PART A: ARTICLES

THE SOCIAL CHARTER OF THE OAS: A STEP FORWARD IN THE ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS IN THE AMERICAS?

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Abstract

The text of the Social Charter in the Americas was formally launched and adopted at the 42th session of the Organization of American States (OAS) on 4 June 2012, renewing the quest for reinforcing economic and social rights in the continent. The 2012 Social Charter of the OAS is accompanied by an action plan, which has not yet been adopted. As its main goal it focuses on the eradication of extreme poverty and encourages the States to take effective steps to fight discrimination and set the indivisibility of human rights in motion. Several questions arise with the adoption of this text. The need for a new tool and its ‘suitableness’ in the human rights universe of the Americas are at stake. This article will put into context and analyse the reasons for the adoption of the Social Charter, as well as its contribution to the promotion and protection of economic and social rights. The reasons for this new text, its status and its shortcomings will be studied, bearing in mind that such a soft law mechanism can be a useful tool in terms of legitimacy and can make an impact on the effective protection of human rights in the context of the Inter-American system of protection of human rights and within the work of its two main organs, the Inter-American Commission and the Court.

Keywords: American Convention on Human Rights; American Declaration of the Rights and Duties of Man; economic, social and cultural rights; enforceability of rights; Inter-American Court; interpretation of treaties; Protocol of San Salvador; Social Charter of the Americas; soft law.

Mots-clés: Chartre Européenne des Amériques; droits économiques, sociaux et culturels; Cour interaméricaine; interprétation des traités; Déclaration américaine des droits et devoirs de l’homme; Convention américaine des droits de l’homme; Protocole de San Salvador;
1. INTRODUCTION

Broadly stated, the 2012 Social Charter of the Organization of American States (the Social Charter) – launched by the Permanent Mission of the Bolivarian Republic of Venezuela and co-sponsored by Argentina, Brazil, and Uruguay – has the ambitious tasks to reinforce the existing instruments of the OAS on democracy and integral development, and to fight against poverty. Clearly, since the concept of ‘integral development’ referred to in the Preamble of the Social Charter, formally adopted on 4 June 2012, includes at least certain economic and social rights, it may (rightly) be assumed that a better enhancement of these rights will constitute at least part of the future Charter’s wide mandate. But this assertion cannot be taken for granted, as the Social Charter is a resolution of the General Assembly of the OAS, which does not define rights and is aimed at shaping States’ social policies. Assuming, nevertheless, that the Social Charter will concern itself to some extent with these rights, then a number of relevant issues should be addressed.

The Charter seeks to reflect a broader concept of social justice and tries to respond and enhance a long standing goal of the OAS, namely, the fight against poverty. How this goal is defined and the potential impact and power of this instrument will be the main focus of the present article, which will address the following questions: which economic and social rights are included within the Social Charter’s mandate and how will they be enhanced; what role will economic and social rights standards contained in the Social Charter play in the OAS regional approach; how should the role of the Social Charter be conceptualized, and more specifically what is involved in ‘reinforcing’ the existing instruments of the OAS; what, if anything, can the Social Charter learn from the experience of other international texts which already play a role in promoting the enjoyment of economic and social rights in the Americas; and what are the main considerations that must guide the Social Charter in shaping its approach to these rights, mainly in the light of the present process of drafting the plan of action to the Social Charter, which has to identify and guide States towards specific goals and benchmarks in order to achieve better protection in the field?

The debate on the opportunity to draft a Social Charter of the Americas based itself on the proposals worked out by the representatives of Venezuela. Although difficult and still ongoing as concerns its action plan, it proved possible for its drafters to transcend the traditional (often quite strong) reluctance of several other

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2 By OAS, ‘Social Charter of the Americas: Renewal of the hemispheric commitment to fight Poverty in the Region’ General Assembly Res AG/RES 2699 (XLII-O/12) (Cochabamba, Bolivia 4 June 2012) at 42.

3 The process of drafting this plan of action is still on-going and will continue beyond 2013.
member countries of the OAS to undertake clear and firm commitments in relation to economic, social and cultural rights. Could the Social Charter and its action plan be a significant tool for the Inter-American system of human rights or is it yet another soft-law proposal and initiative that does not serve this purpose? This article will therefore, in Part 2 put into context and analyze the reasons for the adoption of the Social Charter, as well as its contribution to the promotion of economic and social rights. The status of this new text, the language used in it, its ambitious scope and the goal pursued with the elaboration of the plan of action will be the subject of this first Part, which will also explore the limitations inherent to the Social Charter itself. This will lead to the analysis of its possible implications for the effective protection of human rights in the framework of the work already launched by the Inter-American Commission and the Inter-American Court which will be the subject of Part 3. Starting with the Social Charter, the article will include an in-depth analysis of the possible use of this soft law instrument by human rights bodies and the interaction of the Charter with other specialized texts in the region, such as the Protocol of San Salvador, as well as the level of protection of economic, social and cultural rights achieved in the Americas. Finally, its possible catalyzing role towards more coherent and audacious protection in the field will be also considered in the conclusions of this work.

2. THE CONTRIBUTION OF THE SOCIAL CHARTER TO THE PROMOTION OF SOCIAL, ECONOMIC AND CULTURAL RIGHTS

The official drafting of the Social Charter was launched in 2004 by Resolution 2056 of the General Assembly of the OAS. This required the Permanent Council and the Executive Permanent Commission of the Inter-American Council to work on the project of the Social Charter, as well as on the preparation of an action plan. The resolution, whose full title is Renewal of the Hemispheric Commitment to Fight Poverty in the Region, was the result of a proposal by Venezuela, backed by Argentina, Brazil and Uruguay, among others. A Joint working group, formed by both the Permanent Council and the Inter-American Council for Integral Development, was created and achieved the adoption of the Social Charter on 4 June 2013.

The reasons behind the adoption of this new text can only be explained through examining the complex path followed in its elaboration and its possible effects on the promotion of economic and social rights. Indeed, the Charter’s adoption can


be defined as paradoxical: unanimously endorsed by all the countries of the OAS, it enounces ambitious goals and contains a long term action plan, yet to be fully developed. However, its elaboration was slow and difficult (almost 10 years) and its effectiveness and real contribution remain uncertain. In a context of not only economic but also political crisis in which some countries have withdrawn from the Inter-American system of protection of human rights, among which Venezuela, the adoption of the Charter can be a double-edged tool that may have been designed to divert attention from other tools enshrined in the Inter-American human rights system. Its real contribution to promoting respect for human rights in general and for social and economic rights, in particular, has yet to be considered and the Charter has to prove to be something more than just another resolution or soft law instrument.

2.1. AN AMBITIOUS AND INNOVATIVE TEXT

The Social Charter is a new tool with broad and ambitious objectives, renewing the OAS’s commitment to fighting poverty. It does not come alone, as it is to be accompanied by an appendix as important as the text of the Charter itself: the action plan. This is an innovative mechanism designed to complement and reinforce the other mechanisms and instruments already in existence. Elaborated together, the two are meant to make a difference in the promotion of economic, social and cultural rights in the continent and to become an effective and new tool, as the ‘fulfillment of economic, social and cultural rights is an essential element for the promotion and consolidation of democracy’.

