An approach to the reform process to the Inter- American Commission of Human Rights: context, development and perspectives to an ongoing process

Una aproximación al proceso de reforma a la Comisión Interamericana de Derecho Humanos: Contexto, Desarrollo y algunas perspectivas de un proceso en curso

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Fecha de recepción: 20 de octubre de 2014
Fecha de aprobación: 25 de noviembre de 2014

Abstract

The IACHR is relevant organ in the Inter American System of Human Rights. As was foreseeable, it work and powers has caused a significant tension among the state- members that has increased in recent years. This tension is due to the clash between two different paradigms in international relations, on one hand, the liberalism paradigm that emphasized in the idea of cooperation and human rights, and, on the other, the realistic paradigm that is focus in the notion of sovereignty and self- interest of the States on the international level. Recently, this stress has been growing and a reform process has been opened with the purpose to make some changes in the work of the Commission. On one side, the Commission and some organizations of the civil society want to preserve their autonomy, independence and powers. On the other side, some States want to restrict the powers of the Commission and are threatening to block the system. This article tries to address this tension giving to the reader some key elements about the context and some perspectives of a process that is still ongoing and could implied significant effects to the international protection of human rights in the region.

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Key words: *Inter American Commission of Human Rights, Organization of American States, Human Rights, Precautionary Measures, Liberalism, Realism.*

Resumen

La Comisión Interamericana de Derechos Humanos es un órgano relevante dentro del Sistema Interamericano de Protección de derechos Humanos. Como era previsible, su trabajo ha causado tensión entre los Estados miembros. Recientemente, esta tensión se ha venido incrementando, en parte debido al conflicto entre dos paradigmas diferentes en las relaciones internacionales. Por un lado, del paradigma liberal que enfatiza en la idea de la cooperación y los Derechos Humanos, y por otro, el paradigma realista que se centra en la noción de soberanía y en el propio interés de los Estados en el plano internacional. A causa de la creciente tensión entre ambos paradigmas, un proceso de reforma se ha abierto con el propósito de hacer algunos cambios en el funcionamiento de la Comisión. Por un parte, la Comisión y algunas organizaciones de la sociedad civil pretenden preservar su autonomía, independencia y competencias. Por la otra, algunos Estados presenten restringir las competencias de la Comisión y han amenazado con bloquear al sistema. Este artículo trata de abordar dicha tensión, dando al lector algunos calves sobre el contexto y perspectivas sobre el proceso de reforma que aún permanece abierto y que pudiera tener serios efectos en la protección internacional de los Derechos Humanos en la región.

Palabras clave: *Comisión Interamericana de Derechos Humanos, Organización de Estados Americanos, Derechos Humanos, Medidas Cautelares, Liberalismo, Realismo.*

Introduction

The Inter- American Commission of Human Rights [Hereinafter “IACHR”] has played and plays an important role in the protection of human rights in the region. However, it work and powers has caused a significant tension among the state- members that has increased in recent years. Because of that, a reform process has been opened with the purpose of restring some powers of the Commission. In this reform process a balance should be achieve between the sovereignty of the states and the autonomy of the IACHR. The best solution should be the one that allow the continuity of the Commission by the states but also guarantee in the best way possible the independence that is required for the protection of Human Rights.

The IACHR is an autonomous organ of the Organization of American States whose mission is to promote and protect human rights in the American hemisphere. In this sense, the

powers of the Commission combine semi- judicial with political functions. Historically, the Commission has played an active role in the promotion and defense of the human rights especially in the transition processes from authoritarian governments to democracies that took place in the continent.

This active role is still ongoing. As in the past, this attitude has created some tensions between the Commission and the member states subject to their decisions. However, this tension has been growing particularly strongly since the last five years due to the discontent that some decision had produced in governments like Venezuela, Ecuador and lastly Brazil. Currently the pressure of the states is so strong against the Commission that last December the OAS General Assemble decided to open a process to reform some of the powers of the Commission among others changes into the Inter- American System of Human Rights.

Although this process was named as a "strengthening process of the Inter- American human rights system", by its objectives and currently proposals by the member states is clear that the main goals are to restrict and downgrade some of the powers of the Commission. In this sense proposals like limit the use of precautionary measures, regulate the kind of statements that the Commission could address to the member states and limit the financial resources of the IACHR are good examples of that sense.

All this situation could be explained under the different conceptions of what the IACHR is and more specifically the different perspective in the relationship between this treaty organ and their member states. In this sense, the state members seems to be taking a position addressed to ensure and protect state sovereignty against the autonomy and independence of the Commission in his work and powers. From this perspective, the reform of the IACHR will be successful if the final result responds to the sovereign concerns of the member states.

However, this position do not appears to be the most convenient from a progressive human rights perspective. In this sense, the autonomy, independence and even counter-majoritarian nature of the organs that are responsible for the supervision of human rights are crucial in the advance and guarantee for the human rights standards. From this perspective, any restriction of the autonomy and independence of the IACHR could be conceived as a regression on the protection of the human rights in the region.

Therefore, the result of the currently reform process of the IACHR will have a significant impact into the Inter- American System. The search for a balance between the different perspective mention above seems to be necessary and convenient. In this sense, a reform that responds to the concerns of the state, and doing that avoids the possibility to just withdraw the organization, but also tries to maintain the maximum possible level of autonomy of the Commission appears to be the most adequate and convenient decision under the current circumstances.

To develop this analysis, the present paper is divided in three parts. The first one will be dedicated to present the IACHR as a treaty organ into the OAS, emphasizing in their powers,

functions and the evolution that the Commission has taken since their creation to now days. The second part of the paper will be addressed to explain the so called "process of strengthening" that is taking place in relation to the work of the Commission. In this sense, it will be emphasized the circumstances that conducted to this situation, the parties, their interest, the development and the currently stage of the process. The third part will be intended to contextualize in a theoretical framework the mentioned process, noting there the role played by the human rights in the international relations, the paradigm before the international actors, and lastly some possible solutions to overcome the currently conjuncture behalf the human rights but also under a "realistic" perspective. Finally, it will be presented some preliminary conclusions to this work and also the most relevant and troubling questions than remain open into this ongoing process.

