BRAZIL AND THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

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Let me start by thanking Paulo Abrão, and Marcelo Torelly in particular, for the very kind invitation. It is a pleasure to be here. I very much look forward to the discussions as many of the themes that I would like to cover involve issues on which you are the real experts.

And it is of course also interesting times to be here in Brasilia with perhaps unprecedented interest from the outside world in the domestic political developments in Brazil.

My remarks will be on the Inter-American Human Rights System, and its relevance for human rights protection here in Brazil. The focus of my talk is not primarily legal or jurisprudential. Rather what I thought would be useful would be to locate the Inter-American System in its relevant political context and to try to understand the various ways in which the System matters.

I. What is the IAHRS and how has it developed over time?

It might be useful to start with a very brief account of the historical development of the Inter-American Human Rights System (IAHRS). With the establishment of the Organization of American States in 1948, an American Declaration on the Rights and Duties of Man was adopted. The American Declaration preceded by a few months the Universal Declaration of Human Rights of the United Nations.

But it took until 1959 for the Inter-American Commission on Human Rights to be created with the mandate to use the standards in the Declaration to evaluate the human rights record of OAS member states. And, it took nearly another decade before the American Convention on Human Rights was adopted, and another near-decade before the Convention entered into force in 1978.

Under the Convention, the Inter-American human rights system became a two-legged system, thereby adopting an institutional structure that has remained to this day. First, under the mechanisms developed under the OAS Charter, the Inter-American Commission is authorized to supervise human rights in the territories of OAS member states. Second, the

mechanisms set forth in the Convention authorize the Commission and the Inter-American Court of Human Rights under its contentious jurisdiction to handle individual complaints of human rights violations allegedly committed by any state party of the Convention. The Court has the further competence to render advisory opinions on matters of interpretation of the Convention and other human rights instruments.

In other words, the IAHRS has emerged as an integral part of the regional institutional landscape of the Americas since the mid-20th century.

But, it is also important to note that the regional human rights system has evolved in light of the specific political conditions prevailing in the region.

First, the system was created and experienced its initial development in a region marked by the Cold War and long periods of repressive and authoritarian rule, from the 1950s to the mid-1980s. During this period, the IAHRS primarily sought to identify general patterns of human rights violations rather than focusing on individual cases. The Inter-American Commission's country visits and reports played an important role in some cases – for example in Nicaragua under Somoza (1978), and in Argentina in 1979 – but had limited influence overall.

However, with the general return to democracy in Latin America, the Inter-American System gained in influence. In particular, with the democratic transitions, the System sought to insert itself into debates concerning transitional justice, and the political calculations made by transitional governments with regards to how to deal with human rights abuses under previous (predominantly military) regimes. As I will return to in a moment, the IAHRS continues to shape ongoing transitional justice trends in the region.

From the mid-1990s onwards, the system turned its attention to the challenge of improving the quality of democratic rule, and efforts to address human rights challenges in a regional context where electoral democracy has made significant advances, but also where there continue to be widespread human rights abuses. Indeed, the IAHRS' increasing case-load demonstrates that democratic rule as such is not a guarantee for the respect of human rights.

In sum, over the decades the IAHRS has established the legal obligation under regional and international human rights law of states to protect the rights of citizens, and in the light of the failure to do so, the international obligation to hold states accountable.

Today then, the reach of the IAHRS is truly hemispheric, covering all the 35 OAS member states. Twenty-five states have ratified the American Convention, and are therefore under

the jurisdiction of the Inter-American Court.[1] Out of the 25 states that have ratified the American Convention, to date 21 states[2] have recognized the contentious jurisdiction of the Inter-American Court, including Brazil of course.

It should be noted however that Trinidad and Tobago denounced the American Convention in 1998, and Venezuela did the same last year. This means that the Inter-American Court will not have jurisdiction over human rights violations in Venezuela with effect from September this year. I will return to the political context in which Venezuela's withdrawal from the Court's jurisdiction occurred towards the end of my talk.

But, despite the significant political tensions surrounding the IAHRS in recent years, the system remains at the centre of regional human rights politics. There are three key features of how the IAHRS works – how it matters for human rights politics – that I would like to highlight here:

First, the significant development of regional human rights standards by the IAHRS;

Second, role of the IAHRS to stimulate human rights mobilisation in the region; and

Third, how the regional human rights standards and the Inter-American Court's jurisprudence are shaping domestic judiciaries and constitutional debates.

