

ECONOMIC AND SOCIAL RIGHTS WITHIN
THE INTER-AMERICAN HUMAN RIGHTS
SYSTEM: THINKING NEW STRATEGIES FOR
OBTAINING JUDICIAL PROTECTION*

DERECHOS ECONÓMICOS Y SOCIALES EN EL
SISTEMA INTERAMERICANO DE DERECHOS
HUMANOS: PENSANDO NUEVAS ESTRATEGIAS
PARA OBTENER PROTECCIÓN JUDICIAL

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ABSTRACT

After more than half a century of existence of international human rights regimes, a differential degree of protection is still received by the so-called economic and social rights, when compared to the ones named civil and political. However, this article aims to show that certain strategies used within the Inter-American Human Rights System, IAHRs, have proved to be relatively successful for granting judiciable character to economic and social rights. Moreover, the paper discusses alternative paths that could be tried in order to obtain an improved judicial protection for these rights within the Americas.

Key words author: Economic and social rights, ESR; Inter-American Human Rights System; Right to health; Environmental rights; Right to food.

Key words descriptor: Inter-American Human Rights System, Economic and Social Rights, Civil Rights (International Law).

RESUMEN

Luego de más de medio siglo de existencia de regímenes internacionales de protección de los derechos humanos, todavía hay un nivel diferencial de protección recibido por los llamados derechos económicos y sociales, en comparación con los denominados derechos civiles y políticos. No obstante ello, el objetivo de este trabajo es exponer que ciertas estrategias empleadas en el marco del Sistema Interamericano han tenido relativo éxito en lograr la justiciabilidad de los derechos económicos y sociales. Así mismo, el artículo propone la discusión de estrategias alternativas que pueden ser empleadas a fin de mejorar la protección judicial de los mencionados derechos en el ámbito americano.

Palabras claves autor: *Derechos económicos y sociales; Sistema Interamericano de Protección de los Derechos Humanos; Derecho a la salud; Derecho a un ambiente sano; Derecho a la alimentación.*

Palabras clave descriptor: *Sistema Interamericano de Derechos Humanos, derechos económicos y sociales, derechos humanos (Derecho internacional).*

SUMMARY

INTRODUCTION.- I. THE ARTIFICIAL DIVISION OF HUMAN RIGHTS.- *A. The beginning of the story within the United Nations, UN.- B. The American version of the same story.* - II. POSSIBLE STRATEGIES WITHIN THE IAHRs.- *A. The progressive development of ESR.- B. The judicial protection of the right to work.- C. The right to health and the adequate protection of personal integrity.- D. The imperative prohibition of discrimination regarding social security.- E. Environmental rights and the European Court case law.- F. The right to food and the conditions for an adequate life.* - CONCLUSIONS.- BIBLIOGRAPHY.

INTRODUCTION

More than sixty years have passed since economic and social rights, ESR, were recognized as human rights within the American continent, which took place through the adoption of the American Declaration of the Rights and Duties of Man in 1948.¹ Furthermore, over three decades ago the American States already committed themselves to fulfil particular international obligations on ESR, when the American Convention on Human Rights entered into force in 1978.² Moreover, it has been almost eleven years since a specific treaty aimed at protecting ESR entered into force in the Americas, the *Protocol of San Salvador*, which occurred in 1999. Nevertheless, in 2011 the legal satisfaction of ESR is still a controversial topic, as the regional human rights tribunal –the Inter-American Court of Human Rights– seems to find multiple difficulties when requested to issue binding decisions concerning the guarantee of the mentioned human rights.

Even though the legal history of ESR could help to partially explain these difficulties, it seems hard to believe that nowadays an alleged division of human rights could be hold as a legal argument in court. On the other hand, it cannot be ignored that certain legal restrictions do exist concerning ESR, as the outcome of political negotiations of international treaties show the limited will of States to assume broad obligations on this subject. However, it has to be noted that different strategies are being used in order to make States comply with existing international obligations regarding ESR.

The aim of this paper is to deal with different paths that have been taken to make those rights judiciable within the Inter-American Human Rights System, IAHRs, besides proposing

1 American Declaration of the Rights and Duties of Man, adopted by the Ninth International Conference of American States, Bogota, Colombia, 1948. [Hereinafter American Declaration]. Available at: <http://www.cidh.oas.org/Basicos/English/Basic2.American%20Declaration.htm>.

2 American Convention on Human Rights, signed at the Inter-American Specialized Conference on Human Rights, San Jose, Costa Rica, 22 November 1969, entered into force in 1978. Available at: <http://www.oas.org/juridico/english/treaties/b-32.html>.

different strategies that could be used to overcome current limitations. The focus will be on the IAHRs, because it offers a comparative advantage for the protection of human rights in the American Continent, for it has a judicial organ that can issue compulsive decisions regarding Member States.

The article would be divided in two main sections. The first one will conduct a brief historical analysis of the source of the division of human rights in different categories, which would help to understand certain legal restrictions deliberately posed on the judiciable character of ESR. It will be divided in two sub-sections, respectively addressing the subject within the United Nations and the IAHRs. The second section will then comment on different venues that have been tried in order to overcome existing obstacles, and it will also propose other paths that could help to achieve an improved protection of ESR within the Americas. This section will be organized in six sub-sections, each focusing on a different strategy for the protection of ESR.

I. THE ARTIFICIAL DIVISION OF HUMAN RIGHTS

A. *The beginning of the story within the United Nations, UN*

It should be highlighted that is not a coincidence that international human rights regimes have emerged in just over fifty years, since the end of the Second World War. In fact, it has to be noted that the need of transnational protection of human rights was actually a response to the horrors that humanity faced during the Genocide committed within the Third Reich, as a commitment to not repeat such atrocities. This could be seen clearly, as the creation of the United Nations was aimed to “... *save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind...*”,³ and that

3 Charter of the United Nations, signed on June 26, 1945, San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force on 24 October 1945, preamble, 59 Stat. 1031, T.S. 993, 3 Bevans 1153. Available at: <http://www.un.org/en/documents/charter/index.shtml>.

it is within the main purposes of the organization to “...achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”⁴

One of the cornerstones of international human rights regimes was actually conceived within the UN, when in the year 1948 the General Assembly approved the Universal Declaration on Human Rights.⁵ This particular document, even though a piece of *soft law* by definition, indisputably became a binding source of international law as a customary norm.⁶ The Universal Declaration established a general recognition of human rights, in disregard of a possible division between the so-called civil and political rights and the ones lately referred as economic, social and cultural rights. Nevertheless, this dichotomy was created when the General Assembly decided in 1951 the elaboration of two different international human rights treaties.⁷ The decision to create two categories of human rights, with a different range of legal protection, did not obey to legal or academic reasons. On the contrary, this distinction is clearly artificial,⁸ and its foundation is mainly a political response to the will of certain States within the UN.⁹

4 Charter of the United Nations, signed on June 26, 1945, San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force on 24 October 1945, art 1.3. Available at: <http://www.un.org/en/documents/charter/index.shtml>.

5 Universal Declaration on Human Rights, adopted and proclaimed by the General Assembly of the United Nations, on December 10, 1948, Paris, France. Available at: <http://www.un.org/en/documents/udhr/index.shtml#ap>.

6 Mónica Pinto, *Temas de Derechos Humanos*, 36 (Editores del Puerto, Buenos Aires, 1997).

7 Antonio A. Cançado-Trindade, *La protección internacional de los Derechos Económicos, Sociales y Culturales*, in *Estudios Básicos de Derechos Humanos I*, 39-62, 40 (Rodolfo Cerdas-Cruz & Rafael Nieto-Loaiza, eds., Instituto Interamericano de Derechos Humanos, IIDH, San José, 1994). Available at: http://www.iidh.ed.cr/comunidades/diversidades/docs/div_docpublicaciones/la%20proteccion.pdf.

8 Manuel Ventura-Robles, *Jurisprudencia de la Corte Interamericana de Derechos Humanos en materia de derechos económicos, sociales y culturales*, 40 *Revista Instituto Interamericano de Derechos Humanos*, *Revista IIDH*, 87-131, 88 (julio-diciembre 2004). Available at: <http://www.juridicas.unam.mx/publica/librev/rev/iidh/cont/40/pr/pr6.pdf>.

9 Asbjørn Eide & Allan Rosas, *Economic, Social and Cultural Rights: A Universal Challenge*, in *Economic Social and Cultural Rights*, 3-7, 3 (Asbjørn Eide, Catarina Krause & Allan Rosas, eds., Martinus Nijhoff Publishers, Dordrecht, 2001).