The Inter- American Commission of Human Rights: functions and history

The Organization of American States [OAS] is an international organization formally created by the States of the Americas in 1948 with the objective to achieve a regional order of peace and justice, promote solidarity, and defend their sovereignty, territorial integrity, and independence based on respect for the "essential rights of man" as is established in the OAS Charter[1].

Since the creation of the OAS, the States of the Americas have adopted a series of international instruments that have become the normative basis of a regional system for the promotion and protection of human rights. Those instruments, jointly with the supervision institutions and their decisions, compound the Inter- American System of Human Rights[2]. As part of this system, the Inter- American Commission of Human Rights [IACHR] is a principal organ of the OAS whit the explicit mission to promote and protect human rights in the American hemisphere[3]. Formally the Commission was created by the OAS in 1959, but was installed with the currently powers only until 1979 when their Statute was approved in the ninth regular sessions of the OAS General Assembly in La Paz- Bolivia[4].

According to this statute, the IACHR is comprised of seven persons, elected in their personal capacity by the General Assembly of the OAS, who shall be persons of high moral character

1 Organization of American States, Charter of the Organization of American States [OAS Charter]. Signed in Bogotá in 1948 and amended by the Protocol of Buenos Aires in 1967, by the Protocol of Cartagena de Indias in 1985, by the Protocol of Washington in 1992, and by the Protocol of Managua in 1993, accessed at: http://www.oas.org/en/iachr/mandate/Basics/charterOAS.asp consulted on; November 19, 2012.

2 Claudio Grossman. "Strengthening the Inter- American Human Rights System: the current debate", in: *American Society of International Law,* Washington D.C, vol 92, April 1998, p. 186, accessed at: www.jstor.org/stable/25659214 consulted on: November 19, 2012.

3 Art. 106 OAS Charter and Art. 41 American Convention of Human Rights, accessed at: http://www.oas.org/en/iachr/mandate/Basics/convention.asp consulted on: November 19, 2012.

4 Organization of American States, Statute of the Inter- American Commission on Human Rights. Approved by Resolution N° 447 taken by the General Assembly of the OAS at its ninth regular session, held in La Paz, Bolivia, October 1979, accessed at: http://www.oas.org/en/iachr/mandate/Basics/statuteiachr.asp consulted on: November 19, 2012.

and recognized competence and expertise in the field of human rights. They are elected for a four-year term, and may be reelected only once. The Commissioners act in their personal capacity and therefore do not represent in any case the Organization or their origin States.

According to the OAS Charter and the Statute, it could be hold that the work of IACHR rests on three main pillars: (i) Individual petition system; (ii) Monitoring of the human rights situation in the Member States, and (iii) Attention devoted to priority thematic areas.

Regarding the individual petition system, the IACHR has the power to receive, analyze, and investigate individual petitions related to violations of human rights. This power could be exercised against any Member State of the OAS that had ratified the Inter- American Convention of Human Rights[5] or even the Inter- American Declaration of Human Rights[6]. To doing that, the Commission has powers to request information from governments concerned to investigate the facts in the complaint, collect data and evidence with the parties interested and even makes on- site visits to the Member States to conduct an in-depth analysis about the specific situation, according to the article 18 of the Statute.

After the investigation period and if exists merit, the IACHR depending to the international obligations assumed by the Member State could, on one hand, make recommendations to them to adopt measures that contribute to protecting human rights in the particular situation if the State has not recognized the contentious jurisdiction of the Inter-American Court of Human Rights[7]. On the other hand, if the State Member has recognized the jurisdiction of the Court, the Commission can submit the case to the Inter-American Court and appears before it during the processing and consideration of the case[8]. In this case, it is possible to argue that the Commission has semi- judicial powers because it decide, not only about the admissibility of the claim, but also to their merits, and then has the discretion to submit the case before the Court.

In second place and related to the function of monitoring the human rights, the Commission has the power to observe the general situation of human rights in the Member States and also to publish special reports on the situation in a given Member State when considers it appropriate. In addition, the IACHR can receive and examine communications in which one State party claims that another State has committed human rights violations against

5 The non- universality of the Inter- American Convention of Human Rights is a great issue on the Inter- American System because the normative standards in the protections of Human Rights differ significantly in both documents. Nowadays, nine States have not signed the Convention: Antigua and Barbuda, Bahamas, Belize, Canada, United States, Guyana, San Kitts and Nevis, Sant Lucia, Sant Vicent and the Grenadines.

6 The Inter- American Declaration of Human Rights was signed by all 35 member states of the OAS.

7 Now days, eleven States have not accepted the adjudicatory jurisdiction of the Inter- American Court of Human Rights: Antigua and Barbuda, Bahamas, Belize, Canada, United States, Guyana, San Kitts, Saint Lucia, Saint Vincent and the Grenadines, Grenada and Jamaica.

8 According to the article 61 of the American Convention of Human Rights “Only the States Parties and the Commission shall have the right to submit a case to the Court”.

the American Convention. In both cases the Commission could recommend to the Member States the adoption of measures that contribute to protecting human rights in the countries of the hemisphere.

In third place, the IACHR fosters public awareness of human rights in the Americas. To that end, the Commission prepares and publishes reports on specific and priority thematic areas. Now days, the prioritized topics are related to the effects of internal armed conflicts on certain groups; the human rights situation of children, women, migrant workers and their families, persons deprived of liberty, human rights defenders, indigenous peoples, afro descendants, and persons deprived of liberty; on freedom of expression; citizen security and terrorism and their link with human rights, among others. Since 1990, the Commission began to create thematic rapporteurships with the purpose to strengthen, promote, and systematize the Inter-American Commission's own work on each of those issues[9].

In summary, it could be hold that since 1979 the IACHR combines two different powers, on one side, semi- judicial functions related to the power to investigate individual petition of violations of human rights than later could be submitted before the Inter- American Court. And, on the other side, some political functions related to the monitoring and promotion the observance and protection of the human rights by all Member States of the OAS.

Since their creation, The IACHR has played an active role in the promotion and defense of the human rights in the American continent and therefore had and has been considered as a principal organ in the Inter- American System of Human Rights. However, this does not mean that the role on the protection of the human rights of the IACHR had been the same along their history. Actually, during the existence of the IACHR it could be identified two different periods in the role played by the Commission attending to the particular context in the continent.