2.1.1. The wide scope of the Charter

The main goal of the Social Charter is ‘to reinforce the existing instruments of the OAS on democracy, integral development, and the fight against poverty’. The working group’s task was to draft a text giving all citizens in the Member States ‘more opportunities to benefit from sustainable development with equity and social inclusion’. Fighting poverty is a goal which has become an essential element in the OAS policies. Its importance in achieving democracy has become the key notion of the Social Charter. However, neither democracy nor the fight against poverty are new

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6 Venezuela announced formally its withdrawal from the American Convention of Human Rights on 6 September 2012 and this became definitive on 6 September 2013, following the rules of the Vienna Convention on the Law of Treaties.
7 OAS, ‘Background and proposals for Drafting the Social Charter of the Americas’ (13 October 2005) GTC/CASA/doc.9/05.
8 OAS, Res AG/RES. 2056 (n 5).
notions in the Americas. According to Article 2 of the OAS Charter, 10 ‘in order to put into practice the principles on which it is founded and to fulfill its regional obligations under the Charter of the United Nations’, the OAS proclaims among its goals: ‘f) To promote, by cooperative action, their economic, social, and cultural development; g) To eradicate extreme poverty, which constitutes an obstacle to the full democratic development of the peoples of the hemisphere.’

The ideas of social and sustainable development, as well as the importance of solidarity and equal growth, were already reinforced by the Protocol of Buenos Aires, which was adopted on 27 February 1967 and entered into force, modifying the Charter of the OAS, in 1970. The Protocol, in seeking to promote ‘general conditions of well-being that will ensure dignity and freedom of their people’, introduced changes to Chapter VI of the OAS Charter, entitled “Economic Standards”, and included solidarity and social justice, as well as economic and social development, as goals of the Organization.

Through its relationship with democracy, which is considered ‘indispensable for the stability, peace and development of the region’, 11 poverty is the other factor which constitutes an obstacle to sustainable development and to ‘democratic development’. 12

The Social Charter recalls that: ‘the elimination of extreme poverty is an essential part of the promotion and consolidation of the democratic framework’. The Resolution of the OAS General Assembly 2056 (XXXIV-O/04), the inception resolution launching the work on the Social Charter, makes the essential link between the promotion and observance of economic, social and cultural rights on one side, and development and equitable growth on the other. In its first Chapter, the Social Charter enounces that ‘the promotion and observance of economic, social, and cultural rights are inherently linked to integral development, equitable economic growth and the consolidation of democracy in the states of the hemisphere’. 13 Therefore, Member States commit to promoting and to progressively realising the full achievement of economic, social and cultural rights and principles. Article 7 further states that Member States ‘will strive […] to make efforts […] to eliminate obstacles to development with a view to achieving full enjoyment of civil, political, economic, social and cultural rights’.

The Social Charter is clearly a text that has to find its way from the institutional and from the substantive point of view. From the institutional perspective, it is the result of the combined effort of different institutional bodies in charge of fighting poverty and discrimination inside the OAS: the Inter-American Council for Integral

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11 OAS, Res. AG/RES. 2056 (n 5).
12 Ibid.
13 Article 2 of the Social Charter.
Development, the Inter-American Commission for Social Development and the Inter-American Program to combat Poverty and discrimination. However, it is difficult to ignore that it was a political project originally sponsored by Venezuela and backed by Argentina, Brazil and Uruguay. Concerning its goal and contribution, its task is to complete other existing texts and resolutions, such as the Charter of the OAS, the Inter-American Democratic Charter, explicitly cited in Resolution 2056, and the relevant Declarations of the different Summits of the Americas,\textsuperscript{14} as well as those adopted in the framework of the United Nations,\textsuperscript{15} and not only these. According to the inception paper presented by Venezuela in 2005, the Social Charter was indeed a way to reinforce and follow up not only on other similar soft law instruments, but also on the Universal Declaration of Human Rights (‘UDHR’),\textsuperscript{16} the International Covenant on Economic, Social and Cultural Rights (‘ICESCR’),\textsuperscript{17} and the Protocol of San Salvador (the American Convention on Human Rights\textsuperscript{18} does not appear among the texts of reference). In the background paper prepared by the Secretariat at the beginning of the drafting of the Social Charter, reference was also made to the importance of economic, social and cultural rights and of the introduction of a companion document to the Democratic Charter of the OAS dealing with the protection of socio-economic rights in order to ensure a multidimensional protection of human rights within the OAS framework, already present in all the documents cited, which are ‘inherently linked to integral development, equitable economic growth, and to the consolidation of democracy in the states of the Hemisphere’.\textsuperscript{19}

It is therefore complex to evaluate the specific contribution of the Social Charter. The text in itself is a classical resolution but it has very broad and ambitious goals with the intent to interact with other texts and treaties in reinforcing economic, social and cultural rights. The Charter was meant to be accompanied by an action plan, an effective and ‘operative’ part of the text which should be essential in achieving the broad objectives pursued and which is supposed to be the real innovation to the project.

\textsuperscript{14} Such as the Declaration of Nuevo León of the Special Summit of the Americas and the Declaration of Mar de Plata, basic documents that set forth the objectives of fighting and overcoming poverty, inequity, and social exclusion.
\textsuperscript{15} Such as the Declaration on the Right to Development, the Millennium Declaration, and the Declaration of the International Conference on Financing for Development (Monterrey Consensus) of the United Nations.
\textsuperscript{16} Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).
\textsuperscript{17} International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).
\textsuperscript{19} OAS, ‘Background and proposals for Drafting the Social Charter of the Americas’ (13 October 2005) GTC/CASA/doc.9/05.
2.1.2. An innovative plan of action: setting rights in motion?

The action plan comes as an essential element of the Social Charter, although it is still a draft. In 2011, taking into account the slow evolution of the drafting of the action plan, the working group decided to alter the original decision of adopting the two texts together and opted to separate the Charter from the action plan. The Charter was therefore adopted on 4 June 2012 without being accompanied by the action plan. The birth of the Charter in advance has nevertheless not cancelled the existence of an essential link to its younger *nasciturus* brother.

Although in Resolution 2699 (XLII-O/12), which allowed for the adoption of the Social Charter, it was decided that the first draft of the action plan should be submitted for discussion in August 2012, the action plan is not yet in force and the working group requested further renewal of its mandate beyond 2013 in order to finalise the drafting process. Why has the process been so long and slow and why did the Social Charter have to become a separate instrument from the action plan? This question raises a second one: what is so complex about elaborating the action plan and what relationship is it going to have with its reference text, the Social Charter? There are two main complexities which stem from the analysis of the working group papers and first drafts. One has to do with the originality of the instrument; the other with its effectiveness in building progress towards better social policies.

If the Social Charter appeared to be a new instrument, it is, as we have seen, yet another resolution with a broad intent. However, the action plan, conceived as the operative part to the Social Charter, is supposed to be a new and original tool capable of finally bridging the gap between promotion and protection concerning social and economic rights in the continent, as well as of fighting poverty. Can the action plan become the ultimate effective tool it purports to be? It is necessary to analyse its structure and content to answer this question.

The first original element of the action plan lies in its structure. The plan does not follow the structure of the Social Charter, which is divided in five chapters: ‘Social Justice, development with equity and democracy’, ‘Inclusive and equitable economic development’, ‘Social Development, equal opportunity and non-discrimination’, ‘Cultural development, diversity and pluralism’ and ‘Solidarity and collective endeavor in the Americas’. Although this decision may seem puzzling in terms of the relationship between the two texts, the structure of the Social Charter does not help enforcement of rights and policies. Nor is it just difficult to establish a clear distinction between the different topics chosen as the Articles themselves are drafted in different ways, sometimes being more rights-protection oriented and at other times as programmatic standards and principles. As stated by the Chair of the Working Committee, in order for the Plan to be truly effective, it was necessary to identify those elements in the Charter which are important but not enforceable as such. Therefore, the Charter’s content is classified in three parts: one which contains real ‘areas of intervention’, for which the Plan will provide targets and strategic lines
of action; another concerning key element for developing social policies, but not considered as part of them per se, named ‘enabling environment’; and finally, there are ‘aspirations, crosscutting issues and guiding principles that must permeate all activities undertaken’.20 Among the aspirations, there are social justice, equity, social inclusion and poverty eradication. For example, in the category of ‘crosscutting issues’ the working group classifies gender equality, attention to the poor and vulnerable and sustainable development and environment. Finally, the ‘guiding principles’ include ‘participation, inter-sectoral approach, Inter-American solidarity and cooperation, respect for diversity and human rights’.21