After the adoption of two different conventions for the protection of indivisible and interrelated human rights, two distinctive regimes were also created at the universal level. Even though both regimes lacked a judicial organ that could issue binding decisions regarding States Parties to the Covenants, the protection of economic, social and cultural rights did not even have a particular Committee until 1985, when the Economic and Social Council created such organ.¹⁰ Furthermore, it was as recently as 2008 that the General Assembly adopted a Protocol to the original Covenant that will allow the Committee to consider individual complaints when entry into force.¹¹

B. The American version of the same story

The Organization of American States, created in 1948, established the framework for the development of the IAHRs, a regional regime aimed at the protection of human rights in the Americas. Nevertheless, it was not until the entry into force of the American Convention on Human Rights in 1978 when the current structure of the IAHRs was shaped, setting up two main organs: a Commission, which was already an organ of the Organization of American States, OAS, and a Tribunal.¹²

According to the American Convention, the Commission can examine individual petitions and make recommendation to the States regarding them.¹³ However, the Court has understood that the recommendations issued by the Commission are not to be considered binding for the States, as they lack the character of judicial decision for which the failure to comply generates

10 Economic and Social Council Res. 17, UN Doc. E/1985/17 (28 May 1985). Available at: <http://www2.ohchr.org/english/bodies/cescr/>.

11 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. The General Assembly adopted resolution A/RES/63/117, on 10 December 2008. Available at: http://www2.ohchr.org/english/law/docs/A.RES.63.117_en.pdf.

12 American Convention on Human Rights, Nov. 22, 1969, *OAS Treaty Series, OASTS* No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention]. Available at: http://www.hrcr.org/docs/American_Convention/oashr4.html.

13 American Convention, arts. 44-50. Available at: http://www.hrcr.org/docs/American_Convention/oashr4.html.

international responsibility.¹⁴ Nonetheless, this opinion was later attenuated, when the Tribunal stated that State Parties to the American Convention have an obligation to make every effort to comply with the Commission's recommendations.¹⁵

On the other hand, if the States do not comply with the Commission's recommendations, this organ has the ability to submit the case to the Inter-American Court, provided that the State involved had ratified the Convention and expressed its consent to be subject to the competence of the Tribunal.¹⁶ The rulings of the Court, establishing a human rights' violation and the measures to be adopted in consequence,¹⁷ are undoubtedly compulsive. That is the international duty assumed by States when ratifying the American Convention.¹⁸ In fact, the compulsory force of the decisions of human rights tribunals is the most essential difference between the regional protection regimes and the one created within the UN.

Moreover, nowadays the competence of the Court is not limited to the analysis of the violation of the American Convention on Human Rights,¹⁹ but it also covers the abridgment of obligations assumed by the States Parties to the Inter-American Convention to Prevent and Punish Torture,²⁰ the Inter-American Conven-

14 *Case of Caballero-Delgado and Santana v. Colombia*, Inter-American Court of Human Rights (ser. C) No. 22, ¶ 67 (8 Dec. 1995).

Case of Genie-Lacayo v. Nicaragua, Inter-American Court of Human Rights (ser. C) No. 30, ¶ 93 (29 Jan. 1997).

15 *Case of Loayza-Tamayo v. Peru*, Inter-American Court of Human Rights (ser. C) No. 33, ¶¶ 80-81 (17 Sept. 1997).

16 American Convention, art. 51. Available at: http://www.hrcr.org/docs/American_Convention/oashr4.html.

17 American Convention, art. 63.1. Available at: http://www.hrcr.org/docs/American_Convention/oashr4.html.

18 American Convention, art. 68.1. Available at: http://www.hrcr.org/docs/American_Convention/oashr4.html.

19 *Case of Las Palmeras v. Colombia*, Inter-American Court of Human Rights (ser. C) No. 67, ¶ 62 (4 Feb. 2000).

20 Inter-American Convention to Prevent and Punish Torture, adopted at Cartagena de Indias, Colombia, on December 9, 1985, at the fifteenth regular session of the General Assembly, Sept. 12, 1985, *OASTreaty Series*, *OASTS* No. 67. Available at: <http://www.oas.org/juridico/english/treaties/a-51.html>.

Even though this Convention does not establish the jurisdiction of the Court, the Tribunal itself has decided its competence to adopt decisions regarding its violation. *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala*, Inter-American Court of Human Rights (ser. C) No. 63, ¶¶ 247-252 (19 Nov. 1999).

tion on Forced Disappearance of Persons;²¹ the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women;²² and the Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, “Protocol of San Salvador”, PSS.²³

However, the IAHRs did not constitute an exception regarding the protection of ESR. When the American Convention was under elaboration, the recognition of those rights was discussed and deliberately left aside. As judge Ventura-Robles affirmed, several projects proposed the inclusion of ESR in the text of the treaty,²⁴ which makes it easy to realize it was not the case of an “*honest mistake*”. Consequently, even though the American Declaration of 1948 had already acknowledged ESR,²⁵ the Convention has no explicit recognition of them.

Therefore, the American Convention ended up being a treaty on civil and political rights with only one article regarding ESR, which states: “*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, educa-*

21 Inter-American Convention on Forced Disappearance of Persons, adopted at Belém do Pará, Brazil, on 9 June 1994, at the twenty fourth regular session of the General Assembly of the OAS, art. XIII, Sept. 6, 1994, 33 *International Legal Materials*, ILM 1429. Available at: <http://www.oas.org/juridico/english/treaties/a-60.html>.

22 Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, adopted at Belém do Pará, Brazil, on 9 June 1994, at the twenty fourth regular session of the General Assembly of the OAS, Sept. 6 1994, 33 *International Legal Materials*, ILM 1534. Available at: <http://www.oas.org/juridico/english/sigs/a-61.html>. However, regarding this treaty the Court only has jurisdiction to decide the violation of article 7, according to the limitation established in article 12.

23 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, “Protocol of San Salvador”, adopted at San Salvador, El Salvador on November 17, 1988, at the eighteenth regular session of the General Assembly, *OAS Treaty Series*, OASTS No. 69 [hereinafter American Convention Protocol]. Available at: <http://www.cidh.oas.org/Basicos/English/Basic6.Prot.Sn%20Salv%20Ratif.htm>.

24 Manuel Ventura-Robles, *Jurisprudencia de la Corte Interamericana de Derechos Humanos en materia de derechos económicos, sociales y culturales*, 40 *Revista Instituto Interamericano de Derechos Humanos, Revista IIDH*, 87-131, 93-100 (julio-diciembre 2004). Available at: <http://www.juridicas.unam.mx/publica/librev/rev/iidh/cont/40/pr/pr6.pdf>.

25 American Declaration of the Rights and Duties of Man, articles XI, XII, XIV and XVI, *OAS Official Records*, OEA/Ser.L./V/II.23, doc. 21 rev. 6 (1948). Available at: <http://www.cidh.oas.org/Basicos/English/Basic2.American%20Declaration.htm>.

tional, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires."²⁶

It took the IAHRs over twenty years to have a treaty on ESR into force, the mentioned PSS, which recognized several ESR, such as the right to work; the right to organize and join trade unions; the right to social security; the right to health; the right to a healthy environment; the right to food; and the right to education.²⁷ However, this Protocol was quite restrictive regarding the judiciable character of these rights within the IAHRs. It contemplated a double monitoring procedure; concerning the whole range of recognized rights there is a mechanism of reports submission by the State Parties concerning the adoption of progressive measures. On the other hand, according to article nineteen, the PSS only allows the judicial protection within the IAHRs of the rights of workers to organize and join trade union, and the right to education.

From a legal perspective, it could be said that the only real improvements obtained with the PSS are the recognition of the right to a healthy environment as a human right, and the explicit possibility of bringing a case in front of the Inter-American Court, regarding the right to education or concerning trade unions. Far from being a pessimistic view of the PSS, the foundation of this perspective is based on the opinion that when the PSS entered into force, the American Declaration had already established binding obligations regarding most human rights recognized in the Protocol. Even though the Declaration was originally a *soft law* instrument, its binding character appears as undeniable for every OAS Member State, as the Inter-American Court affirmed it in the year 1989.²⁸

26 American Convention, art. 26. Available at: http://www.hrcr.org/docs/American_Convention/oashr4.html.

27 American Convention Protocol, articles 6 to 13. Available at: <http://www.cidh.oas.org/Basicos/English/Basic6.Prot.Sn%20Salv%20Ratif.htm>.

