

Military Justice in Chile: Exploring its Ongoing Violation of the American Convention on Human Rights

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ABSTRACT

Between 1973 and 1990, Chile was ruled by Augusto Pinochet, a military dictator known for his persecution of leftists and political opponents. Although Chile transitioned to democracy, ratified the American Convention on Human Rights, and joined the Inter-American System for the protection of human rights (IAHRS) in 1990, Pinochet's legacy of human rights abuse lingers. The Chilean military justice system exemplifies this through its ongoing jurisdiction over cases in which military personnel harmed civilians, which violates the Convention's guarantee of access to competent courts and fair trials. This research fills a gap in the existing literature on this violation by exploring the following question: how do the combined structural weaknesses of the Chilean judiciary and IAHRS limit the Chilean military justice system's compliance with the Convention? To address this question, I analyzed the foundational documents of the Chilean judiciary and IAHRS with a focus on how vague or inconsistent language in the articles that connect through the procedural interactions between the two institutions work together to create loopholes for the Chilean military justice system to exploit. This thesis argues that ambiguous and contradictory language in the articles of the Chilean and IAHRS documents involved in the referral of human rights petitions to the Inter-American Court limits compliance by jeopardizing the legitimacy of petitions against Chile for its military justice system's inappropriate jurisdiction and by creating significant deterrents for those considering petitioning against Chile. Throughout the twentieth century, military dictatorships ruled several Latin American countries that have since ratified the Convention. This research could therefore illuminate tendencies central to understanding and rooting out dictatorial legacies in the region and inform more effective collaboration between the IAHRS and its Member States in addressing impunity for human rights abuse.

Introduction

"Chile returns to democracy, it returns without violence, without blood, without hate — it returns by the road of peace," said Patricio Aylwin to a crowd of Chilean citizens during his inaugural presidential address on March 11, 1990.¹ Aylwin won Chile's first presidential election since 1970, replacing Augusto Pinochet, the authoritarian leader of Chile's seventeen-year military junta.² Pinochet came to power in 1973 by staging a coup d'état to overthrow president Salvador Allende, a democratically elected socialist.³ The military junta constituted a violent period in Chile's history during which the state arrested 28,459 people for political reasons and disappeared or killed 3,216 people.⁴ Aylwin's election to the presidency marked the beginning of an era of optimism and change, catalyzing democratic reforms and the investigation of human rights abuses that took place under the military junta.

A pivotal step in Chile's democratic transition was its ratification of the Inter-American Convention on Human Rights (hereinafter "the Convention"), the primary human rights treaty of the Organization of American States (OAS) and foundational document of the OAS' Inter-American System for the protection of human rights (IAHRS).⁵ The

Convention outlines OAS Member States' human rights obligations and establishes the two essential organs of the IAHRS: the Inter-American Commission on Human Rights (hereinafter "the Commission") and the Inter-American Court of Human Rights (hereinafter "the Inter-American Court").⁶ By ratifying the Convention, Chile accepted the jurisdiction of the Inter-American Court as well as the mandate of the Commission as an investigative body.

In addition to visiting Member States, publishing reports, and implementing human rights initiatives, the Commission receives and processes petitions from individuals, groups, or organizations alleging that their state has violated the human rights established in treaties recognized by the IAHRS.⁷ If the Commission decides to refer a petition to the Inter-American Court, the Court determines the responsibility of the state in question by interpreting the Convention according to the pro-homine principle, meaning that it prioritizes the human rights of individuals in the Member States that it serves. If the Inter-American Court decides that a state is responsible for violating human rights guaranteed by the Convention or other treaties recognized by the IAHRS, it issues a legally binding decision that may require the state's government to make reparations to victims.⁸ The

reparations included in the Inter-American Court's decisions take into account victims' needs and the "structural or normative aspects that caused the violation and need to be modified by the State to avoid the repetition of the same type of violations."⁹ The "structural or normative aspects that caused the violation" can pertain to the domestic laws of the state in question, meaning that the Inter-American Court can require the state government to change its laws.

The Inter-American Court also monitors the implementation of reparations through a variety of practices including "written process, hearings, visits and notes of the Secretariat of the Court."¹⁰ Through its assessment of Member States' international responsibility for human rights violations, decisions on reparations, and monitoring of reparation implementation, the Inter-American Court is the principal accountability mechanism for compliance with the human rights standards of the Convention. Accepting the Inter-American Court's jurisdiction was therefore of particular importance to the development of Chile's human rights protections as it transitioned out of a dictatorship defined by human rights violations.

Chile's interaction with the Inter-American Court since ratifying the Convention involves four separate cases: *Olmedo-Bustos et al. v. Chile* (2001), *Case Palamara-Iribarne v. Chile* (2005), *Claude-Reyes et al. v. Chile* (2006), and *Norín Catrیمان et al. (leaders, members, and activists of the Mapuche Indigenous People) v. Chile* (2014).¹¹ The Chilean government fully complied with the Inter-American Court's decisions in all of these cases except *Norín Catrیمان et al. v. Chile* (2014), as it did not meet the required dollar amount in reparations to indigenous peoples and has failed to improve their access to consultation on land development and resource extraction (which were key issues in the case).¹² This relatively consistent compliance with the Inter-American Court's decisions has bolstered Chile's rise as a regional model for advancing human rights protections and suggests that it has a cooperative relationship with the IAHRs.

However, despite Chile's renewed commitment to human rights protection and compliance with the Inter-American Court's decisions, Pinochet's legacy of brutality and impunity lives on through the Chilean military justice system, which continues to preside over cases in which military personnel violated the human rights of civilians. According to the Inter-American Court, military jurisdiction must exclude civilians,¹³ meaning that the Chilean military justice system violates the Convention's guarantee of the right to "a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention."¹⁴ As the Chilean judiciary and the IAHRs are both central to

addressing this ongoing violation, this thesis explores how flaws in the composition and procedures of each institution overlap and create loopholes for the military justice system's ongoing violation through the following question: how have the combined structural weaknesses of the Chilean judicial system and the IAHRs limited Chile's compliance with the Inter-American Convention on Human Rights, specifically its standards for military justice systems?