One first period, could be identified by the prevalence of the political functions of the Commission and comprises, more or less, since their creation until the beginning of the 90´s. In this phase, under the National Security doctrine many States in South America, especially in the south cone, were under authoritarian or military governments with the excuse to avoid the communist threat. During those governments gross and systematic violations of human rights took place not only in their own territories but all over the continent. As an example, it could be enough naming the "Condor Operation" as an international plan designed and executed by some military governments in the region to disappear, murder and torture political opponents all around the continent[10].

In this context, the main role played by the Commission´s was not to try to investigate isolated violations, but to document the existence of these gross and systematic violations

9 Today there are created nine thematic Rapporteurships that in the follow areas: Rights to indigenous people, women, migrant workers and their families, freedom of expression, of the child, rights defenders, persons deprived of liberty, afro- descendants and against racial discrimination, and one unit on the rights of LGTBI people.

10 Patrice J. McSherry. "Operation Condor: Clandestine Inter- American System", in: *Social Justice,* San Francisco, Vol. 26, 1999, p. 144, accessed at: http://www.public.asu.edu/~idcmt/terror.pdf consulted on: November 19, 2012.

and to exercise pressure to improve the general conditions of human rights in the country concerned. In this sense, the judicial powers were put in second place and all the political powers were addressed to denounce the abuses of the authoritarian governments, thus, visits *in loco*, investigations, publication of report of each country and their presentation to the General Assemble of the OAS and to the press, were the main actions took it by the Commission in those times. The strategy was clear: to prioritize the need to establish and to publicize what was happening and to seek change by pressure and negotiation through the political organs of the OAS and the mass media, rather than through adverse ruling in petition cases.

The role played by the Commission during this period achieved significant effect in the national and international sphere. In this sense, David Harris asserts that "The Inter American Commission´s report have acted as a catalyst or had some other beneficial effect. A vivid example was the 1980 report that brought home to people in Argentina the record of their military government on disappeared persons in the late 1970´s. Such effect as the Commission´s reports have achieved has not been with the backing of the General Assembly of the OAS."[11] Also, Maria Chirstina Cerna considers that "Since many countries in the region were under military dictatorships, the Commission carried out in- site investigations and prepared country studies on large scale violations, such as the systematic practice of torture or forced disappearances. [...] The main contribution of the Inter- American Commission during this period was toward the delegitimization of military dictatorship in the hemisphere, which facilitated the return of democracy governments"[12]. Therefore, it could be hold that the Commission played a principal role in the transitional process from authoritarian governments to democracies that took place in relevant number of American countries, and in part due to their job, at least at the beginnings of the 90´s the military regimens were part of the history in America.

A second period, could be identified since the ends of the 80´s until now days. Before weak but at least democratic government operating in the most countries in the continent, the Commission jointly with the political functions put an especial accent in their quasi- judicial powers. Thereon, the Commission started to investigate individual claims of violations of human rights, made statements of the merits of those petitions and when considered to exist enough evidence and relevance submitted the cases before the Inter- American Court of Justice for a definitive ruling.

This new role of the IACHR was indisputable since April 1986 when the Commission presented the first three contentious cases before the Inter- American Court concerning the forced disappearance of four individuals in Honduras committed by security forces officials. The actions took it by the Commission originated the famous case knew as the Velasquez

11 Stephen Livingstone (Ed), *The Inter- American system of Human Rights*. New York, Oxford University Press, 1998, p. 12.

12 Christina M. Cerna, "The Inter- American System for the Protection of Human Rights", in: American Society of International Law, Washington D.C, Vol. 95, 2001, p. 76.

Rodriguez case[13], where the Court rule in the sense presented by the Commission and the State was found responsible for several violations of Inter- American Convention of Human Rights. Until today, this case is still considered as a landmark decision into the framework of State liability for violations of human rights under their jurisdiction and also "is cited frequently for its major contribution to the advancement of international law"[14].

After those initial cases, through this work the Commission has addressed and developed relevant and always controversial topics related to the violations of human rights in the region, for example, the Commission has triggered the nullification of the effects of laws that provided amnesty in relation to grave violations of human rights committed by dictatorships and authoritarian governments[15]; has established the standards for participation of indigenous people in the determination of their rights[16]; and has recognized and denounced crimes against humanity committed in America stemming from patterns of forced disappearances, torture and sexual violence[17].

In this sense and regarding to the new role, it could be hold that "The Commission converted itself into an accusatory agency, a kind of hemispheric grand jury, storming around Latin America to vacuum up evidence of high crimes and misdemeanors and marshaling it into bills of indictment in to the form of country reports for delivery to the political organs of the OAS and the Inter- American Court"[18].

Despite the periods of the works of the Commission as an organ of the Inter- American System, is clear that the IACHR has played and plays an important role in the protection of human rights in the region. Not only as a political actor, monitoring and promoting the observance of the human rights all over the continent, but also as a quasi- judicial organ that has develop an essential role in the judgment and prosecution of the state liability for violations of human rights.

13 Inter-American Court of Human Rights, *Case of Velázquez-Rodríguez v. Honduras,* Judgment of July 29, 1988, Series C No. 4, accessed at: http://www.unhcr.org/refworld/pdfid/40279a9e4.pdf consulted on November 19, 2012.

14 Juan E. Méndez. *Taking Stand: The evolution of Human Rights*. New York, Palgrave Mcmillan, 2011, p. 101.

15 Inter-American Court of Human Rights. *Case of Barrios Altos v. Peru*. Merits. Judgment of March 14, 2001. Series C No. 75, accessed at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_75_ing.pdf consulted on: November 19, 2012.

16 Inter-American Court of Human Rights, *Case of the Saramaka People. v. Suriname,* Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007 Series C No. 172, accessed at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf consulted on: November 19, 2012.

17 Inter-American Court of Human Rights, *Case of Loayza-Tamayo v. Peru.* Reparations and Costs. Judgment of November 27, 1998. Series C No. 42, accessed at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_42_ing.pdf

18 Tom Farer, "The rise of the Inter- American Human Rights Regime: No longer a Unicorn, Nor Yet an Ox", in David J. Harris, Stephen Livingstone, Ed. *The Inter- American system of Human Rights*. New York, Oxford University Press, 1998, p. 32.

