

## ARTICLES

### UPHOLDING DISABILITY RIGHTS IN THE AMERICAS: THE ROLE OF THE INTER-AMERICAN INSTITUTIONS

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The responsibility for any oversights or mistakes remains ours alone.

## ABSTRACT

This Article studies how the adjudicative institutions created by the Inter-American Convention on Human Rights (ACHR) have worked to uphold the rights of persons with disabilities. It argues that those institutions, the Inter-American Commission on Human Rights (the Commission or IACHR) and the Inter-American Court of Human Rights (the Court or IACtHR), have begun to construct a regime of enforceable rights of persons with disabilities by applying international rules and interpretations to fill gaps in a relatively sparse Inter-American disability rights treaty framework. To buttress general principles of equality and non-discrimination with specific rights, the Commission and the Court have turned to the United Nations (UN), and occasionally other international sources of law, to aid in interpreting concepts and terms relating to disability rights. A watershed moment was the adoption of the Convention on the Rights of Persons with Disabilities (CRPD) in 2008, which provided a detailed definition of disability rights that was (and remains) lacking in the Inter-American disability rights treaty, the 2001 Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (CIADDIS).

Only a small fraction of the complaints and cases before the Commission and the Court raise disability rights. However, as the Article shows by canvassing their case law through 2020, the overall activity of the Commission and the Court is increasing and may further accelerate as procedures and resources are adapted to process a significant backlog of cases. In lieu of an overarching set of disability rights in the Inter-American treaties, a few specific streams of jurisprudence have developed. These streams attach disability rights to the ACHR's provisions regarding the rights to life and humane treatment, and to the progressive realization of economic, social, and cultural rights. Cases have focused mainly on treatment of persons held in state institutions, and on extending access to health care and public education. Recent rulings seem to indicate a fusion of due process rights of redress to these substantive rights, in principle, expanding access to judicial remedies for persons with disabilities. The Article concludes that the Court and the Commission will likely continue to build out their framework of enforceable disability rights, but there are severe practical limits to what they can accomplish. Even when states willingly engage with the Court's and the Commission's effort, economic factors constrain governments' responses.

## I. INTRODUCTION

The Inter-American human rights system is an institutional outgrowth of the Organization of American States (OAS).<sup>1</sup> At the supranational level, the system consists of a set of treaties among OAS states<sup>2</sup> and institutions for the study, promotion, and enforcement of human rights, most prominently the Inter-American Commission (the Commission or IACHR)<sup>3</sup> and Inter-American Court of Human Rights (the Court or IACtHR),<sup>4</sup> which have adjudicative as well as advisory competences.<sup>5</sup> In disability rights protection, the system incorporates international instruments, but its regional foundation is the 1969 American Convention on Human Rights (the Convention or ACHR)<sup>6</sup> and the 2001 Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (CIADDIS).<sup>7</sup> The United States of America has participated in the Inter-American system to a very limited degree. For example, they decline to participate in the contentious jurisdiction of the Court and rarely engage with

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<sup>1</sup> Hugo Caminos, et al., *The OAS Charter After Forty Years*, 82 AM. SOC'Y INT'L L. PROC. 101, 115 (1988).

<sup>2</sup> E.g., Organization of American States, American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter ACHR]; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Nov. 17, 1988 (entry into force, November 16, 1999), O.A.S.T.S. No. 69 [hereinafter Protocol of San Salvador]; Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, O.A.S.T.S. No. 67, OAS/Ser.L/V/I.4 rev.7; Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, Jun. 9, 1994, 27 U.S.T. 3301; Inter-American Convention on Forced Disappearance of Persons, Jun. 9, 1994, O.A.S.T.S. No. 47, OAS/Ser.L/V/I.4 rev.7.

<sup>3</sup> *Inter-American Commission on Human Rights*, ORG. OF AM. STATES, [http://www.oas.org/en/about/commission\\_human\\_rights.asp](http://www.oas.org/en/about/commission_human_rights.asp) (last visited Mar. 3, 2022).

<sup>4</sup> Inter-Am. Ct. H.R., *What is the I/A Court H.R.?*, INTER-AM. CT. H.R., [https://www.corteidh.or.cr/que\\_es\\_la\\_corte.cfm?lang=en](https://www.corteidh.or.cr/que_es_la_corte.cfm?lang=en) (last visited Mar. 3, 2021) [hereinafter *What is the I/A Court H.R.*].

<sup>5</sup> Derek de Bakker, *The Court of Last Resort: American Indians in the Inter-American Human Rights System Why American Indians Should Utilize Supranational Courts*, 11 CARDOZO J. INT'L & COMP. L. 939, 94243 (2004) (De Bakker notes that the Inter-American Commission on Human Rights and the Inter-American Court on Human Rights are the most promising supranational tribunals in protecting human rights in the Inter-American system).

<sup>6</sup> ACHR, *supra* note 2.

<sup>7</sup> The Inter-American Convention on the Elimination of all Forms of Discrimination against Persons with Disabilities, Jun. 8, 1999, AG/RES. 1608 (XXIX-O/99) [hereinafter CIADDIS] (The CIADDIS was adopted in 1999 within the Organization of American States and entered into force on 14 September 2001).

the Commission in its inquiries.<sup>8</sup> As a result, the system has evolved largely as a regional human rights regime for Latin America.<sup>9</sup>

The Inter-American institutions and the OAS member states have made considerable efforts to improve the protection of disability rights,<sup>10</sup> and the Inter-American system has begun to evolve toward a rights-based model of disability.<sup>11</sup> Nevertheless, much remains to be done to protect the 85 million persons with some form of disability in Latin America.<sup>12</sup> Persons with disabilities in most Latin American countries are essentially excluded from significant social spheres of life.<sup>13</sup> They are “isolated, stigmatized, mistreated, and marginalized”<sup>14</sup> and viewed “as subjects of pity, in need of a medical cure or charity . . . not as human beings entitled to political, social, and civil rights.”<sup>15</sup> This is reflected in the widespread public policies and practices in

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<sup>8</sup> Francisco J. Rivera Juaristi, *U.S. Exceptionalism and the Strengthening Process of the Inter-American Human Rights System*, 20 HUM. RTS. BRIEF 19, 19–20 (2013); see also María Díaz Crego, *The United States and the Inter-American System of Human Rights: Is There a Way Forward?* (Mar. 23, 3016) (A talk by María Díaz Crego at Harvard Law School, discussing how “[t]he situation of the United States of America in relation to the Inter-American Human Rights System is characterized by its reluctance to engage fully in the system” and arguing that “[t]he United States is one of the few OAS Member States that has not yet ratified the American Convention on Human Rights neither has accepted the jurisdiction of the Inter-American Court of Human Rights. It is only bound by the human rights obligations stated in the Charter of the OAS and the American Declaration of the Rights and Duties of Man, as interpreted by the Inter-American Commission on Human Rights.”).

<sup>9</sup> Rivera Juaristi, *supra* note 8.

<sup>10</sup> Louis O. Oyaro, *Africa at Crossroads: The United Nations Convention on the Rights of Persons with Disabilities*, 30 AM. U. INT'L L. REV. 347, 371 (2015) (noting that prior to the introduction of the CRPD, the Inter-American Convention on the Elimination of all Forms of Discrimination against Persons with Disabilities “adopts a relatively low standard in recognizing and protecting persons with disabilities. The definition of disability is too similar to the medical model in its definition of disability.”).

<sup>11</sup> See e.g., Meghan Gallagher, *No Means No, or Does It? A Comparative Study of the Right to Refuse Treatment in A Psychiatric Institution*, 44 INT'L J. LEGAL INFO. 137, 163 (2016) (Gallagher argues that the inter-American system “give[s] positive rights to persons with mental disabilities regarding freedom and liberty”); see also Arlene S. Kanter, *The Globalization of Disability Rights Law*, 30 SYRACUSE J. INT'L & COM. 241, 260 (2003) (noting that the IACHR decision in *Victor Rosario Congo v. Ecuador* suggests that the Inter-American human rights system began to adopt a rights-based model of disability).

<sup>12</sup> THE WORLD BANK, *85 Million Reasons to Prioritize Persons With Disabilities During Disasters in Latin America and the Caribbean* (Dec. 3, 2019), <https://www.worldbank.org/en/news/feature/2019/12/03/85-million-reasons-to-prioritize-persons-with-disabilities-during-disasters-in-latin-america-and-the-caribbean>.

<sup>13</sup> Christian Courtis, *Disability Rights in Latin America and International Cooperation*, 9 SW. J. L. & TRADE AM. 109, 109-112 (2003).

<sup>14</sup> Kanter, *supra* note 11, at 245.

<sup>15</sup> *Id.* at 245, 246.

the Americas that treat support extended toward persons with disabilities as an act of charity rather than a matter of legally enforceable rights.<sup>16</sup>

Inter-American disability jurisprudence has centered mainly on ensuring equal access for persons with disabilities to basic human rights and to due process of law.<sup>17</sup> Insofar as the Inter-American institutions have engaged specifically with disability rights, they have concentrated on the right to receive necessary health care based on disability<sup>18</sup> and on the prohibition of capital punishment of persons with mental disabilities.<sup>19</sup> Otherwise, the work of the Inter-American Court and, in its adjudicative role, the Commission has focused mainly on ensuring that persons with disabilities have access to the rights and services available to other citizens and are not mistreated while in institutional custody.<sup>20</sup> The Inter-American human rights system does not declare a comprehensive system of disability rights. Instead, using the discretion its statute affords it to consider international as well as Inter-American sources of human rights law, the Court has fashioned lines of case law that establish discrete disability rights across the Inter-American

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<sup>16</sup> Courtis, *supra* note 13, at 111.

<sup>17</sup> To be discussed in Part III. B.

<sup>18</sup> For example, William Alberto Pérez Jerez v. El Salvador, Resolution 27/2014, Inter-Am. Comm'n H.R., Precautionary Measure No. 42212 (2014), <http://www.oas.org/en/iachr/decisions/pdf/2014/pm442-12-en.pdf> and Julio César Cano Molina v. Cuba, Resolution 24/2014, Inter-Am. Comm'n H.R., Precautionary Measure No. 307-14(2014), <http://www.oas.org/en/iachr/decisions/pdf/2014/mc307-14-en.pdf> concerned prisoners with disabilities, requiring that they be provided appropriate health care.

<sup>19</sup> Most of the Commission decisions involving disability rights concerned the right of persons with mental disabilities against capital punishment. *E.g.* Clarence Allen Lackey et al., Miguel Angel Flores, and James Wilson Chambers v. United States, Cases 11.575, 12.333 and 12.341, Inter-Am. Comm'n H.R., Report No. 52/13, OEA/Ser.L/V/II, doc. 224 (2013) (upholding this right); Victor Saldano v. United States, Case 12.254, Inter-Am. Comm'n H.R., Report No. 24/17, OEA/Ser.L/V/161, doc.31 (2017) (affirming that this right extends to disability caused by conditions of post conviction imprisonment). Furthermore, Abu-Ali Abdur'Rahman v. United States (2014) and Edgar Tamayo Arias v. United States (2014) also focused on capital punishment. *See* Abu-Ali Abdur'Rahman v. United States, Case 12.422, Inter-Am. Comm'n H.R., Report No. 13/14, OEA/Ser.L/V/II.150, doc. 17, rev. ¶¶ 94-95 (2014); Edgar Tamayo Arias v. United States, Case 12.873, Inter-Am. Comm'n H.R., Report No. 44/14, OEA/Ser.L/V/II.151, doc. 9 (2014).

<sup>20</sup> CIADDIS, *supra* note 7, at Preamble (affirming that “persons with disabilities have the same human rights and fundamental freedoms as other[s]”); *see also* Kanter, *supra* note 11, at 258 (noting that the Organization of American States has passed “strong equality legislation on disability”); Osvaldo Kreimer, *The Beginnings of the Inter-American Declaration on the Rights of Indigenous Peoples*, 9 ST. THOMAS L. REV. 271 (1996) (noting that “[o]ne of the basic principles in the Charter of the Organization of American States is ‘respect for the fundamental rights of the individual, without distinction as to race, nationality, creed, or sex’”).

system.<sup>21</sup> Since 2008, Inter-American jurisprudence has increasingly developed against the background of the Convention on the Rights of Persons with Disabilities (CRPD),<sup>22</sup> an international human rights treaty, incorporating several of its standards.<sup>23</sup>

This Article examines the implementation of disability rights in the Inter-American human rights system of the Organization of American States (OAS). Its analysis centers on the two main Inter-American human rights bodies: The Inter-American Commission and Court of Human Rights. Guarnizo-Peralta's *Disability Rights in the Inter-American System of Human Rights: An Expansive and Evolving Protection*<sup>24</sup> presented the main outlines of the Commission's and the Court's disability-related jurisprudence to 2017. This Article builds on that work by looking at 2018–2020 cases empirically to show how disability rights doctrines have continued to develop from principles of health care as a human right, non-discrimination, and equal access to rights and public services. Part II of the Article describes the Inter-American legal framework governing disability rights, both in itself and in relation to its international counterpart. Part III traces some main trends in disability related case law, highlighting how the Commission and the Court have applied both international and Inter-American legal sources to develop a unique regional jurisprudence. Part IV of the Article explores practical challenges facing the Inter-American system, such as its procedural inefficiency, state reluctance to accept adverse rulings of the Inter-American bodies, and the key issue of economic constraints. A brief conclusion then assesses the Inter-American system's development and highlights remaining concerns regarding its effectiveness and accessibility.

## II. DISABILITY RIGHTS IN THE INTER-AMERICAN SYSTEM

The Inter-American human rights system began with the American Declaration of the Rights and Duties of Man (American Declaration) in

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<sup>21</sup> To be discussed in Part III.B.

<sup>22</sup> The Convention on the Rights of Persons with Disabilities, May 3, 2008, 2515 U.N.T.S. 3 [hereinafter CRPD].

<sup>23</sup> Org. of Am. States, *Regional Diagnosis on the Exercise of Legal Capacity of Persons with Disabilities* (2015), [https://www.oas.org/en/sedi/ddse/pages/documentos/English\\_Diagnosis.pdf](https://www.oas.org/en/sedi/ddse/pages/documentos/English_Diagnosis.pdf), at 1-2 (noting that the Committee for the Elimination of All Forms of Discrimination against Persons with Disabilities (CEDDIS) acknowledged “the urgent need to align article I.2, paragraph b) of [the CIADDIS] to the new paradigm set forth by the CRPD.” A working group was put together to analyze the differences in more detail; a report was produced aiming to “eliminate the contradiction that exists between the Conventions.”).

<sup>24</sup> Diana Guarnizo-Peralta, *Disability Rights in the Inter-American System of Human Rights: An Expansive and Evolving Protection*, 36 NETH. Q. HUM. RIGHTS 43, 43-63 (2018).

