

'Recent Developments in Human Rights Protection Systems in Latin America'

Based on the following sources: the Center for Justice and International Law (CEJIL), the International Justice Resource Center (IJRC) and other institutional and press sources

The human rights protection system of the Organisation of American States (OAS) comprises two institutions which serve to uphold and promote basic rights and freedoms in the Americas: the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights. Recently, both have faced criticism from a number of governments in the region, and they have been forced to defend their authority and independence. According to numerous human rights activists and human rights organisations from the region, several governments are attempting to undermine the ability of the Inter-American Court and Commission to defend human rights. For instance, Venezuela on a number of occasions has denounced the IACHR of lacking objectivity and impartiality and has accused the IACHR of not acting independently. Moreover, in response to the Court's decision, it went as far as to officially give notice of withdrawal from the American Convention on Human Rights¹. Also, some other countries, especially those from the Bolivarian Alliance for the Peoples of Our America (ALBA²), have repeatedly and openly attacked the regional system (Bolivia, Ecuador and Nicaragua). Moreover, in 2011, when the IACHR granted precautionary measures to the members of the indigenous communities - in the case concerning Belo Monte hydroelectric power plant - criticism even came from Brazil. In its attempts to put pressure on the Commission, Brazil recalled its Ambassador to the OAS and its candidate for Commissioner, and also suspended its contributions to the OAS. Certain commentators qualify this phenomenon as a regional diplomatic movement to dismantle the long-established OAS institutions which protect human rights.

The Key Role of the Commission

For over 50 years the Inter-American Commission on Human Rights (IACHR) has been holding governments accountable for major human rights violations. The IACHR has investigated thousands of human rights petitions and promoted conventions on some of the most important issues in the hemisphere, including torture, forced disappearances and violence against women. The hearings and reports of the Commission reflect some of the structural human rights problems which persist in the region. These relate, for example, to guarantees of fair process and judicial protection, freedom of expression and the rights of indigenous peoples. A great number of specific human rights problems - often too sensitive to tackle at national level - are discussed at public hearings of the IACHR (e.g. a public hearing on the Human Rights Situation of Persons Detained in the Naval Base of Guantánamo).

¹ Pursuant to Article 78 of the American Convention, the Government of Venezuela officially made its denunciation in a letter delivered to the Secretary General of the OAS.

² The Bolivarian Alliance for the Peoples of Our America (ALBA) – an international co-operation organisation based on the idea of the social, political and economic integration of the countries of Latin America and the Caribbean, associated with socialist and social democratic governments.

Problematic Reforms of the Inter-American Commission of Human Rights

The afore-mentioned autonomous body of the OAS, which is responsible for the promotion and protection of human rights (IACHR), has recently undergone a process of reform. This reform, which officially began in 2011, has caused serious concerns because it has allowed states - including those which have been the target of critical reports - to rewrite the rules and to set new limits on the Commission's powers. Effectively, some of the discussed proposals aim to limit the reach of the Commission by curbing its authority and by restricting its budget. For instance, since the Commission denounced the efforts of the President of Ecuador, Rafael Correa, to curb freedom of expression and to imprison those who criticise his administration, he has multiplied his efforts to restrict the work of the Commission, especially that of the Special Rapporteur on Freedom of Expression (whom he characterises as a tool used by the United States). On the other side, the Commission has itself tried to safeguard its prerogatives and use the reform for the purpose of strengthening the protection and promotion of human rights. With this aim, the IACHR has reviewed its procedures and mechanisms - through a process that included public consultations and hearings - in order to garner the opinions, input and experience of all interested parties. As a result of long and complicated negotiations, in March this year the IACHR approved the reform of its Rules of Procedure, Policies and Practices³ which has been endorsed by the OAS's General Assembly. The reform will take effect on 1 August 2013.

Proposals by a group of states - Bolivia, Ecuador, Nicaragua and Venezuela – were aimed at limiting the Commission's authority to grant precautionary measures. As a result, the reform had to reconcile their demand of the legal certainty (expected by states) with the flexibility necessary to respond to the needs of victims and persons at risk. It resulted in significant changes covering precautionary measures. The amended rules identify more precisely "serious and urgent situations presenting a risk of irreparable harm to persons or to the subject matter of a pending petition or case" and provide a number of definitions.

The afore-mentioned ALBA states also attempted to eliminate Chapter IV of the Commission's Annual A report in which countries with particularly troublesome human rights conditions are highlighted. Moreover, their proposals had included recommendations to limit the funding of the Inter-American Commission - by prohibiting earmarked voluntary contributions - and to reduce the budget and autonomy of the Special Rapporteur on Freedom of Expression.

Whilst the final Resolution did not adopt the recommendations which had posed the greatest threats to the Inter-American Commission on Human Rights' autonomy and mandate, the agreement reached will allow for further discussion. Therefore, the afore-mentioned proposals could possibly be forced upon the Inter-American human rights organs in the future. As a result of the reform, the IACHR is obliged to adopt measures on institutional policy and practices - including modifications to the Strategic Plan - implementation of which will depend on the availability of the respective funds. The Commission has been requested to develop functions other than the protection of human rights (their promotion). Such promotion should not come at the expense of reducing efforts on resolving specific complaints about human rights violations. Taking into account that the IACHR must also assist states in complying with their international responsibilities to strengthen their internal capacity and improve their mechanisms for protecting human rights, it has been entrusted with a very large mandate with financing capacities

³ IACHR Resolution 1/2013

which remain limited⁴. The attempts to multiply the Commission's functions and priorities could be interpreted as an attempt aimed at weakening its main function – the protection of human rights.

