

VICTIMS UNSILENCED

The Inter-American Human Rights System
and Transitional Justice in Latin America

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English translation by Gretta K. Siebentritt
Spanish editing by Mónica Ávila Paulette
English editing by Catherine A. Sunshine
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About I

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Ariel E. Dulitzky

What is the relevance of the Inter-American human rights system in strengthening transitional justice processes in the region of the Americas? Most informed observers would begin by citing the Inter-American Court of Human Rights judgments in the *Barrios Altos* case from Peru and the *Almonacid* case from Chile.¹ Similarly, if pressed to cite a contribution that the Inter-American Commission on Human Rights (IACHR) has made toward transitional justice in Latin America, they might recall Reports 28 and 29 of 1992, concerning the so-called amnesty laws in Argentina and Uruguay.²

The contribution of the Inter-American human rights system, however, cannot be examined solely through the actions and decisions of the Commission and the Court. The system comprises four essential groups of actors: states, as the architects and executors of their international obligations; the political organs of the Organization of American States (OAS), in theory the collective guarantors of the system itself;³ the Commission and the Court; and finally, victims and civil society organizations. One must therefore scrutinize the interactions between these four sets of actors, at minimum, together with the conditions that allow these interactions to advance the goals of truth, justice, and reparations.

A vision of the system through the lens of resolved cases is limited and problematic. A purely legalistic case-centered approach to the Inter-American system, focusing on the *Barrios Altos* and *Almonacid* cases, fails to elicit its true contribution. Can the mere examination of a judgment's content be sufficient to establish whether the Inter-American system is in fact fulfilling the role it is called upon to perform? Can an exclusively juridical Inter-American approach truly address victims' demands for truth, justice, and reparations? Even if one believes that an Inter-American juridical response is the ideal means to meet the needs of transitional justice, it is still relevant to ask just what the role of the Commission may be in this legalistic, case-centered approach.

The Inter-American system should therefore be regarded from the standpoint of the powers ascribed to the Court and, in particular, to the Commission. A look at the Commission

reveals how it has employed the various tools at its disposal to participate in the public debate over transitional justice. We may ask whether the IACHR's signal contribution derives from its resolution declaring Chile's self-amnesty law incompatible with the American Convention on Human Rights, which it reiterated in numerous cases before finally sending a Chilean case to the Court.⁴ Or was it perhaps more important that three commissioners testified before the Truth and Reconciliation Commission in Peru,⁵ or that the Commission turned over the entirety of its historical archives to Panama's Truth Commission?⁶ What about the provisional measures it requested on behalf of children who had been adopted illegally by their parents' captors under the military dictatorship in Argentina? Perhaps more relevant still was its adoption of a report on El Salvador following publication of the Salvadoran Truth Commission's findings and the enactment of the amnesty law, or its resolutions on asylum and international crimes, the prosecution of such crimes, and universal jurisdiction.⁷

There are no pat answers to these questions or to others that could be posed. At least I do not profess to have such answers. The essays included in this volume are a collective reflection intended to deepen the debate over the prerequisites for the success of a regional human rights system. They offer a critique of how success is measured and explore the type of profile the Inter-American system should have if it is to address the demands currently emanating from the region. What is clear is that transitional justice—and in a broader sense, the transition from dictatorships and civil wars to weak democratic systems with still-unresolved structural and institutional deficiencies in the area of human rights—requires a reflection on the Inter-American system. We must examine the types of cases taken up by the Commission and the Court, the way both organs operate and the tools they employ, as well as the new ways in which the different actors of the Inter-American system relate to each other. What follows is a rough sketch of certain elements for reflection which, rather than purporting to offer conclusive answers, is intended to spur a broader debate.

OBJECTIVES OF THE INTER-AMERICAN SYSTEM

As reflected in the chapters that follow, it is not possible to answer all these questions without first determining the aims, objectives, and mandates that govern the actions of the Inter-American human rights system. It could be argued that the most important contribution the Inter-American system has made to transitional justice is the Court's judgment

in the *Barrios Altos* case, considering that the fundamental role of an international tribunal is to set forth the appropriate interpretations of the American Convention on Human Rights, together with the applicable reparations, in addition to resolving cases through binding legal judgments. Conversely, it could be argued that the Inter-American system is only effective to the extent that domestic courts apply the Convention or adhere to the interpretations handed down by the Inter-American organs. One might also assert that the Inter-American system was effective when it monitored developments in the search for truth, justice, and reparations in Argentina for nearly two decades, consistently following up on the recommendations from Report 28/92 concerning that country's impunity laws until the Argentine Supreme Court finally found them unconstitutional.⁸ This transpired without the direct intervention of the Inter-American Court in Argentine cases on the subject. Could it be that the best example of the Commission's effectiveness is the space it created in Argentina, previously nonexistent in that country, for civil society organizations to hold the state accountable for its actions before an independent third party such as the IACHR, rather than allow the demand for truth, justice, and reparations to be confined to a single social sector?

This section offers a brief outline of what I consider to be the fundamental objectives of the Inter-American system. By identifying these basic objectives we change the way the Inter-American system's role in transitional justice is evaluated.

