

## II.8

### The Riffo-Salinas Case

#### Human Rights of Older Persons Consolidated in the Inter-American System

By *Aída Díaz-Tendero*

##### 1. Introduction

According to the Inter-American Convention on the Protection of the Human Rights of Older Persons (ICPHROP)<sup>1</sup> and the dominant trend in gerontology, aging is a gradual process that develops during the course of life and involves biological, physiological, psychosocial, and functional changes of various consequences, which are associated with dynamic and permanent interactions between the subject and his or her environment. For its part, old age is a social construction<sup>2</sup> referring to the last stage of the life course in the sense that both old age and the problems faced by the elderly<sup>3</sup> are socially constructed. In other words, aging is a verifiable or objective fact, while old age is a subjective concept.<sup>4</sup>

The culture of old age, the individual and collective perceptions and ideas about what it is to be an older person are under permanent construction and deconstruction, and the age groups and generations that today are older people have an impact on the paradigm of old age that subsequent age groups and generations will experience through their reproduction or rupture of the stereotype.

<sup>1</sup> Organization of American States (OAS), *Inter-American Convention on the Protection of the Human Rights of Older Persons (A-70)*, General Assembly, forty-fifth regular session, Washington, DC, June 15, 2015.

<sup>2</sup> Peter Berger and Thomas Luckmann, *The Social Construction of Reality* (Anchor 1967).

<sup>3</sup> In more developed countries, the lower age limit is sixty-five years of age, while in developing countries it is sixty years of age. Thus, in the ICPHROP, the age limit is sixty years or older, unless domestic law determines a lower or higher base age, provided that it does not exceed sixty-five years. This concept includes, among others, the concept of elderly person, which is the concept used in the Bolivian legislation (Article 2 of the *General Law for the Elderly* reads: “[B]eing holders of the rights expressed therein the elderly persons of sixty years of age or older, in the Bolivian territory” (Law No. 369 General Law for the Elderly Persons, Supreme Decree 1807, May 1, 2013)).

<sup>4</sup> For a dissident position with respect to the aforementioned dominant criterion, see Aída Díaz-Tendero, “Epílogo,” in Aída Díaz-Tendero (coord.), *Un pacto con la soledad. Envejecimiento y vejez en la literatura en América Latina y el Caribe* (Tirant Lo Blanch 2019).

The treatment of the elderly by the law, or in other words, the legal formulations<sup>5</sup> on the elderly, reflect the social constructs on old age of previous cohorts and generations. It is for this reason that there is a gap between public policies and legal frameworks that were designed for a short old age<sup>6</sup> that was conceived as one of physical, economic, and social deprivation and the needs of today's older persons, who in many cases live their old age in conditions of health, productivity, autonomy, and well-being during a stage that extends over decades.<sup>7</sup> It should be noted that this new paradigm does not contradict the recognition of the existence of frail and vulnerable older persons for different reasons and circumstances,<sup>8</sup> nor their corresponding need for protection.

The adoption of an inclusive perspective, encompassing the multiple forms of old age, is an essential part of the human rights approach to older persons, which has shown itself to be notably more agile in adapting to the new realities and new paradigms of old age. The visibility of older persons as subjects of rights is the result of certain phenomena such as the increase in the relative and absolute number of older persons in the world, an irrefutable fact also in the case of Latin America and the Caribbean.<sup>9</sup> At the same time, the evolution in the development of human rights, after normatively consolidating the rights of citizens, led to the creation of instruments of various kinds for specific groups, including those dedicated to the elderly.

Before the Protocol of San Salvador, there were few inter-American norms directly protecting the rights of older persons. Those were limited to the right to social security (American Declaration on the Rights and Duties of Man, art. XVI) and the prohibition of the death penalty (American Convention on Human Rights, art. 4.5). The Protocol introduced broader protection, determining that “[e]veryone has the right to special protection in old age” and establishing the duty to progressively take the necessary steps to ensure proper housing, food, medical care, work, and quality of life (art. 17). After the Protocol,

<sup>5</sup> Riccardo Guastini, “Interpretation and legal construction” [2015] 43 *Isonomia* 11–48.

<sup>6</sup> Life expectancy in the Latin American and Caribbean region was 51.4 years in the five-year period 1950–1955 (ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN, *Observatorio Demográfico 2019. Proyecciones de población*, Santiago de Chile, ECLAC 2020).

<sup>7</sup> Life expectancy in the Latin American and Caribbean region is 76.1 years in the five-year period 2020–2025 (*ibid.*).

<sup>8</sup> Antonio Martínez Maroto, “Aspectos legales y consideraciones éticas básicas relacionadas con las personas mayores,” in Rocío Fernández-Ballesteros (dir.), *Gerontología social* (Ediciones Pirámide 2009).

<sup>9</sup> Latin American and Caribbean aging is characterized by the high speed at which the aging process will occur in relation to the pioneer countries in the demographic transition (such as the European countries), although each country within the subset of the sample will carry out these changes with a different chronology, with decades of difference between them. In the coming years, the proportion of older persons in the total population of the countries of the region will double and even triple (ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN, *Demographic Observatory 2015. Population projections*, Santiago de Chile, ECLAC 2016).

other inter-American treaties also introduced direct protections for the rights of older persons (Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, art. 9; Inter-American Convention against All Forms of Discrimination and Intolerance, art. 1.1).

