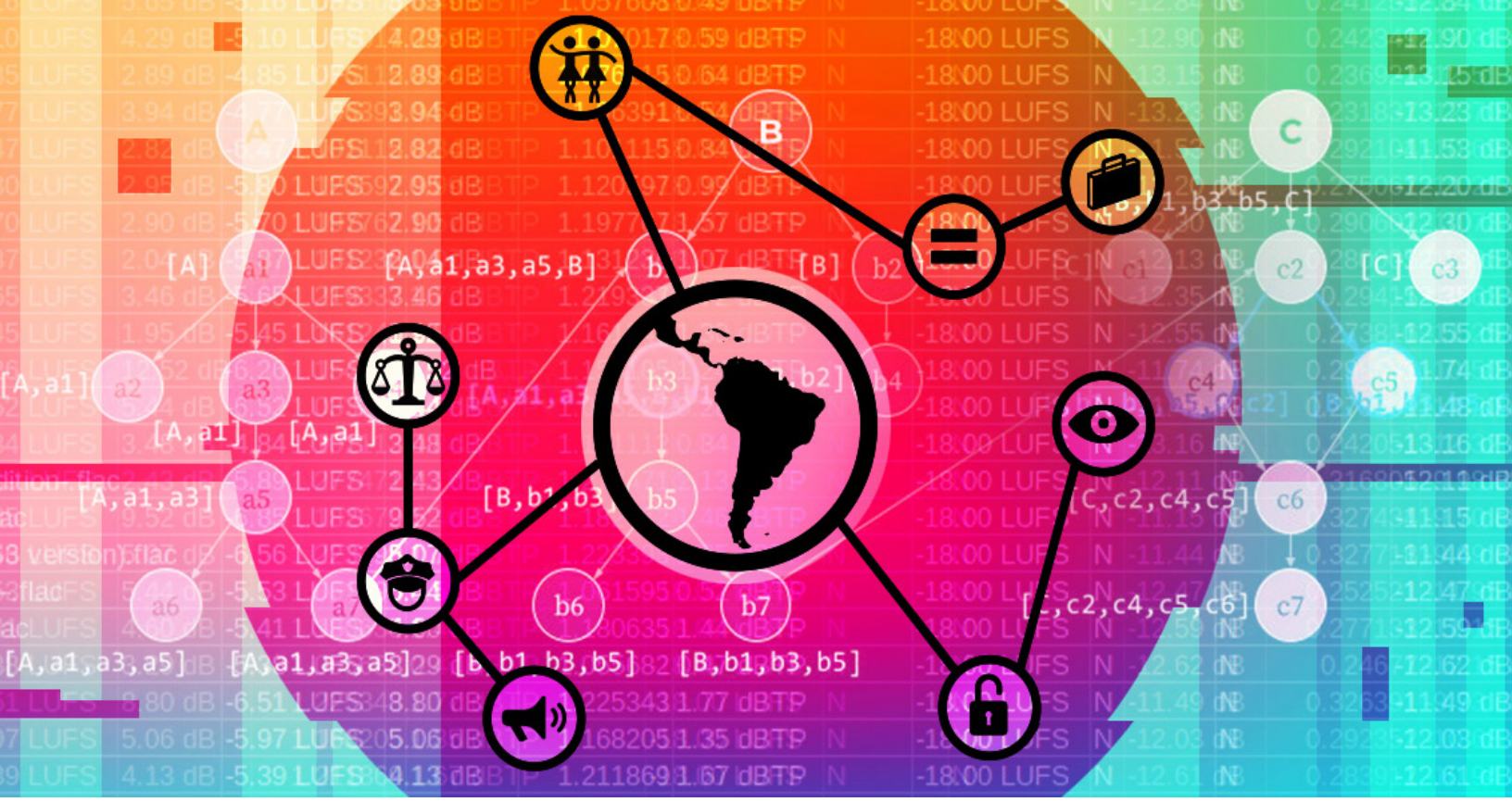

Inter-American Standards and State Use of AI for Rights-Affecting Determinations in Latin America

Human Rights Implications and Operational Framework

ELECTRONIC FRONTIER FOUNDATION

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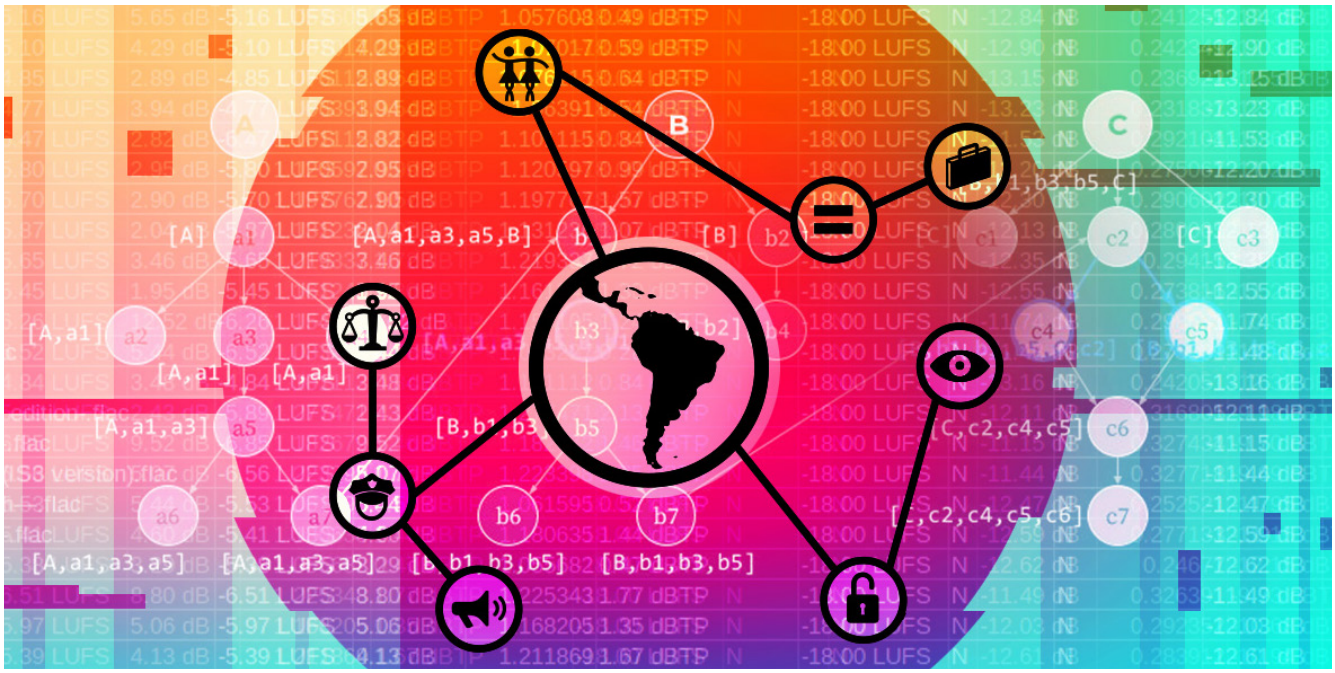

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INTRODUCTION

The use of algorithmic systems and data analytics by public institutions to support consequential decisions affecting people's lives raises many challenges to democratic governance and the legitimacy of government decision-making and policy-making. The lack of meaningful transparency and civic participation in how States develop, purchase, implement, and generally use these systems are key factors underpinning such challenges. Yet, state institutions in Latin America have increasingly deployed Artificial Intelligence (AI) and Automated Decision-Making (ADM) systems to perform important functions in law enforcement, social welfare, and other government fields with insufficient legal safeguards, institutional capacity, and meaningful social oversight.

Different studies and entities have been mapping specific uses of automated systems by state institutions in Latin American countries. To cite just a few examples, back in 2018, the World Wide Web Foundation released the report "Algorithms and Artificial Intelligence in Latin America," addressing cases in Argentina and Uruguay.[1] The organization Coding Rights developed an illustrative map of AI projects in the public sector in the region,[2] with a related report prepared by researchers Varon and Peña.[3] Derechos Digitales conducted six case studies in Brazil, Chile, Colombia, and Uruguay with partner researchers[4] and published a comparative report on related trends.[5] Intergovernmental entities, such as the Organization for Economic Cooperation and Development (OECD) and CAF - Development Bank of Latin American and the Caribbean, have also conducted research pointing out specific cases of implementation.[6]

This report draws on Inter-American Human Rights Standards to devise implications and an operational framework for their due consideration in government use of algorithmic systems for rights-affecting determinations in Latin American countries. It is important to note that the majority of States in Latin America and the Caribbean have ratified or acceded to both the American Convention on Human

1 Ortiz Freuler, J., & Iglesias, C. (2018). Algorithms and Artificial Intelligence in Latin America: A Study of Implementation by Governments in Argentina and Uruguay. World Wide Web Foundation.
2 Coding Rights. (n.d.). Projetos de I.A. do Setor Público na América Latina: Preconceito e Discriminação de Gênero e suas Interseccionalidades.
3 Varon, J., & Peña, P. (2022). Not My AI: Towards Critical Feminist Frameworks to Resist Oppressive AI Systems. Carr Center Discussion Paper Series.
4 See at <https://ia.derechosdigitales.org/pt/publicaciones/>.
5 Velasco, P., & Venturini, J. (2021). Decisiones Automatizadas en la Función Pública en América Latina: Una proximación Comparada a su Aplicación en Brasil, Chile, Colombia y Uruguay. Derechos Digitales.
6 OECD/CAF. (2022). The Strategic and Responsible Use of Artificial Intelligence in the Public Sector of Latin America and the Caribbean. OECD Public Governance Reviews, OECD Publishing.

Rights (hereinafter "American Convention" or "Convention") and the Protocol of San Salvador.[7] This report unfolds from extensive research of Inter-American Commission on Human Rights' reports and Inter-American Court of Human Rights' decisions and advisory opinions. A thorough compilation of standards and passages we considered can be found in our Appendix.

Grounding Concerns

The adoption of AI/ADM systems by public institutions takes place in a context of intensified datification,[8] particularly of individuals, groups, and communities in their relationship with the State. It is constantly intermingled with public sector "digital transformation" incentives and initiatives that tend to normalize the deployment of algorithmic systems for sensitive uses. More often than not, these processes fail to properly address required legal guarantees, state apparatus, and relationships with affected people and the broader public, which is crucial to ensure effective respect of human rights by States.[9]

Our grounding concerns revolve around at least two problematic trends. First, these processes are often shrouded in opacity with little or no social participation, aggravating and giving new shape to historical challenges of transparency and democratic participation in States' decision- and policy-making. The resulting asymmetries of information and influence hinder or even prevent the ability of society and affected groups to understand and have a say about:

- the public policy decisions, and political decisions, embedded in algorithmic systems and the values they prioritize, considering the technical and human elements involved;
- how system's designers frame as an algorithmic problem the social phenomenon that the AI/ADM-based policy or initiative seeks to address (i.e. which choices and assumptions underpin the translation of a certain issue into a mathematical model);
- how the system integrates and interacts with the social context in which it is or will be implemented;

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7 See current list of accessions and ratifications for the American Convention at <https://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights_sign.htm>. See a similar list of the Protocol of San Salvador at <https://www.cidh.oas.org/basicos/english/Basic6.Prot.Sn%20Salv%20Ratif.htm>.

8 Datification is a concept that refers to the growing use of data and its impact on social life. See Heeks, R., & Shekhar, S. (2019). Datafication, Development and Marginalised Urban Communities: An Applied Data Justice Framework. Information, Communication & Society, 22(7), 992-1011, and Masiero, S., & Das, S. (2019). Datafying Anti-Poverty Programmes: Implications for Data Justice. Information, Communication & Society, 22(7), 916-933.

9 UNESCO has been conducting important work on this front with its *Readiness Assessment Methodology and Ethical Impact Assessment* framework, drawing on and advancing in the implementation of UNESCO's Recommendation on the Ethics of Artificial Intelligence. All cited resources are available at <https://www.unesco.org/en/artificial-intelligence/recommendation-ethics>.

- the underlying logic of AI/ADM-based decisions affecting people and whether this logic is well justified in terms of model design choices and applicable legal guarantees.

Second, there is a tendency of state institutions to roll out these systems without accompanying measures, processes, and structures capable of ensuring the proper protection of human rights at all stages of implementation— from the analysis of whether to adopt the system to the periodic evaluation of its impacts.

Report's Scope and Terminology

This report focuses on States' use of algorithmic systems for rights-affecting determinations. Here is how we understand the different elements that this scope comprises:

States' or Government Use - It encompasses all State's branches (Legislative, Executive, Judiciary), different levels of public administration (national, provincial, and city levels), and the use by private third-parties when on behalf of a state institution in the context of a state policy or initiative.

Algorithmic Systems - An algorithm is a set of steps to accomplish a task. Algorithms can be simple enough to be performed by a human, but computers allow the development of algorithms that take into account a large number of inputs and steps. Machine Learning (ML) and AI techniques take that to the extreme, incorporating huge numbers of inputs and automatically generating complex algorithms from them, called models. This report uses the term AI/ADM systems to broadly encompass all algorithms performed by a computer and used in decision making, whether they are small or large, and whether or not they use AI or ML techniques.

Rights-Affecting Determinations - *Rights-affecting* determinations are those that may impact the recognition, enjoyment, and/or exercise of human rights and fundamental freedoms. Examples are AI/ADM-based selection of recipients of social security programs and health services, risk classification of defendants, fraud detection, risk assessment of families regarding potential child abuse, predictive policing, as well as recognition and inferences of patterns, information, and/or biometric data online and offline. AI/ADM-fueled state surveillance can also be generally included in our scope. The automation of workflows may be included if they are potentially sensitive to human rights (e.g., when courts rely on automated systems to establish on which cases to rule; when public hospitals use AI models to flag which patients deserve priority; or when public schools are led to use AI large language models to create lesson plans as part of an education public policy). *Determinations* generally encompass predictions, recommendations, classification, and decisions. This report uses the terms "determinations" and "decisions" interchangeably, and adopts

variations like "rights-based determinations" and "rights-related decisions" to define what we have just explained.

Another relevant distinction concerns the terms *deployer/deployment* and *developer/ development* of algorithmic systems in this report. With "deployer," we refer to the entity that uses an automated decision tool to make a rights-affecting determination, whereas by "developer," we mean a person, partnership, government entity, or company that designs, codes, produces an automated decision tool, trains AI models, or substantially modifies an automated decision-making system or service for the purpose of making, or being a controlling factor in making, rights-based determinations.[10]

Although important related elements, data management and stewardship, or implications and recommendations concerning the ownership of related technological infrastructure are not addressed in this report. They deserve specific, complementary elaboration also grounded in human rights law and standards.

Inter-American Human Rights System: Institutions, Instruments, and Rights Considered

This report focuses on the guarantees of the American Convention and the Protocol of San Salvador, without prejudice to the body of norms and safeguards foreseen in other human rights instruments and documents within or outside the Inter-American System, such as United Nations' instruments and mechanisms. Our scope considers that the great majority of the States in Latin America has committed to the American Convention, and that most of them have also ratified or acceded to the Protocol of San Salvador. This means they are bound by human rights obligations derived from these two instruments of international human rights law (*see Chapter 1*) and, as such, must take the necessary steps to properly fulfill such rights and obligations. Relatedly, the term "conventional rights" as we use in this report is a general reference to rights enshrined in the American Convention and the Protocol of San Salvador.

Our research has centered on judgments and advisory opinions issued by the Inter-American Court (hereinafter "Court" or "Inter-American Court") and reports released by the Inter-American Commission (hereinafter "Commission" or IACHR) and its Special Rapporteurs. It is important to note that Inter-American Court rulings constitute an international precedent, establishing measures States must comply with[11]

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10 The definitions used in our distinction take inspiration from the proposed California law A.B.331, available at <https://legiscan.com/CA/text/AB331/id/2785846>.

11 "Article 63.1 of the American Convention on Human Rights constitutes the conventional basis for the Court to determine in its Judgments what are the measures that the State must adopt to comply with said obligation of repair. [...] Said article also grants the Inter-American Court a wide margin of judicial discretion to determine the

and fixing authoritative interpretation that must inform the actions of all States bound by the American Convention.

Moreover, while cognizant of the interdependence and indivisibility of human rights, the research underpinning this report focused on specific rights, which we address in greater detail in Chapter 4. We should note that most of these rights represent cross-cutting guarantees in government use of algorithmic systems for rights-related determinations. At the same time, we do not specifically address significant rights, such as the right to work and the right to education, or environmental issues and rights more broadly. The report does not cover either the intersection between States' use of AI/ADM systems and specific human rights guarantees applicable to migrants and people on the move, although many rights and standards we analyzed also provide protection and require due consideration for these groups. We should note that migrants, people in transit, and undocumented immigrants are included in what we refer to as groups in situations of historical discrimination.

A similar situation occurs with the rights of children and adolescents. In this case, we do not tackle in depth the human rights framework applicable to their protection,[12] but we elaborate on safeguards related to due process and the right to a private and dignified life in government decisions that may result in the separation of children from their families.

This report is divided into 5 chapters. The first two chapters cover standards that underpin the application and interpretation of the American Convention and the Protocol of San Salvador more broadly. The third chapter delves into the Inter-American System's guarantees within government policymaking, while the fourth chapter elaborates on specific conventional rights. Each of these chapters contains a summary of related Inter-American Human Rights Standards and a set of *implications* we have derived from such standards. The fifth, and final, chapter draws conclusions and recommendations. We underline what are the essential baseline and basic tenets of the Inter-American System for state use of algorithmic systems when making rights-affecting determinations. We also establish crucial aspects of transparency-related rights for such determinations and develop an operational framework to materialize Inter-American guarantees and implications into States' action.

measures that will allow the consequences of the violation to be repaired. On the other hand, Article 68 of the American Convention establishes the conventional obligation that States have to implement, both in the international and internal sphere, in good faith, and in a prompt and complete manner, the provisions of the Court in the Judgments, and Failure to comply with the State may incur an international wrongful act. [...]" Inter-American Court of Human Rights. Learn about the Monitoring Compliance with Judgment at <https://www.corteidh.or.cr/conozca_la_supervision.cfm?lang=en>.

12 In 2021, the UN Special Rapporteur on the Right to Privacy presented a report on Artificial Intelligence and Children's privacy. United Nations, Artificial Intelligence and Privacy, and Children's Privacy, Report of the Special Rapporteur on the Right to Privacy, Joseph A. Cannataci, A/HRC/46/37, January 25, 2021. See also Instituto Alana & InternetLab. (2020). O Direito das Crianças à Privacidade: Obstáculos e Agendas de Proteção à Privacidade e ao Desenvolvimento da Autodeterminação Informacional das Crianças no Brasil. Joint Contribution to the UN Special Rapporteur on the Right to Privacy.

Please note that we compiled the main excerpts of documents, rulings, and advisory opinions that we considered in our analysis in an Appendix that accompanies this report. For a more extensive consultation of them, we invite you to check this Appendix.

1. States' Commitments Under the Inter-American Human Rights System

1.1. Obligation to Respect Rights

States' obligation to respect rights, recognized in Article 1 of the Convention, entails their duty to carry out measures to respect conventional rights and freedoms such as freedom of expression, freedom of religion, and freedom of assembly. States must also ensure that everyone can exercise such rights and freedoms freely and fully without discrimination. (*see also Section 4.3*). To accomplish this obligation, States must "organize the government apparatus and, in general, all the structures through which public powers are exercised [...]."[13]

Relatedly, the obligation to respect rights includes States' duties to prevent, investigate, punish, and provide redress to any violation of conventional rights.

Human Rights Violations

The Court argues that States have "a legal duty to take reasonable steps to prevent human rights violations [...],"[14] and such a duty to prevent "includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights [...]."[15] As a consequence, States must "ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages."[16] The Court has also clarified that "the obligation to prevent is an obligation of means or conduct, and failure to comply with it is not proved by the mere fact that a right has been violated."[17]

Moreover, the Court also understands that "[a]ny impairment of those rights which can be attributed to the action or omission of any public authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by the

13 Case of the Santo Domingo Massacre v. Colombia, Preliminary Objections, Merits and Reparations, Judgment of November 30, 2012, para. 189.
14 Case of Velásquez-Rodríguez v. Honduras, Merits, Judgment of July 29, 1988, para. 174.
15 Case of Velásquez-Rodríguez v. Honduras, supra note 14, para. 175.
16 Case of Velásquez-Rodríguez v. Honduras, supra note 14, para. 175.
17 Case of Velásquez Paiz et al. v. Guatemala, Preliminary Objections, Merits, Reparations and Costs, Judgment of November 19, 2015, para. 107.

Convention,"[18] which means that "[w]henever a State organ, official or public entity violates one of those rights, this constitutes a failure of the duty to respect the rights and freedoms set forth in the Convention."[19]

States' Obligation to Adopt Measures concerning Economic, Social and Cultural Rights (ESC rights): The Protocol of San Salvador prescribes in Article 1 the need not only to respect ESC rights but also to take measures to achieve them progressively. Accordingly, the Convention establishes States' commitment to the "progressive development" of ESC rights in Article 26 (*see also Section 2.4*).

1.2. Domestic Legal Effects

Article 2 of the Convention sets States' duty to adopt domestic legislative or other measures to give effect to conventional rights where domestic legal frameworks and related practices still fail to properly ensure these rights. The Commission has stated that States' obligation to adapt national legislation, policies, and practices to Inter-American standards encompasses the Inter-American legal *corpus* as a whole,[20] which reaches all States' legal situations.[21]

The Court has also established that "according to international law, the obligations that it imposes must be honored in good faith and domestic laws cannot be invoked to justify their violation."[22] Accordingly, state authorities and bodies in general have the obligation to take Inter-American Human Rights standards into consideration when carrying out their duties, which involves both their actions and omissions.[23]

Domestic Laws and Conventionality Control

According to the Court, adapting domestic law to the Convention implies both suppressing and creating laws. In this sense, States must (i) "avoid promulgating laws that may impede the free exercise of these rights, as well as preventing the

18 Advisory Opinion OC-18/03 of September 17, 2003, Juridical Condition and Rights of Undocumented Migrants, para. 76.
19 Advisory Opinion OC-18/03, supra note 18, para. 76.
20 IACHR, Compendium on the Obligation of States to adapt their Domestic Legislation to the Inter-American Standards of Human Rights, January 25, 2021, para. 18.
21 IACHR, Compendium on the Obligation of States to adapt their Domestic Legislation to the Inter-American Standards of Human Rights, supra note 20, para. 21.
22 Case of Almonacid-Arellano et al. v. Chile, Preliminary Objections, Merits, Reparations and Costs, Judgment of September 26, 2006, para. 125, citing Advisory Opinion OC-14/94 of December 9, 1994, International Responsibility for the Issuance and Application of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights), para. 35.
23 IACHR, Compendium on the Obligation of States to adapt their Domestic Legislation to the Inter-American Standards of Human Rights, supra note 20, para. 34.

amendment or suppression of any laws which protect those rights;"[24] (ii) promote "the elimination of the norms and practices of any nature that entail a violation of the guarantees established in the Convention or that disregard the rights recognized therein or impede their exercise;"[25] and (iii) enact "laws and the implementation of practices leading to the effective observance of the said guarantees ('[which] obliges the State to prevent the recurrence of human rights violations [...] to this end, [the State] must adopt all the necessary legal, administrative and other measure to avoid similar facts occurring in the future')."[26]

The Court has also stated that "when a State is Party to an international agreement such as the American Convention, all its organs, including its judges and all other entities linked to the administration of justice, are also subject to it."[27] As a consequence, the body points out that "[t]he judges and entities engaged in the administration of justice at all levels are required to undertake 'Convention control' [or 'conventionality control'] *ex officio* between domestic law and the American Convention in the context of their respective competencies and the corresponding procedural regulations,"[28] and, when performing this sort of task, those legal authorities "must take into account not only the Convention, *but also the interpretation thereof by the Inter-American Court, in its role as the final authority on the interpretation of the American Convention*."[29]

Domestic Legal Effects and ESC Rights: the Protocol of San Salvador sets a similar obligation regarding ESC rights. Article 2 of the Protocol explicitly stipulates that "[i]f the exercise of the rights set forth in [the] Protocol is not already guaranteed by legislative or other provisions the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of [the] Protocol, such legislative or other measures as may be necessary for making those rights a reality."

24 Case of Atala Riffo and Daughters v. Chile, Merits, Reparations and Costs, Judgment of February 24, 2012, para. 279.
25 Adapted from Case of Fornerón and Daughter v. Argentina, Merits, Reparations, and Costs, Judgment of April 27, 2012, para. 131, citing Case of Salvador Chiriboga v. Ecuador, Preliminary Objection and Merits, Judgment of May 6, 2008, para. 122, and Case of Fontevecchia and D'Amico v. Argentina, Merits, Reparations and Costs, Judgment of November 29, 2011, para. 85.
26 Adapted from Case of Fornerón and Daughter v. Argentina, supra note 25, para. 131, citing Case of Salvador Chiriboga v. Ecuador, supra note 25, para. 122, and Case of Fontevecchia and D'Amico v. Argentina, supra note 25, para. 85.
27 Case of Atala Riffo and Daughters v. Chile, supra note 24, para. 281.
28 Case of Atala Riffo and Daughters v. Chile, supra note 24, para. 282, citing Case of Almonacid-Arellano et al. v. Chile, supra note 22, para. 124, and Case of Fontevecchia and D'Amico v. Argentina, supra note 25, para. 93.
29 Case of Atala Riffo and Daughters v. Chile, supra note 24, para. 282 (emphasis added).

1.3. Restrictions Regarding Interpretation

Article 29 of the Convention establishes restrictions for States' interpretation of conventional provisions. The article aims to prevent the treaty from being interpreted a) to suppress or restrict conventional rights and freedoms, or to restrict them to a greater extent than the Convention provides for; b) to restrict recognized rights or freedoms based on national laws or other conventions; c) to exclude rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or d) to exclude or limit the effect that the American Declaration and other international acts of the same nature may have.

Two principles are crucial for guiding States' interpretation of conventional norms. First, States must abide by the *pro persona* principle. According to the Court, compliance with this principle means that "when interpreting the Convention it is always necessary to choose the alternative that is most favorable to protection of the rights enshrined in said treaty, based on the principle of the rule most favorable to the human being."[30]

The second is the principle of "good faith." The Court has emphasized the language of the Vienna Convention establishing that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to [its] terms in their context and in the light of its object and purpose" (Article 31). Drawing on the interpretation rules of the Vienna Convention, mainly Articles 31 and 32, the Court stated that these rules "must be interpreted as a whole," which means that the "usual meaning of the terms 'in good faith,' 'object and purpose of the treaty' and the other criteria combine to unravel the meaning of a specific provision."[31] The Court also indicated that "[s]upplementary means of interpretation, especially the preparatory work of the treaty, may be used to confirm the meaning resulting from the application of [...] [conventional] provisions,"[32] since this is a method of interpretation that "respects the principle of the primacy of the text, that is, the application of objective criteria of interpretation."[33]

30 Case of the "Mapiripán Massacre" v. Colombia, Merits, Reparations, and Costs, Judgment of September 15, 2005, para. 106, citing Case of Ricardo Canese v. Paraguay, Merits, Reparations and Costs, Judgment of August 31, 2004, para. 181; Case of Herrera-Ulloa v. Costa Rica, Preliminary Objections, Merits, Reparations and Costs, Judgment of July 2, 2004, para. 184; and Case of Baena-Ricardo et al. v. Panama, Merits, Reparations and Costs, Judgment of February 2, 2001.
31 Case of González et al. ("Cotton Field") v. Mexico, Preliminary Objection, Merits, Reparations and Costs, Judgment of November 16, 2009, para. 33.
32 Advisory Opinion OC-3/83 of September 8, 1983, Restrictions to the Death Penalty (Arts. 4(2) And 4(4) American Convention on Human Rights), para. 49.
33 Advisory Opinion OC-3/83, supra note 32, para. 50.

1.4. States' Responsibility, Judicial Protection, and Reparation

The Court has highlighted that States' responsibility towards human rights arises from public authorities' actions and omissions. According to the Court, "[a]ny impairment of those rights which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by the Convention."[34] The Court has also asserted that "the intent or motivation of the agent who has violated the rights recognized by the Convention is irrelevant [...]. What is decisive is whether a violation of the rights recognized by the Convention has occurred with the support or the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible."[35]

Human rights violations perpetrated by private agents may also result in States' liability. The Court has stated that "under the American Convention international liability comprises the acts performed by private entities acting in a State capacity, as well as the acts committed by third parties when the State fails to fulfill its duty to regulate and supervise them."[36] It means that the obligation to guarantee rights "encompasses the duty to prevent third parties, in the private sphere, from violating the protected rights"[37] and, in this context, "the particular circumstances of the case must be examined and whether the obligation to guarantee rights has been met."[38]

Judicial Protection and Access to Justice

Article 25 of the Convention ensures the right to judicial protection. Elaborating on such protection, the Court asserted that it is State's "obligation to offer to all persons subject to their jurisdiction an effective judicial recourse to contest acts that violate their fundamental rights."[39] It has also noted that "[t]he inexistence of an effective recourse against violations of the rights established in the Convention constitutes a violation thereof by the State Party."[40] Moreover, "it is not enough that recourses exist

34 Case of Velásquez-Rodríguez v. Honduras, supra note 14, para. 164.
35 Case of Velásquez-Rodríguez v. Honduras, supra note 14, para. 173.
36 Case of Ximenes-Lopes v. Brazil, Merits, Reparations and Costs, Judgment of July 4, 2006, para. 90.
37 Case of the Miskito Divers (Lemoth Morris et al.) v. Honduras, Judgment of August 31, 2021, para. 44, citing Case of the "Mapiripán Massacre" v. Colombia, supra note 30, para. 111, and Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their Families v. Brazil, Preliminary Objections, Merits, Reparations and Costs, Judgment of July 15, 2020, para. 117.
38 Case of the Miskito Divers (Lemoth Morris et al.) v. Honduras, supra note 37, para. 44, citing Case of the Pueblo Bello Massacre v. Colombia, Merits, Reparations and Costs, Judgment of January 31, 2006, para. 123, and Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their Families v. Brazil, supra note 37, para. 117.
39 Case of Claude-Reyes et al. v. Chile, Merits, Reparations and Costs, Judgment of September 19, 2006, para. 128.
40 Case of Claude-Reyes et al. v. Chile, supra note 39, para. 130, citing Case of YATAMA v. Nicaragua, Preliminary Objections, Merits, Reparations and Costs, Judgment of June 23, 2005, para. 168; Case of Yakye Axa Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment of June 17, 2005, para. 61; and Case of the "Five Pensioners" v. Peru, Merits, Reparations and Costs, Judgment of February 28, 2003, para. 136.

formally; they must be effective" and such a duty "implies that the recourse must be appropriate to contest the violation, and that its implementation by the competent authority must be effective."[41]

Effective judicial protection entails proper access to justice, so that people can demand remedies, investigation, and punishment of those responsible for human rights violations. According to the Court, compliance with "access to justice must ensure, within a reasonable time, the right of the presumed victims or their next of kin that everything necessary is done to discover the truth of what happened and to investigate, prosecute and duly punish those eventually found responsible."[42] In order to comply with such a duty, the Court affirms that "States have the obligation to eliminate existing legal and administrative barriers that limit access to justice, and adopt those aimed at achieving its effectiveness,"[43] in addition to addressing "cultural, social, physical or financial barriers that prevent access to judicial or extrajudicial mechanisms for persons belonging to groups in situations of vulnerability."[44]

Remedies and Reparations

The Court has highlighted that "the absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking."[45] On this basis, "for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective."[46] As for

41 Case of Claude-Reyes et al. v. Chile, supra note 39, para. 131, citing Case of Ximenes-Lopes v. Brazil, supra note 36, para. 192; Case of Baldeón-García v. Perú, Merits, Reparations, and Costs, Judgment of April 6, 2006, para. 144; Case of Acevedo-Jaramillo et al v. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment of February 7, 2006, para. 213; Case of López-Álvarez v. Honduras, Merits, Reparations and Costs, Judgment of February 1, 2006, para. 139; Case of Palamara-Iribarne v. Chile, Merits, Reparations and Costs, Judgment of November 22, 2005, para. 184; and Case of Acosta-Calderón v. Ecuador, Merits, Reparations and Costs, Judgment of June 24, 2005, para. 93.
42 Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia, Preliminary Objections, Merits, Reparations and Costs, Judgment of November 14, 2014, para. 435, citing Case of Bulacio v. Argentina, Merits, Reparations and Costs, Judgment of September 18, 2003, para. 114, and Case of the Human Rights Defender et al. v. Guatemala, Preliminary Objections, Merits, Reparations and Costs, Judgment of August 28, 2014, para. 199.
43 Case of the Miskito Divers (Lemoth Morris et al.) v. Honduras, supra note 37, para. 50, citing United Nations, Guiding Principles on Business and Human Rights: Implementing the United Nations, "Protect, Respect and Remedy" Framework, HR/PUB/11/04, 2011, principles 25-31.
44 Case of the Miskito Divers (Lemoth Morris et al.) v. Honduras, supra note 37, para. 50, citing United Nations, Guiding Principles on Business and Human Right, supra note 43, principles 25-31.
45 Advisory Opinion OC-18/03, supra note 18, para. 108, citing Case of the "Five Pensioners" v. Peru, supra note 40, para. 136; Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations and Costs, Judgment of August 31, 2001, para. 113; Case of Ivcher-Bronstein v. Peru, Merits, Reparations and Costs, Judgment of February 6, 2001, paras. 136-137; and Advisory Opinion OC-9/87 of October 6, 1987, Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights), para. 24.
46 Advisory Opinion OC-18/03, supra note 18, para. 108, citing Case of the "Five Pensioners" v. Peru, supra note 40, para. 136; Case of Acosta-Calderón v. Ecuador, supra note 41; Case of Ivcher-Bronstein v. Peru, supra note 45, paras. 136-137; and Advisory Opinion OC-9/87, supra note 45, para. 24.

the corresponding reparation, it "requires, wherever possible, full restitution (*restitutio in integrum*), which consists of reinstating the situation prior to the violation."[47]

IMPLICATIONS

- As per Article 1(1) of the American Convention, State Parties of the American Convention are obligated to respect and guarantee human rights, which includes the duty to prevent, investigate, and punish human rights violations, as well as to provide effective remedies and proper reparation when these violations occur.
- The obligation to respect rights and freedoms enshrined in Article 1(1) of the ACHR, without prejudice of other international human rights instruments, is the essential baseline of any State's development and/or use of AI/ADM systems that can affect the recognition or exercise of such rights and freedoms considered in their interdependence.
- When adopting AI/ADM systems to support rights-related decision-making, States must have the proper processes and apparatus in place to prevent human rights violations or provide effective remedies and reparations in case they occur, including when perpetrated by private third parties.
- States must also take steps to ensure that all those affected have the means to freely and fully exercise their rights regarding the decision-making process and the institutions in charge of them.
- This entails having domestic legal and institutional frameworks equipped with instruments, practices, and safeguards capable of fulfilling the protection of conventional rights. Norms and practices underpinning the violation of conventional rights and freedoms must be reformed, repealed, or nullified.
- States' obligations before the American Convention and its protocols are not limited to the literal meaning of the provisions. They encompass the Inter-American Court's case law, which is the ultimate interpreter of the Convention.
- All state institutions and those acting on their behalf, including judges and entities engaged in the administration of justice, are subject to commitments the State undertook before the Inter-American System. As such, local courts have the duty to exercise "conventionality control" over domestic laws governing the use of AI/ADM systems in situations or through procedures that are illicit under the Convention. This also entails control of norms that prevent the proper exercise of conventional rights and freedoms before the implementation and operation of such systems.
- When assessing the development, deployment, and/or implementation of AI/ADM systems vis-à-vis their obligations under conventional rights, state bodies and officials must interpret the Convention in good faith and adopt the most favorable interpretation to the protection of people affected, that is, they must abide by the *pro persona* principle.