Protecting individuals

International protection of the individual may be construed as the concrete ability to remedy a human rights violation and to safeguard the right or freedom at stake in a particular case. Obviously, in terms of transitional justice this translates into the system's ability to guarantee truth, justice, and reparations for specific individuals. The entire Inter-American system revolves around this core objective. The American Declaration of the Rights and Duties of Man, for example, establishes among its principles that "the international protection of the rights of man should be the principal guide of an evolving American law."⁹ Likewise, the American Convention establishes that the Commission and the Court are the "means of protection" of the rights set forth therein.¹⁰

From this perspective it would appear obvious that the case system, in conjunction with the protective mechanisms of precautionary and provisional measures, offers the best tool for attaining this objective. The Inter-American system's contribution should be mea-

sured in terms of whether it has achieved truth, justice, and reparations in the case of specific victims who have sought its assistance. Toward this end, one can examine all of the Commission's reports on individual cases, as well as the judgments issued by the Court, that document that the rights of the victims were violated because the state failed in its obligation to guarantee truth, justice, and reparations, and that ultimately it was the decision of the international organs that protected those rights.¹¹

In a formalistic sense, one could argue that the Commission and the Court have been effective to the extent that a decision issued by these organs *per se* constitutes a remedy of sorts. Of course, we consider the Inter-American system to have been completely effective for specific victims if, once a favorable decision has been obtained from an international organ that partly restores their honor and dignity, that decision is fully carried out by the states involved. But we do not believe that the protection of rights is secured solely through individual cases. It is also achieved when the Commission requests the adoption of precautionary measures or the Court grants provisional measures to protect judges, public prosecutors, witnesses, and victims in their attempts to see justice done.¹² Other examples include situations in which a report on the general situation of human rights in a particular country, or a public declaration, helps to prevent or mitigate a situation of impunity to the detriment of specific victims,¹³ or when the authorities take action based on the recommendations or statements issued by the Commission.

Promoting awareness of the human rights situation

The organs of the Inter-American system promote awareness of the human rights situation by providing credible, reliable information on the overall human rights strategy in a particular country in terms of general patterns of behavior, their rationale, and their motives.¹⁴ The American Convention states specifically that one of the Commission's roles is to "develop an awareness of human rights among the peoples of America."¹⁵

One of the Inter-American Commission's primary tools is the preparation of country reports, usually following an on-site visit.¹⁶ One purpose of these reports is to "mobilize international public opinion to bear witness credibly, as a basis for opinions on situations of massive and systematic violations" of human rights.¹⁷ Another objective is to develop specific policy recommendations for states.

An example of the Commission's timely action in this regard was its 1994 *Report on the*

Situation of Human Rights in El Salvador, which harshly criticized the enactment of the amnesty law just days after the publication of the Truth Commission's report.¹⁸ Another relates to Guatemala, when the IACHR approved a report five years after the signing of the peace accords to verify the progress and problems in implementation to date. The Commission also may promote awareness through its analysis of the general situation in a country. In response to the incipient democratic opening in the Southern Cone, for instance, the IACHR pointed out in 1986 that "the urgent need for national reconciliation and social pacification must be reconciled with the ineluctable exigencies of an understanding of the truth and of justice." It reiterated that "every society has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent repetition of such acts in the future."¹⁹ The IACHR also fosters understanding by making recommendations in specific areas, such as the resolutions on universal jurisdiction and international crimes mentioned earlier.

Lastly, besides doing justice in a specific case, individual case work exposes the underlying context. Returning to the narrow argument that the Inter-American system's primary task consists of processing cases, it is evident that every time the Commission adopts a final report or the Court issues a judgment on a core aspect of transitional justice, those decisions transcend the individual case involved. They serve as a reminder to the state that the practice at issue is incompatible with international standards and should be corrected before the situation deteriorates. At the same time, the Commission and the Court alert the international community to certain circumstances in that state that contravene international human rights standards. An important advantage of raising awareness through individual cases is that the issue is depoliticized: that is, the conclusions reached by the Commission and the Court derive from a legal debate between the petitioner and the state.

The credibility of the organs of the Inter-American system must be ensured if they are to effectively fulfill the objective of raising awareness. To have an impact, the message of the Commission and the Court must be heard and accepted as objective, impartial, well-founded, logical, and reasonable. The power of the Inter-American organs hinges solely on their capacity for persuasion. For this reason, their message must be clear with respect to the legal imperatives associated with truth, justice, and reparations. It must also be realistic, meaning that these organs must be able to adapt general legal principles to different political and social contexts, while always preserving their independence and impartiality.

The Commission and the Court, therefore, must continually remind themselves exactly who it is they wish to persuade and who constitutes their target audience. Is it the state itself and, if so, only the direct interlocutor with the system's organs, in other words, the ministry of foreign affairs? Or is the main audience judges, or legislators, or perhaps the OAS or the international community? What about human rights groups, the victims themselves, or the press? Does the audience include all of these actors or only some of them? The country case studies presented in this volume show that the strategy of persuasion must cast the widest possible net. Only when a wide range of actors are persuaded by the legitimacy of the Inter-American message—its impartiality, rationality, and apolitical nature—will genuine progress be made in the sphere of transitional justice.

Creating space for democratic dialogue

Even today, many Latin American countries lack a broad public space for the safe and democratic debate of human rights issues. Weaknesses and gaps in the functioning of legislatures and judiciaries frequently make it difficult to take up such issues in the context of parliamentary or legal debates. In many countries in the hemisphere, human rights defenders and journalists who report human rights violations or official corruption and abuses become targets of threats, assassinations, and kidnappings.²⁰ In this context, one of the primary objectives of the Inter-American system is to create a safe space for civil society and the government to engage the debate over human rights and—of particular interest in the context of this volume—the best strategies for truth, justice, and reparations.

This space may be found in individual case processing, which entails an egalitarian discussion of whether the state has fulfilled its duty to ensure the right to truth, justice, and reparations. The state and the victims engage in a legal debate before impartial actors such as the Commission and the Court. Moreover, the state may not take reprisals against the complainants and it is obligated to respond to, and cooperate with, the organs of the system. In theory, through the case system the dialogue can be depoliticized in the sense of averting any perception that it is geared to partisan political benefits.

