted, namely, whether these measures involved democratic proceedings and/or were adopted by democratic regimes. Be that as it may, it is also pointed out that the IACtHR has arguably nuanced its traditionally interventionist or too controlling approach to national exemption measures.

The first section of this article theoretically examines the above-mentioned legitimacy standards. Second, the way in which victim rights are powerful grounds for the IACtHR's jurisprudence on exemption measures and how other human rights bodies have construed case law on victim rights are analysed. Third, approaches of other human rights bodies and international criminal tribunals to exemption measures and relevant domestic practices are discussed. Fourth, whether the IACtHR has considered democratic accountability and potential ways ahead, is examined.

2. Legitimacy standards

Whereas sociological legitimacy examines whether the institution is perceived to be legitimate, normative legitimacy involves whether and to what extent an institution is entitled to rule under objective standards.[2] These legitimacy types are conceptually distinct; however, it is difficult to examine one detached from the other.[3] In turn, legitimacy analyses involve three dimensions: origin, process, and results of the respective institution under examination.[4] This article mainly but not exclusively applies normative legitimacy analysis to these dimensions.

The legitimacy assessment of international judicial decisions under legitimacy standards constitutes a second analytical level. Under academic literature and practice, three legitimacy standards are particularly suitable to examine the legitimacy of the practice of diverse

[2]D. Bodansky, 'Legitimacy in International Law and International Relations', in J. Dunoff and M. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations* (2012), 321, at 326–7; I. Clark, *Legitimacy in International Society* (2005), 18–19; S. Langvatn and T. Squatrito, 'Conceptualizing and Measuring the Legitimacy of International Criminal Tribunals', in N. Hayashi and C. Bailliet (eds.), *The Legitimacy of International Criminal Tribunals* (2017), 41, at 43.

[3]Bodansky, ibid., at 327.

[4]Langvatn and Squatrito, *supra* note 2, at 51–2.

https://doi.org/10.1017/S092215652000028X Published online by Cambridge University Press

international courts and tribunals in general, including the IACtHR's jurisprudence on amnesty laws and other exemption measures such as presidential pardons and statutes of limitations. These legitimacy standards are: i) human rights, namely, rights of victims of mass atrocities; ii) consistency, namely, coherence of the IACtHR's jurisprudence with international, regional and national practices; and iii) considerations related to democracy, namely, democratic legitimacy. This section aims to justify the relevance of these standards to assess the legitimacy of international courts such as the IACtHR.

Alongside the rule of law and democracy, human rights are a fundamental pillar of the constitutionalization of the global system.[5] At the regional and international levels, there has been an increasing focus on human rights, which is arguably a component of an emerging 'international constitutional order' in de Wet's terms.[6] As the UN Secretary General explicitly recognized, the decisions of states and other entities must be consistent with international human rights norms and standards.[7] This includes international courts.

Grossmann has powerfully remarked that the legitimacy of international courts partially comes from their ability to help states to (better) comply with human rights, and international courts cannot be legitimate if they facilitate state violations of these human rights standards.[8] Thus, the promotion of normative regimes that are coherent with fundamental human rights is pivotal to legitimize international courts.[9] Should an international court cease to protect human rights or fail to find state responsibility for violations of human rights, it arguably becomes illegitimate regardless of its achievement of other normative goals.[10] In concurrence with Ulfstein, international courts must be consistent with internationally recognized human rights to exercise their judicial function properly.[11] As Føllesdal highlights, regional human rights courts should arguably comply with more demanding human rights standards than those required for other international courts.[12]

Concerning consistency/coherence, this is a rule of law principle which also applies to international institutions.[13] As the UN Secretary General identified, states and other subjects of international law must adopt decisions which are consistent with international legal standards.[14] Coherence grants legitimacy to implementing institutions such as international courts since it provides reasonable connections between the application of rules or normative provisions and, *inter alia*, principles previously developed to solve similar problems.[15]

In the context of institutional fragmentation and diversification of international law, judicial consistency among international courts is needed.[16] The rulings of a specific international court must be consistent with the object and purpose of the respective normative regime(s) it was established to adjudicate.[17] As Grossman remarks, to acquire or enhance its legitimacy, an international court must generally act in accordance with the respective 'object and purpose of the normative

[5]A. Wiener et al., 'Global Constitutionalism: Human Rights, Democracy and the Rule of Law', (2009) 1 *Global Constitutionalism* 1, at 1.

[6]See E. de Wet, 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order', (2006) 19 LJIL 611.

[7]Report of the Secretary General, The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, UN Doc. S/2004/616 (2004), para. 6.

[8]N. Grossman, 'The Normative Legitimacy of International Courts', (2013) 86 *Temple Law Review* 61, at 65.

[9]Ibid., at 105.

[10]Ibid., at 103.

[11]G. Ulfstein, 'The International Judiciary', in J. Klabbers et al. (eds.), *The Constitutionalization of International Law* (2011), 126, at 126–8.

[12]A. Føllesdal, 'Constitutionalization, Not Democratization: How to Assess the Legitimacy of International Courts', in N. Grossman et al. (eds.), *Legitimacy and International Courts* (2018), 307, at 330.

[13]Ulfstein, *supra* note 11, at 62.

[14]Report of the Secretary-General, *supra* note 7, paras. 6, 37, 64(e).

[15]T. Franck, *The Power of Legitimacy Among Nations* (1990), 147–8.

[16]Ulftsein, *supra* note 11, at 135–42.

[17]Grossman, *supra* note 8, at 103.

https://doi.org/10.1017/S092215652000028X Published online by Cambridge University Press

regimes they interpret and apply'.[18] The need for coherence/consistency between the jurisprudence of regional human rights courts such as the IACtHR and practices of other international courts and bodies which decide on similar legal issues arguably corresponds to efforts towards convergence and unity in international law.[19] Moreover, such consistency has important effects in terms of predictability and legal security.[20] Consideration of domestic practices is also important for analyses of consistency.[21]

As for democracy, there have been concerns about the lack of democratic accountability of international courts and the related need for their 'democratization', which includes the jurisprudence of these courts.[22] According to Cohen and other scholars, more 'democratic' international courts should be less biased, which requires specific calls.[23] The legitimacy of international courts is challenged when they interpret or apply law, and for practical effects make law, namely, international courts task away this crucial mandate from political legislative bodies, which in turn constitutes the most important source of democratic legitimation.[24] However, since international treaties are by definition incomplete, international courts necessarily have to interpret them, including normative gap-filling functions.[25] Von-Bogdandy and Venzke have convincingly argued that since international courts exercise public authority, their actions and rulings are expected to meet or be justified under fundamental premises or principles of democratic legitimacy.[26]

Some scholars have indicated that notions such as fidelity to international law or international justice barely present a direct association with democracy.[27] Thus, to better assess the legitimacy of international courts, global constitutionalism analyses are suitable to distinguish between decision-making democratic institutions, normative principles that justify these institutions, and important characteristics that contribute to the their justification.[28] In light of global constitutionalism, democratic institutions are required, including states, international institutions and their law-making activities as Peters proposes.[29] The democratic legitimacy of international organizations, including international courts, mainly lies in state consent when ratifying their respective instruments: states are legally bound.[30] Franck accurately remarked that 'international institutions derive their validity from the consent of the governments involved'.[31]

However, broad or expansive judicial interpretations by international courts are not uncommon at regional human rights courts and particularly at the IACtHR. This has brought new challenges and questions in terms of potential democratic legitimacy deficits of these supranational

[18]Ibid., at 104.

[19]M. Andenas, 'Reassertion and Transformation: From Fragmentation to Convergence in International Law', (2015) 46 *Georgetown Journal of International Law* 685, at 692; B. Simma, 'Universality of International Law from the Perspective of a Practitioner', (2009) 20 EJIL 265, at 267.

[20]Ibid.

[21]E.g., C. Binder, 'The Prohibition of Amnesties by the Inter-American Court of Human Rights', (2011) 12 *German Law Journal* 1203, at 1218–26; L. Mallinder, 'The End of Amnesty or Regional Overreach? Interpreting the Erosion of South America's Amnesty Law', (2016) 65 *International and Comparatively Law Quarterly* 645, at 658.

[22]See H. Cohen et al., 'Legitimacy and International Courts – A Framework', in Grossman et al., *supra* note 12, at 7–8.

[23]See ibid., at 8.

[24]Føllesdal, *supra* note 12, at 325.

[25]See J. Pauwelyn and M. Elsig, 'The Politics of Treaty Interpretation: Variations and Explanations Across International Tribunals', in Dunoff and Pollack, *supra* note 2, at 445–73.

[26]A. von-Bogdandy and I. Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (2014), 28.

[27]M. Sellers, 'Democracy, Justice and the Legitimacy of International Courts', in Grossman et al., *supra* note 12, at 342.

[28]See Føllesdal, *supra* note 12, at 307–37.

