

HOW TO MAINTAIN THE INDEPENDENCE OF A HUMAN RIGHTS BODY WITHIN AN INTERGOVERNMENTAL STRUCTURE: THE CASE OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS IN THE ORGANIZATION OF AMERICAN STATES

JEFFERSON NASCIMENTO
AND RAÍSA CETRA

FOREIGN POLICY AND HUMAN RIGHTS
PROGRAMME, CONECTAS HUMAN RIGHTS

INTRODUCTION

The Inter-American Commission on Human Rights (IACHR) – a political and quasi-judicial body of the Inter-American Human Rights Protection System (IAHRS)¹ – has faced serious threats to its independence over the past two years. What became known as the Process for Strengthening the IAHRS, which began in mid-2011, and which was

not the first such process, demonstrated the challenges faced by a body that is intended to protect and promote human rights, but that is also a part of an intergovernmental structure. This makes it subject to the shifting circumstances of the member states of the organisation – in this case, of the Organization of American States (OAS).

A principal and autonomous organ of the OAS, the Commission is the only institution with a mandate to promote and protect human rights all around the American hemisphere. Such mandate is rooted in the OAS Charter and complemented by dispositions contained in the American Convention on Human Rights, the latter applicable only to state parties. Since its inception, the Commission has evolved from an imminently promotional body to an organ with a wide scope of action, including thematic reports, on-site visits and an individual petition system. The IACHR had an important role as a last judicial remedy in many Latin American states ruled by military dictatorships during the 1970s and 1980s and has also been a protagonist during ongoing processes of transitional justice in countries such as Argentina, Peru and Uruguay.

Notwithstanding, even this role has been changing. Victor Abramovich claims that the change in the Commission's form of action – from a last recourse to justice for victims, to effectively influencing the quality of dem-

ocratic processes² – in recent decades has impacted on the public human rights policies of OAS countries, not least because civil society in those countries have access to transnational legal activism as an instrument of transformation.³ The establishment of standards on the right of freedom of expression,⁴ the compilation of a legal framework regarding the right to access to information⁵ and reports on the human rights of persons deprived of liberty in the Americas⁶ are illustrative of how the IAHRS has had an impact on improving the quality of democratic processes.

RESULTS OF THE RECENT PROCESS

Despite initially being linked to the emergence of the OAS – having been created in 1959 at an ad hoc meeting of Ministers of Foreign Affairs⁷ – the IACHR has, since the approval of its first statute in 1960, been recognised as an autonomous body of the OAS, with the primary function of promoting the observance and defence of human rights in the 35 member states of OAS.⁸

Although the debate on the need to strengthen and reform the IACHR is not new,⁹ the recent attempt by member states to reform it and restrict its autonomy was particularly striking, particularly in its attempt to eliminate Chapter IV of the IACHR's annual report, which covers the human rights situ-

ation in member states identified as needing the IACHR's special attention. There were also challenges to the legitimacy and independence of its Special Rapporteurship for Freedom of Expression and on the alleged lack of authority of the IACHR to issue precautionary measures.¹⁰ Such measures are remedies aimed to tackle serious and urgent situations that present risks of irreparable harm to persons or to the subject-matter of pending cases before organs of the Inter-American System.¹¹

A discussion on the independence and autonomy of the IACHR was launched with the creation of the Special Working Group to Reflect on the Workings of the Inter-American Commission on Human Rights, by the OAS Permanent Council on 29 June 2011, with a view to Strengthening the Inter-American System of Human Rights. This process came to an end in March 2013,¹² but can easily be updated.¹³ The process enabled some member states to voice their strong discontent with the IACHR's work.

During the process, it was no easy task to assert the independence and autonomy of the Commission. Intense debate between CSOs, academics, member states that opposed reform ideas and the IACHR itself was extremely important in order to prevent the worst case scenario. Nevertheless, there is a continuous need to assert the Commission's independence and to consolidate a

strong IACHR that is capable of resisting attempts to limit its freedom of action in the face of tough challenges by some states.