If the logic behind the action plan and the divergence on the approach with the Social Charter seem to be justified in order to achieve efficiency, several of the choices made can be seen as problematic and more open to criticism. The first problem encountered in the choices made is that the draft plan categorises human rights, as enounced in the Social Charter, among general guiding principles, close to such ideas as ‘participation’ or ‘solidarity’; gender equality is not considered a principle but an aspiration, and democracy is neither an aspiration or a principle, but part of the ‘enabling environment’. The plan, therefore, not only fails to follow a human rights oriented approach, but also considers that none of the direct references in the Social Charter to human rights, including to economic, social and cultural rights, are enforceable (sic!). Starting with this framework, the quest for efficiency has to follow a different path. Considering the Social Charter as the ‘benchmark for social policy in the region, in a manner similar to the Democratic Charter’,22 the action plan identifies seven key areas of intervention: labor, social protection, health, food and nutrition, education, housing and basic public services and culture. Each of the different Articles of the Social Charter is analysed and classified in each of these three categories (enabling environment, guiding principles/aspirations and areas of intervention) to define its enforceability in terms of building the action plan, although the working group has stated that all three sections are interdependent.23

There is therefore a separation in the Social Charter between principles and rights.24 Incidentally, it is worth noting that a further distinction has also been made between the provisions on rights in the Charter and the provisions concerning specific goals and targets.

Another of the problematic issues in the action plan concerns the textual basis followed. In the last draft submitted for discussion by the working group, the Social

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21 Ibid.
22 Ibid.
Charter and the relevant Articles within it were not the only texts identified for further defining the areas of intervention. Other texts and mandates, such as the conclusions attached to the Summit of the Americas, to Ministerial Conferences (on Labour, on Social Development, on Sustainable development, and so on) and those made by some specialised organisations, such as the PAHO (Pan American Health Organization) or the CEPAL (Economic Commission for Latin American and the Caribbean) have been taken into account.\textsuperscript{25} The action plan’s openness, which goes beyond the text of the Social Charter, can be perceived both as an asset and as a weakness. Indeed, it can be positive in terms of enjoying the fruits of the work already done in this field by other fora. As an example of these interactions, the working group has proposed that every single area of intervention has a defined objective, with specific goals attached which will be determined at a later stage, and strategic lines of action.\textsuperscript{26} Tracking indicators will also be identified and added, following a scheme and a methodology already used for social and economic rights.\textsuperscript{27} At the same time, however, by widening the basis of the action plan beyond the Social Charter itself, it can further dissociate the two texts which have already been separated in their adoption, with the action plan becoming a separate instrument with a different approach and different field of action. This may also blur the objectives of the action plan and the whole purpose of efficiency the Social Charter sought to achieve, thus rendering it a text whose effect in promoting economic, social and cultural rights is limited.

2.2. A LIMITED TEXT: ITS SHORTCOMINGS

The Social Charter, ambitious in its goal and intent, is a limited text and this is mainly for two reasons. First, it has been adopted as a resolution of the OAS General Assembly, and it is what can be called a soft law mechanism. It is not the purpose of this article to discuss international law terminology, but by soft law what is meant here is that it is a text which does not constitute an international treaty and does not require any signature or ratification by Member States to enter into force. Second, the shortcomings of the Social Charter and the complementary action plan stem from the approach and content chosen, which cast doubts on the real contribution to the promotion or the protection of economic and social rights in the Inter-American context.

\textsuperscript{25} OAS, ‘Mandates in support of areas or topics of intervention in the draft Plan of Action of the Social Charter of the Americas’ (14 December 2012) GTC/CASA/doc.205/12. Other specialised international organisations have been taken into account, such as ILO, IDB, UNDP, IOM, and so on.

\textsuperscript{26} OAS, ‘Purposes and Table summarizing the purposes and guiding principles of the proposed Plan of Action of the Social Charter of the Americas’ (21 March 2013) GTC/CASA/doc. 207/13 rev 2.

\textsuperscript{27} For this, the experience of the United Nations or even the Inter-American Commission on Human Rights will be used, the latter of which has elaborated the OAS, IACHR ‘Guidelines for preparation of progress indicators in the area of economic, social and cultural rights’ (19 July 2008) OEA/Ser.L/V/II.132 Doc 14.
2.2.1. The legal status of the Charter

The Social Charter’s status is similar to the status of the Inter-American Democratic Charter. The Social Charter is not comparable to what could be considered as its European counterpart, starting with the name chosen – The European Social Charter – as the latter is a legal instrument, an international human rights treaty, which is equivalent to the Protocol of San Salvador in the Inter-American system of protection, but not to the Social Charter of the Americas.

However, the fact that the Social Charter is not a treaty does not entail per se the lack of specific legal obligations for the States. From a procedural point of view, it should be recalled that all articles and chapters were adopted through consensus by the members of the working group, and that the Charter as a whole was unanimously adopted in June 2012 by all the countries in the continent. In the concept paper preceding the drafting of the Social Charter, the two possible options were analysed: either to create a legally binding text, or a declaration or statement. The drafters considered that ‘declaratory statements seek to influence the design or implementation of public policy at the national levels and guidelines for international cooperation for development, invoking the moral authority conferred by their approval by the international community’. Their choice was therefore clear: wanting to influence national policies, and taking into account the amount of compulsory texts, a declaratory resolution was the path to be followed.

In this context, as an OAS GA resolution, and because of the unique nature and structure of the Inter-American system, the Social Charter may well have a better chance of survival as an efficient tool than if it had been born as a treaty. The Inter-American system of protection of human rights is an à la carte mechanism, with States assuming different obligations depending on their political will. The American Convention on Human Rights is only applicable to 20 out of 35 States in the continent; the Protocol of San Salvador has only been ratified by 20 States and according to Article 63 of the American Convention the Inter-American Court of Human Rights has contentious competence only once States have deposited an instrument accepting its jurisdiction in this sense. Two States have already withdrawn. It is well known that the Inter-American system is far from the universality reached at the European system on human rights, where all States are bound by the European Convention and the European Court of Human Rights has automatic competence. However, precisely to overcome this different status and obligations according to different texts, the Inter-American Commission has developed a unique competence to adopt reports.

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28 The European Social Charter, the first human rights treaty entirely devoted to economic, social and cultural rights (adopted 18 October 1961, entered into force 26 February 1965) revised 3 May 1996.
29 OAS, ‘Background and proposals for Drafting the Social Charter of the Americas’ (13 October 2005) GTC/CASA/doc.9/05.
on admissibility and on the merits on individual cases against any State in the system, in spite of the lack of ratification of any relevant human rights treaty. According to this competence, when the State in question has not ratified the American Convention on Human Rights, the Inter-American Commission can exercise an automatic contentious jurisdiction; in order to assess legally the facts submitted, it uses texts such as the American Declaration on the Rights and Duties of Man or the Charter of the OAS, which have a legal application to all the Member States of the OAS.

Another argument in favour of the value of the Social Charter and its possible legal contribution lies in the so-called “nature” of economic, social and cultural rights themselves. The Social Charter’s flexibility in addressing the issue could be a welcome strategy for building further on the extremely wide scope of the Charter and to escape from the limitations of State consent. Of course, the flexibility thereby sought might be used to operate for different purposes, notably as a tool to revitalize traditional arguments which consider that economic and social rights, far from being fully justiciable, are fundamentally programmatic, and there is no guarantee that this will not happen. Perfectly in line with such reasoning (as well as with the language of the Social Charter that fails to refer to enforceable rights explicitly in its text), these rights could be regarded more in terms of general (and generic) statements than enforceable rights. Instead, if this is not the case, such rights should be dealt with by at least some international legal instruments, such as the American Convention or the Protocol of San Salvador, without forgetting that the Charter of the OAS and the American Declaration also contain references and a catalogue of economic, social and cultural rights.

