CONCURRING OPINION OF JUDGE EDUARDO FERRER MAC-GREGOR POISOT

CASE OF GONZALES LLUY ET AL. v. ECUADOR

JUDGMENT OF SEPTEMBER 1, 2015
(*Preliminary objections, merits, reparations and costs*)

Judges Roberto F. Caldas and Manuel E. Ventura Robles adhered to this Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot.

INTRODUCTION: THE RIGHT TO EDUCATION AND THE RIGHT TO HEALTH

1. This is the first case in the history of the Inter-American Court of Human Rights (hereinafter "the Court" or "the Inter-American Court") in which the Court declares the violation of a norm established in the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (hereinafter "Protocol of San Salvador").[1] Thus, in the case of *Gonzales Lluy et al.,* it declared the violation of the "right to education" established in Article 13 of the Protocol, taking into account that, when she was five years old, Talía Gabriela Gonzales Lluy was expelled from the kindergarten she attended because of her health status and because she was a person with HIV,[2] while the authorities asserted that Talía could exercise her right to education "by individualized distance education."[3]

2. The Inter-American Court concluded that the real and significant risk of infection that could endanger the health of Talía's companions was extremely limited. Following an assessment of the need for, and strict proportionality of, the measure, the Court emphasized that the measure chosen represented the most harmful and disproportionate option of all those available to achieve the aim of protecting the integrity of the other children in the educational establishment. The national authority also used abstract and stereotypical arguments to justify a decision that was extreme and unnecessary, so that the decision constituted discriminatory treatment against Talía. In addition – as I will examine in a subsequent section – the Court considered that the victim had suffered discrimination based on her condition as a person living with HIV, as a minor, as a woman, and as a person living in poverty; hence, for the first time, the Inter-American Court used the concept of "intersectionality" to analyze the discrimination.

3. In addition, in keeping with its previous case law concerning the obligation to regulate, supervise and monitor the provision of health service, the Inter-American Court declared the violation of Articles 4 and 5 of the American Convention with regard to the right to life and the right to personal integrity. In this case, the declaration of the violation of the "right to life" had the particularity of involving arguments that went far beyond the concept of "decent life" and entailed an analysis of extreme circumstances such as those of

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[1] Adopted in San Salvador, El Salvador, on November 17, 1988, at the eighteenth General Assembly of the Organization of American States ("OAS"), entering into force on November 16, 1999. To date, this Protocol is in force in 16 countries: Argentina, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname and Uruguay.

[2] The Third Contentious Administrative District Court declared the application for constitutional protection inadmissible considering that "there [was] a conflict of interests, between the individual rights and guarantees of [Talía] in relation to the interests of a group of students, a conflict that mean[t] that the societal or collective interests, such as the right to life, outweighed the right to education." *Cf.* para. 141 of this Judgment.

[3] Para. 144 of this Judgment.

this case, where the facts that gave rise to international responsibility are associated with a significant risk for the life of Talía Gonzales Lluy, a risk she will face throughout her life. The declaration of the State's responsibility took into account the particular context of vulnerability of the Lluy family and the specific conditions of Talía as a woman, a minor, a person living in poverty, and a person living with HIV.

4. I agree fully with the findings of the judgment. I issue this opinion because I consider it necessary to emphasize and examine further some elements of the case that I believe are fundamental for the development of the inter-American human rights system: (I) the concept of "intersectionality" in the discrimination (*paras. 5-12*); (II) the possibility of having dealt with the "right to health" directly and, eventually, having declared the violation of Article 26 of the American Convention (*paras. 13-17*), and (III) the need to continue advancing towards the full justiciability of economic, social, cultural and environmental rights under the inter-American system (*paras. 18-23*).

I. INTERSECTIONALITY OF DISCRIMINATION

5. The Inter-American Court considered that the State had violated the "right to education" contained in Article 13 of the Protocol of San Salvador,[4] in relation to Articles 19 (Rights of the Child) and 1(1) (Obligation to Respect Rights) of the American Convention to the detriment of Talía Gonzales Lluy, owing to the discrimination she suffered because of her condition of being a person living with HIV, a minor, a woman, and a person living in poverty.

6. For the first time, the Court used the concept of the "intersectionality" of discrimination as follows:

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[4] "Article 13: Right to education:

1. Everyone has the right to education.

2. The States Parties to this Protocol agree that education should be directed towards the full development of the human personality and human dignity and should strengthen respect for human rights, ideological pluralism, fundamental freedoms, justice and peace. They further agree that education ought to enable everyone to participate effectively in a democratic and pluralistic society and achieve a decent existence and should foster understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups and promote activities for the maintenance of peace.

3. The States Parties to this Protocol recognize that in order to achieve the full exercise of the right to education:

a. Primary education should be compulsory and accessible to all without cost;

b. Secondary education in its different forms, including technical and vocational secondary education, should be made generally available and accessible to all by every appropriate means, and in particular, by the progressive introduction of free education;

c. Higher education should be made equally accessible to all, on the basis of individual capacity, by every appropriate means, and in particular, by the progressive introduction of free education;

d. Basic education should be encouraged or intensified as far as possible for those persons who have not received or completed the whole cycle of primary instruction;

e. Programs of special education should be established for the handicapped, so as to provide special instruction and training to persons with physical disabilities or mental deficiencies.

4. In conformity with the domestic legislation of the States Parties, parents should have the right to select the type of education to be given to their children, provided that it conforms to the principles set forth above.

