The Presidential Pardon of Fujimori: Political Struggles in Peru and the Subsidiary Role of the Inter-American Court of Human Rights

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ABSTRACT[∞]

In 2017, former Peruvian President Alberto Fujimori was pardoned after serving less than half of a 25-year sentence for human rights violations. The measure was taken amidst political turmoil and an impeachment process led by the Fujimorista party against former President Pedro Kuczynski. Fujimori's victims in the *Barrios Altos* and *La Cantuta* cases requested the Inter-American Court of Human Rights (IACtHR) to annul the pardon due to its incompatibility with Peru's human rights obligations. The IACtHR decided that it was for the Peruvian courts to exercise jurisdictional control over the pardon, thus affirming its subsidiary role. Through an examination of the political situation, the underlying principles of the IACtHR's jurisprudence on amnesties, and rule of law and international standards, this article argues that the IACtHR had sufficient grounds to overturn the pardon. The court's resolution to refer the matter to the Peruvian jurisdiction may be explained by an increasing awareness of its subsidiary role, particularly regarding sensitive political issues.

KEYWORDS: presidential pardon, Inter-American Court of Human Rights, subsidiarity, impunity, rule of law, Peru

INTRODUCTION

On 24 December 2017, former Peruvian president Alberto Fujimori was granted a humanitarian pardon for all his accounted crimes and *derecho de gracia* (presidential clemency) for pending criminal proceedings by then President Pedro Pablo Kuczynski. Under

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[∞] Research for this article was partially funded by the Research Council of Norway Project Number 223274-PluriCourts. We thank the three anonymous reviewers at the *Journal* for their valuable inputs to this article.

Peruvian legislation, a humanitarian pardon is a presidential authorization to release an individual from any criminal conviction for health (so-called humanitarian) considerations.[1] These specific features of humanitarian pardons, including balancing the convicted person's rights to health/life vis-à-vis competing victims' rights and state obligations, pose particular problems as examined at the international and national levels and discussed in this article. On 7 April 2009, Fujimori was sentenced by the Peruvian Supreme Court to 25 years in prison after being found guilty of aggravated murder, serious bodily harm and aggravated kidnapping, which was upheld by the Appeals Chamber of the Supreme Court on 30 December 2009.

Fujimori's pardon generated significant controversy in the already polarized Peruvian society. Some believe that Fujimori's release contributes to a necessary national reconciliation almost 20 years after the internal armed conflict (1980–2000), while others see it as an illegal, unjustified political move disregarding victims' rights and perpetuating impunity.[2]

The Inter-American Court of Human Rights (IACtHR) monitors the execution of judgments against Peru for the *Barrios Altos*[3] and *La Cantuta*[4] cases that include crimes for which Fujimori was found responsible and imprisoned in Peru. The victims in those cases asked the court to overturn Fujimori's pardon. After hearing relevant arguments, the IACtHR issued an order in May 2018 requesting the Peruvian jurisdiction to exercise control of conventionality over this pardon, namely, whether this pardon was consistent with regional human rights obligations.[5] On 3 October 2018, the Supreme Court overturned Fujimori's

[1] 'Reglamento Interno de la Comisión de Gracias Presidenciales,' Resolución Ministerial No. 0162-2010-JUS, art. 31.
[2] The controversy was reported by the national and international press. See, among others, 'Alberto Fujimori: Reacciones en redes sociales tras indulto a expresidente,' https://larepublica.pe/politica/1162111-alberto-fujimori-reacciones-en-redes-sociales-tras-indulto-a-expresidente-fotos, 'Indulto a Fujimori provocó protestas y celebraciones,' https://elcomercio.pe/politica/indulto-alberto-fujimori-provoco-protestas-celebraciones-galeria-noticia-484054 and '¿"Indulto humanitario" o "pacto por la impunidad"? Por qué causa tanta polémica en Perú el perdón a Alberto Fujimori,' www.bbc.com/mundo/noticias-america-latina-42476477 (all accessed 9 March 2019).
[3] IACtHR, *Barrios Altos v. Peru*, Merits, Judgment (14 March 2001), Series C No. 75.
[4] IACtHR, *La Cantuta v. Peru*, Merits, Reparations and Costs, Judgment (29 November 2006), Series C No. 162.
[5] IACtHR, *Barrios Altos v. Peru* and *La Cantuta v. Peru,* Monitoring Compliance with Judgment, Order (30 May 2018).

pardon,[6] yet Fujimori returned to prison on 23 January 2019 due to medical treatment. On 13 February 2019, the Supreme Court denied Fujimori's appeal against the revocation of his pardon.[7]

Some IACtHR decisions have caused controversy in Peru and received much public attention. In most cases, however, the court's decisions remain in the spheres of legal scholarly debate and human rights practice, both nationally and internationally. Although the IACtHR's jurisprudence on amnesties and similar measures is generally positive and solid, it has also been questioned. Indeed, there is a debate among transitional justice scholars about whether amnesties and pardons for gross human rights violations are prohibited (examined later). In this particular case, the IACtHR's order and the subsequent revocation of the pardon touch directly upon a specific political situation that might be described as a crisis. The IACtHR's resolution has had both legal and political consequences. As much as the *Fujimori* case set international precedence for criminal accountability and human rights law a decade ago, his pardon arguably tests the limits of criminal accountability at the hands of political actors and the IACtHR's ability to decide on such politically charged matters.

This article primarily discusses the IACtHR's role in the review of the presidential pardon of Fujimori: How does the court justify its decision on the validity of the pardon? How can the IACtHR's rationale be understood within both a transitional justice context and the particular circumstances of this humanitarian pardon? What international standards are applicable to reach a solution to such a complex matter? These questions are timely given the IACtHR's influential role in international human rights practice. To answer these questions, the article first provides the background to the pardon in order to understand its political significance. It then addresses the issues of supervision of compliance and assessment under rule of law (RoL) considerations, particularly proportionality and international legal standards.

[6] Peruvian Supreme Court, *Fujimori*, Resolution No. 10 (3 October 2018), Case No. 00006-2001-4-5001-SU-PE-01.
[7] Ibid., Resolution No. 46 (13 February 2019).

The article ends with some reflections about the political and legal consequences of the IACtHR decision.

FUJIMORI PARDON IN CONTEXT: UNDERSTANDING PERU'S POLITICAL SYSTEM

Peru, Christmas Eve 2017. The country had just recovered from the shocking prospect of having a democratically elected president impeached and removed by a national Congress with an overwhelming opposition majority led by the Fujimorista Fuerza Popular party. The attempt has been described by many Peruvians as an assault on democracy and the RoL. Yet with absentions from the left and the unexpected voting of some opposition representatives, President Kuczynski remained in power and could complete his term until 2021.

Announced only two days after the failed process of impeachment, the presidential pardon has been interpreted as the result of political bargaining to remain in power, and not due to humanitarian considerations. The pardon was questioned nationally and internationally, producing numerous protests. The political polarization otherwise present in Peruvian public debate now divided the country between those for and those against the pardon. As mentioned, representatives of the victims of the *La Cantuta* and *Barrios Altos* cases before the IACtHR turned to the court in an attempt to annul the pardon. While waiting for the decision, the opposition put forward a new impeachment process scheduled for 22 March 2018. The procedure never took place as Kuczynski resigned the night before amidst a scandal involving political bargaining, abuse of power and leaked videotapes (discussed later).

To understand the political turmoil caused by the pardon of a former president, we next discuss briefly the main features of the Peruvian political system, as well as the role of Fujimori and the Fujimorista movement(s) in Peruvian politics, all of which are closely interconnected.