47 Case of Atala Riffo and Daughters v. Chile, supra note 24, para. 241, citing Case of the "Mapiripán Massacre" v. Colombia, supra note 30, para. 294, and Case of Barbani Duarte et al. v. Uruguay, Merits, Reparations and Costs, Judgment of October 13, 2011, para. 2.

- Good faith Interpretations of the Convention involve observing the ordinary meaning of its terms and protocols "in their context and in the light of [their] object and purpose." It also involves applying objective criteria to interpret the Convention and following interpretations that align with the rules and values of international human rights laws (in accordance with Article 31 of the Vienna Convention).[48] Conclusions must also reflect the understanding of human rights treaties as *living instruments*, meaning they must resonate with current living conditions.[49]

- State bodies and officials must keep in mind that the interpretation of conventional provisions cannot imply that rights and freedoms be suppressed or restricted in excess of what's allowed under the Convention. Likewise, such interpretation cannot exclude other rights or guarantees that are inherent in the human personality or intrinsic to democratic societies.

- This has many implications, one of which being that States should not justify the arbitrary implementation of AI/ADM systems (*see Chapter 5*) by invoking a commitment to comply with the progressive development of Economic, Social and Cultural rights (ESC rights) or the imperative to protect other specific conventional rights and freedoms.

- Any human rights violation resulting from States' adoption of these systems must be adequately investigated, and necessary measures must be taken to establish its causes and those responsible.

- If a violation relates to the AI/ADM system component of a state policy or activity, States are responsible for its impacts, as what matters is whether the rights violation "has occurred with government support or acquiescence," or whether the "State has allowed the act to take place without taking measures to prevent it or to punish those responsible." This encompasses both acts and omissions of public authorities or private agents acting in a State capacity, regardless of their intent or motivation, or whether their individual identity is known.

- Investigations of related human right violations must provide inputs for a strict assessment of the system and the various relevant elements surrounding its use, leading either to effective modifications or discontinuation. This does not replace or exclude States' responsibility to carry out periodic evaluations and independent audits to assure the system operates according to human rights standards.

- The outcomes of the investigation must also set precedents for state bodies using or seeking to use similar systems. This is as an essential measure to prevent the recurrence of human rights violations.

- States must ensure effective appeals mechanisms and judicial protection for those whose rights are impaired by the use of AI/ADM systems within public institutions' functions and policies (*see also Section 4.4*). This involves eliminating legal and administrative barriers limiting access to judicial and extrajudicial remedies, as well as addressing cultural, social, physical, or financial barriers for people in vulnerable groups (*see also Section 4.3*).

- Any human rights violation resulting from States' adoption of AI/ADM systems must give rise to an effective remedy and proper reparation of any damages caused, and

48 Case of González et al. ("Cotton Field") v. Mexico, supra note 31, para. 33.
49 Case Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica, Merits, Reparations and Costs, Judgement of 28 November, 2012, para. 245.

reinstate, whenever feasible and appropriate, the preexisting situation and rights. Properly redressing violations relating to the allocation of state welfare subsidies and benefits entails putting the person in the position they would enjoy if they had been given a just outcome.

2. Guidelines for Admissible States' Restrictions and/or Limitations to Rights

Article 30 of the American Convention addresses restrictions that States may place on the enjoyment or exercise of conventional rights. According to this provision, those limitations "may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established." This chapter presents concepts and interpretations that are relevant to establish whether a right restriction or limitation complies with the Convention.

2.1. The Meaning of "Laws" and Related Implications

The Court has stated that the word "laws" in Article 30 of the Convention refers to "normative acts directed towards the general welfare, passed by a democratically elected legislature and promulgated by the Executive Branch," which means that "[o]nly formal law [...] can restrict the enjoyment and exercise of the rights recognized by the Convention."[50] Therefore, to qualify as "law" it must be "a general legal norm tied to the general welfare, passed by democratically elected legislative bodies established by the Constitution, and formulated according to the procedures set forth by the constitutions of the States Parties for that purpose."[51] The Court has also clarified that "Article 30 cannot be regarded as a kind of general authorization to establish new restrictions to the rights protected by the Convention, additional to those permitted under the rules governing each one of these. The purpose of the article, on the contrary, is to impose an additional requirement to legitimize individually authorized restrictions."[52]

This reflects the requirements of the legality principle and legitimacy for any rights' restriction or limitation. In this sense, the Court has asserted that "[u]nder democratic constitutionalism, the requirement of law (*reserva de ley*) in cases of interference in the realm of freedom is essential to the legal protection and full existence of

50 Advisory Opinion OC-6/86 of May 9, 1986, The Word "Laws" in Article 30 of the American Convention on Human Rights, para. 35.
51 Advisory Opinion OC-6/86, supra note 50, para. 38.
52 Advisory Opinion OC-6/86, supra note 50, para. 17. See also Case of Members of the "José Alvear Restrepo" Lawyers Co llective v. Colombia, Preliminary Objections, Merits, Reparations and Costs, Judgment of October 18, 2023, para. 529.

human rights. For the principles of legality and requirement of law (*reserva de ley*) to be an effective guarantee of the rights and freedoms of the individual, not only must the latter be formally proclaimed but there must also be a system that will effectively ensure their application and an effective control of the manner in which the organs exercise their powers."[53] Stressing the close relation between legality and legitimacy, the Court has emphasized that for purposes of interpreting Article 30 "the concepts of legality and legitimacy coincide, inasmuch as only a law that has been passed by democratically elected and constitutionally legitimate bodies and is tied to the general welfare may restrict the enjoyment or exercise of the rights or freedoms of the individual."[54]

In a nutshell, considering Article 30 in conjunction with other articles, the Court explained that States must concurrently meet three conditions to legitimately restrict or limit conventional rights: (a) the limitation must be expressly authorized by the Convention and meet the special conditions required; (b) the ends of such restriction must be legitimate, that is, *it must pursue reasons of general interest and not stray from such purpose*, which is a means to control any misuse of power; and (c) the restriction or limitation must be established by law and applied accordingly.[55]

2.2. General Interest and General Welfare

"General interest" and "general welfare" are important concepts in assessing whether the restriction or limitation of conventional rights are legitimate. As mentioned above, Article 30 of the Convention sets that restrictions or limitations to these rights must be "in accordance with laws enacted for reasons of *general interest* and in accordance with the purpose for which such restrictions have been established." Article 32 recognizes that every person has responsibilities to their family, community, and humanity, establishing that "the rights of each person are limited by the rights of others, by the security of all, and by the just demands of the *general welfare*, in a democratic society."

The two concepts are intertwined. According to the Court,"laws enacted for reasons of general interest [...] must have been adopted for the 'general welfare' (Art. 32(2)), a concept that must be interpreted as an integral element of public order (ordre public) in democratic states."[56] The Court has stated that "[w]ithin the framework of the Convention," the concept of general welfare refers "to the conditions of social life that allow members of society to reach the highest level of personal development and the optimum achievement of democratic values [...]."[57] The Court has also

53 Advisory Opinion OC-6/86, supra note 50, para. 24.
54 Advisory Opinion OC-6/86, supra note 50, para. 37.
55 Advisory Opinion OC-6/86, supra note 50, para. 18.
56 Advisory Opinion OC-6/86, supra note 50, para. 29.
57 Advisory Opinion OC-5/85 of November 13, 1985, Compulsory Membership in an Association Prescribed by Law for

emphasized that the concepts of "public order" and "general welfare" when "invoked as a ground for limiting human rights, must be subjected to an interpretation that is strictly limited to the 'just demands' of 'a democratic society,' which takes account of the need to balance the competing interests involved and the need to preserve the object and purpose of the Convention."[58]

ESC Rights and Restrictions to them: The Protocol of San Salvador also regulates the "Scope of restrictions and limitations" of rights in its Article 5. This provision stipulates that States may establish restrictions and limitations on the enjoyment and exercise of the rights established in the Protocol "by means of laws promulgated for the purpose of preserving the general welfare in a democratic society only to the extent that they are not incompatible with the purpose and reason underlying those rights."

2.3. Legitimate Aim, Necessity and Proportionality

In addition to a proper legal basis, restrictions or limitations to conventional rights must pursue a legitimate aim and be suitable, necessary, and proportionate for achieving such aim. The combined analysis of legality, legitimate aim, and the standards of adequacy, necessity, and proportionality is known as the three-part test and has been fleshed out by Court's decisions and Commission's reports when addressing various rights (*See Section 4 for guidelines towards specific rights*).

The Commission has summarized the elements of this analysis, provided the legality principle is fulfilled: "in order to determine whether or not the restriction of a right is acceptable in terms of the treaty concerned, both the Commission and the Court have resorted to a scaled judgment of proportionality, which includes the following elements: (i) the existence of a legitimate goal; (ii) suitability, that is, the determination of whether or not there is a logical means-to-end relationship between the goal sought and the distinction; (iii) necessity, that is, to determine if there are less restrictive but equally suitable alternatives; and (iv) proportionality in the strict sense of the word, that is, striking a balance between the interests at stake and the level of sacrifice required from one party compared to the level of benefit of the other."[59] It is important to note that the necessary standard "is not synonymous with 'useful,' 'reasonable' or 'convenient.' In order for a limitation to be legitimate [...] the legitimate

the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), para. 66.
58 Advisory Opinion OC-5/85, supra note 57, para 67.
59 IACHR, Report No. 157/19, Case 12.432, Former Workers of the Judiciary v. Guatemala, Merits, September 28, 2019, para. 89, citing IACHR, Application before the Inter-American Court of Human Rights, Karen Atala and Daughters v. Chile, September 17, 2012, para. 86; Case of Atala Riffo and Daughters v. Chile, supra note 24, para. 164. See also Case Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica, supra note 49, para. 274.

and compelling objective cannot reasonably be accomplished by any other means less restrictive to human rights."[60]

As for the "legitimate goal" (or "compelling objective"), the Court has stated that "[t]he content of the American Convention itself indicates what are to be considered legitimate aims that authorize the restriction of rights (Articles 13, 15, 16 and 22 of the Convention, in harmony with the text of the International Covenant on Civil and Political Rights, Articles 12, 14, 19, 21 and 22). Accordingly, the following are legitimate aims in this regard: a) the protection of national security; b) the maintenance of public order; c) the safeguarding of public health; and d) the protection of human rights."[61] This legitimate aim must be "understood as 'necessary in a democratic society'." The Court adds that these goals "are revealed as 'legitimate aims' according to their correspondence with the aim that, ultimately, is the basis and guide for the existence of a Rule of Law, [...] the protection of the essential rights [of the human person] and the creation of circumstances that allow them to progress spiritually and materially."[62] The Court also explained that "[i]n a democratic society the rights and freedoms inherent to the individual, their guarantees and the rule of law constitute a triad, each of whose components is defined, completed and acquires meaning in function of the others."[63]

2.4. Restrictions to ESC Rights, Progressive Development, and Non-regression

Restrictions and limitations to ESC rights[64] should also comply with these guidelines. In this sense, the Commission has stated that "in exceptional cases where measures limiting an ESCER are unavoidable, States should ensure that such measures are fully and strictly justified, necessary and proportional, taking into account all rights at stake and the proper use of the maximum available resources."[65] The principles of progressive development and non-regression are additional elements of this analysis and help to shape the scope of admissible restrictions or limitations to ESC rights.

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60 IACHR, Office of the Special Rapporteur for Freedom of Expression, Inter-American Legal Framework regarding the Right to Freedom of Expression, December 30, 2009, para. 85, citing Advisory Opinion OC-5/85, supra note 57, para. 46; Case of Herrera-Ulloa v. Costa Rica, supra note 30, para. 122; and IACHR, Annual Report 1994, February 17, 1995, chapter V.

61 Case of Members of the "José Alvear Restrepo" Lawyers Collective v. Colombia, supra note 52, para. 531, freely tra nslated.

62 Case of Members of the "José Alvear Restrepo" Lawyers Collective v. Colombia, supra note 52, para. 533, freely translated, citing Advisory Opinion OC-8/87 of January 30, 1987, Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), para. 24; Case of Baraona Bray v. Chile, Preliminary Objections, Merits, Reparations and Costs, Judgment of November 24, 2022, para. 89; Advisory Opinion OC-6/86, supra note 50, para. 29; and Case of Salvador Chiriboga v. Ecuador, supra note 25, para. 122, para. 74.

63 Case of Members of the "José Alvear Restrepo" Lawyers Collective v. Colombia, supra note 52, footnote 656, freely translated.

64 Some of the excerpts below refer to the abbreviation "ESCER," which encompasses Environmental Rights. Such a category, however, is not specifically addressed by this report.

65 IACHR, Resolution 1/2020: Pandemic and Human Rights in the Americas, April 10, 2020, para. 14.

Regarding the principle of progressive development, the Court stressed that "two types of obligations arise from [the OAS Charter's economic, social, educational, scientific and cultural norms]: those that can be claimed immediately, and those of a progressive nature."[66] In this respect, "the Court considers that, in general, it will not be possible to achieve the progressive development of economic, social, cultural and environmental rights in the short-term and, therefore, 'a necessary flexibility device is required reflecting the realities of the real world and the difficulties involved for any country in ensuring their full realization.'"[67] Concerning the limits of such a flexible device, the Court affirmed that "the State has essentially, although not exclusively, an obligation to act; in other words, an obligation to take measures and provide the necessary means and elements to respond to the requirements for the realization of the rights involved, always to the extent permitted by the economic and financial resources available to comply with its respective international commitment."[68] That progressive implementation "may be subjected to accountability and, if applicable, compliance with the respective commitment assumed by the State may be demanded before instances called to decide on possible human rights violations."[69]

In addition to progressive development, States must also abide by the principle of non-regression.[70] The Court recalls that "the Inter-American Commission has considered that in order to evaluate whether a regressive measure is compatible with the American Convention, it is necessary to 'determine if it was justified by strong reasons.' Based on the foregoing, it is worth mentioning that the regression is actionable when economic, social and cultural rights are involved."[71] Also on this topic, the Commission argues that "States should refrain from adopting policies, measures and legal rules that – without adequate and justifiable grounds – worsen the situation

66 Case of Cuscul Pivaral et al. v. Guatemala, Preliminary Objection, Merits, Reparations and Costs, Judgment of August 23, 2018, para. 141.
67 Case of Cuscul Pivaral et al. v. Guatemala, supra note 66, para. 141, citing Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru, Preliminary Objection, Merits, Reparations and Costs, Judgment of July 1, 2009, para. 102, and United Nations, Committee on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, para. 1, of the Covenant), December 14, 1990, E/1991/23, para. 9.
68 Case of Cuscul Pivaral et al. v. Guatemala, supra note 66, para. 142, citing Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru, supra note 67, para. 102, and United Nations, Committee on Economic, Social and Cultural Rights, An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant, Statement, E/C.12/2007/1, September 21, 2007, paras. 8-9.
69 Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru, supra no te 67, para. 102.
70 "[...] the IACHR in its jurisprudence stated that the nature of the obligations derived from Article 26 of the American Convention implies that the full realization of the rights enshrined in that norm must be achieved progressively and in accordance with the available resources. This implies a correlative duty not to regress in the achievements made in this area. This is the obligation of non-regression developed by other international organizations and understood by the IACHR as a State duty that can be justiciable through the individual petition mechanism enshrined in the Convention." IACHR, Special Rapporteurship on Economic, Social, Cultural and Environmental Rights (REDESCA), Compendium on Economic, Social, Cultural and Environmental Rights: Inter-American Standards, December 31, 2021, para. 57.
71 Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru, supra note 67, para. 103, citing IACHR, Report No. 38/09, Case 12.670, National Association of Ex-Employees of the Peruvian Social Security Institute et al. v. Peru, Admissibility and Merits, March 27, 2009, paras. 140-147.

of the population's economic, social and cultural rights. The State has the duty to account for how available resources have been employed to a maximum degree to progressively achieve full effectiveness of these rights."[72]

IMPLICATIONS

- While States' use of AI/ADM systems can theoretically serve to protect and promote conventional rights and freedoms, relying on them for rights-based decision-making carries at least the potential for interfering with one or more of such rights and freedoms. As a consequence, States' development or adoption of these systems must observe the admissible grounds for restricting or limiting human rights.
- This means States must first comply with legality and legitimacy standards. Restrictions and limitations must be grounded in the law. Any underpinning legal provisions must be fit for the purpose, i.e. have been democratically approved and meet the guarantees of the Inter-American System. Restrictions/limitations of rights must also be authorized by the Convention and/or its protocols, and fulfill their corresponding requirements.
- Any laws underpinning rights restrictions or limitations must have been enacted (or be enacted) for the general welfare, which is "the conditions of social life that allow members of society to reach the highest level of personal development and the optimum achievement of democratic values." Rights restrictions based on general welfare must be strictly limited to the "just demands" of a "democratic society" considering both individual and collective interests. This means that rights restrictions/limitations must pursue a legitimate aim and cannot stray from the legitimate purpose that justified the restriction. Failing that, there will be a misuse of power.
- For a pursued goal to legitimately justify the restriction or limitation of conventional rights, it must be "necessary in a democratic society." A democratic society entails the interrelation between the concepts of "Rule of Law," "human rights," "guarantees," and "democracy."[73] As such, a pursued goal is a *legitimate aim* to the extent that it corresponds to protecting "the essential rights and the creation of circumstances that allow the human person to progress spiritually and materially."[74] In this sense, generic justifications based on national security, public order, or even the protection of a conflicting human right are not consistent with this reasoning. A consistent analysis demands looking at the particular context and at the elements and implications involved in prioritizing a certain goal over a specific right.
- Moreover, States must meet suitability, necessity, and proportionality standards from the moment they first assess whether to adopt AI/ADM systems for rights-based determinations and throughout the system's implementation and use. This requires rigorous scrutiny to determine whether adopting the system is an adequate means

72 IACHR, Report on Poverty and Human Rights in the Americas, September 7, 2017, Recommendations, item 2.
73 Case of Members of the "José Alvear Restrepo" Lawyers Collective v. Colombia, supra note 52, footnote 656, freely translated.
74 Case of Members of the "José Alvear Restrepo" Lawyers Collective v. Colombia, supra note 52, para. 533, freely trnslated, citing Advisory Opinion OC-8/87, supra note 62, para. 24; Case of Baraona Bray v. Chile, supra note 62, para. 89; Advisory Opinion OC-6/86, supra note 50, para. 29; and Case of Salvador Chiriboga v. Ecuador, supra note 25, para. 74.

to achieve the legitimate goal pursued and identify the rights restrictions involved (*suitability*). To limit rights, it is not sufficient that the measure be useful, reasonable, or convenient. Restricting or limiting a certain right must be the least harmful alternative available to achieve the legitimate goal (*necessity*), and there must be a proportional balance between the level of restriction and the level of benefit to the interest pursued (*proportionality*).

- For ESC rights, the above analysis must integrate the principles of progressive development and non-regression. States' adoption of AI/ADM systems in the context of social protection, or welfare, must be conducive to the proper enjoyment and attainment of ESC rights, and should not implicate a regression in social protection guarantees and policies. Any restrictions to ESC rights must also be justified and balanced in light of these two principles (*see also Section 4.7*).

3. Public Policies and Human Rights in the Inter-American Human Rights System

The IACHR has emphasized that human rights should be put at the center of public policy design, implementation, monitoring, and evaluation.[75] Accordingly, human rights are essential guidelines for States when identifying and defining problems to target by public policymaking.[76] The Commission remarked that the human rights approach to public policies[77] is based on two pillars: States' obligation to guarantee rights and being the responsible agent of their promotion, defense, and protection; and the concept that people and social groups are holders of rights with the capacity and right to call for these rights and participate.[78] According to the IACHR, the principles that must guide all public policymaking are equality and non-discrimination; social participation; complaint mechanisms and access to justice; the production and access to information as a guarantee of transparency and accountability; priority protection for groups in situations of historical discrimination; and inclusion of the gender and diversity perspective.[79] All state branches, bodies, and levels must take this perspective into consideration.[80]

75 IACHR, Public Policy with a Human Rights Approach, September 15, 2018, para. 41.
76 IACHR, Public Policy with a Human Rights Approach, supra note 75, para. 43.
77 The Commission has defined public policies with a human rights approach as "a series of decisions and actions that the state designs, implements, monitors, and evaluates—on the basis of an ongoing process of effective social inclusion, deliberation, and participation—for the purpose of protecting, promoting, respecting, and guaranteeing the human rights of all the persons, groups, and communities that comprise a society, under the principles of equality and nondiscrimination, universality, access to justice, accountability, transparency, and cross-cutting and intersectional perspectives." IACHR, Public Policy with a Human Rights Approach, supra note 75, para. 147.
78 IACHR, Public Policy with a Human Rights Approach, supra note 75, para. 44.
79 IACHR, Public Policy with a Human Rights Approach, supra note 75, para. 22.
80 IACHR, Public Policy with a Human Rights Approach, supra note 75, para. 112.

3.1. Social Participation

The Commission has asserted that "the active participation of persons in public decision making—in the cycle of public policymaking[81] among others—is not only desirable but also an enforceable right and an obligation of the state."[82] This participation enables policies to "incorporate the experiences, perspectives, and viewpoints of the persons and groups who are the holders of the rights that are being targeted for safeguarding,"[83] which is especially relevant concerning groups and people that have been historically discriminated against.[84] Taking such a framework into consideration, the Commission has encouraged States to adopt measures to prevent risks to human rights violations,[85] carrying out a preventive approach when assessing and structuring public policies.

The Commission has emphasized the importance of effective participation in the public policy cycle. According to the IACHR, it is not sufficient to provide consultation and deliberation mechanisms, as "it is necessary to incorporate the contributions coming from them into the decision making process throughout the cycle, from the preparation of the assessment and design of the instruments up to their implementation, monitoring, and evaluation."[86] In this sense, "[t]he Commission stresses the importance of having forums that exist, function, and promote thinking, the exchange of opinions, and negotiations that exert a tangible impact on public policymaking processes and then on the implementation and evaluation stages."[87] To determine such a tangible impact, the Commission indicates it's important to check "if the opinions that are consulted are then enshrined and lead to changes and reformulations."[88]

Representativity and Participation of Marginalized and Vulnerable Groups[89]

The Commission "has pointed out that ensuring the representation and full participation of all social sectors in public life is one of the fundamental objectives of any democratic system."[90] It has emphasized that States have the duty "*to adopt*

81 The Commission refers to a "public policy cycle" as the identification of relevant social or individual problems, their diagnostics/analysis and the development of a structure for addressing the problem, which entails the design and implementation of public policy instruments and the evaluation of their results. Source: IACHR, Public Policy with a Human Rights Approach, supra note 75, para. 156.
82 IACHR, Public Policy with a Human Rights Approach, supra note 75, para. 56
83 IACHR, Public Policy with a Human Rights Approach, supra note 75, para. 58, citing IPPDH, Ganar Derechos: Lineamientos para la Formulación de Políticas Públicas Basadas en Derechos, September 2014, para. 105.
84 IACHR, Public Policy with a Human Rights Approach, supra note 75, para. 59.
85 IACHR, Public Policy with a Human Rights Approach, supra note 75, para. 157.
86 IACHR, Public Policy with a Human Rights Approach, supra note 75, para. 60.
87 IACHR, Public Policy with a Human Rights Approach, supra note 75, para. 61.
88 IACHR, Public Policy with a Human Rights Approach, supra note 75, para. 61.
89 For remarks on public policies, equality and non-discrimination, see also section 4.3. Equality and No n-discrimination.
90 IACHR, Compendium on Democratic Institutions, Rule of Law, and Human Rights, November 30, 2023, para. 105,

measures to ensure broad participation, without any type of discrimination [...] [, which makes it] essential to implement special actions that guarantee substantive participation and effective incidence in all political decision-making spaces by the most vulnerable and excluded persons and groups."[91]

Concerning the gender divide, it has indicated "that the involvement of women in all spheres of political life is a necessary condition to guarantee a truly egalitarian society and *to consolidate participatory and representative democracy in the Americas*."[92] The IACHR has also pointed out that States can foster the democratic participation of LGBTQI+ people by promoting "*their effective participation in decision-making spaces and bodies on the respective public policies, in order to ensure that their own vision of inclusion and the enforcement of their rights is taken into account*."[93]

Indigenous people and communities enjoy important safeguards in the Inter-American System when it comes to political participation. According to the Commission, "*the right to political participation constitutes an extremely important right because they are groups that have historically suffered the consequences of social and structural inequalities*."[94] Therefore, their representation and political participation must be ensured by a legal framework, since "[t]he recognition and protection of indigenous and tribal peoples as culturally distinct peoples also requires that *their participation in public life be guaranteed through inclusive political and institutional structures and the protection of their cultural, social, economic and political institutions in decision-making*."[95]

Participation and the Rights to Self-Determination and Consultation

The protection of the Inter-American System to the right to self-determination of indigenous people and African Descent communities has developed into relevant standards regarding political participation. They include the rights to free, prior, and informed consultation and consent for actions and decisions that can affect their rights and lands. Although these standards are connected to the collective property

citing IACHR, Annual Report 1999, chapter VI, section A - Considerations regarding the Compatibility of Affirmative Action Measures Designed to Promote the Political Participation of Women with the Principles of Equality and Non-Discrimination, April 13, 2000.

91 IACHR, Compendium on Democratic Institutions, Rule of Law, and Human Rights, supra note 90, para. 148.

92 IACHR, The Road to Substantive Democracy: Women's Political Participation in the Americas, April 18, 2011, para. 47 (emphasis added). See also para. 6.

93 IACHR, Advances and Challenges towards the Recognition of the Rights of LGBTI Persons in the Americas, December 7, 2018, para. 112 (emphasis added).

94 IACHR, Right to Self-Determination of Indigenous and Tribal Peoples, December 28, 2021, paras. 169 and 172.

95 IACHR, Right to Self-Determination of Indigenous and Tribal Peoples, supra note 94, para. 214, citing IACHR, Situation of Human Rights of the Indigenous and Tribal Peoples of the Pan-Amazon Region, September 29, 2019, para. 44.

of their lands and the cultural context of these communities, they can also offer valuable guidelines for civic participation as a whole.

According to the Commission "*[t]he information provided by the State in the consultation process must be clear and accessible*. This supposes that *the information which will be provided must be comprehensible, [...] sufficient, appropriate and complete* to allow for a consent which is not manipulated in favor of the project or activity. *The condition of prior notification implies that information must be presented with sufficient time prior to the authorization or prior to the initiation of the negotiations [...].*"[96] In this regard, "[t]he international and regional regulation's emphasis on good faith in compliance with the State duty to consult indigenous peoples *seeks to establish a safeguard against merely formal consultation procedures*, an unfortunately frequent practice which has been consistently denounced by indigenous peoples. *Consultation procedures are not tantamount to compliance with a series of pro forma requirements*."[97]

3.2. Public Oversight, Right to Information, and Monitoring & Evaluation (M&E)

The IACHR has pointed out that National Human Rights Institutions and civil society organizations are essential agents in monitoring States' compliance with human rights principles, by means of "demanding participation, transparency, accountability, and access to information as democratic components of public policies."98 The Commission has also emphasized that the auditing role played by oversight institutions concerning budget allocation should take into consideration a human rights approach, assessing whether funds are invested to foster "the assurance of rights, the closing of inequality gaps, and the prioritization of groups suffering historical discrimination."[99]

The IACHR has underlined that the creation of M&E systems are tied to States' adequate compliance with international obligations and to the principles of transparency and accountability.[100] In this sense, the Commission "understands that

96 IACHR, Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities, December 31, 2015, para. 108 (emphasis added), citing IACHR, Special Rapporteur on the Right to Freedom of Expression, The Right to Access to Information in the Inter-American System, December 30, 2009, para. 72.
97 IACHR, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System, December 30, 2009, para. 317 (emphasis added), citing United Nations, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, A/HRC/12/34, July 15, 2009, para. 46.
98 IACHR, Public Policy with a Human Rights Approach, supra note 75, para. 134, citing IACHR, Public Hearing, Control of Public Spending, Fiscal Policies and Economic, Social and Cultural Rights Guarantees in Latin America, May 11, 2018, Comments of the IACHR.
99 IACHR, Public Policy with a Human Rights Approach, supra note 75, para. 135, citing IACHR, Public Hearing, Control of Public Spending, supra note 98, comments of the IACHR.
100 IACHR, Public Policy with a Human Rights Approach, supra note 75, para. 97.

evaluation mechanisms must focus on identifying the evidence and concrete results achieved, comparing this information to the planning."[101] The Commission recommends that M&E processes include indicators on human rights that provide adequate information to assess States' fulfillment of their human rights obligations.[102]

Transparency, Accountability, and Addressing Corruption

The Commission considers that "transparency and accountability of public authorities strengthen democratic systems, and *has therefore called on States to strengthen transparency and accountability mechanisms as a fundamental principle of public policies with a human rights approach and as a way to guarantee the right of access to information of the population*."[103] This is also because public policymaking demands from States the carrying out of "exhaustive, ongoing reviews of their human rights obligations in order to create the policies needed to ensure due diligence in promoting, protecting, and guaranteeing them."[104]

The Commission has emphasized the production of and access to information as crucial guarantees for transparency and accountability in policymaking. The IACHR stated that "transparency encompasses a series of components for the development of public policies ranging from design processes—including [...] participation mechanisms—to decision making on sectors, groups, and populations who will be the beneficiaries, monitoring their implementation, and ultimately the data needed to carry out an objective evaluation."[105] Also in this sense, "the IACHR stresses t*hat access to information starts with the stage prior to designing policies themselves*, that is, during the assessment stage. This is mainly because the correct development of mechanisms to guarantee human rights requires the compilation of enough high-quality information, both quantitative and qualitative."[106] Likewise, the IACHR underlines that the State production of information is key to implementing and evaluating the impact of a public policy.[107]

Finally, the Commission has underscored the right to information as a key element in

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101 IACHR, Public Policy with a Human Rights Approach, supra note 75, para. 98. See also para. 99.
102 IACHR, Public Policy with a Human Rights Approach, supra note 75, para. 100.
103 IACHR, Compendium on Democratic Institutions, Rule of Law, and Human Rights, supra note 90, para. 139, citing Inter-American Democratic Charter, Art. 4; IACHR, Pandemic and Human Rights, September 9, 2022, para. 74; and IACHR, Press Release No. 223/20, IACHR Calls to Combat Corruption and Guarantee Human Rights through Transparency and Accountability in Public Management in Context of COVID-19 Pandemic, September 16, 2020.
104 IACHR, Public Policy with a Human Rights Approach, supra note 75, para. 158.
105 IACHR, Public Policy with a Human Rights Approach, supra note 75, para. 79..
106 IACHR, Public Policy with a Human Rights Approach, supra note 99, para. 77 (emphasis added).
107 "The IACHR has indicated that states must guarantee that gender and diversity perspectives shall be adopted in the systems and databases that are established, in order to benefit from information disaggregated by gender and diversity. It is also essential for data to be disaggregated by sex and other elements of diversity, such as age, ethnicity, disability, socioeconomic situation, etc." IACHR, Public Policy with a Human Rights Approach, supra note 75, para. 76, citing IACHR, Towards the Effective Fulfillment of Children's Rights: National Protection Systems, November 30, 2017, para. 426. See also IACHR, Access to Information, Violence Against Women, and the Administration of Justice in the Americas, March 27, 2015, paras. 43-51.

countering corruption. According to the IACHR, "transparency must be understood as a necessary condition for promoting public debate and at the same time as a prerequisite for accountability and public responsibility in combating corruption, both by preventing it and by investigating and punishing those kinds of illicit acts against public administration and fundamental rights."[108]

Likewise, the IACHR recommends the States to "[c]ontinue enacting laws that allow effective access to public information, *especially for those persons or groups of people in vulnerable situations or at great risk*, consistent with international standards, and encourage their effective and efficient implementation. Strengthen oversight bodies with guarantees of autonomy and independence; provide training to public officials and educate the public *in order to eradicate the culture of secrecy and with the purpose of providing individuals with the tools to effectively monitor State operations, public management and the fight against corruption*."[109]

3.3. Public Security Policies

For the Commission "it is clear that citizen security must be thought of as public policy."[110] Therefore, people also have the right to effectively participate in the design, implementation and evaluation of defense, internal security and crime prevention policies. In this context, the Commission remarked that those policies "have to be defined within the frame of reference that the international principles of human rights provide, especially the principles of participation, accountability and non-discrimination."[111]

The IACHR has observed that political systems within the region have historically, and often informally, delegated the responsibilities regarding security policies to state security forces. This has meant that decisions about the security of persons and their property were informed mainly by the interests of such forces, "*completely separate and apart from the rest of public policy and not subject to any form of citizen oversight. In many cases, the result was the abuse and misuse of power on the part of state security forces.*"[112] Accordingly, the Commission emphasizes that effective accountability and public oversight requires "an institutional structure and human and material resources."[113] On this basis, "indicators must be devised and made public so that the entire population knows what they are; *[and] the means to verify*

108 IACHR, Corruption and Human Rights: Inter-American Standards, December 6, 2019, para. 231.
109 IACHR, Resolution 1/18: Corruption and Human Rights, March 2, 2018, section (2) (c) (ii) (emphasis added).
110 IACHR, Report on Citizen Security and Human Rights, December 31, 2009, para. 52.
111 IACHR, Report on Citizen Security and Human Rights, supra note 110, para. 51.
112 IACHR, Report on Citizen Security and Human Rights, supra note 110, para. 74 (emphasis added), citing Saín, M. F. (2004) Seguridad, Delito y Crimen Organizado. Los Desafíos de la Modernización del Sistema de Seguridad Policial en la Región Sudamericana. In Rhi-Sausi, J. L. (Ed.). El desarrollo local en América Latina. Logros y Desafíos para la Cooperación Europea, RECAL/CESPI/Nueva Sociedad, 135-148.
113 IACHR, Report on Citizen Security and Human Rights, supra note 110, para. 95.

compliance with the goals or objectives set within public policy on citizen security must also be clearly defined."[114]

The Commission has also taken a stance "against the militarization – and privatization – of the security forces." The IACHR "asserted that the effect of privatizing security functions is loss of control over acts undertaken with the use of force and insensitivity to the notion of human rights, which the State has a duty to defend, protect, and guarantee." As a consequence, "security becomes a mere commodity that can be bought on the market and usually only by those sectors of society that can afford it."[115]

Policymaking and ESC Rights: According to the Commission, "the right fiscal policy can contribute [...] to the investment needed for the realization of human rights, especially economic and social rights; and to accountability between State and citizenry."[116] In this context, the IACHR has listed principles and obligations relevant for a human rights approach towards fiscal policy. These principles are "securing essential minimum levels; mobilization of the maximum amount of resources available for progressive realization of economic, social, and cultural rights; the progressive realization and non-regressive nature of those rights; and the principle of equality and non-discrimination."[117]

IMPLICATIONS

- The commitments that States undertook under the Inter-American Human Rights System call on them to adopt a human rights approach to public policymaking. As such, human rights principles and standards must guide States in scoping the problems they seek to address and determining whether the development, procurement, and/or use of AI/ADM systems as part of a certain policy is appropriate. If so, human rights principles and standards must also inform the design, implementation, and monitoring of the system's use within a particular public policy.
- Any public policymaking must begin with the principle that people and social groups are holders of rights and, as such, have the capacity and right to call for these rights and participate.[118] This involves the right to meaningful information about how an AI/ADM tool is developed and works.