5. Nothing in this Protocol shall be interpreted as a restriction of the freedom of individuals and entities to establish and direct educational institutions in accordance with the domestic legislation of the States Parties."

> 290. The Court notes that, in Talía's case, numerous factors of vulnerability and risk of discrimination **intersected** that were associated with her condition as a minor, a female, a person living in poverty, and a person living with HIV. The discrimination experienced by Talía was caused not only by numerous factors, **but also arose from a specific form of discrimination that resulted from the intersection of those factors; in other words, if one of those factors had not existed, the discrimination would have been different**. Indeed, the poverty had an impact on the initial access to health care that was not of the best quality and that, to the contrary, resulted in the infection with HIV. The situation of poverty also had an impact on the difficulties to gain access to the education system and to lead a decent life. Subsequently, because she was a child with HIV, the obstacles that Talía suffered in access to education had a negative impact on her overall development, which is also a differentiated impact taking into account the role of education in overcoming gender stereotypes. As a child with HIV, she required greater support from the State to implement her life project. As a woman, Talía has described the dilemmas she feels as regards future maternity and her interaction in an intimate relationship, and has indicated that she has not had appropriate counseling. In sum, Talía's case illustrates that HIV-related stigmatization does not affect everyone in the same way and that the impact is more severe on members of vulnerable groups (bold added).

7. The concept of intersectionality allowed the Court to develop the Inter-American Court's case law on the scope of the principle of non-discrimination, taking into account that, in this case, multiple discrimination occurred based on the composite nature of the causes of the discrimination. Indeed, the discrimination against Talía was associated with factors such as the fact that she was a woman, a person with HIV, a person with a disability, a minor, and due to her socio-economic status. These aspects increased her vulnerability and exacerbated the harm she suffered. The intersection of these factors in a discrimination with specific characteristics constituted multiple discrimination that, in turn, constituted, intersectional discrimination. Nevertheless, not every multiple discrimination, is necessarily associated with intersectionality.

8. Indeed, with regard to multiple or composite discrimination, the United Nations Committee on Economic, Social and Cultural Rights has affirmed that "[s]ome individuals or groups of individuals face discrimination on more than one of the prohibited grounds […]. Such cumulative discrimination has a unique and specific impact on individuals and merits particular consideration and remedying."[5] In order to consider that discrimination is "multiple," several factors must exist that give rise to this discrimination. Thus, the Inter-American Convention on Protecting the Human Rights of Older Persons, adopted by the OAS General Assembly in June 2015, defines multiple discrimination as "[a]ny distinction, exclusion, or restriction toward an older person, based on two or more discrimination factors."[6]

9. Thus, the multiple aspect relates to the composite nature of the causes of discrimination. Determining the way in which, in some cases, these causes interact is a different aspect, and requires an assessment of whether they have a separate or a simultaneous impact.

10. Meanwhile, the intersectionality of discrimination not only describes a discrimination for different reasons, but also relates to a meeting or simultaneous concurrence of different reasons for discrimination. In other words, during the same event, discrimination occurs

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[5] United Nations Committee on Economic, Social and Cultural Rights. General comment No. 20, E/C.12/GC/20 of 2 July 2009, para. 17.

[6] Inter-American Convention on Protecting the Human Rights of Older Persons, adopted by the OAS General Assembly on June 15, 2015, article 2.

owing to the concurrence of two or more prohibited factors. This type of discrimination may have a synergetic effect that exceeds the simple sum of several forms of discrimination, or may activate a specific form of discrimination that only operates when several reasons for discrimination are combined. Not all multiple discrimination will be intersectional discrimination. Intersectionality relates to a meeting or simultaneous concurrence of different reasons for discrimination. This activates or underlines a discrimination that only occurs when the said reasons are combined.[7]

11. Thus, intersectional discrimination refers to multiple reasons or factors that interact to create a unique and distinct burden or risk of discrimination. Intersectionality is associated with two characteristics. First, the reasons or the factors are analytically inseparable because the experience of discrimination cannot be disaggregated into different reasons. The experience is transformed by the interaction. Second, intersectionality is associated with a different qualitative experiences, creating consequences for those affected in ways that are different from the consequences suffered by those who are subject to only one form of discrimination.[8] This approach is important because it underscores the particularities of the discrimination suffered by groups that, historically, have been discriminated against for more than one of the prohibited reasons established in various human rights treaties.

12. In sum, in this case, intersectionality is fundamental in order to understand the specific injustice of what occurred to Talía and to the Lluy family, which can only be understood in the context of the convergence of the different forms of discrimination that occurred. Intersectionality constitutes a different and unique harm, which is distinct from the discriminations assessed separately. None of the forms of discrimination assessed independently would explain the particularity and specificity of the harm suffered in the intersectional experience. In future, the Court could gradually define the scope of this approach, which will help to add a new dimension to the principle of non-discrimination in certain kinds of case.

II. THE POSSIBILITY THAT THE RIGHT TO HEALTH COULD HAVE BEEN APPROACHED DIRECTLY AND AUTONOMOUSLY (ARTICLES 26 AND 1(1) OF THE AMERICAN CONVENTION)

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[7] For further development of the legal doctrine on this issue, see: Aylward, Carol, "Intersectionality: Crossing the Theoretical and Praxis Divide," *Journal of Critical Race Inquiry*, Vol 1, No 1; and Góngora Mera, Manuel Eduardo, "*Derecho a la salud and discriminación interseccional: Una perspectiva judicial de experiencias latinoamericanas*," in Clérico, Laura, Ronconi, Liliana, and Aldao, Martín (eds.): *Tratado de Derecho a la Salud*, Buenos Aires, Abeledo Perrot, 2013, pp. 133-159.

