

Prosecuting serious human rights violations in domestic courts

The impact of international law and the Inter-American human rights system in Latin America

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During the 1970s, 1980s, and early 1990s, a large portion of Latin America was facing internal armed conflicts or dictatorships that led to massive human rights violations and international crimes, including murder, forced disappearances, torture, massacres, arbitrary detentions, forced recruitment of children and even genocide. During that period, the national courts, with very few exceptions, did not play a rights-protective role rather they played the role of guarantors of impunity¹.

Examples

Eventually, civilian governments came to power, but they were slow and sometimes reluctant to adopt measures to investigate crimes from their recent past or provide redress for victims. Most of the new governments, despite becoming democracies, put in place **amnesty laws** that impeded prosecution of those responsible for grave human rights violations, along with a combination of other legal obstacles and a hostile political climate².

Nevertheless, over the last two decades, this pessimistic panorama has been changing: successful prosecutions for cases of grave human rights violations

¹ For more information about the role of the courts during these periods see the final reports of the Salvadorian Truth Commission and the Peruvian Truth Commission. Both reports are available in English at the United States Institute of Peace website <http://www.usip.org/sites/default/files/file/ElSalvador-Report.pdf> and <http://www.usip.org/publications/truth-commission-peru-01>

² For example, the 1978 *Decreto Ley 2191* in Chile; the 1979 *Ley No. 6.683/79* in Brazil; the 1986 *Ley de Punto Final* and the 1987 *Ley de Obediencia Debida* in Argentina; the 1986 *Ley de Caducidad de la Pretension Punitiva del Estado* in Uruguay and the 1993 *Ley para la Reconciliacion Nacional* in El Salvador.

illustrate a remarkable shift in the region. For example: in April 2009, the former Peruvian president Alberto Fujimori was convicted to 25 years in prison for crimes against humanity; in 2010, former Uruguayan president Juan Maria Bordaberry was convicted to 30 years in prison for violating the constitutional order and for a number of murders and forced disappearances that occurred during his government in the early 1970s; in 2012, an Argentine court sentenced former dictator Jorge Rafael Videla to 50 years in prison for crimes against humanity, Videla was already facing a life sentence for torture and extrajudicial executions; and more recently, in 2013, former *de facto* president of Guatemala Efraín Ríos Montt, was convicted for genocide.

These decisions weren't unique: during the last decade many trials for grave human rights violations have been opened in Latin America, involving former and current military and police members as well other public officials. According to different research projects, in **1997** there were no more than five domestic trials in the region for grave human rights violations or international crimes. By **2013** there were at least 1500 prosecutions taking place in Argentina³, 800 in Chile, 400 in Peru, and 4 or 5 in Brazil and Guatemala, among others⁴.

However, it is important to note that the record of human rights prosecutions in Latin America continues to be sporadic. While some countries such as Argentina and Chile have moved significantly forward in recent years, others have seen almost simultaneous progress and setbacks as in the case of Peru⁵. Other countries, such as Brazil and El Salvador, have shown little progress⁶.

³ Data from the online blog maintained by the Center for Legal and Social Studies (CELS): <http://www.cels.org.ar/wpblogs/>, accessed on November 4, 2011.

⁴ Jo-Marie Burt. *Challenging Impunity in Domestic Courts: Human Rights Prosecutions in Latin America*. Available at <http://www.vancecenter.org/vancecenter/images/stories/vancecenter/prosecutionlatinamerica.pdf>

⁵ For example, on July 20, 2012, a judgment of the Permanent Criminal Chamber of the Supreme Court of Justice of Peru in the case of the *Barrios Altos* massacre was intended to be a turning point in Peruvian human rights case law. The content of this judgment offered a contradictory interpretation of legal issues that the Inter-American Court of Human Rights and some national courts had maintained up to that point, especially the court that convicted Fujimori. One of the most questionable legal aspects of the judgment was that the Barrios Altos massacre was not a crime against humanity, but merely a

Examples - Peru

How did the region reach this point of accountability? Multiple factors explain this turn.

1. The first element –and maybe the most relevant- *the persistence of the victims and the work of civil society*: victims themselves, family members of the disappeared and killed, lawyers, and human rights organizations all played a key role. Over decades they coordinated together, putting aside possible differences

common crime. DPLF presented an *amicus brief* affirming that under international law, inter-American and national jurisprudence, the massacre constitutes a crime against humanity.

