

‘Nunca Más’: Connecting Latin American Approaches to Impunity with Positive Complementarity Using Technology Driven Resources

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Over the last thirty years, the cry of ‘nunca más’ (never again) has become a powerful symbol against impunity for gross human rights violations across Latin America. A variety of mechanisms have been pursued to redress the causes of these public expressions of widespread suffering and to seek accountability, creating rich jurisprudence and establishing mixed accountability models. The legal mechanisms for individual criminal accountability for crimes committed across the region can be connected to the principle of positive complementarity in two ways: the legal frameworks developed by Latin American countries can enrich other jurisdictions, while the methodology of international criminal law (ICL) can provide a vital service to national criminal justice efforts across the region. Effective engagement with ICL can be supported with IT tools such as the ICC Legal Tools Database (LTD), ICC Case Matrix (CM) Database of Open Case Files (DOCF) and Investigation Database of Open Cases (iDOC).

1. Using Multiple Legal Mechanisms to Address Impunity

One characteristic of accountability efforts is the diversity of legal frameworks that have been adopted. The Inter-American system has reinforced the principle of individual criminal responsibility and developed the legal framework governing the crime of enforced disappearance, while universal and territorial jurisdiction have been used to prosecute former presidents and military leaders and lower level perpetrators. These advances have usually been made through the application of human rights law, although with the advent of the International Criminal Court (ICC) engagement with ICL has grown.

1.1. A ‘Beacon of Hope’: Accountability in the Inter-American Human Rights’ System

The progressive evolution in the Inter-American system – from addressing the massive human rights’ violations of the 1970’s to ‘90s, to tackling the structural patterns and challenges that underpin conflict or characterize transitions to democracy – can provide support to the accountability efforts of recent post-conflict countries. The Inter-American Commission and its Court (IACHR) have developed detailed jurisprudence on the principle of individual criminal responsibility, declaring the irrelevance of personal immunity in the perpetration of international crimes,¹ which was applied during the trial of former Peruvian President, Alberto Fujimori. The IACHR has declared blanket amnesties, pardons, and other measures aimed at avoiding criminal investigations of serious human rights violations² as inapplicable. It has consistently defined the act of enforced disappearance as a crime against humanity, specifically its widespread and systematic use by governments and has formulated a human rights law principle of States due diligence to prevent enforced disappearances and provide effective remedy to affected persons.³ Furthermore, its recognition of the right to truth as a means to ensure effective and active participation of victims in judicial proceedings⁴ has reinforced the importance of victim participation in the ICC era. As a human rights mechanism however, it remains limited in its ability to directly adjudicate

1 Inter-American Court of Human Rights, *Castro Castro v. Perú*, 2006.

2 Inter-American Court of Human Rights, *Barrios Altos v. Perú*, 2001; *Gomes Lund y otros (“Guerrilha do Araguaia”) vs. Brasil*, 2010; and *Gelman v. Uruguay*, 2011.

3 Inter-American Court of Human Rights, *Velásquez Rodríguez v. Honduras*, 1988; *Rosendo Radilla v. México*, 2009.

4 Inter-American Court of Human Rights, *La Cantuta v. Perú*, 2006.

widespread and systematic abuses that may amount to crimes against humanity, and is excluded from adjudicating over war crimes.

1.2. Universal Jurisdiction: Pioneering Criminal Accountability of the Most Senior Leaders

The groundbreaking effort to extradite the former Chilean President, Augusto Pinochet to Spain in 1998, for trial by its Audiencia Nacional (AN), irrevocably changed the landscape of national criminal justice for atrocity, triggering the successful prosecution of high ranking State or military officials through universal jurisdiction, removing the perception of impunity and catalyzing territorial prosecutions across Latin America. The AN's jurisprudence has addressed the individual criminal responsibility of senior leaders in a range of crimes prohibited by the Rome Statute. These contributions include the extradition and subsequent trial of Argentinian Ricardo Miguel Cavallo, from Mexico to Spain in 2003, to face accusations of genocide and terrorism committed during the Argentinian dictatorship; the arrest and trial of Argentinian Naval Officer, Adolfo Scilingo for his role in the 'Death Flights;' or the pursuit of former Guatemalan President Efraín Ríos Montt.