II. How does the IAHRS matter?

1. Development of regional human rights standards

First, the IAHRS has emerged as the central human rights reference point in the region. In particular, the human rights system has developed regional standards incorporating a wide range of human rights norms that seek to regulate the relationship between the state and its citizens.

Indeed, an indication of the evolution of the regional human rights system as it has extended its reach across a variety of human rights issue-areas could be seen in the increasing number of ratifications of regional human rights instruments.

[1] Argentina, Barbados, Bolivia, Brasil, Chile, Colombia, Costa Rica, Dominica, Ecuador, El Salvador, Grenada, Guatemala, Haití, Honduras, Jamaica, México, Nicaragua, Panamá, Paraguay, Perú, República Dominicana, Suriname, Trinidad & Tobago, Uruguay, and Venezuela.

[2] Costa Rica, Perú, Venezuela, Honduras, Ecuador, Argentina, Uruguay, Colombia, Guatemala, Suriname, Panamá, Chile, Nicaragua, Paraguay, Bolivia, El Salvador, Haití, Brasil, México, República Dominicana y Barbados

Yet, there is significant regional variation with regards to the formal adherence to the system. This is reflected in the uneven adoption of regional human rights instruments by OAS member states. Indeed, one of the contentious issues surrounding the IAHRS is precisely its uneven ratification record. While most Latin American states demonstrate a high degree of formal commitment to the IAHRS, the US, Canada, and most of the English-speaking Caribbean have not ratified the American Convention and have not accepted the jurisdiction of the Inter-American Court.

From this perspective, Brazil's ratification record is notable. Though it should be noted that compared to its regional neighbours Brazil was, for example, one of the last OAS member states in Latin America to recognize the jurisdiction of the Inter-American Court of Human Rights. In part, until quite recently, the relative neglect of the regional human rights system could be explained by the fact that Brazilian governments' engagement with international human rights has tended to be projected outside the region and towards the UN.

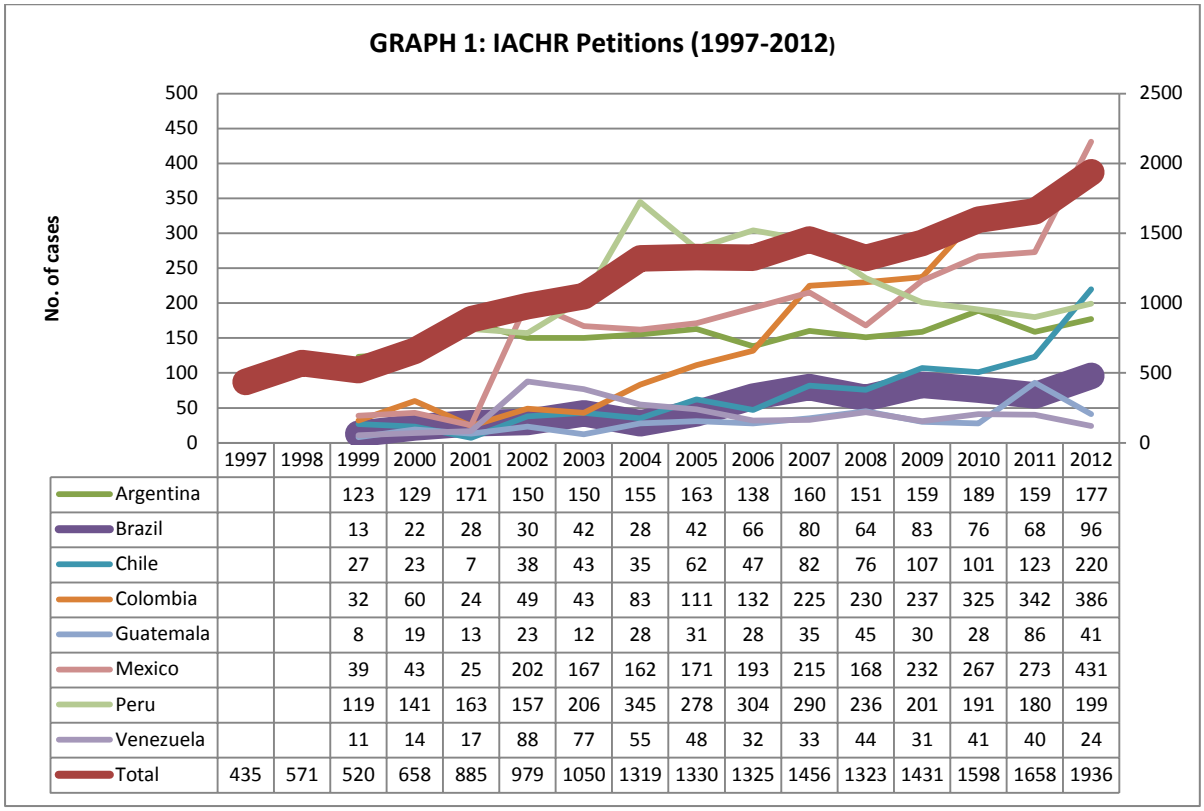
This has led to Brazil not having a clearly defined presence within the IAHRS. The Brazilian perception of having a self-contained legal system combined with a lingering reluctance to accept international scrutiny of the country's domestic human rights record on sovereignty grounds has made Brazil a relative latecomer to the regional human rights regime (at least judged on regional terms).