In general, five years after the conclusion of the Fujimori trial, empirical research into Peru's domestic human rights prosecutions reveals a dramatic reversal of past successes in its transitional justice process. For more information see the website <http://rightspereu.net/> and Jo-Marie Burt's article *Challenging Impunity in Domestic Courts: Human Rights Prosecutions in Latin America*, available at <http://www.vancecenter.org/vancecenter/images/stories/vancecenter/prosecutionlatinamerica.pdf>

⁶ Brazil and El Salvador are the only countries with a current blanket amnesty in the region and incipient or in-existent criminal prosecutions for crimes from the past.

On November 2010, the Inter-American Court of Human Rights issued its landmark judgment in the case of *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*. This ruling invalidated Law 6.683/79, known as the Brazilian Amnesty Law, insofar as it had been applied to impede the investigation and prosecution of gross human rights violations, such as enforced disappearances and extrajudicial executions by Brazilian military agents. Just months before this ruling, the Federal Supreme Court (Supremo Tribunal Federal) issued a judgment on April 29, 2010, in which it confirmed the validity, from the perspective of the Brazilian Constitution, of the Amnesty Law. But a year later things started to change: on November 18, 2011, the National Truth Commission (Comissão Nacional da Verdade) was created by Law 12.528 and tasked with examining and clarifying gross human rights violations and in March and July 2012, the Office of the Federal Public Prosecutor (Ministério Público Federal) presented two criminal indictments regarding enforced disappearances related to the case of *Gomes Lund*. To date, there are only four criminal actions related to gross human rights violations perpetrated by State agents during the 1964–1985 dictatorship.

In 2000, the Salvadoran Supreme Court issued a decision that allowed each criminal judge to determine whether the amnesty law's application in a particular case would violate El Salvador's treaty obligations or interfere with remedying fundamental rights violations; if that occurred, then the amnesty law ostensibly could not be applied. However, in El Salvador, the public prosecutor determines whether cases involve fundamental rights and, in the past decades, has not found a case that falls within that determination. Thus, a *de facto* situation of impunity continues.

On December 2012, the Inter-American Court of Human Rights issued another landmark judgment in the case of *The Massacres at El Mozote and Neighboring Locations v. El Salvador*. This ruling invalidated the 1993 country's Amnesty law. In addition, a new petition for challenging the constitutionality of Amnesty Law was brought to the Supreme Court in March of 2013 and a new decision is still pending.

in order to have a common voice and sought out international support for their demands. They also publicized, in their country and worldwide, a reality that many people would have rather ignored or forgotten.

They were aware that the fight had to be fought at the international as well as national level. And it was clear to them that any political demand should be accompanied by a very well founded and high caliber legal strategy. The evidence they collected and the judicial petitions they filed—even though they were denied at that time—provided useful proof of the events and, many years later, became the starting point for the work of prosecutors and judges.

Examples, Peru

2. A second factor: the rapid and rich development of international law. The last two decades have seen a significant development in international law, in particular in international criminal law, which went hand to hand with the creation and development of international tribunals. In 1993, for the first time since the Nuremberg trials, an international tribunal was created to adjudicate genocide, crimes against humanity, and war crimes in the former Yugoslavia. A year later, the UN Security Council created a similar tribunal for Rwanda.

Although focused on those particular countries, the work of these tribunals began to give concrete answers to some of the issues and dilemmas involved in cases of international crimes and violations of international humanitarian law. It also showed that it was possible to create and operate an international court that, although not free of problems, complied with international standards of legality and due process.

Nevertheless, these tribunals had limits. According to expert opinions, they were slow and expensive, it was hard for victims and the population in general to understand and follow the proceedings and they did not necessarily have a broader impact in the fight against impunity. All these critiques led to a reassessment of the importance of strengthening national courts.

The approval of the Rome Statute and the establishment of the **International Criminal Court** (ICC) in 1998 was a result of these new discussions. The essence of the Statute, unlike the prior tribunals created by the Security Council, was that international jurisdiction has to be complementary to national jurisdiction; therefore the Court can act only when national courts are unable or unwilling to do so. The starting point is clearly the national courts, which meant that State Parties to the ICC had to modify their internal law to make sure they could prosecute the crimes listed in the Statute.

Although the ICC doesn't have jurisdiction over crimes committed before 2002 when the Statute was ratified and implemented, and thus will not be able to investigate the crimes of past Latin American dictatorships, the process of formation and development of the Court created a space for dialogue regarding the need for justice for the worst international crimes. Latin American actors played an important role in the negotiations and setting up of the Court, and many States in the region are parties to the Rome Statute⁷.