1.3. Territorial Jurisdiction: Accountability through Mixed Models

Criminal accountability measures have operated alongside alternative mechanisms, including Truth and Reconciliation Commissions and partial amnesty programs. In addressing historic abuses by State leaders, Peru and Guatemala have taken momentous steps to establish their individual criminal responsibility: in 2009, Peru tried and sentenced its former President, Alberto Fujimori for ordering the killings of 25 people during the 1990s conflict, following his successful extradition from Chile. This was the first time a democratically elected Latin American leader was tried and convicted in their country for human rights abuses.

In March 2013, the most recent Latin American member of the ICC, Guatemala, began its anticipated trial of General Ríos Montt and former chief of intelligence, José Mauricio Rodríguez Sánchez, for their role in genocidal killings of at least 1,771 members of the Ixil group of Mayan Indians, marking the first time genocide proceedings have been brought in the context of the 36-year civil war in Guatemala where an estimated 200,000 people died or were killed. During its turbulent proceedings, the case has been suspended, judges have been excused, and a re-trial has been ordered. On 20 May 2013, a 700 page guilty verdict was delivered while days later, the Constitutional Court issued a partial revocation of the

judgment, returning the case for re-trial.⁵

Other efforts to prosecute State or army leaders have been pursued, including the cases brought against former Uruguayan President, Juan Maria Bordaberry and his Foreign Minister, Juan Carlos Blanco Estradé; former Minister of Interior of Paraguay, Sabino Augusto Montanaro, and former President of Mexico, Luis Echeverría. In 2005, a specialized unit of the Mexican Attorney General's Office, with responsibilities for crimes related to "social and political movements of the past" charged Echeverría with genocide, for ordering the 1968 killings of students and other social leaders in Tlatelolco, classifying the two groups as 'nationality groups,' a process which led to his acquittal in 2009.

National prosecutors have also pursued lower level perpetrators for historical and current violations. Since the nullification of the Argentinian impunity laws in 2003, 449 persons have been tried, with 404 convictions and 45 acquittals. Currently there are 15 trials underway in different regions of the country, while almost 1,000 accused persons are waiting trial. Some NGOs have expressed concern regarding the length of the appeal process, which takes an average of 27 months.⁶ In Uruguay, the IACHR ordered the State to remove obstacles, including the 'Expiry Law'⁷ that blocked criminal accountability for human rights violations committed during the years of civilian and military rule (1973–1985).⁸ Congress nullified the Expiry Law, in March 2013, but the Supreme Court declared the nullification as unconstitutional, stating that the IACHR's decision in *Gelman v. Uruguay* was not binding. Colombia has also adjudicated a high number of cases although the most responsible persons have avoided justice: there have been 397 convictions for crimes that amount to crimes within the jurisdiction of the ICC, where 309 or 78% of the convicted persons are Fuerzas Armadas Revolucionarias de Colombia (FARC) or Ejército de Liberación Nacional (ELN), leading to popular accusations of shielding of

5 See the Open Society Justice Initiative website for the trial: <http://www.riosmontt-trial.org/>, last accessed on 25 June 2013.

6 Centro de Estudios Legales y Sociales (CELS), "A 36 años del golpe de Estado: Situación de los juicios por crímenes de lesa humanidad" (36 years after the coup: situation of trials for crimes against humanity), 23 March 2012, available at <http://www.cels.org.ar/comunicacion/?info=detalleDoc&ids=4&lang=es&ss=46&idc=1488>, last accessed on 11 April 2013.