Bogotá, Colombia, in April of 1948.<sup>25</sup> The Declaration recognizes disability as a challenge to self-sufficiency, giving rise to a compensating right to social security.<sup>26</sup> The OAS has adopted several further instruments that protect the rights of persons with disabilities. Some, notably the OAS Charter (the Charter)<sup>27</sup> and the ACHR,<sup>28</sup> do not specifically pronounce disability rights, but their Preambles emphasize equality and inclusion. The Charter strives to “provide for the betterment of all, in independence, in equality and under law.”<sup>29</sup> The Convention calls for “a system of personal liberty and social justice based on respect for the essential rights of man”<sup>30</sup> to supplement protections of national laws.<sup>31</sup> A protocol to the Convention, the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (the Protocol of San Salvador), commits states to make best efforts to advance economic, social or cultural rights, without discrimination.<sup>32</sup>

It is well established in the Inter-American system that persons with disabilities own the full set of basic human rights, without discrimination in law or practice. The main disability rights instrument of the OAS is the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities,<sup>33</sup> which affirms that “persons with disabilities have the same human rights and fundamental freedoms as other[s],”<sup>34</sup> and states a commitment to “eliminating discrimination, in all its

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<sup>25</sup>Org. of Am. States, *What is the IACHR*, <https://www.oas.org/en/iachr/mandate/what.asp> (last visited Mar. 7, 2022); see e.g. Lawrence O. Gostin & Lance Gable, *The Human Rights of Persons with Mental Disabilities: A Global Perspective on the Application of Human Rights Principles to Mental Health*, 63 MD. L. REV. 20, 50 (2004) (discussing the links between the Organization of American States and the Inter-American human rights system).

<sup>26</sup>American Declaration on the Rights and Duties of Man, May 2, 1948, O.A.S. Doc. OEA/ser.L./V./II.23, doc. 21 rev.6, at 38, available at <https://www.oas.org/en/iachr/mandate/Basics/declaration.asp> (last visited March 7, 2022). (Article XVI states, “[e]very person has the right to social security which will protect him from the consequences of unemployment, old age, and any disabilities arising from causes beyond his control that make it physically or mentally impossible for him to earn a living.”).

<sup>27</sup>Charter of Org. of Am. States, U.N. 01/16/52 No. 1609 Vol. 119 (1948) [hereinafter the Charter] (adopted at Bogotá, Colombia on April 30, 1948, at the Ninth International Conference of American States).

<sup>28</sup>ACHR, *supra* note 2.

<sup>29</sup>The Charter, *supra* note 27, at Preamble.

<sup>30</sup>ACHR, *supra* note 2, at Preamble.

<sup>31</sup>ACHR, *supra* note 2, at Preamble.

<sup>32</sup>Protocol of San Salvador, *supra* note 2, at Preamble.

<sup>33</sup>CIADDIS, *supra* note 7.

<sup>34</sup>CIADDIS, *supra* note 7, at Preamble (the non-discrimination provision in the preamble of the CIADDIS does not specifically mention disability, but after listing its criteria, the Inter-American system further forbids discrimination based on “any other social condition.”). See Protocol of San Salvador, *supra* note 2, at Art. 3.

forms and manifestations, against persons with disabilities.”<sup>35</sup> As the world’s first international instrument targeted at disability rights,<sup>36</sup> the CIADDIS has nineteen states parties to date.<sup>37</sup>

The CIADDIS requires states to “adopt the legislative, social, educational, labor-related, or any other measures needed to eliminate discrimination against persons with disabilities and to promote their full integration into society.”<sup>38</sup> It does not provide a way to pursue individual complaints. Instead, the CIADDIS implements a state reporting mechanism as most other UN human rights treaties do.<sup>39</sup> Each state should report its situation and measures that have been adopted to ensure its compliance with the treaty.<sup>40</sup> A Committee for the Elimination of All Forms of Discrimination against Persons with Disabilities,<sup>41</sup> consisting of one representative appointed by each state party, reviews state reports<sup>42</sup> and makes suggestions to the states for the progressive realization of disability rights.<sup>43</sup> However, this Committee has not achieved substantial improvements in terms of protecting the rights enshrined in the CIADDIS, with “limited impact on the development of policies,”<sup>44</sup> and had held only fourteen meetings from 2007 to 2020.<sup>45</sup>

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<sup>35</sup> CIADDIS, *supra* note 7, at Preamble.

<sup>36</sup> Guarnizo-Peralta, *supra* note 24, at 44.

<sup>37</sup> General Secretariat of the Org. of Am. States, *Practical Guide to Inclusive and Rights-based Responses to COVID-19 in the Americas* at 30, OAS. Official documents; OEA/Ser.D/XXVI.16 (2020).

<sup>38</sup> CIADDIS, *supra* note 7, at art. III. § 1.

<sup>39</sup> CIADDIS, *supra* note 7, at art. VI. § 3 (Art. VI. 3 provides that “[a]t the first meeting, the states parties undertake to submit a report to the Secretary General of the Organization for transmission to the Committee so that it may be examined and reviewed. Thereafter, reports shall be submitted every four years”). Other international human rights treaties adopt a similar approach. For example, Int’l Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, art. 17, requires its member states to submit a report on the measures they have adopted and the progress made in achieving the observance of the human rights recognized in the Covenant. The International Covenant on Civil and Political Rights requires its member states to submit regular reports to the Secretary-General of the United Nations, and the reports “shall indicate the factors and difficulties, if any, affecting the implementation of the [...] Covenant.” *See*. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, art. 40; *see also* Curtis, *supra* note 13, at 118.

<sup>40</sup> CIADDIS, *supra* note 7, at art. VI.

<sup>41</sup> CIADDIS, *supra* note 7, at art. VI, § 1. (Article VI. 1 provides “a Committee for the Elimination of All Forms of Discrimination against Persons with Disabilities, composed of one representative appointed by each state party, shall be established.”).

<sup>42</sup> CIADDIS, *supra* note 7 at art. VI. 3.

<sup>43</sup> CIADDIS, *supra* note 7 at art. VI. 5.

<sup>44</sup> Guarnizo-Peralta, *supra* note 24, at 46.

<sup>45</sup> Org. of Am. States, *Persons with Disabilities - CEDDIS meetings*, [http://www.oas.org/en/sedi/ddse/pages/index-4\\_committee\\_meetings.asp](http://www.oas.org/en/sedi/ddse/pages/index-4_committee_meetings.asp) (last visited

Otherwise, the CIADDIS only imposes a generic duty on member states to “[c]ooperate with one another in helping to prevent and eliminate discrimination against persons with disabilities;”<sup>46</sup> it encourages them to collaborate in scientific and technological research related to the prevention and rehabilitation of disabilities as well as the “total integration into society of persons with disabilities.”<sup>47</sup>

The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have increasingly applied the CIADDIS in tandem with the CRPD to uphold disability rights as an extension of the fundamental rights provided for in the ACHR.<sup>48</sup> Beyond non-discrimination, the CIADDIS does not detail the rights of persons with disabilities.<sup>49</sup> By contrast,<sup>50</sup> the CRPD describes human, social, and political rights accruing to persons with disabilities.<sup>51</sup> Notably, it provides for new disability rights that other human rights treaties do not cover.<sup>52</sup> For example, Article 17 protects the physical and mental integrity of persons with disabilities;<sup>53</sup> Article 19

Mar. 7, 2022) (Eight regular meetings, five special meetings and one working group meetings. The last meeting was in 2017.).

<sup>46</sup> CIADDIS, *supra* note 7, at art. IV. 1.

<sup>47</sup> CIADDIS, *supra* note 7, at art. IV.2.

<sup>48</sup> For more details, *see* Part III.B.

<sup>49</sup> CIADDIS, *supra* note 7, at Preamble (in the Preamble, the CIADDIS reaffirms that “persons with disabilities have the same human rights and fundamental freedoms as other persons; and that these rights, which include freedom from discrimination based on disability, flow from the inherent dignity and equality of each person.” However, reading through the entire Convention, it does not specify the rights of persons with disabilities. This differs from the CRPD approach); *see also* Guarnizo-Peralta, *supra* note 24, at 45.

<sup>50</sup> ANDREA BRODERICK AND DELIA FERRI, INTERNATIONAL AND EUROPEAN DISABILITY LAW AND POLICY, 476-479 (2019) (. differing from the CIADDIS, CRPD also emphasizes the protection for other rights, such as accessibility for persons with disabilities, legal capacity and human dignity, as well as social inclusion).

<sup>51</sup> CRPD, *supra* note 22, at art. 14-30. (art. 14 protects liberty and security of persons with disabilities; art. 15 protects persons with disabilities freedom of torture or cruel, inhuman, or degrading treatment or punishment; art. 16 protects the right to freedom from exploitation, violence, and abuse; art. 17 protects the integrity of persons with disabilities; art. 18 protects the right to liberty of movement and nationality; art. 19 protects the rights to live independently and to be included in the community; art. 20 protects the right to personal mobility; art. 21 protects the right to freedom of expression and opinion, and access to information; art. 22 protects the right to respect for privacy; art. 23 protects the right to respect for home and the family; art. 24 protects the right to education; art. 25 protects the right to health; art. 26 protects the right to habilitation and rehabilitation; art. 27 protects the right to work and employment; art. 28 protects the right to an adequate standard of living and social protection; art. 29 protects the right to participate in political and public life; art. 30 protects the right to participate in cultural life, recreation, leisure, and sport).

<sup>52</sup> Guarnizo-Peralta, *supra* note 24, at 46.

<sup>53</sup> CRPD, *supra* note 22, at art.17 (“Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.”).

protects the right to live independently and being included in the community;<sup>54</sup> Article 20 protects the right to personal mobility.<sup>55</sup>

Both the CIADDIS and the CRPD rest on basic ideas of disability and non-discrimination. In defining discrimination, they begin with “any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms.”<sup>56</sup> The CIADDIS definition extends beyond discrimination based on a “disability” to include a “record of disability, condition resulting from a previous disability, or perception of disability, whether present or past.”<sup>57</sup> The CRPD definition places a stronger emphasis on rights, defining rights as encompassing “all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field [and] all forms of discrimination, including denial of reasonable accommodation.”<sup>58</sup>

As the older regime, the CIADDIS treats disability as primarily a matter of the individual’s impairment, whereas the CRPD exhibits a more socially oriented approach. The CIADDIS defines “disability” as “a physical, mental, or sensory impairment, whether permanent or temporary, that limits the capacity to perform one or more essential activities of daily life, and which can be caused or aggravated by the economic and social environment.”<sup>59</sup> It thus proposes a hybrid focus, on both the medical elements and “social constraints or barriers,”<sup>60</sup> however, it still appears to prioritize the impairment, with the socioeconomic environment a secondary consideration.<sup>61</sup> The non-exclusive CRPD definition of persons with disabilities “include[s] those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”<sup>62</sup> Guarnizo-Peralta sees

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<sup>54</sup> CRPD, *supra* note 22, at art. 19.

<sup>55</sup> CRPD, *supra* note 22 at art. 20.

<sup>56</sup> CRPD, *supra* note 22, at art. 2; *see also* Eric Rosenthal, *A Mandate to End Placement of Children in Institutions and Orphanages: The Duty of Governments and Donors to Prevent Segregation and Torture*, in *PROTECTING CHILDREN AGAINST TORTURE IN DETENTION: GLOBAL SOLUTIONS FOR A GLOBAL PROBLEM* 303, 335 (Vidya Dindiyal, et al., eds., 2017) (“The CRPD is designed to ensure that people with disabilities are treated equally and have the same opportunities as others.”); the CIADDIS has similar language, *see* CIADDIS, *supra* note 7, at art. I.2.(a) (The equivalent CIADDIS language is “[A]ny distinction, exclusion, or restriction based on a disability ... which has the effect or objective of impairing or nullifying the recognition, enjoyment, or exercise by a person with a disability of his or her human rights and fundamental freedoms.”).

<sup>57</sup> CIADDIS, *supra* note 7, at art. I.2.(a).

<sup>58</sup> CRPD, *supra* note 22, Art 2.

<sup>59</sup> CIADDIS, *supra* note 7, at Art. I.1

<sup>60</sup> Courtis, *supra* note 13, at 114–15.

<sup>61</sup> Guarnizo-Peralta, *supra* note 24, at 45.

<sup>62</sup> CRPD, *supra* note 22, at Art. 1.

in this a “new paradigm,” by which “problems related to disability do not focus on the medical issue of disability but on the social response to it.”<sup>63</sup> Both the CIADDIS and the CRPD definitions remain within what Kanter critically calls a “social welfare or medical model of disability.”<sup>64</sup> This falls short of a fully rights based approach, but the entry into force of the CRPD, in which all OAS member states are parties, has coincided with increasing numbers of cases where the Commission and the Court treat disability as a matter of individual rights.<sup>65</sup>

### III. INTER-AMERICAN ENFORCEMENT MECHANISMS: THE IACHR AND THE IACtHR

The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights are key enforcement institutions of the OAS system.<sup>66</sup> The Commission is a consultative organ; advising states, recommending law and policy measures for states to adopt to further advance human rights, and providing an annual report to the OAS General Assembly.<sup>67</sup> Its mandate involves processing individual complaints,<sup>68</sup> including the adoption of urgent protective measures, and monitoring human rights generally through on-site visits, and the publication of country and regional reports.<sup>69</sup> The Commission’s remit covers human rights conditions and violations in all thirty-five OAS member states.<sup>70</sup> It has created rapporteurships and units to monitor OAS member states’ compliance with Inter-American human rights treaties, including a unit on the Rights of Persons with Disabilities.<sup>71</sup>

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<sup>63</sup> Guarnizo-Peralta, *supra* note 24, at 45.

<sup>64</sup> Kanter, *supra* note 11, at 268.

<sup>65</sup> CRPD, *supra* note 22 (noting that CPRD was adopted on Dec. 13, 2006 and came into force on May 3, 2008). The inter-American system has seen an increasing number of cases after the adoption of CRPD in 2008, for more details regarding the statistics of the Inter-American disability rights cases, *see* 30 chart1; 34 chart2; 38 chart3; 42 chart4.

<sup>66</sup> *Human rights in the Inter-American System*, ORG. OF AM. STATES, at 1, <https://www.oas.org/ipsp/images/English%20FAQs.pdf> (last visited Mar. 17, 2022).

<sup>67</sup> Org. of Am. States G.A. Res. 447, Statute of the Inter-American Commission on Human Rights, at art. 1,1, art 18 (October 1, 1979).

<sup>68</sup> Ariel Dulitzky, *Too Little, Too Late: The Pace of Adjudication of the Inter-American Commission on Human Rights*, 35 LOY. L.A. INT’L & COMP. L. REV. 131, 141 (2013).