Peruvian Political System: A Weak System of Representation

The Peruvian political system is characterized by the near absence of political parties. The economic crisis of the 1980s, combined with the crude violence of the internal armed conflict,

resulted in the effective dismantling of the political party system.[8] State repression weakened trade unions and social movements, which were suspected of being infiltrated by guerrillas. As a result, an already fragile system of political representation and interest mediation crumbled. The weakness of political parties and the vulnerability of social movements in the late 1980s left the political scene occupied by independent candidates such as Fujimori, who had no previous political experience or party affiliation. He rose to the presidency in 1990 and put an end to the economic crisis with a series of neoliberal market-friendly policies, with huge social costs. However, his rise to power did not do much to address the crisis of representation or to reconstitute the political arena.[9]

This weakness of political parties also affects the relationship between the executive, legislative and judicial branches of power and limits the possibility for civil society to influence the political agenda through mechanisms of political representation. The Peruvian judicial system has historically remained permeable to political interference at all levels, with a much-needed judicial reform permanently postponed. Audio recordings from a drugs-related investigation made public in mid-2018 exposed the extreme levels of corruption entrenched in the Peruvian judiciary, involving Supreme Court judges who were members of the National Council of the Judiciary (responsible for appointing judges).[10] The audio scandal led to the removal of a Supreme Court judge and all the members of the said council. Corruption in Peru is not a recent problem.[11] The weaknesses of the political and judicial systems bear consequence for human rights trials, as advances made by some decisions are not guaranteed

[8] Martin Tanaka, *Los espejismos de la democracia: el colapso del sistema de partidos en el Perú, 1980–1995, en perspectiva comparada* (Lima: Instituto de Estudios Peruanos, 1998).
[9] Conversely, on 5 April 1992, Fujimori closed the Congress as part of a self-coup, allegedly to secure governability and reestablish the constitutional order by calling for a new constitutional assembly. By 1993 Peru had a new constitution and a reordered political system where the legislative and judiciary were subjected to the executive, setting the ground for an authoritarian regime. See, Jo-Marie Burt, *Political Violence and the Authoritarian State in Peru: Silencing Civil Society* (New York: Palgrave Macmillan, 2007).
[10] IDL-reporteros, 'Corte y corrupción,' 7 July 2018, https://idl-reporteros.pe/corte-y-corrupcion/ (accessed 9 March 2019).
[11] Alfonso W. Quiroz, *Historia de la corrupción en el Perú* (Lima: Instituto de Estudios Peruanos, 2013).

to set precedence. The term 'accountability impasse' accurately describes the Peruvian situation: the coexistence of advances in criminal accountability and persistent impunity.[12]

While there is a competitive electoral process in Peru, the political system is characterized by volatile electoral lists rather than solid political parties. Congressional representatives have few incentives to establish constituencies based on collective agendas rather than on individual political ambitions. Electoral lists tend to recruit congressional candidates among local and regional networks in order to secure local support, but do not necessarily share a common political platform or adhere to internal election processes. The main feature of Peruvian legislatures since 2000 is the volatility of the electoral lists. New lists and coalitions are formed for every general election. Some disappear entirely from the political scene.

The 2017/2018 political crisis is closely related to the original composition of the Peruvian Congress for the 2016–2021 legislature, where Fuerza Popular, led by Fujimori's daughter Keiko Fujimori, had an initial majority: 73 out of 130 congressional seats.[13] While Keiko Fujimori led the Fujimorista lists, lost two consecutive presidential elections (2011, 2016) and is currently held in preventive detention for alleged money laundering charges, her brother, Kenji Fujimori, the most voted Congress representative in the country, was suspended from Congress by his own party on charges of bribery and influence trading. These two political figures and the relationship between them have dominated much of the Peruvian political landscape over the past two years.

The overwhelming majority that Fuerza Popular achieved for the 2016–2021 legislature has until recently been used in a manner characterized by most political observers as one of abuse of congressional power over the executive branch. Through Congress, Fuerza Popular embarked on a constant obstruction of executive initiatives, including votes of no confidence

[12] Francesca Lessa, Tricia D. Olsen, Leigh A. Payne, Gabriel Pereira and Andrew G. Reiter, 'Overcoming Impunity: Pathways to Accountability in Latin America,' *International Journal of Transitional Justice* 8(1) (2014): 75–98.

[13] Fuerza Popular obtained 36 percent of the valid votes in the congressional election, yet due to the quotient system (*sistema de cifra repartidora*) applied in Peru, the total number of seats to parties with higher vote numbers increases. Jurado Nacional de Elecciones, Resolución No. 0660-2016-JNE.

against several ministers; constitutional denunciations against Congress representatives from other parties, members of the Constitutional Tribunal, the General Attorney's Office and the Ombudsman's Office; and direct interference and threats to Public Prosecutor's Office members. When newly sanctioned by the IACtHR to respect the independence of the Constitutional Tribunal,[14] Fuerza Popular openly proposed withdrawing Peru from the IACtHR's jurisdiction – much like Alberto Fujimori did in the late 1990s when an IACtHR decision found Peru at fault. Several political observers characterized the congressional obstruction of the Kuczynski government by Fuerza Popular as a parody and abuse of democratic politics.[15]

The Fujimoris and Fujimorismo in Peruvian Politics

It is in this structurally weak democracy that we find political actors representing 'Fujimorismo,' a political force or movement based, first of all, on adherence to former president Fujimori (and his children). Ideologically, Fujimorismo could be characterized as forwarding a populist and neoliberal agenda.[16]

Fujimorismo was clearly a strong political force in the 1990s in terms of electoral support. Since then, Alberto Fujimori himself and his electoral lists have experienced a deterioration, yet they are still part of Peruvian politics. How to understand the resilience of Fujimorista support and the entrenchment of Fujimorismo in Peruvian politics? This is partly explained by the sociopolitical context in which Fujimorismo emerged, one where Alberto Fujimori is associated with the end of both the economic crisis and the internal armed conflict. Peru in the 1980s was a prime example of Latin America's 'lost decade': hyperinflation,

[14] IACtHR, *Durand and Ugarte v. Peru*, Adoption of Urgent Provisional Measures (17 December 2017 and 8 February 2018).
[15] See columns by journalists Gustavo Gorriti, Rosa-María Palacios, Jaime de Althaus and Augusto Álvarez-Rodrich throughout 2017 in national news outlets such as *Caretas*, *La República* and *El Comercio*.
[16] About Fujimorismo as a political force, see, John Crabtree and Jim Thomas, eds., *El Perú de Fujimori: 1990-1998* (Lima: Instituto de Estudios Peruanos, 1999); Yusuke Murakami, *Perú en la era del Chino: la política no institucionalizada y el pueblo en busca de un salvador* (Lima: Instituto de Estudios Peruanos and Center for Integrated Area Studies, 2007).

massive unemployment and huge budget deficits. The disastrous economic policies of Alan García's first term (1985–1990) left the country in economic chaos. The liberal economic package applied to 'fix' the economy (the so-called Fujishock) was brutal and had devastating consequences for millions of Peruvians who saw their incomes decimated overnight. The economic measures were effective in controlling hyperinflation and the basis for new fiscal and production-related policies was created. The leader of the Maoist Communist Party Shining Path, Abimael Guzmán, was captured in September 1992, put on trial and sentenced to prison. The Peruvian state could thus declare a military and political victory over the Shining Path, a victory that has remained relatively unchallenged in Peruvian society and that gave President Fujimori much popularity and political gains. At the core of the Fujimorista support, then, is the recollection of these two processes: the end of both economic chaos and the armed conflict. More nuanced perspectives and narratives, which include other elements and social actors (such as the high social costs of the Fujishock, systematic human rights violations, peasant self-defence, authoritarian practices), have been voiced and gained legitimacy in Peru throughout the years, but have not been able to alter the core of Fujimorista support.

The Fujimori regime collapsed in 2000. What started off as a democratic regime gradually turned to more authoritarian and clientelistic practices, restricting critical social and political actors. The leaking of the infamous 'Vladivideos' in 2000 showing the presidential advisor and head of the intelligence service Vladimiro Montesinos paying off top leaders of the judiciary, media and private sector, delivered a death blow to the authoritarian Fujimori regime. Alberto Fujimori sought refuge in Japan, where he stayed until his return to Peru via Chile, where he was detained awaiting extradition to Peru for dozens of charges.

