



REFLECTIONS & FUTURE CONSIDERATIONS: THE OAS @ 70

**Access to Rights for Vulnerable Groups –
LGBTI, Children, Afro-descendants,
Indigenous people, Women and Persons
with Disabilities in the Inter-American
Human Rights System**

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Abstract

The paper examines the authoritative body of international human rights jurisprudence and norms which have been developed as a result of the work of two OAS bodies: the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court, (the Court) which collectively are known as the Inter-American Human Rights System (IAHRS). It pays special attention to the IAHRS's influential work on vulnerable groups in the hemisphere: indigenous peoples, children, afro-descendants, women, persons with disabilities and the lesbian, gay, bisexual, transgender, intersex (LGBTI) community, thereby contributing to the expansion of these rights to their fullest capacity. The IAHRS has helped the most vulnerable and marginalized to have a voice and to access rights, when their own states had failed them. Concrete, positive regime change through successful human rights advocacy and adjudication, for example, toppling dictatorships in the region, has also been attributed to the IACHR. While the IACHR and the Court are regional entities, they are acknowledged as framing important jurisprudential principles for adoption in the international sphere, thereby punching above their weight.

It is suggested that the collective mission of the IAHRs to promote and protect human rights in the American hemisphere, in terms of scope, extensive reach and dynamism, has been surpassed. The paper concludes that in its over 70 years of existence, the IAHRs has made a significant contribution in ensuring that more persons have had access to rights in the Americas.

Keywords: Inter-American Commission on Human Rights; Inter-American Court on Human Rights; Inter-American Human Rights System; indigenous peoples; children; afro-descendants; women; persons with disabilities; and the lesbian, gay, bisexual, transgender, intersex (LGBTI); discrimination; human rights; OAS Charter; American Declaration on Human Rights

The Organization of American States (OAS) Inter-American system for the protection and promotion of human rights (IAHRs) comprises two bodies: the Inter-American Commission on Human Rights (the IACHR) headquartered in Washington, D.C., and the Inter-American Court of Human Rights, (the Court) based in San José, Costa Rica. In the more than 70 years of its existence, the OAS, through these special human rights organs, has made a significant contribution in ensuring that more persons have had access to rights in the Americas. The scope and reach of these rights have also expanded to their fullest capacity through the work of these bodies. Their collective mission to promote and protect human rights in the American hemisphere has therefore been surpassed.

It is impossible to articulate adequately the depth and impact of the work of the IAHRs on these groups in a single paper. Suffice it to say that the reach of the OAS through the IACHR and the Court has been extensive and all encompassing. It has enveloped the mighty: for example, the IACHR is credited with toppling dictatorships in the region.¹ Simultaneously, it has allowed the most vulnerable and marginalized to have a voice and to access rights, when their own states had failed them. This paper will speak to the most influential of these developments with respect to the still most vulnerable groups in our societies and our hemisphere: Indigenous peoples, Children, Afro-descendants, Women, Persons with Disabilities and the lesbian, gay, bisexual, transgender, intersex (LGBTI) community.

An authoritative body of international human rights jurisprudence and norms has grown up as a result of the work of the IAHRs. The IACHR and the Court are regional entities, but have punched above their weight, particularly in the areas of indigenous

rights, Afro-descendants, disability and more recently, LGBT rights, being acknowledged as framing important jurisprudential principles for adoption in the international sphere.

A recent example of the influence of the IACHR was the issue of the 43 disappeared students of Ayotzinapa, Mexico. After the establishment of an IACHR Task Force and an exhaustive and emotional country visit in 2015 by the IACHR,² the first international body to take up the issue, the Mexico government decided to reopen its own investigation, leading to greater hope for justice.³

In the words of one NGO:

Through its groundbreaking decisions on critical issues such as gross human rights violations under military dictatorships, indigenous rights, women's rights, and military justice, the . . . (IACHR) has demonstrated its effectiveness and vital importance in safeguarding human rights. Its resolutions, in conjunction with decisions of the Inter-American Court of human rights, have spurred legal reform and the introduction of human rights protections in many countries. Moreover, its monitoring and reporting functions have served to hold states publicly accountable for human rights abuses, and to promote the protection of human rights around the region.⁴

BUILDING NORMS AND SIMPLIFYING ACCESS TO RIGHTS

The ability and success of the IAHRs, particularly the IACHR, in shaping human rights norms and in general, elevating the capacity of the OAS to provide greater access to rights for more people, are not limited to adjudication or formal petitions, but as explained below, extend to a wide variety of avenues at its disposal.

Notably, the OAS human rights system is centred on an inclusive approach which involves NGOs, victims and OAS states, while forming key partnerships with other international bodies, all of which deepen effectiveness.

The hallmark of the IACHR's process (the first rung) is accessibility through a system of simple procedures for receiving redress. This is somewhat unusual for international bodies. Any person, group of persons, or organization, on its own, or in representation of another, may file a petition alleging a violation of human rights against one or more Member States of the OAS. A

person may be both the petitioner and the alleged victim in a petition. The representation of a lawyer to file and process the petition is not required. The procedures before the Commission are free of charge.