114 IACHR, Report on Citizen Security and Human Rights, supra note 110, para. 95 (emphasis added).
115 IACHR, Situation of Human Rights in Brazil, February 12, 2021, para. 273, citing IACHR, Report on Citizen Security and Human Rights, supra note 110.
116 IACHR, Public Policy with a Human Rights Approach, supra note 75, para. 118, citing IACHR, Report on Poverty and Human Rights in the Americas, supra note 72, p. 174.
117 IACHR, Public Policy with a Human Rights Approach, supra note 75, para. 119, citing Report on Poverty and Human Rights in the Americas, supra note 72, para. 502.
118 IACHR, Public Policy with a Human Rights Approach, supra note 75, para. 44.

- Any public policymaking should also abide by principles of social participation, due process, access to justice, and access to information to promote transparency, accountability, equality, and non-discrimination. This involves ensuring priority protection for groups subject to historical discrimination and adopting a gender and diversity protective perspective (*see Chapter 5*).

- In this and other sections, we present a non-exhaustive list of the repercussions for taking a human rights approach to using AI/ADM systems in public policymaking. The use of AI/ADM systems as public policy tools must take into account the cross-cutting principles mentioned above. This means that States must ensure appropriate conditions and mechanisms for social participation and public oversight *from the moment* they assess and identify a problem they aim to address. This assurance also applies when States are examining whether the adoption of an AI/ADM tool is suitable for the problem and during the design, implementation, and evaluation phases of the policy being created or changed (*see Section 5.4*).

    - A thorough and democratic assessment *before* deciding to adopt the system is particularly critical for AI technologies. The analysis on its "suitability" to address a certain issue must consider that machine learning fundamentally attempts to reproduce patterns observed in the available data, which can frequently produce an undesirable outcome to guide decisions. In addition, because AI systems involve probability and randomness in making determinations, they may not be sufficiently understandable or equitable for rights-based decisions.

    - It is crucial for States to adopt measures ensuring broad participation without any type of discrimination, which entails implementing "special actions that guarantee substantive participation and effective incidence in all political decision-making spaces by the most vulnerable and excluded persons and groups."[119]

    - In this sense, decisions about and monitoring of the adoption and use of AI/ADM systems in public policies must give special attention to historically discriminated against groups, prioritizing their protection and fostering their effective participation (*see Section 4.3*). This enables policies to "incorporate the experiences, perspectives, and viewpoints of the persons and groups who are the holders of the rights that are being targeted for safeguarding."[120]

    - Consequently, incorporating a gender and diversity perspective for algorithm-based systems employed as part of a state policy or initiative is important to ensure that the use of the system does not reproduce discrimination and negatively impact diverse bodies and identities. Accordingly, the validation, testing, and review of both AI and traditional ADM systems must consider not just average members of society but also marginalized groups and gender expressions that diverge from cisnormative or heteronormative standards.

    - Effective participation can take many and complementary forms, but it should include the ability for independent and expert organizations to audit the system.

    - To ensure effective participation, States must make clear to the public how

119 IACHR, Compendium on Democratic Institutions, Rule of Law, and Human Rights, supra note 90, para. 148. Section 3.1 of the Appendix provides examples of statements where the Commission highlights the importance of measures to ensure effective political participation of women, LGBTQI+ people, and indigenous people and communities.
120 IACHR, Public Policy with a Human Rights Approach, supra note 75, para. 58, citing IPPDH, Ganar Derechos, supra note 83, para. 105.

contributions from consultations and deliberative mechanisms inform the design, implementation, and evaluation of AI/ADM-based public policies (*see also Section 4.1*).

- Mechanisms of participatory democracy concerning indigenous and Afro-descendant communities bring valuable models and lessons for States committed to ensure broad and effective social participation in policymaking. Free and informed consultation and consent of communities before implementing projects or other initiatives that can affect their rights and territories are important guidelines to consider. The same goes for effective participation in prior impact assessment studies.

- As these participatory standards point out, "consultation is not a single act, but a process of dialogue"[121] where clear, accessible, and complete information is provided with sufficient time to allow proper community engagement.[122] Good faith consultations must not involve any type of coercion and must go beyond merely *pro forma* procedures.[123] In this sense, failure to give proper consideration to the concerns and feedback gathered in consultations is contrary to the principle of good faith.[124] In line with due process guarantees, State decisions resulting from the participatory processes are subject to review by higher administrative and judicial authorities.[125]

- Relatedly, effective social participation throughout the policy cycle presupposes access to meaningful information about the AI/ADM system and its potential (or current) use, as well as the potential (or actual) results of such use (*see Section 4.2*).

- This means States must provide access to relevant information prior to designing a certain AI/ADM-based public policy, making available information and indicators that underpin States' evaluation during this assessment stage. As a result, the fact that the state body is still assessing the contours of a certain policy does not justify restricting access to information about that policy. On the contrary, seeking societal feedback and publicly providing meaningful information prior to design is essential to ensuring that the development, procurement, and/or use of AI/ADM systems as part of a certain policy is appropriate and respectful of human rights. Similarly, a vendor's supposed commercial interest in the secrecy of their technology cannot override the need for public scrutiny; technologies containing significant secrets are not suitable for rights-affecting decisions (*see Section 5.3*).

- Diverse and effective social participation aligns with States' duty to take reasonable steps to prevent human rights violations (*see Section 1.1*). In the context of policy-making, this is reflected by including a preventive approach to how States structure the problem they aim to tackle and decide whether, or to what extent, the use of AI/ADM systems is appropriate to fulfill the envisioned goal.

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121 IACHR, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources, supra note 97, para. 285.
122 IACHR, Indigenous Peoples, Afro-Descendent Communities, and Natural Resources, supra note 96, para. 108, citing IACHR, Special Rapporteur on the Right to Freedom of Expression, The Right to Access to Information in the Inter-American System, December 30, 2009, para. 72.
123 IACHR, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources, supra note 97, para. 317, citing United Nations, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, supra note 97, para. 46.
124 IACHR, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources, supra note 97, para. 325.
125 IACHR, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources, supra note 97, para. 328.

- Moreover, budget allocation and introduction of AI/ADM systems in this context should aim to reduce inequalities and promote rights (*see Section 4.7*).
- Measures strengthening transparency, accountability, and public debate about State's budget allocation for developing, purchasing, and implementing AI/ADM systems are also instrumental to the public's ability to monitor, identify, and prevent corruption and/or misuse of public funds. They can shine a light on state bodies favoring problematic vendors or deals and help eradicate the culture of secrecy that leads to rights-invasive outcomes.
- State bodies must continuously monitor the implementation of AI/ADM technology as public policy instruments, publishing indicators and analysis that can measure public policies' results and impacts. Monitoring and evaluation (M&E) processes should build on such indicators and analysis to assess whether a certain policy (and the automated system within it) has been an effective tool to accomplish human rights. The assessment of results and impacts must flag any issues and offer inputs for adjustments or discontinuation.
- In addition to the body in charge of the policy, independent state institutions should oversee the design, implementation, and evaluation of policies using AI/ADM systems. AI/ADM-based policies should also benefit from the combined expertise of government entities, including data protection authorities and, as appropriate, bodies that focus on technology, education, health, etc. Moreover, M&E processes must involve civil society actors and effective social participation to integrate public oversight mechanisms into the policy's evaluation dynamic. M&E processes must also incorporate data about administrative and judicial complaints (*see also Section 4.4*).
- All these measures also apply to public security policies that involve the use of AI/ADM systems. As with other areas of government policymaking, transparency, civic participation, independent oversight, and proper M&E processes are important to ensure that state bodies in charge are accountable and that policies are respectful of human rights. Militarization and privatization of public security generally undermine these goals and should not prevail.

4. Highlights on Inter-American Human Rights Standards Regarding Relevant Rights

In this chapter we build on Inter-American standards regarding selected rights that are critical in the context of state adoption of AI/ADM systems for rights-affecting determinations (either by state institutions or third parties acting on their behalf). The selected rights are: political participation; access to Information; equality and non-discrimination; due process; private life and related rights; freedoms of expression, association and assembly; and the right to a dignified life in connection with ESC rights.

4.1. Political Participation

The Court and the Commission have addressed the right to political participation enshrined in Article 23 of the American Convention in various opportunities, giving us elements to outline States' obligations in this regard. As the Court highlighted, Article 23 "establishes the rights to take part in the conduct of public affairs, to vote and to be elected, and to have access to public service, which must be guaranteed by the State under conditions of equality."[126] The Court has asserted that "[t]he effective exercise of political rights constitutes an end in itself and, also, an essential means that democratic societies have to ensure the other human rights established in the Convention."[127] It has also stated that "[p]olitical rights and their exercise promote the strengthening of democracy and political pluralism,"[128] and that it is "essential that the State should generate the optimum conditions and mechanisms to ensure that these political rights can be exercised effectively, respecting the principles of equality and non-discrimination."[129]

The Court has pointed out that political participation can take different forms, exercised both individually and collectively, and includes influencing State policy using direct participation mechanisms.[130] The Commission has emphasized that the active participation of persons in public decision-making, including public policymaking, is an enforceable right and an obligation of the State.[131] Such participation involves the exercise of other rights, like freedom of opinion, association and assembly, and right to information.[132]

According to the IACHR, effective participation means that States need not only to provide consultation and deliberation mechanisms, but also need to incorporate the corresponding contributions in the development of public policies.[133] In this sense, diverse participation models and possibilities may exist and must offer a place to foster reflections, opinion exchange, and negotiations from the planning to public policies implementation and evaluation.[134] Those models may consist in "the participatory drafting of standards, the holding of public hearings, the establishment of consultative councils, the drafting of participatory social budgets, among others."[135]

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126 Case of YATAMA v. Nicaragua, supra note 40, para. 194.
127 Case of Petro Urrego v. Colombia, Preliminary Objections, Merits, Reparations and Costs, Judgment of July 8, 2020, para. 93, citing Case of Castañeda Gutman v. Mexico, Preliminary Objection, Merits, Reparations and Costs, Judgment of August 6, 2008, para. 142, and Case of López Lone et al. v. Honduras, Preliminary Objection, Merits, Reparations and Costs, Judgment of October 5, 2015, para. 162.
128 Case of Petro Urrego v. Colombia, supra note 127, para. 93, citing Case of YATAMA v. Nicaragua, supra note 40, para. 192, and Case of López Lone et al. v. Honduras, supra note 127, para. 162.
129 Case of YATAMA v. Nicaragua, supra note 40, para. 195.
130 Case of Castañeda Gutman vs. México, supra note 127, para. 146
131 IACHR, Public Policy with a Human Rights Approach, supra note 75, para. 56.
132 IACHR, Public Policy with a Human Rights Approach, supra note 75, para. 57.
133 IACHR, Public Policy with a Human Rights Approach, supra note 75, para. 60.
134 IACHR, Public Policy with a Human Rights Approach, supra note 75, para. 61.
135 IACHR, Public Policy with a Human Rights Approach, supra note 75, para. 62.

IMPLICATIONS

- The public has a right to political participation, which includes speaking out about and influencing whether or how state institutions use AI/ADM technology to support rights-based determinations. The imperative of ensuring political participation as a vital element of democratic societies remains valid and enforceable, regardless of whether States' actions involve the use of AI/ADM technologies.
- States must organize governmental apparatus and practices to ensure the free and full exercise of the right to participate in government (*see Section 1.1*). This entails creating and/or adapting existing structures and processes to enable effective and diverse participation in decision-making and evaluation of state use of AI/ADM systems (*see Chapter 3*).
- It is important that participation models and processes allow affected communities and civil society to "exert a tangible impact"[136] on States' decisions regarding the use of AI/ADM technologies for rights-based determinations, and provide proper means for assessing and measuring such an impact (*see Section 3.1*).
- Effective participation also implies taking steps to remove barriers for civic engagement in public affairs, especially regarding groups in situations of historical discrimination.

4.2. Access to Information

The American Convention ensures to every person the right of access to information in its Article 13 "without the need to prove direct interest or personal involvement [...], except in cases in which a legitimate restriction is applied."[137] The IACHR's Special Rapporteur for Freedom of Expression has noted this right encompasses "information that is in the care of, possession of, or being administered by the State; the information that the State produces, or the information that it is obliged to produce; the information that is under the control of those who administer public services and funds and pertains to those specific services or funds; and the information that the State collects and that it is obligated to collect in the performance of its functions."[138] As such, the right to information has a broad scope in terms of bound entities and authorities. It "generates obligations at all levels of government, including for public authorities in all branches of government, as well as for autonomous bodies." It also affects "those who carry out public functions, provide public services, or manage public funds in the name of the State" regarding information on these activities.[139]

136 See IACHR, Public Policy with a Human Rights Approach, supra note 75, paras. 60-61.
137 Case of Claude-Reyes et al. v. Chile, supra note 39, para. 77.
138 IACHR, Office of the Special Rapporteur for Freedom of Expression, The Inter-American Legal Framework regarding the Right to Access to Information: Second Edition, March 7, 2011, para. 21.
139 IACHR, Office of the Special Rapporteur for Freedom of Expression, The Inter-American Legal Framework regarding the Right to Access to Information, supra note 138, para. 19.

Building on the Court's case law, the Inter-American Juridical Committee's *Principles on the right of access to information* and other Inter-American standards, the IACHR Office of the Special Rapporteur for Freedom of Expression has consolidated States' obligations arising from this right. They encompass the obligations of active transparency and adequate implementation, and the obligations to: adjust domestic legislation to ensure the right of access to information; respond in a timely, complete, and accessible manner to requests; offer a legal recourse that satisfies the right; provide an adequate and effective legal remedy for reviewing denials of information requests; create a culture of transparency; and produce or gather information.[140] As for the latter, it is critical to underscore that "the State has the obligation to produce or gather the information it needs to fulfill its duties, pursuant to international, constitutional, or legal norms."[141]

The Principles of Maximum Disclosure and Good Faith

According to the Court, "to guarantee the full and effective exercise of [the right of access to information], it is necessary that the legislation and the State procedures are governed by the principles of good faith and maximum disclosure, *in a way that all information in State power is presumed public and accessible, subject to a limited regime of exceptions*."[142] The Special Rapporteur has underlined that acting in good faith means that those bound the by right to information "ensure the strict application of the right, provide the necessary measures of assistance to petitioners, promote a culture of transparency, contribute to making public administration more transparent, and act with due diligence, professionalism, and institutional loyalty. They must take the actions necessary to serve the general interest and not betray the people's confidence in State administration."[143]

As for the principle of maximum disclosure, the Special Rapporteur has consolidated its implications into three main elements: (a) the right of access to information is the rule and secrecy is the exception; (b) the burden of proof rests with the State when limits on the right to access information are established; (c) preeminence of the right to access information in the face of conflicting statutes or lack of regulation.[144]

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140 IACHR, Office of the Special Rapporteur for Freedom of Expression, The Inter-American Legal Framework regarding the Right to Access to Information, supra note 138, pp. 8-15.
141 IACHR, Office of the Special Rapporteur for Freedom of Expression, The Inter-American Legal Framework regarding the Right to Access to Information, supra note 138, para. 35.
142 Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil, Preliminary Objections, Merits, Reparations and Costs, Judgment of November 24, 2010 (emphasis added).
143 IACHR, Office of the Special Rapporteur for Freedom of Expression, The Inter-American Legal Framework regarding the Right to Access to Information, supra note 138, para. 15.
144 IACHR, Office of the Special Rapporteur for Freedom of Expression, The Inter-American Legal Framework regarding the Right to Access to Information, supra note 138, pp. 4-6.

Right of Access to Information, Democratic Participation, and Oversight

The Court has recognized the relevance of the right of access to information to democratic participation and oversight, asserting that "in a democratic society, it is essential that the State authorities are governed by the principle of maximum disclosure."[145] In this context, The Court sustained that "the State's actions should be governed by the principles of disclosure and transparency in public administration that enable all persons subject to its jurisdiction to exercise the democratic control of those actions, and so that they can question, investigate and consider whether public functions are being performed adequately. Access to State-held information of public interest can permit participation in public administration through the social control that can be exercised through such access."[146]

Proper Justification of Denials, Effective Appeals, and Autonomous Oversight

States have the duty to clearly justify the denial of information requests and must favor access to information in case of conflict of laws or lack of adequate regulation. The Court has underlined that "all denials of information must be motivated and founded, to which the State is responsible for the burden of proof on the impossibility of presenting said information, and given doubts or empty legal arguments, the right to access to information will be favored."[147] Additionally, States must ensure a prompt and effective appeal mechanism before the denial of information requests. The Court has stated that "the State must guarantee that there is a simple, prompt and effective recourse that permits determining whether there has been a violation of the right of the person requesting information and, if applicable, that the corresponding body is ordered to disclose the information. In this context, the recourse must be simple and prompt, bearing in mind that, in this regard, promptness in the disclosure of the information is essential."[148]

The Special Rapporteur for Freedom of Expression has noted that "in the event that a request is denied, it must be reasoned and *there must be a possibility of appealing the denial before a higher or autonomous body, as well as later challenging the denial in court*."[149] The Rapporteur has urged countries to "adapt their legislation to strengthen the institutional structure for overseeing the implementation of laws on

145 Case of Claude-Reyes et al. v. Chile, supra note 39, para. 92.
146 Case of Claude-Reyes et al. v. Chile, supra note 39, para. 86.
147 Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil, supra note 142, para. 230, citing IACHR, Office of the Special Rapporteur for Freedom of Expression, Right to Access to Information in the Inter-American Legal Framework, 2010.
148 Case of Claude-Reyes et al. v. Chile, supra note 39, para. 137.
149 IACHR, Office of the Special Rapporteur for Freedom of Expression, The Inter-American Legal Framework regarding the Right to Access to Information, supra note 138, para. 26 (emphasis added).

access to public information,"[150] pointing to the Model Inter-American Law on Access to Public Information as the high standard States should follow. This supervisory body should have the necessary powers to fulfill its mission, such as "'*the power to review any information held by a public authority, including through on-site inspection*'"[151]. Accordingly, this body "must be independent of political influence, accessible to requesters without the need for legal representation, without formalities, timely and, preferably, specialized."[152]

Admissible Restrictions to the Right of Access to Information

There is significant literature and jurisprudence addressing the application of the three-part test to the restriction or limitation of the right to information (*see also Section 2.3*). The Court has asserted that "the restrictions established by law must respond to an objective allowed in Article 13(2) of the American Convention, namely, *they must be necessary to assure* 'the respect for the rights and reputation of others' or 'the protection of national security, public order, or public health or morals.' *The limitations imposed must be necessary in a democratic society and oriented to satisfy an imperative public interest*. This implies that from all the possible alternatives *there must be elected those measures that restrict or interfere in the most minimal possible manner* the effective exercise of the right to seek and receive information."[153]

The requirement of a risk/prejudice that would result from disclosing the information is part of this assessment and closely connected to States' compliance with necessity and proportionality principles. According to the IACHR's Special Rapporteur for Freedom of Expression: "(a) it [the restriction] must be related to a legitimate aim that justifies it; (b) it must be demonstrated that the disclosure of the information effectively threatens to cause substantial harm to this legitimate aim; and (c) it must be demonstrated that the harm to the objective is greater than the public's interest in having the information."[154] In addition, the Rapporteur has noted that necessary and proportionality principles also demand that the restriction be limited to a reasonable time period. The Special Rapporteur has stressed that the exception regime should set forth a reasonable time period and "[o]nce that time period expires, the

150 IACHR, Office of the Special Rapporteur for Freedom of Expression, Los Órganos de Supervisión del Derecho de Acceso a la Información Pública: Compilación de informes temáticos contenidos en los Informes Anuales 2013 y 2014 de la Relatoría Especial para la Libertad de Expresión de la Comisión Interamericana de Derechos Humanos, 2016, para. 7.
151 IACHR, Office of the Special Rapporteur for Freedom of Expression, Los Órganos de Supervisión del Derecho de Acceso a la Información Pública, supra note 151, para. 12, freely translated (emphasis added), citing OAS, Model Inter-American Law on Access to Public Information, Resolution AG/RES. 2607 (XL-O/10), June 8, 2010.
152 IACHR, Office of the Special Rapporteur for Freedom of Expression, Los Órganos de Supervisión del Derecho de Acceso a la Información Pública, supra note 150, para. 12, freely translated.
153 Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil, supra note 142, para. 229 (emphasis added), citing Advisory Opinion OC-5/85, supra note 57, para. 46; Case of Ricardo Canese v. Paraguay, supra note 30, para. 96; and Case of Palamara-Iribarne v. Chile, supra note 41, para. 85.
154 IACHR, Office of the Special Rapporteur for Freedom of Expression, The Inter-American Legal Framework regarding the Right to Access to Information, supra note 138, para. 53.

information must be made available to the public. In this sense, material can only be kept confidential while there is a certain and objective risk [...]."[155] According to the Court, this "requires periodic reviews [of classified information] to verify" if the strict necessity to keep it secret for the fulfillment of the legitimate purpose persists.[156]

Importantly, the Court has reinforced that "in cases of human rights violations, secrecy of information justified on grounds of public interest or national security cannot cover the refusal of authorities to provide information required by judicial or administrative bodies in charge of the investigation or pending proceedings. Furthermore, in the case of an investigation of a punishable act, the decision to classify the information as secret and the consequent refusal to provide it can never depend exclusively on a State body whose members are accused of committing the unlawful act."[157]

Access to Information and National Security

The Special Rapporteur for Freedom of Expression has emphasized that "security sector entities, as public bodies, are subject to the rule of law and accountability, such as other public institutions,"[158] which means that the principles of maximum disclosure and good faith,[159] the three-part test and, consequently, the principles of legality, legitimate aim, necessity and proportionality, are also applicable to security authorities.[160] In this context, the Special Rapporteur has mentioned[161] the Tshwane Principles to point out that "[n]o restriction on the right to information on national

155 IACHR, Office of the Special Rapporteur for Freedom of Expression, The Inter-American Legal Framework regarding the Right to Access to Information, supra note 138, para. 54.
156 Case of Members of the "José Alvear Restrepo" Lawyers Collective v. Colombia, supra note 52, para. 607, freely translated, citing Open Society Foundations/Open Society Justice Initiative, The Global Principles on National Security and the Right to Information (Tshwane Principles), June 12, 2013, principle 16.
157 Case of Members of the "José Alvear Restrepo" Lawyers Collective v. Colombia, supra note 52, para. 607, freely translated, citing Case of Myrna Mack Chang v. Guatemala, Merits, Reparations and Costs, Judgment of November 25, 2003, para. 180; Case of Flores Bedregal et al. v. Bolivia, Preliminary Objections, Merits, Reparations and Costs, Judgment of October 17, 2022, para. 138; United Nations, Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Framework Principles for Securing the Accountability of Public Officials for Gross or Systematic Human Rights Violations Committed in the Course of States-Sanctioned Counter-Terrorism Initiatives, A/HRC/22/52, April 17, 2013, paras. 40-41; Open Society Foundations/ Open Society Justice Initiative, The Global Principles on National Security and the Right to Information, supra note 156, principle 10; OAS, Inter-American Model Law on Document Management, 2020, Art. 27.
158 IACHR, Office of the Special Rapporteur for Freedom of Expression, Derecho a la Información y Seguridad Nacional: El Acceso a la Información de Interés Público frente a la Excepción de Seguridad Nacional, July 2020, para. 73, freely translated.
159 IACHR, Office of the Special Rapporteur for Freedom of Expression, Derecho a la Información y Seguridad Nacional, supra note 158, para. 74.
160 IACHR, Office of the Special Rapporteur for Freedom of Expression, Derecho a la Información y Seguridad Nacional, supra note 158, paras. 77-78. It is interesting to mention that in February 2024, the Mexican Supreme Court voted in favor of public information disclosure concerning the deployment of Pegasus Software, putting away the allegation that such information should remain secret due to national security reasons. Further information: ARTICLE 19 Mexico and Central America, SCJN confirma que Hacienda deberá entregar información relativa al caso Pegasus, February 6, 2024. Available at <https://articulo19.org/scjn-confirma-que-hacienda-debera-entregar-informacion-relativa-al-caso-pegasus/>.
161 IACHR, Office of the Special Rapporteur for Freedom of Expression, Derecho a la Información y Seguridad Nacional, supra note 158, para. 80.

security grounds may be imposed unless the government can demonstrate that: (1) the restriction (a) is prescribed by law and (b) is necessary in a democratic society (c) to protect a legitimate national security interest; and (2) the law provides for adequate safeguards against abuse, including prompt, full, accessible, and effective scrutiny of the validity of the restriction by an independent oversight authority and full review by the courts."[162] As the Rapporteur highlighted "when the concept of national security is used to limit the right of access to information, it must be interpreted in a manner consistent with the human rights obligations of States and must not be justified by an idea of national security that is incompatible with a democratic society."[163]

Regarding surveillance in the context of national security, the Office of the Special Rapporteur has emphasized that "it is essential for the State to ensure that individuals are duly informed, at a minimum, about the legal framework that regulates surveillance and its purpose, as well as the regulatory framework for surveillance programs; the procedures to be followed for the authorization, selection of targets and data use and management; the protocols for the exchange, storage and destruction of intercepted material, as well as with respect to the entities authorized to carry out surveillance actions and the statistics concerning the conducting of these activities and the bodies in charge of implementing and monitoring such programs."[164]

Following the principle of maximum disclosure, the Rapporteur has indicated that "when a record contains both exempt and non-exempt information, the exceptions to disclosure apply only to the specific information protected by the exception and not to the entire document."[165] Accordingly, the Court clearly stated that blanket restrictions based on the justification of national security are not compatible with Inter-American Standards. It has affirmed that "*it is not feasible for the State to prevent access to any information that, through a general qualification, is considered related to* [the purpose of national security], but it is necessary for the law to designate the specific and strict categories that, based on that objective, are covered by the confidentiality. *Consequently, it is not compatible with Inter-American standards to establish that a document is reserved merely because it belongs to an*

162 Open Society Foundations/Open Society Justice Initiative, The Global Principles on National Security and the Riht to Information, supra note 156, principle 3.
163 IACHR, Office of the Special Rapporteur for Freedom of Expression, Derecho a la Información y Seguridad Nacional, supra note 158, para. 90, freely translated, citing American Convention on Human Rights, Arts. 1 and 2, and IACHR, Special Rapporteur for Freedom of Expression, Informe Especial sobre la Situación de la Libertad de Expresión en Chile 2016, March 15, 2017, para. 82.
164 IACHR, Office of the Special Rapporteur for Freedom of Expression, Derecho a la Información y Seguridad Nacional, supra note 158, para. 117, freely translated, citing Open Society Foundations/Open Society Justice Initiative, The Global Principles on National Security and the Right to Information, supra note 157, principle 10, E, (1) and (2).
165 IACHR, Office of the Special Rapporteur for Freedom of Expression, Derecho a la Información y Seguridad Nacional, supra note 158, para. 129, freely translated, citing OAS, Model Inter-American Law on Access to Public Information, supra note 151, and Open Society Foundations/Open Society Justice Initiative, The Global Principles on National Security and the Right to Information, supra note 156, principle 22.

intelligence agency and not based on its content."[166]

Access to Information and Public Security

Public security authorities must also comply with the principles and obligations related to the right to information. According to the Commission, "[w]hen designing, implementing and - most especially - evaluating the public policy on citizen security [...], the authorities of the *State must produce, organize and disseminate information. [...] The production and dissemination of reliable information on the policy of citizen security is one of the State's positive obligations in order to protect and ensure the human rights at stake in the matter of citizen security.*"[167] For instance, the Commission states that "[t]he information that the public authorities produce and circulate should highlight the plight of those *sectors of the population that are most likely to have their human rights violated with implementation of policies on citizen security*, especially when it comes to preventing interpersonal and/or social violence. This information should devote as a *priority attention to the situation of women, Afro-descendents, the indigenous population, migrants, children and adolescents*."[168]

IMPLICATIONS

- States must comply with the principles of maximum disclosure and good faith in their use of AI/ADM technologies. The fact they are novel or complex technologies does not waive States' duties to uphold the public's right to information.
- All levels of government in all branches must comply with obligations derived from the right of access to information, including secretariats, ministries, and security agencies, which encompass military forces.
- Just as all public institutions in all branches of government must comply with the public's right to access information, so too must autonomous bodies and other entities which employ AI/ADM tools to carry out public services. The same goes for entities that receive public funds to deploy or operate AI/ADM systems within a state policy or activity.
- The right of access to information includes a set of obligations starting with active transparency and adequate implementation.[169] Regarding active transparency, States

166 Case of Members of the "José Alvear Restrepo" Lawyers Collective v. Colombia, supra note 52, para. 603, freely translated, citing The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, principle 12, and Open Society Foundations/Open Society Justice Initiative, The Global Principles on National Security and the Right to Information, supra note 156, principles 4.d and 5.b. See also OAS, Model Inter-American Law on Access to Public Information, supra note 150, Art. 30, and IACHR, Office of the Special Rapporteur for Freedom of Expression, Derecho a la Información y Seguridad Nacional, supra note 158, para. 25.
167 IACHR, Report on Citizen Security and Human Rights, supra note 110, para. 183 (emphasis added).
168 IACHR, Report on Citizen Security and Human Rights, supra note 110, para. 186 (emphasis added).
169 IACHR, Office of the Special Rapporteur for Freedom of Expression, The Inter-American Legal Framework regarding the Right to Access to Information, supra note 138, pp. 8-15.

should as a basic first step disclose, in a systematic and user-friendly way, which AI/ADM systems are used and for which purposes. Those disclosures should also include the related legal framework, the categories of data involved, which institutions are in charge, which are the system's developers and/or vendors, the public budget involved, reasons and documentation underpinning the adoption of the system, all impact assessments carried out, performance metrics, information on the decision-making flow including human and AI agents, the rights of people affected, and the means available for review and redress (*see Section 5.3*).

- Regarding information requests, denying access to information about the assessment, implementation and use of AI/ADM technologies within state activities and policies is allowed only exceptionally and must meet the Inter-American System's criteria to comply with human rights standards.
- The interlink between access to information and democratic participation and oversight of state use of these technologies is tremendous and must underpin the application of maximum disclosure and good faith principles and analysis of admissible restrictions. Bound entities must assess in good faith how keeping information secret is detrimental to the rights of individuals and groups.
- Bound institutions must clearly and properly justify denying requests, weighing the risk or harm the disclosure can cause to a legitimate aim under Art. 13(2) of the Convention, through an analysis of necessity and proportionality. If admissible, the restriction should last only as long as such specific and objective risk exists.
- In view of the implications of secrecy in this context, the protection of trade secrets should not constitute a sufficient basis for legitimately denying access to information, including access to the system's source code, development records, and the ability to conduct independent audits (*see Section 5.3*).
- Restriction justifications based on the general welfare (e.g. national security or public order) must be strictly limited to the "just demands" of a "democratic society" (*see Chapter 2*). This means they cannot implicate an all-encompassing limitation, but be strictly tailored to the types of information and the types of disclosure that effectively represent a risk as per democratic principles, and only until such specific and objective risk exists (which entails conducting periodic reviews of classified information).[170]
- State authorities are forbidden from using the secrecy of information in their control "with the disguised interest of favoring or harming a particular political activity or ideology, or in any other way that implies any type of discrimination."[171] In case of human rights violations, authorities cannot keep secret information required by judicial or administrative bodies in charge of investigations or pending proceedings. Moreover, the decision to classify and deny access to information cannot be made by a state body whose members are accused of committing a punishable unlawful act.[172]
- In this sense, it is crucial to emphasize that government entities engaged with security activities, including national and public security, are subject to the rule of law and accountability just like other public bodies, and must comply with access to information obligations. This means that the principles of maximum disclosure and good faith, as well as the three-part test,[173] with the principles of legality, legitimate aim, and

170 Case of Members of the "José Alvear Restrepo" Lawyers Collective v. Colombia, supra note 52, para. 607.
171 Case of Members of the "José Alvear Restrepo" Lawyers Collective v. Colombia, supra note 52, para. 607.
172 Case of Members of the "José Alvear Restrepo" Lawyers Collective v. Colombia, supra note 52, para. 607.
173 "In order to be in line with the American Convention, an instance of interference must meet the following

suitability, necessity and proportionality, are also applicable to security authorities (*see Chapter 2*).

- As a result, blanket restrictions based on a general qualification are not allowed.[174] Any limitations must clearly justify why a specific content falls within strict restriction categories set by law, in accordance with Inter-American standards. Access to information law should, to the extent of any inconsistency, prevail over other legislation, while secrecy laws should be subject to public debate and conventionality control.[175] In fact, creating, organizing, and disseminating reliable information about the design, implementation, and evaluation of public security policies, including when they rely on AI/ADM systems, is foundational to a democratic model of citizen security based on the protection of human rights of the entire population.[176]

- When it comes to AI/ADM systems deployed for surveillance purposes, including in the context of national security, people should be informed, at a minimum, about the legal framework regulating these practices; the bodies authorized to use such systems; oversight institutions; procedures for authorizing the system's use, selecting targets, processing data, and establishing the duration of surveillance; protocols for sharing, storing, and destroying intercepted material; and general statistics regarding these activities.[177]

- In the same vein, restricting access to information based on fraud prevention and its potential relation to preserving the public order must be thoroughly assessed against conventional guarantees and the tenet that "people and social groups are holders of rights with the capacity and right to call for their rights and participate in states' activities" (*see Chapter 3*). States' claims that the public's knowledge about these technologies correspond to the risk of fraud implies suppressing the right to political participation, among others, and fails to meet Inter-American standards (*see Chapter 1*).

