

Children's Rights in the Inter-American System of Human Rights: Framework and Institutions

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ABSTRACT

The need to protect children has been a long-standing concern in the American Hemisphere, where child poverty, high rates of violence, and economic and social inequalities, particularly those affecting indigenous children, justify increased efforts to protect children and adolescents. These have led to the enshrining of children's rights in the major human rights instruments adopted within the Inter-American system, and to the development of Inter-American private international law on children. Alongside various normative efforts, a comprehensive institutional framework, encompassing institutions specifically dedicated to protecting children's welfare (e.g. the Inter-American Children's Rights Institute of 1927 and the Rapporteur on the Rights of the Child of 1998), has been established. Other bodies with a general mandate to ensure the states' compliance with human rights include the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. This paper presents a brief overview of the normative and institutional frameworks for children's rights protection in the Inter-American human rights system.

KEYWORDS

children's rights, child welfare, Inter-American system of human rights, Inter-American Children's Rights Institute, Inter-American Commission on Human Rights, Inter-American Court of Human Rights

1. Introduction

In the Western Hemisphere, the protection of children and adolescents has long been a great concern. International cooperation in this field dates to the early 20th century and is connected to Luis Morquío's initiative of creating the Inter-American Office for the Protection of Children, proposed at the Second American Congress

Katarzyna ZOMBORY (2024) 'Children's Rights in the Inter-American System of Human Rights: Framework and Institutions'. In: Anikó RAISZ (ed.) *Children's Rights in Regional Human Rights Systems*. pp. 191–209. Miskolc–Budapest, Central European Academic Publishing.
https://doi.org/10.71009/2024.ar.crirhrs_9

on Children's Issues in 1919.¹ Following that initiative, in 1927, ten countries of the Western Hemisphere (i.e. Argentina, Bolivia, Brazil, Cuba, Chile, Ecuador, the United States of America, Peru, Uruguay, and Venezuela) signed the Founding Charter of what is nowadays known as the Inter-American Children's Institute (IIN).² Today, the IIN forms an inherent part of the Inter-American human rights system, serving as a specialized organisation of the Organization of American States (OAS).³

The long-standing concern about children's welfare in the Americas is not surprising. Approximately 272 million children⁴ live in the 35 member states of the OAS, all of which struggle with child poverty regardless of their level of development and economic growth. In Latin America and the Caribbean alone, over 80 million children and adolescents live in poverty, 32 million of whom live in extreme poverty.⁵ The most affected are indigenous and Afro-descendant children, with two out of every three living in poverty and one out of every three living in extreme poverty. In Canada, nearly 14% of children live in poverty (albeit the poverty index reaches 40% for indigenous children), while approximately 22% of children (16 million children) in the United States of America live in families with income below the federal poverty threshold, with these numbers being especially prominent in the Afro-descendant population.⁶

The consequences of child poverty are manifold and long lasting. In the Americas, poverty is a primary reason for parents to decide to give up their guardianship or abandon their children.⁷ Poverty does not only prevent children from accessing the basic standards of welfare (e.g. quality education, decent housing, physical safety,

1 Professor Luis Morquio was a Uruguayan paediatrician who later became the first Honorary Director of the International American Institute for the Protection of Children. See the History of the Inter-American Children's Institute [Online]. Available at: <http://www.iin.oas.org/en/historia.html> (Accessed: 12 July 2023).

2 Founding Charter of the International American Institute for the Protection of Children (Acta Fundacional del Instituto Internacional Americano de Protección a la Infancia), adopted in Montevideo on 9 June 1927 [Online]. Available at: <http://www.iin.oas.org/pdf-iin/Acta-fundacional-del-IIN.pdf> (Accessed: 12 July 2023).

3 In the Americas, human rights protection is overseen and coordinated by the Organization of American States, which is a regional international organisation comprising 35 member states. It came into being in 1948 with the signing of the Charter of the OAS, and aims to achieve, among its member states, 'an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence', as stipulated in Art. 1 of the Charter of the Organization of American States, adopted at Bogotá on 30 April 1948 by the Ninth International Conference of American States, UN Treaty Series, No. 1609 ('Charter of the OAS'). The 35 OAS member states are, as of 1 April 2023, Antigua and Barbuda, Argentina, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, The Bahamas, Trinidad and Tobago, United States of America, Uruguay, and Venezuela.

4 Domingo, 2020, p. 178.

5 Inter-American Commission on Human Rights (IACmHR), 2017, para. 340.

6 Ibid, para. 341.

7 Ibid, para. 345.

and adequate family care) but also puts them at risk of entering the cycle of inter-generational poverty, such as by hindering their physical and mental development and ability to develop skills to access future opportunities.⁸ Furthermore, while child poverty is the most frequent challenge that children and youth in the Western Hemisphere face every day, it is sadly far from the worst danger. The region is known for having the highest rates of violence and crime in the world, where the age group most exposed to violence is the 15–29 years group.⁹ According to the Inter-American Commission of Human Rights (IACmHR), in the Americas, 14% of all children and adolescents have suffered some form of sexual violence,¹⁰ there is the second highest adolescent pregnancy rate in the world, and it is the only region worldwide with rising trends in the number of births to girls below the age of 15 years.¹¹

This chapter presents a brief overview of the institutional and normative framework for the protection of children in the Inter-American human rights system. This exploration is important because the political and social reality of the region, including the long-lasting effects of historical inequalities, have made the protection of the rights of boys, girls, and adolescents (*derechos de niños, niñas y adolescentes*) an urging and particularly challenging issue.