Yet, it should be noted that Brazil's diplomatic relationship with the System has evolved over time. Starting with the Fernando Henrique Cardoso government, the Brazilian state moved from an obstructionist to a more cooperative relationship with the IAHRS reaching a number of friendly settlement agreements with the Inter-American Commission.

Moreover, Brazil supported the candidacies of Antônio Cançado Trindade to the Inter-American Court of Human Rights (serving as judge on the Court from 1995 to 2006) and of Hélio Bicudo, a deputy of the Workers' Party and former prosecutor in São Paulo, who was elected member of the IACHR in 1997 (and served 1998-2001). And of course, Paulo Sergio Pinheiro has played an active role in various capacities on the Inter-American Commission. And, just last month, Paulo Vannuchi's reinstated candidacy to the Inter-American Commission was successful.

2. Human rights mobilisation

The second dimension to how the System matters is to consider its role as an important platform for human rights mobilisation. The use of the Inter-American Commission by human rights organisations across Latin America, in particular, has increased dramatically in recent decades.



	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Argentina			123	129	171	150	150	155	163	138	160	151	159	189	159	177
Brazil			13	22	28	30	42	28	42	66	80	64	83	76	68	96
Chile			27	23	7	38	43	35	62	47	82	76	107	101	123	220
Colombia			32	60	24	49	43	83	111	132	225	230	237	325	342	386
Guatemala			8	19	13	23	12	28	31	28	35	45	30	28	86	41
Mexico			39	43	25	202	167	162	171	193	215	168	232	267	273	431
Peru			119	141	163	157	206	345	278	304	290	236	201	191	180	199
Venezuela			11	14	17	88	77	55	48	32	33	44	31	41	40	24
Total	435	571	520	658	885	979	1050	1319	1330	1325	1456	1323	1431	1598	1658	1936

As can be seen in this graph, in terms of the number of petitions to the Inter-American Commission, comparatively few cases have tended to be related to Brazil. This is particularly noteworthy when comparing with other Latin American countries, and considering the relative size of the Brazilian population, and the human rights challenges facing Brazilian society.

There are some more historical reasons for this reluctant engagement with the regional human rights system. Comparatively few cases were submitted to the Inter-American Commission during Brazil's military regime. Following the democratic transition, Brazil has had comparatively few dealings with the IAHRS, and by the mid-1990s only a handful of the several hundred cases pending before the IACHR concerned Brazil. This pattern of recourse to the IAHRS continued throughout the 2000s.

Hence, although Brazil has had a very vibrant civil society since the transition to democracy, it has not actively taken recourse to the regional human rights regime. A number of factors can be identified to explain this:

In first instance, one of the reasons for the relatively late emergence of strategic human rights litigation in Brazil, for example, has been the dominant role of public prosecutors in taking on human rights cases. Some argue that this has led to a certain crowding out of legal advocacy by civil society activists. Moreover, many Brazilian civil society organizations have

chosen more explicitly political advocacy strategies over the legalistic discourse of human rights. Also, given the extensive set of human rights enshrined in the 1988 Constitution, activists have tended to use national law rather than international human rights law. And, it should be noted, up until the mid-1990s at least, Brazilian authorities put pressure on the Inter-American Commission not to recognize cases from Brazilian petitioners.

