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The Inter-American Court of Human Rights and Amnesty laws:
an assessment of the legitimacy and effectiveness of supranational adjudication

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Introduction

In 2001, the Inter-American Court of Human Rights, in the case of *Barrios Altos v. Peru*[1], ruled for the first time that certain precise and defined domestic laws were to be considered without legal effect because they were contrary to the values contained in the *Convención Americana sobre Derechos Humanos*. For the first time, an international court for the protection of human rights had established that some internal norms of a state legal system were null and void because they were contrary to an international treaty, thus setting an important precedent, which would have conditioned its future jurisprudence.

The laws in question, then, *ley 26.479* and *ley 26.492*, were not just any laws. While the second turned out to be merely an interpretative reinforcement of the first rule, the latter, however, was a real amnesty law, enacted to obscure the past and circumvent justice. As will be seen from the following pages, in fact, with the application of this legal instrument, political crimes in particular, but in reality even heavier offenses, such as war crimes, genocides, enforced disappearances, are no longer investigated and judged, allowing the real perpetrators to escape from the radar of justice. Oblivion takes over, and the search for truth, with all that that entails, is put on the back burner. The gaze is oriented towards the future, but only if one has first turned one's back on the past.

A strong and decisive position, therefore, that of the Inter-American Court of Human Rights, which will remain similar in other subsequent cases with the same subject matter. A position that will not be shaken by the different circumstances encountered, but which will constantly be based on a single vision: the *ratio* behind such national amnesty laws is contrary to the *Convención Americana sobre Derechos Humanos* and for this reason they must be considered null and void.

Clear, thus, is the aim to make respect for human rights prevail above all else, but at the same time, one cannot help but notice a behaviour that is too invasive for an international court such as the Inter-American Court of Human Rights. Indeed, the decision to define domestic laws without legal effect is an action that, at least on the surface, is outside the bounds that encapsulate the legitimate work of such a court, and this makes it the target of serious concerns and heavy criticism. Thus, the first main research question that characterises this text arises: can this interventionist jurisprudence of the Inter-American Court of Human Rights be considered legitimate?

Following on, one realises that in today's day and age, these criticisms and concerns do not stop only in this field. In fact, an argument concerning doubts about the effectiveness of the Inter-American Court of Human Rights is coming forward with increasing force. Effectiveness, then, understood as the ability to influence the internal situations of a country with its own decisions and thus obtain clear results. Another important research question, therefore, arises more than spontaneously: can the work of the Inter-American Court of Human Rights be considered effective?

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[1] IACtHR. *Barrios Altos v. Peru*. Judgement of 14th March 2001. Serie C No. 75. https://www.corteidh.or.cr/docs/casos/articulos/seriec_75_ing.pdf

With these two main objectives on the horizon, the following text, to be more precise, will be divided into four different chapters, each with its own importance and singularity.

The first chapter, although it may be considered introductory, as it will initially focus on the figure of the amnesty, allowing for an understanding of its structure and various facets, it will subsequently project the reader directly onto Latin American soil with a careful overview of the concrete application of this legal instrument. In fact, several states, 9 to be precise, including Argentina, Brazil, Nicaragua, and others, will become the focus of attention and through the retracing of the events, an attempt will be made to explain why a law granting amnesty was enacted in that particular place and time.

The second chapter will then go into more detail, unpacking the complex and unique structure of that system for the protection of human rights that favours on this territory, namely the *Sistema Interamericano de Protección de los Derechos Humanos*. The legal sources that move the wheels of this system will be analysed, thus allowing the possibility of understanding that one is dealing with a bicephalous system of legal sources, the *Declaración Americana de los Derechos y Deberes del Hombre* and the *Convención Americana sobre Derechos Humanos*, governed by the work of as many institutions, namely the Inter-American Commission of Human Rights and, indeed, the Inter-American Court of Human Rights. This will guide the reader within the complex functioning of this structure aimed at the protection of human rights otherwise almost impossible to decipher. Once put in its place, however, the real and important character of this text, the Inter-American Court of Human Rights, will take the reins of the speech and its relationship with the institute of amnesty will be considered thanks to the examination of important cases, such as the previous mentioned *Barrios Altos v. Peru*, but also *Almonacid Arellano v. Chile*, *La Cantuta v. Peru*, *Gomes Lund et al. v. Brazil*, and *Gelman v. Uruguay*. The position as well as the typical behavior of the court will then be revealed.

The third chapter, following, will represent the space for the first of the two verifications that characterize the present work: the analysis of legitimacy. In fact, an attempt will be made to determine whether the Court's traditional interventionist jurisprudence in relation to amnesty laws can be considered legitimate. To this end, time will first be given to explaining the concept of legitimacy, and then the standards of legitimacy, namely human rights, consistency, and democratic accountability, on which the entire examination will be based will be presented. Once this is completed, the analysis will come to life and the reader will be provided with answers that will allow him to have a much more complete view of the work of the court.

The fourth and final chapter will continue by focusing on the other important exam that distinguishes this work: the analysis of effectiveness. Once again, it will start from the object of verification, precisely effectiveness in this case, presenting its meaning, and then move on to analyze the different mechanisms applied by the Inter-American Court of Human Rights to obtain compliance with its decisions. Subsequently, the examination will take its deserved space and numerous cases in a state of supervision by the court or concluded and archived will be taken into consideration so as to be able to provide precise answers in the form of percentages.

Finally, some general conclusions will recall the main information and the salient results that emerged from each chapter, trying to close the discussion.

Chapter I

Amnesty: the synonym of oblivion

The term *amnesty* is certainly not a modern term. The institution of the amnesty, in fact, has deep roots in the past as its malleable nature has allowed it to be applied in different historical periods and in different legal systems. From the pharaohs of Egypt to the Ancient Greeks, from the Roman Empire to the Middle Ages, and then on for the whole period before the 1900s up to the present day, amnesty has been a very present element in the legal world[1]. But what is an amnesty and where has it been most applied in the recent past?

The purpose of the first chapter is to answer this question. We will start with a definition of amnesty, which will allow us to distinguish it from *pardon*, which are too often confused. We will then consider the two most identified categories of amnesty, given the great difficulty of being able to merge all amnesty cases into a single definition. Finally, the geographical area that in the final part of the last century proved to be the preferred area for the application of the amnesty itself will be outlined. A quick conclusion will come full circle and introduce the following chapter.

1.1. Defining Amnesty

The Greek word ἀμνηστία, literally forgetfulness or oblivion, has given life, thanks to the etymological development of the word, to what we know today as *amnesty*, that is, a cancellation of memory which in legal terms translates into annulment of the crime and punishment[2].

However, if a concrete definition wants to be found, the Black's Law Dictionary comes in handy, as it not only defines it as a legal instrument but also indicates when it can be applied and what crimes it refers to. The latter in fact describes amnesty as:

> "A pardon extended by the government to a group or class of persons, usually for a political offense; the act of a sovereign power officially forgiving certain classes of persons who are subject to trial but have not yet been convicted"[3].

Thus, it is clear that the crimes cancelled turn out to be those of a political nature while the moment in which this legal institution can be applied is that which precedes the sentence itself. Another thing, however, catches the eye when reading this definition, namely that the term amnesty is associated with that of *pardon*, which often generates confusion. The two legal terms, in fact, present great differences.

Following what Anja Seibert-Fohr in the Max Planck Encyclopaedia of Public International law says, in fact:

[1] Close, Josepha. Amnesty, Serious Crimes and International Law. 1st ed. 2019. Reprint, Taylor and Francis, 2019. https://www.perlego.com/book/1379327/amnesty-serious-crimes-and-international-law-global-perspectives-in-theory-and-practice-pdf

[2] Ntoubandi, Faustin Z. "*Chapter 2. The Concept of Amnesty*". In Amnesty for Crimes against Humanity under International Law, (Leiden, The Netherlands: Brill | Nijhoff, 2007), 9. doi: https://doi.org/10.1163/ej.9789004162310.i-252.10

[3] Garner, Bryan Andrew, "*Black's Law Dictionary*", 11th ed. (St. Paul, Minnesota: West Publishing co., 2019), s.v. "amnesty", https://www.westlaw.com/Document/Ifdbe40e4808411e4b391a0bc737b01f9/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0

"While pardons usually cancel a penalty individually after conviction, amnesties are more general in scope, applying usually to a greater number of offenders having committed specific offences, and preventing or terminating prosecutorial investigations"[4].

First of all, therefore, while the pardon is granted on an individual level, the amnesty is addressed to a larger number of individuals. Secondly, while, as has been written before, amnesty extinguishes the crime and consequently also the penalty, pardon "does not overlook the offense, but remits the punishment"[5], thus not attacking the crime in its entirety which instead will continue to produce the effects it can still have. Thirdly, the application time also has its differences. In fact, while amnesty can be guaranteed to those people on trial (or still not) but who have not yet been sentenced, precluding not only prosecution but even investigation itself, pardon can be granted only after the individual has heard the words that sanction the end of the case[6]. Finally, while political crimes, such as treason, sedition, rebellion[7], are crimes that affect amnesty, common crimes, or simply those that can be considered "an infraction against the peace of the state"[8], are those that affect pardon.

Nevertheless, the fact that amnesty refers in particular to political crimes does not mean that the latter characteristic excludes other types of crimes. In fact, following the words of Christine Van Den Wijngaert, political crime is nothing more than a "label which, as soon as a number of criteria are fulfilled, may be attached to every crime"[9]. In this sense, any crime could fall into this category if the right characteristics were respected, thus also including serious crimes such as those under international criminal law (genocide, war crimes, etc.) or serious violations against human rights such as torture or enforced disappearances[10].

One thing, however, needs to be clarified before moving on. Although in the past, amnesties granted by democratically elected governments[11] or self-amnesties proclaimed by dictatorships then standing[12] have ensured that for a long time the authors of serious offences remained protected from the action of justice, this is strongly questioned today, also thanks, as will be seen later, to the work carried out by the Inter-American Court of Human Rights and in general by the entire Inter-American System of Human Rights. Indeed, as stated by the Office of the United Nations High Commissioner for Human Rights (OHCHR):

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[4] Seibert-Fohr, Anja. "Amnesties." In *Max Planck Encyclopaedia of International Law*. Oxford Public International Law, February 2018.https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e750?rskey=Ld2RFV&result=2&prd=MPIL

[5] Weisman, Norman. "*A History and Discussion of Amnesty*", Columbia Human Rights Law Review 4, no. 2 (Fall 1972): 530. https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/colhr4&id=536&men_tab=srchresults#

[6] Ntoubandi, *supra* note 2, at 10.

[7] H.C. Black, "*Black's Law Dictionary*" revised 4th ed. (St. Paul, Minnesota: West Publishing co., 1968), s.v. "amnesty", https://www.latestlaws.com/wp-content/uploads/2015/04/Blacks-Law-Dictionery.pdf

[8] Weisman, *supra* note 5, at 530.

[9] Quoted by Close, *supra* note 1, at chapter 3.

[10] Ibid.

[11] Argentina. Senado y Camera de Diputados. *Ley 23.492*. Approved on 24 December 1986. http://servicios.infoleg.gob.ar/infolegInternet/anexos/20000-24999/21864/norma.htm; Argentina. Senado y Camera de Diputados. *Ley 23.521*. Approved on 8 June 1987. http://servicios.infoleg.gob.ar/infolegInternet/anexos/20000-24999/21746/norma.htm

[12] Chile. Junta de Gobierno. *Decreto 2191*. Approved on 18 April 1978. https://www.bcn.cl/leychile/navegar?idNorma=6849

"Amnesties are now regulated by a substantial body of international law that sets limits on their permissible scope. Most importantly, amnesties that prevent the prosecution of individuals who may be legally responsible for war crimes, genocide, crimes against humanity and other gross violations of human rights are inconsistent with States' obligations under various sources of international law as well as with United Nations policy. In addition, amnesties may not restrict the right of victims of violations of human rights or of war crimes to an effective remedy and reparations; nor may they impede either victims' or societies' right to know the truth about such violations"[13].

In this sense, international treaties and customary law oblige states to prosecute such offenses, confirming the fact that amnesties should not extend to these crimes[14] and effectively changing part of the previously mentioned description.

1.2. Two kinds of amnesties: pacification and transitional

The general definition, however, as very often happens, remains too vague and in a discourse that sees the term amnesty as the protagonist, the problem becomes even wider. Indeed, following the words of Mark Freeman, "no two amnesties - and no two contexts of amnesty - are exactly alike"[15]. In this sense, a single definition is not enough to be able to include in it all the different types of amnesty with their differences in terms of form, objective, mode of adoption and application, purpose, and so on.

Despite this, a simplified categorization is still possible. According to Josepha Close, in fact, the distinction based on the context of adoption between *pacification amnesties* and *transitional amnesties* is very common. While the former are applied in an attempt to resolve an ongoing armed conflict, the latter see their use in an effort to let a shift from an authoritarian regime to a democracy. The aim, however, remains the same since both allow the protection of certain categories of chosen people from accountability for crimes committed during a period or context that is coming to an end, both a war and an authoritarian regime precisely[16].

Therefore, certain that the big difference lies in the circumstance of adoption, all that remains is to analyze the two categories more closely, also taking into account the great doubts they create.

Speaking of the former, while such amnesties belonging to this group were once often integral parts of peace treaties concerning the resolution of international armed conflicts[17], i.e. intra-state conflicts, in the recent past there has been a great increase in their use to try to facilitate negotiations in non-international armed conflicts[18], i.e. conflicts in which one or more non-State armed groups face state forces[19]. In such a context, it is not

[13] OHCHR. *Rule of Law Tools for Post-Conflict States: Amnesties*. HR/PUB/09/1. (United Nations, 2009): 1. https://www.ohchr.org/sites/default/files/Documents/Publications/Amnesties_en.pdf
[14] International Center for Transitional Justice. *Amnesty Must Not Equal Impunity* (fact sheet). January 1, 2009. https://www.ictj.org/sites/default/files/ICTJ-DRC-Amnesty-Facts-2009-English.pdf
[15] Freeman, Mark. *Necessary Evils: Amnesties and the Search for Justice*. (Cambridge: Cambridge University Press, 2009), 13. doi:10.1017/CBO9780511691850.
[16] Close, *supra* note 1, at Chapter 3..
[17] ICRC. *The Geneva Conventions of 12 August 1949*. Ref. 0173, (2015), Article 2 (Common). https://www.icrc.org/en/doc/assets/files/publications/icrc-002-0173.pdf
[18] Ibid. at Article 3 (Common).
[19] Close, *supra* note 1, chapter 3.

difficult to understand why the role undertaken by the amnesty is often considered nothing more than that of a “bargaining tool to entice rebel groups to negotiate or commit to peace when the state is unable to defeat them through military means”[20]. However, such an application can only generate a great debate based on the eternal peace vs justice dilemma: stop the bloodshed and obtain peace even at the expense of future justice, or severely search for those responsible in the name of the rule of law and human rights, risking to cause the conflict itself to continue?

Clearly, there is no single answer, as everything is due to individual circumstances, but it is important to see the different ideas. Indeed, there are those who take sides on one side and those on the other. The proponents of *no peace without justice* are convinced that the two elements just mentioned are complementary, and without one there cannot be the other[21]. In this sense, a lasting peace, but also simply a just peace, cannot really be achieved without the presence of measures of criminal accountability[22]. The supporters of a more flexible position, instead, while recognizing the duty of accountability for serious crimes, believe that the need for peace should overcome any other consideration in the face of ongoing armed conflicts. Following the words of Jack Snyder and Leslie Vinjamuri, in fact, a strategy based only on the persecution of perpetrators of atrocities in the moment of full confrontation would risk “causing more atrocities than it would prevent, because it pays insufficient attention to political realities”[23]. In short, trying to implement universal standards of justice without the presence of those institutions that would protect them would only risk weakening the structure of justice itself as well as that of the hope of lasting peace[24]. This should not lead to believe that justice is less important than peace itself, but simply that in these cases it is better for justice to follow and not guide[25]. Practically speaking, the strategy proposed by this fringe of scholars is that based on the introduction of politically expedient bargaining, of which the amnesty is a clear example, because once an agreement is reached, efforts could be directed towards the creation of those institutions useful for the security of the rule of law and human rights in the future[26].

Turning now to the second category – transitional amnesties - , it is easy to see that the political transition process turns out to be the dominant landscape. In particular, a political transition from an authoritarian regime to a democracy. Analyzing the enormous work done by Renée Jeffery which includes 636 amnesties of different categories between 1987 and 2007[27], it can be seen that those who implement amnesties in this particular context belong to two groups in particular: top members of a regime that is falling or in need of

[20] Ibid.
[21] Bassiouni, M. Cherif. “*Searching for Peace and Achieving Justice: The Need for Accountability.”* Law and Contemporary Problems 59, no. 4 (1996): 9–28. https://doi.org/10.2307/1192187.
[22] Ibid.
[23] Snyder, Jack, and Leslie Vinjamuri. “*Trials and Errors: Principle and Pragmatism in Strategies of International Justice*.” International Security 28, no. 3 (2003): 5. http://www.jstor.org/stable/4137476.
[24] Ibid.
[25] Ibid. at 6.
[26] Close, *supra* note 1, at chapter 3.
[27] She develops 9 different categories. See Jeffrey, Renée. *Amnesties, Accountability, and Human Rights*. 2014. Reprint, University of Pennsylvania Press, Inc., (2014), 38. https://www.perlego.com/book/731870/amnesties-accountability-and-human-rights-pdf.

stability, or representatives of a new government elected immediately after the end of an authoritarian period[28]. Following this reasoning, and this time using concrete examples, while it may be logically clear why a dictatorship like Pinochet's issued a self-amnesty[29], it may be less clear why the government of Raúl Alfonsin, elected immediately after the defeat of the military junta in 1983, also granted two amnesties to the proponents of the known *Proceso de Reorganización Nacional*[30]. How is it possible that once the *evil* was defeated, there was still the need to obscure justice in the name of a new stability? Basically, in this case, there was not an ongoing armed conflict.

The reason is very simple, and it is due to the fact that, as it was mentioned above, the legal and political landscape within which this particular type of amnesties usually enters the field is represented by a *transitional justice* process, namely what can be defined as "the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes"[31]. Legal responses which aim to lay down arms and stop serious violations, provide victims with recognition and truth to their close relatives, strengthen and restore trust in nascent state institutions such as that in the rule of law, as well as attempt to obtain concrete reconciliation and lasting prevention against new violations[32]. Yet this does not fully dissect the previous doubt.

All these elements, in fact, do not seem to belong to the amnesty, or rather, it does not seem that they can be achieved through an amnesty since, as stated in the previous paragraph, the amnesty does not represent other than a clear decision to renounce justice, even in the face of serious crimes. Why then is amnesty often proclaimed at the origin of a transitional justice process?

The answer actually comes from logic. Even in this context, in fact, more often than not such an amnesty is applied as a means of bargaining, thus obtaining a role that can be understood as a necessary first step or as a complementary transitional justice tool to support other mechanisms of justice. The Argentine case, mentioned above, is a clear example of this. President Raúl Alfonsin faced by the so-called *carapintadas*, representatives of a military caste still too strong despite its political and military defeat and worried about the various legal proceedings that would have been started after the disconcerting revelations in the famous inform *Nunca Màs* published by the CONADEP Truth Commission in 1984, was forced to issue the *Ley de Punto Final* and the *Ley de Obedencia Debida*[33]. The attempt to obtain a *lesser evil* therefore, as well as the fear of a return to arms

[28] Ibid. at 41-44.
[29] For a deeper historical discussion on the subject, see: Borzutzky, Silvia. *Human Rights Policies in Chile. The Unfinished Struggle for Truth and Justice.* (London: Palgrave Macmillan, 2017)
[30] For a deeper discussion on the subject, see: Canelo, Paula. *El proceso en su laberinto: La interna militar de Videla a Bignone.* (Buenos Aires: Prometeo Libros, 2008); Canelo, Paula. *La política secreta de la última dictadura argentina (1976-1983): A 40 años del golpe de Estado.* (Barcelona: Edhasa, 2016).
[31] Teitel G., Ruti. "Transitional Justice Genealogy." *Harvard Human Rights Journal* Vol. 16 No. (Spring P., 2003): 69-94. https://harvardhrj.com/wp-content/uploads/sites/14/2020/06/16HHRJ69-Teitel.pdf
[32] UN Security Council. *The rule of law and transitional justice in conflict and post-conflict societies.* Report of the Secretary-General, S/2004/616. General Distr., 23 August 2004. http://archive.ipu.org/splz-e/unga07/law.pdf
[33] D'Alesio, Rosa. *Fuerzas Armadas. A 34 años: ¿qué fue el levantamiento carapintada de 1987?*. La Izquierda Diario, 15 April 2021. https://www.laizquierdadiario.com/A-34-anos-que-fue-el-levantamiento-carapintada-de-1987

or new bloodshed, made the search for peace and stability a winner in the tug-of-war against justice.

1.3. Amnesty laws in the Latin American continent: overview

The aforementioned cases of amnesty in Argentina and Chile, however, were not isolated cases. The enforcement of amnesty laws, as well as self-amnesty laws, in fact, becomes a regional feature when considering the area of Latin America. The impressive *The Transitional Justice Research Collaborative Dataset*, which analyzes 109 democratic transitions in 86 countries around the world from 1970-2012[34], can be of great help in confirming what has just been said. Indeed, analyzing the latter, and considering the following figure 1[35], it can be noted that Latin America has an evident tradition in the application of amnesties as primary transitional justice mechanisms, compared to any other region analyzed:

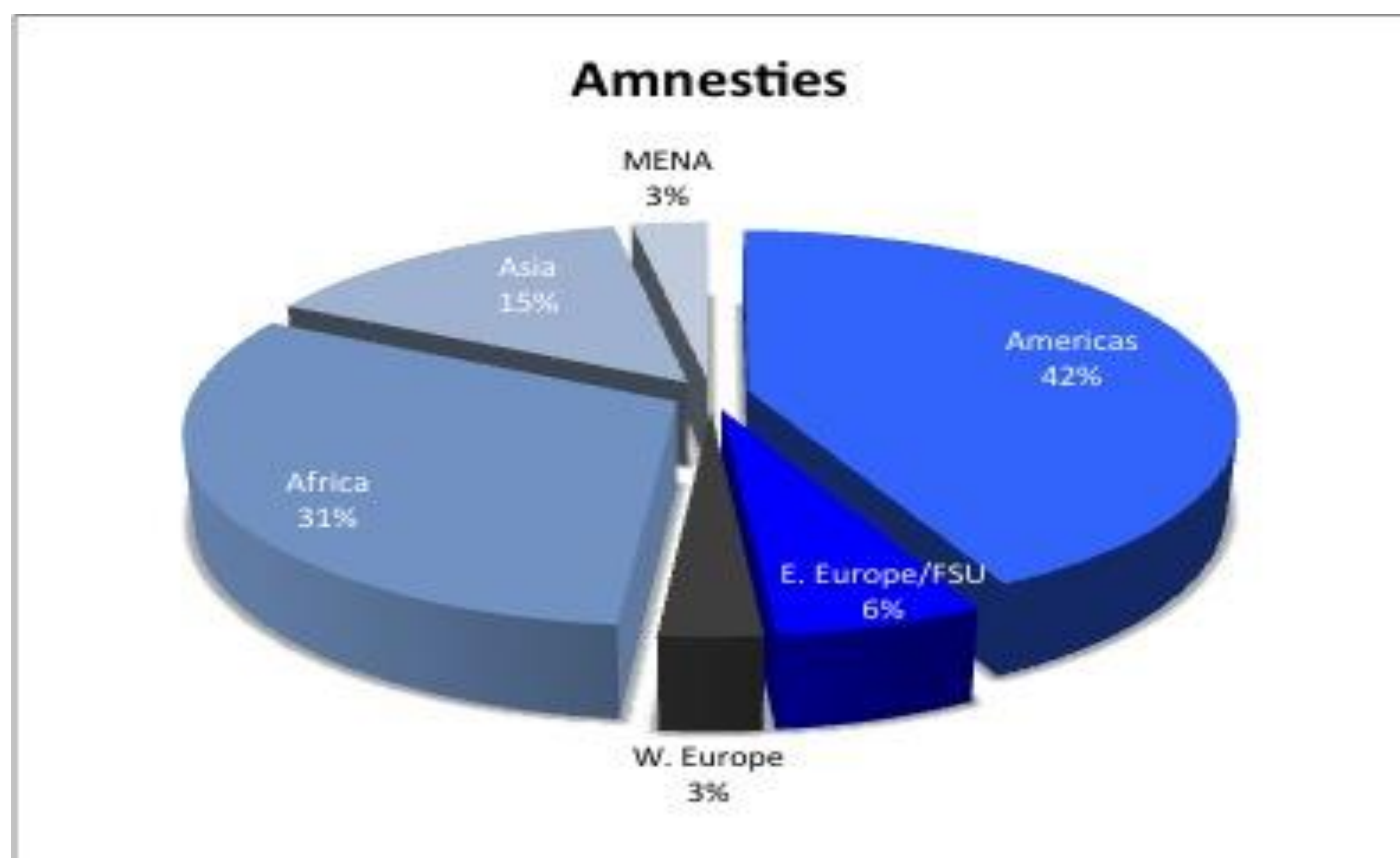

FIGURE 1 - DATA FROM "THE TRANSITIONAL JUSTICE RESEARCH COLLABORATIVE DATASET" (TJRCD) WEBSITE

Even the words of Michelangela Scalabrino, then, can also be considered to confirm the previous statement given that the latter states that with the exception of Bolivia, Ecuador, Paraguay, the Dominican Republic, Venezuela and Mexico, no country has been immune from the effects of an amnesty[36].

Having thus outlined the landscape in which to move, all that remains is to analyze these institutions of amnesties more closely by considering the different States in which they have been enacted, thus giving a

[34] Dancy, Geoff, Francesca Lessa, Bridget Marchesi, Leigh A. Payne, Gabriel Pereira, and Kathryn Sikkink. 2014. "*The Transitional Justice Research Collaborative Dataset*". Accessed date: 5/11/22. Available at www.transitionaljusticedata.com
[35] Ibid.
[36] Scalabrino, Michelangela. *Per non dimenticare. Violazioni dei diritti umani e leggi di amnistia in America latina*. (Italia: Vita e Pensiero, 2007), 13-14.

more specific picture. Despite this, however, given the exaggerated length that the speech would take when reviewing each amnesty, only the most important ones of some countries are chosen for the purpose of this discussion: Argentina, Brazil, Chile, El Salvador, Guatemala, Honduras, Nicaragua, Peru, Uruguay. Furthermore, the historical and political context, always for the same reasons, will only be described in outline. Finally, while a table will summarize the analysis of the in-text chosen laws (Table 2), two maps (South America and Central America) will give a geographical perspective of all the laws enacted according to the aforementioned *The Transitional Justice Research Collaborative Dataset*[37] (Table 3-4).

1.3.1. Argentina

Considering the first country, beside the two laws mentioned above - the *Ley de Punto Final* and the *Ley de Obedencia Debida* of 1986 and 1987[38]- another one has to be added. In order to do so, however, we must go a little further back and consider March 24, 1976, when for the first time, in the already troubled history of Argentina, all three military branches together carried out a coup d'état against the then President Isabella Perón and formed a *junta militar*, implementing from there until 1983, as mentioned above, the so-called *Proceso de Reorganización Nacional*. A process aimed at eliminating any enemy of the state, particularly identified with members of left-wing armed movements such as the *Montoneros*, but which eventually led, officially, to the forced disappearance of 8960 people[39], while unofficially, the disappearance of a number of individuals that is around 30,000. The debate on the number is still open [40]. The *junta*, therefore, was stained with unprecedented crimes and when things became particularly complicated, given the horrendous management of the Malvinas / Falkland war against the United Kingdom in 1982, and a fall of the dictatorship with a return of justice seemed imminent, the self-amnesty law number 22.924, also known as *Ley de Pacificación Nacional*, made its entrance[41]. With it, all crimes committed "*con motivación o finalidad terrorista o subversiva*"[42] between 1973 and 1982 were exempted from criminal proceedings and a voluntary oblivion of the past was sought. Interestingly enough, both sides in the conflict, therefore both members of the armed forces and left-wing *guerrillas*, were the beneficiaries. Under Alfonsin, however, that is the same who in 1986-1987 would have presented the two amnesty laws mentioned above because driven by the delicate situation, the legislative branch challenged the self-amnesty law, declaring it completely void[43]. We close the circle by taking up the two laws above, namely n. 23,492 (*Ley de Punto Final*) and n. 23,521 (*Ley de*

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[37] Dancy, *supra* note 34.
[38] See paragraph 1.2 "Two kinds of amnesties: pacification and transitional"
[39] Comisión Nacional sobre la Desaparición de Personas (CONADEP). *Informe "Nunca Más"*. September, 1984. http://www.derechoshumanos.net/lesahumanidad/informes/argentina/informe-de-la-CONADEP-Nunca-mas-Indice.htm#C6
[40] D'Andrea, Darío Silva. *¿Cuántos desaparecidos dejó la dictadura? La duda que alimenta la grieta argentina*. PERFIL, 07/02/20. https://www.perfil.com/noticias/politica/cuantas-personas-desaparecieron-en-la-dictadura-la-duda-que-divide-a-los-argentinos.phtml
[41] Argentina. Presidente de la Nación Argentina. *Ley 22.924*. Approved on 22 September 1983. http://servicios.infoleg.gob.ar/infolegInternet/anexos/70000-74999/73271/norma.htm
[42] Ibid. at Article 1.
[43] PERFIL. *Cómo se derogó la ley de 'autoamnistía': el momento en el que radicales y peronistas se alinearon*. 23/09/22. https://www.perfil.com/noticias/juicio-a-las-juntas-militares/como-se-derogo-la-ley-de-autoamnistia-el-momento-en-el-que-radicales-y-peronistas-se-alinearon.phtml

Obedencia Debida), and stating that they too had the same end, given that on June 14, 2005 the Argentine Supreme Court of Justice declared them "*incompatibles con diversas cláusulas de la Constitución Nacional*"[44].

1.3.2. Brazil

Compared with other countries of these lands, Brazil showed during the period of military dictatorship between 1964 and 1985 a perpetration of violence to a certainly lesser extent[45]. In fact, despite the clear participation of its secret services in the famous *Operation Condor*[46], the victims on green-gold soil currently recognized thanks to the report provided by the *Comissão Nacional da Verdade*, the last to be established in chronological order compared to the other Truth Commissions that characterize the Latin territory, are "only" 434[47]. Despite this, however, it is now known that Brazil "suffered a very high incidence of non-fatal torture"[48]. The dark period began in 1964 when the Armed Forces deposed President João Goulart through a coup. Interestingly enough, from then on, unlike what happened in Chile or Uruguay where power was in the hands of only one (Pinochet and Stroessner respectively), a series of different military juntas alternated until 1985 when a political distinction towards democratization, which had already begun with President Ernesto Geisel, ended positively under the presidency of General João Figueiredo[49]. At this date, the dictatorial experience is brought to an end even if the first real democratically elected President will only take place in 1990 with Fernando Collor de Mello[50]. And to this figure, that is General João Figueiredo, is connected the enactment of the self-amnesty law number 6,683 with which all persecutions concerning political crimes committed between 1961 and 1979, both for dissidents and for the military, were cancelled[51]. Although in this law violent acts classified as assault, kidnapping or terrorism were not covered, this did not lead to more accurate investigations, so much so that "the death of missing persons was not officially acknowledged"[52]. To date, the Justiça Federal do Rio de Janeiro considers the law incompatible with the international law in force to which the Brazilian state is

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[44] Corte Suprema de Argentina. *Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc. (Poblete) -causa N° 17.768*. Judgment of 14 June 2005. http://www.saij.gob.ar/corte-suprema-justicia-nacion-federal-ciudad-autonoma-buenos-aires-simon-julio-hector-otros-privacion-ilegitima-libertad-etc-poblete-causa-17768-fa05000115-2005-06-14/123456789-511-0005-0ots-eupmocsollaf.

[45] Goes, Iasmin. "Between Truth and Amnesia: State Terrorism, Human Rights Violations and Transitional Justice in Brazil." *Revista Europea de Estudios Latinoamericanos y Del Caribe / European Review of Latin American and Caribbean Studies*, no. 94, 2013, pp. 83–96. *JSTOR*, http://www.jstor.org/stable/23408423. Accessed 6 Nov. 2022.

[46] In poor terms, Operation Condor was a coordination operation between intelligence agencies of different Latin American countries funded by the US government under Richard Nixon. Driven by the *doctrine of national security*, the operation aimed to solidify the foundations of the Latin States, even with military dictatorships, in an attempt to stop the socialist and communist advance that was spreading like wildfire throughout the fragile continent. Countries such as Argentina, Chile, Bolivia, Brazil, Uruguay and Paraguay actively participated in the operation, not disdaining acts such as murders, torture, forced disappearances as tools to achieve common goals For a deeper historical discussion on the subject, see: Calloni, Stella. "*Operazione Condor. Un patto criminale*". (Italia: Zambon Editore, 2010).

[47] Comissão Nacional da Verdade. *Relatório da Comissão Nacional da Verdade*. Vol. 3. 10 December 2014. http://cnv.memoriasreveladas.gov.br/images/pdf/relatorio/volume_3_digital.pdf

[48] Skaar Elin, Jemina Garcia-Godos, and Cath Collins. *Transitional Justice in Latin America*. 1st ed. 2016: Chapter 5. Taylor and Francis, 2016. https://www.perlego.com/book/1629949/transitional-justice-in-latin-america-the-uneven-road-from-impunity-towards-accountability-pdf

[49] Goes, *supra* note 45.

[50] Ibid.

[51] Brazil. PRESIDENTE DA REPÚBLICA. *Lei 6.683*. Approved on 28 August 1979. http://www.planAltos.gov.br/ccivil_03/leis/l6683.htm

[52] Ibid., at 90.

linked[53], but looking at the past it can be strongly stated that Brazil also decided to address "the authoritarian past through avoidance, passing an amnesty law and hoping for amnesia"[54].

1.3.3. Chile

When talking about amnesty in Latin America, one cannot fail to refer to the Chilean case which sees the then dictator Augusto Pinochet as the protagonist. Having taken power against the democratically elected president Salvador Allende in 1973, Augusto Pinochet establishes a terrible and stable dictatorship that will last for 17 years until 1990[55]. According to the report of the *Comisión Nacional de Verdad y Reconciliación*, the first Chilean commission of inquiry into ascertaining the truth established in 1990, out of 2,920 cases analyzed, as many as 2,279 amounted to political violence or violations of human rights ascertained[56]. However, the number was destined to rise. Analyzing, in fact, the reports, known as Valech reports (I and II), presented by the second Chilean truth commission, i.e. the *Comisión Nacional sobre Prisión Política y Tortura* established in 2003, the reality that is found is very different:

- According to the Valech 1 report, November 2004, 23,856 males (87.5%) and 3,399 females (12.5%), for a total of 27,255 (100%), were the "*victimas directas*" of the military dictatorship[57]. In the immediately subsequent period, however, during various reconsiderations, another 1,204 cases were recognized, thus bringing the number to 28,459[58];

Despite this, however, the story does not end there. Indeed, in 2010, President Michelle Bachelet established a new commission, called *Comisión Asesora Presidencia para la Calificación de Detenidos Desaparecidos, Ejecutados Políticos y Víctimas de Prisión Política y Tortura*, which took into consideration all those cases that had been left out by the precedent commissions, thus confirming the large number of victims that this dictatorship caused. Of the 32,453 cases that were considered, 30 were defined as missing or executed political prisoners, while 9,795 as victims of political prison and torture[59]. Adding it all up, therefore, and without making any distinctions, a total that exceeds 40,000 confirmed victims is reached.

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[53] Justiça Federal - Seção Judiciária do Rio de Janeiro. *Justiça Federal julga Lei de Anistia incompatível com a Convenção Americana de Direitos Humanos*. Comunicação: 4/10/2022. Accessed date: 07/11/22. https://www.jfrj.jus.br/conteudo/noticia/justica-federal-julga-lei-de-anistia-incompativel-com-convencao-americana-de

[54] Ibid.

