THE AMERICAN CONVENTION AND THE PROTOCOL OF SAN SALVADOR:
TWO INTERTWINED TREATIES

NON-ENFORCEABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE INTER-AMERICAN SYSTEM

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Abstract

This article discusses the direct enforceability of economic, social, and cultural (ESC) rights in the Inter-American System, also called 'the direct approach'. It starts by presenting two apparent conflicts between certain provisions of the American Convention on Human Rights ("the Convention") and the Protocol of San Salvador ("the Protocol") related to the ESC rights recognised in Article 26 of the Convention and the mechanisms of protection of such rights. The author concludes that ESC rights were never intended to be directly enforceable before the Inter-American System and therefore the direct approach is not feasible, except for the right to unionisation and the right to education, the only rights expressly conceived as directly enforceable by the Protocol. The recent decision of the Inter-American Court of Human Rights in Acevedo-Buendía et al. v. Peru is also studied. The Court declared that it has contentious jurisdiction over alleged violations of ESC rights, but it took no notice of the Protocol. This article stresses that every interpretation on ESC rights in the Inter-American System must not ignore the Protocol of San Salvador.

Keywords: conflicts of norms; economic, social and cultural rights; enforceability of rights; Inter-American Court; interpretation of treaties; Protocol of San Salvador

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I. INTRODUCTION

The Inter-American System (IAS) has three main instruments related to economic, social, and cultural (ESC) rights: the American Convention on Human Rights (the Convention or ACHR), and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, known as the Protocol of San Salvador (the Protocol or PSS).3

The Declaration was adopted by the Organization of American States (OAS) in 1948. This instrument set forth a series of fundamental human rights with no distinction between civil and political rights, and ESC rights. The Convention was adopted in 1969, in San José, Costa Rica. So far 23 of 35 OAS Member States have ratified it.4 While the Convention provided treaty-level protection to principles previously contained in the Declaration, it also reduced the entire topic of ESC rights to a single provision: Article 26. This article provides:

The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States [...].

The Protocol was adopted in San Salvador, El Salvador, in 1988. So far 16 State Parties in the Convention have ratified the Protocol.5 This instrument protects a number of ESC rights,6 but according to Article 19(6) PSS, only violations of the right to unionisation (Article 8(1)(a) PSS), and the right to education (Article 13 PSS) may give rise, through participation of the Inter-American Commission of Human Rights (the Commission or IACOMHR) and, when applicable, of the Inter-American Court of Human Rights (the Court or IACHR), to application of the system of individual petitions governed by the Convention. In other words, the Protocol only gives jurisdiction ratione materiae to the Commission and the Court over two ESC rights. As Cavallaro and Schaffer assert, '[t]he negative inference of the language used in Article 19 is that the violation of other rights enshrined in the Protocol does not give rise to the right of petition to the [IAS].7

Nevertheless, some scholars argue that Article 26 ACHR is directly applicable to any ESC rights violation, and the limitation set by Article 19(6) PSS shall not alter this possibility.8 This has been called the 'direct
approach. Critics to this approach counter by arguing that Article 26 ACHR does not recognise individual, immediately justiciable rights, and Article 19(6) PSS, in conjunction with the terms of the Convention, 'leads to the conclusion that the American States drafting those two instruments did not intend to authorise the Court to adjudicate petitions alleging ESC rights abuse through article 26. 

The case-law of the Court regarding Article 26 ACHR has not been consistent over the years, and until recently no State Party has challenged the jurisdiction of the Court regarding ESC rights claims under Article 26 ACHR. The situation changed in the case Acevedo-Buendia et al. v. Peru. The Government objected to the Court's jurisdiction ratione materiae concerning the applicants' claims under this provision, pointing out that the Court lacked competence in matters concerning the alleged violation to the right to social security, since this right is not enshrined in the Convention and it is not even one of the two rights that would be actionable before the IAS in accordance with Article 19(6) PSS. The Court asserted that the broad wording of the Convention indicates that according to Article 62(1) ACHR it has full jurisdiction over all matters pertaining to its articles and provisions. The Court ignored completely the Protocol, focusing only on the Convention. This article questions the Court's decision. It argues that the Protocol should not be ignored. Every interpretation and application of ESC rights in the IAS must take into account both treaties, the Convention and the Protocol. Otherwise the analysis would be incomplete and will definitely contradict the State Parties' consent, undermining the legitimacy of the Commission or the Court.

The analysis will be divided in five sections. Section 1 will study the relationship between the Protocol and the Convention. After outlining the relevant provisions of the Convention and the Protocol, Section 2 will identify two types of conflicts of norms that seem to arise from the wording of these treaties: one related to the rights protected and the other one related to the jurisdiction of the IAS bodies. Section 3 will try to solve both conflicts by using the tools set forth in the Vienna Convention on the Law of Treaties (VCLT). In Section 4 the Court's decision in Acevedo-Buendia et al. v. Peru will be analysed taking into consideration how the conflicts were solved in the previous section. Finally, Section 5 will conclude that the Protocol is an integral part of the IAS that cannot and should not be ignored by the Commission or the Court.

2. THE RELATIONSHIP BETWEEN THE PROTOCOL AND THE CONVENTION

Supporters of the direct approach argue that the Protocol is an 'entirely separate treaty [whose] primary value [...] in the individual petitions process [...] lies in its fleshing-out, in binding treaty form, of the rights to which American States have previously committed in other less precisely-worded instruments, particularly the American Convention'. This argument does not conform to the VCLT. Pursuant to Article 2(1)(a) VCLT, 'treaty' means 'an international agreement concluded between the States parties to a social, economic, and cultural human rights' as enforceable through the implementation of reparation measures ordered by the Court in contentious cases (Aguilar-Cavillo, loc. cit. note 8; Feria-Tinta, M., 'Justiceicability of Economic, Social, and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions', Human Rights Quarterly, Vol. 29, 2007, pp. 431-459).

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13 Art. 62(1) ACHR provides that: 'A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention'.

14 I am not going to analyze the jurisdiction ratione materiae of the Commission to directly apply the ESC rights provisions of the American Declaration to individual petitions against OAS Member States that have not ratified the Convention.


