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WHY REGIONAL MECHANISMS ARE UNDER UTILIZED BY SOUTHERN CONE HUMAN RIGHTS VICTIMS

Michael WASCO

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I. INTRODUCTION

1. *Argentina, 1979*

“A man’s hands are shackled behind him, his eyes blindfolded... a man is then... doused with water, tied to the ends of the bed or the table, hands and legs outstretched. And the application of the electric shocks begins... It’s impossible to shout, you howl... when electric shocks are applied, all a man feels is that they are ripping off his flesh” (Roberta Cohen, 1982).

2. *Chile, 1975*

Note on a box of cigarettes from a girl on a 1975 list of 119 Chileans who - according to the dictatorship media - “had been killed in armed encounters between extremists across the Argentine border”:

Dearest Sandra,

I remember when I met you in the house of terror, of what you gave me and surrendered to me. In those moments in which the light was a dream or a miracle. However, you were the light amongst the darkness. We were as one in our misfortune. Today, after thousands of misfortunes more, I can see you, as I did then, always looking forward. We will see each other again through the fog that we will disperse.

Do not forget me comrade.

Blondie

Month: of despair

Year: of torture

(<http://www.remember-chile.org.uk/>)

3. *Uruguay, 1978*

Magna Morales and Bernadina Alva were promised gifts by their government if they underwent sterilization procedures. Mrs. Alva was given two dresses for her daughters and a T-shirt for her son. Mrs. Morales died 10 days later from complications arising out of the procedure. Mrs. Morales family was not permitted to sue the government because she agreed to the procedure (Steiner and Alston, 2000).

The human rights violations that occurred prior to the establishment of democracy in Latin America, and specifically the southern cone, are now well known. Various local, individual and institutional actors as well as non-governmental organizations have provided concrete evidence of torture and disappearances to the global community.

Regional mechanisms have been instituted to remedy these atrocities. Perhaps the most significant of these mechanisms is the Inter-American Human Rights Convention, which oversees the Inter-American Commission on Human Rights (“the Commission”) and accompanying Inter-American Human Rights Court (“the Court”) in San Jose, Costa Rica.

The Court publishes annual reports outlining the progress and resolution of every case it handles in a given year. The 2004 report discusses seventy four cases throughout Latin America. Although Argentina, Chile and Uruguay are all members of the Inter-American Commission on Human Rights and within the purview of the Court, only two cases from these countries were listed in the 2004 annual report (Annual Reports Inter-American Court of Human Rights, 2004). According to the Inter-American Commission, which has now reopened on claims numbering in the thousands, no southern cone cases concerning human rights violations prior to 1990 have been found admissible for the Court since 2000.

Children taken away from the arms of their disappeared parents, have been forced to grow into adults without knowing their own true identity. In the examples above, none of the families have received compensation for the losses at the hands of their own governments.

This paper attempts to analyze and explain why pre-democratic human rights violations in the southern cone have not been addressed by the Court.¹ To be clear, this paper is only concerned with the human rights violations that occurred during the bureaucratic authoritarian regimes in the southern cone.² This paper first analyzes possible shortcomings with the Inter-American system and the southern cone in general, and then specific problems with Argentina, Chile and Uruguay respectively. The structures and actions of the three countries are looked at in isolation, without comparison to other Latin American countries. Likewise, the Inter-American system is not compared to other regional systems. What is it about the legal, social, political and cultural structure of the southern cone that allows for the inadequate redress of these violations by the institutions specifically designed to address these problems?

II. THE INTER-AMERICAN COURT

To even to begin to answer this question, it is necessary to understand the Court and accompanying institutions, and more specifically, how it is that cases appear before the Court.

The Inter-American Commission on Human Rights was founded in 1959. Its purpose was to address human rights violations in those countries that had widespread systematic human rights abuses and no adequate national system to address those abuses. However, the Commission was rather hapless without cooperation from those countries committing the violations. In 1965 the Commission was given the power to examine specific instances of human rights violations on

¹ The Court was set up to address and has addressed all human rights violations in Latin America, not just recent violations.

² The Inter-American Commission has recently found numerous cases in Argentina and Chile admissible for the Court, however these cases arise out of police brutality subsequent to 1990. Uruguay remains conspicuously absent from almost all reporting mechanisms of the Court, the Commission and the Convention.

its own. However, under this system, once the Commission made a finding, nothing else could be done; there were no enforcement mechanisms. Eventually, the Commission was given the power to conduct investigations and publish reports, which it did, but which did not give redress to the victims. As such, the Commission was the sole entity responsible for addressing human rights violations in a region in which human rights protection was a low priority (Cecilia Medina, 1990). Eventually, enough individual complaints regarding human rights violations created the need for a re-vamped system.