<sup>69</sup> Rosa Celorio, *Discrimination and the Regional Human Rights Protection Systems: The Enigma of Effectiveness*, 40 U. PA. J. INT’L L. 781, 791 (2019).

<sup>70</sup> ACHR, *supra* note 2, at Art. 35 (“[t]he Commission shall represent all the member countries of the Organization of American States”).

<sup>71</sup> Inter-Am. Comm’n on H.R., Rules of Procedure of the Inter-American Commission on Human Rights, 147th Reg. Period of Sess., entered into force on August 1, 2013, <https://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp> [hereinafter the Rules of Procedure (article 15 of the Rules of Procedure regulates the establishment of

Individuals, groups, or organizations may petition the Commission to hear complaints against OAS states alleging human rights violations, on their own behalf or on behalf of a third party.<sup>72</sup> Petitioners must show they have exhausted domestic legal remedies, must submit their petitions no later than six months after a final domestic judgment, and the subject must not be “pending in another international proceeding for settlement,”<sup>73</sup> unless domestic law does not provide due process, domestic remedies are inaccessible, or judgment based on those remedies is unduly delayed.<sup>74</sup> The state is notified of the complaint, then if it is admissible, the petitioner’s brief and is invited to respond at both stages.<sup>75</sup> The Commission must then try to facilitate a friendly settlement between the parties. Failing that, it may proceed to the merits, and ultimately may bring cases to the Inter-American Court of Human Rights against states that do not timely implement its merits decisions.<sup>76</sup> The Commission may also issue precautionary measures when an individual or the subject of a complaint is at immediate risk of irreparable harm.<sup>77</sup>

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rappoteurships and working Groups); *IACHR Thematic Rapporteurships and Units*, ORG. OF AM. STATES, <https://www.oas.org/en/iachr/mandate/rappoteurships.asp> (providing a list of the current thematic rapporteurships and their years of creation). *See also*, Press Release, Inter-Am. Comm’n on H.R., IACHR Welcomes Broad Participation in Consultation on Persons with Disabilities, No. 157/18 (Jul. 20, 2018), [https://www.oas.org/en/iachr/media\\_center/PReleases/2018/157.asp](https://www.oas.org/en/iachr/media_center/PReleases/2018/157.asp).

<sup>72</sup> ACHR, *supra* note 2, at Art. 44 (“[a]ny person or group of persons, or any nongovernmental entity legally recognized in one or more member Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party”); *see also* Dulitzky, *supra* note 68, at 141–42; Brian D. Tittlemore, *The Dann Litigation and International Human Rights Law: The Proceedings and Decision of the Inter-American Commission on Human Rights*, 31 AM. INDIAN L. REV. 593, 599-601 (2007) (providing an example of the Commission publishing a decision and recommendation following the third-party filing of a complaint).

<sup>73</sup> ACHR, *supra* note 2, at Art. 46.1.

<sup>74</sup> *Id.* at Art. 46.2.

<sup>75</sup> Dulitzky, *supra* note 68, at 142-43 (usually the Commission decides on admissibility before proceeding to the merits, but it may request a State to respond to both immediately if “it is believed that the life or personal integrity of a person is in real and imminent danger”).

<sup>76</sup> Dulitzky, *supra* note 68, at 143 (citing Art. 45.1 of the Rules of Procedure. “If the State in question has accepted the jurisdiction of the Inter-American Court [ . . . ] and the Commission considers that the State has not complied with the recommendations of the report approved in accordance with Article 50 of the American Convention, it shall refer the case to the Court, unless there is a reasoned decision by an absolute majority of the members of the Commission to the contrary”).

<sup>77</sup> Dulitzky, *supra* note 68, at 142; *see also* Org. of Am. States, *About Precautionary Measures*, <https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/decisions/about-precautionary.asp> (last visited Mar. 12, 2022).

The Inter-American Court of Human Rights interprets and applies the American Convention on Human Rights<sup>78</sup> and may base its decisions on other international instruments as well. It resolves cases and supervises judgments, gives advisory opinions on the interpretation of the Convention or other human rights treaties, and can order provisional measures.<sup>79</sup> In its advisory role, the Court is available to the Commission and other OAS institutions and to member states, whether or not they have ratified the Convention.<sup>80</sup> This enables the Court “to hear cases that are inaccessible to [it] under the contentious jurisdiction.”<sup>81</sup> Twenty states have recognized the contentious jurisdiction of the Court: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, and Uruguay.<sup>82</sup> Only states parties and, by referral, the Commission may bring a case to the Court; individuals or organizations must direct their complaints to the Commission.<sup>83</sup>

*A. Trends in numbers of remedies for disability rights violations (2011-2020)*

The number of petitions received annually by the Commission grew from 1,325 in 2006 to 3,034 in 2019.<sup>84</sup> In the most recent three years tabulated, Brazil (583), Colombia (1,905), Mexico (2,427), and Peru (673) together have been the subject of about two thirds of the 8,485 submissions to the Commission,<sup>85</sup> with Colombia and Peru accounting for the most per capita among this group.<sup>86</sup> From 2006-2019, the Commission issued 935

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<sup>78</sup> Org. of Am. States, Statute of the Inter-American Court of Human Rights, Oct. 1, 1979, adopted by the General Assembly of the OAS at its Ninth Regular Session, Resolution N° 448, at Art. 1.

<sup>79</sup> *What is the I/A Court H.R.*, *supra* note 4.

<sup>80</sup> Jorge Luis Delgado, *The Inter-American Court of Human Rights*, 5 ILSA J. INT’L & COMP. L. 541, 549 (1999) (“The advisory jurisdiction extends to all OAS Member States, even those which have not ratified the Convention. The treaty in question does not have to be one adopted within the Inter-American system or a treaty to which only American states may be parties. The Court may interpret any treaty that concerns the protection of human rights in a Member State of the Inter-American system”) (footnotes omitted).

<sup>81</sup> *Id.* (citing Mary Caroline Parker, *Other Treaties: The Inter-American Court of Human Rights Defines its Advisory Jurisdiction*, 33 AM. U. L. REV., 211, 215 (1983)).

<sup>82</sup> *What is the I/A Court H.R.*, *supra* note 4.

<sup>83</sup> ACHR, *supra* note 2, at Art. 61.1 (“[o]nly the States Parties and the Commission shall have the right to submit a case to the Court”).

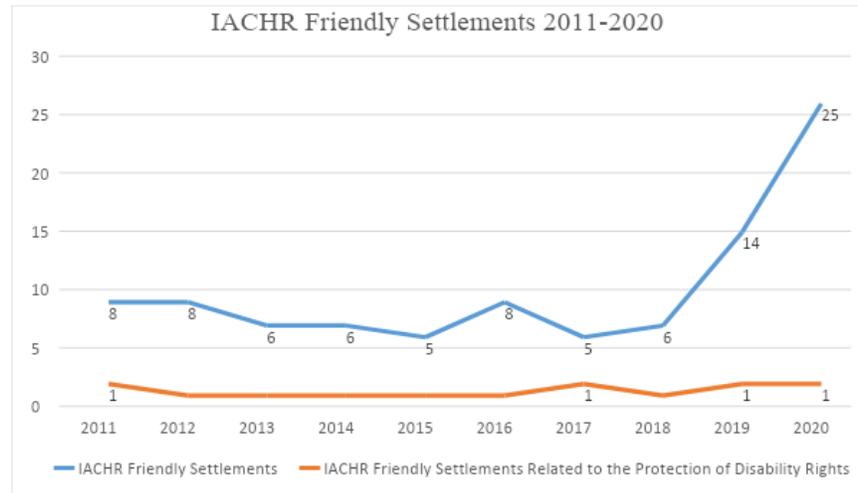
<sup>84</sup> Inter-Am. Comm’n H.R. Executive Secretariat, *IACHR Statistics* (December 21, 2020), <https://www.oas.org/en/iachr/multimedia/statistics/statistics.html>. [hereinafter *IACHR Statistics*].

<sup>85</sup> *IACHR Statistics*, *supra* note 84.

<sup>86</sup> *IACHR Statistics*, *supra* note 84.

admissibility reports, of which 360 are from the most recent three years.<sup>87</sup> As this section details, only a small proportion of the reported cases relate to disability rights.

**Chart 1 IACHR Friendly Settlement Reports Related to Disability Rights<sup>88</sup>**



The parties have reached friendly settlements to 10.38% of the complaints the Commission has admitted,<sup>89</sup> with at most twenty-five settlements reported in any single year (2020).<sup>90</sup> From 2011 to 2020, only one settlement report rested on disability rights: in *María Soledad Cisternas Reyes*

<sup>87</sup> *IACHR Statistics*, *supra* note 84.

<sup>88</sup> Chart 1 was developed by the authors based on the OAS data on IACHR Friendly Settlements and the IACHR reports on Friendly Settlements. *See IACHR Statistics*, *supra* note 84 (OAS data on IACHR Friendly Settlements). The authors also reviewed all published IACHR reports on friendly settlements from 2011 to 2020, and identified those related to the protection of disability rights. Org. of Am. States, *IACHR Friendly Settlements*, <https://www.oas.org/en/iachr/decisions/friendly.asp> (last visited Mar. 7, 2022) [hereinafter *IACHR Friendly Settlements*].

<sup>89</sup> Estimate based on 91 settlements reported versus 877 admissibility reports from 2011-2020. The settlement and the report would likely be in different years, so this is only a very rough comparison. *IACHR Friendly Settlements*, *supra* note 88; *see also* Org. of Am. States, *IACHR Admissibility Reports*, <https://www.oas.org/en/iachr/decisions/admissibilities.asp> (last visited Mar. 7, 2022).

<sup>90</sup> *IACHR Friendly Settlements*, *supra* note 88.

v. *Chile*,<sup>91</sup> where an airline discriminated against a blind attorney by requiring her to bring a support person or dog in order to travel.<sup>92</sup> Three more reports considered the importance of protecting the rights of persons with disabilities but did not specifically discuss disability rights. In *Ruben Dario Arroyave Gallego v. Colombia*, the state failed to protect a prisoner with a mental disability against kidnapping and murder by insurgents.<sup>93</sup> In *Emilia Morales Campos v. Costa Rica*, a severely asthmatic woman and her daughter had not been provided with healthy housing, or vouchers, to which they were entitled, for fifteen years until 2006, when she complained to the Commission.<sup>94</sup> In *Graciela Ramos Rocha and Family v. Argentina*, an impoverished woman with three children, including one with a disability, had been improperly convicted for occupying an unused property after fleeing an abusive domestic situation.<sup>95</sup> As indicated in Chart 1, for the years 2012-16 and 2018, no Commission settlement reports explicitly related to the rights of persons with disabilities. Additionally, the annual number of settlements fluctuated between five and eight,<sup>96</sup> until 2019 when there were fourteen friendly settlements in total, and 2020 when there were twenty-five.<sup>97</sup>

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<sup>91</sup> See Maria Soledad Cisternas Reyes v. Chile, Case 12.232, Inter-Am. Comm'n H.R., Report No. 86/11, (2011) <https://www.oas.org/en/iachr/decisions/2011/CHSA12232EN.DOC>.

<sup>92</sup> *Id.* ¶ 2 at 1.

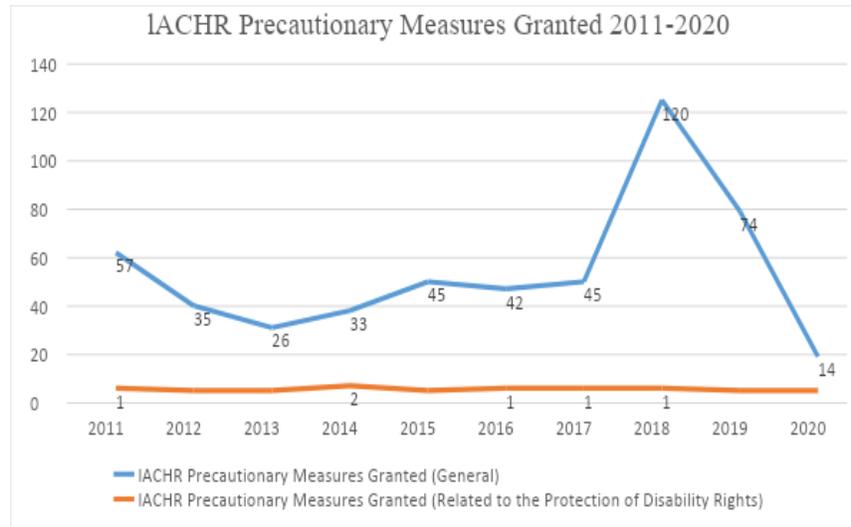
<sup>93</sup> Ruben Dario Arroyave Gallego v. Colombia, Case 12.712, Inter-Am. Comm'n H.R., Report No. 135/17, OEA/Ser.L/V/II.165, doc. 161 (2017).

<sup>94</sup> Emilia Morales Campos v. Costa Rica, Case 12.942, Inter-Am. Comm'n H.R., Report No. 71/19, OEA/Ser.L/V/II. doc. 79 (2019) (discussing “access to the dignified house and an enhanced quality of life.”).

<sup>95</sup> Graciela Ramos Rocha and Family v. Argentina, Case 13.011, Inter-Am. Comm'n H.R., Report No. 197/20, OEA/Ser.L/V/II. doc. 211 (2020).

<sup>96</sup> During 2011-2018 the Commission reported eight, eight, six, six, five, eight, five, and six settlements, respectively. See *IACHR Friendly Settlements*, *supra* note 88.

<sup>97</sup> *IACHR Friendly Settlements*, *supra* note 88.

**Chart 2 IACHR Precautionary Measures Granted<sup>98</sup>**

In general, the Commission has been more active in ordering precautionary measures than in finalizing friendly settlements. As Chart 2 shows, from 2011-2020, the Commission granted 535 requests for precautionary measures, ranging between fifty-seven in 2011 and a low of twenty-six in 2013, before rising sharply to 120 requests granted in 2018 and seventy-four in 2019, then dropping to fifty-eight in 2020.<sup>99</sup> Requests for precautionary measures have generally increased since 2010, peaking with 1,618 in 2018.<sup>100</sup> The Commission has granted approximately six percent of these requests since 2011 (535 out of 8,494).<sup>101</sup> In some years, less than four percent were granted; for example, in 2016, the Commission received 1,061 requests and only forty-two were granted.<sup>102</sup>

Only a few (six) declarations of precautionary measures explicitly

<sup>98</sup> Chart 2 was developed by the authors based on OAS data on precautionary measures and IACHR reports on precautionary measures. *IACHR Statistics*, *supra* note 84. The authors also reviewed all published reports on precautionary measures from 2011 to 2020, and identified the ones related to the protection of disability rights, for a full list of IACHR reports on precautionary measures, see *IACHR Precautionary Measures*, ORG. OF AM. STATES <http://www.oas.org/en/iachr/decisions/precautionary.asp> [hereinafter *IACHR Precautionary Measures*].