16 Melish, 'Rethinking the Less as More Thesis', loc. cit. note 8, at pp. 225 and 234.
States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation. A treaty text, in the sense of the Vienna Convention, is not necessarily tantamount to one instrument. Linderfalk gives as an example the agreement concluded by Yugoslavia and Romania on 31 November 1963. The agreement contains a specific provision stating that a multiplicity of instruments shall constitute a single unit. Within the scope of the one single treaty, it is possible to count one Agreement, five Conventions, four of which with Annexes added, one Charter, two Protocols, both with Annexes and one with an Addendum, as well as two Échanges des Lettres.\(^{17}\)

Linderfalk recognises that it is not always easy to determine whether two instruments shall be considered as integral parts of a single treaty, or whether they shall be considered as two separate treaties. In the agreement between Yugoslavia and Romania cited above it was easy to determine that all those instruments shall be considered a single treaty, because there is a provision that expressly states that, however, two international instruments are not necessarily to be considered as two separate treaties, just because it is not stated that they are to be considered as an integrated whole. "The ultimate determining factors for the relationship between two instruments are the intentions of their parties."\(^{18}\) Even though the Protocol of San Salvador does not contain a specific provision saying that it is an integral part of the Convention, that conclusion could be reached by its name and preamble.\(^{19}\) The Protocol is not just another treaty in the IAS; it is an 'Additional Protocol to the American Convention', adopted only by the State Parties to the Convention. It also makes direct reference to Article 77(1) ACHR which allows State Parties to submit proposed protocols to the Convention.\(^{20}\) This relationship was the understanding of the Court when it submitted to the OAS its observations on the Draft Protocol. According to the Court, if the idea was to include other rights in the protection regime of the Convention, it would need to be done through the adoption of an additional protocol and not through a separate convention.\(^{21}\)


2. \(^{18}\) Idem.


4. \(^{20}\) Art. 77(1) ACHR provides: "In accordance with Article 31, any State Party and the Commission may submit proposed protocols to this Convention for consideration by the States Parties at the General Assembly with a view to gradually including other rights and freedoms within its system of protection." Art. 31 ACHR provides: 'Other rights and freedoms recognized in accordance with the procedures established in Articles 76 and 77 may be included in the system of protection of this Convention.'


In the European system of human rights, the European Convention of Human Rights and its Protocols have been read as a whole.\(^{22}\) This amounts to saying that the European Convention and its protocols are to be considered as together forming the text of one single treaty.\(^{23}\) The very same conclusion could be applied in the IAS. The intention of the State Parties to the Convention was to adopt another instrument – the Protocol – for the purpose of incorporating other rights and freedoms into the protective system of the Convention and to enhance that system of protection.

Accordingly, when applicants, pursuant to Article 31 VCLT, interpret an ESC right provision, they must follow the general rule of interpretation embodied in Article 31 VCLT, which provides that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. The first step, therefore, is to analyse the ordinary meaning of the relevant provision. If the ordinary meaning is either vague or ambiguous or leads to conflicting results, it must then be supplemented by additional means of interpretation, such as the context. Pursuant to Article 31(2) VCLT, the context for the purpose of the interpretation of a treaty shall comprise, inter alia, the 'text, including its preamble and annexes'. The 'text' of a treaty, pursuant to Article 2(1)(a) VCLT, consists of any and all instruments of which the treaty can be considered comprised. In the IAS the relevant 'text' on ESC rights is comprised not only by the American Convention, but also the Protocol of San Salvador. The Protocol is an integral part of the Convention and must be read together with it. The next section will further address this relationship.

3. THE ORDINARY MEANING OF THE CONVENTION AND THE PROTOCOL

Article 26 ACHR provides that State Parties undertake to adopt measures with a view to achieving progressively the full realisation of the rights implicit in the Charter. This Article is under Chapter III ('Economic, Social and Cultural Rights') of Part I of the Convention. Part I is entitled 'State Obligations and Rights Protected'. If one has to start from the assumption that the State Parties intended to use uniform terms in a uniform meaning throughout the Convention,\(^{24}\) it could be deduced that the term 'rights' in Article 26 ACHR has the same meaning as the ones used by other


23 Linderfalk, op.cit. note 17, at p. 121.

Convention provisions. Hence, the ordinary meaning of the terms of Article 26 ACHR lead to the following conclusion: (Conclusion A) Article 26 ACHR contains rights.

Regarding the system of protection of the ESC rights contained in Article 26 ACHR, Article 42 ACHR provides that:

The State Parties shall transmit to the Commission a copy of each of the reports and studies that they submit annually to the Executive Committees of the Inter-American Economic and Social Council and the Inter-American Council for Education, Science, and Culture, in their respective fields, so that the Commission may watch over the promotion of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

The term 'watch over' is not defined in Article 42 ACHR, but Article 41 ACHR includes a number of functions and powers of the Commission, including taking action on petitions and other communications. Article 41 ACHR makes no distinction between the rights contained in Part I, Chapter II of the Convention ('Civil and Political Rights'), and the ones implicit in Article 26 ACHR, the lonely provision in Chapter III ('Economic, Social, and Cultural Rights'). No distinction could be found either in other provisions that describe the procedure to be followed in individual petitions or define the jurisdiction of the Commission and the Court. These norms seem to suggest the following conclusion: (Conclusion B) the Commission may 'watch over' the promotion of ESC rights implicit in Article 26 ACHR by a number of measures, including taking action on individual petitions and submitting a case to the Court.

Conclusions (A) and (B) seem to support the position of the defenders of the direct approach when they argue that the literal interpretation of the Convention grants subject-matter jurisdiction to the Commission and the Court regarding individual petitions for alleged violations of any ESC right implicit in Article 26 ACHR. However, supporters of the direct approach pay little attention to the following provisions of the Convention and the Protocol.

Pursuant to Article 31 ACHR, '[o]ther rights and freedoms recognized in accordance with the procedures established in Articles 76 and 77 may be included in the system of protection of this Convention' Article 77(1) ACHR provides that 'any State Party and the Commission may submit proposed protocols to this Convention for consideration by the States Parties at the General Assembly with a view to gradually including other rights and freedoms within its system of protection'. The Preamble of the Protocol makes direct reference to these articles.

If the Protocol was adopted in order to include other rights and freedoms, then the rights and freedoms included by the PSS were not recognised in the Convention and they were not 'within its system of protection'. If those rights and freedoms were already in the Convention, the States Parties would have preferred to amend the Convention to complement or expand the scope of such rights. The sole idea of a 'protocol', pursuant to Article 77 ACHR, means inclusion. On the contrary, the ordinary meaning of the term 'amendment' denotes the improvement or revision of a text. Therefore, the literal reading of these norms may lead to the following conclusion: (Conclusion C) Article 26 ACHR does not contain the rights included by the Protocol.

Finally, Article 19(6) PSS clearly states that only two ESC rights are directly justiciable in the IAS: the right to unification and the right to education. No further interpretation is needed to conclude: (Conclusion D) with the exception of two rights, ESC rights are not directly enforceable in the IAS.

The literal interpretation of the relevant provisions of the Convention and the Protocol seems to lead to two conflicting results: if Conclusion A (Article 26 ACHR provides that a State Party may declare 'that it recognizes as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention'.

