

TRANSITIONAL JUSTICE AND THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

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Let me start by thanking Ainhoa Montoya for organising this conference and for bringing such an excellent group together. I very much look forward to today's discussions.

I will focus my remarks on the role of the Inter-American Human Rights System in shaping transitional justice trends in Latin America.

IAHRS and Transitional Justice in Latin America

As a preliminary point it is important to note that the IAHRS came of age through its engagement with the dilemmas of transitional justice. At the beginning of the 1980s, it was a weakly institutionalised and mainly promotional regional system consisting of a Commission, and a Court without any cases. From the mid-1980s onwards however, the IAHRS started to increasingly insert itself into transitional justice struggles in multiple ways.

Yet, as I will note, there is a notable unevenness in the IAHRS' capacity to shape TJ trends in Latin America, with significant differences between countries.

In the first instance I would like to highlight two main aspects of the role of the Inter-American Human Rights System in shaping transitional justice trends in Latin America:

First, there is the role of the IAHRS in the construction of a set of rules, norms and principles of transitional justice.

In the early stages of the democratic transitions in the Southern Cone, the international influences on transitional justice were limited. Confronted with the dilemmas of transitional justice, there were few international precedents to draw from to guide government policies. International human rights jurisprudence at the time was of limited concrete help.

Moreover, in the early stages of the transitional period, the regional human rights system was not sufficiently developed to play an active role in the attempts to hold the military accountable for their human rights abuses. In terms of human rights activism, although

increasingly professionalized human rights NGOs more actively started to use the IAHRs, the learning process among the actors involved was still in its incipient stages.

However, the influence of the IAHRs would grow significantly over time, especially as the system developed a jurisprudence that emphasised the right to truth and individual judicial redress.

In particular, the IAHRs has adopted an increasingly robust position on the legitimacy of amnesty laws in the region.

Most famously, in the 2001 *Barrios Altos* judgement the Court ruled that two self-amnesty laws granted by the Fujimori regime to itself violated the victims' rights of access to justice.

The *Barrios Altos* case, together with subsequent cases related to amnesty provisions in Chile, Uruguay, and Brazil, consolidated the IAHRs' position on impunity. The Court has defined impunity as a systematic failure to investigate, arrest, prosecute, adjudicate, and convict those who are responsible for violations of rights protected by the American Convention.

Its condemnation of impunity is twofold. On the one hand, for societies, impunity "fosters the chronic repetition of human rights violations." On the other, for victims and their family members impunity fosters "the total defenselessness of the victims and their next of kin, who have the right to know the truth about the facts".

In sum, following the transitions to democracy in Latin America, the Inter-American system has played an important role in developing norms regarding transitional justice as they pertain to the scope of amnesty laws in particular.

The IAHRs dealings with TJ have given rise to a broad set of obligations that public institutions have to ensure accountability and reparations. The key principles that the IAHRs has developed in response to TJ dilemmas include:

- a victim-oriented approach;
- the right to effective judicial remedy – i.e. right to a fair trial and judicial protection – in other words, access to justice;
- the right to truth; and
- increasingly comprehensive and 'holistic' reparation policies.

Clearly, as a legal and judicial system, the IAHRs has reinforced the dominance of legal and judicial strategies in the field of transitional justice – its 'legal bias' if you like.

For some, the pursuit of trials, for example, demonstrates that law can prevail over politics, and that the criminal prosecution of abuses can assist in breaking the 'wall of impunity'.

Now, it is important to note that the IAHR is a human rights entity and can therefore only attribute state responsibility for violations. However, it is clearly the case that the IAHR jurisprudence has fed into domestic criminal proceedings in a number of Latin American countries where trials are currently underway.

There is a second dimension of the IAHR that I would like to briefly touch upon – that is the social and political relationships that the IAHR has developed over time.

As I mentioned at the outset, the IAHR has inserted itself into transitional justice struggles in multiple ways, including as an opportunity structure for civil society activism, and in the increasingly authoritative jurisprudence available to domestic litigants and judges.

There are, however, significant differences between countries in the region when it comes to the diffusion of IAHR norms related to transitional justice in general, and amnesties in particular.

A significant part of these differences can be explained by the variation among civil society organizations in their use of the system.

I can only briefly state here that the differentiated engagement with the IAHR by human rights organizations reflects varied capacities in terms of degree of professionalization, their levels of legal and technical expertise, and their access to international resources and human rights networks. The organisations that score high on these dimensions are able to integrate the IAHR into their advocacy work – such as Argentina’s CELS. The organisations that do not, have difficulties in taking advantage of the IAHR.

But, beyond civil society activism, it is also important to see domestic judiciaries as political actors. There are significant differences in the willingness of judges to engage with international human rights law, including the jurisprudence of the IAHR.