Overall, the combined effect has been a relative lack of awareness within Brazil's human rights community of the resources and opportunities provided by the Inter-American System. Nonetheless, a number of human rights advocacy groups have emerged, such as *Conectas* and *Justiça Global*, that are increasingly using strategic litigation and that consciously draw on international human rights law, including the Inter-American System, in their domestic human rights advocacy.

Indeed, the availability of the IAHRS for domestic human rights groups has the potential to strengthen the domestic position of those groups that engage with the system. Human rights groups can use the IAHRS to expose systemic human rights violations; to negotiate with state institutions through the friendly settlement procedures provided by the IACHR; to frame social and political debates on the basis of IAHRS norms and jurisprudence; to promote the interests of vulnerable groups; to boost human rights litigation before domestic courts; and to strengthen regional human rights networks and use of the IAHRS in strategic supranational litigation (e.g. the example of CEJIL).

In short, the IAHRS provides opportunities for domestic and transnational human rights activists to bring pressure for change in their domestic political systems.

However, the capacity of actors to access and to mobilize the IAHRS is highly unequal. The graph I showed you with the number of petitions to the Inter-American Commission from a selection of countries, illustrates this country variation across the region. The graph indicates that patterns of use of the IACHR do not necessarily reflect levels of human rights violations. Rather they reflect both the capacity and willingness of individuals and groups to turn to the Inter-American System as part of their advocacy strategies.

I can only briefly state here that the differentiated engagement with the IAHRS 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 IAHRS into their advocacy work – such as Argentina's CELS. The organisations that do not, have difficulties in taking advantage of the IAHRS.

The increasing number of petitions to the Inter-American Commission has also led to a significantly increased case-load for the Inter-American Court. Yet, the Court deals with a

very small number of cases when contrasted with the number of cases dealt with on an annual basis by the IACHR. The contrast with the European Court of Human Rights is also noteworthy: there are around 100,000 cases pending before the European Court with around 50,000 new cases being submitted every year.

A final point with regards to the use of the Inter-American System by human rights defenders in the region. It should be noted that in many countries in Latin America the risks associated with human rights work remain considerable. From efforts to hold perpetrators to account for gender violence in Mexico to mobilisation around LGBT or land rights in Brazil, HRDs face regular and widespread low-level police harassment, political vilification, paramilitary violence, and threats of assassination.

In the face of these realities, a slow-moving judicial process in Washington D.C. and San José, Costa Rica is of little direct help. The IAHRS has attempted to respond to these realities by developing specific institutional mechanisms aimed at HRDs such as the use of precautionary measures (*medidas cautelares*) to respond quickly to situations of acute risks. As I will return to in a few moments, the use by the Inter-American Commission of precautionary measures has been controversial however, as seen in the case of Brazil in relation to *Belo Monte*.

3. Domestic judiciaries and the IAHRS

The third dimension of how the IAHRS matters is that beyond civil society activism, it is important to note the extent to which regional human rights norms are incorporated into domestic legal systems and how the jurisprudence of the IAHRS affects domestic legal processes.

Clearly, the impact of the human rights standards developed by the IAHRS depends on the extent to which domestic legal systems incorporate these standards. This points to the importance of developments at the domestic level as governments pass laws to ensure constitutional safeguards for the protection of human rights. Indeed, in many states of Latin America human rights have been 'constitutionalized'. And, of course, there is a distinguished Latin American constitutional tradition that incorporates extensive human rights protections.

However, as is well known, there is widespread variation in the effective enforcement of human rights within domestic legal systems. There are also significant differences in the willingness of judges to engage with international human rights law, including the jurisprudence of the Inter-American Court.

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 transnational legal communities. The key point to make here is that domestic judges are important political actors that shape the ways in which international human rights are applied domestically.

With regards to Brazil specifically, the Brazilian judiciary has traditionally displayed resistance to international (human rights) law and institutions. Indeed, in Brazil the constitutional status of international human rights treaties ratified by the Brazilian state appears to be a matter of legal debate still. For example, the Brazilian Federal Supreme Tribunal (STF) has taken a restrictive view on the status of international human rights treaties within the Brazilian constitution. From what I understand, the majority position of the STF is that international human rights treaties have equal status to federal law.

This stands in clear contrast to Argentina, for example, where the main international human rights treaties have constitutional standing. Also, in terms of substance, international human rights norms figure prominently in all national constitutions across Latin America, but the Argentine Constitution is "a unique, verbatim replica of [international human rights] treaties."[3] From a regional and comparative perspective hence, Argentina is exceptionally open to international human rights law.