The relevant section of the Preamble of the Protocol reads as follows: 'Considering that the American Convention on Human Rights provides that draft additional protocols to that Convention may be submitted for consideration to the States Parties, meeting together on the occasion of the General Assembly of the Organization of American States, for the purpose of gradually incorporating other rights and freedoms into the protective system thereof, I have agreed upon the following Additional Protocol to the American Convention on Human Rights Protocol of San Salvador'.

Art. 26(1) ACHR provides that: 'Proposals to amend this Convention may be submitted to the General Assembly so that the action it deems appropriate by any State Party directly, and by the Commission or the Court through the Secretary General.'
contains rights) is true, Conclusion C (Article 26 ACHR does not contain the rights included by the Protocol) may be false, or vice versa; and if Conclusion B (the Commission may 'watch over' the promotion of ESC rights implicit in Article 26 ACHR by a number of measures, including taking action on individual petitions and submitting a case to the Court) is true, Conclusion D (with the exception of two rights, ESC rights are not directly enforceable in the IAS) is false, or vice versa. It is important to emphasize that Conclusions A and C are related to the rights protected, while Conclusions B and D are related to the ratione materiae jurisdiction of the IAS bodies. This article will refer to the first conflict as 'rights-based conflict', and the second one as 'jurisdiction-based conflict'. In the next section this article will offer some solutions to both conflicts.

4. SOLVING THE CONFLICTS

The first step to solve conflicts between norms is verifying whether the treaties have a conflict-resolving clause. Such a clause is present in the Convention and also in the Protocol. Pursuant to Article 29 ACHR:

No provision of this Convention shall be interpreted as:

a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;
b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

Article 4 PSS establishes that:

A right which is recognized or in effect in a State by virtue of its internal legislation or international conventions may not be restricted or curtailed on the pretext that this Protocol does not recognize the right or recognizes it to a lesser degree.

These two norms, however, are not applicable to both conflicts analyzed here. Article 4 PSS assumes that a right must be recognized in other international conventions and this is precisely the fact that is in dispute in the 'rights-based conflict': whether or not the Protocol is including rights that were not in the Convention. On the other hand, Article 4 PSS indicates that a 'right' may not be restricted, but it does not grant jurisdiction to the Commission or the Court to declare a violation of the provision that recognizes that right. Similarly, Article 4 PSS cannot be interpreted as if it is prohibiting the use of Article 19(6) PSS 'as a pretext to limit or restrict the adjudicability of the rights consecrated in Convention Article 26'. Accepting that Article 4 PSS 'cancels' the purpose of Article 19(6) PSS would mean that the States had two contradictory aims when they adopted the Protocol: (i) not to limit the jurisdiction of the IAS bodies (Article 4 PSS), and (ii) to limit the jurisdiction of the IAS bodies (Article 19(6) PSS). This is a false conflict, since another interpretation, more natural and fitted to the ordinary meaning of the terms is possible. Article 4 PSS commands that a right or its scope cannot be limited on the pretext of the Protocol, but it is silent in respect to the jurisdiction of the IAS bodies. The specific provision or lex specialis that expressly deals with jurisdictional issues is Article 19 PSS, which in its paragraph 6 limits the jurisdiction ratione materiae of the Commission and the Court.

This conclusion cannot be overthrown by the pro homine principle or the principle of the most favourable rule for protection of human rights, that has been developed under Article 29 ACHR, according to which the Court must turn to the broader standard or more extensive interpretation when it comes to recognize the rights protected and, inversely, to the narrow standard or interpretation when it comes to set restrictions, limitations, or suspensions of the exercise of rights. The Court has rightly concluded that the pro homine principle cannot be used as a basis for granting jurisdiction when the literal meaning of a norm does not. Similarly, Article 31(1) VCLT states that '[a]
treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. It is evident from reading this text that the object and purpose is not considered independently of other means of interpretation. The object and purpose is always used in relation to 'the ordinary meaning'; it is always a second step in the interpretation process. According to Linderfalk, what Article 31(1) VCLT says

is not that the terms of a treaty shall be interpreted in the light of its object and purpose. What the provision says is that a treaty shall be interpreted 'in accordance with the ordinary meaning to be given to the terms of the treaty [...] in the light of its object and purpose'.

If the ordinary meaning of a provision is clear in not granting jurisdiction to the IAS bodies, the object and purpose of the Convention cannot be used to overthrown that result. Consequently, there is no conflict-resolving clause in the Convention or in the Protocol that could be applied to both conflicts we are analysing here. The interpreter must therefore turn to other tools offered in the VCLT to solve the conflicts.

4.1. RIGHTS-BASED CONFLICT: WHETHER THE PROTOCOL IS INCLUDING RIGHTS THAT THE CONVENTION DOES NOT PROTECT

As seen above, Article 26 ACHR does not recognise directly any right; it makes a referral to the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the OAS Charter. Supporters of the direct approach have inferred virtually all internationally recognised ESC rights through different interpretations of the Charter's provisions. The wording of the Charter is so broad that its interpreters have read in it whatever they have wanted to read. For instance, the right to health has been inferred from Article 34(1) of the Charter, which declares that one of the goals of the OAS Member States is the 'protection of man's potential through the extension and application of modern medical science'. Since 'the medical science' is related to the right to health, this has been enough to infer this right from the Charter to 'fill' Article 26 ACHR. This extreme position has been criticised by Abramovich and Rossi, who warned about the 'temptation' to introduce through Article 26 ACHR 'a complete catalogue of social rights that States obviously did not intend to incorporate in the Convention's system, designed primarily for the protection of civil and political rights'.

The problem continues when supporters of the direct approach try to give some content to the relevant ESC right that has been inferred. The textual basis offered by the Charter is in most cases insufficient to determine what the ESC right provision commands, permits, or prohibits, or the specific obligations that must be fulfilled by the States. To give content to the identified right, interpreters seek other sources. Usually these sources are the American Declaration and the Protocol, but some authors also include the International Covenant on Economic, Social, and Cultural Rights; the Convention on the Rights of the Child; the Convention on the Elimination of All Forms of Discrimination Against Women; general observations of the Committee on Economic, Social, and Cultural Rights; UN Special Rapporteurs' reports; and UN specialised agencies' guidelines and principles, among others.

The question that arises here is whether these sources are clarifying the meaning of the Charter's provisions or including new meanings, rights, or obligations that are not in the Charter. The difference is not futile. Interpretation is the clarification of an unclear text of a treaty rather than a device for altering the text of a treaty. According to the International Court of Justice: '[i]t is the duty of the Court to interpret the Treaties, not to revise them'. The text of the treaty is the base but also the limit to its interpreters' activity. If the process of interpretation has followed the applicable international rules and its results could still be attributed to the text, there would be a genuine interpretation. On the contrary, if the result modifies the text of a norm or if it includes a new norm, there would be an 'extreme non-interpretation'.