BRIEF HISTORY OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

The IAHRs was born with the adoption of the American Declaration of the Rights and Duties of Man (the American Declaration) in 1948, the first international human rights instrument of a general nature, predating the UN Declaration of Human Rights. The IACHR was created in 1959. In 1969, the American Convention on Human Rights was adopted. The Convention defines the human rights which the ratifying States have agreed to respect and ensure. The Convention created the Court (1979) and defines the functions and procedures of both the Commission and the Court.⁵

Of the two human rights institutions, the Court makes final judicial determinations, although often adopting the reasoning and decisions of the IACHR, from which selected eligible cases are referred. However, in terms of jurisdiction, the Court is less accessible than the IACHR and it is the latter that has been the forerunner in enabling access to rights for more and more peoples in the OAS states. This is because every single state in the OAS falls under the jurisdiction of the IACHR. In contrast, the jurisdiction of the Court is limited to those states that have accepted its special jurisdiction to adjudicate human rights individual complaints under the optional protocol of the Convention. Many, particularly those in the Commonwealth Caribbean, have not done so.⁶

Consequently, the IACHR, which is the older body, is the organ of the OAS with the principal responsibility for the promotion, observance and protection of human rights in the Americas.⁷ The majority of human rights matters that reach the OAS system end at the IACHR because of its mandate to receive, analyze and investigate individual human rights petitions from all OAS member states, regardless of signature to the Convention, its authority being derived from the American Declaration and OAS Charter themselves.⁸

The IACHR has received thousands of petitions. In 2016 alone, it received 2,567 petitions. As of 2017, the Commission has held 166 public sessions, in different countries of the Americas. It has also carried out hundreds of visits to its member States and determined

an increasing number of requests for precautionary measures – 1,061 in 2016, as compared to 301 in 2008. These numbers alone tell of a success story with regard to access and address of rights in the hemisphere.

Further, the IACHR's work, unlike the Court's, is not limited to the adjudicative function. Consequently, this paper will place more emphasis on the work of the IACHR, although it is recognized that the validity and authority of jurisprudence from the IACHR, when in fact a petition reaches the Court, resides in that latter body.

TOOLS AND UNDERLYING PRINCIPLES OF THE IACHR IN PROTECTING HUMAN RIGHTS

In fulfilling its mandate to promote and defend human rights, the IACHR has wide and diverse tools at its disposal. However, its work rests on three main pillars: the individual petition system, where cases are determined; monitoring of the human rights situation in the Member States, and the attention devoted to priority thematic areas. The IACHR:

1. receives, analyzes and determines individual petitions alleging human rights violations from all OAS states;
2. hosts conciliation between parties in petition matters to conclude Friendly Settlements;
3. conducts public hearings on specific thematic areas bringing together the state and NGOs to interrogate the subject matter of the hearing;
4. observes the general situations of human rights in Member States and publishes Thematic Reports and Country Reports (including the Chapter 1V Report on the worst offenders) for submission to the OAS General Assembly, where appropriate;
5. conducts on-site visits to countries to observe human rights situations in greater depth and/or to investigate particular circumstances, often leading to a Country Report;
6. promotes awareness of human rights through public relations activities, including press releases;
7. organizes and participates in conferences and meetings with governments, academics, and NGOs with a view to disseminating and analyzing human rights matters;
8. presents recommendations to OAS member States on the adoption of measures to assist in promoting and guaranteeing human rights;

9. requests States to adopt specific precautionary measures to prevent serious and irreparable harm to human rights in urgent cases; and, where appropriate, requests the Court to demand temporary measures from governments, even when those cases have not yet been brought before the Court;
10. submits cases to the contentious jurisdiction of the Court, appearing before the Court in those cases; and
11. seeks advisory opinions from the Court on issues arising from the interpretation of the American Convention.

The principles which undergird the work of the IACHR result in special attention being devoted to those populations, communities and groups that have historically been the targets of discrimination, or marginalized. The Commission's work is also informed by other principles, among them the following: the *pro homine* principle, whereby a law must be interpreted in the manner most advantageous to the human being; the necessity of access to justice, and the inclusion of the gender perspective in all its activities. Article 1 of the Convention, equality, is treated as an enveloping principle.

Rapporteurships Lead to Greater Awareness and Access to Rights

Since 1990, the IACHR has given heightened focus to specific groups or individuals deemed particularly at risk of human rights violations due to their state of vulnerability and historical discrimination, through specially created Rapporteurships. These are led by individual Commissioners, who serve as Rapporteurs. The Rapporteurships, in chronological order, are:

- Rights of Indigenous Peoples;
- Rights of Women;
- Rights of the Child;
- Human Rights Defenders;
- Rights of Persons Deprived of Liberty;
- Rights of Persons of African Descent and against Racial Discrimination; and
- Rights of Lesbian, Gay, Trans, Bisexual and Intersex Persons.⁹

The formation of Rapporteurships on these important subject areas has helped to strengthen, promote, and systematize the IACHR's work, placing important emphasis on the selected rights and

enlarging access for such vulnerable persons. Rapporteurships encourage specific public thematic hearings, country visits, press releases and the gathering of information in relation to their subject matter and can be influential in changing public perception, state attention and providing relief to human rights victims. For example, the Rapporteurship on Indigenous Peoples has been instrumental in raising awareness of the right to consent in relation to the ancestral property of indigenous peoples and murdered indigenous women in Canada.¹⁰ The newest Rapporteurship, LGBTI, was born out of the work of the Unit that preceded it, which hosted a public data collection mechanism, documenting the huge instances of violence meted out to the LGBTI community with impunity throughout the region, forcing policy-makers to take notice.