Given the structural features of the Peruvian judicial system, the Fujimori trials that started in 2007 showed a remarkable advancement in criminal accountability; the human rights cases, in particular, became paradigmatic.[17] After a 15-month trial, former president Fujimori

[17] See, Jo-Marie Burt, 'Guilty as Charged: The Trial of Former Peruvian President Alberto Fujimori for Human Rights Violations,' *International Journal of Transitional Justice* 3(3) (2009): 384–405; Elizabeth Salmón, *La condena de Alberto Fujimori y el Derecho internacional de los derechos humanos: Un capítulo fundamental de la lucha contra la impunidad en el Perú* (Bogotá: Universidad Externado de

was sentenced to 25 years in prison for the Barrios Altos (1991) and La Cantuta (1992) massacres and Sótanos SIE crimes (1992), leading to the killing of 25 people by the paramilitary group Grupo Colina. By applying the doctrine of control of an organized power apparatus, the Supreme Court convicted Fujimori as the mediate perpetrator of the crimes executed by the Colina group as part of a national security policy that allowed systematic human rights violations. The Fujimori trial and conviction was a successful test for the Peruvian judicial system, making history for being the first time a former head of state was prosecuted for human rights violations in and by his/her own country.

Ever since, however, the possibility of a presidential pardon for Fujimori has been on the political agenda. Three presidents have confronted the issue. García realized that a pardon at the end of his second term (2006–2011) was politically impossible. Ollanta Humala (2011–2016) opted to follow the procedures for presidential pardons established by law, and thus did not grant one. Kuczynski declared himself in favour of a humanitarian pardon, but was not willing to take the initiative, at least not until the threat of impeachment by Fuerza Popular. As a political leader and presidential candidate, Keiko Fujimori tried to distance herself from the 'wrongdoings' of her father's regime, not entirely acknowledging that they were systematic human rights violations. Political analysts in Peru have argued that her father's continuous imprisonment was politically necessary for Keiko's succession to the Fujimori party and legacy. Her brother Kenji, on the other hand, made the liberation of their father the first priority in his political agenda. Determining the rightful heir to the Fujimori legacy has implications far beyond the Fujimorista party, due to its original majority in Congress and the pressure it exerts over the executive. Compromising information from the Odebrecht corruption scandal and financial support to Peruvian candidates exacerbated this situation.[18] Initially interpreted as an attempt

Colombia, 2014); Jemima García-Godos and Félix Reátegui, 'Peru: Beyond Paradigmatic Cases,' in *Transitional Justice in Latin America: The Uneven Road from Impunity towards Accountability*, ed. Elin Skaar, Jemima García-Godos and Cath Collins (London: Routledge, 2016).

[18] See, e.g., IDL-Reporteros, 'Confesiones que fulminan,' https://idl-reporteros.pe/confesiones-que-fulminan-1/ (accessed 9 March 2019). The Odebrecht scandal and related investigations have led to fractures within the Fujimorista party as well. Its congressional majority has been reduced from 56 to 42 percent of the seats. However, the Fujimorista representation in Congress is still significant.

by Fuerza Popular to take over government by way of Congress, the first impeachment of Kuczynski is now seen as an attempt by Fuerza Popular and Keiko Fujimori to stop what was in the making: the presidential pardon of Alberto Fujimori. President Kuczynski avoided the impeachment, but was totally unprepared for the political turmoil to follow.

Amidst national protests and disbelief, the *Barrios Altos* and *La Cantuta* cases' victims asked the IACtHR to render the pardon void. Given the political context from which this claim emerges, the implications of the court's ruling reach far beyond legal practice and international jurisprudence. In this specific case, the IACtHR enters the minefield of the political sphere. At a general level, the decision is confronted with the legitimacy of political actions concerning accountability for human rights violations; at the specific level, it encounters power struggles in Peruvian politics. The next section explores how the IACtHR conducted its review of Fujimori's pardon and the decision it reached.

IACtHR'S REVIEW OF FUJIMORI PARDON

The review of Fujimori's pardon by the IACtHR was carried out under the proceedings of monitoring compliance with the court's *Barrios Altos* and *La Cantuta* judgments against Peru.[19] Immediately after the granting of Fujimori's pardon, the victims' representatives in those cases requested the IACtHR to declare such a discretionary measure incompatible with Peru's obligation to investigate, prosecute and, if appropriate, punish perpetrators of human rights violations, as declared in the respective judgments.[20] Indeed, the IACtHR had already clarified that states are obliged to enforce condemnatory sentences as part of their obligation to punish, and therefore this subject falls under its competence during monitoring of compliance.[21] However, whether the IACtHR is actually authorized to overturn a state act such as a presidential pardon is still a matter under discussion. In fact, although the IACtHR periodically

[19] The IACtHR has repeatedly declared its competence to exercise this function, e.g. *Acevedo Buendía et al. v. Peru*, *Monitoring Compliance*, Order (1 July 2011). [note that *IJTJ* doesn't give specific references unless there is a direct quote, thus the deletions]
[20] Monitoring of compliance with these orders is still open. See, *Barrios Altos* and *La Cantuta v. Peru,* supra n 5.
[21] IACtHR, *Myrna Mack Chang v. Guatemala,* Monitoring of Compliance, Order (26 November 2007).

monitors the execution of its judgments, the understanding of its powers within this framework seems to be developing on a case-by-case basis. That is, without sufficient guidelines coming from the American Convention on Human Rights (ACHR) or the IACtHR's rules, the Unit of Monitoring of Execution continuously develops the catalogue of measures required to achieve full compliance.[22]

IACtHR's Decision Regarding Fujimori's Pardon

After some months of anticipation, the IACtHR issued a decision in which it seems to be divided between asserting its subsidiary role in the Inter-American system and offering effective protection to victims of grave human rights violations. Through the principle of subsidiarity, states have the primary role of dealing with human rights violations. Regional courts only step in when states fail to fulfil this obligation.[23] Indeed, the IACtHR decided to leave it to the competent domestic judicial organs to determine whether Fujimori's pardon complied with the requisites for its issuance, although the court also pointed out that it could revise this decision later on.[24] Nevertheless, the IACtHR did not limit itself to establishing reasons why such a deference was appropriate. It additionally offered important analytical tools to carry out an assessment of pardons voiding the effects of a criminal conviction, and also provided a checklist of controversial issues for the relevant Peruvian judicial organ to review in order to decide adequately.

In what follows, we summarize the IACtHR's rationale leading it to *prima facie* decline an assessment of Fujimori's pardon. It is contended that two factors might have influenced this decision: increasing requests for a clearer subsidiary role, and the desire to avoid an unnecessary involvement in highly politically charged controversies.

[22] While research on compliance rates exists, very little has been discussed on the limits of the IACtHR's monitoring of compliance powers. See, J. Schneider, 'Reparation and Enforcement of Judgments: A Comparative Analysis of the European and Inter-American Human Rights Systems' (PhD diss., Johannes Gutenberg University, Mainz, 2015).
[23] See, Paolo Carozza, 'The Problematic Applicability of Subsidiarity to International Law and Institutions,' *American Journal of Jurisprudence* 61(1) (2016): 51–67.
[24] *Barrios Altos* and *La Cantuta v. Peru*, supra n 5.