[29]A. Peters, 'Dual Democracy', in Klabbers et al., *supra* note 11, at 264; Wiener et al., *supra* note 5, at 3, 10.

[30]Ulfstein, *supra* note 11, at 75.

[31]T. Franck, 'Legitimacy and the Democratic Entitlement', in G. Fox and B. Roth (eds.), *Democratic Governance and International Law* (2009), 25, at 31.

https://doi.org/10.1017/S092215652000028X Published online by Cambridge University Press

bodies. In principle, extensive empowerment of international courts may be justified and may even become necessary to realize pivotal international goals such as human rights protection by regional human rights courts 'even at the expense of democratic majority ideals' as Ulfstein notes.[32] Nevertheless, international courts should consider the tension between international effectiveness and democratic control when they exercise their powers.[33]

The democratic control over decisions of international courts may include instances where domestic courts find the non-execution of international judgments. This is illustrated by cases such as those of the Russian Constitutional Court[34] and the Venezuelan Supreme Court[35] which decided not to execute judgments of the ECtHR and the IACtHR respectively. However, the Russian and Venezuelan cases may be understood under an alternative reading: this rejection to execute international judgements is arguably a consequence of the deterioration of the democracy and rule of law in these countries. Closely related to the said democratic control, the principle of subsidiarity may shed light on or guide an appropriate allocation of powers between international courts and national organs.[36]

Therefore, human rights, consistency/coherence and democracy are useful global constitutionalism standards to examine the legitimacy of international institutions, including international courts and tribunals such as the IACtHR. To conduct legitimacy assessments of international courts, the said three standards can be used separately, together, or even combined with other criteria. In this context, the following sections adapt and apply these three standards to assess the legitimacy of the IACtHR's jurisprudence on amnesty laws and other exemption measures.

3. Amnesty laws and victim rights

This section first explores how the rights of victims of serious abuses have been an important factor in the IACtHR's jurisprudence on amnesty laws/exemption measures. Then, case law on victim rights at other human rights systems is examined to evidence that there are common grounds with the IACtHR's case law on victim rights.

3.1 Victim rights in the IACtHR's jurisprudence on amnesty laws

As a key ground for its jurisprudence on amnesty laws/exemption measures, the IACtHR has invoked the rights of victims of serious human rights violations. In the seminal *Barrios Altos*, a crucial ground for declaring the lack of effects of Peruvian amnesty laws was that these laws:

> ... prevented the victims' next of kin and the surviving victims in this case from being heard by a judge, as established in Article 8(1) [Right to a Fair Trial] of the Convention; they violated the right to judicial protection embodied in Article 25 [Right to Judicial Protection]; they prevented the investigation, capture, prosecution and conviction of those responsible for the events that occurred in Barrios Altos ... and they obstructed clarification of the facts of this case.[37]

The IACtHR additionally found that, under Articles 1(1) (Obligation to Respect Rights) and 2 (Domestic Legal Effects) of the American Convention on Human Rights (ACHR), states parties to the ACHR:

[32]Ulfstein, *supra* note 11, at 150.
[33]Ibid.
[34]Russian Constitutional Court, Judgment no 12-P/2016, 19 April 2016.
[35]Venezuelan Supreme Court, Judgment, File No. 08-1572, 9 December 2008.
[36]G. Ulfstein, 'Institutions and Competences', in Klabbers et al., *supra* note 11, at 45, 57.
[37]*Barrios Altos*, *supra* note 1, para. 42.

https://doi.org/10.1017/S092215652000028X Published online by Cambridge University Press

> . . . are obliged to take all measures to ensure that no one is deprived of judicial protection and the exercise of the right to a simple and effective recourse, in the terms of Articles 8 and 25 of the Convention. Consequently, States Parties to the Convention which adopt laws that have the opposite effect, such as self-amnesty laws, violate Articles 8 and 25, in relation to Articles 1(1) and 2.[38]

Furthermore, the IACtHR determined that self-amnesty laws leave victims defenceless, perpetuate impunity, are incompatible with the ACHR, and 'obstruct[s] the investigation and access to justice and prevent[s] the victims and their next of kin from knowing the truth and receiving the corresponding reparation'.[39] It emphasized that surviving victims and relatives of the fatal victims, who are also victims themselves, were prevented from knowing the truth about the Barrios Altos massacre.[40] The IACtHR importantly clarified that 'the right to the truth is subsumed in the right of the victim or his next of kin to obtain clarification' of the facts and state responsibility via investigation and prosecution, namely, rights to judicial guarantees (fair trial) and judicial protection.[41]

The IACtHR has largely invoked its findings on the rights of victims of serious rights violations in its subsequent jurisprudence on inadmissibility of amnesty laws and similar measures that favoured the accused of or convicted of serious abuses such as systematic or widespread torture, enforced disappearances and extrajudicial executions. *Almonacid Arrellano* v. *Chile* concerning a self-amnesty law adopted during the Pinochet regime in 1978 and *Gomes-Lund* v. *Brazil* involving an amnesty law adopted by the Brazilian military dictatorship in 1979 illustrate this point.

Under the ACHR and concerning serious human rights violations that constitute international crimes, the IACtHR in *Almonacid Arrellano* established that the states parties to the ACHR 'must prevent, investigate, and punish all violations of the rights recognized by the Convention and, at the same time, guarantee the reinstatement, if possible, of the violated rights, and . . . the reparation of the damage caused'.[42] Impunity and the lack of reinstatement of victim rights determine state violation of its obligations to ensure 'the free and full exercise of those rights to the individuals who are subject to its jurisdiction'.[43] By invoking *Barrios Altos*, the IACtHR added that the application of Decree Law 2191 breached Chile's obligations (ACHR, Article 1(1)) in violation of the rights of the victims of this case, namely, they were deprived of their rights to judicial protection (ACHR, Article 8) and to a simple and effective recourse (ACHR, Article 25) and, thus, Chile was found internationally responsible.[44] Concerning reparations for victims, the IACtHR ordered the adaptation of Chilean domestic law to conform to the ACHR and the state duty to continue investigating this case, prosecute, and punish those responsible.[45] Under this reparation measure, the IACtHR ordered Chile to 'ensure that Decree Law No. 2.191 does not continue to hinder the investigation, prosecution and, as appropriate, punishment of those responsible for similar violations perpetrated in Chile'.[46] Finally, the IACtHR added that the right of victims to know the truth is included in victims' rights to have the harmful acts and related responsibilities clarified by the state via investigation and prosecution under the ACHR (Articles 8, 25).[47]

As for *Gomes Lund*, the IACtHR also established and discussed the intrinsic connection between victims' rights and inadmissibility of amnesty laws and similar measures. This was conducted in terms of the rights to judicial guarantees (right to a fair trial) and judicial protection, in

[38]Ibid., para. 43.
[39]Ibid.
[40]Ibid., para. 47.
[41]Ibid., paras. 48–9.
[42]*Almonacid Arrellano v. Chile*, Judgment of 26 September 2006, Series C., No. 154, para. 110.
[43]Ibid.
[44]Ibid., paras. 127–8.
[45]Ibid., para. 145.
[46]Ibid.
[47]Ibid., para. 148.

https://doi.org/10.1017/S092215652000028X Published online by Cambridge University Press

relation to the obligation to respect and ensure rights and the obligation to adopt domestic legal effects.[48] According to the IACtHR, Article 8 of the ACHR establishes that victims of serious human rights violations, or their next of kin, should be given broad possibilities 'to be heard and act in the respective procedures, in the search to ascertain the facts and in the punishment of those responsible, as well as the search for due reparation'.[49] It invoked the right of victims or their next of kin 'to file a complaint or present a lawsuit, evidence, or applications, or any other matter, in order to participate procedurally in the criminal investigation with the hope of establishing the truth'.[50] The IACtHR found that Brazil interpreted and applied the Amnesty Law inconsistently with international state obligations to investigate and punish serious human rights violations since it prevented the next of kin from being heard before a judge (ACHR, Article 8) and breached the right to judicial protection (ACHR, Article 25) due to the failure to investigate, prosecute, and punish those responsible (ACHR, Article 1(1)).[51] Under the ACHR, the IACtHR emphasized that the states parties to the ACHR must guarantee that no person under their jurisdiction is deprived of the right to judicial protection and the right to a simple and effective remedy.[52]

Therefore, the examined IACtHR's case law evidences important jurisprudential developments on the rights of victims of serious human rights violations related to criminal proceedings. These include the rights to: access to justice, know the truth, participate/be heard in criminal proceedings, and receive reparations. These important case law developments have arguably enhanced the IACtHR's legitimacy under human rights as a global constitutionalism standard. In the face of adversity determined by mass atrocities and subsequent impunity policies across the region, the IACtHR has tirelessly and rigorously examined whether and to what extent the Latin American states have fully met their international obligations in order to realize the rights of victims of atrocities.