Similarly, the Rapporteurship on the Rights of Persons of African Descent and Against Race Discrimination, between 2012 and 2015, was instrumental in highlighting the issue of racial bias in the US criminal justice system, by initiating a series of public hearings, beginning with the Trayvon Martin issue and a lecture series on Race and Invisibility,¹¹ culminating in a 2015 country visit to the US to investigate police killings.¹² This predated the ‘Black Lives Matter’ movement, but helped to fuel it, with some of the key protagonists in the struggle for race equality in the US invited to appear before the IACHR. The Rapporteur was also invited to present at the United Nations (UN) in 2015 on the subject.¹³

The Rapporteurship was also instrumental in calling for an inquiry into the issues of race in the citizenship issues of the Dominican Republic, which led to a country visit and a final report entitled ‘Situation of Human Rights in the Dominican Republic.’¹⁴ In 2012, the IACHR launched its “Report on The Situation of People of African Descent” to the Heads of Government of the Caribbean Community, or CARICOM, recognizing that while in the Caribbean countries of the OAS which have majority African descent populations, there is less explicit racism, “the problem of race is more complex and subtle” and problems of indirect discrimination persist.¹⁵

Precautionary Measures

The advent of Precautionary Measures authorized under Article 25 of the Rules of Procedure of the IACHR has further revolutionized access to protection of rights. Article 25 provides that in “serious and urgent situations, the Commission may, on its own initiative or at the

request of a party, request that a State adopt precautionary measures to prevent irreparable harm to persons”, either in connection with a pending petition or case or “independently of any pending petition or case.” These measures have proven to be a vital human rights protective tool for each of the groups underlined in this paper, preventing, or ‘staying’,¹ numerous serious human rights violations in speedy timeframes.

RIGHTS FOR INDIGENOUS PEOPLES AND LANDMARK PRECEDENTS

The IAHRs, has been at the forefront of rights norm building on the subject of rights for indigenous peoples. Without a specific human rights convention on indigenous peoples and relying on the International Labour Organization (ILO) Convention on Indigenous Peoples, the IAHRs has carved out jurisprudential principles based on fundamental concepts of equality, fueled by its Rapporteurship on Indigenous peoples.

In the landmark case of *Twelve Saramaka Clans v. Suriname*¹⁶ the Court endorsed the findings of the IACHR that the rights of the Saramaka indigenous peoples to the use and enjoyment of their ancestral property and their recognition and fundamental equality as a people had been violated. The IACHR’s Report had concluded that the State was responsible for the violation of: the right to property established in Article 21 of the American Convention to the detriment of the Saramaka people, by not adopting effective measures to recognize its communal property right to the lands it has traditionally occupied and used, the right to judicial protection enshrined in Article 25 of the American Convention, to the detriment of the Saramaka people, by not providing them effective access to justice for the protection of their fundamental rights, and Articles 1 and 2 of the Convention by failing to recognize or give effect to the collective rights of the Saramaka people to their lands and territories.¹⁷

In response to the IACHR’s request, the Court made a number of orders:

¹ ‘Staying’ in this context means that the measure operates in similar fashion to an injunction, so that the state is required to desist from or cease the relevant activity that is causing the alleged violation of rights.

“94. In order to guarantee the non-repetition of the violation of the rights of the members of the Saramaka people to the recognition of their juridical personality, property, and judicial protection, the State must carry out the following measures: a) delimit, demarcate, and grant collective title over the territory of the members of the Saramaka people, in accordance with their customary laws, and through previous, effective and fully informed consultations with the Saramaka people, . . .”

It saw the protection of these rights as “a form of reparation” for the historical rights violations.

Significantly, the principle of free, prior and informed, consultation and consent as ancillary rights for indigenous peoples with respect to state actions concerning indigenous property was enshrined. This ‘right to say no’ has since become an important benchmark for international jurisprudence on rights for indigenous peoples,¹⁸ particularly with regard to the struggle against encroachments by extractive industries, typically sanctioned by the nation-state.¹⁹

Moreover, the IAHRs, and particularly, the IACHR in its public sessions, precautionary measures and Reports, have actively promoted the expansive nature of rights which attach to indigenous peoples. They have condemned the criminalization of indigenous human rights defenders when seeking to protect the property rights established in international law and have also pointed to the elements of race discrimination underlying the failure of the state to protect indigenous rights. In addition, economic, social and cultural rights (ESC rights), in particular, the right to water, to livelihoods, to health and to the environment, the latter considered synonymous with the lifestyle and world view of indigenous peoples, have all been highlighted as important to the full realization of the rights of indigenous peoples.

Notwithstanding the increasing recognition of rights to property and juridical personality for indigenous peoples in the international sphere, during the last decade the emergence of a strong transnational extractive industry and investment project-culture has threatened indigenous peoples’ access to and full enjoyment of their rights. In indigenous legal systems, property is expressed in terms of communal rights and often conflicts with individual rights and majority interests. The so-called development agenda has often tended to undermine these indigenous rights, especially because

indigenous peoples view land differently to materialistic Western cultures. There is a philosophical clash over land rights linked not only to religious/ ethnic rights, sovereignty and dignity, but demonstrating how that translates into environmental rights and connecting directly with rights to water, sustainable development and the very survival of the planet (climate change).

In my tenure as Rapporteur for Indigenous peoples, I described this as “one of the most important human rights issues of our time.”²⁰ The seriousness of the threat is evidenced by the several indigenous rights defenders who have been killed, violating the fundamental right to life, displaced, or imprisoned as a result of predatory practices by multinational companies (foreign and local) operating in poor OAS states eager for business. The issue has raised important considerations of corporate responsibility from an extra-jurisdictional perspective and the territorial limits of rights protection. It has also catalyzed the movement interrogating rights’ responsibilities of business, as opposed to viewing rights as solely the subject of nation-states. The matter has been the subject of important intervention by the IACHR, including special hearings and a thematic Report on the subject.²¹

It is apparent therefore, that the IAHRs has succeeded in developing, giving access to indigenous rights and thereafter considerably widening the scope of such rights on the international plane.