In the case of Brazil, where domestic laws come into conflict with international obligations, domestic laws apply. In other words, the Brazilian judiciary has traditionally been reluctant to accept the notion that international agreements might override the national constitution and domestic laws.

Again, I understand that there are some very substantive debates in Brazilian constitutional law circles, and that there have been some incipient changes towards a more expansive interpretation of the legal status of Brazil's international human rights commitments in relation to the constitution in recent years.

And yet, there appears to be some ideological resistance among sectors of the Brazilian judiciary to use international human rights law. It should also be recognized, however, that there is a widespread sense in some political and legal circles that international human rights law is superfluous given the extensive human rights guarantees enshrined in the 1988 Constitution.

So, to sum up what I have said so far:

[3] Koven Levit, 'Constitutionalization of Human Rights' p.292.

First, the IAHRS has developed significantly over the years since its creation during the Cold War. As I have tried to briefly demonstrate, the Inter-American System – both the Commission and the Court – have engaged in extensive efforts to promote and protect human rights in the region, often against considerable resistance and in very difficult circumstances.

In this process, the IAHRS has emerged as an important actor in support of human rights that over the years has carved out a fairly independent political space within the Organisation of American States.

Compared to most of its regional neighbours, Brazil has been a relative latecomer to the IAHRS, though there have been important changes during the last decade or so.

In the remainder of my remarks, I would like to highlight two substantive dimensions of the role of the Inter-American System in ensuring better human rights protections that I think are of particular relevance when discussing Brazil:

First, I would like to outline the role that the IAHRS has had in shaping approaches to transitional justice in the region.

I will then turn to the ways in which the IAHRS has moved beyond transitional justice to address ongoing human rights challenges and how the future of the IAHRS is and should be a key concern for Brazil.

III. Transitional Justice and the IAHRS

In many ways, the IAHRS came of age through its engagement with the dilemmas of transitional justice. As I have already mentioned, at the beginning of the 1980s, the IAHRS 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.

1. Rules, norms, and principles of transitional justice

In particular, the Inter-American System has played a central role 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 in the 1980s, 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, increasingly professionalized human rights NGOs started to use the IAHRS more actively, but the learning process among the groups 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 the right to individual judicial redress.

In particular, over time, 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 Inter-American 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, of course 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. One the 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 transitional justice 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.

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

Indeed, 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, including Argentina, Chile, to some extent in Peru, and most recently in Guatemala.

2. Brazil, transitional justice, and the IAHRS: Gomes Lund

This brings me more concretely to Brazil, ongoing transitional justice struggles in this country, and the *Gomes Lund* case before the Inter-American Court of Human Rights specifically.

First, very briefly, what is *Gomes Lund* about; how and why did the case end up before the Inter-American Court; and why is it significant?

As you know, the *Gomes Lund* case is related to the Brazilian military's counterinsurgency campaign against militants of the Brazilian Communist Party, between April 1972 and January 1975 – in the area of the Araguaia river banks in the state of Pará. Members of the group were detained, and after being identified, they were killed and buried secretly. None of the individuals was acknowledged as dead, remaining in the status of persons who had disappeared for political reasons.

In the beginning of the 1980s, attempts by family members of some of the disappeared members of the guerrilla were blocked by the broad interpretation by judges of the 1979 Amnesty Law. The Amnesty Law, adopted as a measure to facilitate a political opening in Brazil, was initially targeting the political crimes committed by those struggling against the military regime, but the interpretation of the Law was extended to include military and police officials who had committed human rights violations.

In 1995, after several years of the case being passed back and forth between lower courts and courts of appeals in Brazil, the relatives, represented by several local and international human rights groups,[4] submitted a petition against the Brazilian State to the Inter-American Commission. The case was named for Júlia Gomes Lund, whose son Guilherme Gomes Lund, a member of the Araguia guerrilla, disappeared in 1973 when he was 26 years old.

[4] CEJIL, the Americas/Human Rights Watch, the Grupo Tortura Nunca Mais (GTNM/RJ) and the *Comissão de Familiares de Mortos e Desaparecidos Políticos de São Paulo* [Committee of the Families of Those Who Died or Disappeared for Political Reasons] (CFMDP/SP)

In October 2008, the Inter-American Commission finally found in favour of the petitioners, and in March 2009 it submitted the case to the Inter-American Court. The Commission argued, effectively, that the Brazilian government's unwillingness until then to declassify the documents on the military operations in the Araguaia region constituted a denial of the 'right to truth'. It also argued that the Brazilian Amnesty Law violated Brazil's international human rights obligations to the extent that it prevents the investigation, prosecution and punishment of serious human rights violations, including forced disappearances and extrajudicial executions.

