

# **Understanding the impact of the Inter-American Court of Human Rights**

Amalia Ydrefelt Hanell

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# **1. Introduction**

## **1.1 Background and research questions**

The Inter-American Court of Human Rights (Inter-American Court or the Court) was founded through the American Convention of Human Rights (ACHR), which was adopted in 1969 and came into force in 1978. As the sole judicial organ of the Inter-American human rights system and the final adjudicator of the ACHR, the Court has been a central actor in determining and shaping the human rights agenda through the modern Latin American history of dictatorships, civil wars and political instability. As democratization processes and peace efforts have made their marks on the continent, petitions alleging human rights violations continue to increase and reached an all-time high in 2019.<sup>1</sup> However, state compliance rates with the Court's judgments remain low.

Against this background, this essay seeks to explore how the Court is contributing to human rights protection in Latin America. Specifically, it seeks to outline what impact the Court might have despite its low compliance rates.

## **1.2 Disposition and limitations**

In order to give a broad understanding of the Court, the essay will begin by describing its function before it moves on to investigate the compliance rates and what they suggest. The essay will then explore what other types of impact the Court can achieve. Finally, from these collected findings, the Court's contribution to human rights protection in Latin America will be discussed.

Since the Court is part of a broader Inter-American System for Human Rights (IAHRS), it is in certain aspects impossible to analyze without also acknowledging the role of the Inter-American Commission of Human Rights (the Commission), which the Court is particularly linked to since the petition process within the IAHRS begins at the Commission.<sup>2</sup> However, this essay seeks to understand the impact of the Court as a judicial organ and not of the IAHRS as a whole, and therefore the specific or combined effects of the Commissions work is not further explored. Another limitation follows from the Court's monitoring of compliance, which focuses on judgments made within their contentious function. Because of this, the essay will not examine effects of the Court's other functions, such as friendly settlements, provisional measures and advisory opinions.

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<sup>1</sup> The Inter-American Commission on Human Rights, *Annual Report 2019*, p. 63.

<sup>2</sup> Art. 61 ACHR.

## 2. The Inter-American Court of Human Rights

### 2.1 The Court's jurisdiction and mandates

The Court is the judicial organ of the IAHRs, set up by the Organization of American States (OAS). The OAS is an organization made up by 35 independent states of the Americas with the purpose, inter alia, to strengthen peace and security on the continent.<sup>3</sup> The Court came into force through the ACHR with the main purpose of the application and interpretation<sup>4</sup> of the same document, as well as ensuring state compliance with the rights set forth in it.<sup>5</sup>

Under its contentious jurisdiction, the Court rules on whether a state has violated any of the human rights included in the ACHR. The Court's jurisdiction, however, is limited to those states that have ratified the ACHR and accepted the jurisdiction.<sup>6</sup> As of today, this includes 20 states.<sup>7</sup> Two states – Trinidad and Tobago and Venezuela – have left the Court's jurisdiction by denunciation,<sup>8</sup> while 13 states of the OAS have never accepted it. This includes the influential Northern American countries of the United States of America and Canada. It is therefore safe to say that the Court's case law has developed largely in the specific Latin American context and its experiences of the late 20<sup>th</sup> century.

Any person, group of persons, or nongovernmental entity that is legally recognized in a member state of the OAS may file a petition to the Commission alleging that an individual's right has been violated.<sup>9</sup> The case can be submitted to the Court, if the state party does not follow the Commission's recommendations or if the state itself wants to challenge the Commission's attribution of responsibility.

If the Court finds that there has been a human rights violation under the ACHR, the state incurs international responsibility for the violation of international law with the resulting duty to make reparation and put an end to the consequences of the violation.<sup>10</sup> For these purposes, the Court has developed a wide range of reparations through its case law, including measures for restitution, rehabilitation, satisfaction, guarantees of non-repetition, obligations to punish those responsible for the human rights violations as well as compensation and reimbursement of costs and expense.<sup>11</sup> In each ruling where a state is

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<sup>3</sup> The OAS was set up in accordance with article 52 of the Charter of the United Nations, which affirms that regional arrangements for the maintenance of peace and security are not in breach of the Charter.

<sup>4</sup> Zuloaga, p. 407.

<sup>5</sup> Pasqualucci, s. 4.

<sup>6</sup> Art. 62 ACHR.

<sup>7</sup> Inter-American Court of Human Rights, *Annual Report 2019*, p. 12.

<sup>8</sup> *Ibid.*, p. 12, footnote 6.

<sup>9</sup> Art. 44 ACHR.