2. Normative framework for children's rights in Americas

2.1. Human rights instruments

The principal human rights documents adopted under the auspices of the OAS are the 1948 American Declaration of the Rights and Duties of Man (ADRDM),¹² and the 1969 American Convention on Human Rights (ACHR),¹³ complemented by two additional Protocols.¹⁴ They provide a general framework for the protection of individual rights and freedoms that applies equally to adults and children without discrimination.¹⁵

8 Ibid, para. 343.

9 IACmHR, 2015, paras. 41–42. In Latin America and the Caribbean, the advances made, through successful public policies protecting children, in the rate of surviving early childhood are reversed in adolescence owing to homicide rates in that age group. Ibid, para. 9.

10 IACmHR, 2022a.

11 IACmHR, 2022b.

12 American Declaration of the Rights and Duties of Man, adopted at Bogotá in 1948 by the Ninth International Conference of American States [Online]. Available at: <https://www.oas.org/en/iachr/mandate/Basics/american-declaration-rights-duties-of-man.pdf> (Accessed: 12 July 2023).

13 American Convention on Human Rights “Pact of San José, Costa Rica”, adopted at San José on 22 November 1969, UN Treaty Series, vol. 1144, No. 17955.

14 Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights “Protocol of San Salvador”, adopted at San Salvador on 17 November 1988, No. A-52; Protocol to the American Convention on Human Rights to Abolish the Death Penalty, adopted at Asunción on 8 June 1990, OAS Treaty Series, No. 73.

15 Art. II of the ADRDM and Art. 1 para. 1 of the American Convention on Human Rights (ACHR).

Furthermore, in the Inter-American human rights system, children enjoy, in addition to the aforementioned guarantees enjoyed by every person, complementary protection through specific provisions designed to safeguard their rights.

The ADRDM establishes in its Art. VII the right to special protection for mothers and children, according to which ‘all women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid’. In addition, Art. VI guarantees the right to the protection of the family, Art. XII provides for the right to education, Art. XXX determines the duties of society towards children, and specifies the children’s duties towards their parents, something that has no parallel in the universal or the European human rights system. Art XXX describes that, ‘It is the duty of every person to aid, support, educate and protect his minor children, and it is the duty of children to honour their parents always and to aid, support and protect them when they need it’. The drafters of the ADRDM have thus considered a caring approach towards children, perceiving them as human beings who deserve assistance and care because of their status as minors and not rights holders.¹⁶

Regarding the ACHR, its adoption catalysed numerous changes in the Inter-American human rights system regarding child protection, coinciding with the general paradigm shift in international children’s rights law marked by the adoption of the United Nations Convention on the Rights of the Child.¹⁷ The ACHR drafters recognised children as persons with legal rights and treated them as subjects of rights, not merely as objects of protection.¹⁸ The rights of the child are established in Art. 19 of the ACHR, according to which ‘every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state’. Although the drafters did not explicitly define the term “child”, the Inter-American Court of Human Rights (IACtHR) has accepted that any person under 18 years should be considered a child.¹⁹ The ACHR contains several other provisions referring to children in specific contexts, such as the right to special protection of minors under criminal proceedings (Art. 5, para. 5 of the ACHR) and the equal rights of children born out of wedlock and those born in wedlock (Art. 17, para. 5 of the ACHR). The adoption of the ACHR in 1969 created new avenues for children’s rights protection in the Americas. By incorporating provisions securing the rights of

¹⁶ IACmHR, 2008, para. 20.

¹⁷ Convention on the Rights of the Child, New York, 20 November 1989, UN Treaty Series, vol. 1577, No. 27531. The United Nations Convention on the Rights of the Child recognises the child as a subject of rights, which is manifested in that the child holds rights which have an influence on her or his life (participatory rights under Art. 12 of the CRC), and not only rights derived from her or his vulnerability or dependency on adults, see: UN Committee on the Rights of the Child, General comment No. 12 (2009) on The right of the child to be heard, 20 July 2009, CRC/C/GC/12.

¹⁸ IACmHR, 2008, para. 63.

¹⁹ The definition of the child in the Inter-American Human Rights System is based on the provisions of Art. 1 of the Convention on the Rights of the Child, see: IACtHR, ‘Street Children’ (Villagran-Morales et al.) vs. Guatemala, Judgment of 19 November 1999 (Merits), Series C, No. 63, para. 188; IACtHR, Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/2002 of 28 August 2002, para. 42.

the child into an international instrument endowed with a compliance monitoring mechanism, children's rights have gained a treaty-binding and enforceable character. As Feria-Tinta argues, the IACtHR has material jurisdiction and power to deal with individual complaints about children's rights violations in a way that no other international judicial body is empowered to (i.e. by issuing binding decisions and ordering state reparation measures, which the states are bound to implement).²⁰

Art. 19 of the ACHR has been subject to extensive interpretation in the IACtHR's case law. It is accepted as a complementary right established by the ACHR, implying the reinforced protection of children and adolescents in addition to the protection and rights enjoyed by all persons.²¹ The 'measures of protection', within the meaning of Art. 19, may refer to several different aspects of children's protection, such as non-discrimination, special assistance for children deprived of their family environment, the guarantee of survival and development of children, the right to an adequate standard of living, or the social rehabilitation of all children who are abandoned or exploited.²² The underlying principle of children's rights protection stemming from Art. 19 is the best interest of the child, which in turn is based 'on the very dignity of the human being, on the characteristics of children themselves, and on the need to foster their development, making full use of their potential'.²³ To determine the duties of states under Art. 19, the IACtHR has referred to both the rules of interpretation stemming from international law²⁴ and Art. 29 of the ACHR. These rules allowed the IACtHR to establish that the scope of children's rights under Art. 19 should be determined in line with the *corpus juris*, which is the international framework for the protection of the child that encompasses the 1989 United Nations Convention on the Rights of the Child,²⁵ the decisions of the Committee on the Rights of the Child, and Protocol II to the Geneva Conventions.²⁶ Accordingly, the children's rights guaranteed in Art. 19 of the ACHR enjoy the highest level of protection, as manifested in the fact that they cannot be suspended even in times of public emergency. Furthermore, the provisions of Art. 27 of the ACHR allowing for the limitation of human rights in times of war, public danger, or other emergencies explicitly prohibit the suspension of children's rights secured in Art. 19, as well as of the judicial guarantees essential for the protection of such rights. Consequently, even during states of emergency, judges should always process legal actions brought for the protection of children's rights,