The IACtHR began its analysis by declaring its competence – within the context of monitoring execution – to assess the victims' request regarding the compatibility of Fujimori's pardon with the Peruvian state's obligation to investigate, prosecute and punish perpetrators of human rights violations. The court concluded that it is not necessary for the said request to have previously exhausted domestic remedies (this is only required during the merits stage), and that it could review any act performed by any state organ or power.[25] However, the IACtHR also declared that, on certain occasions, it would be convenient for competent state organs to assess the execution of remedial measures orders prior to an IACtHR decision.[26] Although the court continued presenting a detailed analysis of the elements to be considered when assessing executive pardons and similar measures (analyzed later), it eventually returned to the possibility that a domestic organ could primarily exercise jurisdictional control over such measures.[27] Thus, the IACtHR declared that when a national executive power takes a discretionary measure of this nature (i.e. annulling or lessening a sentence for grave human rights violations), this act should be subject to jurisdictional control. As for Peru, the court observed that the Constitutional Tribunal had at least once exerted jurisdictional control over a presidential humanitarian pardon, resulting in its annulment, and had also *seemed* to declare that sentences for crimes against humanity were not subject to amnesties, pardons and similar measures.[28] These two examples led the IACtHR to conclude that Fujimori's pardon could (and should) be reviewed under domestic jurisdictional control, leaving the door open for subsequent review at the regional level.[29]

The IACtHR's choice to *prima facie* leave the decision on the validity of Fujimori's pardon in the hands of the Peruvian judicial organs is indeed an unexpected move. Although this is the first time the IACtHR has dealt with the pardon of a former head of state for his responsibility in human rights violations, the court's *jurisprudence constant* is rich and well

[25] Ibid.
[26] Ibid.
[27] Ibid.
[28] Ibid. In the latter case, the Constitutional Tribunal referred to 'pardons' and not 'humanitarian pardons' for which controversy exists about their application to Fujimori.
[29] Ibid.

respected regarding the evaluation of similar measures, such as amnesty laws, which could have been used as a robust basis for forming a decision rejecting such a measure. Hence, it is interesting to see the IACtHR's choice in the light of increasing requests for exerting a more assertive subsidiary role. Certainly, it is germane to notice that the IACtHR's review of acts performed by democratic states has been questioned, especially in cases related to the annulment of amnesty laws in postconflict settings.[30] The way that such questioning resonates with the case at hand, and the possible application of existing IACtHR jurisprudence to the review of the presidential pardon, are discussed below.

IACtHR's Jurisprudence on Amnesties, Pardons and Similar Measures Preventing Criminal Prosecution or Voiding the Effects of a Conviction and its Contestation

Prior to the IACtHR's review of Fujimori's pardon, this court had limited jurisprudence about the compatibility of pardons with the ACHR.[31] It had recognized the right of individuals to request pardons and other similar measures in order to change or commute their death penalty sentences, thus demanding states to secure the availability of adequate domestic remedies for challenging such decisions.[32] Moreover, particularly regarding the pardon of convicted individuals, the IACtHR had declared that states shall refrain from this measure (and others aimed at preventing criminal prosecution or at voiding the effects of a conviction such as amnesty laws) as it contravenes their obligation to investigate occurrences of human rights violations and the ensuing identification, prosecution and punishment of perpetrators.[33] The IACtHR's jurisprudence on amnesties is much richer than its findings on pardons.

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[30] Roberto Gargarella, 'La democracia frente a los crímenes masivos: una reflexión a la luz del caso Gelman,' *Latin American Journal of International Law* 2 (2015), http://www.revistaladi.com.ar/numero2-gargarella/; Jorge Contesse, 'Contestation and Deference in the Inter-American Human Rights System,' *Law and Contemporary Problems* 79(2) (2016): 123–145.

[31] American Convention on Human Rights, adopted 22 November 1969, entered into force 18 July 1978.

[32] IACtHR, *Fermín Ramírez v. Guatemala*, Merits, Reparations and Costs, Judgment (20 June 2005), Series C No. 126.

[33] IACtHR, *Gutiérrez Soler v. Colombia*, Merits, Reparations and Costs, Judgment (12 September 2005), Series C No. 132. Studies indicate that prosecution of perpetrators promotes trust in domestic courts, although perceptions might change over time. See, Ezequiel Gonzáles-Ocantos, 'Evaluations of Human Rights Trials and Trust in Judicial Institutions: Evidence from Fujimori's Trial in Peru,' *International Journal of Human Rights* 20(4) (2016): 445–470.

We submit that pardons and amnesties are two different legal institutions. Although pardons and amnesties have been extensively used in postconflict settings, a concerted legal definition of these terms is absent in international law.[34] While 'pardons' usually benefit persons already declared criminally responsible by a court of law, 'amnesties' are used to bar or cancel prosecution of allegedly responsible individuals.

However, we argue that pardons and amnesties share characteristics and goals, which makes it possible to use the IACtHR's jurisprudence on amnesties as adequate guidance for evaluating pardons. Indeed, as the IACtHR recognized in its monitoring order, Fujimori's 'humanitarian' pardon is a distinctly Peruvian legal concept, which differs from regular pardons and amnesties.[35] Nevertheless, its principal effect is the waiver of a criminal conviction imposed for acts constituting grave human rights violations, which – as in the case of amnesties – affects the victims' right to access to justice and might favour impunity. Thus, while it is important to appreciate the specific characteristics of Fujimori's pardon and its particular context, dissimilar nomenclature must not prevent useful comparisons and *mutatis mutandis* reliance on common principles.

The IACtHR has declared the incompatibility of amnesty laws based on two remedial measures: orders to investigate, prosecute and, if appropriate, punish perpetrators of human rights violations, and to reform legislation contravening the ACHR and other relevant human rights instruments.[36] The IACtHR has repetitively declared that states have an obligation to investigate, prosecute and punish occurrences of human rights violations.[37] Such an obligation is indeed independent of whether human rights violations are declared by the IACtHR, although the inclusion of an order to investigate and prosecute facilitates supervision. Furthermore, the

[34] See, International Committee of the Red Cross (ICRC), 'Amnesties and IHL: Purpose and Scope,' Legal factsheet, 2017, www.icrc.org/en/document/amnesties-and-ihl-purpose-and-scope (accessed 9 March 2019).
[35] *Barrios Altos* and *La Cantuta v. Peru*, supra n 5.
[36] Besides declaring violations and ordering compensations, the IACtHR identifies appropriate remedial measures (nonrepetition guarantees included). See, Dinah Shelton, *Remedies in International Human Rights Law* (New York: Oxford University Press, 2015); Leiry Cornejo Chavez, 'New Remedial Responses in the Practice of Regional Human Rights Courts: Purposes Beyond Compensation,' *International Journal of Constitutional Law* 15(2) (2017): 372–392.
[37] IACtHR, *Velásquez Rodríguez v. Honduras*, Merits, Judgment (29 July 1988), Series C No. 4.

IACtHR does not recognize an absolute obligation to punish perpetrators of human rights violations; the duty is of performance and not of result.[38] Specifically on amnesties and other measures preventing the prosecution or punishment of perpetrators, the IACtHR's position has been clearly asserted: such measures are against the state obligation to investigate, prosecute and punish perpetrators of serious human rights violations; the effective protection of the ACHR; and the *pacta sunt servanda* principle (treaties must be complied with).[39] This rationale prevails in the court's jurisprudence, and is the reason why, while examining challenged legislation, it does not focus on its formal aspects (e.g. the author of the amnesty, its formation process) but rather on the accountability for serious human rights violations.[40]

The IACtHR sometimes orders the reform of laws considered incompatible with the ACHR.[41] Occasionally, these orders are directed to the straightforward repeal of certain norms.[42] Jo Pasqualucci notes that this practice secures the effective functioning of the Inter-American human rights system since victims are not forced time and again to resort to the court once a norm has been declared incompatible.[43] Alternatively, legislative reform orders consist in the implicit but direct abrogation of a law. That is, independently of orders to reform legislation, the IACtHR de facto nullifies the validity of a domestic norm, namely, the said provision is left without legal effects from the moment the judgment is issued.[44]

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[38] Annelen Micus, *The Inter-American Human Rights System as a Safeguard for Justice in National Transitions: From Amnesty Laws to Accountability in Argentina, Chile and Peru* (Leiden: Brill Nijhoff, 2015).

[39] See, IACtHR, *Moiwana v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment (15 June 2005), Series C No. 124; IACtHR, *Huilca Tecse v. Peru*, Merits, Reparations and Costs, Judgment (3 March 2005), Series C No. 121; IACtHR, *Serrano Cruz Sisters v. El Salvador*, Merits, Reparations and Costs, Judgment (1 March 2005), Series C No. 120; IACtHR, *Bulacio v. Argentina*, Merits, Reparations and Costs, Judgment (18 September 2003), Series C No. 100.