[8] General Assembly of the United Nations. World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance. "The idea of 'intersectionality' seeks to capture both the structural and dynamic consequences of the interaction between two or more forms of discrimination or systems of subordination." "Whatever the type of intersectional discrimination, the consequence is that different forms of discrimination are more often than not experienced simultaneously by marginalized women." A/CONF.189/PC.3/5 of 27 July 2001, paras. 23 and 32. In this regard, the CEDAW Committee has recognized that "discrimination against women based on sex and gender is inextricably linked to other factos that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste, and sexual orientation and gender identity." United Nations Committee for the Elimination of Discrimination against Women. Views. *Comunication No. 17/2008, Alyne da Silva Pimentel Teixeira v. Brazil*. CEDAW/C/49/D/17/2008 of 27 September 2011, para. 7.7.

13. In a Concurring Opinion in the case of *Suárez Peralta v. Ecuador,*[9] I set out the reasons why I consider that the "right to health" can be interpreted as a right admitting direct justiciability in the context of the provisions of Article 26 of the American Convention.

14. In the instant case, the pertinence of an analysis based on the "right to health" emerges with greater intensity. The Court has made some progress in this area by defining some specific aspects of the scope of this right that had not been established previously in its case law. For example, the Inter-American Court mentioned standards for access to medicines and, in particular, defined how the access to antiretroviral drugs is only one of the elements of an effective response for persons living with HIV, because those living with HIV require a comprehensive approach that includes a continuum of prevention, treatment, care and support.[10] In addition, the Court referred to issues relating to access to health care information;[11] the right to health of children,[12] and the right to health of children with HIV/AIDS.[13] However, the Court's analysis is made in light of its traditional case law on the connectivity of health with the rights to life and to personal integrity.

15. In this regard, as I indicated in the said Concurring opinion in the *case of Suárez Peralta* (2013), the following considerations, at least, exist as to why the right to health should be dealt with directly:

> 5. Based on the premise that the Inter-American Court has full competence to analyze violations of all the rights recognized in the American Convention, including those relating to Article 26,[14] which include the right to the progressive development of economic, social and cultural rights, which includes the right to health — as recognized in the judgment that gives rise to this separate opinion — I consider that, in this case, this social right should have been analyzed directly, based on the competence that I understand this Inter-American Court to have to rule on a possible violation of the guarantee of economic, social and cultural rights, especially the right to health.
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> 6. Indeed, the competence of the Inter-American Court to examine the right to health is found directly in Article 26 (Progressive Development) of the Pact of San José (using different interpretative mechanisms (*infra* paras. 33 to 72), in relation to Articles 1(1) (Obligation to Respect Rights) and 2 (Domestic Legal Effects), as well as to Article 29 (Restrictions regarding Interpretation) of the American Convention itself. In addition considering Articles 34(i) and 45(h) of the Charter of the Organization of American States, Article XI of the American Declaration on the Rights and Duties of Man, and Article 25(1) of the Universal Declaration of Human Rights (the last two instruments pursuant to the provisions of Article 29(d) of the Pact of San José), as well as other international instruments and sources that accord content, definition and scope to the right to health – as the Court has done in relation to the civil and political rights – such as Articles 10 of the Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights, 17 and 33(2) of the Social Charter of the Americas, 12(1) and 12(2)(d) of

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9 *Cf. Case of Suárez Peralta v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of May 21, 2013. Series C No. 261.

10 *Cf.* Paras. 193 to 197 of the Judgment.

11 *Cf.* Para. 198 of the Judgment.

12 *Cf.* Para. 174 of the Judgment.

13 *Cf.* Paras. 198 and 199 of the Judgment.

14 *Cf. Case of Acevedo Buendía et al. ("Discharged and Retired Employees from the Comptroller's Office") v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2009. Series C No. 198, para. 16: "the Court has previously indicated that the broad terms in which the Convention is written indicate that the Court exercises full jurisdiction over all its articles and provisions," and, thus, it decided to examine the merits of the matter and reject the preliminary objection filed by the State, precisely with regard to the Court's supposed lack of competence with regard to Article 26 of the American Convention.

the International Covenant on Economic, Social and Cultural Rights, 12(1) of the Convention on the Elimination of all Forms of Discrimination against Women, and 24 and 25 of the Convention on the Rights of the Child, among other international instruments and sources — and even national ones by way of Article 29(b) of the American Convention. And this, without being limited by Article 19(6) of the Protocol of San Salvador, which merely refers to the justiciability of certain trade union rights and the right to education, whereas it is Article 26 of the American Convention itself that accords this possibility, as we shall see below.

7. Evidently, this position requires further scrutiny of the interpretation of the inter-American normative as a whole and, particularly, of Article 26 of the Pact of San José, which establishes "the full effectiveness" of economic, social and cultural rights, without the elements of "progressiveness" and of "available resources" to which this article refers constituting conditioning normative elements for the justiciability of the said rights; rather, in any case, they constitute aspects relating to their implementation in keeping with the specific circumstances of each State. Indeed, as indicated in the *case of Acevedo Buendía*, cases may arise in which judicial control is focused on alleged regressive measures or on inadequate management of the available resources (in other words, judicial control in relation to progressive development).