Both Chile and the IAHRs have attempted to address the military justice system's jurisdiction over civilian human rights cases. In 2005, the Inter-American Court pinpointed the problematic scope of the military jurisdiction through the *Case of Palamara Iribarne v. Chile*. Humberto Antonio Palamara Iribarne was a naval officer convicted by a Chilean military court for attempting to publish a book on "military intelligence issues and the need to be guided by ethical standards" as well as for making comments to the media that were critical of the Navy during the proceedings against him.¹⁵ The Inter-American Court condemned this conviction, citing that the Naval Court had a vested interest in convicting Palamara Iribarne and therefore violated his access to an impartial and competent court, which Article 8 of the Convention guarantees.^{16,17} To align Chile's judiciary with international law, the Inter-American Court required it "to set limits to the subject-matter and personal jurisdiction of military courts" in order to protect civilians from military jurisdiction.¹⁸

In order to meet the requirements of the Inter-American Court's *Palamara v. Iribarne* decision, the Chilean National Congress introduced Law 20.477 in December 2010,¹⁹ which explicitly excludes civilians and minors from military jurisdiction.²⁰ This reform, while promising in its intended purpose of limiting the scope of military jurisdiction, has failed to prevent military courts from presiding over civilian human rights cases. Since the law's implementation in 2010, military courts have tried numerous Carabineros (national police) who violated the human rights of civilians, depriving victims of access to competent, impartial courts, and shielding members of the armed forces from justice for their flagrant abuse of citizens.²¹

Given the failures of the Chilean government and the IAHRs to address this Convention violation, it is crucial to consider the following: if Chile successfully created a law against subjecting civilians to military jurisdiction to align itself with IAHRs standards, why isn't it able to enforce it? Are there loopholes in domestic law that the military justice system is exploiting? And if Chile cannot enforce its own law, why hasn't the IAHRs intervened again or devoted resources to overseeing the Chilean judiciary's compliance with the Convention? What is preventing victims of this Convention violation from submitting a petition to the

IAHRS so that it can force Chile to reckon with the scope of military justice once again? While there is extensive research on Chile's complex relationship with the IAHRS, it lacks a holistic examination of how each of these factors coincides and hampers Convention compliance, which is what this thesis seeks to explore.

Literature Review

This work examines how flaws in the structures of the Chilean judiciary and IAHRS work together to enable the Chilean military justice system's ongoing Convention violation. As scholarship on this aspect of Chile's relationship with the IAHRS is limited, my research draws from analyses of Chile's political history, investigations of the Chilean military justice system's conduct, and critiques of the IAHRS' weak enforceability mechanisms. These historical analyses, investigative reports, and criticisms of the IAHRS as an institution tend to blame the flaws in either the domestic system or the IAHRS for the Chilean military justice system's ongoing violation of the Convention. By exclusively focusing on one system or the other, existing literature overlooks the way the two systems interact to produce this outcome. To holistically understand and address Chile's ongoing violation of international law, it is necessary to examine how the weaknesses of each system compound one another. My argument thus draws on existing analyses but synthesizes their elements to examine this phenomenon through a novel systems-thinking approach.

Historical Analysis

The enduring influence of Pinochet's dictatorial legacy is a central theme in Chile's relationship with the IAHRS, as many scholars have argued in the existing body of work on the historical context that shaped modern Chile. Numerous scholars approach this historical analysis with a focus on how the political circumstances of the 1990 transition impacted the strength of Chile's domestic human rights protection mechanisms and its compliance with the Convention. For example, Silvia Borzutzky argues that the enduring influence of the military dictatorship in the incoming democratic government played a key role in limiting the potential of the new government and reparations programs to facilitate lasting change through transitional justice.²² While the 1990 transition from military dictatorship to democracy marked a seismic shift in Chile's approach to human rights, officials guilty of human rights abuse maintained substantial power in the early years of the transition, robbing the democratic government of the "institutional capacity and determination" necessary to prosecute abusers.²³

Borzutzky also points out that the deliberate preservation

of military power in the incoming democratic government was particularly evident in the judiciary. After Pinochet seized control of the government in 1973, he declared Chile to be in a "state of war," and the Supreme Court gave up its "rights and obligation to oversee the military tribunals and to demand from those tribunals an adequate interpretation of the laws."²⁴ The 1980 Constitution codified this lack of oversight into law, paving the way for members of the armed forces or law enforcement agencies to violate civilians' human rights with impunity.²⁵ The lack of accountability for military tribunals that survived the democratic transition is a crucial phenomenon to examine in assessing military courts' illegitimate jurisdiction over human rights cases. In recognizing the consequential role of these historical developments in shaping the Chilean judiciary, Borzutzky draws connections between the institutionalization of military power in the transition government, and the current judicial system's shortcomings in human rights protection. While this analysis illuminates Pinochet's influence on the judiciary before and after the transition, Borzutzky neglects to investigate the ties between the circumstances of the transition and Chile's non-compliance with the Convention since becoming a democracy. This thesis seeks to expand on Borzutzky's insight by exploring how the operation of the judiciary under enduring dictatorial legacy contributes to limited Convention compliance in combination with the structural flaws of the IAHRS.

The writings of Cath Collins exemplify another approach to historical analysis of political influence on human rights in Chile. Collins acknowledges the influence of Pinochet's legacy over judicial structures identified by Borzutzky, but focuses on international legal precedent as the principal hindrance to post-transition human rights reforms. In her discussion of prosecutions in the context of transitional justice efforts, she establishes that, with the unique circumstances of the Nuremberg Trials as an exception, domestic justice systems seldom permit the direct national prosecution of individuals for international crimes.²⁶ The 1990-91 Truth Commission in Chile fit this norm, meaning that international law was "used for its norm-establishing and reaffirming value" – but not for the actual prosecution of individuals – in the process of addressing the dictatorship-era human rights abuses in the transition to democracy.²⁷ In Collins' view, the international legal precedent of not prosecuting individuals for human rights abuse in the context of transitional justice efforts limited the extent to which the Chilean Truth Commission could facilitate the implementation of comprehensive domestic human rights protections. Her analysis provides insight into the role of international legal precedents in impeding comprehensive changes to the systems built during the dictatorship.

Borzutksy and Collins both offer important analyses, but each focuses on one side of this phenomenon. Borzutksy's approach emphasizes the role of internal structural factors, such as the Supreme Court's forfeiture of power to oversee military courts. Collins' approach focuses on external factors, such as the role of international legal precedent in weakening transitional justice efforts. While both analyses are helpful in understanding the historical context of the transition and its shortcomings in improving Chile's human rights protections, neither approach addresses how these forces combine to enable the ongoing violation of international law.

