

Chile and the Inter-American Human Rights System: Past, Present, and Future

Par Engstrom

This chapter introduces the Inter-American Human Rights System (IAHRS or ‘the System’) in two sections. The first part briefly analyses the System’s current state, including its achievements and the many challenges it faces. Reference is made to the central issues that confront the IAHRS both today and in the near future. Secondly, the chapter describes the relationship between Chile and the System, especially outlining certain comparative perspectives between Chile and the IAHRS, which may be helpful in thinking of Chile not only as an isolated island cut off from the rest of Latin America, but as part of a regional human rights system.

I. The Inter-American Human Rights System: Current State of Affairs

First, what are the achievements of the System and what are the challenges facing it? It needs to be said that any answer to these questions will inevitably depend on your perspective, and in particular, what you think one could reasonably expect the System to achieve.

Achievements

As to the System’s achievements – the glass half full version of this story – five particularly salient dimensions illustrate how the IAHRS has emerged as the central human rights reference point in its region.

In terms of rule-making, both the Inter-American Commission and the Inter-American Court of Human Rights (IACtHR) perform a crucial function in the development of human rights standards. The Court has developed progressive human rights jurisprudence through its rulings, in particular when it comes to reparation policies. The Commission also serves an important function in this regard through its thematic reports and development of policy guidelines; in other words, though its role in the development of soft law.

The System’s monitoring and evaluation functions also need highlighting. An independent regional human rights court and an autonomous commission regularly monitor the performance of regional states and judge whether regional states are in compliance with their international human rights obligations.

Moreover, the IAHRS has established itself as an important advocacy actor in its own right in Latin America. The Commission in particular, has developed a comprehensive

set of tools in addition to individual cases that range from public diplomacy in the form of press releases, public hearings, onsite visits, interim measures (precautionary mechanisms), to behind the scenes negotiations with state officials and individual petitioners. But the IAHRs also performs an important indirect advocacy role by providing an important platform for human rights NGOs; some of which have been very adept at integrating the IAHRs into their advocacy strategies in order to bring pressure for change in their domestic political and legal systems.

The IAHRs also performs important accountability functions, though we should not exaggerate their relative robustness. Various mechanisms have been developed by the IAHRs to hold states accountable for human rights violations, including Court rulings, and compliance reports. However, these are weak accountability mechanisms in the sense that there are no enforcement mechanisms in place to hold states responsible for implementation to account. For example, there is no clearly mandated political compliance mechanism, as assumed by the Committee of Ministers in the European system. Still, accountability can operate through various channels, including primarily domestic accountability mechanisms – e.g. in the form of mobilisation of public opinion around specific cases, raising awareness through media strategies, and domestic litigation processes.

Finally, the focus on domestic politics highlights the ways in which the IAHRs has become increasingly inserted into domestic policy and legislative debates on specific human rights issues across the region. This signals, among other things, a gradual move away from a dominant focus on contentious litigation of individual cases to attempts to settle cases through friendly settlement procedures. This “change of paradigm” in human rights activism also reflects the increasing use of individual cases to promote broader government policy changes and institutional changes.

Challenges

I have already alluded to some of the many challenges facing the IAHRs. Let us therefore turn to two particularly important challenges facing the system.

First, does the system ‘matter’ to those mostly in need, however conceived? Put differently, this is a question of access and participation. Individuals and groups in the Americas may submit complaints of human rights violations to the Inter-American Commission, and the Commission may refer cases to the Inter-American Court if the country involved has accepted the Court’s jurisdiction.

We should not overstate, however, the general accessibility of the IAHRs to individual petitioners. The capacity of actors to access and to mobilize the IAHRs is highly unequal. Successfully accessing the IAHRs requires high level of legal and technical expertise. In practice, this means that the vast majority of petitions that actually gain traction in the System – i.e. proceed beyond initial submission phase – are advocated by NGOs. Nonetheless, engaging in the process of litigation before the IAHRs involves very lengthy proceedings that imply a significant drain on already limited resources for NGOs that pursue litigation. The outcomes are also highly unpredictable and very often

partial. Still, the Commission receives an increasing number of petitions, which has led to a significantly increased case-load, and back-log of cases, for the System.

Another aspect to note in this regard is that individuals and groups do not have direct access to the Court. The Commission only has the mandate to bring cases to the Court. In practice, this means that the lawyers of the Inter-American Commission have been delegated the responsibility to act on behalf of individual petitioners. This also means that often professional human rights NGOs bring cases representing individual victims or group of victims. The structure of these dynamics is such that potential problems of representation and legitimacy may arise, with NGOs pursuing interests and objectives that are not necessarily aligned with the interests of individual victims; e.g. devising litigation strategies that may seek to leverage individual cases to bring about broader policy and legislative changes, for example. Indeed, this is a potential issue in strategic litigation cases more generally.

A second challenge to the system concerns its future, in light of political changes in the region, as well as broader global shifts that may increasingly challenge the international human rights regime. The Inter-American System is subject to some very significant legitimacy and authority challenges. From the perspective of the users of the IAHRs, as explained above, the system can appear fairly inaccessible. For the petitioners that manage to pursue their cases, the outcomes are also highly unpredictable and very often partial.

Moreover, the internal functioning of the System also raises questions concerning the perceived legitimacy and efficacy of the system. For example, one common criticism is that the Commission is not transparent in its selection of what cases to accept. The length of proceedings also undermines claims that justice is rendered even in cases that result in a Court ruling for example. Doubts are regularly raised concerning the competence, independence, and motivations of individual members of the Commission and the Court. And, the significant growth in the IAHRs' caseload has occurred without any corresponding rise in funding.