[55] For a deeper but short historical discussion on the subject, see: Biblioteca del Congreso Nacional de Chile. Periodo 1973-1990. Régimen militar. https://www.bcn.cl/historiapolitica/hitos_periodo/detalle_periodo.html?per=1973-1990

[56] United States Institute of Peace. *Report of the Chilean National Commission on Truth and Reconciliation*. Truth Commissions Digital Collection: Reports: Chile: Appendices. Posted by USIP Library on: October 4th, 2002. https://web.archive.org/web/20071212223844/http://www.usip.org/library/tc/doc/reports/chile/chile_1993_appendices.html#II

[57] Comisión Nacional sobre Prisión Política y Tortura. *Infome de la Comisión Nacional sobre Prisión Política y Tortura (Valech I).* (Chile: Salesianos Impresores, 2005), 471. https://bibliotecadigital.indh.cl/handle/123456789/455.

[58] Comisión Asesora Presidencial para la Calificación de Detenidos Desaparecidos, Ejecutados Políticos y Víctimas de Prisión, Política y Tortura. *Informe y Nómina de Personas Reconocidas como Víctimas en la Comisión Asesora Presidencial para la Calificación de Detenidos Desaparecidos, Ejecutados Políticos y Víctimas de Prisión, Política y Tortura (Valech II).* 2011. https://bibliotecadigital.indh.cl/bitstream/handle/123456789/600/Informe-ValechII.pdf?sequence=5&isAllowed=y

[59] Ibid., at 47.

Therefore, not many- words are needed to explain why in 1978 Augusto Pinochet felt compelled to promulgate the famous Decree 2191, i.e. a real law of self-amnesty no longer than a page. Although this amnesty referred to any person who had committed criminal acts between 1973 and 1978, in reality it was nothing more than a law that benefited the personnel of the military and security forces[60], given that according to article 2 all those who had been convicted by military tribunals, namely none other than members belonging to the previously mentioned categories, received immediate amnesty[61]. Furthermore, all those who, at the time the decree went into effect, were on trial or had already been previously convicted were exempt from this amnesty[62]. Simply put, everyone who was not in the military[63]. To date, although Augusto Pinochet was arrested in 1998 in London but never convicted in his native country, this law is still in force[64] and it is confirmed that it was invoked several times before Chilean courts, even when, after 1990, the transition to democracy had begun its journey[65].

1.3.4. Central America: El Salvador, Guatemala, Honduras, Nicaragua

The amnesty issue in these 4 countries can be linked to two events in particular: the agreements of Esquipulas I and II between 1986 and 1987[66]. In fact, El Salvador, Guatemala, Nicaragua introduced amnesty laws precisely as a consequence of these agreements, and albeit Honduras made no direct reference to them in its amnesty law number 199-87 of November 29, 1987, it is nevertheless mentioned here due to its active participation.

Before starting, however, it is good to make two clarifications. First of all, it must be specified that the following amnesty laws are not the only ones that have been enacted in these countries. Given the length that would be reached if all were considered, only amnesty laws connected to these agreements were chosen also because the latter had a considerable national and international impact compared to all the others[67]. Secondly, it must be remembered that Costa Rica also participated in these agreements and indeed played a fundamental role[68]. Despite this, no relevant amnesty laws related directly to these mentioned agreements have been found and this does not allow the state of Costa Rica to be taken into consideration in this specific discussion.

Torn apart by internal military conflicts between rebels and government forces very often supported by the United States which raged on a stage characterized by the Cold War, the countries of Central America, with

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[60] Norris, Robert E. "*Leyes de impunidad y los derechos humanos en las Américas: una respuesta legal*". Revista IIDH, , 1992 p. 47-121. http://biblioteca.corteidh.or.cr/tablas/R06852-3.pdf
[61] Chile, *supra* note 12, at Article 2.
[62] Ibid., at article 1.
[63] Norris, *supra* note 60, at 49-52.
[64] Dancy, *supra* note 34, Browse Data at "*Amnesties-Chile*", (1978). Accessed date: 19/11/22.
[65] Amnesty International. *Cile di Augusto Pinochet: fatti e cifre*. 3 september 2003. https://www.amnesty.it/cile-di-augusto-pinochet-fatti-e-cifre/#:~:text=Nel%20marzo%201978%2C%20il%20decreto,e%20il%2010%20marzo%201978.
[66] Rojas Aravena, Francisco. *El proceso de Esquipulas : el desarrollo conceptual y los mecanismos operativos*. Estudios Internacionales, 22(86), (1989): 224–247. https://doi.org/10.5354/0719-3769.1989.15597
[67] For a deeper analysis of other amnesty laws enacted in these countries, see: Norris, Robert E. "*Leyes de impunidad y los derechos humanos en las Américas: una respuesta legal*". Revista IIDH, , 1992 p. 47-121 . http://biblioteca.corteidh.or.cr/tablas/R06852-3.pdf
[68] Rojas Aravena, *supra* note 66.

the goal of putting an end to these atrocities , demonstrated to the world great international cooperation. In fact, despite the results came very late[69], these agreements can be considered as a first big step in reducing the "mistrust and the perceived risk involved in pursuing peace unilaterally"[70]. Simply put, these peace initiatives changed everything by changing nothing. In fact, especially after the signing of the *Procedimiento para Establecer La Paz Firme y Duradera en Centroamerica* (Esquipulas II), structurally nothing changed but showed how Central America now wanted to move towards a path of peace and no longer war[71], having objectives that had to be achieved within a set deadline[72].

Among these objectives was that of *Reconciliación nacional*, to be achieved through three elements, namely the *Diálogo*, the *Amnístia*, and the creation in each country of a *Comisión Nacional de Reconciliación* with the function of monitoring the reconciliation process[73]. Just about the topic of amnesties we can read:

> "*En cada país centroamericano, salvo en aquellos en donde la Comisión Internacional de Verificación y Seguimiento determine que no es necesario, se emitirán decretos de amnistía que deberán establecer todas las disposiciones que garanticen la inviolabilidad de la vida, la libertad en todas sus formas, los bienes materiales y la seguridad de las personas a quienes sean aplicables dichos decretos.* [...]"[74]

Translated, it was precisely these agreements that, where necessary, encouraged the enactment of these laws.

Starting with El Salvador, the law resulting from these aforementioned agreements was *Decreto No. 805* approved on October 27, 1987 by the Legislative Assembly under President José Napoleón Duarte, the first democratically elected president after almost 50 years in 1984[75]. A law granting amnesty to all persons who had committed political crimes in the past, common crimes related to political crimes, or common crimes when no less than 20 people intervened[76]. A law aimed at both parties, therefore both state agents and guerrillas, but which in particular was negatively related to the latter. First of all, while the amnesty was automatic and immediate for anyone who was not a rebel[77], the same was not the case for those considered subversives, who, among other things, only had 15 days to turn themselves in[78]. Secondly, there was a great deal of distrust in the effectiveness of the amnesty itself. The *Comisión Interamericana de Derechos Humanos*, in fact, declared in 1987 that many feared the death caused by the death squads once they surrendered[79]. At

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[69] Oliver, Johanna. "*The Esquipulas Process: A Central American Paradigm for Resolving Regional Conflict*". Ethnic Studies Report 17, no. 2 (1999). https://web.archive.org/web/20110722031032/http://www.ices.lk/publications/esr/articles_jul99/ESR-Oliver.pdf
[70] Ibid., at 155.
[71] Rojas Aravena, *supra* note 66.
[72] Oliver, *supra* note 69.
[73] Acuerdo de Esquipulas II. Procedimiento para establecer la paz firme y duradera en Centroamérica. Signed August 7, 1987. ACNUR (2004): 2. https://www.acnur.org/fileadmin/Documentos/BDL/2004/2530.pdf
[74] Ibid.
[75] Norris, *supra* note 60, at 92-94.
[76] El Salvador. Asamblea Legislativa de la Republica de El Salvador. *Decreto No. 805*. Article 1. Approved on 27 October 1987. https://www.jurisprudencia.gob.sv/DocumentosBoveda/D/2/1980-1989/1987/10/88872.PDF
[77] Norris, supra note 60, at 94-97.
[78] El Salvador, *supra* note 76, at Article 1.
[79] Comisión Interamericana de Derechos Humanos. *Informe Anual 1987*. OEA/Ser.L/V/II.74, Doc. 10 rev. 1, (16 septiembre 1988): Chapter 4 "El Salvador". http://www.cidh.oas.org/annualrep/87.88sp/cap.4b.htm

the end of the 15 days, no guerrillas had formed up[80]. Quite interesting is the fact that the Supreme Court of Justice was asked to evaluate the constitutionality of this amnesty as it was considered contrary to various articles of the Salvadoran Constitution[81]. To date, after 35 years, the Court has still not expressed itself[82].

The Guatemalan version of these amnesties resulting from the Esquipulas II Agreement was *Decreto No. 71-87* adopted on October 24, 1987 by Congress under the democratically elected President Cerezo immediately after the end of the last military junta in the hands of General Mejia Victores[83]. It decreed amnesty for any person who had previously committed political crimes and "related common crimes against the political order of the State”[84]. Already from these words it can be understood how in reality this law was particularly in favor of state agents, weighing heavily on the rebels, who, among other things, had only 180 days to surrender, lay down all their arms, and turn themselves in[85]. Furthermore, Americas Watch found that the amnesty "proved meaningless in the Guatemala context, as authorities continued to eliminate their opponents, rather than jail them"[86], and that the lack of even the most basic human rights guarantees for those who accepted was evident[87].

Turning to Honduras, as mentioned above, the *Decreto 199-87* taken into consideration cannot be considered strictly a consequence of the Esquipulas I-II Agreements of 1986-1987 as it does not make direct reference to them. Despite this, however, since it was issued on November 29, 1987[88] and since the then President José Simón Azcona del Hoyo, democratically elected, played an important role in the success of the agreements mentioned above[89], it can be said that this law was the result of the atmosphere that these peace initiatives were creating. Reading the preamble, in fact, the Esquipulas I-II Agreements are not mentioned at all, while the enactment of the same amnesty is justified for adverse socio-economic reasons and as an attempt to ensure "*la concordia entre los hondureños, garantizandoles el pleno ejercicio de los derechos constitutionales*”[90]. What is important to understand, however, is that with this decree broad and unconditional amnesty was granted to all persons who had committed, prior to the date of issue of the same decree, political or common crimes connected[91]. The term *all people* clearly also referred to members of government forces or members of the 3-16 Death Squad, created in 1980 by the infamous General Gustavo Alvarez Martínez[92], and this of course did not go unnoticed. The relatives of the victims, in fact, demonstrated against this law considering it a

[80] Norris, *supra* note 60, at 94-97.
[81] Ibid., at 97-99.
[82] Ibid.
[83] Ibid., at 69-71.
[84] Dancy, *supra* note 34. Browse Data at “*Amnesties-Guatemala*”, (1987) Decree 71-87. Accessed date: 13/11/22.
[85] Norris, *supra* note 60, at 69-71.
[86] Simon, Jean-Marie. *Closing the Space: Human Rights in Guatemala May 1987-October 1988*. Americas Watch Report. (New York: November 1, 1988): 103. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336528
[87] Ibid., at 104.
[88] Norris, *supra* note 60, at 62-65.
[89] Rojas Aravena, *supra* note 66.
[90] CEDOH, *Boletín Informativo*. No.80, (December 1987). http://www.cedoh.org/Biblioteca_CEDOH/archivos/00977%20CEDOH%20BOLETIN%20DICIEMBRE%201987%20No%2080.pdf
[91] Ibid., at 7.
[92] Norris, *supra* note 60, 60-61.

representation of "*codardía moral*"[93], but they had no immediate effect. To date, however, thanks to the decision of the Supreme Court of Honduras, the law has been partially annulled[94].

Finally, the last country party to the Esquipulas I-II Agreements to be considered is Nicaragua. A country that was the playground of one of the longest-lasting military dictatorships in Latin America, namely that of the Somoza family from 1937 to 1979[95]. In this case, two laws are taken into consideration: *Ley No. 33* and *Ley No. 36* closely related to the previous one. The first mentioned, enacted on December 14, 1987, regulated the granting of amnesty to all those who at the time of its enactment were detained, tried, or convicted of crimes in violation of the *Ley de Mantenimiento del Orden y de Seguridad Pública* of July 20, 1979 and its reforms[96], namely the law that the *Junta de Gobierno de Reconstrucción Nacional de la República de Nicaragua* had promulgated immediately after the end of the Somoza dictatorship[97]. This law, however, provided for its implementation conditioned by elements present in article 3[98]. According to the latter, in fact, the law would enter into force only when the *Comisión Internacional de Verificación y Seguimiento*, an institution created precisely thanks to the agreements mentioned several times, had verified the fulfillment of two conditions:

- Central American governments were to prevent the use of their territory and were not to provide assistance to any organization whose objective was to destabilize the state of Nicaragua;
- regional and extra-regional governments were to cease providing any assistance to the irregular forces in force against the State of Nicaragua;

However , these conditions were not respected and therefore the law never produced its effects . However, the latter laid the foundations for *Ley No. 36*, issued on March 26, 1988 thanks to the *Acuerdo de Sapoá* between the government of Nicaragua and the Resistance[99], which granted a general and gradual amnesty to those convicted of violating the aforementioned law and to all members of the Somozist army who had committed crimes before July 19, 1979[100]. Some prisoners were freed, but the ceasefire, a fundamental element for being able to fully apply the law, was never reached, and therefore also in this case this amnesty did not find full application[101].

1.3.5. Peru

With the discussion on the amnesty in Peru we enter the 90s of the last century. The undisputed protagonist of

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[93] CEDOH, *supra* note 90, at 8.
[94] Dancy, *supra* note 34. Browse Data at "*Amnesties-Honduras*", (1987) Decree 199-87. Accessed date: 16/11/22.
[95] For a deeper historical discussion on the subject, see: Blanco, Ferrero and María Dolores. "*La Nicaragua de los Somoza 1936-1979.*". (Huelva, Spain: Universidad de la Huelva, 2010)
[96] Republica de Nicaragua. *La Gaceta*. Año XCI, No. 267. (Managua, published on 14 December 1987): 3065-3066. http://legislacion.asamblea.gob.ni/gacetas/1987/12/g267.pdf
[97] Republica de Nicaragua. La Gaceta. Año LXXXIII, No. 1. (Managua, published on 22 August 1979): 5-6. http://legislacion.asamblea.gob.ni/gacetas/1979/8/g1.pdf
[98] Republica de Nicaragua, *supra* note 96.
[99] Ibid.
[100] Republica de Nicaragua. *La Gaceta*. Año XCII, No. 78. (Managua, published on 27 April 1988): 449-450. http://legislacion.asamblea.gob.ni/gacetas/1988/4/g78.pdf
[101] Norris, *supra* note 60, at 101-103.

these years was Alberto Fujimori, democratically elected president in 1990, who however turned out to be a terrible dictator who controlled the country until 2000. In fact, in 1992, thanks to an autocoup, he closed the *Congreso de la Republica*, established the *Gobierno de Emergencia y de Reconstrucción Nacional*, and instituted a strongly influenced constituent assembly which led to the birth of the Constitution (1993) which still today appears to be the one in force in the country [102]. This period, however, also goes down in history for the constant clash between government forces and the Maoist- Marxist guerrillas of the *Sendero Luminoso*[103], stage on which the enactment of the self-amnesty law number 26.479 rises, closely linked to a particular event. In April 1995, Judge Antonia Saquicuracy of the Sixteenth Criminal Court of Lima, summoned by then prosecutor of the Office of the Forty-first Provincial Criminal Prosecutor of Lima, Ana Cecilia Magallanes, began a formal investigation into the events that are known today as related to the Barrios Altos massacre of November 3, 1991 for a total of 19 victims [104]. However, as soon as the investigations took place, the Congress of Peru, without announcement and discussion, issued the aforementioned law on June 14, 1995, effectively allowing members of the military, police, or civilian forces to escape responsibility for any

"*hechos derivados u originados con ocasión o como consecuencia de la lucha contra el terrorismo y que pudieran haber sido cometidos en forma individual o en grupo desde Mayo de 1980 hasta la fecha de la promulgación de la presente Ley*"[105].

In fact, according to article 6, all judicial proceedings relating to crimes covered by the amnesty were definitively archived[106]. This law is then followed by another, number 26.492, which, being considered as an interpretative law of the first, does nothing but reinforce the provisions of the former and broaden its sphere of application[107]. In this sense, ley 26.492 cannot be considered a proper amnesty law.

The beneficiaries were above all the members of the famous *Colina Group*, a death squad that under the Fujimori presidency became the architect of torture, disappearances, and extra-judicial murders[108]. Nowadays, Fujimori is in prison waiting to be released again[109], while the law is still in force albeit partially annulled by a decision of the Peruvian Supreme Court in 2007 [110].

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[102] Vergara, Alberto, and Aaron Watanabe. *Delegative Democracy Revisited: Peru Since Fujimori*. Journal of Democracy 27, no. 3 (2016): 148-157. doi:10.1353/jod.2016.0054
[103] Ibid.
[104] IACtHR. *Barrios Altos v. Peru*, supra note 1 (Introduction).
[105] Peru. Presidente de la Republica. *Ley 26.479*. Approved on 14 June 1995. Article 1. https://docs.peru.justia.com/federales/leyes/26479-jun-14-1995.pdf
[106] Ibid., at Article 6.
[107] Peru. Presidente de la Republica. *Ley 26.492*. Approved on 28 June 1995. https://docs.peru.justia.com/federales/leyes/26492-jun-30-1995.pdf
[108] Immigration and Refugee Board of Canada. *Peru: The Colina Group, its objectives, its relation to the army, its founding date, its leaders and its actions since 1995*. Canada, 6 June 2000, PER34490.FE. https://www.refworld.org/docid/3df4be9114.html
[109] De La Quintana, Jimena. *El expresidente de Perú Alberto Fujimori saldrá nuevamente en libertad*. CNN, 17 March 2022. https://cnnespanol.cnn.com/2022/03/17/fujimori-libertad-carcel-peru-orix/. Fujimori was arrested in 2007 and received a 25-year sentence. In December 2017 he received a pardon at the hands of the then President Pedro Pablo Kuczynski thus leaving prison. Immediately afterwards, however, in October 2018, the Supreme Court of Peru canceled the pardon, forcing Fujimori to return to prison. In the current year, the Constitutional Tribunal of Peru gives rise to a writ of habeas corpus in favor of the ex-president, who, therefore, at the venerable age of 84, will soon be released from prison barring the latest upheavals.
[110] Dancy, *supra* note 34. Browse Data at "*Amnesties-Peru*", (1995). Accessed date 20/11/2022.

1.3.6. Uruguay

Finally, looking at the Uruguayan state, one realizes that is dealing with a state which, although it did not experience violent military repression like Argentina or Chile, boasts the record of having had the highest number of political prisoners per capita in the world[111]. Certainly the instrument of torture, for example, became a "*herramienta principal del régimen, en una verdadera obsesión de los militares, en una práctica sistemática, cotidiana, en un instrumento de poder y terror*"[112], but according to Norris during the military dictatorship "only" 90 people died of torture, while 167 disappeared into thin air[113]. On the other hand, the number of those who were arrested, around 60,000[114], and those forcibly exiled, around 380,000 or 14% of the population at the time, was very high[115]. However, without a historical location, these data lose their value.

The period in question goes from 27 June 1973 to 1 March 1985, i.e. that period of time of a civil-military dictatorship. The starting date coincides with the closure of the Parliament by the armed forces which at that moment supported the newly elected president Juan Maria Bordaberry, but the same must only be considered as the culmination of a dictatorial process that had begun to create its foundations already in the previous administrations of Jorge Pacheco Areco (1966-1971) and of Bordaberry himself, from 1971 until the coup[116]. Suffice it to say that as early as 1968, the Areco government, in the midst of the fight against the Tupamaros rebels, subjected Uruguay to the application of the *Medidas Prontas de Seguridad*, namely emergency powers that allowed the executive to temporarily suspend certain constitutional guarantees[117]. Guarantees that began to lose their value more and more until they lost it completely during the first mentioned dictatorship[118].

Since 1980, however, things begin to change. First of all, a popular referendum, called by the military-backed government itself to approve or deny a constitution that would have institutionalized military power, shows that dictatorship was not well liked with 57% of voters against such an initiative[119]. The year 1983, then, is characterized by strong demonstrations, while 1984 becomes the theater of the *Pacto del Club Naval*[120]. The latter ratifies the military's acceptance of a return to civilian government, which will take shape under the hands of the elected president Julio María Sanguinetti in 1985[121]. Precisely during his first mandate, 1985-

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[111] Norris, *supra* note 60, at 84.

[112] Artucio, Mercedes and Alejandro Artucio. *La amnistía en Uruguay : efectos jurídicos, fundamentos, alcance y aplicación.* Secretariado Internacional de Juristas por la Amnistía en Uruguay (SIJAU). (1983): 2. https://sitiosdememoria.uy/sites/default/files/2021-11/la-amnistia-en-uruguay_mercedes-artucio-alejandro-artucio_f6-1983.pdf

[113] Ibid.

[114] Ibid.

[115] Schelotto, Magdalena. *La dictadura cívico-militar uruguaya (1973-1985): la construcción de la noción de víctima y la figura del exiliado en el Uruguay post-dictatorial.* Nuevo Mundo Mundos Nuevos in Open Edition Journals, 2015. https://doi.org/10.4000/nuevomundo.67888

[116] Lessa, Francesca. *Il golpe Uruguayano*. Interview of Alfredo Sprovieri. Archivio Desaparecido, 2021. https://www.archiviodesaparecido.com/il-golpe-uruguayano/

[117] Kierszenbaum, Leandro. "Estado peligroso" y Medidas Prontas de Seguridad: Violencia estatal bajo democracia (1945-1968). Contemporanea. Historia y problemas del siglo XX | Año 3, Volumen 3, 2012, ISSN: 1688-7638. http://www.geipar.udelar.edu.uy/wp-content/uploads/2014/10/Contemporanea03_2012-11-23-webO-05.pdf

[118] Lessa, *supra* note 116.

[119] Schelotto, *supra* note 115.

[120] Ibid.

[121] Ibid.

1990, the two laws that are considered in this case were born: *Ley 15.737* of 8 May 1985 and *Ley 15.848* of 22 December 1986. Interestingly, while the first can be considered a real amnesty, the second must be understood as a prescription law which however, in reality, permitted a fictitious amnesty. Interesting, moreover, because the first refers only to political prisoners[122], while the second is aimed only at members of the armed forces and police who committed crimes before March 1, 1985[123]. Both, then, owe their enactment to political pressure. The first, in fact, was promulgated thanks to strong pressure from the mothers of political prisoners who since 1982 had been demonstrating incessantly for their release, while the second thanks to the will of the armed forces themselves when the possibility that its members could be summoned by non-military courts was about to emerge[124].

Dwelling on *Ley 15.848*, however, does not imply a waste of time. As mentioned, we are not faced with an amnesty law, at least from a legal point of view, but with a prescription law. In fact, with this law the criminal act remained alive, but the criminal responsibility disappeared[125]. In this sense, all still could give rise to civil actions for compensation or administrative penalties such as the denial of promotions, but this turned out to be only theoretical[126]. Up until 1989, in fact, of the 18 civil actions that had been filed against the state, none had received a sentence, while many officers, despite being accused of human rights violations, still received promotions.[127].

To date, *Ley 15,737* is still valid, while *Ley 15,848*, after various vicissitudes, was partially nullified by the Supreme Court of Uruguay on various occasions during the 2000s[128].

[122] Uruguay. El Senado y la Cámara de Representantes de la República Oriental del Uruguay. *Ley 15.737*. Approved on 8 March 1985.
https://legislativo.parlamento.gub.uy/temporales/leytemp1696380.htm#:~:text=%2D%20Decl%C3%A1ranse%20extinguidas%20de%20pleno%20derecho,virtud%20de%20los%20delitos%20amnistiados.
[123] Uruguay. El Senado y la Cámara de Representantes de la República Oriental del Uruguay. *Ley 15.848*. Approved on 22 december 1986. https://www.impo.com.uy/bases/leyes/15848-1986
[124] Norris, *supra* note 60, at 85.
[125] Ibid., at 90.
[126] Ibid.
[127] Ibid.
[128] Dancy, *supra* note 34. Browse Data at "*Amnesties-Uruguay*", (1986). Accessed date 21/11/2022.

State	Law / Decree Number	Year	Type of Law	Issuing Institution
Argentina	Law 22.294 (Ley de Pacificación Nacional)	1983	self-amnesty	Junta Militar
	Law 23,492 (Ley de Punto Final)	1986	amnesty	Democratically elected government
	Law 23,521 (Ley de Obedencia Debida)	1987	amnesty	Democratically elected government
Brazil	Law 6.683	1979	self-amnesty	Junta Militar
Chile	Decree 2191	1978	self-amnesty	Junta Militar
El Salvador	Decree 805	1987	amnesty	Democratically elected government
Guatemala	Decree 71-87	1987	amnesty	Democratically elected government
Honduras	Decree 199-87	1987	amnesty	Democratically elected government
Nicaragua	Law 33 Never created legal effects	1987	amnesty	Democratically elected government
	Law 36 Incomplete implementation	1988	amnesty	Democratically elected government
Peru	Law 26.479	1995	self-amnesty	Dictatorship coming from an autogolpe
Uruguay	Law 15.737	1985	amnesty	Democratically elected government
	Law 15.848	1986	amnesty	Democratically elected government

TABLE 1 – DATA FROM "THE TRANSITIONAL JUSTICE RESEARCH COLLABORATIVE DATASET" WEBSITE AND ELABORATED BY THE AUTHOR

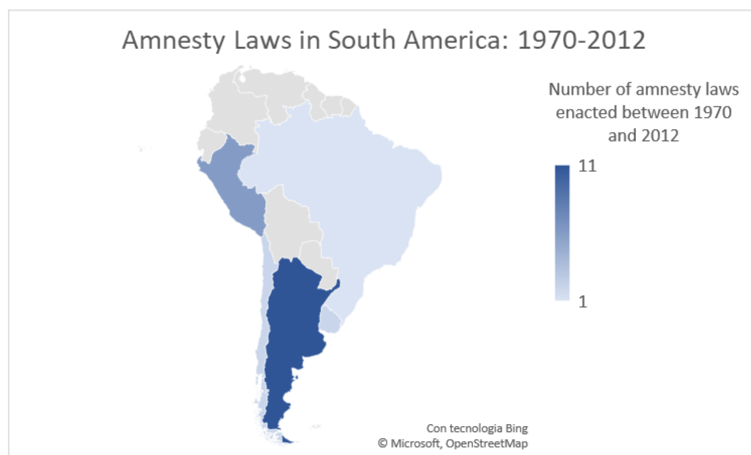

FIGURE 2- DATA FROM THE TJRCD WEBSITE AND ELABORATED BY THE AUTHOR

State	Number of amnesty laws enacted between 1970 and 2012
Argentina	11
Brazil	1
Chile	2
Peru	6
Uruguay	2

TABLE 2- DATA FROM THE TJRCD WEBSITE AND ELABORATED BY THE AUTHOR

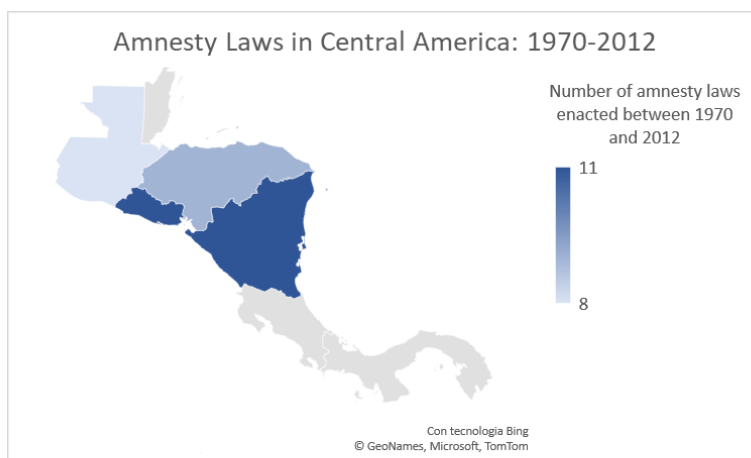

FIGURE 3- DATA FROM TJRCD WEBSITE AND ELABORATED BY THE AUTHOR

State	Number of amnesty laws enacted between 1970 and 2012
El Salvador	11
Guatemala	8
Honduras	9
Nicaragua	11

TABLE 3- DATA FROM THE TJRCD WEBSITE AND ELABORATED BY THE AUTHOR

1.4. Conclusions

The character of this chapter - the amnesty - has therefore been extensively described. A legal institution, not to be confused with other instruments such as the pardon, which in itself seems to have only negative sides. The latter, in fact, allows oblivion to take over with a particular focus on eliminating all traces of past political crimes. As we have seen, however, the latter crimes are not the only ones involved since, given the characteristics, any crime, even those under international criminal law such as genocide or war crimes, can fall into the category of offenses that can be canceled with the amnesty.

Viewed this way then one would wonder why such a tool should be used. The distinction of the same figure in *pacification amnesty* and *transitional amnesty*, however, gives us an answer and allows us to have a broader vision of the subject. Sometimes the only solution to resolve an ongoing conflict or to allow a peaceful transition towards democracy turns out to be a compromise. And the compromise is precisely represented by this figure called amnesty.

The purpose of the chapter was not to judge positively or negatively its application and emanation, but it was to define its characteristics, the contexts in which it is applied, and the dimensions of the consequences that are created. With this in mind, it was possible to state which is the geographical area in which this institution appears to have been most applied, at least in the recent past. The last paragraphs, in fact, demonstrate how Latin America seems to have been the perfect theater for the action of the amnesty. Making a quick calculation, in 9 states analysed, between 1970 and 2012, we arrive at the impressive total number of amnesties issued equal to 61. Each with its reasons and its context, but all characterized by only two categories of subjects emanators: a dictator or a military junta seeking stability and future leniency for its actions, or a democratically elected government constrained by strong external and internal pressures.

One other thing, however, unites these laws. As mentioned at the beginning, to date, the purpose and principle behind them has been questioned by one institution in particular: the Inter-American Court of Human Rights[129]. The latter and the Inter-American system of human rights in its entirety will be the protagonists of the next chapter.

[129] See in this text at pages 9-10.

Chapter II
The Inter-American Court of Human Rights Amnesty Jurisprudence

The chapter that has just ended has demonstrated how amnesty appears to be a particularly present element in the recent history of most Latin American countries. As we have seen, in fact, too often the completion of the transition toward democracy has come at the price of this legal instrument. Equally, however, starting from the 2000s, the latter became a very discussed topic also in the chambers of the Inter-American Court of Human Rights (henceforth IACtHR). Of course, it is true that already in 1992, the Inter-American Commission on Human Rights (hereinafter IACHR) expressed its opinion on the matter[1], but it is only with the historic decision of the IACtHR in *Barrios Altos v. Peru* in 2001 that the amnesty legislation really reaches the regional human rights agenda[2].

Despite this, one cannot focus only on the analysis of the IACtHR. The latter, in fact, is nothing more than a gear in a much more complex system, namely the Inter-American one for the Protection of Human Rights, which must be taken into consideration if a complete study is what one is looking for.

Following this reasoning, this chapter will develop as follows. First, the legal basis on which the functioning of the Inter-American System for the Protection of Human Rights is based will be considered. This will allow us to describe not only the "helper" of the IACtHR, i.e. the Inter-American Commission on Human Rights (henceforth IACHR), but also the IACtHR itself, given that these two entities can be considered as the foundation of this system[3]. A quick comparison, then, will close their presentation. Once positioned in the system, however, the IACtHR will be studied more thoroughly in the next paragraph, and in particular its relationship with the amnesty laws is what will be taken into account. To this end, an analysis of a series of decisions of the IACtHR on the aforementioned issue will be carried out, thus completing the speech. The usual conclusions will close the chapter.

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[1] Binder, Christina. "The Prohibition of Amnesties by the Inter-American Court of Human Rights." *German Law Journal* 12, no. 5 (2011): 1203–30. doi:10.1017/S2071832200017272.
In 1992, the IACHR stated that the amnesty laws of Argentina and Uruguay are inconsistent with the human rights obligations of those states.
[2] Ibid. at 1208-1209.
[3] IJRC. *Inter-American Human Rights System*. In International Justice Resource Center website. Accessed on 24/11/2022. https://ijrcenter.org/regional/inter-american-system/

2.1. Legal sources of the Inter-American Human Rights System

As is well known, human rights are protected by law at both the international and regional levels, as well as at the domestic level. Leaving aside the last level mentioned, intended for the competences of the national courts or tribunals of each State, and leaving apart also the first, or global system for the protection of human rights, in which the main player is certainly the United Nations (UN)[4], what results fundamental for our discussion is the second level, i.e. the regional system for the protection of human rights.

To date, there are 3 major regional systems for the protection of human rights, and each with a well-defined area of action: Africa, Europe, and America[5]. The latter, which is called *Sistema Interamericano de Protección de los Derechos Humanos* (SIDH), is the one that is about to be examined.

The framework within which these protection mechanisms move their gears is the *Organización de los Estados Americanos* (OEA), established with the *Carta de la Organización de los Estados Americanos* signed in Bogota in 1948[6] and which currently has 35 States members[7]. Year and place, which must be considered very important since they are the same in which the *Declaración Americana de los Derechos y Deberes del Hombre* (hereinafter *Declaración*) was adopted, immediately recognizing that "*la protección internacional de los derechos del hombre debe ser guía principalísima del derecho americano en evolución*"[8]. Recognized by all member states of the OEA and with a simple and linear structure, thanks to the presence of only two chapters[9], this declaration is not the only written legal foundation on which the SIDH is based.

About twenty years later (1969), in fact, at the close of the Inter-American Specialized Conference on Human Rights, the *Convención Americana sobre Derechos Humanos* (hereinafter *Convención*) was adopted in San José, Costa Rica[10], entering into force only in 1978[11]. The latter, however, although it turns out to be an international treaty created within the framework of the OEA, is actually independent of it, and therefore, for one reason or another, not all 35 states have adhered to or have ratified it[12].

As can be seen in the table at the end of this paragraph, in fact, of the 35 OEA states, the two big western democracies USA and Canada plus communist Cuba and problematic Venezuela, along with other small

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[4] Heyns Christof, David Padilla and Leo Zwaak, *A schematic comparison of regional human rights systems*, SUR (international journal on human rights), 4 (2006). https://sur.conectas.org/en/schematic-comparison-regional-human-rights-systems/
[5] Ibid.
[6] Ninth International Conference of American States. *Carta de la Organización de los Estados Americanos*. (A-41). Bogotá, Colombia, 1948. https://www.oas.org/es/sla/ddi/docs/tratados_multilaterales_interamericanos_A-41_carta_OEA.pdf
[7] Sánchez-Bayon, Antonio, Gloria Campos García de Quesvedo and Carlos Fuente Lafuente. *Sistemas Regionales de Derechos Humanos: aclaraciones y consejos para su exigibilidad.* Derecho y Cambio Social, n. 55, 2019. ISSN: 2224-4131. file:///C:/Users/andre/Downloads/Dialnet-SistemasRegionalesDeDerechosHumanos-6967893.pdf; Cavallaro, James L. et al. *Doctrine, Practice, and Advocacy in the Inter-American Human Rights System.* (New York: Oxford University Press, 2019): 1. https://opil.ouplaw.com/display/10.1093/law/9780190900861.001.0001/law-9780190900861
[8] Ninth International Conference of American States. *Declaracion Americana de los Derechos y Deberes del Hombre*. Bogotá, Colombia, 1948. https://www.oas.org/dil/esp/declaraci%C3%B3n_americana_de_los_derechos_y_deberes_del_hombre_1948.pdf
[9] Ibid.
[10] OEA. *Convención Americana sobre Derechos Humanos*. (B-32). San José, Costa Rica, 1969. https://www.oas.org/dil/esp/tratados_B-32_Convencion_Americana_sobre_Derechos_Humanos.pdf
[11] Cavallaro, James L. et al., *supra* note 7, at 22.
[12] Sánchez-Bayon, *supra* note 7.

Caribbean or Southern countries like Antigua and Barbuda, Belize, Guyana, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, The Bahamas (Commonwealth of), and Trinidad and Tobago are not, to date, party to the aforementioned convention, thus bringing the number to 23 adhering or ratifying states[13].

Two legal sources, then, which however show great differences between them.