All in all, the efforts to weaken the Inter-American Human Rights System under the guise of reform have failed so far to a great degree. Nevertheless, the distortion of the follow-up of the reform process remains a threat. Some OAS states - despite the recently adopted reform of the IACHR – continue to attempt to influence and change the work of the Commission ("give continuity to the reform proposals"). For instance, a group of countries (23 foreign ministers) gathered in May this year in Cochabamba (Bolivia) to consider further structural reforms to the Inter-American Human Rights System. Keeping the real aim of weakening the system hidden, as their main proposal, they put forward the relocation of the Commission's headquarters from Washington to another member country. It is meaningful that at this meeting not only representatives of ALBA countries highlighted the importance of "reforming the Inter-American Human Rights System". Similarly, foreign ministers of Brazil and Argentina have affirmed "the need for an institutional analysis focusing on the long term".

Problems of the Court

As in the case of the Commission, the Inter-American Court of Human Rights' behaviour has also been criticised and accused of politisation. The withdrawal of the Bolivarian Republic of Venezuela from the American Convention on Human Rights contributed recently to the weakening of its jurisdiction. The withdrawal does not take effect until one year following the denunciation of the Convention so that in case of Venezuela the withdrawal will be effective in September 2013.

Problems with enforcing Court decisions have persisted almost from its creation in 1979. The Court should note non-compliance by a state to the OAS General Assembly, however, the character of this organ (acting by consensus) and its deep political divisions, have not helped to bolster the Court's authority (leaving non-complying countries unpunished and therefore encouraging them to challenge the Court). This link between the political bodies of OAS and the Court is a contributing factor to the rather weak Court position. The Court's reluctance has been nurtured by state's reactions to its decisions which have often been considered as violating their sovereignty or as being too progressive (e.g. in 2012 the Court reaffirmed that individuals throughout Latin America and the Caribbean cannot be denied access to in vitro fertilisation). Obviously, under international public law states that are bound by the Convention must comply with the Court's decisions. Unfortunately, this is not always the case. On a positive note, for instance, the President of Guatemala, Otto Pérez Molina, this year announced the derogation of a Resolution that would have attempted to limit the Inter-American Court's jurisdiction over alleged human rights violations that took place before 1987.

The number of cases received by the regional human rights institutions have been increasing - especially in the last 20 years. It is likely that the trend of an even greater demand for the inter-American Human Rights System's adjudicatory and non-adjudicatory functions will persist. In this context, the demand to give to individuals the right to appeal to the Court can re-emerge (until now they can only bring cases to the Commission which is acting as a filter and "gatekeeper").

⁴ Most of the budget comes from non-OAS regular funds and the IACHR is heavily dependent on voluntary contributions (mostly from the US and Canada). According to ALBA countries, the IACHR should stop relying on the US which has not ratified the Convention, but still hosts and finances inter-American institutions.

Future of the Inter-American System under Threat

Given the efforts already undertaken by certain governments to weaken the work of the main bodies of the regional system of protection of human rights, the danger of weakening and further diluting this system is real. Although the Resolution adopted in March closes a contentious two-year process of reflection on the Inter-American human rights organs, it also requires the OAS Permanent Council to continue the dialogue on additional proposals for change. It is likely that these proposals will soon appear and put Latin America's human rights cause in serious danger, since they are controversial from the human rights defenders' perspective.

In the future, OAS member states could blackmail the regional system and push for undesired reforms by threatening to withdraw from the Convention. Since there is already no regional universality concerning the Court's jurisdiction (9 out of 35 countries are not bound by the Convention), the withdrawal of other states would further limit the regional scope of action of the Court. At the same time, it should be underlined that the Commission would remain relevant for all OAS countries, because they are bound by the American Declaration on the Rights and Duties of Man (1948)⁵. Most experts affirm that in order to completely withdraw from the jurisdiction of the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights, a state must withdraw its membership from the OAS, and this is unlikely to happen in the near future. However, in the OAS framework states can (as some of them did in the past) consider that the Commission only issues non-binding Recommendations and decide not to apply them.

Nevertheless, the Commission remains the key actor of the system of regional protection of human rights and it needs to maintain its authority and independence. Further attempts of the ALBA countries and other like-minded states to weaken this institution, will be attentively followed and countered, not only by human rights activist groups, but also by other international actors such as the United Nations High Commissioner for Human Rights (already explicit on this topic) or regional organisations like the Council of Europe. A further deterioration of the regional system of protection of human rights in the Americas would create a dangerous precedent for Europe. Some European states may take inspiration from the views and actions taken by some Latin American countries. The "domino effect" even if of little probability, may be felt. Therefore, the Council of Europe should consider how it could help the IACHR to strengthen its capacity to fulfil its mandate to promote the observance and protection of human rights, in an independent and autonomous manner.

BWM

⁵ The terms of the Declaration are still enforced with respect to those states that have not ratified the Convention, such as Cuba, the United States and Canada.