28 *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 OC-10/89 of July 14, 1989. Ser. A No 10, ¶¶ 43-47. Available at: www.iidh.ed.cr/BibliotecaWeb/Varios/Documentos/BD_1051382564/AI_10.DOC.

Therefore, it has to be recognized that every Member State of the OAS is actually bound by international obligations to protect and ensure ESR. Moreover, the Inter-American Commission can issue recommendations regarding the violation of the ESR recognized in the Declaration, and has actually done so in several occasions.²⁹ Nonetheless, when the Commission has submitted cases to the Court alleging the violation of the Declaration, the Tribunal found itself lacking jurisdiction to rule on that matter, limiting its decision to the rights also protected by the American Convention. Even though in the year 2002 the reasons given by the Tribunal for not applying the Declaration may have appeared to be founded in a *ratione temporis* limitation,³⁰ the Tribunal has recently been clear regarding its lack of competence to establish a violation of the Declaration.³¹

Overall, it could be affirmed that every Member State of the OAS is under the obligation to protect ESR, due to the binding character of the American Declaration. However, the Court has denied having jurisdiction to analyze such obligation in a contentious case. On the other hand, for the States Parties to the PSS it is evident that the Tribunal could issue compulsive decisions

29 The Commission has studied the conditions of ESR in several country reports and it has also decided the violation of ESR recognized by the Declaration in different individual cases. *Seventh Report on the Situation of Human Rights in Cuba*, Inter-American Commission of Human Rights, OEA/Ser.L/V/II.61, doc. 29 rev. 1 (1983). Available at: <http://www.cidh.oas.org/countryrep/Cuba83sp/indice.htm>.

Fourth Report on the Situation of Human Rights in Guatemala, Inter-American Commission of Human Rights, OEA/Ser.L/V/II.83, doc. 16 (1993). Available at: <http://www.acnur.org/biblioteca/pdf/4391.pdf?view=1>.

Third Report on the Situation of Human Rights in Paraguay, Inter-American Commission of Human Rights, OEA/Ser. L/V/II.110, doc. 52 (2001). Available at: <http://www.cidh.oas.org/countryrep/Paraguay01eng/TOC.htm>.

Case 4402 (Cuba), Inter-American Commission of Human Rights, Report No 45/81, OEA/Ser.L/V/II.54, doc. 9 rev.1 (1980-1981). Available at: <http://www.cidh.oas.org/annualrep/80.81eng/Cuba4402.htm>.

Case 2300 (Cuba), Inter-American Commission of Human Rights, Report No. 2/82, OEA/Ser.L/V/II.57, doc. 6 rev.1 (1981-1982). Available at: <http://www.cidh.oas.org/annualrep/81.82eng/Cuba2300.htm>.

Case 7615 (Brazil), Inter-American Commission of Human Rights, Report No. 12/85, OEA/Ser.L/V/II.66, doc. 10 rev.1 (1985). Available at: <http://www.cidh.oas.org/annualrep/84.85eng/brazil7615.htm>.

30 *Case of Cantos v. Argentina*, Inter-American Court of Human Rights (ser. C) No. 97, ¶ 48 (28 Nov. 2002).

31 *Case of Bueno-Alves v. Argentina*, Inter-American Court of Human Rights (ser. C) No. 164, ¶¶ 59-60 (11 May 2007).

in cases where the alleged violation concerns either the right to join trade unions or the right to education. Nevertheless, the next section of this paper will propose other strategies to obtain judicial protection for ESR, through the use of the American Convention, which would be applicable for every State Party of the Convention that have accepted the jurisdiction of the Court.

II. POSSIBLE STRATEGIES WITHIN THE IAHRHS

A. The progressive development of ESR

As it has been said, the only explicit obligation regarding ESR that the American Convention imposed on States Parties refers to the progressive realization of such rights. However, article twenty-six of the Convention is far from being clear regarding the rights protected thereby and the obligations assumed by the States. Concerning the protected rights, the article does not even mention them but refers to those implicit in the OAS Charter.³² The multiple possible interpretations of this statement has allowed Verónica Gómez to affirm that States Parties have only acknowledged two rights, the rights to work and to education.³³ On the other hand, a much promising understanding is proposed by Christian Curtis, who argued that not only those rights could be identified in the Charter, but also the rights to social

32 Charter of the Organization of American States, as amended by the Protocol of Amendment to the Charter of the Organization of American States "Protocol of Buenos Aires", signed on February 27, 1967, at the Third Special Inter-American Conference; by the Protocol of Amendment to the Charter of the Organization of American States "Protocol of Cartagena de Indias", approved on December 5, 1985, at the Fourteenth Special Session of the General Assembly; by the Protocol of Amendment to the Charter of the Organization of American States "Protocol of Washington", approved on December 14, 1992, at the Sixteenth Special Session of the General Assembly; and by the Protocol of Amendment to the Charter of the Organization of American States "Protocol of Managua", adopted on June 10, 1993, at the Nineteenth Special Session of the General Assembly. Available at: http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.htm.

33 Verónica Gómez, *Economic, Social, and Cultural Rights in the Inter-American System*, in *Economic, Social and Cultural Rights in Action*, 167-194, 170 (Mashood Baderin & Robert McCorquodale, eds., Oxford University Press, New York, 2007).

security; housing rights; the right to food; the right to health; and also cultural and consumer rights.³⁴

Even though this last mentioned interpretation offers a useful understanding of the rights subject to the protection of article twenty-six, the specific obligations assumed thereby are also unclear. Nonetheless, the work of the Inter-American Commission has been valuable for obtaining certain clarifications. This organ has expressed that even if the article did not enumerate specific measures to implement ESR, it stated a legal obligation to adopt progressive measures to advance constantly and consistently towards the full realization of these rights.³⁵ Another clarification made by the Commission illustrated that the progressive nature of the measures to be taken does not mean that such adoption could be postponed indefinitely, but the process to achieve the full realization of ESR should begin immediately.³⁶

Finally, the Commission, referred to the progressive character that must be achieved by the adopted measures. The organ stated that the adoption of regressive measures was clearly prohibited by the Convention,³⁷ and that a worsening of the effective observance of ESR would possibly constitute a violation of the obligation assumed by the States.³⁸ As it can be seen, the Commission adopted standards that were established by the Committee on Economic, Social and Cultural Rights regarding a similar prescription on progressive realization of ESR included

34 Christian Courtis, *La protección de los derechos económicos, sociales y culturales a través del artículo 26 de la Convención Americana sobre Derechos Humanos*, in *La ciencia del derecho procesal constitucional*, 361-438, 371-391 (Eduardo Ferrer-MacGregor & Arturo Zaldívar-Lelo de Larrea, eds., Universidad Nacional Autónoma de México, UNAM, Mexico, 2008). Available at: <http://www.bibliojuridica.org/libros/6/2562/20.pdf>.

35 *Report on the Situation of Human Rights in Ecuador*, Inter-American Commission of Human Rights, OEA/Ser.L/V/II.96, doc. 10 rev. 1, 23 (1997). Available at: <http://www.cidh.oas.org/countryrep/ecuador-eng/index%20-%20ecuador.htm>.

36 *Third Report on the Situation of Human Rights in Colombia*, Inter-American Commission of Human Rights, OEA/Ser.L/V/II.102, Doc. 9 rev. 1, ¶ 6 (1999). Available at: <http://www.cidh.oas.org/countryrep/colom99en/table%20of%20contents.htm>.

37 *Jorge Odir Miranda-Cortez et al. v. El Salvador*, Case 12.249, Inter-American Commission of Human Rights, Report No. 27/09, OEA/Ser.L/V/II., doc. 51 rev.1, ¶ 106 (2009). Available at: <http://www.cidh.oas.org/annualrep/2009eng/ElSalvador12249eng.htm>.

38 *Second Report on the Situation of Human Rights in Peru*, Inter-American Commission of Human Rights, OEA/Ser.L/V/II.106, Doc. 59, ¶ 11 (2000). Available at: <http://www.cidh.org/countryrep/Peru2000en/TOC.htm>.

in the International Covenant on Economic, Social and Cultural Rights, ICESCR.³⁹

On the other hand, there is a particular situation concerning article twenty-six that has not attracted much attention from the Commission, the Court or the authors. It has to be noted that the text of the article has a substantial difference between its Spanish and English version. While, the Spanish text shows a prescription similar to the one of the ICESCR, stating that the measures to be adopted would be subject to the availability of resources, this phrase is absent in the English version.⁴⁰ This situation would allow different interpretations of the article, since the validity of alleging scarce resources as a reason for not complying with the progressive development of ESR, would depend on the version of the text under analysis.⁴¹

Nevertheless, this paper would not analyze this particularity in-depth, because the existence of resources would not state a different standard regarding the judiciable character of ESR, since this type of evaluation appears as a difficult task for a judicial organ like the Court. However, it is worth remembering that the Tribunal has stated that when different treaties apply to the same situation, the rule most favourable for the individual

39 International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force on 3 January 1976. Available at: <http://www2.ohchr.org/english/law/cescr.htm>.