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However, two questions remain to be answered: is the use of ambivalent and not (exclusively) rights-oriented language in the Social Charter and the lack of adoption of the action plan already undermining the Social Charter’s possible contribution to the promotion of economic, social and cultural rights? Is the Social Charter a friend or a foe towards a more coherent approach in the field?

2.2.2. A limited approach to rights

As already stated in the first part of this article, it cannot automatically be claimed that the Social Charter of the OAS concerns itself with social and economic rights, or at least not in a systematic or comprehensive manner. The Social Charter poses the fundamental question of which economic and social rights should be reinforced in order to accomplish its statutory goals. The most immediate response is that while the Social Charter might be interpreted as encompassing all the rights generally included in the international instruments dealing with the protection in the field, such an approach would result in giving it an ‘extremely broad scope of application’, a prospect which, this document seems to imply, could be – if not unrealistic – at least difficult to justify.

The Social Charter’s scope of application, through its text and above all through its action plan, has focused on (and been restricted to) thematic areas having a strong direct connection with both Contracting States’ policies on democracy support and on fighting under-development and poverty. While it could perhaps be argued that this option in reality is a little more than a mere formality presented to ensure that there is some lively discussion, the Social Charter significantly stresses in its preamble the need to ‘[…] ensure a balance between the policies, plans, and programs geared toward increasing the well-being of the sectors in greatest need with the characteristics […] of each state’.

One of the most problematic and complex issues involves determining what constitutes the ‘economic, social and cultural rights’ in the Social Charter. Nowhere are they defined as such, and indeed one of the major drawbacks of the document is that it classifies rights as falling into the traditional category of economic, cultural, or social. There are several reasons for the confusion associated with the real meaning and definition of these rights. Briefly listing them in order of importance, the first is that, even in a different context, such as the United Nations, the issue of classification may be complex for various reasons. First of all, it is not truly evident why certain rights such as the right to family life are recognized as being within both of the major categories and therefore included in the International Covenant on Civil and Political Rights as well as the International Covenant on Economic, Social and Cultural Rights. Second, while it normally claimed that the three categories of social,

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economic and cultural rights may easily be separated from one another, it is highly questionable to catalogue the right to social security as an economic rather than also a social right, the right to take part in cultural life as a cultural rather than also a social right, and so on. The absence in the Social Charter of qualifications of any specific right as being social, cultural or economic is a further reason for confusion as regards the definition of these rights. Indeed, the five chapters of the Social Charter do not clearly outline any known way of classifying different rights and, what is even more important here, the implications of inserting a right under one chapter as opposed to another seem not to be particularly relevant. Chapter III of the Social Charter, entitled ‘social development, equal opportunity and non-discrimination’, for example, appears to embody most, but not all, of the rights which could be classified as being economic, social and cultural rights and contains most of the Articles that are part of the ‘areas of intervention’ identified by the action plan. However, Chapter IV also encompasses several rights that are (also) social or at least cultural in character, such as the right to cultural heritage or to cultural development. Only Chapters I and V of the Social Charter do not seem to contain Articles identified as part of the seven areas of intervention of the action plan.

From this section of the article three major points emerge. The first is that indicating which rights are social, cultural and economic and which ones are not, even assuming that such terminology can be used, is never as simple as might be presumed. This is especially true if it is done in order to subsequently focus on those specific economic, social and cultural (‘ESC’) rights that are instrumental to enhancing development and the fight against poverty. There is a great deal of overlapping and interdependence among the civil and political (‘CP’) rights and ESC rights, on one hand, and the ESC rights amongst themselves on the other. The second point is that the lack of clarity highlighted above does not change the fact that the Social Charter may appropriately be considered to be clearly non self executing, not only because it is not a treaty but also, and mainly, because of the content of the provisions themselves, or at least most of them. The third and last point is that, in spite of its shortcomings, the Social Charter and its forthcoming action plan can be considered to be a contribution to the promotion of economic and social rights through the reinforcement of social policies, as it emphasizes the relevance of economic, social (and also of cultural) rights for achieving democracy and long term sustainable development as a tool for fighting poverty. It also renews the Americas’ commitment to this goal and focusses attention


38 OAS, ‘Explanation of reasons for elaborating the draft plan of action of the social charter of the Americas’ (2 November 2012) GTC/CASA/doc.201/12 add.1.
at the beginning of the 21st century on the interdependence of ESC and CP rights to which the OAS and its Member States have subscribed in international fora.39

However, if the Social Charter and its action plan can promote ESC rights through its link to democracy, development and the fight against poverty, can it effectively contribute to their protection? Broad general classifications are not the way to address this complex issue. Instead a more nuanced case-by-case analysis (examination) is required, depending on the context in question. This leads to the unanswered puzzle deriving from the peculiar interaction between the Social Charter itself and the existing (legally binding) instruments of the OAS on economic, social and cultural rights, an issue which will be the subject of Part 3.

3. THE CONTRIBUTION OF THE SOCIAL CHARTER TO THE PROTECTION OF SOCIAL, ECONOMIC AND CULTURAL RIGHTS

While the European system has two sets of separated mechanisms – the European Court of Human rights, based on the European Convention of Human Rights, and the European Social Charter, which has its own Committee – the Inter-American system has a multiplicity of texts and actors which in recent years have tried to evolve into a more coherent and consistent approach towards the protection of economic and social rights. The Inter-American Court of Human Rights has become the first judicial mechanism to have used its competence in this field in an explicit manner, and it has now also been followed by the African Court of Human and Peoples’ Rights which has yet to produce a substantial body of case-law.

The Social Charter and its action plan have the task of renewing and updating the continent’s commitment to better and more efficient social policies at the national level. However, the Charter is not an internationally binding treaty and, although it contains several references to rights, according to the action plan it does not advocate a human rights-oriented approach. The interaction between the Social Charter and its forthcoming action plan and the human rights instruments existing in the continent is therefore not self-evident. Two issues have to be addressed here: first, whether the existing human rights instruments and texts in the Americas offer already a sufficiently coherent approach for the protection of economic, social and cultural rights; second, whether the Social Charter, which does not belong to the human rights system as such, can provide an effective contribution towards the construction of a

39 The Commission in particular has been a strong supporter of progressivity and the indivisibility of ESC and civil and political rights (hereinafter ‘CPR’). More specifically, it has issued general statements in favor of ESCR in its annual reports and in addresses to the OAS General Assembly. Nevertheless, with very few exceptions, it has not applied ESCR principles in the individual petitions that it examines.
more efficient respect for economic, social and cultural rights in the framework of the Inter-American system of protection of human rights.

3.1. BUILDING A COHERENT PROTECTION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE AMERICAS

The history of ESC rights in the OAS context is a checkered one. The OAS Charter contains several important provisions relating to ESC rights such as the rights to education, social security, work, collective bargaining, strike, participation in development decision-making, and legal assistance. Moreover, there are two bodies in the OAS, namely the Inter-American Council for Education, Science, Culture and the Economic and Social Council, aimed at setting legal standards, examining reports by Contracting States, and formulating recommendations. The OAS Charter clearly refers to State duties to guarantee the fundamental aims of availability of food and proper nutrition and adequate housing, a healthy urban environment, stability of domestic prices, employment opportunities, acceptable working conditions for all, rapid eradication of illiteracy, enhancement of educational chances, and equitable land-tenure systems, distribution of national income, and systems of taxation. Nevertheless, some substantial obstacles hinder the effective protection of the provisions on ESC rights in the OAS Charter and one is the absence of any textual reference to “rights” that are capable of having direct effect, namely to provide individuals with a cause of action against State institutions in OAS Member States. Despite the Charter’s status as a legally binding agreement, most of its ESC-related provisions are named “principles and mechanisms” and “basic goals” rather than “rights”. Moreover, the Charter is not a human rights enforcement mechanism and it therefore lacks any monitoring device.