The current "strengthening" process of the Inter- American Commission of Human Rights

The work of the Commission has not been immune from critics and tensions with the Member States, especially with the recipients of the measures adopted by the IACHR. This tension and resistance to the work of the Commission already took place in the past and conducted, in most extreme cases and by the end of the 90´s, to the withdrawal of Trinidad and Tobago from the Inter- American Convention to shield its death penalty from the Commission and Court scrutiny and Peru´s short- lived intended withdrawal in the same decade as a reaction to the measures adopted by the IACHR under the Alberto Fujimori regime.

However, in the last five years this resistance to the Inter- American System of Human Rights, and especially to the work of the Commission, has been growing with special strength. Thereon, Member States with great relevance in the Inter- American System as Ecuador, Venezuela and lastly Brazil, among others, have been expressing their discontent and unrest with some positions and decisions adopted by the IACHR and therefore have stated the necessity to develop some reforms to the powers of the Commission particularly.

As examples, the government of the President Rafael Correa in Ecuador has criticized vigorously the work of the Commission in two different aspects. First, some decisions took it by the Commission jointly with the Inter- American Court related to indigenous communities which both organs recognized the collective right that those communities have to be consulted by the government previously to any economical interventions on their ancestral and collective territories[19]. In the concept of the President Correa this decision constitute a violation of the national sovereign of the State and a transgression of the powers conferred to the Commission by the Inter- American Convention, because in the judgment both organ equated the right to "previous consultation", that is in the Convention, with a new requisite to "previous consent"[20]. Second, the Ecuadorian Government has criticized the work of the Special Rapporteur for Freedom of Expression of the Commission due to strong warnings that this office has made in favor of journalists and mass media for the violation of the freedom of speech committed by the State. Those actions by the Commission has conducted to the President Correa refers to this Special Rapporteurship as the "spokeswoman of the businesses engaged in the communications"[21].

19 Inter-American Court of Human Rights, *Case Pueblo indigena Kichwa de Sarayaku v. Ecuador. Merits and reparations*. Judgment of June 27 of 2012. Serie C No. 245. Accessed at: http://www.corteidh.or.cr/casos.cfm?idCaso=388 consulted on November 19, 2012.

20 About this issue the President Correa explicitly said that "Please, a little more of responsibility, a little more of respect to the sovereign of ours countries, a little more respect to the normative in the Convention, that gives the functions to the Inter- American Convention [sic] the power to promote the Human Rights but not a pseudo- ecological terrorism". Ecuador, Presidencia de la República, *Public Intervention in the 42 General Assembly of the OAS, Cochabamba- Bolivia,* June 4 of 2012. p 20. Accessed at: http://www.presidencia.gob.ec/discursos-e-intervenciones consulted: Novermber 19, 2012.

21 *Ibid.* p. 9.

Meanwhile the government of the Bolivarian Republic of Venezuela with Mr. Hugo Chavez as President also has criticized and resisted to the work of the IACHR[22]. To the Venezuelan government, the Commission in some recent cases - related to political opponents and where has been protected their rights to freedom of expression, due process and access to justice[23]- has transgressed, on one hand, the scope and powers attributed to the Commission, and on the other hand, the constitutional regime enforce in Venezuela. In this sense, has considered explicitly that "The Commission has not acted with objectivity and transparency, violating the spirit of the Convention by sponsoring impunity, particularly of those individuals involved in the events of April 2002 coup, as well as in the business and oil strike of December 2003. Have manipulated international law to remove the guilt to the violators of our laws, and make them victims of unfounded false violations of their human rights"[24].

And finally, since 2011 the government of Brazil became part to the group of critics of the role played by the Commission. In April of this year, the IACHR imposed precautionary measures in favor of some indigenous communities that inhabit the area where a huge dam will be built in the Amazon jungle and therefore ordered the immediate suspension of the project. The arguments of the Commission where clear, again the obligation to perform previous consultations with the indigenous communities that will be affected by the development of the project in accordance with the American Convention on Human Rights and the jurisprudence of the Inter- American System was not accomplished, and then the licensing process of the project should be immediately suspended[25].

The reactions of rejection to this measure by the Brazilian government were notable[26]. First, in an official note, the Minister of International Affairs of Brazil expressed the "perplexity" of their government with the measure and considered it as "hasty and unexplained"[27]. Second, the Brazilian government called for consultations the ambassador of Brazil before the OAS, Mr. Ruy Casaes. Third, the government retired the Brazilian candidate to the IACHR in substitution to the former Brazilian Commissioner Mr. Paulo Sérgio Pinheiro. Fourth, ordered the suspension of contributions to the OAS, and therefore to the Commission,

22 Juan E. Méndez. *Op. cit.* p. 105.

23 Among others, *Case Perozo and others v. Venezuela; Case Brewer Carías v. Venezuela; case Díaz Peña v. Venezuela.* Quoted in: Venezuela, Presidencia de la República, Notification of denunciation of the American Convention of Human Rights by the Bolivarian Republic of Venezuela. September 6, 2012. p. 10 and further.

24 *Ibid.* p. 11.

25 Inter- American Commission of Human Rights, Letter MC-382-10, Indigenous Communities of the Xingu River Basin, Pará- Brazil. April 1, 2011, accessed at: http://www.oas.org/en/iachr/indigenous/protection/precautionary.asp consulted on: November 19, 2012.

26 Paulo Sotero. "The Brazilian Challenge: how to manage asymmetrical regional relations beyond the OAS", in: *CIDOB Review d´afers internacionals,* Barcelona, vol. 97-98, April 2012, p. 101- 116.

27 "Brasil protesta contra pedido de comissao da OEA sobre Belo Monte". UOL Noticias Brasil, Rio de Janeiro, April 5, 2011, accessed at: http://noticias.uol.com.br/ultimas-noticias/afp/2011/04/05/brasil-protesta-contra-pedido-de-comissao-da-oea-sobre-belo-monte.jhtm consulted on: November 19, 2012.

with the excuse of the necessity to contain national costs, suspension that took place until December of 2011. And last but not least, the government of Dilma Rousseff pointed out to the others State Members the necessity to open a process to revise and look over the currently operation of the Inter- American System of Human Rights and specially the work of the IACHR.