General public policy debate occurs mainly in connection with the Commission's advocacy role, in particular its general thematic hearings. In recent years, for example, the Commission has scheduled hearings on implementation of the recommendations of the Truth and Reconciliation Commission in Peru, on progress made by the Uruguayan

administration in limiting the effects of the impunity law in that country, and on the national reparations program in Guatemala.²¹ Some might say that such hearings have facilitated dialogue between governments and human rights groups and enabled states to benefit from the cooperation of the Inter-American system in developing human rights policy or in determining the available remedies. In many instances these hearings have served simply to keep an issue on the radar screen of the international community until such time as the conditions in-country are more conducive to advancing the debate on specific aspects of transitional justice.

Legitimizing actors

Victims of human rights violations in Latin America, especially during periods of dictatorship or civil war, have not been distributed randomly among the population. In a general sense, victims tend to be concentrated disproportionately among the poor, the landless, the disenfranchised, and members of ethnic, racial, cultural, and political minorities.²² Victims have been, and in some cases continue to be, silenced not only by force and fear but also by efforts to delegitimize their right to criticize. The same holds true for human rights groups and attorneys who defend the rights of victims and who, in countless instances, have been discredited by the government. In the case of transitional justice, more than once national authorities have accused those demanding truth, justice, and reparations of seeking vengeance, reopening old wounds, dredging up the past, or serving foreign interests.

The Inter-American system has a key role to play in this regard by acting as a channel of access for the silenced majorities and by lending legitimacy to the victims and their representatives. By listening and attending to the claims brought by different sectors, an international entity such as the Commission lends credence to these sectors. In doing so, the Commission sends a clear signal to states: these sectors have a valid message that must be heeded. Moreover, the Inter-American system legitimizes actors by ensuring that they are not censured for the mere act of approaching an international forum. As the Inter-American Court consistently has affirmed, beginning with its first contentious case, "some of the Government's arguments are unfounded within the context of human rights law. The insinuation that persons who, for any reason, resort to the Inter-American system for the protection of human rights are disloyal to their country is unacceptable and cannot constitute a basis for any penalty or negative consequence."²³

Finally, the Commission and the Court have been extremely receptive to the need to protect members of civil society and thereby legitimize their work. In 2005, for example, the Commission adopted precautionary measures to protect witnesses of human rights violations, members of human rights organizations, indigenous leaders, and members of social organizations, especially trade unions. In its recently published *Report on the Situation of Human Rights Defenders in the Americas*, the Commission underscored the crucial role these actors play in democratic societies. It affirmed that "the work of human rights defenders, protecting individuals who are victims of human rights violations, publicly denouncing the injustices that affect large sectors of society, and pointing to the need for citizen oversight of public officials and democratic institutions, among other activities, means they play an irreplaceable role in building a solid and lasting democratic society."²⁴

Building a culture of human rights

A consolidated, accepted, and widespread culture of human rights is still missing in Latin America. The region lacks a social atmosphere in which human rights standards are part of the daily life of citizens, the authorities are accountable for violations of fundamental freedoms, and the judiciary offers genuine remedies when abuses occur. The Inter-American system must act as a guide for domestic courts, legislatures, and governments in their efforts to build democratic societies based on respect for individual rights and the rule of law.

In this regard, it is crucial to develop jurisprudence by establishing precedents and monitoring countries. The case system helps broaden and deepen democracy by creating a culture of legality through the interpretation of Inter-American standards. Moreover, when the organs of the system adhere to these same standards, they act as a model for domestic governments. Their own procedures, therefore, must ensure transparency, reduce discretionary actions, and promote equality of the parties. The serious and prompt consideration of each petition is another important prerequisite derived from this objective.

The Commission's hearings, thematic studies, country reports, and advocacy efforts also help to strengthen this democratic culture by seeking dialogue with social sectors, depoliticizing the debate, formulating recommendations, reporting problems in a timely manner, and training government officials.

ROLES AND INTERACTIONS OF THE COMMISSION AND THE COURT IN TRANSITIONAL JUSTICE

The notion that the Inter-American human rights system's main contribution to transitional justice consists of the *Barrios Altos* or *Almonacid* decision is based on the premise that the best approach to human rights is an Inter-American juridical one. From this standpoint it would appear that scant relevance is accorded the work of the Inter-American Commission, not only in the exercise of its general powers but in terms of individual casework as well. The implication seems to be that a fragmented approach based on the 15 or so cases decided annually by the Court is more important than a more comprehensive approach encompassing all the demands for truth, justice, and reparations in the region and the different ways in which the system addresses them.

From the standpoint of individual cases, one might ask whether the 15 decisions issued by the Inter-American Court in periods of transitional justice can really meet the needs of our countries or whether, to the contrary, they will simply mirror the problems of unequal access to justice. Over 300 massacres were committed during the course of the scorched-earth policy in Guatemala. Is a legal ruling in one of them—the Plan de Sánchez massacre—the best strategy available to the Inter-American system to put an end to the prevailing state of impunity for all these atrocities?²⁵ Or does it merely reflect the ability of a nongovernmental organization, one familiar with the system and endowed with sufficient resources, to document and process this case before the Commission and later the Court? What happens with regard to the other 300 massacres and the victims who do not have access to the system?

