

The Inter-American Commission on Human Rights and Human Rights Defenders in Latin America

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Assessing the Inter-American Human Rights System: Empirical and Methodological Challenges

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This memo outlines some of the ways in which human rights organisations, or human rights defenders, in Latin America have deployed the mechanisms of the Inter-American Human Rights System, the Commission in particular, in their domestic advocacy strategies. In the first instance, the memo locates the IAHR at the centre of regional human rights politics and mobilisation. The second section outlines, more narrowly, the institutional mechanisms developed by the IAHR for the protection of human rights defenders, and the third section focuses on the question of how to approach the question of evaluating whether they ‘work’, or their effectiveness, if you will.

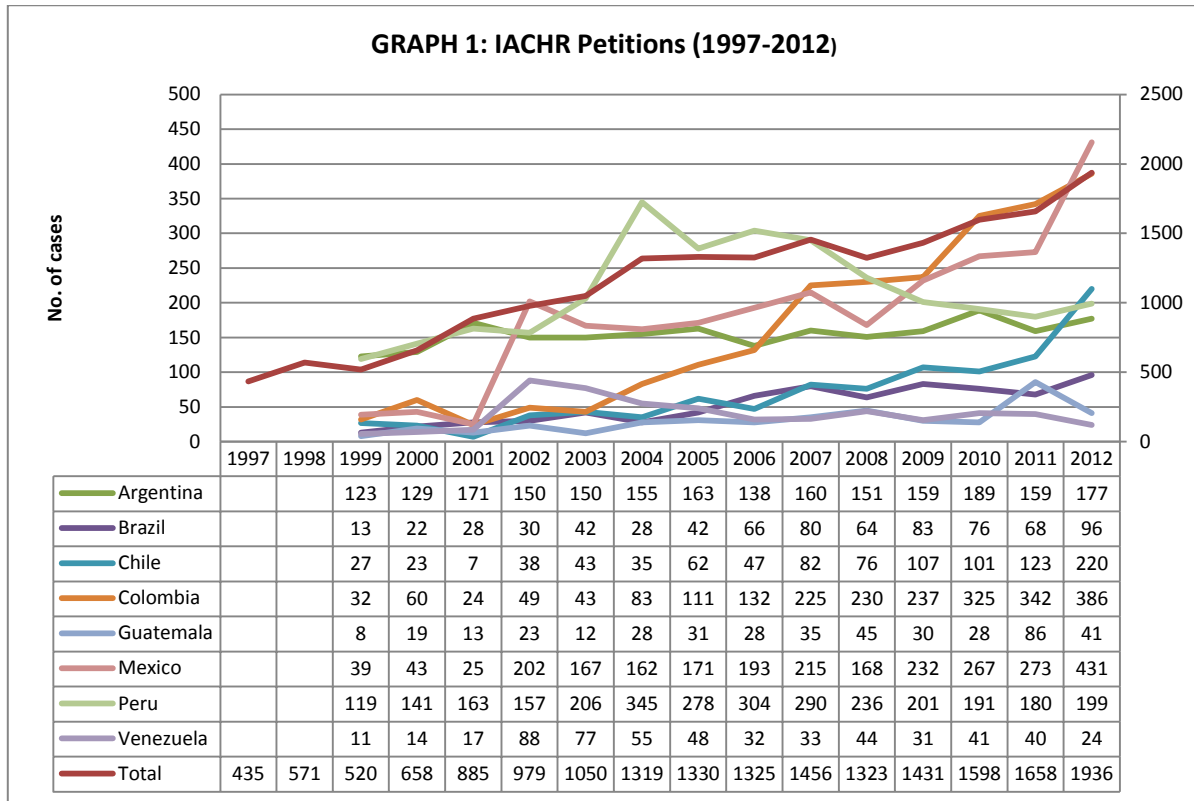
I. The IAHR and Human Rights Mobilisation

The use of the IACHR by HRDs across the region of Latin America has increased dramatically in recent decades (see graph 1.). The availability of the IAHR for human rights groups has the potential to strengthen the domestic position of those groups that engage with the system. The IAHR is an important driver of human rights politics through its impact on mobilization as, for example, a resource for civil society organizations; in the ways it shapes the discourse and practices of human rights groups; and in its capacity to mediate the relationship between NGOs and the state. Human rights groups use the IAHR to expose systemic and institutionalised human rights violations; to negotiate with state institutions through the friendly settlement procedures provided by the IACHR; to frame social and political debates on the basis of IAHR norms and jurisprudence; to promote the interests of vulnerable groups; to strengthen the domestic administration of justice through human rights litigation before domestic courts; and to strengthen regional human rights networks and use of the IAHR in strategic supranational litigation (e.g. the example of CEJIL).