<sup>99</sup> *IACHR Statistics*, *supra* note 84.

<sup>100</sup> *IACHR Statistics*, *supra* note 84.

<sup>101</sup> *IACHR Precautionary Measures*, *supra* note 98.

<sup>102</sup> See *IACHR Statistics*, *supra* note 84; *IACHR Precautionary Measures*, *supra* note 98.

engaged with disability rights.<sup>103</sup> In *Virgilio Maldonado Rodríguez v. United States* (2011),<sup>104</sup> the Commission asked the state to stay the execution of a man with an intellectual disability, citing a risk to his rights under Articles 1, 18, 25 and 26 of the American Declaration.<sup>105</sup> *William Alberto Pérez Jerez v. El Salvador*<sup>106</sup> and *Julio César Cano Molina v. Cuba*<sup>107</sup> also concerned prisoners with disabilities, requiring that they be provided appropriate health care.<sup>108</sup> In *Irene v. Argentina*<sup>109</sup> and *Zaheer Seepersad v. Trinidad and Tobago*,<sup>110</sup> the Commission requested that the states provide necessary educational support and health care for persons with disabilities.<sup>111</sup> The measures in *Judge Rotenberg Educational Center (United States of America)*<sup>112</sup> addressed mistreatment of patients in a mental health institution,<sup>113</sup> an area previously of concern to the Commission in 2003 and 2008.<sup>114</sup>

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<sup>103</sup> Data was analyzed by the authors by comparing OAS data on precautionary measures and the IACHR reports on precautionary measures. See *IACHR Statistics*, *supra* note 84; *IACHR Precautionary Measures*, *supra* note 98.

<sup>104</sup> *Virgilio Maldonado Rodríguez v. United States*, Petition 1762-11, Inter-Am. Comm'n H.R., Report No. 63/12, ¶ 59 at 10(2012).

<sup>105</sup> *Id.* ¶ 59.

<sup>106</sup> *William Alberto Pérez Jerez v. El Salvador*, Resolution 27/2014, Inter-Am. Comm'n H.R., Precautionary Measure No. 422-12 (2014), <http://www.oas.org/en/iachr/decisions/pdf/2014/pm442-12-en.pdf>.

<sup>107</sup> *Julio César Cano Molina v. Cuba*, Resolution 24/2014, Inter-Am. Comm'n H.R., Precautionary Measure No. 307-14 (2014) <http://www.oas.org/en/iachr/decisions/pdf/2014/mc307-14-en.pdf>.

<sup>108</sup> *William Alberto Pérez Jerez v. El Salvador*, Resolution 27/2014, Precautionary Measure No. 422-12 (2014); *Julio César Cano Molina v. Cuba*, Resolution 24/2014, Precautionary Measure No. 307-14 (2014).

<sup>109</sup> *Irene v. Argentina*, Resolution 38/2016, Inter-Am. Comm'n H.R., Precautionary Measure No. 376-15 (2016), <https://www.oas.org/es/cidh/decisiones/pdf/2016/mc376-15-es.pdf>.

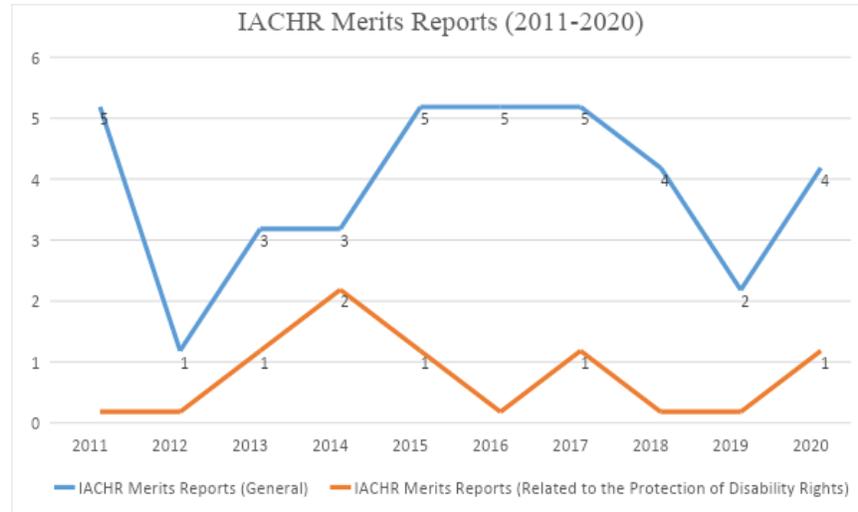
<sup>110</sup> *Zaheer Seepersad v. Trinidad and Tobago*, Resolution 28/2017, Inter-Am. Comm'n H.R., Precautionary Measure No. 440-16 (2017), <https://www.oas.org/en/iachr/decisions/pdf/2017/28-17MC440-16-TT-EN.pdf>.

<sup>111</sup> *Id.*; see also *Irene v. Argentina*, Resolution 38/2016, Precautionary Measure No. 376-15 (2016).

<sup>112</sup> *Judge Rotenberg Educational Center (United States of America)*, Resolution 86/18, Inter-Am. Comm'n H.R., Precautionary Measure No. 1357-18 (2018).

<sup>113</sup> *Id.*

<sup>114</sup> *Patients at the Neuropsychiatric Hospital v. Paraguay*, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.118, doc. 5 rev. 2, Ch. III, ¶ 60 (2003); *Patients at the Neuropsychiatric Hospital v. Paraguay*, Inter-Am. Comm'n H.R., Precautionary Measure No. 277-07, OEA/Ser.L/V/II.134, doc. 5 rev. 1, ch. III (C)(1), ¶ 33 (2008).

**Chart 3 IACHR Merits Reports**<sup>115</sup>

Any overall assessment of merits judgments (see Chart 3) is likely based on incomplete information, because merits judgments are not routinely published.<sup>116</sup> Since 2011, the Commission has published thirty-seven general merits decisions, from one to five per year.<sup>117</sup> Most of the few decisions that concerned the rights of disabled persons centered on the right of persons with mental disabilities against capital punishment. In *Clarence Allen Lackey et al. v. United States*, the Commission upheld this right,<sup>118</sup> and, in *Victor Saldano*

<sup>115</sup> Chart 3 was developed by the authors based on OAS data on IACHR merits reports and the actual IACHR merits reports published by OAS. For OAS data on IACHR merits reports, see *IACHR Statistics*, *supra* note 84. The authors also reviewed all published merits reports from 2011 to 2020, and identified those related to the protection of disability rights, for a full list of IACHR merits reports. Org. of Am. States, *IACHR Merits Reports*, <https://www.oas.org/en/iachr/decisions/merits.asp> (last visited Mar. 7, 2022) [hereinafter *IACHR Merits Reports*].

<sup>116</sup> *IACHR Merits Reports*, *supra* note 115.

<sup>117</sup> See 38 chart3.

<sup>118</sup> *Clarence Allen Lackey et al; Miguel Angel Flores, and James Wilson Chambers v. United States*, Cases 11.575, 12.333 and 12. 341, Inter-Am. Comm'n H.R., Report No. 52/13, OEA/Ser.L/V/II, doc. 224 (2013) at 206 (noting that, “[w]hile the American Declaration does not expressly prohibit the imposition of the death penalty in the case of persons with mental disability, such a practice is in violation of the rights recognized in Articles I and XXVI of the American Declaration”); ¶ 178 (providing that, “[t]he element that all these cases have in common is that the alleged victims were sentenced to death and then executed while they were the beneficiaries of precautionary measures granted by the IACHR. [They] were executed before the Inter-American Commission had an opportunity to issue its finding on the alleged violations of rights protected under the American

*v. United States* the Commission affirmed that this right extends to disability caused by conditions of post-conviction imprisonment.<sup>119</sup> *Abu Ali Abdur Rahman v. United States* and *Edgar Tamayo Arias v. United States* also focused on capital punishment, finding violations of the rights to life, liberty, and personal security; a fair trial; and due process, under the American Declaration (respectively Articles 1, 18 and 26), when court-provided lawyers failed to present readily available evidence of the defendants' mental disabilities.<sup>120</sup> Exceptionally, the Commission also found in *J.S.C.H. and M.G.S. v. Mexico* that the dismissal of army personnel from their employment due to their having contracted HIV violated their rights to equality and non-discrimination under the American Convention on Human Rights.<sup>121</sup>

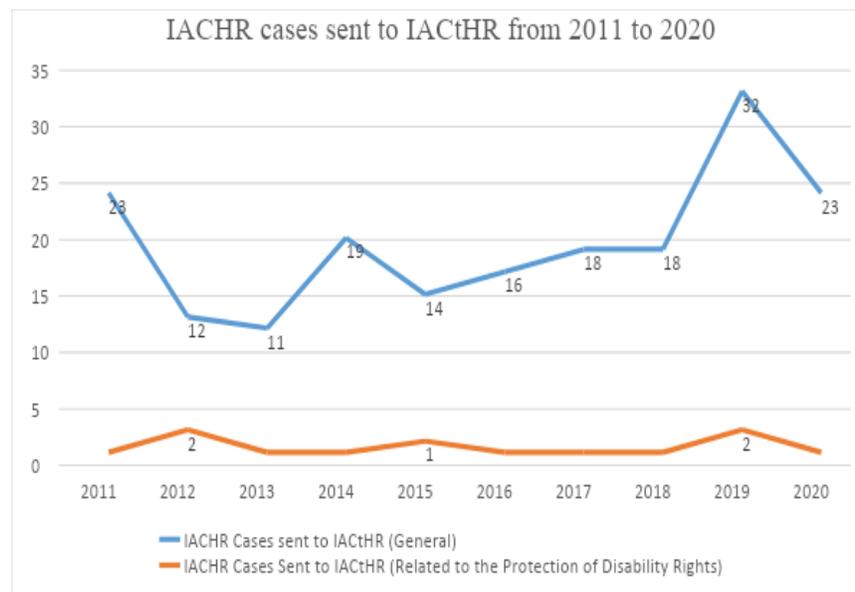
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Declaration”).

<sup>119</sup> Victor Saldano v. United States, Case 12.254, Inter-Am. Comm'n H.R., Report No. 24/17, OEA/Ser.L/V/161, doc.31 (2017) (finding that mental disability precludes the death penalty, even if, as in Mr. Saldano's case, that disability is caused by conditions of incarceration after being convicted of the crime.).

<sup>120</sup> Edgar Tamayo Arias v. United States, Case 12.873, Inter-Am. Comm'n H.R., Report Nno. 44/14, OEA/Ser.L/V/II.151, doc. 9 (2014) (finding also a violation of article 25, protection against arbitrary arrest); Abu-Ali Abdur'Rahman v. United States, Case 12.422, Inter-Am. Comm'n H.R., Report No. 13/14, OEA/Ser.L/V/II.150, doc. 17, ¶¶ 94-95 (2014).

<sup>121</sup> J.S.C.H and M.G.S v. Mexico, Case 12.689, Inter-Am. Comm'n H.R., Report No. 80/15, OEA/Ser.L/V/II.156, doc. 33 (2015).

**Chart 4 IACHR Cases Brought to the IACtHR<sup>122</sup>**

When the Commission issues a merits report but the state fails to implement its recommendations, the Commission usually initiates a case at the Inter-American Human Rights Court. As Chart 4 shows, from 2011 through 2020, the Commission lodged 186 such cases, ranging from eleven in 2013 to thirty-two cases in 2020.<sup>123</sup> Only a few raised issues of disability rights. One line of cases affirmed that access to health care is a universal right that must be extended to persons with disabilities: The decision in *Ximénes López v. Brazil* stated this principle, in the context of the abuse and death of a patient in a psychiatric institution that operated within the public health system in Brazil (the “Uniform Health System”);<sup>124</sup> *Artavia Murillo et al. v. Costa Rica*<sup>125</sup> found an affirmative right to access to reproductive health

<sup>122</sup> Chart 4 is based on OAS data on cases sent to the Court as well as published reports on cases in the Court. For OAS data on cases sent to the Inter-American Court, see *IACHR Statistics*, *supra* note 84. The authors also reviewed all published reports on cases in the Court from 2011 to 2020, and identified those related to the protection of disability rights. For a full list of published reports on cases in the Court, see *Cases in the Court*, ORG. OF AM. STATES, <http://www.oas.org/en/iachr/decisions/cases.asp> (last visited Mar. 9, 2022).

<sup>123</sup> *IACHR Statistics*, *supra* note 84; *Cases in the Court*, ORG. OF AM. STATES, <http://www.oas.org/en/iachr/decisions/cases.asp> (last visited Mar. 9, 2022).

<sup>124</sup> *Ximenes-Lopes v. Brazil*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 149, ¶ 2, 112(3) (Jul. 4, 2006).

<sup>125</sup> *Artavia Murillo et al. v. Costa Rica*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257 (Nov. 28, 2012).

treatment for persons with disabilities, on the basis of equality;<sup>126</sup> and the *Gonzales Lluy et al. v. Ecuador*<sup>127</sup> Court required that a girl with HIV have access to such support as needed to enable her to attend school.<sup>128</sup> In 2012, *Furlan and Family v. Argentina*<sup>129</sup> tied due process to disability rights, extending the fair trial right in Article 8 of the ACHR to require due process rights in obtaining compensation for a disability acquired through an accident at a state military facility.<sup>130</sup>

The Commission notified two cases to the Court in 2019 that raised disability rights, and sought to build on these precedents.<sup>131</sup> In its merits report for *Martina Vera Rojas v. Chile*,<sup>132</sup> the Commission determined that an insurer's decision to cancel coverage for critical home care for a girl with Leigh's syndrome violated her rights under the ACHR, primarily the right to health derived from the rights to humane treatment and progressive realization of social rights.<sup>133</sup> The Court in *Luis Eduardo Guachalá Chimbó v. Ecuador*<sup>134</sup> detailed a psychiatric hospital's violation of the basic human rights of a patient with a mental disability, who disappeared and remained unaccounted for more

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<sup>126</sup> *Id.* at 40-93.

<sup>127</sup> *Gonzales Lluy et al. v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 298 (Sept. 1, 2015).

<sup>128</sup> *Id.* ¶¶ 262-263.

<sup>129</sup> *Furlan and Family v. Argentina*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 246 (Aug. 31, 2012).

<sup>130</sup> *Id.* ¶¶ 267-269, at 4.