Investigative Reports

While the works discussed thus far concentrate on how the circumstances of the transition potentially impeded the development of comprehensive human rights protections in democratic Chile, independent human rights organizations have extensively documented instances of Chilean military jurisdiction over human rights cases and investigated its underlying causes. In 2018, Amnesty International published a report titled "Chile: 'I didn't know there were two kinds of justice': Military jurisdiction and police brutality in Chile." Chilean organic constitutional law recognizes the Carabineros de Chile (national police) as a military force,²⁸ and their abuse of civilians in the context of civil unrest has raised awareness of problematic military jurisdiction in recent years. Amnesty International investigated the scope of military jurisdiction in Chile by documenting cases of police brutality in "public demonstrations in support of various social demands throughout the country" and evaluating whether the Chilean judicial system held police officers to account.²⁹

In its review of cases that went through the Santiago Second Military Court, Amnesty International found that of the cases submitted by civilians for unnecessary violence by national police officers in 2005, 2008, 2011 and 2014, only 14 out of 4,551 cases were resolved, and that almost all of the cases were closed without holding any of the officers who used excessive force against civilians accountable.³⁰ As a result of its findings, Amnesty International calls on Chile to ensure that military courts refer investigations and trials of Carabineros for abuse of civilians to ordinary courts and that civilians have access to "comprehensive reparation... including compensation, rehabilitation, satisfaction and guarantees of non-repetition."³¹

In addition to establishing the severity of this issue and demanding action from the Chilean government, the report explains the basic structure of the military justice system and identifies codes under Chilean organic constitutional law that inform its operation, such as the Organic Court Statutes

Code (Código Orgánico de Tribunales, COT) and the Code of Military Justice (Código de Justicia Militar, CJM). The footnote citations included in the report's discussion of these codes frequently list Article 5 of the COT and Articles 5, 6, and 330 of the CJM as involved in determining the military courts' jurisdiction and officers' accountability for the use of excessive force.³² Amnesty International's identification of these codes and specific articles provides a starting point for investigating the structural flaws of Chile's judiciary.

Human Rights Watch also published a report on Chilean military jurisdiction titled, "Undue Process," which investigates the Chilean government's handling of the Mapuche indigenous population's unrest over the land disputes. In its examination of police brutality during Mapuche protests, Human Rights Watch echoes the sentiments of the Amnesty International report in asserting that military jurisdiction over police abuses of the Mapuche people denies them due process.³³ This report also scrutinizes the Chilean judiciary's handling of civilian cases through the lens of its international human rights obligations. Citing the IAHR's restrictions against military jurisdiction over human rights cases, Human Rights Watch recommends that the Chilean government implement legislative reforms to ensure that "human rights abuses by Carabineros, such as homicides, excessive or unjustified use of force, illegal arrest, and torture or ill-treatment of detainees, are investigated by ordinary prosecutors and judged in ordinary courts."³⁴ By providing concrete examples of the Chilean military justice system violating civilians' access to competent and impartial courts, these investigations reveal the profound impact of the dictatorial legacy identified by Borzutksy and Collins on the lives of people on the ground in Chile.

Critiques of the IAHRs

The historical analyses and reports by independent human rights organizations recognize Chile's failure to comply with the Convention, but do not fully engage with the longstanding criticism of international legal bodies (specifically the IAHRs) amongst academics, legal professionals, and politicians. In her work titled *The Practice and Procedure of the Inter-American Court of Human Rights*, Jo Pasqualucci addresses the stark reality of widespread noncompliance amongst states that have ratified the Convention and accepted jurisdiction of the Inter-American Court. She comments that in most Inter-American Court cases that result in calls for the investigation of a member state, "... the State power structure lacks the means or the will to bring the perpetrators of human rights violations to justice. Domestic statutes of limitations or laws on double jeopardy may bar investigations and trials."³⁵ Pasqualucci also posits that if Member States were incentivized to take their IAHRs obligations more seriously, the IAHRs could more substantially limit

impunity and act as a deterrent for human rights abuse.³⁶

While Pasqualucci's take on the limits and potential of the IAHRs hints at the role of dictatorship-era power structures in member state judiciaries in limiting compliance with the IAHRs, it reveals that Member States do not view the IAHRs as an institution with real power to enforce compliance with the Convention. This analysis creates the basis for the argument that the Inter-American System is inconsequential in its capacity to improve human rights protection in Chile (and other Member States) because there is little that it can do to incentivize or enforce compliance. Pasqualucci's commentary addresses this regional dynamic and summarizes common concerns about the impact of the IAHRs, but does not specifically analyze the dynamics of the relationship between Chilean institutions and the IAHRs.

Building on Pasqualucci's observations of domestic systems' inability to implement the decisions of the Court, other researchers have analyzed the general effectiveness of the IAHRs as a human rights protection mechanism. As a part of the IAHRs Studies Project of the Asociación por los Derechos Civiles, Basch et al. conducted an investigation of historical levels of compliance with Inter-American Court decisions handed down from the Convention's petition-based system.³⁷ They concluded that the IAHRs must "strengthen the control, monitoring, and follow-up capabilities of the system's bodies" by implementing protocols like the OAS' political sanctioning of states that are reluctant to or fail to comply with rulings and recommendations of the Court and the Commission.³⁸

Basch's recommendation aligns with Pasqualucci's commentary on Member States' lack of compliance enforcement mechanisms, but concentrates more on the absence of IAHRs enforcement as the underlying cause of non-compliance (instead of the weaknesses of the domestic system). This study pinpoints specific weaknesses of the IAHRs' enforcement tools and prescribes steps for improvement, but like Pasqualucci's contributions, fails to address how the characteristics of domestic judicial systems and the IAHRs overlap and affect Chile's compliance. This thesis will fill this gap by examining both the domestic and regional systems at play, keeping in mind the notion that enforceability and subsequent member-state cooperation is a two-way street.

Summary

Each of the above authors establishes several internal and external contributing factors to Chile's ongoing violation of the Convention, which are essential to a holistic understanding of Chile's complicated relationship with the IAHRs. However, it is crucial to fill the gaps in the existing body of work by investigating the potential synthesis between the weaknesses of both the Chilean judicial system

and the IAHRs. Doing so could not only illuminate why this issue continues to affect Chile in particular, but also reveal how dictatorial legacy in Member States' judicial structures impedes the IAHRs' ability to fulfill its purpose of protecting human rights in the region. Executing this more comprehensive analysis requires examination of the procedures that inform domestic judicial operations and the IAHRs' assessment of petitions through direct engagement with the documents that shape them.

