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Migrants' Rights in the U.S. under the Inter-American Human Rights System

BY FRANCISCO J. RIVERA JUARISTI*

The Inter-American Human Rights System (IAHRS) of the Organization of American States (OAS) includes important norms and enforcement mechanisms for the protection of the rights of migrants in the Americas, including in the United States. This short article describes some ways in which U.S. attorneys, advocates, and victims can use the IAHRS as part of a broader strategy to protect and guarantee the rights of migrants and obtain some form of remedy for human rights violations of this population. It also points the reader to primary sources with more information about relevant norms, jurisprudence, and other resources.

I. What is the IAHRS?

The IAHRS is a set of human rights norms and enforcement mechanisms within the Organization of American States.

A. Norms

The following ten main regional human rights instruments make up the primary normative framework of the IAHRS: (1) the American Declaration on the Rights and Duties of Man; (2) the American Convention on Human Rights; (3) the Protocol to the American Convention on Human Rights to Abolish the Death Penalty; (4) the Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights; (5) the Inter-American Convention to Prevent and Punish Torture; (6) the Inter-American Convention on Forced Disappearance of Persons; (7) the Inter-American Convention on the Prevention, Punishment, and Elimination of Violence Against Women; (8) the Inter-American Convention on the Elimination of All Forms of Discrimination

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Against Persons with Disabilities; (9) the Inter-American Convention on Protecting the Rights of Older Persons, and (10) the American Declaration on the Rights of Indigenous Peoples. The following two additional treaties have been adopted and will come into effect once the required number of ratifications has been reached: (1) the Inter-American Convention Against All Forms of Discrimination and Intolerance, and (2) the Inter-American Convention Against Racism, Racial Discrimination, and Related Forms of Intolerance.

None of these instruments specifically focuses on migrants' rights. Nevertheless, some specifically recognize rights that are particularly relevant in the context of immigration. For example, Article 22 of the American Convention on Human Rights recognizes the right to freedom of movement and circulation; Article XXVII of the American Declaration of the Rights and Duties of Man recognizes the right to seek and obtain asylum; Article 9 of the Inter-American Convention on the Prevention, Punishment, and Elimination of Violence Against Women recognizes the duty of States Parties to take special account of the vulnerability of migrant women to violence, and Articles 5 and 17 of the Inter-American Convention on Protecting the Rights of Older Persons recognize the duty of States Parties to develop policies, plans and norms that protect older persons from discrimination on the basis of age, particularly those who are most vulnerable, including migrants, and the duty to recognize social security and pension benefits of migrants, respectively. Additionally, these regional instruments also recognize human rights all individuals enjoy, including migrants, regardless of their immigration status. This normative framework is also further developed in the jurisprudence, decisions, and reports of the IAHR.

Unfortunately, the United States has not ratified any of these treaties and is therefore not bound by them. Nevertheless, by virtue of having ratified the Charter of the Organization of American States, the U.S. has legal obligations under the American Declaration of the Rights and Duties of Man. These include the rights to life, personal integrity, personal liberty, due process, access to justice, non-discrimination, family life, and privacy, among others. A more detailed description of these rights and how they apply to immigrants in the United States can be found in the 2011 "Report on Immigration in the United States: Detention and Due Process."¹

1. Inter-American Commission on Human Rights [hereinafter "IACHR"], *Report on Immigration in the United States: Detention and Due Process*, ORGANIZATION OF AMERICAN STATES (Apr. 2010) <http://www.oas.org/en/iachr/migrants/docs/pdf/Migrants2011.pdf>.

B. Inter-American Commission on Human Rights

The Inter-American Commission on Human Rights (IACHR) is an organ of the Organization of American States whose mission is to promote and protect human rights in the region, including in the United States. It is composed of seven independent experts who serve in their individual capacities. With the assistance of the Executive Secretariat based in Washington, D.C., the IACHR ensures that states in this hemisphere respect, protect, and guarantee the human rights of all, but particularly of those most vulnerable, including migrants.

C. Inter-American Court of Human Rights

The Inter-American Court of Human Rights is the judicial organ of the IAHRs. This court can only hear cases against OAS Member States that have ratified the American Convention on Human Rights and have also accepted the court's jurisdiction. Since the United States has done neither, this court does not have jurisdiction over human rights violations by the United States. Nevertheless, the court's judgments and advisory opinions serve as persuasive authority on migrants' rights issues, including refugee determination,² mass expulsions,³ and the rights of migrant workers,⁴ among others.

II. What are Some Ways to Engage with the IACHR?

The Inter-American Commission on Human Rights offers multiple ways to address migrants' rights issues in the United States. These include filing complaints (known as "petitions") against the U.S. for violations of the American Declaration on the Rights and Duties of Man; requesting precautionary measures in serious and urgent situations presenting a risk of irreparable harm; participating in public hearings about migrants' rights; engaging with the specialized unit (known as "rapporteurship") on

2. *See generally*, Case of the Pacheco Tineo Family v. Bolivia, INTER-AM. CT. H. R. (Nov. 25, 2013), http://www.corteidh.or.cr/docs/casos/articulos/seriec_272_ing.pdf.