Similar questions arise when we examine the amounts of compensation granted by the Court in the form of reparations. What are the consequences of asserting that the Inter-American parameters established in connection with a particular case should be applied as national standards? An estimated 69,000 murders were committed in Peru during the internal armed conflict. If the amounts granted by the Court as reparations for violations of the right to life were to be used as the yardstick for reparations at the domestic level, the Peruvian state would owe between \$80,000 and \$200,000 for every murder. This comes to a grand total of \$5.5 billion to \$13.8 billion, a significant portion of the country's gross domestic product and nearly its entire annual budget.²⁶

Such concerns suggest that the Inter-American system and those who use it should take

a more comprehensive approach to transitional justice, based on the regional situation in general and on the limitations, strengths, potential, and opportunities offered by each Inter-American tool. The Commission and the Court should be regarded as having complementary, nonhierarchical mandates to take up matters relating to the fulfillment of the commitments acquired by the states parties to the Convention (Article 33). A legal judgment in a case should not always be viewed as the most effective way to further the objectives of truth, justice, and reparations in a particular country. The intention here is not to undercut the case system, but rather to place it in its proper context and avoid making it into more than it is.

An analysis of the Inter-American system and its effectiveness should encompass the myriad roles assigned to it. In certain circumstances processing an individual case may not be as important as issuing a resolution to help combat impunity in a particular country, influence a parliamentary debate over a particular bill, or perhaps facilitate the extradition of individuals accused of serious human rights violations. The Commission can also offer general guidelines on how to address broader issues such as the situation of children of disappeared persons.²⁷ It can insist on the appointment of a central figure to direct implementation of a reparations program in a country, rather than process a particular case concerning a specific situation that may not be representative of the broader problems facing that society.²⁸ In a system beset by chronic financial problems, it is not always realistic to argue that the best strategy is to employ all of these tools at once.

Regarding interactions between the Commission and the Court, it is important to consider the different means by which the Commission can facilitate the Inter-American Court's contribution to transitional justice. For example, the Commission may choose to refer cases to the Court, request provisional measures, or request advisory opinions.²⁹ The American Convention on Human Rights has assigned an important role to the Commission, requiring its presence in all matters taken up by the Court.³⁰ There are two bases for this requirement. First, the Convention regards the legal system of individual petitions as just one aspect of one of the tools designed to promote and protect human rights in the region. It is important, therefore, that the Court listen to the Commission as an organ empowered to utilize the entire remaining spectrum of alternatives in cooperation with OAS member states. Second, the Commission represents an Inter-American interest that transcends the parties to a particular case. It is essential that the Court respond to this overall vision rather than to a particular point of view.³¹ In terms of transitional justice, the Commission must present the true dimensions of the specific case under consideration by the Court in the context of existing national and regional efforts.

With regard to individual cases, it is significant that the Commission is one of the principal organs of the OAS Charter (in contrast to the Court, which is Convention-based). It therefore represents all member states of the OAS. This has two implications for transitional justice. First, the Commission has competence to evaluate the human rights situation in each and every member state of the OAS and not just in those that have ratified the American Convention and accepted the jurisdiction of the Court. This affords the Commission broader geographic coverage relative to the Court.

Second, the Commission has competence to examine situations that have occurred since its founding in 1959, and it can apply the American Declaration of the Rights and Duties of Man to circumstances that predate the ratification of the American Convention. Hence, the Commission exercises broader temporal competence than the Court, which may only examine events that followed the declaration by the respective state accepting the Court's competence. This distinction is critical in countries such as Argentina, Chile, El Salvador, and Brazil, which ratified the Convention and/or accepted the Court's jurisdiction only after the restoration of democracy or the end of a civil war, thereby barring the Court from taking up the serious, massive, and systematic violations that occurred during those periods. In those countries the Court, unlike the Commission, may take up only procedural violations or due process violations; it may not consider the violation of a substantive right such as a massacre, extrajudicial execution, or torture.³² Forced disappearances constitute a limited exception to this insofar as they are defined as a continuous crime, although the Court has been extremely restrictive in this regard.³³

The American Convention of Human Rights grants the Commission the authority to decide whether a case should be taken up by the Inter-American Court or whether it should be resolved through a decision of the Commission itself.³⁴ According to the American Convention, the decisions of the Court and the Commission are equally valuable and effective for the protection and promotion of human rights, and the Convention therefore confers upon the main OAS advisory organ—the Commission—the authority to decide which of the two will have the final say. In my view, this is a clear indication that the Convention does not necessarily consider a judicial decision to be the only or the best possible solution. Indeed, for years the Commission chose to publish its decisions regarding amnesty laws in cases from Argentina, Uruguay, Chile, and El Salvador, rather than refer them to the Court. Only after many years did it begin to send some, though not all, cases concerning similar issues to the Court. In this way the Commission established a series of precedents on the incompatibility of self-amnesty laws with the Convention. Once the various Inter-American actors had assimilated this groundbreaking work, the

Commission decided that the optimum human rights protection should be consolidated juridically through a Court decision, which it subsequently obtained with the *Barrios Altos* judgment.

COMMISSION-STATE RELATIONS: THE NEED FOR DIALOGUE

State entities have a critical role to play in the application of international law. International provisions are only operational to the extent that states activate their domestic legal systems to give them effect. This is the weakest link of international law insofar as compliance with its obligations is ultimately in the hands of domestic organs. The authors of this volume illustrate several of these weaknesses in their national case studies.

With regard to transitional justice, the Inter-American system relies on the establishment of a dialectical relationship with domestic legal systems. These must give effect to their international commitments through legislative, administrative, or judicial means, or any other necessary and effective means to ensure truth, justice, and reparations. At the same time, the Inter-American system, using the methods outlined earlier, monitors state actions relevant to these international obligations to determine whether justice is being served.