<sup>131</sup> The cases were referred to the Court in 2019. The Commission had issued its merits reports in 2018 and 2019, respectively. See Press Release, Org. of Am. States, *Press Release - IACHR Takes Case Involving Ecuador to the Inter-American Court of Human Rights*, No. 283/19 (Nov. 1, 2019) [https://www.oas.org/en/iachr/media\\_center/PReleases/2019/283.asp](https://www.oas.org/en/iachr/media_center/PReleases/2019/283.asp) [hereinafter *IACHR Takes Case Involving Ecuador to the Inter-American Court of Human Rights*] (noting that “[t]he Inter-American Commission on Human Rights (IACHR) filed on July 11, 2019 an application before the Inter-American Court of Human Rights, in a case involving Luis Eduardo Guachalá Chimbó and his family, with regard to Ecuador.”); Press Release, Org. of Am. States, *Press Release - IACHR Brings Chile Case before the IA Court*, No. 037/20 (Feb. 13, 2020), [http://www.oas.org/en/iachr/media\\_center/PReleases/2020/037.asp](http://www.oas.org/en/iachr/media_center/PReleases/2020/037.asp) [hereinafter *IACHR Brings Chile Case before the IA Court*] (noting that “[o]n September 6, 2019, the Inter-American Commission on Human Rights (IACHR) filed an application with the Inter-American Court of Human Rights (IA Court) over case 13.039, *Martina Rebeca Vera Rojas v. Chile*.”).

<sup>132</sup> *Martina Vera Rojas v. Chile*, Case 13.039, Inter-Am. Comm'n H.R., Report No. XX/18, OEA/Ser.L/V/II.169, doc. [not yet assigned] (2019).

<sup>133</sup> *IACHR Brings Chile Case before the IA Court*, *supra* note 131.

<sup>134</sup> *Luis Eduardo Guachalá Chimbó and Next of Kin v. Ecuador*, Case 12.786, Inter-Am. Comm'n H.R., Report No. 111/18, OEA/Ser.L/V/II.169, doc. 128 (2018).

than fifteen years later.<sup>135</sup> In both cases, the Commission linked the health care right developed from Articles 4, 5 and 26 with the process rights grounded in Articles 8 and 25, applied to persons with disabilities.<sup>136</sup> In a third 2019 case, *Opario Lemoth Morris et al. (Miskitu divers) v. Honduras*, the Court raised disability as a consequence of discriminatory and abusive labor practices, but the case was not based in disability law.<sup>137</sup>

From 2011 through 2020, the Commission received over 20,000 human rights petitions.<sup>138</sup> Nevertheless, as indicated by Charts 1–4, only ninety-one cases were resolved through friendly settlements; 186 cases were referred to the Court; 491 precautionary measures were granted; thirty-seven merits judgements were published.<sup>139</sup> Among the 805 cases that received some form of remedies, only twenty-one have been identified as relating to disability rights.<sup>140</sup>

### B. Jurisprudence

Recent Inter-American jurisprudence has advanced the rights of persons with disabilities. The Commission, periodically affirmed by the Court, has enforced these rights in areas such as health care, treatment of institutionalized persons, and access to social services. Particularly since the CRPD entered into force, the Commission has increased its consideration of cases and precautionary measures<sup>141</sup> and has referred a few disability related

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<sup>135</sup> *IACHR Annual Report 2019*, ORG. OF AM. STATES, <http://www.oas.org/en/iachr/docs/annual/2019/TOC.asp>, Chapter II, at 123 [hereinafter *IACHR Annual Report 2019*].

<sup>136</sup> Luis Eduardo Guachala Chimbo v. Ecuador, Case 12.786, Report No. 111/18 (2018).

<sup>137</sup> Org. of Am. States, *IACHR Brings Honduras Case before IA Court* (Oct. 11, 2019), [https://www.oas.org/en/iachr/media\\_center/PReleases/2019/257.asp](https://www.oas.org/en/iachr/media_center/PReleases/2019/257.asp) (“IACHR concluded that Honduras violated the rights to personal integrity of 34 Miskito divers who met with accidents due to the deep dives they were making which led them to suffer decompression sickness.” [...] “[A]lthough the state of Honduras was aware of the divers’ situation and the perversity of their labor relations, it did not take deliberate, concrete measures to ensure they could exercise their right to work in fair, equitable, appropriate conditions, nor could they access healthcare and social security coverage. Furthermore, given the victims’ multiple vulnerability factors, including the fact that they belong to an indigenous people that has been marginalized historically and lives in extreme poverty and that many of them are people with disabilities, the IACHR deemed that the state is also responsible for violating the principle of equality and nondiscrimination.”); see also *IACHR Annual Report 2019*, *supra* note 135, Chapter II, at 120-121.

<sup>138</sup> *IACHR Statistics*, *supra* note 84.

<sup>139</sup> See 30 chart1; 34 chart2; 38 chart3; 42 chart4

<sup>140</sup> See 30 chart1; 34 chart2; 38 chart3; 42 chart4.

<sup>141</sup> Guarnizo-Peralta, *supra* note 24, at 49 (“[w]ith the adoption of the CRPD . . . the Commission took a more decisive role . . . by examining more cases related to persons with disabilities”); (also noting that “[a] similar phenomenon happened at the European Court

cases to the Court.<sup>142</sup> The Commission and the Court have mostly acted to protect the universal human rights of persons with disabilities rather than taking a specifically disability rights approach or “detail[ing] how those rights should be exercised in order to fully meet the persons with disabilities’ needs.”<sup>143</sup> They have gradually moved towards disability rights analysis, but primarily by attaching disability rights to the ACHR and the American Declaration rather than by applying international disability rights *strictu sensu*.<sup>144</sup> A disability perspective entered Inter-American jurisprudence through interpretation of Articles 4 and 5 of the ACHR (rights to life and humane treatment),<sup>145</sup> supplemented at times by reference to the state duty of progressive development of social rights under Article 26.<sup>146</sup> The Commission and the Court have tended to ground their decisions in the ACHR and international law, including the CRPD, rather than on the CIADDIS.<sup>147</sup> Recent cases concerning persons with disabilities have raised violations of fundamental human rights and social rights, such as the rights to life and humane treatment; basic health care (including mental health care services); physical, mental and moral integrity; education; due process rights; and reproductive rights.<sup>148</sup> Alongside these main streams of jurisprudence, the Commission in a cluster of cases involving the United States has declared that the American Declaration precludes the death penalty for persons with mental disabilities.<sup>149</sup>

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of Human Rights, which increased the number of landmark decisions on disability rights following the entry into force of the CRPD”).

<sup>142</sup> See 42 chart4.

<sup>143</sup> Guarnizo-Peralta, *supra* note 24, at 49.

<sup>144</sup> Guarnizo-Peralta, *supra* note 24, at 49, 54.

<sup>145</sup> Guarnizo-Peralta, *supra* note 24 at 55 (noting “[t]his follows a line of jurisprudence established by the Court that allows the protection of the right to health, even though that right is not directly enforceable in the Inter-American system”).

<sup>146</sup> For example, Luis Eduardo Guachalá Chimbo and Next of Kin v. Ecuador (2018), Martina Vera Rojas v. Chile (2019), and a few other cases discussed in the following paragraphs cited ACHR, *supra* note 2, at art. 26 (Article 26 states, “[t]he States Parties undertake to adopt measures [...] to achiev[e] progressively [...]the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the [OAS Charter].”).

<sup>147</sup> Guarnizo-Peralta, *supra* note 24, at 55-56 (noting that the Commission had failed to refer to the CIADDIS or the CRPD in many of the cases involving the protection of disability rights). However, references to the CRPD may be increasing in more recent cases. For example, in Judge Rotenberg Educational Center (United States of America), Resolution 86/18, Inter-Am. Comm’n H.R., Precautionary Measure No. 1357-18 (2018), the Commission identified potential violations of Articles 3, 12, 15, 19 and 25 of the CRPD. The Commission and the Court still refer to the CIADDIS only rarely.

<sup>148</sup> See discussion in Part III. B.

<sup>149</sup> *Id.*

*i. Rights to life and humane treatment*

The Commission's early uses of the ACHR to protect the rights of persons with disabilities related to persons confined in state institutions. In *Victor Rosario Congo v. Ecuador*,<sup>150</sup> the Commission first applied the ACHR specifically to protect persons with mental disabilities.<sup>151</sup> A pre-trial detainee with a mental disability was physically abused by guards, detained in isolation, denied access to proper medical and psychiatric treatment, and died.<sup>152</sup> Finding him to be disabled, the Commission declared that Article 5 "must be interpreted in light of the *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care* . . . adopted by the United Nations General Assembly,"<sup>153</sup> and that "the right to physical integrity is even more serious,"<sup>154</sup> due to the "particularly vulnerable position" resulting from mental disability.<sup>155</sup> On similar facts at a psychiatric facility, compounded by the institution's failure to investigate the victim's death, the Court in *Ximénes López v. Brazil* relied on Articles 4 and 5<sup>156</sup> to recognize state duties to "guarantee the provision of effective health care services to all persons with mental illness,"<sup>157</sup> which also encompasses mental health care services.<sup>158</sup> The Court declared that the rights to life and humane treatment require "access to basic health care for every individual, as well as the promotion of mental health."<sup>159</sup> This affirmed the Commission's prior use of Articles Four and Five to uphold disability rights and, with the added weight of the CIADDIS having entered force in 2001, endorsed further efforts by the Commission to import disability rights into Inter-American Human

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<sup>150</sup> *Victor Rosario Congo v. Ecuador*, Case No. 11.427, Inter-Am. Comm'n H.R., Report No. 63/99, OEA/Ser.L/V/II.106, doc. 6 rev. (1999).

<sup>151</sup> Kanter, *supra* note 11, at 260–61.

<sup>152</sup> *Victor Rosario Congo v. Ecuador*, Case No. 11.427, Report No. 63/99, ¶¶ 7, 9–10, and 19–20 (1999); *see also* Guarnizo-Peralta, *supra* note 24, at 47 (The Commission found violations of Articles 4(1) and 5 ACHR); *see also* Kanter, *supra* note 11, at 260 ("The Commission found that Mr. Congo's mental state degenerated as a result of being held in isolation, and that holding him in seclusion under these circumstances constituted inhuman and degrading treatment." "The Commission also found that Ecuador's failure to provide appropriate care for Mr. Congo violated its duty to protect his life.").

<sup>153</sup> *Victor Rosario Congo v. Ecuador* Case No. 11.427, Report No. 63/99, ¶ 54 (1999).

<sup>154</sup> *Id.* ¶ 67.

<sup>155</sup> *Victor Rosario Congo v. Ecuador*, Case No. 11.427, Inter-Am. Comm'n H.R., Report No. 63/99, OEA/Ser.L/V/II.106, doc. 6 (1999).

<sup>156</sup> *Ximenes-Lopes v. Brazil*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 149, ¶ 2, 112(3) (Jul. 4, 2006).

<sup>157</sup> *Id.* ¶ 128.

<sup>158</sup> *Id.* at ¶¶ 125, 128, 132; *see also* Guarnizo-Peralta, *supra* note 24, at 55 (*Ximénes López v. Brazil* was the first case decided by the Court on persons with disabilities).

<sup>159</sup> Guarnizo-Peralta, *supra* note 24, at 55 (citing *Ximenes-Lopes v. Brazil* (ser. C) No. 149 (2006)).

### Rights Jurisprudence.

The same pattern of using international legal sources to support the ACHR has informed the Commission's efforts to proactively intervene to stop abuses in mental health institutions. In its first precautionary measures, the Commission in *Patients at the Neuropsychiatric Hospital v. Paraguay*<sup>160</sup> requested Paraguay "protect [the patients'] lives, health, [and] physical, mental, and moral integrity, with special attention to the situation of women and children," improve hygienic and sanitary conditions, and "restrict the use of isolation cells [following] international protocols and safeguards."<sup>161</sup> Since the entry into force of the CRPD, the Commission has applied it to add detail to precautionary measures protecting prisoners who suffered from some degree of mental impairment.<sup>162</sup> In *William Alberto Pérez Jerez v. El Salvador* (2014)<sup>163</sup> and *Julio César Cano Molina v. Cuba*,<sup>164</sup> the Commission found that without access to immediate and proper medical treatment, the prisoners' lives would be "in grave danger"<sup>165</sup> and ordered the states to provide health care, including specialized care.<sup>166</sup> In *William Alberto Pérez Jerez*, the

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<sup>160</sup> *Patients at the Neuropsychiatric Hospital v. Paraguay*, Inter-Am. Comm'n H.R., Precautionary Measure No. 277-07, OEA/Ser.L/V/II.134, doc. 5 rev. 1, ch. III (C)(1), ¶ 33 (2008).

<sup>161</sup> Alison A. Hillman, *Protecting Mental Disability Rights: A Success Story in the Inter-American Human Rights System*, 12 No. 3 HUM. RTS. BRIEF 25, at 27; see also Guarnizo-Peralta, *supra* note 24, at 52. After petitioning on behalf of two teenaged boys, the Mental Disability Rights International (MDRI) and the Center for Justice and International Law (CEJIL) notified the Commission of systemic mistreatment of all 460 persons in the facility. See Hillman, at 25.

<sup>162</sup> See generally, e.g. *William Alberto Pérez Jerez v. El Salvador*, Resolution 27/2014, Inter-Am. Comm'n H.R., Precautionary Measure No. 42212 (2014), <http://www.oas.org/en/iachr/decisions/pdf/2014/pm442-12-en.pdf>; *Julio César Cano Molina v. Cuba*, Resolution 24/2014, Inter-Am. Comm'n H.R., Precautionary Measure No. 307-14(2014), <http://www.oas.org/en/iachr/decisions/pdf/2014/mc307-14-en.pdf>; Judge Rotenberg Educational Center (United States of America), Resolution 86/18, Inter-Am. Comm'n H.R., Precautionary Measure No. 1357-18 (2018); see also Guarnizo-Peralta, *supra* note 24, at 52-53.

<sup>163</sup> *William Alberto Pérez Jerez v. El Salvador*, Resolution 27/2014, Precautionary Measure No. 422-12 (2014).

<sup>164</sup> *Julio César Cano Molina v. Cuba*, Resolution 24/2014, Precautionary Measure No. 307-14 (2014).

<sup>165</sup> *William Alberto Pérez Jerez v. El Salvador*, Resolution 27/2014, Precautionary Measure No. 422-12, ¶ 3.A.(2014). (The Commission held that "[t]he current conditions under which Mr. William Alberto Pérez Jerez is imprisoned are putting his health and life in grave danger."); see also *Julio César Cano Molina v. Cuba* Resolution 24/2014, Precautionary Measure No. 307-14, ¶ 2 (2014).