Importantly, the Report is intersectional, contextualizing the concerns about extractive industries not only within the sphere of indigenous peoples, but also Afro-descendants, who are also disproportionately disadvantaged by these developments, though hardly every acknowledged, itself an avenue for addressing the invisibility articulated by the IACHR and in this paper when the rights of Afro-descendants are involved.

Impact of IACHR jurisprudence in Domestic Law Cases

The authoritative jurisprudence of the IAHRs on indigenous rights has been impactful in domestic courts in the region, even in the Commonwealth Caribbean, where the IAHRs’s influence is arguably the weakest. One of the most recent examples is the landmark case of *Mayan Leaders Alliance*²², a case from Belize, where the CCJ, the highest Court of Appeal, relied specifically on the OAS jurisprudence to identify rights for the Mayan ancestral peoples. The CCJ not only recognized and secured the right of the Mayan peoples to land based

on customary rights, but it was clearly influenced by the notions of equality, liberty, when it called for an “innovative” approach, referring to the “centuries of oppression” of the Mayan people and the “marginalization of their culture.”

LGBTI RIGHTS

As noted above, LGBTI rights form the newest Rapporteurship of the IACHR. However, the IAHRs has a lengthy, distinguished progeny on the subject of LGBTI and this jurisprudence has been consistent, flowing from the fundamental notions of equality and non-discrimination.

Perhaps the most significant juristic expression of the commitment of the IAHRs to this issue is the seminal case of *Atala Riffo v Chile*.²³ While the American Convention does not directly refer to sexual orientation or gender equality, the standards developed by the IACHR and the Court over several years through their interpretation of umbrella rights was examined and upheld in this case. Karen Atala was a lesbian mother and judge whose children and employment were taken away from her because of her sexual orientation. The Court, agreeing with the Commission, located fundamental rights protection for Atala in Article 1 of the Convention, what has been described as the core rights, namely equality and non-discrimination. The IACHR held that sexual orientation and gender identity are protected grounds given that Article 1, in outlining non-discrimination, refers not only to specific grounds such as race, religion and the like but also “any other social condition”. Moreover, the Court affirmed the universality of this approach, referring to equality and non-discrimination as *jus cogens* norms. The right to a family was also specifically protected.

Further, the Court spoke to the evolving and dynamic nature of the interpretation of treaties and relied on the demonstrations of adherence to these rights evidenced by the OAS General Assembly Resolutions since 2008 on the subject of violence and discrimination of LGBTI persons.

Afro-descendants

While Afro-descendants constitute a special Rapporteurship, albeit fairly recently (2005), the priority afforded this grouping has been inconsistent, as I have noted while holding the post of Rapporteur. The enduring problem faced by Afro-descendants and the

underlying issue of race discrimination is that of invisibility. This has affected the operations of the IACHR itself. There is a tendency to confuse formal equality or *de jure* equality, which undoubtedly exists in the laws of the region, with that of genuine equality or *de facto* equality. As such, although structural patterns of race discrimination are evident throughout the region, they are often hidden, undermining the ability of this issue to receive the attention or financial support it needs to confront these entrenched problems. There is a risk that rights can be eroded under a façade of formal equality. Thus, while, in the eyes of the law, all are already equal, inherent inequalities persist, grounded in historical realities and paradigms. In its 2012 Report, the IACHR identified structural, enduring and multiple forms of racism in the entire region of the Americas. Further, it identified: (a) systematic obstacles for the enjoyment of ESC rights; and (b) intersectionality of different factors of discrimination.

Nonetheless, considerable gains have been achieved. Initially, the focus was on promoting the rights and indeed, the racial identity of the Afro-descendant peoples of Latin America, where minority groups had not engaged in the kind of historical struggles for equality seen in other parts of the region and race assimilation was seen as the desired objective. The IAHRs succeeded in addressing these in hearings and cases. For example, in *Simone André Diniz v Brazil*,²⁴ a newspaper advertisement indicated a preference for a white person. The alleged victim, who was black, was informed that she did not meet the requirements for the job. Her complaint to the authorities was not prosecuted, but was archived. The State was found to be responsible for the violation of the rights to equality before the law, judicial protection, and to a fair trial, enshrined respectively at Articles 24, 25, and 8 of the American Convention. It was held to have breached its obligation to adopt provisions of domestic law in the terms of article 2 of the American Convention. The Court further declared that: “states are obliged to take affirmative action to reverse or change discriminatory situations that exist in their societies to the detriment of a specific group of persons. . . with regard to acts and practices of third parties who, with its tolerance or acquiescence, create, maintain or promote discriminatory situations.”

The IACHR recognized that historically, the problem of race inequality in North American and the Caribbean had been ignored somewhat by the institution. Accordingly, the Rapporteurship on Persons of African descent determined to place particular focus on

this issue in its work. The concerted promotional efforts, mentioned above, were part of this initiative toward exposing the often accepted structural patterns of race inequality that exist even in countries with civil rights movements. An important focus was the issue of criminal justice for minorities. Stand your Ground laws in the USA, racial profiling, racial bias in sentencing and Death Row, the war on drugs and police violence, which disproportionately impact Afro-descendants, were all important and consistent topics of interrogation by the IACHR.