While not offering an exhaustive list, this article identifies some aspects, structural and political, that are key to preserving the autonomy of the IACHR. Some of these were revealed during the recent process and others have been recognised for some time by concerned CSOs and academics. Key structural aspects, those related to the organisation and workings of the IACHR, include the choice of its members and the sustainability of its funding, while political factors include its autonomy to choose where and how it will act and its capacity to inform political processes and policies.

MEASURES TO MAINTAIN THE INDEPENDENCE AND AUTONOMY OF THE IACHR

Transparency in the choice of Commission members

The Commission is composed of seven members, elected in a personal capacity by the General Assembly of the OAS from a list of candidates proposed by member states.¹⁴

The only criteria are that they must be "...persons of high moral character and recognized competence in the field of human rights."¹⁵ Until recently, this selection process offered no scope for accountability and meant that the members selected might not always be independent members who are genuinely committed and capable of carrying out the purposes of the IACHR.



In May 2013, after the conclusion of the strengthening process, an important step was taken to improve the accountability and transparency of elections of members,¹⁶ which took place in July 2013: for the first time, a forum¹⁷ was organised in which the candidates gave presentations about their backgrounds and primary concerns for the Commission and answered questions prepared by states and

CSO representatives.¹⁸ According to Lilia Varela, attorney at *Instituto de Defensa Legal* a Peruvian NGO, "both the presentations and the proceeding dialogue were quite formal and diplomatic, but they allowed civil society and the public in general who watched the event on the OAS webcast to get to know the candidates a little better."¹⁹ The forum, not yet formally enshrined in either the IACHR's Rule of Procedure or American Convention,

has the potential to increase independence of candidates by minimising the possibility of “clean slate” elections (i.e. uncontested and/or previously-arranged disputes) and to give CSOs an additional basis for their advocacy, considering the commitments made by candidates during the interactive dialogue.

Improving the transparency of the election process can be seen as one way in which the IACHR can be supported to assert its autonomy, in a crucial process for its functioning. This mechanism needs to be institutionalised, extended and properly regulated to guarantee its effectiveness as an instrument of civic oversight, rather than remain an isolated initiative that is dependent on the political will of member states.



FINANCIAL SUSTAINABILITY AND AUTONOMY IN THE MANAGEMENT OF RESOURCES AND PRIORITIES

Another crucial challenge is the shortage of financial resources for the IACHR, a recurring sticking point in debates over its strengthening. Its funding is split between regular fund-

ing, provided by the OAS²⁰ and specific funding²¹ – made up of voluntary donations from member states, permanent observers and other institutions. However, funding is not substantial, given the IACHR’s many functions and concerns.²² The restrictive budget means that significant resource allocation decisions have to be made and some activities take precedence over others, for instance, preventive measures (general reports) over protective ones (individual cases).

As stated by Felipe González, president of the IACHR, the lack of adequate funding “has particularly [sic] detrimental effect on the case system, which cannot possibly process the enormous volume of complaints it receives every year in a timely manner.”²³ The long time to assess cases in the system of individual

petitions wanes its utmost importance as tool to challenge violations of human rights protected by American Convention, mainly when national judicial systems are incapable of a properly response.

This issue came to light during the strengthening process,²⁴ and some states criticised the increased priority the IACHR arguably gives to protection activities (the system of individual petitions and

precautionary measures) to the detriment of promotion activities (through thematic reports, in loco visits and training activities, among others).²⁵ In order for such criticisms to be avoided, and for the autonomy of the IACHR to set its agenda, it is necessary to increase the size and diversity of its funding, both by increasing the voluntary contributions of member states²⁶ and by finding new sources of funding. Here, CSOs could play an important role by pressuring states to step up the amount and frequency of their voluntary contributions and by campaigning for new donators.

Ensuring that the IACHR manages its own financial resources is essential if it is to have effective decision-making autonomy and the ability to prioritise actions based on its own analysis. Autonomy implies that the Commission can make decisions based on human rights criteria, rather than on the political disposition of states.

CONCLUSION: CHALLENGES PERSIST TO IACHR AUTONOMY

The IACHR must remain effectively independent if it is to maintain and expand its role as a relevant body that can influence political processes and the shaping of public policies in OAS countries.