The year 2015 marked a shift regarding the rights of older persons in the Inter-American System. The adoption of the ICPHROP was a milestone, not only in the region but also the world. The treaty places the Inter-American System at the vanguard of international human rights law, in so much as it establishes binding obligations specifically targeted at protecting the rights of older persons, adopting a holistic and inclusive approach. It has catalyzed the protection of the rights of older persons even for States that are yet to ratify the ICPHROP, fostering holistic protection. For example, in *Poblete Vilches et al. v. Chile*, the Inter-American Court relied on the ICPHROP to interpret the American Convention on Human Rights, concluding that the right to nondiscrimination applies to discriminatory conduct based on older age.

In this context, this chapter focuses on the analysis of the *Riffo Salinas* case, judged on February 28, 2018, by the Plurinational Constitutional Court of Bolivia. This chapter questions some aspects of the protection of the human rights of older persons<sup>10</sup> in the Inter-American System, aiming to demonstrate how inter-American jurisprudence and norms impact on our national courts of justice.

Section 2 assesses the relevance of this judgment in several ways: first, in the dimension of its significance for the jurisprudence on older persons as subjects of law; second, in terms of whether it integrates or excludes the ad hoc instrument available to the Inter-American System for the protection of the human rights of older persons, the ICPHROP;<sup>11</sup> third, by the degree of integration or exclusion of the inter-American standards established by the Inter-American Court and Commission on Human Rights; fourth, by the degree to which it constitutes evidence of the multilegal system, converging national and inter-American norms; and fifth, by the type of social constructions on old age and the elderly that derive from the case.

Section 3 is devoted to an in-depth examination of the articles of the ICPHROP that are used in the *Riffo Salinas* judgment, in order to determine how they go beyond, or not, the interpretations of these articles made in the judgment.

<sup>10</sup> In Bolivian legislation, the concept used is that of an elderly person (Article 2 of the *General Law of the Elderly* reads: “[B]eing holders of the rights expressed therein the elderly persons of sixty or more years of age, in the Bolivian territory” (Law No. 369 General Law of the Elderly Persons, Supreme Decree 1807, May 1, 2013)).

<sup>11</sup> Organization of American States, Inter-American Convention on Protecting the Human Rights of Older Persons, June 15, 2015, T.S. No. A-70.

Section 4 addresses the cases on older persons in which the Inter-American Court of Human Rights established the violation of the same rights violated in the *Riffo Salinas* case.

Section 5 focuses on identifying the social constructions on old age and the elderly in the judgments of the Inter-American Court. Some of these social constructions will also be indicated in a cross-cutting manner throughout the sections.

Section 6 summarizes the contributions of the chapter, although the final assessment of whether the *Riffo Salinas* case represents a good practice for the countries that are part of the Inter-American System will be made by the reader after reviewing this chapter and, of course, the judgment itself.<sup>12</sup>

In general, this judgment shows the coexistence, antagonism, and/or overlapping of two phenomena: on the one hand, the permanent updating of international law on the protection of rights and in this case, the adaptation to the subjects of law that are the elderly today; and on the other hand: the permanence of jurisprudential interpretations that obey social constructions on old age that correspond to previous stages of history.

## 2. *Riffo Salinas* Case Judgment

Marco Antonio Riffo Salinas, a seventy-eight-year-old man prosecuted for material and ideological falsehood and others, was granted by the Eighth Criminal Sentencing Court of the Department of La Paz, Bolivia, the cessation of his preventive detention. The cessation was appealed by the plaintiff and the Second Criminal Chamber of the Departmental Court of Justice of La Paz, which ordered the enforcement of the detention.

In February 28, 2018, the Plurinational Constitutional Court's Second Chamber annulled the challenged resolutions, ordering the issuance of a new resolution, which should respect his constitutional rights and guarantees, and provided for the immediate release of Mr. Riffo Salinas.

The legal grounds essentially revolved around the error of not taking into account that the subject was an elderly person. The decision is based on the following arguments: differential and intersectional approach to the rights of the elderly; exceptionality of the preventive detention of elderly persons; the principle or test of proportionality in the application of preventive detention based

<sup>12</sup> Plurinational Constitutional Ruling 0010/2018-S2, Sucre, February 28, 2018, La Paz, file 21259-2017-43-AL, <https://jurisprudenciaconstitucional.com/sentencias/19232-sentencia-constitucional-0010-2018-s2> (accessed December 29, 2022).

on an intersectional approach; criteria for the application of preventive detention of elderly persons; and analysis of the specific case.

On all points, except for the *criteria*, the ruling is based on the ICPHROP, as well as on Bolivian domestic law.<sup>13</sup> In the *differential and intersectional approach*<sup>14</sup> of the legal grounds as well as in the *exceptionality of the preventive detention of older adults*, reference is made to Article 5 (equality and nondiscrimination on grounds of age) of the aforementioned ICPHROP to underline the importance of intersection and multiple discrimination:

The States Parties shall develop specific approaches in their policies, plans and legislation on aging and old age, in relation to older persons in vulnerable conditions and those who are victims of multiple discrimination (...) persons deprived of their liberty.

The right to liberty and security of person of the elderly is upheld on the basis of Article 13 (right to personal liberty) of the aforementioned instrument, which mentions:

States Parties (...) shall promote alternative measures to deprivation of liberty, in accordance with their domestic legal systems.

Regarding Bolivian legislation, although there are rules such as the General Law on Older Persons (2013) that guarantee and protect the rights of this age group, and where special protection is established, the fact is that the interpretation of these rules by the Plurinational Constitutional Court of Bolivia is based primarily on the ICPHROP and complementarily on domestic law.<sup>15</sup> As for the *analysis of the specific case*, the ruling is based on Article 13 of the aforementioned instrument, which promotes the adoption of criminal precautionary measures other than those involving deprivation of liberty.