Methodology

I divided my research into three phases: analysis of the documents that shape the Chilean judiciary, analysis of the documents that shape the IAHRs, and comparative analysis of the documents from the Chilean judiciary and the Inter-American System (see Appendix).

Chilean Document Analysis

To provide a comprehensive analysis of the development and impact of the structures of the Chilean judiciary, I qualitatively analyzed the documents that inform its organization and procedures. I first analyzed Chile's 1980 Constitution with a specific focus on Chapter VI, titled 15 "Judicial Power."³⁹ Pinochet oversaw the writing of the 1980 Constitution with the intent of centralizing military power in the government for decades to come, and it has shaped the composition and operation of the Chilean judiciary ever since.⁴⁰ The 1980 Constitution delegates the operation of the judicial system to organic constitutional law, which includes the codes identified by the Amnesty International report:⁴¹ the Organic Court Statutes Code (Código Orgánico de Tribunales, COT) and the Chilean Code of Military Justice (Código de Justicia Militar, CJM). The COT regulates the organization and jurisdiction of courts throughout Chile, and I concentrated my analysis on Articles 5, which focuses on the authority of specialized courts. The CJM is the basis for the organization and practices of Chilean military courts, containing 436 articles that dictate the military justice system's procedures, penalties, and special provisions. Guided by the Amnesty International report,⁴² my qualitative analysis of the CJM focuses on Articles 5, 6, and 330, which pertain to the jurisdiction of the military justice system and punishment for military personnel guilty of using excessive force. Furthermore, I analyzed Articles 48 and 70-A of the CJM to examine the appeals process for cases in which military personnel harmed civilians.

IAHRs Document Analysis

As shown in the literature review, critics of the IAHRs argue that the Commission's inadequate monitoring

mechanisms are the key weaknesses to address. However, even if the Commission's monitoring capacity were increased, the Commission would still not be able to issue legally binding requirements.⁴³ That is to say, identifying weaknesses in the Commission's monitoring mechanisms would not be effective in improving its ability to address illegitimate military jurisdiction in Chile. The Inter-American Court, on the other hand, can issue legally binding decisions, and Chile has consistently complied with its requirements since ratifying the Convention.⁴⁴ The Inter-American Court's consequential role in improving human rights in Chile makes its accessibility to civilians subjected to military jurisdiction crucial. As the Commission is the gatekeeper to the Court, analyzing its process for admitting petitions is essential to understanding which weaknesses of the IAHRs factor into Chile's ability to keep violating the Convention without consequence. I therefore conducted a qualitative analysis of the Rules of Procedure of the Inter-American Commission on Human Rights (hereinafter "the Rules of Procedure"), which governs the Commission's process for referring human rights petitions against Member States to the Inter-American Court. I specifically focused on Article 31, which gives the criteria for referral to the Inter-American Court.

Comparative Analysis

My approach to analyzing the relationship between the structural weaknesses of the Chilean judiciary and the IAHRs culminated with a comparative analysis. In this portion of my analysis, I juxtapose the vague language and contradictory articles that I identified in my separate analyses of the two document groups (see Appendix). I specifically assess how ambiguous provisions and conflicting articles between the 1980 Constitution, COT, CJM, and Rules of Procedure intersect and impact Chile's ability to continue violating the Convention without consequence.

Document Analysis

This portion of the thesis engages directly with the documents that guide the military justice system's operations within the broader judiciary and the IAHRs' handling of petitions against Member States. Through a qualitative analysis of the Chilean documents, I illustrate the impact of Pinochet's enduring legacy in the judiciary by uncovering inconsistent provisions for determining military jurisdiction and the protection from oversight afforded to the military justice system by Pinochet-era judicial structures and procedures. My examination of the Rules of Procedure exposes vague language in the criteria for petition admissibility, which is problematic because it needlessly jeopardizes the

referral of petitions against formerly dictatorial states to the Inter-American Court. By analyzing how these flaws overlap, my comparative analysis of the two document groups demonstrates how their respective weaknesses compound each other's effects, exacerbating the lack of accountability on the domestic front and hampering the IAHRs' ability to address Chile's ongoing Convention violation.

Part I: Chilean Judiciary Documents

The Convention violation constituted by Chilean military courts hearing human rights cases is, domestically, an issue of jurisdiction and liability for the abuse of civilians. With this in mind, this section serves to identify the articles of the 1980 Constitution, COT, and CJM that directly shape the authority and accountability of the military justice system and assess how they create opportunities for it to continue hearing human rights cases. Through this qualitative analysis of the documents that dictate the administration and conduct of the Chilean judiciary, I argue that the contradictory nature of the language in the articles of all three ultimately undermines provisions created to protect civilians from military jurisdiction.

The 1980 Constitution

At the apex of the documents that shape the Chilean judiciary is the 1980 Constitution. Article 19 of the 1980 Constitution guarantees Chilean citizens the right to competent judges, and Article 82 declares that the Supreme Court "holds the directive, correctional and economic superintendence of all the tribunals of the Nation."⁴⁵ While these provisions seem conducive to justice and accountability in the Chilean judiciary, their benefits are undermined by the significant leeway given to special tribunals (including military tribunals). Article 77, for example, leaves the organization and procedures of tribunals throughout the country up to constitutional organic law, emphasizing the role of documents such as the COT and the CJM in shaping the operation of the Chilean judiciary.⁴⁶

Organic Court Statutes Code

The COT mimics the Constitution in that it delegates power to yet another document: the CJM. This delegation of authority is explicitly stated in Article 5, which declares that *specialized* courts, including "the family courts, the Labor Courts, the Labor and Social Security Collection Courts and the *Military Courts in times of peace*," shall be "governed in organization and attributions by the constitutional organic provisions contained in Law No. 19,968, the Labor Code, and the *Code of Military Justice and its complementary laws*" and that "the provisions of this Code shall apply to

them only when the aforementioned legal bodies expressly refer to it.”⁴⁷ By leaving the operation of the military courts up to the CJM (aside from the settlement of jurisdictional disputes), the COT isolates the military justice system from the broader judiciary and other branches of government, leaving it with little accountability for presiding over civilian human rights cases.