In November 2010 the Inter-American Court published its ruling in *Gomes Lund*. In essence, the Court found that Brazil is responsible for the forced disappearance of 62 people between 1972 and 1974 in Araguaia. And, it ordered the Brazilian State to investigate and prosecute those responsible for the crimes.[5]

With regards to the Amnesty Law, the Court argued that: "The provisions of the Brazilian Amnesty Law that prevent the investigation and sanctioning of severe human rights violations are incompatible with the American Convention, have no legal effects and cannot continue to stand in the way of investigating the facts of this case."

The Court, then, ordered the Brazilian state to remove all practical and judicial obstacles to investigating the crimes, to establishing the truth as well as the responsibility of those involved. The Court also emphasised the right to access information, including the principle of maximum disclosure and the need to justify any refusal to provide information.

These elements of the ruling were widely expected and are in line with the increasingly robust jurisprudence of the Inter-American Human Rights System on amnesty laws.

The *Gomes Lund* ruling makes Brazil the fourth country in Latin America – after Peru, Chile, and Uruguay – to have its amnesty law invalidated by the Court. Only Argentina and Uruguay have, however, to date, revoked their respective amnesty laws.

3. Implications for transitional justice in Brazil

What are some of the implications of the Court ruling for transitional justice in Brazil?

First, it needs to be recognized that a number of important measures have already been taken by successive Brazilian governments in the area of transitional justice, particularly in

[5] In *Gomes Lund v. Brazil*, the Inter-American Court found that Brazil violated its obligations under the American Convention, including the rights to life, liberty, and personal security (Articles 1, 4, and 7), juridical personality (Article 3), humane treatment (Article 5), fair trial (Article 8), and judicial protection (Article 25) by forcibly disappearing the victims and withholding access to truth and information from their families.

the area of reparations. Successive Brazilian governments have emphasised limited truth efforts and compensation to victims.

With regards to the Amnesty Law and demands for accountability, in April 2010 the Brazilian Supreme Tribunal upheld the amnesty law in a ruling just a few months before the Inter-American Court's judgement in *Gomes Lund*. It should be noted however, that in its 7-2 vote the Tribunal considered the amnesty law to be primarily a political matter, and it recommended that the Brazilian Congress takes up the issue and considers the future status of the law.

The decision by the Tribunal could therefore be interpreted as not constituting an insurmountable barrier for Brazilian political forces to carry out the ruling of the Inter-American Court. Moreover, the current President of the Tribunal, Joaquim Barbosa, suggested in an interview that there is scope for reinterpretation of the Amnesty Law by the Tribunal should the Law come before it once more.

This raises the question: *does Brazil have to overturn its amnesty law to comply with the Gomes Lund ruling?* A simple response to that question could be: not necessarily. After all, it could be argued that there might be ways to circumvent amnesty laws and to mitigate for the impunity effects that such laws may have. Indeed, there are examples in Latin America where transitional justice proceeds without amnesty laws being overturned – e.g. as demonstrated, to some extent, in Chile, and in Argentina prior to the latter's overturning of its amnesty laws.

And yet, there is a certain momentum building up in Latin America against amnesty laws. Both Argentina and Uruguay have overturned their respective amnesty laws. Moreover, the Inter-American Court's judgment requires Brazil to ensure that the Amnesty Law does not preclude the investigation and punishment of human rights violations committed during the military regime and to establish legislation criminalizing forced disappearances. This is likely to be a tall order in the absence of, at the minimum, some quite significant re-interpretation of the provisions of the Amnesty Law by the Brazilian judiciary.

This raises the further question*: does Brazil have to conduct trials to comply with the Inter-American Court ruling?* Again, not necessarily. Trial justice is only one form of accountability. However, will it be possible to maintain the Amnesty Law, given the normative presumption against impunity that has strengthened across Latin America, and beyond the region, in recent decades?

In the case of compliance with *Gomes Lund* therefore, at the minimum, a strong case can be made that the responsibility lies with the Brazilian government to demonstrate that any

transitional justice measure it implements – such as the National Truth Commission – advances accountability.

