

LEGAL FRAMEWORK AND MECHANISMS FOR THE PROTECTION OF ELDERLY RIGHTS IN THE INTER-AMERICAN SYSTEM¹

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On behalf of the Inter-American Commission on Human Rights, I would like to express our appreciation for the opportunity to participate in this first substantive session of the United Nations Open-Ended Working Group on strengthening the protection of the human rights of older persons. It is my goal today to provide you with information on the existing regional framework and the mechanisms for the protection of human rights of older persons, and perhaps some suggestions on constructive ways to apply them to advance this issue.

The IACHR has followed with interest the special focus placed by OAS member states on the human rights of older adults. In the June 2009 Declaration of the Fifth Summit of the Americas, member states assumed the commitment to continue the necessary work to place this matter on public policy agendas and promote a regional study on the feasibility of drafting an inter-American convention on the rights of older persons. In October 2009, the Inter-American Commission on Human Rights was represented at the Panel on the Evolution of the Rights of older persons in the international context, which took place in Santiago de Chile, as part of the follow-up to the Brasilia Declaration. Since then, the Inter-American Commission has been represented at several events pertaining to the rights of older persons. More recently, on October 28, 2010 the Permanent Council of the OAS carried out a Special Session on the Rights of Older Persons, where the majority of participating states called for a regional convention on the rights of older persons.

Without prejudice to that initiative, for which the Inter-American Commission is available to advise the member states as the principal OAS organ in the area of human rights, it should be noted that the regional system already contains a number of legal mechanisms for protecting the rights of older persons.

The inter-American system of human rights

The IACHR is composed by seven Commissioners, elected on an individual basis by the OAS General Assembly and who, in performing their functions, represent neither their countries of origin nor any other State. The Commissioners meet for sessions at its Washington, D.C. headquarters at least three times a year, in order to review cases, general reports and all other matters before it, and to adopt the respective decisions. The system also includes the Inter-American Court, a judicial organ created by the American Convention, consists of seven judges who serve in an individual capacity and are elected by the States for six-year appointments.

¹ Presentation at the First Substantive Session of the Open-Ended Working Group on Ageing (UN General Assembly Resolution 65/182), New York, 18-21 April 2011.

The Inter-American Commission's main function is to promote the observance and defense of human rights. In fulfilling its mandate, the IACHR performs the following activities:

- a. Receives, analyzes, and investigates individual petitions alleging human rights violations.
- b. Observes the general level of human rights in the member States and, when it deems appropriate, publishes special reports on the situation in given States or regarding certain rights or groups of persons.
- c. Conducts on-site visits to countries to observe the general situation in greater depth and issues reports with findings and recommendations to the respective member states.
- d. Encourages awareness of human rights in the OAS Member States.
- e. Organizes and participates in conferences and meetings with governments, academics, and nongovernmental organizations.
- f. Presents recommendations to OAS member States on the adoption of measures to assist in promoting and guaranteeing human rights.
- g. Grants precautionary measures to prevent serious and irreparable harm to human rights in urgent cases; it can also request provisional measures to the Inter-American Court.
- h. Submits cases to the contentious jurisdiction of the Inter-American Court, and it appears before the Court in those cases.
- i. Asks the Inter-American Court for advisory opinions on issues arising from the interpretation of the American Convention.

Individual petition system

Any person, group of individuals, or nongovernmental organization can place a complaint before the Commission, alleging violations of the human rights protected by the American Convention and the American Declaration of the Rights and Duties of Man. Petitions may be presented in any of the four official languages of the OAS, by victims themselves or by third parties. The IACHR studies those petitions that allege that State agents have committed a human rights violation. If it finds that the respective State is responsible, it recommends a complete investigation and the punishment of all the individuals responsible, together with full reparations to the victims or their families.

Until now, very few cases regarding the rights of older persons that have been brought to the system and decided by its organs; most of them involve the issues of social security and retirement. The first of them is known as the Case of the Five Pensioners v. Peru, in which the Inter-American Court found that the State was responsible for the violation of the victims' right to judicial protection and property, inasmuch as it did not comply with the decision of the Supreme Court of that country to restore their pensions.² In another case regarding Peru, the victims had opted for a pension plan, but did not receive it for ten years after their retirement, and were also not protected by the domestic tribunals. The Inter-American Court determined that the State had violated their rights to judicial protection and to property; however, it did not consider that there was a violation of Article 26 of the American Convention, which pertains to the progressive development of economic, social and cultural rights.³

Another interesting precedent was set in the Yakye Axa Case, dealing primarily with indigenous peoples' rights in Paraguay, which the Inter-American Commission submitted to the Court after that State failed to comply with its recommendations. In the judgment of the Court, it was established that Paraguay had the duty to ensure the autonomy and continuing functionality of older persons, by ensuring the enjoyment of their right to adequate food, access to clean water and health care.⁴ The Court determined the duty of the State to provide care for the elderly with chronic diseases and those who were in terminal stages, in order to help them avoid unnecessary suffering.

The IACHR and the Court have determined in various cases the duty of the State to respect and guarantee the enjoyment of human rights of all persons subject to its jurisdiction, with respect to the actions of authorities but also of third parties. Both organs have also adopted urgent measures for the protection of persons deprived of liberty, specifically regarding their life and personal integrity, as well as the minimum conditions compatible with human dignity, sanitation and nutrition. In the first case decided with respect to Brazil, the Inter-American Court held that the State was responsible for the violation of the rights of Damiano Ximenes Lopes, a patient who was beaten, tortured and eventually died in a psychiatric hospital in that country in 1999. The Court found that Brazil was responsible for violating the rights to physical integrity and to life of the victim, and the rights to access to justice and due process of his family. Given that the case involved a patient in a long-term care facility, the standards set by the Court could be relevant in an eventual case involving the rights of older persons in a similar situation of restricted liberty.⁵

² Inter-American Court of Human Rights, Case of the Five Pensioners v. Peru, Judgment of February 28, 2003 (Merits, Reparations and Costs).