Moreover, states are regularly questioning the authority of the System; some withdrawing their diplomatic and financial support. Venezuela has withdrawn from the Court's jurisdiction, and Ecuador, Peru and Nicaragua have threatened to follow Venezuela's example. In addition, influential countries escape meaningful scrutiny and accountability. This raises the problem of having one system seeking to apply general principles of law in a regional context characterised by considerable heterogeneity between, and within, countries.

Still, to conclude this part on a semi-optimistic note: despite its many institutional weaknesses, the IAHRs performs many important functions as briefly outlined above. And the system continues to be turned to by those who have been denied justice at home.

II. Chile and the IAHRs

This part offers some observations that take a slightly longer view on Chile's relationship with the system, beyond individual cases, however important they are, both for Chile and for the System itself.

A History of Distance

The history of the relationship between Chile and the IAHRs might be best characterised as distant, for a number of reasons that have to do with nature of Chile's transition to democracy, patterns of civil society mobilisation, judicial and legal 'culture', and institutional attitudes within the Chilean state.

The Inter-American Commission conducted an on-site visit shortly after the military coup in 1973, and published a number of reports on the human rights situation in the country during the Pinochet regime (in 1974, 1976 and 1977). However, the IACHR reports did not leave the same legacies on Chilean human rights politics as the report on Argentina following the 1979 IACHR visit to that country.

Moreover, given the negotiated nature of the democratic transition in Chile, international human rights played a marginal role in early years of democratic governments. This is despite the fact that shortly following the democratic transition in 1990, Chile ratified a number of key human rights treaties, including the American Convention on Human Rights, whilst also recognizing the contentious jurisdiction of the IACtHR.

1. Chilean civil society and the IAHRs

Chile's very active human rights organizations made little use of the IAHRs in the early period of the democratic transition. In part this can be explained by the fact that many human rights activists following the democratic transition took up government positions, and some civil society organizations cooperated extensively with the state.

Moreover, given the robustness of the military regime's 1978 amnesty law in this early period combined with the strong association of human rights with the past and leftist ideology in Chile, meant that there was a significant disconnect between civil society organizations focusing on the past with those organizations that sought to expand the human rights agenda to include more contemporary challenges.

In addition, Chilean human rights organizations have tended to be relatively disconnected from regional support networks for bringing cases to the IAHRs. It should be noted, however, that there have been some important shifts in recent years in all these aspects that have raised the profile of the IAHRs in Chilean human rights politics.

2. *Chilean judiciary and the IAHRS*

The Chilean judiciary has traditionally not engaged with international (human rights) law. Judges have generally taken the view that human rights are a political issue and a matter for the other branches of government. As a result, the judiciary has tended to overall adopt a passive attitude towards the Chilean state's international human rights obligations, a sovereigntist position on the status of international human rights treaties in relation to domestic laws, and generally rejected supra-national judicial instances (with the exception of those in the field of international trade law).

It might be the case that Chilean judges have become increasingly open to legal arguments drawing on international human rights law, especially at the higher levels of the judiciary. But, many continue to face the professional risk of having their decisions overturned in higher courts, if they rely primarily on international legal norms.

However, the use of strategic litigation appears to be on the rise in Chile. Therefore, the accumulation of cases before the IAHRS combined with domestic litigation efforts has pushed the Chilean judiciary to increasingly engage with international human rights law.

Chilean state institutions and the IAHRS

With regards to Chilean state institutions, the engagement with the IAHRS has been similarly reluctant. As in other countries in Latin America, the relationship with the IAHRS has mainly been channelled through the Foreign Ministry, the *Cancillería*. This brings with it the risk of a general disconnect from domestic human rights politics. Moreover, the *Concertación*'s general human rights policy over the years has remained unclear, with the result, it appears, that the *Cancillería* has not received clear instructions with regards to what policy to pursue in relation to the IAHRS. Moreover, the human rights section within the *Cancillería* has limited institutional power.

As a result, the Chilean state has generally adopted a defensive and overwhelmingly reactive position with regards to the IAHRS, including the refusal to accept any state responsibility for actions taken, and not taken, by the domestic judiciary.

Also in stark contrast with the case of Argentina, for example, Chile has generally been reluctant to accept the binding nature of the judgements of the IACtHR. It has adopted a formal and legalistic approach in the negotiations with the IAHRS, and it has on occasion resisted engaging more actively with Chilean litigants before the IAHRS.

Will the future resemble the past?

Although there have been some paradigmatic Chilean cases before the IAHRS that have prompted legislative reforms, such as *The Last Temptation of Christ*¹ case with regards to

¹ I/A Court H.R., Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile. Merits, Reparations and Costs. Judgment of February 5, 2001. Series C No. 73

freedom of expression, the relationship between IAHRS and Chile has been tentative. To be fair, it should be pointed out that this should also be attributed to the IAHRS itself. The IACHR, for example, has generally not considered Chile to be a problematic country by regional standards. It has therefore taken a very long time to process Chilean cases submitted to it.

Still, all this raises the question: does the future relationship between Chile and the IAHRS have to resemble the past? There have been changes in recent years with the Chilean state more consistently engaging with the IAHRS and taking the system more seriously. To a large extent this can be explained by the increasing use of the system by Chilean human rights advocates, but it is also a result of a more active role of Chilean state authorities in international human rights fora more generally. As the contributions to this book amply illustrate, the Inter-American System is playing an increasingly important role in Chilean human rights politics, and, conversely, Chilean cases have contributed significantly to the development of the System's jurisprudence over the years. The critical assessment of the relationship between Chile and the Inter-American Human Rights System that this book offers is therefore long overdue.