According to the UN Treaty Reference Guide, in fact, between the two legal sources there is an enormous difference outlined by the fact that while a declaration is, by its nature, a non-binding *soft law* instrument, the convention is a binding act being understood as a real own treaty[14]. Of course, it is true that, to date, the *Declaración* is understood as a source of obligations from the countries of the OEA[15], but the striking difference between the two sources still remains. The declaration, therefore, can be understood more as a guideline for the development of the system itself, while the *Convención* must be considered as an agreement between the parties by which each of them undertakes to maintain their reciprocal commitments. This is also confirmed by the words of the former vice president of the IACtHR Manuel E. Ventura Robles, who states that from the moment in which the *Convención* entered into force, that is, as mentioned earlier, in 1978, the institutional structure of the SIDH will no longer be based "*sobre instrumentos de naturaleza declarativa sino que lo hará sobre instrumentos que tendrán una base convencional y obligatoria*"[16].

Much more important, then, is the fact that while the *Declaración* does not specify any concrete protection mechanism[17], confirming its merely expository nature, the *Convención* dedicates its second part (articles 33 - 73) precisely to the latter, specifying, in article 33, the competent bodies: the IACHR and the IACtHR[18].

Finally, while the *Convención* appears to be the basis on which the contentious function of the IACtHR is based[19], the *Declaración* does not seem to have the same destiny.

It is clear, therefore, on what the functioning of the SIDH rests the most.

However, this should not be misleading. The *Convención* does not exclude or limit the effect of the *Declaración Americana* as confirmed by reading article 29 of the aforementioned convention[20]. Furthermore, this declaration, although not directly cited, finds its place in the interpretative function of the IACtHR when in article 64.1 of the *Convención* it is stated that the IACtHR may be consulted not only for the interpretation of the convention itself, but also of other treaties concerning the protection of human rights in the American

[13] Cavallaro, James L. et al., *supra* note 7, at 1; Zúñiga Torres, Natalia. *The InterAmerican Court of Human Rights: The Legitimacy of International Courts and Tribunals*. 1st edition. (New York: Routledge, 2022): 69. ISBN 978-1-032-06137-5.
[14] United Nations. *Definitions. Definition of key terms used in the UN Treaty Collection*. In United Nations Treaty Collection website, accessed on 26/11/2022. https://treaties.un.org/pages/Overview.aspx?path=overview/treatyRef/page1_en.xml
[15] Sánchez-Bayon, *supra* note 7; Cavallaro et al., *supra* note 7, at 22.
[16] Ventura Robles, Manuel E. *El Sistema Interamericano de Protección de los Derechos Humanos*. Fortaleza, Brazil, 2014. https://www.corteidh.or.cr/tablas/r34041.pdf
[17] Ninth International Conference of American States, *supra* note 8.
[18] Ibid., at article 33.
[19] Ibid., at articles 62-63.
[20] Ibid., at article 29.

continent[21]. This declaration, as already stated, since is now understood as a mandatory source, falls into this category.

To conclude, therefore, it cannot be said that one legal source is more important than the other, but it can certainly be said that we are faced with a bicephalous system of legal sources that is unique in its kind.

State	***Declaración Americana de los Derechos y Deberes del Hombre* (since the joining to the Carta OEA)**[22]	***Convención Americana sobre Derechos Humanos***[23]
Antigua and Barbuda	**YES** signed in 1981 and ratified in 1981	**NO**
Argentina	**YES** signed in 1948 and ratified in 1956	**YES** signed in 1984 and ratified in 1984
Barbados	**YES** signed in 1967 and ratified in 1967	**YES** signed in 1978 and ratified in 1981
Belize	**YES** signed in 1991 and ratified in 1991	**NO**
Bolivia	**YES** signed in 1948 and ratified in 1950	only adhered 1979
Brazil	**YES** signed in 1948 and ratified in 1950	only adhered 1992
Canada	**YES** signed in 1989 and ratified in 1989	**NO**
Chile	**YES** signed in 1948 and ratified in 1953	**YES** signed in 1969 and ratified in 1990
Colombia	**YES** signed in 1948 and ratified in 1951	**YES** signed in 1969 and ratified in 1973
Costa Rica	**YES** signed in 1948 and ratified in 1948	**YES** signed in 1969 and ratified in 1970
Cuba	**YES** signed in 1948 and ratified in 1952	**NO**

[21] Ibid., at article 64.1.
[22] OEA. *Carta de la Organización de los Estados Americanos (a-41).* Estado de firmas y ratificaciones in OEA website. Accessed on 27/11/2022. https://www.oas.org/es/sla/ddi/tratados_multilaterales_interamericanos_A-41_carta_OEA_firmas.asp
[23] OEA. *Convención Americana sobre Derechos Humanos suscrita en la Conferencia especializada Interamericana sobre Derechos Humanos (b-32).* Estado de firmas y ratificaciones in OEA website. Accessed on 27/11/2022. https://www.oas.org/dil/esp/tratados_B-32_Convencion_Americana_sobre_Derechos_Humanos_firmas.htm

Dominica (Commonwealth of)	**YES** signed in 1979 and ratified in 1979	only adhered 1993
Dominican Republic	**YES** signed in 1948 and ratified in 1949	**YES** Signed in 1977 and ratified in 1978
Ecuador	**YES** signed in 1948 and ratified in 1950	**YES** signed in 1969 and ratified in 1977
El Salvador	**YES** signed in 1948 and ratified in 1950	**YES** signed in 1969 and ratified in 1978
Grenada	**YES** signed in 1975 and ratified in 1975	**YES** signed in 1978 and ratified in 1978
Guatemala	**YES** signed in 1948 and ratified in 1951	**YES** signed in 1969 and ratified in 1978
Guayana	**YES** signed in 1991 and ratified in 1991	**NO**
Haiti	**YES** signed in 1948 and ratified in 1950	only adhered 1977
Honduras	**YES** signed in 1948 and ratified in 1950	**YES** signed in 1969 and ratified 1977
Jamaica	**YES** signed in 1969 and ratified in 1969	**YES** signed in 1977 and ratified in 1978
Mexico	**YES** signed in 1948 and ratified in 1948	only adhered 1981
Nicaragua	**YES** signed in 1948 and ratified in 1950	**YES** signed in 1969 and ratified in 1979
Panama	**YES** signed in 1948 and ratified in 1951	**YES** signed in 1969 and ratified in 1978
Paraguay	**YES** signed in 1948 and ratified in 1950	**YES** signed in 1969 and ratified 1989
Peru	**YES** signed in 1948 and ratified in 1952	**YES** signed in 1977 and ratified in 1978
Saint Kitts and Nevis	**YES** signed in 1984 and ratified in 1984	**NO**
Saint Lucia	**YES** signed in 1979 and ratified in 1979	**NO**

Saint Vincent and the Grenadines	**YES** signed in 1981 and ratified in 1981	**NO**
Suriname	**YES** signed in 1977 and ratified in 1977	only adhered 1987
The Bahamas (Commonwealth of)	**YES** signed in 1982 and ratified in 1982	**NO**
Trinidad and Tobago	**YES** signed in 1967 and ratified in 1967	**NO** despite having adhered in 1991, in 1998 it presented a complaint notifying, therefore, the withdrawal of its ratification
United States of America	**YES** signed in 1948 and ratified in 1951	**NO** signed in 1977 but never ratified
Uruguay	**YES** signed in 1948 and ratified in 1955	**YES** signed in 1969 and ratified in 1985
Venezuela	**YES** signed in 1948 and ratified in 1951	**NO** although it signed in 1969 and ratified in 1977, in 2012 it filed a complaint, thus notifying the withdrawal of its ratification

TABLE 4 - DATA FROM THE OEA WEBSITE AND DEVELOPED BY THE AUTHOR

2.2. The Inter-American Human Rights System: a binary protection system

Two-headed, as has been understood, is also the system that concerns the supervisory bodies. Article 33 already mentioned, in fact, provides that:

"*Son competentes para conocer de los asuntos relacionados con el cumplimiento de los compromisos contraídos por los Estados Partes en esta Convención:*

a) la Comisión Interamericana de Derechos Humanos, llamada en adelante la Comisión, y

b) *la Corte Interamericana de Derechos Humanos, llamada en adelante la Corte*[24]"

Let us analyze them further.

2.2.1. The Inter-American Commission on Human Rights (IACHR)

The first to be taken into consideration is the IACHR, namely a main and autonomous body of the OEA created in 1948[25], but born only in 1959 at the hands of the *Quinta Reunión de Consulta de Ministros de Asuntos Exteriores* celebrated in Santiago de Chile[26]. According to articles 34 and 36 of the *Convención*, which we recall was adopted 10 years later, 7 are the judges who must compose the Court, each elected by the General Assembly of the organization on the proposal of the member states[27].

Despite being part of a system of human rights protection, as we have seen, quite fragmented, the IACHR seems to be putting some order. Being, in fact, a body of the OEA, that is, wanted by the States that accepted the OEA Charter with their signature, it has jurisdiction over all 35 members of the organization[28]. This means that both in the case where there are States that have not ratified the *Convención* and in the cases in which the IACtHR does not appear to have jurisdiction, the IACHR can still deal with any complaint filed against any State[29].

The IACHR, then, has been defined at the beginning of the chapter as the "helper" of the IACtHR not by chance. The reason for this cheerful adjective is very simple, and it does not come only from the fact that this institution is the effective partner of the IACtHR in the SIDH. In reality, this adjective comes from the fact that one of the most important functions of the IACHR is to forward the cases it receives, and which it considers admissible, to the judgment of the Court[30]. In poor words, without the Commission's affirmative decision on the degree of admissibility (first instance), the cases proposed directly by the possible victims (or

[24] Ibid., at article 33.
[25] Ninth International Conference of American States, *supra* note 6, at article 106.
[26] Reunión de Consulta de Ministros de Relaciones Exteriores Santiago, Chile. *Quinta Reunión De Consulta De Ministros De Relaciones Exteriores: Acta Final : Santiago De Chile, 12 a 18 De Agosto De 1959.* (Washington, D.C.: Union Panamericana, Secr. General de los Estados Americanos, 1960): 205-206. http://www.oas.org/es/cidh/mandato/Basicos/Acta-final-Quinta-reunion-Chile-1959.pdf
[27] OEA, *supra* note 10, at articles 34 and 36.
[28] Ventura Robles, *supra* note 16.
[29] Ubeda de Torres, Amaya. *The Inter-American Court of Human Rights in the Face of Terrorism.* International Human Rights and Counter-Terrorism. (Singapore: Springer Singapore, 2019): 499-515. https://link.springer.com/content/pdf/10.1007/978-981-10-4181-5_26.pdf
[30] OEA, *supra* note 10, articles 48-50 and 61.2.

their representatives) do not reach the Court (second instance). The result of this structure is that the supranational human rights dispute before the system is composed of two possible phases.

First of all, any individual, group of persons, or non-governmental entity legally recognized can file a petition, regarding possible violations of protected rights by any member of the OEA, before the IACHR. If the latter considers that the state in question is responsible for the alleged violations, then it can make recommendations to the said state to avoid future violations. If, however, that state fails or is unwilling to implement these recommendations, then the IACHR may refer the case to that Court for a legally binding judgment[31]. This makes it clear not only that in the SIDH individual appeal is allowed[32], but also that this body is an important aide to the IACtHR, as it regulates the flow of cases, limiting the overload that could affect the work of the court. The following two graphs[33] confirm what has just been said:

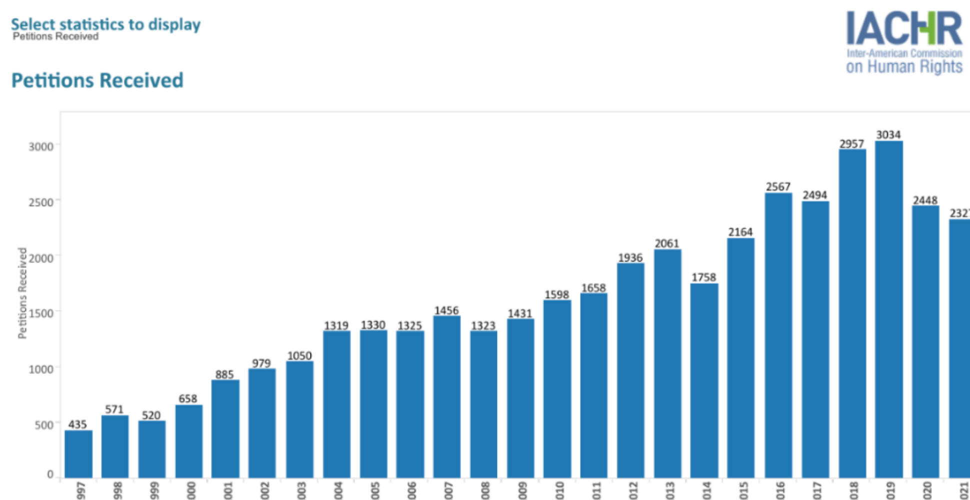

FIGURE 4 – DATA FROM IACHR WEBSITE

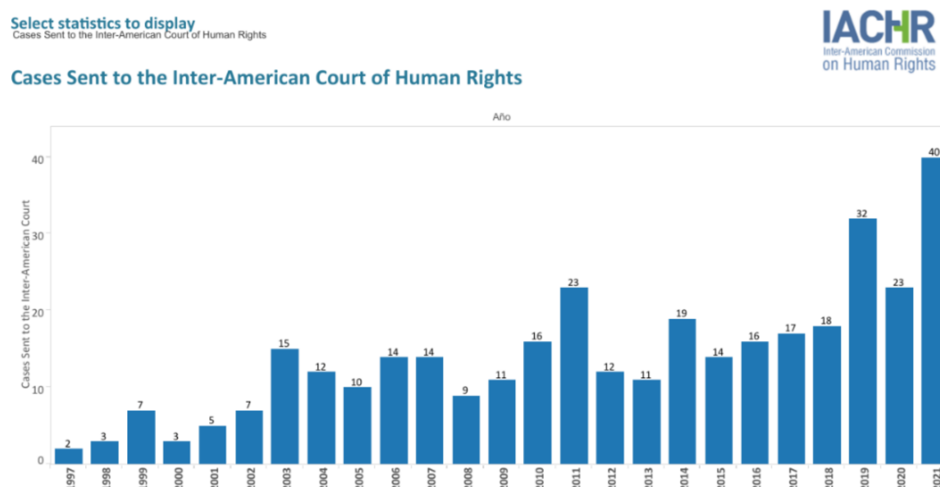

FIGURE 5 – DATA FROM THE IACHR WEBSITE

[31] Cavallaro, James L., and Stephanie Erin Brewer. "Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court." *American Journal of International Law* 102, no. 4 (2008): 768–827. doi:10.2307/20456681; Reisman, W. Michael. *Practical Matters for Consideration in the Establishment of a Regional Human Rights Mechanism: Lessons from the Inter-American Experience*, 1 St. Louis-Warsaw Transatlantic L.J. (1995): 91-92. https://openyls.law.yale.edu/bitstream/handle/20.500.13051/5291/Practical_Matters_for_Consideration_in_the_Establishment_of_a_Regional_Human_Rights_Mechanism_Lessons_from_the_Inter_American_Experience.pdf?sequence=2&isAllowed=y

[32] Pasqualucci, Jo M. *The Practice and Procedure of the Inter-American Court of Human Rights*. 2nd edition. (Cambridge: Cambridge University Press, 2013): 5. ISBN 978-1-107-00658-4

[33] Available at: https://www.oas.org/en/iachr/multimedia/statistics/statistics.html (last visited 30/11/2022).

Nevertheless, all of this applies only to those member states of the OEA which have not only signed or adhered to the *Convención*, but which at the same time have also accepted the jurisdiction of the IACtHR. The number and identification of these states will be presented in the following paragraph, while now it is essential to understand the fate of those states that do not fall into the previous category.

The process is very similar, but the difference lies in the fact that the IACHR cannot take the *Convención* as a yardstick, but must refer to the *Declaración*. In this case, if the state in question does not comply with the commission's recommendations, unfortunately there are no further avenues for the alleged victim, representing a major gap in the protection system[34].

Having said that, then, among the functions we find[35]:

- promote respect for human rights;
- receive, analyze, and investigate individual petitions regarding possible violation of both the convention and the declaration, according to articles 44-51 of the same convention;
- transmit recommendations in the form of resolutions;
- solicit advisory opinions from the IACtHR regarding the interpretation of the convention;
- observe the situation of human rights in the various countries and, if deemed necessary, draw up reports on the subject;
- request precautionary measures from states in an emergency or urge the Court to request provisional measures from states in cases of danger, even if the Court has not yet received the case;

All these functions, in conclusion, give us a much more complete vision of this particular institution. Thanks to the latter, in fact, we are able to define the IACHR as a quasi-juridical body. Indeed, while it acts as a court, since it receives complaints, analyzes, and transmits them in the form of cases to the IACtHR when necessary, and issues, in addition, resolutions, it cannot properly be defined in this way. Its resolutions, in fact, must be considered more as moral sanctions[36], as they do not represent an obligation or a constraint, and this implies that they need the political will of the states to be implemented and achieve the set objectives[37].

2.2.2. The Inter-American Court of Human Rights (IACtHR)

The IACtHR, on the other hand, although already present in the *Convención* of 1969, had to wait until 1978 to be able to see the work for its creation and organization begin, since it required the effective entry into force of the aforementioned convention[38]. In 1978, in fact, as required by article 74 of the convention to be able to

[34] Pasqualucci, *supra* note 32, at 83.
[35] Ventura Robles, *supra* note 16, at 259-260.
[36] Ibid., at 260.
[37] LP. *Diferencias entre la Comisión Interamericana (CIDH) y la Corte Interamericana (Corte IDH)*. In Pasión por el Derecho website. Accessed on 28/11/2022. https://lpderecho.pe/diferencias-entre-comision-interamericana-cidh-corte-interamericana-corte-idh/
[38] Cavallaro et al., *supra* note 7, at 43.

enter into force[39], eleven states appeared to have deposited their instruments of ratification or accession[40], thus sanctioning the beginning of the production of its legal effects. On 22 November 1979, therefore, during the *Séptimo Período Extraordinario de Sesiones de la Asamblea General de la OEA*, the IACtHR was created, and to date, as required by article 52 of the convention[41], 7 are the judges who compose it.

Then following the speech, and considering its statute, the IACtHR is an autonomous judicial institution, whose main objective is to apply and interpret the *Convención*[42]. Thanks to this, it can be understood that this body has two important functions: the contentious and the consultative one.

Thanks to the first function, the IACtHR acts as an international court to which all those states that have ratified or acceded to the convention and, at the same time, have also recognized the jurisdiction of the court itself are subject[43]. Since Dominica (Commonwealth of), Grenada, and Jamaica are linked to the convention but do not recognize the Court, the decisions of the latter, therefore, concern in particular only 20 states out of the 35 of the OEA[44]. Despite this function, however, this Court must absolutely not be confused with a criminal court because it "does not determine whether individuals are guilty of human rights violations, [but] rather, it determines State liability"[45].

With reference to the judgments of the Court, the latter are, according to Article 67 of the convention, "*definitivo[s] y inapelable[s]*"[46]. Despite this, the same article follows by saying that in case of disagreement, the Court will be able to interpret its decision by the will of any party, provided however that the request is sent within 90 days of the issuing of the sentence[47]. This, however, in practical terms changes almost nothing given that the states, in one way or another, are in any case obliged to undertake to respect the decisions of the Court in any case[48]. Finally, it is important to remember here that, due to the lack of a body in charge of supervising the execution of the sentences, it is the IACtHR itself that carries out this task. This is due to a lacuna in Article 65 of the convention, which mandates the IACtHR alone to submit to the General Assembly, in each regular session, a report on its work, indicating, where necessary, cases in which a state had not complied with the sentence[49]. The theme that has just opened up will however have greater resonance in chapter 4 of this text, that is, when the *effectiveness* of the Court will be taken into consideration[50].

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[39] OEA, *supra* note 10, at article 74.
[40] Observing figure 4, it can be seen that as of 1978, 11 states have adhered to or ratified the convention. See above, figure 4, 27-29.
[41] OEA, *supra* note 10, at article 52.
[42] Sánchez-Bayon, *supra* note 7, at 14.
[43] OEA, *supra* note 10, at article 62.
[44] Cavallaro, James L. et al., *supra* note 7, at 1; Zúñiga Torres, *supra* note 13, at 69.
[45] Pasqualucci, supra note 32, at 10.
[46] OEA, *supra* note 10, at article 67.
[47] Ibid.
[48] Ibid., at article 68.
[49] Ibid., at article 65.
[50] See in this text at chapter 4.

Turning towards the second function[51], on the other part, the Court is called upon either by the IACHR or directly by any OAS state to interpret the convention or other treaties[52], or by the states themselves to understand whether their domestic laws are compatible with the convention or other treaties[53]. In fact, since it is a substantially consultative activity, it is not required that the States accept the advisory jurisdiction of the court[54]. In this case, therefore, this jurisdiction concerns all 35 states of the organization, including those that have not ratified the convention mentioned several times[55]. It is clear, thus, that, unlike what happens under the contentious function, not everyone is allowed to request advisory opinions. Currently, for example, the only way available to NGOs is to try to convince a state or authorized bodies to do it for them[56].

Finally, we conclude by referring to another important activity carried out by the Court, namely that of issuing provisional measures, binding on the States[57], in cases of extreme gravity and urgency both in cases known to it and in those unknown to it[58]. In the latter case, as we have seen above, this activity can be carried out at the direct request of the IACHR, as well as of other organs of the OAS and even of OAS member states themselves[59]. Nevertheless, there are limits that must be respected. Indeed, the Court is justified in ordering a State to apply provisional measure only when domestic State protections are not sufficient, or when the State itself is unwilling or unable to ensure the effectiveness of the requested protections[60].

2.2.3. A brief comparison between the two organs: differences between the IACHR and the IACtHR

Although both institutions have the main objective of promoting the defense of human rights at the level of the inter-American system, reading the two previous paragraphs, it is immediately clear that there are major differences that separate them. A focus on the latter, however, can only benefit our discussion.

The first major difference that is immediately apparent is the fact that while the IACHR has jurisdiction over all 35 OAS states, receiving, analyzing and investigating individual petitions both for those states that have acceded to or ratified the *Convención* and for those that have not, the IACtHR adjudicates only those cases that the IACHR forwards to it and has jurisdiction only over those states that have accepted it, i.e. 20 units[61]. This is because the IACHR is a body specifically envisaged by the OEA Charter, while the IACtHR is a body created by decision of the countries party to the convention[62].

The IACHR, then, as has been mentioned, is a quasi-judicial body, so that its resolutions, lacking in binding

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[51] For a deeper discussion on this particular function see Cavallaro, James L. et al., *supra* note 7, at 212-226.
[52] OEA, supra note 10, at article 64.1.
[53] Ibid., at article 64.2.
[54] Pasqualucci, *supra* note 32, at 38.
[55] OEA, supra note 10, at article 64.
[56] Pasqualucci, *supra* note 32, at 45.
[57] Ibid., at 11.
[58] OEA, supra note 10, at article 63.
[59] Binder, *supra* note 1, at 1206.
[60] Pasqualucci, supra note 32, at 253.
[61] Ventura Robles, *supra* note 16. Cavallaro, James L. et al., *supra* note7.
[62] LP, *supra* note 37.

force, need the political will of the States to be implemented, while the IACtHR, as a court, is a judicial body to all intents and purposes since its sentences are mandatory[63].

The IACHR, moreover, also can be said to absorb more of a paralegal role. In fact, among other things, it stimulates human rights awareness among OEA country members, requests from the states parties to the convention reports on the progress of respect for human rights at internal level, sends its conclusions in the form of annual reports to the OEA, makes appropriate recommendations[64]. Furthermore, the Court, in addition to its contentious and advisory function, as we have seen, can also order states to take provisional measures in cases of extreme urgency[65].

In poor words, it can be said that "*mientras la Comisión esencialmente recomienda o exhorta, la Corte manda [y] ordena*"[66].

2.3. Court decisions on Amnesty Laws: analysis of several law cases

Once the description of the functioning of what is understood to be the SIDH has been completed, all that remains is to understand what value the legal instrument of the amnesty has in all of this. To do this, it is of great help to take into consideration the IACtHR's point of view on the matter through its jurisprudence.

Precisely for this reason, in the following subparagraphs different jurisprudential cases will be treated. The cases in question are: *Barrios Altos v. Peru*, *La Cantuta v. Peru*, and *Almonacid-Arellano et. v. Chile*.

2.3.1. *Barrios Altos v. Peru*

The case which must be considered first, given its importance in this matter, is certainly the historical case of *Barrios Altos v. Peru*, judged by the IACtHR on March 14, 2001[67]. Importance coming from the fact that since its opening, the fog that obscured the truth about all of Latin America seemed ready to clear. In just over 32 pages of ruling, in fact, the IACtHR "set a precedent that rose against the practice of impunity in the Americas"[68]. The theme of the amnesty thus entered the courtrooms with force, drastically changing the vision of this juridical element, now considered as incompatible with the *Convención*[69].

2.3.1.1. Facts

In the midst of the clash that characterized Peruvian history in the period between 1980 and the mid-1990s, namely that between the Maoist-Marxist terrorist group called *Sendero Luminoso* (or Shining Path in English)

[63] See in this text at subparagraph 2.2.2. "The Inter-American Court of Human Rights (IACtHR)".
[64] LP, *supra* note 37.
[65] See in this text at subparagraph 2.2.2. "The Inter-American Court of Human Rights (IACtHR)".
[66] LP, *supra* note 37.
[67] IACtHR. *Barrios Altos v. Peru*, supra note 1 (Introduction).
[68] CEJIL. *Barrios Altos*. In CEJIL website, 3 July 2017. Accessed on 05/12/2022. https://cejil.org/en/case/barrios-Altos-2/
[69] Corte Interamericano de Derechos Humanos. *Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos No. 15 : Justicia transicional* / Corte Interamericano de Derechos Humanos (San José, C.R. : Corte IDH, 2020):71. https://www.corteidh.or.cr/sitios/libros/todos/docs/cuadernillo15_2020.pdf

and the various Peruvian governments that followed one another in this time frame[70], the Barrios Altos massacre stands as an important memory.

Around 10:30 pm on November 3, 1991, during a *pollada*, a typical popular festival to obtain funds, 6 heavily armed individuals broke into the building located at no. 840 Jíron Huanta, in the heart of the Barrios Altos district of Lima. They forced the victims, meanwhile hooded, to kneel and fired several shots at them. In a period of time identified as 2 minutes, 111 cartridges plus 33 bullets of the same caliber were exploded, killing 15 people and wounding 4 others. Once the action was completed, they quickly got back on the two cars used to arrive at the place, and this time with sirens blaring, they left the area (§2.a-2.c).

These executors of the operation will later be recognized as members of *Grupo Colina*, a death squad linked to the Peruvian army with its own anti-subversive program. All this, then, is also confirmed by numerous US documents declassified through the application of the Freedom of Information Act (FOIA) at the request of the Peruvian Truth and Reconciliation Commission[71], such as for example the following shown in the photos in which a claimed member of the *Grupo Colina* describes the events of the execution[72]:

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NODIS

E.O. 12356:   DECL: OADR
TAGS:         PHUM, PGOV, PREL, PTER, PE
SUBJECT:      CLAIMED MEMBER OF "COLINA" DESCRIBES
CHEROKEE, CONTAINED MARTIN, SUPO AND SEVEN
AGENTS.  IN THE SECOND VEHICLE, A WHITE PICK-UP,
WERE PICHILINGUE, AIO "KIKO," AND NINE PERSONS.
IN A THIRD VEHICLE (GREEN TOYOTA SEDAN) WERE LT.
COL. RODRIGUEZ, AND FIVE FEMALE MEMBERS OF THE
GROUP.  THERE WERE ALSO TWO MOTORCYCLES WITH TWO
MEN EACH.  THE GROUP ARRIVED IN BARRIOS ALTOS AT
ABOUT 8:00 PM.  OTHER AGENTS WERE ALREADY IN THE
BARRIOS ALTOS AREA.

11.  ONE GROUP OF AGENTS, UNDER LT. COL.
                              SECRET

                              SECRET

PAGE 02          LIMA   02372   03 OF 05   151935Z
RODRIGUEZ, WENT INTO THE BARBEQUE TO DO MORE
RECONNAISSANCE, ACCORDING TO THE DOCUMENT.  THIS
TOOK PLACE JUST BEFORE MARTIN'S TWO VEHICLES
ARRIVED.  WHEN MARTIN ARRIVED, HE ALLEGEDLY
ORDERED THE VEHICLES TO AWAIT ORDERS FROM ABOVE.
THE AUTHOR OF THE DOCUMENT CLAIMS THAT MARTIN
WAS NERVOUS, AND THAT HE COULD SEE THAT MARTIN
ALLEGEDLY TRIED SEVERAL TIMES TO CALL MONTESINOS'
USING HIS CELLULAR PHONE (554446).  THE AUTHOR
OF THE DOCUMENT CLAIMED THAT MARTIN REPEATEDLY
STATED "VLADI DOESN'T ANSWER."  AT 10:15 P.M.,
THE AUTHOR OF THE DOCUMENT CLAIMED THAT MARTIN
SAID "NOW WE HAVE THE GREEN LIGHT FROM VLADIMIRO."

12.  ACCORDING TO THE DOCUMENT, MARTIN LED THE

Current Class: SECRET
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FIGURE 6-DATA FROM THE NATIONAL SECURITY ARCHIVE

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   Current Class: SECRET
Current Handling: NODIS
 Document Number: 1994LIMA02372

MEMBERS FROM THE TWO VEHICLES INTO THE BARBEQUE.
MARTIN WENT FIRST WITH ABADILLA, WHO CONFIRMED
THAT THE PERSONS AT THE PARTY WERE SL MEMBERS.
MARTIN THEN ORDERED HIS MEN TO ENTER AND TO LINE
UP THE PERSONS AGAINST A WALL.  THE DOCUMENT SAID
THIS WAS EASILY ACCOMPLISHED SINCE THE PEOPLE
WERE QUITE DRUNK AND PUT UP NO RESISTENCE, EXCEPT
FOR ONE PERSON WHO "BECAME EMBOLDENED."  HE WAS
BEATEN "TO SHOW WHO WAS IN CHARGE."  ONE AGENT
TOOK A BABY FROM ONE OF THE WOMEN AND PUT IT TO
ONE SIDE.  A SMALL BOY WAS PLACED IN A SEPARATE
ROOM.  ONE PART OF THE GROUP SECURED THE SECOND
FLOOR OF THE BUILDING.  A FEMALE AGENT TURNED UP
THE VOLUME ON THE MUSIC PLAYING AT THE PARTY.
THE AUTHOR OF THE DOCUMENT DOES NOT REMEMBER WHO
ORDERED THE GROUP TO OPEN FIRE; USING
                              SECRET