The judgment does not refer to any of the Inter-American Court judgments related to older persons that predate *Riffo Salinas (Five Pensioners v. Peru)* (2001); *Yakye Axa v. Paraguay* (2005); *Acevedo Buendía et al. v. Peru* (2009); and *García*

<sup>13</sup> Constitución Política del Estado Plurinacional (2009), Ley General de las Personas Adultas Mayores (2013), Código De Procedimiento Penal (1999).

<sup>14</sup> Intersectionality describes micro processes with respect to how each individual and group occupies a social position in interlocking structures of oppression. The dimensions and relationships of class, gender, and race/ethnicity must be studied together (Paula Dressel et al., "Gender, Race, Class, and Aging: Advances and Opportunities," in Meredith Minkler and Carroll L. Estes, *Critical Gerontology: Perspectives from Political and Moral Economy* (Baywood 1999)).

<sup>15</sup> The ruling cites Articles 3, 5.b. and c., 67.I, and 68 of the *General Law on Older Persons* (2013); Articles 13.1 and 125 of the *Political Constitution of the State* (2009); and Articles 233.2 and 234 of the *Code of Criminal Procedure* (1999).

*Lucero et al. v. Chile* (2013).<sup>16</sup> However, other rulings and votes issued by that international tribunal are present. In relation to the argument of the *exceptionality of the preventive detention of elderly people*, there is the intersectional approach that was introduced in the Inter-American System as an interpretation criterion on violence against women, whose application was later extended to the analysis of discrimination of other groups in vulnerable situations. In the *principle or test of proportionality in the application of pretrial detention based on an intersectional approach*, the Inter-American Commission established the following in its Report on the Use of Pretrial Detention:

When courts resort to pretrial detention without considering the application of other less burdensome precautionary measures, given the nature of the facts under investigation, pretrial detention becomes disproportionate.<sup>17</sup>

In turn, the Inter-American Court in its 2016 judgment on Merits, Reparations and Costs in the *Andrade Salmón v. Bolivia* case, reiterates what was mentioned in the *Chaparro Álvarez and Lapo Íñiguez v. Ecuador* case (2007):

That the purpose of the measures that restrict this right (...) will not impede the development of the procedure or evade the action of justice . . . that they are absolutely indispensable (...) and that they are measures that are strictly proportional in such a way that the sacrifice inherent to the restriction of the right is not exaggerated or disproportionate to the advantages obtained through such restriction and the fulfillment of the purpose pursued.<sup>18</sup>

*Proportionality* is also upheld in the Bolivian ruling in the reasoned opinion of Judge Sergio García Ramírez in relation to the judgment of the IACHR Court in the aforementioned case versus Ecuador, which states:

Criminal precautionary measures, like any other restriction of fundamental rights, should be: a) exceptional and not ordinary (...) b) justified within a precise framework of reasons and conditions that give them legitimacy and rationality; c) agreed upon by an independent jurisdictional authority (...); d) indispensable; e) proportional; f) limited; g) periodically reviewable;

<sup>16</sup> These cases will be reviewed in section 4, “In What Aspects Do the IACHR Court Cases on Older Persons Go Further than the Bolivian Case?” *infra*.

<sup>17</sup> IACHR, *Report on the Use of Pretrial Detention in the Americas*, OEA/SER.L/V/II, Doc. 46/13, December 30, 2013, para. 162.

<sup>18</sup> *Caso Andrade Salmón v. Bolivia* [2016], IACtHR, Ser. C No. 330, para. 147.

h) revocable or replaceable (...) All this (...) has special emphasis if one thinks of the most severe of these: the precautionary deprivation of liberty.<sup>19</sup>

An important aspect that forms a central part of the grounds of the ruling of the Bolivian Plurinational Constitutional Court in the *Riffo Salinas* case is the right to health, which had been ignored by the Second Criminal Chamber of the Departmental Court of Justice of La Paz.

### 3. How Does the ICPHROP Go beyond the Bolivian Case?

The ICPHROP was signed on June 15, 2015, within the OAS and entered into force on January 11, 2017. To date, it has been ratified by Uruguay, Costa Rica, Bolivia, Chile, Argentina, El Salvador, and Ecuador and requires three more ratifications for the follow-up mechanisms established therein to become operational. Just as well, the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Belém do Pará Convention) requires special consideration for elderly women (art. 9), while the Inter-American Convention against All Forms of Discrimination and Intolerance prohibits age-based discrimination (art. 1.1).

The ICPHROP is a cutting-edge instrument that introduces new concepts on aging and includes the civil, political, and social rights of the elderly.<sup>20</sup> It takes inequality into account—Latin America and the Caribbean is the most unequal region on the planet—as well as multiculturalism and multiple forms of aging. By determining that States must take awareness-rising measures, the treaty aims to target the root causes of discrimination against older persons. It also includes a progressive agenda,<sup>21</sup> recognizes the right to palliative care,<sup>22</sup> and adopts a

<sup>19</sup> *Case of Chaparro Álvarez and Lapo Ñíguez v. Ecuador Bolivia* [2007], IACtHR, Ser. C No. 170, reasoned opinion of Judge Sergio Ramírez, para. 7.