The Inter-American human rights system has developed its unique and specific features also in the field of economic, social and cultural rights. Three texts deal with them within the system: the American Declaration, the American Convention and last but not least, the Protocol of San Salvador. The three follow a time frame and a logic which can lead to a coherent approach towards ESC rights, despite all the classic problems and obstacles attached to these rights – that are shared with other human rights systems – which have appeared when setting the rights in motion.

3.1.1. Building a coherent textual approach

All three texts, the American Declaration, the American Convention and the Protocol of San Salvador, have included the protection of economic, social and cultural rights from different perspectives.

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The American Declaration contains a rather long catalogue of ESC rights. It defends the rights to education, to social security, to health, to work, to fair remuneration, to rest and leisure, to property, to inviolability of the home, to special protection for mothers, and the family, and to the benefits of culture. Akin to the UDHR, it supplies a list, including both civil and political rights and economic, social and cultural rights.

The American Convention has a somehow paradoxical approach to these rights. In fact, while it recognizes several rights with a social nature, such as the right to a family (Article 17) and children (Article 19) or the right to property (Article 21), it does not explicitly mention any of these rights as economic, social and cultural rights and they are included as merely civil and political rights. Despite what is mentioned in the last paragraph of its Preamble (which recalls that the Third Inter-American Special Conference approved the incorporation into the OAS Charter of ‘broader standards on economic, social and cultural rights’), it merely refers to these rights in rather general and generic terms, stating the obligation to progressively implement and realize economic and social rights set out in other legal instruments. Article 26 of the American Convention, precisely because it does not enounce any specific individual rights, has been considered by many legal scholars as not establishing any justiciable direct rights, although the practice has not supported this view and this will be analysed below. It should be remembered that while the American Convention does distinguish the treaty provisions consecrating its “protected rights” into two

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41 Among the economic, social and cultural rights, see the right to the protection of the family (Article VI), to the protection of mothers and children (Article VII), to health and well-being (Article XI), to education (Article XII), to the benefits of culture (Article XIII), to leisure (Article XV) and to social security (Article XVI).

42 According to Article 26 of the American Convention, Contracting States shall ‘undertake to adopt measures [...] with a view to achieving progressively [...] the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the [OAS Charter].’ Because the Court’s essential mandate is to apply the provisions of the Convention to individual cases, Art. 26 supplies the possibility of holding States accountable, under the Court’s contentious jurisdiction, for protecting, guaranteeing, and progressively implementing the rights found in the OAS Charter.

43 The principle of progressive realisation is not unique to the American Convention; it is also embodied, for instance, in Article I Protocol of San Salvador. While compliance with the principle of ‘progressive realisation’ depends on the availability of resources, this provision also imposes particular conduct that is compulsory for all states parties, regardless of their level of development. In this respect, Article 26 ACHR prescribes the duty to continuously enhance conditions and the prohibition of taking deliberately retrogressive measures. This interpretation finds support in the recent jurisprudence of the Inter-American Commission on Human Rights, for example *Miranda Cortez et al. v. El Salvador* (Case 12,249, Report 27/09, 20 March 2009); see also *National Association of Ex-Employees of the Peruvian Social Security Institute et al. v. Peru*, (case 12,670, Report 38/09, 27 March 2009), as well as in the case-law of the Inter-American Court of Human Rights, where *Acevedo Buendia* has become a landmark decision in this respect (see further down; see also, on the scholar debates, Oswaldo Ruiz-Chiriboga, ‘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’, (2003) 31/32 *NQHR*, pp. 159-186.
substantive chapters – one entitled “Civil and Political Rights”, the other “Economic, Social and Cultural Rights” – it subordinates the rights in both chapters equally to the two general duties clauses established in Chapter I.\(^4\)

The Protocol of San Salvador completes the corpus of the Inter-American human rights instruments for the protection of economic, social and cultural rights. Adopted to complete the lacunae in the Convention in this respect, it imposes clearly-identifiable and concrete obligations on Contracting States to adopt all appropriate and necessary measures to respect and ensure economic, social, and cultural rights. However, only two rights can be brought to the Inter-American Court of Human Rights and are therefore actionable before the system: the rights to education and unionization (which nevertheless constitute only a small portion of the Protocol’s “protected” rights).\(^5\)

Therefore, other important ESC rights included in the Protocol, such as the right to just, equitable, and satisfactory conditions of work (Art. 7), to social security (Art. 9), to health (Art. 10), to the environment (Art. 11), to food (Art. 12), and the right to the Formation and the Protection of Families (Art. 15), cannot be the subject of individual petitions. This is of course a major limitation compared for example to the Optional Protocol to the ICESCR.\(^6\) Several reasons may justify this choice. The Protocol of San Salvador was adopted in 1988, at a later stage of the American Convention, but at a still early stage in the protection of ESC rights. In the United Nations system, these rights have become actionable and the subject of individual petitions only with the adoption of the Optional Protocol to the International Covenant in 2008. The Protocol became a pioneer text, as not even at the European level, perceived as the most advanced integral human rights system, is there a direct individual claim system in social and economic rights.

3.1.2. The inconsistencies in practice: the justiciability issue

The three texts seem to follow a coherent approach towards the protection of economic, social and cultural rights, but this is not always the case concerning the interactions of the three texts in the practice of the Inter-American Commission and Court.

The real scope and contribution of Article 26 of the American Convention to the effective and possible actionable protection of economic, social and cultural rights is one of the most debated issues within the Inter-American system. The wording of Article 26 and the introduction of the idea of progressivity have fostered the discussion about the real meaning of this provision. It is important to note that the American

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\(^6\) See Marco Odello and Francesco Seatzu, (n 34) ch. II.
Convention was the first international human rights treaty, followed later by the African Charter on Human and People's Rights,47 to include a direct reference in its text to the protection of economic, social and cultural rights, although, as already analysed before, the text is quite general and vague and it follows a different structure than the other Articles in the Convention devoted to the so called civil and political rights. However, the American Convention is not the only international treaty that enounces economic, social and cultural rights in terms of progressivity. The ICESCR recognizes also the principle of progressivity in Articles 2 and 16(1). In its General Comments, the Committee on Economic, Social and Cultural Rights has interpreted the idea of "progressive realization" as implying that ‘the full realization of economic, social and cultural rights will generally not be able to be achieved in a short period of time’.48 The UN Committee stated that the necessary flexibility, which is different from the immediate obligation required for civil and political rights, does not imply the lack of a clear obligation for the State 'to move as expeditiously and effectively as possible' towards the full realization of economic, social and cultural rights.49 The adoption of the Optional Protocol to the Covenant in 2008, as it has been considered above, has further reinforced the need to consider these rights actionable,50 opening the individual complaints mechanism.51

The Inter-American Court of Human Rights has followed this path and has given meaningful content to Article 26 of the American Convention, notably in Acevedo Buendia et al. v. Peru,52 a turning point in its case law.53 The Court considered for the first time in this case that 'the regression is actionable when economic, social and cultural rights are involved'.54 The Court had never dealt in such a straightforward manner with Article 26 of the Convention. The Article itself had not been used in many cases, as it was somehow despised or even considered superfluous and