3. The role of the Inter-American human rights system. At the beginning, when the civil wars or the dictatorships ended and the first demands were submitted to national courts, there was no answer so the victims and civil society groups sought to use international entities, especially the Inter-American system of human rights, to challenge amnesty laws, push national governments to investigate, prosecute and punish grave human rights violations, and provide reparations to victims. And they found an answer.

Indeed, while the victims didn't receive an answer from their national authorities and courts, they started to receive an answer from the Inter-American

⁷ Latin American States Parties to the Rome Statute of the ICC: Antigua & Barbuda, Argentina, Barbados, Belize, Bolivia, Brazil, Chile, Canada, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, Guatemala, Grenada, Guyana, Honduras, Mexico, Panama, Paraguay, Peru, St. Kitts & Nevis, St. Lucia, St. Vincent & Grenadines, Suriname, Trinidad & Tobago, Uruguay and Venezuela. Latin America States that are still pending of ratification of the Rome Statute: **Cuba, El Salvador, Haiti and Nicaragua.** http://www.icc-cpi.int/en_menus/asp/states%20parties/latin%20american%20and%20caribbean%20states/Pages/latin%20american%20and%20caribbean%20states.aspx

Commission and Inter-American Court for Human Rights. Both organs (part of the Organization of American States -OAS) began to hand down decisions upholding the state's duty to prosecute grave violations of human rights, the right of access to justice for victims, as well as the right to truth, among other topics, and this had a big and important impact by supporting local efforts in the region to prosecute and punish perpetrators of grave violations of human rights.

Since its first case –which was one among many similar cases and was resolved in 1988⁸– the Inter-American Court established the obligation of States to investigate, prosecute, punish, and repair grave human rights violations. The Court's jurisprudence, along with the reports and recommendations of the Inter-American Commission on Human Rights, eventually began to penetrate the thinking of many prosecutors and judges and began to be reflected in the decisions of national courts. Since then, in its jurisprudence on forced disappearances, extrajudicial executions, and torture, and on the importance of respecting and ensuring the rights of victims, the Inter-American Court has set the standards followed by many judges in the region⁹.

Here comes something very important: while the Court jurisprudence is the most visible product, the Inter-American Commission –the previous phase before a case is analyzed by the Court- played a key role combating impunity. Through its reports, recommendations, friendly settlements, precautionary measures, public hearings, in loco visits, periodic meetings with public officials, and capacity-

⁸ *Velásquez-Rodríguez v. Honduras*. Angel Manfredo Velásquez Rodríguez disappeared on September 12, 1981, in Tegucigalpa, Honduras. His friends and family never saw him again, the Honduran government denied any knowledge or involvement in his disappearance, and the Honduran courts would not hear the family's case. For more information about the impact of this case in the region and the international law see Claudio Grossman, *The Inter-American System of Human Rights: Challenges for the Future*. Available at <http://www.sipiapa.org/wp-content/uploads/2012/03/09e.pdf>

⁹ Of particular relevance were the decisions in the cases of **Barrios Altos** (Peru) and **Almonacid Arrellano** (Chile), in which the Court held that amnesties and other limiting devices like statutes of limitations could not override the duty to investigate, prosecute, and punish those responsible, nor the duty to provide reparation to the victims. Numerous national courts have cited these Inter American Court decisions.

building efforts, the Commission clearly had a real impact and “prepared the ground” in order that the Court decisions have a real impact¹⁰.

And here the role of the victims and civil society groups were also fundamental: they pushed the Commission in order to advance in that direction. They were the engine that make them to advance creatively in order to give the victims the answer they didn’t find in their own countries.

}} Victims unsilenced

4. *The role of some Latin American courts.* All these factors, some with more weight than others depending of the country, led to the reopening of judicial investigations, the formulation of charges, and the eventual trials of individuals accused of committing grave violations of international human rights and international humanitarian law. Many of these criminal cases confronted similar problems like how should the crimes be characterized? Were they common crimes under the existing criminal codes—murder, aggravated kidnapping—or were they international crimes? How should the courts deal with the challenges of statute of limitations, amnesties, or official immunities, among others? Many of the cases involved the direct perpetrators, but in other cases the accused had given the order or was part of a chain of command. How should this be addressed?