Under the American Convention of Human Rights system, the Convention oversees the Commission, and the Commission and the Inter-American Court work together to address human rights violations throughout Latin America. The handling of individual and state cases begins with the Commission. The Commission's responsibilities, among others, include, reviewing individual complaints and handling individual cases on its own motion as well as participating in the handling of the cases before the Inter-American Court. The complaint, often referred to as communications, can be brought by individuals, groups or certain recognized non-governmental organizations. The Commission also has the authority to begin investigating a case on its own motion. The Commission then determines the admissibility of the complaint or communication for the Court.

The requirements for a case to be found admissible for the Court are not over strict or rigid. To be admissible, the complaint or communication must 1) Alleges a violation of a right recognized by the Convention³ 2) A communication on the same subject is not pending or has not been previously studied by the Commission or any other international entity, 3) The remedies under the state's domestic laws have been exhausted, or the state does not respect the due process law for the alleged violation, and 4) the communication is brought within a timely manner (American Convention on Human Rights, Articles 44-51).

The Convention gives the Commission the power to request information from the government concerned, and with the consent of that government, to investigate the complaint. If the government does not res-

³ The rights are outlined in the Convention's American Declaration of Rights.

pond to the requests for information, the Commission can assume the facts as true unless contradictory evidence is presented. This is the extent of the Commission's investigation required by the Convention. The Commission then places itself at the disposal of the parties to come to a resolution of the matter. If there is no settlement, the Commission may send an unpublished report to states involved, and eventually send the matter to the Court. Accordingly, the Commission's annual reports include all of the countries involved in any one of these phases of the investigation. The state concerned can also send the matter to the Court (if it is a party to the convention).

In addition to the above criteria, before a case can be accepted by the Court, the case must be admitted for investigation and the Commission's report sent to the state. The state must also recognize the contentious jurisdiction of the Court. For a state to submit a case to the court on its own volition, the only requirement is that the state(s) has acknowledged the contentious jurisdiction of the Court. Accordingly, the majority of the cases received by the Court are via the Commission, as states are reluctant to send cases to the Court themselves for political reasons.

As of 2005, 21 parties have recognized the contentious jurisdiction of the Court (Annual Reports Inter-American Court of Human Rights, 2004). One of the first things that Argentina and Uruguay's new democratic governments did was to ratify the Convention and acknowledge the jurisdiction of the Court. Chile has also acknowledged the contentious jurisdiction of the Court.⁴

Thus, the Court will handle isolated cases of human rights violations by states which otherwise respect the general rules of law, after significant review by the Commission. The system only works if states act in good faith and cooperate with the Commission. Some suggest that the requirement of state cooperation in itself makes the system bound to be inadequate.⁵ The Commission is part of the political organization that is the Convention, and as shown below, evi-

⁴ Argentina ratified the Convention and accepted the jurisdiction of the Court on September 5, 1984, Uruguay did the same on April 1985, according to documents filed with the secretary of the Court.

⁵ Quiroga, Medina *The Battle of Human Rights: Gross, Systematic Violations and the Inter-American System* (1988).

dence exists to show that politics within the region may influence which countries are investigated.

According to former Judges of the Court, the fact that the Commission was founded so much earlier than the Court itself is a factor for why more cases are not sent to the Court by the Commission (Lynda E. Frost, 1992). As outlined above, for many years the Commission was entirely responsible for all phases of human rights work within Latin America. The initial Judges observed hesitation on the part of the Commission to utilize the Court adequately, perhaps because it was not used to dealing with another entity.

However, while this may explain the dearth of overall contentious cases the Court initially heard, it does not explain the lack of representation in overall cases from the southern cone for human rights violations during the authoritarian regimes. With regard to the southern cone specifically, the initial Judges stated that often times the Commission would find violations, and for whatever reason would not send the cases to the Court, and would not give any explanations for same (*Id.*).

The process for sending cases to the Court is very time consuming and costly for all those involved. After the domestic remedies are exhausted, the case has to go the Commission in Washington and then to the Court in San Jose. Not something that the most recently economically devastated countries would want to spend money on in the last ten years.

Some have suggested that this recent democratic regression in the southern cone has led to inaccessibility of justice (Margaret Popkins, 2003). This may be particularly applicable to Argentina, where grinding poverty, inequality of wealth distribution, and lack of economic stability are problems that may trump legal reform. It is suggested that large portions of populations are excluded from democracy and specifically, access to justice, and recognition of their human dignity (*Id.*).