[40] IACtHR, *Gomes Lund et al. ('Guerrilha do Araguaia') v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, Judgment (24 November 2010), Series C No. 219.

[41] IACtHR, *Garibaldi v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, Judgment (23 September 2009), Series C No. 203.

[42] IACtHR, *Caesar v. Trinidad and Tobago*, Merits, Reparations, and Costs, Judgment (11 March 2005), Series C No. 123.

[43] Jo Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge: Cambridge University Press, 2013).

[44] E.g., IACtHR, *Raxcacó Reyes v. Guatemala*, Merits, Reparations and Costs, Judgment (15 September 2005), Series C No. 133.

It was precisely in the *Barrios Altos* case that the IACtHR declared that (self)-amnesty laws passed by the Peruvian government were not only incompatible with the ACHR – since they were designed to grant impunity to perpetrators of serious human rights violations – but they also lacked legal effects in the domestic order.[45] Certainly, this declaration was not only applicable to that particular case but, due to its nature, had generic effects in subsequent cases.[46] The fact that domestic tribunals reopened criminal trials against perpetrators in the *La Cantuta* and *Barrios Altos* cases confirmed the domestic acceptance of the court's reasoning.[47] It has been argued that the IACtHR's methodology conveniently averts the difficulties of requiring states to reform determined legislation in a particular way. This is especially true considering the concerns that some states have expressed about the challenges these orders pose to the division of powers required in a democratic order.[48] Nevertheless, the IACtHR's rejection of amnesty laws has seemingly been well received in many states, and applied through the conventionality control by domestic courts. For instance, in 2007 the Argentine Supreme Court invoked the conventionality control to declare the presidential pardon of 30 former military officers unconstitutional and, in Colombia, the Constitutional Court invoked the IACtHR's rationale to declare that only certain cases of amnesties and pardons were constitutional.[49]

Impunity is at the core of the IACtHR's rationale for declaring laws without legal effect. However, not all exemption measures are destined to be rejected. The IACtHR's jurisprudence shows that not all efforts to prevent the investigation of human rights violations will trigger an

[45] *Barrios Altos v. Peru*, supra n 5.
[46] See, IACtHR, *Barrios Altos v. Peru*, Interpretation of the Judgment of the Merits (3 September 2001), Series C No. 83; *La Cantuta v. Peru*, supra n 4. Later, the court followed the same formula, leaving the incompatible legislation without effects, but not ordering the state to formally derogate this legislation. See, IACtHR, *Almonacid-Arellano et al. v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Judgment (26 November 2006), Series C No. 154.
[47] *La Cantuta v. Peru*, supra n 4. Similarly, the IACtHR later declared that a Uruguayan amnesty law lacked legal effects but did not order its repeal. See, IACtHR, *Gelman v. Uruguay*, Merits, Reparations and Costs, Judgment (24 February 2011), Series C No. 221.
[48] See state representatives' declarations in IACtHR, *Castillo Petruzzi et al. v. Peru*, Monitoring of Compliance, Order (17 November 1999); IACtHR, *Olmedo Bustos et al. v. Chile,* Monitoring of Compliance, Order (28 November 2003).
[49] Argentine Supreme Court, *Mazzeo Julio Lilo y otros*, Judgment (13 July 2007); Colombian Constitutional Court, Judgment C-695/02 (28 August 2002).

adverse declaration from this court. In recent cases the IACtHR has adopted a more nuanced approach to amnesty laws and similar measures. In *Massacre of El Mozote v. El Salvador*, the IACtHR used the concept 'grave human rights violations' as a threshold for evaluating whether certain criminal conducts may be subject to amnesty,[50] thus producing a (non-exhaustive) list of crimes (including torture, extrajudicial execution and forced disappearance) for which amnesties are inapplicable and, therefore, leaving the possibility open for others. Likewise, as analyzed later, the IACtHR has also paid attention to international standards following a similar rationale.

Despite being praised for offering effective protection to victims, the IACtHR's jurisprudence on amnesties and other exemption measures has also been significantly criticized. Popular support given to an amnesty law in Uruguay[51] – passed by a democratic government and backed by two popular consultations[52] – did not prevent the IACtHR from declaring its incompatibility with the ACHR and, therefore, without legal effects.[53] Voices of concern were heard all over the region about the troubling repercussions of such decisions in a democratic setting. Among others, Roberto Gargarella argued that the IACtHR should distinguish between different types of amnesty, paying attention to the democratic legitimacy these norms enjoy.[54] According to him, differences between the Peruvian self-amnesty and the Uruguayan expiry law justified upholding the latter or, at least, a greater effort to explain the IACtHR's choice. Furthermore, he criticized the IACtHR for disregarding the capacities of democratic communities to decide on the principles with which they would govern their own institutions.[55]

The rejection of amnesty laws and pardons might also impose challenges for reaching a peace agreement in the context of ongoing internal armed conflicts. Indeed, the IACtHR has

[50] IACtHR, *Massacres of El Mozote and Nearby Places v. El Salvador*, Merits, Reparations and Costs, Judgment (25 October 2012), Series C No. 252. This concept had been used in, e.g., *Barrios Altos v. Peru*, supra n 3; *Gelman v. Uruguay*, supra n 47.
[51] Law No. 15.848 *Ley de Caducidad de la Pretensión Punitiva del Estado*, also called 'Expiry Law.'
[52] Referendum of 1989 and Plebiscite of 2009.
[53] *Gelman v. Uruguay,* supra n 47.
[54] Gargarella, supra n 30.
[55] Ibid. Cf. Eur. Ct. H.R., *Ould Dah v. France*, No. 13113/03, ECHR 2009-I.

declared that amnesties in favour of perpetrators of grave human rights violations committed *during* armed conflicts lack legal effect. A concurring opinion clarifies that even in these cases, when a balance should be made between the cessation of violence and a search for justice, amnesties shall not benefit perpetrators of war crimes and crimes against humanity.[56] This precedent played an important role during the negotiations of the Colombian peace agreement with the guerrilla group FARC (*Fuerzas Armadas Revolucionarias de Colombia*) in 2016, and arguably helped to shape the ensuing Colombian Amnesty Law which rejected the granting of amnesties and pardons for a number of crimes.[57] Since the doctrine of conventionality control obligates all state actors to apply the ACHR according to the standards developed by the IACtHR, the exclusion of particular crimes from amnesties and pardons might hinder the success of peace negotiations in ongoing and postconflict settings.

As Louise Mallinder points out, the mentioned reservations and the need for a more consolidated doctrine at the regional level should be considered.[58] However, the above summary of the IACtHR's practice regarding amnesty laws and similar measures provides evidence of its strong and well-grounded position on this issue. The court has construed a solid appreciation of the limited viability of amnesties despite significant criticism related to its democratic legitimacy. Indeed, the IACtHR has arguably used this criticism to accommodate its approach, giving room for the application of amnesties and similar measures under certain conditions. Hence, it is in principle difficult to understand the IACtHR's choice of not directly declaring the incompatibility of Fujimori's pardon considering that the crimes for which he was condemned clearly fit its developed criteria (i.e. grave human rights violations).

[56] *Massacres v. El Salvador*, supra n 50, Concurring Opinion Judge Diego García-Sayán.
[57] Under art. 23 of Law No. 1820 (30 December 2016), amnesties, pardons, etc., do not apply to, inter alia, crimes against humanity, genocide, grave war crimes, torture, extrajudicial executions and forced disappearance.
[58] Louise Mallinder, 'The End of Amnesty or Regional Overreach? Interpreting the Erosion of South America's Amnesty Laws,' *International and Comparatively Law Quarterly* 65(3) (2016): 645–680.