20 Feria-Tinta, 2014, p. 234.

21 Aguilar Cavallo, 2008, p. 240.

22 IACtHR, 'Street Children' (Villagran-Morales et al.) vs. Guatemala, para. 196.

23 Advisory Opinion OC-17/02, paras. 56–61; See Aguilar Cavallo, 2008, pp. 238–244.

24 In particular, from the Vienna Convention on the Law of Treaties, adopted in Vienna on 23 May 1969, UN Treaty Series, vol. 1155, No. 18232.

25 Convention on the Rights of the Child, adopted in New York on 20 November 1989, UN Treaty Series, vol. 1577, No. 27531.

26 For example, 'Street Children' (Villagran-Morales et al.) vs. Guatemala, paras. 192–195; IACtHR, 'Mapiripán Massacre' vs. Colombia, Judgment of 15 September 2005 (Merits, Reparations, and Costs), Series C, No. 134, para. 153. See IACmHR, 2008, para. 53.

and exercise judicial control based on the reasonableness and proportionality of the restricted act.²⁷

Special provisions for children's rights are also enshrined in the Additional Protocol to the ACHR on Economic, Social, and Cultural Rights (also known as the Protocol of San Salvador). Art. 16 of the Protocol of San Salvador states that:

Every child, whatever his parentage, has the right to the protection that his status as a minor requires from his family, society and the State. Every child has the right to grow under the protection and responsibility of his/her parents, except in exceptional, judicially recognised circumstances, a young child ought not to be separated from his/her mother. Every child has the right to free and compulsory education, at least in elementary school, and to continue training at higher levels of the educational system.

Unlike the right to complementary protection established in Art. 19 of the ACHR, which is enforceable before the IACtHR, the rights set forth in Art. 16 of the Protocol of San Salvador are not justiciable within the system of individual petitions. The right to education, listed among the rights guaranteed under Art. 16, can be enforced, albeit based on the normative content of Art. 13 of the Protocol of San Salvador, and not Art. 16.²⁸

2.2. *Inter-American private international law framework*

Over the last few decades, the protection of children has been the focus of Inter-American international private law, and been codified under the auspices of the Inter-American Specialised Conferences on Private International Law (Conferencia Especializada Interamericana sobre Derecho Internacional Privado, also known as CIDIP).²⁹ The development of Inter-American international private law on children began in the 1980s, and has been landmarked by the adoption of four major conflict-of-law treaties, which are the 1984 Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors,³⁰ the 1989 Inter-American Convention on International Return of

27 IACmHR, 2008, para. 51.

28 In accordance with Art. 19 para. 6 of the Protocol of San Salvador.

29 The process of codification of private international law in the Inter-American context has been one of the ongoing legal activities of the American states since the closing decades of the 1800s. It has taken different institutional forms and is currently being carried out within the framework of the Specialized Conferences on Private International Law, WHICH have resulted in 26 international instruments. see more on <https://www.oas.org/dil/PrivateIntLaw-HistDevPriLaw-Eng.htm>. According to Art. 122 of the Charter of the OAS, the Specialized Conferences are intergovernmental meetings to deal with special technical matters or to develop specific aspects of inter-American cooperation.

30 Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors, adopted on 24 May 1984 at La Paz under the auspices of the 3rd Inter-American Specialised Conferences on Private International Law, OAS Treaty Series, No. 62.

Children,³¹ the 1989 Inter-American Convention on Support Obligations,³² and the 1994 Inter-American Convention on International Traffic in Minors.³³ The 1984 Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors applies to the adoption of children and other procedures that confer a legally established filiation where the domicile of the adopter is in one state party and the habitual residence of the adoptee is in another.³⁴ This 1984 Inter-American Convention establishes the applicable law to govern the capacity to be an adopter, the relations between the adopter and adoptee, and succession rights.³⁵ It guarantees the secrecy and irrevocability of adoption.³⁶

The 1989 Inter-American Convention on International Return of Children seeks to secure the return of children habitually residing in a state party who have been wrongfully removed or retained in another state party, and secure the enforcement of visitation and custody rights of the parties entitled to them.³⁷ This 1989 Inter-American Convention is modelled on, and shares the same principles and objectives as, the 1980 Hague Convention on the Civil Aspects of International Child Abduction.³⁸ The 1989 Inter-American Convention creates a cooperative mechanism between the state parties with the view of obtaining the prompt return to the country of habitual residence of abducted or wrongfully retained children, where the cooperation takes place through the Central Authority designated by each state party. The main difference between the 1989 Inter-American Convention and the 1980 Hague Convention relates to the state authorities' jurisdiction to receive and process the application for the return of a child. Under the 1989 Inter-American Convention, the authorities of the state party in which the child habitually resided immediately before removal or retention have jurisdiction to consider a petition for the child's return, and only in case of urgency may the application be submitted to the Central Authority of the

31 Inter-American Convention on International Return of Children, adopted on 15 July 1989 at Montevideo under the auspices of the 4th Inter-American Specialised Conferences on Private International Law, OAS Treaty Series, No. 70.

32 Inter-American Convention on Support Obligations, adopted on 15 July 1989 at Montevideo under the auspices of the 4th Inter-American Specialised Conferences on Private International Law, OAS Treaty Series, No. 71.