While it is true that only if victims are aware of the procedures and processes available to them, can they come forward with potential cases for the Court, Latin America has acknowledged the importance of educating citizens on the means available to them (Outlined in Quebec City Summit of the Americas, 2001). Chile and Argentina

have had significant development in training individuals for alternative dispute resolution (Margaret Popkins, 2003). Since there is no shortage of complaints being brought to the Commission by individuals in the southern cone, it is unlikely that the source of the problem is the victims themselves.⁶

Since one of the requirements in the process of a case reaching the Court is the exhaustion of remedies within that state, one must look closer at the manner in which each of the southern cone countries has handled authoritarian regime human rights violations within its own borders.

III. ARGENTINA

To understand the current lack of attention to early human rights abuses one has to look at the political, social and cultural environment at the time of the violations. In Argentina, many citizens at the time of the violations were politically brainwashed into believing that if people were being abused it was because they deserved it. It is now public knowledge that at the time of the disappearances in Argentina, many people believed that the notices about disappearances were just rumors to cover up fleeing rebels (Louis Roniger, 1999). If individuals ignore the violations at the time of their occurrence, it makes it even more difficult to organized witness testimony and evidence years later for the Commission's investigations.

As Argentina's democracy evolved, president Rau Alfonsin authorized an official investigation of human rights violations as well as judicial proceedings against the perpetrators during his years in office, 1983-1989 (David Pion-Berlin, 1994). However, Argentina's democratization process also included the institution of laws pardoning those that were responsible for the tortures and killings (<http://www.derechos.org/nizkor/argeng.html>). Although certain amnesty laws have recently been found unconstitutional, the effects of this legislation may never be cured.

But Argentina's amnesty laws are not the simple answer for the dearth of predemocratic Argentinean cases in the San Jose Court.

⁶ When the Commission visited Argentina in 1980, 5000 complaints were received (Human Rights Watch).

Despite the amnesty laws, “truth trials” continued in 2001 and 2002 even though the guilty would never be prosecuted, and victims would never be compensated. In addition, many specific crimes were not covered by the amnesty laws. Dozens of former military officers were prosecuted for ordering the theft of babies born to mothers in secret detention centers (Human Rights Watch annual report, 2002).

Also in 2001, Argentinean courts used as a model the Inter-American Court to bring to justice those that committed dirty war human rights violations (Human Rights Watch report 2002). However, president de la Rúa not only failed to support these developments, but instead continued to back the amnesty laws and rejected extradition of individuals to courts outside of Argentina (*Id.*). In 2001, federal Judge Gabriel Cavallo ruled the amnesty laws unconstitutional. The Argentine Supreme Court upheld the decision four years later, after Kirchner and Congress had purged the court of justices who backed the amnesty. In June of 2005, Argentina’s Supreme Court Ruled by 7-1 that the two greatest amnesty laws were unconstitutional. Yet it is hopeful at best to suggest that now that the Argentinean Court’s have declared the amnesty laws unconstitutional that dirty war cases will flood the Court.

Perhaps one of the reasons that Argentina has failed to address human rights violations during the “dirty wars” and most likely will continue to ignore this time frame is that with the above mentioned regression in democratization has come new human rights violations. Although the dirty wars have long ended, human rights violations are a current problem in Argentina. Journalists, continue to be harassed for writing articles offensive to the government, and in some cases have been beaten up or killed. Conditions in jails are inhuman, beatings at police stations commonplace, and disappearances at the hand of the police are not unheard of. Prisoners often stay in jail for years before being tried for their alleged crimes. There is at least one prisoner of conscience, Fray Antonio Puigjane who has been sentenced to twenty years in prison just for his beliefs. While one would assume that perhaps Argentina and the Commission would begin its focus on the earliest violations, the only violations addressed by the Commission on the eve of the amnesty being lifted were cases subsequent to 1991.

It should be emphasized that the minimal presence of “dirty war” matters in the Court does not mean that Argentina has not acknowledged the Court itself. Argentina’s case is unique to most of Latin America, in that its own justice system has used the decisions from the Inter-American Court to clean up its own house. The Argentinean Judges in fact used the decisions of the Inter-American Court in finding the amnesty laws unconstitutional (Popkins, 1999). Perhaps if Argentina is able to make progress in redressing human rights violations on its own, the Commission feels less obligated to send cases to the Inter-American Court. By incorporating the jurisprudence of the Inter-American Court into its own system, Argentina is actually far ahead of most Latin American countries, a trend that should continue now that the amnesty has officially been lifted.