IACtHR's Assertion of its Subsidiary Role

The IACtHR's decision to defer – for the fist time in this matter – to the jurisdiction of domestic courts should be seen in light of existing calls for a more assertive subsidiary role. The IACtHR's monitoring order included several additional elements which manifestly supported a declaration of incompatibility of Fujimori's pardon. It highlighted the importance of upholding the principle of proportionality, striking a balance between the victims' right of access to justice and measures which might reduce or annul criminal sentences lawfully imposed.[59] Certainly, access to justice as a victims' right, including not only those individuals directly affected by human rights violations but also their next of kin, had a prominent role in the IACtHR's analysis.[60] It also carried out an assessment of current international standards, noticing the existence of regional consensus prohibiting the granting of pardons for crimes of the highest gravity.[61] Moreover, the IACtHR deemed it essential to ponder the possible effects that a pardon might entail for the social tissue, especially considering a transitional justice setting.[62] Nevertheless, despite considering all these elements, the IACtHR found it most appropriate to assert its subsidiary role and defer to domestic jurisdictional control.

This kind of deference, commonly exerted by the European Court of Human Rights, is rare in the Inter-American system.[63] Traditionally, distrust in domestic judiciary and a prevailing climate of widespread impunity in the region have led the IACtHR to take a stronger position, sometimes even acting as a constitutional court.[64] Nevertheless, although the IACtHR has diverged from such a path in the monitoring order, this order shows that the court has not completely abandoned the exercise of strong review over domestic judicial and administrative

[59] *Barrios Altos* and *La Cantuta v. Peru*, supra n 5.
[60] The IACtHR has ruled that amnesties affect victims' and their next-of-kin's rights to fair trial and judicial protection enshrined in the ACHR.
[61] *Barrios Altos* and *La Cantuta v. Peru*, supra n 5.
[62] Ibid.
[63] See, Bernard Duhaime, 'Subsidiarity in the Americas: What Room Is There for Deference in the Inter-American System?' in *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation*, ed. L. Gruszczynski and W. Werner (Oxford: Oxford University Press, 2014); Nino Tsereteli, 'Emerging Doctrine of Deference of the Inter-American Court of Human Rights?' *International Journal of Human Rights* 20(8) (2016): 1097–1112.
[64] Armin von Bogdandy, 'Ius Constitutionale Commune in Latin America: A Look at a Transformative Constitutionalism,' *Revista Derecho del Estado* 34 (2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2637448.

decisions. While recognizing the primacy of the domestic judiciary to evaluate the pardon, the IACtHR thoroughly pointed out the elements which must be analyzed to secure an appropriate decision.[65] Hence, the IACtHR is arguably still – although indirectly – exercising strong supervision. Among the essential elements to consider, the IACtHR mentioned the political context surrounding the granting of pardon, including allegations of possible purchase of parliamentary votes and political favours. While it is true that the IACtHR avoided directly dealing with the heavily politically charged situation in Peru, the inclusion of this issue in the aforementioned task list pinpoints the court's continuous attention to these factors.

RULE OF LAW CONSIDERATIONS

The pardon and the IACtHR's order may be analyzed under RoL elements in the context of transitional justice. As ratified in 2011,[66] the 2004 UN Secretary-General's report 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies'[67] is relevant. The RoL as a governance principle in (post)conflict societies applies to all persons, institutions and states.[68] As done by the IACtHR and the Supreme Court, the principle of proportionality and consistency with international standards are discussed next.

Proportionality

Proportionality involves reasonable and rational exercises of means to achieve permissible goal(s), without unduly impinging on rights, and applies across policy-making and legal areas.[69] The IACtHR appropriately found that the principle of proportionality is important to establish and execute sentences.[70] To examine the interplay of interests at stake in pardons and

[65] *Barrios Altos* and *La Cantuta v. Peru*, supra n 5.
[66] 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General to the Security Council,' S/2011/634 (12 October 2011).
[67] UN Doc. S/2004/616 (23 August 2004).
[68] Ibid.
[69] Emily Crawford, 'Proportionality,' in *Max Planck Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum (Oxford: Oxford University Press, 2011).
[70] *Barrios Altos* and *La Cantuta v. Peru*, supra n 5.

revocations thereof in transitional justice scenarios, Robert Alexy's three-pronged balancing proportionality test is useful.[71]

The first prong concerns the suitability of measures to achieve sought goal(s);[72] particularly, whether the competent authority in a serious and truthful manner seeks to achieve legally valid and legitimate objective(s) rather than mere political plans or gains.[73] This implies examining whether the pardon was suitable to achieve or substantially contribute towards completion of a peaceful transition and/or reconciliation in Peru. As discussed, the pardon of Fujimori was seemingly a political bargain by Kuczynski to avoid his parliamentarian impeachment for corruption allegations rather than a measure objectively grounded on humanitarian reasons. As the IACtHR requested, the Peruvian jurisdiction evaluated this and overturned the pardon. This national evaluation constituted a test of the RoL in Peru, which relates to the IACtHR's character as a court of last resort and its increasing awareness of its subsidiary role. This may explain why the court ruled the way it did.

A second aspect involves whether the objective(s) could only be attained by the adopted measure, namely that there was no less intrusive alternative concerning justice interests.[74] The least onerous option must be selected.[75] As the IACtHR appropriately found, the obligation to punish perpetrators of serious violations with a sentence proportionate to the seriousness of these abuses cannot become illusory during sentence execution and measures adopted must be the least restrictive of the victims' right to access to justice.[76] The house arrest of Fujimori rather than his pardon and subsequent release from prison could have been ordered. Whether the pardon corresponds to the sociopolitical context[77] and state justice

[71] Robert Alexy, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2002); Kai Ambos, *Treatise on International Criminal Law, Volume 1: Foundations and General Part* (Oxford: Oxford University Press, 2013).
[72] Ibid.; Crawford, supra n 69.
[73] Ambos, supra n 71.
[74] Ibid.
[75] Crawford, supra n 69.
[76] *Barrios Altos* and *La Cantuta v. Peru*, supra n 5.
[77] Darryl Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court,' *European Journal of International Law* 14(3) (2003): 481–505.

initiatives[78] should be also assessed. However, the IACtHR did not explicitly discuss some of these elements, deferring such assessment to Peruvian jurisdiction, which did so only partially.

In the Peruvian context, there was no urgent need for the pardon granted to Fujimori as a transitional justice mechanism. Unlike countries like Colombia, Peru was neither undertaking peacemaking negotiations nor emerging from a conflict and/or dictatorship. As the IACtHR mentioned, the 1993 Peruvian constitution, including the provision on pardons, did not stem from a transitional justice agreement.[79] Peru's internal armed conflict and Fujimori's authoritarian regime ended in 2000. In the intervening years, there have been successive democratic regimes, albeit with their deficits.

The third aspect is proportionality *stricto sensu*.[80] This requires balancing the qualitative (seriousness) and quantitative (scale) dimensions of the crimes covered by the pardon and the pursued goals thereof, namely, the balanced consideration of all the factors and elements for/against peace or justice interests.[81] To assess the admissibility of pardons under proportionality *stricto sensu*, Ambos identifies useful guidelines.[82] First, pardons are generally inadmissible regarding mass atrocities.[83] As the IACtHR remarked,[84] the Supreme Court had convicted Fujimori of serious domestic offences, which were judicially characterized as crimes against humanity under international criminal law.[85] Despite some controversy,[86] such characterization respects the principle of legality. The Supreme Court only characterized the international nature and dimension of the crimes perpetrated rather than incorporating crimes against humanity, as defined in the International Criminal Court (ICC) statute, into the Peruvian

[78] Juan Méndez, 'The Right to Truth,' in *Reigning in Impunity for International Crimes and Serious Violations of Fundamental Human Rights: Proceedings of the Siracusa Conference, 17–21 September 1998*, ed. Christopher Joyner (Toulouse: Eres, 1998).
[79] *Barrios Altos* and *La Cantuta v. Peru*, supra n 5.
[80] Crawford, supra n 69; Ambos, supra n 71.
[81] Ibid.; Robinson, supra n 77.
[82] Ambos, supra n 71.
[83] Ibid.; Juan Méndez, 'Accountability for Past Abuses,' *Human Rights Quarterly* 19(2) (1997): 255–282.
[84] *Barrios Altos* and *La Cantuta v. Peru*, supra n 5.
[85] *Fujimori*, Judgment (7 April 2009).
[86] See, 'César San Martín: "Alberto Fujimori no podía ser sentenciado en el Perú por crímenes de lesa humanidad",' https://peru21.pe/politica/cesar-san-martin-alberto-fujimori-podia-sentenciado-peru-crimenes-lesa-humanidad-390848 and 'Alberto Fujimori nunca fue acusado por lesa humanidad, dice su abogado,' http://archivo.elcomercio.pe/politica/gobierno/fujimori-nunca-fue-acusado-lesa-humanidad-dice-su-abogado-noticia-1445124 (both accessed 9 March 2019).

legal system.[87] Thus, this characterization was only for sentencing, reparations and the inadmissibility of an early release.