More broadly, observers have pointed out that the *Gomes Lund* case has highlighted some of the continuing tensions in Brazilian civil-military relations. True, the Brazilian military's long-held opposition to a Truth Commission eased somewhat since the Supreme Court upheld the interpretation of the country's 1979 Amnesty Law, which protects suspected torturers from facing trials. By implementing the Inter-American Court ruling therefore, the Brazilian government has the opportunity to further strengthen effective civilian control over military affairs.

Moreover, one of the most important aspects of *Gomes Lund* is the affirmation of victims' right to the access of information. The Brazilian government, the ruling stated, "is required to continue developing initiatives for the search, systematization, and publication of all information about the Araguaia guerrilla, along with information relating to human rights violations that occurred during the military regime, and guarantee access to this information." The *Gomes Lund* ruling appeared to feed into important legislative debates in Brazil that led to the recent entry into force of a new Access to Information Law.

In short, complying with *Gomes Lund* could strengthen the very crucial cluster of rights regarding state accountability, transparency, freedom of information, and the right to truth in Brazil. It would shift the responsibility to the state to provide public justifications to citizens why they should not have access to government deliberations and documentations.

It should be noted that in the immediate aftermath of the *Gomes Lund* ruling, the Brazilian government was fairly responsive. Paulo Vannuchi, Brazil's then Secretary for Human Rights, called the court's decision "very important to continuing to develop human rights" in Brazil. "We need to find the bodies of those resistance fighters and return them to their families," Vannuchi said; "[t]his is indispensable to talking about democratic reconciliation, about being one united country."

It is precisely in this context that I think the work of the National Truth Commission is very interesting. The creation of the Truth Commission has been promoted by some as a significant advance and as a crucial step towards accountability for past human rights violations.

Yet, I assume that you are familiar with the various critiques leveled against the Truth Commission. Many have pointed out that the mandate of the Commission is limited. Although its original mandate has been extended, the remaining time period to complete its work is limited, and the period covered – 1964 to 1985 – is extensive. The Commission has the power to call witnesses to investigate abuses committed both by the military and by

guerrillas. But, it has no prosecutorial powers. And, in line with the Amnesty Law, it will have no powers to investigate or condemn suspects.

Moreover, there have been disagreements within the Truth Commission between the members, apparently in relation to how the Commission is meant to work, and how it can and should contribute to its primary objectives. On the one hand, there are those who see the Commission as a catalyst for participation and as a platform for societal mobilisation and for victims. On the other there are those who see the role of the Commission as primarily being about an objective quasi-judicial evaluation of evidence and witness statements and the production of an authoritative report on the Commission's findings at the end of its mandate. There are indeed strong arguments in favour of both models, but the main point here is that it still does not seem clear to the Commissioners themselves what role the Commission should have.

On other hand, for many any official transitional justice initiative is better than none. Some argue that the creation of the Commission constituted a major advance and it should be welcomed as such. For some, the Commission could provide an important catalyst for truth and accountability efforts in Brazil. And its report could offer an authoritative contribution to the construction of the country's recent past.

The main point here however, is that in terms of compliance with the *Gomes Lund* ruling of the Inter-American Court the Truth Commission will not be enough. Time will tell whether it will remain possible for the Brazilian government to put a full stop to increasingly concerted legal efforts to hold individual military and police personnel to account for their involvement in human rights violations under the military regime.

Moreover, if I may, the contrast with Brazil's regional neighbours is instructive. Whilst very significant accountability advances have taken place in countries such as Argentina, Chile, Uruguay, and, arguably, Peru, the Brazilian government has maintained its policy preference for 'truth' over 'justice'.

IV. Brazil and the IAHRS: Beyond Transitional Justice

In conclusion, looking beyond the specific details of the *Gomes Lund* ruling and its implications for accountability for *past* human rights abuses, there are some broader aspects concerning Brazil's relationship with the IAHRS that I would like to emphasise. Three key points are particularly important to note.

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 transitional justice.

In other words, the IAHRS has gradually turned its attention towards human rights violations under formally democratic regimes in contemporary Latin America. The IAHRS has become increasingly ambitious both in terms of what 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.

These developments have already had significant implications for Brazil. As is well known, in the case of *Maria da Penha*, the Inter-American Commission applied the Convention of Belém do Pará for the first time when establishing the international responsibility of the Brazilian state for its negligence in the prosecution of domestic violence. The resulting so-called *Maria da Penha* law in Brazil is an important illustration of how the IAHRS can shape domestic legal and institutional reforms.