                              SECRET

PAGE 03          LIMA   02372   03 OF 05   151935Z
SUBMACHINEGUNS WITH SILENCERS, THE SHOOTING TOOK
20 SECONDS.  THE DOCUMENT SAID THE NOISE WAS
BARELY HEARD AS THE SILENCERS DID THEIR WORK
WELL.  AFTERWARDS, THE SMALL BOY CAME OUT OF THE
ROOM, SURPRISING MARTIN WHO THOUGHT SOMEONE COULD
BE ATTACKING THEM.  HE KILLED THE CHILD.  THE
GROUP EXITED.  ONCE IN THE VEHICLES, THEY TURNED
ON SIRENS TO APPEAR LIKE POLICE, AND DEPARTED
QUICKLY.  THEY DIVIDED INTO SEVERAL GROUPS. AND
```

FIGURE 7-DATA FROM THE NATIONAL SECURITY ARCHIVE

At least initially, the general intention was to find the culprits. In the same month, in fact, an Investigation Committee was created by the Senate. However, the same committee failed to carry out its investigations since in April 2002, as we mentioned before, President Fujimori implemented a self-coup by dissolving the Congress

[70] COHA. *The Rise and Fall of Shining Path*. In the Council on Hemispheric Affairs website, 6 May 2008. Accessed on 07/12/2022. https://www.coha.org/the-rise-and-fall-of-shining-path/

[71] Tamara Feinstein. *The Search for Truth. The Declassified Record on Human Rights Abuses in Peru*. In National Security Archive website, 28 August 2003. Accessed on 07/12/2022. https://nsarchive2.gwu.edu/NSAEBB/NSAEBB96/index.htm

[72] US Embassy (Lima) Cable. *Claimed Member of "Colina" Describes Barrios Altos Executions*. March 15, 1994, Secret. Through National Security Archive Request (Tamara Feinstein - Peru Documentation Project). https://nsarchive2.gwu.edu/NSAEBB/NSAEBB96/940315.pdf

and establishing the *Gobierno de Emergencia y de Reconstrucción Nacional*. The new Democratic Constituent Congress, elected in 1992, strongly influenced by Fujimorist politics, clearly did not pursue the search for evidence (§2.f).

Other investigations began only 4 years later, when Judge Antonia Saquicuray of the Sixteenth Criminal Court of Lima, summoned by the then prosecutor of the Office of the Forty-first Provincial Criminal Prosecutor of Lima, Ana Cecilia Magallanes, tried to obtain statements by the then accused. But the results were the same. Not only the high military ranks did not allow any news to get out, but, as we know, the amnesty law number 26,479 was enacted, thus sanctioning the annulment of any further investigation as well as exempting members of the military, police or civilians from any judicial responsibility for acts committed between 1980 and 1995 (§2.g-2.j).

Despite this, Judge Antonia Saquicuray opposed the application of the law as it conflicted with constitutional guarantees and international obligations that Peru had to respect as part of the *Convención Americana sobre Derechos Humano* (§2.k). Subsequently, following an appeal by the defendants' lawyers against Judge Saquicuray's decision, the case was transferred to the Eleventh Criminal Chamber of the Lima Superior Court, where Superior Prosecutor Carlos Arturo Mansilla Gardella defended all aspects of the decision of the Judge Saquicuray (§2.l).

Nevertheless, the Democratic Constituent Congress, in the face of these decisions, issued a second law, number 26,492, which, as we have seen above[73], although it cannot be considered a true amnesty law, served as an interpretation and reinforcement of the first, making it immune to any attempt to review it by a judicial instance. In a nutshell, this second law prevented the possibility that other judges could in the future object to the validity of the amnesty law n. 26.479, effectively nullifying Judge Saquicuray's decision (§2.m).

The consequence of this was that the Eleventh Criminal Section of the Superior Court of Lima not only decided that the proceedings in the Barrios Altos case should be annulled, but also that the same laws were no t contrary to the Constitution (§2.n).

2.3.1.2. The case before the IACHR

As explained above, in order for a case to reach the IACtHR, it must first pass into the hands of the IACHR, which, if substantiated is found, makes recommendations to the State in question. If the latter are not followed by the aforementioned State, then the IACHR can transfer the case to the IACtHR, which will present a binding decision according to the values of the *Convención*[74]. This procedure is precisely what happened with the case now analysed.

Faced with numerous petitions from various humanitarian organizations, representatives of the victims and their closest loved ones, the IACHR decided to open case n. 11.528 in 1995, thus beginning its investigation

[73] See subparagraph 1.3.5. “Peru”.
[74] See subparagraph 2.2.1. “The Inter-American Commission on Human Rights (IACHR)”.

into the tragic event of the Barrios Altos massacre (§4). It took five years for the IACHR to complete its work, so that in March 2000, following article 50 of the convention, this institution presented its recommendations, among which the following certainly stands out:

"[The State of Peru should] annul any domestic, legislative or any other measure aimed at preventing the investigation, prosecution and punishment of those responsible for the assassinations and injuries resulting from the events known as the "Barrios Altos" operation. To this end, the State of Peru should abrogate Amnesty Laws Nos. 26479 and 26492" (§17.)

The Peruvian government, however, indirectly rejected these exhortations by reaffirming the constitutional validity of the laws in question. In view of this, the IACHR then decided to transfer the case to the jurisdiction of the IACtHR in May 2000 (§18-19).

2.3.1.3. IACtHR decision

Meanwhile the wind in Peru was changing. If up to that moment the government of Peru had been reluctant towards the Court, so much so that in 1999 it presented the *Resolución Legislativa* no. 27152 with which it withdrew with immediate effect from the jurisdiction of the same, the forced resignation of Fujimori in 2000, due to evident corruption, allowed the new government to move in a completely different direction. In fact, the latter not only derogated from the aforementioned resolution, thus accepting the jurisdiction of the Court, but also recognized the international responsibility of the state itself for the facts of the complaint[75]. In very few words, Peru was now presenting itself as willing to open investigations, find the culprits, and sanction them, in a slow attempt to implement a process of re-institutionalization [76].

Within this new context, in just over a year of work, after reviewing the case and hearing the parties, the IACtHR unanimously presented its decision on March 14, 2001. Various articles of the convention were violated, among which we have (§51.2):

- Article 4 (Right to Life) for the murder of 15 people;
- Article 5 (Right to Humane Treatment) for the serious injury of 4 people;
- Articles 8 and 25 (Right to a Fair Trial and Right to Judicial Protection) for not having allowed, due to the promulgation of laws n. 26.479 and n. 26.492, due process and obscuring the truth to the closest relatives of the aforementioned victims;
- Article 1.1 (Obligation to Respect Rights) and Article 2 (Obligation to Adopt provisions of Domestic Law) for the promulgation and application of amnesty laws n. 26.479 and 26.492;

Another part of the decision, however, turns out to be even more important, and certainly more useful for our discussion. Point 4, in fact, states that:

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[75] García Belaunde, Domingo. *Amnistía y derechos humanos. A propósito de la sentencia de la Corte Interamericana de Derechos Humanos en el caso "Barrios Altos"*. Instituto de Investigaciones Jurídicas, UNAM, (2002): 253. https://www.verdadyreconciliacionperu.com/admin/files/articulos/892_digitalizacion.pdf

[76] Ibid.

"[…] Amnesty Laws N. 26.479 and N. 26.492 are incompatible with the American Convention on Human Rights and, consequently, lack legal effect" (§51.4).

With these words the Court, from a legal point of view, was not derogating or declaring them null and void, rather, it kept the laws intact, but declared them unenforceable[77]. It should then have been the task of the state in question, Peru, as Judge García Ramirez put it, "to analyze and implement the decision that will lead to the intended end, which is the elimination of any potential effect of a legal provision that is incompatible with the convention"[78].

Analyzing, then, the particular point mentioned, the latter arises from the fact that the IACtHR, in the light of Articles 1.1 and 2 of the convention, and also taking into account Articles 8 and 25, considered that all states parties were obliged to take all necessary measures to ensure that no one was deprived of possibility of having a fair judicial protection. Consequently, all those states parties that had enacted laws with effects contrary to the above, as in the case of Peru, would have violated the convention itself, causing the lack of legal effect of the laws in question (§43).

In very poor words, with this decision the IACtHR not only sanctioned for the first time in history that national laws, belonging to the internal legal system of a particular state, were without legal effects because they were in contrast with the values of the *Convención*[79], but also that in general,

"[…] all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law" (§41).

2.3.1.4. Final interpretation

Despite the clarity of these words, some doubts arose about the generic nature of the decision. Immediately after the sentence, in fact, the IACHR, making use of article 67 of the Convención, asked the IACtHR to clarify whether the effects of resolution point 4, mentioned above, applied only to the specific case or if they were of a generic nature, i.e. applicable to any case of violation where amnesty laws n. 26.479 and n. 26.492 had interfered[80].

The IACtHR, through its interpretation judgment of September 2001, swept away any doubts in this regard. Reaffirming what was already said in the sentence of March 2001, it not only confirmed that these laws were

[77] García Belaunde, *supra* note 75, at 255.
[78] Quoted by Burgorgue-Larsen Laurence Úbeda de Torres Amaya and Rosalind Greenstein. *The Inter-American Court of Human Rights : Case-Law and Commentary*. (Oxford: Oxford University Press, 2011): 265. ISBN: 9780199588787
[79] Perez-Leon-Acevedo, Juan Pablo. "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, no. 3 (2020): 667–87. doi:10.1017/S092215652000028X.
[80] IACtHR. *Interpretación de la sentencia de fondo, Barrios Altos v. Peru*. Judgment of 3rd September 2001. Serie C No. 83. (§8). https://www.corteidh.or.cr/docs/casos/articulos/Seriec_83_esp.pdf

devoid of legal effects as they were contrary to the values of the *Convención*, but also that the sentence itself had a general application[81]. Consequently, this sentence of March 2001 did not only concern the *Barrios Altos* case, or other possible cases in which these amnesty laws n. 26.479 and n. 26.492 had been applied, but somehow, thanks to the general value entrusted to it, would have had the same effect in relation to any amnesty law, given that:

> "*la promulgación de una ley manifiestamente contraria a las obligaciones asumidas por un Estado parte en la Convención constituye per se una violación de ésta y genera responsabilidad internacional del Estado*"[82].

All this confirms what was said above: a judicial precedent against the practice of amnesty had arisen. Its incompatibility with the *Convención* would no longer go unnoticed.

2.3.2. *La Cantuta v. Peru*

The same elements were then reconsidered in another very important case, once again with Peru part of the process, namely the case *La Cantuta v. Peru* judged by the IACtHR on November 29, 2006[83]. In fact, in a 148-page judgment, the IACtHR not only reaffirms that the enactment of a law contrary to the obligations dictated by the *Convención* constitutes in itself a violation and generates international responsibility for the state (§167), but also categorically states that the two aforementioned laws, *Ley* 26.479 and *Ley* 26.492, "*no han podido generar efectos, no los tienen en el presente ni podrán generarlos en el futuro*" (§189), sanctioning thus their incompatibility with the Convención *ab initio*.

2.3.2.1. Facts

Through Decree N. 726 of 8 November 1991, the Fujimori government authorised military control over the internal activities of the various universities on the country's soil, due to concerns over the possible presence of influential elements linked to the *Sendero Luminoso*. Such a fate also befell the *Universidad Nacional de Educación 'Enrique Guzmán y Valle' - La Cantuta* (hereinafter *Universidad La Cantuta*), the place where the seizure that is the subject of the sentence took place. On the morning of 18 July 1992, members of the Peruvian army broke into the university buildings and took into custody against their will a total of nine students and one professor, considered subversive and dangerous (§80.9-80.16).

The same military identities will then be recognized also in this case as members of *Grupo Colina*, thanks also to the declarations of the third general in command Rodolfo Roble Espinoza, who, on May 5, 1993, wrote a document at the US embassy in which he was requesting asylum[84], stating that:

[81] Ibid., (§15-18).
[82] Ibid., (§18).
[83] IACtHR. *La Cantuta v. Peru*. Judgment of 29th November 2006. Serie C No. 162. https://www.corteidh.or.cr/docs/casos/articulos/seriec_162_esp.pdf
[84] For more infomation, view the declassified document stating that General Rodolfo Roble Espinoza was at the US Embassy on the morning of 5 May 1993, ready to make statements about the Grupo Colina in exchange for political asylum. Available at: https://nsarchive2.gwu.edu/NSAEBB/NSAEBB64/peru35.pdf

"El crimen de La Cantuta [...] ha sido cometido por un destacamento especial de inteligencia que opera bajo las órdenes directas del asesor presidencial y virtualmente jefe del SIN, Vladimiro Montesinos y cuyo accionar se coordina con el Servicio de Inteligencia del Ejército (SIE) y con la Dirección de Inteligencia del EMGE (DINTE) pero que es aprobado y conocido siempre por el Comandante General del Ejército" (§80.17).

Before reaching the IACtHR, however, there were many attempts to obtain justice.

Initially, the disappearance of these people led family members and close members to file *habeas corpus* actions, i.e. official requests before a court regarding the existence of specific legal conditions that could limit a person's freedom. Simply put, they wanted to know where the alleged victims were located. However, the answers were all negative, as according to the consulted courts there were neither documents certifying the arrest of the alleged victims nor documents confirming the military action that had taken place at *La Cantuta Universidad* (§80.20). The same fate befell the numerous denunciations. None of them, in fact, led to any real investigations (§80.21-80.24).

The attempt carried out by the *Comisión Investigadora* was also negative. The latter was created in April 1993 after statements by Congressman Henry Pease García, who claimed to have received documents attesting to the army's responsibility for the incident. Investigations were carried out, evidence and testimony presented, but the new Democratic Constituent Congress, created immediately after Fujimori's self-coup in 1992, scuppered everything (§80.25-80.29).

The discovery of human remains in mass graves in July 1993, attributable to some of the alleged victims (§80.30-80.41), seemed to change the cards on the table. In fact, two criminal investigations were opened in the civil jurisdiction with the aim of discovering those responsible. At the same time, however, two criminal investigations were also opened in the military jurisdiction, which led to the so-called *contienda de competencia*, i.e. the problem represented by the fact that investigations into the same events cannot coexist in two separate jurisdictions. The latter was resolved in January 1994 by the decision of the Penal Chamber of the Supreme Court of the Republic, which entrusted the investigations to military jurisdiction (§80.44-80.50).

Differently from what one might think, however, these investigations led the *Consejo Supremo de Justicia Militar* (CSJM) to condemn, between February and May 1994, various elements of the Peruvian army for the events (§80.54), but when it seemed that justice had presented its first hint, here comes, in June 1995, the enactment of the many times mentioned amnesty laws n. 26,479 and n. 26,492, through which amnesty was granted to all military, police, or civilian personnel involved in violations of human rights committed between 1980 and the date of enactment of the laws themselves (§80.58). The CSJM itself, then, on June 16, 1995 applied the benefit of amnesty to all those previously convicted (§80.60). In few words, justice once again seemed to have failed.

2.3.2.2. Effects of the *Barrios Altos* Sentence

The situation changed, as we have seen, when, on March 14, 2001, the IACtHR ruled its judgment in the case *Barrios Altos v. Peru*, declaring the aforementioned laws as devoid of legal effect and therefore unenforceable. For the avoidance of doubt, then, in September of the same year, the Court clarified that the effects of the sentence of March 2001, as general, were not to be attributed only to the case in question, but to all those in which the laws n. 26,479 and n. 26,492 had been applied (§80.62). Going even further, however, as has already been said, these two sentences can also be understood as a real watershed in the vision of the institution of amnesty in cases of serious human rights violations, which is now to be considered as contrary to the philosophy and to the values of the *Convención*, whatever the case considered.

Consequently, returning to the main point, the inapplicability of the amnesty laws mentioned also applied to what happened in *La Cantuta Universidad*. The *Sala Plena* of the *CSJM*, in fact, trying to implement the decision of the IACtHR on national soil, cancelled its amnesty sentence of June 16, 1995, stating among other things that the proceeding would return to the previous procedural state and therefore allowing the judicial execution of the alleged culprits, hitherto protected by law (§80.63). Despite this, at least until 2006, the year in which the case *La Cantuta v. Peru* was resolved by the IACtHR, there is no evidence of the execution of such sentences (§80.64).

2.3.2.3. The case before the IACHR

Interesting is the fact that the case concerning the kidnapping in *La Cantuta* was opened by the IACHR even before what would later lead to the famous case of *Barrios Altos*. In fact, in 1992, three years before the opening of case 11.528 (future *Barrios Altos* case), the IACHR, prompted by numerous complaints, opened case 11.045 (future *La Cantuta* case), starting its investigations into the events that took place in the University in question (§5). However, while the first can be said to be closed in 7 years with the 2001 sentence of the IACtHR, the second will see its end only in 2006, 14 years later, when the IACtHR will resolve the dispute.

Thirteen years after the opening of the case, in 2005, the IACHR, implementing article 50 of the *Convención*, presented its *Informe de Fonda No. 95/05* in which it claimed that the following articles had been violated (§10):

- Article 1.1 (Obligation to Respect the Rights);
- Article 2 (Obligation to Adopt Provisions of Domestic Law);
- Article 3 (Right to Juridical Personality);
- Article 4 (Right to Life);
- Article 5 (Right to Humane Treatment);
- Article 7 (Right to Personal Liberty);
- Article 8 (Right to a Fair Trial);
- Article 25 (Right Judicial Protection);

With the same granted a certain period of time to the state of Peru to take appropriate measures to comply with the aforementioned recommendations (§10-11).

Nevertheless, not enough was done by the Peruvian government according to the IACHR, and therefore the latter on February 10, 2006 decided to refer the case to the IACtHR (§14).

2.3.2.4. IACtHR decision

Faced with the partial recognition of its responsibility by the state of Peru (§37), which however affirmed that in any case "*recibirá y acatará lo que la Corte determine*" (§132.1), the IACtHR on November 29, 2006 presented its decisions. Here too, many articles were violated, among which we have:

- Article 1.1 (Obligation to Respect Rights), for not having completed sufficient investigations and refusing *habeas corpus* actions, but more generally for having committed the violation of all other rights;
- Article 4 (Right to Life), for having committed the extra-judicial murder of the 10 victims (§114);
- Article 5 (Right to Humane Treatment), for having placed the 10 victims, during the period in which they were detained and transferred, in situations of vulnerability and non-protection, thus damaging their physical, mental and moral integrity, as well as for having caused psychological and mental damage to many of the victims' families (§126);
- Article 7 (Right to Personal Liberty), for having carried out a detention of 10 people on the basis of a list of names, without this act being ordered by a competent authority or presenting the purpose of placing these people in front of a judge. Furthermore, it is clear that this act was a real abuse of power (§109);
- Article 8 (Right to a Fair Trial) and Article 25 (Right to Judicial Protection), for having committed the manipulation of legal mechanisms in resolving the *contienda de competencia*, thus entrusting the task of investigating and judging to the military jurisdiction, considered unsuitable and completely impartial. The foundations for guarantees and proper judicial protection have therefore disappeared (§135-145);

Article 3 (Right to Juridical Personality), instead, was not recognized as violated (§121). The IACHR had placed its argument on the possible violation of the previous article based on the fact that the enforced disappearance of the victims had consequently led to their exclusion from the juridical and institutional order of the Peruvian state, thus ending up in a sort of *limbo juridico* (§118). Nonetheless, the IACtHR was not of the same mind. In fact, the latter based its negative response on the words used in its previous decision *Bámaca Velásquez vs. Guatemala* of 2000, in which he stated that:

> "*la privación arbitraria de la vida suprime a la persona humana, y, por consiguiente, no procede, en esta circunstancia, invocar la supuesta violación del derecho a la personalidad jurídica o de otros derechos consagrados en la Convención Americana*" (§119).

In poor words, the suppression of the life of the person does not allow the invocation of this article as the person in question is no longer a legal person after death.

2.3.2.5. Violation of Article 2 and amnesty laws

Finally, a separate discussion requires the finding by the IACtHR of the violation of article 2 (Obligation to Adopt provisions of Domestic Law). In this case, the IACtHR not only reiterated what it said in its 2001 judgments related to the case *Barrios Altos v. Peru*, and therefore that the amnesty laws n. 26,479 and n. 26,492 were incompatible with the *Convención* (§167), but it also stated that such laws were incompatible *ab initio*, and therefore even the mere enactment of such laws should be considered in itself a violation of the *Convención* (§174). Consequently, the applications of these laws in cases even prior to 2001 had to be considered as a violation, whatever the state body that implemented them (§174).

According to the IACtHR, therefore, the use of these laws by the *CSJM* in the amnesty judgment of 16 June 1995 had to be understood as a violation as the effects of the laws remained active from the date previously mentioned to the day on which the *Barrios Altos* case was concluded in March 2001 (§188). Because of this, the IACtHR concluded that during the period in which these laws remained in effect (1995-2001), the State of Peru violated its obligation to adjust its domestic law with the Convención or , to put it more simply, violated Article 2 (§189). To the next of kin of the survivors and victims, therefore, as was the case in *Barrios Altos v. Peru*, the right to monetary compensation and psychological support was granted[85]. Furthermore, it was established that the investigations and prosecutions had to proceed in such a way as to finally be able to find those responsible for the reported event[86].

2.3.3. *Almonacid Arrellano v. Chile*

By remaining, anyway, on Peruvian soil only it is not possible to fully understand the extent of the importance that, at an international level, the case Barrios Altos v. Peru in particular had. With it, it has been said several times, not only it is defined that the two Peruvian amnesty laws n. 26,479 and n. 26,492 are devoid of legal effects and therefore inapplicable in any situation, but in general also that the institution of the amnesty itself, in the event of serious violations of human rights, is in itself a violation of the *Convención*. In short, whatever the amnesty considered, in the face of serious violations of rights under international human rights law, the Court would have maintained its position, therefore also outside the Peruvian case.

This is precisely what happens in the case of *AlmonacidArellano v. Chile* judged by the IACtHR on September 26, 2006[87], exactly two months before the conclusion of the case just analyzed *La Cantuta v. Peru*. Using the provisions of the *Barrios Altos v. Peru* in 2001, in fact, the IACtHR defined the Decree Law 2.191, self-amnesty law, as contrary to the *Convención* and therefore devoid of legal effects (§119 and §171.3).

[85] Binder, *supra* note 1, at 1210.
[86] Ibid.
[87] IACtHR, *AlmonacidArellano v. Chile*. Judgment of 26 September 2006. Serie C No.154. https://www.corteidh.or.cr/docs/casos/articulos/seriec_154_esp.pdf

Furthermore, importantly, in this sentence the IACtHR presented for the first time the future doctrine of *control de convencionalidad* (§124), a concept aimed at identifying the instrument that allows the States themselves to implement the obligation to respect human rights domestically, verifying the conformity of its internal laws with the *Convención* and the interpretation that the IACtHR makes of it[88].

2.3.3.1. Facts

The detention and murder of Mr Almonacid Arellano, an elementary school teacher but also a communist militant and candidate for councillor of the same party (§82.2), took place between 16 and 17 September 1973 (§82.8), that is exactly one week after the *coup d'état* which deposed the pro-Marxist president Salvador Allende in favor of General Augusto Pinochet (§82.3). Under the latter, the country lived in a continuous state of *siege*, which is the reason why the generalized repression directed at people considered opponents, albeit with different intensities depending on the period, was permitted (§82.3-82.4). The event connected to Mr. Almonacid Arellano, in fact, is to be understood as one of many that took place during these times, a representation of a massive and systematic practice (§82.4-82.7).

Practice, moreover, completely shrouded in shadow and fireproof in the face of justice. Suffice it to say that although the murder of the man in question took place in 1973, the first real investigations took place only in 1992, clearly after the fall of the regime in 1990. The case that opened before the *Primer Juzgado del Crimen de Rancagua* in 1973 , in fact, was temporarily archived already in 1974 (§82.9). On 18 April 1978, then, the famous *Decreto Ley 2.191* was issued and amnesty was granted to any person who had committed criminal acts during the period of state of *siege*, namely between 1973 and 1978 (§82.10).

The investigations carried out since 1992, however, did not give the results hoped for by the victim's family. Although two people were identified as perpetrators of the crime, Neveu Cortesi and Castro Osorio (§82.11), the passage of the case from civil to military jurisdiction wrecked any hope of justice (§82.17).

The jurisdiction dispute between the two jurisdictions was created because the *Segundo Juzgado Militar de Santiago* addressed the *Primer Juzgado del Crimen de Rancagua* stating that the accused should be considered as "on duty" at the time of the events and therefore complying with the orders during the state of *siege* (§82.16). The case, therefore, had to and could only be analyzed and investigated by a military body. This is at least what the Supreme Court dictated with a ruling on December 5, 1996 (§82.17).

Under this jurisdiction, of course, these possible criminals received clemency on January 28, 1997 and, with the application of *Decreto Ley 2.191*, the *Segundo Juzgado Militar de Santiago* allowed them to escape justice (§82.20). The Martial Court and the Supreme Court, furthermore, later questioned, confirmed this resolution

[88] Corte Interamericano de Derechos Humanos. *Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos No. 7: Control de Convencionalid* / Corte Interamericano de Derechos Humanos (San José, C.R. : Corte IDH, 2021): 3. https://www.corteidh.or.cr/sitios/libros/todos/docs/cuadernillo7_2021.pdf

and recognized the effectiveness and validity of the law repeatedly mentioned, thus closing, at least for the moment, the case in November 1998 (§82.21-82.23).

2.3.3.2. The case before the IACHR

On September 15, 1998, shortly before the filing of the case, the family members of Mr. Almonacid Arellano decided to submit a petition to the IACHR, which, however, only recognized it as admissible in 2002, thus starting its investigations (§6-7).

Three years later, in March 2005, the IACHR presented *Informe no. 30/05* with which it claimed that the state of Chile had violated the following articles (§8):

- Article 1.1 (Obligation to Respect the Rights);
- Article 2 (Obligation to Adopt Provisions of Domestic Law);
- Article 8 (Right to a Fair Trial);
- Article 25 (Right to Judicial Protection);

With the same tool, then, thanks to the application of article 50 of the *Convención*, the IACHR granted a certain period of time to the government of Chile to comply with the recommendations sent to it (§9). Nonetheless, faced with the lack of information regarding the implementation of the aforementioned recommendations, the IACHR decided to refer the case to the IACtHR on July 11, 2005 (§11).

2.3.3.3. Preliminary exceptions expressed by the State of Chile

The behavior of Chile was absolutely different from that of Peru which has be seen in the two previous cases. In fact, while the latter had declared its international responsibility in the *Barrios Altos* case, and partial responsibility in the *La Cantuta* case, thus showing itself willing to collaborate with the IACtHR, the same cannot be said for the State of Chile.

In fact, before the IACtHR could express its final decision, the State of Chile, on November 26, 2005, presented two preliminary objections contesting the application (§17), namely (§38):

- lack of competence *ratione temporis* of the IACtHR to hear the case;
- violations during proceedings before the IACHR;

With regard to the first objection, the State argued that the IACtHR, having taken up the case, had failed to comply with the declaration filed by the State on August 21, 1990. In this latter declaration, Chile stated that it would respect the jurisdiction and the competence of the IACtHR only for those events that allegedly occurred after March 11, 1990, i.e. the date on which the instrument of ratification of the Convención was deposited (§39.a). Thus, given that the events concerning Mr. Almonacid Arellano dated between 16 and 17 September 1973, the latter then, according to the State of Chile, did not fall within the ratione temporis jurisdiction of the IACtHR (§39.b).

The IACtHR, however, rejected both preliminary objections.

First of all, it did not recognize this declaration as a reservation to the treaty, but as a real temporal limitation imposed by the State (§43). The latter, in itself, is not incompatible with the *Convención* (article 62), but is nonetheless dependent on the final decision of the Court itself (§44). Indeed, it stated that it was the jurisdiction of the Court and not of the State to determine which facts it could or could not take into consideration, irrespective of the period under consideration (§45). This comes from the fact that the IACtHR, citing its previous decision *Las Hermanas Serrano Cruz Vs. El Salvador* of 2004[89], introduced in the speech the principle *de competénce de la compétence*, according to which whatever body with judicial functions, including therefore also the IACtHR, has the possibility and power to determine the extent of its jurisdiction[90].

Furthermore, it clarified that it was about to pronounce itself not on the detention and death of Mr. Almonacid Arellano, events as noted which occurred in 1973, but on three facts which according to it would have occurred after 11 March 1990 and on which it could therefore pronounce given which were covered by its *ratione temporis* competence (§46):

1. the passage of the case from public to military jurisdiction (1996);
2. the ongoing validity of Decree Law 2.191 even after the ratification of the Convention by the State of Chile (1990 onwards);
3. the application of this Decree Law 2.191 in the present case by the hands of the military authorities (1997-1998);

Consequently, the IACtHR rejected the first preliminary objection, thus declaring itself competent to adjudicate the case (§51).

The second exception, instead, can be divided into two parts:

Firstly, the State of Chile claimed to have received the *Informe 30/05* from the IACHR late, or rather, it claimed that even if the IACHR stated that the report in question had been sent on April 11, 2005, thus entrusting the State a period of two months (June 11, 2005) to implement its recommendations, in reality this would have arrived in complete state only on May 12, 2005, thus leaving the State of Chile in a prejudicial situation with respect to the deadline that had been set (§52.b). The same, therefore, would have required more time to be able to complete the obligation without, however, according to it, receiving adequate time. Finally, Chile sent the information regarding the implementations only on 11 July 2005, considering itself in any case as an entity that had complied with the established deadlines (§52.d).

Secondly, the State of Chile also claimed that the IACHR had not taken into account the declaration of 11 July 2015 and that it had therefore decided to submit the case to the Court well before receiving the requested

[89] IACtHR. *Caso de las Hermanas Serrano Cruz Vs. El Salvador.* Judgement of 23 November 2004. https://www.corteidh.or.cr/docs/casos/articulos/seriec_118_esp.pdf
[90] Ibid., (§63).

information that could have changed the course of events . Simply put, the State of Chile claimed that its right to be heard had been violated (§52.e).

The Court then replied as follows:

At first, it did not deny that *Informe 30/05* had arrived late but also pointed out that the IACHR had in reality granted Chile an extension until 1 July 2005 (§59). Then, it claimed that it was a mistake by the State of Chile to consider July 11, 2005 as the date granted to itself, since the latter was actually a date intended for the IACHR. In fact, there were two deadlines (§60):

- July 1, 2005 for the State to send its information about the implementations;
- 11 July 2005 for the IACHR as the deadline for presenting the case to the Court;

The State of Chile, therefore, considering July 11, 2005 as the date granted to it, had made a mistake and therefore had sent its report after the deadline, while the IACHR had implemented in accordance with its regulatory provisions and the convention (§61).

The second argument, on the other hand, was quickly overcome because according to the Court, the IACHR, by advising the victims' representative of the possibility of submitting the case to the Court itself, had merely applied the regulations in force and therefore nothing seemed in contrast (§62).

Consequently, even the second preliminary objection proposed by the State was rejected (§63).

2.3.3.4. IACtHR decision

Once the preliminary objections presented by the State of Chile had been denied and the initial adverse behavior of the same had been overcome, the Court was ready to present its final decision. The latter was presented on 26 September 2006.

The possible violation of the four articles, previously presented by the IACHR[91], required a careful analysis of the matter by the IACtHR, which focused on several points (§90).

To begin with, the IACtHR focused on defining the murder committed against Mr. Almonacid Arellano as a crime against humanity or not (§93). By reviewing various definitions and descriptions of the aforementioned crime previously set forth by various international tribunals such as the International Military Tribunal of Nuremberg or the International Military Tribunal of Tokyo, or present in statutes, such as those of the International Criminal Tribunals for the former Yugoslavia and Rwanda (§94-1010), and noting the presence of a massive and systematic homicidal practice in Chile between 1973 and 1990 (§103), the IACtHR could not help but ascertain that this event was a crime against humanity (§104).

Continuing then, it wondered whether such a crime could be amnestied or not (§105-114). Looking at international law, the IACtHR ascertained that the prohibition of committing crimes against humanity was a

[91] See at page 49 of this text.

norm of *jus cogens*, i.e. a norm instituted to protect values considered fundamental and which absolutely cannot be derogated from (§99). Consequently, the commission of these acts violated this *ius cogens* norm and the punishment, therefore, was mandatory (§99). Furthermore, in its 2000 report, the Secretary General of the United Nations affirmed that although the institution of the amnesty was recognized as a valid instrument, it would assume inapplicability in the face of international crimes such as genocide, crimes against humanity or serious breaches of international humanitarian law (§108). The latter did nothing but reflect precisely what the IACtHR had already said in the previously examined case *Barrios Altos v. Peru*, through which it was established that amnesty as a legal instrument, in case of similar crimes, had to be considered as a violation of the *Convención* itself (§112). Thus, even considering the doctrine of international law, the IACtHR came to the conclusion that no type of law could have conferred amnesty in the face of such a crime (§114). The latter, in fact, affirmed that

> "[...] *los Estados no pueden sustraerse del deber de investigar, determinar y sancionar a los responsables de los crímenes de lesa humanidad aplicando leyes de amnistía u otro tipo de normativa interna*. [...]" (§114).

Established that the reported event was a crime against humanity and that the latter category could not possibly be amnestied, the IACtHR wondered whether Chile, by keeping the *Decreto Ley 2.191* in force even after the ratification of the *Convención*, had contravened its obligation to comply with Article 2 (Obligation to Adopt Provisions of Domestic Law) of the *Convención* (§115). Clearly the IACtHR found that this happened, thus identifying Chile as a violator of the aforementioned article (§122). Chile, in fact, not only kept the law in force, even if for most of the time it was not used, but did not even show any effort to change the internal legal situation, thus contravening the previous article (§121).

Finally, the possible violation of articles 1.1 (Obligation to Respect Rights), 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection) was analysed (§123-128). In this regard, the IACtHR stated that Chile had violated:

- Article 1.1, for having issued, applied and kept in force the *Decreto Ley 2.191* (§123);
- Articles 8 and 25, for having applied the *Decreto Ley 2.191*, thus causing the cessation of the investigations, the dismissal of the case, and impunity for the perpetrators. Furthermore, in doing so, the victim's family members were not allowed to have an effective legal remedy, to be heard by a competent and independent court, to know the truth (§126);

In other words, the IACtHR considered that the State of Chile, by applying this *Decreto Ley 2.191*, contravened what, from this case onwards, would be known as the doctrine of *control de convencionalidad* (§124). Through the latter, which appeared, as mentioned, for the first time in this particular case, the IACtHR set the obligation for the national judges and courts to verify the validity of the internal rules with those of the *Convención*, as well as the obligation to keep into account the interpretation implemented by the IACtHR, the last interpreter of the treaty in question (§124).

As can be easily seen, therefore, this doctrine of *control de convencionalidad* is none other than the interpretative and especially jurisdictional specification of the guarantee obligation presented by articles 1.1 and 2 of the *Convención*. Obligation that translates into the mandatory duty for the State party to the treaty to organize its internal legal order in such a way as to allow "*el pleno y efectivo goce y ejercicio de los derechos y las libertades que se les reconocen en la CADH*"[92].

In the light of what has been said up to now, thus, it should come as no surprise that the *Decreto Ley 2.191* had the same fate that had befallen the amnesty laws previously analyzed with the cases in Peru. As already mentioned in the case *Barrios Altos v. Peru*, in fact, amnesty laws with the characteristic of obfuscating serious violations of international law or allowing impunity for crimes against humanity are in themselves a violation of the *Convención*. Since the *Decreto Ley 2.191* fell precisely into this category, the IACtHR could do nothing but declare its juridical effects lost, in the specific case as in any other case (§119 and §171.3).

2.3.4. Further Cases: *Gomes Lund et al. v Brasil* and *Gelman v. Uruguay*

In reduced form, but still keeping alive the care with which the analysis has been carried out up to now, two other cases deserve notable mention. Cases that will be crucial when in the third chapter the legitimacy of the action of the IACtHR will be tested under one of the standards that will be mentioned later.

The cases in question are:

1. *Gomes Lund et al. v. Brasil*[93], adjudicated November 24, 2010;;
2. *Gelman v. Uruguay*[94], judged instead on February 24, 2011;

1) Regarding the first case, the IACtHR found itself judging the international responsibility of the State of Brazil for the detention, torture, and enforced disappearance of a defined number of people linked to the Brazilian communist party during the military dictatorship which, once ousted President João Goulart in 1964[95], took place until 1985 (§2). In particular, these practices were applied by the Brazilian army against a resistance movement to the military regime defined as *Guerrilha do Araguaia*, which, born in 1972, saw its end, precisely because of these actions, already in 1974 (§88 -90).

More important for our discussion, however, is the fact that the IACtHR was also called to judge the possibility of violation of the *Convención* by the State of Brazil given the enactment of the amnesty law n. 6.683 in 1979 (§2). As already mentioned above[96], this last law granted amnesty to anyone who had committed a crime attributable to the political area between 1961 and 1979 (§134), thus making the events concerning the *Guerrilha do Araguaia* also fall within this time range. Furthermore, the same law remained legally active

[92] Corte Interamericano de Derechos Humanos, *supra* note 88, at 5.
[93] IACtHR, *Gomes Lund et al. v. Brasil*. Judgment of 24 November 2010. Serie C, No. 219. https://www.corteidh.or.cr/docs/casos/articulos/seriec_219_esp.pdf
[94] IACtHR. *Gelman v. Uruguay*. Judgment of 24 February 2011. Serie C, No. 221. https://www.corteidh.or.cr/docs/casos/articulos/seriec_221_esp1.pdf
[95] See at sub-paragraph 1.3.2. "Brazil".
[96] Ibid.

even during the democratic governments following the dictatorship and indeed its validity was confirmed by the Supreme Court, which, on April 29, 2010, declared it legitimately constitutional since, being a real "*ley medida*" (§136), namely the result of political agreements based on particular interests of the moment, "*representó, en su momento, una etapa necesaria en el proceso de reconciliación y redemocratización del país*" (§44).

In the meantime, given the lack of attention paid by national institutions to the events that occurred, the next of kin of the victims already presented a petition to the IACHR on 7 August 1995. Concrete results, however, only arrived in 2008 when the IACHR, after the usual investigations, approved the *Informe de Fondo n. 91/08*, finding violations of the Convention and then submitting recommendations to the State of Brazil to be respected within a period of two months (§1).