33 Inter-American Convention on International Traffic in Minors, adopted on 18 March 1994 at Mexico City under the auspices of the 5th Inter-American Specialised Conferences on Private International Law, OAS Treaty Series, No. 79.

34 Art. 1 of the 1984 Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors. As of 1 April 2023, nine states members of the OAS have ratified the 1984 Inter-American Convention.

35 Arts. 8–11 of the 1984 Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors.

36 Arts. 7 and 12 of the 1984 Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors.

37 Art. 1 of the 1989 Inter-American Convention on International Return of Children.

38 Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, adopted at the Hague on 25 October 1980, UN Treaty Series, Vol. 1343, No. 22514. See Blanco-Rodríguez and Santacruz-López, 2009, pp. 262–263.

state to which the child was wrongfully removed or retained.³⁹ In contrast, the 1980 Hague Convention establishes that a person claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or that of any other contracting state.⁴⁰ The 1989 Inter-American Convention applies only to member states that ratified the OAS.⁴¹ Among the OAS member states parties to both the 1989 Inter-American Convention and the 1980 Hague Convention, the 1989 Inter-American Convention prevails unless a bilateral agreement prioritises the application of the 1980 Hague Convention.⁴²

The 1989 Inter-American Convention on Support Obligations establishes a cooperative mechanism between state parties to provide broad protection for child support, encourage the enforcement of support between spouses, and facilitate the extension of the Convention's benefits to all forms of family support.⁴³ The Convention applies to situations in which the support creditor is domiciled or habitually resident in one state party and the debtor is domiciled, habitually resident, has property, or income in another state party (Art. 1). The 1989 Inter-American Convention treats three conflict-of-laws topics, as follows: (i) grants jurisdiction on specified grounds to the courts of states parties to the Convention; (2) provides choice-of-law rules for the resolution of those cases; (3) structures the recognition and enforcement of qualifying decisions.⁴⁴ Among member states of the OAS parties to both the 1989 Inter-American Convention and the 1973 Hague Convention on the recognition and enforcement of decisions relating to maintenance obligations,⁴⁵ the 1989 Inter-American Convention applies and prevails, unless a bilateral agreement gives priority to the application of the 1973 Hague Convention.⁴⁶

The 1994 Inter-American Convention on International Traffic in Minors was adopted to protect the fundamental rights of children and their best interests by preventing and punishing international traffic in minors and regulating its civil and penal aspects.⁴⁷ The international traffic in minors refers to the abduction, removal, or retention or attempted abduction, removal, or retention of a minor for unlawful purposes or by unlawful means.⁴⁸ The term "unlawful purpose" includes prostitution,

39 Art. 6 of the 1989 Inter-American Convention on International Return of Children. Nonetheless, this Inter-American Convention does not specify the term 'in case of urgency' nor determines situations considered urgent.

40 Art. 8 of the 1980 Hague Convention on the Civil Aspects of International Child Abduction.

41 As of 1 April 2023, 14 OAS states members have ratified the 1989 Inter-American Convention on International Return of Children.

42 Art. 34 of the 1989 Inter-American Convention on International Return of Children.

43 Bruch, 1992, p. 820.

44 Ibid, p. 819.

45 Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance, adopted at the Hague on 23 November 2007, UN Treaty Series, vol. 2955, Registration No. 51361.

46 Art. 29 of the 1989 Inter-American Convention on Support Obligations. As of 1 April 2023, 14 OAS states members have ratified the 1989 Inter-American Convention on Support Obligations.

47 Art. 1 of the 1994 Inter-American Convention on International Traffic in Minors.

48 Art. 2 b) of the 1994 Inter-American Convention on International Traffic in Minors.

sexual exploitation, servitude, or any other purpose unlawful in either the state of the minor's habitual residence or the state party where the child is located. Meanwhile, the term "unlawful means" includes kidnaping, fraudulent or coerced consent, the giving or receipt of unlawful payments or benefits to achieve the consent of the parents, persons, or institutions having the care of the child, or any other means unlawful in either the state of the minor's habitual residence or the state party where the child is located.⁴⁹ The state parties to the 1994 Inter-American Convention undertook to create a system of mutual legal assistance dedicated to the prevention and punishment of international traffic in minors, and adopt related administrative and legal provisions to that effect. The international cooperation takes place through Central Authorities designated by each state party. Importantly, the 1994 Inter-American Convention refers to crimes involving international traffic in minors (Arts. 7–11) and parallelly regulates the civil aspects of the international traffic of children related to the proceedings for locating and returning a child (Arts. 12–17). The 1994 Inter-American Convention also contains provisions related to the illegal adoption of children, as it falls within the definition of trafficking in minors.⁵⁰ According to Art. 18, adoptions and other similar legal proceedings shall be subject to annulment if they had their origin or purpose in international traffic in minors, under the condition that in such an annulment the child's best interests are considered at all times. Similarly, Art. 19 of the 1994 Inter-American Convention states that the care or custody of a child may be revoked whenever it has its origin or purpose in international traffic in minors, providing that in such an annulment, the child's best interests are duly considered.

3. Institutional framework

3.1. *Inter-American Commission on Human Rights*

The IACmHR is the principal and autonomous organ of the OAS, and aims to promote and protect human rights. It was created in 1959 and formally became one of the main organs of the OAS in 1967.⁵¹ Its position within the OAS is regulated in Art. 53 and 106 of the Charter of the Organization of American States, and by ratifying the Charter, every OAS member state accepted the competence of the IACmHR to consider individual complaints concerning alleged human rights violations occurring in their

49 Art. 2 c)-d) of the 1994 Inter-American Convention on International Traffic in Minors.

50 The 1994 Inter-American Convention does not establish the requirement of an exploitative purpose for trafficking in children to exist; this is unlike Art. 3 a) of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime). Still, the 1994 Inter-America Convention provides two optional elements instead (trafficking 'for unlawful purposes' or 'by unlawful means') that are met in illegal adoption cases. See de Boer-Buquicchio, 2017, pp. 7–8.