<sup>166</sup> *William Alberto Pérez Jerez v. El Salvador* Resolution 27/2014, Precautionary Measure No. 422-12, ¶ 2. (2014) (where the Commission "consider[ed] that the information presented shows prima facie that Mr. William Alberto Pérez Jerez would be currently in a serious and urgent situation, as his rights to life, personal integrity and health are allegedly

Commission relied on the CRPD for its definition of “reasonable accommodation.”<sup>167</sup> Most recently, the Commission applied precautionary measures against the use of electrical shocks and restraints as behavioural correction means by a facility for persons with emotional disorders, intellectual disabilities, and autistic-like behaviors,<sup>168</sup> in *Judge Rotenberg Educational Center (United States of America)*.<sup>169</sup> The Commission identified potential violations of Articles 3, 12, 15, 19 and 25 of the CRPD,<sup>170</sup> and requested that the state “protect the rights to life and personal integrity”<sup>171</sup> of all persons at the facility, particularly by immediately ceasing the use of any harmful measures, including electroconvulsive therapies; adopt measures in consultation with the parties concerned; and investigate the underlying events “to prevent their repetition.”<sup>172</sup>

Capital punishment is the area where the Commission has engaged most closely with disability rights within the framework of civil rights.<sup>173</sup> The

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threatened and at serious risk.” The IACHR applied Article 25 of the Rules of Procedure of the Commission and requested El Salvador to “[a]dopt the necessary measures to guarantee the life and personal integrity of Mr. William Alberto Pérez Jerez. In particular, to provide the specialized medical care needed, taking into account the deterioration that his pathologies would be producing and the special supports that currently requires”); *see also* Julio César Cano Molina v. Cuba, Resolution 24/2014, Precautionary Measure No. 307-14, ¶ 2 (2014) (where the Commission held that Julio César Cano Molina was “in a serious and urgent situation” and “his life, personal integrity and health face[d] an imminent risk.” The Commission applied Article 25 of the Rules of the IACHR and required Cuba to “[a]dopt the necessary measures to ensure Mr. Julio César Cano Molina’s right to life and personal integrity.” In particular, the Commission required Cuba to provide specialized medical care. The Commission “declared that there is a State’s duty to provide appropriate health care, but it did not indicate how such services should be provided or how they should be adapted in order to meet the victims’ needs”); *see also* Guarnizo-Peralta, *supra* note 24, at 53.

<sup>167</sup> William Alberto Pérez Jerez v. El Salvador, Resolution 27/2014, Inter-Am. Comm’n H.R., Precautionary Measure No. 42212, ¶ 18 (2014), <http://www.oas.org/en/iachr/decisions/pdf/2014/pm442-12-en.pdf>; *see also* Guarnizo-Peralta, *supra* note 24, at 52.

<sup>168</sup> LYDIA BROWN, *Compliance is Unreasonable: The Human Rights Implications of Compliance-Based Behavioral Interventions under the Convention Against Torture and the Convention on the Rights of Persons with Disabilities*, in TORTURE IN HEALTHCARE SETTINGS: REFLECTIONS ON THE SPECIAL RAPPORTEUR ON TORTURE’S 2013 THEMATIC REPORT 186 (Juan E. Mendez & Hadar Harris ed., 2014).

<sup>169</sup> Judge Rotenberg Educational Center (United States of America), Resolution 86/18, Inter-Am. Comm’n H.R., Precautionary Measure No. 1357-18 (2018).

<sup>170</sup> *Id.* ¶ 16.

<sup>171</sup> *Id.* ¶ 25.

<sup>172</sup> *Id.*

<sup>173</sup> *E.g.*, Ramón Martínez Villareal v. United States, Case 11.753, Inter-Am. Comm’n H.R., Report No. 52/02, OEA/Ser.L/V/II.117, doc. 5 rev. 1 at 821 (2002); Virgilio Maldonado Rodríguez v. United States, Case 12.871, Inter-Am. Comm’n H.R., Report No. 33/21, OEA/Ser.L/V/II doc. 343 (2020).

complaint in *Ramón Martínez Villareal v. United States*<sup>174</sup> asserted inadequate representation and failure to take mental disability into account, as well as the failure to provide Martínez Villareal with access to consular assistance (as a Mexican national).<sup>175</sup> The Commission decided in favor of Martínez Villareal on the latter ground, but did not discuss his capacity to stand trial as it would in later cases.<sup>176</sup> When considering a similar case with facts concerning On similar facts—mental incapacity and inadequate counsel, —the Commission issued precautionary measures in *Virgilio Maldonado Rodríguez v. United States*,<sup>177</sup> asking the state not to apply the death penalty until the petition had been fully assessed.<sup>178</sup> The Commission finally pronounced a general prohibition on capital punishment of persons with mental disabilities in merits reports of two United States cases.<sup>179</sup> In *Clarence Allen Lackey et al. v. The United States*<sup>180</sup> and *Edgar Tamayo Arias v. The United States*,<sup>181</sup> the Commission read Articles 1 (life, liberty and personal security) and 26 (due process of law) of the American Declaration as reflecting “a principle of international law” that no person with a mental disability may be executed.<sup>182</sup> The Commission’s application of a disability rights analysis affirmed “a growing understanding in international law [that] persons with mental disability should not be subjected to the death penalty,”<sup>183</sup> but arguably went beyond the international norm by phrasing its rule as an absolute

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<sup>174</sup> *Ramón Martínez Villareal v. United States*, Case 11.753, Report No. 52/02 (2002).

<sup>175</sup> *Id.* ¶¶ 1, 2.

<sup>176</sup> *Id.* ¶ 5; see also Guarnizo-Peralta, *supra* note 24, at 48.

<sup>177</sup> *Virgilio Maldonado Rodríguez v. United States* (2011), Case 12.871, Report No. 33/21.

<sup>178</sup> *IACHR Annual Report 2011*, ORG. OF AM. STATES, ch. 3, ¶ 91, <https://www.oas.org/en/iachr/docs/annual/2011/Chap3C1.doc>.

<sup>179</sup> Guarnizo-Peralta, *supra* note 24, at 50.

<sup>180</sup> *Clarence Allen Lackey et al., Miguel Angel Flores, and James Wilson Chambers v. United States*, Cases 11.575, 12.333 and 12.341, Report No. 52/13; *Clarence Allen Lackey et al., Miguel Angel Flores, and James Wilson Chambers v. United States* (2013), *supra* note 19, at ¶¶ 1, 2 (Lackey concerned sixteen prisoners who were sentenced to death and subsequently executed despite their mental disability and whilst precautionary measures were ordered by the Inter-American Commission on Human Rights.); see *id.* ¶ 218 (noting “persons with mental disability cannot be subjected to capital punishment, as these individuals are unable to comprehend the reason for or consequence of their execution”).

<sup>181</sup> Guarnizo-Peralta, *supra* note 24, at 50 (Tamayo Arias concerned “a Mexican citizen executed in the United States who had a mental disability caused by an injury to his brain’s frontal lobe, and whose right to consular notification was apparently denied”); *Edgar Tamayo Arias v. United States*, Case 12.873, Inter-Am. Comm’n H.R., Report No. 44/14, ¶ 159 (2014) (noting “it is a principle of international law that persons with a mental and intellectual disabilities, either at the time of the commission of the crime or during trial, cannot be sentenced to the death penalty”).

<sup>182</sup> Guarnizo-Peralta, *supra* note 24, at 50. (“As the United States is not part of the ACHR but is of the American Declaration on Human Rights, the Commission has approached the cases against this country through the enforcement of the latter.”).

<sup>183</sup> *Id.* at 51.

prohibition.<sup>184</sup> By contrast, the international consensus seems to forbid the death penalty for persons with a severe mental illness, reflecting “the functional approach” that sees persons with mental disabilities as still having “different levels of capacity.”<sup>185</sup> Although *Abu Ali Abdur Rahman v. United States* also concerned capital punishment of persons with mental disabilities, the Commission did not elaborate on the principle of international law forbidding it.<sup>186</sup> The merits report concluded instead that “the State is responsible for violations of Mr. Abdur’ Rahman’s right to a fair trial and to due process under Articles XVIII (right to a fair trial) and XXVI (right to due process of law) of the American Declaration.”<sup>187</sup>

ii. *Social rights*

Occasionally, the Commission has explicitly recognized the need to accommodate disabilities.<sup>188</sup> In a few cases, the Commission has gone beyond generally applicable human rights to engage with disability rights.<sup>189</sup> The first two simply referenced CIADDIS as an interpretive framework. In *Maria Soledad Cisternas Reyes v. Chile*,<sup>190</sup> a friendly settlement addressed an airline’s discriminatory treatment of a blind attorney, in permitting her to make a travel reservation only on the condition she would bring another person or a guide dog to assist her during the flight at her own expense.<sup>191</sup>

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<sup>184</sup> *Id.* (“Although the facts exposed in the cases are an indication that the Commission contemplates certain gravity in the level of disability, the lack of qualification in the term ‘mental disability’ may imply that, for the Commission, all persons with mental disability, regardless of the level of seriousness, should enjoy this protection.”).

<sup>185</sup> *Id.* at 50-51 (citing *Francis v. Jamaica* HR Comm no 606/1994 (1995) UN Doc CCPR/C/54/D/606/1994; *Williams v. Jamaica* HR Comm no 609/1995 (1997) UN Doc CCPR/C/61/D/609/1995; and *RS v. Trinidad & Tobago* HR Comm no 684/1996 (2002) UN Doc 684/1996; American Bar Association, *Mental Illness Resolution* (2006) [http://www.americanbar.org/groups/committees/death\\_penalty\\_representation/resources/dp-policy/mental-illness-2006.html](http://www.americanbar.org/groups/committees/death_penalty_representation/resources/dp-policy/mental-illness-2006.html); and Economic and Social Council Resolution (1989) 1989/64, para 1(d)). (The Committee on the Rights of Persons with Disabilities concluded similarly later in 2014.).

<sup>186</sup> *Abu-Ali Abdur’Rahman v. United States*, Case 12.422, Inter-Am. Comm’n H.R., Report No. 13/14, OEA/Ser.L/V/II.150, doc. 17, ¶¶ 4-5.

<sup>187</sup> *Id.* ¶¶ 4-5.

<sup>188</sup> Guarnizo-Peralta, *supra* note 24, at 53.

<sup>189</sup> *Id.* at 48, 50, 56 (Guarnizo-Peralta identified three cases where the Commission went beyond generally applicable human rights to engage with disability rights: *Maria Soledad Cisternas Reyes v. Chile* (2011), *Luis Fernando Guevara Diaz v. Costa Rica* (2012), and *Artavia Murillo et al. v. Costa Rica* (2012). The authors identified another similar case *Zaheer Seepersad v. Trinidad and Tobago* (2017)).

<sup>190</sup> See *Maria Soledad Cisternas Reyes v. Chile*, Case 12.232, Inter-Am. Comm’n H.R., Report No. 86/11, (2011) <https://www.oas.org/en/iachr/decisions/2011/CHSA12232EN.DOC>.

<sup>191</sup> *Id.* ¶ 2; see also Guarnizo-Peralta, *supra* note 24, at 48.

Cisternas Reyes alleged violations of ACHR Articles 5(1) (respect for her mental and moral integrity), 11(2) (no arbitrary interference in her private life), 22(2) (right to leave her country freely), 24 and 25 (equal protection and judicial protection), in conjunction with Article 1(1) and Article 2.<sup>192</sup> The parties eventually agreed to commit to promoting “the progressive social integration of persons with disabilities,”<sup>193</sup> taking particular consideration of national anti-discrimination legislation and CIADDIS.<sup>194</sup> The Commission ruled in *Luis Fernando Guevara Diaz v. Costa Rica*<sup>195</sup> that the state’s failure to hire a job candidate with a mental disability despite his having placed first on the entry exam likely constituted discrimination, implicating fair trial rights and equal protection, which the Commission should analyze on the merits with reference to the CIADDIS and the Protocol of San Salvador.<sup>196</sup>

Most of the Inter-American cases on social rights of persons of disabilities have focused on the right to health care. The rule of *Ximénes López*<sup>197</sup> that the right to health care includes consideration of disabilities has continued to develop, through cases like *Artavia Murillo et al. v. Costa Rica*<sup>198</sup> and *Zaheer Seepersad v. Trinidad and Tobago*.<sup>199</sup> In *Artavia Murillo et al.*,<sup>200</sup> the Court determined that the universal right to health care for persons with

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<sup>192</sup> Maria Soledad Cisternas Reyes v. Chile, Case 12.232, Report No.86/11 (2011) ¶ 1.

<sup>193</sup> *Id.* ¶ 11(2).

<sup>194</sup> *Id.*; see also Guarnizo-Peralta, *supra* note 24, at 48 (This friendly settlement, like most, “did not provide details about the particular changes that the Chilean legislation should undertake in order to be compatible with disability rights, thus leaving unresolved the question of how a disability perspective could be implemented in order to guarantee the personal mobility of persons with disabilities.”).

<sup>195</sup> See Luis Fernando Guevara Díaz v. Costa Rica, Petition 1064-05, Inter-Am. Comm’n H.R., Report No. 13/12 (2012) [http://www.worldcourts.com/iamchr/eng/decisions/2012.03.20\\_Guevara\\_Diaz\\_v\\_Costa\\_Rica.pdf](http://www.worldcourts.com/iamchr/eng/decisions/2012.03.20_Guevara_Diaz_v_Costa_Rica.pdf).

<sup>196</sup> *Id.* ¶¶ 2, 9, 11; see also Guarnizo-Peralta, *supra* note 24, at 50.

<sup>197</sup> Ximenes-Lopes v. Brazil, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 149, ¶ 2, 112(3) (Jul. 4, 2006).

<sup>198</sup> See generally *Artavia Murillo et al. v. Costa Rica*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 257, ¶¶ 40-93. (Nov. 28, 2012) (finding there is an affirmative right to reproductive health treatment access for people with disabilities).

<sup>199</sup> See generally *Zaheer Seepersad v. Trinidad and Tobago*, Resolution 28/2017, Inter-Am. Comm’n H.R., Precautionary Measure No. 440-16 (2017), <https://www.oas.org/en/iachr/decisions/pdf/2017/28-17MC440-16-TT-EN.pdf>.

(stating that the Commission requests that the State of Trinidad and Tobago to take into account characteristics of medical conditions, and “condition as a person with disability”).