8. Furthermore, this line of argument requires a progressive vision and interpretation, in keeping with the times, which requires considering the progress made in comparative law – especially that of the highest national jurisdictions of the States Parties, and even the tendencies in other parts of the world – as well as an interpretation that analyzes the inter-American *corpus juris* as a whole, especially the relationship between the American Convention and the Protocol of San Salvador.
[…]

11. Indeed, without denying the progress achieved in the protection of economic, social and cultural rights indirectly and in connection with other civil and political rights — which has been the well-known practice of this Inter-American Court – in my opinion, this approach does not accord full efficacy and effectiveness to those rights, denaturing their essence. Moreover, it does not contribute to clarifying the State's obligations in this regard and, ultimately, results in an overlap among rights, which leads to unnecessary confusion in these times when there is a clear tendency towards the recognition and normative efficacy of all the rights in keeping with the evident progress that can be noted in the domestic sphere and in international human rights law.
[…]

15. The possibility for this Inter-American Court to rule on the right to health arises, first, from the "interdependence and indivisibility" that exists between civil and political rights and economic, social and cultural rights. Indeed, the judgment that underlies this separate opinion, expressly recognizes this nature, because all rights should be understood integrally as human rights, without any specific hierarchy, that may be required at all times before those authorities who have the respective competence.
[…]

18. The important point of this consideration on the interdependence of civil and political rights with economic, social and cultural rights, made by the Inter-American Court in the *case of Acevedo Buendía et al. v. Peru*, stems from the fact that this ruling was made when examining the interpretive scope of Article 26 of the American Convention, with regard to a right (social security), that is not expressly recognized to be justiciable in Article 19(6) of the Protocol of San Salvador. Prior to its analysis of the merits, the Inter-American Court had expressly rejected the preliminary objection of lack of competence *ratione materiae* filed by the defendant State.

19. The Inter-American Court, without mentioning the Protocol of San Salvador to determine whether it had competence in this regard, finding that this was not necessary

because the direct violation of that international instrument had not been alleged, rejected the State's preliminary objection, considering, on the one hand, that as any organ with jurisdictional functions, the Inter-American Court had the authority inherent in its attributes to determine the scope of its own competence (*compétence de la compétence*); and, on the other hand, that "the Court must take into account that the instruments accepting the optional clause on binding jurisdiction (Article 62(1) of the Convention) suppose the acceptance of the Court's right *to decide any dispute relating to its jurisdiction* by the States that present this instrument. In addition, the Court has indicated previously that the broad terms in which the Convention was drafted indicate that the Court *exercises full jurisdiction over all its articles and provisions*."

20. In this important precedent, the Inter-American Court rejected the preliminary objection of the defendant State which expressly argued that this jurisdictional organ lacked competence to rule on a non-justiciable right under Article 19(6) of the Protocol of San Salvador. In other words, by rejecting this preliminary objection and examining the merits of the matter, the Inter-American Court considered that it had competence to hear and to decide (even to be able to declare violated) Article 26 of the Pact of San José. However, in that particular case, it found that there had not been a violation of this treaty-based provision. When examining the merits of the matter, the Inter-American Court considered that the economic, social and cultural rights referred to in Article 26 are subject to the general obligations contained in Articles 1(1) and 2 of the American Convention, as are the civil and political rights established in Articles 3 to 25.
[…]

27. From my perspective, these implications involve: (a) establishing a strong relationship, based on their equal importance, between civil and political rights, and economic, social and cultural rights; (b) making it obligatory to interpret all rights together – which, at times, results in overlapping contents – and to assess the implications of the respect, protection and guarantee of some rights for other rights, as regards their effective implementation; (c) considering economic, social and cultural rights autonomously, based on their intrinsic essence and characteristics; (d) recognizing that they can be violated autonomously, which could lead – as happens in the case of civil and political rights — to declaring the obligation to guarantee rights arising from Article 26 of the Pact of San José, in relation to the general obligations established in Articles 1 and 2 of the American Convention; (e) defining the obligations that the State must fulfill in the area of economic, social and cultural rights; (f) allowing a progressive and systematic interpretation of the inter-American *corpus juris*, especially to emphasize the implications of Article 26 of the Convention with regard to the Protocol of San Salvador, and (g) providing a further justification for using other instruments and interpretations of international organizations with regard to economic, social and cultural rights in order to endow them with content..
[…]

34. When considering the scope of the right to health, it is necessary to make an interpretative re-evaluation of Article 26 of the American Convention, the only article of this treaty that refers to "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," based on the fact that the Inter-American Court exercises full jurisdiction over all the articles and provisions, which include this provision of the Convention.

35. Furthermore, Article 26 forms part of Part I (State Obligations and Rights Protected) of the American Convention and, therefore, the general obligations of the States established in Articles 1(1) and 2 of the Convention are applicable to it, as recognized by the Inter-American Court itself in the *case of Acevedo Buendía v. Peru*. Nevertheless, there is an apparent interpretative conflict between the scope that should be given to Article 26 of the Pact of San José, and Article 19(6) of the Protocol of San Salvador, which limits the justiciability of the economic, social and cultural rights to certain rights only.
[…]

36. From my perspective, an interpretative development of Article 26 of the Pact of San José is required in the case law of the Inter-American Court, and this could open new possibilities for making economic, social and cultural rights effective, in both their individual and collective dimensions. Moreover, in the future new content could be established through evolutive interpretations that enhance the interdependent and indivisible nature of human rights.