General Comment No. 3, U.N. Doc. E/1991/23, ¶¶ 1, 2 and 9 (1990). Available at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/94bdbaf59b43a424c12563ed0052b664?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664?Opendocument).

40 The English translation of the Spanish version could be read as: *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, [subject to available resources], 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.*

41 Regarding the Spanish version, Christian Courtis, *La protección de los derechos económicos, sociales y culturales a través del artículo 26 de la Convención Americana sobre Derechos Humanos*, in *La ciencia del derecho procesal constitucional*, 361-438, 418 (Eduardo Ferrer-MacGregor & Arturo Zaldivar-Lelo de Larrea, eds., Universidad Nacional Autónoma de México, UNAM, Mexico, 2008). Available at: <http://www.bibliojuridica.org/libros/6/2562/20.pdf>.

As to the interpretation of the English text, Matthew Craven, *The Protection of Economic, Social and Cultural Rights under the inter-American System of Human Rights*, in *The Inter-American System of Human Rights*, 289-323, 298-299 (David Harris & Stephen Livingstone, eds., Clarendon Press, Oxford, 1998).

must prevail.⁴² Consequently, if that is the correct interpretation with confronting treaties, the same should be established with different interpretations of the same treaty. Therefore, it could be inferred that scarce resources should not stand as a valid argument before the Court.

Regarding the interpretation of article twenty-six made by the Inter-American Court, it has to be highlighted that up to the end of the year 2010, the Tribunal has never declared a violation of this article.⁴³ The Court has used this prescription for the interpretation of the right to life in a particular case;⁴⁴ it has refused to analyze the violation of this prescription when alleged by the Commission or the victims, in different cases;⁴⁵ and it has studied the article itself in just two cases, but to state that there has not been a violation.⁴⁶ Nonetheless, these last mentioned cases deserve special attention, as they have been the only two opportunities when the Tribunal has elaborated on the interpretation of this article.

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- 42 *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*. Advisory Opinion OC-5/85, Inter-American Court of Human Rights (ser. A) No 5, ¶ 52 (13 Nov. 1985). Available at: http://www.iidh.ed.cr/BibliotecaWeb/Varios/Documentos/BD_1051382564/AI_05.DOC.
- 43 On the other hand, the Commission did find violations of article 26. In a well-known case concerning Nicaragua, this organ declared that the arbitrary dismissal of 142 workers from the customs agency was an abridgement of article 26. However, the Commission did not analyze in-depth how the standards of article 26 had been violated. *Milton García-Fajardo et al. v. Nicaragua*, Case 11.381, Inter-American Commission of Human Rights, Report No. 100/01, OEA/Ser.L/V/II.114, Doc.5 rev.1 at 95 (2001). Available at: <http://www.cidh.oas.org/annualrep/2001eng/Nicaragua11381.htm>.
- 44 *Case of the Yakye Axa Indigenous Community v. Paraguay*, Inter-American Court of Human Rights (ser. C) No. 125, ¶ 163 (17 Jun. 2005).
- 45 *Case of the "Juvenile Reeducation Institute" v. Paraguay*, Inter-American Court of Human Rights (ser. C) No. 112, ¶ 255 (2 Sept. 2004).
Case of Acevedo-Jaramillo et al. v. Peru, Inter-American Court of Human Rights (ser. C) No. 144, ¶ 285 (7 Feb. 2006).
Case of the Dismissed Congressional Employees (Aguado-Alfaro et al.) v. Peru, Inter-American Court of Human Rights (ser. C) No. 158, ¶ 136 (24 Nov. 2006). However, in the last cited case, Judge Cançado-Trindade (separate opinion, ¶ 7) stated that he considered unsatisfactory the denial of the Court to analyze a violation to article 26, expressing that all human rights were promptly and immediately demandable and judiciable.
- 46 *Case of the "Five Pensioners" v. Peru*, Inter-American Court of Human Rights (ser. C) No. 98, ¶¶ 147-148 (28 Feb. 2003).
Case of Acevedo-Buendía et al. ("discharged and Retired Employees of the Office of the Comptroller") v. Peru, Inter-American Court of Human Rights (ser. C) No. 198, ¶ 106 (6 Jul. 2009).

Firstly, in the “*Five Pensioners*” case,⁴⁷ the Tribunal declared that economic, social and cultural rights have both an individual and a collective dimension. However, it stated that its progressive development should be measured concerning the entire population and not a limited group of individuals. This ruling of the Court has raised a number of criticisms, leaving serious doubts regarding the possibility of obtaining judicial protection of ESR within the IAHRS.⁴⁸ Nevertheless, even if the Court has said that the evaluation of the standard of progressive development has to be done over the entire population, it would not be impossible for the Tribunal to study a general public policy, as it has already done with general laws or even constitutional clauses.⁴⁹

On the other hand, in the most recent “*Discharged and Retired Employees of the Comptroller*” case,⁵⁰ the Tribunal finally stated that the progressive character of a policy should be measured in relation to the whole group of ESR, instead of regarding the entire population.⁵¹ Moreover, it has declared that the States are

47 The case was about former public servants whose pensions had been diminished through an amendment of the legislation. Even though the petitioners obtained favourable decisions from the domestic courts, the State refused to fully comply with those rulings. Therefore, the Court found a violation of the rights to property and to judicial protection, but it refused to declare the abridgement of article 26.

48 Christian Courtis, *La protección de los derechos económicos, sociales y culturales a través del artículo 26 de la Convención Americana sobre Derechos Humanos*, in *La ciencia del derecho procesal constitucional*, 361-438, 421-423 (Eduardo Ferrer-MacGregor & Arturo Zaldívar-Lelo de Larrea, eds., Universidad Nacional Autónoma de México, UNAM, Mexico, 2008). Available at: <http://www.bibliojuridica.org/libros/6/2562/20.pdf>.

Fabián Salvioli, *La protección de los derechos económicos, sociales y culturales en el Sistema Interamericano de Derechos Humanos*, 39 *Revista Instituto Interamericano de Derechos Humanos*, *Revista IIDH*, 101-167 (enero-julio 2004). Available at: <http://www.juridicas.unam.mx/publica/librev/rev/iidh/cont/39/pr/pr6.pdf>.

Case of the “Five Pensioners” v. Peru, Inter-American Court of Human Rights (ser. C) No. 98, ¶¶ 147-148 (28 Feb. 2003). Reasoned opinion of judge Roux Rengifo. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_98_ing.pdf.

49 *Case of Suárez-Rosero v. Ecuador*, Inter-American Court of Human Rights (ser. C) No. 35, operative paragraph 5 (12 Nov. 1997).

Case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile, Inter-American Court of Human Rights (ser. C) No. 73, operative paragraph 4 (5 Feb. 2001).

Case of Caesar v. Trinidad and Tobago, Inter-American Court of Human Rights (ser. C) No. 73, operative paragraph 4 (11 Mar. 2005).

50 In this case, the State refused to comply with judicial rulings ordering the reimbursement of pensions payments owed to former public servants. The Court found a violation of the rights to property and to judicial protection, but it refused to declare the abridgement of article 26.

51 *Case of Acevedo-Buendía et al. (“discharged and Retired Employees of the Office of the Comptroller”) v. Peru*, Inter-American Court of Human Rights (ser. C) No. 198, ¶ 102 (6 Jul. 2009).

under the positive obligation of adopting measures in order to guarantee the satisfaction of ESR, but this obligation was considered to be subject to the economic and financial resources of the States.⁵² Lastly, the Tribunal clearly affirmed the judiciable character of ESR by confirming that it is competent to analyze whether the policies adopted by the States are in conformity with the principle of progressive protection of ESR.⁵³

Nonetheless, this huge step forward of the Court had specific downsides. Firstly, the Tribunal decided to understand the standard of progressive protection in a limited way. The Court interpreted this standard as only prohibiting the adoption of regressive measures, following a similar understanding to the one adopted by the Commission. Therefore, it could be said that the Tribunal missed an important opportunity to establish that the principle of progressive development is not just about prohibiting regressive measures, but it also creates an actual obligation to a continued improvement of the protection of ESR.

