

The Asymmetries of Disability Rights Protection in the Inter-American System¹

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Introduction

The Inter-American system is the first that adopted a convention specifically addressing the rights of persons with disabilities. On 7 June 1999, the Organization of American States (OAS) adopted the Inter-American Convention for the Elimination of All Forms of Discrimination against Persons with Disabilities (Convención Interamericana para la Eliminación de todas las Formas de Discriminación contra las Personas con Discapacidad: CIADDIS), via Resolution 1608 (XXIX-O/99) of the General Assembly.³ Currently, most States in the Inter-American continent have adhered to the UN Convention on the Rights of Persons with Disabilities (CRPD), which was adopted in 2006.⁴ The Inter-American normativity on the rights of persons with disabilities therefore sits in the context of the international human rights system: most States in the Americas are bound by double-layered protection with respect to disability rights. The OAS has played a key role in the development of this framework, with respect to both law-making and enforcement.

This contribution explores disability rights protection in Inter-American States within the framework of the OAS and in the context of the obligations established under the CIADDIS and the CRPD. Following the classical division between ‘primary’ and ‘secondary’ rules,⁵ the contribution first sketches key regulatory initiatives in the area of disability rights and second considers compliance and enforcement mechanisms. Along these lines, the first section illustrates similarities and differences between the CIADDIS and the CRPD and, within this framework, essential regional regulatory initiatives. The second section assesses disability rights in select countries, based on periodic reports under the CIADDIS and CRPD. The

¹ A later version of this draft appeared in Quirico, Ottavio (ed), *Inclusive Sustainability: Harmonising Disability Law and Policy*, Springer Singapore, 2022.

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³ OAS, AG/RES. 1608, XXIX-O/99: CIADDIS, opened for signature June 1999, entered into force 14 September 2001.

⁴ Opened for signature 13 December 2006, 2515 UNTS 3, entered into force 2 May 2008.

⁵ See Hans Kelsen, *Pure Theory of Law* (tr. Max Knight, Peter Smith, 1967).

section examines the four largest countries by population in the region, notably, the United States of America (US), Mexico, Brazil and Colombia.⁶ The third section explores the enforcement of disability rights via key cases before the Inter-American Commission on Human Rights (IACoMHR) and the Inter-American Court of Human Rights (IACtHR). The purpose is providing a comprehensive understanding of disability rights in the region and identifying key regulatory problems and ways forward.

1 Regional instruments: between the CIADDIS and the CRPD

1.1 CIADDIS and CRPD: significance and limits

American States are subject to disability regulation, on the one hand, via instruments under general international law, and, on the other, via regional instruments adopted in the context of the OAS. Since 1948, the OAS has promoted inter-State cooperation, particularly via the General Assembly, and rights-enforcement, particularly via the IACoMHR and IACtHR. The principal regulatory instrument of the OAS in the area of fundamental rights is the 1969 American Convention on Human Rights (ACHR: Pact of San José),⁷ which is complemented by the 1988 San Salvador Protocol on Economic, Social and Cultural Rights (SSP)⁸ and spells out in detail the 1948 American Declaration on the Rights and Duties of Man (ADRDM).⁹ The main regulatory instrument promoted by the OAS in the area of disability is the 1998 CIADDIS, whilst the principal general instrument on disability under international law to which American States adhere is the 2006 CRPD.

The purpose of the CIADDIS is affording more specific protection for people with disabilities as compared to general human rights instruments adopted in the context of the OAS. Persons with disabilities indeed represent a specific vulnerable group and, although fundamental rights also address disabled persons, they do not address their particular needs.¹⁰ The Convention is an OAS instrument and most American States are parties to the CIADDIS, which entered into force in 2001, following the requested number of ratifications, with the notable exceptions of Canada and the US.¹¹

The CIADDIS is a short text including fourteen articles, exclusively focusing on the elimination of discrimination against persons with disabilities, aiming to foster integration in society (Article II). Under Article I, ‘disability’ is defined 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’, which ‘can be caused or aggravated by the economic and social environment.’ Under the same provision, ‘discrimination’ is defined as ‘any distinction, exclusion, or restriction’ based on a disability, which affects the enjoyment of fundamental rights and freedoms (Article I(II)(a)), whereby nonetheless disability is considered a differential situation that may justify differential treatment (Article I(II)(b)). Within this framework, States commit to adopting the necessary policies and legislation to, *inter alia*, make

⁶ List of Countries by Population (Lista de países ordenados por población), December 2019, <https://www.populationpyramid.net/es/poblaci%C3%B3n-por-pa%C3%ADs/2020>.

⁷ Opened for signature 22 November 1969, 1144 UNTS 123, entered into force 18 July 1978.

⁸ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, adopted 17 November 1988, entered into force 16 November 1999.

⁹ Adopted 2 May 1948.

¹⁰ Monika Domańska, ‘People with Disabilities as a Vulnerable Group: The Concept of Protection of the Rights of Vulnerable Groups’ (2018) 23(4) *Białostockie Studia Prawnicze* 25.

¹¹ OAS, Multilateral Treaties, American Convention on Human Rights, B-35, https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm.

employment, housing, education and infrastructure accessible (CIADDIS Article 3(1)(a)-(c)). The Convention therefore outlines general objectives, giving States a wide margin of discretion as concerns implementation. For the purpose of achieving the aims of the CIADDIS, States commit to cooperation (Article IV), involving relevant representative organisation in the development, execution, and evaluation of disability measures and policies (Article V). Monitoring is ensured via the institution of a Committee for the Elimination of All Forms of Discrimination against Persons with Disabilities (CEDDIS), comprising of a representative appointed by each State Party (Article VI(1)). States submit periodic reports to the CEDDIS on measures taken to implement the CIADDIS and the Committee elaborates conclusions, observations and suggestions for the 'gradual fulfilment' of the Convention (CIADDIS Article VI(5)). The Convention has indefinite validity in time (Article XIII), but entails a 'most-favourable-treatment' clause under Article VII, as no provisions under the Convention can be interpreted so as to restrict the enjoyment of the rights of persons with disabilities under customary or treaty law.