<sup>10</sup> Inter-American Court of Human Rights, *Case of Blake v. Guatemala*, Judgment of January 24, 1998.

<sup>11</sup> Pasqualucci, p. 299.

found guilty of a human rights violation, the Court provides the state with a checklist of highly specific steps of reparations – *compliance orders* – that they must undertake. The Court then uses that checklist to follow up on the state’s behavior, carefully examining and judging whether the steps are complied with or not. They continue to issue such compliance reports indefinitely until compliance is considered complete.<sup>12</sup>

### **3. The effects of the Court**

#### **3.1 Compliance with Court-ordered reparations**

According to article 68(1) of the ACHR, states are to undertake to comply with the judgment of the Court in any case to which they are parties. As follows from the principle of *pacta sunt servanda*, states are obligated to comply with their treaty obligations, including the rulings of international tribunals.<sup>13</sup> As described above, the Court is responsible for monitoring state compliance with their rulings. The ACHR, however, does not stipulate any penalties in the case of non-compliance and the Court has no other mechanisms to enforce its judgments.<sup>14</sup>

As of the end of 2019, the Court announced that a total of 35 of cases had been closed “because each and every reparation ordered in the respective judgment had been completed”.<sup>15</sup> Remaining 223 cases were reported to be on the stage of monitoring compliance with judgment, meaning that the reparations ordered had not yet been fulfilled. This means that by the end of 2019, only 13.5 % of the Court’s rulings had been complied with. Considering this low number, it might be understandable that the success of the Court has been questioned.<sup>16</sup>

The closer implications of these rather discouraging numbers have however been the subject of examination for several researchers. As the Court use an “all-or-nothing-criterion”, a state party is considered non-compliant with a ruling until it has complied with all of the ordered reparations.<sup>17</sup> This is especially relevant since the Court’s rulings generally contain a long and specified list of reparations measures, ranging from apologizing and paying compensation to ordering legal reform and ensuring prosecution.<sup>18</sup>

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<sup>12</sup> Hawkins and Jacoby, p. 44.

<sup>13</sup> *Pacta sunt servanda* is a general principle within international law, that is stated for example in article 26 of the Vienna Convention on the Law of Treaties (23rd of May, 1969). See also Pasqualucci, p. 299.

<sup>14</sup> Pasqualucci, p. 7. Engstrom, p. 47.

<sup>15</sup> Inter-American Court of Human Rights, *Annual Report 2019*, p. 85.

<sup>16</sup> See for example Posner and Yoo (2005), *Judicial Independence in International Tribunals*, 93 California Law Review 1.

<sup>17</sup> *Ibid*, p. 85. González-Salzberg, p. 123.

<sup>18</sup> Zuloaga, p. 408.

As a consequence, a notable gap in compliance rates can be found between the different types of reparations measures used by the Court. González-Salzberg, who examined all of the Court's cases up to the end of 2008, found that while economic compensation to victims and payment of costs and expenses was fulfilled in 70 % and 59 % of cases respectively<sup>19</sup>, the obligation of prosecuting the individual perpetrators of a human rights violation had a 0 % compliance rate. Not a single state had complied with an order of the latter sort until Peru fulfilled its obligation in the case of *Castillo-Páez* the following year (2009).<sup>20</sup>

Basch et al., who performed a study of compliance rates with both the Court and the Commission, similarly found that economic compensation, symbolic reparations as well as the restitution of rights had the highest compliance rates. These were also the reparations measures that were most often ordered by the Court.<sup>21</sup> Orders to investigate and punish those responsible for violations, on the other hand, were the reparation measures least complied with.<sup>22</sup> Another study by Hawkins and Jacoby also found that payment of moral and material damages and of costs and expenses were the reparations most complied with, and added that these are the measures that are complied with within in the least amount of time.<sup>23</sup>

These studies demonstrate that although a 13.5 % compliance rate is an admittedly very low number, consideration must be taken to the full meaning behind it. As described by Hawkins and Jacoby, states rarely do all they are ordered to do, but by the same token, they rarely do nothing at all.<sup>24</sup> González-Salzberg similarly noted that all states under the Court's jurisdiction had taken some steps to comply with an ordered reparation.<sup>25</sup> In fact, partial compliance was found in 83 % of the cases examined and was therefore the most prevalent state behavior in relation to Court's rulings.<sup>26</sup> It is therefore necessary to use the perspective of partial compliance to fully understand the effects of the Court's rulings.