51 With the adoption of the Protocol of Amendment to the Charter of the Organization of American States ("Protocol of Buenos Aires"), signed at Buenos Aires on 27 February 1967, OAS Treaty Series, No. 1-A.

jurisdiction.⁵² In parallel, the IACmHR has also become a treaty body of the ACHR as part of its compliance–monitoring mechanism. As an organ of the OAS, the IACmHR performs its functions in accordance with the Charter in relation to all its member states; as an ACHR treaty body, it exercises its mandate in relation to the state parties to the ACHR.

In the exercise of its mandate to promote and protect human rights, the IACmHR has numerous functions and powers, including developing an awareness of human rights among the peoples of America, making recommendations to the member states of the OAS for the adoption of progressive measures in favour of human rights, and requesting information from the member states.⁵³ As Rodríguez-Pinzón emphasised, the term “protection of human rights” necessarily involves the power to receive and consider human rights cases,⁵⁴ implying that the IACmHR is empowered to receive individual complaints concerning alleged violations of human rights both in relation to OAS member states that have ratified the ACHR and those who are not parties to the ACHR.⁵⁵ While dealing with such complaints, the IACmHR’s double affiliation (i.e. a Charter-based OAS organ and a treaty body of the ACHR) translates into different competences and reference points for legal considerations depending on the state’s status. For states that are members of the OAS but have not ratified the ACHR, complaints can be brought before the IACmHR based on the ADRDM.⁵⁶ Although the ADRDM was not initially adopted as a legally binding treaty, it has become a source of legal obligations for all OAS member states.⁵⁷ Regarding states which have ratified the ACHR, contentious cases are brought before the IACmHR under the ACHR.⁵⁸

The IACmHR is competent to examine the complaints to verify the facts, and if it finds that there has been a violation of human rights (either guaranteed in the ADRDM or in the ACHR), it has the power to make recommendations for the respondent state to take appropriate measures to remedy the wrongful situation.⁵⁹ If the state party does not comply with the recommendations, the IACmHR may submit the case to the

52 Rodríguez-Pinzón, 2013, p. 13.

53 Art. 41 of the ACHR. The structure, competence, and procedure of the IACmHR are regulated in the Statute of the Inter-American Commission on Human Rights, approved through Resolution No. 447 adopted by the OAS General Assembly during its ninth period of sessions, held at La Paz in October 1979. They are also regulated in the Rules of Procedure of the Inter-American Commission on Human Rights, approved by the IACmHR at its 137th regular period of sessions and held from 28 October to 13 November 2009. These Rules of Procedure were modified in 2011 and 2013 [Online]. Available at: <https://www.oas.org> (Accessed: 12 July 2023).

54 Rodríguez-Pinzón, 2013, p. 13.

55 Under Art. 20 (b) of the Statute of the IACmHR (in relation to those OAS member states not parties to the ACHR) and under Art. 41 (f) of the ACHR (in relation to OAS member states that have ratified the ACHR).

56 Pursuant to Art. 20 (b) of the Statute of the IACmHR.

57 Rodríguez-Pinzón, 2013, p. 13. See IACtHR, Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Art. 64 of the American Convention on Human Rights, Advisory Opinion OC-10/90 of 14 July 1989, Series A, No. 10, paras. 35–45.

58 Pursuant to Art. 41 (f) of the ACHR.

59 Art. 20 (b) of the Statute of the IACmHR; Art. 51 para. 2 of the ACHR.

IACtHR for a binding judgment.⁶⁰ However, if the complaint has been brought under the ADRDM, the state has not recognised the IACtHR's jurisdiction, or the parties have reached a friendly settlement, the case is not submitted to the IACtHR and remains at the IACmHR's level.⁶¹

Within its adjudicatory function in individual cases, the IACmHR has the power to adopt precautionary measures, constituting an important instrument to prevent continued human rights violations.⁶² This mechanism applies to all OAS member states regardless of having ratified the ACHR, and allows the IACmHR to request from states, in serious and urgent cases which amount to a breach of human rights, the adoption of urgent measures to prevent irreparable harm. Similarly, in cases of extreme seriousness and urgency and when it becomes necessary, the IACmHR may resort to the IACtHR for an order of provisional measures to avoid irreparable damage to persons and prevent ongoing violations.⁶³

Finally, its monitoring and investigation of the situation of human rights in the Americas requires the IACmHR to draft and submit annual reports to the General Assembly of the OAS, and to prepare thematic and country reports on human rights status.⁶⁴ The IACmHR's Rules of Procedure empower it to create special and thematic "rapporteurships" with mandates linked to the promotion and protection of human rights in thematic areas of special interest (e.g. the rights of children, indigenous peoples, and women).⁶⁵

3.2. The Office of the Rapporteur on the Rights of the Child

The Office of the Rapporteur on the Rights of the Child of the Inter-American Commission on Human Rights was created in 1998 to bolster respect for the human rights of children and adolescents in the Americas.⁶⁶ Its mandate is based on Art. 41, para. 2 of the ACHR and Art. 18 of the IACmHR Statute, which together establish specific functions in the sphere of promoting human rights. The primary mandate of the Rapporteur on the Rights of the Child is to promote the human rights of children and

60 Art. 61 of the ACHR; Villalta Vizcarra, 2015, p. 676.

61 Feria-Tinta, 2014, p. 234.

62 Art. 25 of the Rules of Procedure of the IACmHR. Precautionary measures are urgent requests, directed to an OAS member state, to take immediate injunctive measures in serious and urgent cases and whenever necessary to prevent irreparable harm to persons. As cited in Rodríguez-Pinzón, 2013.

