

CONCURRING OPINION OF JUDGE HUMBERTO ANTONIO SIERRA PORTO

JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF GONZALES LLUY ET AL. v. ECUADOR

JUDGMENT OF SEPTEMBER 1, 2015

(Preliminary objections, merits, reparations and costs)

A. Introduction

1. The purpose of this opinion is to expand on and supplement the reasons why I consider that it is not necessary to declare the violation of Article 26 of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”) in order to achieve the effective protection and guarantee of economic, social and cultural rights (hereinafter “ESCR”). To the contrary, my legal opinion on this matter is that using this way to try and make the ESCR justiciable under the inter-American system may be even more problematic than other ways that exist and have already been applied by the Court. For example, in this case, the Court protected the right to health by way of its connectivity to the right to life and to personal integrity, by declaring the violation of “the obligation to monitor and supervise the provision of health care services, within the framework of the right to personal integrity and of the obligation not to endanger life.”¹

2. In this regard, I would like to clarify that I am basing my opinion on the premise that mechanisms must exist to protect these rights, and for this reason I understand the good intentions of the judges and academics who propose the direct application of Article 26 of the Convention. However, I believe it important to point out the main problems that, in my opinion, arise from this proposal and that are, in turn, the reason why I consider that the Inter-American Court should not adopt this position.

3. To support the foregoing, I will proceed to analyze: (i) the scope of Article 26 of the American Convention; (ii) the limitation of competence established in the Protocol of San Salvador, and (iii) the use of evolutive interpretation and the *pro homine* principle. Lastly, and in conclusion, I will include some general considerations on the nature and competence of human rights courts.

B. Scope of Article 26 of the American Convention

4. Before beginning to examine Article 26 of the Convention, I would like to clarify that my position on this issue refers exclusively to the competence of the Inter-American Court to declare a violation of the rights established in the Protocol of San Salvador; consequently, I will not refer in great detail to some of the discussions that exist in the context of the debate on the justiciability of ESCR. In particular, I do not find it relevant to engage in a more in-depth discussion of the nature of ESCR as rights that require action by the public authorities (*derechos prestacionales*), because it is clear that every right requires this to a greater or lesser extent. Furthermore, I do not consider that my position disregards the indivisible nature of human rights, because I make a distinction between the obligations that a State undertakes to meet by the

¹ Para. 191 of this Judgment.

signature and ratification of a treaty, and the competences that the said treaty may accord to the organ or court that monitors it. In this regard, it is true that all rights are intrinsically connected and should not be considered in isolation – which is why I support the justiciability of ESCR by way of connectivity – but the indivisible nature of rights is not a sufficient reason to modify the competence of a court, as proposed by those who seek direct justiciability by means of a broad interpretation of Article 26 of the Convention.

5. Having clarified the foregoing, I consider it pertinent, in the first place, to establish the obligations that arise from Article 26 of the Convention. This article stipulates that:

CHAPTER III
ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Article 26. Progressive Development

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

6. Regarding the scope of Article 26, the Court has indicated that the main obligation arising from this article is the progressive development of economic, social and cultural rights,² which entails “an obligation – although conditional – of non-regressivity, that should not always be understood as prohibiting measures that restrict the exercise of a right.”³ In addition, the Court has asserted that the general obligations under Articles 1 and 2 of the Convention are also applicable to this article.⁴

7. However, Article 26 does not establish a list of rights, but refers directly to the Charter of the Organization of American States (hereinafter “the Charter” or “the OAS Charter”). A reading of the Charter reveals that this does not contain a list of subjective, clear and precise rights either; rather, to the contrary, it includes a list of expectations and goals that the States of the region are striving to attain, which makes it difficult to surmise which rights the article is referring to. In brief, there are no express references to the ESCR and, in order to affirm that they are, in fact, established in the Charter, it is necessary to perform a fairly extensive task of interpretation. An example of this is the right to health, which was analyzed in this case. Some authors affirm that this right is clearly established in the Charter; however, when one looks for this in the text, one finds only two indistinct references in Articles 34⁵ and 45.⁶ In this regard, I fully agree that “it is not enough just to infer a right by

² Cf. *Case of the “Five Pensioners” v. Peru. Merits, reparations and costs.* Judgment of February 28, 2003. Series C No. 98, para. 147.