The effects of the critics by this group of Members States to the Inter- American System and especially to the role played by the Commission created immediate and diverse consequences. The most extreme course of action was took it by the Venezuelan government who decided to denounced the American Declaration of Human Rights and therefore withdraw to the Inter- American System of Human Rights. This decision was took it on September of 2012 and the reasons includes that "The Inter American Commission and the Court have moved away to the sacred principles that they should protect, becoming in a political *throwable* weapon used to destabilize some governments, especially ours [Venezuela], taking the trend to interfere with internal issues of our government"[28].

On the other side and due in part to the political weight that Brazil has in the Inter- American System, a process addressed to revise and look over the work of the system of Human Rights was started ordered by the General Assembly of the OAS. Despite it was obvious from the context that the process was guided to debilitate the Commission restringing their powers and their autonomy, paradoxically, the name gave to it was "The process of strengthening of the Inter- American System for the protection of Human Rights".

In this sense, on June 29, 2011, the OAS Permanent Council established a Special Working Group composed by some ambassadors of the State Members to the OAS. On December 13, 2011, this group issued 53 recommendations to the IACHR, 13 to the member states and one to the OAS Secretary General related the operation of the Human Rights System[29]. The Report of the Special Working Group was then adopted by the Permanent Council on January 25, 2012 and ratified by the OAS General Assembly on June 5 of 2012[30]. The recommendations focused its attentions on the following topics: (i) Precautionary measures; (ii) procedural matters in processing cases and individual petitions; (iii) Friendly settlements; (iv) Criteria of constructing the annual reports of the IACHR about the development of Human Rights in the region; (v) Promotion of Human Rights, and (vi) The financial situation of the Inter American System of Human Rights.

28 Nicolás Maduro Moros. *Op. Cit*. At .2.

29 Report of the Special Working group to Reflect on the Working of the inter- American Commission in Human Rights with a view to Strengthening the Inter- American Human Rights System for consideration by the Permanent Council, OEA/Ser.G, GT/SIDH-13/ 11 rev., December 13, 2011.

30 Resolution of the OAS General Assembly adopted at the fourth plenary session held on June 5, 2012, AG/RES.2761 (XLII-O/12), "Follow- up of the recommendations of the "Report of the Special Working group to Reflect on the Working of the inter- American Commission in Human Rights with a view to Strengthening the Inter- American Human Rights System".

During this process, the IACHR by their own started a process to consultation with the purpose to know the position of the civil society organizations, victims of human rights violations and academics about the called "strengthening process". On October 23, 2012, the IACHR published a reply to the Permanent Council of the OAS regarding the recommendations contained in the Report of the Special Working Group to reflect on the Working of the IACHR and adopted by the General Assemble of the OAS[31].

Due to the restriction of space and the scope of the present paper, it will not be possible to present and analyze each of the issues and recommendations made by the States and the Special Working Group, the position adopted by the General Assembly and the response by the IACHR. For these reasons and as an indicator of the rest of them, it will be selected and analyzed one of the most controversial topics in this process of revision: the legality of the powers of the Commission to impose precautionary measures to the Member States. To do this, it will be exposed normative support of this power, the position of some member states and the IACHR about it, and finally the position adopted by the General Assembly and the response by the Commission.

To start taking about precautionary measures, it is necessarily begin saying that the article 63.2 of the American Convention of Human Rights established the power to the Inter-American Court to impose precautionary measures, but said nothing about this possibility by the IACHR. This power is just established in the Rules of Procedure of the IACHR, rules that were approved by the Commission itself and not in an international treaty like the Convention.

This starting point and context explained above, has opened a debate about the legality of those kinds of powers that are not worthless at all as was presented above. In this regard are two opposite positions. On one side, there is the position of the IACHR itself and other Human Rights Organizations that defend the legality and legitimacy of the powers to request precautionary measures to the Members States. Regard to the legality, the Commission adopting the doctrine of "implied powers"[32] considers that- this power "emanates from the IACHR's function of overseeing the implementation of the commitments assumed by the States parties, established in Article 18 of the Commission's Statute and Article 41 of the American Convention, and it rests on the general obligation of the States to respect and ensure human rights (Article 1.1 of the American Convention), to adopt the legislative or other measures necessary to give effect to human rights (Article 2), and to carry out the obligations contracted pursuant to the Convention and the OAS Charter in good faith"[33].

31 Inter- American Commission of Human Rights, "Reply to the Permanent Council on Process of Strengthening of the System", accessed at: http://www.oas.org/en/iachr/strengthening/respuesta.asp consulted on: November 19-20-12

32 Apparently in the most flexible and wide of this doctrine meaning that an international organization and/or it organs have all the powers that are essential to the performance of its duties. About it: Jan Klabbers. *An Introduction to International Institutional Law.* London, Cambridge University Press. 2009. p. 69.

33 Inter- American Commission of Human Rights, "Reply to the Permanent Council on Process of Strengthening of the System", p. 18 FN 60.

On the other side, there is the position of some Member States which consider that under the doctrine of "attributed powers"[34], the no explicit attribution of powers on the Inter-American Convention or in any other treaty precluded any decision about precautionary measures by the Commission. In this sense, the Ecuadorian government has said that "The Inter- American Commission, by the Rules of Procedure made by them, arrogated to itself powers that are not established on the Statute"[35].

Despite the opposite considerations about the legality of those powers, the position adopted by the Special Working Group and then by the General Assembly by the OAS it seems to be intermediate between them. First, the common document for those organs begins making an implicit recognition of the power that assist the IACHR to impose precautionary measures because they establish explicitly that "the system of precautionary measures of the IACHR has been and continues to be of practical value and usefulness"[36]. Second, with the idea to give greater clarity to this system, the document recommends the strict observance of the parameter used by the Commission to the imposition of this kind of measures and the necessity to disseminate the criteria uses to do that, but also warns the document "without impairing its ultimate purpose of requesting prompt protection for persons in circumstances that warrant it"[37]. In other words, the General Assembly after the recognition to the powers to the Commission to impose precautionary measures pretends to reduce the discretionality in their use.