Thus, it is not enough just to infer a right by its name from the Charter, it is also necessary that the Charter provides a minimum content for that right. This minimum content could then be clarified – to a certain extent – by other international

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54 Abramovich, and Rossi, loc.cit. note 8, at p. 37 (author's translation; the original in Spanish reads: 'un catálogo completo de derechos sociales que evidentemente los Estados no tuvieron intención de incorporar en el sistema de la Convención, diseñado principalmente para la tutela de derechos civiles y políticos').

55 CEIL/1. La protección de los derechos económicos, sociales y culturales, op.cit. note 8; Courtois, loc.cit. note 8.

56 Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase), Advisory Opinion, 18 July 1950, ICJ Reports 1950, at p. 229. See also the Separate Opinion of Judge Vico-Grossi of the Inter-American Court in the case Blanco-Romero et al. v. Venezuela (Order Monitoring Compliance), 22 November 2011, at p. 4; the Court is called on to apply and interpret the Convention and not to amend it, a function which is the exclusive responsibility of the States Parties’.

instruments. Defining the entire content and scope of a right by means of other instruments would invariably result in a modification of the Charter.

Some scholars argue that since the Court declared that the American Declaration 'contains and defines the fundamental human rights referred to in the Charter', the inference shall take into consideration the American Declaration as well. Abramovich and Ross have rightly responded that it is necessary to avoid the 'shortcut' of appealing directly to the American Declaration. The fact is that Article 26 ACHR makes a referral to the Charter, not to the Declaration. If States had wanted to make a referral to the Declaration, they would have done so. LeBlanc also suggests that the content of Article 26 ACHR reflects the lack of enthusiasm of the Inter-American States at that time for taking a clear stand on ESC rights. In his view, this article 'fails to recognize that such rights are proclaimed in the American Declaration as human rights, and it recognizes the rights as being only implicit in the economic, social and cultural standards elaborated in the OAS Charter'. Consequently, even though it is true that the Declaration should serve to integrate the content of the Charter, when it comes to interpret Article 26 ACHR, it cannot be forgotten that this provision mandates that the first step is to infer the rights from the Charter, and this operation cannot be replaced by a direct appeal to the Declaration.

Regarding the use of global covenants and soft law standards to fill in the rights inferred into Article 26 ACHR, it is important to recall that: (1) the Commission and the Court have no jurisdiction over global treaties; (2) the General Observations of the UN treaty bodies, as well as their views on individual communications and concluding observations, are not legally binding; and (3) soft-law guidelines and principles are by definition not binding. Giving entire meaning to an ESC right by application of global covenants and non-binding instruments or recommendations would not only result in a modification of the Charter, it would also be prematurely hardening global soft law at the regional level and extending the jurisdiction of the IAS over treaties outside the region. The OAS States 'did not reduce the [American Convention] to a local enforcement mechanism for the global Covenants, and they did not simply delegate to the Court the task of adopting whatever standards it chooses from a future corpus of soft law texts'.

Regarding the use of the Protocol to give content to the rights inferred from the Charter, a distinction should be made between the States that have ratified it and those that have not. For those States that have not ratified the Protocol, its provisions are not binding. The meaning and scope of the rights recognised in the Protocol cannot be imposed on them. Inferring an ESC right just by its name from the Charter and then endowing it entirely with content obtained from the Protocol would simply circumvent the consent of the States that have not ratified it, imposing on them obligations they did not assume and, as mentioned before, it would also mean a modification of the Charter.

For those States that have ratified the Protocol, even though they agreed on the content of the rights and the scope of the obligations arising from it, they also stipulated that the IAS bodies have no jurisdiction over any breach of the Protocol, except those mentioned in Article 19(6) PSS. Taking the Protocol's provisions that are useful to give full content to the ESC rights inferred to fill Article 26 ACHR, disregarding at the same time the provisions that are not 'useful', would mean treating the Protocol as if it were a menu, where the interpreter/diner chooses the provision/dish that better fits his or her interests. It would also mean that there are two rights to food, two rights to health, two rights to work, and so on, arising from the same source - the Protocol - but with different protection mechanisms. In the following section, this article will discuss in depth the jurisdictional issues, but for now it can be stressed that this kind of interpretation would undermine the IAS cohesion.

Summarising, Article 26 ACHR makes a referral to the OAS Charter and the Charter alone. Interpreters should not avoid this step by appealing to other international instruments, including the American Declaration. Interpretation is a tool for clarifying norms rather than altering norms; therefore, it is not enough to infer just the name of an ESC right from the Charter, it is also necessary that the Charter provides some content to that right. Such minimum content could then be clarified - to a certain extent - using other international instruments, including the Declaration. Giving full content to an ESC right using instruments different from the Charter would imply a modification of the Charter, and depending on the case, it would also enforce global covenants locally, harden global soft law, circumvent the will of OAS Member States, and undermine the cohesion of the IAS.

It can be argued that some civil and political rights are also so vaguely defined to the extent that the IAS bodies had had to 'fill' the right almost completely by using other international treaties. That is the case, for instance, of the rights of the child. Article 19 ACHR provides that 'every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state'. The Court has borrowed global and European standards as a means of

40 C/EJJL, La protección de los derechos económicos, sociales y culturales, op.cit. note 8; Urquilla, loc.cit. note 8; Salmon, op.cit. note 9.
41 ACHR, Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights (Advisory Opinion), 14 July 1989, (Series A No. 10), at para. 43.
42 Abramovich, and Ross, loc.cit. note 8, at p. 47.

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providing specificity to this right. However, this position has been criticized in the following terms:

The rapid incorporation of blocks of global hard and soft law into the regional convention spares the Court considerable effort in working out and justifying the consequences of Article 19, and demands major improvements in the conditions suffered by impoverished children in the Americas. In part, this advance may be supported on the ground that all parties to the American Convention have also ratified the Convention on the Rights of the Child. However, that consensual argument would not extend further to the incorporation of non-binding elaborations of CRC provisions or to other soft law instruments concerning children. The formulations contained in soft law might turn out to coincide with the most convincing supraproductive analysis of children’s human rights, but the bare appearance of a proposition in a UN resolution or an expert body’s recommendation does not ipso facto carry conclusive normative force.

Therefore, the conclusion should not be that ESC rights must be ‘filled’ entirely by standards borrowed from European or global treaties or soft-law, just like some civil and political rights have been. Quite the opposite, the Court should be very careful when it borrows foreign standards to provide specificity to any right, but especially ESC rights that are not expressly defined in the Convention, or even worse, not defined in the Charter.