3.2 Victim rights in other human rights systems

The recognition of victim rights in criminal proceedings related to cases of serious human rights violations, including those concerning amnesties and other exemption measures, is not exclusive to the IACtHR. Conversely, this is also present in other human rights systems. The ECtHR's case law is considered here due to the reciprocal influence between the ECtHR and the IACtHR in matters of victims and serious human rights violations. Since Latin American states have obligations under the UN human rights system, attention is then drawn to the case law of the UN treaty bodies.

In cases concerning serious human rights violations, the ECtHR has regarded that the European Convention on Human Rights (ECHR) grants victims certain procedural rights.[53] The Court has invoked victims' legitimate interest in serious human rights violations cases, namely, 'their close and personal concern with the subject matter of the inquiry ... to safeguard their interests',[54] to justify their involvement in criminal proceedings. The following victim rights may be identified in the ECtHR's jurisprudence.

First, victims hold the right to be informed of the progress of proceedings and the decisions.[55] This right is crucial to exercise other victim rights. Second, victims need to be heard during

[48] *Gomes Lund et al. v. Brazil*, Judgment of 24 November 2010, paras. 126–82.

[49] Ibid., para. 139.

[50] Ibid.

[51] Ibid., para. 172.

[52] Ibid., para. 173.

[53] E.g., *Shanaghan v. United Kingdom*, Judgment of 4 August 2001, [2001] ECHR 330; *Kelly and Others v. United Kingdom*, Judgment of 4 August 2001, [2001] ECHR 328. See also J. C. Ochoa, *The Rights of Victims in Criminal Justice Proceedings for Serious Human Rights Violations* (2013), 122–31.

[54] E.g., *Edwards and Edwards v. United Kingdom*, Judgment of 14 March 2002, [2002] ECHR 303, para. 70.

[55] E.g., *Orhan v. Turkey*, Application No. 25656/94, Judgment of 18 June 2002, paras. 346, 348.

https://doi.org/10.1017/S092215652000028X Published online by Cambridge University Press

criminal proceedings.[56] This is implemented in accordance with the respective national framework. Yet, the right to be heard must be exercised in civil law and common law states.[57] Third, victims can access case files subject to potential prejudicial effects on other individuals and investigations.[58] The Court has found state responsibility when victims and their families were denied access to judicial documents.[59] Fourth, the right to be informed by the prosecutor of his/her decision not to prosecute serious human rights violations cases so that victims can challenge it.[60] The Court has found ECHR violations when the state did not inform direct victims and/or their next of kin of decisions not to prosecute.[61] Fifth, dead victims' relatives should be involved in the investigation without necessarily being civil parties.[62] Sixth, the right to access witness statements before the witness appears.[63]

Additionally, the ECtHR has stressed the importance of the victim's right to claim reparations in national proceedings under the ECHR (Article 13).[64] Furthermore, the ECtHR has found that Article 6(1) (right to a fair trial) is applicable to civil party participation in criminal trials.[65] However, this is subject to the decisiveness of such proceedings for compensation for victims, which may be restrictive.[66]

Although the Human Rights Committee (HRC) concluded that the victim's right to an effective remedy obliges states to investigate and prosecute human rights violations, it has considered that the International Covenant on Civil and Political Rights (ICCPR) does not provide for rights to demand criminal prosecutions or participate in criminal proceedings.[67] In cases of serious human rights violations the HRC, however, has adopted more flexible interpretations, which coincide with approaches of the Committees against Torture (CAT) and Enforced Disappearance (CED) when applying the respective human rights treaties in individual complaints.

According to these treaty bodies, victims of serious human rights violations are entitled to, *inter alia*: an effective remedy which requires states to investigate, prosecute, try and punish offenders;[68] information;[69]an impartial and prompt examination by competent authorities;[70] active participation in criminal proceedings;[71] equality before courts;[72] and prompt and adequate redress.[73] To an important extent these victim rights have been construed or invoked by the said bodies when applying the respective international human rights treaties in contexts of serious abuses in Latin America and/or situations involving amnesties/exemption measures in and beyond Latin America.

[56]E.g., *Edwards and Edwards*, *supra* note 54, paras. 84, 87; *Rantsev v. Cyprus and Russia*, Judgment of 7 January 2010, 51 EHRR 1, para. 286.

[57]Ochoa, *supra* note 53, at 130.

[58]*Kelly and Others*, *supra* note 53, para. 115.

[59]*Gul v. Turkey*, Judgment of 14 December 2000, (2002) 34 EHRR 719, para. 93.

[60]Ibid., para. 118; *Ogur v. Turkey*, Application No. 21594/93, Judgment of 20 May 1999, ECHR 1999-III, para. 92.

[61]Ibid.

[62]*Slimani v. France*, Judgment of 27 July 2004, 43 EHRR 1068, para. 47.

[63]*Kelly and Others*, *supra* note 53, para. 128.

[64]*Kaya v. Turkey*, Judgment of 19 February 1998, [2000] ECHR 129, para. 107.

[65]*Perez v. France*, Judgment of 12 February 2004, ECHR 2004-I, paras. 62–3.

[66]Ochoa, *supra* note 53, at 127.

[67]*HCMA. v. The Netherlands*, Communication No. 213/1986, Views, 3 April 1989, para. 11.6; *Vicente et al. v. Colombia*, Communication No. 612/1995, Views, 14 June 1994.

[68]HRC, *Rodríguez v. Uruguay*, Communication No. 322/1988, Views, 19 July 1994, para. 14; CAT, *Abdulrahman Kabura v. Burundi*, Communication No. 549/2013, Views, 11 November 2016, para. 7(5).

[69]HRC, *Aliboev v. Tajikistan*, Communication No. 985/2001, Views, 18 October 2005, paras. 6–7.

[70]CAT, *Guridi v. Spain*, Communication No. 212/2002, Views, 24 May 2005, paras. 6.3–6.8.

[71]CED, *Estela-Deolinda Yrusta/Alejandra del-Valle-Yrusta v. Argentina*, Communication No. 1/2013, Views, 12 April 2016, paras. 10(9), 12.

[72]HRC, *Angel Olo-Bahamonde v. Equatorial Guinea*, Communication No. 468/1991, Views, 20 October 1993, para. 9.4.

[73]*Guridi*, *supra* note 70, paras. 6.3–6.8; HRC, *Laureano-Atachahua v. Peru*, Communication No. 540/1993, Views, 16 April 1996, para. 10; CED, *Estela-Deolinda Yrusta/Alejandra del-Valle-Yrusta*, *supra* note 71, para. 12.

https://doi.org/10.1017/S092215652000028X Published online by Cambridge University Press

Therefore, the IACtHR and other human rights bodies share important grounds in jurisprudential developments of the rights of victims of serious human rights violations in criminal proceedings. Indeed, these developments have substantially contributed to and/or been consistent with principles on victims' rights adopted by the UN General Assembly.[74] Despite certain differences across human rights systems, there is arguably a common grammar on the rights of victims of serious abuses and justice. Under international human rights law, the core content of these victim rights cannot be overlooked when states plan to adopt amnesties and other exemption measures. This explains and in principle, justifies, the control exercised in these issues by supranational human rights bodies consensually created consensually by states via treaties. Thus, the legitimacy of these bodies has been strongly enhanced in terms of protection of human rights as a global constitutionalism standard. The next section applies the second global constitutionalism standard considered herein, i.e., consistency, to assess the legitimacy of the practice of the IACtHR on amnesties and other exemption measures.

4. Consistency with international, regional and national standards

In light of consistency as a legitimacy standard, this section examines whether the IACtHR's jurisprudence on amnesties/exemption measures is coherent or consistent with relevant international, regional, and national practices.

4.1 International and regional human rights law

This subsection surveys primarily case law at the international level (UN) and the regional level (mainly the ECtHR). In *Rodríguez* v. *Uruguay*, the HRC found that amnesties for serious human rights violations are incompatible with state obligations under the ICCPR because they exclude investigation into those violations and prevent states from discharging their responsibility 'to provide effective remedies to the victims of those abuses'.[75] It added that amnesty laws contribute to impunity, undermine democracy, and may 'give rise to further grave human rights violations'.[76] Uruguay was urged not to be involved in similar violations again.[77] Indeed, the HRC's General Comments found that amnesties are generally incompatible with state obligations to investigate serious human rights violations, determine criminal responsibility, ensure the non-repetition of these abuses, and provide individuals with an effective remedy, including reparations.[78]

By stating that states parties to the Convention against Torture are obligated to punish perpetrators, impose appropriate penalties against offenders, and prevent torture, the CAT in *Guridi* v. *Spain* found that lighter penalties and pardons for the offenders are incompatible with the said Convention.[79] Spain was urged 'to ensure in practice that persons responsible for acts of torture are appropriately punished, and also to guarantee that the victim receives full redress'.[80]

In its Principles on Impunity, the former Commission on Human Rights set up specific restrictions concerning amnesty and other clemency measures.[81] In Principle 24 (Restrictions and other

[74]Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147, 16 December 2005; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc. A/RES/40/34, 29 November 1985.