- It is equally problematic to deny requests on the basis that state institutions are still assessing the implementation of AI/ADM systems. Civic participation is crucial for ensuring that States are properly conducting such assessments and comply with their duty to take reasonable steps to prevent human rights violations (*see Chapter 3*). It also does not seem to fit in with the legitimate goals set in Art. 13(2).

- The obligation to produce or gather information the State needs to fulfill its duties requires state bodies and other bound institutions to have proper knowledge about the AI/ADM systems they adopt or aim to adopt for rights-based determinations. Under this obligation, state bodies and other institutions cannot claim that the State does not have the information requested when such information is relevant for conducting a state policy and/or activity.

standards: to be contemplated in legislation, to serve a legitimate purpose, and to be suitable, necessary, and proportionate." Case of Tristán Donoso v. Panamá, Preliminary Objection, Merits, Reparations, and Costs, Judgment of January 27, 2009, para. 56.

174 Case of Members of the "José Alvear Restrepo" Lawyers Collective v. Colombia, supra note 52, para. 603, freely translated.

175 See IACHR, Office of the Special Rapporteur for Freedom of Expression, Derecho a la Información y Seguridad Nacional, supra note 158, paras. 74, 77-78, and 88; UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media and OAS Special Rapporteur for Freedom of Expression, Joint Declaration on Access to Information and on Secrecy Legislation, December 6, 2004; and IACHR, Report on Citizen Security and Human Rights, supra note 110.

176 IACHR, Report on Citizen Security and Human Rights, supra note 110, para. 186.

177 IACHR, Office of the Special Rapporteur for Freedom of Expression, Derecho a la Información y Seguridad Nacional, supra note 158, paras. 117 and 119.

- Relatedly, producing, organizing, and disclosing information about public budget allocations to pay for AI/ADM systems is critical for preventing corruption and enabling public oversight (*see Section 3.3*). This also applies to security authorities and activities, including national security and public security.[178]
- Reliable indicators on the implementation of policies that include AI/ADM systems is equally crucial to properly monitor and evaluate such policies. States must devise, produce, and periodically release these indicators, which must constitute a relevant basis for assessing whether the policy and its AI/ADM system component are advancing or hindering the protection of human rights (*see also Section 3.3*). Indicators should pay special attention to policies' impacts on historically marginalized groups, measuring results regarding Afro-descendant populations, indigenous groups, women and sexual minorities, children and adolescents, and migrants, among others. This is especially relevant in the context of security and social welfare policies.
- States must have clear guidance and structures in place to adequately and effectively satisfy the right to information regarding their adoption of AI/ADM systems. This includes properly gathering and managing related information, training agents responsible for responding to requests, and setting processes to fulfill active transparency duties.
- States must also ensure a simple, prompt, and effective appeal mechanism to the denial of information requests about AI/ADM systems (*see Section 4.4*). Those who had their information petitions refused must be able to count on an independent body, distinct from the one that denied the request, to present an appeal.[179] A specialized administrative body is ideal for this, in addition to people's right to go to court.[180]
- This administrative body should have the resources and power to carry out its duties timely and independently, including overseeing enforcement of right-to-information obligations and resolving disputes over the provision of information through binding decisions.[181] The Model Inter-American Law on Access to Public Information is an essential reference for States regarding proper compliance with the right of access to information.

4.3. Equality and Non-discrimination

Articles 1(1) and 24 of the American Convention are core provisions for the protection of equality and non-discrimination. The IACHR understands "equality and non-discrimination as a guiding principle, as a right, and as a guarantee, that is, it involves a principle whose importance impacts all the other rights enshrined in domestic and international law."[182] According to the Court, "*[n]on-discrimination*, together with

178 IACHR, Office of the Special Rapporteur for Freedom of Expression, Derecho a la Información y Seguridad Nacional, supra note 158, para. 126, and IACHR, Report on Citizen Security and Human Rights, supra note 110.
179 Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil, supra note 143, para. 231, citing Case of Claude-Reyes et al. v. Chile, supra note 39, para. 13.
180 IACHR, Office of the Special Rapporteur for Freedom of Expression, Los Órganos de Supervisión del Derecho de Acceso a la Información Pública, supra note 150, para. 7.
181 IACHR, Office of the Special Rapporteur for Freedom of Expression, Los Órganos de Supervisión del Derecho de Acceso a la Información Pública, supra note 150, para. 44.
182 IACHR, Compendium on Equality and Non-Discrimination: Inter-American Standards, February 12, 2019, para. 29.

equality before the law and *equal protection of the law*, are elements of a general basic principle related to the protection of human rights."[183] As for the protected categories, "[t]he Court has also established that the prohibited categories of discrimination listed under Article 1(1) of the American Convention *are neither exhaustive nor restrictive, but merely indicative*." In this sense, the Court finds that "by including the expression 'or any other social condition' the article leaves the grounds of discrimination open in order to recognize other categories that were not explicitly listed but are analogous to these. *Consequently, when interpreting this phrase, the hermeneutic alternative that is most favorable to the protection of the rights of the individual and compatible to the application of the pro persona principle must be chosen*."[184]

Distinction vs. Discrimination

In the Advisory Opinion OC-18/03, the Court differentiated *distinction* from *discrimination* and elaborated on criteria that are required so that there is no violation of the principle of equality and non-discrimination in a concrete case. Thus, according to the body, "distinction will be used to indicate what is admissible, because it is reasonable, proportionate and objective. Discrimination will be used to refer to what is inadmissible, because it violates human rights."[185] In the same document, the Court stated that "[n]o discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things. It follows that there would be no discrimination in differences in treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review."[186]

When taking measures that possibly restrict rights in a way that affects the protected categories of Article 1(1) of the Convention, the State has to prove that is not carrying out a discriminatory measure: "the possible restriction of a right requires a rigorous and substantial justification and also the burden of proof is inverted, which means that it is for the authority to prove that its decision did not have a discriminatory purpose or effect."[187]

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183 Advisory Opinion OC-18/03, supra note 18, para. 83 (emphasis added).
184 Advisory Opinion OC-24/17 of November 24, 2017, Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples (emphasis added), citing Case of Ximenes-Lopes v. Brazil, supra note 36, para. 105; Case of Chinchilla Sandoval et al. v. Guatemala, Preliminary Objection, Merits, Reparations and Costs, Judgment of February 29, 2016, para. 44; United Nations, Committee on Economic, Social and Cultural Rights, General Comment No. 5: Persons with Disabilities, E/1995/22, December 9, 1994, para. 5; and Art. 2 of the Convention on the Rights of Persons with Disabilities.
185 Advisory Opinion OC-18/03, supra note 18, para. 84.
186 Advisory Opinion OC-18/03, supra note 18, para. 91, citing Advisory Opinion OC-17/02 of August 28, 2002, Juridical Condition and Human Rights of the Child, para. 47; and Advisory Opinion OC-4/84 of January 19, 1984, Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, para. 57. See also Case of I.V. v. Bolivia, Preliminary Objections, Merits, Reparations and Costs, Judgment of November 30, 2016, para. 241, and additional references in Section 4.3 of the Appendix.
187 Case of Granier et al. (Radio Caracas Televisión) v. Venezuela, Preliminary Objections, Merits, Reparations and

Material Equality, Indirect Discrimination, and Preventive Approach

There is a distinction between formal equality from a notion towards real, substantial or material equality. According to the Commission, real equality is "based on the acknowledgment that certain sectors of the population require the adoption of affirmative action measures that make it possible to have a more level playing field," a position that is followed by the Court.[188] As a consequence, "the right to equality entails the obligation to [...] promote the inclusion and participation of historically marginalized groups, to guarantee to disadvantaged persons or groups the effective enjoyment of their rights and, in sum, to offer everyone real possibilities of achieving material equality."[189]

The Inter-American System has also elaborated on the concept of indirect discrimination regarding laws and policies that are allegedly neutral but have a disparate impact in groups historically discriminated against. In this sense, the Commission has "established that the examination of norms and policies on the basis of the principle of effective equality and non-discrimination also encompasses the possible discriminatory impact of these measures, even when they might seem neutral in their wording or involve measures with a general and non-differentiated scope."[190] In the same vein, the Court stated that "a violation of the right to equality and non-discrimination also occurs in situations and cases of indirect discrimination reflected in the disproportionate impact of norms, actions, policies or other measures that, even when their formulation is or appears to be neutral, or their scope is general and undifferentiated, have negative effects on certain vulnerable groups."[191]

The Commission has highlighted States' duty to conduct a preventive analysis before adopting regulations and other measures, having "the obligation to adopt the measures necessary to recognize and guarantee the effective equality of all persons before the law; to abstain from introducing in their legal framework regulations that are discriminatory towards certain groups either in their [text] or in practice; and to combat discriminatory practices."[192] In this sense, "[t]he Commission has underscored that laws and policies should be examined to ensure that they comply with

Costs, Judgment of June 22, 2015, para. 228. Mutatis mutandis, Case of Atala Riffo and Daughters v. Chile, supra note 24, para. 124

188 IACHR, Compendium on Equality and Non-Discrimination, supra note 182, para. 37.

189 Case of Guachalá Chimbo et al. v. Ecuador, supra note 188, para. 167, citing Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, supra note 37, para. 199.

190 IACHR, Compendium on Equality and Non-Discrimination, supra note 182, para. 41, citing the Inter-American Convention against All Forms of Discrimination and Intolerance, and the Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance, Art. 1.2.

191 Case of Nadege Dorzema et al. v. Dominican Republic, Merits, Reparations and Costs, Judgment of October 24, 2012, para. 235, citing United Nations, Committee on Economic, Social and Cultural Rights, General Comment No. 20:, Non-Discrimination in Economic, Social and Cultural Rights, July 2, 2009, para. 10(b).

192 IACHR, Report No. 80/11, Case 12.626, Jessica Lenahan (Gonzales) et al. v. United States of America, Merit, July 21, 2011, para. 109, citing IACHR, Report No. 67/06, Case 12.476, Oscar Elías Bicet et al. vs. Cuba, October 21, 2006, paras. 228-231; IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Community vs. Belize, October 12, 2004, paras. 162 and 166.

the principles of equality and nondiscrimination; an analysis that should assess their potential discriminatory impact, even when their formulation or wording appears neutral, or when they apply without textual distinctions."[193]

Public Policies

Concerning policymaking, the Commission asserted that the interpretation of the principles of equality and non-discrimination by the Inter-American System "indicates that *it is necessary to design mechanisms and tools using a differentiated approach that addresses the specific conditions* of certain persons, groups, or populations in order to guarantee sufficient protection to achieve substantive equality." It complements that, "*this notion of equality requires the active participation of the persons, groups, and populations in situations of historical discrimination in designing public policies that concern them*."[194]

The Commission has also indicated that States are obligated "to pay special attention to the social sectors and people who have suffered from the various manifestations of historic exclusion or are victims of persistent prejudice, and must immediately adopt the necessary measures to prevent, reduce, and eliminate the conditions and attitudes that create and perpetuate discrimination in practice. These principles have been enshrined in the instruments that govern the actions of the Inter-American human rights system."[195]

Stereotypes and Discriminatory Profiling

The Court has stated that "*gender stereotyping refers to a preconception of personal attributes, characteristics or roles that correspond or should correspond to either men or women*," recognizing that "the subordination of women can be associated with practices based on persistent socially-dominant gender stereotypes, *a situation that is exacerbated when the stereotypes are reflected, implicitly or explicitly, in policies and practices and, particularly, in the reasoning and language of the judicial police authorities*."[196] The Court has also elaborated on stereotyping by sexual orientation,[197] and reaffirmed that "'[*s]tereotyping distorts perceptions and results*

193 IACHR, Report No. 80/11, Case 12.626, supra note 192, para. 109, citing IACHR, Access to Justice for Women Victims of Violence in the Americas, January 20, 2007, para. 90. See also IACHR, Report No. 5/14, Case 12.841, Ángel Alberto Duque v. Colombia, Merits, April 2, 2014, para. 61; IACHR, Situation of Human Rights in Guatemala, December 31, 2017, para. 124; and IACHR, The Road to Substantive Democracy, supra note 92, para. 14.
194 IACHR, Public Policy with a Human Rights Approach, supra note 75, para. 48 (emphasis added).
195 IACHR, Public Policy with a Human Rights Approach, supra note 75, para. 83.
196 Case of González et al. ("Cotton Field") v. Mexico, supra note 31, para. 401 (emphasis added).
197 For instance, in the Case of Azul Rojas Marín et al. v. Peru, the Court stated: "The Court recalls that stereotyping based on sexual orientation refers to a preconception of attributes, conducts or characteristics possessed by a person based on their sexual orientation, in this case in particular, by homosexual men or men perceived as such." Case of Azul Rojas Marín et al. v. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment of March 12, 2020, para. 198, citing Case of Atala Riffo and Daughters v. Chile, supra note 24, para. 111, and Case of Ramírez Escobar et al. v. Guatemala, Merits, Reparations and Costs, Judgment of March 9, 2018, para. 301.

in decisions based on preconceived beliefs and myths rather than relevant facts,' 'which can, in turn, lead to misscarriage of justice, including the revictimization of the complainants'."[198]

The Commission has also pointed out the relation between ethnic and racial discrimination and State racial profiling. For instance, addressing the situation of human rights in Brazil, the Commission "ascertained, with profound concern, systemic violence practiced by State agents, especially by members of police institutions and agents in justice systems rife with *racial profiling designed to criminalize and punish the Afro-descendant population*."[199]

It is important to note that a person's self-perception of being part of a group is not a necessary condition for discrimination to occur. On the contrary, the Court underlined that "*a person may be discriminated against on the grounds of the perception that others have of his or her relationship with a social sector or group, regardless of whether this corresponds to the reality or to the self-identification of the victim*."[200] This concerns discrimination based on perception, whose purpose or effect is "to prevent or invalidate the recognition, enjoyment or exercise of the human rights and fundamental freedoms of the person [...], irrespective of whether that person self-identifies with a specific category."[201] The Court pointed out that "[a]s with other forms of discrimination, *the person is reduced to a single characteristic attributed to him or her, without taking into account other personal conditions*."[202]

IMPLICATIONS

- Equality and non-discrimination are guiding principles for all state activities, norms,

198 Case of Azul Rojas Marín et al. v. Peru, supra note 197, para. 199 (emphasis added), citing Case of Gutiérrez Hernández et al. v. Guatemala, Preliminary Objections, Merits, Reparations and Costs, Judgment of August 24, 2017, para. 173, and Case of López Soto et al. v. Venezuela, Merits, Reparations and Costs, Judgment of September 26, 2018, para. 326. Similarly, see United Nations, Committee on the Elimination of Discrimination against Women, General Recommendation No. 33 on Women's Access to Justice, CEDAW/C/GC/33, August 3, 2015, para. 26.
199 IACHR, Situation of Human Rights in Brazil, supra note 115, para. 21 (emphasis added), citing IACHR, Report No. 23/03, Case 11.634, Néri da Fonseca v. Brazil, Merits, March 11, 2004, and IACHR, Report No. 66/06, Case 12.001, Merits, Simone André Diniz vs. Brazil, October 21, 2006.
200 Advisory Opinion OC-24/17, supra note 184, para. 79 (emphasis added), citing Case of Perozo et al. v. Venezuela, Preliminary Objections, Merits, Reparations and Costs, Judgment of January 28, 2009, para. 380; Case of Ríos et al. v. Venezuela, Preliminary Objections, Merits, Reparations and Costs, Judgment of January 28, 2009, para. 349; and Case of Flor Freire v. Ecuador, Preliminary Objection, Merits, Reparations and Costs, Judgment of August 31, 2016, para. 120.
201 Advisory Opinion OC-24/17, supra note 184, para. 79 (emphasis added). Mutatis mutandis, Case of Perozo et al. v. Venezuela, supra note 200, para. 158; Case of Ríos et al. v. Venezuela, supra note 200, para 146; and Case of Flor Freire v. Ecuador, supra note 200, para. 120.
202 Advisory Opinion OC-24/17, supra note 184, para. 79 (emphasis added). Mutatis mutandis, Case of Perozo et al. v. Venezuela, supra note 200, para. 158; Case of Ríos et al. v. Venezuela, supra note 200, para. 146; and Case of Flor Freire v. Ecuador, supra note 200, para. 120. Assessing the matter of gender identity, the Court concluded that "the prohibition to discriminate on the grounds of gender identity is understood not only with regard to the real or self-perceived identity, but also in relation to the identity perceived externally, regardless of whether or not that perception corresponds to the reality." Advisory Opinion OC-24/17, supra note 184, para. 79

and practices, and as such present specific and particular implications for government use of AI/ADM systems for adjudication, recognition, and exercise of rights.

- The American Convention prohibits all discriminatory treatment. Consequently, prior to implementation and throughout the system's lifecycle, States must take all the necessary steps to ensure that the AI/ADM systems they employ for rights-related purposes do not result in discriminatory treatment—meaning any exclusion, restriction, or privilege that is not objective, necessary, and proportional to the legitimate goal they aim to achieve and that adversely affects human rights.

- Differential treatment that negatively impacts rights and freedoms based on speculation, presumption, or stereotypes of persons and groups is incompatible with the Convention (*see also Section 4.4*). This poses special challenges when States adopt AI/ADM technologies for rights-based decision-making, as algorithmic determinations rely on pattern recognition within a dataset to infer conclusions about a person or situation that may fail to reflect or match real life circumstances. Relatedly, machine learning includes a probabilistic element, such that random chance plays a significant role in the outputs of many AI technologies.

- For AI/ADM adoption to be compliant with international human rights law, States must organize their apparatus, processes, and practices, and adapt national legislation if needed, to prevent, mitigate, remedy, and redress discriminatory decision-making based on those systems.[203]

- It is crucial for States to adopt practices to meet this obligation, including: conducting human rights impact assessments before implementation and during the system lifecycle; ensuring that responsible state institutions and oversight bodies have access to the system's inner workings and proper expertise to assess them from a human-rights perspective; carrying out internal and external independent audits; and ensuring there is human oversight and meaningful human review of AI/ADM-based decisions by competent officials following strict and transparent criteria (*see Chapter 5*). Providing meaningful human review entails properly addressing the so-called "automation bias," which is the propensity for humans to favor suggestions from automated decision-making systems and ignore contradictory information made without automation, even if it is correct. In addition, periodical evaluation, impact assessments, and audits should address not just the initial design but the actual outcomes of using AI/ADM systems once implemented. Human rights impact assessments and audits should adopt a gender and intersectional perspective in observation of IACHR's three-step guide to policy design (see detailing below).

- In each one of these measures, the engaged institutions and officials must observe whether the use of the system may cause, or is leading to, indirect discrimination with a disproportionate impact on certain groups. Institutions and officials must be aware that even AI/ADM technologies presumably built to act neutrally towards different groups can result in discriminatory treatment.

- States' adoption of these technologies should not take an approach that is neutral or blind to historical discrimination and inequalities in society and within the particular contexts where the system would be or is implemented. This is important not only to prevent discrimination but also to accomplish the States' duty to pursue substantial/

203 See Case of the Santo Domingo Massacre v. Colombia, supra note 13, para. 18; IACHR, Compendium on the Obligation of States to adapt their Domestic Legislation to the Inter-American Standards of Human Rights, supra note 20, para. 29; and Case of Velásquez-Rodríguez v. Honduras, Merits, supra note 14, para. 166.

material equality. In particular, if the training data for an AI technology reflects historical discrimination and inequalities, it will not be suitable for AI training, because the resulting AI system will reproduce those historical patterns.

- Companies selling AI/ADM systems to States for decision-making applications that affect the recognition, enjoyment, and exercise of human rights must put in place the necessary processes and measures to assess, prevent, and mitigate discrimination and other detrimental impacts to human rights their systems may cause. They must provide States with sufficient guarantees that their systems are compatible with human rights and comply with proper standards of transparency, fairness, privacy, security, and reliability, among others attributes, while also making available all information pertinent to State and independent analysis of the system.
- States must refrain from implementing AI/ADM technologies that do not provide these guarantees, including having a track record of human rights violations. States must also refrain from adopting AI/ADM-based decision-making for purposes or in contexts where it would be incompatible with human rights, such as state practices that replicate systemic discrimination and/or entail racial profiling. In this sense, States must refrain from implementing AI/ADM technologies that have disproportionate impact on specific groups and/or inherently reproduce discriminatory views or practices reflected in biased datasets used to train the AI model or feed the system's operation (see Section 4.4). State use of facial recognition and predictive policing technologies are examples of those.
- The three-step guide the IACHR recommends for policy design, implementation, and evaluation configures a relevant roadmap for States to assess public policies that make use of AI/ADM systems. It encompasses the consideration of: (i) the differential impact a certain policy has or might have for groups that have been historically discriminated against; (ii) the views and concerns of these groups at different stages of the policy's cycle; (iii) and the actual benefits this policy brings or may bring for reducing inequities impacting those groups.
- Relatedly, States must establish the means and processes for effective civic participation, particularly of historically discriminated against groups, at different stages of AI/ADM systems adoption by public institutions for rights-based determinations (*see Chapter 3 and Section 4.1*).
- It is up to state authorities, rather than the persons affected, to justify and prove that a decision based on automated systems or AI models did not have a discriminatory purpose or effect. To properly comply with this obligation, States must ensure that AI/ADM-based decisions have explainable and justifiable grounds.

4.4. Due process

The Inter-American Court has reinforced a broad understanding of the scope of Article 8 of the American Convention, which establishes the right to a fair trial. This right is intertwined with the notion of justice and the imperative of preventing State's arbitrary decisions. This guarantee unfolds in, among others, the right to be heard with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of

any accusation of a criminal nature or for the determination of a person's rights and obligations.

The Court has held that the application of the right to a fair trial "is not strictly limited to judicial remedies, 'but rather the procedural requirements that should be observed in order to be able to speak of effective and appropriate judicial guarantees' so that a person may defend himself adequately in the face of any kind of act of the State that affects his rights."[204] It has asserted that "the list of minimum guarantees of due legal process applies when determining rights and obligations of *'civil, labor, fiscal or any other nature*.' This shows that due process affects all these areas and not only criminal matters."[205] The Court has established that due process guarantees involve any act or omission of state bodies in proceedings that may affect people's rights[206] and apply in all stages of such proceedings, including preliminary stages.[207]

In this sense, the Court has noted that "when the Convention refers to the right of everyone to be heard by a competent judge or court to 'determine his rights', this expression refers to any public authority, whether administrative, legislative or judicial, which, through its decisions, determines individual rights and obligations. For that reason, this Court considers that any State organ that exercises functions of a materially jurisdictional nature has the obligation to adopt decisions that are in consonance with the guarantees of due legal process in the terms of Article 8 of the American Convention."[208]

Right to be Heard

The right to be heard constitutes a pivotal element of due process of law. The Court has affirmed that "in general, it signifies the right of everyone to have access to the court or the organ of the State responsible for determining his or her rights and obligations. Regarding the right to a hearing, [its guarantees] suppose that the victims *must have ample possibilities of being heard and acting* in the respective proceedings, so that they *may submit their claims and present probative elements*, and that *these are analyzed completely and rigorously by the authorities before a decision* is taken on the facts, responsibilities, sanctions, and reparations."[209]

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204 Case of the Constitutional Court v. Peru, Merits, Reparations and Costs, Judgment of January 31, 2001, para. 69, citing Advisory Opinion OC-9/87, supra note 49, para. 27.
205 Advisory Opinion OC-18/03, supra note 18, para. 124.
206 Case of Baena-Ricardo et al. v. Panama, supra note 30, para. 124.
207 See Case of Baena-Ricardo et al. v. Panama, supra note 30, para. 124; Case of Ruano Torres et al. v. El Salvador, Merits, Reparations and Costs, Judgment of October 5, 2015, para. 152. See also Arroyo, F. J. F. (2015). El debido proceso desde la perspectiva de la Corte Interamericana de Derechos Humanos. Revista Jurídica de la Universidad de Palermo, 14(1), 155-184, pp. 162-163.
208 Case of the Constitutional Court v. Peru, supra note 204, para. 71.
209 Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador, Preliminary Objections, Merits, Reparations and Costs, Judgment of August 28, 2013, para. 181 (emphasis added); Case of Genie Lacayo v. Nicaragua, Merits,

The Court has indicated that "this right includes *a material aspect of protection which means that the State must guarantee that the decision produced by the proceedings satisfies the end for which it was conceived*. The latter does not mean that the right must always be granted, *but rather that the capacity of the body to produce the result for which it was conceived be guaranteed*."[210]

Competent Authority and Impartial Decision

Due process involves the right to be judged by a competent, independent, and impartial court previously established by law, which must set the legal proceedings to be followed. In this sense, the Court has held that "[Article 8] implies that the judge or court responsible for hearing a case must, above all, be competent, in addition to independent and impartial. More specifically, the Court has indicated that 'any person subject to a trial of any nature before an organ of the State must be guaranteed that this organ [...] acts pursuant to the procedure established by law for hearing and deciding the case submitted to it.'"[211]

This right is closely related to predictability, coherence and objectivity of state bodies' decisions. It is crucial to avoid or address cases in which state authorities issue decisions that are unduly discretionary, arbitrary and/or even discriminatory. In a case referring to the determination of a person's refugee status, the Court considered that "even if States may determine the proceedings and authorities to implement that right, in application of the principles of nondiscrimination and due process they must ensure predictable proceedings, as well as coherence and objectivity in decision-making at each stage of the proceedings to avoid arbitrary decisions."[212] Looking at the application of these guarantees in the administrative sphere, the Inter-American Commission has affirmed that States are obliged "to have clear rules governing the behavior of their agents in order to avoid inappropriate levels of dis-

Reparations and Costs, Judgment of January 29, 1997, para. 74; Case of Cabrera García and Montiel Flores v. Mexico, Preliminary Objection, Merits, Reparations and Legal Costs, Judgment of November 26, 2010, para. 140; Case of the Constitutional Court v. Peru, supra note 204, para. 81; Case of Baldeón-García v. Perú, supra note 41, para. 146; and Case of Barbani Duarte et al. v. Uruguay, supra note 47, para. 120.

210 Case of Barbani Duarte et al. v. Uruguay, supra note 47, para. 122 (emphasis added). This case discussed administrative decisions of Uruguay's Central Bank. Responding to different situations unfolding from a banking crisis in Uruguay, the State promulgated a law establishing a special administrative procedure conducted by the Central Bank to determine the rights of "depositors" of affected banks whose savings "had been transferred to other institutions [...] without their consent." The Court decided that such a "special administrative procedure was ineffective, in light of what it had to determine" (para. 142) since it was proved in the case that "the administrative body decided not to analyze elements that could invalidate or impair consent" (para. 141). This is because, according to the Court, "[a]ny determination of whether consent had been given that did not take into account elements that could impair or invalidate it, such as the alleged defects of consent and non-compliance with the obligation to provide complete and truthful information, was incorrect" (para. 141).

211 Case of Yvon Neptune v. Haiti, Merits, Reparations and Costs, Judgment of May 6, 2008, para. 80, citing Case of Castillo Petruzzi et al. v. Peru, Merits, Reparations and Costs, Judgment of May 30, 1999, para. 130; Case of the Constitutional Court v. Peru, supra note 204, para. 77; Case of La Cantuta v. Peru, Merits, Reparations and Costs, Judgment of November 29, 2006, para. 140; and Case of Almonacid-Arellano et al. v. Chile, supra note 22, para. 130.

212 Case of the Pacheco Tineo Family v. Plurinational State of Bolivia, Preliminary Objections, Merits, Reparations and Costs, Judgment of November 25, 2013, para. 157.

cretionality in the administrative sphere that might encourage arbitrary or discriminatory practices."[213]

Substantiated Decision

The Court has reinforced that State decisions "should be justified, otherwise they would be arbitrary decisions."[214] On this basis, it "has indicated *that the grounds [for a decision] are the exteriorization of the reasoned justification that allows a conclusion to be reached*.' In general, the obligation to provide grounds for a decision is a guarantee related to the proper administration of justice, *which grants credibility to juridical decisions in a democratic society*."[215] As a consequence, "the considerations of a ruling and certain administrative decisions must reveal the facts, grounds and laws on which the authority based itself to make its decision in order to eliminate any sign of arbitrariness. [...] *the obligation to provide the grounds for a decision is one of the 'due guarantees' included in Article 8(1) to safeguard the right to due process*."[216] Also in this sense, "[t]he Court has established that the reasoning shows the parties that they have been heard and, in those cases in which the decisions can be appealed, provides them with the possibility of contesting the decision and obtaining a fresh examination of the matter before the higher courts."[217]

Right of Defense and Presumption of Innocence

Due process entails people's right to present a defense in state proceedings determining their rights and obligations. As noted above, due process guarantees go beyond Legal Court proceedings. According to the Inter-American Court, "[t]he right of defense is a central component of due process *which requires the State to treat an individual at all times as a true party to the proceeding, in the broadest sense of this concept, and not simply as an object thereof*."[218] It includes the right of the persons accused to receive a detailed notification of the charges against them, since "the State must notify the accused not only of the charges against him, that is, the crimes or offenses he is charged with, but also of the reasons for them, and the

213 IACHR, Access to Justice as a Guarantee of Economic, Social and Cultural Rights: A Review of the Standards Adopted by the Inter-American System of Human Rights, September 7, 2007, para. 11.
214 Case of Claude-Reyes et al. v. Chile, supra note 39, para. 120.
215 Case of Escher et al. v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Judgment of July 6, 2009, para. 208 (emphasis added).
216 Case of Chocrón Chocrón v. Venezuela, Preliminary Objection, Merits, Reparations and Costs, Judgment of July 1, 2011, para. 118 (emphasis added).
217 Case of J. v. Peru, Preliminary Objection, Merits, Reparations and Costs, Judgment of November 27, 2013, para. 270, citing Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela, Preliminary Objection, Merits, Reparations and Costs, Judgment of August 5, 2008, para. 78, and Case of Chocrón Chocrón v. Venezuela, supra note 216, para. 118.
218 Case of Ruano Torres et al. v. El Salvador, supra note 207, para. 153 (emphasis added), citing Case of Barreto Leiva v. Venezuela, Merits, Reparations and Costs, Judgment of November 17, 2009, paras. 29 and 61, and Case of Argüelles et al. v. Argentina, Preliminary Objections, Merits, Reparations and Costs, Judgment of November 20, 2014, paras. 175 and 177.

evidence for such charges and the legal definition of the facts. The defendant has the right to know, through a clear, detailed and precise description, all the information of the facts in order to fully exercise his right to defense and prove to the judge his version of the facts."[219]

One essential principle of the right of defense is the presumption of innocence, which, according to the Court, "implies that judges should not begin the process with a preconceived idea that the accused has committed the crime with which he is charged."[220] Additionally, the Court has highlighted the interdependence between the presumption of innocence and the imperative of impartiality and objectivity of the decision body.

On this basis, the Court has stated that decisions based on prejudiced and stereotyped views fail to meet these standards: "Criminal law *may be applied in a discriminatory manner if the judge or court convicts an individual on the basis of reasoning founded on negative stereotypes that associate an ethnic group with terrorism in order to determine any element of criminal responsibility*. It is incumbent on the criminal judge to verify that all the elements of the offense have been proved by the accuser, because, as this Court has stated, the irrefutable proof of guilt is an essential requirement for criminal punishment; thus, the burden of proof evidently falls on the accuser and not on the accused." Still in this sense, the Court noted that "*Stereotypes are pre-conceptions of the attributes, conducts, roles or characteristics of individuals who belong to a specific group* [, indicating] that discriminatory conditions 'based on stereotypes [...] that are socially dominant and socially persistent, [...] *are increased when the stereotypes are reflected, implicitly or explicitly, in policies and practices, particularly in the reasoning and the language of [the authorities]*'."[221]

Right to Appeal

The right to appeal is also part of the right of defense. The Court has elaborated on this right sustaining, for instance, that "the primary purpose of the right to challenge the judgment is to protect the right of defense, *inasmuch as it affords the possibility of a remedy to prevent a flawed ruling, containing errors that are unduly prejudicial*

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219 Case of Barreto Leiva v. Venezuela, supra note 218, para. 28, citing Case of López-Álvarez v. Honduras, supra note 41, para. 149; Case of Palamara-Iribarne v. Chile, supra note 50, paras. 184 y 225; Case of Acosta-Calderón v. Ecuador, supra note 41, para. 118; and Case of Tibi v. Ecuador, Preliminary Objections, Merits, Reparations and Costs, Judgment of September 7, 2004, para. 187.

220 Case of Zegarra Marín v. Peru, Preliminary Objection, Merits, Reparations and Costs, Judgment of February 15, 2017, para. 123, freely translated, para. 123, citing Case of Cabrera García and Montiel Flores v. Mexico, supra note 209, para. 184, and Case of Ruano Torres et al. v. El Salvador, supra note 207, para. 127. See also ECHR, Case of Telfner v. Austria, Application No. 33501/96, Judgement of March 20, 2001, para. 15.

221 Case of Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile, Merits, Reparations and Costs, Judgment of May 29, 2014, paras. 223 and 226-228 (emphasis added), citing Case of Cabrera García and Montiel Flores v. Mexico, supra note 209, para. 182; Case of J. v. Peru, supra note 217, para. 233; Case of González et al. ("Cotton Field") v. Mexico, supra note 31, para. 401; and Case of Atala Riffo and Daughters v. Chile, supra note 24, paras. 95, 111 and 401.

to a person's interests, from becoming final, which assumes that the remedy must be guaranteed before the judgment becomes *res judicata*. The right to a review by a higher court *allows* for the correction of errors or injustices that may have been committed in the decisions in the first instance [...]."[222]

Still regarding seeking "a review by a higher court, *the Court has indicated that what matters is that the remedy guarantees a comprehensive examination of the judgment being challenged*."[223] Important elements of this right are that the appeal must be accessible and efficient,[224] which means that the remedy must fit its purpose. In this sense, "the Court recalls that an effective remedy implies that the analysis by the competent authority of a judicial remedy cannot be reduced to a mere formality, but must examine the reasons invoked by the plaintiff and expressly state its position on them."[225] Thus, enabling a review that constitutes an appropriate means for correcting a wrongful conviction "requires it to analyze questions of fact, evidence, and law upon which the contested judgment is based, since in judicial activity *there is interdependence between the factual determinations and the application of law in such a way that an erroneous finding implies a wrong or improper application of law*."[226]

Public Nature of the Proceedings

Regarding the connection between due process and transparency, the Court has held that "[t]he publicity of criminal proceedings aims at preventing the administration of secret justice, submitting it to the careful examination of the parties and the public, and is related to the requirements of transparency and impartiality of the decisions which are to be taken. Furthermore, it is a means for promoting confidence in courts of law. Publicity specifically refers to the access to the information the parties to the case, and even third parties, may have on the proceedings."[227] The Court admits restrictions to the publicity of proceedings only under certain circumstances and complying with the principles of necessity and proportionality. For instance, in the Advisory Opinion OC-17/02, the Court found that it is appropriate to

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222 Case of Liakat Ali Alibux v. Surinam, Preliminary Objections, Merits, Reparations and Costs, Judgment of January 30, 2014, para. 85 (emphasis added), citing Case of Vélez Loor v. Panama, Preliminary Objections, Merits, Reparations and Costs, Judgment of November 3, 2010, paras. 178-179; Case of Herrera-Ulloa v. Costa Rica, supra note 30, paras. 158 and 165; Case of Mendoza et al. v. Argentina, Preliminary Objections, Merits and Reparations, Judgment of May 14, 2013, paras. 242-244; and Case of Barreto Leiva v. Venezuela, supra note 218, para. 89.