IV. CHILE

Investigations in Chile prior to democratization suggest that the Organization of American States (“OAS”) system combined with lack of cooperation contributed to the current lack of representation in the Commission and the Court. Within one week of the Coup in Chile September 11, 1973, the Commission requested information from Chilean officials. In October the executive secretary visited, which resulted in an on site visit by the Commission in July 22-August 2, 1974. The Commission conducted a thorough investigation of then ripe human rights abuses, conducting interviews and taking in over 500 complaints. Government authorities granted interviews, and witnesses gave statements corroborating the complaints. The Commission observed Military tribunals and reviewed trial records. Visits to detention centers uncovered evidence and identified facilities where torture occurred. The Commission’s report concluded that the government of Chile was guilty of a wide range of human rights abuses including systematic violations of the rights to life liberty and personal security, due process and civil liberties. However, despite the detail and thoroughness of the report, the Chilean government refused to acknowledge it. Even though it was investigating over 600 cases of torture and 160 disappearances, the Chilean government was uncooperative. The communication system was not well suited for handling

wide range systematic violations. The second Commission report on Chile in 1976 applied new pressure on the Pinochet regime, this report undercut the Chilean claims that the situation had returned to normal. For whatever reason, the cases were never resolved or sent for the Court (Jack Donnelly, 1998). Chile's new democracy initially allowed for inquests into human rights abuses, but did not allow for trials.

However, some believe that the most recent waive of human rights action in Chile has been even more successful than Argentina in handling the human rights situation within Chile (David Pion-Berlin, 1994). Chile has recently been able to acquiesce the Commission by acknowledging Inter-American Court proceedings within its own judicial system. In 2005 Human Rights Watch reported:

According to the Catholic Church's Vicariate of Solidarity, 311 former military personnel, including twenty-one army generals, have been convicted or are facing charges for human rights violations (As of mid-2004). In early January 2004, the Santiago Appeals Court upheld the conviction of Gen. Manuel Contreras, former head of the Directorate of National Intelligence (DINA, or Pinochet's secret police), and three lower-ranking DINA agents, for the 1975 "disappearance" of detainee Miguel Angel Sandoval Rodríguez. In November, the Supreme Court dismissed a final appeal against the conviction, ruling that the crime of kidnapping was not covered by an amnesty law enacted by the military government in 1978.

Accepting the lead of the Inter-American Court system, the Chilean courts have deemed the 1978 amnesty laws to be inapplicable in "disappearance" cases since a "disappearance" must be considered a kidnapping—an ongoing crime—unless the victim's remains have been found and the courts have thereby established his or her death. Following the Supreme Court verdict, the government announced that a building on an army base would be adapted as a special prison for human rights offenders.

In another encouraging ruling, the Santiago Appeals Court stripped Pinochet of his immunity as a former head of state in May 2004, allowing him to face trial for the "disappearance" of twenty people during the authoritarian regime. The Supreme Court narrowly affirmed the decision in August of that year. As of December 1, 2004,

the investigating judge in the case was assessing reports on Pinochet's medical condition before deciding whether to indict him. In December Pinochet lost his immunity again, this time to face possible prosecution for the 1974 assassination in Buenos Aires of former army commander Gen. Carlos Prats and his wife, Sofia Cuthbert. When countries demonstrate the ability to prosecute offenders within their own borders, it is more likely that they will cooperate with the Convention and the Court in the event that the matters are not resolved within the domestic system.

V. URUGUAY

Uruguay is perhaps the most intriguing case of all of Latin America. Human rights abuses during the authoritarian regime in Uruguay are just as well documented as those throughout the rest of Latin America.⁷ It is indisputable that Uruguay cooperated with Argentina and Chile in orchestrating the disappearances of government objectors during its authoritarian rule lasting until 1985.⁸ Yet, although it has been subject to the jurisdiction of the Court, and as seen below, even outspoken about respecting the authority of the Court, no country in Latin America has had less involvement with the Court and the Commission than Uruguay. Since 2001, Uruguay appears only once in the Commission's annual reports, and in that case the Commission found the communication inadmissible.⁹ Only one case from Uruguay is referenced in the annual Inter-American Court reports since 1993. Not a single tormentor of a single political prisoner has been punished or even indicted (Human Rights Watch).

Unfortunately, for perhaps the same reasons and factors that have kept Uruguay out of the reach of investigation by the Commission

⁷ In the late 1970s, Uruguay had the highest ratio of political prisoners to population in the world, torture was practiced at a highly sophisticated level; for month or years on certain prisoners (As reported by Human Rights Watch, 1989).