[75]HRC, *Rodríguez v. Uruguay, supra* note 68, para. 12.4.

[76]Ibid.

[77]Ibid., para. 14.

[78]General Comment 20, UN Doc. A/44/40, 10 March 1992, para. 15; General Comment 31, UN Doc. CCPR/C/21/Rev.1/Add. 13, 29 March 2004, para. 18.

[79]*Guridi*, *supra* note 70, paras. 6.6–6.7.

[80]Ibid., para. 8.

[81]Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005.

https://doi.org/10.1017/S092215652000028X Published online by Cambridge University Press

Measures Relating to Amnesty), the Commission pointed out that even when amnesties and other clemency measures are intended to establish conditions conducive to foster national reconciliation or reach peace agreements, these measures should remain within certain bounds. Perpetrators of serious crimes may not benefit from these measures until the state meets its obligations to proceed with thorough, independent, and impartial investigations as well as prosecution, trial, and due punishment.[82] Also, exemption measures (amnesties included) 'shall be without effect with respect to the victims' "right to reparation"' and 'shall not prejudice the right to know'.[83]

In the European human rights system, the ECtHR in *Marguš* v. *Croatia*, invoked its case law to affirm that amnesties in cases of killing and ill-treatment of civilians are contrary to state obligations under the ECHR because this 'would hamper the investigation of such acts and necessarily lead to impunity for those responsible'.[84] The Court relied extensively on international sources such as the IACtHR's jurisprudence to conclude that there is a 'growing tendency in international law to see such amnesties as unacceptable because they are incompatible with the unanimously recognised obligation of States to prosecute and punish grave breaches of fundamental human rights'.[85] Although the Court added that these amnesties may be possible only if there are particular circumstances such as reconciliation and/or reparations for victims, it found no such circumstances in this case.[86] Thus, the Court found no state responsibility for having convicted the petitioner of war crimes against the civilian population despite him previously having benefited from an amnesty law.[87]

In *Lexa* v. *Slovakia*, the ECtHR acknowledged that pardons are generally atypical discretionary acts that are not normally subject to judicial review and the retroactive revocation of amnesties would generally be inconsistent with the principles of legal certainty and non-retroactivity of criminal law.[88] Nevertheless, the ECtHR discussed international practice, including the IACtHR's jurisprudence, to state that amnesties or pardons are not permissible to benefit perpetrators of serious crimes such as torture.[89]

Concerning an 'effective remedy', the ECtHR in *Abdülsamet Yaman* v. *Turkey* and *Taylan* v. *Turkey* found that amnesties for state agents involved in torture or ill-treatment is inadmissible and, thus, found ECHR violations.[90]

Regarding violations of Article 2 (right to life) of the ECHR, the ECtHR in *Enukidze and Girgvliani* v. *Georgia* determined that 'the granting of an amnesty or pardon can scarcely serve the purpose of an adequate punishment' and, actually, states need 'to be all the more stringent when punishing their own law-enforcement officers for the commission of such serious life-endangering crime'.[91] The Court appropriately emphasized that, besides individual criminal liability of the perpetrators, what is at stake is 'the State's duty to combat the sense of impunity the offenders may consider they enjoy'.[92] Thus, the Court found Georgia to be internationally responsible for procedural violations of Article 2.[93]

Concerning the African human rights system, the African Commission on Human and Peoples' Rights has invoked case law of the HRC and the IACtHR. Thus, the Commission found that the granting of amnesties to perpetrators of serious human rights violations breaches state

[82]Ibid., Principles 24(a) and 19.
[83]Ibid., Principle 24(b).
[84]*Marguš v. Croatia*, Judgment of 27 May 2014, [2014] ECHR 523, para. 127.
[85]Ibid., para. 139.
[86]Ibid.
[87]Ibid., para. 140.
[88]*Lexa v. Slovakia*, Judgment of 23 September 2008, [2008] ECHR, paras. 94–5.
[89]Ibid., paras. 96–9, 139.
[90]*Abdülsamet Yaman v. Turkey*, Application No. 32446/96, Judgment of 2 November 2004, paras. 55, 61; *Taylan v. Turkey*, Application No. 32051/09, Judgment of 3 July 2012, para. 45 and operative paragraph 3.
[91]*Enukidze and Girgvliani v. Georgia*, Application No. 25091/07, Judgment of 26 April 2011, para. 274.
[92]Ibid.
[93]Ibid., para. 275 and operative paragraph 3.

https://doi.org/10.1017/S092215652000028X Published online by Cambridge University Press

obligations to prosecute and punish these abuses and prevents victims from seeking effective remedies and claiming compensation.[94]

Some conclusions stem from this survey. Unlike the IACtHR, other human rights bodies have not declared amnesty laws ineffective or null. However, the IACtHR's case law on amnesties has influenced other human rights systems. Other human rights bodies have even invoked such jurisprudence. Moreover, the IACtHR's jurisprudential substantive principles on amnesties are arguably consistent with the case law standards of other human rights systems. Concerning serious abuses of human rights, this involves common trends towards inadmissibility or limited application of amnesty laws/exemption measures plus determination of violation of international state obligations (particularly human rights treaties) and related determination of state responsibility.

Thus, the legitimacy assessment of the IACtHR is mostly positive in light of consistency as a global constitutionalism standard, i.e., consistency of the IACtHR's practice with case law developments in other human rights systems. The following two subsections provide a legitimacy assessment of the IACtHR's practice on amnesties/exception measures based on its consistency with international criminal law and domestic practices, namely, beyond the human rights regime.

4.2 International criminal law

By invoking, *inter alia*, HRC case law, the International Criminal Tribunal for the former Yugoslavia in *Furundzija* was, in 1998, the first international criminal tribunal to conclude that national measures such as amnesties that absolve torturers are incompatible with the prohibition of torture under peremptory international law.[95] These national measures cannot prevent criminal accountability.[96]

In 2004, the Special Court for Sierra Leone referred to, *inter alia*, *Furundzija* and considered IACtHR's case law to conclude that the amnesty laid down in the Lomé Agreement, which put an end to the Sierra Leonean civil war, cannot include international crimes because this would breach state obligations towards the international community as a whole.[97] The Court indeed invoked a similar understanding to the UN, which signed the Lomé Agreement, as for such inapplicability.[98] The Court acknowledged the existence of a 'crystallising international norm that a government cannot grant amnesties' for international crimes and, thus, found that blanket amnesties were inadmissible under international law.[99]

Among international and hybrid criminal tribunals, the Extraordinary Chambers in the Courts of Cambodia (ECCC) conducted the most extensive analysis of amnesties/exemption measures. In light of IACtHR's jurisprudence and other international human rights law sources as well as international and domestic criminal law practices,[100] the ECCC in *Case 002* found the following:[101] First, there is an emerging consensus on the prohibition of amnesties for serious international crimes under the state duty to investigate, prosecute and punish offenders. Second, treaty obligations prohibit amnesties and similar measures concerning genocide, torture, and grave breaches of the Geneva Conventions. As for other serious violations, there is at least a minimum retroactive right for international(ized) and domestic courts as well as third states to examine amnesties and put them aside or restrict their scope in case they are incompatible with international norms. Third, states are obligated to hold perpetrators of international crimes accountable, and grant

[94] *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication No. 245/02, Decision, 21 May 2006, paras. 211, 215; *MIDH v. Ivory Coast*, Communication No. 246/2002, Decision, 29 July 2008, paras. 97–8.

[95] *Prosecutor v. Furundzija*, Judgment, IT-95-17/1-T, T.Ch., 10 December 1998, para. 155.

[96] Ibid.

[97] *Prosecutor v. Kallon/Kamara*, Decision on Challenge to Jurisdiction, SCSL-2004-15-PT/SCSL-2004-16-PT, A.Ch., 13 March 2004, paras. 66–74.

[98] Ibid., para. 85.

[99] Ibid., para. 82.

[100] *Case 002*, Decision on Ieng Sary's Rule 89 Preliminary Objections, 002/19-09-2007/ECCC/TC, T.Ch., 3 November 2011, paras. 37–53.

[101] Ibid., para. 53

https://doi.org/10.1017/S092215652000028X Published online by Cambridge University Press

victims effective remedies. The ECCC concluded 'that amnesties for these crimes (especially when unaccompanied by any form of accountability) are incompatible with these goals'.[102]

As for the International Criminal Court (ICC), there are neither explicit normative provisions nor jurisprudence concerning amnesties and similar measures. However, the ICC Statute (Article 110) and ICC Rules of Procedure and Evidence (Rule 223) contain provisions on reduction of sentence and early release. Whereas the ICC denied sentence reduction in *Lubanga*,[103] it conceded this in *Katanga*.[104] Under the ICC's law and practice the following principles may be identified: First, the state of sentence enforcement shall not release the convicted before the ICC sentence expires, and only the ICC may reduce sentences. Second, the ICC shall review the sentence when the convicted has served two thirds of the sentence or 25 years (life imprisonment situations). Third, for sentence reductions, the ICC should consider, *inter alia*: the offender's continuous co-operation with the ICC and dissociation from his/her crime; the offender's prospect of resocialization and resettlement; whether early release would lead to significant social instability; the offender's significant action to benefit victims and impact of his/her early release on victims and their families; and the offender's individual circumstances, including worsening physical or mental health or advanced age.