Secondly, the Court affirmed that the obligation of adopting measures was subject to the availability of resources. Nevertheless, as it has been said before, this interpretation is correct according to the Spanish version of the Convention, but it limits the understanding of the English text. Therefore, it seems inconvenient that the Tribunal has opted for the restricted possible interpretation, which could be analyzed to contradict the prevalence of the rule most favourable for the individual.

However, the lesson to be drawn is the possibility of protecting ESR through the IAHRs. On the one hand, the protected rights could be seen as the ones expressed by Christian Courtis. On the other hand, at the very least a non-regressive protection of ESR is a clear obligation assumed by the States. Consequently, the most obvious scenario would regard a regressive policy adopted

52 *Case of Acevedo-Buendía et al. ("discharged and Retired Employees of the Office of the Comptroller") v. Peru*, Inter-American Court of Human Rights (ser. C) No. 198, ¶ 102 and 105 (6 Jul. 2009).

53 *Case of Acevedo-Buendía et al. ("discharged and Retired Employees of the Office of the Comptroller") v. Peru*, Inter-American Court of Human Rights (ser. C) No. 198, ¶ 103 (6 Jul. 2009).

by the States concerning the protection of ESR, in such a case it would be evident that there is a violation of article twenty-six that could be decided by the Tribunal. Furthermore, a key to future pronouncements on this issue is the continued allegation of the violation of ESR by the Commission and the victims, which could set the ground for ulterior progress on the extension of the standard.

Lastly, it could be said that a proper understanding of the standard of progressive development is not only applicable to State policies, but it could also be considered to bind the Court itself.⁵⁴ It could be proposed that a legal reason for this statement is based on the fact that it is the Tribunal the organ monitoring States' compliance with this standard; therefore, it would be only logical to request it to issue decisions with improving standards. In other words, if the standards established by the Tribunal could be seen as less progressive than those stated in previous judgments, regressive State policies would be allowed. Therefore, the appropriate path in order to secure the progressive development of ESR would be to consider the Court itself to be bound by the standard of article twenty-six.

B. The judicial protection of the right to work

As it has been said, the Court cannot establish a violation of the right to work itself, since it is not recognized within the American Convention and it has been left aside the judicial procedure of the PSS. However, the right to work has gained certain judiciable character within the System, mainly through the rights to a fair trial and to judicial protection, which could be used to protect workers from arbitrary dismissal.

54 *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, Inter-American Court of Human Rights (ser. C) No. 146, separate opinion of Judge Cançado-Trindade ¶ 71 (29 Mar. 2006).

Fabián Salvioli, *La protección de los derechos económicos, sociales y culturales en el Sistema Interamericano de Derechos Humanos*, 39 *Revista Instituto Interamericano de Derechos Humanos, Revista IIDH*, 101-167, 166 (enero-julio 2004). Available at: <http://www.juridicas.unam.mx/publica/librev/rev/iidh/cont/39/pr/pr6.pdf>.

In the cases “*Baena*”,⁵⁵ “*Acevedo-Jaramillo*”⁵⁶ and “*Aguado-Alfaro*”,⁵⁷ the Court granted judicial protection for public workers dismissed by the State, showing a path that could be followed within the System. Even though the facts of each case were different, the standard established by the Court refers to the right of individuals to seek judicial protection in the case of dismissal, as well as the obligation of the States to comply with the decision made by the domestic tribunals. In other words, when public workers are dismissed they have the right to challenge that decision in court. Moreover, the States are under the obligation to comply with the judicial decision reinstating the workers, if it is so ordered.

On the other hand, a second path could be found in cases where a different arbitrary measure of the State is the cause for the dismissal from a public work. In two cases the Tribunal has ordered that individuals that were dismissed as a consequence of measures that violated human rights –arbitrary detentions in those opportunities–, should be reinstated in their jobs.⁵⁸

55 The case concerned 270 public workers arbitrarily dismissed after their participation in a public demonstration and a work stoppage. Furthermore, the victims could not find effective judicial protection within domestic courts due to the application of a retroactive law. The Inter-American Court found that both the arbitrary dismissal and the lack of judicial protection were violations of the rights to judicial guarantees and judicial protection. *Case of Baena, Ricardo et al. v. Panama*, Inter-American Court of Human Rights (ser. C) No. 72 (2 Feb. 2001).

56 The case regarded legislation that established regular assessment programs for workers in public offices. Due to the application of such norm a number of employees were fired by a local government, either for failing the examination or for refusing to take it, and even though domestic courts ordered their reinstatement, the rulings were not observed. Therefore, the Inter-American Court declared a violation of the right to judicial protection given the refusal to comply with the rulings of the domestic tribunals. *Case of Acevedo-Jaramillo et al. v. Peru*, Inter-American Court of Human Rights (ser. C) No. 144, ¶285 (7 Feb. 2006).

57 The case referred to the dismissal of 257 workers from the Peruvian Congress, following a decree-law that authorized a process to streamline the personnel of that organ. The workers tried unsuccessfully to obtain judicial protection, but the domestic courts ruled against their petition. The Inter-American Court found that the lack of effectiveness of the judicial organs was a violation of the rights to a fair trial and to judicial protection. However, the Tribunal did not order the reinstatement of the workers, but that an independent and impartial domestic body should have a final decision regarding whether the victims were dismissed in a justified manner. *Case of the Dismissed Congressional Employees (Aguado-Alfaro et al.) v. Peru*, Inter-American Court of Human Rights (ser. C) No. 158, ¶136 (24 Nov. 2006).

58 *Case of Loayza-Tamayo v. Peru*, Inter-American Court of Human Rights (ser. C) No. 42, operative paragraph 1 (27 Nov. 1998).
Case of De la Cruz-Flores v. Peru, Inter-American Court of Human Rights (ser. C) No. 115, operative paragraph 8 (18 Nov. 2004).

In sum, it has to be recognized that the protection of the right to work offered by the IAHRs is not wide. However, some strategies have been developed allowing certain degree of safeguard for public workers, when there has been an arbitrary measure adopted by the State that led to the dismissal. In those situations, the rights to a fair trial and to judicial protection seem to be a relatively successful guarantee to protect the right to work.⁵⁹

C. The right to health and the adequate protection of personal integrity

The Inter-American Court has transited a long way regarding the protection of individuals' health. Even though the provisions of the American Convention are quite restricted concerning this right, the expansion of the protection of the right to personal integrity—which comprises the respect of physical, mental and moral integrity—, could be seen as an essential tool for protecting the right to health.

Since the year 1998, the Tribunal started establishing that suffering and anguish caused by the State implied a violation of the right to personal integrity.⁶⁰ Even though this recognition was limited, it was an actual expansion of the protection given by the textual reading of the Convention.⁶¹ Related to this interpretation appeared the Court's orders to provide free medical, psychological and psychiatric treatment to victims of violations of human rights and their relatives—which are also considered victims within the System—.

59 Moreover, in 2007 the Commission approved a document which illustrates aspects of the access to justice for ESR. *Access to justice as a guarantee of economic, social and cultural rights. A review of the standards adopted by the Inter-American system of human rights*, Inter-American Commission of Human Rights, OEA/Ser.L/V/II.129, Doc. 4 (2007). Available at: <http://www.cidh.oas.org/countryrep/AccessoDESC07eng/Accessodescindice.eng.htm>.

60 *Case of Blake v. Guatemala*, Inter-American Court of Human Rights (ser. C) No. 36, ¶¶ 114-116 (24 Jan. 1998).

61 The Court stated that in the specific case of children deprived of their freedom, due to the right to personal integrity the States are under the obligation to provide adequate health care. *Case of the "Juvenile Reeducation Institute" v. Paraguay*, Inter-American Court of Human Rights (ser. C) No. 112, ¶ 161 (2 Sept. 2004).