While Article 5 effectively transfers responsibility for the administration of the military justice system to the CJM, it maintains the nation’s appeals courts and Supreme Courts as authorities in oversight of the judiciary. This is addressed by Article 191, which states that when a special court and an ordinary court both believe themselves to be competent to hear a case, their shared appeals court must settle the matter. If the two courts have different appeals courts, the Supreme Court settles the dispute.⁴⁸ As will be seen in the following section, this provision’s capacity to actually protect civilians whose rights were violated by military personnel from military jurisdiction is unreliable.

The Code of Military Justice

Like the 1980 Constitution’s articles on access to competent courts, the CJM’s articles on the military justice system’s jurisdiction and accountability protocols appear to benefit civilian access to justice. For instance, Articles 5 and 6 provide what are, at first glance, clear definitions of what constitutes a military offense and who is considered to be military personnel. Article 5 declares that “military jurisdiction shall be responsible for hearing: cases for military offenses, which are understood to be those contemplated in this Code...”⁴⁹ It also clarifies that “common crimes committed by military personnel during the state of war, while on campaign, in the act of military service or on the occasion of military service” are to be tried in ordinary courts.⁵⁰ According to Article 6, the CJM applies only to “... officers belonging to the Armed Forces and the Carabineros de Chile, made up of regular personnel, personnel called to service and reserve personnel called to active service.”⁵¹

In addition to defining military offenses and military personnel, the CJM provides certain protections for civilians and recognizes the use of excessive force as a violation of the law. With regard to the subjection of civilians to military jurisdiction, Article 5 is immediately followed by Nota 1, which states: “Art. 1° of Law 20477, published on 30.12.2010, provides that in no case shall civilians and minors be subject to the jurisdiction of military courts. This will always be rooted in the ordinary courts with jurisdiction in criminal matters.”⁵² Nota 1 is a direct manifestation of the Inter-American Court’s requirements of Chile in the Case of Palamara Iribarne vs. Chile, meaning that in theory, civilians are protected by the Inter-American Court’s legal-

ly-binding decision. To address accountability for excessive force, Article 330 provides a list of punishments:

Any soldier who, in order to carry out a superior order or in the exercise of military functions, uses or causes to be used, without rational motive, unnecessary violence for the execution of the acts he is to perform, shall be punished:

1° With the penalty of major imprisonment in its minimum to medium degrees if it causes death of the offended party;

2° With minor imprisonment in its medium degree to major imprisonment in its minimum degree if it causes serious injuries;

3° To the minimum to medium term of imprisonment if it causes less serious injuries;

*4° With the maximum term of imprisonment to the minimum term of imprisonment if no or only minor injuries are caused.*⁵³

If a civilian’s case is heard by a military court despite the existence of Law 20477, they can appeal. To do so, they must go to one of the country’s two Courts Martial, which are the military justice system’s version of appeals courts.⁵⁴ According to Article 48 of the CJM, the Court Martial of the Army, Air Force, and Carabineros includes “two members of the Santiago Court of Appeals, the Auditors General of the Air Force and Carabineros, and a military judge of the rank of colonel on active service.”⁵⁵ Should a civilian wish to appeal the decision of the Court Martial, they must go to the Supreme Court. Article 70-A of the CJM states that “The Supreme Court, composed of the Auditor General of the Army or whoever may subrogate him, is also responsible... to hear:

1° Of cassation appeals, both in form and substance, against the sentences of the Courts Martial;

2° Of appeals for review against final judgments in matters of peacetime military jurisdiction;

3° Of appeals against decisions of Courts Martial and, in the second instance, of appeals of complaint heard by the Courts Martial;

4° Of the requests for implication or recusal against the ministers of the Courts Martial; 5° Of disputes of jurisdiction between a military court and another of the common jurisdiction;

6° Of disputes of jurisdiction between Institutional Courts that depend on different

Courts Martial and of those that arise between them;

7° Of active extradition in military jurisdiction proceedings.⁵⁶

While the CJM includes measures to protect civilians from military jurisdiction and deter the use of excessive violence by military personnel, whether or not they actually fulfill their purpose is another story. For example, just by recognizing police brutality in Article 330, the CJM makes it possible for a Court Martial or the Supreme Court to affirm military jurisdiction over a case in which a military officer harms a civilian. Additionally, when an ordinary or military court is making a decision about its competence to hear this type of case, the civilian protection given by the CJM's recognition of Law 20477 in Nota 1 is threatened by the seemingly straightforward provisions of Articles 5 and 6. In other words, the decision about whether or not a case falls under military jurisdiction can come down to the involvement of a Carabinero, bypassing the CJM's stipulations on civilian exemption and the mandatory trial of common crimes in ordinary courts. Combined with the 1980 Constitution and COT's isolation of the military justice system and unreliability of their oversight mechanisms, the lack of continuity resulting from the above articles subverting each other is the key to answering the question posed in the introduction about Chile's failure to enforce Law 20477; it makes Law 20477 distinctly challenging to enforce.

As with the provisions of Nota 1 and Article 330, the process for civilians to seek justice by appealing decisions of military courts lacks public trust and institutional backing. Because military personnel still play a key decision-making role in the appeals process, the Courts Martial are partial and therefore incompetent to hear civilian human rights cases per the Inter-American Court's decision in *Palamara Iribarne vs. Chile*.⁵⁷ The same can be said of the Supreme Court. Because the Army Auditor General, a member of the armed forces, is a member of the Penal Chamber of the Supreme Court, the Supreme Court lacks the impartiality necessary to be competent to hear a civilian human rights case. This process is firmly rooted in Pinochet-era judicial practices, as the Auditor General was formerly one of Pinochet's army subordinates.⁵⁸

The impact of the flaws in the procedures governing the military justice system can be seen in the case of Manuel Gutiérrez. In August 2011, 16-year-old Manuel Gutiérrez was watching violent clashes resulting from the United Workers' Confederation strike in the streets of Santiago and was fatally shot by a Carabinero. While authorities initially denied police responsibility for the shooting, the case was

taken up by the local prosecutor and the Carabinero was eventually detained and charged with homicide.⁵⁹ The ordinary court that was set to try the Carabinero declared the case to be outside of its jurisdiction simply because it involved a Carabinero. The case file was then passed on to the Santiago Second Military Court, and the Carabinero "was conditionally released pending trial."⁶⁰ Almost three years later, the court sentenced him to three years and one day of imprisonment for the crime of "unnecessary violence resulting in death" along with 60 days for "unnecessary violence causing less serious injuries."⁶¹

The Inter-American Court established that military courts "must only try military men for the commission of crimes or offenses that due to their nature may affect military interests."⁶² Despite the murder of a civilian constituting a common crime, which is to be tried in an ordinary court according to Article 5 of the CJM, the involvement of a police officer was the ordinary court's basis for sending the case to the military tribunal. According to the Inter-American Court, cases in which military personnel violate the human rights of civilians must be tried in an ordinary court because civilians have "the right to participate in the criminal proceedings not only for the effects of the corresponding reparation of the damage but also to exercise their rights to the truth and to justice,"⁶³ which is a right that military courts lack the impartiality and competence to protect.