37. In this regard, I consider opportune the call made some months ago by the very distinguished judge, Margarette May Macaulay — from the Inter-American Court's previous composition — in her concurring opinion in the *case of Furlan and family members v. Argentina*, regarding the updating of the normative meaning of this treaty-based precept. The former judge indicated that the Protocol of San Salvador "does not establish any provision intended to restrict the scope of the American Convention." […]

38. Judge Macaulay specified that it was incumbent on the Inter-American Court to update the normative meaning of Article 26 […].

39. Besides the above, some arguments additional to this interpretation of the relationship between the American Convention and the Protocol of San Salvador can be considered concerning the Court's competence to examine direct violations of economic, social and cultural rights in light of Article 26 of the Pact of San José.

40. First, it is essential to establish the importance of taking into account the literal interpretation of Article 26 with regard to the competence established to protect all the rights established in the Pact of San José, which include the rights established in Articles 3 through 26 (Chapter II: "Civil and political rights, and Chapter III: "Economic, social and cultural rights"). As I have already mentioned, the Inter-American Court recognized this expressly in the judgment in the *case of Acevedo Buendía et al. v. Peru.*
[…]

42. Now, none of the articles of the Protocol of San Salvador make any reference to the scope of the general obligations referred to in Articles 1(1) and 2 of the American Convention. If the Pact of San José is not being amended expressly, the corresponding interpretation should be the least restrictive as regards its scope. In this regard, it is important to stress that the American Convention itself establishes a specific procedure for its amendment. If the Protocol of Salvador had been intended to annul or amend the scope of Article 26, this should have been established explicitly and unequivocally. The clear wording of Article 19(6) of the Protocol does not permit inferring any conclusion with regard to the literal meaning of the relationship between Article 26 and Articles 1(1) and 2 of the American Convention, as the Inter-American Court has recognized.

43. Differing positions have arisen with regard to the interpretation of Article 26 and its relationship with the Protocol of San Salvador. In my opinion, the principle of the most favorable interpretation must be applied not only with regard to the substantive aspects of the Convention, but also as regards procedural aspects related to the attribution of competence, provided that a real and specific conflict in interpretation exists. If the Protocol of San Salvador had expressly indicated that it should be understood that Article 26 was no longer in force, the interpreter could not reach the opposite conclusion. However, no article of the Protocol refers to the reduction or limitation of the scope of the American Convention.

44. To the contrary, one of the articles of the Protocol indicates that this instrument should not be interpreted in order to disregard other rights in force in the States Parties, which include the rights derived from Article 26 within the framework of the American Convention. Moreover, in the terms of Article 29(b) of the American Convention, a restrictive interpretation of the rights is not permitted.

> 45. Thus, this – apparent – problem must be resolved based on a systematic, teleological and evolutive interpretation that takes into account the most favorable interpretation to ensure the best protection of the individual and the object and purpose of Article 26 of the American Convention regarding the need to truly guarantee economic, social and cultural rights. In the presence of a conflict in interpretation, prevalence should be given to a systematic interpretation of the relevant norms.
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> 46. In this regard, the Inter-American Court has indicated on previous occasions that human rights treaties are living instruments, the interpretation of which must keep up with the times and current living conditions. Furthermore, it has also affirmed that this evolutive interpretation is consequent with the general rules of interpretation established in Article 29 of the American Convention, and also in the Vienna Convention on the Law of Treaties. When making an evolutive interpretation, the Court has given special relevance to comparative law, and has therefore used domestic laws or the case law of domestic courts when analyzing specific disputes in contentious cases
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> 47. It is clear that the Inter-American Court cannot declare the violation of the right to health under the Protocol of San Salvador, because this can be observed from the literal meaning of its Article 19(6). However, it is possible to understand the Protocol of San Salvador as one of the interpretative references concerning the scope of the right to health protected by Article 26 of the American Convention. In light of the human rights *corpus juris*, the Additional Protocol throws light on the content that the obligations of respect and guarantee should have in relation to this right. In other words, the Protocol of San Salvador provides guidance on the application corresponding to Article 26 together with the obligations established in Articles 1(1) and 2 of the Pact of San José.
> […]
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> 57. Up until now, the Inter-American Court has used different aspects of the *corpus juris* on the right to health in order to found its arguments on the scope of the right to life or personal integrity, using the concept of decent life or another type of analysis based on the relationship between health and these civil rights […]. This argumentation strategy is valid and has permitted significant progress in inter-American case law. However, the main problems of this argumentation technique is that it prevents an in-depth analysis of the scope of the obligations of respect and guarantee in relation to the right to health, as in the judgment that give rise to this separate opinion. In addition, there are some components of social rights that cannot be extended to standards of civil and political rights. As I have underlined, "the specificity could be lost of both civil and political rights (that begin to cover everything) and of social rights (that are unable to project their specificities).
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> 58. Considering that, in its evolutive case law, the Inter-American Court has already explicitly accepted the justiciability of Article 26 […], in my opinion, the Inter-American Court now needs to resolve several aspects of this article, which poses the difficult future task of deciding three distinct questions relating to: (i) what rights does it protect; (ii) what type of obligations arise from those rights, and (iii) what are the implications of the principle of progressiveness. […]

16. In addition, regarding the argument that the American Convention does not establish social rights because, if those rights had already been included in that treaty, the States Parties would have preferred to amend it to supplement or expand the scope of those rights – rather than adopt a protocol – in our Concurring Opinion on the judgment in the recent case of *Canales Huapaya et al. v. Peru,* Judge Roberto F. Caldas and the undersigned asserted that a different interpretation of the relationship between "treaties" and their "protocols" was possible under international human rights law, as can be seen in several protocols additional to treaties that establish regulations that supplement the matters developed in the respective treaty. In other words, the protocols are not restricted to

establishing new rights;[15] and, we considered this valid in light of a systematic interpretation of Articles 26, 31 and 77 of the Pact of San José.