³ I-ACtHR, Case of Acevedo Buendia *et al* v. Peru, Judgment of July 1, 2009 (Merits, Reparations and Costs).

⁴ I-ACtHR, Case of the Yakye Axa Indigenous Community v. Paraguay, Judgment of June 17, 2005 (Merits, Reparations and Costs).

⁵ I-ACtHR, Case of Ximenes Lopes v. Brazil, Judgment of 17 August, 2006 (Merits, Reparations and Costs).

Also worthy of mention is the case of Case of Karina Montenegro against Ecuador, where the allegations regard the arrest and imprisonment of women over 65 years of age, in violation of that country's national legislation.⁶ In its admissibility decision, the Inter-American Commission considered that a colorable claim was raised by the arguments of the failure by the authorities to substitute preventive detention for house arrest, as ordered by the judge in the case of Ms. Montenegro and the other 4 alleged victims.

Rapporteurships and thematic work

In addition to its function of applying the standards set in the American Convention and the American Declaration, as well as the other relevant regional instruments, the Commission also works from a thematic perspective. This implies the treatment of certain special issues or the human rights situations of specific groups of persons through its rapporteurships assigned to the members of the Commission or an external specialist. Unlike other international bodies, the thematic rapporteurships of the IACHR are created by the Commissioners themselves, who define the mandate and may name the rapporteur from among the members of this body, or decide to assign the functions to a special expert reporting directly to them. Rapporteurs conduct a number of activities, including on-site visits and the preparation of reports for consideration by the plenary of Commission.

There are currently seven rapporteurships, each assigned to a Commissioner, with respect to the following issues: women's rights, children's rights, conditions at detention centers in the Americas, internally displaced persons, and the rights of migrant workers and their families. Finally, there is a Special Rapporteur on Freedom of Expression, led by an expert working full time at the IACHR Executive Secretariat. Over the past 10 years, the work of the various rapporteurs has increased substantially, resulting in the broad dissemination of information on human rights in the Americas and also in obtaining justice in individual cases and in emergency protective measures.

Hearings

Another important way for the Inter-American Commission to focus on specific human rights situations is to hold thematic or general hearings during its periods of sessions. These hearings are open to the public, are broadcast live online, and receive ample media coverage, all of which are excellent promotional tools. In some cases, the information received from Member States and representatives of civil society at these hearings has caused the IACHR to observe a topic more closely or even to address it in a special report. One recent example is a series of hearings on the rights of migrant workers in the United States, which led to visits by the thematic rapporteur, and ultimately resulted in a study of due process and detention of migrants in that country, with concrete conclusions and recommendations.⁷ A very interesting development in

⁶ IACHR, Report N° 48/07, Petitions 261-03, 397-03 and 1377-04, Admissibility, Karina Montenegro *et al.*, Ecuador, July 23, 2007.

⁷ IACHR, Report on Immigration in the United States: Detention and Due Process, OEA/Ser.L/V/II. Doc. 78/10, 30 December 2010.

this regard has been the use of the legal analysis, conclusions and recommendations of this report in a specific domestic case regarding deportations in the United States. The IACHR has actively promoted the use of its decisions and standards in proceedings at the domestic level as a very concrete way of expanding human rights protection in the Member States of the OAS.

Legal provisions

As for the rights expressly recognized in the inter-American instruments, Article 17 of the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San Salvador) guarantees every person the right to special protection during old age. The duty imposed by this provision should be interpreted in the light of Article 26 of the American Convention, which refers to the progressive development of economic, social, and cultural rights, to the extent that resources are available. Stemming from this is the correlative duty not to backtrack from achievements attained in this area. The non-regression obligation developed by other international organizations has been understood by the IACHR as a state obligation that is justiciable through the individual petition mechanism set forth in the American Convention.

Additionally, the Protocol of San Salvador guarantees at Article 9 the right to social security, which has been examined in various cases before the Commission and the Inter-American Court of Human Rights. Although this right is not justiciable under that instrument, the bodies of the inter-American system can analyze the duty of progressive development in some specific cases in which it is argued that the application of social security rules has resulted in violations of the rights to property and judicial protection, among others.

Other relevant provisions of the Protocol of San Salvador are Article 10, which guarantees the right to health, understood as the enjoyment of the highest level of physical, mental, and social well-being. Article 18 also recognizes the rights of persons with physical or mental disabilities, and Article 3 prohibits discrimination.

More generally, all provisions of the instruments of the inter-American system are available to older adults who believe their rights have been violated by any of the OAS member states—in particular, the provisions guaranteeing equal treatment before the law for cases in which older adults believe they have been given discriminatory treatment without proper justification, in keeping with inter-American jurisprudence.

Conclusion

These legal mechanisms offer an appropriate frame of reference for channeling the interest of the OAS member states and their inhabitants in the topic of older persons, which has already spurred various important declarations and resolutions of its political bodies. The immediate challenge lies in making creative use of the possibilities offered by the inter-American human rights system, with the shared objective of developing and broadening legal means of protecting older persons.

The Inter-American Commission believes it can make a significant contribution to this process in the context of its mandate to defend and promote the human rights of all persons, without discrimination of any kind. This session has focused on understanding the current situation of the human rights of older persons all over the world, specifically in the case of this panel, the human rights frameworks available. We hope to provide the information and advice you consider necessary with a view to advancing toward this goal.

Thank you very much.