Part II: Inter-American System Document Analysis

Rules of Procedure of the Inter-American Commission on Human Rights

When the Commission processes petitions and deliberates over their referral to the Inter-American Court, it relies primarily on Articles 28-31 of the Rules of Procedure. If a petition against a member state meets the basic requirements given in Article 28 and has been forwarded to the government of the state in question in accordance with Article 30,⁶⁴ the Commission examines the domestic legal mechanisms potentially involved in the alleged human rights violation. Article 31(1) states that in order to determine whether a petition is admissible, the Commission must assess whether or not "the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law."⁶⁵ Because Chile's domestic judicial system does not comply with the Convention in the first place, interpretation of Article 31(1) is complicated, making the exceptions to Article 31(1) crucial to determining the admissibility of a petition against Chile for its military justice system's ongoing Convention violation.

Article 31(1)(a) waives the requirement given in Article 31(1) if “the domestic legislation of the State concerned does not afford due process of law for protection of the right or rights that have allegedly been violated.”⁶⁶ Civilians whose human rights cases are heard by a military court are denied due process because the military courts lack the impartiality to be considered competent according to international law.⁶⁷ While the application of the exception given in Article 31(1) (a) in the case of Chilean military courts hearing human rights cases seems to be straightforward, its recognition depends on Commission members’ interpretation of Article 31(1)’s vague language about the petitioner needing to have pursued or exhausted domestic legal remedies “... in accordance with the generally recognized principles of international law.”⁶⁸ As demonstrated in the “Comparative Document Analysis” section of this thesis, this ambiguous stipulation is open to subjective interpretation, which could jeopardize the recognition of the Article 31(1)(a) exception when the Commission decides whether to refer a petition against Chile to the Court.

The requirement that petitioners pursue or exhaust domestic legal remedies is also waived by Article 31(1)(b) when “the party alleging violation of his or her rights has been denied access to the remedies under domestic law or has been prevented from exhausting them.”⁶⁹ The application of Article 31(1)(b) is also vulnerable to the vague language in Article 31(1). Members of the commission could determine that the petitioner whose human rights case was heard by Chilean military courts has not been prevented from

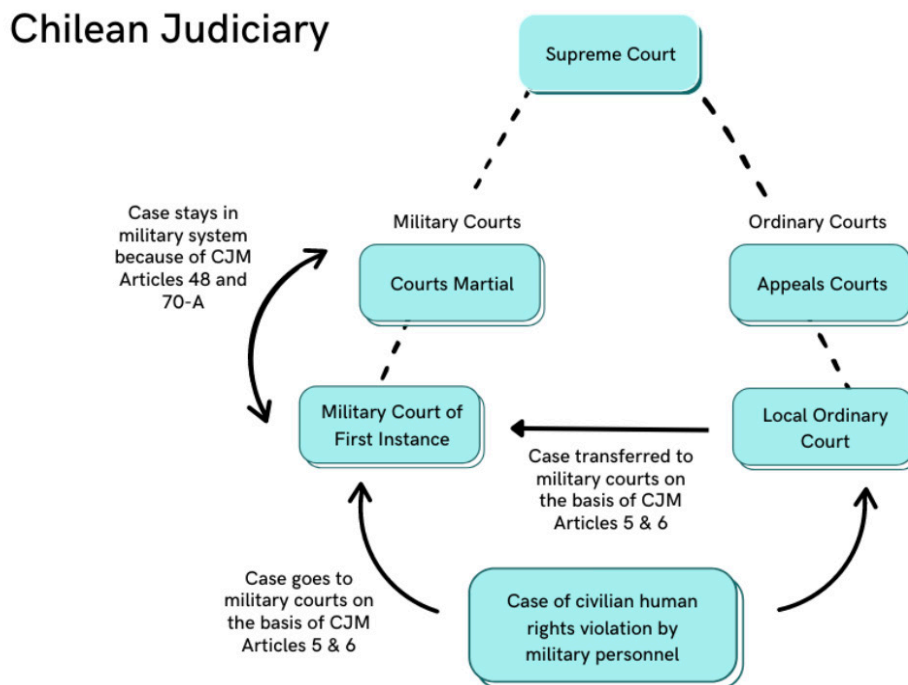
exhausting remedies under domestic law because they could take their case to Chile’s higher courts.

The Court and the Inter-American System in theory are used as a last resort; they are to be engaged when a victim of human rights violation’s only viable path to justice is to petition against their own state because there are no workable domestic procedures to modify existing systems. While Article 31(1) is designed to secure the Court’s purpose as a last resort, it is too ambiguous for the Commission to be able to take the composition of the judiciary in the state in question into account when making decisions. This ultimately opens the Rules of Procedure up to interpretations that could allow violations by entities like the Chilean military justice system to fall through the cracks.

Comparative Document Analysis

To engage with the overlapping weaknesses of the foundational documents of the Chilean judiciary and the Inter-American System, it is necessary to reestablish the flaws within the legal frameworks of each system. As seen in the “Chilean Document Analysis” section, the legacy of Pinochet’s military dictatorship endures in democratic Chile through the structure and procedures of its judiciary, despite its constructive relationship with the IAHRs in the years since the transition. In this previously dictatorial state, the provisions of the 1980 Constitution, COT, and CJM created with oversight and civilian protection in mind are, as seen in the Gutiérrez case, not enough to protect human rights according to the standards of the Convention.

FIGURE 1. A Visual Representation of the Chilean Judiciary’s Structural Weaknesses.