Due to inadequate response from Brazil, however, the IACHR, on March 26, 2009, decided to transfer the case to the IACtHR (§1), which therefore found itself once again discussing the "intrinsic connection between victims' rights and inadmissibility of amnesty laws and similar measures"[97].

On November 24, 2010, therefore, the IACtHR presented its decisions, confirming that the State of Brazil had been guilty of violating:

- Articles 3 (Right to Juridical Personality), 4 (Right to Life), 5 (Right to Humane Treatment), and 7 (Right to Personal Liberty), all related to article 1.1 (Obligation to Respect Rights), for causing the enforced disappearance of several victims (§125 and §325.4);
- Article 13 (Freedom of Thought and Expression) in relation to articles 1.1, 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection), for not allowing the normal application of the right to seek and receive information , as well as the right to know the truth (§212 and §325.6);
- Article 5 in connection with Article 1.1, for causing moral and psychological harm to the victims' closest relatives (§243 and §325.7);
- Article 2 (Obligation to Adopt Provisions of Domestic Law) in relation to articles 8, 25 and 1.1, since, having interpreted and applied *Lei 6.683* in contravention of the *Convención*, the State of Brazil had not fulfilled its obligation to align its domestic law with the *Convención* (§180 and §325.5);
- Articles 8 and 25 in relation to articles 1.1 and 2, since by applying *Lei 6.683*, the State of Brazil had failed to investigate the facts, as well as to prosecute and punish those responsible (§180 and §325.5));

Moreover, as already happened in the previously analyzed cases, the *Lei 6.683* in question was judged to have no legal effects, therefore unable to continue to be an obstacle for the investigations concerning the case in question as well as any other similar one on national soil (§174 and §325.5).

A further detail in this sentence is that here the doctrine of *control de convencionalidad* was reproposed,

[97] Perez-Leon-Acevedo, *supra* note 79, at 672.

according to which although it is true that national institutions are subject to their own internal law, it is equally true that they are subject to the international law of the *Convención*, if the State they compose is part of the latter. This subjection to the provisions of the *Convención* means that, as we have seen, the national judicial power is internationally obliged to verify the conformity of domestic laws with the treaty, otherwise a violation is incurred (§176).

However, what is even more interesting is the fact that the IACtHR did not limit itself, as in the case of *Almonacid Arellano v. Chile*[98], to find that, in general, the *control of convencionalidad* had not been exercised, thus incurring a violation (§177), but also affirmed that the Brazilian Supreme Court, confirming the validity of *Lei 6.683*, had not taken into account international obligations deriving in particular from articles 1.1 and 2 of the *Convención* (§177). In a nutshell, the IACtHR had not only identified one of the culprits of the violation of the articles just mentioned, but, placing itself at a higher level, it also had directly judged the decision of the Brazilian Supreme Court as erroneous and not compliant with the values of the *Convención*, implementing a behavior particularly intrusive in national jurisprudence.

2) Moving on to the second case, however, the IACtHR was summoned to judge the international responsibility of the Eastern Republic of Uruguay (hereinafter State of Uruguay) for the illegal and arbitrary detention, torture, and enforced disappearance of Mrs. María Claudia García Iruretagoyena de Gelman (henceforth Mrs. Gelman) which took place, according to the documents, in 1976 (§2), i.e. in the midst of a civil-military dictatorship in the country which took its steps between 1973 and 1985[99]. Mrs. Gelman, in an advanced state of pregnancy, was kidnapped in Buenos Aires by Argentine and Uruguayan agents at the height of their functions under the famous "Operation Condor"[100], a coordination operation between intelligence agencies of various Latin American countries in that moment under military dictatorship aimed at eradicating rampant subversivism, (§44-63) and transported to a detention center in Montevideo, capital of the State of Uruguay (§84). Here, Mrs. Gelman gave birth to her daughter, María Macarena Gelman García Iruretagoyena, who was immediately entrusted to an alien Uruguayan family, a common practice under many military dictatorships in Latin America (§60-63), while Mrs. Gelman was made disappear without leaving any trace (§2).

At the same time, however, the IACtHR was also asked to judge whether the State of Uruguay had broken the *Convención* given the enactment and implementation of law n. 15.848, or *Ley de Caducidad*, in 1986 (§2 and §144), which, although more a prescription law than anything else[101], nonetheless granted a fictitious amnesty to all military and police members who had committed political offenses before the 1st of March 1985 given that the exercise of the punitive claim ceased to exist[102]. It should also be noted that this law was not issued as

[98] IACtHR, *Almonacid Arellano v. Chile*, supra note 87, (§124).
[99] See at sub-paragraph 1.3.6. "Uruguay".
[100] See at *supra* note 46 (Chapter 1) for a deeper explanation.
[101] See at sub-paragraph 1.3.6. "Uruguay".
[102] Uruguay, *supra* note 123 (Chapter 1).

a self-amnesty by an ongoing dictatorship, as in the cases seen above, but should be considered as a "*consecuencia de la lógica de los hechos originados por el acuerdo celebrado entre partidos políticos y las Fuerzas Armadas en agosto de 1984 y a efecto de concluir la transición hacia la plena vigencia del orden constitucional*"[103]. Simply put, it was issued by a democratically elected government at the end of the previous dictatorship in an attempt to complete the long-awaited democratic transition.

Despite this, the Uruguayan Supreme Court was called, in 1988, to judge the constitutionality of the law, which was confirmed the same year (§146). Furthermore, the following year, as well as in 2009, the same law was subjected to a popular referendum, after the presentation of numerous signatures, but in both cases the necessary votes to allow a modification of the law itself were not reached, keeping thus the law intact (§147 and §149). It should therefore be noted that the law in question had not only been democratically approved but had also been subsequently reaffirmed twice by two different popular referendums, making it one of the few laws granting amnesty in Latin America to also be accepted on a popular level.

Meanwhile, in 2008, the IACHR approved the *Informe de Fondo No. 32/08*, in which violations by the State of Uruguay were found not only of the *Convención*, but also of the *Convención Interamericana sobre Desaparición Forzada de Personas*[104] (§1). Consequently, recommendations, which had to be respected within a defined period of time, were sent to the State of Uruguay (§1). Faced with the inactivity of the State in question, however, the IACHR was forced, on 21 January 2010, to submit the case to the IACtHR, which therefore began its analysis of the specific case (§1).

On 24 February 2011, therefore, the IACtHR presented its decisions, which can be summarized in the following points. The State of Uruguay had violated:

- Articles 3 (Right to Juridical Personality), 4 (Right to Life), 5 (Right to Humane Treatment), and 7 (Right to Personal Liberty), in relation to article 1.1 (Obligation to Respect Rights) of the *Convención* and with articles I and XI of the *Convención Interamericana sobre Desaparición Forzada de Personas*, to be responsible for the enforced disappearance of Ms. Gelman (§101 and §312.2);
- Articles 3, 4, 5, 7, 17 (Rights of the Family), 18 (Right to a Name), 19 (Rights of the Child), and 20 (Right to a Nationality), in relation to article 1.1 of the *Convención* and with articles I and XI of the *Convención Interamericana sobre Desaparición Forced de Personas*, to be responsible for the suppression and substitution of identity of María Macarena Gelman García Iruretagoyena, daughter of Mrs. Gelman, from her birth until the recognition of her true identity (§137 and §312.3);
- Articles 5 and 17, in connection with article 1.1 of the *Conveción*, for having caused moral and psychological damage to Mr. Juan Gelman, grandfather of María Macarena Gelman García Iruretagoyena (§138 and §312.4);

[103] Ibid, at Article 1.
[104] OEA. *Convención Interamericana sobre Desaparición Forzada de Personas*. (A-60). Belém do Pará, Brasil, 1994. https://www.oas.org/juridico/spanish/tratados/a-60.html

- Articles 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection), in relation to articles 1.1 and 2 (Obligation to Adopt Provisions of Domestic Law) of the *Convención* and with articles I.b and IV of the *Convención Interamericana sobre Desaparición Forzada de Personas*, for not having carried out effective investigations into the case and consequently not having tried and sanctioned those responsible (§244 and §312.5);
- Article 2, in relation to articles 8, 25 and 1.1 of the *Convención* and with articles I.b, III, IV and V of the *Convención Interamericana sobre Desaparición Forzada de Personas*, since, having interpreted and applied the law n. 15.848, or *Ley de Caducidad*, in contravention of the *Convención*, the State of Brazil had failed to fulfil its obligation to bring its domestic law into line with the Convención (§246 and §312.6);

Finally, as already seen on other occasions, the law object of the complaint, in this case the law n.15.848, or *Ley de Caducidad*, was defined as having no legal effects and therefore not able to represent an obstacle for future investigations of the case concrete as in any other case on national soil (§232 and §246).

Although it may seem a decision very similar to those that have been analyzed previously, there is one detail that must not be overlooked. As has been mentioned above, the IACtHR was, in this case, adjudicating on an amnesty granting law which had not only been enacted through a democratic process, but had also been supported on two different occasions by two popular referendums. Simply put, this law at the time of its enactment, as well as afterwards, held a higher level of democratic legitimacy than any other amnesty that has been encountered so far[105].

Despite this, however, the IACtHR maintained its typical position towards amnesty laws, demonstrating that it does not take into account so much the process of adoption of the law or the authority that issues it, but to focus more on its "ratio", which is none other than "*dejar impunes graves violaciones al derecho internacional cometidas*" (§229). A "ratio" that clearly goes against the values of the *Convención* and that the IACtHR considers impossible to ignore.

2.4. Conclusions

This chapter has made it possible to unpack the complex and unique structure of the *Sistema Interamericano de Protección de los Derechos Humanos* (SIDH) into smaller sections, thus enabling a more careful analysis of its parts.

A human rights protection system that moves its mechanisms within an organisation of 35 states, the *Organización de los Estados Americanos* (OEA), and which is based on two legal sources with profound differences given their legal nature, the *Declaración Americana de los Derechos y Deberes del Hombre* and the *Convención Americana sobre Derechos Humanos*. Although one is a declaration, and therefore

[105] Gargarella, Roberto. "Democracy and Rights in Gelman v. Uruguay." *AJIL Unbound* 109 (2015): 115–19. doi:10.1017/S2398772300001276.

characterised by an expository nature, and the other a convention, and therefore a true treaty implying obligations, both have allowed for an articulate development of the system itself. Of course, it is true that while one is recognised by all 35 states of the OAS (the *Declaración*), the other has only been adopted or ratified by 23 of them (the *Convención*), but this difference does not eliminate the importance mentioned earlier.

The two legal sources are then put into practice and enforced by two institutions: the IACHR and the IACtHR.

The former is provided for directly by the OAS Charter, while the latter was created at the behest of the convention's contracting countries. This also explains why the IACHR has jurisdiction over all 35 states, while the IACtHR only over those that have not only ratified or adopted the *Convención* but also accepted the Court jurisdiction itself, i.e. 20 out of 23 countries. Although both have the same objective, that is, to promote respect for human rights in the Inter-American area, it would be a mistake to consider them as having the same competence. One, in fact, is a quasi-judicial body (the IACHR), which makes its resolutions without binding force, while the other is a full-fledged judicial body (the IACtHR), which makes its decisions as mandatory. Despite this, the two institutions, as we have seen, are closely intertwined in an ongoing struggle against human rights violations. The IACHR, in fact, can be seen as a real opening and closing valve in the path that leads cases to the IACtHR. Petitions, even individual ones, cannot actually reach the court directly, but must first pass through the jurisdiction of the IACHR, which avoids overloading the IACtHR itself.

The same chapter then dealt with several cases judged by the IACtHR (*Barrios Altos v. Peru*, *La Cantuta v. Peru*, *Almonacid Arellano v. Chile* and more briefly *Gomes Lund et al. v. Brasil* and *Gelman v. Uruguay*), each with its own importance but all sharing not only the subject matter of the complaint but also two other particularly obvious elements.

The first element is certainly the approach and viewpoint of the IACtHR with respect to amnesty laws. As can be seen, the IACtHR does not focus so much on whether the respective law is a self-amnesty applied by a dictatorship or an amnesty passed in accordance with the domestic legal order, rather it bases its discussion on the *ratio legis* of the law in question[106]. Indeed, whichever way one wants to put it, the IACtHR does not compromise that amnesty is nothing more than an attempt to protect perpetrators of gross human rights violations from persecution and, precisely by this nature, in conflict with the *Convención.*[107]. In doing so, the Court repeatedly refers to the *ius cogens*, and thus non-derogable, character of the rights that have been violated[108]. In the same way, it not only affirms that such laws are a violation of rights for the victims, but also and especially for the survivors and next of kin, who are prevented from being heard or receiving a fair trial and judicial protection.

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[106] IACtHR. *Almonacid Arellano v. Chile*, *supra* note 87, (§120); IACtHR, *Gomes Lund et al. v. Brasil*, *supra* note 93, (§175); IACtHR, *Gelman v. Uruguay*, *supra* note 94, (§229);
[107] IACtHR. *Barrios Altos v. Peru*, supra note 1 (Introduction), (§41); IACtHR, *La Cantuta v. Peru*, *supra* note 83, (§152); IACtHR. *Almonacid Arellano v. Chile*, *supra* note 87, (§120);
[108] IACtHR. *Barrios Altos v. Peru*, supra note 1 (Introduction), (§41); IACtHR, *La Cantuta v. Peru*, *supra* note 83, (§160); IACtHR. *Almonacid Arellano v. Chile*, *supra* note 87, (§99);

The second element, on the other hand, is its very similar behaviour to a state Supreme Court. Indeed, in all cases analysed, the IACtHR did not limit itself to checking that the values and philosophy inherent in the articles of the *Convención* had been respected, which, by the way, is within its competence, but also intervened in the domestic law of the states in question. The two Peruvian Amnesty Laws n. 26.479 and n. 26.492, the Chilean *Decreto Ley 2.191*, but also the Brazilian Amnesty Law n. 6683 of 1979 and the Uruguayan Amnesty Law n. 15.848 of 1986, were in fact judged by the IACtHR as having no legal effect and therefore inapplicable[109]. Furthermore, on two occasions, the CIDH has even judged wrong the decision of a national Supreme Court, the Brazilian one in the case *Gomes Lund et al. v. Brasil*[110], or completely ignored the political and social situation in which a given law was enacted, as in the case of *Gelman v. Uruguay*[111].

It seems almost clear therefore that the IACtHR has exceeded its competences as dictated by the articles within the *Convención*, creating a "traditional interventionist jurisprudence" that has raised quite a few legitimacy and legal challenges across Latin America. Precisely this latter fact will be presented in the following chapter in which an attempt will be made to determine whether the IACtHR's decisions regarding amnesty laws are legitimate under certain standards.

[109] IACtHR. *Barrios Altos v. Peru*, supra note 1 (Introduction), (§44); IACtHR. *La Cantuta v. Peru*, *supra* note 83, (§174); IACtHR. *Almonacid Arellano v. Chile*, *supra* note 87, (§119); IACtHR. *Gomes Lund et al. v. Brasil*, *supra* note 93, (§174 and §325.5); IACtHR. *Gelman v. Uruguay*, *supra* note 94, (§232 and §246);
[110] IACtHR. *Gomes Lund et al. v. Brasil*, *supra* note 93, (§177);
[111] IACtHR. *Gelman v. Uruguay*, *supra* note 94, (§238-239);

Chapter III

IACtHR's legitimacy on amnesty laws

At this point, it is clear that there is no denying that the IACtHR has proven to be an important and highly active human rights defender in Latin America. In particular, the previous chapter allowed us to see how the IACtHR has developed a dynamic and innovative jurisprudence with respect to human rights violations and the attempt to bury them in oblivion through the application of an amnesty. The latter, understood as a legal institution, has been in fact considered to be in contrast with the *Convención* if applied to be able to hide from justice those guilty of serious offenses under international law. As a result, specific amnesty laws have been found by the IACtHR to be without legal effect and therefore unenforceable.

If on the one hand, this has created the possibility of being able to reopen trials and investigations on domestic soil, on the other "this dynamic has led to the Court's jurisdictional competence developing a life of its own which, at times, hardly finds a legal basis in the Convention"[1]. Indeed, in what can be described as a typical act of a national Supreme Court, the IACtHR, by ruling that national laws were devoid of legal effect, did nothing but implement an approach particularly monist to the relationship between international and national law[2]. In doing so, it has eroded the principle of subsidiarity or, to put it in more European terms, it has severely limited the "margin of appreciation" intended for national authorities, an essential doctrine developed by the European Court of Human Rights[3].

It should therefore come as no surprise that such supranational control has led not only to numerous criticisms, given that the Court has been accused of acting too much as a sort of judicial legislator[4], but also to multiple challenges regarding its legitimacy[5].

Following this context, the subsequent chapter will aim to determine whether the interventionist behavior applied by the IACtHR on amnesty laws is legitimate in terms of some standards: human rights, coherence or consistency, and democratic accountability. In this regard, the chapter in question will develop as follows.

First, the concept of legitimacy will be analysed, thus making it possible to define the dimension within which the assessment will take place. An assessment which needs the three different standards of comparison mentioned above, which, therefore, will be identified, defined, and their choice justified. Once this action has been completed, it will be time to go into more detail, ascertaining, through the application of the aforementioned legitimacy standard, whether the action of the IACtHR in the field of amnesty law can really be considered legitimate or not. The usual conclusions will close the chapter.

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[1] Binder, *supra* note 1 (Chapter 2), at 1204.
[2] Ibid.
[3] Føllesdal, Andreas. "Exporting the margin of appreciation: Lessons for the Inter-American Court of Human Rights." *International Journal of Constitutional Law* 15 (2017): 359-371. https://doi.org/10.1093/icon/mox019
[4] Binder, *supra* note 1 (Chapter 2), at 1204.
[5] Perez-Leon-Acevedo, *supra* note 79 (Chapter 2), at 668.

3.1. Legitimacy concept

Determining the legitimacy of the decisions of the IACtHR is an action that cannot be performed if the dimension within which the aforementioned analysis is to be articulated has not first been identified. To do this, however, it is good and right, first of all, to distinguish the concept of legitimacy, i.e. its meaning, from various and more particular conceptions of legitimacy, i.e. how this meaning is received and elaborated[6], given that it is customary to assume that there can be one concept, but many different conceptions of the same[7].

Too often, in fact, the term legitimacy seems to be used to express approval or disapproval, likes or dislikes, because of the conception one has of it[8]. Clearly this cannot be an effective yardstick.

The meaning, or the concept, that one wants to take from the term of legitimacy is in this case more restricted and particular, namely the normative one, relative to the acceptance and justification of authority, or, using a formula common to many authors, relative to the "right to rule"[9]. In this sense, a legitimate institution will have the right to exercise its authority, while in the case of illegitimacy this right will not be possessed.

However, this meaning does not move by itself.

In fact, as Buchanan and Keohane state, "legitimacy has both a normative and a sociological meaning"[10]. While, as we have just seen, the normative meaning involves whether and to what extent an institution has the right to express its own authority[11], the sociological or descriptive meaning implies whether the court is perceived to be, or believed to be, legitimate by relevant audiences[12]. The difference lies in the fact that while one focuses on objectivity, the other focuses on subjectivity, or, while one focuses on the qualities of the ruler, the other focuses on the behavior of the ruled[13].

The two perspectives are distinctly different from each other, but at the same time they do not seem to be detached from each other:

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[6] Ezcurdia, Maite. "The Concept-Conception Distinction." *Philosophical Issues* 9 (1998): 187–92. https://doi.org/10.2307/1522969.

[7] Langvatn, Silje Aambø, and Theresa Squatrito. "Conceptualising and Measuring the Legitimacy of International Criminal Tribunals." Chapter. In *The Legitimacy of International Criminal Tribunals*, edited by Nobuo Hayashi and Cecilia M. Bailliet, 41–65. Studies on International Courts and Tribunals. (Cambridge: Cambridge University Press, 2017): 49. doi:10.1017/9781316536469.003.

[8] Bodansky, Daniel. "Legitimacy in International Law and International Relations." Chapter. In *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, edited by Jeffrey L. Dunoff and Mark A. Pollack, 321–42. (Cambridge: Cambridge University Press, 2012): 324. doi:10.1017/CBO9781139107310.016;

[9] Langvatn, *supra* note 7, at 41; Bodansky, *supra* note 7, at 324; Buchanan, Allen, and Robert O. Keohane. The Legitimacy of Global Governance Institutions. Ethics & International Affairs, Vol. 20, No. 4. (2006): 405. doi:10.1111/j.1747-7093.2006.00043.x; Grossman, Nienke. *The Normative Legitimacy of International Courts*. Temple Law Review, Vol. 86, 2013, University of Baltimore School of Law Legal Studies Research Paper No. 2014-03: 64. https://ssrn.com/abstract=2185304; Tasioulas, John (2010). "The Legitimacy of International Law," in John Tasioulas and Samantha Besson (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010): 97. https://iuristebi.files.wordpress.com/2011/07/the-philosophy-of-international-law.pdf

[10] Buchanan, *supra* note 9, 405.

[11] Perez-Leon-Acevedo, *supra* note 79 (Chapter 2), at 668.

[12] Langvatn, *supra* note 7, at 43.

[13] Bodansky, *supra* note 8, at 327.

"On the one hand, to some degree, descriptive legitimacy seems conceptually parasitic on normative legitimacy since beliefs about legitimacy are usually beliefs about whether an institution, as a normative matter, has a right to rule. People justify, criticize, and persuade on the basis that an institution is actually legitimate (or illegitimate). On the other hand, some argue the other way around, that normative legitimacy depends on descriptive legitimacy. It has an intrinsically social quality and depends on people's beliefs. An institution could not be normatively legitimate if no one thought it so"[14].

Two different dimensions, therefore, but also closely connected, which can generate profound confusion at the time of the analysis.

Bodansky's words, however, help to distinguish the two perspectives better. Indeed, according to the author, if one wanted to know what makes an institution legitimate from a normative point of view, the answer that one would find would be based on arguments concerning moral, political, and legal theory, while if one wanted to know what made an institution legitimate from a sociological point of view, the answer would depend on interpretive and concrete arguments about what people believe and above all why[15]. It is therefore clear that one or the other dimension needs different standards of comparison.

To do this, however, Langvatn and Squatrito clearly state that, when discussing about legitimacy "one should make clear whether descriptive or normative legitimacy is the focus of attention"[16]. Therefore, the choice of dimension, like the choice of comparison standards useful for further study, must be as clear as possible so as to avoid any misunderstanding or simply for analytical clarity. In this regard, in case it was not clear, it is reiterated that the normative dimension of recent legitimacy discussion is the dimension that will be taken into consideration here.

3.2. Standards of Legitimacy

Having defined the dimension within which the legitimacy check of the IACtHR will be applied, it only remains to identify the verification standards. The latter, if respected, may confirm the legitimacy of the IACtHR's action regarding amnesty laws, while otherwise they may reveal a layer of illegitimacy in its actions.

According to Perez-Leon-Acevedo, there are three standards that are particularly effective and useful for this cause[17]:

1. Human rights, namely the inalienable rights that every human being possesses;
2. Consistency, understood as coherence between the IACtHR's jurisprudence and international, regional, and national practices;
3. Democratic accountability;

[14] Ibid.
[15] Ibid.
[16] Langvatn, *supra* note 7, at 44.
[17] Perez-Leon-Acevedo, *supra* note 79 (Chapter 2), at 669.

1) The reason for choosing human rights as the first legitimacy standard is very simple and can be explained in Grossman's words:

"[…] international courts' legitimacy turns, in part, on their ability to help states do a better job of complying with a core set of human rights obligations than states would in their absence"[18].

It is known that, regardless of the circumstances, international law does not allow States to violate some rights considered inalienable. Consequently, the authority of an international court, the first real applier of this set of binding rules, is legitimate and justified if it helps states to respect these prohibitions with its decisions. Conversely, such jurisdiction is considered illegitimate if the international court in question acts in a way that facilitates the violation of international law by states[19].

What has just been said is nothing more than a simplistic way of explaining that a substantive condition of legitimacy for international courts is that "they must promote the purposes of the normative regimes they are charged with interpreting and applying"[20]. In this sense, the judgments of the court in question must be compatible with the object and purpose of the regulatory regime that it has been entrusted to judge and protect[21]. Therefore, if the IACtHR, for example, ceases to fulfill its work as a defender of human rights on Latin American soil or fails to enforce the obligations owed to states in terms of human rights, then its authority will no longer be able be considered legitimate.

All this is then also confirmed by Ulfstein, who, taking up the Tadic case judged by the Appeals Chamber of ICTY[22], states that in order to be able to implement their juridical function in a legitimate and justified manner, any international court should be in full accordance with the values of the international recognized human rights[23].

2) Turning then to the second legitimacy standard, namely consistency, what was written in the 2004 report of the UN Secretary General helps to justify the choice. According to the latter, in fact, any type of international law subjects must adopt actions and decisions that "are consistent with international human rights norms and standards"[24]. Following this reasoning, the different parts of a whole should act coherently with each other to thus allow the achievement of the common goal.

In this case, in fact, consistency is understood as coherence, namely as "a state or situation in which all the parts or ideas fit together well so that they form a united whole"[25], thus suggesting a sort of interconnection

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[18] Grossman, *supra* note 9, at 65.
[19] Ibid., at 100-101.
[20] Ibid., 103.
[21] Ibid.
[22] ICTY. *Prosecutor v Dusko Tadic.* Case IT-94-1-AR72. Judgment of 2 October 1995. At paragraph 45. https://www.icty.org/x/cases/tadic/acdec/en/51002.htm
[23] Ulfstein, Geir. 'The International Judiciary', in J. Klabbers et al. (eds.), *The Constitutionalization of International Law* (Oxford: Oxford University press, 2011): 128. https://academic.oup.com/book/36169?login=true
[24] UN Security Council, *supra* note 32 (Chapter 1), at para. 6.
[25] Collins English Dictionary. 13th ed. (Glasgow: HarperCollins, 2018) s.v. "coherence". https://www.collinsdictionary.com/dictionary/english/coherence

between the parts. Naturally, among these parties there is also the IACtHR, for which the more its actions and decisions are consistent with the practices of other international courts and bodies that decide on similar matters, the higher its level of legitimacy, given that this would result in an effort towards convergence and unity in international law[26].

According to Crossley, in fact, greater consistency "improves the perceived legitimacy of protection practice"[27], while according to Franck, consistency allows institutions such as international courts to obtain legitimacy because it provides reasonable links between the application of regulatory provisions and the principles developed to solve similar problems[28].

3) Finally, it is time for the third and final legitimacy standard, i.e. democratic accountability. This is because, in order to obtain legitimacy, an international court must respect a certain level of democracy, understood as a positive response to democratic principles[29]. Indeed, according to von-Bogdandy and Venzke, international courts are "actors who exercise public authority" and "therefore they require a modus of legitimation that lives up to basic premises of democracy"[30]. As Bodansky writes, however, "democracy can mean many different things [such as] popular democracy, representative democracy, pluralist democracy, or deliberative democracy, to name a few"[31]. It is therefore clear that particular instruments must be taken into consideration in order to be able to carry out this verification.

In these terms, the legitimacy just mentioned is challenged when international courts "interpret international instruments and in effect make law", thus removing this crucial mandate "from political legislative bodies – the most important source of democratic legitimation"[32]. Therefore, it is not a surprise that the chosen instruments fall on the figure of the principle of subsidiarity, i.e. the concrete deference towards a specific state, which appears to be a central element in being able to evaluate legitimacy under the democratic standard[33], and on the concept of the "margin of appreciation", closely related to each other.

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[26] Simma, Bruno. Universality of International Law from the Perspective of a Practitioner. *European Journal of International Law*, Volume 20, Issue 2, (April 2009): 267. https://www.jus.uio.no/ifp/english/people/aca/msandena/msandenaarbeider/andenas-georgetownlaw-2015.pdf

[27] Crossley, Noele. "Conceptualising Consistency: Coherence, Principles, and the Practice of Human Protection", *Global Responsibility to Protect* 12, 4 (2020): 450. doi: https://doi.org/10.1163/1875-984X-01204010

[28] Quoted by Perez-Leon-Acevedo, *supra* note 79 (Chapter 2), at 669.

[29] Cohen, Harlan Grant, et al. "Legitimacy and International Courts – A Framework." Chapter. In *Legitimacy and International Courts*, edited by Nienke Grossman, et al., 1–40. Studies on International Courts and Tribunals. (Cambridge: Cambridge University Press, 2018): 7. doi:10.1017/9781108529570.001.

[30] von Bogdandy, Armin, and Ingo Venzke. *In Whose Name? A Public Law Theory of International Adjudication*. International Courts and Tribunals Series (Oxford: Oxford University Press, 2014): 28. https://academic.oup.com/book/2894?login=true

[31] Bodansky, Daniel. The Legitimacy of International Governance: A Coming Challenge for International Environmental Law? *The American Journal of International Law* 93, no. 3 (1999): 599. https://doi.org/10.2307/2555262.

[32] Føllesdal, Andreas. "Constitutionalization, Not Democratization: How to Assess the Legitimacy of International Courts." Chapter. In *Legitimacy and International Courts*, edited by Nienke Grossman, et al., 307–337. Studies on International Courts and Tribunals. (Cambridge: Cambridge University Press, 2018): 325. doi:10.1017/9781108529570.011.

[33] Jachtenfuchs, Markus, and Nico Krisch. "SUBSIDIARITY IN GLOBAL GOVERNANCE." *Law and Contemporary Problems* 79, no. 2 (2016): 1–2. http://www.jstor.org/stable/43920656; Føllesdal, Andreas. "SUBSIDIARITY AND INTERNATIONAL HUMAN-RIGHTS COURTS: RESPECTING SELF-GOVERNANCE AND PROTECTING HUMAN RIGHTS—OR NEITHER?" *Law and Contemporary Problems* 79, no. 2 (2016): 147-148. http://www.jstor.org/stable/43920662.

Consequently, going into detail, if the IACtHR leaves a certain "margin of appreciation" to the States, then its action would be legitimately democratic, on the contrary if the IACtHR proves shy towards the principle of subsidiarity, leaving no "margin of appreciation" to the States in question, then its jurisprudence may not be considered legitimate.

3.3. Legitimacy Assessment

Although one might be tempted to give a quick answer regarding the legitimacy of the IACtHR's action according to these standards just proposed, also having read what was written in the previous chapter, a careful verification is nonetheless essential to dispel any analytical doubts. In this regard, the following paragraphs have precisely the goal of determining whether what has been defined as a "traditional interventionist jurisprudence"[34] of the IACtHR vis-à-vis national amnesty laws conforms to the standards that have been previously proposed.

3.3.1. Human Rights

Re-reading what was written above regarding the first standard of legitimacy selected - human rights - it appears clear that in order to be able to judge legitimate the IACtHR's action under this particular standard with respect to amnesty laws, it is necessary to verify whether the IACtHR presents "important jurisprudential developments on the rights of victims of serious human rights violations related to criminal proceedings"[35].

This discourse cannot begin without taking into consideration the widely analyzed landmark *Barrios Altos v. Peru* decision of March 2001. As has been reiterated several times, with this decision the IACtHR defined the two Peruvian amnesty laws (*Ley n. 26.479* and *Ley n. 26.492*) as devoid of legal effects because in particular:

"[…] *impidieron que los familiares de las víctimas y las víctimas sobrevivientes en el presente caso fueran oídas por un juez, conforme a lo señalado en el artículo 8.1 de la Convención; violaron el derecho a la protección judicial consagrado en el artículo 25 de la Convención; impidieron la investigación, persecución, captura, enjuiciamiento y sanción de los responsables de los hechos ocurridos en Barrios Altos, incumpliendo el artículo 1.1 de la Convención, y obstruyeron el esclarecimiento de los hechos del caso. Finalmente, la adopción de las leyes de autoamnistía incompatibles con la Convención incumplió la obligación de adecuar el derecho interno consagrada en el artículo 2 de la misma"*[36].

Furthermore, the IACtHR itself stated that:

"[…] *los Estados Partes tienen el deber de tomar las providencias de toda índole para que nadie sea sustraído de la protección judicial y del ejercicio del derecho a un recurso sencillo y eficaz, en los términos de los artículos 8 y 25 de la Convención. Es por ello que los Estados Partes en la Convención que adopten leyes que tengan este efecto, como lo*

[34] See at page 59 of this text.
[35] Perez-Leon-Acevedo, *supra* note 79 (Chapter 2), at 673.
[36] IACtHR. *Barrios Altos v. Peru*, supra note 1 (Introduction), (§42).

son las leyes de autoamnistía, incurren en una violación de los artículos 8 y 25 en concordancia con los artículos 1.1 y 2 de la Convención"[37].

In other words, the application of these amnesty laws by Peru had led the latter to contravene obligations and values, or even better, human rights, considered from now on by the IACtHR as fundamental because they are foundations of the same *Convención* and relating to international law..

The same Court then established that the victims were not only those who had fallen under the blows of the brutality of the dictatorship in a physical sense, but also those who had been affected morally and mentally, namely the closest relatives. In fact, through the application of the aforementioned laws, the latter had been deprived of the possibility of knowing the truth, favoring impunity, hindered access to justice, and eliminated the opportunity to receive the reparation that was due to them by law[38]. Precisely for this reason, a reparation against them was considered by the IACtHR as an obligation that had to be respected by part of the State of Peru[39].

All these conclusions, as seen, were confirmed in other cases, such as, for example, that of Almonacid *Arellano v. Chile* of September 2006. In it, the IACtHR not only stated that *Decreto Ley 2.191* was devoid of legal effects[40], but also established that a crime such as the one suffered by Mr. Almonacid Arellano had to be identified as a crime against humanity and therefore impossible to be amnestied[41], as the prohibition of committing crimes against humanity was and is a jus cogens norm[42].

At the same time, the IACtHR reiterated that States parties to the *Convención* had an obligation to

"[...] *organizar todo el aparato gubernamental y, en general, todas las estructuras a través de las cuales se manifiesta el ejercicio del poder público, de manera tal que sean capaces de asegurar jurídicamente el libre y pleno ejercicio de los derechos humanos. Como consecuencia de esta obligación los Estados deben prevenir, investigar y sancionar toda violación de los derechos reconocidos por la Convención y procurar, además, el restablecimiento, si es posible, del derecho conculcado y, en su caso, la reparación de los daños producidos por la violación de los derechos humanos*"[43].

Not having made any changes to its internal apparatus, but rather having kept alive such a violating law, Chile had contravened Article 2 (Obligation to Adopt Provisions of Domestic Law) of the *Convención*[44]. Furthermore, as was the case in *Barrios Altos v. Peru* of March 2001, Chile, by applying this *Decreto Ley 2.191*, did nothing but provoke

"[...] *el cese de las investigaciones y el archivo del expediente, dejando en la impunidad a los responsables de la*

[37] Ibid., (§43).
[38] Ibid.
[39] Ibid., (§50).
[40] IACtHR. *Almonacid Arellano v. Chile*, *supra* note 87 (Chapter 2), (§119).
[41] Ibid., (§99).
[42] Ibid.
[43] Ibid., (§110).
[44] Ibid., (§115).

muerte del señor Almonacid Arellano. De acuerdo a lo anterior, se impidió a los familiares que ejercieran el derecho a ser oídos por un tribunal competente, independiente e imparcial, a través de un recurso efectivo y adecuado que repare las violaciones cometidas en perjuicio de su ser querido y les permitiera conocer la verdad"[45].

In a nutshell, as for Peru, speaking from a normative point of view, Chile had broken articles 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection), while, speaking from a practical point of view, it had not granted to victims neither the respect of their right to judicial protection nor the observance of their right to a fair trial.

Finally, with regard to the reparations due, as usual, to the next of kin of the victims, the IACtHR ordered the State of Chile to ensure that *Decreto Ley 2.191* did not continue to represent an obstacle to internal investigations relating both to the case of Mr. Almonacid Arellano as to any similar event on Chilean soil, and to adapt its domestic law to the values of the *Convención*[46]. Therefore, the obligation for the State of Chile, established by the IACtHR, to seek the truth and allow free entry to basic justice was clear.

We conclude by stating that very similar elements can also be found in famous cases such as *Gomes Lund et al. v. Brazil* of 2010[47] and *Gelman v. Uruguay* of 2011[48], or *La Cantuta v. Peru* of November 2006[49], seen in detail in the previous chapter.

As can be understood, rereading what has just been written, it is clear that the IACtHR has carried out crystalline jurisprudential developments in the field of human rights. As Perez-Leon-Acevedo states, these developments include rights such as "access to justice, know the truth, participate [or] be heard in criminal proceedings, and receive reparations"[50]. By doing this, it can therefore be firmly stated that the IACtHR, since the case *Barrios Altos v. Peru*, has largely complied with the obligation to promote the purposes of the regulatory regime that it must interpret and apply[51], ensuring legitimacy to its work under the legitimacy standard of human rights.

3.3.2. Consistency or Coherence

Once having ensured that the action of the IACtHR against the institution of the amnesty appears to be legitimate under the human rights standard, it is time to move on to verify whether the same practice is also legitimate under the second previously presented legitimacy standard, namely consistency understood as coherence.

Using what was written at the time of the justification of this standard, it is not difficult to understand the fact that in order to be able to affirm the existence of such legitimacy it is necessary to examine "whether the IACtHR's jurisprudence on amnesties/exemption measures is coherent or consistent with relevant

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[45] Ibid., (§126).
[46] Ibid., (§145).
[47] See sub-paragraph 2.3.4.
[48] See sub-paragraph 2.3.4.
[49] See sub-paragraph 2.3.2.
[50] Perez-Leon-Acevedo, *supra* note 79 (Chapter 2), at 673.
[51] Grossman, *supra* note 9, at 103.

international, regional, and national practices"[52], or, in simpler words, whether the IACtHR point of view regarding amnesties can be considered as an integral part of a common vision.

In this regard, the jurisprudence of two of the ten UN treaty bodies[53], that is the Human Rights Committee (HRC) and the Committee Against Torture (CAT), as well as that of the European Court of Human Rights (ECtHR), will be mentioned to thus take into consideration the behavior that, outside of that of the IACtHR, is found towards the institution of the amnesty both at an international and regional level. A quick consideration will also be made for the African region via the consideration of the African Commission on Human and People Rights (ACHPR). As far as the national level is concerned, instead, different laws and constitutions will be taken into account together, of course, with a consideration to the statal jurisprudence.

3.3.2.1. International Level

Globally, the position of the UN towards the institution of the amnesty is clear and direct: "there can be no impunity for atrocious crimes"[54]. Clearly, this vision influences the policy of the member states of the UN, but in a certain sense it also has important implications for the UN itself. As the Secretary-General writes in his report, in fact,