63 Art. 25 para. 12 and Art. 76 of the Rules of Procedure of the IACmHR. See IACmHR, 2008, paras. 14–15.

64 Arts. 59 and 60 of the Rules of Procedure of the IACmHR.

65 Based on Art. 15 para. 3 of the Rules of Procedure of the IACmHR.

66 IACmHR, 2008, para. 5. Rapporteur on the Rights of the Child is one of thirteen Rapporteurships currently operating within the IACmHR, which include also Rapporteurships for People of African Descent, Rights of Older Persons, Indigenous Peoples, LGBTI Persons, Human Mobility, Human Rights Defenders. Persons Deprived of Liberty, Persons with Disabilities, Women, Memory, Truth and Justice, as well as Special Rapporteurships for Freedom of Expression and on Economic, Social, Cultural, and Environmental Rights [Online]. Available at: <https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/composition.asp#2> (Accessed: 12 July 2023).

adolescents within the jurisdiction of OAS member states.⁶⁷ The Rapporteur has the following duties and responsibilities: (I) providing specialised advice to the IACmHR in the proceedings of petitions regarding violations of the rights of children and adolescents; (II) conducting studies on the rights of children and adolescents, including recommendations to encourage states' compliance with international human rights standards; (III) undertaking on-site visits to countries in the region and meeting with governmental authorities and civil society organisations; and (IV) conducting promotional activities on the protection of the rights of children.⁶⁸ At least annually, the Rapporteur on the Rights of the Child reports to the IACmHR and presents his/her work plans to the IACmHR for approval.⁶⁹ The Rapporteur advises the IACmHR with respect to all issues he/she has become aware of and which may be considered matters of controversy, grave concern, or special interest for the IACmHR.⁷⁰

3.3. Inter-American Court of Human Rights

The IACtHR, formally envisaged by the ACHR in 1969, was established in 1979 as the sole judicial organ involved in the Inter-American human rights system.⁷¹ Although Art. 33 of the ACHR empowers both the IACtHR and the IACmHR to ensure state parties' compliance with the ACHR, only the IACtHR has formal powers to issue decisions which the states are bound to comply with.⁷² The IACtHR performs its functions as a treaty body of the ACHR, meaning that its purpose is connected primarily with its application and interpretation.⁷³

The IACtHR is composed of seven judges, all of whom are nationals of OAS member states and are elected for a six-year term from among jurists of the highest moral authority and recognised competence in the field of human rights.⁷⁴ The IACtHR seat is located in San José, Costa Rica; however, it may also convene in any OAS member state.⁷⁵ It is not uncommon for the IACtHR to hold sessions in other countries, through which it increases public awareness of the Inter-American human rights system, develops a more cooperative working relationship with the local governments and

67 IACmHR, 2008, para. 8.

68 Ibid, paras. 10–13.

69 Art. 15 para. 6 of the Rules of Procedure of the IACmHR.

70 Art. 15 para. 8 of the Rules of Procedure of the IACmHR.

71 Villalta Vizcarra, 2015, p. 677. The IACtHR's first hearing was held in June 1979.

72 See Art. 68 para. 1 of the ACHR.

73 The IACtHR exercises its functions in accordance with the provisions of the ACHR. Its functions and procedures are regulated in detail in its Statute and Rules of Procedure, as follows: Statute of the Inter-American Court of Human Rights, adopted by the General Assembly of the OAS at its Ninth Regular Session, held in La Paz in October 1979, Resolution No. 448; Rules of Procedure of the Inter-American Court of Human Rights, which were approved by the IACtHR during its LXXXV Regular Period of Sessions held on 16–18 November 2009 [Online]. Available at: <https://corteidh.or.cr> (Accessed: 12 July 2023).

74 Art. 52 para. 1 of the ACHR, restated in Arts. 4–5 of the Statute of the IACtHR.

75 Art. 3 para. 1 of the Statute of the IACtHR and Art. 13 of the Rules of Procedure of the IACtHR.

judiciary, and fosters a better understanding of human rights among civil society and the general public.⁷⁶

The IACtHR exercises contentious (regulated in Arts. 61–63 ACHR) and advisory (regulated in Art. 64) jurisdictions. Under its contentious jurisdiction, the IACtHR rules on whether a state party has violated the human rights guaranteed in the ACHR,⁷⁷ and it can exercise its adjudicatory functions in relation to OAS member states that are parties to the ACHR and have accepted the IACtHR's optional jurisdiction as binding.⁷⁸ Only the IACmHR and state parties to the ACHR have the right to submit cases to the IACtHR.⁷⁹ While victims, as individuals, do not have the right to submit an individual complaint to the IACtHR, they enjoy *locus standi* in proceedings before the IACtHR. If the IACtHR finds that there has been a violation of the human rights guaranteed in the ACHR, it has expansive formal powers to order the state to make reparations for the victims.⁸⁰ The IACtHR considers that the reparation of the damages caused by the infringement of human rights shall aim, whenever possible, at the full restitution and removal of the effects of the violation.⁸¹ Where this is not possible, other measures may be implemented to guarantee the observance of human rights and remedy the consequences of the breaches. The IACtHR supervises the states' compliance with the ordered reparation measures through various methods (e.g. written processes, hearings, and visits), and monitoring compliance with judgments is an element of the jurisdictional function of the IACtHR. Regarding the IACtHR's advisory jurisdiction, OAS member states and its organs may consult the IACtHR regarding the interpretation of the ACHR or other treaties concerning the protection of human rights in American states.⁸² The IACtHR's advisory opinions, unlike its judgments in contentious cases, are not binding to states. Nonetheless, as Pasqualucci emphasised, they have undeniable legal and moral effects on both national and international law.⁸³

76 Pasqualucci, 2013, p. 9.

77 Feria-Tinta, 2014, pp. 678–679; Pasqualucci, 2013, pp. 10–11.

78 See Art. 62 para 1. Of the ACHR. As of 1 April 2023, 20 states have recognised the IACtHR's contentious jurisdiction, namely Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, and Uruguay.