These two aspects, application and monitoring, establish—or at least should establish—a dialogue among the relevant actors. The Inter-American system's experience with transitional justice has shown that communication occurs in varying forms and degrees, ranging from simple monologues to complex forms of interaction.

The country chapters illustrate the spectrum of possibilities for dialogue and communication. For instance, Inter-American organs and government actors may have an excellent relationship with each other, yet one that is characterized by parallel discourse. An example of this might be El Salvador, where the Commission's consistent decisions on that country's amnesty law have failed to find echo in the discourse and actions of successive administrations. It is also safe to say that, in the case of El Salvador, the Inter-American discourse has failed to produce a strong, effective social demand for the implementation of Inter-American decisions.

The Chilean case offers a similar example. Despite its many decisions on the Chilean self-amnesty law, the Inter-American system has been only a bit player in the human rights

debate of recent years, in the political sphere as well as in legal deliberations regarding individual cases. Of course, the recent judgment in the *Almonacid* case could alter this assessment by demonstrating that the voice of the Court can sometimes help deepen communication and dialogue.

The Uruguayan example illustrates different patterns of communication. Interaction between government actors and the Inter-American organs, at times nonexistent, has occasionally been tense and confrontational, to the point where the government has attempted to silence the Commission.³⁵ More recently, an incipient dialogue suggests that there may be some interest in strengthening communication, an impression that is reflected in the growing number of hearings on Uruguay during the Commission's last three sessions.

Argentina offers the most complex example of a continuous back-and-forth, featuring an interplay between national efforts and Inter-American responses through the cases before the Commission, hearings, and the application of Inter-American precedents in the domestic venue. When Inter-American voices have not been, or are not, heeded internally, domestic actors, particularly human rights defenders and nongovernmental organizations but some state actors as well, have turned and continue to turn to the IACHR to facilitate and broaden the space for this dialogue.³⁶

A more specific analysis may be applied to the communication between Inter-American organs of international supervision and local judiciaries on issues of truth, justice, and reparations. National tribunals take on a special dimension in their role as guarantors of the rights enshrined in the American Convention, which requires that domestic remedies be exhausted before activating a supervisory mechanism.³⁷ In other words, in virtually all international complaints concerning the lack of truth, justice, and reparations, some domestic tribunal is implicated for having failed in its obligation to ensure the effective enjoyment of recognized rights. In addition to this, the American Convention stipulates that "everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights . . . even though such violation may have been committed by persons acting in the course of their official duties."³⁸ This confirms the critical role that domestic tribunals play in the application of human rights treaties.

In general, judges handling cases concerning truth, justice, and reparations base their decisions primarily on political constitutions, laws and decrees, regulations, and domestic case law. Yet the courts also should take into account the Inter-American

human rights system. The experience of transitional justice has shown that courts tend to be more receptive when the domestic legal community invokes international human rights instruments in its legal arguments and demands that the courts apply these instruments in their daily proceedings, in accordance with their hierarchical standing in the respective legal system. While it is true that in the domestic venue most Latin American judges habitually ignore the human rights treaties in force, one of the reasons for this, though it is not necessarily the main one, is that attorneys do not invoke these treaties often enough. While judges should be familiar with the law, it is also incumbent upon the attorneys to call the court's attention to applicable laws and to invoke legal standards that support their clients' interests. The most promising outcomes in the dialogue between Inter-American and domestic jurisprudence occur when attorneys routinely invoke international norms and judges apply them. This leads to a mutually reinforcing dynamic in which judges apply international standards because they are invoked by attorneys, while attorneys continue to invoke them because they are being applied by judges. For its part, the IACHR closely follows such positive developments and is therefore situated to monitor and react to domestic rulings concerning truth, justice, and reparations and to encourage, to the extent possible, rulings that adhere to international standards.³⁹

Of course, there are various ways in which the decisions made by the Inter-American system are received at the national level, understood as a reference by a domestic court to an international ruling on a case submitted for a hearing. But essentially this process can be reduced to two sequential steps: (a) domestic courts review international jurisprudence to determine whether any existing international norms are applicable to the case to be resolved, and (b) they evaluate how that norm has been interpreted in international jurisprudence. For example, if a court must decide a case in which a victim of human rights violations is claiming civil damages, it must determine whether any Inter-American norm establishes the duty to make reparations, as well as how that norm has been interpreted.

There are many ways in which local courts and international organs interact in the sphere of transitional justice. While this not intended to be an exhaustive list, we can begin with the aforementioned requirement of prior exhaustion of domestic remedies. Local courts must rule on matters relating to international human rights treaties before it is possible to resort to an international venue. For their part, before declaring a case admissible, international supervisory organs must verify whether the relevant tribunals have indeed exhausted all existing effective and appropriate remedies, or whether an exception to the requirement applies.

At the same time, Inter-American organs examine domestic court proceedings to determine whether they are consistent with the state's international obligations and, where possible, to establish the state's international responsibility. There are two main issues here: first, whether the courts have acted in accordance with the principles of due process, impartiality, and fairness, and second, whether the ruling itself is consistent with the American Convention. With regard to the former, the Inter-American Commission and the Inter-American Court have intervened when Supreme Courts have upheld the constitutionality of amnesty laws or rejected petitions seeking compensation for human rights violations.⁴⁰ Another scenario is when investigations have been characterized by impunity, or when an investigation into what has transpired has been assigned to a military court.⁴¹ In all of these circumstances, the Commission and the Court have been highly critical in their messages to domestic courts.