Similar to the CIADDIS, the CRPD aims to eliminate discrimination against persons with disabilities and to achieve full integration in society. Most American States are parties to the CRPD, which entered into force in 2008, with the notable exception of the US.¹² Along these lines, whilst the CRPD does not define the notion of 'disability', Article 1 clearly relinquishes the medical approach to disability and fosters a social paradigm, based on non-discrimination (Article 3(b)), aiming to achieve full and effective participation in society for the disabled on an equal footing with others (Article 5). In this respect, the CRPD builds on the CIADDIS to elaborate more advanced protection, to the extent that it grants persons with disabilities specific rights and recognises the rights of specific groups, particularly, women and children.¹³ Fundamentally, the CRPD has a tripartite structure, along the lines of the trajectory that links first-, second- and third-generation human rights.¹⁴ Thus, CRPD Articles 10-23 and 29 regulate the civil and political rights of persons with disabilities, such as the right to protection and safety in situations of risk, including armed conflicts and humanitarian emergencies. Articles 24-28 and 30 cover economic, social and cultural rights, for instance, the right to work. Furthermore, the Preamble (g) posits the concept of 'inclusive sustainability', along the lines of the notion of 'sustainable development' proposed in the Brundtland Report.¹⁵ Institutionally, the CRPD is implemented via the Committee on the Rights of Persons with Disabilities (CtRPD), which elaborates recommendations based on State periodic reports (CRPD Article 35) and individual complaints (CRPD Optional Protocol,¹⁶ Articles 1-2). Furthermore, the Convention compels States to establish *ad hoc* mechanisms for implementing disability rights and monitoring implementation (CRPD Article 33).

The CIADDIS and the CRPD aim to establish a specific regulatory framework for persons with disabilities (*lex specialis*), beyond the obligations outlined via general human rights conventions (*lex generalis*), such as the ACHR and the 1966

¹² CRPD, UNTS, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en.

¹³ Diana Guarnizo-Peralta, 'Disability Rights in the Inter-American System of Human Rights: An Expansive and Evolving Protection' (2018) 36(1) *Netherlands Quarterly of Human Rights* 43, 45-46

¹⁴ See Burns H. Weston, 'Human Rights' (1984) 6(3) *Human Rights Quarterly* 257, at 264.

¹⁵ World Commission on Environment and Development, *Our Common Future*, Report (1987).

¹⁶ Opened for signature 30 March 2007, 999 UNTS 3, entered into force 3 May 2008.

International Covenants on Civil and Political Rights (ICCPR)¹⁷ and on Economic, Social and Cultural Rights (ICESCR).¹⁸ However, unlike the ACHR, which is subject to adjudication via the IACoMHR and IACtHR, the CIADDIS and the CRPD are not subject to supranational adjudication mechanisms. There is therefore a discrepancy between primary and secondary rules on disability in the inter-American system, whereby the CIADDIS and the CRPD aim to advance disability rights in the region, but do not have ‘teeth’ and can only be relied upon by the IACoMHR and IACtHR as interpretative documents in applying the ACHR.

1.2 The OAS Programs of Action: the emerging concept of ‘inclusive sustainability’

Within the context of the obligations contracted under the CIADDIS and the CRPD, the OAS has adopted relevant measures to implement disability rights. Therefore, whilst they are not strictly speaking justiciable, these Conventions have provided effective guidance in outlining disability policies for States in the Americas. The general guidelines for disability policies in the inter-American system have been defined via decennial implementation plans, aiming to facilitate the application of the CIADDIS and the CRPD.

On 6 June 2006, the fourth plenary Assembly of the OAS adopted the Declaration on the Decade of the Americas for the Rights and Dignity of Persons with Disabilities for the period 2006-2016.¹⁹ The Declaration underscored the need to adopt hemisphere-wide measures and strategies to promote first-, second- and third-generation fundamental rights for people with disabilities.²⁰ It also declared the period 2006-2016 a Decade for disability rights, aiming to ensure equality, dignity, and participation for people with disabilities in society.²¹ Within this framework, in 2007, the OAS Assembly adopted a Program of Action for the Decade of the Americas for the Rights and Dignity of Persons with Disabilities (2006-2016).²² The Program aimed at ensuring substantial progress in creating an inclusive society based on the full and equal exercise of human rights and fundamental freedoms for persons with disabilities, including concrete actions, ranging from health plans to ensuring political participation and employment.²³

On 14 June 2016, the OAS General Assembly adopted a Resolution on the Extension of the Decade of the Americas for the Rights and Dignity of Persons with Disabilities for the period 2016-2026,²⁴ aiming at consolidating the previous Program of Action. The Resolution restates the commitments under the 2006-2016 Program, prioritising universal accessibility, creating statistical records on disabilities as essential mechanisms for inclusive public policies, addressing social protection and affirming a community-based approach to development. A trajectory

¹⁷ Opened for signature 16 December 1966, 999 UNTS 171, entered into force 23 March 1976.

¹⁸ Opened for signature 16 December 1966, 993 UNTS 3, entered into force 3 January 1976.

¹⁹ OAS, AG/DEC. 50 (XXXVI-O/06).

²⁰ *Ibid.*, at para 2.

²¹ *Ibid.*, at para 3.

²² OAS, AG/RES. 2230 (XXXVI-O/06).

²³ Permanent Council of the OAS, Committee on Juridical and Political Affairs, Working Group to Prepare a Program of Action for the Decade of the Americas for the Rights and Dignity of Persons with Disabilities (2006-2016), <http://www.oas.org/consejo/CAJP/disabilities.asp>.

²⁴ OAS, Declaration on Extension of the Decade of the Americas for the Rights and Dignity of Persons with Disabilities and Consolidation of the Program of Action for the Decade of the Americas for the Rights and Dignity of Persons with Disabilities (2016–2026), AG/DEC. 89 (XLVI-O/16).

thus emerges, whereby the concept of ‘inclusive sustainability’ promoted by the UN²⁵ assumes a central role in harmonising disability policies in the Americas.²⁶

As a follow-up to the extension of the decade on the rights of persons with disabilities, in 2018 the OAS General Assembly adopted a second Program of Action for the Decade of the Americas for the Rights and Dignity of Persons with Disabilities,²⁷ outlining policy guidelines for implementing the rights of persons with disabilities in American States until 2026. In particular, the Program commits States to harmonising domestic legislation with the standards of international human rights law in this area, to the utmost of available resources, notably, in line with CRPD Article 12, on equal legal capacity.²⁸ Addressing areas that span from education to work, accessibility and independent living, the Program again outlines concrete actions, such as the need to undertake public awareness-raising campaigns and to implement procedures enabling people with disabilities to provide free and informed consent for medical treatment.²⁹

In line with the extension of the Decade for the Rights and Dignity of Persons with Disabilities, a key development in the 2016-2026 Programme, with respect to the 2006-2016 Decade, is the centrality of the concept of inclusive sustainability. The 2016-2026 Program embeds a preliminary reference to the 2015-2030 Sustainable Development Goals (SDGs)³⁰ and includes the concept of ‘sustainability’ as a cross-cutting issue throughout the different components of the Program. Strategically, the Program provides that States promote training and capacity building for governmental institutions in implementing international obligations relating to the SDGs associated with persons with disabilities (Strategy 5).³¹ Fundamentally, action on development, well-being and social inclusion is structured around the participation of persons with disabilities in social and economic development, supporting the productive and sustainable participation of people with disabilities in the economic system (Action 9(a)).³² The Program also aims to ensure that international cooperation involving resources from the Inter-American system or multilateral organisations promotes the inclusive and sustainable development of persons with disabilities (Action 15(f)).³³ More specifically, within the context of the policies on participation in sport, cultural and leisure activities, the Program envisages the adoption of National Action Plans (NAPs), fostering the ‘sustainability of high-performance sport entities for persons with disabilities’ (Action 8(d)).³⁴

2 Country situation

Taking into account key political criteria, such as the gross domestic product (GDP), democracy and the rule of law, critical differences emerge in the disability policies of

²⁵ UN, Sustainable Development Goals, <https://sdgs.un.org/goals>; OHCHR, Analytical Study on the Promotion and Protection of the Rights of Persons with Disabilities in the Context of Climate Change, UN Doc A/HRC/44/30 (2020).