The transition from being a Commission with an open mandate to promote human rights

to offering a locus of protection through the use of individual petitions – a powerful tool to challenge violations of human rights committed by state parties and protected by American Convention – has made the IACHR a privileged agent in the process of globalising human rights standards, from which national courts and decision-makers in the countries of the region are not immune.

The Commission has been criticised for awareness of its importance in shaping public policies; however, this is part of the Commission's unique role within the IAHRs. Criticisms made by some voices²⁷ during the strengthening process about the IACHR's political character – often in contrast to the judicial nature of the Inter-American Court of Human Rights, implying the superiority of that body – underestimate the fundamental distinct purposes of the Commission and the Court and there should not be taken on, and the IACHR's functional independence celebrated as enabling a systemic vision of the protection of human rights in the region that is not made by any other OAS body.

It is worth pointing out that, on the institutional level, after the debates on the strengthening process were over, the independence and autonomy of the Commission had not been altered from what is stated in the Charter of the OAS.²⁸ Nevertheless, a systematic analysis of the alterations made to the IACHR's Rules of Procedure reveals that

measures that seem necessary at first glance – such as greater clarity in the handling of petitions (Articles 26 and 29), more thorough justification in decisions on admissibility (Article 36) and refinement of the analysis criteria for issuing precautionary measures (Article 25) – may have an adverse effect on the decision-making autonomy of the Commission, since the resulting increase in its workload was not adequately addressed by the provision of additional resources.

This means that the lack of attention paid to ongoing structural deficiencies of the Commission during the strengthening process could, in practice, undermine what actions the IACHR is able to perform; it may make decisions based more on what actions are possible, given multiple administrative limitations, rather than on what is most necessary to address human rights violations in the region, an aspect unfortunately seen in other intergovernmental institutions, although the IACHR has a very specific context and functions.

Even after the completion of process – although the outcome was not particularly negative for the Commission, and it maintained its autonomy by taking the lead in the reform of its rules of procedure – challenges remain. Challenges such as the unaddressed issue of financial sustainability, potential ambiguity over the implementation of its new rules of procedure and reform of pro-

cedures that are still not institutionalised demonstrate the need for continuing dialogue with OAS member states.

In the current climate, the Commission must not lose sight of its important role as a relevant body that can influence political processes on human rights in the Americas and can continue to make progress in key areas in the realisation and protection of human rights, regardless of ongoing criticisms and limitations.

¹For more information on the process of strengthening the IACHR, please see: <http://www.oas.org/en/iachr/mandate/strengthening.asp>.

²V Abramovich, From massive violations to structural patterns: new approaches and classic tensions in the Inter-American Human Rights System, (2009) Sur - International Journal on Human Rights 6(11), 7.

³C Santos, Transnational legal activism and the State: reflections on cases against Brazil in the Inter-American Commission on Human Rights, (2007) Sur - International Journal on Human Rights 4(7), 29.

⁴A Hemispheric Agenda for the Defense of Freedom of Expression, Office of the Special Rapporteur for Freedom of Expression Inter-American Commission on Human Rights, 2010, available at: <http://www.oas.org/en/iachr/expression/docs/publications/Hemispheric%20Agenda%20Eng%20FINAL%20portada.pdf>.

⁵The Inter-American Legal Framework Regarding The Right To Access To Information, Office of the Special Rapporteur for Freedom of Expression Inter-American Commission on Human Rights, 2009, available at: http://www.oas.org/es/cidh/expresion/docs/cd/sistema_interamericano_de_derechos_humanos/index_IALFRAI.html.

⁶Report on the Human Rights of Persons Deprived of Liberty in the Americas, Inter-American Commission on Human Rights, 31 December 2011, available at: <http://www.oas.org/en/iachr/pdl/docs/pdf/PPL2011eng.pdf>.

⁷Final Act, Fifth Meeting of Consultation of Ministers of Foreign Affairs. Organization of American States, August 1959, available at: <http://www.oas.org/consejo/MEETINGS%20OF%20CONSULTATION/Actas/Acta%205.pdf>, pg 11.

⁸Chapter I, Origins and Legal Bases of the IACHR, IACHR, Organization of American States, available at: <http://www.cidh.org/annualrep/98eng/Chapter%20I.htm>.

⁹Above fn 2, pg 8.