Regard to these recommendations, the IACHR expressed their agreement and they will undertake to develop and subsequently publish a digest that systematize and explain the standards set in precautionary measures and the best practices about it. In this sense, the Commission recognizes the importance of disseminate and incorporate these strict criteria in the future analyses for granting or lifting such measures. Thus, the Commission accepts to restrict part of their own autonomy and independence, at least for the sake of predictability of their decisions and restrict the legal insecurity in their actions, to maintain the support of the General Assembly.

From a general perspective, this is the same pattern followed by the General Assembly regard the other issues recommended to the Commission. It is the interest to regulate and make predictable and reduce the legal insecurity through parameters and criteria the actions that in the future will be taken by the Commission. Despite this strategy implies a kind of restriction

34 Under this doctrine the "international organizations, and their organs, can only do those things for which they are empowered". Jan Klabbers. *Op. Cit.* p 64.

35 Rafael Correa. *Op. Cit.* p. 16.

36 Inter- American Commission of Human Rights ,"Report of the Special Working Group to reflect on the Working of the Inter- American Commission on Human Rights with a View to Strengthening the Inter. American Human Rights System for Consideration to the Permanent Council". OEA/Ser.G, GT/SIDH-13/ 11 rev., December 13, 2011 p. 10, accessed at: http://www.oas.org/en/iachr/mandate/strengthening.asp consulted on: November 19, 2012.

37 *Ibid.* p.10.

of the autonomy and independence of the IACHR, it is not too severe at the end because it is the Commission itself who will be establishing the parameters to their future work and doing she could continue with her work and with the support of the General Assembly.

A preliminary evaluation of the "strengthening" process of the IACHR and some perspectives

Since 1945 the idea of human rights has been spread all over the world. One fact in this sense is the multiplicity of international declarations, covenants, conventions and treaties celebrated by the states and related to human rights since the end of the Second World War. However the implications of this apparent consensus about human rights are still uncertain. In words of Michael Ignatieff, "We are scarcely aware of the extent to which our moral imagination has been transformed since 1945 by the grown of a language and practice of moral universalism, expressed above all in a shared human rights culture"[38].

In this dynamic, the international sphere has not been an exception. Today, the effects of the recognition and protection of human rights in the international relations are more evident. In one way, most States are becoming to be more inclined to act on behalf of human rights because "while States retain most of their sovereign functions, their legitimacy is no longer exclusively conditioned by the contract with the Nation, but also by the adherence to a set of nations- transcending human rights ideals"[39]. In the other way, the International Organizations itself are using more decisively the legitimacy of human rights and democracy as criteria into the decision- making processes[40]. Therefore, it could be hold without any doubt that human rights have an important role to play in the future development of the international institutional law.

However this development was not and will not be pacific and exempt of tensions in the international sphere and especially with the states. To understand this, it is necessary to remember, at least, the three main elements of the nature of human rights[41]. First, that the individual is the holder of the right. Second, that the State is the bound party to recognize and protect the scope of the right to the holder. And third, the possibility to claim before an authority to protect the scope of the right, which is called, the justiciability of the rights. Just with the mention of those elements, it is clear that the idea of human rights could clash, and in fact does continuously, with the self- interest, sovereignty and security of the States in the international field.

38 Michael Ignatieff. *The Warrior´s Honor: Ethic War and the Modern Conscience*. New York, Metropolitan, 1997, p. 8.

39 Daniel Levy; Natan Sznaider, "Sovereignty transformed: a sociology of human rights", In: *The British Journal of Sociology,* London, vol. 57, Issue, 4, 2006, p. 657.

40 As an example of how human rights and democracy has become into a criteria to the admission and exclusion of States to International Organizations see: Alison Duxbury. *The participation of States in International Organizations: The role of Human Rights and Democracy.* New York, Cambridge University Press, 2011, pp. 311- 317.

41 About the structure of rights, see: W. Hohfeld. *Fundamental Legal Conceptions*, New Haven, Yale University Press, 1919.

Thus, the recognition and protection of human rights implies the idea of a new paradigm in the international relations among States. This paradigm has been identified by some authors with the term "liberalism"[42] and start considering that individuals, international organizations and states are subjects in the international relations leaving behind the state- centric idea in the international community. In this sense, "liberalism contends that people and the countries that represent them are capable of finding mutual interests and cooperating to achieve them, at least in part by working through international organizations and according to international law"[43]. Liberals are also prone to think that all humans have common bonds that can draw on to identify themselves beyond the narrow boundaries of their country, and the ownership of human rights is a good example of those bonds. Hence, it could be hold that "The core idea of liberalism centers on respect for personal moral rights, based above all on the equal worth of the individuals, whose preference should be followed in the public domain"[44]

With the foregoing, it is clear that this new international paradigm contrast with the realism theory in international relations. Under this paradigm the decisive dynamic among countries is a struggle for power in an effort by each to preserve or, preferably, improve its security and economic welfare in the international anarchic arena. Realism see this struggle as a zero-sum game[45], one in which a gain for one country is inevitably a loss for others. In this sense, a realist was not moved by ideals, sentiments or justice, only by hard- headed calculations of power and security for and by the State. Consequently, ideas like discretion, sovereign, non- intervention, security and national interest are the parameters in a realist perspective of the international relations.

Despite of the fact that the notion of human rights is increasing their acceptance all over the world, it would be just wrong consider that the idea of state sovereignty and therefore the realist paradigm has disappear in the theory and the practice of the international affairs. Although the recent erosion of the concept of sovereignty, the sovereign- state logic is still the main character, the state consent continues still maters and the realism is also the most widespread practice in the international arena. Therefore, it could be hold that the international human rights are here to stay but so is state sovereignty and the relevant issue is to figure out how to unlock the zero- sum equation between them.

Whether and how far human rights issues should be pushed in the expenses of traditional security and economic concerns of each state is today a classic dilemma due to the clash of liberalism and realism. Foreign policy is inescapably about the management

42 David P. Forsythe, *Human Rights in international relations*. New York, Second Edition, Cambridge University Press, 2006. p. 3

43 John T. Rourke, *International Politics on the World Stage.* New York, Twelfth Edition, Mc Graw Hill, 2007. p. 23.

44 David P. Forsythe, *Op. Cit.* p. 33

45 John T. Rourke. *Op. Cit.* p. 20.

of contradictions, meaning that "policy makers will frequently find it necessary in strike compromises between advancement of human rights and that of other perceived public good"[46]. Thus, find some balancing between realism and liberalism and how to solve the tension between them should be the main focus on the currently discussion of human rights and international relations.