In particular, it is interesting to note that since the year 2001, when these measures were ordered for the first time, it became usual for the Tribunal to include them in its rulings. It should be highlighted that, up to the end of the year 2009, the Court has issued a total of 114 rulings on reparations and thirty nine of those judgments established the obligation to provide the treatment under analysis.⁶² This means that over the third part of the

- 62 *Case of Barrios Altos v. Peru*, Inter-American Court of Human Rights (ser. C) No. 87, operative paragraph 3 (30 Nov. 2001).
Case of Cantoral-Benavides v. Peru, Inter-American Court of Human Rights (ser. C) No. 88, operative paragraph 8 (3 Dec. 2001).
Case of Durand and Ugarte v. Peru, Inter-American Court of Human Rights (ser. C) No. 89, operative paragraph 3 (3 Dec. 2001).
Case of the 19 Tradersmen v. Colombia, Inter-American Court of Human Rights (ser. C) No. 109, operative paragraph 9 (5 Jul. 2004).
Case of the "Juvenile Reeducation Institute" v. Paraguay, Inter-American Court of Human Rights (ser. C) No. 112, operative paragraph 12 (2 Sept. 2004).
Case of De la Cruz-Flores v. Peru, Inter-American Court of Human Rights (ser. C) No. 115, operative paragraph 5 (18 Nov. 2004).
Case of the Plan de Sánchez Massacre v. Guatemala, Inter-American Court of Human Rights (ser. C) No. 116, operative paragraph 7 (19 Nov. 2004).
Case of Lori Berenson-Mejía v. Peru, Inter-American Court of Human Rights (ser. C) No. 119, operative paragraph 4 (25 Nov. 2004).
Case of Serrano-Cruz Sisters v. El Salvador, Inter-American Court of Human Rights (ser. C) No. 120, operative paragraph 11 (1 Mar. 2005).
Case of Huilca-Tecse v. Peru, Inter-American Court of Human Rights (ser. C) No. 121, operative paragraph 1.g (3 Mar. 2005).
Case of Caesar v. Trinidad and Tobago, Inter-American Court of Human Rights (ser. C) No. 73, operative paragraph 2 (11 Mar. 2005).
Case of the Yakye Axa Indigenous Community v. Paraguay, Inter-American Court of Human Rights (ser. C) No. 125, ¶ 221 (17 Jun. 2005).
Case of Fermín Ramírez v. Guatemala, Inter-American Court of Human Rights (ser. C) No. 126, operative paragraph 11 (20 Jun. 2005).
Case of Gutiérrez-Soler v. Colombia, Inter-American Court of Human Rights (ser. C) No. 132, operative paragraph 2 (12 Sep. 2005).
Case of Raxcacó-Reyes v. Guatemala, Inter-American Court of Human Rights (ser. C) No. 133, operative paragraph 10 (15 Sep. 2005).
Case of the Mapiripán Massacre v. Colombia, Inter-American Court of Human Rights (ser. C) No. 134, operative paragraph 10 (15 Sep. 2005).
Case of Gómez-Palomino v. Peru, Inter-American Court of Human Rights (ser. C) No. 136, operative paragraph 10 (22 Nov. 2005).
Case of García-Asto and Ramírez-Rojas v. Peru, Inter-American Court of Human Rights (ser. C) No. 137, operative paragraph 11 (25 Nov. 2005).
Case of the Pueblo Bello Massacre v. Colombia, Inter-American Court of Human Rights (ser. C) No. 140, operative paragraph 11 (31 Jan. 2006).
Case of the Sawhoyamaxa Indigenous Community v. Paraguay, Inter-American Court of Human Rights (ser. C) No. 146, separate opinion of Judge Cançado-Trindade ¶ 230 (29 Mar. 2006).
Case of Baldeón-García v. Peru, Inter-American Court of Human Rights (ser. C) No. 147, operative paragraph 12 (6 Apr. 2006).
Case of the Ituango Massacres v. Colombia, Inter-American Court of Human Rights (ser. C) No. 148, operative paragraph 16 (1 Jul. 2006).

Court's judgments on reparations (34.21 percent), included the obligation to provide free health treatment has been ordered.

On the other hand, it was not until the year 2006 that the Tribunal pronounced a decision regarding actual health care issues.⁶³ The Court then stated that health is a public interest whose protection is an obligation of the States, which must regulate and supervise all activities related to health care, as a special duty to protect individuals' life and personal integrity in an effective manner.⁶⁴ Following these rulings, there appears

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- Case of Goiburú et al. v. Paraguay*, Inter-American Court of Human Rights (ser. C) No. 153, operative paragraph 9 (22 Sep. 2006).
Case of Vargas-Areco v. Paraguay, Inter-American Court of Human Rights (ser. C) No. 155, operative paragraph 12 (26 Sep. 2006).
Case of the Miguel Castro-Castro Prison v. Peru, Inter-American Court of Human Rights (ser. C) No. 160, operative paragraph 13 (25 Nov. 2006).
Case of La Cantuta v. Peru, Inter-American Court of Human Rights (ser. C) No. 162, operative paragraph 14 (29 Nov. 2006).
Case of the Rochela Massacre v. Colombia, Inter-American Court of Human Rights (ser. C) No. 163, operative paragraph 11 (11 May 2007).
Case of Escué-Zapata v. Colombia, Inter-American Court of Human Rights (ser. C) No. 165, operative paragraph 12 (4 Jul. 2007).
Case of Cantoral-Huamani and García-Santa Cruz v. Peru, Inter-American Court of Human Rights (ser. C) No. 167, operative paragraph 13 (10 Jul. 2007).
Case of García-Prieto et al. v. El Salvador, Inter-American Court of Human Rights (ser. C) No. 168, operative paragraph 7 (20 Nov. 2007).
Case of Heliodoro Portugal v. Panama, Inter-American Court of Human Rights (ser. C) No. 186, operative paragraph 15 (12 Aug. 2008).
Case of Bayarri v. Argentina, Inter-American Court of Human Rights (ser. C) No. 187, operative paragraph 9 (30 Oct. 2008).
Case of Ticona-Estrada et al. v. Bolivia, Inter-American Court of Human Rights (ser. C) No. 191, operative paragraph 14 (27 Nov. 2008).
Case of Valle-Jaramillo et al. v. Colombia, Inter-American Court of Human Rights (ser. C) No. 192, operative paragraph 18 (27 Nov. 2008).
Case of Kawas-Fernández v. Honduras, Inter-American Court of Human Rights (ser. C) No. 196, operative paragraph 13 (3 Apr. 2009).
Case of Anzualdo-Castro v. Peru, Inter-American Court of Human Rights (ser. C) No. 202, operative paragraph 13 (22 Sep. 2009).
Case of González et al. ("Cotton Field") v. Mexico, Inter-American Court of Human Rights (ser. C) No. 205, operative paragraph 24 (16 Nov. 2009).
Case of Radilla-Pacheco v. Mexico, Inter-American Court of Human Rights (ser. C) No. 209, operative paragraph 16 (23 Nov. 2009).
Case of the "Las Dos Erres" Massacre v. Guatemala, Inter-American Court of Human Rights (ser. C) No. 211, operative paragraph 16 (24 Nov. 2009).
63 *Case of Ximenes-Lopes v. Brazil*, Inter-American Court of Human Rights (ser. C) No. 149 (4 Jul. 2006).
Case of Albán-Cornejo et al. v. Ecuador, Inter-American Court of Human Rights (ser. C) No. 171 (22 Nov. 2007).
64 *Case of Ximenes-Lopes v. Brazil*, Inter-American Court of Human Rights (ser. C) No. 149, ¶ 89 (4 Jul. 2006).
Case of Albán-Cornejo et al. v. Ecuador, Inter-American Court of Human Rights (ser. C)

a strong possibility to protect the right to health as the needed path to assure the right to personal integrity of individuals. Paraphrasing, a serious breach of the State's duty to protect individuals' health could be presented within the IAHRs as a violation of the right to personal integrity.

Overall, it could be said there is an already consolidated jurisprudence regarding the obligation to provide medical, psychological or psychiatric assistance to victims of human rights violations attributable to the States. Furthermore, cases regarding individuals in need of health care should be presented to the Court, alleging the existence of an abridgement of the right to personal integrity. This strategy could possibly lead to the judicial recognition of the States' obligation to provide treatment, even when the cause of the affliction has not been caused directly by the States.

*D. The imperative prohibition of discrimination
regarding social security*

The mentioned cases of the “*Five Pensioners*” and the “*Discharged and Retired Employees of the Comptroller*” were certainly the most important pronouncement of the Tribunal regarding the right to social security. According to the Court's rulings on those cases, the protection of such right could be thought through the right to judicial protection. However, the prohibition of discrimination could also prove to be a strong tool for protecting the right to social security.

Within the Inter-American System, the principle of non-discrimination could be defined as the prohibition of differential treatment that does not obey to substantial factual differences or does not respect a relationship of proportionality between those differences and the aims of the distinction, which also cannot be unjust or unreasonable.⁶⁵ Furthermore, the importance of

No. 171, ¶ 121 (22 Nov. 2007).