### **3.2 Non-compliant state behavior**

When considering the Court's use of extensive order lists as well as their supervision by an "all-or-nothing-criterion", the low compliance rates appear somewhat more nuanced. As

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<sup>19</sup> González-Salzberg, p. 128.

<sup>20</sup> Inter-American Court of Human Rights, *Case of Castillo-Páez. Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of April 3, 2009.*

<sup>21</sup> Basch et al, p. 16.

<sup>22</sup> Ibid, p. 18.

<sup>23</sup> Hawkins and Jacoby, p. 58.

<sup>24</sup> Ibid, p. 60.

<sup>25</sup> González-Salzberg, p. 129.

<sup>26</sup> Hawkins and Jacoby, p. 56.

the Court itself has stated, the time in which a case may remain on the stage of monitoring compliance is impacted by the number of reparations ordered, their nature and complexity.<sup>27</sup> Within the wide range of reparations that the Court uses, there are obvious variations in how easily achievable these are for the convicting state. The method adopted can be compared with that of the European Court of Human Rights, which does not specify reparations measures other than to pay the “just satisfaction” and to identify and execute any other steps to bring it into compliance.<sup>28</sup>

The more extensive method of the Inter-American Court should be understood to have evolved to fit the specific context of gross and systematic violations of human rights.<sup>29</sup> Founded in an era of military dictatorships and civil wars, the Court lacked a base of well-functioning democracy and rule of law.<sup>30</sup> Despite Latin America being a significantly more peaceful and secure place today, widespread corruption and impunity remains.<sup>31</sup>

Consequently, the fact that complicated and more far-reaching measures are complied with in lower numbers cannot always be taken as disregard for human rights.<sup>32</sup> Such violations often occur within fragile state systems where responsibility is difficult to establish. Even if political will exists, implementation can be hindered by ill-equipped state infrastructure.<sup>33</sup> The most notable example are orders to investigate, prosecute and punish individuals responsible for human rights violation. As shown, such orders are seldom fulfilled, which reflects the state of impunity that also otherwise reigns in a large part of Latin America.<sup>34</sup>

On the other hand, it should not be ignored that human rights are a matter of political contestation both within and between Latin American states, and in some cases, non-compliance cannot be understood as anything else than refusal on the states behalf.<sup>35</sup> Such resistance might typically be associated with political and executive actors – most notoriously resulting in the denunciation of the ACHR – but can be found on several levels within the state system. For example, impunity for human rights violations during the military dictatorship-era is often the result of amnesty laws that still receive domestic

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<sup>27</sup> Inter-American Court of Human Rights, *Annual Report 2019*, p. 61.

<sup>28</sup> Hawkins and Jacoby, p. 44.

<sup>29</sup> Zuloaga, p. 408.

<sup>30</sup> Bailliet, p. 478.

<sup>31</sup> Bailliet, p. 478. Pasqualucci, p. 8.

<sup>32</sup> See also Zuloaga, p. 409.

<sup>33</sup> Engstrom, p. 49–50.

<sup>34</sup> Pasqualucci, s. 8. Bailliet, p. 480.

<sup>35</sup> See also Engstrom, p. 36–37.

support. In Brazil, the Supreme Court upheld the national amnesty law of 1979<sup>36</sup>, despite clear precedent from the Inter-American Court that such laws are in breach of the ACHR.<sup>37</sup> Only one of the Brazilian judges referred to the precedent, while the majority disregarded it and stated that the issue was a question of domestic law.<sup>38</sup>

In contrast, the Supreme Court of Uruguay referred explicitly to the Inter-American Court's case law when they declared their amnesty law of 1986 incompatible with the constitution in 2009.<sup>39</sup> Yet, in a national referendum just a few days after the judgment, 52 % of voters endorsed the law. Thus, when the Inter-American Court declared the law incompatible with the ACHR in the case of *Gelman v. Uruguay* in 2011<sup>40</sup>, compliance with the ruling could be expected to loiter due to the popular resistance to repealing the law.<sup>41</sup> The national congress, however, almost immediately enacted new laws that suspended statutes of limitation for dictatorship-era human rights crimes<sup>42</sup>, but they have since been challenged in domestic courts. The examples illustrate that Court's rulings that seek to support state-building run the risk of clashing with existing power structures<sup>43</sup> and that such resistance can be deeply rooted within states.