With this purpose, it is reveling identify two different levels of tensions between both paradigms. One level refers to the question of what or which human rights bind the State under the international sphere. For that, the State consent to which human rights is liable for and with which scope. This is the case of the massive ratifications of substantive human rights instruments like declarations, covenants and conventions made by the states that took place in the second half of the past century all over the world. Usually those international norms take the form of "soft law", meaning that their mandatory status is at least limited to the states. In this situation, the tension level between liberalism and realism is lower because at the end and regard to the implementation of those norms the state remains being the judge and jury because there is no superior authority that can impose their enforcement[47].

The second level of tension is higher and refers to the idea of "who" in the international field can ensure the observance of human rights. In other words, in this case, the state submits itself to an authoritative international mean of supervision and enforcement of the human rights standards previously accepted. This is the case which a state assumes and accepts voluntarily the adjudication of jurisdiction to an international court or tribunal for future and generic cases to make judgments on issues related to alleged violations of the human rights by their own citizens and territory. Thus, the tension level is significant higher to the case presented earlier and also permanent because is obviously foreseeable the adoption of decisions that could be consider in some cases juxtaposed to the self- interest of the state.

These two different levels of tensions could explain the gap between recognition and protection of human rights. In other words, there could be a possible answer to the question of how could the rhetoric of human rights be so globally pervasive while the politics of human rights is so utterly weak[48], could be answer saying that is because the enforcement actions of human rights usually suppose acting against the immediate interest of the states. In other words, "[a] strong international legal regime for human rights cost something in national discretion"[49]. As a result, the realistic paradigm explains in the international level, at least in part, the differential development between recognition and protection of human rights.

46 David P. Forsythe. *Op. Cit.* p. 16.

47 About the concept of "soft law" in international Human Rights law, see: *Ibid.* p. 12.

48 Camiel Kenneth, "The recent History of Human Rights", In: *American Historical Review,* Bloomington, vol. 109, 2004, at 18.

49 David P. Forsythe. *Op. Cit.* p. 38.

This function of judicial review in human rights issues is commonly assumed by international organizations, particularly in organizations with regional scope[50]. Therefore, the mentioned tension usually shifts from the supervision organs to the organization as a whole, making visible there the complex relationship between the organization and its members states. Currently, in those supervision organs and their international organizations is taking place the biggest disputes regarding to the advancement of the human rights against the realistic paradigm, been the results still uncertain[51].

Precisely, is in this context where might be located the currently dynamic of the Inter- American System of Human Rights. To start, in the American continent the idea of an effective human rights system is not yet consolidated because the gap that exist between the recognition of human rights and its mechanism of international protection is still significant. As was said before, despite all the thirty five States ratified the Inter- American Declaration of Human Rights, nine have not signed yet the Inter- American Convention where the mechanisms of protection are established. Therefore, the paradigm of realism is still relevant in the dynamic of the states in America and moreover about the international human rights issues.

Likewise, in the reform process that is taking place in the IACHR it could be also identified the roles and paradigms in dispute. On one hand, there is the IACHR who clearly has played a relevant role as a supervisor organ of the observance of the human rights standards into the OAS. Their actions has been inspired under the liberalism perspective where the goal to ensure the observance of human rights by the states and behalf the individuals have been constant. Under this perspective, the autonomy and independence of the Commission to political pressure and to the interference of the member states will be not only convenient and preferable but also necessary because those are guarantee of the impartiality in their decisions and also ensure the anti- majority nature of rights[52].

In this reasoning, the IACHR and some civil society organizations seek a system that will be flexible, open and progressive. About the issues that emerged during the reform process their position will be, as an example, in defense of the precautionary measures and their complete flexibility in their application; in resistance to any regulation by the member states to the content and the scope of the report made by the Commission; and require the absolute sufficiency and independence in the management of the budget of the Commission to develop their work.

50 Janusz Symonides (Ed), *International protection, monitoring and enforcement of Human Rights*. London, Unesco 2003, p. 165.

51 A good example of those disputes is the Kadi case before the European Court of Human Rights. Among other interpretations, this case could be interpreted as the tension between the human rights perspective between the realism that characterize the war against terrorism. Precisely, this case conceded, until today, a partial victory to human rights perspective. European Court of Human Rights, Grand Chamber, September 3, 2008, Cases C-402/05 and C-415/05.

52 *The Stanford Encyclopedia of Philosophy*, s.v (2011) "Rights", accessed at: http://plato.stanford.edu/archives/fall2011/entries/rights/ consulted on: November 11, 2012.

Although, the work of the Commission as an international authority in the protection of human rights, has caused and continue causing strong tensions with the member states subject to their powers[53]. This because some member states have considered contrary to their self- interests some decision took it by the Commission and appeal to their sovereignty to disclaim it. In this behavior is evident the leading of the realistic paradigm, where the self- interest and the sovereignty of the State should ruling their actions on the international level. This conduct could be identified in the actions regard to the IACHR of states such as Venezuela, Ecuador and Brazil with different intensity.

In this reasoning, those member states claim for a rigid, formal and strict system that will be predictable and restricted in their actions, in other words, that provide legal security to the states members. For example, they request for the prohibition of the use of precautionary measures because those are not explicitly consented by the signatory states of the Inter- American System, or at least, them should be regulated and restricted to the most exceptional cases. Also, claim for the necessity to regulate the way that the reports of the Commission are made and to require the previous consultation and consent of each state to the content of the reports. In the same way, they request for the convenience of the strict approval for the members states to the budget and their destination of the Commission. Finally, if any of those demands are not adopted, the member state could always block the implementations of the decision of the system and, as the last resort, just withdraw to the Inter- American System[54].

As is evident, from the most extreme positions of both perspectives the result is a zero- sum equation where any agreement is impossible to achieve and only one part can win. In this scenario, the remaining relevance of the principle of sovereignty of the states would make foreseeable the prevalence of the realistic perspective, including the withdraw option from the System. Without any doubt, this is the worst possible result to the development of the human rights and obviously to the Inter- American System of Human Rights due, on one side, to the rupture with the principle of universalism of human rights and to the block effect caused to the system. On the other side, there is the lost of legitimacy by the outgoing state in the international sphere[55] with the denial to their people of a relevant international judicial remedy for violations of human rights.