<sup>20</sup> For a review of the civil, political and social dimensions of the ICPHROP, see Aída Díaz-Tendero, “Dimensiones civil, política y social de la Convención Interamericana sobre la Protección de los Derechos Humanos de las Personas Mayores,” in Eduardo Ferrer Mac-Gregor and Luis Raúl Guerrero (coords.), *Derechos del Pueblo Mexicano: México a través de sus Constituciones*, vol. V, *Transversalidad constitucional con perspectiva convencional* (Instituto de Investigaciones Jurídicas/Miguel Ángel Porrúa 2016), 187–202.

<sup>21</sup> Suffice it to mention the inclusion in the right to equality and nondiscrimination on grounds of age (art. 5) of victims of multiple discrimination, such as persons of diverse sexual orientations and gender identities (see section 3.1 *infra*); the inclusion in the right to health (art. 19) of public policies on sexual and reproductive health of the elderly (see section 3.2 *infra*); the inclusion in the right to life and dignity in old age (art. 6) of palliative care and palliative care for the elderly (see section 3.3 *infra*); and the inclusion in the right to life and dignity in old age (art. 6) of palliative care and other measures to avoid unnecessary suffering and futile and useless interventions, in accordance with the right of the elderly person to express informed consent (art. 11) in the field of health (see section 3.2 *infra*).

<sup>22</sup> See Tamar Ezer, Diederik Lohman, and Gabriela B. de Luca, “Palliative Care and Human Rights: A Decade of Evolution in Standards” [2018] 55 *Journal of Pain & Symptom Management* 163,

concept of “older person.”<sup>23</sup> Although there is room for improvement,<sup>24</sup> there is also a gender perspective.<sup>25</sup>

This section will specifically review in what sense Articles 5 (equality and nondiscrimination on grounds of age) and 13 (right to personal liberty) go beyond their use in the *Riffo Salinas* judgment, and what other dimensions of the ICPHROP do the rights to liberty, life, health, and security that the judgment considers to have been violated appear in the ICPHROP.

### 3.1. Equality and Nondiscrimination on the Basis of Age and the Right to Personal Freedom

The broadening of the criteria for discrimination<sup>26</sup> in the ICPHROP is very notable: gender, disability, sexual orientation, gender identity, migration, poverty, marginalization, Afro-descent, and Indigenous origin, but also discrimination against homeless people, people in prison, people belonging to traditional peoples or ethnic, racial, national, linguistic, and religious and rural groups, as well as the multiplying effect of discrimination when several of these conditions or characteristics are added together. Article 5 (equality and nondiscrimination) represents a recognition of regional multiculturalism, responding to the vast cultural richness and heterogeneity and to the claims of the Indigenous peoples.<sup>27</sup> It also strongly emphasizes the gender perspective in the instrument.

164, 166; Francesco Seatzu, “Constructing a Right to Palliative Care: The Inter-American Convention on the Rights of Older Persons” [2015] 1 *Ius et Scientia* 25.

<sup>23</sup> See Francesco Seatzu, “Sulla convenzione dell’organizzazione dell’organizzazione degli stati americani sui diritti delle persone anziane” [2015] 31 *Anuario Espanol de Derecho Internacional* 349, 358.

<sup>24</sup> See Caitlin R. Williams, Erin C. Bennett, and Benjamin Mason Meier, “Incorporating a Gender Perspective to Realise the Health and Human Rights of Older Persons,” in Allyn Taylor and Patricia Kuzler (eds.), *Ageing, Health and International Law: Towards an International Legal Framework to Advance the Health and Human Rights of Older Persons* (2010), [https://ssrn.com/abstract\\_id=3790125](https://ssrn.com/abstract_id=3790125) (accessed December 13, 2021).

<sup>25</sup> Preamble and art. 3 (1), 12 Inter-American Convention on Protecting the Human Rights of Older Persons.

<sup>26</sup> Discrimination is understood as any distinction, exclusion, or restriction that has the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural, or any other sphere of public and private life (ICPDHPM definition).

<sup>27</sup> On Indigenous Peoples and the *Convention*, see Aída Díaz-Tendero, “La *Convención Interamericana sobre la Protección de los Derechos Humanos de las Personas Mayores* y los Pueblos Originarios,” in Jorge Olvera, Julio César Olvera, and Ana Luisa Guerrero, *Los Pueblos Originarios en los debates actuales de los Derechos Humanos* (Universidad Autónoma del Estado de México/CIALC/UNAM and MA Porrúa 2017), 237–254.

At the same time, Article 5 constitutes one of the most avant-garde elements of the ICPHROP. It incorporates sexual orientation<sup>28</sup> and gender identity<sup>29</sup> in the *corpus* of human rights of the elderly, thus breaking the homogeneous and stereotyped vision about this population.

The *Riffo Salinas* sentence also refers to Article 13, the promotion of alternative measures to the deprivation of liberty by the States. This article is particularly interesting because it establishes the guarantee by the States of access by the elderly person deprived of liberty to rehabilitation mechanisms for their reintegration into society. Underlying the spirit of the norm is the consideration of life after the period of deprivation of liberty, discarding the idea that for an incarcerated elderly person there is no future in society after the end of his or her sentence.

In the ICPHROP, freedom also appears in Article 12 dedicated to the rights of the elderly person receiving long-term care services, establishing in one of the subparagraphs of Paragraph c) on the operation of the services that “the exercise of the freedom and mobility of the elderly person shall be protected.” Other specific freedoms that appear in the ICPHROP are the right to freedom of expression (art. 14), the right to freedom of movement and the freedom to choose one’s residence (art. 15).

### 3.2. Rights to Safety, Life, and Health

The right to security is present in the ICPHROP in other articles in addition to the aforementioned Article 13. The “right to safety and to a life free from violence” (art. 9) refers to multiple types of violence and mistreatment.