223 Case of Liakat Ali Alibux v. Surinam, supra note 222, para. 85 (emphasis added), citing Case of Vélez Loor v. Panamá, supra note 222, paras. 178-179; Case of Herrera-Ulloa v. Costa Rica, supra note 30, para. 158 and 165; Case of Mendoza et al. v. Argentina, supra note 222, paras. 242-244; Case of Barreto Leiva v. Venezuela, supra note 218, para. 89.

224 See, for instance, Case of Liakat Ali Alibux v. Surinam, supra note 222, para. 86.

225 Case of Zegarra Marín v. Peru, supra note 220, para. 179, freely translated.

226 Case of Mohamed v. Argentina, Preliminary Objection, Merits, Reparations and Costs, Judgment of November 23, 2012, para. 100 (emphasis added).

227 Case of Palamara-Iribarne v. Chile, supra note 41, para. 168, citing ECHR, Osinger v. Austria (No. 54645/00), § 44, March 24, 2005; Riepan v. Austria (No. 35115/97), § 40, ECHR 2000-XII; and Tierce and Others v. San Marino (Nos. 24954/94, 24971/94, and 24972/94), § 88, ECHR 2000-IX.

set certain limits considering the "best interests of the child," "not regarding access by the parties to evidence and decisions, but [...] regarding public observation of the procedural acts."[228] We should note that the opinion has not specifically addressed administrative procedures. In any case, and in line with previous sections, in particular Section 4.3, transparency in decision-making proceedings must not result in or serve to discriminatory and stigmatizing purposes or practices.

IMPLICATIONS

- Due process guarantees apply at all stages of any proceeding conducted by any public authority to determine people's rights and obligations, including administrative and judicial proceedings, regardless of whether or not such determinations are based on AI/ADM systems.
- This means authorities using AI/ADM systems as part of decision-making about rights and obligations remain responsible for preventing arbitrary conclusions and must ensure that the procedures involving these systems fulfill Article 8 guarantees.
- State proceedings that deal with rights-related issues must ensure that those affected can fully exercise their right to be heard. This means setting up processes allowing affected people to intervene in proceedings, submit their claims, and present factual and probative elements (e.g. to indicate inaccurate or outdated data). Those elements and claims must be properly analyzed before a final decision is reached by the body holding the proceeding. This is equally connected to the right of defense.
- Accordingly, the person affected must be made aware of the proceeding analyzing their rights and obligations before a decision is reached. Wherever possible, affected individuals should receive prior and detailed notice. In any case, individuals must receive, in time for them to intervene as detailed above, clear information explaining why they are subject to the proceeding, the relevant elements being considered, and a minimum reference about how the elements being assessed factor into the consequences they may face, including legal or disciplinary rules pertinent to a final decision. Affected individuals must also be informed of the means available to them to present their claims, which must be easily accessible.
- States must also take necessary measures to ensure that decision-making proceedings include the information and elements needed to produce the determination they are intended for.[229] The metrics, criteria, and accuracy of the data the AI/ADM system considers, among others, are elements of the decision-making proceeding and must be appropriately conducive for analyzing what the proceeding is meant to analyze. It is also crucial that States ensure competent human oversight of public institutions' AI/ADM-based determinations affecting human rights.
- The guarantees of independence and impartiality mean that people should, as a general rule, know what to expect from decision-making processes affecting their rights. Government use of AI/ADM systems for rights-based determinations should

228 Advisory Opinion OC-17/02, supra note 186, para. 134.
229 See Case of Barbani Duarte et al. v. Uruguay, supra note 47, para. 122.

follow specific, previously approved, and publicly available protocols grounded in law and capable of ensuring that proceedings are predictable, objective, and coherent.

- The guarantees also mean that officials involved in decision-making proceedings have the required competencies and are properly trained to interact with the AI/ADM system at issue. This is crucial to ensure that resolutions reached through the decision-making process comply with due process guarantees.

- Still regarding objectivity and impartiality, state use of ADM and AI systems—and the decisions those systems make— that affect people's rights must not be the result of or reproduce prejudices and stereotypes. According to the Court, "stereotypes are pre-conceptions of the attributes, conducts, roles or characteristics of individuals who belong to a specific group." Public bodies must take all the necessary measures to prevent stereotyping from influencing the decision-making proceeding (*see also Section 4.3*). Failure to do so also implies a violation of the presumption of innocence.

- When AI/ADM technologies are used in the justice system to support any rights-based determinations, defendants' right to confront the software come into play, including the ability of defense experts to evaluate and audit the system.[230] This right should act as a final line of defense to evaluate a technology that has already been subject to systematic safeguards, meaning the primary burden of evaluating the suitability of technology should not fall on individual criminal defense teams.

- State use of AI/ADM systems to support decision-making proceedings must not undermine the presumption of innocence and shift the burden of proof to individuals subject to algorithmic-based decisions. This is especially important in criminal and disciplinary proceedings. Disciplinary, punitive, or rights-restrictive consequences related to AI/ADM-based decisions must not apply if authorities are not able to ascertain whether the conclusions they produce are reliable and/or whether the facts, data, and criteria underpinning the decision are accurate or pertinent.

- Decisions based on AI/ADM systems must have a clear, reasoned, and coherent justification. This means that systems employed for rights-based determinations must meet interpretability and explainability goals (*see Chapter 5*). The principle that States must justify decisions affecting people's rights is a cornerstone of democratic societies and a necessary condition for the full exercise of the right to appeal.

- States must ensure that effective judicial and administrative remedies are available and easily and equitably accessible. People affected by an administrative AI-based decision must have the appropriate means to challenge it at the administrative level, in addition to the right to take it to court.

- Effective appeals are not a mere formality but a consistent mechanism that ensures a comprehensive examination of the decision challenged. This entails a human review with the proper authority and expertise to assess the decision through strict and transparent criteria. Expertise and adequate protocols are crucial to duly address the potential "automation bias" of human reviews.[231] The conclusions of the review must

230 See more at Lacambra, S., Matthews, J., & Walsh, K. (May 2018). Opening the Black Box: Defendant's Rights to Confront Forensic Software, The Champion (NACDL); and Gullo, K., Victory! New Jersey Court Rules Police Must Give Defendant the Facial Recognition Algorithms Used to Identify Him, Electronic Frontier Foundation, June 7, 2023. Available at <https://www.eff.org/deeplinks/2023/06/victory-new-jersey-court-rules-police-must-give-defendant-facial-recognition>.

231 As noted in the implications of Section 4.3, "automation bias" refers to the propensity for humans to deem decisions of a machine more objective or correct than those taken by people.

also be duly justified.

- Complaints and challenges targeting AI/ADM-based decisions must inform States' design, implementation, and evaluation of public policies. They hold crucial information for assessing the quality of policies in place and establishing parameters for new policies (*see Chapter 3*).
- This requires State bodies to document them and generate publicly available statistical reports. Complaints, challenges, and related documentation should be included in auditing processes and available to independent oversight bodies. They should also be available to independent researchers and the general public in a way that follows adequate privacy and data protection guarantees.
- AI/ADM decision-making in the scope of this paper should abide by the principle of transparency. Relevant information about the decision proceeding (such as stages involved in decision-making, criteria considered, and information on how data is processed) should be publicly available with appropriate protections against the sharing of private, personal data with third parties. Special attention must be given to historically vulnerable or marginalized groups to make sure they do not suffer discrimination and stigmatization resulting from inadequate protections in this context.[232]

4.5. Dignity, Right to Private Life, and Related Rights

The American Convention recognizes the right to private life in Article 11. As the Court understands it,[233] this right includes and goes beyond the right to privacy, encompassing rights that ensure that every person may take decisions about themselves so that self-determination, autonomy, and the right to identity are respected.

Concerning the right to private life, "[t]he Court has held that the sphere of privacy is characterized by being exempt from and immune to abusive and arbitrary invasion or attack by third parties or by the public authorities."[234] Moreover, the Court has stated that "[t]he right to privacy is not an absolute one, and, so, it may be restricted

232 One example of this concern is the stigmatization of women (especially black women) in the context of social welfare policies. See, for example, Eubanks, V. (2018). Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor. St. Martin's Press; and Valente, M., Santos, N., & Fragoso, N. (2021). Presa na Rede de Proteção Social: Privacidade, Gênero e Justiça de Dados no Programa Bolsa Família [Trapped in the Social Safety Net: Privacy, Gender and Data Justice in the Bolsa Família Program]. InternetLab.

233 It's important to note that the Court does not necessarily refer to the "right to private life" and the "right to privacy" interchangeably. Building on the European Court of Human Rights' case law, the Inter-American Court has affirmed a broader scope to the former. For instance, in the judgment of the Case of Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica, the Court stated that the protection of private life goes beyond the right to privacy, encompassing "a series of factors associated with the dignity of the individual, including, for example, the ability to develop his or her own personality and aspirations, to determine his or her own identity and to define his or her own personal relationship," including also other aspects we highlight in this topic. Case Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica, supra note 49, para. 143.

234 Case of Tristán Donoso v. Panamá, supra note 173, para. 55, citing Case of the Ituango Massacres v. Colombia, Preliminary Objection, Merits, Reparations and Costs, Judgment of July 1, 2006, paras. 193-194; ECHR, Case of Klass and others v. Germany, Judgment of September 6, 1978, para. 29; Case of Halford v. the United Kingdom, Judgment of May 27, 1997, para. 44; Case of Amann v. Switzerland, Judgment of February 16, 2000, para. 44; and Copland v. the United Kingdom, Judgment of March 13, 2007, para. 41.

by the States *provided that their interference is not abusive or arbitrary; accordingly, such restriction must be statutorily enacted, serve a legitimate purpose, and meet the requirements of suitability, necessity, and proportionality which render it necessary in a democratic society."*[235] This is often referred to as the three-part test.[236] In analyzing the right to privacy in the context of increased use of communications technologies, the Court affirmed that, *"the State must increase its commitment to adapt the traditional forms of protecting the right to privacy to current times."*[237]

Right to Private Life In Connection To Other Rights and Guarantees

The Court has established a broad understanding of the right to private life, encompassing notions interrelated with data protection, identity, personal autonomy, self-determination, and free development of one's personality. In this sense, it stated that "[p]rivacy is an ample concept that is not subject to exhaustive definitions and includes, among other protected realms, *the sex life and the right to establish and develop relationships with other human beings*. Thus, *privacy includes the way in which the individual views himself and to what extent and how he decides to project this view to others."*[238]

Furthermore, the right to private life is connected to dignity. Also according to the Court, "[t]he protection of private life encompasses a series of factors associated with the dignity of the individual, including, for example, *the ability to develop his or her own personality and aspirations, to determine his or her own identity and to define his or her own personal relationships*. The concept of private life encompasses *aspects of physical and social identity, including the right to personal autonomy, personal development and the right to establish and develop relationships with other human beings and with the outside world."*[239] Moreover, the protection of dignity is intertwined to people's possibility of self-determination and free choice, and "the principle of the autonomy of the individual plays an essential role, *and prohibits any State action that attempts to 'instrumentalize' individuals; in other words, convert them into a means for purposes unrelated to their choices about their own*

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235 Case of Tristán Donoso v. Panamá, supra note 173, para. 56 (emphasis added).
236 The Inter-American standards' background paper of the Necessary and Proportionate principles elaborate further the three-part test for limiting the right to privacy in the context of State communications surveillance. Rodríguez, K., Hernandéz, V., & Lara, J. C. (August 2016). The Inter-American Legal Analysis. In Necessary & Proportionate on the Application of Human Rights to Communications Surveillance, Electronic Frontier Foundation.
237 Case of Escher et al. v. Brazil, supra note 216, para. 115 (emphasis added).
238 Case of Atala Riffo and Daughters v. Chile, supra note 24, para. 162 (emphasis added), citing Case of Rosendo Cantú et al. v. Mexico, Preliminary Objections, Merits, Reparations and Costs, Judgment of August 31, 2010, para. 129, citing ECHR, Case of Dudgeon v. United Kingdom (No. 7525/76), Judgment of October 22, 1981, para. 41; Case of X and Y v. The Netherlands (No. 8978/80), Judgment of March 26, 1985, para. 22; Case Niemietz v. Germany (No. 13710/88), Judgment of December 16, 1992, para. 29; and Case Peck v. United Kingdom (No. 44647/98), Judgment of January 28, 2003, para. 57.
239 Case Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica, supra note 49, para. 143 (emphasis added) citing Case of Rosendo Cantú et al. v. Mexico, supra note 239, para. 119, and Case of Atala Riffo and Daughters v. Chile, supra note 24, para. 162.

life, body and full development of their personality within the limits imposed by the Convention."[240]

Personal Data and Surveillance

Elaborating on key standards concerning the right to private life vis-à-vis state surveillance within intelligence activities, the Court pointed out that "actions such as covert surveillance, interception of communications, or collection of personal data [...] constitute undeniable interference with the exercise of human rights, requiring precise regulations and effective controls to prevent abuse from state authorities."[241] It emphasized that "[t]he effective protection of the rights to privacy and freedom of thought and expression, combined with the extreme risk of arbitrariness posed by the use of surveillance techniques, selective or large-scale, of communications, especially in light of existing new technologies, *leads [the] Court to conclude that any measure in this regard* (including interception, surveillance and monitoring of all types of communication, whether by telephone, telematic or other networks) *requires a judicial authority to decide on its merits*, while also defining its limits, including the manner, duration, and scope of the authorized measure."[242]

Informational Self-Determination

The Court recognized the right to informational self-determination as an autonomous human right protected by the American Convention. It stated that "the individual is also free to self-determine when and to what extent to disclose aspects of their private life, which includes defining what type of information, including their personal data, can be known by others."[243]

On this basis, the Court has held that "*the right to informational self-determination*

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240 Case of I.V. v. Bolivia, supra note 186, para. 150 (emphasis added), citing Case of Atala Riffo and Daughters v. Chile, supra note 24, para. 136; Case of Flor Freire v. Ecuador, supra note 200, para. 103; and Art. 32 of the American Convention, entitled "Relationship between Duties and Rights", which establishes that: "1. Every person has responsibilities to his family, his community, and mankind. 2. The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society."

241 Case of Members of the "José Alvear Restrepo" Lawyers Collective v. Colombia, supra note 52, para. 541, freely translated, citing Case of Myrna Mack Chang v. Guatemala, supra note 157, para. 284, and Case of the Landaeta Mejías and Others v. Venezuela, Preliminary Objections, Merits, Reparations and Costs, Judgment of August 27, 2014, para. 126.

242 Case of Members of the "José Alvear Restrepo" Lawyers Collective v. Colombia, supra note 52, para. 547 (emphasis added), freely translated, citing United Nations, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue, A/HRC/23/40, April 17, 2013, paras. 6.a and 37, and, among others, decisions from the ECHR: Case of Klass and Others v. Germany (No. 5029/71), Judgement of September 6, 1978, para. 56; Case of Roman Zakharov v. Russia (No. 47143/06), Judgment of December 4, 2015, paras. 233 and 249; Case of Szabó and Vissy v. Hungary (No. 37138/14), Judgment of January 12, 2016, para. 77; Case of Big Brother Watch and Others v. United Kingdom (Nos. 58170/13, 62322/14 and 24960/15), Judgment of May 25, 2021, paras. 336 and 351; and Case of Centrum för rättvisa v. Sweden (No. 35252/08), Judgement of May 25, 2021, para. 250.

243 Case of Members of the "José Alvear Restrepo" Lawyers Collective v. Colombia, supra note 52, para. 570, freely translated, citing Case of Manuela et al. v. El Salvador, Preliminary Objections, Merits, Reparations and Costs, Judgment of November 2, 2021, para. 206 and 227.

participates in the protection of private life recognized in Article 11 of the Convention, insofar *as it prohibits arbitrary or abusive interference with it* (numeral 2), *and ensures the protection 'of the law against such interference*' (numeral 3). In turn, *informational self-determination is based on the right of access to information* that [the] Court has recognized from the content of Article 13.1 of the Convention, in the understanding that this norm 'protects the right [...] to request access to information under the control of the State' and, consequently, imposes on the authorities 'the positive obligation [...] to provide it, in such a way that the person may have access to know that information or receive a reasoned response when for any reason permitted by the Convention the State may limit [their] access [...] for the specific case'."[244]

Moreover, the Court has underlined that the standards unfolding from the right to informational self-determination serve "as a guarantee for other rights, such as those concerning privacy, the protection of honor, the safeguarding of reputation and, in general, the dignity of the individual. *It should be noted that the right extends, with the applicable limitations* [...], *to any personal data held by any public body, and also operates with respect to records or databases held by private parties*."245

In detailing the scope of the right to informational self-determination the Court stated that "from the perspective of the person whose data is contained in state records, it is essential, *in order to guarantee their autonomy and freedom of self-determination, to recognize their right to access and control such data*, with the following scope:

(i) the right to know what data are in the records of public bodies, on physical, magnetic, electronic or computer formats, where they come from, how they were obtained, what they are used for, how long they are kept, whether they are shared with other bodies or persons, the reason for this and, in general, the conditions of their processing;

(ii) the right to demand the rectification, modification or updating of the data, in case they are inaccurate, incomplete or outdated;

(iii) the right to demand the elimination, cancellation or suppression of the data, in

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244 Case of Members of the "José Alvear Restrepo" Lawyers Collective v. Colombia, supra note 52, para. 587, freely translated (emphasis added), citing Case of Claude-Reyes et al. v. Chile, supra note 39, para. 77; and Case of Flores Bedregal et al. v. Bolivia, supra note 157, para. 132.

245 Case of Members of the "José Alvear Restrepo" Lawyers Collective v. Colombia, supra note 52, para. 588, freely translated (emphasis added), citing United Nations, General Comment No. 16: Article 17 (Right to Privacy), April 8, 1988, para. 10; United Nations, General Comment No. 34: Article 19 (Freedoms of Opinion and Expression), CCPR/C/GC/34, September 12, 2011, para. 18; OAS, Inter-American Model Law on Document Management, 2020, Art. 16; United Nations, Resolution of the General Assembly, December 16, 2020, A/RES/75/176, para. 8.e. Concerning the access to personal data in different domains, see also ECHR, inter alia, Case of Rotaru v. Romenia (No. 28341/95), Judgment of May 4, 2000, para. 43; Case of Odièvre v. France (No. 42326/98), Judgment of February 13, 2003, paras. 28-29; and Case of K. H. and Others v. Slovakia (No. 32881/04), Judgment of April 28, 2009, paras. 44-46.

the event of finding the illegality of its collection or conservation, or the inexistence of reasons that justify its maintenance in state files or databases, as long as this does not affect other rights, which must necessarily be weighed according to the nature of the files in question and the information they contain, always following the applicable regulation;

(iv) the right to object to data processing, in those cases in which, due to the particular situation of the person, damage is caused to his or her detriment, as well as in the cases provided for in the relevant regulations, and

(v) when possible and in accordance with the relevant legal provisions, the right to receive the data in a structured, commonly used and machine-readable format, and to request its transmission without being prevented from doing so by the authority that holds it."[246]

Free and Informed Consent

The Court has highlighted free and informed consent for personal data processing as a key element of international standards on the matter. It noted that although consent is generally waived in the context of intelligence services, data processing must properly meet the standards of legality, necessity, and proportionality, including when limiting consent. In this sense, the Court pointed out that "[i]nternational standards on the protection of personal data require that their collection, storage, processing and disclosure be feasible only with the free and informed consent of the data subject or, failing that, derived from a regulatory framework that expressly authorizes public agencies to carry out such actions. In any case, the collection and management of personal data is only authorized, within the framework of the American Convention, for the pursuit of legitimate purposes and by legal mechanisms."[247]

The Court explained that in order to "obtain the 'free and informed consent of the data subject,' the person should be provided with sufficient information about the details of the data to be collected, the manner of its collection, the purposes for which it will be used and the possibility, if any, of its disclosure; the individual should

246 Case of Members of the "José Alvear Restrepo" Lawyers Collective v. Colombia, supra note 52, para. 585 (emphasis added), freely translated, citing OAS, Inter-American Juridical Committee, Updated Principles on Privacy and Protection of Personal Data, with Notes, CJI/RES. 266 (XCVIII-O/21), April 9, 2021, principle 8 and pp. 57-63, highlighting the Right to Personal Data Portability; United Nations, Compilation of Good Practices on Legal and Institutional Frameworks and Measures that Ensure Respect for Human Rights by Intelligence Agencies while Countering Terrorism, Martin Scheinin, A/HRC/14/46, May 17, 2010, practice 26; UN Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression, IACHR Special Rapporteur for Freedom of Expression, Joint Declaration on Surveillance Programs and their Impact on Freedom of Expression, June 21, 2013, para. 12. See also European Parliament & Council of the European Union, Regulation 2016/679, Protection of Natural Persons with regard to the Processing of Personal Data and on the Free Movement of Such Data, April 27, 2016, Arts. 20-21.

247 Case of Members of the "José Alvear Restrepo" Lawyers Collective v. Colombia, supra note 52, para. 573, freely translated (emphasis added).

also express his or her willingness in such a way that there is no doubt as to his or her intention. In short, the data subject should have the ability to exercise a real choice and there should be no risk of deception, intimidation, coercion or significant negative consequences to the individual from refusal to consent.'"[248] Also according to the body, in contexts in which free and informed consent is obtained, there are limitations, since "the powers of use, conservation and processing of data must be exercised in accordance with the purposes for which they were collected and for the time necessary to do so."[249]

Data Control

Additionally, the Court has asserted that States have the duty to ensure the right to informational self-determination and provide mechanisms for data subjects to access and control their data held by public institutions. Any restrictions to this right must build on the standards for admissible limitations to the right to access information (see also Section 4.2). In this context, the Court recalled that they must process and respond to "requests for access and control of such data, with reasonable time limits defined for their resolution and under the responsibility of duly trained officials. This requirement, derived from the duty established in Article 2 of the American Convention, insofar as it encompasses the issuance of rules and the development of practices conducive to the observance of human rights, including appropriate administrative procedures, constitutes an essential guarantee to enforce and exercise this right."[250]

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248 Case of Members of the "José Alvear Restrepo" Lawyers Collective v. Colombia, supra note 52, footnote 718, freely translated, citing OAS, Inter-American Juridical Committee, Updated Principles on Privacy and Protection of Personal Data, supra note 246, p. 32.

249 Case of Members of the "José Alvear Restrepo" Lawyers Collective v. Colombia, supra note 52, para. 576, freely translated, citing OAS, Inter-American Juridical Committee, Updated Principles on Privacy and Protection of Personal Data, supra note 246, principles 3-7 and pp. 70-71 (Incorporation of privacy in the design of systems); UNESCO, Guidelines for judicial actors on privacy and data protection, CI-2022/FEJ/ME-1, 2022, p. 18; United Nations, Compilation of Good Practices on Legal and Institutional Frameworks and Measures that Ensure Respect for Human Rights by Intelligence Agencies while Countering Terrorism, supra note 247, practice 23; United Nations, The Right to Privacy in the Digital Age, A/HRC/39/29, August 3, 2018, para. 29. See also Brazil's Supreme Court ruling in ADI 6649 and ADPF 695 (Joint decision, Judgement of September 15, 2022, available at <https://portal.stf.jus.br/processos/detalhe.asp?incidente=6079238>), in which it was established the necessity to comply with certain criteria for sharing personal data between Brazilian Federal Public Administration bodies, and ADI 6390, which held unconstitutional the Provisional Measure No. 954/2020 for violating the right to data protection, inviolability of intimacy, private life, honor, image and data secrecy (Judgment of May 7, 2020, available at <https://portal.stf.jus.br/processos/detalhe.asp?incidente=5895176>).

250 Case of Members of the "José Alvear Restrepo" Lawyers Collective v. Colombia, supra note 52, para. 599, freely translated, citing Case of Claude-Reyes et al. v. Chile, supra note 39, para. 163; Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil, supra note 142, para. 231; Case of Flores Bedregal et al. v. Bolivia, supra note 157, para. 140; Castillo Petruzzi et al. v. Peru, supra note 211, para. 207; and Case of García Rodríguez et al. v. Mexico, Preliminary Objections, Merits, Reparations and Costs, Judgment of January 25, 2023, para. 143. Concerning the recognition of informational self-determination in the context of data held by intelligence agencies, see also Art. 16 quáter of Argentina's National Intelligence Law (No. 25.520) and Argentina's Supreme Court Judgement of April 19, 2011 ("Recurso de hecho, R.P, R.D. c/ Estado Nacional - Secretaría de Inteligencia del Estado"), in addition to: a) Germany's Federal Law of Protection of the Constitution (BVerfSchG, §15 and §28); b) Croacia's Security and intelligence System Act (Article 40); c) Sweden's Act on Supervision of Certain Crime-Fighting Activities (SFS 2007:980, §3); d) Switzerland's Federal Law that establishes measures to preserve National Security (LMSI, Article 18); and e) The Netherlands' Intelligence and Security Services Act 2017 (Wiv 2017).

In this sense, "[a]s a guarantee of the right to informational self-determination [...], the legal system must provide for a judicial mechanism that allows the individual to object to the reasons invoked by the administrative authority to deny him access to his data, a jurisdictional instrument that may be preceded, as provided for in domestic regulations, by a review of the denial by administrative authorities. In any case, the judicial authority, if it deems it necessary to make its decision, must be able to examine the information to which access has been denied."[251] The Court emphasized that limitations to informational self-determination must be previously set by law, which must clearly and precisely establish which kind of information authorities can keep in secrecy and for how long, which must be always exceptional and proportionate for the protection of legitimate reasons set out by law[252]

Self-determination and Identity

Building on the free development of one's personality and the right to private life, the Court has elaborated on the right to identity in the Advisory Opinion OC-24/17. This opinion addressed the subject of gender identity, and equality and non-discrimination of same-sex couples. On this basis, the Court interpreted that "the right to identity arises from recognition of the free development of the personality and the protection of the right to privacy. *This right is closely related to the principle of personal autonomy and it identifies the person as a self-determining and self-governing individual*. In other words, the right to identity understands individuals as masters of themselves and of their own acts."[253]

In previous decisions, the Court had pointed out that "'the right to identity can be conceptualized, in general, *as a collection of attributes and characteristics that allow for the individualization of a person in society*. In that sense, it includes several other rights according to the subject of the rights in question and the circumstances of the case.' Thus, *personal identity is intimately linked to the person in his or her specific individuality and private life, both of which are based on an historical and biological experience, as well as the way in which each individual relates with others through the development of social and family ties*."[254]

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251 Case of Members of the "José Alvear Restrepo" Lawyers Collective v. Colombia, supra note 52, paras. 600 and 608, freely translated, citing The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, principle 14; Open Society Foundations/Open Society Justice Initiative, The Global Principles on National Security and the Right to Information, supra note 156, principles 3, 6 and 26; and OAS, Model Inter-American Law on Access to Public Information, supra note 150, Art. 53.

252 Case of Members of the "José Alvear Restrepo" Lawyers Collective v. Colombia, supra note 52, paras. 601-606.

253 Advisory Opinion OC-24/17, supra note 184, para. 89 (emphasis added). See also Colombia's Constitutional Court, Ruling T-063/2015.

254 Case of Contreras et al. v. El Salvador, Merits, Reparations and Costs, Judgment of August 31, 2011, para. 113 (emphasis added), citing Case of Gelman v. Uruguay, Merits and Reparations, Judgment of February 24, 2011, para. 122. "For example, expert witness Yáñez de la Cruz indicated that 'according to psychology, identity responds to a basic question, which is 'who am I?'; the need to know one's identity [...] is a basic need of each human being; it is the center of gravity around which the person develops and becomes part of the world; your place or your persona in the world is based on identity; but identity also has a dialectic perspective between the individual persona and the social

Private Life, Rights of the Family, and Rights of the Child

The Court has reiterated that "Article 11(2) of the American Convention is closely related to the right recognized in Article 17 [...],"[255] which stipulates the rights of family. According to the Court, "every person's right to protection against arbitrary or unlawful interference with his or her family is implicitly a part of the right to protection of the family."[256] At the same time, the Court highlights that the concept of "family" should not be narrowly understood. In this sense, it stated that "[w]ith regard to the concept of family, various human rights organs created by treaties have stated that *there is no single model for a family, which may have many variations*. [...] the imposition of a single concept of family should be analyzed not only as possible arbitrary interference with private life, [...] but also, because of the impact it may have on a family unit [...]."[257]

Furthermore, the Court affirmed the rights to reproductive autonomy and reproductive health as related to the rights to private life and the right to found a family. In this sense, it has pointed out that "the right to reproductive autonomy is also recognized in Article 16(e) of the Convention for the Elimination of All Forms of Discrimination

persona. The human being evolves in society; the identity is developed first within the primary framework of the family, the mother, the father, but it evolves in the social framework in which it is inserted: namely the community, which represents place, other families, and therefore there is no persona that is not a social persona; it is not separate, we are social beings.' Expert opinion provided by María Sol Yáñez de la Cruz before the Inter-American Court during the public hearing held on May 17, 2011. For her part, expert witness Villalta stated: '[t]he right to a name and a nationality is universal, but, at the same time, the identity includes the knowledge of the family and maintaining close ties; the legacy of customs and traditions from the surroundings and from ones grandparents.' Expert opinion provided by Ana Georgina Ramos de Villalta [before notary public (affidavit) on May 5, 2011] (evidence file, volume XI, affidavits, folio 7534)." Case of Contreras et al. v. El Salvador, Merits, Reparations and Costs, Judgment of August 31, 2011, footnote 170. See more in the Appendix.

255 Case Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica, supra note 49, para. 145, citing Case of Atala Riffo and Daughters v. Chile, supra note 22, para. 169.

256 Case of Atala Riffo and Daughters v. Chile, supra note 24, para. 170, citando el Art. V de la Declaración Americana de los Derechos y Deberes del Hombre, que afirma que "[t]oda persona tiene derecho a la protección de la Ley contra los ataques abusivos a su honra, a su reputación y a su vida privada y familiar".

257 Case of Atala Riffo and Daughters v. Chile, supra note 24, paras. 172 and 175 (emphasis added), citing United Nations, Committee on the Elimination of Discrimination Against Women, General Recommendation No. 21: Equality in marriage and in family relationships, 1994, para. 13 ("The form and the concept of a family can vary from State to State and even between regions within a State. Whatever form it takes, and whatever the legal system, religion, custom or tradition within the country, the treatment of women in the family, both at law and in private, must conform to the principles of equality and justice for all people, as Article 2 of the Convention requires"); United Nations, Committee on the Rights of the Child, General Comment No. 7: Implementing Child Rights in Early Childhood, CRC/C/GC/7, September 30, 2005, paras. 15 and 19 ("The Committee recognizes that 'family' here refers to a variety of arrangements that can provide for young children's care, nurturance and development, including the nuclear family, the extended family and other traditional and modern community-based arrangements, provided that these are consistent with children's rights and best interests. [...] The Committee notes that in practice family patterns are variable and changing in many regions, as is the availability of informal networks of support for parents, with an overall trend towards greater diversity in family size, parental roles and arrangements for bringing up children"); United Nations, General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses, 1990, para. 2 ("The Committee notes that the concept of family may differ in some respects from State to State, and even between regions within a State, and that it is therefore not possible to give the concept a standard definition"); and United Nations, General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, 1988, para. 5 ("Regarding the term 'family,' the objectives of the Covenant require that for the purposes of Article 17, this term be given a broad interpretation that includes all those comprising the family, as understood in the society of the State Party concerned.").

against Women, according to which women enjoy the right 'to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means that enable them to exercise these rights.'"[258]

Finally, the Court established necessary conditions States must fulfill in decisions affecting children, especially those that may result in the separation of the child from their family. The interplay of the protection of private and family life with due process guarantees and the principle of equality and non-discrimination is of particular importance in this context. According to the Court, due process principles and provisions must be respected both regarding minors and those who have rights in connection with them, also considering the specific conditions of the children.[259]

Regarding the right to be heard, it "must be interpreted in light of Article 12 of the Convention on the Rights of the Child, which contains appropriate stipulations on the child's right to be heard, for the purpose of facilitating the child's intervention according to his age and maturity and ensuring that it does not harm his genuine interest."[260] The Court underscored the connection between the protection of "the best interests of the child" and the right to be heard, asserting that: "those responsible for applying the law, whether in the administrative or judicial sphere, must take into account the specific conditions of the child and his or her best interests to decide on the child's participation, as appropriate, in determining his or her rights. *This consideration will seek as much access as possible by the minor to the examination of his or her own case. Likewise, the Court considers that children should be informed of their right to be heard directly, or through a representative, if they so wish.*"[261]

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258 Case Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica, supra note 49, para. 146.
259 Advisory Opinion OC-17/02, supra note 186, resolution point 12.
260 Case of Atala Riffo and Daughters v. Chile, supra note 24, para. 196, citing Art. 12 of the Convention on the Rights of the Child: "1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law;" and Advisory Opinion OC-17/02, supra note 186, para. 99. For its part, the United Nations Committee on the Rights of the Child has established that the right "to be heard in any judicial and administrative proceedings affecting the child" implies that "this provision applies to all relevant judicial proceedings affecting the child, without limitation." United Nations, Committee on the Rights of the Child, General Comment No. 12: The Right of the Child to be Heard, CRC/C/GC/12, July 20, 2009, para. 32. In particular, UNICEF has indicated that "any judicial [...] proceedings affecting the child' covers a very wide range of court hearings, including all civil proceedings such as divorce, custody, care and adoption proceedings, name-changing, judicial applications relating to place of residence, religion, education, disposal of money and so forth, judicial decision-making on nationality, immigration and refugee status, and criminal proceedings; it also covers States' involvement in international courts." UNICEF, Implementation Handbook for the Convention on the Rights of the Child (Third Edition Fully Revised), 2007, p. 156. For further relevant considerations on Art. 12 of the Convention on the Rights of the Child, see para. 198 of the Judgment of Case of Atala Riffo and Daughters v. Chile, supra note 24, footnote 218.
261 Case of Atala Riffo and Daughters v. Chile, supra note 24, para. 199 (emphasis added), citing United Nations, Committee on the Rights of the Child, General Comment No. 7: Implementing Child Rights in Early Childhood, CRC/C/GC/7, September 30, 2005, para. 17, and Advisory Opinion OC-17/02, supra note 186, para. 102. The Court has also stated that "the phrase 'best interests of the child', set forth in Article 3 of the Convention on the Rights of the Child, entails that children's development and full enjoyment of their rights must be considered the guiding principles to establish and apply provisions pertaining to all aspects of children's lives." Advisory Opinion OC-17/02, supra

Delving into guidance for States bodies' decisions that may result in the separation of the child from their family, the Court has emphasized that "[t]he child has the right to live with his or her family, which is responsible for satisfying his or her material, emotional, and psychological needs."[262] In this sense, "[p]rotection measures adopted by administrative authorities must be strictly in accordance with the law *and must seek continuation of the child's ties with his or her family group, if this is possible and reasonable* [...]; in case a separation is *necessary, it should be for the least possible time possible* [...]; *those who participate in decision-making processes must have the necessary personal and professional competence to identify advisable measures from the standpoint of the child's interests* [...]. All this enables adequate development of due process, reduces and adequately limits its discretion, in accordance with criteria of relevance and rationality."[263] The Court has also held that "speculations, assumptions, stereotypes, or generalized considerations regarding the parents' personal characteristics or cultural preferences regarding the family's traditional concepts are not admissible."[264] In this sense, the Court highlighted that the mere reference of the child's best interest without specific proof of risks or damages "cannot serve as a suitable measure to restrict a protected right," such as be invoked to justify discrimination against their parents.[265]

note 186, resolution point 2.