With ups and downs, Latin American courts have responded to these challenges using the developments of international law and in particular Inter-American law. The courts that assumed these difficult challenges were usually courts that have gone through years of judicial reform that brought –among other things- some

¹⁰ Another important contribution of the Inter-American System –and the Court in particular is the doctrine adopted in 2006, commonly known as the “control of conventionality,” under which judges and other national authorities find themselves obligated to disregard domestic regulations that fail to conform to the American Convention on Human Rights as they are interpreted by the Court. By endowing the judges and national authorities with this responsibility, the conventionality control doctrine seeks to reinforce the protection of human rights in the region.

awareness about the particularities of these type of cases and promoted some changes in order to respond to them. On the other hand and although not perfect in any way, in general, there are “champion” judges and prosecutors that push for these cases and are up to date on the new developments in international law. It has been very important to identify and promote them.

5. Exchange of information across the region: Latin American national courts, with imagination and rigor, have been solving these and other problems in concrete cases and news of these decisions and the new approaches they bring have made their way around the region. Although the decisions reflected the particularities of each country, many have been useful and relevant to solving similar problems in neighboring States.

There are countries in the region, notably in Central America, that are just beginning to come to terms with the past, a process that is much more advanced in southern cone countries –such as Argentina and Chile-. But there is already dialogue among judges and lawyers on the best way of resolving some of the common legal issues that arise, in which the jurisprudence and arguments made in one country may be useful in another, taking into account each country’s particularities.

To contribute to this sharing of knowledge, DPLF has been working intensively to compile, analyze, and systematize landmark decisions from Latin American courts that address issues that are particularly relevant to the national prosecution of international crimes. The main objective of our work has been to create a simple and accessible tool to facilitate the work of judges, prosecutors, and litigants involved in these types of trials and also serves as a starting point for the academic discussion of these issues. To date, this project has produced two volumes that together constitute the *Digest of Latin American Jurisprudence on International Crimes* that I share with you today. A third volume dedicated to the rights of victims is coming soon.

6. The role of Truth Commissions: In the region’s struggle to finally have criminal trials against perpetrators of massive human rights violations, the creation of

truth commission had also an important role. We had truth commissions in Argentina, Chile, Peru, El Salvador and Guatemala – and currently in Brasil. In none of these countries did the truth commissions have judicial faculties, but they were key because of the following reasons:

- i) For the first time an official history existed which included all the atrocities committed by both sides of the conflict –the case of Argentina is a little bit different-. The truth about the past was not only now known but there was an official truth in countries where for years there had been a denial about the horrible massacres and systematic human rights violations committed in a particular period of time;
- ii) For the first time, the victims had a voice and could talk publicly about the violations they had suffered. In the case of the truth commission of Peru, we had public hearings, thematic and regional, allowing the victims, in many cases for the first time, to express in their own words the atrocities they lived through.
- iii) They offered a space to reflect on the structural problems that allowed these events to take place and gave concrete recommendations for overcoming these problems and keeping them from ever happening again.

Although these Truth Commissions neither had **subpoena powers** nor **judicial faculties** the information they gathered has been used in legal cases. In the case of Peru, the Truth Commission had a special division that analyzed 46 cases in depth and sent this analyses –with all the evidence and information collected- to the general prosecutor’s office. Most of these cases are currently under trial.

The historical and political effect of a truth commission can be huge, but there are limitations. The Latin American experience has shown the following:

- Overcome the past is an exercise that requires truth, justice, redress for the victims and measures to not repeat the mistakes of the past that allowed

these human rights violations to happen. It is wrong to believe that a truth commission will be the only or most important measure to reach these goals.

-A Truth Commission establishes a historic truth but does not come with the force and details of a judicial decision, and thus cannot replace a judicial decision. Thus, it is very important to be clear and not “replace” truth for justice. Many governments say that because of the political environment it is not possible to have both, but from the experience in Latin America, it is also not possible to overcome the past just with one of the components.

-“Reconciliation” is hard to come by and a Truth Commission’s report should be one of many different steps towards reconciliation but it is not recommendable to put all our expectations just on its work. That could bring just disappointments

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In this stage of domestic prosecutions in Latin America for grave human rights violations or international crimes there is no doubt of the crucial contributions made by international criminal law and regional human rights system jurisprudence in shaping national justice systems. The current accountability era I’ve described, with lights and shadows, has been possible because lawyers, judges, prosecutors and the victims themselves have used international standards and decisions as a tool to press for improvements in their country's human rights performance.

We’ve learned that International law is enforceable as it is applied through domestic institutions, and want to open a door for sharing and exchanging this experience with other countries like Turkey.

I hope that the Latin American experience may provide inspiration, some lessons learned and perhaps even lines of argument for jurisprudential backing to other national courts that are starting to seriously deal with impunity.

Thank you.