¹⁰D Ventura, F Piovesan and J Kweitel, Sistema Interamericano sob forte ataque [Inter-American System under strong attack], Folha de São Paulo newspaper, 7 August 2012, available at: <http://www.conectas.org/en/actions/foreign-policy/news/in-the-media-tendencias-debates-folha-de-s-paulo-newspaper>.

¹¹In accordance with Articles 106 of the Charter of the Organization of American States, 41(b) of the American Convention on Human Rights, 18(b) of the Statute of the Commission, Article 25 of the Rules of Procedure of the Commission and Article XIII of the American Convention on Forced Disappearance of Persons.

¹²Process to reform the Inter-American System draws to a close, Conectas Human Rights, 26 March 2013, <http://www.conectas.org/en/actions/foreign-policy/news/process-to-reform-the-inter-american-system-draws-to-a-close>.

¹³At the Conference of States Parties to the American Convention on Human Rights, some governments, such as Ecuador, still repeated the criticisms made during the Strengthening Process.

¹⁴Article 36 American Convention on Human Rights, Organization of the Inter-American Commission on Human Rights, 1969, available at: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm.

¹⁵Article 1, Item 3, Rules of Procedure of the IACHR, available at: <http://www.oas.org/en/iachr/mandate/Basics/rulesia-chr2013.pdf>.

¹⁶According to Articles 36 and 37 of the American Convention on Human Rights, the members of the Commission shall be persons of high moral character and recognized competence in the field of human rights, elected in a personal capacity by the OAS General Assembly from a list of candidates proposed by the governments of the Member States. Each of those governments may propose up to three candidates, who may be nationals of the State proposing them or of any other OAS Member State. When a slate of three is proposed, at least one of the candidates shall be a national of a State other than the one proposing the slate. The members of the Commission are elected for a four-year term and may be reelected only once.

¹⁷Forum with candidates for the IACHR, Due Process of Law Foundation, 25 April 2013, available at: <http://dplfblog.com/2013/04/25/foro-de-candidatos-para-la-cidh/>.

¹⁸L Varela, Por primera vez, candidatos a la CIDH se presentan en foro público organizado por la OEA [For the first time, IACHR candidates appear at public forum organized by the OAS], 2 May 2013, available at: <http://www.justiciaviva.org.pe/noti-home/notihome01.php?noti=1046>.

¹⁹Ibid.

²⁰In 2012, the allocation was equivalent to 6% of the OAS Budget, which represented 55% of all IACHR funding. For further information see: Sources of Financing and Execution of Resources 2012, IACHR, available at: http://www.oas.org/en/iachr/mandate/finances/Informe%20CIDH%202012_web_Eng_final.pdf

²¹In 2012, the allocation of Specific Funding was equivalent to 45% of IACHR funding. Ibid.

²²Above fn 14, Article 41.

²³F González, Three key aspects of strengthening the Inter-American Human Rights System, (2012) Aportes DPLf 5(16), 15, available at: <http://www.dplf.org/uploads/1338572412.pdf>

²⁴Report of the Special Working Group to reflect on the workings of the Inter-American Commission on Human Rights with a view to strengthening the Inter-American Human Rights System for consideration by the Permanent Council, Special Working Group to Reflect on the workings of the IACHR with a view to strengthening the IAHRS, 13 December 2011, available at: <http://www.oas.org/consejo/workgroups/Reflect%20on%20Ways%20to%20Strengthen.asp>, pg 16.

²⁵Ibid, pg 9, A.c.

²⁶Excluding donations by the United States, which represented 45 percent of the specific funding in 2012, only four member states donated the small amount of 10 percent of these funds. Above fn 20.

²⁷Some criticism of the criteria of admissibility of precautionary measures by IACHR and the lack of a conventional mandate to issue such kind of remedy (arguably an exclusive function of Inter-American Court of Human Rights) could be seen in P Vannuchi and C Timponi El Sistema Interamericano de Derechos Humanos, Foreign Affairs Latinoamérica 13(3), 40.

²⁸OAS Resolution 1/2013 – Reform of the Rules of Procedure, Policies and Practices, IACHR, OAS, available at: <https://www.oas.org/en/iachr/decisions/pdf/Resolution1-2013eng.pdf>.