Violence against the elderly includes, among others, different types of abuse, including financial and patrimonial, physical, sexual, psychological, labor exploitation, expulsion from their community and all forms of abandonment

<sup>28</sup> Sexual orientation is independent of biological sex or gender identity; it refers to the capacity of each person to feel a deep emotional, affective and sexual attraction to persons of a gender different from his or her own, of the same gender or of more than one gender, as well as the capacity to maintain intimate and sexual relations with people. It is a complex concept whose forms change over time and differ among different cultures. (United Nations, Sexual Orientation and Gender Identity in International Human Rights Law. South America, Office of the United Nations High Commissioner for Human Rights, 2012, 3).

<sup>29</sup> The internal and individual experience of gender as each person deeply experiences it, which may or may not correspond to the sex assigned at birth, including the personal experience of the body (which may involve modification of bodily appearance or function through medical, surgical, or other techniques, provided it is freely chosen) and other expressions of gender, including dress, speech, and manners (ibid.).

or neglect that take place within or outside the family or domestic unit or that are perpetrated or tolerated by the State or its agents wherever they occur.

Again, multiculturalism is reflected in the expulsion of the elderly from their community, a customary practice of certain native peoples.

Safety is also reinforced in the rights of the elderly person receiving long-term care services<sup>30</sup> in Article 12, which determines the establishment of a regulatory framework for the operation of long-term care services, including the adoption of measures to “protect the personal safety and the exercise of freedom and mobility of the elderly person.”

The right to life occupies a prominent place in Article 6 “Right to life and dignity in old age” and relates especially to the end of life, palliative care, appropriate management of problems related to the fear of death of the terminally ill, pain, unnecessary suffering, and futile and useless interventions, in accordance with the right of the elderly person to express informed consent. This article affirms life and considers death as a normal process, which should neither be accelerated nor delayed.

The right of the elderly person to make decisions and to define his or her life plan, as well as to develop an autonomous life (art. 7, right to independence and autonomy), is also a dimension of the right of the life.

The right to health enshrined in Article 19 is one of the broadest and most comprehensive of the ICPHROP. It takes into account regional socioeconomic inequality as well as multiculturalism.

The instrument’s emphasis on multiculturalism is also evident in the special attention it pays to traditional, alternative, and complementary medicine. The right to provide free and informed consent—in the field of health—in accordance with the communication needs of the elderly person and the fact that the information provided must be presented in accordance with the level of education (art. 11) shows sensitivity to regional socioeconomic inequity. Likewise, the inclusion of sexual and reproductive health and the treatment of sexually transmitted diseases in the right to health of the elderly (art. 19), as well as the right to give free and informed consent (art. 11, to accept, refuse to receive or voluntarily interrupt medical or surgical treatment and to receive clear and timely information on the possible consequences and risks of such decision), may be considered a progressive agenda in the area of health.

<sup>30</sup> Elderly person receiving long-term care services: a person who resides temporarily or permanently in a regulated facility, whether public, private, or mixed, in which he/she receives quality comprehensive social and health services, including long-stay residences, that provide these long-term care services to the elderly person with moderate or severe dependency who cannot receive care at home (CIPDHPM definition).

#### 4. In What Aspects Do the IACHR Court Cases on Older Persons Go Further than the Bolivian Case?

This section will analyze cases of the Inter-American Court of Human Rights on the elderly in relation to the *Riffo Salinas* case, in order to find some coincidences, differences, and/or complementarities. The analysis focuses on freedoms and rights that were violated in *Riffo Salinas* (to life, to health, and to liberty and security).

##### 4.1. Right to Life

In the case *Yakye Axa v. Paraguay*<sup>31</sup> (2005), the Court analyzes Article 4 (right to life) of the American Convention in relation to Article 1.1, concluding that it “includes not only the right of every human being not to be arbitrarily deprived of life, but also the right not to be subjected to conditions that prevent or hinder access to a dignified existence.”

This can be understood as a special relationship of the right to life with other rights, that is, the factors that intervene in the attainment of a dignified life such as health. Similarly, the *Riffo Salinas* case (Point III.5) sheds light into the health-life binomial: “[T]he rights to life and health must take precedence when making a determination.” The *Yakya Axa* case also calls attention to factors that hinder a dignified life, specially the extreme poverty generated by the lack of access to land ownership and natural resources. It even goes much further in this same case, and the Commission’s arguments relate the right to life to social rights, in an interpretation of Article 26 of the American Convention:

Paraguay has the duty to guarantee the conditions necessary for the attainment of a life in dignity, a duty that is underlined by the commitment contained in Article 26 of the Convention to adopt appropriate measures to achieve the full realization of social rights.<sup>32</sup>

In the same sense, the Court manifests itself in the case *Poblete-Vilches v. Chile*<sup>33</sup> (2018) when it establishes the right to life as a fundamental right for whose compliance and according to Article 4 of the American Convention:

<sup>31</sup> The lands of the Paraguayan Chaco, where the Yakye Axa Indigenous community used to live, were sold to British businessmen at the end of the nineteenth century for cattle ranching, and the Indigenous people worked for these companies in very poor conditions. In 1986, they moved to another tract of land, which also brought no improvement in their quality of life. Since 1993, the Yakye Axa Indigenous community began the corresponding procedures to claim the lands they consider their traditional habitat. The case reached the Court on March 17, 2003 (*Case Yakye Axa v. Paraguay* [2005], IACtHR, Ser. C No. 123).

<sup>32</sup> *Case Yakye Axa v. Paraguay* [2005], Ser. C No. 123, para. 157, subpara. e).