²⁶ See World Bank, Eighty-five Million Reasons to Prioritize Persons with Disabilities during Disasters in Latin America and the Caribbean, 3 December 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>.

²⁷ OAS, AG/RES. 2230 XXXVI-O/06.

²⁸ *Ibid.*, at 8-9.

²⁹ *Ibid.*, at 18 ff.

³⁰ *Ibid.*, at 5.

³¹ *Ibid.*, at 54.

³² *Ibid.*, at 40.

³³ *Ibid.*, at 51.

³⁴ *Ibid.*, at 39.

States in the American continent.³⁵ Whilst countries in Latin America have established *ad hoc* institutions to address the needs of people with disabilities, particularly via inter-sectoral commissions and secretariats, effective implementation is often hampered by a lack of adequate financial resources.³⁶

Besides the divide between countries in the Northern and Southern hemispheres,³⁷ key factors, such as the territorial extension and the size of the population, impact the definition of disability policies.³⁸ In this context, economic inequality is an essential obstacle to the achievement of sustainable inclusiveness: people with disabilities experience high levels of poverty for reasons such as not having paid work and facing additional costs associated with disability.³⁹

World Rank	United States	Brazil	Mexico	Colombia
Economic Equality ⁴⁰	57 th	88 th	93 rd	100 th
Transparency ⁴¹	25 th	94 th	124 th	92 th
Democracy ⁴²	25 th	49 th	72 nd	46 th
Rule of Law ⁴³	21 st	67 th	104 th	77 th

Figure 9.1. Summary of key political drivers in the largest countries by population in the Americas

2.1 North America

³⁵ See, for instance, Enrique Peruzzotti and Catalina Smulovitz (eds.), *Enforcing the Rule of Law: Social Accountability in the New Latin American Democracies* (University of Pittsburgh Press, 2006); Beth Harry, *Childhood Disability, Advocacy, and Inclusion in the Caribbean: A Trinidad and Tobago Case Study* (Palgrave MacMillan, 2020).

³⁶ See Heidi Ullman, 'Disability and Public Policy: Institutional Policies and Challenges in Latin America', in Rodrigo Martínez (ed.), *Institutional Frameworks for Social Policy in Latin America and the Caribbean* (UN, 2018) 255, at 262 and 266.

³⁷ On geological, cultural and political grounds, it is disputed whether Northern and Central America and the Caribbean, on the one hand, and South America, on the other hand, are two 'continents' or one 'continent'. The convention in most English-speaking countries seems to be that they are two different continents, whereas in non-English-speaking Europe and Latin America the one-continent view prevails. Here, we follow the view implicit in the OAS Charter, which refers to the whole region as 'America' and 'the continent' in all official versions (English, French, Portuguese and Spanish): Charter of the Organization of American States, opened for signature 30 April 1948, 119 UNTS 1609, entered into force 13 December 1951.

³⁸ Rodrigo Martínez and Carlos Maldonado Valera, 'Institutional Framework for Social Development', in Rodrigo Martínez (ed.), *Institutional Frameworks* (2018) 21, at 29 ff.

³⁹ Monica Pinilla-Roncancio, 'Disability and Social Protection in Latin American Countries' (2015) 30(7) *Disability & Society* 1005, at 1018.

⁴⁰ Based on the Gini coefficient measurements of economic inequality, <https://worldpopulationreview.com/country-rankings/income-inequality-by-country>.

⁴¹ A larger number reflects higher levels of corruption in the country, <https://www.transparency.org/en/cpi/2020/index/nzl#>.

⁴² See: <https://www.eiu.com/n/campaigns/democracy-index-2020>

⁴³ See https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_o.pdf.

Among North American countries, the US is a crucial economic and political player.⁴⁴ The country is not a signatory to the CIADDIS and has not ratified the CRPD, and thus it has submitted no formal reports on compliance under either convention and has received no feedback from the UN and OAS. Whilst the US played a crucial role in the promotion of the CRPD,⁴⁵ it only became a signatory in 2009⁴⁶ and is not yet a party to the Convention, because of a negative vote in the Senate in 2012, which was grounded, among other reasons, in resistance to ceding sovereignty to the UN on disability rights matters.⁴⁷

Despite such a lack of formal international commitment, responding to the first OAS Program of Action in October 2009, the US Department of Health and Human Services prepared a positive report on the rights of persons with disabilities,⁴⁸ in the context of a meeting held to assess progress under the Program.⁴⁹ The Report positively highlights the adoption of key regulatory instruments, particularly, the 'Traumatic Brain Injury Act' and the 'Pending Health Reform Proposals and Medical Equipment Accessibility and Personnel Cultural Competence Senate Bills'.⁵⁰ Addressing CRPD Articles 31 (Statistics) and 32 (International Cooperation), the Report underscores that the US acts as the Secretariat for the international Washington Group on Disability Statistics.⁵¹ The document also reports an expenditure benefiting persons with disabilities for over \$200 billion in Medicaid services destined to approximately twelve million people under CRPD Article 3; support for institutionalised people with disabilities to move to another institution when necessary or live independently in society, according to CRPD Article 19; fighting discrimination in the workplace and supporting the acquisition of skills for work and economic independence, in line with CRPD Article 27.⁵² Admittedly, the Report is provisional (of 'progress'), partial (only concerning health but no other disability right, eg education, equality, accessibility, access to justice or participation in political and public life) and not open to scrutiny (feedback from the CRPD or CIADDIS committees). Therefore, it provides a glimpse into the situation in this

⁴⁴ Congressional Research Services, US Role in the World: Background and Issues for Congress, 19 January 2021; World Bank, US- GDP, https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?name_desc=true&locations=US.

⁴⁵ See how the US promoted the creation of CRPD, which was modelled after its own disability law (American Disability Act, 1990), in Arlene S. Kanter, 'Let's Try Again: Why the United States Should Ratify the United Nations Convention on the Rights of People with Disabilities' (2019) 35(1) *Touro Law Review* 301, at 302.

⁴⁶ White House, Office of the Press Secretary, Remarks by the President on Signing of UN Convention on the Rights of Persons with Disabilities Proclamation, 24 July 2009, available at <https://obamawhitehouse.archives.gov/realitycheck/the-press-office/remarks-president-rights-persons-with-disabilities-proclamation-signing>.