In the criminal justice system, which might appear to be universally equitable, it was observed that minorities do not experience this presumption of equality, or often, even the presumption of innocence, in practice. This occurs whether examining the status of the minority individual at the point of entry into the criminal justice system, during a formal criminal process, the arrest, the trial, or indeed, after – at the sentencing and incarceration processes. Bias also affects which offences attract criminal penalties (such as loitering – a remnant of slave plantation societies) and which do not and how laws are applied unequally in ways that disproportionately and unfairly impact minorities.

Moreover, IACHR experience demonstrates clearly that this is true whether we are speaking of the adult or child Afro-descendant. This experience has been gleaned from a variety of interventions, from petitions, site visits, promotional work and more recently, targeted hearings on racism, including Race and the Criminal Justice system, whereby important information from NGOs and states are gathered, including important statistics. Such racial discrimination in the justice system and policing is certainly a microcosm of the wider societal problem. It is not an isolated phenomenon limited to the judicial system, nor is it exceptionalistic.

While most of these paradigms are fairly well known, there are some surprising findings. For example, in the Rapporteur's Missouri site visit, an intriguing link between excessive racial profiling of Afro-descendants resulting in continuous traffic stops, fines, etc. and the legal set up of the funding arrangements for principalities in the states was unearthed. The fact that law enforcement agencies were directly funded from the monies from these traffic tickets and other criminal fines gave an added incentive for targeting Afro-descendants. Indeed, between 2012 and 2014 African Americans accounted for 85% of all vehicle stops, 90% of citations and 93% of arrests in Ferguson.

Exposing links between Race Discrimination and Law and Order Laws

The IACHR has also succeeded in exposing the way in which the legal framework has embraced excess in terms of policing by combining anti-terrorism and militarization with ordinary law and order functions. Anti-terrorist laws have been used for regulation of ordinary protesters with the full understanding that the typical protestor is in fact a minority, such as an Afro-descendants protesting race injustices, or an indigenous person protecting land rights. This is an expansion of what should be a civil law framework into the most dangerous and oppressive realm of the criminal law and constitutes a violation of several principles of international human rights law, including rights relating to movement, liberty and principles of proportionality. The statistics are alarming. For example, in the USA, black males between 15 and 19 are 21 times more likely to be killed by the police than their white counterparts. The Department of Justice itself has confirmed the inequities. In Brazil, the statistics are equally frightening.

Laws which permit wide discretion to use force are shown to be inherently discriminatory in societies where there are already set negative stereotypes of minorities fueled by generations of inequality. This is so whether we are speaking of laws which concede such power to ordinary citizens, such as in Stand your Ground laws, ostensibly a form of self-defence, or police use of force legal norms. Such laws, as seen in the Trayvon Martin case have led to increased killings of minorities. Instructively, when minorities attempt to use these laws in their own self-defence, they are not usually successful. We saw this in the Merlene Alexander case, the subject of an IACHR hearing, a black woman who unsuccessfully cited the defence when she fired a warning shot after being in fear of domestic violence. This illuminates the underlying discriminatory attitudes inherent in such laws and the deep subjectivity which frames them.

Moreover, international legal obligations as to where the base-lines must be, are typically ignored. The principle of proportionality and the preservation of the right to life, should be the first premises in terms of policing, not a subjective test of what is reasonable. In a context of structural inequality, in which minorities exist, the standard of reasonableness on the part of a law enforcement officer, in particular, an untrained one, ignorant of the culture and experience of minorities, is not a fair standard.

Increased militarization of law and order efforts, including anti-gang laws, is part of this unequal power structure. The IACHR has highlighted these patterns of inequity, paving the way for new avenues for redress. In 2015, the Chilean government abolished the use of anti-terrorist laws for this purpose.

The IACHR has also noted in several of its Reports, that indigenous peoples and Afro-descendants continue to occupy the lowest income groups in the Americas – the phenomenon of persistent poverty – a historical paradigm resistant to change. Poverty is both a cause of discrimination in the justice system and an exacerbating factor. Further, discrimination fuels poverty.

JURISPRUDENTIAL MAPPING OF GENDER BEFORE THE IAHRs

Ensuring increased access for rights for women can hardly be seen to be the preserve of the IAHRs. Yet, the OAS system has contributed a considerable slice of the now enlarged space for gender rights. A concerted emphasis to identify gender discrimination has resulted in a jurisprudential mapping of the subject of gender rights which has been emblematic. The IACHR and the Court have also made important pronouncements on the many different aspects of human rights that are violated in this context: the right to life, to integrity, to be free from torture, equality and non-discrimination, the right to a family life and to enjoy ESC rights.

Significantly, the jurisprudence has broadened to consider structural patterns of discrimination, where seemingly neutral actions result in disadvantage, or indirect discrimination. These have often been innovative, as in the cases concerning patterns of violence against women by the armed forces, e.g. in Columbia.²⁵ Sexual and reproductive rights have been a consistent theme and has witnessed significant development. Important examples include the IACHR's intervention into cases of forced sterilization,²⁶ forced abortions of young girls and whether the right to in vitro fertilization (IVF) treatment forms part of the right to health. Rape has also been held to be torture in certain circumstances.²⁷

Inter-related issues such as the right to work, the indirectly discriminatory and intersectional impact of health for women in rural areas, low income women and certain minorities are also notable.

The IACHR case of *Maria Morales de Sierra*²⁸ which analyzed the provisions of the Civil Code of Guatemala, defining the rights and responsibilities of men and women in marriage demonstrates the

creativity of the jurisprudence. Here, provisions permitting women to work or pursue activities outside of the home only if their husbands did not oppose such activities were denounced. It was as a result of this case that the Guatemalan Congress finally revised the Civil Code and fixed the problem.