Lastly, there are scenarios in which domestic courts must implement the decisions handed down by international organs in specific cases. In other words, after a case has been processed at the international level and the Commission or the Court has ruled, the victims turn to their own courts to request that those rulings be given effect or carried out. One significant example of a best practice in this regard is a specific case in which the Argentine Supreme Court carried out an order handed down by the Inter-American Court despite its profound disagreement with that order.⁴²

Clearly, the most effective dialogue between international organs and local courts is one characterized by permeability, osmosis, and functional synergy, in which the courts demonstrate a marked inclination to bring their decisions into line with those of the international mechanisms.⁴³ With respect to transitional justice, the domestic courts in Argentina, Colombia, and Peru have been most receptive to Inter-American jurisprudence. We might mention here the *Simón* case in Argentina, in which the Supreme Court revoked the Punto Final (Full Stop) and Obediencia Debida (Due Obedience) laws, basing its ruling on the Commission's proceedings and the jurisprudence of the Inter-American Court.⁴⁴ Another important example comes from Peru, where the Constitutional Court, drawing from the Inter-American interpretation, upheld the right to know the truth.⁴⁵ In Colombia, in a tutela action (action to protect a fundamental right), the Constitutional Court ruled that the review remedy permitted the reopening of investigations should the Commission or the Inter-American Court so require, and that the principles of *res judicata* and *non bis in idem* did not constitute obstacles to this.⁴⁶

SOME PREREQUISITES FOR THE EFFECTIVENESS OF THE INTER-AMERICAN SYSTEM IN TRANSITIONAL JUSTICE

Throughout much of its history, Latin America has favored legal form over substance. Most Inter-American treaties were ratified when states emerged from military dictatorships or civil wars, signaling a new political approach that places fundamental freedoms at the center of the legal landscape. But this does not go far enough, inasmuch as human rights treaties require the effective exercise of the rights they protect, particularly the right to effective legal recourse. To this end, it is sometimes necessary to enact new laws—to ensure that reparations are made, for example—or repeal others, such as self-amnesty laws or laws establishing military jurisdiction over cases involving egregious human rights violations. What is required in all instances, and without fail, is absolute respect for treaty and conventional provisions.

Human rights and democracy are inextricably linked. There can be no effective respect for human rights in the absence of democratic conditions. A state cannot be considered democratic if human rights are not respected. Adherence to international human rights treaties requires as a *sine qua non* the existence of a democratic society, and at the same time helps to consolidate such a society. A democratic society and a culture of human rights cannot be built if the foundations of truth, justice, and reparations are missing. The chapters that follow show that significant progress in the sphere of justice and reparations has indeed been achieved in democratic settings.

For this to happen, however, the authorities must demonstrate unwavering political will to ensure and respect these rights. No legal or political reform, ratification of international human rights treaties, or decision by the Court or the Commission will lead to change if those staffing the three branches of government lack a collective and profound commitment to that enterprise. The case of Uruguay is a present-day example of the need for a confluence of wills. While the executive branch has generated new momentum and created opportunities for progress, at least in the area of truth, the judiciary is blocking many of its initiatives.

If they are to comply fully with the American Convention, the three branches of government must be proactive in their promotion and respect for rights. The authorities and society must establish mechanisms, enact laws, train public officials, publicize the contents of the Convention, eliminate areas of authoritarianism, and reform repressive institutions.

It will not do to wait until human rights violations occur, or until the Commission and the Court point them out, and then suddenly recall those international obligations. The oft-mentioned triad of truth, justice, and reparations must be a daily working agenda that is nourished by Inter-American inputs.

As they tackle this enormous task, the national authorities and societies of our countries have important allies in the Inter-American organs, and therefore, as noted in the preceding section, they must establish and solidify a constructive dialogue with those organs. The Commission and the Court should not be regarded as enemies of a misplaced national pride, but rather as strategic allies in the common struggle to ensure truth, justice, and reparations and to combat impunity.

This task, moreover, cannot be accomplished solely through the efforts of national authorities and the organs of the Inter-American system. Civil society has a crucial role to play in many areas, including training and dissemination, oversight and monitoring, and uncovering and reporting of abuses. What is more, civil society organizations have amassed invaluable experiences and technical expertise on these issues. In the quest for ever more effective ways of ensuring truth, justice, and reparations, civil society must be a protagonist in any policy undertaken. The experiences described in the ensuing chapters demonstrate that the Inter-American system has been more effective where there has been greater demand, and more spaces, for dialogue between the government and civil society and between government, civil society, and the Inter-American system. It is also in those same countries where the greatest progress has been made in truth, justice, and reparations.

I conclude with a very brief reference to certain operational, current, and specific factors that could facilitate implementation of the decisions made by the Inter-American organs in relation to transitional justice. The following, while not intended as an exhaustive list, are examples of measures that could contribute to this process. In my view, it is important to begin by enacting comprehensive legislation to ensure that decisions are carried out, by establishing an inter-institutional mechanism that brings together all government agencies and entities that may have jurisdiction over such matters, and by adopting legal mechanisms to ensure adequate compliance.

In the sphere of legislative reform or review, it is clear that amnesty laws are a recurring issue during periods of transitional justice. Therefore, when there has been an Inter-American decision that a particular law is incompatible with the American Convention, the executive should be required to exercise immediately its legislative prerogative to

initiate a process for the reform or repeal of that law. Similarly, in countries whose congresses are authorized to fast-track certain legislative initiatives, Inter-American decisions should be considered sufficient grounds to activate such measures. An unconstitutionality by omission proceeding should be initiated if the legislature, within a designated time period, fails to repeal or reform a particular law in keeping with the requirements of the Inter-American organ.