As a result, there has been a discernible evolution towards a more case-oriented existence in the interplay between the Commission and the Court. These developments have meant increasing focus on the Inter-American Court. Yet, the Court deals with a very small number of cases when contrasted with the number of cases dealt with on an annual basis by the IACHR. The contrast with the European Court of Human Rights is also noteworthy: there are around 100,000 cases pending before the European Court with around 50,000 new cases being submitted every year. The case-load of the Inter-American Court of Human Rights is, nonetheless, increasing on a year-to-year basis, with an increasing number of cases at the monitoring stage.

Overall, therefore, the IAHR is at the centre of regional human rights politics in Latin America. The IAHR provides opportunities for domestic and transnational human rights activists to bring pressure for change in their domestic political systems. The transnational legal and political processes that result from such interaction have the potential to generate norms and practices that in turn influence domestic legal and political processes. Hence, the ‘impact’ of the IAHR, in this sense, lies in its ability to shape the nature and direction of the processes of democratization and the role of human rights in these processes.

However, the capacity of actors to mobilize the IAHRs is highly unequal. Using numbers of petitions to the IACHR as a proxy, Graph 1 illustrates this country variation across the region, and indicates that patterns of recourse to the IACHR does not reflect levels of human rights violations – rather patterns of human rights mobilisation.



The differentiated engagement with the IAHRs by HROs reflects varied capacities in terms of organizational structures, legal and technical expertise, and international connections. More specifically, the factors that shape the capacity of civil society actors to mobilize the IAHRs include the degree of professionalization of human rights groups; their capacity to frame their demands and advocacy in legal terms; and the degree of internationalization of their activism. These factors shape the capacity of actors to mobilize the IAHRs and the likelihood of their success in achieving their objectives through participating in the procedures made available by the IAHRs.

II. HRDs and the Inter-American Commission on Human Rights

The effective legal mobilisation of the IAHRs requires, moreover, a minimum degree of personal security for human rights activists and a degree of openness in and responsiveness by domestic political and legal institutions. Yet, in many countries in Latin America the risks associated with human rights work remain considerable. From Ciudad Juárez in the North to Chiloé in the South, HRDs face a range of threats to their physical security because of their human rights activism, including police harassment, political vilification, criminalisation, paramilitary violence, and targeted killings. When confronted with urgent and immediate threats, a slow-moving judicial process in Washington D.C. and San José, Costa Rica, is of limited, if any, immediate help.

Protection mechanisms

The IACHR has responded to these realities of much human rights work in the region by developing specific institutional mechanisms aimed at HRDs, such as the IACHR Rapporteurship on Human Rights Defenders, and in particular, rapid-response precautionary measures (PMs).¹

First, the mechanism for PMs is established in Article 25 of the Rules of Procedure of the IACHR. Hence, the authority of the PMs is not derived from a formal legal instrument.² The key features of PMs are:

1. In short: they are interim measures that are adopted to prevent irreparable harm to persons
2. With PMs the IACHR aims to respond quickly to situations characterised by particularly urgent and serious circumstances of risk, in particular, threats to life and the physical integrity of persons
3. The request for protection by the IACHR is aimed at state authorities to provide immediate and effective measures of protection.
4. These measures are not exclusively aimed at preventing harm to HRDs – but over time increasingly deployed to protect HRDs

Second, how are PMs meant to work? That is, what are the underlying assumptions of these mechanisms? In simple terms, there are two key assumptions underpinning the rationale for PMs, namely: (i) that the actual intervention of the IACHR and, in this case, the granting of PMs, will offer protection for the individuals and groups subject to the measure (through preventing and deterring harm against beneficiaries); and (ii) that the state authorities to which the IACHR directs its request have the capacity, and the willingness, to provide *effective* protection.