Despite the differences between international/hybrid criminal tribunals and the IACtHR, this analysis evidences the influence of the IACtHR's jurisprudence on amnesties/exemption measures on certain international criminal justice practice. Moreover, there are some common grounds in terms of substantive law principles across these institutions.

4.3 Domestic practices

As academic literature has analysed, states continue granting amnesties and similar exemption measures, even in cases of international crimes.[105] There are several grounds underlying these domestic practices, including the need to move on from violent pasts,[106] prevent future atrocities,[107] and/or pave the transition to democratic regimes.[108] Nevertheless, there are important trends in state practice that suggest the increasing inadmissibility or limitation of amnesties in cases of serious violations in terms of: subject-matter, i.e., international crimes excluded; intended beneficiaries; and requirements. The International Committee of the Red Cross found a customary rule of inadmissibility of amnesties for international crimes, particularly war crimes.[109]

Laws or constitutions in Argentina,[110] Bosnia-Herzegovina,[111] Burundi,[112] Central African Republic,[113] Colombia,[114] Democratic Republic of Congo,[115] Ecuador,[116] Ethiopia,[117] Guatemala,[118]

[102]Ibid.

[103]E.g., *Prosecutor v. Lubanga*, Decision on the Review Concerning Reduction of Sentence, ICC-01/04-01/06-3173, A.Ch., 22 September 2015.

[104]*Prosecutor v. Katanga*, Decision on the review concerning reduction of sentence of Mr Germain Katanga, ICC-01/04-01/07-3615, A.Ch., 13 November 2015.

[105]F. Lessa et al., 'Persistent or Eroding Impunity? The Divergent Effects of Legal Challenges to Amnesty Laws for Past Human Rights Violations', (2014) 47 *Israel Law Review* 105, at 106–11; Mallinder, *supra* note 21, at 673–6.

[106]Ibid.

[107]A. Reiter, 'Examining the Use of Amnesties and Pardons as a Response to Internal Armed Conflict', (2014) 47 *Israel Law Review* 133, at 146.

[108]J. Elster, *Retribution and Reparation in the Transition to Democracy* (2006), 188–215.

[109]Available at ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule159.

[110]Law 27156 (2015).

[111]Law on Amnesty (1999).

[112]Penal Code (2009).

[113]Penal Code (2010).

[114]Justice and Peace Law (2005).

[115]Ordinance on a Collective Pardon (2010).

[116]Constitution (2008), Art. 80.

[117]Constitution (1994), Art. 28(1).

[118]National Reconciliation Law (1996).

https://doi.org/10.1017/S092215652000028X Published online by Cambridge University Press

Ivory Coast,[119] Philippines,[120] Poland,[121] Suriname,[122] Tunisia,[123] Uruguay,[124] and Venezuela[125] have explicitly prohibited the application of amnesties/exemption measures to international crimes and/or serious human rights violations.

Domestic jurisprudence further evidences trends of retroactive repeals of blanket amnesties and/or similar measures or restricted scope of application thereof. Frequently, the highest national courts have issued these decisions in countries such as Argentina,[126] Chile,[127] Colombia,[128] France,[129] Honduras,[130] and Uruguay.[131] Latin-American courts overall have given effect to an IACtHR judgment involving an amnesty law/exemption measure of the respective country and followed IACtHR jurisprudence on amnesty laws.[132] This now includes Brazil, which was a significant exception.[133] A Federal Regional Tribunal recently declared the Brazilian amnesty law to be anti-conventional.[134] However, it remains to be seen whether the highest court in the land, namely, the Brazilian Supreme Federal Court, will change its traditionally reluctant stance on the IACtHR's exercise of control of conventionality on amnesties/exemption measures.[135] Courts of third states have found amnesties or similar measures that involve international crimes to be inconsistent with international crimes and, thus, not binding on these national courts under the principle of universal jurisdiction. French,[136] Spanish,[137] and Dutch[138] practices illustrate this.

Additionally, closer analyses of amnesties and/or similar measures reveal that in several cases these benefits were granted upon the fulfilment of requirements, namely, not blanket but conditional amnesties. Practices in Algeria,[139] Cambodia,[140] Haiti,[141] Sierra Leone,[142] South Africa,[143] and Uganda[144] indicate that amnesties and/or similar measures have been: granted as a part of reconciliation; subject to some form of accountability and victims' access to the truth; applied under the conditions of ceasing armed activities, handing over weapons, and/or surrendering to authorities; and/or given case-by-case in light of the process leading to the respective measure and its contents, scope and alternative accountability mechanisms.

[119]Amnesty Law (2003).
[120]Proclamation 1377 (2007).
[121]Act on the Institute of National Remembrance (1998).
[122]Decree No. 5544 (1992).
[123]Legislative Decree No. 2011-1 (2011).
[124]Law on Cooperation with the ICC (2006).
[125]Constitution (2009), Art. 29; Law of General Political Amnesty (2000).
[126]Supreme Court, *Julio Mazzeo et al.*, Judgment, 13 July 2007.
[127]Supreme Court, *Claudio Lecaros-Carrasco*, 18 May 2010.
[128]E.g., Constitutional Court, C-370/06, Judgment, 18 May 2006.
[129]E.g., Court of Cassation, *Aussareses*, Judgment, 17 June 2003.
[130]Supreme Court, *Hernandez Santos*, 18 January 1996.
[131]Supreme Court, *Nibia Sabalsagaray-Curutchet*, 19 October 2009.
[132]See Binder, *supra* note 21, at 1218–26
[133]Mallinder, *supra* note 21, at 657–8.
[134]Federal Regional Tribunal-2nd Region, *Antonio-Waneir Pinheiro-Lima*, 14 August 2019. See also A. Gurmendi, 'At Long Last, Brazil's Amnesty Law Is Declared Anti-Conventional', *Opinio Juris*, 16 August 2019, available at opiniojuris.org/2019/08/16/at-long-last-brazils-amnesty-law-is-declared-anti-conventional/.
[135]See S.T.F., 2008/148623, 29 April 2010, 180, Diario do Judiciario, 19 September 2011.
[136]Court of Cassation, 23 October 2002, Bull. Crim. 2002, No. 195.
[137]Audiencia Nacional, *Pinochet*, Judgment, 5 November 1998.
[138]District Court (The Hague), *Public Prosecutor v. F, 09/75001-06*, 25 June 2007.
[139]Charter for Peace and National Reconciliation (2005).
[140]Law on Outlawing the Group of Democratic Kampuchea (1994).
[141]Law relating to Amnesty (1994).
[142]Lome Peace Accord (1999).
[143]Promotion of National Unity and Reconciliation Act (1995); *AZAPO v. the President of the Republic of South Africa*, Case CCT 17/96, 25 July 1996.
[144]Constitutional Court, *Kwoyelo v. Uganda*, Ruling on Petition 036/11, 22 September 2011.

https://doi.org/10.1017/S092215652000028X Published online by Cambridge University Press

Hence, the national practice examined confirms that the IACtHR's sceptical position towards exemption measures is not isolated but, arguably, belongs to trends of inadmissible or restricted exemption measures. In turn, this enhances the legitimacy of the IACtHR's practice under consistency as a global constitutionalism standard.

5. Democratic accountability considerations

The IACtHR's traditional position on amnesties is first discussed. Then, the analysis focuses on potential avenues of changes, paying attention to IACtHR's important and recent jurisprudence. The discussion is mainly conducted through democratic legitimacy or accountability lenses.

5.1 Situation at the IACtHR

Overall, international courts are in need of enhancing their democratic legitimacy. The principle of subsidiarity, namely, due deference given to the respective state, plays an important role to address and handle perceived democratic deficits of international courts.[145] To enhance the democratic legitimacy of regional human rights courts such as the IACtHR, the respective institution should, in principle, adopt a normative approach to the principle of subsidiarity, namely, states (local authorities) should benefit from a rebuttable presumption or prioritization when they decide on legal issues.[146] A manifestation of this normative approach to the principle of subsidiarity is the ECtHR's doctrine of margin of appreciation.