With regard to monetary compensation, the annual budget should include specific amounts earmarked for the payment of reparations ordered by the Commission or the Court. Should this procedure not be followed, it should be stipulated, for example, that the annual budget for the year following the Inter-American decision include the necessary line items to proceed with the relevant outlays. The decisions of both organs should be executable in the domestic venue as suggested by Article 68 of the American Convention.

A number of proposals can be made with respect to criminal investigations into cases of human rights violations. First, when there has been a definitive ruling from a local court closing an investigation, a Court judgment or recommendation from the IACHR should serve as grounds for the review of such decisions to preclude a claim of *res judicata*. Secondly, the organic law of the public ministry could include a provision making it incumbent upon the respective prosecutor to initiate, deepen, reactivate, or undertake anew such investigations as the Commission or the Court might require.

Lastly, procedural laws can be reformed, particularly *amparo* and *habeas corpus* laws, so that they can be used to request compliance with the decisions of the Commission or the Court. A final proposal is that, in countries where they exist, the people's defender, human rights ombudsman, or similar figure should be invested with the authority and the obligation to monitor state compliance with the decisions of the Inter-American organs.

NOTES

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the Inter-American Court issued its judgment in the Almonacid case from Chile (see note 1). Therefore, while references to the judgment appear in several sections of the essay, its potential impact is not examined.

1 Inter-American Court, *Barrios Altos v. Peru*, Judgment of March 14, 2001, Ser. C, No. 75; *Almonacid Arellano et al. v. Chile*, Judgment of September 26, 2006, Ser. C, No. 154.

2 *IACHR Annual Report 1992-93*, Report 28/92, Cases 10.147, 10.181, 10.240, 10.262, 10.309, and 10.311, Argentina, October 2, 1992, and Report 29/92, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374, and 10.375, Uruguay, October 2, 1992.

3 The assumption here is that the political organs of the OAS—the General Assembly, the Permanent Council, the Committee on Political and Juridical Affairs, and the General Secretariat—represent more than merely the sum of the individual will of each member state.

4 See *IACHR Annual Report 1996*, Report 34/96, Cases 11.228, 11.229, 11.231, and 11.282, Chile, October 15, 1996. On July 11, 2005, the Inter-American Commission on Human Rights, in accordance with Articles 51 and 61 of the American Convention on Human Rights, lodged a complaint against the state of Chile in the case of *Luis Almonacid Arellano* (No. 12.057); see note 1.

5 The three commissioners were Marta Altoaguirre, Robert K. Goldman, and Juan Méndez.

6 See IACHR Press Release 10/01, issued following the IACHR's visit to Panama.

7 See Inter-American Court, *Reggiardo Tolosa Case*, Order of the Court of November 19, 1993, Ser. E, No. 1; IACHR, *Report on the Situation of Human Rights in El Salvador 1994*, OEA/Ser.L/V/II.85, Doc. 28 rev., February 11, 1994; "Recommendation on Asylum and International Crimes," in *IACHR Annual Report 2000*, chap. VI; IACHR, *Resolution No. 1/03 on Trial for International Crimes*, October 24, 2003; "Recommendation on Universal Jurisdiction and the International Criminal Court," in *IACHR Annual Report 1998*, chap. VII.

8 See note 2.

9 Third *Whereas* of the American Declaration of the Rights and Duties of Man, Resolution XXX of the Ninth International Conference of American States, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L/V/II.82 doc.6 rev.1 at 17 (1992).

10 American Convention on Human Rights, part II.

11 By contrast, certain United Nations organs have ruled that they lack temporal competence to take up certain Argentine cases.

12 In 2005 the Commission granted 11 precautionary measures to protect such victims.

13 Perhaps the IACHR's *Report on the General Human Rights Situation in Argentina 1980* (OEA/Ser.L/V/II.49, Doc. 19 corr.1, April 11, 1980) is the most paradigmatic example; it publicized a situation that previously had not been well documented. Another example is the recently issued IACHR Press Release 23/06, "IACHR Expresses Concern over Guatemalan Constitutional Court Decision," July 3, 2006.

- 14 See Tom J. Farer, "The Future of the Inter-American Commission on Human Rights: Promotion versus Exposure," in *El Futuro del sistema interamericano de protección de los derechos humanos*, ed. Juan E. Méndez and Francisco Cox (San José: Instituto Interamericano de Derechos Humanos, 1998), p. 524.
- 15 American Convention on Human Rights, Art. 41(a).
- 16 Regarding in loco visits, see Tom Farer, "No Longer a Unicorn, Not Yet an Ox," *Human Rights Quarterly* 19, no. 3 (1997): 510-46.
- 17 "Submission of the Annual Report of the Inter-American Commission on Human Rights 1995, by its Chairman, Dean Claudio Grossman to the Committee on Juridical and Political Affairs of the OAS Permanent Council," April 30, 1996, in *IACHR Annual Report 1996*.
- 18 *IACHR, Report on the Situation of Human Rights in El Salvador*, February 11, 1994.
- 19 *IACHR Annual Report 1985-86*, chap. V.
- 20 In its *Annual Report 2005*, the IACHR reported that during that year attempts were made on the lives of human rights defenders, some of whom were, at the time, under protection ordered by the organs of the Inter-American system. See also IACHR, *Report on the Situation of Human Rights Defenders in the Americas*, OEA/Ser.L/V/II.124, Doc. 5 rev.1, March 7, 2006.
- 21 Specific examples of general public policy debate are drawn from hearings during the Commission's 123rd Regular Session, held October 11-28, 2005, and its 124th Regular Session, held in February-March 2006. Information about Colombia presented at those hearings focused primarily on the demobilization process, violations of the cease-fire declared by leaders of the United Self-defense Forces of Colombia (Autodefensas Unidas de Colombia), and application of this policy by civil society organizations and the state. With respect to Uruguay, the Commission, together with the state and the respective petitioners; examined compliance with the recommendations found in its Report 29/92 on the Ley de Caducidad de la Pretensión Punitiva (Expiry Law of the Punitive Powers of the State) in that country. The IACHR was informed of various initiatives undertaken by the administration of President Tabaré Vázquez to ascertain the whereabouts of individuals disappeared in Uruguay under the military dictatorship. During the hearing on Peru, attended by representatives of the state and nongovernmental organizations, the discussion included the Peruvian state's compliance with the recommendations of the Truth and Reconciliation Commission and its obligation to investigate and prosecute international crimes. Another example of general public policy debate is found in the information obtained during the Commission's 118th Regular Session held in October 2003 on the implementation of the national reparations program in Guatemala.
- 22 *IACHR Annual Report 2005*, introduction, pars. 3 and 4.
- 23 Inter-American Court, *Velásquez Rodríguez v. Honduras*, Judgment of July 29, 1988, Ser. C, No. 4, par. 144.
- 24 IACHR, *Report on the Situation of Human Rights Defenders in the Americas*, par. 23.
- 25 Inter-American Court, *Plan de Sánchez Massacre v. Guatemala*, Judgment of April 29, 2004, Ser. C, No. 105.
- 26 Pablo de Greiff, "Justice and Reparations." In *The Handbook of Reparations*, ed. Pablo de Greiff (New York: Oxford University Press, 2006), chap. 12.