In addition to these assumptions regarding state capacity and willingness, this perspective on how PMs are meant to work is also grounded in understandings of how the Inter-American system is able to induce human rights change. This is a consequence of the changing character of the Inter-American system in recent decades, which has gone from being primarily concerned with ‘naming and shaming’ repressive military regimes in the region, to engaging democratic regimes through a (quasi)judicial process that assumes at least partially responsive state institutions.

Hence,, with PMs the IACHR aims to respond quickly to situations characterised by particularly urgent and serious circumstances of risk. The request for protection by the IACHR is aimed at national authorities to provide measures of protection. The PMs are interim and non-judicial mechanisms and in this similar to other interim human rights mechanisms available from the UN’s Special Procedures, UN treaty body system, and from the European Court of Human Rights.

But, how are the PMs are used, and to what effect?

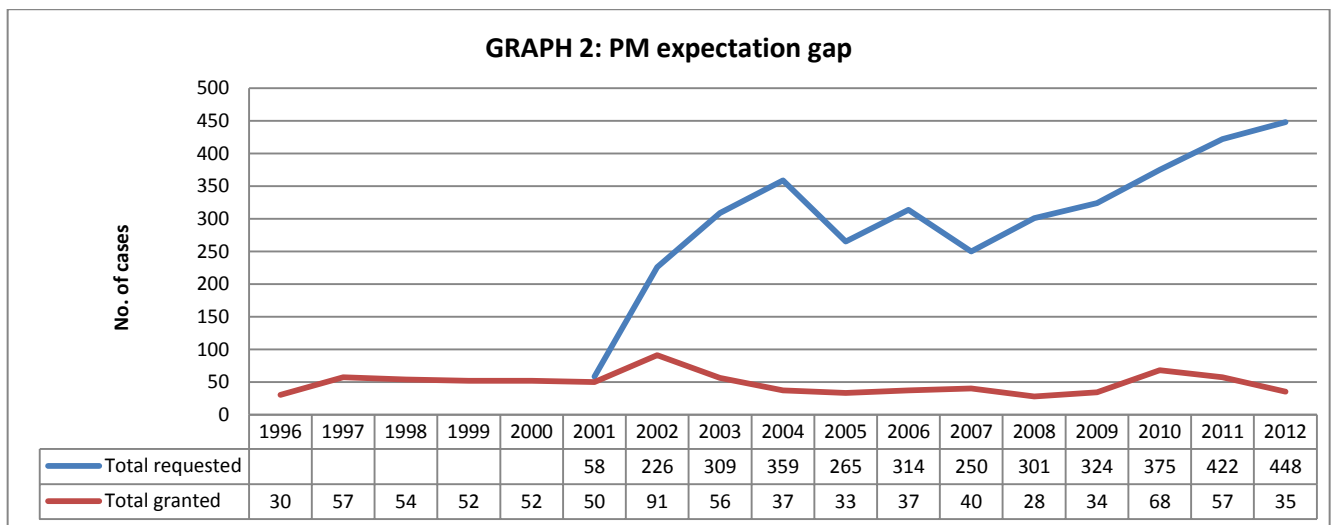
¹ It should also be noted that the Inter-American Court also provides interim measures. The differences between the Court’s provisional measures and the Commission’s precautionary measures are noteworthy: the former are enshrined in the American Convention, and they are judicial in character. Yet, still discretionary powers of the Court to evaluate requests. The measures are available to the Court in relation to cases already under consideration, but the Court may also adopt measures at the request of the IACHR in other cases.

² Yet, the IACHR argues with regards to the legal status of PMs that these mechanisms are binding. However, the fact remains that the PMs are not included in the American Convention. Instead they have been institutionalized for decades through the Rules of Procedure of the Commission. The IACHR applies them, nonetheless, to all thirty-five member states of the OAS. This is part of the reason for the objections raised by certain OAS member states against the use of the IACHR of these measures (see recent controversy around the PM granted with regards to *Belo Monte*).