> "These standards also set the normative boundaries of United Nations engagement, such that, for example, […], United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights, […]"[55]

A strong adversity against the institution of the amnesty which is also reaffirmed in the words of the former Secretary General of the United Nations Ban Ki-moon, who, in his official statement expressed in Sudan in 2007, stated that "Justice is an important part of building and sustaining peace. A culture of impunity and a legacy of past crimes that go unaddressed can only erode the peace"[56].

Returning to the obligations for the States, the latter, according to the principles articulated several times by the UN system, must[57]:

a) ensure that those responsible for serious violations of human rights and humanitarian law are brought to justice;
b) assure victims an effective right to a remedy, including reparation;

Regarding point a), in the annex to resolution 60/147, adopted by the General Assembly in December 2005,

[52] Perez-Leon-Acevedo, *supra* note 79 (Chapter 2), at 675.
[53] IJRC. *UN Human Rights Treaty Bodies*. In International Justice Resource Center website. Accessed on 07/01/2023. https://ijrcenter.org/un-treaty-bodies/
[54] OHCHR, *supra* note 13 (Chapter 1), at 2.
[55] UN Security Council, *supra* note 32 (Chapter 1), at 5.
[56] UN Secretary-General. *Secretary-General's address to the United Nations Association in Sudan*. Public speech transcript. Sudan, September 3, 2007. https://www.un.org/sg/en/content/sg/statement/2007-09-03/secretary-generals-address-united-nations-association-sudan
[57] OHCHR, *supra* note 13 (Chapter 1), at 27.

in fact, it is written:

"In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him […][58]"

An obligation that can also be found in the Update Set of Principles for the protection of human rights through action to combat impunity promoted in 2005 by the former United Nations Commission on Human Rights, now replaced by the Human Rights Council[59]:

"States shall undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished"[60].

Turning the gaze towards the previous point b), however, the first mentioned resolution 60/147 states that the States, having regard to the obligation to respect and guarantee the respect as well as the implementation of international human rights law and international humanitarian law, have the duty to "provide effective remedies to victims, including reparation"[61]. Similarly, as before, the same duty can be found in the Update Set of Principles for the protection of human rights through action to combat impunity, in which principles 31 and 32 state respectively that:-

- Principle 31. "Any human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the State to make reparation and the possibility for the victim to seek redress from the perpetrator"[62];
- Principle 32. "All victims shall have access to a readily available, prompt and effective remedy in the form of criminal, civil, administrative or disciplinary proceedings […]"[63];

If then one wanted to seek the application of these principles in particular, what the Human Rights Committee (HRC) in 1994 affirms in its Views concerning Communication N. 322/1988 (Rodríguez v. Uruguay) and what, instead, the Committee against Torture (CAT) established in Communication No. 212/2002 (Guridi v. Spain) can be very useful in research. In these two Communications, in fact, these two UN treaty bodies,

[58] UN General Assembly. *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*. Resolution, A/RES/60/147. (16 December 2005): paragraph 4, pg. 5. https://www.ohchr.org/sites/default/files/2021-08/N0549642.pdf
[59] Haldemann, Frank and Thomas Unger. *The United Nations Principles to Combat Impunity: A Commentary*. Oxford Commentaries on International Law. (UK: Oxford University Press): 9. 10.1093/law/9780198743606.001.0001.
[60] UN Commission on Human Rights. *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): Principle 19, pg. 12. https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement
[61] UN General Assembly, *supra* note 58, at paragraph 3.d., pg. 5.
[62] UN Commission on Human Rights, *supra* note 60, at Principle 31, pg. 16.
[63] Ibid., at Principle 32, pg. 17.

namely committees, which in total are 10, of independent experts that control the implementation of major international human rights treaties[64], confirm through particular cases what was previously specified theoretically.

The HRC, for example, confirms that "amnesties for gross violations of human rights and legislation […] are incompatible with the obligation of the State party under the Covenant", which in this case is represented by the International Covenant on Civil and Political Rights (ICCPR), given that "the adoption of [these laws] effectively exclude in a number of cases the possibility of investigation into past human rights abuses and thereby prevents the State party from discharging its responsibility to provide effective remedies to the victims of those abuses"[65]. At the same time it shares the idea that the application of similar laws contributes "to an atmosphere of impunity which may undermine the democratic order and give rise to further grave human rights violations"[66].

The CAT, for its part, while not directly naming the subject of the amnesty, finds that "the imposition of lighter penalties and the granting of pardons to the civil guards are incompatible with the duty to impose appropriate punishment"[67], provided for by article 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[68]. In its General Comment No. 2 of 2007, however, the Committee itself becomes more direct and strongly states that:

> "amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability"[69].

Concept, then, also reaffirmed in his General Comment No. 3 of 2012[70].

3.3.2.2. Regional Level

As has been mentioned above[71], there are three major regional systems for the protection of human rights[72], namely the European, African, and clearly the American one.

On European soil, the protection of human rights is entrusted to the European Court of Human Rights (hereinafter ECtHR) which however, unlike what has been seen for the IACtHR, has not yet carried out a clear

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[64] OHCHR. *The United Nations Human Rights Treaty System*. Fact Sheet No. 30/Rev.1. (1 August 2012): 19. https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet30Rev1.pdf
[65] HRC. *Rodríguez v. Uruguay*. Communication No. 322/1988, Views, 19 July 1994. At paragraph 12.4., pg. 8. https://juris.ohchr.org/Search/Details/625
[66] Ibid.
[67] CAT. *Guridi v. Spain*. Communication No. 212/2002, Views, 24 May 2005. At paragraph 6.7. https://www.ohchr.org/sites/default/files/cat.pdf
[68] UN General Assembly. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. New York, 10 December 1984. At Article 4. https://www.ohchr.org/sites/default/files/cat.pdf
[69] CAT. *General comment No. 2 on the implementation of article 2 by States parties*. CAT/C/GC/2, 24 January 2008. At paragraph 5, pg. 2. https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/402/62/PDF/G0840262.pdf?OpenElement
[70] CAT. *General Comment No. 3 on the implementation of article 14 by States parties*. CAT/C/GC/3, 13 December 2012. At paragraph 38, pg. 8. https://www.refworld.org/docid/5437cc274.html
[71] See at page 28 of this text.
[72] Heyns Christof, *supra* note 4 (Chapter 2).

judicial review of amnesties[73]. Despite this, the ECtHR has nonetheless demonstrated that it has its own clear vision on the effects that amnesties cause on human rights and on the compatibility of these effects with the international obligations that States have under the European Convention on Human Rights (ECHR)[74].

In a nutshell, even if the ECHR "is not a system […] nor is its jurisprudence noted for confronting situations of gross and systematic violations of rights"[75], and does not seem to deal directly with prosecution or amnesty[76], it still prohibits such violations of human rights and, most importantly, it ensures the right to a fair remedy and open access to justice before a competent court[77].

What has just been said can be confirmed by taking a look at *Marguš v. Croatia* case, judged by the ECtHR on 27 May 2014, in which the ECtHR, taking into explicit consideration also what was stated in the past by the IACtHR[78], comes to invoke its case law[79] to state that

> "granting amnesty in respect of the killing and ill-treatment of civilians would run contrary to the State's obligations under Articles 2 and 3 of the Convention since it would hamper the investigation of such acts and necessarily lead to impunity for those responsible"[80].

Consideration, among other things, also present in one of its previous cases, namely *Lexa v. Slovakia*, judged on 23 September 2008, in which, once again taking up the international practice with regard to the amnesty[81], it does nothing but affirm its position which coincides with the general that amnesties are neither accepted nor permitted in the case in which they benefit perpetrators of serious human rights violations.

However, if one wanted to find an even clearer position of the ECtHR towards the amnesty, one could find it in *Enukidze and Girgvliani v. Georgia* case, judged on 26 April 2011, in which it clearly states that "the granting of an amnesty or pardon can scarcely serve the purpose of an adequate punishment"[82] and that all member states of the Convention should be much more careful and severe in judging guilty of serious violations of human rights because "what is at stake is not only the issue of the individual criminal-law liability of the perpetrators but also the State's duty to combat the sense of impunity"[83].

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[73] Perez-Leon-Acevedo, Juan Pablo. The European Court of Human Rights (ECtHR) vis-à-vis amnesties and pardons: factors concerning or affecting the degree of ECtHR's deference to states. *International Journal of Human Rights*, *26*(6), 1107-1137. (2022): 1108. https://www.tandfonline.com/doi/citedby/10.1080/13642987.2022.2027761?scroll=top&needAccess=true&role=tab
[74] Ibid.
[75] Aolain, Fionnuala N. *The Fractured Soul of the Dayton Peace Agreement: A Legal Analysis*. Michigan Journal of International Law 19.4. (1998): 977. https://repository.law.umich.edu/mjil/vol19/iss4/1/
[76] Buyse, Antoine, and Michael Hamilton, eds. *Transitional Jurisprudence and the ECHR: Justice, Politics and Rights*. (Cambridge: Cambridge University Press, 2011): 10. doi:10.1017/CBO9780511758515.
[77] Ibid.
[78] ECtHR. *Marguš v. Croatia*. Judgment of 27 May 2014. 4455/10. At paragraphs 60-66.
[79] For a deeper discussion about see: *Abdülsamet Yaman v. Turkey*, no. 32446/96, § 55, 2 November 2004; *Okkalı v. Turkey*, no. 52067/99, § 76, ECHR 2006-XII; and *Yeşil and Sevim v. Turkey*, no. 34738/04, § 38, 5 June 2007; Egmez v. Cyprus, no. 30873/96, § 71, ECHR 2000-XII, and Turan Cakir v. Belgium, no. 44256/06, § 69, 10 March 2009). In its decision in the case of Ould Dah v. France ((dec.), no. 13113/03, ECHR 2009.
[80] ECtHR, *supra* note 78, at paragraph 127.
[81] ECtHR. *Lexa v. Slovakia*. Judgement of 23 September 2008. 54334/00. At paragraphs 96-99.
[82] ECtHR, *Enukidze and Girgvliani v. Georgia*. Judgment of 26 April 2011. 25091/07. At paragraph 274.
[83] Ibid.

Moving then to Africa, it can be seen that the vision does not change. In what can be considered the youngest of the three human rights systems[84], in fact, the African Commission on Human and People's Rights (ACHPR), in its "The Robben Island Guidelines", adopted in October 2002, firmly states that "to combat impunity States should:

a) ensure that those responsible for acts of torture or ill-treatment are subject to legal process; a
b) ensure that there is no immunity from prosecution for nationals suspected of torture, and that the scope of immunities for foreign nationals who are entitled to such immunities be as restrictive as is possible under international law"[85];

In particular, instead, analyzing the case MIDH v. Ivory Coast, decided on 29 July 2008, can be noted as the ACHPR

> "holds that by granting total and complete immunity from prosecution which foreclosed access to any remedy that might be available to the victims to vindicate their rights, and without putting in place alternative adequate legislative or institutional mechanisms to ensure that perpetrators of the alleged atrocities were punished, and victims of the violations duly compensated or given other avenues to seek effective remedy, the Respondent State did not only prevent the victims from seeking redress, but also encouraged impunity, [...]. The granting of amnesty to absolve perpetrators of human rights violations from accountability violates the right of victims to an effective remedy"[86].

3.3.2.3. National Level

As Mallinder reports, despite this great struggle against the unconditional use of an institution like the amnesty, many countries in the recent past, such as Afghanistan in 2009, Libya in 2012, or the Philippines in 2014[87], still have guaranteed immunity even in the face of serious human rights violations. This shows that, despite there has been a clear reduction in the use of this institution, thanks also, as can be seen from what is written above, to an apparent common vision, "unconditional amnesties continue to be enacted in different parts of the world"[88].

At the same time, however, there are clear trends in state practice that suggest a strong development of adversity and restraint behavior towards amnesty in the face of gross human rights violations.

In fact, taking a look, for example, at the articles of two Constitutions belonging to two countries located in two different continents, namely that of Ecuador and Ethiopia, one can notice an explicit prohibition of the

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[84] IJRC. *African Human Rights System*. In International Justice Resource Center website. Accessed on 09/01/2023.
[85] ACHPR. *Resolution on guidelines and measures for the prohibition and prevention of torture, cruel, inhuman or degrading treatment or punishment in Africa. The Robben Island Guidelines*. Adopted in October 2002. At Article 16, pg. 12. https://policehumanrightsresources.org/content/uploads/2016/05/Robben_Island_guidelines_eng.pdf?x96812
[86] ACHPR. *MIDH v. Ivory Coast*. Judgment of 29 July 2008. Communication No. 246/2002. At paragraph 98.
[87] Regarding Afghanistan, Mallinder quotes the *National Reconciliation, General Amnesty and National Stability Law*, published in the Official Gazette, Serial No. 965. Regarding Libya, she quotes *Law 38, On Some Procedures for the Transitional Period*, while as for the Philippines, she considers the Annex on Normalization, an integral part of the Framework Agreement on the Bangsamoro (FAB).
In Mallinder, Louise. "The end of amnesty or regional overreach? Interpreting the erosion of South America's amnesty laws." *The International and Comparative Law Quarterly* 65, no. 3 (2016): 676. http://www.jstor.org/stable/24762281.
[88] Ibid.

application of the amnesty. Article 28 of the Ethiopian Constitution (1994) reads:

> "Criminal liability of persons who commit crimes against humanity, so defined by international agreements ratified by Ethiopia and by other laws of Ethiopia, such as genocide, summary executions, forcible disappearances or torture shall not be barred by statute of limitation. Such offences may not be commuted by amnesty or pardon of the legislature or any other state organ"[89].

Article 80 of the Ecuadorian Constitution (2008), instead, states that:

> "Proceedings and punishment for the crimes of genocide, crimes to humanity, war crimes, forced disappearance of persons or crimes of aggression to a State shall not be subject to statutes of limitations. None of the above-mentioned cases shall be liable to benefit from amnesty […]"[90]

Analyzing, then, various laws enacted in different countries of the world, the scenario does not seem to change. In Argentina, for example, *Ley 27.156* of 2015 puts into practice a sentiment shared throughout Argentine soil, declaring that penalties and trials for crimes such as genocide, crimes against humanity, or war crimes cannot be subject to amnesty[91]. A condition also shared by the Central African Republic as can be seen in its Penal Code drafted in 2010. Indeed, after having defined the various crimes against the human person, such as the crime of genocide, war crimes and crimes against humanity[92], in Article 162 it firmly states that the aforementioned crimes cannot be subject to amnesty in any situation[93]. Finally, arriving in Europe, Poland, with its Act on the Institute of National Remembrance of 1998, certifies with conviction that

> "In relation to the perpetrators of war crimes, crimes against the humanity, and communist crimes, the provisions of the Acts and Decrees issued prior to 07 December 1989 which stipulate amnesty or abolition shall not be applied[94]".

The jurisprudence of national courts, then, is no less, given that it can fully play the role of example that confirms the aforementioned state practice, following a crystalline trend of retroactive abrogation of generalized amnesties, as Perez-Leon-Acevedo affirms[95]. Indeed, considering the Argentine Supreme Court, the latter in the judgment *Julio Mazzeo et al.* of July 2007 declares the unconstitutionality of decree 1002/89, which was issued under the Presidency Menem, and which guaranteed pardon to members of the armed forces who had committed crimes during the period of military juntas[96]. Similarly, in the *Sabalsagaray Curutchet, Blaca Stela* case, judged by the Supreme Court of Uruguay in 2004, some articles of *Ley n. 15.848*, well

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[89] Ethiopia. *Constitution*. Adopted on 8 December 1994. At Article 28.1. https://www.constituteproject.org/constitution/Ethiopia_1994?lang=en
[90] Ecuador. Constitution. Adopted in 2008. At Article 80. https://www.constituteproject.org/constitution/Ecuador_2021?lang=en
[91] Argentina. Senado y Cámara de Diputados de la Nación Argentina reunidos en Congreso. *Ley 27.156*. Approved on 24 July 2015. http://servicios.infoleg.gob.ar/infolegInternet/anexos/245000-249999/249820/norma.htm
[92] Central African Republic. *Loi N. 10.001 - Penal Code*. Approved on 6 January 2010. At Articles 152-157, pgs. 22-23. https://acjr.org.za/resource-centre/penal-code-of-the-central-african-republic-2010/view
[93] Ibid., at Article 162, pg. 24.
[94] Poland. *Act on the Institute of National Remembrance*. Approved on 18 December 1998. At Article 4.3. https://ipn.gov.pl/en/about-the-institute/documents/327,The-Act-on-the-Institute-of-National-Remembrance.html
[95] Perez-Leon-Acevedo, *supra* note 79 (Chapter 2), at 679.
[96] Corte Suprema de Argentina. *Mazzeo, Julio Lilo y otros s/ rec. de casación e inconstitucionalidad*. Judgment of 13 July 2007. https://www.legal-tools.org/doc/7ed416/pdf

analyzed in the first chapter at the time of consideration of the State of Uruguay[97], are declared unconstitutional as they are contrary to the values of the Uruguayan Constitution itself[98].

3.3.2.4. Final Considerations

At this point, some conclusions can be drawn.

First of all, considering the international and the regional level, it can be observed that although the human rights bodies that have been analyzed have never declared a national law as devoid of legal effects, which has instead been done several times by the IACtHR, it is clear and glaring a common view towards amnesty when used to pardon serious human rights violations. In these cases, in fact, the inadmissibility of such laws is a shared conception, just as the practice of determining which obligations the State in question has violated and consequently determining its international responsibility is also shared. All this does nothing but confirm that "IACtHR's jurisprudential substantive principles on amnesties are [...] consistent with the case law standards of other human rights systems"[99]. Therefore, it can be affirmed without a shadow of a doubt that the legitimacy assessment of the IACtHR is positive in the light of the legitimacy standard in question, i.e. consistency, as there is evident coherence between the practice of the IACtHR and the international and regional one[100].

Moving, then, on the national level, the rapid consideration of various Constitutions and Laws, as well as that of national jurisprudential practice, confirms that the position taken by the IACtHR with respect to these measures which guarantee an unjust immunity is not isolated, but, most likely, belongs to an articulated shared trend. This only strengthens the legitimacy of the IACtHR under the legitimacy standard in question[101].

3.3.3. Democratic Accountability

Finally, we come to the analysis of the legitimacy of the IACtHR under the latest legitimacy standard, which has been defined as democratic accountability. In order to carry out this verification, however, as has been mentioned above, particular tools are necessary, and the latter are represented by the principle of subsidiarity and by the concept of "margin of appreciation" entrusted to the states, an element, as mentioned above, typical of European doctrine.

Put simply, in order to confirm the legitimacy of the IACtHR's action on amnesty laws under this particular standard, it must be verified whether the national authorities enjoy a certain priority when they act, or better still, whether the level of intrusiveness of the IACtHR in the national legal order is not so evident as to hinder the principle of subsidiarity and consequently the freedom of manoeuvre entrusted to the states through the application of the concept of "margin of appreciation". Indeed, as many authors state, to enhance the

[97] See at sub-paragraph 1.3.6. "Uruguay".
[98] Corte Suprema de Uruguay. *Sabalsagaray Curutchet, Blaca Stela*. Complaint. Unconstitutionality Objections for Articles 1, 3, and 4 of Law No. 15.848. Ficha 97-397/2004. https://www.fder.edu.uy/sites/default/files/2017-11/Sentencia%20365%20de%202009%20SCJ.pdf
[99] Perez-Leon-Acevedo, *supra* note 79 (Chapter 2), at 677.
[100] Ibid.
[101] Ibid., at 679.

democratic legitimacy of international courts like the IACtHR, local authorities should enjoy a certain priority when deciding on legal and administrative issues[102].

In this regard, it is clear that a small part of the discussion must be entrusted to the explanation of these elements just mentioned. Once this is done, the behavior of the IACtHR, implemented in several cases already examined, will be analyzed, in order to draw conclusions on the topic in question.

3.3.3.1. Principle of subsidiarity and concept of "margin of appreciation"

First, it is important to understand what the principle of subsidiarity is useful for.

The latter, using very simple words, is nothing more than a principle that can be used as a normative framework to evaluate how to distribute and materialize authority within a multi-layered political and legal order. This principle, therefore, does nothing but mark the roles that different institutional bodies must have within a multilevel system.

However, if a concrete definition of what has just been written is what one is looking for, then the latter can be found in article 5.2 of the old "Treaty Establishing the European Community" (TEC), known today, after the amendment by work of the "Treaty of Lisbon" in 2009, as "Treaty on the Functioning of the European Union" (TFEU)[103]:

> "In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community"[104].

The same principle, then, can also be analyzed by taking into consideration article 5.3 of the "Treaty on European Union" (TEU), also amended by the "Treaty of Lisbon" in 2009[105]:

> "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level"[106].

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[102] Føllesdal, *supra* note 32, at 148; Kumm, Mattias. "Sovereignty and the Right to be left alone: subsidiarity, justice-sensitive externalities, and the proper domain of the consent requirement in international law". *Law and Contemporary Problems* 79, no. 2 (2016): 239-240. http://www.jstor.org/stable/43920666; Contesse, Jorge. Contestation and Deference in the Inter-American Human Rights System, 79 *Law and Contemporary Problems*, (2016): 124-126. https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4782&context=lcp

[103] European Parliament. *The principle of subsidiarity*. Fact Sheets on the European Union. In European Parliament website. Accessed on 18/01/2023. https://www.europarl.europa.eu/factsheets/en/sheet/7/the-principle-of-subsidiarity#_ftnref1

[104] Official Journal of the European Communities. *Consolidated version of the Treaty Establishing the European Community*. C340/173. (10/11/1997): article 5.2. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:11997E/TXT&rid=1

[105] European Parliament, *supra* note 103.

[106] Official Journal of the European Communities. *Consolidated version of the Treaty on European Union*. C326/13. (26/10/2012): article 5.3. https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF

Few differences between the words used, therefore, but a meaning that remains intact.

A meaning that implies, using Føllesdal's words, "a rebuttable presumption for the local"[107], i.e. that states "should have the prima facie authority to determine what qualifies as a policy challenge and how to respond to it legally, unless there are good reasons for international law to restrict what states may do and impose its own solutions"[108]. Therefore, following this principle, the higher-level institution will carry out the assigned tasks only if the latter cannot be performed by the lower institution.

In this regard, the concept of "margin of appreciation" should be introduced, developed entirely by the jurisprudence of the ECtHR[109]. In fact, this concept "is a judicial created doctrine"[110], that is, it was generated and refined over time only through jurisprudence, given that its "doctrine has not been the subject of sustained conceptual or theoretical explanation by its founders"[111]. This, therefore, does not allow to find a concrete definition of the concept, but in the European context various authors agree in defining it as "the latitude allowed by the ECtHR to the member states in their observance of the European Convention on Human Rights (ECHR)"[112]. In other words, following this vision, the margin of appreciation is nothing more than that margin of freedom of manoeuvre and action that the ECtHR recognizes to the member states of the Convention in the management and application of its values.

However, this does not mean that any international court is cut off.. Indeed, according to Legg, the margin of appreciation is the practice applied by an international human right court which involves "assigning weight to the respondent state's reasoning in a case on the basis of […] external factors"[113], among which we can find the common practice of states or the experience attributed to them[114]. Briefly, therefore, the international court of human rights in question still adjudicates the case, but takes into account also external factors, clearly not primary in the case, which in any case can change the result[115].

3.3.3.2. Principle of subsidiarity and concept of "margin of appreciation" in the *Convención*

Once the meaning of the two elements, mentioned several times above, has been explained, it is worthwhile, before verifying the behavior of the IACtHR in the face of the latter, to ascertain whether this principle of subsidiarity and the consequent concept of "margin of appreciation" can be found reading the articles of the *Convención*.

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[107] Føllesdal, *supra* note 32, at 148.
[108] Kumm, *supra* note 102, at 239-240. http://www.jstor.org/stable/43920666.
[109] Legg, Andrew. *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality*. Oxford Monographs in International Law (Oxford, 2012; online edn, Oxford Academic, 20 Sept. 2012): 3. https://doi.org/10.1093/acprof:oso/9780199650453.001.0001
[110] Ibid., at 16.
[111] Ibid.
[112] Bertelsan, Soledad. *A margin for the margin of appreciation: Deference in the Inter-American Court of Human Rights*. International Journal of Constitutional Law. (Volume 19, Issue 3, July 2021): 889. https://doi.org/10.1093/icon/moab063
[113] Legg, *supra* note 109, at 17.
[114] Ibid.
[115] Ibid., at 17-18.

With regard to *Sistema Interamericano de Protección de los Derechos Humanos*, the *Convención* refers to the principle of subsidiarity mentioned above, perhaps not too clearly, in its preamble:

"*Reconociendo que los derechos esenciales del hombre no nacen del hecho de ser nacional de determinado Estado, sino que tienen como fundamento los atributos de la persona humana, razón por la cual justifican una protección internacional, de naturaleza convencional coadyuvante o complementaria de la que ofrece el derecho interno de los Estados americanos*"[116];

The terms "*coadyuvante*" and "*complementaria*", which in English can be translated respectively with "contributory" and "complementary", in fact, do nothing more than specify the role that international protection must have in relation to human rights with respect to the within each state. Although therefore, there is not literally written "principle of subsidiarity", as it is present in the preamble of the ECHR, [117], it is clear that the *Convención* also establishes that international institutions for the protection of human rights must have a purely "contributory" and " complementary" with respect to national institutions.

Santiago also points out that the principle of subsidiarity can also be detected by reading article 46, paragraph 1.a, of the same legal source[118]:

"*Para que una petición o comunicación presentada conforme a los artículos 44 ó 45 sea admitida por la Comisión, se requerirá:*

a) que se hayan interpuesto y agotado los recursos de jurisdicción interna, conforme a los principios del Derecho Internacional generalmente reconocidos; [...]"[119].

In other words, in order for a complaint to reach the tables of the IACHR, the resources of the internal jurisdiction must have been used and therefore exhausted [120]. This prevents a state from having to answer before an international body without first having had the opportunity to remedy any violations in its local courts. What has been said, therefore, appears at first sight as a clear manifestation of the previously described principle of subsidiarity[121]. Furthermore, taking into consideration the article 1 of the statute of the IACtHR we read:

"*La Corte Interamericana de Derechos Humanos es una institución judicial autónoma cuyo objetivo es la aplicación e interpretación de la Convención Americana sobre Derechos Humanos. La Corte ejerce sus funciones de conformidad*

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[116] OEA, *supra* note 10 (Chapter 2), at Preamble.
[117] After the ratification of Protocol n. 15 to the ECHR, a clear reference to subsidiarity and the doctrine of the margin of appreciation has been added to the Preamble.
Stanculescu, Daria. *Subsidiarity and the margin of appreciation in Protocol 15 of the ECHR: substantial or symbolic change?*. In PILPG website, 5 July 2021. Accessed on 19/01/2023. https://www.publicinternationallawandpolicygroup.org/lawyering-justice-blog/2021/7/5/subsidiarity-and-the-margin-of-appreciation-in-protocol-15-of-the-echr-substantial-or-symbolic-change
[118] Santiago, Alfonso. *El principio de Subsidiariedad en el Derecho internacional de los Derechos Internacional*. Academia Nacional de Ciencias Morales y Políticas. (7 August 2013): 445-446. https://www.ancmyp.org.ar/user/files/02-Santiago13.pdf
[119] OEA, *supra* note 10 (Chapter 2), at article 46.1.b.
[120] Santiago, *supra* note 118, at 445-446.
[121] Ibid.

con las disposiciones de la citada Convención y del presente Estatuto"[122].

In other words, the IACtHR, being a judicial institution whose primary objective is to apply and interpret the *Convención*, exercises its functions in accordance with the provisions of this legal basis, thus having to respect, at least in theory, the principle of subsidiarity registered in it.

Turning instead to the concept of margin of appreciation, the latter seems not to be taken into consideration at all in the inter-American context. In fact, although the IACtHR itself initially recognized this doctrine, as can be seen in its advisory opinion 4/84, in which it states that the values proposed by the *Declaración* "*adquieren dimensiones concretas a la luz de la realidad en que están llamados a materializarse y que dejan un cierto margen de apreciación para la expresión que deben asumir en cada caso*"[123], subsequently the same was not applied, as will be better seen in the following sub-paragraph.

Finally, searching in the *Convención*, no word or any reference is made to this concept, an element instead present, once again, in the ECHR, precisely in its preamble[124].

3.3.3.3. Considerations on the democratic accountability of the IACtHR

Now that all the pieces are in order, what remains is to verify the legitimacy of the work of the IACtHR under the democratic accountability standard, clearly using the elements explained above.

What is evident by analyzing the jurisprudence of the IACtHR is that despite, as we have seen, the principle of subsidiarity seems to be inherent in the *Convención* itself, it has always shown a sort of reluctance towards the latter and in particular towards the concept of margin of appreciation[125].

One of the main reasons for this reluctance, as Perez-Leon-Acevedo points out, could be "the very poor record of democratic credentials that characterized a number of Latin American regimes during past decades"[126]. In fact, what is written in the chapters above seem to confirm the words of the author. It is no secret, in fact, that the violation of human rights, as well as the attempt to cover it up through the enactment of amnesty laws and similar measures, was the order of the day. The former member of the International Court of Justice as well as ex-president of the IACtHR, Antônio Augusto Cançado Trindade, then increases the dose proving to be more than satisfied that the doctrine of margin of appreciation "no ha encontrado un desarrollo paralelo explícito en la jurisprudencia bajo la Convención Americana sobre Derechos Humanos"[127] given the evident deficit of the judiciary at the local level, the context of rampant impunity, or the pressure and intimidation on the judicial power throughout Latin America[128]. In a nutshell, leaving too much room for manoeuvre to the local

[122] Asemblea General de la OEA. *Estatuto de la Corte Intramericana de Derechos Humanos*. Resolucion 448. (La Paz, Bolivia, October 1979): article 1. https://www.corteidh.or.cr/estatuto.cfm
[123] IACtHR. *Opinión Consultiva OC-4/84*. Propuesta de modificación a la Constitución Política de Costa Rica relacionada con la naturalización. (19 January 1984): §58. https://www.corteidh.or.cr/docs/opiniones/seriea_04_esp.pdf
[124] Stanculescu, *supra* note 117.
[125] Perez-Leon-Acevedo, *supra* note 79 (Chapter 2), at 680.
[126] Ibid.
[127] Quoted by Santiago, *supra* note 118, at 456-457.
[128] Ibid.

authorities, given the critical situation in which democracy was concerned, simply would not have brought the desired results, namely the protection of human rights.

Legal manifestation of this reluctance is certainly the doctrine of *control de convencionalidad*, well explained in the previous chapter[129]. As mentioned above, this doctrine makes its debut in the case of *Almonacid Arellano v. Chile*, when in paragraph 124 of the judgment, the IACtHR states that:

"*el Poder Judicial debe ejercer una especie de "control de convencionalidad" entre las normas jurídicas internas que aplican en los casos concretos y la Convención Americana sobre Derechos Humanos. En esta tarea, el Poder Judicial debe tener en cuenta no solamente el tratado, sino también la interpretación que del mismo ha hecho la Corte Interamericana, intérprete última de la Convención Americana*"[130].

Although it may seem a very similar concept to that of the European margin of appreciation, the doctrine of *control de convencionalidad* is completely different from it. Of course, it is true that apparently it seems that the States party to the *Convención* are given a certain degree of freedom in verifying the conformity between domestic and international legal order, but in reality the States themselves are obliged to apply the *Convención* only in the way in which it is interpreted by the IACtHR[131]. Indeed, Dulitzky states, "in Latin America [...] we are under the American Convention on Human Rights, but the Convention is what the judges of the Inter-American Court of Human Rights say it is"[132].

It is therefore clear that this doctrine is applied in a largely absolutist manner, which causes a transformation of the *Conveción* from a complementary and subsidiary international treaty to a norm hierarchically superior to any other in the legal system of a State, of which the IACtHR turns out to be the one and only interpreter[133]. The primacy of regional human rights law over domestic legal systems is therefore evident, as is the intrusive behavior of the IACtHR itself.

Example of such behavior was seen, for example, when the case *Gomes Lund et al. v. Brasil* was analyzed at the end of chapter 2[134].

In 2010, the Brazilian Supreme Court judged *Lei 6,683* as valid and constitutional as a "*ley medida*"[135] and representative of a political decision useful for the democratic transition[136]. Despite this, however, the IACtHR considered this decision to be erroneous because the control de convencionalidad had not been exercised, thus contravening the *Convención*[137]. In other words, given that the decision of the Brazilian Supreme Court did

[129] See at sub-paragraph 2.3.3.
[130] IACtHR, *Almonacid Arellano v. Chile*, *supra* note 87 (Chapter 2), at §124.
[131] Dulitzky, Ariel E. *An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights*, 50 Texas International Law Journal 45 (2015): 52.
https://law.utexas.edu/faculty/publications/2015-An-Inter-American-Constitutional-Court-The-Invention-of-the-Conventionality-Control-by-the/download
[132] Ibid., at 46.
[133] Ibid., at 52-64.
[134] See at sub-paragraph 2.3.4.
[135] IACtHR, *Gomes Lund et al. v. Brasil*, *supra* note 93 (Chapter 2), at §44.
[136] Ibid., at §136.
[137] Ibid., at §177.

not coincide with the interpretation that the IACtHR had given of the amnesty laws, then this decision could not be accepted[138]. It therefore seems that, “for the Court, the only valid conventionality control is the one that coincides with its own decisions”[139], regardless of whether one considers a national court to be independent, impartial, and part of a democratic system or not[140].

Another striking example of this intrusive behavior is certainly what can be found in the case *Gelman v. Uruguay*, where, as we have seen, the IACtHR does not change its position on amnesty laws even in the face of norms issued and supported by well-defined democratic processes. Law 15.848, or *Ley de Caducidad*, in fact, was not only enacted by the Uruguayan Parliament in 1986[141], but was also first confirmed as valid and constitutional by the Uruguayan Supreme Court in 1988[142], and then even supported by two popular referendums in 1989 and 2009[143]. However, all this was not enough, and the IACtHR affirmed that the State of Uruguay, by interpreting and applying the law in question, had not complied with the obligation to adapt its internal legal system to the *Convención*[144].

Clear was therefore the message of zero tolerance that had been sent by the IACtHR towards amnesties when the latter affected the human rights of the victims. As Perez-Leon-Acevedo states, it did not matter whether such measures had a "democratic" pedigree or validation[145]. In fact, the IACtHR in the same judgment stated that:

> “*El hecho de que la Ley de Caducidad haya sido aprobada en un régimen democrático y aún ratificada o respaldada por la ciudadanía en dos ocasiones no le concede, automáticamente ni por sí sola, legitimidad ante el Derecho Internacional*”[146]

Rereading what is written, therefore, it can be concluded by saying that, if under the legitimacy standards such as human rights and consistency, the legitimacy of the action of the IACtHR is more than evident, the same cannot be said if this verification is carried out under the standard of democratic accountability. The IACtHR in its jurisprudence regarding amnesties has more often opted towards making its interpretation of the *Convención* prevail rather than leaving a "margin of appreciation" to the States, which greatly affects the level of legitimacy of its action.

3.4. Conclusions

This chapter was useful to verify the legitimacy of the action of the IACtHR against the amnesty laws.

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[138] Dulitzky, *supra* note 131, at 69.
[139] Ibid.
[140] Perez-Leon-Acevedo, *supra* note 79 (Chapter 2), at 681.
[141] IACtHR, *Gelman v. Uruguay*, *supra* note 94, at §144.
[142] Ibid., at §146.
[143] Ibid., at §147 and §149.
[144] Ibid., at §246 and §312.6.
[145] Perez-Leon-Acevedo, *supra* note 79 (Chapter 2), at 682.
[146] IACtHR, *Gelman v. Uruguay*, *supra* note 94 (Chapter 2), at §238.

A respectable examination action, however, cannot begin without understanding the meaning of the object of verification, which in this case is represented by the concept of legitimacy. The latter has both a sociological and a normative meaning, which, however, must be divided between them if one wants to define the dimension within which to articulate the aforementioned verification. In fact, while the former creates a subjective dimension in which the verification of legitimacy is based on the interpretation of what is perceived as legitimate from the outside, the latter forges an objective one in which moral, political, and legal theory is the master, focusing more on the presence or absence of a "right to rule". Clear is the importance of the second meaning in this discourse.

Furthermore, a verification cannot be carried out without comparison factors, or in this case, legitimacy standards: human rights, consistency understood as coherence, and democratic accountability. Each one, taken individually, made it possible to analyze the legitimacy of the work of the IACtHR.

Moving under the first standard, human rights, the analyzed jurisprudence of the IACtHR, aimed at the complete and incorruptible defense of the human rights of the victims, has more than manifested the will of the same to promote the values and objectives of the regulatory regime that it is called upon to interpret and apply. Furthermore, the same case law has made it possible to ascertain that the IACtHR has carried out clear jurisprudential developments in the field of human rights, well represented by the priority given to access to justice and the discovery of the truth, thus confirming a large level of legitimacy.

Legitimacy, then, also confirmed under the second legitimacy standard, consistency understood, in this case, as coherence between the work of the IACtHR and international, regional, and national practices. In fact, the analysis of the jurisprudence of two UN treaty bodies, such as the Human Rights Committee (HRC) and the Committee Against Torture (CAT) for the international level, as well as that of the ECtHR and the ACHPR as regards the regional level, respectively European and African, demonstrated an evident harmony in the choices and perceptions regarding the amnesty and its effects with that of the IACtHR itself. In fact, the role of the IACtHR point of view on amnesties as an integral part of a common vision was clear. Considering, then, the national level through the examination of constitutions, laws, and state jurisprudence, it has also been seen that the position presented by the IACtHR regarding these measures granting amnesty is not an isolated one but rather appears to belong to a particular and shared trend.

Different speech, however, if one wants to confirm the legitimacy of the IACtHR under the latest standard, i.e. democratic accountability. The development of the *control de convencionalidad* doctrine has completely eliminated the consideration of the principle of subsidiarity and consequently of the typically European concept of “margin of appreciation”. In other words, dictated above all by a lack of trust in the democratic credentials possessed by the states, the latter are left with zero leeway in decisions regarding the interpretation of the *Convención*, which leads to a cumbersome interventionism by the IACtHR in the internal arrangements. The declaring of national laws as devoid of legal effect, adjudicating directly on the decision of a national court, or not considering at all the process that led to the enactment of a particular law, are proof of this. The