7 Enacted on 22 December 1986, the Expiry Law provided a de facto amnesty, blocking "the exercise of penal actions with respect to crimes committed until March 1, 1985, by military and police officials either for political reasons or in fulfillment of their functions and in obeying orders from superiors during the de facto period". The Executive Branch was granted discretionary powers to order restricted investigations and prosecutions of the crimes protected by the Expiry Law.

8 IACHR, *Gelman v. Uruguay*, *supra* note 2.

paramilitary and State military. In addition 50 former congressmen have been convicted for promoting armed groups, while the national prosecution service is investigating 1,669 cases of ‘false positive’⁹ killings, indicating that this could rise to 2,896.¹⁰

2. The ICC System and Latin American Countries

With the exception of Colombia, prosecutions have taken place outside of the ICC system, as they occurred before the Court came into existence. The region is largely supportive of the ICC, ratifying the ICC Statute and also adopting legislation: only Cuba, El Salvador and Nicaragua remain outside the ICC. Several countries have substantially reformed their criminal codes and adopted co-operation obligations – including Argentina, Chile, Panama, Peru and Uruguay – while Bolivia and Paraguay are in the process of drafting legislation. Ecuador and Mexico have undergone partial but incomplete reforms to revise their criminal law framework in line with international standards. The LTD has supported legislative reforms by providing comparative legislative frameworks of all States that have implemented the ICC Statute.

2.1. Communications and Preliminary Examinations at the ICC

It is well known that the ICC operates under the principle of complementarity – that States have the primary responsibility to exercise their criminal jurisdiction over conduct criminalized by the ICC Statute – and that its Office of the Prosecutor (OTP) is empowered to initiate *proprio motu* investigations and to receive referrals from States and the UN Security Council. Civil society organizations have made use of this provision, submitting allegations of abuses, known as ‘communications’, while the OTP has adopted a practice of opening Preliminary Examinations to assess whether the alleged conduct fulfills the temporal and subject-matter jurisdiction of the Court. Preliminary examinations in Latin American countries have been made public in Colombia, Venezuela and Honduras.

Since June 2004, Colombia has been under preliminary examination, with over 114 communications alleging violations of the Rome Statute. The OTP has assessed that FARC, ELN and paramilitary groups have committed five specific crimes against humanity. Furthermore it believes that six acts of war crimes by FARC and ELN have occurred, with five acts of war crimes by State ac-

tors. In addition, OTP has considered that ‘false positives’ killings committed by State actors amount to crimes against humanity of murder and enforced disappearances. While prosecutions continue, there remains a strong degree of skepticism in the national process, because the process has failed to target those bearing greatest responsibility. The recent Constitutional amendment¹¹ and prosecutorial policy to map and prioritize open cases is one measure to address this omission and follows a similar trajectory to the prosecution strategy adopted in Bosnia and Herzegovina (BiH), and to the thematic prioritization policy adopted in the Democratic Republic of the Congo (DRC).

Communications alleging murder, imprisonment, torture and persecution as crimes against humanity in Venezuela were dismissed as the information failed to demonstrate that the conduct formed part of a widespread and systematic attack against a civilian population, one of the essential common elements of the crime against humanity. Similar challenges may face the preliminary examination into incidences in Honduras, although OTP has yet to determine the subject-matter jurisdiction: 17 communications allege that crimes within the ICC’s jurisdiction were committed following the 2009 coup, including imprisonment, killings, torture, rape and sexual violence, deportation and persecution amounting to crimes against humanity. A more recent communication alleges that widespread and prolific killings conducted by the Mexican military and police in connection with drug-trafficking and organized crime amount either to crimes against humanity or war crimes.

3. Positive Complementarity, Latin America and Technology Tools

While there have been successful prosecutions of atrocity crimes using regional and national human rights law, recognition of its limitations have occurred, alongside a growing awareness of the importance of ICL as a tool to reduce impunity and an increased interest in using international jurisprudence and sources of law. Similarly, criminal justice actors recognize the benefits of technology-assisted tools and work processes, including greater accuracy and efficiency. This final section reviews three ICL components: jurisprudence concerning the means of proof, elements of crimes and modes of liability, preparation of accurate case files and sources of ICL, and introduces some technology-driven tools that can assist in these areas.