The significance of the 1994 *Inter-American Convention for the Prevention, Punishment, and Eradication of Violence against Women* (Belém do Pará Convention) on enlarging the scope of rights for women cannot be underestimated. To date, it has been ratified by 32 of the 34 members of the Organization of American States (OAS). It has influenced the drafting of various laws on violence against women, undertaken numerous awareness campaigns, and supported legal and health services for women throughout the Americas.

CHILDREN'S RIGHTS

The IAHRs follows closely the parameters set by UNICEF and works hand in hand with the UN body. However, intersectional elements of rights violations have perhaps been most important and influential in its work. For example, race is an important variable in the injustices and excesses that have been identified in juvenile justice, resulting in increasing tendencies to criminalize minority youth, particularly males, subjecting them to incarceration and harsh penalties.

Harsh laws against gangs, maras; lower ages for criminality (Brazil); instituting Gang Laws, all of which disproportionately penalize minorities in the current context, have been important subjects of inquiry, as have the interconnected issues of gender discussed above.

Important subjects also include the spill-over effect on the ESC rights of children, in particular, the rights to education, health and family life.

PERSONS WITH DISABILITIES

While the IACHR has no Rapporteurship on disabilities, it has increasingly included the situation of persons with disabilities in its country and thematic reports.²⁹

Importantly, the IACHR led the way in defining international norms for persons living with disabilities, with its initiation of the Inter-American Convention on the Elimination of All Forms of

Discrimination against Persons with Disabilities (June 7, 1999). The Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care, (MI Principles) 1999 are also noteworthy. The importance of these framing international instruments has declined somewhat with the more recent and far-reaching 2006 UN Convention.³⁰ Notwithstanding, the longevity and specific focus of the IAHR's work means that its jurisprudence is still regarded as authoritative and provides useful guides for interpreting the Convention on the Rights of Persons with Disabilities (CRPD) and current international norms.

Since the CRPD, the inter-American adjudicative bodies have interpreted the American Convention in the light of this more modern instrument, so that there is now a fusion in the international jurisprudence on disability. For example, in *Sebastián Furlán and Family v. Argentina*, the Court discussed the views adopted by the CRPD Committee, defining states' responsibilities for children with disabilities as a 'life project'.³¹

To date, the disability rights issues that have arisen most frequently before the IACHR concern persons with psychosocial disabilities deprived of their liberty. Many of the worst forms of human rights abuses are related to the institutionalization of persons with disabilities, in often little more than detention facilities. The IACHR has a well-established jurisprudence of declaring as human rights violations, including for persons with disabilities - harmful conditions that exist in detention, e.g. overcrowding, lack of drinking water, massive spread of disease and the lack of medical attention for the interned, often under the threshold of the right to health. However, institutionalization is just one aspect of a much wider problem, which strikes at the very heart of a human rights system, the right of every individual to live in dignity and equality, in conditions which uphold her inherent liberty.

The IACHR's first merits decision on psycho-social disability was in 1999 in *Victor Rosario Congo v. Ecuador*, where it found that Ecuador had violated the rights of a person with a psycho-social disability who was detained preventively and who died while in state custody due to abuse by security personnel and a failure to receive psychiatric treatment. Here, the IACHR interpreted for the first time rights recognized by the American Convention in light of the MI Principles.

The IACHR has also used its authority to adopt landmark precautionary measures to protect the life and physical integrity and

health of persons with psycho-social and other disabilities residing in institutional settings. In Precautionary Measure 370/12: 334 Patients of the Federico Mora Hospital, Guatemala, the IACHR requested the Government of Guatemala to adopt the necessary measures to guarantee the life and personal integrity of the persons in the Hospital Federico Mora, in particular, to provide adequate medical treatment to inmates, special measures in the best interests of the child, including separation from adults, provide unarmed hospital staff; restrict the use of isolation rooms to situations and under the conditions laid down in international standards on persons with mental disabilities; implement immediate measures aimed at preventing that all patients, particularly women and children, are not subjected to physical violence, psychological and sexual abuse. In this regard, the Government had to undertake a program, by mutual agreement between the parties and submit a timeline for implementation of these precautionary measures.

Disability has been viewed purposively to further protect ESC rights, such as the right to work. For example, in 2009, the IACHR declared admissible the case *Buzos Miskitos v. Honduras*, involving claims concerning the death or disability of 48 members of an indigenous community due to inadequate labor conditions. In 2012, the IACHR declared admissible the case *Luis Fernando Guevara Diaz v. Costa Rica*, where the presumed victim allegedly was denied employment on the basis of his intellectual disability.

Similarly, in 2006 the Court issued the IAHR's landmark disability-related decision in *Ximenes-Lopes v. Brazil*, importantly underscoring the right to health and ruling that the State had an affirmative duty to regulate and monitor all public and private healthcare providers. The Court also recognized persons with psycho-social disabilities as a vulnerable group "entitled to special protection."

Gender, Reproductive Rights and Disabilities

Another important issue has to do with the denial of reproductive rights to persons with disabilities intersecting with women's rights. A less orthodox aspect of this subject was highlighted in the case of *Artavia Murillo v. Costa Rica* (the 'In Vitro Fertilization' case), where the applicant Murillo claimed protection as a person with disability due to her infertility. Such gender issues are discussed in the IACHR's 2011 report *Access to Justice for Women Victims of Sexual Violence: Education and Health*.