⁸ Details of "Operation Condor", a clandestine écheme by the military regimes of Chile, Argentina, Brazil, Uruguay, and Paraguay to kidnap and "disappear" dissidents from each other's countries, became public record with the Supreme Court decisions overturning amnesty in Chile.

⁹ OEA/Ser.L/V/II.122 Doc. 5 rev. 123 February 2005 (by comparison, fourteen United States cases are discussed within the same time frame).

and the Court, it is difficult to analyze how Uruguay has been able to keep the veil over its human rights record. Not surprisingly, very little research has been done at all concerning Uruguay's lack of involvement with the system. There are very few non-governmental organizations that deal specifically with Uruguay's human rights situation.

Uruguay has never made it easy for those looking into human rights violations. The new democracy initially did not call for inquests or trials for human rights violations (David Pion-Berlin, 1994). Accordingly, Uruguay did not preserve evidence of disappearances as well as the other countries in the region, making it difficult for the Commission to conduct its investigations. Yet Uruguay's democracy has never openly shunned the Commission or the Court. Quite the contrary, we know that Uruguay believes that the Court should have the ability to publish advisory opinions on the interpretation of the American Declaration of Rights and "without this interpretation the region's human rights provisions would be meaningless" (Advisory Opinion OC 10/89 Inter-American Court of Human Rights, 1989).

Recent events illustrate the up hill battle the Commission faces with Uruguay. It is understandable that the Commission has not expended valuable resources investigating this country. Like the other countries in the region, Uruguay's extensive domestic amnesty laws have hindered the country's own investigations into authoritarian human rights violations. However, Uruguay's economic devastation brought about positive political change. The worst recession in the country's history drove from power the two political parties that had backed the 1989 referendum upholding the amnesty for the military. The election of leftist President Tabare Vazquez last year brought many of the military's old foes to power, including the defense minister Azucena Berrutti. Berrutti, a lawyer and old friend of the mothers of the disappeared, immediately pushed for the first exhumations of the burial grounds of Uruguay's military dictators. However, as a symbol of Uruguay's human rights landscape, the excavations at two Uruguayan army bases did not reveal one body. "We will know the truth [about the disappeared] in any case", Berrutti said. "That is a promise which we will keep" (As reported by the Boston Globe).

In 2005, President Vazquez promised to implement Article 4 of the 1986 Expiry Law. This Article, requiring the executive to order immediate investigations into any cases of disappearance referred to it by the Court, has never been enforced. Taken as a whole, the Expiry Law sanctioned impunity by exempting from punishment police and military personnel responsible for human rights violations committed before March 1985 in blatant violation of Uruguay's international obligations (Amnesty International World Report 2005).

As pointed out by the justices above, the Commission is a political entity, motivated by political factions. It is not a huge leap to assume that the Commission is not going to act contrary to the interests of the super powers within the region. No where is that more the case than with Uruguay. The United States was conspicuously silent in its position when Uruguay's amnesty referendum was up for annulment in 1989. It was reported that the United States behind closed doors actually supported the upholding of the amnesty laws (Human Rights Watch, 1989). By doing so, "The United States thus left the impression in Uruguay that its allies of the past, the abusive military, remain its principal allies today" (*Id.*).

Uruguay's ability to demonstrate that it is serious about addressing authoritarian human rights abuses is critical to any future involvement with the Commission and the Court. It appears that Uruguay is making positive changes, recently, Uruguayan prosecutors filed criminal charges against Juan María Bordaberry and his foreign minister, Juan Carlos Blanco for homicides committed during the authoritarian regime.

VI. CONCLUSION

The brief history of the Inter-American Court suggests that it has not been used favorably by the southern cone to address pre-democratic human rights violations. There are many reasons for this phenomenon, not all unique to the southern cone.

Efforts to obstruct investigations through amnesty laws and disappearances dating back to the era of the violations, combined with the costly and political process of the process itself are just some of the factors to be considered. In the case of Chile, the bureaucracy of the

system itself during the time of the offenses has hampered Commission investigations.

In addition, the Commission responsible for sending cases to the Court is a political entity itself that likely can be persuaded in how to use its resources by super powers as appears to be the case in Uruguay.

Finally, lack of authoritarian regime human rights abuse cases within the Court does not mean that the victims have been entirely neglected. Argentina and Chile have both recently demonstrated that they have the ability to look to the Court to handle abuses domestically. Only time will tell if the abolishment of amnesty laws and active domestic judicial systems will result in more utilization of the Court.