9 ‘False Positives’ refer to the deliberate killings of civilians by State actors, whose murders were reported as lawful killings of guerilla fighters.

10 ICC Office of the Prosecutor, *Report on Preliminary Examination Activities 2012*, November 2012, paras. 109–116.

11 Marco Legal Para la Paz, Acto Legislativo 01 de 2012, numero de Gaceta 534/12. The Legal Framework For Peace, Law 01, 2012, Gazette 534/12, includes a temporary constitutional reform, to enable the prioritization and selection of cases.

3.1. Understanding the Means of Proof, Elements of Crimes and Modes of Liability of International Crimes

As NGOs adapt to the ICC communication system and national criminal justice actors consider how to address their responsibilities as ICC member-states, they will need to equip themselves with working knowledge of the legal requirements of ICC crimes, which differ from human rights charges or ordinary crimes. They will also benefit from familiarizing themselves with ICL jurisprudence, in addition to national and regional human rights case law. Each of the ICC crimes of genocide, crimes against humanity or war crimes require that the contextual elements as well as the underlying act be proven. Without making this connection, cases or communications will fail to demonstrate that an international crime has been committed. The CM can support criminal justice actors in their efforts to apply ICC crimes, by providing easy-to-reference jurisprudence concerning the means of proof, elements of crimes and modes of liability, drawn from international criminal tribunals, human rights bodies and publicists.

3.2. Preparing Case Files of Core International Crimes

Simultaneously, stronger case construction through IT-driven tools can better ensure that the complex web of facts and evidence that form the basis of case files can link incidents to suspects, victims and witnesses. The CM helps to organize that evidence and material as well as to test the strength and sufficiency of evidence, in a secure IT environment. It breaks down the substantive elements of core international crimes, showing the means of proof that are required for each crime, including its contextual elements, specific elements, and modes of individual liability that must be assigned to every individual for every crime under consideration. Provided without cost, following the execution of a user agreement, more than 125 institutions, including in Argentina, Chile, Colombia, Mexico and Uruguay, currently use it.

The quantity and diversity of violations can be overwhelming without the advantages provided by technology-driven tools, while the failure to address this systematically can lead to stagnation of justice and impunity, or

to biased or imbalanced prosecution of suspects and crime categories, both of which undermine democracy and security. Allegations of disproportionate prosecutions of particular crimes, ethnic groups or armed groups are frequently made, but often difficult to disprove, requiring a laborious and time-consuming effort to gather statistics that could verify whether bias is occurring, according to the known facts. Where prosecution services do not have an overview of incidences and open case files, prosecutorial strategies, including the prioritization and selection of cases can unwittingly incur selective bias. The DOCF provides the possibility to thoroughly map open files, reducing bias and error, while ensuring that policy objectives can be met within the bounds of rule of law: it has been applied in BiH and the DRC. Similarly, the iDOC provides management support to fact-driven investigations, enabling linkages to be established between facts, victims, witnesses and suspects, based on both human rights law and ICL.

3.3. Sourcing International Criminal Law

Criminal justice actors will also need to access a wide range of legal sources, which typically involves multiple searches on different websites. With over 64,000 documents, the LTD is the largest online library of documents relevant to the practice of ICL, including national legislation and cases of core international crimes, international cases and legislation, all the preparatory works of the ICC, its Statute, rules, regulations, judgments, decisions and orders, and relevant international and regional human rights decisions. Its recent translation into Spanish is one small effort to bridge the information gap. The Universidad Torcuato di Tella (Argentina) leads the efforts of the LTD in Spanish language jurisdictions. Individuals and organizations are encouraged to submit public materials that they think may be relevant to the LTD to info@casematrixnetwork.

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