<sup>33</sup> On January 17, 2001, Mr. Vinicio Antonio Poblete Vilches, seventy-six years old, was admitted to the Sótero del Río public hospital due to severe respiratory failure. He was hospitalized for four days in

States have the obligation to ensure the creation of the conditions required to prevent violations of this right.<sup>34</sup>

## 4.2. Right to Health

It is convenient to separate allusions to the right to health from those referring to the condition of lack of health.

In the *Riffo Salinas* case, health, or rather the lack thereof, is understood as an impediment to the exercise of rights in the general sense, that is, a deficit in the exercise of rights of a civil, political, or social nature whose origin is the lack of the right to health, a social right par excellence.

It is also “the lack of health” that appears as a conditioning factor for the analysis of the evidentiary elements from a different perspective in the *Riffo Salinas* ruling.

In the case *Yakye Axa v. Paraguay*, the right to health is protected by Article 10 of the Protocol of San Salvador, which “establishes the right of ethnic and cultural groups to use their own traditional medicines and health practices, as well as the right of access to health institutions and medical care provided to the rest of the population in order to preserve their physical, mental and moral integrity,”<sup>35</sup> and the protection is reinforced because they are elderly people. If in this ruling there is a social construction of old age as vulnerability, it certainly does not appear explicitly.

The *Poblete-Vilches v. Chile* case<sup>36</sup> is the first case in which the Inter-American Court of Human Rights ruled directly on the right to health of the elderly.<sup>37</sup>

the intensive care unit. He was then admitted to the Surgical Intensive Care Unit where he underwent surgery when the patient was unconscious, without having obtained the consent of his relatives. On February 2, he was discharged early, without further instructions, and his relatives had to hire a private ambulance to take him home, since the hospital had no ambulances available. Three days later, Mr. Poblete was admitted to the same public hospital, where he remained in the intermediate care unit, despite the fact that the medical record required him to be admitted to the intensive care ward. He also required a respirator, which was not provided. Mr. Poblete-Vilches died two days later, on February 7, 2001. The relatives filed a first criminal complaint in 2001 and a second one in 2005. On December 11, 2006, the First Civil Court ordered the dismissal of the case; it was dismissed in 2007. Again, on June 30, 2008, the case was dismissed and on August 5, 2008, the case was unsealed. It reached the Court in 2018 (*Case Poblete-Vilches v. Chile* [2018], IACtHR, Ser. C No. 372).

<sup>34</sup> *Ibid.*, para. 145.

<sup>35</sup> *Case Yakye Axa v. Paraguay* [2005], IACtHR, Ser. C No. 123, partially dissenting opinion of Judge A. Abreu Burelli, para. 25.

<sup>36</sup> On the *Poblete-Vilches v. Chile* case, see Mariela Morales Antoniazzi and Laura Clericó (coords.), *Interamericanización del derecho a la salud. El caso Poblete de la Corte IDH bajo la lupa* (Instituto de Estudios Constitucionales del Estado de Querétaro 2019).

<sup>37</sup> The designation “elderly person” is used for the first time by the Court in the *Poblete-Vilches v. Chile* case, based on the ICPHROP, setting an important precedent. However, it cannot support its judgment on this instrument, due to the fact that it was ratified by the Chilean State on July 11, 2017.

The Court interprets that the protection of the right to health derives from the American Convention and relies—due to the impossibility of invoking the ICPHROP because the facts were prior to the date of when Chile ratified it (August 15, 2017)—on a multiplicity of instruments. It establishes that health is a fundamental and indispensable human right and that every human being has the right to the enjoyment of the highest attainable standard of health that enables him or her to live in dignity, health being understood not only as the absence of disease or infirmity but also as a complete state of physical, mental, and social well-being, derived from a lifestyle that allows individuals to achieve a comprehensive balance. This general obligation translates into the duty of the States to ensure people's access to essential health services, ensuring quality and effective medical care, as well as to promote the improvement of the population's health conditions.

The merits of the case state that the elderly are entitled to a reinforced protection of the right to health and, therefore, require the adoption of differentiated measures.

The Court valued the opportunity to rule for the first time specifically on the rights of the elderly in the area of health. It highlighted the importance of making the elderly visible as subjects of rights with special protection and therefore comprehensive care, with respect for their autonomy and independence. The Court considered that there is a reinforced obligation to respect and guarantee their right to health. The questioning of the social construction of old age behind this ruling should be repaired in that the exercise of the right to health is linked to the enforceability of the same by its holder, in this case, the elderly person; and in no way is it related to the fact that he or she is vulnerable or fragile. On the other hand, the immediate accompaniment of the principles of autonomy and independence reinforces the interpretation in the same sense.<sup>38</sup>

### 4.3. Right to Liberty and Security

The case of *García Lucero et al. v. Chile*<sup>39</sup> (2011) can be considered complementary to the Riffo Salinas case in relation to due process. The Bolivian case upholds

<sup>38</sup> IACtHR's more recent cases expanding social and economic rights of older persons were not yet decided at the time *Riffo Salinas* was ruled (e.g., *Muelle Flores v. Peru*, 2019). See Daniel Cerqueira, "Jurisprudencia de la corte IDH en casos sobre DESCAs: entre lo retórico y lo impredecible. Justicia en Las Américas" (Blog de la Fundación para el Debido Proceso, July 1, 2020), <https://dplfblog.com/2020/01/07/jurisprudencia-de-la-corte-idh-en-casos-sobre-desca-entre-lo-retorico-y-lo-impredecible/> (accessed January 5, 2022).

