

THE INTER-AMERICAN HUMAN RIGHTS SYSTEM AND TRANSITIONAL JUSTICE IN LATIN AMERICA

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I would like to start by thanking Cath Collins for bringing such an excellent group together. I have benefited greatly from the discussions.

I have been asked to offer some comments on the role of the IAHRs in challenging impunity in Latin America and in influencing accountability efforts in the region.

So in contrast to the other presenters this afternoon my remarks will be regional in scope.

In particular, I will focus on the development by the IAHRs of some of the key norms and principles of international human rights law that have shaped many of the domestic struggles for accountability. Many of these human rights standards have already been referred to today, such as the 'right to truth', reparations, and the inadmissibility of wide-ranging amnesty provisions.

I will also offer some very brief reflections on the impact of the IAHRs, the factors that may explain variation between countries, and the role of the IAHRs in pushing accountability efforts beyond the sometimes narrow confines of TJ.

1. 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. In terms of human rights activism, increasingly professionalized human rights NGOs more actively started to use the IAHRs, but 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 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 Court's 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.

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".

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'. Indeed I think this view underpins much of the discussion of heads of state prosecution.

That is, criminally prosecuting the figurehead and the person with ultimate responsibility will generate a ripple effect of accountability throughout society. I will return to this point towards the end of my remarks.

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, together with the rules, norms and principles I have briefly outlined, have fed into domestic criminal proceedings in a number of Latin American countries where trials are currently underway.

2. The Impact of the IAHR

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.** Or the system's impact, if you like.

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, represented here today by Lorena Balardini. 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.

Cath and I were very fortunate to host the Chilean judge Alejandro Solis on Monday in London. He made it very clear that there have been gradual yet significant changes in judicial thinking with regards to international human rights law and the jurisprudence of the

Inter-American Human Rights System in particular. But, we also need to keep in mind the fragility of such shifts in judicial attitudes. Beyond individual cases of committed judges such as *Ministro Solis*, Latin American judiciaries are attuned to and generally accommodate political shifts. That is, influences external to the judiciary – including from the governments and HROs – are clearly important when accounting for any judicial changes.

To sum up then – the result of IAHRs’s decades long engagement with transitional justice and amnesties in particular is now a broad set of duties of states, rights of victims and families, and obligations to provide reparations that put pressure on governments to revise the political bargains of the past. 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, and in heads of state prosecutions.

Still, in many countries amnesty provisions are circumvented rather than overturned. Hence, a striking feature of regional post-TJ trends consists of the persistence of amnesty laws despite significant challenges to impunity and pressures for accountability and for wide-ranging trials.

This variation is also reflected the relative influence of the IAHRs. Whereas the interaction with the IAHRs in the case of Argentina has been tended to be dense and broadly response, Chilean responses are at best cautious, and in the case of Brazil still incipient. Similarly, in the case of Peru, as highlighted by Jo-Marie Burt, 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. There is, in other words, no easily defined Latin American TJ model.

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

3. 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 start to fulfil its promise and potential to address the many human rights challenges of the present and future as well.

For the purposes of this afternoon’s discussion, Cath asked us to think about the broader political effects of accountability efforts on repudiation, or not, of the authoritarian political projects represented by the various Heads of State.

I tend to formulate the question in terms of whether, and how, TJ can realise its transformative potential.

When considering the potential role of the IAHR in this endeavour, three overlapping, yet distinct, aspects can be noted, in summary form:

First, in its practice, the IAHR 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 IAHR's emphasis on accountability, victims' rights, and reparations, builds on its decades-long engagement with TJ.

Second, the IAHR 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, IAHR 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 IAHR 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 IAHR in recent decades, many challenges remain of course:

The use of the IAHR 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 IAHR in their advocacy strategies. Engaging in the process of litigation before the IAHR 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.

Also, it is clearly the case that the IAHR has tended to reinforce the criminal accountability approach to TJ. The principle of individual criminal accountability has become deeply embedded in global TJ policy and practice. This is in contrast to the more collective notions of accountability – political or regime accountability – that shaped TJ debates in the early transitional period. The enmeshment between international criminal law and TJ has in

other words both criminalised and individualised accountability debates in TJ. The significant limitations on retributionist approaches to criminal justice, especially in response to large-scale organised political violence, are well known. Simply given the vast number of cases in such contexts, attempts to establish individual criminal responsibility tend ultimately to be unsatisfactory. To focus on a handful of cases may invite accusations of selectivity and further contribute to the politicisation of the judicial system. To pursue maximalist prosecutorial strategies, an already slow and inefficient judiciary is likely to grind to a halt, undermining the rule of law.

There may indeed be a strong consequentialist rationale for criminal prosecution of Heads of State as a way to reassert the legitimacy of the state, to strengthen the rule of law, and to promote the principle that no one is above the law, including the very powerful.

Yet, as the followers of Carlos Nino have pointed out, the legitimacy of judicial procedures, and the law more generally, is based on their degree of inclusiveness and the quality of public deliberation. There have indeed been robust procedural safeguards in place to protect defendants' due process rights in the cases we have discussed this afternoon. But, we would also need to reflect on whether criminal prosecutions lead to any discernible increase in the quality of public debate concerning these societies' recent pasts, and whether the trials are likely to lead to improved human rights accountability more generally.

Returning to the IAHRs in conclusion, I have not even touched upon the many political challenges facing the IAHRs. As you may know, 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, the IAHRs has recently been subject to a highly contentious reform process.

Still, I think that I think it is fair to say that the 'reforms' have so far proved less far-reaching than initially feared. This indicates, once more, that the many challenges facing the IAHRs that I have highlighted can at least be mitigated with a strategic vision that recognises both the potential and the limitations of the system.

Thank you.