262 Advisory Opinion OC-17/02, supra note 186, para. 71.

263 Advisory Opinion OC-17/02, supra note 186, para. 103. "[...] Decisions on protection and fair trial do not suffice if the legal operators in the proceedings lack sufficient training on what the best interests of the child involve and, therefore, on effective protection of his or her rights." Advisory Opinion OC-17/02, supra note 186, para. 79, citing Training of officials in charge of childhood and adolescence (United Nations, Report of the Committee on the Rights of the Child in Costa Rica, 2000, and Report of the Committee on the Rights of the Child in Saint Kitts and Nevis, 1999).

264 Case of Atala Riffo and Daughters v. Chile, supra note 24, para. 109, citing, inter alia, in Australia: In the Marriage of C. and J.A. Doyle, (1992) 15 Fam. L.R. 274, 274, 277 (The parent's lifestyle is of no relevance without a consideration of its consequences on the child's well-being); in the Philippines: Supreme Court of the Philippines, Joycelyn Pablo-Gualberto v. Crisanto Rafaelito Gualberto, G.R. No. 156254 of June 28, 2005, stating that sexual preference of itself is not a sign of parental incompetence to exercise the custody of minors ("sexual preference or moral laxity alone does not prove parental neglect or incompetence. [...] To deprive the wife of custody, the husband must clearly establish that her moral lapses have had an adverse effect on the welfare of the child or have distracted the offending spouse from exercising proper parental care"); in South Africa: Constitutional Court of South Africa, Du Toit and Another v. Minister of Welfare and Population Development and Others (CCT40/01) [2002] ZACC 20; 2002 (10) BCLR 1006; 2003 (2) SA 198 (CC), September 10, 2002, permitting the adoption of minors by same-sex couples, considering that it will not affect the child's best interest, and Constitutional Court of South Africa, J. and Another v. Director General, Department of Home Affairs and Others (CCT46/02) [2003] ZACC 3; 2003 (5) BCLR 463; 2003 (5) SA 621 (CC), March 28, 2003.

265 "In conclusion, the Inter-American Court notes that, the child's best interest' being considered as a legitimate goal, in abstract terms, the mere reference to this purpose, without specific proof of the risks or damage to the girls that could result from the mother's sexual orientation, cannot serve as a suitable measure to restrict a protected right, such as the right to exercise all human rights without discrimination based on the person's sexual orientation. The child's best interest cannot be used to justify discrimination against the parents based on their sexual orientation. Therefore, the judge cannot take this social condition into consideration as an element in a custody ruling." Case of Atala Riffo and Daughters v. Chile, supra note 24, para. 110, citing that "[i]n similar vein, in a case on the withdrawal of the custody of a minor based on the mother's religious beliefs, the European Court of Human Rights criticized the lack of specific and direct evidence proving the impact the religious beliefs had on the upbringing and the daily life of the children, for which reason it considered that the domestic court had issued a judgment in abstract, and based on general considerations, without establishing a relationship between the children's lifestyle and the mother's. Case of Atala Riffo and Daughters v. Chile, supra note 24, footnote 125, citing ECHR, Case of Palau-Martínez v. France (No. 64927/01), Judgment of December 16, 2003, Final, March 16, 2004, paras. 42-43.

IMPLICATIONS

- Dignity, private life, autonomy, and self-determination, including informational self-determination, permeate state use of AI/ADM technologies for rights-based determinations.
- The use of these systems in the context of this paper generally entails the processing of data relating to an identified or identifiable individual.[266] It also involves a decision-making process based on a sort of "identity" perceived or established by the system through correlations, profiling, and inferences that produces an artificial "exteriorization of the persona" with significant effects depending on the decision in question. This may seriously affect people's life plans, the free development of their personality, and their social relationships.
- As such, these are all rights and guarantees that States must consider when assessing the adoption, implementing, and evaluating the use of AI/ADM systems for supporting decisions that affect the adjudication, recognition, and exercise of human rights.
- State AI/ADM-based decisions may also seriously impact family life and the free and full enjoyment and exercise of sexual and reproductive rights.
- In this context, authorities must translate the State's duty to "increase its commitment to adapt the traditional forms of protecting the right to privacy to current times"[267] into structures, practices, and effective mitigation and protective measures.
- Any interference with the right to private life and related rights stemming from state AI/ADM-based decision-making must fulfill the principles of legality, legitimacy, suitability, necessity, and proportionality (*see Chapter 2*). There are several measures indicated in previous sections that state authorities must consider and implement to meet these standards (*see particularly Chapters 2, 3, and Sections 4.3 and 4.4*).
- Government surveillance and collection of personal data constitute undeniable interference with the exercise of human rights, requiring precise regulation and effective controls to prevent abuse by state authorities.[268] Government use of AI/ADM systems in the context of this report must be backed by robust legal and institutional safeguards for privacy and data protection. These safeguards must pay due care to sensitive personal data. They deserve special protection given their heightened discriminatory potential, especially when providing the basis for profiling.[269]

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266 In the Case of Members of the "José Alvear Restrepo" Lawyers Collective v. Colombia, supra note 52, the Court adopted the definition of personal data used by the Inter-American Juridical Committee. Such definition establishes that personal data "includes information that identifies, or can be reasonably be used to identify, a natural person, whether directly or indirectly, in particular by reference to an identification number, location data, an online identifier or to one or more factors specific to his or her physical, physiological, genetic, mental, economic, cultural or social identity." It's also interesting to mention that the Updated Guidelines intentionally use the term "data" broadly to encompass "factual items or electronically-stored 'bits' or digital records" and "compilations of facts that taken together allow conclusions to be drawn about the particular individual(s)." The Updated Principles do so in order to promote the greatest protection of privacy. OAS, Inter-American Juridical Committee, Updated Principles on Privacy and Protection of Personal Data, supra note 247, Definition of Personal Data, p. 24.
267 For a deeper analysis on the implications of Inter-American Human Rights Standards to State communications surveillance, see our report available at <https://necessaryandproportionate.org/americas-legal-analysis/>.
268 Case of Members of the "José Alvear Restrepo" Lawyers Collective v. Colombia, supra note 52, para. 541.
269 Case of Members of the "José Alvear Restrepo" Lawyers Collective v. Colombia, supra note 52, para. 554.

- Government surveillance of communications, including tracking enabled by the processing of communications-related data (either content or metadata) generally require a prior and reasoned judicial order. The use of AI/ADM systems by state bodies in this context must observe the proper application of this standard.

- Government implementation of AI/ADM systems to enable indiscriminate surveillance of physical or online spaces is disproportionate and arbitrarily interferes with the right to private life, among other rights.[270]

- The principle of personal autonomy prohibits any State action that attempts to "instrumentalize" individuals. This should reinforce the principle that people and social groups are rights holders and, as such, have the capacity and right to call for their rights and participate in government decision-making. This principle reflects the close ties that autonomy and self-determination have with due process guarantees (within the decision-making proceedings affecting certain individuals and groups) and the right to political participation (as for influencing States' definitions regarding the adoption of AI/ADM systems for rights-based determinations).

- In addition, the protection of autonomy and private life requires authorities to follow an adequate framework regarding the collection and use of personal data to prevent their processing in a manner that is inappropriate or incompatible with these rights. These standards are particularly relevant in the context of government use of AI/ADM technologies for rights-based determinations.

    - Personal data processing must be grounded in free and informed consent or, failing that, grounded in other bases strictly and expressly authorized by law. Personal data processing is only authorized under the framework of the American Convention for pursuing legitimate purposes and by legal mechanisms.[271]

    - Free and informed consent requires providing data subjects with sufficient information about the details of the data to be collected, the manner of its collection, the purposes for which it will be used, and the possibility, if any, of its disclosure. Further, consent by the individual should express their willingness in such a way that there is no doubt about their intention. In short, people whose data is being processed should have the ability to exercise a real choice without the risk of deception, intimidation, coercion, or significant negative consequences for refusing to consent.[272]

    - In cases where state institutions can legitimately process personal data, they are limited to obtaining the truthful, relevant, and necessary data for the strict fulfillment of their functions, in accordance with the applicable legal framework.[273]

    - Institutions in charge of data processing must ensure the protection and security of data, preventing their unauthorized access, loss, destruction, use,

270 IACHR, Office of the Special Rapporteur for Freedom of Expression, Standards for a Free, Open, and Inclusive Internet, March 15, 2017, para. 223, citing UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, IACHR Special Rapporteur for Freedom of Expression, and ACHPR Special Rapporteur on Freedom of Expression and Access to Information, Joint Declaration on Freedom of Expression and Responses to Conflict Situations, May 4, 2015, point 8 a).
271 Case of Members of the "José Alvear Restrepo" Lawyers Collective v. Colombia, supra note 52, para. 573.
272 Case of Members of the "José Alvear Restrepo" Lawyers Collective v. Colombia, supra note 52, footnote 718.
273 Case of Members of the "José Alvear Restrepo" Lawyers Collective v. Colombia, supra note 52, para. 576.

modification, or disclosure. Government decision-making based on data processing must also ensure that data used are kept up to date, complete, and accurate.[274]

- States have the duty to ensure the right to informational self-determination and provide mechanisms for data subjects to access and control their data held by public institutions. Any restrictions to this right must comply with the standards for admissible restrictions and limitations to the right to access information (Article 13 of the Convention). Thus, any denials must be strictly justified and allow for an effective opportunity to appeal, besides the right to object in court the reasons invoked for the denial (*see Section 4.2*). The judicial authority, if it deems necessary, must be able to examine the information to which access has been denied.[275]

- The scope of informational self-determination encompasses a set of powers for data subjects[276] in addition to free and informed consent:

    - the right to know what data from them are held by public and private institutions (whatever their format), where they come from, how they were obtained, what they are used for, how long they are kept, whether they are shared with other bodies or persons, the reason for sharing and, in general, the conditions of their processing. Such right to access should encompass all the data relating to the person considered in the decision-making process. This means not only data actively and knowingly provided by individuals, but also data the institution observed and gathered without their actual knowledge, as well as derived and inferred data.[277]

    - the right to demand the rectification, modification, or updating of the data, in case they are inaccurate, incomplete, or outdated. This should include biased and discriminatory data considered in the decision-making process. For these purposes, individuals should receive information about the underlying logic of derived and inferred data influencing the decision so that they are able to contest, under legitimate grounds, any inaccuracies or issues.

    - the right to object to data processing in cases in which, given the particular situation of the person, damage can be caused to them and in cases provided for in proper regulations; and

    - when possible and according to legal provisions, the right to receive the data in a structured, commonly used machine-readable format, and to request its transmission without being prevented from doing so by the authority that holds it.

- States must provide adequate, agile, free, and effective mechanisms or procedures to process and respond to data subjects' requests for access to and control of their data, with reasonable time limits set for their resolution and under the responsibility of properly trained officials.[278]

274 Case of Members of the "José Alvear Restrepo" Lawyers Collective v. Colombia, supra note 52, para. 576.
275 Case of Members of the "José Alvear Restrepo" Lawyers Collective v. Colombia, supra note 52, paras. 599-600 and 608.
276 Case of Members of the "José Alvear Restrepo" Lawyers Collective v. Colombia, supra note 52, para. 588.
277 For the concepts of "derived" and "inferred" data, see Art. 29 of Data Protection Working Party, Guidelines on the Right to Data Portability, April 2017.
278 Case of Members of the "José Alvear Restrepo" Lawyers Collective v. Colombia, supra note 52, para. 599.

- Informational self-determination is connected to a person's ability to shape and determine their identity. In a context where the processing of personal data through profiling and other techniques creates "data representatives" or "data doubles" that intermediate the person's relationship with others, including state authorities, the powers associated with informational self-determination, as well as non-discrimination and data protection safeguards, are key to preserve individuals' autonomy and rights.

- The right to identity as a guarantee derived from self-determination and the free development of one's personality reinforces the extra care States must give to privacy, data protection, data security, and nondiscrimination when using data processing, digitalization, and algorithmic decision-making to intermediate their relationship with the population. Such a guarantee indicates the need to deter unnecessary and disproportionate data processing while emphasizing the reasons why people have the right to understand how their data is processed to shape state bodies' perceptions and conclusions about who they are.

- Relatedly, such guarantee is in contradiction with an indiscriminate normalization of comprehensive digital identity schemes.[279] Without strict and robust safeguards paired with proper state apparatus to prevent human rights violations, digital identification schemes will actually undermine the right to identity conceived as a guarantee arising from individuals self-determination and the free development of their personality.

- The set of rights analyzed in this section in connection with the principles of equality and non-discrimination requires that States abide by the rights to reproductive autonomy and reproductive health when formulating related public policies. The adoption of AI/ADM technologies as policy instruments in this context demands careful consideration as to whether they are fit for the purpose and non-arbitrary (*see Chapter 5*), and whether their adoption involved broad civic participation, particularly from groups engaged with women's rights and related issues.

- Family and family life play a central role in people's lives, thus States' decision-making affecting family relations and ties must respect this reality. Such decisions should serve the development and strength of the family unit whenever this is reasonable and in accordance with the free development of one's personality and child's rights. The concept of "family" must be broadly understood to encompass different models and configurations.

- This means that the adoption of AI/ADM technologies for State determinations that may cause children to be separated from their family must rigorously observe Inter-American System's parameters for rights restrictions (*see Chapters 2 and 5*) and Inter-American Court guidance linking the protection of private and family life, children's rights, due process, and equality and non-discrimination (*see also Sections 4.3 and 4.4*).

- State institutions must have in place the apparatus and processes needed to properly ensure the rights of children and family members to be heard. "Those who participate in decision-making processes must have the necessary personal and professional

279 See the open letter of the #WhyID campaign, focused on the problems of the current implementations of digital identity programmes. Access Now et al. (n.d.). #WhyID Campaign: An Open Letter to the Leaders of International Development Banks, the United Nations, International Aid Organisations, Funding Agencies, and National Governments.

competence to identify advisable measures from the standpoint of the child's interests."[280] It follows that, while AI/ADM systems may be appropriate to support certain data analysis needs in this context, the proper decision-making requires interdisciplinary human reasoning and assessment.

- Assumptions of risks or harms arising from AI/ADM systems' correlations do not constitute a legitimate basis for a decision involving a child's separation from their family. The lack of material resources is not a sufficient basis either. Meaningful and interdisciplinary human involvement should be required in any decision-making regarding the separation of a child from their family. Finally, States must prevent discriminatory assumptions relating to biases and stereotypes from interfering in decision-making proceedings, considering both humans and AI/ADM technologies involved.

4.6. Freedoms of Expression, Association, and Assembly

Article 13 of the American Convention ensures that everyone has the right to freedom of thought and expression. Freedom of expression is crucial for upholding other conventional rights, such as freedom of association and assembly. These freedoms are usually exercised jointly in protests and other kinds of collective demonstrations where people occupy physical and online spaces. As the Office of the IACHR's Special Rapporteur for Freedom of Expression pointed out, the right to freedom of expression is strongly connected with freedom of assembly and the right to protest - which, in turn, is closely linked to the promotion and defense of democracy.[281] The Inter-American System has detailed how States may permissibly establish restrictions to these rights.

Restrictions to Freedom of Expression

The Court stated that "the responsibilities ensuing from the exercise of freedom of expression must comply with the following requirements, concurrently: (i) they must be previously established by law, in form and in content; (ii) they must respond to a purpose permitted by the American Convention ('respect for the rights or reputation of others' or 'the protection of national security, public order, or public health or morals') and (iii) they must be necessary in a democratic society (and must therefore comply with the requirements of appropriateness, necessity and proportionality)."[282]

Also about the requirements to restrict freedom of expression, the Court has pointed out that "in order for restrictions to be in conformity with the provisions of the

280 Advisory Opinion OC-17/02, supra note 186, para. 103.
281 IACHR, Office of the Special Rapporteur for Freedom of Expression, Protest and Human Rights: Standards on the Rights Involved in Social Protest and the Obligations to Guide the Response of the State, September 2019, paras. 2 and 4.
282 Case of Lagos Del Campo v. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment of August 31, 2017, para. 102, citing Advisory Opinion OC-6/86, supra note 50, paras. 35 and 37; Case of Tristán Donoso v. Panamá, supra note 173, para. 56; and Case of López Lone et al. v. Honduras, supra note 127, para. 168.

Convention, they must be justified in terms of collective purposes which, owing to their relevance, clearly outweigh the social need for the full enjoyment of the rights enshrined by Article 13 of the Convention and do not limit the right established in said article more than is strictly necessary. In other words, the restriction must be proportionate to the interest that justifies it and closely tailored to the accomplishment of that legitimate purpose, interfering as little as possible with the effective exercise of the right to freedom of thought and expression."[283]

Concerning the principle of legality, the Court argued that complying with it is a way to let people adequate their own conduct to comply with law. In this sense, the Court stated that "the law must be formulated with sufficient precision to enable people to regulate their conduct so as to be able to predict with a degree that is reasonable under the circumstances, the consequences that a given action may entail."[284]

Right to Protest and Chilling Effect

The obligation to ensure rights implies measures that the States must either adopt or avoid. In this context, the Office of the Special Rapporteur for Freedom of Expression affirmed that "[t]he holding of meetings, demonstrations, and protests is a central activity of many associations and organizations" and, in this sense, "States have the duty to provide the necessary means for them [people participating in these activities] to conduct their activities freely; to protect them when they are threatened in order to prevent attacks on their life and safety; to refrain from imposing obstacles that might hinder their work; and to investigate seriously and effectively the violations committed against them, thus combating impunity."[285]

Also according to the Special Rapporteur, States should refrain from fostering the so-called chilling effect through criminalization: "[c]riminal proceedings and judgments, as well as administrative penalties or fines and pecuniary reparations, have a systemic effect on the general conditions for peaceful protest as an exercise of freedom of expression. In addition to the individual and institutional (regarding organizations) dimension of the impact of these measures, criminalization has a 'chilling effect' on society as a whole, and may lead to the prevention or inhibition of this type of expression."[286]

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283 Case of Kimel v. Argentina, Merits, Reparations and Costs, Judgment of May 2, 2008, para. 83, citing Advisory Opinion OC-5/85, supra note 57, para. 46; Case of Herrera-Ulloa v. Costa Rica, supra note 30, paras. 121 and 123; Case of Palamara-Iribarne v. Chile, supra note 41, para. 85, and Case of Claude-Reyes et al. v. Chile, supra note 39, para. 91.
284 Case of Fontevecchia and D'Amico v. Argentina, supra note 25, para. 90.
285 IACHR, Office of the Special Rapporteur for Freedom of Expression, Protest and Human Rights, supra note 282, para. 157, citing IACHR, Second Report on the Situation of Human Rights Defenders in the Americas, December 31, 2011, para. 161.
286 IACHR, Office of the Special Rapporteur for Freedom of Expression, Protest and Human Rights, supra note 282, para. 191, citing IACHR, Resolution 6/2014, Matter of Fernando Alcibíades Villavicencio Valencia et al. v. Ecuador, Precautionary Measure No. 30-14, March 24, 2014, paras. 34-36.

Regarding States' accountability, responsibility and oversight mechanisms related to the protection of the right to protest, the Special Rapporteur also stated that "[b]y creating an expectation of accountability, the oversight tools make it possible to model the actions of the security forces on democratic standards consistent with international human rights law." These oversight tools, in turn, "play an important role among the positive measures aimed at ensuring the right to protest, since in addition to constituting a guarantee of non-repetition of violations of rights, they function as an instrument for public policy assessment and improvement."[287] Furthermore, the Special Rapporteur also emphasized that it is a State duty "to take positive measures to prevent a group of vulnerable demonstrators from being threatened or intimidated for exercising their rights."[288]

Right to Protest, Privacy, and Anonymity

The IACHR's Special Rapporteur for Freedom of Expression has underscored the right to privacy and anonymity as enablers of the right to protest. According to the Special Rapporteur, the "guarantee of privacy and anonymity are also part of the rights of association and assembly"[289] and, as a consequence, "States should guarantee the full protection of anonymous speech and regulate specific cases and conditions when such anonymity must be lifted. This requires sufficient judicial oversight and the full application of the principle of proportionality with respect to measures aimed at identifying the person in question."[290]

Private Stakeholders and the Exercise of the Right to Protest

States must also protect rights holders from third parties' violations and abuses against the rights of peaceful assembly and association.[291] Moreover, duties of transparency and accountability must guide any cooperation between private parties and state authorities. According to the Office of the Special Rapporteur for Freedom of Expression, "[w]here permitted by law, any measure of cooperation or technical or financial support that private companies provide to security institutions must be documented and publicly accessible, in order to supervise and avoid conflicts, as well

287 IACHR, Office of the Special Rapporteur for Freedom of Expression, Protest and Human Rights, supra note 282, para. 247.
288 IACHR, Office of the Special Rapporteur for Freedom of Expression, Protest and Human Rights, supra note 282, para. 53.
289 IACHR, Office of the Special Rapporteur for Freedom of Expression, Protest and Human Rights, supra note 282, para. 302, citing United Nations, Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Maina Kiai, A/HRC/23/39, April 24, 2013.
290 IACHR, Office of the Special Rapporteur for Freedom of Expression, Protest and Human Rights, supra note 282, para. 302, citing IACHR, Office of the Special Rapporteur for Freedom of Expression, Freedom of Expression and the Internet, December 31, 2013.
291 IACHR, Office of the Special Rapporteur for Freedom of Expression, Protest and Human Rights, supra note 282, para. 53, citing United Nations, Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, supra note 289, para. 9.

as to establish any potential civil or criminal liability of the private actor."[292]

IMPLICATIONS

- State use of AI/ADM systems that interfere with freedoms of expression, association, and assembly is only admissible to the extent it is authorized by a law democratically approved, and is adequate, necessary, and proportionate to achieve a legitimate aim (*see Chapter 2*).
- Freedoms of expression, association, and assembly are closely interlinked with the right to private life and anonymity. Indiscriminate State monitoring and surveillance of physical and online spaces through AI/ADM technologies seriously impairs the free and full enjoyment and exercise of such freedoms, with unfolding impacts to autonomy and self-determination (see Section 4.5). State use of AI/ADM systems with mass surveillance purposes, as with facial recognition technologies (including emotion recognition), is inherently disproportionate and should not be tolerated under Inter-American human rights standards. The use of IMSI catchers, including against people exercising their freedoms to peaceful assembly and association, raise similar issues.[293]
- Impacts on free expression and assembly rights are particularly severe in the context of the right to protest. As pointed out in Chapters 1 and 2, any State use of AI/ADM systems must be compatible with the tenets of a democratic society, and restrictions to conventional rights are only allowed to the extent they abide by such tenets. AI/ADM systems adopted by the government that prevent people from taking part in demonstrations or illegitimately inhibit their participation violate the Convention.
- States must carefully prevent and address the disproportionate impact government use of AI/ADM systems has on the freedoms of expression, association, and assembly of historically discriminated against groups. Ensuring that these groups can fully exercise such freedoms is instrumental to their right to political participation, including their effective participation in State definitions on the use of AI technologies that may affect their rights.
- States must structure and maintain oversight mechanisms to provide adequate accountability of public institutions' use of AI/ADM systems, following proper transparency and participation standards (*see Chapter 1*). This is crucial to prevent abuses and violations of the freedoms herein, and to ensure remedies and reparations in case they regrettably occur. The fact that algorithmic tools used in a state policy or initiative were developed by private parties does not exempt States' responsibility, including prevention and oversight duties, when adopting these systems for rights-related determinations.

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292 IACHR, Office of the Special Rapporteur for Freedom of Expression, Protest and Human Rights, supra note 282, para. 317, citing United Nations, Joint Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on the Proper Management of Assemblies, A/HRC/31/66, February 4, 2016, paras. 83-87.
293 See N, Y. (June 28, 2019). Gotta Catch 'Em All: Understanding How IMSI-Catchers Exploit Cell Networks. Electronic Frontier Foundation, and Privacy International. (June 2020). IMSI catchers legal analysis.

4.7. The Right to a Dignified Life

This section addresses economic, social, and cultural rights (ESC rights), building on the Inter-American System's expanded view of the right to life, upon which the Court has developed the right to a dignified life. In this sense, the Court has elaborated on what entails the States' obligation to foster the conditions necessary to the exercise of the right to life. On this basis, it has held that "the fundamental right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence," which means that "States have the obligation to guarantee the creation of the conditions required in order that violations of this basic right do not occur and, in particular, the duty to prevent its agents from violating it. [294]

Also in this regard, the Court has asserted that "[o]ne of the obligations that the State must inescapably undertake as guarantor, to protect and ensure the right to life, is that of generating minimum living conditions that are compatible with the dignity of the human person and of not creating conditions that hinder or impede it." As a result, emphasizing the special treatment that must be granted to specific groups, the Court sustained that "the State has the duty to take positive, concrete measures geared toward fulfillment of the right to a decent life, especially in the case of persons who are vulnerable and at risk, whose care becomes a high priority."[295]

Although ESC rights are all important for achieving a dignified life and can be affected by government use of AI/ADM systems, the rights to social security and health stand out and deserve specific attention in the context of this report. The right to enjoy the benefits of scientific and technological progress is also particularly interesting for our analysis. As such, we present some relevant passages about these rights below (*see more about the right to enjoy the benefits of scientific and technological progress in Section 5.3*).

Social Security

The Court has indicated the relevance of the social security apparatus for the realization of other rights and the "enjoyment of a decent life," emphasizing that social security "'plays an important role in supporting the realization of many of the economic, social and cultural rights.'"[296] In this sense, "the Court has indicated that the

294 Case of the "Street Children" (Villagran-Morales et al.) v. Guatemala, Merits, Judgment of November 19, 1999, para. 144.
295 Case of the Yakye Axa Indigenous Community v. Paraguay, supra note 40, para. 162, citing Case of the "Juvenile Reeducation Institute" v. Paraguay, Preliminary Objections, Merits, Reparations and Costs, Judgment of September 2, 2004, para. 159.
296 Case of The National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment of

pension derived from a system of contributions or quotas is a component of social security" and that, "[u]ltimately, the pension and, in general, social security constitute a measure of protection for the enjoyment of a decent life."[297]

The Commission has also pointed out the connection between the right to social security and other rights. It has stated that "the right to social security includes consideration of its close relationship with other rights, such as the right to health, and that the suppression, reduction or suspension of the benefits to which one is entitled must be limited, based on reasonable grounds and provided for in national legislation."[298] In addition, the Commission has sustained that "the State retains the responsibility to regulate and oversee the social security system when third parties administer insurance schemes, as well as to reasonably ensure that private sector actors do not violate this right, including framework legislation, independent oversight, genuine public participation, and the imposition of sanctions in the event of non-compliance."[299]

Right to Health In Connection To Other Rights

The Court has established a comprehensive view of the scope of the right to health, understanding health "*not only as the absence of disease or illness, but also as a state of complete physical, mental and social well-being, derived from a lifestyle that allows the individual to achieve an overall balance*."[300] Following this broader perspective, the Court has pointed out "the intrinsic connection between the rights to private life and to personal integrity and human health*, and that the absence of adequate medical care may result in the violation of Article 5(1) of the Convention*."[301] In this sense, the Court underlined that "[h]ealth, as an integral part of the right to personal integrity, encompasses not only access to health care services under which everyone has an equal opportunity to enjoy the highest attainable level of health, but also [...] *the right to be free from interference, such as the right to be free from*

November 21, 2019, para. 184.

297 Case of The National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru, supra note 296, para. 184, citing Case of Muelle Flores v. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment of March 6, 2019, para. 187, and United Nations, Committee on Economic, Social and Cultural Rights, General Comment No. 19: The Right to Social Security (Art. 9), E/C.12/GC/19, February 4, 2008, paras. 9-28.

298 IACHR, Special Rapporteurship on Economic, Social, Cultural and Environmental Rights (REDESCA), Compendium on Economic, Social, Cultural and Environmental Rights, supra note 70, p. 151, citing IACHR, Report No. 107/18, Case 13.039, Martina Rebeca Vera Rojas v. Chile, Merits, October 5, 2018, para. 65.

299 IACHR, Special Rapporteurship on Economic, Social, Cultural and Environmental Rights (REDESCA), Compendium on Economic, Social, Cultural and Environmental Rights, supra note 70, p. 151, citing IACHR, Report No. 107/18, Case 13.039, supra note 298, para. 65.

300 Case of Cuscul Pivaral et al. v. Guatemala, supra note 66, para. 105 (emphasis added).

301 Case of I.V. v. Bolivia, supra note 186, para. 154 (emphasis added), citing Case of Albán Cornejo et al. v. Ecuador, Merits, Reparations and Costs, Judgment of November 22, 2007, para. 117; Case of Suárez Peralta v. Ecuador, Preliminary Objections, Merits, Reparations and Costs, Judgment of May 21, 2013, para. 130; Case of Gonzales Lluy et al. v. Ecuador, Preliminary Objections, Merits, Reparations and Costs, Judgment of September 1, 2015, para. 171; Case of Chinchilla Sandoval et al. v. Guatemala, supra note 184, para. 170; and Case of Tibi v. Ecuador, supra note 219, para. 157.

torture, non-consensual medical treatment and experimentation."[302]

These guarantees also apply to decision-making impacting the right to health. On this basis, the Court recognized that "personal autonomy and the liberty to take decisions regarding one's own body and health requires, on the one hand, that the State ensure and respect decisions and choices that have been made freely and responsibly and, on the other, *that access to the relevant information is guaranteed so that individuals are in a position to take informed decisions on the course of action with regard to their body and health based on their personal life project*. In the area of health, *opportune, complete, comprehensible and reliable information should be provided, ex officio, because this is essential for decision-making in this area*."[303] Additionally, still concerning an individual's right of access to information, the Court highlighted that "*[t]he obligation of the State to provide information ex officio, known as 'active transparency obligation,' imposes on States the duty to provide the necessary information for individuals to be able to exercise other rights, which is particularly relevant in the area of health care, because this contributes to the accessibility of the health services and to enabling individuals to take free, full, well-informed decisions*."[304]

Enjoyment of the Benefits of Scientific and Technological Progress

Article 14 of the Protocol of San Salvador establishes that "[t]he States Parties to [the] Protocol recognize the right of everyone [...] [t]o enjoy the benefits of scientific and technological progress." Similarly, Article XIII of the American Declaration sets that "[e]very person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries." The IACHR's Special Rapporteur for Freedom of Expression has drawn on these rights to address the fair distribution of the benefits of digital and communications technologies. According to the Special Rapporteur, "[i]n order for the benefits of the Internet and other communications technology *(sic)* to be distributed inclusively and sustainably among the population, *the relevant policies and practices must be based on respecting and guaranteeing human rights*—especially the right to freedom of expression, which facilitates and enables the exercise of other rights on the Internet."[305]

Importantly, the Court has elaborated on the right to benefit from scientific progress

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302 Case of I.V. v. Bolivia, supra note 186, para. 155 (emphasis added), citing United Nations, General Comment No. 14: The Right to the Highest Attainable Standard of Health, E/C.12/2000/4, August 11, 2000, para. 8.
303 Case of I.V. v. Bolivia, supra note 186, para. 155 (emphasis added). Mutatis mutandi, Case of Furlan and Family v. Argentina, Preliminary Objections, Merits, Reparations and Costs, Judgment of August 31, 2012, para. 294.
304 Case of I.V. v. Bolivia, supra note 186, para. 156 (emphasis added), citing Case of Claude-Reyes et al. v. Chile, supra note 39, para. 77.
305 IACHR, Office of the Special Rapporteur for Freedom of Expression, Standards for a Free, Open, and Inclusive Internet, supra note 270, para. 2 (emphasis added).

in connection to sexual and reproductive rights. It has held that "the scope of the rights to private life, reproductive autonomy and to found a family, [...] *extends to the right of everyone to benefit from scientific progress and its applications*."[306] On this basis, the Court has emphasized that "[t]he right to have access to scientific progress in order to exercise reproductive autonomy and the possibility to found a family gives rise to the right to have access to the best health care services in assisted reproduction techniques, and, consequently, the prohibition of disproportionate and unnecessary restrictions, de iure or de facto, to exercise the reproductive decisions that correspond to each individual."[307]

Transparency, Oversight, and Regulation

The Office of the Special Rapporteur for Freedom of Expression of the IACHR has underscored States' duty to comply with active transparency concerning critical information for understanding public expenditure relevant to rights connected to welfare, such as social security and health issues. On this basis, the Special Rapporteur indicated that "[t]he right of access to information imposes on the State the obligation to provide the public with the maximum quantity of information proactively, at least in terms of a) the structure, function, and operating and investment budget of the state; b) the information needed for the exercise of other rights – for example, those pertaining to the requirements and procedures surrounding pensions, health, basic government services, etc.; c) the availability of services, benefits, subsidies, or contracts of any kind; and d) the procedure for filing complaints or requests, if it exists."[308] Additionally, the Special Rapporteur highlighted the need to provide information in an appropriate manner, stressing that "[the] information should be understandable, available in approachable language and up to date. Also, given that significant segments of the population do not have access to new technologies yet many of their rights can depend on obtaining information on how to realize them, in these circumstances the State must find efficient ways to fulfill its obligation of active transparency."[309]

The Court has also asserted that "in order to comply with the obligation to guarantee the right to personal integrity in the area of health care, *States must create an appropriate legal framework that regulates the provision of health services, establishing quality standards for public and private institutions*, which prevent any risk of violating personal integrity when providing such services. In addition, *the State must*

306 Case Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica, supra note 49, para. 150 (emphasis added).
307 Case Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica, supra note 49, para. 150.
308 IACHR, Office of the Special Rapporteur for Freedom of Expression, The Inter-American Legal Framework regarding the Right to Access to Information, supra note 138, para. 32. See also OAS, Inter-American Juridical Committee, Principles on the Right of Access to Information, 2008, principle 4.
309 IACHR, Office of the Special Rapporteur for Freedom of Expression, The Inter-American Legal Framework regarding the Right to Access to Information, supra note 138, para. 32. See also OAS, Inter-American Juridical Committee, Principles on the Right of Access to Information, 2008, principle 4.

establish official State mechanisms to supervise and monitor health care institutions, and procedures for the administrative and legal protection of victims, the effectiveness of which will, ultimately, depend on how they are implemented by the corresponding administrative body."[310] In the same vein, and building on interpretation of the UN Committee on Economic, Social, and Cultural Rights (CESCR), the Court has specified that "that States are responsible for regulating the provision of services (both public and private) and executing national programs to achieve good quality services on a permanent basis."[311]

IMPLICATIONS

- Every human being has the right to a dignified life. That includes protection against circumstances under which they are "prevented from having access to the conditions that guarantee a dignified existence."[312] As a consequence, State adoption of AI/ADM systems cannot constitute an arbitrary barrier for people's enjoyment and exercise of their ESC rights. This is also in line with the principle of non-regression (see Chapter 2).
- States' duty to ensure the right to a dignified life include creating the necessary conditions to prevent violations and arbitrary restrictions of this right. This means that assessing and implementing AI/ADM systems within social protection policies must be grounded in principles and practices aimed at ensuring the right to a decent life and the progressive realization of ESC rights.
- In this sense, an important principle to guide State action in this and other contexts is, again, that people subject to AI/ADM-based decision proceedings are rights holders—including the right to a dignified life and related ESC rights. As such, effective civic participation of affected groups in the design, implementation, and evaluation of public policies involving AI/ADM systems is a second crucial principle to inform State action (*see Chapters 3 and 5*).
- Equality and non-discrimination are also related principles that must govern the exercise of State functions in general and in the context of social protection and ESC rights (*see Chapter 2 and Section 4.3*).
- The rights to social security and health are critical enablers of other rights, including the essential right to life and personal integrity. States must observe such an interdependence when using AI/ADM systems to allocate or deny provisions, subsidies, and services.
- Public provisions, subsidies, and services are all state mechanisms to comply with obligations to ensure members of society can live a dignified life and progressively achieve the realization of ESC rights. Reducing, suspending, or denying them implies a restriction to corresponding ESC rights that must be provided for by law and based

310 Case of I.V. v. Bolivia, supra note 186, para. 154 (emphasis added), citing Case of Ximenes-Lopes v. Brazil, supra note 36, paras. 89 and 99, and Case of Suárez Peralta v. Ecuador, supra note 301, para. 132.
311 Case of Cuscul Pivaral et al. v. Guatemala, supra note 66, paras. 105-106, citing Case of Poblete Vilches et al. v. Chile, Merits, Reparations and Costs, Judgment of March 8, 2018, paras. 118-119; Case of Suárez Peralta v. Ecuador, supra note 301, para. 134.
312 Case of the "Street Children" (Villagran-Morales et al.) v. Guatemala, supra note 295, para. 144.

on legitimate grounds (*see Chapter 2*).