The Inter-American System has inserted itself into other human rights issues in Brazil as well, including in relation to conditions in prisons and detention facilities, conflicts over land and rights of indigenous communities, and of course, police violence.

With regards to violations committed by public security forces in Brazil, one key challenge with regards to implementation of the rulings of the Inter-American System is particularly acute. Brazilian federalism means that accountability for human rights violations remains dispersed, with the military police being controlled by state governors.

This has meant in practice, that while the federal government may have developed a more responsive human rights policy (including federalized jurisdiction over human rights crimes), it has not been matched by a parallel recognition at the sub-national level. Indeed Brazil has 'an extremely fragmented and heterogeneous polity which limits the central state's capacity to implement effective strategies'.[6] This is a key feature of Brazil's political system that has been apparent in recent weeks in state responses to public protests.

This bring me to the second point – Brazil's broader relationship with the Inter-American Human Rights System, and compliance with international human rights by the Brazilian state more generally. There is a strong argument for why the Brazilian government needs to take the Inter-American Human Rights System seriously. In terms of concrete engagement with the IAHRS on specific cases, Brazilian state institutions have tended either to ignore

[6] Panizza and Barahona de Brito, 1998: 21

judgements by the regional system or choose not to implement substantial measures. This has been the response by the Brazilian state to key elements of the *Gomes Lund* case as I have already highlighted.

And, the way the Brazilian government responded to the Inter-American Commission's interim measures in the case of *Belo Monte* has been particularly unfortunate – both for Brazil and for the Inter-American System itself. As you know, the Inter-American Commission adopted interim measures in April 2011 to request Brazil to halt the construction of the Belo Monte dam. The response by the government was very swift when it decided to suspend its annual contribution to the human rights body. At the time, it also withdrew the former Human Rights minister, Paulo Vannuchi's candidacy to become member of the Inter-American Commission. Since then, there have been a gradual return to the status quo by the Brazilian government, as reflected in the recent election of Paulo Vannuchi to the Inter-American Commission.

This brings me to my final point concerning why the Inter-American System matters for Brazil.

Simply put, the relationship with the Inter-American System matters because partly what it means for a so-called 'rising state' to engage internationally is to be able to accept external scrutiny, and respond to such scrutiny constructively.

For example, in the case of *Gomes Lund*, what we are talking about here is whether it was legitimate for the Brazilian state to disappear, torture and extra-judicially execute its citizens. These are of course events of the past, but it is up to the Brazilian state and society in the present to attempt to repair the harm done and, crucially, put in place preventive mechanisms and institutions that ensure that similar acts are not committed in the present.

Moreover, the Brazilian state's relationship with the Inter-American System matters, for many, in terms of what it reveals about the character of Brazil's leadership both regionally and globally. The absence of Brazilian regional leadership is particularly noteworthy in the area of transitional justice, as I alluded to earlier.

Beyond Latin America, it could be argued that the international dimensions of its human rights obligations are particularly important for Brazil. The Brazilian government seeks to play a more prominent international role in the areas of conflict prevention and resolution. And it seeks to insert itself as an international norm entrepreneur with regards to, for example, its notion of 'responsibility while protecting'.

The connections here between what the Brazilian government says and does at home, and what it says and does abroad, are significant. Indeed, many make explicit links between the

Brazilian government's record and policies on international human rights *and* its potential for regional and global leadership.

No matter what you think about the merits of such arguments, the important point here is that they are being made, and the expectations on Brazil that they highlight are only likely to increase.

To sum up then:

The IAHRS has emerged as an important human rights actor in its own right in Latin America. It 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 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 signification 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.

Interestingly, this strategic vision of the IAHRS appears to be increasingly recognised within state bureaucracies across Latin America. For example, the other day I participated in an event with the Defensoria Pública in São Paulo, whose human rights unit is actively petitioning the Inter-American Commission. This engagement between state institutions and the IAHRS highlights that human rights advocacy is not about being for or against the state. Rather, it is about using all available tools to defend human rights, particularly when state authorities fail to protect them. And this is of course something that happens in all societies, not only in Brazil.

It is with this proactive and strategic vision in mind that I thank you for the invitation to come here today, and for your attention. I do hope that some of what I have said will have triggered questions and comments, and I look forward to our discussions.

Thank you.