17. In this particular case, the analysis of the right to health, as an autonomous right, would have allowed the Court to assess more thoroughly issues associated with the unavailability of antiretroviral drugs at certain times, and the problems of geographical accessibility owing to the need to travel to other towns to obtain better care, among others. Regarding this type of issue, an analysis in light of the right to life and the right to personal integrity may be limited, because these rights do not directly incorporate any type of obligation associated specifically with the right to health. In order to understand the relationship between the right to health and the health care systems it is important to apply an adequate rights-based approach to these issues which are of special relevance and sensitivity in the region.

III. THE NEED TO CONTINUE ADVANCING TOWARDS THE FULL JUSTICIABILITY OF ECONOMIC, SOCIAL, CULTURAL AND ENVIRONMENTAL RIGHTS UNDER THE INTER-AMERICAN SYSTEM

18. Starting with the first case I heard as a judge of the Inter-American Court, I ruled in favor of the direct justiciability of the right to health, making an evolutive interpretation of Article 26 of the American Convention in relation to Articles 1(1) and 2, together with Article 29 of this instrument and, in light of a systematic interpretation, with Articles 4 and 19(6) of the Protocol of San Salvador.[16]

19. In this case, I would like to repeat the need to defend an interpretation that tries to assert the pre-eminence of the normative force of Article 26 of the American Convention. It is not a question of ignoring the Protocol of San Salvador or undermining Article 26 of the Pact of San José. The interpretation should be made in light of both instruments. In this understanding, the Additional Protocol cannot take normative force away from the American Convention, if this objective is not expressly stated in that instrument in relation to the obligations *erga omnes* established in Articles 1 and 2 of the American Convention, general obligations that apply to all the rights, even to the economic, social and cultural rights, as the Inter-American Court has expressly recognized.[17]

20. The evolutive interpretation[18] referred to seeks to assign real effectiveness to inter-American protection in this matter, which, more than 25 years after the adoption of the Protocol of San Salvador, and 15 years after its entry into force, is the minimum required to ensure its effectiveness; and calls for an interpretation that is more focused on establishing

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[15] Joint Concurring Opinion of Judges Roberto F. Caldas and Eduardo Ferrer Mac-Gregor Poisot. *Case of Canales Huapaya et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of June 24, 2015, especially paras. 26 to 29. In this opinion, we gave examples related to Protocols Additional to the European Convention on Human Rights and to the International Covenant on Civil and Political Rights.

[16] Concurring Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot in the *Case of Suárez Peralta v. Ecuador*. *Preliminary objections, merits, reparations and costs*. Judgment of May 21, 2013. Series C No. 261.

[17] *Cf. Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru, supra,* para. 100.

[18] The evolutive interpretation of Article 26 of the American Convention is also based on the constitutional norms and the practice of the highest national courts, especially with regard to the justiciability of the "right to health"; as we tried to show in paras. 73 to 87 of the Concurring Opinion in the *Case of Suárez Peralta v. Ecuador*. Regarding judicial practice to protect the right to health in different countries across the globe, see: Yamin, Alicia Ely and Gloppen, Siri (coords.) *La lucha por los derechos de la salud. ¿Puede la justicia ser una herramienta de cambio?*, Buenos Aires, Siglo XXI, 2013.

the greatest practical effects possible of the inter-American norms as a whole, as has been the practice of the Inter-American Court in the case of the civil and political rights.

21. An essential element of the right to health is its interdependence with the right to life and the right to personal integrity. However, this does not justify denying the autonomy of the scope of that social right based on Article 26 of the American Convention in relation to the obligations to respect and ensure rights contained in Article 1(1) of the Pact itself, which requires that the Pact of San José be interpreted in light of the *corpus iuris* on the right to health – as, indeed, the Court has in the *Case of Gonzales Lluy et al.* which prompts this separate opinion – even though it is referred to as personal integrity, limiting significantly, by connectivity, the real scope of the right to health.[19] As I indicated in m Concurring Opinion in the case of *Suárez Peralta:*

> 102. This vision of direct justiciability means that the methodology to attribute international responsibility is circumscribed to the obligations regarding the right to health. This signifies the need for more specific arguments on the reasonableness and proportionality of a certain type of public policy measure. In view of the sensitive nature of an assessment in this sense, the Inter-American Court's decisions acquire greater transparency and strength if the analysis is made directly in this way with regard to the obligations surrounding the right to health, instead of with regard to the sphere more closely related to the consequences of certain effects on personal integrity; that is, indirectly or by connectivity with the civil rights. Similarly, the reparations that the Court traditionally grants, and that in many cases have an impact on services related to the right to health, such as measures of rehabilitation and satisfaction, may acquire a real causal nexus between the right violated and the measure decided with all its implications. Furthermore, when we speak of direct justiciability, this implies changing the methodology based on which compliance with the obligations of respect and guarantee (Article 1(1) of the Pact of San José) is assessed, which is evidently different with regard to the right to life and the right to personal integrity, than it is with regard to the right to health and other social, economic and cultural rights.
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> 103. Social citizenship has made significant progress throughout the world and, evidently, in the countries of the American continent. The "direct" justiciability of economic, social and cultural rights constitutes not only a viable interpretative and argumentative option in light of the actual inter-American *corpus juris*. The Inter-American Court, as the jurisdictional organ of the inter-American system, has the obligation to move in this direction of social justice, because it has competence with regard to all the provisions of the Pact of San José. The effective guarantee of economic, social and cultural rights is an alternative that would open up new possibilities in order to achieve transparency and the full realization of rights,