⁴⁷ Rosalind S. Helderman, Senate Rejects Treaty to Protect Disabled around the World, 4 December 2012, https://web.archive.org/web/20130921055440/https://articles.washingtonpost.com/2012-12-04/politics/35624605_1_treaty-disabled-children-americans-with-disabilities-act.

⁴⁸ US, Progress Report on the Implementation of the Program of Action for the Decade of the Americas for the Rights and Dignity of Persons with Disabilities 2006-2016 (2009), https://www.oas.org/es/sedi/ddse/paginas/documentos/discapacidad/PAD/1er_InformePAD/Estados%20Unidos.pdf

⁴⁹ Second Meeting of Directors and Public Policy Leaders for People with Disabilities (Segunda Reunión de Directores y Formadores de Políticas Públicas para Personas con Discapacidad), August 2010, https://www.oas.org/es/sedi/ddse/paginas/index-4_pda_reunion_II.asp.

⁵⁰ US, Progress Report (2009) at 2.

⁵¹ Washington Group on Disability Statistics, <https://www.washingtongroup-disability.com>.

⁵² *Ibid.*, at 15 ff.: Summary of US Department of Health and Human Services' Programs and Activities Supporting the UN Convention on the Rights of Persons with Disabilities.

North American country but not solid basis for comparison with the other three in the continent.

Considering the situation in Mexico, another key player in the region with the second largest GDP in Latin America,⁵³ assessing the first initial report of Mexico under the CRPD,⁵⁴ in 2014, the CtRPD highlighted a shift in the perspective of the National Council for Persons with Disabilities from a health-based model to a human rights-based approach, via the reform of the Federal Act on the Prevention and Elimination of Discrimination.⁵⁵ Fundamentally, the Committee invited Mexico to eliminate pejorative terminology about persons with disabilities from State legislation under CRPD Articles 1-4 and to eradicate discrimination against women with disabilities under CRPD Article 6.⁵⁶ The Committee also requested improved accessibility as concerns the physical environment, transport, information, communication systems and technologies, including penalties for non-compliant entities under CRPD Article 9.⁵⁷ A key critique addresses participation in society; in fact, the Committee requested Mexico to eliminate medical and psychiatric in-patient treatment, detention on grounds of disability and mental health services that are not based on informed consent under CRPD Articles 14 and 19, including targeted sanctions under CRPD Article 15.⁵⁸

Within this framework, the CtRPD requested Mexico to prevent pregnant women with disabilities from being pressured to undergo abortions, punishing doctors involved in any such cases and investigating judicial and health institutions that enable forced sterilisation of women with disabilities, ensuring that victims have access to justice, in line with CRPD Articles 17 and 25.⁵⁹ Moreover, the country was invited to give persons with disabilities the rights to marry and to have the custody or guardianship of their children, supporting mothers with psychosocial disabilities and establishing the possibility of opting for the placement of abandoned children with disabilities in foster care, rather than institutions, according to CRPD Article 23.⁶⁰ A further step in the implementation of such rights is the necessity of ensuring education for children with disabilities, accessibility of schools and appropriate training for teachers, in line with CRPD Article 24, as well as boosting access to employment programs for persons with disabilities, protecting them from all forms of exploitation and harassment in the workplace, and implementing public and private sector affirmative action measures, consistent with CRPD Article 27⁶¹. The Committee also underscored the need to eliminate disadvantages faced by abandoned or extremely poor indigenous persons with disabilities under CRPD Article 28.⁶² At the institutional level, Mexico was invited to establish a system for the

⁵³ World Bank, GDP – Mexico,

<https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=MX>.

⁵⁴ Implementation of the Convention on the Rights of Persons with Disabilities, Initial Report of Mexico, UN Doc. CRPD/C/MEX/17, February 2013. Mexico has since submitted another report (in February 2018) for which, however, there is no UN feedback yet.

⁵⁵ CtRPD, Concluding Observations on the Initial Report of Mexico, UN Doc. CRPD/C/MEX/CO/1, 27 October 2014, at 1.

⁵⁶ *Ibid.*, at 1 and 3.

⁵⁷ *Ibid.*, at 3-4.

⁵⁸ *Ibid.*, at 6.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*, at 7-8.

⁶¹ *Ibid.*, at 8-9.

⁶² *Ibid.*, at 9

compilation, analysis and publication of statistical data in order to adequately implement disability policies and outcomes, in line with CRPD Article 31⁶³.

On a positive note, under the second CIADDIS report,⁶⁴ in 2016 the CEDDIS highlighted the adoption of several national programs on disability rights, spanning from employment to the administration of justice, protection, rehabilitation and social inclusion.⁶⁵ However, the Committee still expressed concerns regarding schooling, public and private sector health and employment, participation in recreational and cultural activities, and social inclusion of indigenous persons with disabilities who live in poverty.⁶⁶ The Committee also invited Mexico to promote appreciation of disability rights and of a life free from violence, as well as to adopt universal accessibility standards in the construction and remodelling of buildings.⁶⁷

2.1 South America

Within Latin America, Colombia is the fourth largest economy, although the country struggles with huge disparities in the distribution of revenues.⁶⁸ Even prior to the approval of the CRPD via Law 1346/2009, Colombia passed comprehensive regulation governing the national disability system via Law 1145/2007.⁶⁹ Considering the initial report of the country under the CRPD,⁷⁰ in 2016, the CtRPD commended the adoption of national measures defining the offence of discrimination on grounds of disability, prescribing reparation for victims of violence and recognising Colombian sign language as the native language of deaf and deaf-blind persons.⁷¹ Similar to Mexico and Brazil (see below), the CtRPD recommended the use of a human rights-based inclusive approach to disability, instead of a medical paradigm, giving persons with disabilities full legal capacity and removing all derogatory language from laws and official documents, in line with CRPD Articles 1-4.⁷² The Committee also underscored the necessity of eliminating discrimination by abolishing denial of reasonable accommodation under CRPD Article 5 and gender-based violence according to Article 6⁷³.

As in the case of Mexico, the CtRPD envisaged foundational policies as concerns deinstitutionalisation, consistent with CRPD Articles 7 and 19, including informed consent, repealing restrictions on legal capacity under Article 12 and legislation allowing the sterilisation of persons with disabilities without consent, according to Articles 1-4, ensuring access to justice by gender, ethnicity and type and disability, in line with Articles 13-15.⁷⁴ Within this framework, Colombia was invited to repeal any

⁶³ *Ibid.*

⁶⁴ Mexico, Second Report under the CIADDIS (Segundo Informe de Cumplimiento de los Estados Parte de la Convención) (2016) available only in Spanish at http://www.oas.org/es/sedi/ddse/paginas/txt_discapacidad_segundoinforme.html.

⁶⁵ CEDDIS, Revision of the Second Report of Mexico (Revisión del Informe de México) (2016) at 5.