- In addition, any State AI/ADM-based decision affecting the enjoyment of ESC rights must rigorously satisfy due process guarantees (*see Section 4.4*).
- For the benefits of scientific and technological progress to be distributed inclusively and sustainably among the population, relevant State policies and practices must be based on respecting and protecting human rights. This reinforces that State development and use of AI/ADM systems for rights-based determinations must have international human rights law as its baseline.
- The obligation of progressive realization (*see Section 2.4*) prohibits States' from failing to take steps to achieve the comprehensive protection of ESC rights, especially when States' failure to do so puts people's lives or personal integrity at risk.[313]
- The right to health is an integral part of the right to personal integrity and involves having an equal opportunity to enjoy the rights *to the highest attainable level of health* and *to be free of interference*. The latter includes the right to be free from nonconsensual medical treatment and experimentation. State adoption of AI/ADM systems to manage or in other ways establish medical treatment recommendations or routines must observe the right to be free from experimentation, among other rights.
- State adoption of AI/ADM technologies in this context must consider that the right to the highest attainable level of health enables people to live a full life. Health is much more than the absence of disease or illness, but a state of complete physical, mental, and social well-being.[314] Government implementation of these technologies in a way that mostly restricts and/or undermines people's well-being is the opposite of inclusively and sustainably distributing the benefits of scientific and technological progress.
- States must also ensure that individuals receiving their health services have access to relevant information regarding their medical treatment as part of States' active transparency duties. This information must be opportune, complete, comprehensible, and reliable.[315] As the Court highlighted, "information accessibility" is one of the essential elements of the right to the highest attainable standard of health. Accessibility and non-discrimination are also elements States must take into account when assessing the implementation of AI/ADM systems in the context of health services.
- This relates to the connection between physical and mental integrity, personal autonomy, and the freedom to make decisions regarding one's own body and health. This connection also requires States to ensure and respect people's decisions and choices regarding their health that have been made freely and responsibly.[316]
- The deployment and/or implementation of AI/ADM systems in the welfare context (such as social security and health) must abide by States' obligations regarding the right of access to information (*see Section 4.2*). Social protection policies are funded by public budget expenditures. As such, public spending directly connected to the use of these technologies within the welfare system must be publicly available and easily accessible as a general rule.

313 Case of Cuscul Pivaral et al. v. Guatemala, supra note 66, para. 146.
314 Case of Cuscul Pivaral et al. v. Guatemala, supra note 66, para. 105.
315 Case of I.V. v. Bolivia, supra note 186, para. 155.
316 Case of I.V. v. Bolivia, supra note 186, para. 155.

- The inclusive and sustainable fulfillment of the right to enjoy the benefits of scientific and technological progress should encompass State policies that foster research and investments for local development of AI technologies based on principles of openness, decentralization, and respect for human rights.
- One key element of respecting human rights in the context of policies fostering research and development of AI/ADM systems is the principle of personal autonomy and its prohibition against the "instrumentalization" of individuals (*see Section 4.5*). Therefore, State innovation policies must refrain from approaches that either exploit data from the most vulnerable or test experimental solutions on marginalized populations as incentives for partnerships with the private sector.[317]

5. Conclusions and Recommendations

5.1. Essential Baseline

The essential baseline of any adoption of AI/ADM systems by state institutions for rights-based determinations is the States' obligation to respect human rights and fundamental freedoms. This obligation entails the duties to prevent, investigate, punish, and remedy human rights violations. The Inter-American standards and unfolding implications show a set of cross-cutting rights that apply in this context and must be considered in their interdependence, meaning that ensuring one is closely related and dependent on fulfilling the other.

One major consequence highlighted throughout the paper's implications is that States must have the proper processes and apparatus in place to comply with such rights, including to prevent violations or provide effective remedy and reparation in case they regrettably occur. The commitments States have undertaken before the Inter-American System bind all state institutions and those acting on their behalf. Legal frameworks must adjust to such commitments and any legislation failing to abide by conventional norms demands domestic court review to establish adequate interpretation or the need for review (*see more about "conventionality control" in Section 1.2*).

5.2 Basic Tenets

The principles that *the State is the guarantor of rights and responsible for their promotion and protection* and that *people and social groups are holders of rights with the capacity and right to call for these rights and participate*[318] are the basic tenets of any legitimate use of AI/ADM systems for state bodies' decisions affecting

317 See concerns around this approach in López, J. (2020). Experimentando con la Pobreza: El SISBÉN y los Proyectos de Analítica de Datos en Colombia. Fundación Karisma.
318 IACHR, Public Policy with a Human Rights Approach, supra note 75, para. 44.

the recognition, enjoyment, and exercise of human rights.

This means that State action must have the promotion and protection of human rights as its compass, its underlying general goal. As such, States' commitments before international human rights law must guide the way States organize their structure and conduct their activities. In addition, the fact that people and social groups are rights holders implies that their relationship with state institutions entails guarantees and safeguards that public bodies and officials must meet when conducting public services, social assistance, administrative or judicial adjudication, among other functions. This includes people's power to challenge decisions that deny or arbitrarily limit their rights. That is, as rights holders, people have the capacity to demand their rights before state institutions and to participate in public decision-making. This participation is not only desirable but also an enforceable right and an obligation of the State.[319] The coordination of both principles also stress that States are responsible and accountable for their decisions affecting human rights, regardless of whether they have integrated or not an AI/ADM tool in such decision-making procedures.

The implications of Inter-American Human Rights standards developed throughout this report reflect such essential baseline and basic tenets, deepening what they entail in terms of processes, structures, and safeguards. These are the foundation upon which we unfold a human-rights based operational framework, with recommendations to underpin legitimate use of AI/ADM systems by state institutions in the context of rights-based determinations.

Moreover, the implications we outline in each chapter of this report must drive the application of the operational framework as specific guidance for when related rights are or may be affected.

5.3 Crucial Aspects of Transparency in Government Use of AI

A Human-Rights Based Approach to Trade Secrecy and Intellectual Property

A vital feature of the operational framework developed in Section 5.4 is a strict and consistent human rights-based approach to any limitations on public scrutiny of AI/ADM systems' design and functioning. The implications in the previous chapters, especially in Section 4.2, address many of them, such as national and public security. In this section, we briefly discuss business justifications around the protection of

319 IACHR, Public Policy with a Human Rights Approach, supra note 75, para. 56 (emphasis added).

trade secrets.

AI/ADM businesses may claim trade secret rights in software algorithms and source code, and argue that independent audits and public scrutiny of their systems will violate those rights. A trade secret is economically valuable information that a business makes reasonable efforts to keep confidential.[320] In some jurisdictions, trade secrets are considered to be a form of intellectual property (IP). Unlike IP such as patents, however, trade secrets by design are not publicly registered or disclosed.

Trade secrets protections can help preserve fair competition by deterring industrial or commercial espionage and breach of confidence. Yet, those protections should align with international *human rights* law. Similarly, although it can be controversial, and varies by jurisdiction whether trade secrets are considered a form of property, protecting them and creators' related rights under this framing must be consistent with human rights.

The Inter-American Court has specifically addressed the *right to the use and enjoyment of one's intellectual works*.[321] It derives from the right to property, enshrined in Article 21 of the American Convention,[322] and the right to benefit from the protection of moral and material interests derived from any scientific, literary, or artistic production of which he or she is the author (Article 14(1)(c) of the Protocol of San Salvador and Article XIII of the American Declaration of the Rights and Duties of Man).[323]

According to the Court, the right to *use* and *enjoy* intellectual works involves a *tangible dimension* – the publication, exploitation, assignment or transfer of the works and an *intangible dimension* – the link between the creator and their works.[324] The former concerns the author's material interests while the latter refers to their moral interests, as protected by Art. 14(1)(c) of the Protocol of San Salvador and Art. XIII of the American Declaration.

Given that Art. 14(1)(c) of the Protocol of San Salvador practically replicates Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights (ICESCR),[325]

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320 See an overview at <https://www.law.cornell.edu/wex/trade_secret>.
321 See Case of Palamara-Iribarne v. Chile, supra note 41.
322 "Art. 21. Right to Property. 1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. 3. Usury and any other form of exploitation of man by man shall be prohibited by law."
323 "Art. 14. Right to the benefits of culture. 1. The States Parties to this Protocol recognize the right of everyone: [...] (c) to benefit from the protection of moral and material interests deriving from any scientific, literary or artistic production of which he is the author; Art. XIII of the American Declaration of the Rights and Duties of Man. Every person has the right [...] to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author."
324 Case of Palamara-Iribarne v. Chile, supra note 41.
325 See United Nations, Committee on Economic, Social and Cultural Rights, General Comment No. 17 (2005): The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of which he or she is the Author (Article 15, Paragraph 1 (c), of the Covenant), E/C.12/

we can look to the UN Committee on Economic, Social and Cultural Rights for insight.

The UN Committee has underlined that intellectual property rights seek to encourage the active contribution of creators to the arts and sciences and to the progress of society as a whole.[326] Parsing the elements of Art. 15(1)(c), the UN Committee considers that only the "author," understood as the human creator ("whether man or woman, individual or group of individuals") of scientific, literary, or artistic productions, can be the beneficiary of this provision. The Committee points out that although legal entities, such as corporations, may hold intellectual property rights under existing international treaty protection regimes, their entitlements are not protected at the level of human rights.[327] The Inter-American Court has also referred to authors of intellectual works as natural persons.[328] This is in line with Art. 1 (2) of the American Convention, which establishes that "for the purposes of this Convention, 'person' means every human being."

The protection of the author's moral and material interests must also be balanced against other human rights. The UN Committee has stressed that

In striking this balance, the private interests of authors should not be unduly favoured and the public interest in enjoying broad access to their productions should be given due consideration. States parties should therefore ensure that their legal or other regimes for the protection of the moral and material interests resulting from one's scientific, literary or artistic productions constitute no impediment to their ability to comply with their core obligations in relation to the rights to food, health and education, as well as to take part in cultural life and to enjoy the benefits of scientific progress and its applications, or any other right

GC/17, January 12, 2006.

326 United Nations, Committee on Economic, Social and Cultural Rights, General Comment No. 17 (2005), supra note 325, para. 4.

327 United Nations, Committee on Economic, Social and Cultural Rights, General Comment No. 17 (2005), supra note 325, para. 7.

328 "Thus, within the broad concept of 'assets' whose use and enjoyment are protected by the Convention are also the works resulting from the intellectual creation of a person, who, as the author of such works, acquires thereupon the property rights related to the use and enjoyment thereof." Case of Palamara-Iribarne v. Chile, supra note 41, para. 102.

enshrined in the Covenant. Ultimately, intellectual property is a social product and has a social function.[329]

In the context of government use of AI/ADM systems for rights-affecting determinations, States' core obligations concern specific impacted rights and the cross-cutting principles, as discussed in Section 5.4. Among other duties, States must prevent discrimination and guarantee due process. Accordingly, while software algorithms deserve adequate remuneration, material interests may not block people's ability to understand a decision affecting their rights, nor obstruct state institutions' and society's capacity to assess the reliability and efficacy of algorithmic systems (*see Section 5.4*).

Further, the UN Committee on Economic, Social and Cultural Rights has emphasized that Art. 15 (1) does not rest on a rigid distinction between the scientist and the general population.[330] Rather, the UN Committee has affirmed that the right of everyone to participate in cultural life includes *the right of every person to take part in scientific progress and in decisions concerning its direction*.[331] Similarly, enabling individuals and society to enjoy the benefits of scientific progress involves fostering broader critical scientific thinking and the dissemination of scientific knowledge.[332] According to the UN Committee, "States parties should not only refrain from preventing citizen participation in scientific activities, but should actively facilitate it."[333] States should do so "particularly through a vigorous and informed democratic debate on the production and use of scientific knowledge."[334]

Given the ongoing controversies related to the development and use of AI systems, that informed debate is particularly urgent. Accordingly, intellectual property rights should not hamper States' and society's ability to build on the best available scientific evidence to develop policies and support state decision-making on whether, and how, to adopt a certain technological solution.

These bases underpin the operational framework we detail in Section 5.4. This

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329 United Nations, Committee on Economic, Social and Cultural Rights, General Comment No. 17 (2005), supra note 325, para. 35 (emphasis added), citing United Nations, Committee on Economic, Social and Cultural Rights, Human Rights and Intellectual Property, Statement, E/C.12/2001/15, December 14, 2001, paras. 4, 12 and 17.
330 United Nations, Committee on Economic, Social and Cultural Rights, General comment No. 25 (2020) on Science and Economic, Social and Cultural Rights (Article 15 (1) (b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/25, April 30, 2020, para. 9.
331 United Nations, Committee on Economic, Social and Cultural Rights, General Comment n. 25 (2020), supra note 330, para. 10.
332 United Nations, Committee on Economic, Social and Cultural Rights, General Comment n. 25 (2020), supra note 330, para. 10.
333 United Nations, Committee on Economic, Social and Cultural Rights, General Comment n. 25 (2020), supra note 330, para. 10.
334 United Nations, Committee on Economic, Social and Cultural Rights, General Comment n. 25 (2020), supra note 330, para. 54.

framework unfolds from a human rights-based approach to trade secrets and intellectual property, which ultimately articulates why authors' and corporate interests cannot override the full set of human rights impacted by government use of AI/ADM systems—and how knowing, assessing, and understanding such systems are essential for ensuring these rights and fulfilling States' core obligations towards them.[335]

Transparency: Access to Information, Interpretability, and Explainability

Step one of putting transparency commitments into practice is to inform affected individuals that decisions concerning them involve algorithmic systems. It also includes proactively disclosing which state policies or initiatives rely on AI/ADM systems for rights-affecting activities and determinations. As such, States should thoroughly disclose all AI/ADM systems in use (including by delegated third parties). Although still widely neglected, we see increasing efforts to meet this first basic step from either governments or researchers with varying degrees of detail.[336]

Regarding active transparency, States should as a basic first step disclose, in a systematic and user-friendly way, which AI/ADM systems are used and for which purposes. (Section 4.2)

State institutions' proactive disclosure should also include related important information about the system, personal data processing involved, and underpinning legal framework, documentation, and budget, as well as people's rights and the means to exercise them (especially due process and data privacy related rights).

Those disclosures should also include the related legal framework, the categories of data involved, which institutions are in charge, which are the system's developers and/or vendors, the public budget involved,

335 This understanding corroborates what we pointed out in Section 4.2.
336 The Chilean Repositorio Algoritmos Públicos, linked to Gob_Lab at the Adolfo Ibañez University, available at <https://algoritmospublicos.cl/repositorio>. The UK Tracking Automated Government (TAG) Register, developed by the Public Law Project, available at <https://trackautomatedgovernment.shinyapps.io/register/>. The Canadian TAG register, held by the Starling Centre, available at <https://tagcanada.shinyapps.io/register/>. The City of Amsterdam Algorithm Register, available at <https://algoritmeregister.amsterdam.nl/en/ai-register/>. The U.S. AI Use Case Inventory, available at <https://www.dhs.gov/data/AI_inventory>.

reasons and documentation underpinning the adoption of the system, and all impact assessments carried out. Further, they include performance metrics, information on the decision-making flow including human and AI agents, the rights of people affected, and the means available for review and redress. (Section 4.2; see also Section 4.5 for data processing related information)[337]

For example, States can organize most of this information in a public register, breaking them down by type of technology, name of the provider, state institution in charge, related program or policy, among others. Moreover, streamlined access to documentation that justifies the adoption of the system is a vital element to underscore. Related contracts, not only, but including, purchase agreements with developers/vendors, procurement procedures, meetings minutes and administrative procedures/files relating to the institution's decision-making process as to whether or not deploy the system are all connected to public spending and must be released by default. Any limitations must be strict in scope and pass a stringent test, as detailed in Section 4.2.

Such information is crucial to prevent and tackle conflicts of interest and acts of corruption. State institutions should equally disclose related legal documents (e.g., data protection policies) and their protocols concerning the use of the system (*see Section 5.4, "Design"*). Still regarding States' decision-making process as to whether (and, if so, how) to adopt AI/ADM tools for rights-based decisions, Section 5.4 emphasizes it should entail a complex, participatory, and documented process best articulated as a Human Rights Impact Assessment.

Furthermore, there is a set of complementary information that state institutions should have access to and make publicly available, ideally proactively or through information requests. They include details on the model's training and testing datasets, the datasets the institution uses or will use to implement and validate the

337 In regard to privacy and data processing related information, we call specific attention to the following implications in section 4.2 and 4.5, respectively: "When it comes to AI/ADM systems deployed for surveillance purposes, including in the context of national security, people should be informed, at a minimum, about the legal framework regulating these practices; the bodies authorized to use such systems; oversight institutions; procedures for authorizing the system's use, selecting targets, processing data, and establishing the duration of surveillance; protocols for sharing, storing, and destroying intercepted material; and general statistics regarding these activities." And "[f]ree and informed consent require providing data subjects with sufficient information about the details of the data to be collected, the manner of its collection, the purposes for which it will be used and the possibility, if any, of its disclosure; the individual should also express their willingness in such a way that there is no doubt about their intention. In short, the data subject should have the ability to exercise a real choice and there should be no risk of deception, intimidation, coercion or significant negative consequences to the individual from refusal to consent."

system, and further details on its performance and accuracy.[338]

These all relate to the *transparency of algorithmic models*, which involves the documentation of the AI model processing chain. It includes the technical principles of the model, the description of the data used for its conception, and other elements that are relevant for providing a good understanding of the model, thereby relating to interpretability and explainability goals.[339]

Decisions based on AI/ADM systems must have a clear, reasoned, and coherent justification. This means that systems employed for rights-based determinations must meet interpretability and explainability goals. (Section 4.4)

We can distinguish three levels of transparency of AI systems:[340] 1) *Implementation*, which refers to knowing the way the model acts on input data to output a prediction, including the technical architecture of the model – this is the standard level of transparency of most open source models. 2) *Specifications*, which concerns all information leading to the resulting implementation, including details on the specifications of the model (e.g., task, objectives, context), the training dataset, training procedure, model's performances, and other elements that allows the implementation process to be reproduced – research papers often meet this level of transparency. 3) *Interpretability/Explainability,* which relates to enabling human understanding of underlying mechanisms of the model (e.g. the reason or logic behind an output) and the ability to demonstrate that the algorithm follows the specifications and aligns with human values.

Although the interpretability/explainability level is generally harder to achieve, especially depending on the complexity of the model, transparency at the implementation and specification levels is a matter of getting access to the respective information or having it publicly available. Although States should prioritize open source systems, a great deal of crucial information is already available if consistent

338 Inspired by Julia Stoyanovich's point that "algorithmic transparency requires data transparency." The author complements that data transparency is not synonymous with making all data public, noting that it is also important to release "data selection, collection and pre-processing methodologies; data provenance and quality information; known sources of bias; privacy-preserving statistical summaries of the data." Stoyanovich, J. (n.d.). Interpretability, DS-GA 3001.009: Responsible Data Science, pp. 21-22.
339 Hamon, R., Junklewitz, H., & Sanchez, I. (2020). Robustness and Explainability of Artificial Intelligence: From Technical to Policy Solutions. Publications Office of the European Union, p. 2.
340 The description of these three levels is mostly taken from Hamon, R., Junklewitz, H., & Sanchez, I. (2020), supra note 339.

documentation of the model's design and implementation is released to the public.[341] Proper documentation of the system's specifications is also vital to allow a broader understanding of the human choices and decisions shaping the model's operation,[342] which contributes to our ability to interpret and explain the system's decisions and predictions.

In meeting *interpretability and explainability goals*, we should be able to address two general categories of questions: "What are the system's rules?" and "Why are these the rules?"[343] or, in other words, "How does the system behave?" and "What justifies that the system behaves in this way?"

This combination of questions articulates both concerns related to understanding the system's outputs and ascertaining whether its model is well justified.[344] This means enabling "process-based explanations" to demonstrate that the system followed good governance processes and best practices throughout its design and use, as well as providing "outcome-based explanations."[345] The latter involves explaining the reasoning behind a specific algorithmic decision in easily understandable language according to the targeted audience. It also includes providing details about the human involvement in the decision-making process.

For achieving such goals, States adopting AI/ADM systems for rights-affecting determinations should:

- Prioritize the development, acquisition, and deployment of open source AI/ADM systems. In any case, proper assessment of the system before and during its implementation includes having access and analyzing its source code (see Section 5.4);

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341 For a template to document the training dataset, see Gebru, T.; Morgenstern, J., Vecchione, B., Wortman, J. V., Wallach, H., Daumé III, H., & Crawford, K. (2021). Datasheets for Datasets. arXiv. In turn, a template focused on the model can be found in Mitchell, M., Wu, S., Zaldivar, A., Barnes, P., Vasserman, L., Hutchinson, B.; Spitzer, E., Raji, I. D., & Gebru, T. (2019) Model Cards for Model Reporting. In Proceedings of the Conference on Fairness, Accountability, and Transparency, Association for Computing Machinery (ACM). This template inspired the elaboration of a Transparency Sheet (Ficha de transparencia) for government algorithmic systems by the Chilean Adolfo Ibañez University's Gob_Lab. The template of the transparency sheet is available at <https://herramienta-transparencia-goblab-uai.streamlit.app/>.

342 Foryciarz, A., Leufer, D., & Szymielewicz, K. (2020). Black-Boxed Politics: Opacity is a Choice. In AI Systems, Towards Data Science. Human decisions that shape an AI system include: setting the main objective; eliciting values and preferences; choosing the most important outcome; selecting a dataset; choosing a prediction method [a model]; testing and calibrating the system; and updating the model.

343 Selbst and Barocas pose and develop these questions in Selbst, A., & Barocas, S. (2018). The Intuitive Appeal of Explainable Machines. Fordham Law Review, v. 87.

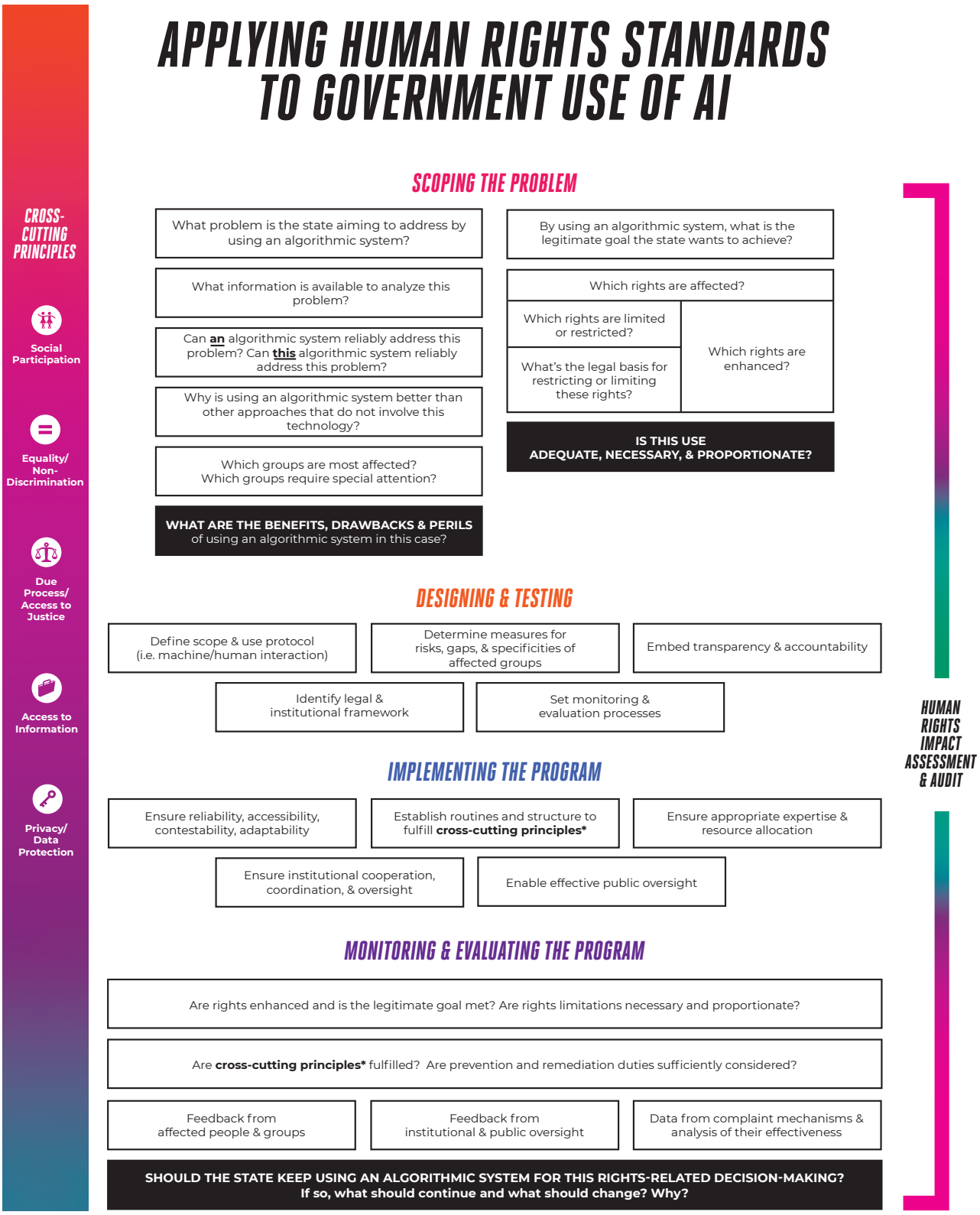
344 Selbst, A., & Barocas, S. (2018), supra note 343, p. 1129.

345 UK Information Commissioner's Office (ICO) & The Alan Turing Institute. (October 17, 2022). Explaining decisions made with AI, p. 23. The document articulates different focuses for explanations regarding AI systems based on a set of important elements organized in the following categories: rationale, responsible actors, data processing, fairness, safety and performance, and impact mitigation and monitoring. We should also note that "process-" and "outcome-based explanation" relates to the two interpretability approaches that the Robustness and Explainability of Artificial Intelligence report briefly points out and explain as "global interpretability setup" and "providing an explanation for a single prediction made by the system." Hamon, R., Junklewitz, H., & Sanchez, I. (2020), supra note 339, pp. 12-13.

- Make the system's documentation of specifications publicly available, establishing this as a prerequisite for developers and vendors to contract with state institutions;
- Adopt only models that are interpretable[346] or that follow an explainability-by-design approach.[347]

346 Rudin, C. (2019). Stop Explaining Black Box Machine Learning Models for High Stakes Decisions and Use Interpretable Models Instead. Nat Mach Intell 1, 206-215. See also Hamon, R., Junklewitz, H., & Sanchez, I. (2020), supra note 339, p. 13 (Section 3.2.4 Interpretable models vs. post-hoc interpretability).
347 Hamon, R., Junklewitz, H., & Sanchez, I. (2020), supra note 339, p. 24.

5.4 Operational Framewok for Applying Inter-American Human Rights Standards



Source: Elaborated by the authors building on the "Diagram of analysis of public policy on the basis of the contribution of the IAHRS" at IACHR, Public policy with a human rights approach, September 15, 2018, p. 50. https://www.eff.org/document/applying-human-rights-standards-government-use-ai

Scoping the Problem

Before developing or implementing an AI/ADM system to support state action and decision-making affecting the recognition and exercise of human rights, state institutions must commit to unleashing a decision-making process as to whether or not adopt the system that begins with the question: *What is the problem/issue we aim to address by using an AI/automated system as part of a rights-related decision-making?* This question leads to another one, which is: *What do we know about this problem?*

To answer this question it is crucial to examine *what are the sources of information available for conducting such analysis*. This examination is two-fold: first, whether there is enough quantitative and qualitative information to carry out a situational assessment of the issue to tackle, its overall context, affected groups, and possible implications of proposed solutions; second, whether there is enough data available related to the problem to properly feed an AI/ADM system and lead to an informed and accurate outcome.[348] Properly assessing the latter requires a broader understanding of the context, which connects to the first component of this analysis, so as to identify possible gaps and biases in the available data.

If the answer to this two-fold examination is negative, then the state institution lacks the appropriate conditions to reliably adopt an AI/ADM system in this context, and other approaches or previous steps must be considered instead. If the answer is affirmative, there is still a relevant set of elements to look at for establishing *whether an AI/ADM system can reliably address the issue or problem*, and more specifically, *whether a certain technology or system already envisioned by the state institution can reliably do so*.

The decision-making process described here embeds steps of an assessment that state institutions must genuinely conduct with proper documentation, transparency and social participation. It is crucial that they do so in collaboration with expert organizations, from academia and civil society, meaningfully engaging with affected groups and communities, and involving all public bodies related to the issue/problem to be addressed. This participative and coordinated analysis should take the form of a **Human Rights Impact Assessment (HRIA)** so that state institutions have the proper framework to identify rights enhanced and limited, as well as to establish the most appropriate approach regarding their interference with human rights.

In view of Inter-American democratic and participatory standards, this analysis cannot be a mere formality and box-checking exercise, nor a process that is confined to

348 See Williams, J., & Gunn, L. (May 7, 2018). Can the available data actually lead to a good outcome? In Math Can't Solve Everything: Questions We Need To Be Asking Before Deciding an Algorithm is the Answer. Electronic Frontier Foundation.

state offices and officials, or an analysis and social participation that are shaped so as to justify a decision already taken. By the same token, putting in place a participatory process, although essential, is not an end in itself. It is the vector for a substantive human rights analysis on whether and how the AI/ADM-based policy could proceed. This means that this process must be assessed against human rights law and standards, both procedurally and substantively, and can be contested on those grounds.

The steps and questions we describe here are not meant to exhaust the framing of this assessment, but they are all important elements that such participative analysis should include.

The implications in Chapter 2 highlight that while States' use of AI/ADM systems can have the potential to promote conventional rights, their adoption in the context of rights-based determinations intrinsically entail at least a potential restriction or limitation to rights and freedoms, such as privacy, informational self-determination, non-discrimination, among others.

As such, the application of the **three-part test** should inform how institutions conduct this assessment. In this sense:

> *Legality principle: the assessment must carefully identify which rights are restricted or limited within such AI/ADM-supported policy or decision-making procedure. Such analysis must consider the people, groups, and communities affected, dwelling on which of them require special attention. Any State action entailing the restriction or limitation of conventional rights must be provided for by law in accordance with Inter-American standards (see Sections 2.1, 2.2, and Article 30 of the American Convention).*

> *Legitimate goal: the State must be clear about what is the legitimate goal it aims to achieve by employing an algorithmic system as part of its rights-related decision-making. That is, the issue or problem the State seeks to address must translate into a legitimate aim that is necessary in a democratic society, according to conventional terms (see Section 2.3). From the perspective of policymaking with a human rights approach,[349] it is also relevant that the State clarify how the legitimate goal consists of or relates to enhancing the protection and/or promotion of human rights.*

349 IACHR, Public Policy with a Human Rights Approach, supra note 75.

Adequate, Necessary, and Proportionate:

Adequate - the State must have sufficient elements demonstrating that the integration of an AI/ADM system to the decision-making process is an adequate means for achieving the legitimate goal pursued. This includes showing it is conducive and can be effective in attaining the legitimate goal.

Necessary and proportionate: having fulfilled the previous steps, the State use of an AI/ADM system to support decision-making affecting rights must be necessary to achieve the legitimate aim. Being "necessary" means that this measure is not only conducive to the legitimate goal, but also is the one least harmful to human rights. If that's the case, the analysis must continue by examining whether the measure is proportionate. This involves weighing the legitimate goal pursued and the rights it seeks to enhance vis-à-vis the rights restricted or limited in such a manner that the system and the way it integrates the decision process is proportionately calibrated. This means fine-tuning to properly strengthen the rights enhanced while interfering to the least extent possible with the limited rights. The implications elaborated on throughout this report work as a guide for this analysis and tuning. This process includes defining adequate metrics, thresholds, safeguards, and mitigation measures, with careful consideration about groups that require special attention, in particular groups that have been historically discriminated against. If there is no such proportional balance, the State cannot legitimately proceed with the adoption of the AI/ADM system.