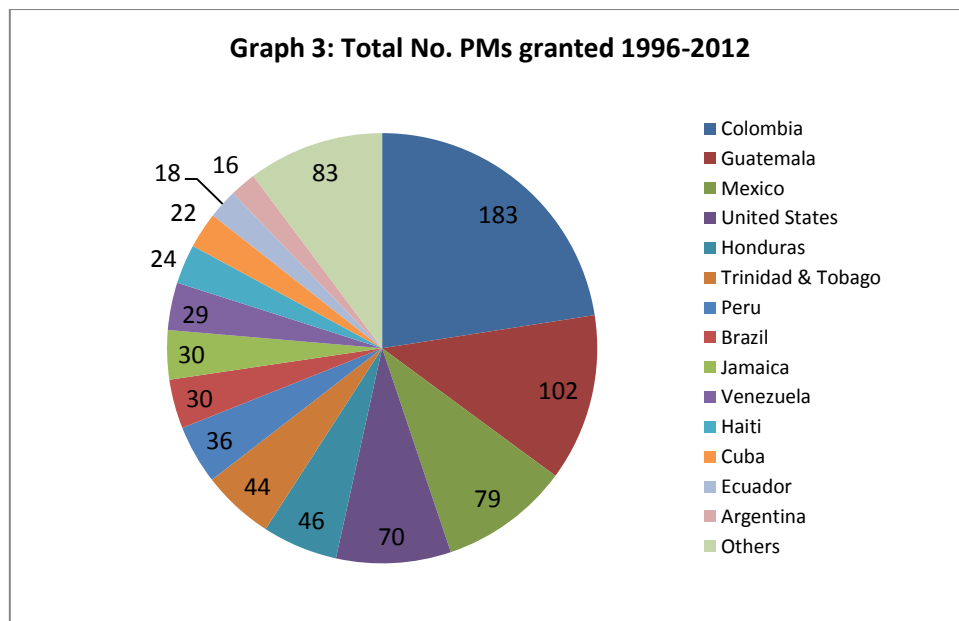
Evidence: patterns of request and adoption

First, what are the main trends in the demands for and granting of PM? Drawing on a unique data set of IACHR precautionary measures, an examination of over 810 PMs in the period 1996-2012 finds some interesting preliminary observations:

The following graph of PMs requested and granted reveals a significant increase since 2002 in particular.³ The significant gap between measures requested and granted indicates, however, a very real ‘expectation gap’ (Graph 2).



There is also significant variability in terms of the countries targeted by precautionary measures (Graph 3).

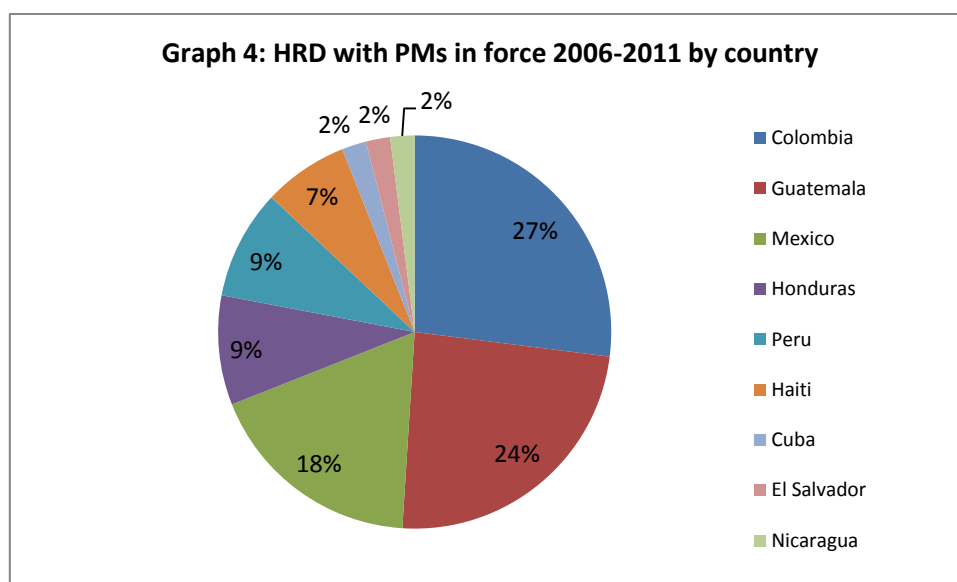


³ To note: “[t]he number of precautionary measures granted does not reflect the number of persons protected by their adoption; [...] many of the precautionary measures issued by the IACHR protect more than one person and, in certain cases, groups of persons such as communities or indigenous peoples.”