As indicated in the “Inter-American System Document Analysis” section, the engagement of the IAHRs is, as a last resort, the best means of moving the needle forward on human rights protections when domestic remedies violate the Convention without consequence. Instances like the aforementioned Gutiérrez case, however, make it clear that the IAHRs is not always involved when it is most needed. The Chilean judiciary and the IAHRs share the following weakness: their articles pertaining to jurisdiction, accountability, and admissibility are in conflict with each other and are ambiguous enough that neither the Chilean judiciary nor the IAHRs can guarantee that their stipulations intended to ensure accountability and civilian protection will apply in any given case. The contradictory articles of the 1980 Constitution, COT, CJM combined with the vague language of Article 31 of the Rules of Procedure also increase the barriers to entry for petitions against Chile for its judiciary’s non-compliance with the Convention.

At a more granular level, this common flaw of linguistic vagueness and ambivalence in the Chilean judiciary and IAHRs is reflected in the intersections of specific articles of each document analyzed in this thesis. For example, the structure and procedure of the Chilean judiciary as dictated by the 1980 Constitution and Articles 5, 6 and 330 of the CJM combined with the vagueness of Article 31 of the Rules of Procedure complicate the IAHRs’ engagement with Chile’s Convention violation through Article 31(1). As stated in the “Inter-American System Document Analysis” section, the language in Article 31(1) on exhausting

domestic legal remedies “in accordance with the generally recognized principles of international law” is open to several interpretations. For example, international law allows for specialized courts (including those intended for military discipline) to exist, so long as they execute their constitutionally prescribed function, nothing more.⁷⁰

According to Article 5 of the COT, Chile’s military courts are specialized courts within the broader judiciary, meaning that the Chilean military justice system has the right to exist under international law. As Article 330 of the CJM includes the offense of “unnecessary violence,” the Commission could use these two factors together to determine that a petitioner actually got due process and deny their petition because it does not meet the standards of the exemption given in Article 31(1)(a). If the Commission determines that the military court’s jurisdiction over a petitioner’s human rights case did get due process, it could also recommend that the petitioner take up their case with the Chilean Supreme Court. As demonstrated in the “Chilean Document Analysis” section, the Supreme Court’s inclusion of military personnel in making decisions on jurisdictional disputes between military and ordinary courts make it partial and therefore incompetent in the eyes of international law.⁷¹

While this just an example of a potential interpretation of Article 31’s language, the combined ambiguity of crucial articles of the Chilean and Inter-American documents ultimately makes one who petitions against Chile for the military justice system’s Convention violation vulnerable to being tossed back into a system that cannot deliver justice

FIGURE 2. A Visual Representation of the IAHRs’ Structural Weaknesses.

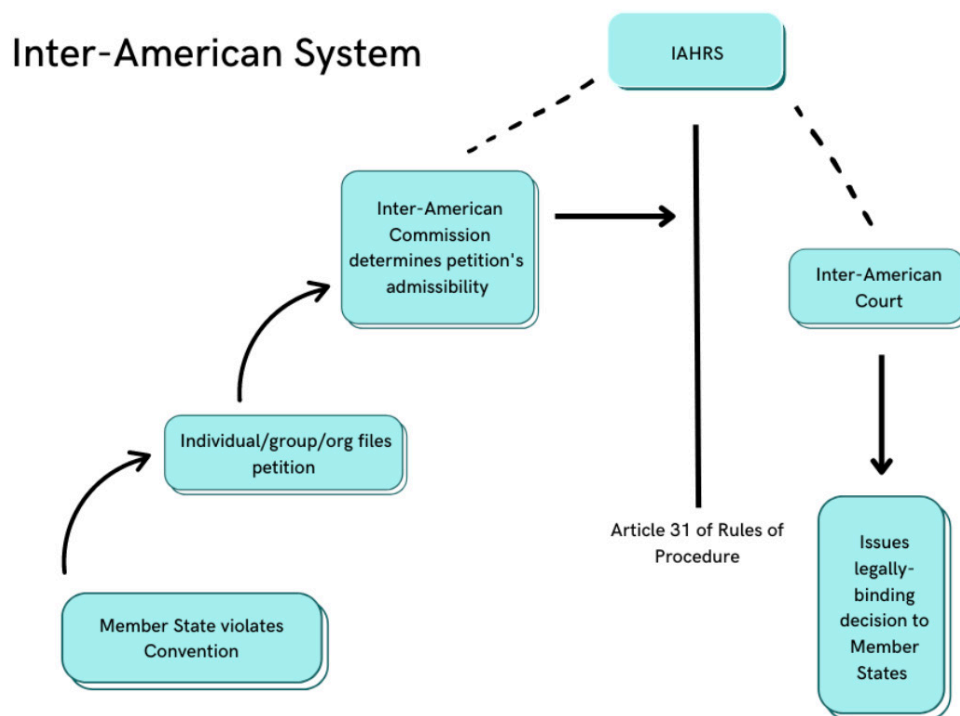
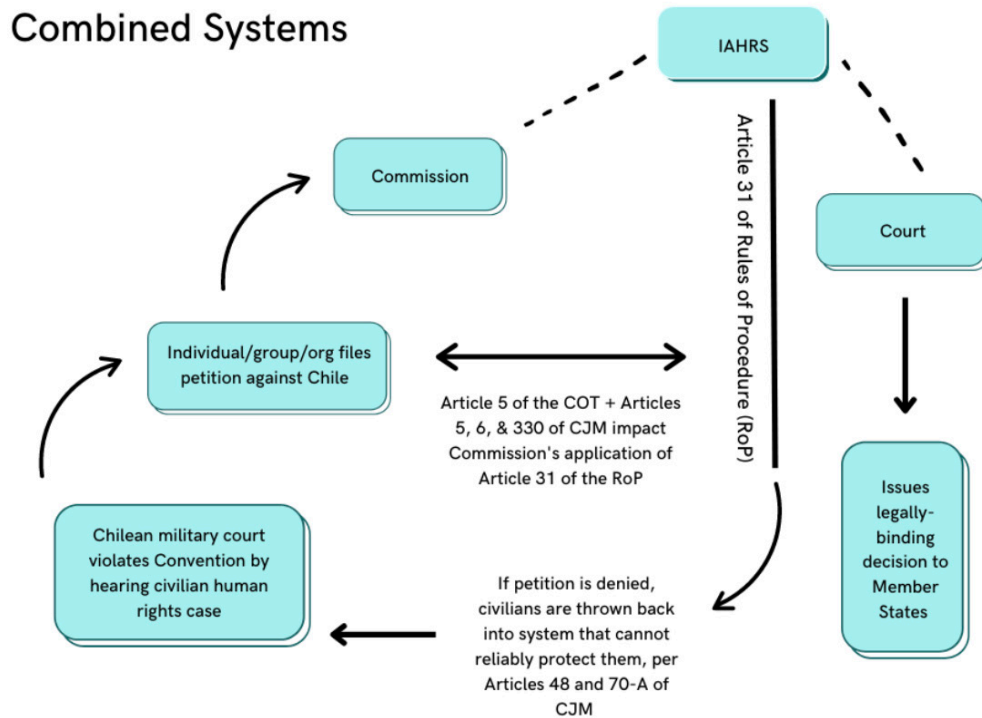