⁶⁶ *Ibid.*, at 1 ff.

⁶⁷ *Ibid.*, at 3 and 6.

⁶⁸ The World Bank Data: Colombia, <https://data.worldbank.org/country/Colombia>.

⁶⁹ Rosylane Nascimento das Mercês Rocha, Francisco Cortes Fernandes and Rui Nunes, 'Assessment of Individuals with Disabilities in Latin America: A Comparative Study of the Legislation' (2020) 13(14) *International Archives of Medicine* 1, at 7.

⁷⁰ Colombia, Second Report under the CIADDIS (Segundo Informe de Cumplimiento de los Estados Parte de la Convención) (2016) available only in Spanish at http://www.oas.org/es/sedi/ddse/paginas/txt_discapacidad_segundoinforme.html.

⁷¹ CtRPD, Concluding Observations on the Initial Report of Colombia, CRPD/C/COL/CO/1, 30 September 2016, at 1.

⁷² *Ibid.*, at 2.

⁷³ *Ibid.*, at 3.

⁷⁴ *Ibid.*, at 2-3 and 6-8.

legislation preventing persons with disabilities from marrying or allowing the placement of children outside their families under CRPD Article 23.⁷⁵ Similarly, the Committee recommended the prohibition and punishment of discrimination on grounds of disability in the education system according to CRPD Article 2, implementation of free and informed consent in health care decisions under Article 25, as well as expedite employment of persons with disabilities through affirmative action, consistent with Article 27.⁷⁶ Participation of persons with disabilities in political life and accessibility of voting procedures was also considered a key aspect of inclusive policies aiming to achieve deinstitutionalisation, consistent with CRPD Article 29.⁷⁷ In light of the concept of ‘inclusive development’, Colombia was further invited to prioritise a disability perspective in poverty reduction and social inclusion strategies, excluding interdiction requirements for persons with disabilities to benefit from social protection measures and strengthening assistance to cover additional costs incurred as a result of disability, in light of CRPD Article 28.⁷⁸

Procedurally, the Committee recommended that Colombia ratify the CRPD Optional Protocol, allowing individuals and groups to access the CtRPD, designates an independent and properly resourced mechanism for CRPD monitoring, including feedback by representative organisations, under CRPD Article 33, and trains judges and prosecutors on disability rights under Article 17.⁷⁹ Interestingly, the Committee recommended that the State ensure access to justice for victims of armed conflicts, women, children, Afro-Colombian, Raizal and indigenous people with disabilities, under CRPD Article 25.⁸⁰ Notably, it was proposed that Colombia investigate the execution of persons with disabilities in ‘false-positive’ cases during armed conflicts,⁸¹ establishing criminal responsibility and reparation to victims, in accordance with CRPD Articles 10 and 16.⁸²

Based on the second report of Colombia under the CIADDIS,⁸³ in 2016 the CEDDIS positively underscored that the country education system is fully inclusive.⁸⁴ However, the Committee recommended that Colombia improve recreation, transportation, sporting, cultural spaces and justice for persons with disabilities.⁸⁵ According to the Committee, another area of improvement is participation in the electoral process and employability, fostering affirmative action in the workplace.⁸⁶

⁷⁵ *Ibid.*, at 9.

⁷⁶ *Ibid.*, at 9-11.

⁷⁷ *Ibid.*, at 11-12.

⁷⁸ *Ibid.*, at 11.

⁷⁹ *Ibid.*, at 2, 12-13 and 17.

⁸⁰ *Ibid.*, at 10.

⁸¹ ‘False positives’ are civilians, some of whom are persons with disabilities, who were killed by Colombian soldiers and later presented as ‘guerrilleros’ in armed conflicts; they were falsely identified as combatants so that soldiers could gain military decorations, promotions and other benefits. Between 1988 and 2014, the number of civilians assassinated as ‘false positives’ might have reached the number of 10,000 (Mariana Palau, ‘The False Positive’ Scandal That Felled Colombia’s Military Hero’, *The Guardian*, 19 November 2020 <https://pulitzercenter.org/stories/false-positives-scandal-felled-colombias-military-hero>).

⁸² CtRPD, Concluding Observations on the Initial Report of Colombia (2016) at 5 and 7-8.

⁸³ Colombia, Second Report under the CIADDIS (Segundo Informe de Cumplimiento de la CIADDIS y del Programa De Acción del Decenio de las Américas por los Derechos y la Dignidad de las Personas con Discapacidad) (2020) http://www.oas.org/es/sedi/ddse/paginas/txt_discapacidad_segundoinforme.html

⁸⁴ CEDDIS, Revision of the Second Submission of Colombia under the CIADDIS (Revisión del Informe de Colombia) (2016) at 1 http://www.oas.org/es/sedi/ddse/paginas/txt_discapacidad_segundoinforme.html.

⁸⁵ *Ibid.* at 3-4.

⁸⁶ *Ibid.*, at 2-4.

From the standpoint of enforcement, the Committee requested Colombia to improve the collection of detailed and disaggregated statistical data on persons with disabilities, particularly as concerns political participation, and to train targeted personnel on inclusiveness.⁸⁷

Moving further south geographically, Brazil is the most important political player in Latin America, particularly because of the size of its territory, population and economy: it is the largest country in South America and the ninth economy in the world.⁸⁸ The country is a party to both the CIADDIS and the CRPD and has adopted comprehensive regulation on disability, starting in 1989 with Federal Law 7853, establishing a comprehensive policy for people with disabilities.⁸⁹

In 2015, the CtRPD commended Brazil, following its Initial Report under the CRPD,⁹⁰ for recognising the Convention at the constitutional level, establishing a dedicated Commission in its Congress, as well as local and regional governmental councils, and for enabling persons with disabilities to access social security cash benefits.⁹¹ At the same time, the Committee invited Brazil to address multiple forms of discrimination against people of indigenous or African descent with disabilities, in line with CRPD Article 5, and to target violence against women with goals and indicators measuring progress, according to Article 6.⁹² As in the case of Mexico, in order to facilitate participation in society, Brazil was required to abolish involuntary hospitalisation, forced medical treatment and arbitrary detention of people with disabilities, according to CRPD Articles 14 and 15, along the lines of the principle of deinstitutionalisation under Article 19, and to withdraw all legal provisions that perpetuate the system of substituted decision-making, prioritising the autonomy of the disabled, consistent with Article 12.⁹³ A key critique concerns the right to life, in conjunction with the right to health, whereby the country should prohibit the sterilisation of persons with disabilities in the absence of informed consent, in line with CRPD Article 17.⁹⁴ Furthermore, similar to Colombia, the Committee underscored the need to increase the rate of employment for people with disabilities, in light of CRPD Article 27,⁹⁵ contrasting a negative trend in Latin American countries, whereby scant progress has been made in improving labour flexibility, with negative effects on poverty and inequality.⁹⁶ Institutionally, Brazil was invited to collect relevant disaggregated data and statistics across a spectrum of activities, spanning from health to justice (Articles 16 and 31).⁹⁷ The country should also put in place independent monitoring and complaint procedures, particularly via a

⁸⁷ *Ibid.*, at 3-5.