48 CESCR 'General Comment 3, The nature of State parties obligations (article 2(1))' (14 December 1990) para 9.
49 Ibid.
50 On the Optional Protocol to the ICESCR, see Marco Odello and Francesco Seatzu (n 34) in particular chapters 2 and 3, also for references to other research.
53 For a detailed comment on the notion of progressivity in the Inter-American system and particular attention to the Acevedo Buendia case, see Laurence Burgorgue-Larsen and Amaya Ubeda de Torres, The Inter-American Court of Human Rights: Case-law and Commentaries (OUP 2011) 612 ff.
54 IACtHR, Acevedo Buendia et al. (‘Discharged and Retired Employees of the Office of the Comptroller’) v. Peru (n 53) para 103.
programmatic.\textsuperscript{55} In the few cases in which it was used, the Court had not been able to build a solid approach to the issue of the implications of Article 26, as the article was rather unclear and even challenged the possible justiciability of economic, social and cultural rights.\textsuperscript{56} Before the \textit{Acevedo Buendía} case the Court had protected economic and social rights in an indirect manner, through classic civil and political rights, or it had taken into account the implications for the rights of unions or others at the reparations stage.\textsuperscript{57} However, the key change came with this judgment, in which

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\item See in this respect the criticism raised by the judgment \textit{Five Pensioners v. Peru} Series C No 98 (IACHR, 28 February 2003, Merits, Reparations and Costs, Series C No. 98), in which the Inter-American Court seems to suggest that Article 26 and justiciability of economic, social and cultural rights should be used only when the whole society (and not a group of individuals) is at stake. This was harshly criticised by Judge Roux Rengifo in his dissident opinion to the judgment and by the legal literature (see Laurence Burgorgue-Larsen and Amaya Ubeda de Torres (n 53) 630 ff.
\item After \textit{Acevedo Buendía}, of the Court has applied a victim-oriented approach and has developed the special obligations the State has in a case concerning children and persons with disabilities in \textit{Furlan v. Argentina} Series C No 246 (IACHR, 31 August 2012) para 220. However, a possible violation of Article 26 of the ACHR was not considered by the Court; it was only analysed in the concurring opinion of judge May Macaulay, which stated that the State violated Article 26 in relation to Articles 5 and 1.1 of the American Convention because of the negative impact the non-respect of the right to health had on the physical and mental integrity of the victim. In \textit{Suárez Peralta v. Ecuador}, the Court further declared the violation of Article 5 of the Convention as a result of the medical negligence the victim suffered and the lack of respect of the State’s positive obligations in this respect \textit{Suárez Peralta v Ecuador} Series C No 261 (IACHR, 21 May 2013). Article 26 was, again, not considered, although the Court recalled the “interdependence and indivisibility of civil and political rights, and economic, social and cultural rights, because they must be understood integrally as human rights without any specific ranking between them” (para. 131). Therefore, the respect of the right to personal integrity has to be considered in the context of respect for the right to health: “States must establish an adequate normative framework that regulates the provision of
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The Social Charter of the OAS

the Court explicitly took a stand in favour of the enforceability and justiciability of Article 26, stating that progressivity implies a direct State obligation of non-regression in the protection of economic, social and social rights. It is not a coincidence that the judgment was issued in 2009, less than a year after the Optional Protocol to the ICESCR had been adopted.

Some scholars have raised the need to consider the Protocol of San Salvador as an integral part of the American Convention.58 To support this thesis, it could be said that the Protocol of San Salvador would have been named differently if it was to be considered as a totally separate and different treaty from the American Convention, mirroring the European system of human rights, in which there are two separate instruments with different names (namely, the European Convention and the Social Charter). As the Protocol of San Salvador is a protocol to the Convention, in accordance with Article 77 of the American Convention, it is possible to conclude that its goal was to complete the Convention by adding and enunciating other specific rights, giving the States the option to decide whether they would like or not to accept new obligations by signing and ratifying the new Protocol. However, it has been further argued that this means that the rights contained in the Protocol of San Salvador were clearly not included in the American Convention (hence the need to adopt a new Protocol) and, therefore, that the Inter-American Court cannot include any direct enforceability of economic, social and cultural rights on the sole basis of the American Convention against States not having ratified the Protocol.59

Appealing as this argument may be, not only has the Court rejected it, but it also follows that there are various reasons which can support, at least to a certain extent, the direct enforceability of the economic, social and cultural rights in the American Convention. First, deciding otherwise would mean that Article 26 of the Convention does not contain any type of legal mandate. It would also mean that Article 26 does not refer to ‘rights’ when applied to economic, social and cultural rights, despite it being included in Part I of the Convention, entitled “State Obligations and Rights Protected”, together with the rest of the (civil and political) rights, and the fact that Article 26 is under Chapter III, which enounces “Economic, Social and Cultural Rights”. However, the terminology and the language in Part I of the Convention is the same and there is no change of the word ‘rights’ into ‘principles’, ‘standards’ or other terms in order to make clear any possible exclusion of a direct justiciable approach to

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58 See Oswaldo Ruiz-Chiriboga (n 43) 163 ff.
59 Ibid.

health care services, establishing quality standards for public and private institutions that allow any risk of the violation of personal integrity during the provision of these services to be avoided. In addition, the State must create official supervision and control mechanisms for health-care facilities, as well as procedures for the administrative and judicial protection of victims, the effectiveness of which will evidently depend on the way these are implemented by the competent administration” (para. 132). The Court already supported these views in the landmark decision Ximenes Lopes v. Brazil Series C No 149 (IACHR, 4 July 2006) paras 89 and 99.
the rights. It cannot be ignored that Article 26 announces rights but does not define or refer precisely to any right, which is precisely the key issue. Economic and social rights as such are only clearly enounced in the Protocol of San Salvador; it has already been established that the Social Charter itself is more ‘goal-oriented’ than ‘rights-oriented’, and this was stated as one of the reasons to choose it to be a Resolution and not a binding treaty. It is nevertheless necessary for the Commission and the Court to establish the precise content and real scope of Article 26, as the Court is the proper interpreter of the American Convention.

The second argument in favour of a possible direct and immediate effect of Article 26 concerns precisely the interpretation methodology. The pro homine interpretation, id est, the idea that the American Convention and other instruments must be interpreted in the way which is most protective of human rights, so cherished by the Inter-American Court, read in combination with Article 29 of the Convention (which mainly protects civil and political rights), is not enough to interpret the American Convention beyond its scope and to include new rights not included as such in the Convention. However, the pro homine interpretation can be fully applicable to the wording of an already existing provision and, for example, interpret the terms (including the idea of progressivity) of Article 26. Moreover, this interpretation has to take place not only in the light of the pro homine principle, but also, and more importantly, in the light of the evolutive interpretation of human rights instruments. Human rights treaties cannot remain like a picture taken on the day of adoption and therefore be immovable in time; they have to evolve in the light of new circumstances. Otherwise, the protection of vulnerable groups and minorities, the construction of the principle of non-discrimination or provisions such as those related to the protection of children, the disabled or even the collective ownership of the earth by indigenous peoples, could not have been built. A further complexity arises, and this is the crucial obstacle to a possible adjudication by the Court on economic

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60 For a discussion on the different direct and indirect approaches to economic, social and cultural rights and the judicial approach for vindicating these rights, see the very interesting work of Paul O’Connell, *Vindicating Socio-Economic Rights. International Standards and Comparative Experiences* (Routledge 2012) 178 ff.


and social rights based on Article 26. This further complexity regards the fact that the Protocol of San Salvador, *lex specialis* in the Inter-American system on the issue, only considers that two rights (education and unions) can be subject to the judicial mechanism. However, this issue can be solved by taking into account that the Court has not declared the violation of an economic and social right solely based on the breach of Article 26, but it has used the idea of progressivity in Article 26 to interpret the possible violation of other specific rights included in the American Convention. Summing up, it is not possible to consider Article 26 of the Convention as establishing or introducing a whole category of economic, social and cultural rights with specific content, overcoming the textual basis of the Protocol. Moreover, the Inter-American Court has also followed a rather cherry-picking approach when looking at the *travaux préparatoires* of Article 26 of the Convention in the Acevedo-Buendia case and it can be criticised for this. Its legal reasoning has not been impeccable. However, Article 26 of the Convention has, over 40 years after its adoption, opened a door to the direct enforceability of rights and has given meaning to the idea of progressivity in the region.