said IACtHR case law has, therefore, explicitly disclosed “an interventionist or controlling approach and, thus, it has been counter-productive in legitimacy terms”[147]. Consequently, as Perez-Leon-Acevedo states, “the overall legitimacy of the IACtHR’s practice on amnesties and other exemption measures has suffered a negative impact”[148].

The common criticisms that are made nowadays and that were presented at the beginning, therefore, as well as the consequent concerns, seem well founded in the face of this behavior. Concerns, then, which also expand towards another important topic concerning the IACtHR: its effectiveness. The latter will be precisely the object of the verification that will be articulated in the following chapter.

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[147] Perez-Leon-Acevedo, *supra* note 79 (Chapter 2), at 687.
[148] Ibid.

Chapter IV

Effectiveness of the IACtHR

The examination carried out in the previous chapter, as we have seen, made it possible to verify the legitimacy of the action of the IACtHR against the amnesty laws on three different fronts thanks to the use of as many standards. Although broad legitimacy has been found in its work given the evident crusade carried out in favor of the protection of human rights and a clear consonance with other developments in international, regional, and national law, the same cannot be said under the point of view of democratic accountability. Seriously interventionist behavior, in fact, does not allow states a concrete freedom to act and this not only limits the level of legitimacy but also gives rise to those concerns and challenges which, it has to be recalled, led to the development of the previous analysis.

Concerns which, however, do not stuck only in this field, but expand, and touch other issues also concerning the functioning of the IACtHR itself. Another central and constant theme of the latter concerns, in fact, turns out to be the question concerning its effectiveness[1], due in particular to the apparent low level of compliance with decisions of the IACtHR[2]. Indeed, "various academic and civil society studies have concluded that in general, […] IACtHR orders related to judicial reparations are those with the lowest level of compliance"[3].

In this regard, the following chapter is precisely aimed at analyzing the effectiveness of the IACtHR in achieving its goal, namely ensuring and promoting the protection of human rights on Latin American soil. To do this, however, in this case it will not be possible to concentrate only on cases in which the object of the complaint is represented by an amnesty law, but the horizon of research will have to be broadened, considering a different multitude of cases concerning different themes. Following this vision, therefore, the present chapter will unfold as follows.

First of all, what is meant by effectiveness, and its relationship with compliance, will be the focus of attention. This consideration will allow not only to give a definition, but will also make it possible to establish the basis on which the aforementioned analysis will be structured, i.e. the compliance of the member states with the provisions of the IACtHR. Next, the legal and institutional architecture underlying compliance mechanisms in the IACtHR will be considered in order to understand how this institution actually tries to ensure that its decisions are enforced. Once this supervision of the various mechanisms has been completed, it will be time to move on to the actual analysis that will allow some answers to be given. Conclusions close the chapter.

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[1] Fernando Basch, Leonardo Filippini, Ana Laya, Mariano Nino, Felicitas Rossi and Bárbara Schreiber. *The Effectiveness of the Inter-American System of Human Rights Protection*. SUR 12 (2010): 9. https://sur.conectas.org/en/effectiveness-inter-american-system-human-rights-protection/

[2] ESCR-Net's Strategic Litigation Working Group. Implementation of decisions of the Inter-American Commission on Human Rights. (n.d.): 3. Accessed on 22/01/2023. https://www.escr-net.org/sites/default/files/201802-discussion-paper-of-escr-nets-strategic-litigation-working-group.pdf; Urueña, Rene. Compliance as transformation: the Inter-American system of human rights and its impact(s). Chapter. In *Research Handbook on Compliance in International Human Rights Law*, edited by Grote, Rainer, Mariela Morales Antoniazzi, and Davide Paris, 225-247. (Cheltenham, UK: Edward Elgar Publishing, 2021): 237. ISBN: 978 1 78897 1119.

[3] ESCR-Net's Strategic Litigation Working Group, *supra* note 2, at 3.

4.1. Definition of Effectivenes

Using Black's Law Dictionary once again, the legal meaning of effectiveness is:

"the closeness of actual results achieved to meeting expectations"[4].

With these few words, therefore, it is understood that effectiveness is nothing more than the ability to make a desired output real or the ability to achieve a prearranged goal. In our case, as we understand, the goal of the IACtHR is to ensure that the human rights contained in the *Convención* are respected in a uniform manner by all members under its jurisdiction, or, in other words, to shape the behavior of States so that the latter do not interfere in the violation of the *Convención* itself. In this sense, therefore, according to Raustiala and Slaughter, effectiveness can be defined as

"the degree to which a rule induces changes in behavior that further the rule's goals"[5]

In this analysis, therefore, effectiveness is to be considered as a measure of the role of the IACtHR in shaping the behavior of actors in international society, namely the States. That is to say, an institution, in this case the IACtHR, will be considered effective "to the extent that its operation impels actors to behave differently than they would if the institution did not exist"[6].

In the light of the definition provided and of what has just been said, the degree of effectiveness of the IACtHR will be analyzed regarding the compliance of the Member States with its decisions. It is no coincidence, in fact, that compliance is defined as "state of conformity or identity between an actor's behavior and a specified rule"[7]. The more it turns out that the States have shown themselves willing to apply the provisions received, the more effective the work of the IACtHR will be. Using the words of González-Salzberg, it will observed "if the existence of the Court's judgments made the States act in a different way than they would have if the ruling would not have been issued"[8].

Before moving on, however, a clarification regarding the relationship between effectiveness and compliance needs its deserved space. Indeed, as implicit as the connection between the two elements may seem, many authors in recent decades have raised serious criticism of the view of considering compliance as useful for

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[4] The Law Dictionary. Free Online Legal Dictionary featuring Black's Law Dictionary 2nd edit. s.v. "effectiveness". In The Law Dictionary website. Accessed on 23/01/2023. https://thelawdictionary.org/effectiveness/

[5] Quoted by Grote, Rainer, Mariela Morales Antoniazzi, and Davide Paris. Compliance in international human rights law: issues, concept, methodology. Chapter. In *Research Handbook on Compliance in International Human Rights Law*, edited by Grote, Rainer, Mariela Morales Antoniazzi, and Davide Paris, 1-10. (Cheltenham, UK: Edward Elgar Publishing, 2021): 3. ISBN: 978 1 78897 1119.

[6] Young, Oran R. "The Effectiveness of International Institutions: Hard Cases and Critical Variables." Chapter. In *Governance without Government: Order and Change in World Politics*, edited by James N. Rosenau and Ernst-Otto Czempiel, 160–94. Cambridge Studies in International Relations. (Cambridge: Cambridge University Press, 1992): 161. doi:10.1017/CBO9780511521775.008.

[7] Raustiala, Kal and Anne-Marie Slaughter, 'International Law, International Relations and Compliance' in Walter Carlsnaes, Thomas Risse and Beth A. Simmons (eds), *Handbook of International Relations* (London: SAGE, 2006): 539. https://scholar.princeton.edu/sites/default/files/slaughter/files/compliance.pdf

[8] González-Salzberg, Damián A. *The effectiveness of the Inter-American Human Rights System: a study of the American States' compliance with the judgments of the Inter-American Court of Human Rights*, 16 International Law, Revista Colombiana de Derecho Internacional, 115-142 (2010): 121. http://www.scielo.org.co/pdf/ilrdi/n16/n16a05.pdf

measuring effectiveness in international law[9]. Raustiala and Slaughter even go so far as to say that "the connection between compliance and effectiveness is also neither necessary nor sufficient"[10]. Their idea is based on the fact that, in reality, rules or regimes are sometimes effective in changing behaviour even if the level of compliance is low, or, conversely, rules or regimes are ineffective in changing pre-existing behaviour even if a good level of compliance is found[11]. This leads one to consider compliance as an unsuitable tool for measuring effectiveness, since what matters, especially in international law, is not so much compliance with it, but the impact it has on the behaviour of international actors such as States[12].

At the same time, however, one must distance oneself from these criticisms when the relationship between compliance and the particular judgments of a regional human rights court like the IACtHR is taken into consideration, which is the focus adopted in this text. Passando dal generale al particolare vi è un forte cambiamento. The distance between compliance and effectiveness, in fact, is greatly reduced when compliance with a judgment is the focus of attention[13], so much so that when faced with a court order, and the resulting change in the behaviour of the state in question, one wonders whether the state would have done the same even without the presence of such an order.

The relationship between effectiveness and compliance thus seems obvious[14], and, above all, useful for the purposes of the research proposed in this text.

4.2. IACtHR supervisory mechanisms

Before going further, however, and therefore analyzing the degree of effectiveness of the decisions of the IACtHR, it is useful to consider what are the actions carried out by the court itself to verify the application of its decisions at the national level. In fact, it must be remembered that, due to a lag present in article 65 of the *Convención*, the only body assigned to supervise the application of the decisions of the IACtHR is precisely the IACtHR itself.[15].

As written above[16], the IACtHR has two main functions which are the contentious and the consultative one, plus it also has the power to issue provisional measures to the States in cases of extreme gravity and urgency. As regards the process that leads to the application of the contentious function and the one that instead leads to the implementation of the ability to order provisional measures, it can be noted that in both a part of the process is intended for monitoring compliance[17], which is essential for the effectiveness of the IACtHR[18].

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[9] Grote, et al., *supra* note 5, at 3.
[10] Raustiala, *supra* note 7, at 539
[11] Ibid.
[12] Grote, et al., *supra* note 5, at 4.
[13] Ibid.
[14] Ibid.
[15] See at sub-paragraph 2.2.2 "The Inter-American Court of Human Rights (IACtHR)".
[16] See again at sub-paragraph 2.2.2 "The Inter-American Court of Human Rights (IACtHR)".
[17] IACtHR. *Annual Report 2015.* (2015): 12, 16-18. https://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2015.pdf
[18] IACtHR. *Annual Report 2010.* (2010): 9. https://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2010.pdf

However, Urueña writes that, before 2009, "no legal provision within the [*Sistema Interamericano de Protección de los Derechos Humanos*] expressly referred to the power of the Court to monitor the compliance of its decisions"[19]. Indeed, the IACtHR considered that the legal grounds for its monitoring powers came from articles of the *Convención*, such as 33, 62(1), 62(3), 65, and from article 30 of the Statute of the Court, which, however, must be considered far from explicit on the subject. In a nutshell, the IACtHR considered that the authority to review its own judgments was more an authority inherent in the exercise of its jurisdictional powers than a power with written origin in a legal source. Consideration, among other things, which can be found in the case of *Baena-Ricardo et al. v. Panama* of 2003[20], which refers to the need to establish and implement concrete monitoring mechanisms:

> "Its jurisdiction includes the authority to administer justice; it is not restricted to stating the law, but also encompasses monitoring compliance with what has been decided. It is therefore necessary to establish and implement mechanisms or procedures for monitoring compliance with the judicial decisions, an activity that is inherent in the jurisdictional function. […] To maintain otherwise, would mean affirming that the judgments delivered by the Court are merely declaratory and not effective"[21].

Precisely for this reason, realizing the importance of monitoring so that the effectiveness of the envisaged provisions is concrete, the IACtHR, during its LXXXV Regular Period of Sessions, in November 2009, approved a new set of rules[22], and in article 69 it explicitly established that first of all, the compliance procedure must be carried out through the submission of reports by States and through observations of the latter by victims, all concluded with comments from the IACHR (§69.1). At the same time, however, the IACtHR is not limited only to receiving these informative reports but it may gather information from all sources (§69.2), and may summon both States and victims' representatives to a hearing in order to check the state of application of its previous decisions (§69.3).

If before, thus, there was a total absence of a procedure to follow in order to verify the compliance of the States with its decisions, the IACtHR has passed, from 2009 onwards, to have real and proper monitoring compliance mechanisms, which are[23]: request for information, monitoring hearings, on-site visits, holding informal meetings with State agents or delegations, and involving national institutions and organs in a position to push for implementation of reparations domestically.

Whatever the method used, then, having obtained the necessary information and having examined the circumstances, the IACtHR is obliged to define the status of the situation in which compliance is concerned with its decisions and therefore issue the relevant orders so that the latter is definitively observed (§69.4).

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[19] Urueña, *supra* note 2, at 231.
[20] IACtHR. *Baena-Ricardo et al. Panama.* Judgment of 28 November 2003 (Judgment). Series C No. 104. https://www.corteidh.or.cr/docs/casos/articulos/seriec_104_ing.pdf
[21] Ibid., at §72.
[22] IACtHR. *Rules of Procedure of the Inter-American Court of Human Rights*. Approved in November 2009. https://www.corteidh.or.cr/sitios/reglamento/nov_2009_ing.pdf
[23] Urueña, *supra* note 2, at 233-236.

4.2.1. Compliance Monitoring Mechanism No. 1: Request for Information

Among the various mechanisms used by the IACtHR and listed above, the first to be examined is that which concerns the constant request for information both to the States and to the representatives of the victims, as well as to the IACHR itself. This action is the direct application of the aforementioned article 69, paragraph 2, as the latter authorizes the IACtHR to search for information even outside the reports that must be sent to the IACtHR through the application of paragraph 1 of the same article. Indeed:

> "The Court may require from other sources of information relevant data regarding the case in order to evaluate compliance therewith. […]"[24].

In this way, the origin of the information relating to the case is not to be linked only to some predefined source, but to sources of different origins, which allows a greater knowledge of the compliance situation by the IACtHR. Among these sources we find, in fact, experts in the sector, domestic institutions su ch as Ombudsman Offices or national Human Rights Institutions, internal departments of the Attorney General's Office of various States, and so on[25].

4.2.2. Compliance Monitoring Mechanism No. 2: Monitoring Hearings

Another monitoring mechanism in the hands of the IACtHR is the possibility of convening hearings, well established, this time, by paragraph 3 of the aforementioned Article 69:

> "When it deems it appropriate, the Tribunal may convene the State and the victims' representatives to a hearing in order to monitor compliance with its decisions; the Court shall hear the opinion of the Commission at that hearing"[26]

These hearings convened, according to the IACtHR Annual Report of 2015, can be of three different types[27]:

1. Monitoring hearings on individual cases;
2. Joint hearings to monitor several cases against the same State;
3. Monitoring hearings away from the seat of the Court, that is, hearings convened in the territory of the State in question;

1) The usefulness of the first type hearings is easy to understand. Indeed, during these hearings, the IACtHR not only takes note of the statements of those summoned, who can be representatives of States, victims, and the IACHR, but also allows the creation of a space in which these representatives can collaborate to resolve difficulties, change some attitudes, and better implement the provisions provided by the court[28].

2) With regard to the second type, on the other hand, the object of verification is represented by various cases which, however, have the same State as a party. These latest hearings not only make it possible to reduce the

[24] IACtHR. *Rules of Procedure of the Inter-American Court of Human Rights*, *supra* note 22, at § 69.2.
[25] Urueña, *supra* note 2, at 233-234.
[26] IACtHR. *Rules of Procedure of the Inter-American Court of Human Rights*, *supra* note 22, at § 69.3.
[27] IACtHR. *Annual Report 2015*, *supra* note 17, at 55-56.
[28] Ibid., at 16.

analysis time of the various cases, but also give the IACtHR the possibility "to deal with such problems transversally in different cases, and to obtain a general overview of the progress made, and any impediments to such progress in a State"[29].

3) Finally, the last type of hearings, which must absolutely be connected to another tool that will be subsequently analyzed, i.e. the on-site visits, allows the IACtHR to listen to elements concerning the situation by going on site, thus collecting direct information on the challenges, obstacles, and possible solutions proposed in relation to the implementation of its previous decisions. This situation can be reached because "this type of hearing enables greater participation by victims and the different state officials and authorities directly responsible for the execution of the various reparations ordered in the judgments"[30].

4.2.3. Compliance Monitoring Mechanism No. 3: On-site visits

Moving on in the review of compliance monitoring mechanisms, we come to the analysis of on-site visits, a practice which, in the Convención, appears to be envisaged for the IACHR and not for the IACtHR. Indeed, Article 48.d., one of those articles intended to explain the procedure before the IACHR, states:

"*Si fuere necesario y conveniente, la Comisión realizará una investigación para cuyo eficaz cumplimiento solicitará, y los Estadosinteresados le proporcionarán, todas las facilid necesarias*"[31].

There does not, however, appear to be anything about this with regard to the IACtHR in the *Convención*.

In spite of this, however, as has been said before, the IACtHR also frequently appeared *in loco* by convening hearings away from the seat of the Court. Indeed, from 2015 onwards, the number of the on-site visits has increased exponentially[32] and their importance is due not only to the possibility for the IACtHR to be able to convene hearings, but also and especially because[33]:

- They allow for a direct analysis of the human rights situation. In fact, the authorities will be forced to account for their actions given the physical presence of the IACtHR;
- They allow the victims, and their families, to have another theatre in which to express their opinions and complaints, favoring direct contact between the latter and the high representatives of the State;
- Allow a direct investigation in the field, which provides more information about compliance with previous decisions taken;

The success of these types of mechanisms is well represented, for example, by the visit made by a delegation of the IACtHR to El Salvador in 2018. This on-site visit, in fact, not only allowed a faster process of paying compensation by the status to victims, but also a wider discussion about the extent of progress in identifying

[29] IACtHR. *Annual Report 2014.* (2014): 8. https://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2014.pdf
[30] IACtHR. *Annual Report 2017.* (2017): 71. https://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2017.pdf
[31] OEA. *Convención Americana sobre Derechos Humanos*, *supra* note 10 (Chapter 2), at §48.d.
[32] Urueña, *supra* note 2, at 235.
[33] CEJIL. *Guía práctica sobre visitas in loco de la CIDH.* Movilidad Humana en Mesoamérica. (San José, 7 May 2021): 5. https://cejilmovilidadenmesoamerica.org/wp-content/uploads/2021/05/Guia-Visita-in-loco.pdf

victims, as well as showed the need for psychosocial care to be made available to the community[34].

4.2.4. Compliance Monitoring Mechanisms No. 4-5: informal meetings and pressure on national institutions

The latest monitoring tools possessed by the IACtHR are those which, according to Urueña, have seen their application since 2016 and are[35]:

- Holding informal meetings with State agents or delegations;
- Involving national institutions and organs in a position to push, in the domestic sphere, for implementation of reparations;

As regards the first mechanism, the latter has the objective of providing the States with information or discussing with them the state of compliance in which the decisions taken concern. Although it must be noted that these are not official hearings, this does not mean that they are less effective. What is written in the 2017 IACtHR Annual Report, in fact, confirms that these meetings have a strong and positive impact "on improving communication on matters such as the different reparations that States are called on to implement, deadlines for the submission of reports, and observations presented by the victims' representatives and the Commission"[36].

Turning the gaze towards the second mechanism, instead, the latter has the objective of involving national bodies or institutions which, within the scope of their competences, solicit the public authorities to carry out specific acts or take measures aimed at the creation and implementation of the provisions ordered by the IACtHR itself in its judgments[37]. Driven by these internal pressures, in fact, these authorities may be more willing to respect the decisions made by the IACtHR.

4.2.5. Orders on monitoring compliance

Once the necessary information has been obtained, the aforementioned article 69.4 obliges the IACtHR to submit orders on monitoring compliance to the States concerned. Indeed, the latter states that:

> "Once the Tribunal has obtained all relevant information, it shall determine the state of compliance with its decisions and issue the relevant orders[38]".

These orders complete the control process by the IACtHR and thus allow to have a complete picture of the situation of compliance with the decision in question. If full compliance with the repairs ordered is found then the case is permanently closed, but if irregularities are found then these orders serve as a request for further

[34] Bailliet, Cecilia M. Procedure for Monitoring Compliance with Judgments and Other Decisions: Inter-American Court of Human Rights (IACtHR). In *Max Planck Encyclopaedia of International Law*. Oxford Public International Law, January 2021. https://opil.ouplaw.com/display/10.1093/law-mpeipro/e2653.013.2653/law-mpeipro-e2653
[35] Urueña, *supra* note 2, at 236.
[36] IACtHR. *Annual Report 2017, supra* note 30, at 83.
[37] Ibid., at 84.
[38] IACtHR. *Rules of Procedure of the Inter-American Court of Human Rights*, *supra* note 22, at §69.4.

information on the measures to be taken as well as an exhortation for states to comply with the decision. Likewise, these orders can take the form of real guides, in which there are instructions for compliance or clarifications regarding aspects on which there is a dispute between the parties[39]. The sole objective of these orders is naturally that of "ensure the full and effective implementation of [the] decisions"[40].

In some cases, moreover, the IACtHR, faced with the complete non-compliance with its decisions by a particular state, can request the intervention of the *Asemblea General de la OEA* through the application of article 65 of the *Convención*:

> "*La Corte someterá a la consideración de la Asamblea General de la Organización en cada período ordinario de sesiones un informe sobre su labor en el año anterior. De manera especial y con las recomendaciones pertinentes, señalará los casos en que un Estado no haya dado cumplimiento a sus fallos*"[41].

Action confirmed also within the statute of the IACtHR thanks to article 30:

> "The Court shall submit a report on its work of the previous year to each regular session of the OAS General Assembly. It shall indicate those cases in which a State has failed to comply with the Court's ruling"[42].

In this way, by appealing to the interest of states, as members, to support the system of rights protection they themselves have created, the IACtHR calls upon the *Asemblea General de la OEA*, which is thus informed and urged to influence the State directly concerned[43].

4.3. Assessing effectiveness

Reading the above, it can undoubtedly be said that the IACtHR, to date, has several procedures for monitoring compliance, which may suggest that the effectiveness of its work is more than evident. If one then also adds to this what Article 68.1. of the Convention states, i.e. that states, as parties to this treaty, must by obligation implement the court's decisions, then what has been said before seems more than confirmed. Apparently, however, the situation is very different, so much so that the considerations of various authors point to a real crisis in the implementation of decisions[44].

4.3.1. From general to particular

Taking into consideration, for example, the analysis carried out by González-Salzberg, the IACtHR, from the beginning of its work to the end of 2008, had made a final decision in 105 cases[45]. Of the latter:

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[39] IACtHR. *Annual Report 2015*, *supra* note 17, at 56.
[40] Ibid.
[41] OEA. *Convención Americana sobre Derechos Humanos*, *supra* note 10 (Chapter 2), at §65.
[42] Asemblea General de la OEA. *Estatuto de la Corte Intramericana de Derechos Humanos*, *supra* note 122 (Chapter 3), at article 30.
[43] IACtHR. *Annual Report 2020.* (2020): 74. https://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2020.pdf
[44] Cavallaro, *supra* note 31 (Chapter 2), at 785; Baluarte, David C., Christian M. De Vos, and David. Berry. *From Judgment to Justice Implementing International and Regional Human Rights Decisions*. (New York, NY: Open Society Foundations, 2010): 63. https://www.justiceinitiative.org/uploads/62da1d98-699f-407e-86ac-75294725a539/from-judgment-to-justice-20101122.pdf
[45] González-Salzberg, *supra* note 8, at 122.

- 2 cases - *Cayara v. Peru*[46] of 1993 e *Alfonso Martín del Campo Dodd v. Estados Unidos Mexicanos*[47] of 2004 - were filed for the court's admission of preliminary objections filed by the State;
- 1 case – *Maqueda v. Argentina*[48] of 1995 - was filed for the cessation of the action promoted by the IACHR;
- 2 cases – *Fairén Garbi y Solís Corrales v. Honduras*[49] of 1989 e *Nogueira de Carvalho y otro v. Brasil*[50] of 2006 - were dismissed because no violation of the *Convención* was found;

In total, therefore, at the end of 2008, 100 judgments appeared to present sentences and reparation obligations attributable to the States in question[51].

Continuing with the analysis then, at the end of the same period, of these 100 cases only 6 had been declared closed as the provisions and the reparation orders issued had been completely respected. Carrying out a simple equation, therefore, it is found that only 6% of the orders dispensed by the court had actually been applied nationwide[52].

In other words, more than 90% of the IACtHR judgments were not implemented by the States, showing a high ineffectiveness of the system itself.

Maintaining the same analytical method, then, the current situation, 2023, does not seem to have changed. To date, in fact, out of a total of 319 cases, 273 are still open, while only 44 can be considered archived:

	Cases at monitoring compliance stage[53]	**Cases at Monitoring with application of Art. 65 of the *Convención***[54]	**Filed cases**[55]
	273	21	44
Total	319		

TABLE 5 – DATA FROM THE IACTHR WEBSITE AND ELABORATED BY THE AUTHOR

[46] IACtHR. *Cayara v. Peru*. Judgment of 3 February 1993. Serie C No. 14. §64. https://www.corteidh.or.cr/docs/casos/articulos/seriec_14_esp.pdf
[47] IACtHR. *Alfonso Martín del Campo Dodd v. Estados Unidos Mexicanos*. Judgment of 3 September 2004. Serie C, No. 113. §86. https://www.corteidh.or.cr/docs/casos/articulos/seriec_113_esp1.pdf
[48] IACtHR. *Maqueda v. Argentina*. Judgment of 17 January 1995. Serie C No. 18. §28. https://www.corteidh.or.cr/docs/casos/articulos/seriec_18_esp.pdf
[49] IACtHR. *Fairén Garbi y Solís Corrales v. Honduras*. Judgment of 15 March 1989. Serie C No. 6. §163. https://www.corteidh.or.cr/docs/casos/articulos/seriec_06_esp.pdf
[50] IACtHR. *Nogueira de Carvalho y otro v. Brasil*. Judgment of 28 November 2006. Serie C No. 161. §82. https://www.corteidh.or.cr/docs/casos/articulos/seriec_161_esp1.pdf
[51] González-Salzberg, *supra* note 8, at 122.
[52] Ibid.
[53] IACtHR. *Cases at monitoring compliance stage*. In IACtHR website. Accessed on 26/01/2023. https://www.corteidh.or.cr/casos_en_supervision_por_pais.cfm?lang=en
[54] IACtHR. *Cases under monitoring with application of Art.65 ACHR*. In IACtHR website. Accessed on 26/01/2023. https://www.corteidh.or.cr/casos_en_supervision_por_pais.cfm?lang=en
[55] IACtHR. *Filed cases*. In IACtHR website. Accessed on 26/01/2023. https://www.corteidh.or.cr/casos_en_supervision_por_pais_archivados.cfm?lang=en

Considering the same type of previous equation, the result that would represent the level of effectiveness of the system is equivalent to approximately 14%.

Of course, the percentage degree evidently increased between 2008 and 2023, but, despite this, a negative percentage of around 86% certainly cannot lead one to affirm that the system itself is completely effective.

Yet, this ineffectiveness is not entirely true.

In fact, carrying out such an analysis, it is absolutely necessary to take into account the fact that the IACtHR itself, in order to establish compliance with its provisions, applies a criterion that can be defined as an "all-or-nothing" criterion[56]. This means that until all the orders laid down in a given sentence are carried out, the case connected to it will still be considered open. In fact, it is no coincidence that “a case at the stage of compliance monitoring has orders whose implementation is still outstanding, while others have already been complied with”[57]. This explains, therefore, the high percentage degree of cases still open.

The verification carried out up to now, therefore, although it cannot be defined as incorrect, certainly lacks completeness.

There is a need to go into more detail, and this is why various authors recommend focusing more on the different measures and provisions ordered by the IACtHR, taken individually and even better if enclosed in different categories of belonging, rather than focusing on the general number of open cases or closed[58].

Following exactly what has been said, now is the time to define these categories, which are useful for setting up the analysis in question. The latter are[59]:

1. Pecuniary compensation;
2. Costs and expenses;
3. Publicity of the international judgment;
4. Public acknowledgement of international liability;
5. Obligation of prosecuting the individual perpetrators of the human rights violation or improve the level of investigations;
6. Adjust the internal order or amendment of the legislation;

Instead, elements such as the obligation to provide the victim or its family with medical and psychological treatment, the duty to nullify a judicial conviction, or the order to memorialize the victims with monuments or street names are left out, as these are measures that find little space in the sentences that will be analysed and are therefore less frequent[60].

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[56] González-Salzberg, *supra* note 8, at 123.
[57] Urueña, *supra* note 2, at 232.
[58] González-Salzberg, *supra* note 8, at 123.
[59] Ibid.
[60] Ibid.

At this point, all the instruments seem to be in place, but further clarifications need to be ascertained before starting with the verification:

1. Firstly, to avoid going too far given the high number of cases undertaken by the IACtHR up to today, which they have be seen to be a total of 319, only the sentences between 2015 and 2023 will be analyzed, thus considering a total of 56 cases over a 5-year period;
2. Secondly, notwithstanding the cases analyzed in Chapter 2 above, namely *Barrios Altos v. Peru* (2001), *La Cantuta v. Peru* (2001), *Almonacid Arellano v. Chile* (2006), *Gomes Lund et al. v. Brasil* (2010), e *Gelman v. Uruguay* (2011), do not fall within the selected time frame, they will still be taken into consideration given the importance they had in the drafting of this text;
3. Thirdly, again for the reason not to dwell too much, only some States will be selected. The latter will be the same that were viewed in Chapter 1 when it has been tried to present a general overview of the enactment of amnesties on Latin American soil, with the exception of the countries of Central America (El Salvador, Guatemala, Honduras, Nicaragua). The States in question, therefore, will be: Argentina, Brazil, Chile, Peru, Uruguay;;
4. Finally, in order to quantify the results that will be obtained, the latter will be classified according to the degree of compliance in three different categories, namely "fully complied" (FC), if the orders in question have been completely fulfilled, “partially complied” (PC), if some action appears to have been taken, but still not enough, and “pending fulfilment” (PF), if no or few actions appear to have been taken to fulfil the provisions in question[61];

Once the necessary preliminary bases have been established, and the structure defined, the verification can finally be carried out.

4.3.2. Effectiveness assessment shown graphically

By examining the IACtHR database[62], and following the instructions listed above, the following table is obtained, which, however, can only give a small glimpse of compliance with the provisions ordered by the court itself.

The results thus obtained, in fact, must be processed to make them more understandable, and this will be done in the following paragraph.

[61] Ibid.
[62] IACtHR *Cases at monitoring compliance stage*, *supra* note 53; IACtHR. *Cases under monitoring with application of Art.65 ACHR*, supra *note* 54; IACtHR. *Filed cases*, *supra* note 55.

	Name of the case	Year of the sentence	**Pecuniary compensation**	**Costs and expenses**	**Publicity of the international judgment**	**Public acknowledgement of international liability**	**Prosecution or investigation**	**Adjust the internal order or amendment of the legislation**
Argentina	Gorigotía	2019	PC	PC				PF
	Perrone y Preckel	2019	FC	FC	FC			
	Romero Feris	2019	FC	FC	FC			
	Hernández	2019	PF	PF	FC			
	López y otros	2019	PF	PF	PF			PF
	Jenkins	2019	PF	PF	FC			
	Comunidades Indígenas (Asociación Lhaka Honhat)	2020		PF	PF	PF		PF
	Spoltore	2020	PF	PF	FC			
	Valle Ambrosio y otro	2020	PF		PF			PF
	Acosta Martínez	2020	PF	PF	PF		PF	
	Fernández Prieto y otro	2020	PF		PF			PF
	Almeida	2020	PF	PF	PF	PF		
	Familia Julien Grisonas	2021	PF	PF	PF	PF	PF	
	Britez Arce y otros	2022	//	//	//	//	//	//
Brasil	**Gomes Lund et al.**	2010	PC	PF	FC	PF	PF	PF
	Trabajadores de La Hacienda Brasil Verde	2016	PC	FC	FC		PF	PF
	Favela Nova Brasilia	2017	PC	FC	FC	PF	PF	PF

	Pueblo Indígena Xucuru	2018	PF	PF	FC			
	Herzog y otros	2018	PF	FC	PC	PF	PF	PF
	Empleados de la Fábrica de Fuegos Artificiales de Santo Antonio de Jesus	2020	PF	PF	PF	PF	PF	
	Barbosa de Souza y sus familiares	2021	PF	PC	PF	PF		
	Sales Pimenta	2022	PF	PF	PF	PF		PF
Chile	**Almonacid Arellano**	2006		FC	FC		PF	PF
	Maldonado Vargas y otros	2015	PC	FC	FC	FC	PF	
	Poblete Vilches y otros	2018	PC	FC	FC	PF		PF
	Órdenes Guerra y otros	2018	PF	PF	FC			
	Urrutia Laubreaux	2020	PF	PF	FC			PF
	Vera Rojas y otros	2021	PF	PF	PF			PF
	Profesores de Chañaral y otros municipalidades	2021	PF	PF	PF	PF		
	Pavez Pavez	2022	PF	PF	PF	PF		PF
Peru	**Barrios Altos**	2001	PC		FC	FC	PF	PF
	La Cantuta	2006	PF	PF	PC	FC	PC	
	Cruz Sánchez y otros	2015		PC	FC		PF	
	Canales Huapaya y otros	2015	PF	PC	FC			
	Wong Ho Wing	2015	PF	PF	FC			

	Comunidad Campesina de Santa Bárbara	2015	PF	PC	FC		PC	
	Galindo Cárdenas y otros	2015	PF	PF	FC		PF	FC
	Quispialaya Vilcapoma	2015	PF	PC	PF		PF	
	Tenorio Roca y otros	2016	PF	PC	FC	FC	PF	FC
	Pollo Rivera y otros	2016	PF	PC	FC		PF	
	Zegarra Marín	2017	PF	PC	FC			
	Lagos del Campo	2017	PF	PC	FC			
	Trabajadores Cesados de Petroperú y otros	2017	PC	PC	FC			
	Munárriz Escobar y otros	2018	PF	PC	FC	FC	PF	
	Terrones Silva y otros	2018	PF	PC	PF		PF	
	Muelle Flores	2019	PF	PC	FC			
	Rosadio Villavicencio	2019	PF	PC	FC			PF
	ANCEJUB - SUNAT	2019	PF	PF	FC	PF		
	Azul Rojas Marín y otra	2020	PF	PC	FC	PF	PF	
	Casa Nina	2020		PC	FC			PF
	Moya Solís	2021	PF	PF	FC			
	Cuya Lavy y otros	2021	PF	PF	PF			PF

	FEMAPOR	2022	PF		PF			
	Benites Cabrera y otros	2022	//	//	//	//	//	//
Uruguay	**Gelman**	2011	FC	FC	FC	FC	PC	PC
	Maidanik y otros	2021	PF		PF	PF	PF	

TABLE 6 - DATA FROM THE IACTHR WEBSITE AND ELABORATED BY THE AUTHOR

4.3.3 Effectiveness assessment in numbers

The data processing mentioned above implies the creation of a further table, number 7, which considers all the cases contained in the previous Table 6:

	Total	**Fully Complied (FC)**	**Partially Complied (PC)**	**Pending Fulfillment (PF)**
Pecuniary Compensation	50	3 (6%)	8 (16%)	39 (78%)
Costs and Expenses	49	9 (18%)	17 (35%)	23 (47%)
Publicity of the International Judgment	53	33 (62%)	2 (4%)	18 (34%)
Public acknowledgement of international liability	21	6 (29%)	0	15 (71%)
Prosecution or investigation	22	0	3 (14%)	19 (86%)
Adjust the internal order or amendment of the legislation	22	2 (9%)	1 (5%)	19 (86%)

TABLE 7 – DATA ELABORATED BY THE AUTHOR BY TAKING INTO CONSIDERATION DATA FROM TABLE 6 ABOVE

The latter, while granting a much clearer vision of the effectiveness of the IACtHR regarding the cases examined, also allows the following statements to be made.

First of all, it can be noted that an analysis of this kind, focusing more on the particular than on the general, makes it possible not to give hasty answers and to see that, in reality, the different measures imposed by the IACtHR have a different and rather evident degree of compliance.

Secondly, going more specifically, it can be noted that the obligation to make public what the IACtHR sentence states certainly shows a high level of compliance with 62%, as is the case for the obligation to pay costs and expenses with a total of 53% if we consider the percentages concerning fully complied (18%) and partially complied (35%) provisions. The discourse takes a different turn, however, if one considers the duty to financially compensate the victims, or to change the internal order or amend the legislation being complained about, which present a low level of compliance equal to 6% and at 9%.

Here, the obligation to conduct domestic investigations into human rights violations in order to find and punish the perpetrators, shows a total compliance level of 0%. This means that almost no major actions (however there is 14% representing partially complied orders) was carried out satisfactorily, so much so that the pending

fulfillment orders represent the 86%. Very similar words are said if, then, the obligation to present a public deed acknowledging international responsibility for what happened is taken into consideration, given only 29% of compliance.

At first sight, therefore, the low degree of compliance found by analyzing the cases presented in Table 6, may lead one to state that the IACtHR has a far from high level of effectiveness. This answer, however, does not, once again, fully reflect reality.

Cases that received a final decision from the IACtHR between 2020 and 2023 were also taken into account in the previous analysis, which data relating to the fulfillment of the orders placed can be considered misleading. It must be assumed, in fact, that if a judgment is filed in, say, 2021, the state in question will not have had the material time, if today's date is taken into account, to be able to fulfil the ordered provisions. Furthermore, analysing the above-mentioned database[63], it is particularly noticeable that once the IACtHR renders a judgment, at least one year passes before the court itself sees the state's compliance with the orders. It will therefore be normal to find a high percentage of orders pending compliance. Table 8 confirms the above:

	Total	**Fully Complied (FC)**	**Partially Complied (PC)**	**Pending Fulfillment (PF)**
Pecuniary Compensation	18	0	0	18 (100%)
Costs and Expenses	16	0	3 (19%)	13 (81%)
Publicity of the International Judgment	20	5 (25%)	0	15 (75%)
Public acknowledgement of international liability	10	0	0	10 (100%)
Prosecution or investigation	5	0	0	5 (100%)
Adjust the internal order or amendment of the legislation	9	0	0	9 (100%)

TABLE 8 - DATA ELABORATED BY THE AUTHOR BY TAKING INTO CONSIDERATION DATA FROM TABLE 6 ABOVE

[63] IACtHR *Cases at monitoring compliance stage*, *supra* note 53; IACtHR. *Cases under monitoring with application of Art.65 ACHR*, *supra* note 54; IACtHR. *Filed cases*, *supra* note 55.

If one considers, therefore, only those sentences that were dictated by the IACtHR before 2020, it can be seen that, at least for some ordered measures, compliance rates are much more positive than before.

	Total	**Fully Complied (FC)**	**Partially Complied (PC)**	**Pending Fulfillment (PF)**
Pecuniary Compensation	32	3 (9%)	8 (25%)	21 (66%)
Costs and Expenses	33	9 (27%)	14 (43%)	10 (30%)
Publicity of the International Judgment	33	28 (85%)	2 (6%)	3 (9%)
Public acknowledgement of international liability	11	6 (55%)	0	5 (45%)
Prosecution or investigation	17	0	3 (18%)	14 (82%)
Adjust the internal order or amendment of the legislation	13	2 (15%)	1 (8%)	10 (77%)

TABLE 9 – DATA ELABORATED BY THE AUTHOR BY TAKING INTO CONSIDERATION DATA FROM TABLE 6 ABOVE

Considering both fully complied and partially complied orders, in fact, greater compliance is reflected with regard to the obligation to pay the victims or their family members for what they suffered with a total of 34% compared to 22 % of Table 6, or as regards the obligation to pay costs and expenses, among other things already more than positive before, which goes from 53% to 70%. Furthermore, the percentage regarding compliance with the obligation to make the sentence of the IACtHR public at national level remains more than positive, reaching a peak of 85%. Finally, the percentage representing the participation of States in acknowledging their international responsibility with a public act becomes more than positive, rising to 55% compared to 29% in Table 6.

Even so, however, the discussion turns to ineffectiveness when considering the items "Prosecution and investigation" and "Adjust the internal order or amendment of the legislation". In fact, 0% for the first category of ordinances does not change, while 15% is a result that is obtained simply because fewer cases with a low percentage of compliance were considered. For those items that can therefore, in a certain sense, be considered more important if one refers to one of the main themes of this text, i.e. amnesties, the IACtHR turns out to be really ineffective.

Despite this, it must be remembered that the main objective of this analysis was to ascertain "if the existence