Precisely, an important feature that has traditionally characterized the IACtHR's practice is its scepticism about and even reluctance towards the doctrine of margin of appreciation. A substantial and underlying factor for this is the very poor record of democratic credentials that characterized a number of Latin American regimes during past decades. The adoption of amnesty laws and similar measures has indeed been a political tool usually employed by dictatorial or authoritarian regimes such as those in Argentina, Brazil, Chile, and Peru or by democratic regimes such as Uruguay concerning serious human rights violations committed by the Uruguayan dictatorship. In his scholarship, Antonio Cançado-Trindade (former IACtHR President and current International Court of Justice member) has sustained this position and underlying reasons. By contrasting a relatively homogeneous European context with the Latin American scenario, Cançado-Trindade expressed his satisfaction with the non-application of the margin of appreciation doctrine due to the serious deficits of local judiciaries and the context of impunity and pressure and intimidation over judges in Latin America.[147]

An important legal manifestation of this reluctance is the control of conventionality doctrine. The first seminal judgment of the IACtHR concerning amnesty laws, namely, the *Barrios Altos* Judgment (2001), made no explicit reference to the conventionality doctrine. However, in *Almonacid Arrellano* (2006) the IACtHR explicitly introduced this doctrine in the context of Chilean amnesty laws:

> . . . the Judiciary must exercise a sort of "conventionality control" between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention.[148]

[145]M. Jachtenfuchs and N. Krisch, 'Subsidiarity in Global Governance', (2016) 79 *Law and Contemporary Problems* 1, at 3.

[146]A. Føllesdal, 'Subsidiarity and International Human-Rights Courts: Respecting Self-Governance and Protecting Human Rights-Or Neither?', (2016) 79 *Law and Contemporary Problems* 147, at 148; M. Kumm, 'Sovereignty and the Right to Be Left Alone: Subsidiarity, Justice-Sensitive Externalities, and the Proper Domain of the Consent Requirement in International Law', (2016) 79 *Law and Contemporary Problems* 239; J. Contesse, 'Contestation and Deferrence', (2016) 79 *Law and Contemporary Problems*, 123, at 125–6.

[147]A. Cançado-Trindade, *El Derecho Internacional de los Derechos Humanos en el Siglo XXI* (2001), 386–7.

[148]*Almonacid Arrellano*, *supra* note 42, para. 124.

https://doi.org/10.1017/S092215652000028X Published online by Cambridge University Press

Since *Almonacid Arrellano*, the IACtHR has further developed the doctrine of conventionality control in subsequent cases. One case precisely corresponds to the context of the Uruguayan amnesty law. In *Gelman*, the IACtHR expanded the scope *ratione personae* of application of the control of conventionality doctrine: not only judges but also all state authorities.[149] Accordingly, the conventionality control demands that all state authorities, especially national judges, apply the ACHR and seemingly the other regional Organization of American States human rights treaties as interpreted by the IACtHR.[150] Nevertheless, as Dulitzky powerfully highlights, the IACtHR has seemingly interpreted the conventionality control in a sort of absolutist manner and, thus, the principle of subsidiarity has been replaced with integration of the international and national legal orders in Latin-America with a primacy of regional human rights law over domestic legal systems.[151] In concurrence with scholars such as Dulitzky and Contesse, this IACtHR intrusive approach, does not correspond to human rights systems; it instead corresponds to intended integration, supremacy or direct effects of its decisions which are imposed over democracies, their popular decisions and democratically elected officials.[152] This has negatively impacted the IACtHR's democratic legitimacy in several Latin-American countries. Yet, the IACtHR has been arguably legitimate in light of human rights as a global constitutionalism standard. This corresponds to the fact that the IACtHR has zealously guarded the rights of victims affected by amnesty laws and other exemption measures, even if the adoption of these measures involved democratic processes and regardless of whether these measures were adopted by democratic regimes.

In any event, the situation of the Brazilian amnesty law and related proceedings at the national level and the IACtHR clearly illustrates its intrusiveness. By examining, *inter alia*, arguments on the incompatibility of the Brazilian amnesty law with the IACtHR's jurisprudence on amnesty laws, the Brazilian Supreme Federal Court found that the said case law was inapplicable because the Brazilian amnesty law differed from previous cases decided by the IACtHR.[153] Nevertheless, the IACtHR considered that the Brazilian Supreme Federal Court did not exercise conventionality control.[154] Thus, the conventionality control to be valid seemingly needs to coincide with the interpretations and decisions of the IACtHR,[155] regardless of whether the national court is independent, impartial and corresponds to a democratic regime. However, paying close attention to the IACtHR's interpretation criteria and jurisprudential standards in order to conduct the conventionality control overall contributes to the adoption of similar approaches to amnesty laws and other exemption measures. In turn, this may enhance the legitimacy of the respective institutions in light of consistency as a global constitutionalism standard. This is particularly pressing taking into account the very large number of national courts (and other competent national authorities) across Latin America. Such a wide array of national institutions would likely lead to (very) dissimilar or inconsistent interpretations of the ACHR when exercising the conventionality control. Thus, close attention to the IACtHR's authoritative interpretation of the ACHR and other inter-American human rights treaties seems to be necessary. The IACtHR's practice arguably serves as a sort of centre of gravity to guarantee the consistent application of conventionality control across Latin America.

As scholars such as Føllesdal and Contesse have appropriately highlighted, the political context and democratic situation of the states under the jurisdictions of the IACtHR and ECtHR have

[149]*Gelman v. Uruguay*, Order of 20 March 2013, para. 66.

[150]A. Dulitzky, 'An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights', (2015) 50 *Texas International Law Journal* 45, at 52.

[151]Ibid., at 52–64.

[152]See ibid.; J. Contesse, 'The international authority of the Inter-American Court of Human Rights-a critique of the conventionality control doctrine', (2017) 21 *International Journal of Human Rights* 1, at 7–11.

[153]2008/148623, *supra* note 135, para. 42.

[154]*Gomes Lund*, *supra* note 48, para. 177.

[155]Dulitzky, *supra* note 150, at 69.

https://doi.org/10.1017/S092215652000028X Published online by Cambridge University Press

substantially changed in recent years.[156] Indeed, the expansion of the Council of Europe has meant that the ECtHR no longer exercises its jurisdiction only over Western European states which may exhibit similar high democratic credentials. In turn, Latin American countries have generally experienced processes of transition from dictatorships or authoritarian regimes into democracies and the consolidation thereof. Cuba and Venezuela are prominent exceptions. Indeed, Cuba does not accept the IACtHR's contentious jurisdiction and Venezuela withdrew from it. Thus, the IACtHR cannot exercise control over exemption measures issued by these two states which exhibit serious rule of law/democratic deficits. Conversely, most of the Latin American states over which the IACtHR exercises its contentious jurisdiction have progressively and significantly improved their democratic credentials. Hence, the generalized reluctance of the IACtHR to apply the margin of appreciation or a similar doctrine may be questioned. Thus, the IACtHR's traditional lack of deference to democratically elected national authorities (such as Parliaments and the Executive) or those officials (such as professional judges) appointed in democratic regimes may be challenged.

In terms of the tension between the IACtHR's jurisprudence on amnesty laws/exemption measures and the respect for internal democratic processes, *Gelman* is particularly illustrative. On 22 December 1986, the Uruguayan Parliament passed the Uruguayan Expiry Law. The Supreme Court of Uruguay upheld the constitutionality of this Law in 1988. The Law was subject to two referendums and remained in effect. In 1987, 58 per cent of the votes upheld the law. The second plebiscite took place on 25 October 2009. This time, by 52 per cent of the votes the law remained effective. Despite all these instances of democratic validation of the law, the IACtHR found in *Gelman* that Uruguay did not comply with its obligation to adopt domestic law (ACHR, Article 2) concerning Articles 8(1), 25, and 1(1) of the ACHR and the Inter-American Convention on Forced Disappearance of Persons (Articles I(b), III-V).[157] Accordingly, the Court ordered Uruguay to guarantee the lack of legal effects of this law due to its incompatibility with the ACHR, which hinders investigation and prosecution of individuals responsible for serious human rights violations.[158] In terms of human rights as a global constitutionalism standard, the IACtHR's legitimacy was arguably reinforced with this decision. The IACtHR sent a message of zero tolerance for exemption measures when these seriously compromise the human rights of victims of atrocities even if amnesties, statutes of limitations or pardons have 'democratic' pedigree or validation.

As the Uruguayan law concerned serious human rights violations, the IACtHR explicitly undermined the importance of the above-mentioned democratic processes:

> ... that the Expiry Law of the State has been approved in a democratic regime and yet ratified or supported by the public, on two occasions, namely, through the exercise of direct democracy, does not automatically or by itself grant legitimacy under International Law.
>
> The bare existence of a democratic regime does not guarantee, per se, the permanent respect of International Law ... The democratic legitimacy of specific facts in a society is limited by the norms of protection of human rights recognized in international treaties ... in such a form that the existence of one true democratic regime is determined by both its formal and substantial characteristics, and therefore, particularly in cases of serious violations of nonrevocable norms of International Law, the protection of human rights constitutes a impassable limit to the rule of the majority ... "control of conformity with the Convention" ... is a function and task of any public authority and not only the Judicial Branch.[159]

[156] A. Føllesdal, 'Exporting the margin of appreciation: Lessons for the Inter-American Court of Human Rights', (2017) 15 *International Journal of Constitutional Law* 359, at 360–2; Contesse, *supra* note 146, at 127–8, 134.