⁸⁸ World Bank, Brazil: Data, <https://data.worldbank.org/country/BR>.

⁸⁹ Rosylane Nascimento das Mercês Rocha, *et al.*, 'Assessment of Individuals' (2020) at 5-6.

⁹⁰ Brazil, Initial Report of State Parties Due in 2010, UN Doc. CRPD/C/BRA/1, 14 July 2014, available only in Spanish at

http://www.oas.org/es/sedi/ddse/paginas/txt_discapacidad_segundoinforme.html.

⁹¹ CtRPD, Concluding Observations on the Initial Report of Brazil, UN Doc. CRPD/C/BRA/CO/1, 29 September 2015, at 1.

⁹² *Ibid.*, at 2-3.

⁹³ *Ibid.*, at 4-5.

⁹⁴ *Ibid.*, at 5.

⁹⁵ *Ibid.*, at 7.

⁹⁶ Mario D. Velásquez Pinto, 'Labour Market Regulation and Social Protection: Institutional Challenges', in Martínez (ed.), *Institutional Frameworks* (2018) 97, at 100.

⁹⁷ *Ibid.*, at 5 and 8.

mechanism in line with the Paris Principles,⁹⁸ including representative organisations, according to CRPD Article 33.⁹⁹

In 2016, considering the second report of Brazil under the CIADDIS,¹⁰⁰ the CEDDIS positively highlighted progress in the implementation of relevant policies helping the disabled to access the labour market, targeted support by type of disability, and improved accessibility in educational institutions, cultural projects and public buildings and sites.¹⁰¹ The Revision nonetheless underscored a low level of compliance with the CIADDIS and the necessity of collecting disaggregated data throughout the different policy areas for adequately addressing future challenges, such as the implementation of anti-discrimination programmes aiming to facilitate employment for people with disabilities.¹⁰²

3 Enforcing disability rights via the IAComHR and IACtHR

3.1 Sources: systemic limits and methodology

The IAComHR is the main adjudicatory body of the OAS: it promotes and monitors human rights in the States that are Members of the OAS (Article 18 of the Statute of the Commission).¹⁰³ In accomplishing its tasks, the Commission relies on fundamental rights as outlined in the ADRDM, ACHR and SSP. Whilst key political players, such as the US and Canada, are not parties to the ACHR and SSP,¹⁰⁴ the ADRDM has a general scope of application.

Concerning the promotion of disability rights, along the lines of the OAS 2016-2026 Programme of Action,¹⁰⁵ in December 2020, on the International Day of People with Disabilities, the IAComHR called on States to implement measures affording people with disabilities full legal capacity.¹⁰⁶ The Commission approached the issue by considering that persons with disabilities have rights equal to those of all other people, and should thus have the power to make choices about any aspects of their life.¹⁰⁷ States should therefore abandon the medical paradigm and move to a sustainable and inclusive model of disability, promoting independent living, in line with the principles of autonomy and non-discrimination.¹⁰⁸ The Commission particularly praised the legislation in Argentina, Colombia, Costa Rica and Peru for moving towards the recognition of full legal capacity for persons with disabilities, consistent with the CRPD, and requested the adequate implementation of

⁹⁸ Principles Relating to the Status of National Institutions (The Paris Principles), UN GA Res. 48/134 of 20 December 1993.

⁹⁹ CtRPD, Concluding Observations on the Initial Report of Brazil (2015) at 8.

¹⁰⁰ Brazil, Second Report under the CIADDIS (Segundo Informe de Cumplimiento de los Estados Parte de la CIADDIS) (2016) http://www.oas.org/es/sedi/ddse/paginas/txt_discapacidad_segundoinforme.html.

¹⁰¹ CEDDIS, Revision of the Second Submission of Brazil under the CIADDIS (Revisión del Informe de Brasil) (2016) at 5 ff., http://www.oas.org/es/sedi/ddse/paginas/txt_discapacidad_segundoinforme.html.

¹⁰² *Ibid.*, at 10-15.

¹⁰³ Statute of the Inter-American Commission on Human Rights, Approved by Resolution 447 Taken by the General Assembly of the OAS at Its Ninth Regular Session, October 1979.

¹⁰⁴ OAS, American Convention on Human Rights, <https://www.cidh.oas.org/basicos/english/Basic4.Amer.Conv.Ratif.htm>

¹⁰⁵ See above section 1.2.

¹⁰⁶ OAS, The IACHR Calls on States to Adopt Measures to Guarantee People with Disabilities Full Legal Capacity from a Human Rights Approach, Press Release, 3 December 2020, http://www.oas.org/en/iachr/media_center/PReleases/2020/289.asp.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

international regulation for promoting the effective participation of people with disabilities in decision-making.¹⁰⁹

As regards monitoring, the IACoMHR conducts inquiries on human rights based on State reports and available information (Statutory Articles 18(b) and 20(2) and ACHR Article 41). It submits an annual report to the General Assembly of the OAS (Article 59 of the Rules of Procedure of the Commission: RPC)¹¹⁰ and assesses human rights breaches based on individual and State petitions, after exhaustion of domestic remedies (RPC Articles 28 and 31 and IACHR Articles 44-45). If it deems a petition admissible, the Commission determines merits and adopts a preliminary report, including relevant recommendations (RPC Article 31 and IACHR Article 50). Moreover, with respect to a State Party to the ACHR that accepted the optional jurisdiction of the IACtHR, the Commission or the State involved may further refer a matter to the Court for a new assessment leading to a binding judgment (IACHR Article 51). When, within three months from the notification of a preliminary report to a State, the matter has not been resolved or referred to the IACtHR, by an absolute majority of votes the Commission may deliver final recommendations. As a follow-up, States concerned submit information on compliance (RPC Article 47 and IACHR Article 51) and the Commission can further adopt measures such as requesting information and holding hearings to verify compliance (RPC Article 48).

The IACtHR was established in 1978, when the ACHR entered into force. The Court may adjudicate upon a dispute if the State involved has ratified the ACHR, accepting the optional jurisdiction of the Court, after investigation by the IACoMHR and referral by either the Commission or a State (IACHR Article 61). If it establishes the violation of a right, the Court can order rectification of the breach, including compensation for damage and litigation costs (ACHR 63). Nonetheless, the Court has no coercive means to enforce its decisions, save taking the initiative of requesting States to report on implementation. The Court also has a consultative function, providing OAS Member States and institutions with an opinion based on the ACHR and other American human rights instruments (ACHR Article 64).