FIGURE 3. A Visual Representation of the Combined Effects of the Weaknesses of the Chilean Judiciary and the IAHRs.



as a result of the dictatorial legacy in its structures and the ambiguity of the laws themselves. It is also important to note that legal interpretation aside, the uncertainty of submitting a petition to the Commission against Chile creates a significant deterrent from pursuing the remedies of the IAHRs altogether.

The Gutiérrez case mentioned in the Chile docs section exemplifies these risks. A Carabinero murdered Gutiérrez, and the case went to the ordinary court (in accordance with Article 5 of the CJM), but the ordinary court kicked it back to the military courts because of the involvement of a Carabinero (in accordance with Articles 5-6 of the CJM). The military court heard the case, denying due process according to the constitution and international law. It would then seem logical for Gutiérrez to petition against the IAHRs because Chile is clearly violating the Convention, and the national judiciary was unable to right that wrong. However, the daunting and complicated process of submitting a petition against Chile for its military justice system's violation of the Convention (despite clear standards of international law) after a difficult, multi-year battle with the domestic legal system can make this choice seem all but illogical. Gutiérrez was just one of thousands of civilians denied justice by the military justice system,⁷² demonstrating the urgent necessity of holding Chile accountable for its military justice system's blatant disregard for human rights and international law.

Conclusion

The Chilean military justice system's jurisdiction over civilian human rights cases is an enduring manifestation of Pinochet's legacy that obstructs the country's human rights progress. When it was created in 1948, the IAHRs was intended to be a tool for citizens of formerly dictatorial Member States like Chile to hold their governments accountable for human rights abuse according to international standards.⁷³ However, the IAHRs' ability to fulfill its purpose depends on whether its procedures take the structural weaknesses left by dictatorial legacies in Member States into account.

Pinochet's institutionalization of military power prior to his departure from office played a crucial role in protecting the military justice system from domestic accountability.⁷⁴ As demonstrated in the "Chilean Document Analysis" section, the jurisdictional ambiguity and lack of oversight created by the judicial frameworks from the Pinochet era allow for military courts to continue hearing human rights cases despite the 2010 law against it. The vague admissibility standards for due process in the Rules of Procedure of the Commission do not account for the effects of Pinochet's lasting influence on Chile's judicial system, threatening Chilean petitioners' access to the Inter-American Court as a Convention enforcement mechanism. Although it is subtle, the loophole for ongoing Convention violation that this relationship creates exposes the importance of dependable human rights protections in the structural frameworks of both domestic and international systems.

While the impunity created by the combined weaknesses of the Chilean judiciary and IAHRs is highly specific, its implications are profound when the regional history is considered. Between 1964 and 1990, military juntas also ruled Ecuador, Guatemala, Brazil, Bolivia, Argentina, Peru, Panama, Honduras, Uruguay, and El Salvador.⁷⁵ Like Chile, all of these countries have since transitioned to democracy, ratified the Convention, and joined the IAHRs.⁷⁶ Because the structural legacy of military rule permeates each country's relationship with the IAHRs, this exploration of Chile's relationship with the IAHRs creates a jumping-off point for understanding and eradicating the legacy of military rule in judiciaries throughout Latin America. The compounding effects of the ambivalent protocols central to interactions between the Chilean judiciary and IAHRs also highlight a specific area for improvement in the IAHRs and its Member States' capacity to eliminate impunity for human rights abuse. Without clear stipulations that reliably protect civilians from dictatorship-era judicial structures on the domestic and IAHRs sides of the equation, the IAHRs cannot fulfill its mission of supporting human rights progress in the Americas.

Appendix

Methods

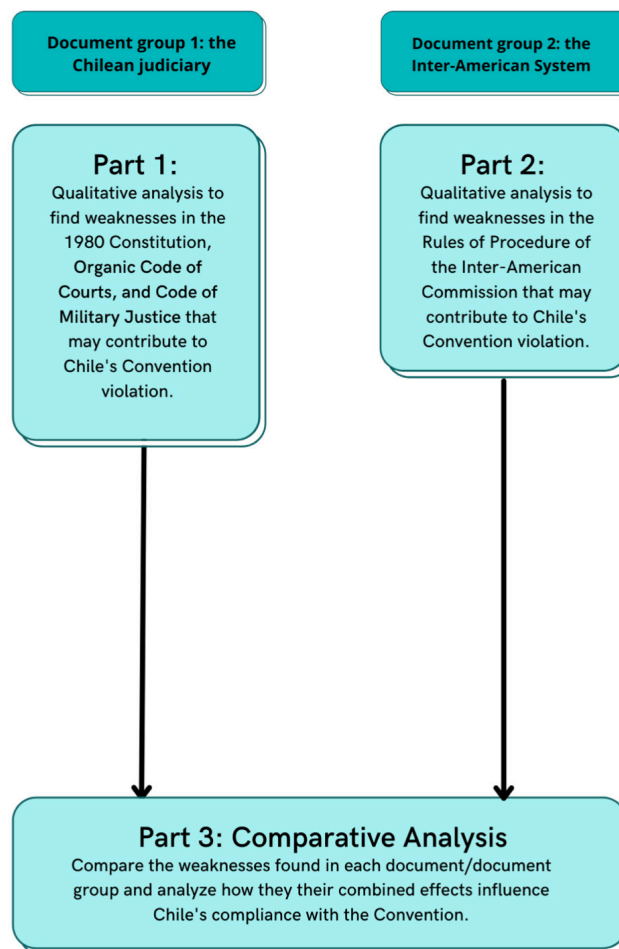


FIGURE A1. A Visual Representation of the Qualitative Analysis Process Described on Page 24 - 25.

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