<sup>200</sup> See generally *Artavia Murillo et al. v. Costa Rica*, (ser. C) No. 257 (2012) (reasoning that the right to health care includes the right to reproductive health care).

disabilities stated in *Ximénes López* extended to protect reproductive rights,<sup>201</sup> which it tied via “the decision . . . to have biological children”<sup>202</sup> to the ACHR rights to “personal integrity, personal liberty, private and family life.”<sup>203</sup> The Court required Costa Rica to repeal its legal ban on in vitro fertilization (IVF) due to its disproportionate effect on couples who cannot conceive naturally.<sup>204</sup> By defining disability partly by reference “to the elements of the World Health Organisation (WHO) in the International Classification of Functioning, Disability and Health (ICF) as well as the definition of the CRPD and CIADDIS,”<sup>205</sup> the Court continued to signal its acceptance of a social definition of disability.<sup>206</sup> In late 2017, the Commission further contributed to the development of jurisprudence in this particular aspect in *Zaheer Seepersad v. Trinidad and Tobago*,<sup>207</sup> where a man suffering from a severe and degenerative neurological disorder had no access to care, and feared confinement under poor conditions in a mental institution.<sup>208</sup> In requesting the state to ensure appropriate medical care, the Commission declared that “persons with disabilities have the right to receive the treatment they require to address their disability,”<sup>209</sup> as well as to be consulted in their care and, under the CRPD, not to be deprived of liberty.<sup>210</sup>

The Commission and the Court have also extended their interpretation of the right to health to include equal access to education and necessary care

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<sup>201</sup> Guarnizo-Peralta, *supra* note 24, at 56; *see also* ACHR, *supra* note 2, at arts. 5 (personal integrity), 7 (personal liberty), 11 (private and family life) and 17(2) (the right to raise a family).

<sup>202</sup> *Artavia Murillo et al. v. Costa Rica*, (ser. C) No. 257, ¶ 137, at 41(2012); *see also* Guarnizo-Peralta, *supra* note 24, at 56.

<sup>203</sup> *See generally* *Artavia Murillo et al. v. Costa Rica*, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 257, at 41-46 (Nov. 28, 2012) (describing generally the right to privacy, personal integrity, and personal liberty considered by the Court); *see also* ACHR, *supra* note 2, at arts. 5 (personal integrity), 7 (personal liberty), 11 (private and family life) and 17(2) (the right to raise a family); *see also* Guarnizo-Peralta, *supra* note 24, at 56.

<sup>204</sup> *Artavia Murillo et al. v. Costa Rica*, (ser. C) No. 257, ¶ 281, at 82-83 (2012).

<sup>205</sup> Guarnizo-Peralta, *supra* note 24, at 56-57 (citing WHO, *Towards a Common Language for Functioning Disability and Health: the International Classification of Functioning, Disability and Health* (2002), WHO/EIP/GPE/CAS/01.3, at 10).

<sup>206</sup> *Id.*

<sup>207</sup> *Zaheer Seepersad v. Trinidad and Tobago*, Resolution 28/2017, Inter-Am. Comm'n H.R., Precautionary Measure No. 440-16 (2017), <https://www.oas.org/en/iachr/decisions/pdf/2017/28-17MC440-16-TT-EN.pdf>.

<sup>208</sup> *Id.* ¶¶ 16-17.

<sup>209</sup> *Id.* at ¶ 21.

<sup>210</sup> *Id.* (“[T]his Convention recognizes that persons with disabilities have the right to exercise their legal capacity on an equal basis with others and the right to live independently and to be included in the community.”).

for children with disabilities.<sup>211</sup> In *González Lluy et al. v. Ecuador*,<sup>212</sup> a girl with HIV was excluded from schooling; the Court found a violation of the right to education laid out in the Protocol of San Salvador, its first application of that Protocol against a state.<sup>213</sup> The Court affirmed that HIV infection is a non-discrimination characteristic protected by the ACHR,<sup>214</sup> so measures based on HIV status require stricter judicial scrutiny.<sup>215</sup> Guarnizo-Peralta argues the Court would likely apply this scrutiny broadly “to any person with a health condition, in which persons with a physical or mental condition could be included.”<sup>216</sup> *Irene v. Argentina* concerned a girl who, due to a neurological condition from her premature birth, needed “medical treatment and therapy to alleviate her condition and allow her to go to school medical treatments and therapeutic support to alleviate her current health condition and allow her to go to school.”<sup>217</sup> The Commission requested that Argentina, taking her condition into account, enable her to access health care and educational support commensurate with international standards.<sup>218</sup> As in prior cases, the Commission focused mainly on Irene’s rights to life and personal integrity,<sup>219</sup> but it also explicitly linked inclusive education to the equal social integration of persons with disabilities.<sup>220</sup> Both *Irene* and *González Lluy* looked to international authority to illustrate the rights recognized in the Inter-American system. *González Lluy*<sup>221</sup> cited General Comments of UN rights bodies<sup>222</sup> for

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<sup>211</sup> *E.g.* *Gonzales Lluy et al. v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 298 (Sept. 1, 2015).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* ¶¶ 234-41, at 34, 67, 82; *see also* Guarnizo-Peralta, *supra* note 24, at 59-60.

<sup>214</sup> *González Lluy et al.*, Inter-Am. Ct. H.R. (ser. C) No. 298, ¶ 255, at 70 (noting that “the Court considers that HIV is a condition based on which discrimination is prohibited under the term ‘any other social condition’ established in Article 1(1) of the American Convention.”). Similarly, at the international level, the UN Commission on Human Rights also emphasizes that “discrimination on the basis of AIDS or HIV status, actual or presumed, is prohibited by existing international human rights standards.” U.N. Comm’n on Hum. Rts., *The Protection of Human Rights in the Context of Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS)*, Apr. 19, 1996, U.N. Doc. E/CN.4/RES/1996/43, at Art. 1 (1996).

<sup>215</sup> *González Lluy*, Inter-Am. Ct. H.R. (ser. C) No. 298 ¶¶ 254-56 at 70-71.

<sup>216</sup> Guarnizo-Peralta, *supra* note 24, at 60.

<sup>217</sup> *Irene v. Argentina*, Resolution 38/2016, Inter-Am. Comm’n H.R., Precautionary Measure No. 376-15, ¶ 1 (2016), <https://www.oas.org/es/cidh/decisiones/pdf/2016/mc376-15-es.pdf>.

<sup>218</sup> *Id.* ¶ 28; *see also* Guarnizo-Peralta, *supra* note 24, at 5.

<sup>219</sup> *Irene v. Argentina*, Resolution 38/2016, Precautionary Measure No. 376-15, ¶ 1 (2016).

<sup>220</sup> *Id.* ¶ 24, 25; *see also* Guarnizo-Peralta, *supra* note 24, at 53.

<sup>221</sup> *Gonzales Lluy et al. v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 298 (Sept. 1, 2015).

<sup>222</sup> *E.g.*, *González Lluy* cited General Comment No. 14 of the United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, General Comments No. 3 and No. 9 of the United Nations Committee on the Rights of the Child

the state's duty to adapt its educational environment to her condition as a person with HIV.<sup>223</sup> *Irene*<sup>224</sup> utilized the United Nations Educational, Scientific and Cultural Organization (UNESCO) definition of inclusion to define "inclusive education" as "a process of addressing and responding to the diversity of needs of all learners through increasing participation in learning, cultures and communities, and reducing exclusion within and from education."<sup>225</sup>

Most recently, the Inter-American system has demonstrated its strong commitment to the protection of children with disability by further extending the interpretation of the right to health to encompass necessary care. *Martina Vera Rojas v. Chile*<sup>226</sup> affirmed that the ACHR rights to life, humane treatment and health (Articles 4, 5 and 26) protected a girl with Leigh syndrome, an inherited disorder of the nervous system, against cancellation of health insurance coverage for "home medical daycare."<sup>227</sup> The Commission emphasized the importance of protecting children with disabilities by referring to Article 19 of the ACHR,<sup>228</sup> explicitly upholding the dignity and best interests of children with disabilities.<sup>229</sup> It declared that the national authorities had failed to decide in the best interest of the child or based on her disability, and it also found failures of procedure and due process, affecting rights to a hearing and to judicial protection (Articles 8 and 25(1) of the ACHR).<sup>230</sup> By highlighting the home care the child needed to survive,<sup>231</sup> this case set a precedent for the Commission to expand the interpretation of the right to health to include necessary care.

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and other general comments of UN rights bodies. See González Lluy et al. v. Ecuador, Inter-Am. Ct. H.R. (ser. C) No. 298 (2015), ¶¶ 193, 198, 199.

<sup>223</sup> *Id.* at 74, ¶ 262.

<sup>224</sup> *Irene v. Argentina*, Resolution 38/2016, Inter-Am. Comm'n H.R., Precautionary Measure No. 376-15 (2016), <https://www.oas.org/es/cidh/decisiones/pdf/2016/mc376-15-es.pdf>.

<sup>225</sup> Guarnizo-Peralta, *supra* note 24, at 53 (citing UNESCO, *Guidelines for Inclusion - Ensuring Access to Education for All* (2005), ED.2004/WS/39, at 13).

<sup>226</sup> *Martina Vera Rojas v. Chile*, *supra* note 132.

<sup>227</sup> *IACHR Annual Report 2019*, *supra* note 135, Chapter II, at 129, ¶¶ 142-43.

<sup>228</sup> See *id.* (noting that the Commission cited Article 19 of the ACHR (rights of the child) to protect children with disabilities).

<sup>229</sup> *IACHR Annual Report 2019*, *supra* note 135, Chapter II, at 129.

<sup>230</sup> *Id.* (The Commission also found an associated violation of "the right to humane treatment of Martina's parents [...] because of the pain caused by the risks to which their daughter's fragile life was exposed.").

<sup>231</sup> *IACHR Brings Chile Case before the IA Court*, *supra* note 131 (The Commission recommended that Chile should "[e]nsure that the home-based hospitalization scheme for Martina Vera Rojas remains in force for as long as she requires." It also stated that "[t]his reparation measure also stipulates that any future decision on this hospitalization scheme must comply with Chile's international obligations in this area and that it should be guided by the victim's best interests as a child with a disability").

iii. *Due process rights*

Two further cases since 2010 asserted the procedural rights of persons with disabilities. Like the earlier cases regarding mistreatment in institutions, they do not engage particularly with disability rights, but instead, assert equal access to universal human rights. *Furlán and Family v. Argentina*<sup>232</sup> concerned judicial protection and a timely remedy for a teenaged boy who developed disabilities after an accidental head injury at a military facility.<sup>233</sup> Relying on the fair trial rules of Article 8 of the ACHR, plus Article 19 for the rights of the child, the Court determined that the twelve-year delay in settling the case had further harmed the plaintiff, and that the state had violated his rights to a hearing and to access juvenile legal protections.<sup>234</sup> Vulnerability due to disability compounded the violations as CRPD Articles 7 and 13 create particularly strong obligations on the state to uphold the rights of children and to ensure access to justice.<sup>235</sup> Guarnizo-Peralta highlights *Furlán* as a landmark because it was the Court's first use of the CRPD to affirm these procedural rights, and because the Court explicitly adopted a social model of disability drawn from the CRPD to buttress the CIADDIS.<sup>236</sup>

The Commission joined the procedural developments of *Furlán and Family*<sup>237</sup> to the health related jurisprudence flowing from *Ximénes López*<sup>238</sup> in *Luis Eduardo Guachalá Chimbó and Next of Kin v. Ecuador*,<sup>239</sup> explicitly

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<sup>232</sup> *Furlán and Family v. Argentina*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 246 (Aug. 31, 2012).

<sup>233</sup> *Id.* at 22-23, ¶¶ 72-74; *see also* Guarnizo-Peralta, *supra* note 24, at 58.

<sup>234</sup> *Furlán and Family v. Argentina*, Inter-Am. Ct. H.R. (ser. C) No. 246, ¶ 204, at 65 (2012).

<sup>235</sup> *Id.* ¶ 229 (citing Article 7 of the CRPD, “[c]hildren with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.” [...] “[i]t is essential that children with disabilities be heard in all procedures affecting them and that their views be respected in accordance with their evolving capacities;” citing Article 13 of the CRPD, “[States party shall] facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.”).

<sup>236</sup> Guarnizo-Peralta, *supra* note 24, at 58.

<sup>237</sup> *See generally*, *Furlán and Family v. Argentina*, Inter-Am. Ct. H.R. (ser. C) No. 246 (2012).

<sup>238</sup> *See generally*, *Ximénes-Lopes v. Brazil*, (ser. C) No. 149(2006).

<sup>239</sup> *Luis Eduardo Guachalá Chimbo and Next of Kin v. Ecuador*, Case 12.786, Inter-Am. Comm'n H.R., Report No. 111/18, OEA/Ser.L/V/II.169, doc. 128, ¶ 114 (2018).

(citing *Furlán* ¶ 134 as requiring “affirmative measures to be determined according to the particular protection needs of the subject of rights, whether on account of his personal situation or his specific circumstances, such as disability”); *see also* ¶ 142 (citing *Ximénes López*, *supra* note 158, at ¶¶ 106-08 for the heightened State duty to safeguard the right to

asserting the social model of disability grounded in the CRPD.<sup>240</sup> The case concerned a man with mental disabilities who was involuntarily committed to a psychiatric institution and disappeared.<sup>241</sup> The Commission followed *Furlán*<sup>242</sup> in ruling that the state's failure over sixteen years to explain or diligently investigate what might have happened to Guachalá Chimbó violated Articles 8(1) (rights to a hearing) and 25 (judicial protection) of the ACHR, as well as his juridical personality (Article 3), personal liberty (Article 7) and access to information (Article 13(1)), among other procedurally oriented rights.<sup>243</sup> The Commission also determined that his disappearance and the failure to investigate or explain raised a presumption of the breach of his rights to life and personal integrity under the ACHR.<sup>244</sup> Although more focused on the need for care than on due process rights, *Martina Vera Rojas v. Chile* also followed *Furlán and Family v. Argentina* for its application of the Article 8 and Article 25 fair trial and judicial protection guarantees.<sup>245</sup> After the states failed to adopt its recommendations, the Commission referred *Luis Eduardo Guachalá Chimbó and Next of Kin v. Ecuador* and *Martina Vera Rojas v. Chile* to the Court, where they remain pending.<sup>246</sup> These cases show the influence of *Furlán*<sup>247</sup> and *Ximénes López*,<sup>248</sup> which the Commission treated as setting basic principles as determined by the Court, and they also show the

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health in light of “the particular risks faced by persons with mental disabilities who have been institutionalized”).

<sup>240</sup> *Id.* ¶ 118 (noting that “the CRPD ... is of crucial relevance as it adopts a social approach for addressing disability”).

<sup>241</sup> *Id.* ¶ 172 (“Luis Guachalá is a person with a mental disability, on taking into account: (i) the medical reports that identify a mental deficit; and (ii) the socioeconomic barriers he faced. The Commission also notes that Mr. Guachalá, who at the time was 23 years old, was institutionalized at the Julio Endara Psychiatric Hospital on January 10, 2004. ... [I]t is not disputed that Mr. Guachalá was hospitalized without his consent...”).

<sup>242</sup> See generally, *Furlán and Family v. Argentina*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 246 (Aug. 31, 2012).

<sup>243</sup> *Luis Eduardo Guachalá Chimbo and Next of Kin v. Ecuador*, Case 12.786, Report No. 111/18, ¶¶ 179, 183, 208-209, 215 (2018).

<sup>244</sup> *Id.* ¶ 191.