Owing to the fact that the CIADDIS and the CRPD are not subject to the jurisdiction of the IACoMHR and the IACtHR, the Commission and the Court have had a limited possibility to address the rights of persons with disabilities directly. However, the Commission and the Court have managed to develop a meaningful jurisprudence on disability rights, by either interpreting the ADRDM and ACHR in light of the CIADDIS and the CRPD, or by relying on further international instruments, such as regulation passed by the World Health Organization. *Mutatis mutandis*, the IACoMHR and the IACtHR have adopted with respect to disability rights the same technique that the European Court of Justice and the Court of Justice of the European Union has developed with respect to human rights more generally. Lacking specific human rights provisions in the primary sources of EU law, the Courts have developed a significant human rights jurisprudence by relying on the European Convention on Human Rights¹¹¹ and other human rights instruments under general international law.¹¹² A notable case in this respect is *Luis Fernando*

¹⁰⁹ *Ibid.*

¹¹⁰ Rules of Procedure of the Inter-American Commission on Human Rights, approved by the Commission at Its 109th Special Session, 4-8 December 2000 and amended at its 116th Regular Period of Sessions, 7-25 October 2002.

¹¹¹ Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 221, entered into force 3 September 1953.

¹¹² See, for instance, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 11-70 (1970) ECR 1125.

Guevara Díaz v Ecuador,¹¹³ where the IAComHR assessed the situation of a person with mental disability, who was not selected for a public post after achieving the best score in a competitive hiring process.¹¹⁴ The Commission upheld a violation of the rights to equal protection before the law, fair trial and judicial protection, based on the SSP interpreted in light of the CIADDIS.¹¹⁵

3.2 Jurisprudence

Because of the impossibility of relying directly on disability rights instruments, the disability jurisprudence of the IAComHR and IACtHR is limited not only quantitatively, but also in scope. In fact, the Commission and the Court have developed a case law on specific aspects of first- and second-generation disability rights, but have not contributed to the advancement of third-generation rights embedded in recent UN and OAS instruments, particularly the OAS 2016-2026 Program of Action. There is therefore need for contribution to the development of critical issues, such as accessibility and full integration of people with disabilities in economic activities. Scholars have nonetheless noted an improvement in the attention paid by the Commission and the Court to the development of disability rights, particularly since 2009.¹¹⁶

The IAComHR has dealt with first-generation rights and disability in cases where persons with disabilities have undergone ill-treatment and medical negligence. In *Patients of the Psychiatric Service of Santo Tomas Hospital v Panama*,¹¹⁷ considering medical negligence, malpractice and manslaughter by hospital personnel, as well as miscarriage of justice, the Commission held the State of Panama in breach of the rights of a mentally disabled person to humane treatment, fair trial and judicial protection under Articles 5, 8 and 25 of the ACHR.¹¹⁸ In *Ronal Jared Martínez and Family & Marlon Fabricio Hernandez Fúnez v. Honduras*,¹¹⁹ the IAComHR upheld the excessive use of force by police agents and members of the National Army causing paraplegia, in breach, *inter alia*, of the right to access judicial remedies, for a mentally disabled person.¹²⁰ Similarly, in *Sebastián Furlán and Family v. Argentina*,¹²¹ the IACtHR assessed the situation of a child suffering from difficulties in speaking and using his upper and lower limbs because of an accident occurred at a military field. Based on the need for social inclusion established under the CRPD and the CIADDIS,¹²² the Court considered that a delay of 12 years in proceedings following a request for compensation constituted a breach of the right to a fair trial and the rights of the child under ACHR Articles 8 and 19.¹²³

The IAComHR has also developed a relevant jurisprudence on the prohibition of capital punishment with respect to people with disabilities. Particularly, in *Clarence*

¹¹³ *Luis Fernando Guevara Díaz v Ecuador*, Petition 1064-05, 12 July 2005.

¹¹⁴ *Id.*, Report No. 13/12 of 20 March 2012, 2, at para. 9.

¹¹⁵ *Id.*, at para. 42.

¹¹⁶ Peralta, 'Disability Rights' (2018) at 49 ff.

¹¹⁷ *Patients of the Psychiatric Service of Santo Tomas Hospital v. Panama*, IAComHR, Petition 790-05, 18 July 2005.

¹¹⁸ *Id.*, Report 94/13, 4 November 2013, at 11.

¹¹⁹ *Ronal Jared Martínez and Family & Marlon Fabricio Hernandez Fúnez v. Honduras*, IAComHR, Petition 886/04, 15 September 2004.

¹²⁰ *Id.*, Report no 56/14, 21 July 2014, at 5-6, paras 29-30.

¹²¹ *Sebastián Furlán and Family v. Argentina*, IACtHR, Petition of 18 July 2001.

¹²² *Id.*, Judgment of 31 August 2012, at 87, para. 278.

¹²³ *Ibid.*, at 103, para. 335.

Allen Lackey and Others v. US,¹²⁴ the IACoMHR considered the execution of 16 victims, including seven people with mental disability, pending proceedings before the Commission. In light of ADRDM Articles I and XXVI, governing the rights to life and fair trial, the Commission considered that people with a mental disability have a right not to be subject to capital punishment,¹²⁵ interpreted as a 'principle of international law'.¹²⁶ According to the Commission, the prohibition is justified by the fact that people with disabilities are unable to comprehend the reasons for an execution and its consequences.¹²⁷ This interpretation is in line with the stance of the UN Human Rights Council in similar cases.¹²⁸

Concerning second-generation rights, in *Irene v. Argentina*,¹²⁹ the IACoMHR considered the situation of a girl of 12 years with cerebral palsy and visual-auditory disorder, necessitating the support of a school therapeutic companion. The State afforded assistance for some years, but suddenly withdrew it without advice. Applying the social model of disability, equality and full integration into society, the Commission held Argentina in breach of not only the rights to personal integrity and life, but also to health and inclusive education, in light of the UNESCO guidelines in the matter.¹³⁰ Along these lines, upon a referral by the IACoMHR, in *Ximenes Lopes v. Brazil*,¹³¹ the IACtHR considered the case of a mentally disabled person who suffered injuries and died at Casa de Reposo Guararapes, a private health institution acting under State delegation, followed by impunity. The Court considered that the right to life entails for the State positive obligations, including a duty to provide essential adequate health services for everyone.¹³² Because of the insufficiency of its operating conditions, the Court held Casa de Reposo Guararapes in breach of the rights to life and personal integrity of people with disabilities, under ACHR Articles 4 and 5.¹³³ In *González Lluy v. Ecuador*,¹³⁴ the IACtHR further elaborated on the right to inclusive education. The Court considered the case of a girl who was infected with HIV in a blood transfusion carried out by a private institution operating under State authorisation, which led to exclusion from several schools throughout the country. The Court determined that HIV should not be a reason for discrimination and held the State in breach of the right to education under Article 19(6) of the SSP,¹³⁵ interpreted in light of the General Comment of the Committee on the Rights of the Child (CtRC) on 'The Aims of Education'.¹³⁶ The IACtHR considered that a decision of the Court of Cuenca in favour of exclusion *prima facie* aiming to protect the right to life of classmates was ultimately based on stereotypes and not supported by adequate evidence.¹³⁷

¹²⁴ *Clarence Allen Lackey et al. v. US*, IACoMHR, Petitions 11.575, 12.333 and 12.341 of 23 May 2011, 2 June 2011 and 11 October 2011.