RIGHTS ARE INDIVISIBLE – INCREASING FOCUS ON ECONOMIC RIGHTS

The main subject areas in this paper do not tell the full story of the capacity of the IAHR to provide more and more rights to OAS citizens. An interlocking theme is ESC rights, such as the rights to health, work, education and the environment. The IAHR and in particular the IACHR, have been successful in significantly and dynamically expanding the scope of available rights by ensuring access to these rights in two ways. First, ESC rights have been viewed as aspects of civil and political rights, treating rights as indivisible. Secondly, there has been a thrust to make ESC rights directly justiciable. In this regard the advent of the OAS's San Salvador Protocol dedicated to the promotion of ESC rights and the interpretation of Article 26 of the American Convention, which makes specific reference to such rights, have been instrumental.

The Protocol envisages measurable indicators for enforcing such rights. An important principle is the principle of non-regression, which dictates that the state commits to progressively realizing ESC rights, and prohibits going backward in terms of their delivery. A number of cases, for example, with respect to pension entitlements, have been in issue.³²

Accordingly, the access to and protection of rights available to vulnerable groups such as women, children, Afro-descendants, persons with disabilities and indigenous peoples, have been considerably broadened and strengthened. This mirrors the experience in relation to civil and political rights revealing a strong bedrock of rights available to all in the IAHR, including the most vulnerable.

NOTES ON CONTRIBUTOR

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NOTES

¹Argentina Hands Records of the Military Dictatorship to IACHR September 17, 2014, http://www.oas.org/en/iachr/media_center/preleases/2014/099.asp; See also 'Taking a Stand: The Evolution of Human Rights', By Juan E. Méndez, Marjory Wentworth, Macmillan, US, 2011; Transformative Constitutionalism in Latin America: The Emergence of a New Jus Commune, A. von Bogdandy, E. Mac-Gregor, M. Morales Antoniazzi, F. Piovesan, X. Soley, (eds) OUP, 2017.

² President Rose-Marie Belle Antoine declared the issue a "human rights tragedy" and assured the families that the IACHR/ OAS would "not abandon" them. <http://www.somosmass99.com.mx/lo-de-ayotzinapa-es-una-tragedia-de-derechos-humanos-cidh/>; <http://www.jornada.unam.mx/2015/09/30/politica/005n1pol>.

³<https://news.vice.com/article/mexico-to-relaunch-probe-into-disappeared-students-after-the-original-loses-credibility>.
<http://www.latimes.com/world/mexico-americas/la-fg-mexico-missing-20151003-story.html>; <http://www.gettyimages.com/detail/news-photo/the-president-and-the-executive-secretary-of-the-inter-news-photo/490534788#the-president-and-the-executive-secretary-of-the-interamerican-on-picture-id4905>.

⁴Freedom House - 'Defending Regional Human Rights Mechanisms, The IACHR under Attack'

<https://freedomhouse.org/sites/default/files/IACHR%20Policy%20Brief.pdf>.

⁵ The Basic Documents of the IAHRs are the American Declaration and the American Convention. These are followed by the inter-American convention against Torture, the additional protocols to the American Convention on ESC rights and on the death penalty, the inter-American conventions on violence against women, forced disappearance of persons and discrimination against persons with disabilities, the ILO Convention on Indigenous Peoples; Also included are the OAS Charter and the Inter-American Democratic Charter; as well as the Declaration of Principles on Freedom of Expression, and Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.

⁶ Six CARICOM countries are signatories to the American Convention on Human Rights and only three (Barbados, Haiti and Suriname) have acceded to the compulsory jurisdiction of the Courts. Trinidad & Tobago was an early signatory to the Convention in 1977 but denounced the Convention in 1998

as a result of discontent over the prevalence of death penalty matters that was proceeding to the Inter-American system, frustrating the country's ability to hang prisoners on Death Row.

⁷ The IACHR is composed of seven Commissioners, elected in their personal capacity by the OAS General Assembly who shall be persons of high moral character and recognized competence in the field of human rights and who, in performing their functions, represent neither their countries of origin nor any other State. The Court, created by the American Convention, consists of seven judges with recognized competence in the field of human rights.

⁸ See Articles 18, 19, and 20 of the IACHR's Statute.

⁹ A Unit on Economic, Social and Cultural Rights was formed in 2012, which may become a Rapporteurship.

¹⁰http://www.fafia-afai.org/wp-content/uploads/2015/01/Missing-and-Murdered-Indigenous-Women-in-British-Columbia_Report_EN.pdf

¹¹<http://pridenews.ca/2014/09/11/african-canadians-express-concerns-to-oass-iachr/>

¹²<http://www.miamiherald.com/news/local/community/miami-dade/article36062421.html>;

<http://communityjusticeproject.com/media/2015/9/22/international-human-rights-investigators-to-hold-community-forum-in-miami-today-to-review-police-violence-racial-discrimination>; <https://www.ushrnetwork.org/resources-media/world-watching-iachr-conducts-visit-united-states>.

¹³<http://webtv.un.org/meetings-events/watch/legal-framework-and-key-concepts-8th-session-of-the-forum-on-minority-issues/4629468907001>.

¹⁴ IACHR Report. OEA/Ser.L/V/II. Doc. 45/15 31 December 2015.

¹⁵<https://www.pcusa.org/news/2012/8/17/report-racism-persists-english-speaking-caribbean/>

¹⁶ Int-Am Judgment of November 28, 2007.

¹⁷ Inter-American Commission on Human Rights, Report N^o 09/06, Admissibility and Merits. Case 12.338. The Twelve Saramaka Clans (LOS). Suriname. March 02, 2006.