79 Art. 61 para. 1 of the ACHR. Nevertheless, Art. 44 of the ACHR entitles any person or group of persons and any legally recognised non-governmental entity to lodge an individual petition with the IACmHR, from where it might be transmitted to the IACtHR.

80 According to Art. 63 para 1. of the ACHR, 'if the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied, and that fair compensation be paid to the injured party'. For more on the reparations in the case law of the IACtHR, cited in: Pasqualucci, 2013, pp. 188–250.

81 See IACtHR, *Sawhoyamaya Indigenous Community vs. Paraguay*, judgment of 29 March 2006 (Merits, Reparations and Costs), Series C, No. 146, para. 197.

82 The IACtHR's advisory jurisdiction can be exercised without the express consent of states, and even OAS member states not parties to the ACHR may request an advisory opinion from the IACtHR. See Pasqualucci, 2013, p. 11; Villalta Vizcarra, 2015, p. 679.

83 Pasqualucci, 2013, p. 11.

To prevent continued human rights violations, the IACtHR is empowered to order provisional measures when they are necessary to avoid irreparable damage to people in cases of extreme gravity and urgency.⁸⁴ The IACtHR may resort to provisional measures in cases it already has under consideration and equally in cases not (yet) *sub judice*; in the latter case, it acts at the request of the IACmHR.⁸⁵ The IACtHR's orders concerning provisional measures are binding on states.

Importantly, during its first two decades of functioning, the IACtHR did not develop significant jurisprudence over children's rights. Since its first judgment in a contentious case involving children's rights (*'Street Children' (Villagran-Morales et al.) vs. Guatemala*) was delivered in 1999, the IACtHR embarked on an evolutionary interpretation of the ACHR to provide children in the Americas with far-reaching protection. The IACtHR's approach stems from the recognition that children should be treated as genuine rights holders, endowed with legal and procedural capacity, who need to be granted full access to justice.⁸⁶ Moreover, the scope of children's rights and the correlated duties of the family, society, and state have been determined by the IACtHR in light of international standards (*corpus juris*) applicable to children.⁸⁷ The recurring themes in the IACtHR's children-related case law include gross and systematic violations of children's rights, such as the following: wrongful deaths, illegal detention, torture, and killing of children by law enforcement officers, sexual violence, inhumane detention conditions, forced displacement of adults and children, and violence against indigenous children and their ethnic communities.

Also within the scope of its advisory functions, the IACtHR has performed, over the years, standard-setting activities in the field of children's rights and has, accordingly, issued several advisory opinions concerning children. These include the Advisory Opinion OC-17/2002 on Juridical Conditions and Human Rights of the Child (2002),⁸⁸ the Advisory Opinion OC-21/14 on Rights and guarantees of children in the

84 Art. 63 para. 2 ACHR.

85 Ibid.

86 Cançado Trindade, 2007, pp. 56–57; Aguilar Cavallo, 2008, pp. 234 and 241.

87 Landmark decisions of the IACtHR for the children's rights protection include the following: IACtHR, *'Street Children' (Villagran-Morales et al.) vs. Guatemala*, Judgment of 19 November 1999 (Merits), Series C, No. 63; IACtHR, *Bulacio vs. Argentina*, Judgment of 18 September 2003 (Merits, Reparations and Costs), Series C, No. 100; IACtHR, *'Juvenile Reeducation Institute' vs. Paraguay*, Judgment of 2 September 2004 (Preliminary Objections, Merits, Reparations and Costs), Series C, No. 112; IACtHR, *Gómez-Paquiyaury Brothers vs. Peru*, Judgment of 8 July 2004 (Merits, Reparations and Costs), Series C, No. 110; IACtHR, *'Mapiripán Massacre' vs. Colombia*; IACtHR, *Girls Yean and Bosico vs. Dominican Republic*, Judgment of 8 September 2005 (Preliminary Objections, Merits, Reparations and Costs), Series C, No. 130; IACtHR, *Vargas-Areco vs. Paraguay*, Judgment of 26 September 2006 (Merits, Reparations and Costs), Series C, No. 155. For a more detailed analysis of the IACtHR's case law on children's rights, please refer to Chapter 11 of this book.

88 IACtHR, *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/2002 of 28 August 2002, Series A, No. 17.

context of migration and/or in need of international protection (2014),⁸⁹ and the Advisory Opinion OC-29/22 on Differentiated approaches with respect to certain groups of persons in detention (2022).⁹⁰ These advisory opinions have significantly contributed to clarifying the scope of states' obligations towards protecting children's rights.

3.4. Inter-American Children's Institute

The IIN was created in 1927 following a resolution of the Fourth Pan-American Child Congress.⁹¹ Since 1949, the IIN has been a specialised organisation of the OAS responsible for promoting the study of issues relating to children and the family in the Americas, as well as for designing technical instruments contributive to solving the problems affecting them.⁹² All 35 OAS members states are members of the IIN. The composition, functions, and competencies of the IIN are set out in its Statute and Rules of Procedure.⁹³ The principal purpose of the IIN is to cooperate with the governments of member states to promote the development of technical activities and instruments that contribute to the integral protection of children and the improvement of their families' quality of life.⁹⁴ The functions of the IIN, stipulated in Art. 3 of its Statute, include those outlined herein: (I) providing technical assistance for raising awareness on all issues relating to children, the family, and the community; (II) promoting actions aimed at favouring the best interests of children as full rights holders; (III) cooperating with member state governments, other agencies within the Inter-American system, other international institutions, and civil society organisations; (IV) watching over the creation of spaces that secure the free expression and participation of children on every matter of their concern; (V) promoting research on various problems affecting children and the family in the Americas.