### 3.3 Impact outside of compliance

As shown in the previous section, compliance can be hindered by a variation of domestic factors, ranging from a lack of sufficient state infrastructure to resistance from different actors within the state. However, while compliance is one aspect of a successful human rights protection, it is not the only effect that an international court can achieve. Several scholars have rejected compliance theories and focused instead on other aspects to measure the effectiveness of international law. Specifically regarding the IAHRs, Engstrom has stated that "compliance might be necessary for effectiveness, but it is not sufficient".<sup>44</sup> Zuloaga goes even further and argues that human rights adjudication can have impact also in the complete absence of any compliance.<sup>45</sup>

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<sup>36</sup> Supremo Tribunal Federal do Brasil, Ação de Descumprimento de Preceito Fundamental, no 153/2008.

<sup>37</sup> See for example *Case of Barrios Altos v. Peru*, Judgment of March 14, 2001 and *Case of La Cantuta v. Peru*, Judgment of November 29, 2006.

<sup>38</sup> Torelly, p. 358. Six months later, the Inter-American Court declared the law incompatible with the ACHR in the *Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, Judgment of November 24, 2020.

<sup>39</sup> Suprema Corte de Justicia. Ficha 97-397/2004. Sentencia no 365. 19 October 2009, p. 30.

<sup>40</sup> *Case of Gelman v. Uruguay*, Judgment of February 24, 2011

<sup>41</sup> Torelly, p. 373.

<sup>42</sup> Ley 18.831, 27 october 2011. Article 2 and 3.

<sup>43</sup> Bailliet, p. 480.

<sup>44</sup> Engstrom, p. 42.

<sup>45</sup> Zuloaga, p. 403.

The concept of *impact* can be said to adopt a wider perspective than compliance in that it includes indirect effects such as ideational change and empowerment of local actors.<sup>46</sup> From this perspective, it should be observed that the Court has an influence on domestic legal actors beyond compliance in individual cases. As the final interpreter of the ACHR, and armed with a steadily developing case law, its rulings reach into the domestic adjudication of several other states as the ACHR obliges domestic courts to follow the Inter-American Court's interpretation of the same document.<sup>47</sup> At the same time, the increasing adaptation of fundamental rights into national constitutional law has strengthened the role of domestic courts as a key arena for human rights politics.<sup>48</sup>

One example of how this can play out is the Uruguayan Supreme Court ruling mentioned above, that used existing Inter-American Court precedent to repeal the country's amnesty law both on constitutional and conventional grounds even before the Inter-American Court ruled on the same law. Another example is the Supreme Court of Chile, which has succeeded to reduce impunity for human rights violations through a harmonization of domestic and international law, even without derogating the country's amnesty law.<sup>49</sup>

These cases show that if the national judiciary is willing to comply with the obligations laid down in the ACHR, they can achieve important human rights development by engaging with the Court's case law. Nonetheless, domestic courts can also show resistance to international law. This would suggest that the Court's impact is limited to those states where sufficient *will* to ensure human rights protection exists on either a political or judicial level.

Such a perspective on human rights implementation, however, does not take into account mechanisms for impact that comes from within the state, rather than from outside actors.<sup>50</sup> In fact, it has been suggested that a civil society that monitors and pressures national governments to comply with human rights law could be a more effective way of protecting human rights.<sup>51</sup> If the Court and the IAHRs as a whole is understood as an institution that provides opportunities for such domestic actors to press for change within their own political or legal system, another important aspect of its impact is brought to light.<sup>52</sup>

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<sup>46</sup> Engstrom, p. 44.

<sup>47</sup> *Case of Almonacid-Arellano et al v. Chile*, Judgment of September 26, 2006.

<sup>48</sup> Engstrom, p. 56.

<sup>49</sup> Torelly, p. 353.

<sup>50</sup> Simmons, p. 154.

<sup>51</sup> González-Salzberg, p. 133.

<sup>52</sup> Engstrom, p. 48.

Since the individual petition process was opened to non-governmental legal entities, human rights organizations have taken a predominant role in presenting and litigating cases all the way to the Court. This is of special importance since it has made it possible also for victims of marginalized groups and communities to come before the Court.<sup>53</sup> As described by Simmons, however, the power of litigation resides not so much in the ability to provide every victim with a decisive win, but rather in its strength as a political strategy.<sup>54</sup> In a survey performed by Zuloaga, she similarly found that human rights organizations bring cases to the Court not only to achieve justice for victims, but also because of the possibility of obtaining impact beyond compliance with the specific ruling.<sup>55</sup>

By successfully mobilizing before the Court, human rights organizations can add pressure on governments to adopt policies, implement legislative changes and reform institutions, independent of a specific ruling that require them to do so.<sup>56</sup> Hence, the IAHRS has provided a new channel for litigation which has strengthened the human rights movement on the ground and provided their demands with legal authority.<sup>57</sup>

## **4. Discussion**

### **4.1 The Court's contribution to human rights protection**

As found above, the compliance rates of the court is affected by the wide range of reparations measures ordered by the court as well as their varying complexity. Therefore, the concept of partial compliance is crucial in order to understand actual compliance within and show us that even though Court's rulings are far from fully complied with, they are generally not ignored.