Second, pardons of political and military leaders are more problematic because they are the most responsible for mass atrocities.[88] As Peruvian president, Fujimori was the highest civilian and military Peruvian official and was convicted as the mediate perpetrator in control of a criminal apparatus of power.[89]

Third, the later exemption measures are given in criminal proceedings, the more acceptable they become because full impunity is prevented and the truth has been (partially) established.[90] Pardons are arguably admissible only if the convicted served a sufficient portion of his/her sentence.[91] Fujimori was pardoned after serving 12 years in prison. Nevertheless, he was sentenced to 25 years. Moreover, the National Criminal Chamber rejected the application of the *derecho de gracia* concerning a new investigation into another massacre involving Fujimori.[92]

Fourth, certain accountability mechanisms and/or public proceedings, including victim confrontation with the accused, disclosure of the facts and the convicted person's effective cooperation with justice, may suggest the adoption of exemption measures.[93] Whether the perpetrator has provided reparations to the victims, including compensation and sincere apologies, is relevant. Victims were civil parties in the Fujimori trial. Nevertheless, Fujimori has not paid victims the compensation ordered by the Supreme Court. Furthermore, Fujimori has given no symbolic reparations, such as apologies to victims. The IACtHR appropriately highlighted that sentence execution is part of the victim's right to access to justice and this right

[87] Kai Ambos, 'The Fujimori Judgment: A President's Responsibility for Crimes against Humanity as Indirect Perpetrator by Virtue of an Organized Power Apparatus,' *Journal of International Criminal Justice* 9(1) (2011): 137–158.
[88] Ambos, supra n 71; Cherif Bassiouni, 'Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights,' in *Post-Conflict Justice*, ed. Cherif Bassiouni (Leiden: Brill/Nijhoff, 2002).
[89] *Fujimori*, supra n 85.
[90] Ambos, supra n 71.
[91] Ibid.
[92] Resolution 39 (9 February 2018).
[93] Ambos, supra n 71; Ronald Slye, 'The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law,' *Virginia Journal of International Law* 43 (2002): 173–247.

must be weighed vis-à-vis Fujimori's right to life/limb in the proportionality assessment of his pardon.[94]

Fifth, the political and socioeconomic impact of the measure must be considered: whether the pardon contributes to legitimate goals such as a peaceful transition, lasting stability, true reconciliation and consolidation/enhancement of the RoL and democracy.[95] Conversely, the pardon of Fujimori and corruption accusations against Kuczynski caused a serious political crisis in Peru, dividing rather than reconciling the country.[96] Kuczynski's resignation in March 2018 was part of this crisis. Unlike the IACtHR, the Inter-American Commission explicitly found that this pardon has negative effects on the Peruvian transitional justice/reconciliation process and alienates victims.[97] According to victims, the pardon was not granted as a transitional justice measure.[98]

Therefore, this pardon is hardly reconcilable with the principle of proportionality, which the Supreme Court considered to overturn this measure.[99] This pardon has indeed obstructed the RoL and transitional justice in Peru.

Consistency with International Standards

The RoL in conflict/postconflict societies requires that transitional justice-related actions of states and other actors are consistent with international standards.[100] As per the IACtHR and the Supreme Court,[101] the pardon of Fujimori may be examined under three international standards: human rights, international criminal justice and (emerging) principles derived from domestic practices. These standards have been largely construed in the context of societies that experienced conflicts and/or human rights abuses and that adopted transitional justice

[94] *Barrios Altos* and *La Cantuta v. Peru*, supra n 5.
[95] Ambos, supra n 71; ICC Prosecutor, 'Informal Expert Paper: The Principle of Complementarity in Practice' (2003).
[96] 'Encuesta GfK: Indulto a Alberto Fujimori divide al país,' http://larepublica.pe/politica/1176746-encuesta-gfk-indulto-a-alberto-fujimori-divide-al-pais (accessed 9 March 2019).
[97] *Barrios Altos* and *La Cantuta v. Peru*, supra n 5.
[98] Ibid.
[99] *Fujimori*, supra n 6.
[100] UN Doc. S/2004/616.
[101] *Barrios Altos* and *La Cantuta v. Peru*, supra n 5.

mechanisms. Besides domestic practices, UN and ICC statute standards on pardons and sentence reductions/early releases are examined here because of their particular relevance to this case: the IACtHR for the first time dealt with pardons rather than amnesties. Furthermore, the IACtHR and the Supreme Court invoked these standards, and Peru is a member of the UN and the ICC.

First, no UN treaty or declaration explicitly prohibits pardons. However, under UN human rights treaties and declarations on serious human rights violations, states have to punish perpetrators with sanctions proportionate to these abuses;[102] the seriousness of the violations must be considered, as for pardons;[103] and clemency measures are subject to the state duty of due sanction, and victim rights to reparations and the truth.[104] According to the Human Rights Committee, exemption measures for gross human rights violations are incompatible with state obligations to provide effective remedies for victims, contribute to impunity, and may undermine democracy and cause new abuses.[105] More specifically, the Committee against Torture has concluded that pardons granted to officials convicted of torture are incompatible with the state duty to apply appropriate punishment.[106]

The UN Working Group on Enforced or Involuntary Disappearances, the special rapporteur on extrajudicial, summary or arbitrary executions, and the special rapporteur on the promotion of truth, justice, reparation and guarantees of nonrecurrence, condemned the pardon of Fujimori and called it a 'slap in the face' for victims.[107] They found it to be granted on politically motivated, rather than humanitarian, grounds because Fujimori's state of health did not merit his release as the Peruvian judiciary had previously determined. According to them, the president's constitutional right to pardon convicted persons cannot be considered in

[102] E.g., Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
[103] 'Declaration on the Protection of All Persons from Enforced Disappearance,' UN Doc. A/RES/47/133 (18 December 1992).
[104] Commission on Human Rights, 'Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity,' E/CN.4/2005/102/Add.1 (8 February 2005).
[105] *Rodríguez v. Uruguay*, Communication 322/1988, Views (19 July 1994).
[106] *Kepa Urra-Guridi v. Spain*, Communication 212/2002, Merits (24 May 2005).
[107] 'UN Human Rights Experts Appalled by Fujimori Pardon,' 28 December 2017, www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22568&LangID=E (accessed 9 March 2019).

isolation since humanitarian releases require proceedings that are transparent, rigorous, credible and compatible with international human rights standards, which restrict pardons in cases of serious violations.

Indeed, these UN experts found that the Supreme Court's revocation of the pardon restores justice to victims and their families, and meets international human rights standards.[108] As they also properly concluded, humanitarian pardons correspond to 'imminent terminal illnesses' rather than mere age or age-related medical problems and, in the latter cases, the state must simply guarantee provision of medical services to ensure the convicted person's right to health.[109]

Second, international criminal justice standards must be considered because they are relevant to pardons, particularly sentence reduction/early release provisions under the ICC statute (Article 110) and Rules of Procedure and Evidence (Rule 223). Indeed, the IACtHR[110] and the Supreme Court[111] invoked the ICC statute. Under the ICC instruments, early releases are generally inadmissible. When two-thirds of the sentence is served, the ICC shall, however, review the sentence for a potential reduction. The ICC's early release criteria include: person's cooperation with investigations/prosecutions and assistance to locate assets for victims; a significant change of circumstances; a genuine dissociation from his/her crime(s); resocialization and resettlement prospects; increase in social instability; person's significant action for victim benefit; impact on victims and their families; and personal circumstances, including worsening physical or mental health or advanced age.