3.2. THE SOCIAL CHARTER: BLURRING THE PICTURE OR BUILDING FURTHER COHERENCE?

Two opposite hypotheses can be defended to reply to this question: the Social Charter, because of its nature and its wording, is not a useful tool in terms of human rights protection, as it is a goal-oriented text directed at States’ social policies; the second hypothesis is that the Social Charter can, nevertheless, be a useful tool precisely because of its soft law nature, notably through interpretation.

3.2.1. The Social Charter is not a human rights protection tool

During the drafting process of the current Social Charter, the principles of social development that could serve as guidelines for the Social Charter of the OAS were one of the major points of discussion. Suffice it to observe that the strategy pursued by the majority of the drafters of the 2012 Social Charter was built on three pillars. The first was to recognize the fulfillment of ESC rights as a key element for the promotion and consolidation of democracy. The second was to ensure that a range of specific social, economic and cultural rights, such as the right to education and the right to social security, were inserted and the third was to include the promotion of social justice.

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63 See Oswaldo Ruiz-Chiriboga (n 43) 169.
64 See Laurence Burgorgue-Larsen and Amaya Ubeda de Torres (n 53) 630 ff.
especially through the fight against poverty and discrimination, which became a core content goal of all the three chapters of the draft Social Charter.

Despite the place of economic, social and cultural rights in the Social Charter, it is appropriate to recall that there were no uncertainties about the ‘concrete duties’ that correspond to the rights enshrined therein. Indeed, the Social Charter is not, as stated before, a rights-oriented text, but rather it is goal-oriented. This means that the economic, social and cultural rights in the text envisage specific end goals, such as the promotion of democracy and the participation of civil society in the preparation, execution, and monitoring of public policy as one of the best guarantees for transparency, stability and democratic governance. In other words, it may be suggested that, considered overall, these rights contain a direct mandate to States to act in their domestic policies, but do not contain any direct enforceability of rights as such. This is illustrated by the inclusion of certain provisions in the Social Charter which can be described as ‘progressive’ or ‘dynamic’, in that State compliance is assessed according to whether the State appears to be actively seeking improvement of a situation, rather than the treatment of an individual specific concern. Therefore, it might appear that the overall purpose of the Social Charter, as set out in its Preamble, is to achieve ‘social and economic’ progress and not to defend the rights of individuals or the rights of specific groups of people. This perception seems to be further reinforced by the choice of terms made by the action plan.

However, when analyzing the Social Charter itself, some (though not many) of the economic, social and cultural rights provisions are sometimes quite specific. A few examples shall suffice to illustrate this point. Article 17 indicates that:

Member states reaffirm that the enjoyment of the highest attainable standard of health is a fundamental right of all persons without discrimination and they recognize that health is an essential condition for social inclusion and cohesion, integral development, and economic growth with equity.

The subsequent Article 18 provides that ‘Everyone is entitled to adequate food without discrimination. Member states commit to making every effort needed to eradicate hunger and malnutrition’. Article 19 further states that

Everyone is entitled to education without discrimination. Access to quality education at all levels and modalities is vital to achieving greater equity, improving standards of living, fostering sustainable development, developing human capital, reducing poverty, strengthening democratic institutions, transmitting civic and social values, creating responsible citizens committed to society, and promoting social inclusion.

It is worth noting here that the classes and categories contained in these provisions belong to what the action plan has identified as ‘areas of intervention’ and impose an immediate interest in guaranteeing that the State will perform the legal duties embodied in the Social Charter, namely to ensure that there will be structures which
will effectively provide the services required. Unlike other catalogues and provisions on economic, social and cultural rights, there is no distinction between ‘hard core’ rights and other rights; but there is definitely a quest for a ‘minimum standard’ which should be achieved by Contracting States in the development of their national social policies.

The Social Charter does not, therefore, enounce specific rights, but it promotes and establishes direct obligations for the States, at least in the seven areas of intervention identified by the action plan, labour; social protection; health; food and nutrition; education; housing and basic public services; and culture. It is therefore a tool, but not one which can be integrated in the Inter-American human rights protection as such. However, not being part of the system, it has a direct relationship with the OAS Charter and represents renewed interest by all members of the Organization towards better protection of economic, social and cultural rights.

3.2.2. *The Social Charter as a catalyst for economic, social and cultural rights*

The American Convention and the Protocol of San Salvador, as stated before, have the advantage of establishing direct obligations for the ratifying States. Nevertheless, they have a significant disadvantage, as they are strongly limited by the principle of State consent. Hence, they are the subject of doubts, criticisms and different interpretations on the major issues affecting the architects of any socio-economic rights related text: the never-ending discussion over the ‘justiciability’ of ESC rights.

The Social Charter, as a soft law instrument, unanimously endorsed by all members of the OAS, is not a human rights tool, but it is not as narrow in its scope as the American Convention and the Protocol of San Salvador. This has two implications. The first concerns the interactions with other texts in the system, including human rights instruments; the other concerns its possible use as a soft law instrument by the Inter-American bodies through interpretation.

66 Within the framework of the Revised European Charter, hard core rights include the right to work (article 1), the right to social security (article 12), and the right to social and medical assistance (article 13). Article 13 states that parties undertake: ‘to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition.’ Colm O’Cinneide, ‘Social Rights and the European Social Charter: New Challenges and Fresh Opportunities’ in Olivier De Schutter (ed.), *The European Social Charter: a Social Constitution for Europe = La Charte sociale européenne: une constitution sociale pour l’Europe* (Brulayt 2010) 167 ff.

Concerning the interaction with the American Convention or the Protocol of San Salvador, it is necessary to remember that Article 26 of the American Convention refers to the OAS Charter, stating that

[T]he 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 as amended by the Protocol of Buenos Aires.

There are two aspects to the question which follows this statement. One is the type of direct effect that the OAS Charter could have via this provision and whether the Social Charter of the Americas could complement and build further on this provision through its relationship with the Charter. Another element that adds further complexity is the fact that the American Declaration of Rights and Duties is the text that ‘defines the human rights referred to in the Charter’.\(^{68}\) Finally, the Protocol of San Salvador not only adds new rights not included in the American Convention or in other instruments, but also merely reaffirms rights which were already covered in other instruments such as the OAS Charter.\(^{69}\) The entanglement among different instruments is therefore complete. The Convention relies, for the definition of specific social, economic and cultural rights, on the OAS Charter. According to the Inter-American Court, the American Declaration specifies the rights included in the Charter and, according to the Commission, the Protocol of San Salvador also contains provisions which merely reflect what already exists in the Charter. The next step is then an easy (sic!) one, implying solving the conundrum concerning what economic, social and cultural rights are contained as such in the OAS Charter, as this will determine what rights can be included as protected in Article 26 of the Convention. If identifying the questions is not difficult, finding the answer is. The scholarly debate has had plenty to get its teeth into, with some authors defending the fact that the catalogue of ESC rights in the American Declaration enounces the rights which should be considered to have been included in the OAS Charter.\(^{70}\) Others, however, maintain that, if Article 26

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\(^{68}\) As stated by the Court in one of its best-known advisory opinions: IACHR, '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' Ser A No 10 Advisory Opinion OC-10/89 (14 July 1989) para 45.