Having said that, it should not be forgotten that low compliance rates also signal that the Court might be failing to safeguard individual's human rights. When a state does not comply with the decisions of the Court, the victims of the human rights violation in question are denied that right. Thus, even if a ruling can lead to important general improvements due to its extra compliance effects, it does not replace compliance in changing the original victim's situation.<sup>58</sup> To this background it can be reminded that the measures that focus on the reparation of the victim in question, such as payment of damages, costs and expenses as

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<sup>53</sup> Zuloaga, p. 412. Pasqualluci, p. 5.

<sup>54</sup> Simmons, p. 132.

<sup>55</sup> Zuloaga, p. 413–429.

<sup>56</sup> Engstrom, p. 52.

<sup>57</sup> Engstrom and Low, p. 141, see also p. 113.

<sup>58</sup> Zuloaga, p. 406.

well as public apologizes, generally have higher compliance rates. On the other hand, the measures that have the lowest compliance rates – punishing perpetrators, altering government behavior, and changing rules and institutions<sup>59</sup> – are those that might be essential to preventing *future* violations and ensuring a long term human rights protection in Latin America. Even considering that these measures are more time-demanding than others, the low compliance rates in this regard are worrying.

However, if compliance rates were the sole priority, the Court could easily improve their numbers by using a less extensive method. Instead, it continues to order and monitor reparations measures that calls for structural changes within the states. By doing so, it could be argued that the Court is attempting to build a more sustainable human rights protection in Latin America. Furthermore, it challenges the state of impunity, corruption and lack of rule of law that still hinders the development towards peace and security in the region. According to the United Nations, establishing such functioning institutions is vital to ensuring immediate security and the necessary stability for peacebuilding.<sup>60</sup>

In this regard, the Court cannot be seen as a sole actor, but as part of a change that requires actions on several levels. Thus, instead of viewing the Court as just a court that is failing to enforce its judgments, it can be understood as a creator of and advocate for human rights law, working from a unique position of legal authority supported by the ACHR. In this role, it can contribute to domestic human rights movement by handing out case law, strategy possibilities, and by setting the standard for sustainable human rights protection high.

There are obvious limitations to international human rights law in that it ultimately cannot change a state that does not want to be changed. On-going human rights violations as well as the denunciations of Trinidad and Tobago and Venezuela remain painful reminders of this basic dynamic. Nevertheless, when cooperating with domestic actors, the Court can contribute to a more effective pressure for change that comes from inside rather than outside of states, which might be essential to preventing human rights violation from occurring in the future.

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<sup>59</sup> See also Hawkins and Jacoby, p. 59.

<sup>60</sup> United Nations, *Rule of Law and Peace and Security*.

## **5. Conclusion**

### **5.1 The impact of the Inter-American Court**

The goal of this essay has been to explore how the Court is contributing to human rights protection in Latin America, and specifically what impact it might have despite its low compliance rates. The findings suggest that the Court's method of demanding specified, far-reaching and complex reparations seldom leads to full compliance with its orders. However, partial compliance is fulfilled in most cases and reparations such as economic compensation have relatively high numbers of compliance. This shows that the Court might have a larger influence on state parties than what the low compliance rates first suggest. More importantly it suggests that in many cases, victims of human rights violation receive some redress after a ruling from the Court.

On the other hand, reparations measures such as the obligation to investigate, prosecute and punish individuals, orders to alter government behavior or to perform legal reform have consistently low compliance rates. This reflects existing flaws in domestic human rights protection due to impunity, corruption and lack of rule of law in several Latin American states. While it seems that the Court is struggling to achieve impact in this area, it can be said to contribute to the long-term development of such institutions through its extra compliance effects. The Court as part of the IAHRS offer possibilities for domestic human rights actors to push for change within their states, as well as guiding decisions of domestic judicial and political actors. These impacts reach beyond state compliance in individual cases and can have effects for actors and victims within the whole region.

In conclusion, the Inter-American Court's part in the development of sustainable human rights protection in Latin America should not be underestimated. By continuing to order structural changes as response to gross violations, it assists domestic actors with important tools to ultimately achieve peace and security in the region.

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