¹²⁵ *Id.*, Report 52/2013, 15 July 2013, at 39, para. 206.

¹²⁶ *Ibid.*, at 39-40, para. 213.

¹²⁷ *Ibid.*, at 41, para. 218.

¹²⁸ See *RS v. Trinidad & Tobago*, HR Comm. 684/1996, UN Doc. 684/1996 (2002) at paras 2.6 and 7.2.

¹²⁹ *Irene v. Argentina*, IACoMHR, Petition 7 August 2015.

¹³⁰ *Id.*, Resolution 38 of 7 July 2016, at 10-11, paras 25 and 31.

¹³¹ *Ximenes-Lopes v. Brazil*, IACtHR, Petition of 1 October 2004.

¹³² *Id.*, Judgment of July 4 2006, at 57-59, paras 125 and 128.

¹³³ *Ibid.*, at 60, para 132.

¹³⁴ *González Lluy v. Ecuador*, IACtHR, Petition of 18 March 2012.

¹³⁵ *Id.*, Judgment of 1 September 2015, at 70, para. 255, and 113.

¹³⁶ CtRC, The Aims of Education (Article 29 of the Convention on the Rights of the Child), General Comment No. 1, UN Doc. CRC/GC/2001/1, 17 April 2001. See *González Lluy* (2015) at 73-74, para. 262.

¹³⁷ *González Lluy* (2015) at 76, para 266.

At the crossroads between first- and second-generation human rights, the IACoMHR has also contributed to advancing the controversial debate on the conflict between the rights to life and health. Notably, in *Artavia Murillo v. Costa Rica*,¹³⁸ upon a referral by the IACoMHR, the IACtHR dealt with a decision of the Constitutional Section of the Supreme Court of Costa Rica to establish an absolute prohibition of *in vitro* fertilisation (IVF).¹³⁹ In line with its previous jurisprudence in *Ximenes Lopes v. Brazil*, the Court acknowledged the right of anyone, including people with disabilities, to access health care, particularly, sexual and reproductive health, based on the CRPD.¹⁴⁰ Building on the definition of disability established under the WHO International Classification of Functioning, Disability and Health, the CIADDIS and the CRPD, the Court considered that involuntary infertility is a form of disability, consistent with the social paradigm.¹⁴¹ The Court thus held that a total prohibition of IVF has a disproportionate impact on the rights to personal integrity, liberty, private and family life and the right to have a family under the ACHR.¹⁴²

Conclusion

Inter-American States are the first who adopted a specific and comprehensive convention in the area of disability: the CIADDIS. The Convention aims to eliminate discrimination and facilitate full integration for the disabled in society. Whilst the CIADDIS is a short text outlining basic directives for State disability policies, it is a significant step in the development of disability law and one on which the CRPD has built to develop further protection for persons with disabilities. Most Inter-American States are currently parties to both the CIADDIS and the CRPD. The purpose of adhering to these treaties is allowing countries in America to develop targeted policies for people with disabilities, whereby the concept of ‘inclusive sustainability’ emerges as central in the move from the first OAS Program of Action on the Rights and Dignity of Persons with Disabilities to the second one. Within such an inter-State regulatory system, two issues emerge where States could do more for respecting, protecting and fulfilling the rights of persons with disabilities. A first issue is socio-economic and a second one is institutional.

From a socio-economic viewpoint, there is a gap between North American and Latin American countries, which hampers the implementation of disability rights. Whilst the CEDDIS and CtRPD underscore the adoption of relevant State policies in the area of disability, not enough progress has been made, with particular regard to the foundational issues of independent living and participation in society. In this context, differences in disability policies between Brazil, Mexico and Colombia are less a matter of kind than of degree: they are likely to be representative of the situation in Latin America. Shortcomings betray wider common problems many of these countries face today at societal level. Notably, integration of marginalised groups requires a significant reduction in economic inequality. Monitoring institutional independence and accountability depends on a strong culture of transparency. Preventing and punishing abuse and violence presupposes a solid rule

¹³⁸ *Artavia Murillo et al. (‘In Vitro Fertilisation’) v. Costa Rica*, Petition of 29 July 2011.

¹³⁹ Decision of 11 October 2000.

¹⁴⁰ *Artavia Murillo*, IACtHR, Judgment of 28 November 2012, at 101, para. 355.

¹⁴¹ *Id.*, at 85-86, para. 289.

¹⁴² *Id.*, at 93, paras. 314-316. This decision remains controversial on several counts. See, for instance: Cianciardo, Juan. 2016. «La especificación Del Derecho a La Vida Del No Nacido En El Sistema Interamericano De Derechos Humanos. Una aproximación Desde El Caso “Artavia Murillo”». *Dikaion* 25 (2):160-89. <https://dikaion.unisabana.edu.co/index.php/dikaion/article/view/6757>.

of law, whilst the implementation of a human rights approach to disability rests on a healthy democratic atmosphere.¹⁴³ Within this context, in light of its political prominence, the fact that the US has not yet ratified both the ACHR, CIADDIS and CRPD constitutes a significant barrier to the implementation of disability rights at the regional level, with important international ramifications.

Institutionally, the Inter-American system is asymmetrical with respect to disability rights, because the IAComHR and the IACtHR have no jurisdiction over the CIADDIS and CRPD. Thus, the Commission and the Court have developed a limited jurisprudence that does not address comprehensively the loopholes highlighted by the observations of the CEDDIS and CtRPD. However, the Commission and the Court have relied on the CIADDIS and the CRPD as interpretive instruments with respect to the ACHR and SSP to develop a meaningful jurisprudence on specific aspects of disability rights. This allows the extension of the disability jurisprudence of the Commission and the Court to States, particularly the US via the ADRMD, which are not parties to the CIADDIS and the CRPD. Notably, in the context of civil and political rights, the IAComHR and IACtHR have contributed to advancing the rights to personal integrity, life and freedom from capital punishment. As concerns economic, social and cultural rights, the Commission and the Court have significantly advanced the rights to education, health and reproductive rights, and access to justice. The Commission and the Court have acted based on individual complaints and have not yet elaborated comprehensively on the third-generation concept of inclusive sustainability, *inter alia*, because of the limits of their jurisdiction. This is an important limit: it should be remedied to improve the effectiveness and full development of disability rights in the Inter-American system.

¹⁴³ As shown in Figure 9.1 the region still has a long way to go in terms of democracy, transparency, economic equality and, crucially, the rule of law.

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