It is not the purpose of this piece to discover which ESC rights could be inferred from the Charter, but the ordinary reading of Article 26 ACHR clearly indicates that it contains ‘rights’. What then is the Protocol including? The only logical conclusion that can be derived from both, the Convention and the Protocol, is that the latter is (1) including rights that cannot be inferred from the Charter, whether because they can only be inferred by their name but with no content, or cannot be inferred at all, and (2) giving a broader content to the rights that can be inferred from the Charter. If this position is correct, the rights-based conflict is not a conflict at all. The Protocol is in fact including - pursuant to Article 77 ACHR - some rights that previously were not in the Convention, but it is also complementing and expanding the rights that previously could be inferred to fill in Article 26 ACHR. As a result, Conclusions A and C mentioned above are not excluding; they can be read together: Article 26 ACHR, as far as it refers to the Charter, contains some rights that were expanded by the Protocol, which at the same time included other rights that were not protected by Article 26 ACHR.

The aforementioned position is supported by the Commission’s reports submitted to the OAS General Assembly and by the Commission’s submission of the Draft Protocol. The Commission used a series of guidelines to determine the ESC rights to be included in the Protocol, as well as the institutional mechanisms to be established. In its annual report 1983–1984 it asserted:

The rights incorporated into the Charter are considered in the context of the standards of international law applicable to relations among the American states, for which reason they do not constitute a base of standards that makes possible their international protection. In other words, that instrument does not recognize human rights, compliance with which may be claimed against a state, but rather it establishes objectives of economic and social development to be reached by the states through internal effort and international cooperation. Therefore, they cannot be treated jointly with the purely instrumental elements such as improvement of the administrative apparatus of the state, international trade, economic integration, tax reforms, and so forth. The list of those rights, moreover, is incomplete.

The Commission also noted that the draft Protocol contained three sets of ESC rights: (1) rights that ‘should merely be reaffirmed in the Additional Protocol’, since they were ‘adequately covered’ in other instruments, either universal or regional, including the OAS Charter; (2) other internationally recognized rights that ‘should be elaborated and developed’; and (3) rights that were based solely on national legislations.

The Commission did not state what ESC rights were in each of the three categories mentioned above, but it is clear that the Protocol was intended to include, elaborate and develop the ESC rights contained in the Charter – and by inference in Article 26 ACHR. Hence, it is not possible to say, as some commenters do, that all of the rights protected in the Protocol are likewise protected by Article 26 ACHR.

Lastly, one question remains: is it possible that the Protocol is not including some rights contained in the Charter? So far this article has explained that not all the rights included by the Protocol were previously recognised in the Charter – and therefore in Article 26 ACHR – or were recognised in a lesser extent. That is to say that the right X was recognised in the Charter, and the Protocol elaborated or developed it, and the right Y was not recognised in the Charter, but it was included by the Protocol. Yet, there


47 Neuman, loc. cit. note 44, at p. 114.
is another possibility: that the right would be the case of the right to decent housing. This right, in their view, is guaranteed in Article 34(k) of the Charter, which indicates that the right of the OAS Member States to provide 'adequate housing for all sectors of the population'. However, the Protocol makes no mention of this right. The question is, consequently, whether this right is included in the system of protection, assuming that the content of this right given by the Charter is enough to consider it included in Article 26 ACHR, which is doubtful.

To answer this question it should be noted that on matters of interpretation one of the main purposes is 'to identify the intention of the parties to a treaty'.54 If it was once unclear which ESC rights could be included in Article 26 ACHR, the States made it clear that the rights protected in the IAS are those set forth in the Protocol. The States also left the door open for the inclusion of other rights or the expansion of those recognised in the Protocol. Article 22 PSS establishes that any State Party and the Commission may submit for the consideration of the State Parties proposed amendments to include the recognition of other rights or freedoms or to extend or expand rights or freedoms recognised in the Protocol. Then, the State Parties, not the Commission or the Court, are the ones that decide which ESC rights will be protected and to what extent. Whether a State has ratified the Protocol does not change the fact that the list of rights the State Parties to the ACHR consider by majority to be protected by the IAS is the one established in the Protocol. Each sovereign State may decide to join the Protocol, or even a part of it, since Article 20 PSS allows reservations,55 or to not be a party at all, but this has no influence on the fact that the list fixed by the States should be respected by the interpreter, and not overlooked by blindly applying a broader inference into Article 26 ACHR.

The absence of the right to decent housing in the Protocol is a clear demonstration that the States did not consent in protecting it. Furthermore, accepting that through the interpretation of the Charter any right not recognised in the Protocol is protected by Article 26 ACHR, opens the door for extremely broad discretion on the part of the Commission or the Court that could circumvent the consent of the States, undermine legal certainty and question the legitimacy of the interpreters. Again, it is the States' task, not the Commission's or the Court's, to decide which rights shall be protected.

Although the established procedures to include more rights or to expand their content (Articles 22 PSS, and 76–77 ACHR) could require a considerable amount of time and effort from governments, civil society, and the IAS bodies, these procedures were meant to be followed to avoid all the mentioned inconveniences and to reach the consent necessary to strengthen the system of protection. Fortunately, the Commission has the possibility to submit proposed amendments to include the recognition of other rights or freedoms in the Protocol. Perhaps the efforts of civil society should focus in requesting the Commission to make use of this prerogative rather than requesting it to declare a violation of Article 26 ACHR in individual petitions.

In conclusion, for the States that have ratified the Protocol, inferences to fill in Article 26 ACHR are no longer needed. The rights they decided to provide through treaty-level protection are those listed in the Protocol, with the scope they agreed those rights to have. For the States that have not ratified the Protocol, inferences to fill in Article 26 ACHR can still take place, but they cannot go beyond the rights recognised in the Protocol. It will be absurd if a State that did not ratify the Protocol is obliged to protect more rights than a State that did ratify it. As the former President of the Inter-American Court, Judge Cancado Trindade sums up, Article 26 ACHR is a regrettable historical anachronism, a provision of bad design and formulation, the result of ideological antagonism at the time of its sluggish writing.56 It simply cannot provide what the supporters of the direct approach look for.

4.2. JURISDICTION-BASED CONFLICT: WHETHER THE COMMISSION AND THE COURT HAVE JURISDICTION RATIONE MATERIAE

The second conflict of norms is related to the jurisdiction of the IAS bodies. As seen above, the literal interpretation of the relevant provisions of the Convention and the Protocol lead to two conflicting conclusions: Conclusion B (the Commission may 'watch over' the promotion of ESC rights implicit in Article 26 ACHR by a number of measures, including taking action on individual petitions and submitting a case to the Court) and Conclusion D (with the exception of two rights, ESC rights are not directly justiciable in the IAS). The question here is whether Article 26 ACHR contains justiciable rights through individual petitions.