<sup>39</sup> The facts of this case take place during the Chilean dictatorship. On September 16, 1973, Mr. Leopoldo García Lucero was arrested by Carabineros in Santiago de Chile and was held incommunicado and tortured in various ways. He was then taken to a concentration camp "Chacabuco" where he remained for thirteen months. After Decree-Law 81 of 1973, Mr. García Lucero was expelled from Chile on June 12, 1975, and has been living in the United Kingdom ever since. In 1993, he sent a letter

the need to promote alternative measures to the deprivation of liberty of an elderly person (see section 2), and the *García Lucero* case raises the right to a simple and prompt recourse before competent judges or courts (art. 25(1) of the ICPHROP: judicial protection) in relation to Article 1(1) of that instrument (obligation to respect rights) on the basis of age.

In the *Poblete-Vilches* case, the right to personal liberty is interpreted in relation to the right to health, specifically, the freedom to give consent prior to surgery. The Chilean State had already accepted prior to the arrival of the case before the Inter-American Court the violation of Mr. Poblete's right to personal liberty<sup>40</sup> (art. 7, everyone has the right to liberty and security of person).

## 5. Social Constructions about Old Age and the Elderly

In the *Riffo Salinas* ruling, the social construction of old age is based on inactivity, a precarious state of health, economic scarcity, and limited social environments. It is counterintuitive to use the ICPHROP without rescuing the ideological part of the instrument, given that its leitmotif is the empowerment of the elderly, the recognition of the multiplicity of old age, and especially the breaking of the association between vulnerability and fragility, with old age.

Similarly, in the case of the IACtHR *García Lucero et al. v. Chile*, the characterization of Mr. Leopoldo García Lucero as a person in a situation of vulnerability due to the fact that he is seventy-nine years old and suffers from a permanent disability is emphasized. Regarding this characterization, it is explained that the Protocol of San Salvador indicates in its Articles 17 and 18 the relevance of "protection" to the "elderly" and "handicapped." Advanced age is also taken into account in the requirement of special diligence in the resolution of the process.

On the contrary, the construction around the elderly in the *Yakye Axa v. Paraguay* case is not monochromatic, since it has to do on the one hand with vulnerability, in that the State is expected to adopt measures aimed at maintaining their functionality and autonomy, guaranteeing the right to adequate food, access to clean water, and healthcare, but on the other hand it has to do with the

from London to the Program for the Recognition of the Politically Exonerated in Chile in which he referred to the injuries caused by the torture he received. He receives three types of monetary compensation under different laws. The case reaches the court in 2011 (*Case García Lucero et al. v. Chile* [2013], IACtHR, Ser. C No. 267).

<sup>40</sup> Of utmost interest is the Court's interpretation of liberty, defining it as "the capacity to do and not to do everything that is lawfully permitted, allowing every person to organize, in accordance with the law, his individual and social life according to his own choices and convictions" (*Case Poblete-Vilches v. Chile* [2018], IACtHR, Ser. C No. 372, para. 169).

empowerment of the elderly, visualizing them as the main oral transmitters of culture to the new generations. In other words, older persons are not only rights-holders but also duty bearers (in this sense, the specific reference to obligations in the African protection instrument is very relevant<sup>41</sup>).

This two-dimensional construction is also found in the *Poblete-Vilches v. Chile* case. The Commission constructs old age around vulnerability, specifically in relation to access to the right to health and the public health system, as well as taking into account people living in poverty. However, the Court highlights the importance of making the elderly visible as subjects of rights with special protection and therefore comprehensive care, with respect for their autonomy and independence. The empowerment of the elderly as subjects of rights and responsibilities can be seen in these principles. Of particular interest for the justiciability of Economic, Social and Cultural Rights (ESCR) is the location of the discourse of social construction. It would seem a priori that the enforceability of civil and political rights is strengthened by social constructions that empower older persons, while that of social rights is based on social constructions of old age based on vulnerability and fragility. However, this is a false dilemma. The ESCR are rights that can be demanded not on the basis of the vulnerability of those who are entitled to them but on the basis of their empowerment, in the same way that in the realm of public policies, social assistance is differentiated from social security.<sup>42</sup> Finally, social constructions based on the ownership of rights, empowerment, autonomy, and independence support the phenomena of interdependence and indivisibility of civil, political, and social rights.

On the occasions when health appears in the *Riffo Salinas* judgment, it is related to certain social constructions that relate the elderly to poor health, in accordance with the previous paradigm on old age. The following excerpt (Point III.1.) of the *Riffo Salinas* ruling shows the argument on the *differential and intersectional approach to the rights of older persons* based on certain social constructions:

Given that old age implies the loss of means of subsistence, either due to the advent of diseases and the consequent loss of health, or because they become economically inactive and are therefore limited in the exercise of their rights.

<sup>41</sup> In the African instrument, the obligations of older persons, integrated in Article 20, consist of generating and transferring knowledge to younger generations, generating intergenerational solidarity and dialogue, and resolving conflicts as mediators (African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Older Persons in Africa*, General Assembly, Twenty Sixth Ordinary Session, Addis Ababa, January 31, 2016).

<sup>42</sup> Aída Díaz-Tendero, "The State and the economic security of older adults. Marco conceptual en torno a las dimensiones de la solidaridad económica" [2015] 85 *Papeles de Población Nueva Época* 79–108.

In other words, there is a social construction of old age as a stage of losses and vulnerabilities, which may be true for a specific case, but is not true for the generality of the elderly population.