¹⁸ See also *Kichwa People of Sarayaku v. Ecuador* (2012): The Court held that Ecuador had violated the property rights of the Kichwa people of Sarayaku by awarding an oil exploration and exploitation concession to a private company partially in the ancestral lands of the Kichwa people, without having conducted an effective and appropriate consultation process, or obtaining their free, prior and informed consent. The "consultation" was not conducted prior to commencing the project; it was not done in good faith, as there were repeated attempts to corrupt indigenous leaders; (iii) the process did not respect traditional decision-making processes of the Sarayaku; (iv) the environmental impact assessments—which were conducted by a private company and not by State agencies—did not take into account cultural and social impacts of the project on the Sarayaku people; and (v) the Sarayaku did not receive adequate information about the proposal. In its reasoning, the Court emphasized "effective participation" as the bedrock principle underlying the right to consultation.

¹⁹<https://politicsofpoverty.oxfamamerica.org/2015/08/the-right-to-say-no-indigenous-rights-experts-weigh-in-on-community-consent/>

²⁰Growing concerns over extractive industries in Latin America' <https://ghrcusa.wordpress.com/2015/03/25/growing-concerns-over-extractive-industries-in-latin-america/>. As Rapporteur for Canada, the issue was also important, given that Canadian companies were the largest investors in the extractive industries in Latin America. <https://www.escr-net.org/petitions/2016/guatemala-we-are-not-criminals-we-are-defenders-rivers-and-mountains>.

²¹ [Indigenous Peoples, Communities of African Descent, Extractive Industries \(2016\)](#), IACHR.

²² *Maya Leaders Alliance et al v The Attorney General of Belize*, CCJ Appeal No BZCV2014/02.

²³ I/A Court H.R., *Case of Atala Riffo and daughters v. Chile*. Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of November 26, 2013.

²⁴ Report No. 66/06 – Merits, Case 12.001 October 21, 2006.

²⁵ [X and Relatives v. Colombia](#) (2008). Colombia failed to prosecute members of the Colombian military for sexually assaulting the victim. The Complaint sought to have Colombia assume international responsibility for violating articles 1(1), 5, 7, 8, 10, 11 and 22 of the American Convention on Human Rights, as well as Articles I, V, VII, XI, XVIII and XXVI of the American Declaration of the Rights and Duties of Man. A friendly settlement was concluded under which the victim was awarded moral and material damages. Colombia also agreed to pay for the victim's education, provide her with medical and psychological services, fully compensate the victim and her family and to reopen the criminal investigation.

²⁶ See also [Maria Mamerita Mestanza Chavez v. Peru](#) (2003). on forced sterilization which eventually caused her death. This was part of a government objective to curb the population numbers of poor, Indian and rural persons. The complaint alleged the violation of Articles 4, 5, 1, and 24 of the American Convention on Human Rights, Articles 3, 4, 7, 8, and 9 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, Articles 3 and 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, and Articles 12 and 14(2) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The parties reached a friendly settlement under which Peru agreed to investigate and punish those responsible for the forced sterilization, pay the victim's next of kin moral and corollary damages, provide her children with free primary, provide secondary and public university education to the victim's children. Peru also agreed to amend its reproductive laws to eliminate any discriminatory policies within such laws. See too [Monica Carabantes Galleguillos v. Chile](#) (2002) where Chile agreed to cover the educational expenses of a pregnant teenager who was expelled from her school for being pregnant.

²⁷ See [Raquel Martín de Mejía v. Peru](#), IACHR, 1996. In 1989, amid the Shining Path Rebellion and drug wars in Peru, members of the Peruvian armed forces abducted Fernando Mejía Ogocheaga and twice raped Mr. Mejía's wife. The IACHR determined that these two instances of rape constituted torture and were a violation of Article 5 of the American Convention on Human Rights (ACHR), which protects the right to humane treatment. The IACHR also held that Peru's failure to act with due diligence in guaranteeing Mrs. Mejía's right to an effective judicial recourse for the human rights violations she and her husband, Mr. Mejía, suffered, constituted a violation of Articles 1(1) (Right to non-discrimination), 8(1) (Right to due process), and 25 (Right to an effective recourse) of the ACHR.

²⁸ (Report No 4 /01, Case 11.625)

²⁹ See, e.g. *Access to Justice for Women Victims of Sexual Violence: Education and Health* and the IACHR's 2012 *Report on the Situation of Human Rights in Jamaica*.

³⁰ The Convention on the Rights of Persons with Disabilities and Optional Protocol (CRPD).

³¹ See also *Report No. 86/11, Case 12.232, Friendly Settlement, María Soledad Cisternas Reyes, Chile, IACHR Report* July 21, 2011. Chile's State airline refused to let Ms. Cisternas Reyes travel by plane alone because of her disability. Moreover, the airline required Ms. Cisternas Reyes to pay the airfare of whoever would accompany her, be

it another passenger or a guide dog. She was traveling to participate in an International Congress on the human rights of persons who are blind or have visual impairments. Prior to the friendly settlement, she pursued domestic remedies for the airline's discrimination, but the Court of Appeals of Santiago declined to find that she had experienced discrimination. The parties agreed that Ms. Cisternas Reyes would advise the State on modifying its laws and regulations regarding air travel by persons with disabilities and that the State would disseminate the modified laws and regulations widely so that persons with disabilities could be free from discrimination when traveling by air.

³² See Rose-Marie Belle Antoine, 'Labour in the Economic, Social and Cultural Rights Regime of the Inter-American System of Human Rights', in D. Brodie, N. Busby, R. Zahn, *The Future Regulation of Work*, Palgrave, McMillan, 2016.