\(^{70}\) This is the position of, among others, Tara Melish, 'Counter-Rejoinder: Justice vs Justiciability: Normative Neutrality and Technical Precision, the Role of the Lawyer in Supranational Social Rights Litigation' (n 55) 338 ff. For this author, this would include rights to education (Articles 34(h), 49 and 50 of the OAS Charter), food and nutrition (Articles 34(j) and 34(d) of the OAS Charter); adequate housing and inviolability of the home (Article 34(k) of the OAS Social Charter); social security
had wanted to refer directly to the Declaration, it would have done so, but the wording clearly refers to the OAS Charter. Therefore, it is necessary to identify not only the ESC rights in the OAS Charter, but also to see whether they are defined as rights and have a minimum content in order to consider them to be included in Article 26 of the ACHR.\(^\text{71}\) There is no clear-cut answer to this and it will be the task of the Commission and the Court to build a coherent approach in this respect.

Can the Social Charter of the Americas (and its plan of action) enlighten this debate by giving further precision to the OAS Charter (and therefore, to Article 26 of the American Convention)? One caveat has to be considered first. As already stated before, the Social Charter does not intend to build a new human rights text, but a national social policy tool. Nevertheless, according to its Preamble, the importance of ‘the full exercise of economic, social, and cultural rights’ is stated, which ‘requires that a series of measures be progressively adopted by member states’. Recognizing ‘the need to strengthen the Inter-American system’, the Social Charter is ‘an instrument to guide action and partnership-for-development activities designed to promote integral development and observance of economic, social and cultural rights, as well as elimination of poverty and inequality’.\(^\text{72}\) The text of the Social Charter contains certain provisions with specific economic, social and cultural rights, which are much more precise than most of the provisions in the OAS Charter in this respect. The principle of equality (Article 1 in fine, 15 and 16, and also throughout the text of the Social Charter), the respect for workers’ rights (including equal employment opportunities and good working conditions, Article 8), property rights (Article 11), the protection of the family (Article 13), access to health and health care (Article 17), right to food (Article 18), right to education (Article 19), right to water (Article 20) and right to cultural life and to enjoy cultural and natural heritage (Articles 25 and 29) […] all of them are enounced, in quite specific terms, in the Social Charter.

It is obviously beyond the scope of this contribution to analyse the importance of the use of soft law as a method of interpretation of human rights treaties.\(^\text{73}\) When dealing with the ‘myths’\(^\text{74}\) accompanying economic, social and cultural rights, such as the constant criticism of their lack of precision, the need to determine its content and the idea of progressivity as obstacles to its enforceability, it should be remembered that many other civil and political rights raise the same type of issues and need to...
be defined through case law, and also that constant criticism of soft law undermines the need to have a binding treaty on the issue. If enforceability is at stake, then perhaps a soft law instrument can even be more useful than a compulsory norm.\textsuperscript{75} Indeed, it appears that a soft law mechanism, at present, can be a useful tool in terms of legitimacy and can make its impact, as the Inter-American Democratic Charter has. The Inter-American Court of Human Rights refers to instruments of soft law in its case law.\textsuperscript{76} Certainly, it has not (and could not) have declared the violation of a substantive provision of the Charter solely based on soft law arguments, but these soft law texts may be used as enlightening tools for showing the path towards the interpretation methodology. The Social Charter, the latest chance the Americas has had to show to what extent and in which specific areas States are ready to intervene, may well be considered as a useful tool to interpret the economic, social and economic rights enshrined in the Inter-American human rights system. However, only practice will determine whether it will effectively help the Court and the Commission in this task or if the Social Charter will inevitably be cast into oblivion.

4. FINAL REMARKS

Lawyers, including public international and comparative lawyers, have generally been doubtful about economic, social and cultural rights as true rights and there is not much in the Social Charter of the Americas to conciliate their mistrust. The Social Charter, mainly because of its non-binding status, gives the ‘peoples of the Americas’ only tantalizing views of ‘rights’ that are at the same time seeable but as yet unreachable. In particular, a hard look at the Social Rights and Democracy chapter shows that the Social Charter’s dauntless statement of social justice is an illusion. The Social Charter encompasses an eclectic and unselective catalogue of economic, social and cultural rights, which distinguishes between unforeseeable rights, several of which are conditional, and recognition of generic principles. For OAS organs, the Social Charter establishes an implicit duty to enhance each of the indicated rights but excludes then the ability to expand their powers to achieve its statutory aims.

For individuals, the Social Charter may be discernible, as with any other text produced by the OAS GA, but it neither directly affects citizens and/or workers’ economic and social rights, nor does it warrant fundamental social entitlements. For OAS members, the Social Charter is a souvenir of their human rights commitments but it enumerates no further obligations even in areas which are beyond the scope of

\textsuperscript{75} See in this respect the classic work by Michael Dennis and David Stewart, ‘Justiciability of Economic, Social and Cultural Rights: Should there be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?’ (2004) 48 American Journal of International Law, 462 ff.

\textsuperscript{76} More details and references can be found in Francesco Seatzu op. ult. cit., 3–22.
the OAS Charter and, therefore, beyond the remit of the OAS organs, at whom it is also aimed.

Notwithstanding these suspicions, and perhaps as a result of them, the Social Charter may yet help to raise the status of economic, social and cultural rights in the internal legal systems of the OAS members. The very unclearness of the Charter arises from the circumstance that it keeps the status quo and so far additionally symbolizes the onset of profound integration as part of a large construction that puts economic, social and cultural rights at the very heart of the process of consolidation of democracy and legality in the States of the southern hemisphere. It is in this frame of reference that the setting of economic, social and cultural rights and democratic values in a single consolidated document should be read and understood.

As part of this process of consciousness and renewal, the OAS members now have an obligation to address lacunae in the content of the Social Charter and obstacles to its effectiveness. Lessons can be mastered from the practice of the Social Charter of the European Community that, as its name suggests, may offer a source of inspiration for the Social Charter of the Americas and the action plan notwithstanding its non-binding status. Moreover, the Charter projects a much broader concept of social justice than the Social Charter of the European Community and has a far higher status in the democratization process from which to impact events. As a living instrument, the Social Charter’s impact will lie with its ability to empower and supply direction to programmatic and legislative action at the OAS and national level. Most significantly of all, the Social Charter, by acting as a guidepost of fundamental economic and social values, may be part of the construction of a new and more comprehensive and effective OAS strategy for fighting poverty and social exclusion in the southern hemisphere.

For the Inter-American Court of Human Rights the challenge is to translate the Charter’s idea of social justice and democracy and draw upon its sources to give complete effect to the gamut of economic, social and cultural rights. The timing of the Social Charter could not be better. Economic, social and cultural rights are back on the political agenda, following the international movement towards the construction of better mechanisms of monitoring and adjudication of economic, social and cultural rights. It is also a text launched and adopted in the midst of a global economic crisis and a more specific intra-systemic crisis, constantly challenging the respect for international human rights instruments. A soft law mechanism in this moment can be a useful tool in terms of legitimacy and can make its impact. Certainly, it was


78 Resulting in 2008 in the adoption, at the United Nations level, of the Optional Protocol to the International Covenant on Civil and Political Rights and, at the Inter-American regional level, of the different efforts developed by the Inter-American Commission, which has elaborated guidelines to improve the situation of these rights in the continent (n 27).

79 With the Trinidad and Tobago and Venezuela’s withdrawal, as well as the constant obstruction to the individual communications mechanism.
a choice not to shape the Social Charter of the Americas as a human rights treaty, which could have been redundant and counterproductive. However, it has strong links to the Inter-American system of human rights. Article 26 of the Convention, the only one especially devoted to social, economic and cultural rights, refers to the OAS Charter. This is the key to the possible Social Charter role. If the Court, when applying Article 26 of the American Convention, is to refer to rights included in the OAS Charter, the Social Charter evokes and, in some cases, ‘fills with content’ the contents of the OAS Charter in this field. Certainly, it is possible to object to the use of a soft law instrument to complement or interpret a human rights treaty and State consent has to be preserved. And yet, the Social Charter and the Inter-American Court, in so far as interpretation of those rights falls within its jurisdiction, can make a contribution to better coherence for the protection of economic, social and cultural rights in the Americas.