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[19] Paras. 172 and 173 of the Judgment that prompts this Opinion recall "the interdependence and indivisibility that exists between civil and political rights and economic, social and cultural rights, because they should be understood as a whole as human rights, without any order of precedence, and enforceable in all cases before the competent authorities." In addition, the judgment cites numerous norms related to the right to health: "Article XI of the American Declaration of the Rights and Duties of Man establishes that "every person has the right to the preservation of his health through sanitary and social measures relating to […] medical care, to the extent permitted by public and community resources." Meanwhile, Article 45 of the OAS Charter requires Member States to "dedicate every effort […] to [the] development of an efficient social security policy." Similarly, Article 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, ratified by Ecuador on March 25, 1993, […] establishes that everyone has the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being, and indicates that health is a public right. In addition, in July 2012, the General Assembly of the Organization of American States emphasized the quality of health care establishments, good and services, which require the presence of skilled medical personnel, and adequate sanitation." See, OAS, Progress Indicators in respect of Rights contemplated in the Protocol of San Salvador, OEA/Ser.L/XXV.2.1, Doc 2/11 rev.2, December 16, 2011, paras. 66 and 67. The judgment even considers the essential elements of the right to health in relation to the *availability, accessibility, acceptability and quality* referred to by the United Nations Committee on the International Covenant on Economic, Social and Cultural Rights (*General comment No. 14*) in para. 173 of the judgment that prompts this Opinion.

without artifices and directly, and thus acknowledge what the Inter-American Court has been doing indirectly or in connection with the civil and political rights.

104. Ultimately, the objective is to recognize what the Inter-American Court and the highest national jurisdictions are, in fact, doing, taking into account the *corpus juris* on national, inter-American and universal social rights, which would also constitute a greater and more effective protection of the fundamental social rights, with clearer obligations for the States Parties. All this is in keeping with current signs of the full effectiveness of human rights (in the national and international spheres), without any categorization or distinction between them, which is particularly important in the Latin American region where, regrettably, high rates of inequality persist, significant percentages of the population live in poverty and even in extreme poverty, and there are still numerous forms of discrimination against the most vulnerable.

105. The Inter-American Court cannot remain on the sidelines of the contemporary debate on the fundamental social rights[20] — which has a long history in the reflection on human rights – and which are the motive for continuing change in order to achieve their full realization and effectiveness in the constitutional democracies of our times.

106. Given the dynamic scenario in this regard at the domestic level and within the universal system, it can be anticipated that, in the future, the Inter-American Commission, or the presumed victims or their representatives may cite more forcefully eventual violations of the guarantees of economic, social and cultural rights derived from Article 26 of the American Convention in relation to the general obligations established in Articles 1 and 2 of the Pact of San José. In particular, the presumed victims may cite the said violations owing to their new faculties of direct access to the Inter-American Court, based on the new Rules of Procedure of this jurisdictional organ, in force since 2010.

107. As a new member of the Inter-American Court, it is not my desire to introduce sterile discussions within the inter-American system and, particularly, within its jurisdictional organ of protection. I merely wish to invite reflection on the legitimate interpretative and argumentative possibility of granting direct effectiveness to economic, social and cultural rights, especially in the specific case of the right to health, by means of Article 26 of the Pact of San José – because I am absolutely convinced of this. It represents a latent possibility of advancing towards a new stage in inter-American case law, which is no novelty if we recall that, on the one hand, the Inter-American Commission has understood this to be so on several occasions and, moreover, the Inter-American Court itself explicitly recognized the justiciability of Article 26 of the American Convention in 2009.[21]

108. In conclusion, after more than 25 years of continuing evolution of inter-American case law, it is legitimate – and reasonable using hermeneutics and treaty-based arguments – to grant full normative content to Article 26 of the Pact of San José, coherently and congruently with the whole inter-American *corpus juris*. This course of action would permit dynamic interpretations in keeping with the times that could lead towards a full, real, direct and transparent effectiveness of all rights, whether civil, political, economic, social or cultural, without hierarchy and categorizations that impede their realization, as revealed by the Preamble to the American Convention, the spirit and ideals of which permeate the whole inter-American system.

22. Almost 46 years after the signature of the American Convention and 27 years after the adoption of the Protocol of San Salvador, it is necessary to take more specific steps

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[20] In this regard, see: von Bogdandy, Armin, Fix-Fierro, Héctor, Morales Antoniazzi, Mariela and Ferrer Mac-Gregor, Eduardo (coords.), *Construcción y papel de los derechos sociales fundamentales. Hacia* un Ius Constitutionale Commune *en América Latina*, Mexico, UNAM-IIJ-Instituto Iberoamericano de Derecho Constitucional-Max-Planck-Institut für ausländisches öffentiliches Recht und Völkerrecht, 2011.