⁶⁵ *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica*. Advisory Opinion OC-4/84, Inter-American Court of Human Rights (ser. A) No. 4,

this principle has been clearly highlighted within the IAHRs, as the Court has affirmed that the prohibition of discrimination belongs to the realm of *ius cogens*.⁶⁶

This principle would be easily applicable to the protection of every single human right,⁶⁷ but has special relevance for the protection of the right to social security, since domestic legislation regarding this subject usually establishes distinctions that could be seen as discriminatory. A particular case study that could illustrate this point concerns the right to obtain a pension after the death of a same-sex life partner, as two similar cases on the subject were evaluated by the Human Rights Committee. The Committee analyzed the cases under the clause of equal treatment before the law, stating that a distinction based on sexual orientation for providing a pension was an evident case of illegal discrimination.⁶⁸ These decisions reinforced the idea that the legislation of every State must comply with the prohibition

¶ 57 (19 Jan. 1984). Available at: www.iidh.ed.cr/BibliotecaWeb/Varios/Documentos/BD_1051382564/AI_04.DOC

- 66 *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03, Inter-American Court of Human Rights (ser. A) No. 18, ¶¶ 100-101 (17 Sep. 2003). Available at: http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf.
Case of Yatama v. Nicaragua, Inter-American Court of Human Rights (ser. C) No. 127, ¶¶ 184-185 (23 Jun. 2005).
Case of the Girls Yean and Bosico v. Dominican Republic, Inter-American Court of Human Rights (ser. C) No. 130, ¶ 141 (8 Sep. 2005).
- 67 The prohibition of discrimination has been also used by the Inter-American Commission to protect the right to work. In a particular case against Guatemala, the Commission analyzed its Civil Code which established that the right of married women to exercise a profession was subject to the absence of a prejudice to their responsibilities within the home, allowing their husbands to legally oppose such exercise. The Commission stated that such legislation denied women the equal right to seek employment. *María Eugenia Morales-de Sierra v. Guatemala*, Case 11.625, Inter-American Commission of Human Rights, Report No. 4/01, OEA/Ser./L/V/II.111, Doc.20 rev. (2001). Available at: <http://www.cidh.oas.org/women/Guatemala11.625eng.htm>.
- 68 *Mr. Edward Young v. Australia*, Communication No. 941/2000, U.N. Doc. CCPR/C/78/D/941/2000 (2003). Available at: <http://www.equalrightstrust.org/ertdocumentbank/Microsoft%20Word%20-%20Mr.%20Edward%20Young%20v.%20Austr.pdf>.
X v. Colombia, Communication No. 1361/2005, CCPR/C/89/D/1361/2005 (2007). Available at: <http://sim.law.uu.nl/SIM/CaseLaw/fulltextccpr.nsf/160f6e7f0fb318e8c1256d410033e0a1/1a2f8747dd3ec252c125732500422033?OpenDocument>.
 However, it is worrying that in the second cited case there was a discrepant opinion wrote by Abdelfattah Amor and Ahmed Tawfik Khalil, who argued that international law did not recognize the right to sexual orientation as a human right and that same-sex couples should not be considered a family.

of discrimination, in order to be compatible with the respect of human rights.

In sum, the use of the prohibition of discrimination could prove very helpful to protect the right to social security, since whether the legislation of a State is compatible with the principle of non-discrimination should be an easy analysis for the Court to make.

E. Environmental rights and the European Court case law

As it has been said, the recognition of the right to a healthy environment as a human right could be considered one of the most important features of the PSS.⁶⁹ However, the judicial protection of the environment seems to be still far from reality within the IAHRs,⁷⁰ while it has been quite successful within the Council of Europe.

An interesting option could be for the Inter-American Court to look at the work carried out by the European Court of Human Rights. In cases such as “*López-Ostra*”,⁷¹ “*Guerra*”,⁷² “*Taşkin*”,⁷³

69 American Convention Protocol, art. 11. Available at: <http://www.cidh.oas.org/Basicos/English/Basic6.Prot.Sn%20Salv%20Ratif.htm>.

70 Some notes have been written on the “*Mayagna*” case, concerning the deforestation of land traditionally belonging to an indigenous community, but the case was solved by the Court based on the right to property and its judicial protection. *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-American Court of Human Rights (ser. C) No. 79 (31 Aug. 2001).

Also the “*Claude Reyes*” case had an environmental background, but the decision was based on the right to access information, being anecdotic that the activity was related to a project with environmental impact. *Case of Claude-Reyes et al. v. Chile*, Inter-American Court of Human Rights (ser. C) No. 151 (19 Sep. 2006).

71 The case concerned the pollution caused by the noise and odors generated by a malfunctioning waste-treatment plant. *López-Ostra v. Spain*, European Court of Human Rights (ser. A) 303-C (1994).

72 The case was about the pollution resulting from the operation of a chemical factory, and the existent risk of a major accident. *Guerra v. Italy*, European Court of Human Rights, Reports of Judgments and Decisions 1998-I (1998).

73 The case referred to the environmental damage caused by the operation of a gold mine. *Taşkin and others v. Turkey*, European Court of Human Rights, Application No. 46117/99 (2004). Available at: <http://www.rimmrights.org/Documents/2005turkeytaskinandother.PDF>.

“*Fadeyeva*”,⁷⁴ and “*Giacomelli*”,⁷⁵ this last Tribunal has protected the right to a healthy environment through the right to private and family life. The European Court has established that severe environmental pollution may affect adversely the individuals’ right to private life, ordering through the guarantee of such right the protection of the environment.⁷⁶ Moreover, it was not considered needed for the pollution to be caused directly by the State, but the Tribunal has explicitly affirmed that State responsibility could also arise from the failure to properly regulate private-sector activities.⁷⁷

Therefore, it is proposed that a similar standard could be used within the IAHRs. In particular, since the European prescription that protects the right to private and family life has an almost equal prescription within the American Convention, establishing the right to privacy.⁷⁸ Nonetheless, up to the year

74 The case regarded the environmental pollution caused by the operation of a steel plant. *Fadeyeva v. Russia*, European Court of Human Rights, Application No. 55723/00 (2005). Available at: <http://sim.law.uu.nl/SIM/CaseLaw/hof.nsf/2422ec00f1ace923c1256681002b47f1/1258011436663dffcl257018004777d8?OpenDocument>.

75 The case dealt with the noise and harmful emissions of a waste-treatment plant. *Giacomelli v. Italy*, European Court of Human Rights, Application No. 59909/00 (2006). Available at: http://www.halat.pl/ECHR_Giacomelli_v_Italy.html.

76 *López-Ostra v. Spain*, European Court of Human Rights (ser. A) 303-C, ¶ 60. (1994). *Guerra v. Italy*, European Court of Human Rights, Reports of Judgments and Decisions 1998-I, ¶ 60 (1998).

Taşkın and others v. Turkey, European Court of Human Rights, Application No. 46117/99, ¶ 113 (2004). Available at: <http://www.rimrights.org/Documents/2005turkeytaskinandothers.PDF>.

Fadeyeva v. Russia, European Court of Human Rights, Application No. 55723/00, ¶ 70 (2005). Available at: <http://sim.law.uu.nl/SIM/CaseLaw/hof.nsf/2422ec00f1ace923c1256681002b47f1/1258011436663dffcl257018004777d8?OpenDocument>.

77 *Giacomelli v. Italy*. Judgment November 2, 2006, ¶ 78. Application no. 59909/00. Available at: http://www.halat.pl/ECHR_Giacomelli_v_Italy.html.

78 While the European Convention reads: “*Everyone has the right to respect for his private and family life, his home and his correspondence (...) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others*”. The American one establishes: “*No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence or of unlawful attacks on his honor or reputation (...) Everyone has the right to the protection of the law against such interference or attacks.*” Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and No. 14, done at Rome, Italy, 4 November 1950, art. 8, 213 UNTS 222. Available at: <http://conventions.coe.int/treaty/en/treaties/html/005.htm>. American Convention, art. 11. Available at: http://www.hrcr.org/docs/American_Convention/oashr4.html.

2011, the right to privacy has only been considered abridged by the Inter-American Court in seven cases, which were not related to environmental issues. The Tribunal has found a violation of article eleven when homes have been destroyed; for detentions without due warrants; for public dissemination of confidential conversations; when public figures were accused of committing crimes; and concerning rape victims –where the Court affirmed that this crime was not only a violation of private life, but it amounted to torture–.⁷⁹

Moreover, it has to be acknowledged that as recently as April 2009 the Inter-American Court has quoted three of the five mentioned European cases, but limiting their understanding to the importance of the link between the protection of the environment and the enjoyment of human rights.⁸⁰ Consequently, it seems difficult to imagine the proposed development to happen in the near future.