[157] *Gelman v. Uruguay*, Judgment of 24 February 2011, Series C., No. 221, para. 312(6).

[158] Ibid., para. 312(11).

[159] Ibid., paras. 238–9.

https://doi.org/10.1017/S092215652000028X Published online by Cambridge University Press

Therefore, the IACtHR in its jurisprudence on amnesties/exception measures traditionally has opted to be fully consistent with human rights standards over democratic accountability considerations. In turn, such a judicial stance substantially and perhaps paradoxically determines both the legitimacy strengths and the legitimacy deficits of the IACtHR's practice. The next subsection examines whether such practice has become more nuanced, and prospective scenarios ahead.

5.2 Ways ahead and winds of change

Traditionally, the IACtHR has rejected all amnesty laws and exemption measures related to serious human rights violations without further consideration of the specific contexts and regardless of the existence of democratic processes and involvement of democratic institutions. Such a lack of further consideration of contextual democracy-related considerations is criticized here. This subsection presents two potential complementary ways ahead at the IACtHR, followed by an assessment of an increasingly 'moderated' practice of the IACtHR, particularly its resolution on the pardon of former Peruvian President Alberto Fujimori.

The first step is that the IACtHR increasingly approaches each specific amnesty law and similar measures and provides substantial case-by-case consideration of the reasons why the Court may find (or not) international state responsibility for a specific exemption measure. The need for the IACtHR to differentiate diverse amnesty laws directly connects to their differing democratic legitimacy and diverse democratic pedigree, paying attention to the substantive differences among the various Latin American amnesty laws and other exemption measures.[160] As Gargarella has exhaustively and critically identified, whereas amnesty laws adopted by dictatorial or autocratic regimes such as those of Chile, Argentina, and Peru had non-existent or very low democratic legitimacy, the Uruguayan Expiry Law holds a significant level of democratic legitimacy.[161] The one-size-fits-all approach of the IACtHR to Latin American amnesty laws/exemption measures should be replaced with more nuanced and case-by-case approaches. The IACtHR should distinguish between normative provisions that lack democratic legitimacy and those that possess an important quota of democratic legitimacy.[162]

For the sake of transparency and better justification of its decisions on exemption measures, the IACtHR importantly ought to discuss the democratic legitimacy of origin or pedigree of the respective norms. The identification and analysis of the distinctive features of autocracies are advisable to verify the low or non-existent presumption of validity of exemption measures rendered by this kind of regime.[163]

As a complementary step, the IACtHR should increasingly give a major margin of deference to national jurisdictions via the use and/or adaptation of the margin of appreciation or a similar theory in cases that merit it. This does not mean that the IACtHR should stop the use of its control of conventionality theory in certain cases which suggest so.

In this scenario, Føllesdal usefully remarks that the application of the ECtHR's margin of appreciation doctrine, including the principle of proportionality, refers to a specific legislative piece or an administrative act rather than the categorization of an entire national regime as democratic or not.[164] There are justifying reasons for this.[165] First, consolidated democracies are not flawless, namely, even this type of regime may adopt exemption measures that are inconsistent with international human rights obligations. Second, the margin of appreciation doctrine, by

[160]R. Gargarella, 'No Place for Popular Sovereignty? Democracy, Rights, and Punishment in *Gelman v. Uruguay*', 2013, 7, 11, available at digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1123&context=yls_sela.

[161]Ibid., at 7–13.

[162]Ibid., at 14.

[163]Ibid., at 36.

[164]Føllesdal, *supra* note 156, at 360, 369. See also *Handyside v. United Kingdom*, Judgment of 7 December 1976, [1976] ECHR, paras. 4, 49–50.

[165]Føllesdal, *supra* note 156, at 369–71.

https://doi.org/10.1017/S092215652000028X Published online by Cambridge University Press

prompting parliaments and other officials to consider alternative measures, may complement the IACtHR's control of conventionality doctrine, incentivize more democratic processes, and provide states with certain discretional scope in accordance with state sovereignty.

Additionally, the doctrine of margin of appreciation may become an instance or manifestation of the 'consistency' standard under global constitutionalism by, *inter alia*, prompting state officials from different branches of power to behave in manners where there is a balance of national interests against coherence with international human rights standards. Thus, such a process could illustrate a path towards the goal of progressively obtaining higher levels of legitimacy. In turn, this is and/or should be a preoccupation among international and national institutions.

Whether the IACtHR will continue its very strict control of amnesty laws and similar measures remains to be seen. As Mallinder and Tseretelli have highlighted, certain judicial findings of the IACtHR indicate the progressive adoption of less interventionist approaches.[166] Concerning cases related to amnesty laws in Guatemala and Chile, the IACtHR did not annul amnesty laws but instead examined whether they were applied to the specific case to determine state international responsibility or disregard the claims.[167] In consideration of the early stage of the Justice and Peace Law (Colombia), the IACtHR indicated guiding principles for its implementation, namely, the IACtHR did not decide whether such law was an amnesty.[168] Concerning the Salvadorian amnesty law, former IACtHR President García-Sayán appropriately differentiated between amnesties adopted to end internal armed conflicts and those rendered by dictatorships.[169]

However, only in 2018 did the IACtHR have, once again, the opportunity to properly exercise control over national exemption measures. Importantly, a 2018 decision of the IACtHR may indicate a potential change of attitude and more openness to sovereign state appreciation concerning actions by democratic regimes. This took place as part of the IACtHR's judicial monitoring of the implementation of its *Barrios Altos* and *La Cantuta* judgments and in light of the pardon of former Peruvian President Fujimori. In 2009, the Supreme Court of Peru had found Fujimori responsible for crimes committed in the Barrios Altos and La Cantuta massacres, which were characterized as crimes against humanity.[170] Based on alleged humanitarian reasons (namely, Fujimori claimed decaying health), the democratically elected President Kuczynski exercised his constitutional powers to grant said pardon in December 2017. The IACtHR declined to exercise conventionality control over this pardon. It instead referred the matter to the Peruvian constitutional jurisdiction, but with some important caveats:

> Since the constitutional jurisdiction can exercise control over Fujimori's "humanitarian pardon" … this Court considers it convenient that the competent Peruvian judicial organs decide on this in light of the standards detailed in this resolution … and address the serious objections on fulfilment of the Peruvian law requirements.
>
> … Peruvian authorities must decide on whether the Peruvian legal order provides for measures other than a humanitarian pardon that protect the life and limb of Alberto Fujimori, who was convicted of serious human rights violations, in case his health and detention conditions seriously jeopardize his life. The measure that is most consistent with the principle of proportionality and victims' right to access to justice must be undertaken.[171]

[166]See Mallinder, *supra* note 21, at 662–8; N. Tseretelli, 'Emerging doctrine of deference of the Inter-American Court of Human Rights?', (2016) 20 *International Journal of Human Rights*, at 1097–112.

[167]*Tiu Tojin v. Guatemala*, Judgment of 26 November 2008, Series C., No. 190, paras. 89–90; *Garcia-Lucero et al. v. Chile*, Judgment of 28 August 2013, Series C., No. 267, paras. 152–3.

[168]*La Rochela Massacre v. Colombia*, Judgment of 11 May 2007, Series C., No. 163, paras. 192–3.

[169]*El Mozote and nearby places v. El Salvador*, Concurring Opinion of Judge García-Sayán-Judgment, 25 October 2012, Series C., No. 252, para. 4.

[170]*Fujimori*, Judgment, 7 April 2009, para. 823.

[171]*Barrios Altos and La Cantuta v. Peru*, Resolution of 30 May 2018, paras. 64, 68 (author's translation).

https://doi.org/10.1017/S092215652000028X Published online by Cambridge University Press

Thus, the IACtHR found that 'this Court is not deciding on the challenges to the observance of the legal requirements applicable to Fujimori's pardon'.[172] In any event, the IACtHR in its Resolution set up detailed standards and guidelines concerning the principle of proportionality, international human rights law, and international criminal law[173] that the Peruvian constitutional jurisdiction was expected to follow. Moreover, the IACtHR identified and listed the existence of 'serious challenges to the observance of the Peruvian legal requirements for granting "humanitarian pardons" ... which have to be analysed by the competent national judicial authorities'.[174]

Such IACtHR resolutions may be read as a combination of the margin of appreciation (subject to adaptations) and control of conventionality. The outcome is arguably 'constrained deference',[175] which evidences the IACtHR's increasing awareness of its subsidiary function.[176] Unlike other decisions on amnesty laws/exemption measures, the IACtHR did not decide on the compatibility of the pardon with the ACHR state obligations as interpreted by the IACtHR. Although this resolution is not a merits decision, such a jurisprudential move is arguably a manifestation of deference to national sovereignty and domestic jurisdiction. This may additionally be read as the IACtHR's implicit recognition of and trust in the Peruvian democratic regime and overall respect for the rule of law, which have also increasingly characterized, to a larger or lesser extent, most Latin American states in this century. However, the IACtHR established the above-mentioned detailed standards and guidelines on proportionality and international law to be followed by the Peruvian constitutional jurisdiction. And the IACtHR importantly added that:

> if needed, this Court may issue a decision on whether the national judicial decision is in accordance with the judgments [*Barrios Altos* and *La Cantuta*] or blocks state obligations to investigate, try and sanction the two cases in light of the above-mentioned standards and unduly impedes sentence execution.[177]

By exercising judicial monitoring of the implementation of its judgments, the IACtHR requested Peru, victims, and the Inter-American Commission of Human Rights to inform the Court about the progress of the constitutional jurisdiction control over Fujimori's pardon.[178]

Thus, the IACtHR continuously monitors state observance of human rights standards, in particular victims' rights. The said request to victims is, arguably, an additional instance of how an international court such as the IACtHR may exercise jurisdiction with a view towards global constitutionalism standards. In turn, this may, to some extent, help to enhance the legitimacy of the IACtHR's practice on amnesties and other exemption measures.