If these standards are *mutatis mutandis* extrapolated to Fujimori's case, of his 25-year sentence, he served only 12 years. Importantly, the negative impact of the pardon on victims, their families and social stability in Peru, as well as Fujimori's indifferent and/or denying attitudes towards the victims and crimes committed, outweigh factors such as his advanced

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[108] 'UN Experts Say Fujimori Ruling Restores Justice,' 9 October 2018, www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23700&LangID=E (accessed 9 March 2019).
[109] Ibid.
[110] *Barrios Altos* and *La Cantuta v. Peru*, supra n 5.
[111] *Fujimori*, supra n 6.

age and alleged deteriorating health. The IACtHR requested the Peruvian jurisdiction to examine whether national requirements for humanitarian pardon were met, including the real existence of justifiable medical grounds.[112] Thus, the Supreme Court found irregularities in the granting of this pardon, including biases and inconsistencies of the medical board that evaluated Fujimori's health, uncorroborated alledged diseases and deteriorating detention conditions, suspiciously expeditious proceedings, and the lack of a proper written justification.[113] Fujimori was hospitalized in a private clinic the day after the Supreme Court overturned his pardon. However, on 18 January 2019, while still in hospital, the Supreme Court informed that he had been found 'clinically and hemodynamically stable' by a medical committee, and it began arrangements for his return to prison.[114]

Third, domestic practices acknowledge the principle of the head of the state's discretional power to pardon convicted persons.[115] Nonetheless, national norms adopted in transitional justice scenarios related to societies that experienced conflicts and/or dictatorships worldwide show increasing trends of inadmissible pardons in cases of international crimes.[116] National courts have overruled pardons/exemption measures concerning gross atrocities.[117] This arguably evidences an emerging general principle of inadmissible pardons regarding serious abuses. By focusing on Latin American practices, the IACtHR and the Supreme Court reached similar findings.[118]

Nevertheless, as transitional justice scholars correctly point out, states continue granting amnesties and pardons, even concerning international crimes or serious human rights

[112] *Barrios Altos* and *La Cantuta v. Peru*, supra n 5.
[113] *Fujimori*, supra n 6.
[114] See, Peruvian Supreme Court, *Fujimori*, Resolution No. 40 (18 January 2019), Case No. 00006-2001-4-5001-SU-PE-01.
[115] Jody Baumgartner and Mark Morris, 'Presidential Power Unbound: A Comparative Look at Presidential Pardon Power,' *Politics and Policy* 29(2) (2001): 209–236.
[116] See, ICRC, 'Rule 159. Amnesty,' https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule159 (accessed 9 March 2019).
[117] E.g., French Court of Cassation Sentence of 2003 (*Aussareses*).
[118] *Barrios Altos* and *La Cantuta v. Peru*, supra n 5; *Fujimori*, supra n 6.

violations,[119] to move on from their violent pasts,[120] transition to democracy,[121] promote lasting peace[122] and/or prevent future violations.[123] Thus, these scholars find no international law prohibition of exemption measures due to insufficient state practice.

However, transitional justice scholars acknowledge that international standards have been important in shaping and/or limiting practices on pardons and similar measures.[124] Indeed, increasing academic literature considers that national exemption measures for international crimes are generally inadmissible under international standards,[125] and/or that these measures may (exceptionally) be admissible but subject to strict conditions not to obstruct accountability: retributive justice and exemption measures may coexist.[126]

Considering the specific circumstances of the pardon of Fujimori and the Peruvian transitional justice process, this measure is arguably inconsistent with international standards. Therefore, the IACtHR's finding on international legal trends to limit exemption measures, including alleged humanitarian pardons,[127] and the Supreme Court's revocation of this pardon are generally sound.

CONCLUSIONS

We have demonstrated that the IACtHR has well-grounded jurisprudence regarding amnesty laws and similar measures which could have served as an adequate basis to declare the

[119] Kieran McEvoy and Louise Mallinder, 'Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy,' *Journal of Law and Society* 39(3) (2012): 410–440.
[120] Mallinder, supra n 58.
[121] Jon Elster, ed., *Retribution and Reparation in the Transition to Democracy* (Cambridge: Cambridge University Press, 2006).
[122] William Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford: Oxford University Press, 2012).
[123] Andrew Reiter, 'Examining the Use of Amnesties and Pardons as a Response to Internal Armed Conflict,' *Israel Law Review* 47(1) (2014): 133–147.
[124] Lessa et al., supra n 12.
[125] Mendez, supra n 83; Naomi Roth-Arriaza, ed., *Impunity and Human Rights in International Law and Practice* (New York: Oxford University Press, 1995); Fernando Travesí and Henry Rivera, 'Political Crime, Amnesties, and Pardons: Scope and Challenges' (ICTJ, March 2016); Ambos, supra n 71; ICRC, supra n 116.
[126] Tricia D. Olsen, Leigh A. Payne and Andrew G. Reiter, 'Conclusion: Amnesty in the Age of Accountability,' in *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, ed. Francesca Lessa and Leigh Payne (New York: Cambridge University Press, 2012).
[127] *Barrios Altos* and *La Cantuta v. Peru*, supra n 5.

incompatibility of Fujimori's pardon with the ACHR. Thus, the IACtHR's decision to instead defer to domestic jurisdictional organs arguably reflects an increasing awareness of its subsidiary role, particularly regarding sensitive political issues. Nevertheless, the analysis of the Fujimori pardon decision also shows that the IACtHR has not entirely abandoned its traditional approach of closely directing the review of state acts. Indeed, while stepping aside to a more subsidiary role and avoiding direct references to the Peruvian political context, the court continues to closely guide the state, through the provision of a task list, in the assessment of the pardon.

In light of the specific circumstances of the *Fujimori* case and the Peruvian transitional justice process, his pardon is overall inconsistent with RoL criteria, particularly proportionality and consistency with international standards, as applied in the Peruvian postconflict society. Moreover, the IACtHR's assessment criteria to determine the validity of this pardon, which were applied by the Peruvian Supreme Court when revoking said pardon, are arguably sound. The IACtHR appropriately identified the need for a proportional balancing between a humanitarian pardon and the victims' right to access to justice. Additionally, the IACtHR examined and discussed standards under international human rights law, international criminal law and Latin American practices. However, the court neither explicitly nor in detail discussed the impact of this pardon and potential revocation thereof in the general political climate in Peru, or the transitional justice and reconciliation process still in progress.

From a strictly legal perspective, this pardon primarily concerns Fujimori and the victims of the *Barrios Altos* and *La Cantuta* cases. Yet legal processes do not exist in a vacuum; they are surrounded by political processes, involving political actors with different capacities to mobilize and influence the course of events – if not of judicial decisions. By deferring the review of the pardon to the domestic jurisdiction, the IACtHR managed to keep Peru's internal political struggles at a distance – at least for the time being. Despite the structural weaknesses of the Peruvian judicial system and deplorable past experiences, as well as the political forces at play, the Supreme Court followed the IACtHR's guidelines, carried out an impartial review of the pardon and overturned it. Fujimori went back to prison, yet he appealed the overturn. At

the end, a special chamber of the Supreme Court rejected the appeal. In any event, there was a safety valve: the IACtHR could review the compatibility of domestic judicial decisions with international human rights obligations. In all cases, the political stakes are high for a Fujimorista party that is losing ground amidst corruption scandals and internal divisions.

Finally, the identification and application of criteria that are coherent with the RoL as adapted to postconflict transitional justice processes may legitimize the judicial outcome in Peru and provide guidance for other societies in transition in Latin America and beyond.