However, there is no actual reason for the Tribunal to inhibit itself from expanding the interpretation of the right to privacy, in order to protect the right to a healthy environment. Therefore, it is foreseeable that the Court might emulate its European pair. The submission of cases concerning the protection of the environment through the right to privacy, including the expert opinion of the European Tribunal, could be thought of a potential path to obtain judicial protection within the IAHRs.

79 *Case of the Ituango Massacres v. Colombia*, Inter-American Court of Human Rights (ser. C) No. 148, operative paragraph 16 (1 Jul. 2006).

Case of Escué-Zapata v. Colombia, Inter-American Court of Human Rights (ser. C) No. 165, operative paragraph 12 (4 Jul. 2007).

Case of Tristán-Donoso v. Panama, Inter-American Court of Human Rights (ser. C) No. 193 (27 Jan. 2009).

Case of Escher et al. v. Brazil, Inter-American Court of Human Rights (ser. C) No. 200 (6 Jul. 2009).

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Case of Rosendo Cantú and other v. Mexico, Inter-American Court of Human Rights (ser. C) No. 216 (31 Aug. 2010).

80 *Case of Kawas-Fernández v. Honduras*, Inter-American Court of Human Rights (ser. C) No. 196, operative paragraph 13, ¶ 148 (3 Apr. 2009).

F. The right to food and the conditions for an adequate life

The right to food was already recognized in the American Declaration,⁸¹ but it was not until the PSS that it appeared in an Inter-American treaty. Its realization within the system appears as possible, taking into account the broad interpretation of the right to life that has been used by the Court since the year 1999. According to this understanding, the right to life includes not only the prohibition of arbitrary deprivation of life, as it is established by article four of the American Convention, but also the right to not be prevented from the conditions that guarantee a dignified existence.⁸²

This broad interpretation of the right to life is concurrent with the hermeneutic principle stating that human rights treaties are live instruments that should be understood to the evolution of the living conditions.⁸³ It has led the Inter-American Court to declare that one of the obligations that the State must undertake is that of generating minimum living conditions that are compatible with the dignity of the human person.⁸⁴ Therefore, the Tribunal established that detriment to the right to food and access to clean water has a major impact on the right to a decent existence.⁸⁵

Even though it might seem that the Court has later restricted such interpretation,⁸⁶ it has been argued already that the different

81 It was acknowledged through an expressed clarification regarding the right to health. American Declaration, art. XI. Available at: <http://www.cidh.oas.org/Basicos/English/Basic2.American%20Declaration.htm>.

82 *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala*, Inter-American Court of Human Rights (ser. C) No. 63, ¶ 144 (19 Nov. 1999).

83 *The Right to Information on Consular Assistance. In the Framework of the Guarantees of the due Process of Law*. Advisory Opinion OC-16/99, Inter-American Court of Human Rights (ser. A) No. 16, ¶ 114 (1 Oct. 1999).

84 *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala*, Inter-American Court of Human Rights (ser. C) No. 63, ¶ 193 (19 Nov. 1999).

85 *Case of the Mayagna (Sumo) Awás Tingni Community v. Nicaragua*, Inter-American Court of Human Rights (ser. C) No. 79, ¶ 146 (31 Aug. 2001).

84 *Case of the Yakyé Axa Indigenous Community v. Paraguay*, Inter-American Court of Human Rights (ser. C) No. 125, ¶ 162 (17 Jun. 2005).

85 *Case of the Yakyé Axa Indigenous Community v. Paraguay*, Inter-American Court of Human Rights (ser. C) No. 125, ¶ 167 (17 Jun. 2005).

86 In a very similar case decided less than a year later, the Court partially modified its criteria.

standards established by the Tribunal should not be regressive, especially in the area of ESR. Consequently, there is a plausible path to obtain judicial protection from the Court, as it could be alleged that States failing to fulfil a minimum level regarding the right to food would also be abridging its obligation to generate living conditions compatible with human dignity.

The Court has already ordered to supply drinking water and sufficient quantity and quality of food to individuals living in conditions of extreme vulnerability.⁸⁷ Moreover, in August 2010, the Court has also analyzed positive measures that were adopted by a State, finding that the quantity and quality of the food and water provided were not enough to guarantee the average essential needs of an individual. Consequently, the Tribunal ruled that the State had violated the right to life of the individuals it was trying to protect.⁸⁸

In sum, States should be considered under the obligation to secure minimum living conditions to every individual within their jurisdiction.⁸⁹ Furthermore, both the absence of measures towards this end and the quality of the measures adopted, are subject to the Court's analysis under its wide interpretation of the right to life.

Case of the Sawhoyamaya Indigenous Community v. Paraguay, Inter-American Court of Human Rights (ser. C) No. 146, separate opinion of Judge Cançado-Trindade ¶ 230 (29 Mar. 2006). As judge Cançado-Trindade highlighted in its separate opinion (¶¶ 67-68), this second case implied an advance regarding the attribution of responsibility to the State for the death of members of the community. Nevertheless, concerning the general standard related to the right to life, a certain backslide might appear compared to the “*Yakye Axa*” case, as the Court stated that for positive obligations to arise there should be a situation posing an immediate and certain risk to the life of individuals (¶ 155).

87 *Case of the Yakye Axa Indigenous Community v. Paraguay*, Inter-American Court of Human Rights (ser. C) No. 125, ¶ 221 (17 Jun. 2005).

Case of the Sawhoyamaya Indigenous Community v. Paraguay, Inter-American Court of Human Rights (ser. C) No. 146, separate opinion of Judge Cançado-Trindade ¶ 230 (29 Mar. 2006).

88 *Case of the Xákmok Kásek Indigenous Community v. Paraguay*, Inter-American Court of Human Rights (ser. C) No. 214, ¶¶ 196, 200 and 217 (24 Aug. 2010).

89 In fact, Judge Cançado-Trindade has affirmed that chronic poverty should be considered a deprivation of all human rights. *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, Inter-American Court of Human Rights (ser. C) No. 146, separate opinion of Judge Cançado-Trindade ¶ 71 (29 Mar. 2006).

IV. CONCLUSIONS

In brief, this article has offered reasons to understand that even though the American States have decided to leave most ESR out of the judicial protection of the IAHRs, there exist different paths to obtain such protection. The strategies proposed hereby are not presented as the only existing ones, neither are they considered to be restricted to the right attached to them in each sub-section of the work. In fact, even though the standard of progressive development was the only one explained as a general clause that could be used for any economic or social right, the same was said regarding the prohibition of discrimination or the right to judicial protection.

These indirect strategies, consisting in the protection of one right through the extensive interpretation of another one, could be questioned as allowing the judicial protection of rights that were intentionally left aside of such protection by the States at the time of ratifying the PSS. Moreover, it could be thought that as a consequence of such extended obligations the States could decide to leave the System.

However, it cannot be forgotten that by ratifying the PSS or by the binding character of the American Declaration, the States are already obliged to comply with the protection of ESR. Therefore, no new obligation is being created, but these strategies are just another path to make States comply with international commitments that have been already assumed. On the other hand, only one State has decided to exit the IAHRs, namely Trinidad and Tobago in the year 1998, and its decision was not related with extended obligations imposed to that State by the Inter-American Court.⁹⁰

On the other hand, it should be highlighted that the Tribunal is responding to these strategies. This becomes clear in certain

90 The denunciation of Trinidad and Tobago was based on the particular interpretation that the length of the process within the IAHRs did not allow the State to apply the death penalty in a humane way. Notice to denounce the American Convention on Human Rights, 26 May 1998. Available at: <http://www.oas.org/juridico/English/signs/b-32.html>.

improvement of the interpretation of article twenty-six; by the fact that over a third of its rulings have ordered to give health treatment to the victims as a measure of reparation; and in the extensive understanding of the right to life within the System.

Evidently, there are still many steps to transit towards the full realization of ESR in the American Continent and it will be needed for the victims to continue petitioning the protection of ESR within the System. If the individuals become conscious that a progressive development of ESR is possible and keep using the IAHRs to fight for the realization of such rights, the standards will get improve. Particularly, because as it has been affirmed, the progressive protection of ESR is not only mandatory for the States, but also for the Tribunal in its rulings.

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