of the Court's judgments made the States act in a different way than they would have if the ruling would not have been issued"[64]. In other words, following the considerations of von Bogdandy and Urueña, it is not so much the mere compliance with the rules established by the court that must be taken into consideration, but the impact that the latter have had on the intrinsic behavior of the State under all points of view[65].

Bearing this in mind, and rechecking the data above (Table 9), it can certainly be said that the decisions of the IACtHR are far from indifferent to the authorities of the Member States of the *Convención*, which confirms the effectiveness, albeit partial, of the IACtHR.

4.4. Conclusions

This recently concluded chapter has made it possible to verify the effectiveness of the IACtHR, or better yet, to understand whether the decisions taken by this institution are actually fulfilled by the States in question.

Before the analysis, however, it was necessary to define the effectiveness of an institution such as an international court, i.e. the ability of the latter to model the behavior of the States with which it comes into contact, which not only made it possible to avoid any misunderstanding, but also allowed to establish the bases from which the analysis itself then took its moves. A high effectiveness of such an institution, therefore, is equivalent to a high level of compliance with its decisions.

It has also been observed that since 2009, the IACtHR itself has shown a great interest in compliance with its ordinances, so much so that various mechanisms have been developed such as the continuous request for information to States and other authorities, the possibility to convene monitoring hearings, and to send delegates throughout the country in order to monitor the situation in a completely direct way.

Finally, we moved on to the analysis itself, the most important element of the chapter in question. After an all too general consideration, it was understood the importance of differentiating the types of repairs required in order to obtain a more detailed and relevant answer to the reality regarding the levels of compliance. In fact, the source from which the data were taken, officially provided by the IACtHR itself, is based on an all-or-nothing criterion, which does not allow to give an accurate answer reflecting the truth. With this objective in mind, therefore, several categories were defined, each representing a type of order typically established by the IACtHR in its judgments, which allowed to have a broader view on the question of compliance with the established orders by the court.

In some ways, however, the results have not been positive. With regard to the issue of the obligation to investigate or to adjust one's internal legal system, in fact, the States did not respond with great interest. This has not only lowered the general level of effectiveness of the IACtHR, but also demonstrated that, although clear steps forward have been made in the fight for justice and the defense of human rights hindered by tools

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[64] González-Salzberg, *supra* note 8, at 121.

[65] von Bogdandy, Armin, and René Urueña. "International Transformative Constitutionalism in Latin America." *American Journal of International Law* 114, no. 3 (2020): 403–42. doi:10.1017/ajil.2020.27.

such as amnesties, at the same time, when States are called to respect what Urueña calls "justice orders", i.e. orders whose implementation requires the action of national judges or prosecutors[66], the States themselves are absent.

Despite this, in parallel, it certainly cannot be said that the IACtHR is completely ineffective. Considering the cases before 2020, in fact, the obligation to compensate the victims, pay the costs and expenses, as well as that of making the sentence public as well as its international responsibility, is more than respected by the States in question.

It can therefore be concluded by saying that, although on some points the IACtHR must absolutely find more effective ways to ensure that its decisions are respected by the Member States of the *Convención*, the same institution, at the same time, appears to be on the right track given its evident ability to influence their behavior.

[66] Urueña, *supra* note 2, at 239.

General Conclusions and a look towards the future

As reflected in this text, the IACtHR, during the dictatorships and civil wars that characterized the 70s and 80s of the last century, as well as during the last decades characterized by strong democratic developments, has played a fundamental role in the protection and promotion of human rights in the Americas. Indeed, it is evident that its work has contributed to the advancement of human rights and the development of international human rights law. To do this, however, the court itself had to come up against many obstacles, one of which was the legal institution of the amnesty.

The very first chapter focused on this last legal figure, examining its minimal characteristics with the aim of finding a precise definition and distancing it from other similar instruments, such as the pardon, thus avoiding possible confusion. What emerges is a description that allows us to identify the amnesty as a legal institution, established by law, whose main purpose is to protect political criminals, but also perpetrators of more serious offenses such as those under international law, from the heavy hand of justice . In a nutshell, the amnesty allows oblivion to take over, circumnavigating justice, with a single goal on the horizon, namely that of forgetting the past for a new future.

This turns out to be particularly evident if the two typical forms of amnesty are taken into consideration, namely the pacification one and the transnational one. Although different from each other, given that the amnesties of the first group are used to calm the spirits of an armed conflict in progress, while the amnesties belonging to the second group are used to allow a fluid sliding from a dictatorial situation to a democratic one, both forms , in fact, ensure the same role, i.e. that of compromise or bargaining tool. Thus peace and stability are obtained at the cost of a lesser evil.

The first chapter, however, does not end only with this information. The same, in fact, has made it possible to identify Latin America as the geographical area that more than any other can be considered the preferred scenario by the issuers of amnesties, which, then, appear to be connected only to two categories, i.e. a dictatorship now military junta seeking stability and future leniency for its actions, or a democratically elected government constrained by strong external and internal pressures. These affirmations have in fact been confirmed by the circumstantial historical analysis carried out on nine countries of the indicated area, such as Argentina, Brazil, Chile, El Salvador, Guatemala, Honduras, Nicaragua, Peru, Uruguay, which not only allowed to find an exorbitant number of amnesty laws enacted (61) between 1970 and 2012, but also to understand why and what events led to their enactment.

The second chapter, then, made it possible to shift attention towards the protective structure of human rights on the identified soil, namely the *Sistema Interamericano de Protección de los Derechos Humanos*. A unique system of its kind that moves its gears within an organization including all 35 states of the American continent, namely the OEA. The reason for the attribution of words such as "unique system of its kind" is easy to understand. The second chapter, in fact, studying the smallest details characterizing the same structure, starting from the juridical sources on which it is based, in particular the *Declaración Americana de los Derechos y Deberes del Hombre* and the *Convención Americana sobre Derechos Humanos*, and moving on

to the actual institutions that act concretely, namely the Inter-American Commission of Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR), has made it possible to find a bicephalous system of protection that is unique in its kind.

Speaking more deeply about the second chapter, first of all the differences between the two legal sources mentioned above were noted. In fact, while the first turned out to be a non-binding soft law instrument, and therefore more a guide for the development of the system itself, the second proved to be a real agreement between the parties by which each of them undertakes to maintain their reciprocal commitments. Furthermore, while the *Declaración Americana de los Derechos y Deberes del Hombre* has been accepted by all 35 members of the *Organización de los Estados Americanos*, la *Convención Americana sobre Derechos Humanos*, being independent of the organization, has been ratified or adhered to fewer members, i.e. 23 out of a total of 35. Finally, it was found that while the first document does not present any description of a protection mechanism, thus confirming its expository nature, the second document devotes a good part of its articles to the description of the functioning of the two institutions mentioned above.

Secondly, precisely through the study of the *Convención Americana sobre Derechos Humanos*, attention has shifted to the analysis of the IACHR and the IACtHR. This made it possible to identify their functions and position within the system, also considering the relationship that binds them. The IACHR demonstrates itself as having a say in all 35 OEA states although it does not have the possibility to present binding decisions, which makes it a quasi-juridical body. Despite this, its role in the system is fundamental. The IACHR, in fact, among other actions, plays a real role of "helper" of the IACtHR, given that it defines the admissibility of cases before they can reach the court itself. In this way, not only is the link between these two institutions understood, but it is also understood that the system itself allows the escape from a possible overload of work. The IACtHR, on the other hand, is a real judicial institution, which appears to have a say only on those states that have not only accepted the *Convención Americana sobre Derechos Humanos,* but which have also accepted its jurisdiction. This means that the IACtHR can perform its litigation function, one of its two fundamental functions, only on 20 out of 35. At the same time, however, its advisory function, the other fundamental function, is enforced on all 35 States, being essentially a consultative activity.

Finally, the second chapter plays another important role. The latter serves as a space in which to present the analysis of different legal cases, which allows not only to have a real connection between the first and second chapters, but also to find the position and behavior of the IACtHR in front of the amnesty laws. The examination of cases such as *Barrios Altos v. Peru*, *Almonacid Arellano v. Chile*, *La Cantuta v. Peru*, *Gomes Lund et al. v. Brazil*, and *Gelman v. Uruguay*, has in fact made it possible to reach two important conclusions. First of all, when it comes to judging the validity of an amnesty law, the IACtHR does not care about the political or historical circumstances that led to its enactment. The *ratio* behind these laws is contrary to the *Convención Americana sobre Derechos Humanos*, and therefore the latter must be considered as having no legal effect. Secondly, and this is related to the previous point, the behavior of the IACtHR is too invasive in

national legal systems. In fact, directly judging a national law as invalid falls outside its competence and this generates many concerns and criticisms, so much so that a "traditional interventionist jurisprudence" has been identified, which at least apparently is far from the limits imposed by legitimacy.

The third chapter focuses precisely on this legitimacy. This last chapter, in fact, gave space to a profound analysis aimed at ascertaining whether the previous concerns and criticisms were founded. In this regard, the normative meaning of the concept of legitimacy, i.e. the one aimed at objectivity and the consideration of the "right to govern" was considered, as well as three different yardsticks, or legitimacy standards, useful for the analysis itself: human rights, consistency understood as coherence, and democratic accountability. Working under these standards, the position and behavior of the IACtHR vis-à-vis those amnesty-granting laws were contextualized and this led to the following conflicting conclusions.

If, while under the human rights and consistency standards, the work of the Inter-American Court of Human Rights appears to be more than legitimate given, on the one hand, the complete and incorruptible defense of the human rights of the victims, and the evident coherence with international, regional, and national practices, on the other hand, the same cannot be said under the democratic accountability standard. In this case, in fact, the implementation of the control de convencionalidad does not allow the clear functioning of the principle of subsidiarity and develops a strong skepticism towards the consequent European concept of the “margin of appreciation”. The result, therefore, is a distrust in the democratic work of the States, which are left little room for manoeuvre in the interpretation of the convention, and a cumbersome interventionism on the part of the IACtHR to make up for this lack. If therefore, under two standards, the work of the IACtHR appears to be more than legitimate, under that of democratic accountability, the legitimacy is more than undermined.

Finally, the last chapter, the fourth, gives space to another important analysis, driven in particular by new criticisms and concerns. This chapter, in fact, becomes the scenario of the analysis of the effectiveness of the IACtHR. Effectiveness understood as a measure of the role of the IACtHR in shaping the behavior of the actors of international society, i.e. states. In this sense, having also presented the report linking the concept of effectiveness with that of compliance, it is understood that the real element that is measured is the compliance of the Member States with its decisions. The higher the compliance with its decisions, the more clearly the court can be considered effective.

Before moving on to the actual examination, however, it was found that the IACtHR shows great attention to the compliance monitoring process, albeit in a concrete way, only since 2009. Various mechanisms, such as request for information, on-site visas, and others, have in fact been analysed, thus presenting, at least in appearance, a more than solid structure and very close to full effectiveness.

The first results, however, which can be identified as superficial, did not show high levels of effectiveness. To date, in fact, only 14% of the total number of cases brought forward by the court can be considered as closed. This result, however, has been shown to be, precisely, too superficial. This comes from the fact that the

criterion used by the IACtHR to establish compliance with its decisions is to be considered as an "all-or-nothing" criterion, i.e. that until all the orders laid down in a given sentence are carried out, the case connected to it will still be considered open. The need to go into more detail, therefore, becomes fundamental in order to obtain a more complete answer.

Different categories, each encompassing different types of provisions were then identified, and the focus was shifted from compliance with the single judgment to compliance with those provisions present in the single judgment. The view has been moved from the general to the specific. Taking these categories into consideration, then, 56 different cases, under monitoring or already archived, in a period between 2015 and 2023 were viewed and the results entered into tables. The analysis of the latter led to the following conclusions.

Although the period between 2020 and 2023 was considered but then discarded, as it was too close to the date of the sentence and therefore bearer of particularly misleading results, the period between 2015 and 2019 showed good compliance by States with obligations such as that of paying expenses and costs, or the victims themselves, as well as with obligations such as that of making public the judgments of the court or one's own international responsibility. On the other hand, the result regarding the compliance of States with obligations such as that of continuing investigations or modifying and adapting their legal system is totally different. Here, in fact, the levels reach deep points, close to 0% compliance, undermining not only the general effectiveness of the IACtHR, but also demonstrating that, although clear steps forward have been made in the fight for justice and the defense of human rights hindered by tools such as amnesties, at the same time, when States are called to respect orders whose implementation requires the action of national judges or prosecutors, the States themselves are absent. Despite this, the IACtHR certainly cannot be considered ineffective given its great ability to influence the behavior of states on various points. If therefore on the one hand, on some points, the IACtHR must absolutely find more effective ways to ensure that its decisions are respected by the States, the same institution, at the same time, appears to be on the right way given the obtained results.

From what has been read, therefore, it is clear that the future of the IACtHR is particularly uncertain. Of course, the enormous strides made in the protection of human rights are more than evident, as is the importance of the presence of such a system of which the IACtHR appears to be at the head. Unfortunately, however, as we have seen, there are also clear problems of legitimacy and effectiveness. These difficulties suggest important challenges on the horizon and this makes the future doubtful.

First of all, its obvious invasive behavior could lead to heavy political pressure from States and other actors who are opposed to its work or the enforcement of its decisions. Actually, this is already happening. In fact, in April 2019, the presidents of Argentina, Brazil, Chile, Colombia, and Paraguay, countries representing a large portion of the territory under the jurisdiction of the court, presented a shared public communication[1] in

[1] Declaración sobre el Sistema Interamericano de Derechos Humanos. Forum: revista del Centro de Derecho Constitucional de la Facultad de Derecho de la Pontificia Universidad Católica Argentina, 7, 2019. https://repositorio.uca.edu.ar/handle/123456789/8628

which, despite reiterating the importance of the *Sistema Interamericano de Protección de los Derechos Humanos*, strongly requested that the regional institutions, including therefore also the IACtHR, begin to respect the principle of subsidiarity more, apply less rigid methods of interpretation, and above all, operate also considering the circumstances external to the concrete case such as political, economic, and so on[2]. Faced with such a position, the IACtHR should absolutely strengthen cooperation with the States, making them more involved and above all giving them wider margins of manoeuvre. In this way, it would not only recover its lost legitimacy but stabilize its position.

Secondly, the financial crisis that hit the IACHR in 2016[3] could prove to be a problem for the IACtHR itself in the near future. The financial support provided by the OEA, thanks to defined annual payments from Member States, plus possible contributions from other sources such as intergovernmental organizations, foundations, and individuals, in 2016 did not seem to be enough, leading to a real economic crisis faced by the IACHR[4]. To date, it is true, the IACtHR seems far from such a situation, but this was also thought with regard to the IACHR. Therefore, to avoid other bad contexts, what began in 2017[5], when the States obliged themselves to double the funding to the organs of the system, which however can only be considered as an immediate response to the crisis mentioned above, should be expanded so as to finally be able to stabilize the economic situation that concerns the system as a whole

Finally, the IACtHR may lose its appeal. The IACtHR, in fact, may also have to navigate an increasingly polarized political landscape in the Americas, where human rights and the rule of law are nowadays, compared to the past, seen as secondary to other political interests. To address this possible problem, the IACtHR should, first of all, develop a greater involvement of civil society, perhaps by intensifying its engagement with organizations and other human rights defenders as they are the very bodies that raise the voice of the population. Secondly, then, the IACtHR should lay the foundations for building awareness of its role and the importance of human rights in the Americas, perhaps by promoting public education and awareness programs and working with the media to reach a wider audience.

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[2] von Bogdandy, *supra* note 65 (Chapter 4), at 403.

[3] Dfensor. *Los desafíos del sistema interamericano de derechos humanos*. Revista mensual de la Comisión de Derechos Humanos del Distrito Federal, número 4, año XV. México, abril 2017. https://cdhcm.org.mx/wp-content/uploads/2014/05/dfensor_04_2017.pdf

[4] Ibid.

[5] ISHR. *Estados duplican el financiamiento de la Corte y Comisión Interamericana de Derechos Humanos*. In International Service for Human Rights website, 23 June 2017. Accessed on 11/02/2023. https://ishr.ch/es/ultimas-noticias/oea-estados-duplican-el-financiamiento-de-la-corte-y-comision-interamericana-de-derechos/

Table of Cases

I. INTERNATIONAL HUMAN RIGHTS COURTS and COMMISSIONS

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Executive Summary

Driven by curiosity in the history and judicial news that surrounds a territory such as Latin America in particular, the author immerses himself in an in-depth study of what concerns the administration of justice and the protection of human rights. The result is a careful analysis of a particular legal institution, the amnesty, and of a fundamental judicial body such as the Inter-American Court of Human Rights. Mainly, the unfolding of the pages focuses on the relationship between these two elements, or better yet, on the position that the court maintains towards the amnesty with a watchful eye towards the two main research questions concerning the legitimacy and effectiveness of the operated by the aforementioned court.

With this in front of his eyes, the author focuses already in the first pages on investigating the different definitions and meanings that are attributed to the term amnesty, following the significant objective of being able to distinguish it from pardon and eliminate the general confusion that arises from it. This leads to the fact that amnesty can be understood as a legal institution, established by law, whose main purpose is to protect the perpetrators of political crimes, and not only, given the inclusion also of serious offenses such as those under international criminal law, from the hand of justice, making them escape any possibility of being investigated and tried. In a nutshell, with the application of this tool, past crimes are completely forgotten and voluntary oblivion takes over.

Voluntary forgetfulness because the enactment of such a law has a precise purpose: to forget the past for a new future. This is particularly evident when the study moves on to the two types of existing amnesties, namely the pacification amnesties and the transitional amnesties. Although different, given that the first type is used to appease the hot tempers of an ongoing conflict, while the other is used to allow a fluid and smooth flow from a dictatorial situation to a democratic one, the two types present the same role, i.e. that of compromise or bargaining tool. The first part of the first chapter, therefore, provides a detailed examination of the figure of the amnesty by delivering into the hands of the reader not only a simple definition of a legal instrument but also the dimension within which the reason for its application is explained.

Having defined the main character of the chapter and the circumstantial dimension in which it moves, the reader is catapulted into the geographical area which, after careful analysis, turns out to be the physical space that more than any other was the scenario for the enactment of such a law guarantor of amnesty: Latin America. In a quick overview of the events that occurred in 9 different countries such as Argentina, Brazil, Chile, El Salvador, Guatemala, Honduras, Nicaragua, Peru, Uruguay, the author shows the circumstances that led to the application of such a tool arriving to discover that, despite their diversity, only two categories of subjects can be considered as emanators: a dictator or a military junta seeking stability and future leniency for its actions, or a democratically elected government constrained by strong external and internal pressures.

Attention then shifts to the leading judicial body for the protection of human rights in Latin America: the Inter-American Court of Human Rights. Although it holds such an important role, however, it is nothing

more than a cog in a much more complex and articulated system, namely the Sistema Interamericano de Protección de los Derechos Humanos, one of the three regional systems for the protection of human rights existing today. Therefore, before focusing on the figure of the court, the author tries to dissect the body of the system, considering the different elements that compose it one by one.

With this objective in mind, the author shows how the wheels of this system move within a structure made up of the 35 states of the American continent, called Organización de los Estados Americanos, and how it is mainly based on two legal sources born in two different moments, namely the *Declaración Americana de los Derechos y Deberes del Hombre* of 1948, and *the Convención Americana sobre Derechos Humanos* of 1968. The latter, although they are solid foundations of the structure previously denominated, present great differences such as for example their “shape”. A careful analysis, in fact, allows to understand that, while the first turns out to be a non-binding soft law instrument, and therefore more a guide for the development of the system itself, the second is a real agreement between the parties by which each of them undertakes to maintain their reciprocal commitments. Furthermore, while the *Declaración Americana de los Derechos y Deberes del Hombre* is accepted by all 35 members of the *Organización de los Estados Americanos*, the *Convención Americana sobre Derechos Humanos*, being independent of the organization, has been ratified or adhered to by a lower number of members, i.e. 23 out of a total of 35. The most important thing, then, especially for the purposes of connection with the following discourse, is that while the first document does not present any concrete protection mechanism, confirming its merely expository nature, the second document devotes a good part of its articles to the description of the functioning of the two institutions that work concretely to achieve the protection of human rights, namely the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights.

This therefore highlights what was said earlier, namely that although a fundamental element of the system, the Inter-American Court of Human Rights is nothing more than a piece of the puzzle that represents the system. Attention must therefore also be given to the other figure, the Inter-American Commission of Human Rights, which in its relevance can be understood as a real "helper" to the court. The result is a careful study of the two organs, first analyzed individually and then compared to understand the bond that binds them.

Starting with the Inter-American Commission of Human Rights, the author presents how the latter turns out to be a body that has a say in all 35 member states of the *Organización de los Estados Americanos*, although it does not have the possibility to present of binding decisions, which makes it a quasi-juridical body. Nevertheless, its importance is not diminished since one of its most important functions is to determine the admissibility of cases before they reach the Inter-American Court of Human Rights. Without the Commission's affirmative decision on the degree of admissibility (first instance), in fact, the cases proposed directly by the possible victims (or their representatives) do not reach the Court (second instance). This commission, therefore, among other things, acts as a regulator of the fluidity of the cases proposed and therefore allows the elimination of the overload to which the Court would otherwise be subjected without its presence.

The Inter-American Court of Human Rights, on the other hand, is a true judicial institution, whose main objective is to ensure that the values and philosophy contained primarily in the *Convención Americana sobre Derechos Humanos* are respected uniformly throughout the territory under its jurisdiction. The same convention, then, is the one that, as mentioned before, regulates the structure and functioning of the court itself. Thanks to the analysis of the latter, in fact, the author is able to explain the two main functions of this organ, namely the contentious and the consultative one. With the former, the court acts as an international court to which all those states that have ratified or acceded to the convention and, at the same time, have also recognised the jurisdiction of the court itself are subject. In this sense, the court's decisions, which are final and unappealable, are transformed into obligations and orders that must be respected by the states in question. With the second function, on the other hand, the court, if called upon, interprets the convention or other treaties. Very interesting is the fact that, while the first function can only be enforced on those states that, as mentioned, have ratified the convention and accepted the court's jurisdiction, i.e. 20 out of 35, the second function, being essentially a consultative activity, can be enforced on all the states of the *Organización de los Estados Americanos*, i.e. 35 out of 35.

From these words, therefore, it is evident that although both institutions have the main objective of promoting the defense of human rights at the level of the inter-American system, profound differences exist, which however allow the correct functioning of a bicephalous system unique in its type.

Once considered every link of this articulated chain of human rights protection that watches over the Latin American territory, the second part of the second chapter takes its moves and the author juggles in a deep examination of important judicial cases with the main objective to try to unmask the relationship between the position of the Inter-American Court of Human Rights and the legal institution of the amnesty. In this part of the chapter, in fact, the author focuses on the facts, on the proceedings before the Inter-American Commission of Human Rights, and on the decision of the Inter-American Court of Human Rights of a total of 5 cases such as, *Barrios Altos v. Peru*, *Almonacid Arellano v. Chile*, *La Cantuta v. Peru*, *Gomes Lund et al. v. Brazil*, and *Gelman v. Uruguay*. Clearly different cases, each with its real importance, but which in the end share two important elements, which lead to the following conclusions.

First of all, a constant position proposed by the Inter-American Court of Human Rights towards amnesties is evident. The latter, writes the author, does not focus so much on whether the respective law is a self-amnesty applied by a dictatorship or an amnesty passed in accordance with the domestic legal order, rather it bases its discussion on the ratio legis of the law in question. Indeed, whichever way one wants to put it, the court does not compromise that amnesty is nothing more than an attempt to protect perpetrators of gross human rights violations from persecution and, precisely by this nature, in conflict with the *Convención Americana sobre Derechos Humanos*. The form of such laws or the circumstances which led to their enactment therefore do not matter. The rationale behind these laws is contrary to convention, and therefore they must be considered null and void.

Secondly, then, the fact that the behavior of the Inter-American Court of Human Rights can be more assimilated to a national Supreme Court than to a typical international court is clear. Indeed, in all cases previously mentioned, the court did not limit itself to checking that the values and philosophy inherent in the articles of the *Convención Americana sobre Derechos Humanos* had been respected, which, by the way, is within its competence, but also intervened in the domestic law of the states in question, going to directly judge national laws as devoid of legal effect. A behavior, in the eyes of all, too invasive and overbearing so much that it has led various authors to identify a "traditional interventionist jurisprudence" which, at least in appearance, lacks legitimacy.

Criticisms and concerns are therefore encountered and this leads to the first main research question that the author asks himself: can a position like the one taken by the Inter-American Court of Human Rights with respect to national amnesty laws be considered legitimate? The third chapter just tries to act as an answer.

The legitimacy, therefore, becomes the object of verification of the previously mentioned chapter. Legitimacy which, from the words of the author, is understood to have two important meanings, namely the normative meaning and the sociological one. The reason for taking into consideration the distinction between these two meanings is soon explained by the author. Each meaning, in fact, leads to a different dimension of analysis, and the choice between one and the other therefore becomes fundamental. While the normative meaning is related to the acceptance and justification of authority, or, using a formula common to many authors, related to the "right to govern", the sociological meaning is related to the perception one has of this institution, i.e. whether such authority is deemed legitimate or not. While one focuses on objectivity, the other focuses on subjectivity, or, while one focuses on the qualities of the ruler, the other focuses on the behavior of the ruled. Therefore, driven by the desire to carry out an examination dictated by objectivity, devoid of individual and subjective elements, it is therefore clear that the normative dimension is the one chosen by the author.

1. According to the first standard, human rights, the authority of an international court such as the Inter-American Court of Human Rights is considered legitimate and justified if States manage to respect human rights through its application, while it is considered illegitimate if clearly the opposite occurs. This is nothing more than a simplistic way of stating that an international court, in order to be considered legitimate under the Human Rights standard, must operate in such a way as to promote the purposes of the regulatory regime it is called upon to interpret and apply. Therefore, if the Inter-America Court of Human Rights, for example, ceases to fulfil its work as a defender of human rights on Latin American soil or fails to enforce the obligations owed to states in terms of human rights, then its authority will no longer be able to be considered legitimate;
2. According to the second standard, instead, an international entity can be considered legitimate if its actions and positions are consistent with other international entities operating in the same field. In this way it is understood that consistency, in this case, is intended as coherence, i.e. as a state in which all

the parts fit together so perfectly as to form a united whole. In this sense, the more the Inter-American Court of Human Rights appears to be consistent with the practices of other international courts and bodies that decide on similar matters, the higher its level of legitimacy;

3. Finally, according to the third standard, an international court is considered legitimate if it respects a certain level of democracy, understood as a positive response to democratic principles. However, given the numerous meanings that can be attributed to the term democracy, the author explains that particular tools must be taken into consideration to carry out the analysis according to this standard. The latter are the principle of subsidiarity and the consequent concept of "margin of appreciation". From this it follows, therefore, that if the Inter-American Court of Human Rights leaves a certain “margin of appreciation” to the States, then its action would be legitimately democratic, on the contrary if the IACtHR proves shy towards the principle of subsidiarity , leaving no “margin of appreciation” to the States in question, then its jurisprudence may not be considered legitimate;

These chosen standards, therefore, allow to confirm what has been said before. In this analysis of legitimacy, the author does not focus on interpretive and concrete arguments about what people believe and above all why, purely subjective elements, but on arguments concerning moral, political, and legal theory, i.e. purely objective.

Once the dimension within which to carry out the analysis has been identified, and the verification standards defined, the author then juggles until the end of the chapter in the actual examination. Through the application of the aforementioned legitimacy standard, in fact, the author tries to achieve the goal of going to understand whether the action of the IACtHR in the field of amnesty law can really be considered legitimate or not. Particularly conflicting conclusions emerge. In fact, if while under the human rights and consistency standards, the work of the Inter-American Court of Human Rights turns out to be more than legitimate given, on the one hand, the complete and incorruptible defense of the human rights of the victims, and the evident coherence with international, regional, and national practices, on the other hand, the same cannot be said under the democratic accountability standard. Here, in fact, the development of a practice defined as *control de convencionalidad*, a concept which obliges the national authorities to verify the conformity of their laws with the *Convención Americana sobre Derechos Humanos* and with the interpretation that the court makes of it, completely eliminates the consideration of the principle of subsidiarity and consequently of the typically European concept of “margin of appreciation”. In other words, dictated above all by a lack of trust in the democratic credentials possessed by the states, the latter are left with zero leeway in decisions regarding the interpretation of the *Convención Americana sobre Derechos Humanos*, which leads to a cumbersome interventionism by the IACtHR in the internal arrangements This significantly undermines the legitimacy of the work of the Inter-American Court of Human Rights and makes the concerns and criticisms that led the author to carry out such an examination well founded.

However, the discussion does not stop there. In fact, aware of the presence of other general concerns and criticisms directed towards the court, the author focuses on another theme, namely the effectiveness of the work of the court itself. The apparent low level of compliance with decisions of the court, in fact, have generated many doubts in recent years about the ability of the court to carry out its objective, that is to enforce human rights on Latin American soil. The second main research question is therefore inevitable: can the work of the Court be considered effective or can the criticisms be considered more than truthful? The fourth and final chapter therefore becomes the place to give an answer to this.

First of all, the term effectiveness, as well as its relationship with the compliance element, is considered by the author. The result is a very concrete and practical definition of effectiveness. This concept, in fact, must be considered as a measure of the role of the Inter-American Court of Human Rights in shaping the behavior of the actors of international society, i.e. the States. In this sense, an institution, in this case the court, is considered effective if the mere existence of its sentences induces states to act differently from what they would have done if the sentences had not been issued. The element that is therefore measured is the compliance of the member states with its decisions. The higher the compliance with its decisions, the more clearly the court can be considered effective.

Before moving on to the actual analysis, however, the author focuses on the study of all those tools implemented by the court itself to obtain this sought-after conformity. It turns out that the court has several procedures for monitoring compliance, such as request for information, monitoring hearings, on-site visits, holding informal meetings with State agents or delegations, and involving national institutions and organs in a position to push for implementation of repairs domestically, which may lead one to think that the previous concerns are completely unfounded. A first look, however, at the numbers of closed and open cases brings to light some particularly negative conclusions. To date, 2023, in fact, the number of closed cases corresponds to only 14% of the provisions presented by the Inter-American Court of Human Rights to the states in question, with a consequent 86% of cases still open. These percentages obtained clearly lead to believe in a total ineffectiveness of the court's work. However, it turns out that such a result is due to the fact that the court itself applies a criterion that can be defined as an "all-or-nothing" criterion. This means that until all the orders foreseen in a particular sentence have been carried out, the related case will be considered still open. It is therefore clear that the previous result does not reflect the reality of the facts, and it is equally clear that there is a fundamental need to go into more detail to obtain a complete answer on the subject.

The author, therefore, delights in identifying different categories, each enclosing typical provisions set by the court itself. In doing so, the analysis moves from the general to the particular since now one no longer focus on compliance with the single sentence but on compliance with the various court-ordered provisions present in the sentence. The latter categories chosen are: pecuniary compensation, costs and expenses, publicity of the international judgment, public acknowledgment of international liability, obligation of prosecuting the

individual perpetrators of the human rights violation or improve the level of investigations, adjust the internal order or amendment of the legislation.

With these categories on the table, the analysis therefore begins. A period between 2015 and 2023 is considered, 56 different judgments having as party 5 important states such as Argentina, Brazil, Chile, Peru, Uruguay, are viewed, percentages of compliance with the previous mentioned categories are presented. Therefore, some important conclusions emerge.

Not considering the period between 2020 and 2023, as the author assumes that too little time has passed since the sentence for the state in question to have complied with the orders, the period between 2015 and 2019 sees different levels of compliance with depending on the category analysed. For example, obligations to pay victims or next of kin, such as the obligation to pay expenses and costs or the obligation to make public the court ruling and their international responsibility, are more than complied with by states in question. Completely different, however, is the discourse concerning the obligations to continue the investigations or to modify and adapt one's legal system. Here, the percentages reach zero levels and undermine not only the effectiveness of the court but also demonstrated that, although clear steps forward have been made in the fight for justice and the defense of human rights hindered by tools such as amnesties, at the same time, when States are called to respect orders whose implementation requires the action of national judges or prosecutors, the States themselves are absent.

Despite this, the author states that the court cannot be considered completely ineffective given that the evident positive percentages demonstrate that the goal of influencing the behavior of states is not that far away. However, it is not denied that the Inter-American Court of Human Rights must certainly work better on other points if it wants more evident compliance with its provisions.

Finally, in the conclusions, the author closes the circle and tries to re-propose all the information and the main findings of each chapter, leaving a small space for an eye towards the future challenges that the Inter-American Court of Human Rights could face and possible solutions.