[21] *Cf. Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru, supra*, paras. 99-103.

towards the direct justiciability of economic, social, cultural and environmental rights, taking into account the progress made in international human rights law,[22] and based on the evident progress made by the States Parties to the American Convention. In this regard, I would like to emphasize, in particular, the 2012 Social Charter of the Americas and, above all, the recent Inter-American Convention on Protecting the Human Rights of Older Persons, adopted on June 15, 2015. Indeed, Article 36[23] of this Convention establishes the possibility that the system of individual petitions operates in relation to the rights established in this Convention, which include, among others the right to social security (Article 17), the right to work (Article 18), the right to health (Article 19), and the right to housing (Article 24). As can be seen, this step taken by several OAS Member States reveals a growing tendency towards the full justiciability of the economic, social and cultural rights.

23. Based on all the arguments set forth in this Opinion, this hermeneutic interpretation does not undermine the legitimacy of the Court. Neither has this legitimacy been lessened by adopting case law criteria that had less normative grounds, as occurred when declaring the existence of certain rights that were not named or established in the Convention.[24] To

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[22] Protocol Additional to the International Covenant on Economic, Social and Cultural Rights, signed by Ecuador.

[23] Article 36. System of individual petitions. Any person or group of persons, or nongovernmental entity legally recognized in one or more member states of the Organization of American States may submit to the Inter-American Commission on Human Rights petitions containing reports or complaints of violations of the provisions contained in this Convention by a State Party. / In implementing the provisions of this article, consideration shall be given to the progressive nature of the observance of the economic, social and cultural rights protected under this Convention. / In addition, any State Party, when depositing its instrument of ratification of, or accession to, this Convention, or at any time thereafter, may declare that it recognizes the competence of the Inter-American Commission on Human Rights to receive and examine communications in which a State Party alleges that another State Party has committed violations of the human rights established in this Convention. In such an instance, all the relevant procedural rules contained in the American Convention on Human Rights shall be applicable. / […] / Any State Party may, when depositing its instrument of ratification of, or accession to, this Convention, or at any time thereafter, declare that it recognizes as binding, *ipso jure* and without any special agreement, the jurisdiction of the Inter-American Court of Human Rights on all matters relating to the interpretation or application of this Convention. In such an instance, all relevant procedural rules contained in the American Convention on Human Rights shall be applicable.

[24] Thus, for example, in the *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador,* the Court interpreted the "right to prior, free and informed consultation" of indigenous and tribal peoples and communities by the recognition of the right to their own culture or cultural identity recognized in ILO Convention 169. In the *Case of Chitay Nech v. Guatemala*, the Court established the special obligation to ensure the "right to cultural life" of indigenous children. Also, in the *Case of the Las Dos Erres Massacre v. Guatemala*, when analyzing the State's responsibility in relation to the rights to a name (Article 18), of the family (Article 17) and of the child (Article 19 of the American Convention), the Court considered that the right of every individual to receive protection against arbitrary or unlawful interference in the family forms part, implicitly, of the right to protection of the family and of the child. Similarly, in the *Case of Gelman v. Uruguay*, the Court developed the so-called "right to identity (which is not expressly established in the American Convention), based on the provisions of Article 8 of the Convention on the Rights of the Child, which establishes that this right includes, among other matters, the right to nationality, name and family relations. In the *Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, the Inter-American Court declared the violation of the "right to know the truth" (a right that is not established autonomously in the American Convention). In addition, in the *Case of the Massacres of El Mozote and nearby places v. El Salvador,* the Court supplemented its case law in relation to the right to property established in Article 21 of the Convention when referring to Articles 13 and 14 of Protocol II Additional to the 1949 Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts of June 8, 1977. Subsequently, in the *Case of the Santo Domingo Massacre v. Colombia*, the Inter-American Court interpreted the scope of the same Article 21 using treaties other than the American Convention. Thus, it referred to Rule 7 of Customary International Humanitarian Law regarding the distinction between civilian objects and military objectives, and Article 4(2)(g) of Protocol II regarding pillage, in order to give content to the right to property established in Article 21 of the American Convention.

As can be appreciated from these examples of inter-American case law, it has been the consistent practice of the Court to use different international instruments and sources other than the Pact of San José in order to define the content and even expand the scope of the rights established in the American Convention and to stipulate the obligations of the States, because those international instruments and sources are part of a very comprehensive

the contrary, systematic, comprehensive and evolutive interpretation supported by the normative grounds established in Article 26 of the American Convention and by its relationship to Articles 1(1) and 2 of this instrument, based on the idea that this article should have practical effects because it has not been rescinded, accords the Inter-American Court full legitimacy to take more decided steps towards the direct justiciability of economic, social and cultural rights, especially taking into account the daily tragedy associated with the systematic denial of these rights in the countries of the Americas.

Eduardo Ferrer Mac-Gregor Poisot
Judge

Pablo Saavedra Alessandri
Secretary

international *corpus iuris* in the matter, also using the Protocol of San Salvador. The possibility of using the Protocol of San Salvador to give content and scope to the economic, social and cultural rights derived from Article 26 of the American Convention, in relation to the general obligations established in Articles 1 and 2 of this treaty, is viable and the Inter-American Court has been using the Protocol to give content to many rights of the Convention using treaties and sources other than the Pact of San José. Thus, it could also use Protocol of San Salvador, together with other international instruments to establish the content and scope of the right to health protected by Article 26 of the American Convention.