<http://www.oas.org/en/iachr/decisions/precautionary.asp>

Now, this data of total number of PMs adopted does not distinguish between HRD specific and non-HRD specific. So, how many of PMs are adopted on behalf of HRDs? According to the IACHR, over 40% of PMs adopted in period 2006-2010 were granted to HRDs. Hence, the data suggests that HRDs are increasingly requesting PMs to protect their activities. These patterns of requests appear to have prompted a shift in IACHR rationale for granting PMs. My preliminary review of PMs suggests that during the initial period (1996-2001/2) PMs were primarily granted by the IACHR in response to urgent threats to non-HRD individuals to prevent irreversible damages, particularly in response to death penalty cases (Caribbean countries), deportation cases (Canada), and detention and health facilities. In the period from 2002, HRDs were increasingly granted PMs.

Again, there is significant country variation, both in terms of PMs adopted in general, and with regards to HRDs specifically. Graph 4 illustrates that of the HRDs in force since 2006, three countries stand out: Colombia, Guatemala, and Mexico.



Preliminary evaluation

What are the main implications of these trends? In the first instance, it is important to note that these statistics do not necessarily reflect any dramatic changes in the human rights situation in the respective countries (with some possible exceptions – e.g. Mexico; Honduras post-coup). The trends reflect, in part, the level of awareness of the existence of the IAHRs in general and the PM mechanism in particular. Here international human rights organisations and regional networks often play crucial roles in facilitating the use by local human rights defenders of these measures. At the very least, the increase in the number of protective measures requested and the significant number of measures granted reflect the belief that they make a difference, and that they provide some degree of protection to the individuals and groups subjected to them.

But, do they make a difference? Are they effective? How do we know?

III. Evaluating effectiveness

Now, measuring effectiveness is tricky. There are, of course, various understandings of the very concept of effectiveness and various approaches to the measurement of the effectiveness of human rights mechanisms. In general, we judge effectiveness of human rights mechanisms by measuring their consequences against some kind of yardstick or set of criteria.⁴ Simply put, we can identify three basic frameworks:⁵

One common way of measuring effectiveness is to evaluate a human rights mechanism against an ideal scenario. For example, 'if PM does not protect HRD from *all* threats and risks, it is a failure'. Such aspirations are of course common, perhaps inevitable, but, fraught with problems of raising expectations unrealistically high. In the process, there is a risk of potentially ignoring the smaller, but still important possible positive effects of PMs.

A second way of measuring effectiveness is to explore counterfactuals. This way of thinking by using hypothetical scenarios are pervasive: "had another type of PM, the HRD would have been better off, more secure". Yet, similarly, such measurements tend to be unsatisfactory. In this connection, one obvious point, but worth stating: *per se*, cases where PMs are granted, and where there are threats towards HRDs, do not necessarily prove that PMs are ineffective. After all, the situation could have been even worse without PM.

I favour instead an alternative way of trying to evaluate the impact/effectiveness of PMs (and the IAHRs more generally): a systematic comparative analysis of cases. In brief, this approach involves contextual analysis of specific cases – process tracing them – and rigorously comparing both processes and outcomes. This approach seeks to measure the gap between how PMs are meant to work and how they actually work in practice.

IV. Way forward

Increasing attention has been given to 'interim measures' by international rights bodies. These measures seek to overcome some of the problems with the increasingly judicialised character of human rights advocacy. Supporters argue that they are more responsive to rapidly evolving human rights challenges, and that they are less cumbersome in terms of requiring legal know-how. But, are these measures effective? Or do they offer false hope to those human rights defenders who have secured them? The impact of these measures on vulnerable and exposed individuals and groups on the ground depends on the local context (political, conflict situation). More specifically, however, what are the factors shaping the effectiveness of these measures?