In any event, the Peruvian Supreme Court arguably paid close attention to the IACtHR's standards, and revoked Fujimori's pardon.[179] Interestingly, an important sector of Peruvians was supportive of this revocation.[180] The fact that the national judicial revocation of the pardon closely followed the IACtHR's guidelines, and that Peruvians generally welcomed such revocation, illustrates consistency under global constitutionalism standards, particularly coherence with international law and democratic accountability. In turn, the said support of the Peruvian population

[172]Ibid., para. 70 (author's translation).

[173]Ibid., paras. 36–53.

[174]Ibid., para. 69 (author's translation).

[175]J. Contesse, 'Case of Barrios Altos and La Cantuta v. Peru', (2019) 113 *American Journal of International Law*, at 568, 574.

[176]L. Cornejo, J. Perez-Leon-Acevedo and J. Garcia-Godos, 'The Presidential Pardon of Fujimori: Political Struggles in Peru and the Subsidiary Role of the Inter-American Court of Human Rights', (2019) 13 *International Journal of Transitional Justice*, at 342, 348.

[177]*Barrios Altos and La Cantuta*, *supra* note 171, para. 64 (author's translation).

[178]Ibid., para. 71(4).

[179]Resolution 10, Case 00006-2001-4-5001-SU-PE-01, 3 October 2018.

[180]See elcomercio.pe/politica/alberto-fujimori-53-desaprueba-anulacion-indulto-encuesta-comercio-ipsos-noticia-567562.

https://doi.org/10.1017/S092215652000028X Published online by Cambridge University Press

suggests that national decisions closely based on the IACtHR's practice on amnesties and other exemption measures may also enjoy sociological legitimacy. Accordingly, judicial practice which is consistent with international and regional standards can also be perceived or believed to be legitimate by important sectors of national societies.

Finally, attention should be drawn to the 2019 provisional measures and supervision of compliance order in *Residents of the Village of Chichupac and Neighboring Communities, Municipality of Rabinal, Molina Theissen and 12 Other Cases* v. *Guatemala* where the IACtHR requested Guatemala not to pass Bill 5377 which aims to reform the 1996 National Reconciliation Law by granting an amnesty for all serious violations committed during Guatemala's conflict.[181] The IACtHR invoked the need to protect victims' right to access justice, which confirms its strong legitimacy under human rights as a global constitutional standard. Unlike its early case law, the IACtHR, however, did not declare Bill 5377 null and void. By not nullifying the bill adopted by a democratic organ (Parliament), the IACtHR arguably avoided (to an important extent) severe questioning of its democratic legitimacy. Moreover, the IACtHR applied its conventionality control in a nuanced manner. It reckoned the importance of initiatives to address the effects of armed conflicts or violent situations, which involve complex processes.[182] Furthermore, Judge Vio Grossi's partial dissent only urged Guatemala to take into account the rise of potential violations of international obligations if/when deciding to pass Bill 5377.[183] This may be considered as a call for deference to Guatemala, which fits well with the margin of appreciation doctrine. Such calls could gain (further) support at the IACtHR in years to come.

To conclude this subsection, it should be remarked that the order on the Guatemalan case and the one concerning Fujimori, read jointly, show that the IACtHR is arguably able to calibrate the level of its conventionality control depending on the particular circumstances of the case rather than adopt a one-size-fits-all approach to amnesties and other exemption measures. Thus, whereas the IACtHR deferred the conventionality control of a pardon which only benefited one convicted and imprisoned individual (Fujimori) to the Peruvian jurisdiction, the IACtHR did not defer to the Guatemalan jurisdiction as to the possibility to pass a prospective blanket amnesty that would have benefited all the suspects and concerned all the procedural stages – precluding even investigations. Yet, even in the latter order, the IACtHR arguably moderated its interventionist approach. Otherwise, the IACtHR would have been plainly confrontational *vis-à-vis* a bill adopted by a democratically elected national organ.

6. Conclusions

The IACtHR's jurisprudence on amnesty laws/exemption measures has traditionally evidenced the strong and interventionist control exercised by the IACtHR over national jurisdictions when compared to other international human rights bodies and courts. Nevertheless, the analysis conducted here suggests that there are underlying elements of the said practice that arguably present an important quota of legitimacy in terms of the rights of victims of serious violations and consistency or coherence with principles identified in international law sources dealing with these measures. As for democratic legitimacy, the IACtHR should continue and expand its early signs towards less controlling approaches.

Victims' rights have underlain the IACtHR's jurisprudence on amnesty laws and similar measures. Importantly, developments on victims' rights are not exclusive to the IACtHR, as case law of other supranational human rights bodies shows. At the international level, the IACtHR has

[181] *Residents of the Village of Chichupac and Neighbouring Communities, Municipality of Rabinal, Molina Theissen and 12 Other Cases v. Guatemala*, Provisional Measures and Supervision of Compliance Order, 12 March 2019, Operative para. 2.

[182] Ibid., para. 39.

[183] *Residents of the Village of Chichupac et al.*, *supra* note 181, Partially Dissenting Opinion of Judge Vio Grossi, at 8 (conclusion).

https://doi.org/10.1017/S092215652000028X Published online by Cambridge University Press

exercised the highest level of control over amnesty laws/exemption measures, even nullifying national legislation. Yet, the IACtHR's case law shares common principles with human rights jurisprudence and domestic practices in terms of inadmissibility or limitation of amnesties and similar measures in cases of serious abuses. Unlike the ECtHR, the IACtHR has not traditionally deferred to sovereign state appreciation. The IACtHR has instead applied its conventionality control doctrine. Nevertheless, the IACtHR has arguably begun to moderate its original interventionist approach, which is advisable under democratic legitimacy considerations.

Thus, the IACtHR's jurisprudence on amnesty laws and other exemption measures present important elements that characterize the IACtHR's traditional scepticism to defer to state appreciation: a feature of this regional human rights practice. This is evidenced by the IACtHR's strong emphasis on victims' rights, the fight against impunity, and the application of the conventionality control doctrine. However, the said jurisprudence also presents 'global' aspects, including similarities with other international judicial interpretations of state obligations and the increasing deference to national jurisdictions.

The strong protection of victims' rights and the high level of consistency with other international law (and also domestic law) developments constitute key elements which enhanced the legitimacy of the IACtHR's jurisprudence on amnesty laws and other exemption measures. And, more generally, the legitimacy of the IACtHR as a whole has been strengthened via the said jurisprudence. With regard to it, the legitimate assessment of the IACtHR's examined practice is mostly positive. Nevertheless, the said IACtHR case law has traditionally manifested an interventionist or controlling approach and, thus, it has been counter-productive in legitimacy terms, particularly as for democratic legitimacy. Accordingly, the overall legitimacy of the IACtHR's practice on amnesties and other exemption measures has suffered a negative impact.

As previously examined in detail,[184] academic literature on backlash against and resistance towards the IACtHR has remarked on the above-mentioned democratic legitimacy deficit. Unlike the IACtHR's relevant practice, the said literature has generally pointed out the advisability or even the need for a nuanced consideration of the democratic credentials or the existence of a democratic process related to amnesties and other exemption measures as a key factor when the IACtHR examines the admissibility of such measures in atrocity cases. Yet, the IACtHR in the field examined is trying to balance its traditional approach to the protection of human rights and its subsidiary function in light of democratic accountability. This may enhance the IACtHR's democratic legitimacy among Latin American states.

[184]See above Section 5.1.

Cite this article: Perez-Leon-Acevedo JP (2020). The control of the Inter-American Court of Human Rights over amnesty laws and other exemption measures: Legitimacy assessment. *Leiden Journal of International Law* **33**, 667–687. https://doi.org/10.1017/S092215652000028X