The *criteria for the application of preventive detention of the elderly* in the *Riffo Salinas* ruling establish that it is also necessary to analyze the evidence from a differentiated perspective and without requiring formalities that are difficult to comply with for the elderly (Point III.4, Paragraph a.1):

Most of them are sick, inactive at work, without patrimony and often without a family environment (...)

This is, once again, a construction of old age based on shortcomings and deficits, in this case in the health, economic, and even social spheres, which in some ways is contrary to the spirit of the ICPHROP.

In the arguments of the *analysis of the specific case* in the *Riffo Salinas* judgment, the right to health appears together with the right to life, and this time it is repeated categorically that “the elderly person has by nature a vulnerable health condition,” that is, again a negative social construction of old age in the following context (Point III.5):

Medical certifications and even a forensic medical expert report recommending the internment of the accused in a hospital due to his advanced age; (...) precisely when facing resolutions that impose precautionary measures on elderly people, the rights to life and health must take precedence when making a determination, since the elderly person has by nature a vulnerable health condition.

## 6. Concluding Remarks

The multilevel impact of the standards of the Inter-American System can be seen in the *Riffo Salinas* case in the application of the ICPHROP, in the integration of the inter-American standards established by the Court and the Commission in cases that do not involve elderly persons, and in the convergence of national and inter-American norms. Regarding its significance for the jurisprudence on the elderly as subjects of law, it is clear that the case is based on the preferential and special treatment to which the defendant is entitled because he is an elderly person.

The answer to the question of whether the case integrates the ad hoc instrument of the Inter-American System for the protection of the human rights of the elderly, the ICPHROP is affirmative and is based, specifically, on the use of

Articles 5 (equality and nondiscrimination on grounds of age) and 13 (right to personal liberty).

In relation to the degree of integration or exclusion of the inter-American standards established by the Court and the Commission, the *Riffo Salinas* judgment includes judgments and votes issued by the Inter-American Court in cases that, although they are not about older persons, are substantive for its legal argumentation, such as the Report of the Inter-American Commission on the use of pretrial detention based on the *intersectional approach*; and the cases *Lapo Íñiguez v. Ecuador* (2007) and *Andrade Salmón v. Bolivia* (2016) on *indispensability* and *proportionality*.

To answer the question of whether the case constitutes evidence of the multilegal system, converging national and inter-American regulations, it is noted in the legal grounds that both the ICPHROP and Bolivian domestic regulations are used, especially the General Law on Older Adults (2013), but also the Political Constitution of the Plurinational State (2009) and the Code of Criminal Procedure (1999).

Regarding the conclusions on the social constructions of old age and the elderly that emerge from the judgment, the ruling does reinforce a negative construction of old age and the elderly, associated with losses and vulnerabilities in different dimensions. Although it is appropriate to portray these circumstances in the characterization of specific cases, it is not correct to generalize them as a definition of old age and/or older persons. In this sense, the *Riffo Salinas* ruling goes against the spirit of the ICPHROP.

Other conclusions that emerge from the analysis of the *Riffo Salinas* case and that were not established in the initial questions are, on the one hand, the interdependence (of civil, political, and social rights) and, on the other hand, the multidimensionality of rights, specifically the right to health. The main right violated in the *Riffo Salinas* case belongs to the civil sphere (right to life), but its link with the right to health (social right), echoing *Poblete-Vilches v. Chile*, a case based on the violation of the right to health in its social dimension but which irremediably brings with it the violation of civil rights such as the right to give informed consent.

A new era in the protection of the human rights of the elderly begins, based on the instrument created specifically for this purpose and which constitutes the vanguard at the global level. The ICPHROP deepens the content and applicability of human rights to the daily reality of the elderly, as evidenced in the possibilities of Articles 5 and 13 and in the magnitude of the rights to security, freedom, life, and health.

Likewise, evidence has been presented to support the assertion that the Court's jurisprudence on the human rights of older persons has established interesting standards in relation to the right to life (*Yakye Axa v. Paraguay* and

*Poblete-Vilches v. Chile* cases, 2018), the right to health (*Yakye Axa v. Chile* and *Poblete Vilches v. Chile* cases), and the rights to liberty and security (*García Lucero et al. v. Chile* and *Poblete-Vilches v. Chile* cases).

A judge's knowledge of the human rights approach applied to aging opens his or her eyes to how his or her jurisdictional task can be strengthened with regional instruments, standards, and jurisprudence that allow understanding the phenomenon of aging and the elderly as subjects of law.

Finally, one of the pending tasks in the *Ius Constitutionale Commune en América Latina* is the inclusion of social constructions on old age and older persons that embrace the multiplicity, plurality, and heterogeneity of old age, without weakening the need for protection, the existence of intersections that enhance the vulnerability of certain older persons, and, in general, the application gap (as recognized by the European Recommendation of 2014<sup>43</sup>) of the regulations that a good number of older persons suffer to a greater extent than other age groups. Positive and plural social constructions about old age and older people have a considerable impact in the legal sphere and beyond, as recognized in the line of jurisprudence classified as therapeutic<sup>44</sup> in Anglo-Saxon gerontological law. Likewise, the way in which older people live and think about their old age today will shape the social—and legal—constructions of old age that will contextualize the lives of older people and the gerontological legal praxis of the next generation.

<sup>43</sup> Council of Europe, *Recommendation on the promotion of the human rights of older persons*, CM/Rec(2014)2, 2014.

<sup>44</sup> David B. Wexler, "Therapeutic jurisprudence in clinical practice" [1996] 153 *American Journal of Psychiatry* 455.