27 "A study about the situation of minor children of disappeared persons who were separated from their parents and who are claimed by members of their legitimate families," in *IACHR Annual Report 1987-88*, chap. V.

28 In Paraguay, the IACHR insisted on the appointment of a people's defender (*defensor del pueblo*) legally empowered to implement the reparations program in the country. See IACHR, *Third Report on the Human Rights Situation in Paraguay*, OEA/Ser.L/V/II.110, March 9, 2001.

29 American Convention on Human Rights, Art. 51, 61, 63(2), and 64(1).

30 American Convention on Human Rights, Art. 57.

31 American Convention on Human Rights, Art. 35. The Commission represents all members of the OAS.

32 See, for example, Inter-American Court, *Moiwana Village v. Suriname*, Judgment of June 15, 2005, Ser. C, No. 124.

33 Inter-American Court, *Blake Case*, Preliminary Objections, Judgment of July 2, 1996, Ser. C, No. 27; *Serrano Cruz Sisters v. El Salvador*, Preliminary Objections, Judgment of November 23, 2004, Ser. C, No. 118.

34 According to Articles 51(1) and 61, only the Commission and the states have the authority to refer cases to the Court. To date, the Commission alone has exercised this authority, with two exceptions: the matter of Viviana Gallardo, in which Costa Rica lodged a petition against itself before the Court, and the case of Lori Berenson, in which Peru brought a complaint before the Court after the IACHR had lodged its own petition. Inter-American Court, *In the Matter of Viviana Gallardo et al.*, Ser. A, No. G 101/81; *Lori Berenson Mejía v. Peru*, Judgment of November 25, 2004, Ser. C, No. 119.

35 It did so through a request for an advisory opinion in which it questioned the Commission's authority to examine the compatibility of the Expiry Law Limiting the Punitive Powers of the State with the American Convention. Inter-American Court, Advisory Opinion OC-13/93, July 16, 1993, Ser. A, No. 13.

36 See, among others, Martín Abregú, "La Tutela Judicial del Derecho a la Verdad en la Argentina," *Revista IIDH* 24 (1996): 11-47.

37 American Convention on Human Rights, Art. 46(1)(a).

38 American Convention on Human Rights, Art. 25.

39 See, for example, IACHR Press Release 28/06, "Statement on Constitutional Court's Decision regarding Application of Law of Justice and Peace in the Republic of Colombia," August 1, 2006.

40 On amnesty laws, see, for example, IACHR Report 136/99, Case 10.488, *Ignacio Ellacuría, S.J. et al.*, El Salvador, December 22, 1999; and Report 25/98, Cases 11.505 et. al., Chile, April 7, 1998. On petitions for compensation, see IACHR Report 1/93, *Report on the Friendly Settlement Agreement in Cases 10.288, 10.310, 10.436, 10.496 10.631, and 10.771*, Argentina, March 3, 1993; and Report 59/05, Petition 381/04, *Admissibility, Magdalena Mercedes Navarrete et. al.*, Chile, October 12, 2005.

41 See IACHR Report 101/01, Case 10.247 et. al., *Extrajudicial Executions and Forced Disappearances of Persons*, Peru, October 11, 2001; and Report 32/04, Case 11.556, *Merits, Corumbiara*, Brazil, March 11, 2004.

42 See Supreme Court of the Nation, "Espósito, Miguel Ángel re/statute of limitations to file a suit brought in his defense based on a ruling by the Inter-American Court in the Bulacio case," December 23, 2004.

43 Thomas M. Franck and Gregory H. Fox, "Introduction: Transnational Judicial Synergy," in *International Law Decisions in National Courts* (Irvington-on-Hudson, NY: Transnational Publishers, 1996), 3.

44 Supreme Court of Justice of the Nation, "Simón, Julio Héctor et. al., on the illegitimate deprivation of liberty, etc.," Case 17.768C.

45 Constitutional Court of Peru, Judgment in the *Genaro Villegas Namuche Case*, file 2488-2002-HC/TC, March 18, 2004.

46 Constitutional Court of Colombia, Judgment C-004/03, January 20, 2003.