The IIN is composed of three organs, namely the Directing Council, the Pan American Congress on Children, and the Secretariat of the Institute, and is directed by the Director General.⁹⁵ The Directing Council comprises representatives from OAS member states, and its main task is to formulate the general policy of the IIN and

89 IACtHR, Rights and guarantees of children in the context of migration and/or in need of international protection, Advisory Opinion OC-21/14 of 19 August 2014, Series A, No. 21.

90 IACtHR, Differentiated approaches with respect to certain groups of persons in detention, Advisory Opinion OC-29/22 of 30 May 2022, Series A, No. 29.

91 The Pan American Child Congresses provided an incentive for child-focused welfare policies in Latin America. for more on the Pan American Child Congresses, see Guy, 1998.

92 Art. 1(a) of the Statute of the Inter-American Children's Institute, approved during the 79th Regular Meeting held 25-26 October 2004 in Mexico City through Resolution CD/RES. 06 (79-04), considered at the Regular Session of the OAS Permanent Council held on 2 February 2005, CP/doc. 3964/04.

93 Rules of Procedure of the Inter-American Children's Institute, approved during the 79th Regular Meeting held 25-26 October 2004 in Mexico City through Resolution CD/RES. 06 (79-04), considered at the Regular Session of the OAS Permanent Council held on 2 February 2005, CP/doc. 3964/04.

94 Art. 2 of the Statute of the IIN.

95 Art. 4 of the Statute of the IIN.

exercise supervision over the fulfilment of its responsibilities.⁹⁶ The Pan American Congress on Children is an Inter-American ministerial meeting aimed at promoting the exchange of experience and knowledge among people in the Americas on issues within the competence of the IIN, and proposing relevant recommendations.⁹⁷ The Secretariat of the Institute is the permanent administrative organ of the IIN, providing support for all its activities.⁹⁸ The Director General is the IIN's legal representative, which in turn is appointed by the OAS Secretary General and responsible for implementing the Directing Council's decisions.⁹⁹

The Statute of the IIN and its Rules of Procedure contain provisions allowing children to participate in the works of the IIN, aiming to secure that the Institute holds a '*view of the reality of children*'.¹⁰⁰ Children under 18 years old may, through their representatives, become members of the official delegations of member states to the Directing Council and Pan American Congress on Children, such that they may be heard on all matters concerning them and advise their respective delegations accordingly.¹⁰¹ Member states should facilitate the participation of children in the IIN so that those children can provide the Directing Council with a new and constantly updated view of the reality of children in the region, and be directly informed of the IIN's policies, programs, and actions. When they return to their home countries, representatives of the children who are members of official delegations are expected to share their experiences with diverse groups of children in their countries.

The IIN works according to the goals set in its Action Plan, which are assessed every four years. In 2019–2023, the priority issues included the rights of adolescents in conflict with criminal law, early childhood, children deprived of parental care (in the context of the right to family life), migrant children, and international child abduction.¹⁰² Previous works have encompassed the rights of children in different areas and life circles, violence, sexual violence and exploitation, juvenile justice systems, and child participation.¹⁰³ The IIN is one of the main organisations in the Inter-American human rights system responsible for promoting children's rights, and its political role has significantly helped OAS state members in building uniform actions to protect children's welfare.¹⁰⁴

96 Arts. 8–9 of the Statute of the IIN.

97 Art. 19 of the Statute of the IIN.

98 Art. 28 of the Statute of the IIN.

99 Arts. 24–25 of the Statute of the IIN.

100 Art. 10 of the Rules of Procedure of the IIN and Art. 7(d) of the Statute of the IIN.

101 Art. 10 of the Rules of Procedure of the IIN.

102 Inter-American Children's Institute, Action Plan 2019-2023, adopted at the 94th Regular Meeting of the Directing Council of the IIN, pp. 38-53 [Online]. Available at: <http://iin.oea.org> (Accessed: 12 July 2023).

103 Domingo, 2020, pp. 179–182.

104 Ibid, p. 182.

4. Conclusions

The need to protect children is a long-standing issue of concern in the Americas that has led to the enshrining of children's rights in the major human rights instruments of the Inter-American system, and to the development of Inter-American private international law on children. The major human rights documents, the ADRDM and the ACHR, contain specific provisions that secure the right of children to special measures of protection along with the rights and freedoms enjoyed by every person. Importantly, the children's rights guaranteed in Art. 19 of the ACHR can be directly invoked and enforced before the IACtHR.

The Inter-American private international law on children consists of four conflict-of-laws conventions that were inspired by pressing family law problems in the Americas and the increasing problem of child trafficking. They are the 1984 Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors, the 1989 Inter-American Convention on International Return of Children, the 1989 Inter-American Convention on Support Obligations, and the 1994 Inter-American Convention on International Traffic in Minors. All these conventions establish different forms of cooperative mechanisms between OAS member states.

The institutional framework for the protection of children's rights in the Americas consists of bodies with a general mandate to ensure state compliance with human rights and institutions specifically dedicated to child welfare protection. The compliance monitoring institutions are the IACmHR and the IACtHR, the latter being endowed with contentious and advisory jurisdiction. The Inter-American Children's Rights Institute (1927) and the Rapporteur on the Rights of the Child (1998) are institutions specifically dedicated to protecting children's welfare. Their activity allows for coordinated actions to protect and promote children's welfare and monitor their rights in the Americas.

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