Supporters of the direct approach and also the Court in Acevedo Buendia et al. rightly argue that there is nothing in the wording of the Convention indicating explicitly that the rights inferred to fill in Article 26 ACHR are not covered by the individual petitions mechanism of protection. Nevertheless, this is not enough to conclude that the States intended to protect ESC rights by that mechanism. The general principle regarding the international tribunals' jurisdiction in contentious matters is that it is based in the consent of States.57 Therefore, the purpose of the interpretation

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53 Courtis, loc. cit. note 8; Melish, 'Rethinking the Less as More: 'Theos', loc. cit. note 8.
55 Art. 20 PSS provides: 'The States Parties may, at the time of approval, signature, ratification or accession, make reservations to one or more specific provisions of this Protocol, provided that such reservations are not incompatible with the object and purpose of the Protocol.'

of the Convention and the Protocol in this respect must be to discover what the States intended when they adopted such instruments.

Ventura-Robles68 and Mejía-Rivera69 affirmed that two of the three drafts of the American Convention (the ones presented by the Inter-American Council of Jurists and by the Uruguay) did not conceive of ESC rights as directly enforceable before the Commission and the Court. The remaining draft (the one presented by Chile) extended to a limited number of ESC rights (property rights, the right to social security, the right to unionise, and some educational rights) the application of the civil and political rights' contentious proceedings before the Commission and Court. In short, not even the most progressive draft envisaged all ESC rights as fully enforceable, and that draft was not even accepted by the other States.

The travaux préparatoires also shows that Article 26 ACHR and Article 42 ACHR were once together. Article 42 ACHR used to be Article 27 of the Draft American Convention and it used to have the title 'Control of Compliance with the Obligations'. The purpose of draft Article 27 was to verify if the State Parties were fulfilling their obligations under Article 26. The mechanism chosen to that effect was the submission of periodic reports and not the system of individual petitions.61 Draft Article 27 was relocated to become the current Article 42 ACHR, because it deals with functions and powers of the Commission. This article now has no title, and it is in Section 2 'Functions' of Chapter VII, devoted to the Commission. However, the connection between Article 26 ACHR and Article 42 ACHR is undeniable since they make the same referral to the OAS Charter. It seems then that Article 42 ACHR was the mechanism chosen by the OAS Member States to monitor the fulfilment of the ESC rights implicit in Article 26 ACHR, and not the system of individual petitions.

LeBlanc's analysis of the travaux préparatoires affirms that draft Article 27 (current Article 42 ACHR) was criticised by several States and 'seemed to be strongly supported by none'.62 In his view, this Article was more controversial than Article 26 ACHR. He asserts that the criticisms focused on two issues. First, some questions were raised about the usefulness of the reporting mechanism, because the OAS Member States were already reporting on ESC matters to other OAS bodies. The second criticism questioned whether or not the Commission was the competent body to supervise the implementation of ESC rights. In his view,

Even the Chilean government, the strongest supporter of [ESC] rights throughout the negotiations on the Convention, questioned whether the [Commission], "conceived of, as it is, as being a juridical and quasi-judicial organ, is the appropriate body to receive regular reports on" those rights.63

The lack of support of the States for draft Article 27 is more evident by the changes they made to it. For instance, current Article 42 ACHR, unlike draft Article 27, does not authorise the Commission to make 'appropriate recommendations', and the word 'verify' was substituted by the words 'watch over'. In LeBlanc's view, the alterations made by the State delegates 'suggest that they deliberately wanted to deny [the Commission] any significant role in this field in the future'.64 Similarly, Cavallaro and Schafer state that '[t]he failure to provide specific protection for these rights appears to be not an oversight, but rather a conscious effort to weaken state obligations in this respect'.65

The aim of excluding the Commission succeeded in the years that followed the adoption of the American Convention. In its annual report 1983–1984, the Commission recognised that the lack of precision of Article 26 ACHR 'combined with the undeniable difficulty involved in the consideration of economic, social, and cultural rights, have brought about the inoperability, in practice, of Article 42 of the American Convention'.66 It also noted that the solution adopted by the OAS Member States to the protection of ESC rights, which is reflected in Article 42 ACHR, 'has, in practice, meant postponing the treatment of this matter'.67 A few years later, the Commission recognised that the mechanism of protection of ESC rights in the IAS was the one established in Article 42 ACHR, which was inadequate and had not been applicable in the years in which the Convention had been in force.68 The Commission never suggested that ESC rights could be protected by the system of individual petitions.

Even some academic papers published before the Convention entered into force stated that it was unlikely that the Commission could or would interpret Article 41(b) ACHR – which allows it to make recommendations to the States – as authorising it to make very specific recommendations in this field. A State Party to the Convention 'could in such an event cite the language of Article 42, which authorizes the [Commission] only to watch over the promotion of these rights',69 if such an interpretation of Article 41(b) was considered problematic, even more problematic is interpreting Article 41(f) – which authorises the Commission to take action on individual petitions – as applicable instead of Article 42 ACHR.

68 Ventura Robles, loc.cit. note 9.
69 Mejía Rivera, 1, Análisis de la protección de los derechos económicos, sociales y culturales en el Sistema Interamericano de Derechos Humanos desde la Teoría y la Filosofía del Derecho [Analysis of the Protection of Economic, Social, and Cultural Rights in the Inter-American System of Human Rights from the Perspective of Legal Theory and Legal Philosophy], Universidad Carlos III de Madrid, Madrid, 2009.
61 Author's translation. The original in Spanish states: 'Control del Cumplimiento de las Obligaciones' (see, ICHR, La justiciabilidad directa de los derechos económicos, sociales y culturales, op.cit. note 8, at p. 135).
62 ICHR, La justiciabilidad directa de los derechos económicos, sociales y culturales, op.cit. 8, Mejía Rivera, op.cit. note 59.
64 Ibidem, at p. 139.
65 Ibidem.
66 IACHR, op.cit. note 48.
67 Ibidem.
68 IACHR, op.cit. note 49.
The solution that the Commission recommended to the OAS General Assembly to overcome the inoperability of Article 42 ACHR and other ESC rights-related issues was, *inter alia*, the designation of an institution responsible for the protection and promotion of ESC rights by the adoption of a new treaty that establishes the functions and methods of control to be used by the aforementioned institution. This new treaty had to face the dilemma of 'having an international instrument that is advanced from a legal point of view but lacking in force for want of ratifications, or preparing a Protocol that will be acceptable to the states in its legal pronouncements but will lack practical effectiveness'. The Commission considered that the institution that should be in charge of the protection and promotion of ESC rights had to be the Commission itself, and the dilemma should be faced by keeping the system of reports, but also granting individuals direct access to the Commission in the case of certain ESC rights. The Commission was starting from the basis that ESC rights were not sheltered by the system of individual petitions, which was reserved only for civil and political rights. What the Commission was looking for is that certain ESC rights could be also covered by the system of individual petitions, whereas the remaining rights continued to be protected by the system of periodic reports.