<sup>245</sup> *Furlán and Family v. Argentina*, Inter-Am. Ct. H.R. (ser. C) No. 246 ¶ 204 at 65.

<sup>246</sup> *Vera Rojas y Otros vs. Chile*, “Visito” ¶ 1 (Inter-Am. Ct. H.R. Dec. 4, 2020), [https://www.corteidh.or.cr/docs/asuntos/vera\\_rojas\\_4\\_12\\_2020.pdf](https://www.corteidh.or.cr/docs/asuntos/vera_rojas_4_12_2020.pdf) (Orders on Evidence and Hearings, I/A Court H.R., Case of Vera Rojas et al. v. Chile. Call to a public hearing. Order of the President Inter-American Court of Human Rights of December 4, 2020); *IACHR Takes Case Involving Ecuador to the Inter-American Court of Human Rights*, *supra* note 131; see also *Inter-Am. American Court of Human Rights Will Hold Its 139<sup>th</sup> Regular Session*, Inter-Am. Ct. H.R. (Jan. 19, 2021), [https://corteidh.or.cr/docs/comunicados/cp\\_04\\_2021\\_eng.pdf](https://corteidh.or.cr/docs/comunicados/cp_04_2021_eng.pdf). (As of January 2021, the Court was still collecting evidence and conducting hearings).

<sup>247</sup> *Furlán and Family v. Argentina*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 246 (Aug. 31, 2012).

<sup>248</sup> *Ximenes-Lopes v. Brazil*, Inter-Am. Ct. H.R., (ser. C) No. 149 (2006).

Commission's willingness to draw broadly on international legal sources to inform its interpretation of the CRPD. This is in contrast to the death penalty cases where the Commission has arguably stated a specifically Inter-American standard of protection.<sup>249</sup> In this way, the Commission and the Court together have used the ACHR as a vehicle to import disability rights into the Inter-American legal order.

#### IV. KEY CHALLENGES

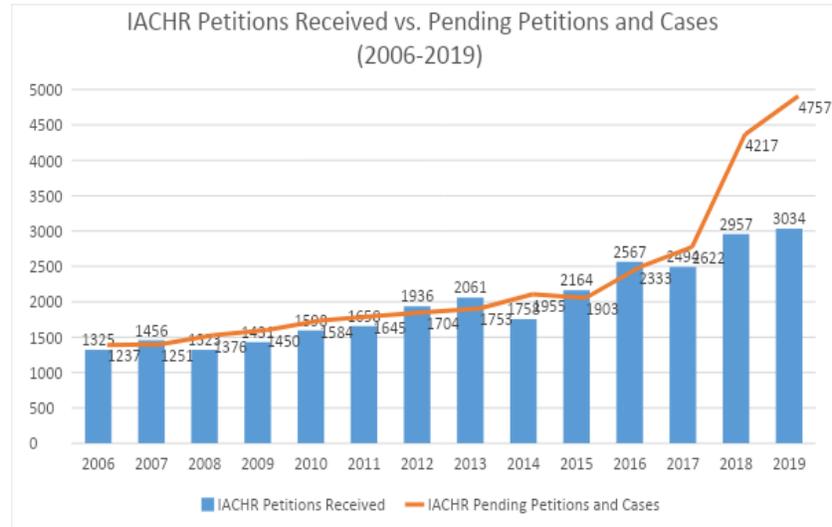
The Inter-American system allows individuals to seek justice if their human rights have been violated and if they have exhausted all domestic remedies.<sup>250</sup> The system is an important tool to “ensure justice and reparations, fight against impunity, and achieve structural reforms in law, policy, and practice” within its jurisdiction.<sup>251</sup> However, the Commission faces three major systemic challenges in disability rights protection: procedural backlog, state resistance, and economic constraints at the state level.

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<sup>249</sup> Guarnizo-Peralta, *supra* note 24, at 54 (Guarnizo-Peralta argued that the Commission's “standards have sometimes followed the CRPD standards, like in the inclusive education cases, but in others it has been clearly contradictory to them, like in the death penalty cases. Thus, the Commission is showing that it is progressively moving forward in the inclusion of international standards on disability rights, but at the same time developing its own voice in the interpretation of disability rights standards.”).

<sup>250</sup> ACHR, *supra* note 2, at Art. 46(1).

<sup>251</sup> *IACHR Annual Report 2017*, ORG. OF AM. STATES, ch.II, ¶ 1, at 49, <http://www.oas.org/en/iachr/docs/annual/2017/TOC.asp> [hereinafter *IACHR Annual Report 2017*].

**Chart 5 IACHR Procedural Backlog<sup>252</sup>**

Procedural backlog undermines the Commission’s ability to provide a timely response to “individuals whose human rights have been violated.”<sup>253</sup> As illustrated in Chart 5, the number of petitions received by the Commission has grown steadily over the last fifteen years, from 1,325 petitions per year in 2006 to 3,034 petitions per year in 2019.<sup>254</sup> However, during this period, the Commission has not seen substantial increases in budget and human resources.<sup>255</sup> The steady rise in the number of petitions at a time of budget and human resources constraints inevitably results in backlog.<sup>256</sup> Pending petitions during this period increased drastically, from 1,237 in 2006 to 4,757 in 2019.<sup>257</sup>

In 2017, the Commission undertook a series of administrative reforms to reduce the backlog.<sup>258</sup> Petitions submitted to the Commission up to 2016

<sup>252</sup> Chart 5 was developed by the authors based on OAS data on petitions received as well as data on pending petitions and cases. See *IACHR Statistics*, *supra* note 84.

<sup>253</sup> *IACHR Annual Report 2017*, *supra* note 251.

<sup>254</sup> *IACHR Statistics*, *supra* note 84.

<sup>255</sup> *IACHR Annual Report 2017*, *supra* note 251 (noting that “[t]he root cause of the backlog is the steady increase in the number of petitions the IACHR receives in a context of budget and human resources constraints that affect its ability to provide the timely response required, which could undermine the effectiveness of the system and discourage its use.”).

<sup>256</sup> *Id.*

<sup>257</sup> *IACHR Statistics*, *supra* note 84.

<sup>258</sup> *IACHR Annual Report 2017*, *supra* note 251.

were to be evaluated in the initial review phase, excluding the petitions that were “strictly necessary to request further information.”<sup>259</sup> The Commission also streamlined its work process and improved workflow efficiency.<sup>260</sup> A Processing Unit was created to centralize the processing of petitions and cases at different stages.<sup>261</sup> These administrative reforms have improved the situation to some extent.<sup>262</sup> For example, nearly 6,500 petitions were reviewed in the initial review stage, and decisions were made regarding whether these petitions were to be further proceeded.<sup>263</sup> 120 reports on admissibility were adopted in 2017,<sup>264</sup> a 62.5% increase on the previous year.<sup>265</sup> The admissibility report numbers also continued to grow in 2018 and 2019.<sup>266</sup> Despite these efforts, Chart 5 indicates there is still a significant backlog and processing times remain long.<sup>267</sup> As acknowledged by the Commission, these administrative reforms are not effective enough to “reverse years of procedural backlog,”<sup>268</sup> although “they are key steps that reflect the IACHR’s commitment to the petition and case system.”<sup>269</sup>

Another challenge the Commission faces is state resistance. This challenge is not specifically related to the protection of disability rights. Instead, it is a generic issue. Only rarely do states explicitly defy the Commission, as for example Trinidad and Tobago did in asserting that by publishing final reports, the Commission had yielded jurisdiction over the matter back to the state—a claim the Court found to be without merit.<sup>270</sup>

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<sup>259</sup> *IACHR Annual Report 2017*, *supra* note 251.

<sup>260</sup> *IACHR Annual Report 2017*, *supra* note 251.

<sup>261</sup> *IACHR Annual Report 2017*, *supra* note 251.

<sup>262</sup> *IACHR Annual Report 2017*, *supra* note 251, at 50 (noting that “the initiatives and outcomes achieved thus far demonstrate the real and concrete possibility of implementing more and better measures to provide a prompt response to individuals who turn to the inter-American system.”).

<sup>263</sup> *IACHR Annual Report 2017*, *supra* note 251, at 49.

<sup>264</sup> Chart 4 indicates that it includes six inadmissibility reports and 114 admissibility reports.

<sup>265</sup> *IACHR Annual Report 2017*, *supra* note 251, ¶ 4 (noting that in 2016, only forty-five reports on admissibility were adopted). Chart 4 indicates that this includes two inadmissibility reports and forty-three admissibility reports.

<sup>266</sup> *See* 42 chart4.

<sup>267</sup> *IACHR Annual Report 2017*, *supra* note 251, ¶ 3 (e.g., despite these efforts, in the initial review phase, the IACHR were still not able to complete the initial evaluations of all the petitions submitted prior to 2016. Rather, it could only focus on the petitions filed in the previous two years due to the administrative budget constraint.).

<sup>268</sup> *IACHR Annual Report 2017*, *supra* note 251, at 50.

<sup>269</sup> *IACHR Annual Report 2017*, *supra* note 251.

<sup>270</sup> Clara Burbano Herrera & Yves Haeck, *Letting States off the Hook? The Paradox of the Legal Consequences Following State Non-Compliance with Provisional Measures in the Inter-American and European Human Rights Systems*, 28/3 NETH. Q. HUM. RTS. 332, 343-344 (2010).

However, states have more frequently simply disregarded the communications of the Inter-American institutions.<sup>271</sup> The Commission has frequently requested information from its member states about alleged human rights violations but has received only very few responses. For example, in 2019, the Commission requested information from the United States about a disabled woman who gave birth without receiving medical assistance at a detention facility in Florida, notwithstanding that she had notified the detention center of her disability and her pregnancy upon arrival and she had sought medical assistance when she began to have contractions seven hours before the delivery.<sup>272</sup> The Commission did not receive a response.<sup>273</sup>

Pushback against the Inter-American human rights system has intensified in recent years. As Contesse argues, domestic courts refuse to adhere to the Court's binding decisions.<sup>274</sup> He provides several examples. In 2011, the Argentinean Supreme Court declined to comply with the Court's decision on the ground that the Court lacked "the authority to order the revocation of a domestic judgment."<sup>275</sup> In 2014, the Constitutional Court of the Dominican Republic also "ruled against its State's acceptance of the Inter-American Court's compulsory jurisdiction."<sup>276</sup> In 2017, the United States government declined to "participate in hearings that the [IACHR] held on various human rights issues concerning the country."<sup>277</sup> Many OAS member states are reluctant to take concrete action to "implement and enforce some of the enacted legal principles and duties" that aim to improve disability rights.<sup>278</sup>

The third major challenge the Inter-American system faces is economic constraints at the state level. Countries of the Global South, which includes most in the Inter-American system, often have limited budget and human resources; they are generally "disadvantaged in terms of realizing disabled people's human rights in practice."<sup>279</sup> For example, in response to the

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<sup>271</sup> CLARA BURBANO HERRERA, PROVISIONAL MEASURES IN THE CASE LAW OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 219-20 (2010).

<sup>272</sup> IACHR Annual Report 2019, *supra* note 135, ¶ 285.

<sup>273</sup> IACHR Annual Report 2019, *supra* note 135, ¶ 285; similarly, in *Abu-Ali Abdur'Rahman v. United States* (2014), the United States ignored the Commission's request for observations. See *Abu-Ali Abdur'Rahman v. United States*, Case 12.422, Report No. 13/14, ¶¶ 4-5 (2014).

<sup>274</sup> Jorge Contesse, *Resisting the Inter-American Human Rights System*, 44 YALE J. INT'L L. 179, 180 (2019).

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at 181.

<sup>277</sup> *Id.*

<sup>278</sup> *Courtis*, *supra* note 13, at 121.

<sup>279</sup> Vera Chouinard, *Living on the Global Peripheries of Law: Disability Human Rights Law in Principle and in Practice in the Global South*, 7 J. L. 8, 8-9 (2018), <https://doi.org/10.3390/laws7010008>.

Commission's first requests in *Patients at the Neuropsychiatric Hospital v. Paraguay* (2003),<sup>280</sup> the government had taken actions to improve the conditions of the two named victims, Julio and Jorge, but still "had done little to address the inhuman and degrading treatment endured by the other 458 detainees."<sup>281</sup> Paraguay lacked the necessary resources to even guarantee "the most basic hygienic conditions within the hospital," let alone improve patient treatment and other rehabilitative services.<sup>282</sup> Similarly, in later cases concerning Paraguay and Guatemala, the Commission addressed serious issues of violence and abuse in mental hospitals, but only ordered the governments broadly to improve hygienic and sanitary conditions and "to provide proper medical care."<sup>283</sup>

## V. CONCLUSION: A LONG WAY AHEAD

Over the last decade, the OAS has made considerable efforts to protect the rights of people with disabilities. This trend has accelerated since the adoption of the CRPD as the remit to consider international law as well as Inter-American instruments in their rulings provides the Court and the Commission an ample range of interpretive tools to extend the protections of the ACHR to specifically recognize disability rights. Partly as a result, Inter-American law has moved away from the outdated charity model toward a social model, and more recently adopting aspects of a rights-based model of disability.<sup>284</sup> Despite these laudable steps, the disability-oriented case law of the Commission and the Court, even relating to its initial focus on persons with mental disabilities, still has significant gaps. Persons with physical disabilities face considerable barriers and discrimination, but this is still largely left to national laws, soft law, and advocacy to redress. Systematic challenges at the Inter-American level and economic challenges at the state

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<sup>280</sup> *Patients at the Neuropsychiatric Hospital v. Paraguay*, Inter-Am. Comm'n H.R., Precautionary Measure No. 277-07, OEA/Ser.L/V/II.134, doc. 5 rev. 1, ch. III (C)(1), ¶ 33 (2008).

<sup>281</sup> Hillman, *supra* note 161, at 28.

<sup>282</sup> Hillman, *supra* note 161, at 28.

<sup>283</sup> Guarnizo-Peralta, *supra* note 24, at 52 (quoting *Patients at the Federico Mora Hospital v. Guatemala*, Inter-Am. Comm'n H.R., Report No. 370/12 (2012)) (noting that "[t]he Commission considered all these situations to endanger the life and integrity of the patients in which can be considered an indirect protection of the right to health in connection with the right to [humane] treatment."); *Id.*

<sup>284</sup> *E.g.*, in December 2020, the IACHR even "[called] on states to adopt measures to guarantee people with disabilities full legal capacity, incorporating a human rights approach." See Org. of Am. States, *Press Release: The IACHR Calls on States to Adopt Measures to Guarantee People with Disabilities Full Legal Capacity from a Human Rights Approach* (Dec. 3, 2020), [http://www.oas.org/en/iachr/media\\_center/PReleases/2020/289.asp](http://www.oas.org/en/iachr/media_center/PReleases/2020/289.asp).

level present the main barriers to the further improvement of regional disability rights.