This is a general framework considering the three-part test. Provided that the steps regarding legality and legitimate aim are properly fulfilled, the conclusion of such analysis demands further consideration. There are other important elements that we must incorporate to the analysis, that relate to answering whether the adoption of an AI/ADM system *can reliably address the problem or issue*. Through this combined analysis, States and society will have a roadmap to ultimately establish *whether such use is adequate, necessary, and proportionate*, and thereby constitute a legitimate application of AI/ADM systems by state institutions in the context of rights-based determinations.

The list of questions below articulates some of the important elements this

assessment should include:[350]

Is an AI/ADM system fit for the intended purpose?

The analysis must confront and analyze the possibility that using an AI/ADM system is not a suitable approach to address the problem. When the rights-related decision-making at issue must rely on human prudence, reasoning, or experience, and automated pattern recognition of available datasets does not have a useful role to play in informing human intervention, then an algorithmic-based system will not be fit for purpose. The same problem occurs when the aimed goal is hard to translate into mathematical variables (e.g. societal happiness) and there are no adequate measurable proxies from the available data.[351] Even if some proxies could possibly work, the mathematical translation of a complex social phenomenon and the use of related proxies may not be the most suitable approach to address the issue or problem. In any case, it is essential to prevent the "formalism trap," meaning the "failure to account for the full meaning of social concepts such as fairness, which can be procedural, contextual, and contestable, and cannot be resolved through mathematical formalisms."[352] It is also essential to consider the current status of the technology and its limitations vis-à-vis the safeguards and rights that must apply considering the purpose for which the system would be implemented (e.g. requirement of strict due process guarantees in relation to non-explainable systems).

As such, this assessment must follow human rights standards and related State obligations under human rights law. It is crucial that States refrain from adopting these systems with the sole purpose of reducing costs, as if automated systems could replace human assessment in critical decision-making. It is also imperative that state institutions do not delegate to automated systems intricate policy decisions that demand human knowledge and consideration. As we pointed out, proper human oversight should always apply in the context of government rights-related decision-making and, in any case, the State remains responsible for the decisions and actions taken on its behalf.

Therefore, this question is the opportunity to genuinely assess whether and, if so, how an AI/ADM system effectively adds to human decision-making in addressing the issue or problem. Why is using an AI/ADM system better than other approaches that do not involve this technology?

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350 The comments to the questions below take into account other EFF's resources related to the topic, particularly Lacambra, S. (2018). Artificial Intelligence and Algorithmic Tools. A Policy Guide for Judges and Judicial Officers. Electronic Frontier Foundation.

351 Proxy is a variable that is not in itself directly relevant, but that serves in place of an unobservable or immeasurable variable.

352 See Selbst, A. D., Boyd, D., Sorelle, A. F., Venkatasubramanian, S., & Vertesi, J. (2019). Fairness and Abstraction in Sociotechnical Systems. In Proceedings of the Conference on Fairness, Accountability, and Transparency (FAT* '19). Association for Computing Machinery (ACM), New York, NY, USA, 59-68.

For that, it is important to build upon the information previously gathered to understand how government institutions are doing in this matter and, if so, how the implementation of algorithmic solutions is conducive to improving the situation and achieving the legitimate aim pursued. Clearly establishing what must be tackled and how success or failure are measured is key and must follow a human rights approach. Answering to this question also includes verifying whether the envisioned technology or specific system has shown effective results in other implementations and the differences and similarities of these previous experiences with the specific social context in which the State intends to apply the AI/ADM system.

Is this technology or system reliable?

Two main aspects indicate that an algorithmic system is not reliable: poor performance and vulnerabilities. Poor performance means that the model does not perform well in a given task, which can lead to inaccurate, discriminatory, or otherwise harmful outcomes. As for vulnerabilities, the model performs well but has vulnerabilities that may lead to malfunctions in specific conditions, including security breaches. These malfunctions may derive from the regular execution of the software or be intentionally exploited or provoked by an adversary with malicious intentions.[353] The question here is then: *What assurances exist that the system performs well (including fairly) and has robust security?*[354]

Developers and vendors of AI/ADM systems used by state institutions must provide sufficient guarantees that their systems perform well and have robust guardrails against vulnerabilities. These guarantees must include evidence that developers took the necessary steps to assess, prevent, and mitigate possible detrimental impacts to human rights, and that their systems meet proper standards of transparency, fairness, privacy, security, among other features. In turn, States must refrain from implementing AI/ADM technologies that do not provide these guarantees, which includes systems with a track record of human rights violations.

This first step is essential, but it is not enough. Systems previously subject to public scrutiny and independent auditing should have preference and may be required for consequential decisions. Independent and rigorous certification mechanisms could also play a role in this regard. Finally, States as catalysts of a participatory and meaningful impact assessment must meet their responsibilities before human rights law.

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353 Hamon, R., Junklewitz, H., & Sanchez, I. (2020), supra note 340, p. 14.

354 See Williams, J., & Gunn, L. (May 7, 2018). What assurances exist that the code is free of errors? In Math Can't Solve Everything: Questions We Need To Be Asking Before Deciding an Algorithm is the Answer. Electronic Frontier Foundation. The piece mentions two examples in the United States: "In New York City, the Office of the Chief Medical Examiner used an algorithmic tool for DNA analysis that was found to contain a bug with the potential to implicate innocent people in crimes. This bug was only discovered when a court permitted a criminal defense team to analyze the software itself, rather than relying only on documentation and testimony about what its creators believed it did. The same type of issue arose in Arkansas, where public disability benefits were slashed based on faulty technology and people suffered and even died after being wrongly denied benefits they needed."

This means that state bodies must also conduct their analysis of crucial aspects of the system in collaboration with independent data scientists and civil society experts. For that, they should be able to have access to the system's source code and executables, anonymized training datasets, and testing materials, including anonymized testing datasets. This would allow analysis of variables and proxies upon which they rely, and analysis to identify and measure any statistical biases (including omitted variable biases).[355] Such analysis must consider not only the algorithmic model's operation ("why the model made the decision it did") but also the design process ("why the model was designed that way"). The design process entails choices and trade-offs that are in effect policy decisions that will impact the system's outcomes.[356] **The best way to address this analysis is through the system's audit**, which should include the collaboration with civil society experts in AI, the intersection of technology and human rights, and the field in which the state body aims to implement the system (e.g., health, social security, public security). The outcomes of this analysis should be public and integrate the broader discussion as to whether or not adopt the AI/ADM system. It is particularly important to highlight what the system is optimized for and how it calibrates fairness concerns.

Beyond the assessment of the algorithmic model and its design process, it is essential to consider how it interacts (or would interact) with its real context of application.

Can the use of this system reliably address the problem in the real world?

Picking up on the first question of this list, it is important to analyze if the AI/ADM system is fit for purpose regarding the specific social context of its purported implementation. As mentioned above, the analysis should look at whether the envisioned technology or specific system has shown beneficial results in other implementations and how the social context of previous experiences resemble or differ from the reality where it would be implemented. This analysis should coordinate with the audit referred to in the previous question and integrate a broader assessment of the dynamic, disparities, and gaps in place, in addition to the potential impacts of introducing a certain AI/ADM technology with the intended purposes, in this social context.

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355 Proxy is a variable that is not in itself directly relevant, but that serves in place of an unobservable or immeasurable variable. Statistical bias is a feature of a statistical technique or of its results whereby the "expected value" of the results differs from the underlying truth. Omitted variable bias is a bias that occurs when an algorithmic system does not have enough information to make a truly informed prediction and learns to rely on an available, but inadequate proxy variable. See Lacambra, S. (2018), supra note 350.

356 "Such documentation could show, for instance, that a design team tested a model with and without certain data and found that using the data reduced the disproportionate impact of the model; or that a team considered adding additional features to create a more accurate and fair model but, after discovering that such features were exceedingly difficult or costly to implement, the company decided to use a less costly proxies that reduced the model's accuracy and fairness." Lacambra, S. (2018), supra note 350, p. 2.

Properly conducting this analysis involves at least two components:

First, to identify *which groups are most affected, how, and which of them require special attention*, analyzing both related potential impacts and necessary measures to prevent human rights violations in case the AI/ADM system is adopted. Recalling the three-step guide to policy design (*see Section 4.3*), such analysis includes assessing the differential impact that using this system has or might have for groups in situations of historical discrimination and the actual benefits it may bring for reducing the inequality divide impacting them. It also entails meaningfully consulting the broader community and affected groups, including the views and concerns of groups that have historically been discriminated against.

As we highlighted in the implications of Section 4.3, States must refrain from adopting AI/ADM-based decision-making in contexts it would be incompatible with human rights, such as state practices that replicate systemic discrimination and/or entail racial profiling. In this sense, States must refrain from implementing AI/ADM technologies that have disproportionate impact in vulnerable populations and/or inherently reproduce discriminatory views or practices reflected in biased datasets used to train the AI model or feed the system's operation (*see Section 4.4*). State use of facial recognition and predictive policing technologies raise exactly these problems and should be rejected.

The second, and related, component is to examine how humans will interact with the algorithmic system and use its outcomes. For that, it is crucial to identify and assess whether there are efficient ways to address the human (and institutional) biases at play. Some of them reflect social problems and institutional discrimination that are entrenched and that human-machine interaction in this context would reproduce with an additional layer of complexity and opacity. When that is the case, as emphasized in the previous paragraph, moving forward is an impermissible risk to human rights. Other biases are virtually inherent to this interaction and must be properly addressed. The so-called "automation bias" deserves special attention. It refers to the human tendency to view machines as objective and inherently trustworthy. It is important to consider how this tendency could play out in the specific context of application, its potential impacts, whether mitigation measures would be efficient, and how to best ensure that human oversight and review of the systems' outcomes are accountable too.

Institutions in charge of the HRIA must properly document each one of these stages, which will be essential for addressing the next and last question.

Is this use adequate, necessary, and proportionate?

If the AI/ADM system is not fit for purpose and its use cannot reliably address the

problem in the real world, considering the social context of implementation, then adopting it is not an adequate measure. Moving forward will be incompatible with human rights law and, therefore, the State must look for other alternatives than AI/automated decision-making to address the problem and achieve the intended legitimate goal.

If it genuinely passes the suitability threshold, then all the elements analyzed within the HRIA will serve as an essential basis to ponder *benefits, drawbacks, and perils* of adopting the AI/ADM system based on the necessary and proportionate test detailed earlier in this section. Adopting the system must be the least harmful measure to achieve the legitimate aim, which involves properly addressing any perils identified with solid mitigation measures and safeguards. Fulfilling proportionality standards also demands consistent compliance with cross-cutting principles and the assurance that the State will definitively implement the system only after adequate testing and any required calibrations to make sure it meets design standards aligned to human rights obligations. We explain more about these requirements below.

Cross-cutting principles

From the initial assessment (the first HRIA) to the monitoring and evaluation stage there are cross-cutting principles that must guide State action throughout the operational framework. Each of these principles relate to rights that we detailed in this report and embody obligations and guarantees that state institutions must observe. These cross-cutting principles are:

- **Social Participation**. It requires giving concrete and practical meaning to the principle that people and social groups are rights holders and have the right to participate through processes and mechanisms that enable meaningful societal influence and feedback, with attention to different backgrounds, expertise, and the need to involve affected and groups in situations of historical discrimination (*see Sections 3.1 and 4.1; also box "Meaningful Social Participation" in this section*).
- **Access to Information**. It demands relying on the duties unfolding from the right to information to build in transparency and accountability across the framework's flow. This requires a committed approach of States to effectively produce information and promote active transparency, while applying restrictions in a strict manner, i.e., only within the limits and for the period that they are actually necessary and proportionate (*see Sections 3.3 and 4.2*). This approach must translate into routines, structures, and resources geared to consolidate transparency practices and accountability mechanisms in how institutions assess and implement AI/ADM systems as part of their rights-related decision-making. Meeting all the other principles depend on this one being properly fulfilled (*see also Section 5.3*).

- **Equality and Non-Discrimination**. They entail giving priority protection to groups in situations of historical discrimination, adopting a gender and diversity perspective in the framework's application. This means having a broader view, going beyond people and groups seen as "normal" or "standard" to duly consider and protect diverse bodies and identities. Doing so requires careful attention to the model's inner workings, its metrics, design process, the datasets used, the model's interaction with human agents that operate and oversee its functioning, and to how this combination integrates and affects the social context in which the system is or will be implemented (*see Section 4.3*). The latter requires a deep understanding of this social context in order not to reproduce inequalities, neglect gaps, deepen exclusion, and drive injustice. For that, meaningful participation of those affected and those who understand the realities involved, especially from historically discriminated against groups, is imperative across the framework's stages. Indicators must be designed to enable monitoring and evaluation of the impacts of the system's adoption in specific affected groups with attention to those most vulnerable or marginalized (*see Sections 3.3 and 4.2*). Human oversight and review of algorithmic decision-making, when properly and transparently ensured, are also critical for safeguarding this principle.
- **Privacy and Data Protection**. It demands providing people with robust protection, information, and powers as to how their data is processed throughout the framework's flow and the system's implementation. The need to safeguard dignity, private life, people's autonomy and self-determination, including informational self-determination, permeates State use of AI/ADM systems for rights-based determinations (*see Section 4.5*) and so must permeate the application of this framework. These rights and guarantees are enablers of a person's ability to freely develop their personality and life plans. Data processing must be secure, legitimate and lawful, limited to specific explicit purposes, and necessary and proportionate for fulfilling these purposes. Data subjects have a set of associated rights (e.g. access, rectification, opposition, etc.) that emphasize that people cannot be instrumentalized through the processing of their data. People have the right to understand how their data is processed to shape state bodies' perceptions and conclusions about who they are. This postulate reinforces the need for meaningful social participation across the operational framework and for solid due process guarantees within each decision-making procedure.
- **Due Process/ Access to Justice**. It requires preventing arbitrary decision-making to be the mainstay of State action at all stages of this framework. This means working as a warning sign to flag when efforts to integrate AI/ADM systems into rights-related decision-making are impermissible and must stop. For example, when decisions must mainly rely on legal and human reasoning and prudence, or when repeating patterns in the available data actually perpetuate injustice. Preventing arbitrary decision-making as a cornerstone also means establishing

and observing the preconditions this entails in each context. Generally, for State rights-related decision-making, this entails making justified determinations that people can understand and challenge (*see Sections 4.4 and 5.3*) through a meaningful, accessible, and expeditious review. Proper human oversight and review are also part of that list.

Cross-cutting principles correspond to a baseline apparatus that States must have in place when assessing and adopting AI/ADM systems for rights-based determinations. In a nutshell, meaningful *social participation* demands dedicated state officials, budget, processes, and planning so it's not a mere box-checking exercise. *Access to information* requires routines and personnel to produce, organize, and disclose information, both actively and in response to requests, as well as an independent supervisory body with sufficient and effective powers. *Equality and non-discrimination* relies on the structure needed for meaningful civic participation, particularly for engaging groups that have been historically discriminated against. It also entails mobilizing diverse expert knowledge within and outside state institutions to properly assess the system and the social context of application and address potential issues. It demands ongoing monitoring of the project's implementation, with competent and accountable human oversight of the tool and diversity and human rights-oriented production and analysis of indicators. *Privacy and data protection* requires security infrastructure and expertise. It also includes having an independent data protection supervisory body in addition to state departments or officials that can fulfill the role of data protection officers alongside measures and routines to timely satisfy data subjects' rights. Finally, *due process/access to justice* demands easily accessible, equitable, and effective judicial and administrative remedies. It also entails proper structures to investigate and punish human rights violations resulting from state use of AI/ADM systems, ensuring reparation and non-repetition.

Having such an adequate apparatus is not secondary. It stems from States' obligation to prevent human rights violations and their fundamental role as guarantors of human rights. The following stages of the operational framework also reflect this concern.

Design & Testing

The design stage of the operational framework indicates five areas of attention. Some of them take inspiration from the IACHR's diagram of analysis for public policy with a human rights approach,[357] which also happens in the other stages (i.e., implementation and monitoring and evaluation). We elaborate on each of these areas below:

357 IACHR, Public Policy with a Human Rights Approach, supra note 75, p. 50.

Scope of the system's use and related protocols (including human-machine interaction). The outcomes of the HRIA conducted in the first stage will inform the definition of the exact scope of use of the AI/ADM tool and how it will integrate the State's policy or initiative. Necessary and proportionate standards are key in properly tailoring the scope, which includes setting the functions and tasks the system is expected to perform or contribute to within such State's policy or initiative. Alongside this definition, establishing adequate and thorough protocols of use is vital for the legitimate adoption of the model by state officials and institutions. These protocols must be public as a rule, forming part of the body of norms regulating that State's policy or initiative. Any impulses or intents to restrict access to information on such procedures must be faced with the prevalence of due process guarantees. As we noted in the implications of Section 4.4, the guarantees of independence and impartiality mean that people, as a general rule, know what to expect from decision-making affecting their rights. Any access limitations that jeopardize due process guarantees cross the safety line against arbitrary decision-making that the due process principle must represent in the context of this report. The protocols must address the governance, security, and operation of both the system and the data involved, as well as how the system's outcomes integrate the state policy or initiative at issue. A crucial aspect concerns the human-machine interaction within the system's operation. Protocols must be clear about the human oversight approach adopted,[358] how it works, what are the competencies required, the oversight and review powers ensured, and the control and accountability measures applied to human intervention (or inaction), including how "automation bias" is addressed.[359] Finally, the implementation of protocols of use entail properly training any officials and agents that will interact with the tool, which should include a basic training both in statistics and on the potential limits and shortcomings of the specific AI/ADM tool they will use.

Measures addressing risks, gaps, and specificities of affected groups. Building on the HRIA process and outcomes, the design stage must carefully and efficiently address risks, gaps, and specificities of affected groups so that potential rights limitations are proportionately balanced with the rights that the State aims to enhance. Both the model and related human-machine dynamics must properly respond to the outcomes of the analysis regarding the differential impact that using this system has or might have for groups historically targeted by discrimination and the actual benefits it may bring for reducing the inequality divide impacting them. The fairness metrics is an essential element of this equation and must reflect these outcomes. It is important that this and other relevant calibrations occur at this stage and

358 For a brief overview of human oversight approaches, see European Commission, Ethics Guidelines for Trustworthy AI, 2019.
359 For example, the training and training materials should include examples of human-model interaction in context and some known unsuccessful placement in the AI process.

throughout the system' use. If risks, gaps, and specificities of affected groups cannot be sufficiently addressed, then the project cannot move forward.

Embedding transparency and accountability. This includes a set of issues in order to embed transparency and accountability not only in the system's functioning, but also in the broader configuration on how it integrates the State's policy or initiative. They all follow from the baseline that using AI/ADM does not displace States' responsibility and accountability for integrating the system to their activities, particularly in the context of rights-affecting decisions. As a consequence, state institutions should not adopt AI/ADM tools whose outcomes and data lifecycle they are not able to explain and/or justify to the public. This unfolds from the fact that it is up to state authorities, rather than the persons affected, to demonstrate that an AI/ADM-based decision was not discriminatory or otherwise arbitrary. At the algorithm level, explainability approaches are crucial, and it is not appropriate to use technologies that include random or unexplainable rationales for decision-making that impacts human rights, as the State cannot satisfy its obligation to show a person subject to such a decision that it was not arbitrary (*see Section 5.3*). At the human-machine interaction level, it entails devising proper human oversight and protocols of use and control, and ensuring the conditions for them to work. At the procedural level, due process guarantees must permeate this and the previous levels, so that the implications in Section 4.4 are duly observed. They involve the existence of accessible, meaningful (including human), and expeditious review and complaint mechanisms, which points to an institutional level. Assuring that people can effectively exercise all their data-related powers stemming from informational self-determination (e.g., access, rectification, opposition, etc) also demands measures at these various levels. Regarding the institutional level, establishing important measures that arise from the cross-cutting principles require designing a strategy and ensuring the accompanying structure at least on three fronts: (i) disseminating information regarding the system, how it is used, the budget involved, the results of its implementation as part of the policy or initiative, as well as people's related rights and how to exercise them, including the existence of review and complaint mechanisms; (ii) producing, collecting, and processing anonymized information on the system's implementation, while making sure that data resulting from review mechanisms, complaint channels, and lawsuits are properly channeled to those implementing and assessing the AI/ADM-based policy or initiative; (iii) articulating public oversight and meaningful social participation through different mechanisms and approaches (see box "Meaningful Social Participation" in this section). The dissemination of information and indicators regarding the AI/ADM-based policy by no means can serve to expose affected people and reproduce stigmatization.

Legal and institutional framework. It must be clear what is the normative basis and the institutional scheme underpinning the implementation of the AI/ADM system as part of a State's policy or initiative. The identification and coordination of both

start in the previous stage of the operational framework as the state body or bodies in charge must spearhead the HRIA process, involving all other relevant state and non-state institutions. Compliance with the legality principle is part of this assessment, which relates to the normative basis. Yet, at the design stage, the HRIA outcomes must serve to fine-tune the institutional and regulatory framework involved. Among others, this process entails coordinating the adequate institutional structure to implement, oversee, and evaluate the policy or initiative, defining clear roles and responsibilities among institutions involved; setting strategies for streamlining relevant fixes or changes; and allocating and planning the budget required to properly implement the AI/ADM-based policy or initiative (which goes beyond the procurement or development of the tool itself to encompass the processes, personnel, and structures needed with attention to cross-cutting principles). Diversity, multidisciplinarity, and proper expertise of the people directly involved with the implementation are all key for ensuring it runs adequately. So too is devising the project's governance to enable public oversight and meaningful social participation.

Monitoring and evaluation (M&E) processes and indicators. In close relation with embedding transparency and accountability, as well as ensuring the proper institutional framework, it is essential to design how the AI/ADM-based policy or initiative will be monitored and evaluated. Which are the relevant indicators and how institutions in charge will collect, organize, and make them publicly available. M&E processes must disaggregate indicators by gender, ethnicity, and other relevant elements of diversity, such as socioeconomic status, age, disability, etc. They must also include specific human rights indicators. The design of M&E processes must articulate the necessary routines, metrics, and channels to allow that all elements included in the M&E stage of this operational framework are properly assessed.

Having covered these five areas, the AI/ADM-based policy or initiative should be rolled out in a **small pilot program** to test if everything is working as planned and if the use of the AI/ADM system is an adequate and proportionate means to achieve the legitimate and stated goal before being largely implemented. This allows for comparison with a baseline control setting that should be made public to allow expert organizations and affected groups to comment on its efficacy and compliance with human rights standards.

Implementation & Operation

Having successfully completed the design stage, the state institution(s) in charge of the project can then move to its full implementation and operation. At this stage, it is critical that all areas work properly by following specifications, planning, and processes designed. Here again we outline five areas of attention:

Reliability, Accessibility, Contestability, Adaptability. It is important to ensure

that the AI/ADM-based policy or initiative is reliable, accessible, contestable, and adaptable. Reliable comprises the elements we discussed above when scoping the issue, particularly when addressing the questions on whether the technology or system was reliable and whether its use could reliably address the problem in the real world. Briefly, it means performing well in the given task and having robust security. Assessing the first one requires looking at the performance of the model, the interaction between the tool and human agents involved, as well as how this system integrates with and impacts its social context of application. Reliability is also connected to the overall quality of the AI/ADM-policy or initiative in terms of fulfilling the legitimate goal and enhancing rights. Accessibility means that the policy or initiative is not exclusionary, especially that its AI/ADM component does not implicate logistical or technical barriers. There should be no obstacle of this kind for accessing the benefits of the policy or the guarantees applied to the system's use, such as data subject's rights and review and complaint mechanisms. Contestability requires easy and equitable access to administrative and judicial remedies that are effective and expeditious. This includes a meaningful review mechanism still at the administrative level which ensures proper and accountable human analysis. Contestability also entails that people know they are subject to a decision-making procedure and can understand the underlying logic of such a decision. Finally, it means that systems should be auditable by independent experts on behalf of persons and communities affected. Adaptability demands continuous analysis and monitoring of the system's implementation, collecting properly anonymized data on its operation and outcomes, comparing results for progress toward the stated goal, and checking whether associated processes, structures, and guarantees are working as planned. All that must be documented and lead to the necessary adjustments.

Routines and apparatus to fulfill cross-cutting principles. Connected to adaptability, this area of attention recalls that the adequate implementation of the AI/ADM-based policy or initiative requires state institutions' routines and apparatus capable of responding to the demands unfolding from the cross-cutting principles (*see "Cross-cutting principles" above, in this section*). The design stage aims at addressing gaps and structuring tasks across its five areas of attention outlined above (*see "Design," in this sectio*n). If the implementation of the AI/ADM-based policy or initiative moves forward so must be in place the proper routines and apparatus to prevent human rights violations and to properly comply with human rights standards.

Proper expertise and allocation of resources. It goes hand in hand with having the appropriate routines and apparatus to meet the cross-cutting principles and comply with human rights. Doing so demands that institutions and people involved have the required expertise to fulfill their role, from the human agents directly interacting with the tool to an oversight institution and its officials; from the personnel producing and organizing related indicators about the system's use to those assessing complaints and collecting feedback from the affected community, just to give

some examples. Mobilizing appropriate expertise should also count on independent experts from academia and civil society, having a diverse and multidisciplinary approach, through a collaboration that does not replace States' responsibilities in this context. This means that States must allocate sufficient and maintainable resources—human and financial—to ensure that proper routines, apparatus, and expertise can put into action the HRIA-based design devised in the previous stage (*see "Design," also in this section*).

Institutional cooperation, coordination, and oversight. Related to the previous areas, it highlights the importance of institutional cooperation and coordination considering the roles and responsibilities consolidated in the design stage (*see "Legal and institutional framework" above*). It is relevant to leverage the combined expertise of government entities to encompass data protection authorities and, as appropriate, bodies related to science and technology, education, health, justice, etc. Clear information sharing on known flaws and issues must feed such cooperation and coordination mechanisms. Moreover, a crucial piece of this institutional framework is ensuring proper independent oversight. Different arrangements are possible—it can be the data protection authority, or another authority that centralizes the oversight of government use of AI/ADM systems, or institutions in charge of this role can vary depending on the system's context of use and field of application. In any case, it should be independent from those responsible for the system's implementation and count on the necessary powers, expertise, and budget to fulfill its tasks. Institutional oversight can also benefit from a broader oversight ecosystem formed by public ombudsman entities (like Defensorías del Pueblo), public defenders' offices, among others that may exist in each domestic context.

Public oversight. Institutional oversight must feed broader public oversight and vice-versa. First, it is important that institutions responsible for monitoring the system's implementation have effective participation channels and mechanisms in place. Through them, oversight institutions can consult and receive feedback from affected people and communities as well as establish dynamics of collaboration with academia and civil society. Both institutions leading implementation and oversight must take steps to ensure that processes and mechanisms designed to disseminate information about the AI/ADM-based policy are working and properly reach the broader public as well as those directly affected (*see Section 5.3 and "Embedding transparency and accountability" in this section*). They must also make sure that review mechanisms and feedback processes are effective and are duly considered in the system's implementation, for instance, to signal necessary fixes. Affected communities, civil society organizations, and press, among others, all have a role to play building on existing information, processes and mechanisms to monitor the implementation of the policy or initiative and push the institutions in charge for human-rights compliant outcomes. This includes engaging in the continuous evaluation of the system's use by feeding institutions' ongoing monitoring and taking part in

periodical human rights impact assessments.

Meaningful Social Participation

Meaningful civic participation throughout the decision-making process as to developing, purchasing, implementing, and evaluating AI/ADM-based public policies or initiatives is an essential part of ensuring equality and non-discrimination, due process, self-determination, social protection, and —ultimately— the foundations of a democratic State. It must go hand in hand with the compliance with human rights law and standards, which participatory mechanisms must enhance, and not compromise.

Participatory mechanisms can take many and complementary forms, and must include historically discriminated against groups and affected people and communities. This operational framework seeks to articulate some mechanisms and structures. They involve meaningful and consistent engagement with affected communities, system's audit in collaboration with independent data scientists and civil society experts, not only in technology-related fields, but also in human rights, differential impact suffered by vulnerable groups, and other specific areas concerned (e.g. health, child protection, criminal justice, etc.), broader consultation processes, feedback and complaint mechanisms, civic participation within oversight institutions, and coordination with ombudsman bodies or similar entities that advocate for the public[360] as moving pieces of a continuous human rights-based evaluation of AI/ADM-supported state initiatives. Yet, there is certainly room for improvement on innovative and effective ways for participation. State actors, civil society, and academia should draw on shared knowledge about participatory methods to devise and set out more robust public engagement and oversight in this context.[361]

The Open Government Partnership provides some important standards to consider for accomplishing this task, such as establishing a permanent space for dialogue and collaboration; providing open, accessible, and timely information about related activities; and fostering inclusive and informed

360 We consider here public entities like Defensorías del Pueblo, public defender's office, public prosecutor's offices related to the defense of civil and human rights, consumer protection agencies in what their work may intersect with the scope of this report (e.g., their oversight on the provision of public services), among others, according to each national context.

361 Data & Society's 2023 policy brief, for example, elaborates on guidelines like: equity and social justice commitments should guide every aspect of participation, build the technical capacity of communities while also acknowledging their expertise; build –and budget for– an institutional commitment to public participation; design participation methods for high-quality engagement; track, measure, and address public participation and its impact; mandate public participation with "hard law" requirements with concrete enforcement mechanisms. Gilman, M. (September 2023). Democratizing AI: Principles for Meaningful Public Participation. Data & Society. We can also mention Hintz, A., Dencik, L., Redden, J., Treré, E., Brand, J., & Warne, H. (July 2022). Civic Participation in the Datafied Society: Towards Democratic Auditing?. Data Justice Lab.

opportunities for co-creation. They rely on guiding principles that add greater substance to government commitments on transparency, inclusive participation, and accountability.[362]

One relevant aspect we underlined in Section 3.1 is that States must clearly specify how contributions coming from consultation and participation mechanisms inform the design, implementation, and evaluation of their use of AI/ADM systems. We also emphasized that Inter-American participatory mechanisms within the context of indigenous and Afro-descendant communities bring valuable models and lessons for meaningful participation, especially those related to previous, free, and informed consultation of affected communities. Some of them are:

- Consultation is not a single act, but a process of dialogue where clear, accessible, and complete information is provided with sufficient time to allow proper engagement;[363]
- Consultation in good faith requires the absence of any type of coercion and must go beyond merely *pro forma* procedures; [364]
- Failure to pay due regard to the consultation's results is contrary to the principle of good faith;[365]
- Decisions resulting from the consultation process are subject to higher administrative and judicial authorities, through adequate and effective procedures, to evaluate their validity, pertinence, and the balance between rights and interests at stake.[366]

In this sense, we should recall the UN Committee on ESC rights' formulation on the right of every person to take part in scientific progress and in decisions concerning its direction (*see Section 5.3*). State use of algorithmic systems for rights-affecting determinations should not disregard these guarantees.

362 See <https://www.opengovpartnership.org/es/ogp-participation-co-creation-standards/>. Available in English at <https://www.opengovpartnership.org/wp-content/uploads/2021/12/OGP-Participation-and-Co-Creation-Standards_24November2021.pdf>.
363 IACHR, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources, supra note 97, para. 285, and IACHR, Indigenous Peoples, Afro-Descendent Communities, and Natural Resources, supra note 96, para. 108.
364 IACHR, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources, supra note 97, para. 318.
365 IACHR, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources, supra note 97, para. 325.
366 IACHR, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources, supra note 97, para. 328.

Monitoring & Evaluation (M&E)

Ongoing monitoring of the AI/ADM-based policy or initiative, including the system's functioning, must take place alongside implementation and operation. It puts into action processes and indicators devised and coordinated in the design stage (*see "Monitoring & evaluation processes and indicators"*), which should include periodical audits and human rights impact assessments (HRIAs). As in the scoping stage, recurring HRIAs should incorporate the outcomes of thorough audits to articulate a broader and participatory analysis grounded in human rights standards. As such, there is a set of questions that the first HRIA after the system's implementation, as well as the following ones, should address in analyzing whether the state institution should continue using the AI/ADM system and, if so, how. The questions below are not exhaustive, but are all relevant for this analysis.

Are rights enhanced and the legitimate goal being satisfied?

- Is the use of the system playing a role to bridge inequality divides identified?

Are rights limitations necessary and proportionate?

- Are any potential differential impacts adequately addressed?
- Is the system performing well and in an accountable manner?
- Is human oversight adequately fulfilling its role?
- Is data processing legitimate, proportionate, and secure? Is the system protected against vulnerabilities?

Are cross-cutting principles properly fulfilled?

- Are review and complaint mechanisms meaningful, accessible, and effective? Are they reliably feeding M&E processes and adjustments in the implementation?
- Do M&E indicators reliably capture the social context of application and affected communities? Are they properly disaggregated considering historically discriminated and vulnerable groups, especially those that require special attention in the context of the policy or initiative?
- Is information about the AI/ADM-based policy or initiative, including the algorithmic system, duly provided to affected people and the public? (see Section 5.3)
- Are the means to exercise data subject's rights ensured in an easy, timely, and complete manner?
- Is state apparatus sufficiently equipped and coordinated to carry on this AI/ADM-based policy or initiative in compliance with human rights?

- Are routines, processes, and institutional structures enabling public oversight and meaningful social participation, including from historically discriminated against groups?

Are States' prevention and remediation duties adequately addressed?

Responding to these questions entails having consistent information-sharing about the system's performance, flaws, and issues, how it integrates the policy or initiative, and the results of the policy or initiative so far. It also involves the committed and competent work of oversight institutions. The assessment must rely on meaningful feedback from affected people through polls, consultations, or other appropriate instruments, with attention to historically discriminated against groups. Anonymized data from complaint mechanisms and administrative and judicial challenges are also a vital input for the HRIA process. Finally, institutions leading the assessment must provide substantial means for participation of communities, experts, academia, and civil society organizations.

Culminating the analysis and based on the questions above, the M&E and HRIA should lastly assess:

Should the State keep using an/this AI/ADM system? If so, what should continue, what should change. Why?

The implications developed throughout this report (*see "implications" boxes*) provide specific guidance that States must consider when conducting the HRIA and other M&E processes. It is crucial that institutions in charge make clear how they examined the relevant issues, including how they analyzed and incorporated inputs coming from feedback and participation mechanisms. Diversity, multidisciplinarity, and proper expertise of people responsible are all key for enabling meaningful M&E processes and the HRIA. The assessment must be properly documented and state institutions must disseminate information on the outcomes of the evaluation, including by making the HRIA report publicly available.

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