In its annual report 1985–1986, the Commission considered that the institutional means for the protection and promotion of ESC rights was a 'delicate matter', and the potential difficulties that such matter could pose could be overcome by a 'realistic, flexible and effective system'. Such a system was described in Article 21 of the draft Protocol, where three rights (trade union rights, the right to strike, and freedom of education) enjoyed the same system of protection that was established for civil and political rights. The other ESC rights were protected only by the mechanism of periodic reports.

The position of the Court was very similar. In its annual report 1985, the Court presented its observations to the Draft Protocol. It considered that:

among the so called economic, social and cultural rights, there are also some that act or can act as subjective rights jurisdictionally enforceable, but there are others that, without ceasing to be fundamental rights of the human being, are by their nature or by each country's conditions of economic and social development, conditioned on the establishment of a complex institutional and economic structure, for which reason it would not be reasonable in the present state of the course of development of the peoples of the Americas to recognize that those rights be immediately and fully enforceable *per se* [...].

Only those rights to which the specific system of protection established by the American Convention is applicable should be incorporated into the mechanisms and procedures provided for by the Convention through an Additional Protocol. That is to say, those rights that may become jurisdictionally enforceable, as happens, for example, with the right of parents to choose the education of their children and right to trade union freedom [...].

For the economic, social and cultural rights that are not enforceable through the specific mechanisms of the Convention, thought could be given to the advisability of signing an Inter-American Convention not connected to the mechanisms of the Pact of San Jose, in the style of and with guarantees similar to those established in, for example, the United Nations International Covenant on Economic, Social and Cultural Rights. Moreover, in those mechanisms of protection parallel to those of the American Convention, not only should the Inter-American Commission on Human Rights play a preponderant roll, through a system of reports similar to that established in the aforementioned International Covenant, but so should the Court itself, through the exercise of its advisory jurisdiction.

In its annual report 1986, the Court reiterated its conclusions submitted in its previous report, but it included the right to strike in the list of enforceable rights. In short, for the Court only three ESC rights (the right of parents to choose the education of their children, the right to trade union freedom, and the right to strike) were to be enforceable through the system of individual petitions, the other ESC rights were only to be protected by the system of periodic reports and through the advisory jurisdiction of the Court, and not through its contentious jurisdiction. The position of the Court obviously started by considering the rights contained in Article 26 ACHR as non-enforceable directly through the system of individual petitions.

The Protocol of San Salvador was approved almost in the same terms proposed by the Commission. The States, however, considered that the right to strike should not be covered by the system of individual petitions. They also included more details...
on how the system of periodic reports should work. The discussions of the States, therefore, started from the fact that ESC rights were not enforceable directly, and that the system of reports stipulated in Article 42 ACHR had to be improved. As Cavallaro and Schaffer rightly pointed out, 'the background understanding of the drafters regarding ESC rights and the American Convention was that those rights could not be litigated through article 26 of the Convention'.

Taking the above considerations into account, the jurisdiction-based conflict is not a real conflict either. The American Convention was never intended to protect ESC rights by the system of individual petitions. The mechanism chosen by the States was the system of periodic reports enshrined in Article 42 ACHR. This mechanism is not an additional protection to ESC rights, as some commentators suggest: it is the only mechanism provided by the Convention. Article 41 ACHR is not applicable to ESC rights. Otherwise, why would the States decide to incorporate a specific provision related to ESC rights (Art. 42 ACHR) when the Commission’s faculties and competence were already defined in Article 41 ACHR? The only logical answer is that Article 42 ACHR is lex specialis regarding ESC rights protection. The Protocol of San Salvador came to improve that mechanism, which was ineffective in practice, and also granted direct enforceability to two ESC rights (the right to unionisation and the right to education).

This solution is the one that best gives effect to both treaties, the Convention and the Protocol; best respects the consent of the Inter-American States; and best adheres to the ordinary meaning to be given to the terms of both treaties in their context.

5. THE COURT’S DECISION IN ACEVEDO-BUENDÍA ET AL. V. PERU

The facts of Acevedo-Buendía et al. are related to the government’s failure to comply with the judgments of the Constitutional Court of Peru delivered on 21 October 1997 and 26 January 2001. This judgement ordered the Office of the Comptroller General of the Republic (OCGR) to comply with the payment to 273 members of the Association of Discharged or Retired Employees of the OCGR of the salaries and wages, benefits, and bonuses received by the active employees of that office performing functions identical, similar, or equivalent to those that the discharged or retired employees performed.

The Commission requested the Court to declare that Peru was responsible for the violation of the rights enshrined in Articles 21 (right to property) and 25 (right to judicial protection) of the Convention. The representatives of the employees requested the Court to also declare that the State was responsible for the violation of the right to social security protected, in their view, by Article 26 ACHR. Peru objected to the Court’s jurisdiction ratione materiae pointing out that the Court lacked competence in matters concerning the alleged violation to the right to social security, since such a right is not included in the American Convention and it is not even one of the two rights that would be actionable before the IAS in accordance with Article 19(6) of the Protocol.

The Court asserted that the broad wording of the Convention indicates that according to Article 62(1) ACHR, it has ‘full jurisdiction over all matters pertaining to its articles and provisions’. Since Peru is a State Party to the Convention and has acknowledged the adversarial jurisdiction of the Court, the latter was ‘competent to decide whether the State has failed to comply with or violated any of the rights enshrined in the Convention, even the aspect concerning article 26 thereof’. The Court noted that the violation of the Protocol ‘has not been alleged in the case at hand’, and therefore it considered it ‘unnecessary’ to decide whether it has jurisdiction over said treaty. It rejected the preliminary objection raised by the State.

On the merits, the Court ruled that Peru violated the rights of the workers to judicial protection (Article 25 ACHR) and to property (Article 21 ACHR), but it did not find grounds ‘to additionally declare the non-compliance with Article 26 of said treaty’. However, it made an historical and systematic interpretation of this provision. According to the historical interpretation, the Tribunal noted that the content of Article 26 ACHR was:

the subject-matter of an intense debate in the preparatory works of the Convention, as a result of the States Parties’ interest to assign a ‘direct reference’ to economic, social and cultural ‘rights’; a provision establishing certain legal mandatory nature [...] in its compliance and application’ as well as ‘the [respective] mechanisms for its promotion and protection’; since the Preliminary Draft of the treaty prepared by the Inter-American Commission made reference to such mechanisms in two Articles that, according to some of the States, only ‘contemplated, in a merely declarative text, the conclusions reached in the Buenos Aires Conference’. The review of said preparatory works of the Convention also proves that the main observations, upon which the approval of the Convention was based, placed a special emphasis on granting the economic, social and cultural rights the maximum protection compatible...
with the peculiar conditions to most of the American States'. In this way, as part of the debate in the preparatory works, it was also proposed 'to materialize the exercise of [said rights] by means of the activity of the courts'.