3. *See generally*, Case of Expelled Dominicans and Haitians v. Dominican Republic, INTER-AM. CT. H. R. (Aug. 28, 2014), http://corteidh.or.cr/docs/casos/articulos/seriec_282_ing.pdf.

4. Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-10/03, INTER-AM. CT. H. R. (Sept. 17, 2003), http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf.

migrants' rights within the IACHR, and requesting site visits to bring a particular issue to the IACHR's attention.

A. *Petitions*

The petitions system of the IACHR allows anyone to bring a case against the U.S. on behalf of any individual, regardless of nationality. The complaint or petition must allege violations of the American Declaration on the Rights and Duties of Man that occur within the jurisdiction of the United States. Petitioners must first exhaust domestic remedies, which usually means that a case must first be litigated domestically all the way before the Supreme Court, and petitioners then have six months after a final judgment to submit their complaint of human rights violations before the IACHR. An exception to this requirement of exhaustion of domestic remedies allows petitioners to submit a complaint when there is an undue delay in the domestic proceedings.

The petition process is similar to those of a judicial proceeding. The parties submit written briefs, there may be a hearing, and the IACHR issues a decision on the admissibility of the petition and on the merits of the case. In its decision on the merits, the IACHR will analyze the facts of the case in light of the relevant human rights norms. Where it finds violations of those norms, the IACHR will recommend appropriate forms of monetary and non-monetary reparations. Getting a decision on the merits often takes many years; therefore, the parties also have the possibility of reaching an early agreement known as a "friendly settlement." The IACHR's website has a list of relevant migrants' rights decisions and jurisprudence.⁵

B. *Precautionary Measures*

The IACHR can also requests the U.S. to take immediate action to protect individuals in serious and urgent situations presenting a risk of irreparable harm to the individuals or to the subject matter of a pending petition. These are known as "precautionary measures." For example, in 2011 the IACHR requested that the U.S. suspend the deportation process of five individuals until Haiti guaranteed safe detention conditions and access to minimum medical care, and until U.S. deportation procedures adequately take into account the beneficiaries'

5. IACHR, *Rapporteurship on the Rights of Migrants: Reports on Petitions and Cases*, ORGANIZATION OF AMERICAN STATES, <http://www.oas.org/en/iachr/migrants/decisions/iachr.asp>.

right to family life and their family ties in the U.S.⁶

C. Thematic Hearings

At least twice a year, the IACHR also holds public hearings to ask questions about and shed light on various human rights issues throughout the Americas. The hearings usually take place in Washington, D.C., but are transmitted live on the internet. The IACHR has held several such thematic hearings over the years to address migrants' rights issues, including in the U.S.⁷ Although these hearings do not lead to a judgment or a decision on the merits of a case, they are useful to generate public and international pressure for governments to change policies and norms.

D. Rapporteurships

The IACHR has also created "rapporteurships" to devote attention and resources to particularly vulnerable groups at risk of human rights violations, including migrants. The Rapporteurship on the Rights of Migrants⁸ has carried out site visits to the U.S., for example, to monitor the situation of unaccompanied children and families who have crossed the southern border of the U.S.⁹ The rapporteurship has also published reports that describe norms and jurisprudence in the context of immigration in general¹⁰, and in the U.S. in particular.¹¹ The IACHR also monitors U.S. immigration policy and makes comments about it through press releases¹².

6. IACHR, *Rapporteurship on the Rights of Migrants: Protection System: Precautionary Measures: PM 5/11 – Gary Resil, Harry Mocombe, Roland Joseph, Evel Camelién, and Pierre Louis, United States*, ORGANIZATION OF AMERICAN STATES (2011) available at http://www.oas.org/en/iachr/migrants/protection/precautionary.asp#Gary_Resil.

7. IACHR, *Hearings and Other Public Events: Rights of Migrants and their Families*, ORGANIZATION OF AMERICAN STATES, <http://www.oas.org/es/cidh/audiencias/topics/list.aspx?lang=en&topic=20>.

8. IACHR, *Rapporteurship on the Rights of Migrants*, ORGANIZATION OF AMERICAN STATES, <http://www.oas.org/en/iachr/migrants/default.asp>

9. IACHR, *Activities and Initiatives: Country Visits: United States 2014*, ORGANIZATION OF AMERICAN STATES (2014), http://www.oas.org/en/iachr/activities/visits/countries_usa2014.asp.

10. IACHR, *Rapporteurship on the Rights of Migrants: Reports: Thematic Reports*, ORGANIZATION OF AMERICAN STATES, <http://www.oas.org/en/iachr/migrants/reports/thematic.asp>.

11. IACHR, *supra* note 1.

12. IACHR, *IACHR Welcomes Executive Action on Immigration in the United States*, ORGANIZATION OF AMERICAN STATES (Nov. 2014), http://www.oas.org/en/iachr/media_center/PReleases/2014/142.asp

The best way to become familiar with the norms and monitoring and enforcement mechanisms of migrants' rights within the Inter-American Human Rights System is to browse through the website of the IACHR, especially the links provided in the website of the Rapporteurship on the Rights of Migrants.