Understanding the sources of this variation can be tricky. Some key factors include different degrees of judicial independence (a variable that can cut both ways), but also divergent national legal traditions, patterns of legal education, and engagement with the transnational legal community.

To sum up then - there is a discernible regional trend of “post-transitional justice” increasingly challenging the political bargains of the democratic transitions. This trend is most clearly reflected in the rising number of human rights trials regarding the past underway in a number of countries in Latin America.

Yet, state responses to civil society activism and judicial processes challenging these amnesties, partly through the IAHR, continue to vary considerably.

Whereas the interaction with the IAHRs in the case of Argentina is dense and broadly responsive, Chilean responses are at best cautious, and in the case of Brazil still incipient. Similarly, in the case of Peru accountability processes have been uneven following Barrios Altos, the Truth and Reconciliation Commission report, and the conviction of Fujimori. Yet, these cases differ significantly from the responses by the Mexican state whose reluctance to accept state responsibility for crimes committed during that country's period of 'dirty war' in effect constitutes a de facto amnesty.

I have argued here that the reasons for these differences lie primarily in the respective domestic contexts. Certain countries and issues are indeed privileged, but for reasons that in large part have to do with differential capacities of mobilisation.

Yet, the IAHRs does select to pursue certain cases – and the criteria for selection are very rarely transparent. Clearly, the case adoption by the IAHRs involves a significant portion of strategizing. However, resources are scarce, which makes some type of selection of how to invest limited resources necessary. And, as the jurisprudence on amnesties show, but also that on reparations, the IAHRs has had ripple effects that go beyond individual cases pursued.

Beyond Transitional Justice

In my remaining time, I would like to briefly highlight some of the ways that the IAHRs has gradually turned its attention towards human rights violations under formally democratic regimes in contemporary Latin America. I believe adding this perspective on the IAHRs is crucial, because it invites us to reflect on how TJ policy and practice – i.e. efforts to seek accountability and reparations for past violations – can actually start to fulfil its promise and potential to address the many human rights challenges of the present and future as well.

How TJ can realise its transformative potential, if you will.

Three overlapping, yet distinct, aspects can be noted, in summary form:

First, in its practice, the IAHRs has shifted from its focus on TJ-related human rights challenges towards dealing with issues related to structural and ongoing violence. Whether it is abuses committed by police and security forces or indigenous groups' rights to ancestral lands, the IAHRs' emphasis on accountability, victims' rights, and reparations, builds on its decades-long engagement with TJ.

Second, the IAHRs is increasingly ambitious both in terms of the types of human rights challenges it deals with, and in terms of what it demands from states. In particular, the Inter-American Court's evolving policies of reparations now span from monetary compensation to victims, symbolic reparations (e.g. memorials), to demands for state reforms and criminal prosecutions of individual perpetrators.

Third, IAHRs has indeed emerged as an important human rights actor in its own right in Latin America. But it also provides an important platform for human rights NGOs; some of which have been very adept at integrating the IAHRs into their advocacy strategies. Moreover, it is important to note the extent to which international human rights norms have become incorporated into domestic legal systems across the region.

Despite these very real advances by the IAHRs in recent decades, many challenges remain of course:

The use of the IAHRs requires a legal know-how that is far beyond the capacity of the vast majority of victims of human rights violations.

There are also some very real costs for organizations that seek to include the IAHRs in their advocacy strategies. Engaging in the process of litigation before the IAHRs involves very lengthy proceedings that imply a significant drain on already limited resources.

The outcomes are also highly unpredictable and very often partial. Compliance and implementation remains an ongoing challenge, to use an understatement. In part, the unevenness of state compliance with the system can be explained by weak state capacity and problematic domestic judiciaries. Yet again, there is significant variation across Latin America in these respects as well. This raises the problem of having one system seeking to apply general principles of law in a regional context characterised by considerable heterogeneity between, and within, countries.

But the IAHRs itself is also struggling to develop adequate responses to pervasive human rights problems. The significant growth in the IAHRs' caseload has occurred without any corresponding rise in allocated resources by OAS member-states.

And while state responses to the IAHRs have improved in general over the course of the last two decades, some states continue to challenge the authority of the IAHRs. Venezuela has withdrawn from the Court's jurisdiction, and Ecuador, Peru and Nicaragua have threatened to follow Venezuela's example. Also, as some of you may know, the IAHRs is currently undergoing a highly contentious reform process. I can return to its implications for the future of the IAHRs in the Q&A if there's interest.

I would like to end on a slightly more upbeat note however, and say that the many challenges that I have highlighted can at least be mitigated with a strategic vision that recognises both the potential and the limitations of the IAHRs.

Thank you.