A systematic evaluation of PMs, and IAHRs mechanisms more generally, would require a clear definition of case selection criteria, for example, by country characteristics (e.g. those singled out as particularly problematic), including contextual factors related to HRD risk, such as: existence of armed conflict; existence of a state of emergency; efficacy of judicial system and severity of impunity; indicia of discrimination against vulnerable groups; control of executive branch over other branches of government. In other words, those very factors identified by the IACHR as contextual factors in the process of granting PMs.

⁴ Sikkink, *The Justice Cascade*, p.164

⁵ Kathryn Sikkink's recent book, *'The Justice Cascade'* is very helpful in outlining these basic frameworks.

Within these country cases, key differences and similarities to be examined include: type of HRD; type of risk/threat the HRDs are facing; type of PM requested, type of specific measure requested; type of PM adopted, i.e. state response, both in terms of process (were PM measure planned and applied with participation of beneficiaries?, and are there any existing institutional arrangement nationally for HRD protection?) and in terms of outcome.

A comparative analysis of such cases would allow specification of key factors that may shape the effectiveness of PMs. A preliminary survey of the PM dataset, taken together with an examination of individual cases, and the IACHR's own evaluation, suggests that there are certain key factors that may shape the effectiveness of PMs:

- The case of Mexico demonstrates the limited effective reach of federal state authorities, and the complexities inherent in the practical implementation of the responsibility of federal states to guarantee protection. But, it also reflects the limitations when violence involves non-state actors, and in particular, powerful sub-national state actors with tenuous, and occasionally conflictive, links to central authorities.
- The example of Colombia illustrates the uncertainties about whether IACHR intervention through the granting of PMs offers protection of HRDs. There are numerous examples of individuals and groups subject to PMs being targeting subsequent to granting of PMs. The increasing use of Colombian HRDs since 2001 in particular is noteworthy. Certainly, evaluating effectiveness in these cases involves counter-factual reasoning. Would the situation of HRDs have been better in the absence of IACHR intervention through the granting of PM?

And, clearly, there are also numerous methodological challenges. There are significant intervening factors, including other possible IACHR actions, or, of course, factors that have nothing to do with the IACHR at all, that explain changes in specific cases.

Yet, reasons to believe that PMs operate through and are affected by factors such as: the degree and nature of media attention; international/national linkages of cases; state capacity (incl. geography, location, rural/urban) and resources; nature of threat facing HRD (including whether state/non-state actor, although boundaries are blurred in many contexts); and the type of HRD and type of human rights issue. To evaluate the relative importance of such factors, input from HRDs affected themselves is required. Also, more fine-grained analysis of state responses – and what exact measures adopted or not – is crucial.

Indeed, the demands on the IAHRs have increased dramatically, that have generated significant push-back from states in recent years. The ongoing reform process has proved contentious, which partly reflects the intrusiveness of the IACHR. But there are also problems – perceived and real – of legitimacy, especially regarding the criteria for using precautionary measures. Indeed, one of the key triggers for the IAHRs reform process was the fallout over one of the IACHR's precautionary measures, concerning Belo Monte. One of the most significant results of the reform process appears to be a reduction in the discretionary powers of the IACHR to issue PMs (by imposing a set of straitjacket criteria on the IACHR).

Moreover, the paradox of exceptional measures – the more they are used, the less exceptional they become, potentially undermining their effectiveness. Of course, the demand is huge and far outstrips the capacity of international human rights institutions, such as the IACHR, to provide effective measures. In addition, broader issues of de facto state responsibility are particularly important. Even in cases where there is political will at the level of central government, effective authority is often diffuse, especially in the context

of many Latin American societies with fragile social order and widespread social violence. Yet, the IAHRs, as other international human rights bodies, has to operate on the fundamental assumption that the state is both a violator and a guarantor of human rights. It is important to recognize that Latin American states are far from homogenous actors. Parts of the state apparatus can be mobilised to protect HRDs.