As presented above, this is the currently situation for the Bolivarian Republic of Venezuela, who recently decided to denounce and withdraw to the Inter- American Convention of Human Rights, and therefore, to the most significant part of the powers of the Commission and also of the Court. As was just said, this is the worst possible scenario from a human rights

53 In the words of Claudio Grossman, "[...] because the system is under constant threat of "reform" its possibilities of mobilizing support against mass and gross violations or ensuring enforcement are reduced, since the system itself is "being review" and its legitimacy questioned". Claudio Grossman. Op. Cit. p. 191.

54 This possibility is explicitly established in the article 78 of the Inter- American Convention of Human Rights.

55 In this sense, David Forsythe said that "Accepting human rights is the best way to legitimate power". David P. Forsythe, *Op. Cit.* p. 9.

perspective and especially to states that somehow already make part of the Inter- American System. The loss for the System is also clear, by the restriction of the universality of their powers and measures and by the precedent created to other countries, making that the system become weaker that it was. Therefore, this option of possible withdraws should be avoided by any possible mean to preserve the System.

In this point, the question is now how far the System, and especially the organs, should concede to the unrest member states to avoid the possibility to withdraw the System and doing this, avert the sum-cero result. The key issue will remain in identify the essence of the mechanism that without them it will not be able to achieve their purpose. Therefore, the System could only confer until to cause harm to the essence of the System. And without any doubt, the autonomy and independence of the organ that supervises and monitor the observance of human rights are part of that essential core. However, those values admit levels of interventions until became meaningless. Therefore, explore this thin line and choose a point that balance the interest both of the upset states and the system without the denial of the values of autonomy and independence, seems to be the right solution to this conjuncture.

Actually, this seems what the Special Working Group did and also the position took it by the General Assembly of the OAS when approved these recommendations to the IACHR. As was explained above, from a general point of view, those recommendations recognized the relevance of the autonomy and independence of the Commission but also tried to restrict them to the point to improve their predictability but not abnegate their existence. Consequently, the claims of the unrest states were took it into account and the role and essence of the Commission and the System is still there, and the most important, the system is preserved and functioning.

Although is true that this is not the ideal solution to the System, compare to what was achieve and the seriousness of the risk, from a strategic and political point of view it is a good enough solution. It should be never forgotten that the Inter- American System was and is still design by the States as part to an international organization that responds to an intergovernmental logical. Therefore, expect something different to this perspective it will be hardly possible in the current circumstances. Or maybe there is time to start taking seriously that the basis for the international supervision and protection of the Human Rights should not depends on the will of the states because its grounds rests possibly in a universal moral consensus. If it is so, our analysis should take us to quite different solutions but we are not there yet.

Conclusion

The IACHR has played and plays an important role in the protection of human rights in the region. However, as was foreseeable it work and powers has caused a significant tension among the state- members that has increased in recent years. This tension is due to the clash between two different perspectives in international relations, on one hand, the liberalism paradigm that emphasized in the idea of cooperation and human rights. And, on the other, the realistic paradigm that is focused in the notion of sovereignty and self- interest of the States on the international level.

Recently, this stress has been growing and a reform process has been opened with the purpose to make some changes in the work of the Commission. On one side, the Commission and some organizations of the civil society want to preserve their autonomy, independence and powers. On the other side, some States want to restrict the powers of the Commission and are threatening to block the system. In fact, during this process the Bolivarian Republic of Venezuela decided to withdraw to the Inter- American Convention of Human Rights and therefore to the protection means of the system.

In this complex context, the General Assembly of the OAS has taken an intermediate position, trying to preserve the autonomy and independence of the Commission but regulating some of their powers making them predictable to the subject states. Precisely, in the currently stage of the process the General Assembly made some recommendation to the Commission and the way that these will be implemented is still pending. However, as it is foreseeable, this crisis is not over and big risks to the whole System are still prowling.

Therefore, decisions as the one took it by Venezuela are clearly the most harmful to the System and must be avoided. Some balance should be found between the sovereignty of the states and the complete autonomy of the IACHR and doing that, preserve the System and their essence. In this sense, the recommendations made by the General Assembly seem to be adequate and sufficient to solve the crisis, and also the Commission stated their agreement with the majority of them.

However, in this stage of the process is not possible to know the final position of the group of the upset states and some rumors could make it think that some other changes are wanted by them. But concede more space to the discretion to the States will make not only meaningless the independence and autonomy of the Commission and the System as a whole, but also the essence of the human rights itself in the Americas.

Bibliography

Cerna, Christina M., "The Inter- American System for the Protection of Human Rights", In: American Society of International Law, Washington D.C, Vol. 95, 2001.

Levy, Daniel; Sznaider, Natan, "Sovereignty transformed: a sociology of human rights", In: *The British Journal of Sociology*, London, vol. 57, Issue, 4, 2006.

Forsythe, David P., *Human Rights in international relations*. New York, Second Edition, Cambridge University Press, 2006.

Klabbers, Jan, *An Introduction to International Institutional Law*. London, Cambridge University Press, 2009.

Symonides, Janusz (Ed), *International protection, monitoring and enforcement of Human Rights*. London, Unesco, 2003.

Méndez, Juan E., *Taking Stand: The evolution of Human Rights*. New York, Palgrave Mcmillan, 2011.

Ignatieff, Michael, *The Warrior´s Honor: Ethic War and the Modern Conscience*. New York, Metropolitan, 1997.

Sotero, Paulo, "The Brazilian Challenge: how to manage asymmetrical regional relations beyond the OAS", In: *CIDOB Review d´afers internacionals*, Barcelona, vol. 97-98, April 2012.

Livingstone, Stephen, (Ed), *The Inter- American system of Human Rights*. New York, Oxford University Press, 1998.

Farer, Tom, "The rise of the Inter- American Human Rights Regime: No longer a Unicorn, Nor Yet an Ox" In: David J. Harris, Stephen Livingstone, Ed. *The Inter- American system of Human Rights*. New York, Oxford University Press, 1998.