Regarding the systematic interpretation, the Court noted:

even though Article 26 is embodied in chapter III of the Convention, entitled 'Economic, Social and Cultural Rights', it is also positioned in Part I of said instrument, entitled 'State Obligations and Rights Protected' and, therefore, is subject to the general obligations contained in Articles 1(1) and 2 mentioned in chapter I (entitled 'General Obligations'), as well as Articles 3 to 25 mentioned in chapter II (entitled 'Civil and Political Rights').

The explanation of the Court is insufficient and even misleading. First, the Court made no effort to clarify whether the right to social security is one of the rights implicit in the Charter that can be inferred to fill in Article 26 ACHR. It only mentioned that the commitment requested from the States by this provision consisted in the adoption of measures 'with a view to achieving progressively the full realisation of certain economic, social and cultural rights'. Which are those rights, or at least why the right to social security is one of those rights, are questions that the Court did not answer.

Second, the historic interpretation of the Court is incomplete. The Court put forward the points of view of only those States which tried to materialise the exercise of ESC rights by means of the activity of the Court. No mention was made of the countries which opposed the enforceability of ESC rights and, more importantly, as Burgorgue-Larsen recalls:

nothing was said about the process which ultimately gave rise to the drafting of Article 26 as such. Nor was anything said about the scope the different States were prepared to confer on this article. Does this mean that the article was the result of a compromise, or did it represent those States which were in favour of giving economic and social rights such an important place? Clearly, the silences of the Court were part of its strategy to reach its objective, come what may, namely conferring the widest scope possible on Article 26. But Brazil and Guatemala aside, the preparatory works show just how reluctant the majority of States were to recognize that what was to become Article 26 should be actionable.

Third, the systemic interpretation of the Court is also incomplete. It only stated that Article 26 ACHR is embodied in Part I, Chapter III of the Convention, entitled

with the peculiar conditions to most of the American States'. In this way, as part of the debate in the preparatory works, it was also proposed 'to materialize the exercise of [said rights] by means of the activity of the courts'.


dState Obligations and Rights Protected', but it did not study other provisions of the Convention, such as Article 42 ACHR, which as explained earlier, may lead to the conclusion that the mechanism chosen by the States to protect ESC rights was the system of periodic reports and not the system of individual petitions. Moreover, the Court completely ignored the Protocol. As seen above, the Protocol is a fundamental piece of the agreement of the States. How can the Court interpret what the intention of the State Parties was if it ignores a fundamental expression of such intention?

The Court explained that it was not going to analyse the Protocol because the Commission and the representatives of the victims did not base their arguments on it. The fact that the applicants did not make any allegation based on the Protocol is understandable because the Protocol would have undermined their position, since the right to social security is not an enforceable right according to Article 19(6) PSS. The strategy they used is the one recommended by the supporters of the direct approach:

while litigants should never plead direct violations of the Protocol's substantive norms outside articles 8.1 a and 13, they can use the Protocol's extensive catalogue of social rights as interpretive tools when invoking the broadly overlapping, but more vaguely-defined rights subject to the Commission and Court's contentious jurisdiction through Convention article 26.

However, Peru brought the Protocol into play in its submissions. As a matter of fact, the government's defence was strongly based on the Protocol. But the Court remained silent, and the silence of the Court on this matter simply belies the judgment and its conclusions.

There are pending cases before the Court at this moment where new allegations on the direct enforceability of Article 26 ACHR have been made. It is hoped the Court will refine its arguments regarding its jurisdiction, or better yet, reconsiders its previous judgment in Acevedo-Buendia et al. by reading the Protocol and the Convention as they really are: two intertwined treaties.

6. CONCLUSIONS

The American Convention and the Protocol of San Salvador are to be considered as together forming the text of one single treaty. The Protocol should not be ignored because it is a fundamental expression of the consent of the State Parties.

For the State Parties, it is no longer necessary to discover which are the ESC rights implicit in the OAS Charter in order to include them in Article 26 ACHR. The States made it clear that the rights they are willing to protect are the ones listed in the Protocol. The States also made the scope of such rights clear. Including more
rights, different from the ones recognised in the Protocol, would mean overlooking the States’ consent.

For the States that are parties in the Convention but not the Protocol, it is still necessary to discover which rights are implicit in the OAS Charter in order to include them in Article 26 ACHR. However, the process of ‘extraction’ of such rights from the Charter is limited by the following considerations. First, Article 26 ACHR makes a referral to the OAS Charter and the Charter alone. Interpreters should not avoid this step by appealing to other international instruments, including the American Declaration. Second, due to the fact that interpretation is a tool for clarifying norms rather than altering norms, it is not enough to infer just the name of an ESC right from the Charter. It is also necessary that the Charter provides some content to that right. Third, if the Charter provides minimum content, it could then be clarified—to a certain extent—using other international instruments, including the Declaration. And, finally, if the Charter does not provide minimum content, the relevant right cannot be included in Article 26 ACHR. Giving full content to an ESC right using instruments different from the Charter would signify a modification of the Charter and, depending on the case, would also enforce global covenants locally, harden global soft-law, circumvent the will of the States and undermine the cohesion of the IAS.

The applicable mechanism to monitor the compliance of the State Parties to the Convention of their ESC rights-related obligations is the system of periodic reports set out in Article 42 ACHR. This provision is not a supplement or an addition to Article 41 ACHR. It is the only mechanism regarding the ESC rights implicit in Article 26 ACHR.

Article 42 ACHR is not applicable to the States that have ratified the Protocol. Instead Article 19 PSS is applicable. The latter provision improved the mechanism of periodic reports and granted jurisdiction ratione materiae to the Commission and the Court regarding individual petitions in cases of alleged violations of the rights to unionisation and education.

The Court’s judgment in the case Acevedo-Buendía et al. v. Peru is far from being conclusive. The Court’s reasoning in this case was incomplete, mainly because it totally ignored the Protocol, but also because it did not consider all the relevant provisions of the Convention. Furthermore, its analysis of the preparatory works only focused on the States that supported the enforceability of ESC rights. This is a single judgment that by no means could be considered jurisprudence constante. The Court should clarify, or better yet modify, its previous judgment in the next case in which it is requested to rule on Article 26 ACHR.