³ *Case of Acevedo Buendía et al. (“Discharged and Retired Employees of the Comptroller’s Office”) v. Peru. Preliminary objection, Merits, reparations and costs.* Judgment of July 1, 2009 Series C No. 198, para. 103.

⁴ “[I]t is pertinent to observe that although Article 26 is found in Chapter III of the Convention, entitled ‘Economic, Social and Cultural Rights,’ it is also located in Part I of this instrument, entitled, ‘State Obligations and Rights Protected’ and, consequently, it is subject to the general obligations contained in Articles 1(1) and 2 of Chapter I (entitled ‘General Obligations’), as are Articles 3 to 25 indicated in Chapter II (entitled ‘Civil and Political Rights’).” *Case of Acevedo Buendía et al. (“Discharged and Retired Employees of the Comptroller’s Office” v. Peru, para. 100.*

⁵ Article 34(i) of the OAS Charter establishes among the “basic objectives of integral development” the “[p]rotection of man’s potential through the extension and application of modern medical science” (underlining added).

its name from the Charter, it is also necessary that the Charter provides a minimum content for that right. This minimum content could then be clarified – to a certain extent – by other international instruments. Defining the entire content and scope of a right by means of other instruments would invariably result in a modification of the Charter.”⁷

8. In this regard, it is worth stressing that:

“The inclusion [of Article 26] in the text of the Convention requires a theoretical effort in order to endow it with meaning in accordance with the other articles of the Convention and the principles that regulate its interpretation, avoiding two position that we understand are incorrect, [including] the temptation to introduce, by means of this article, a complete list of social rights that, clearly, the States did not intend to incorporate into the system of the Convention, which was designed above all to protect civil and political rights.”⁸

9. Even though it would have been desirable when Article 26 was drafted to use a less problematic legislative technique than the complex system of referrals to the OAS Charter, the truth is that the referral is to the Charter and not to the American Declaration of the Rights and Duties of Man, which could have led to a different interpretation, because the Declaration does contain more precise references to the ESCR.⁹ Unfortunately, this is not the case.¹⁰

10. In addition, it has been affirmed that, in the case of *Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru*, the Inter-American Court accepted that Article 26 of the Convention contained a precise list of the ESCR that could be enforced directly. In my opinion, this gives an excessive scope to that judgment. First, the judgment does not declare the violation of Article 26 and the considerations made relate precisely to the obligation of progressive development and not to a direct enforceability of any right in particular. Second, the judgment does not define or clarify either the scope or minimum content of the ESCR that would be protected. Third, even if the intention was to derive some type of direct justiciability from the affirmation that the obligations of respect and guarantee are applicable to Article 26 of the Convention, it should be stressed that this affirmation is an *obiter dictum* of that judgment, and thus has no direct relationship to the final decision which

⁶ Article 45 of the OAS Charter stipulates: “The Member States [...] agree to dedicate every effort to the application of the following principles and mechanisms: [...] (h) Development of an efficient social security policy.”

⁷ Oswaldo Ruiz Chiriboga, *The American Convention and the Protocol of San Salvador: Two Intertwined Treaties: Non-Enforceability of Economic, Social and Cultural Rights in the Inter-American System*, *Netherlands Quarterly of Human Rights*, Vol. 31/2 (2013), p. 171.

⁸ Víctor Abramovich, and Julieta Rossi, ‘*La Tutela de los Derechos Económicos, Sociales y Culturales en el Artículo 26 de la Convención Americana sobre Derechos Humanos*’, *Estudios Socio-Jurídicos*, Vol. 9, 2007, p. 37.

⁹ For example, Article XI establishes that: “Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.”

¹⁰ In this regard, “[w]hen determining whether a rights is implicit in the Charter, it is necessary, in our opinion, to avoid the shortcut of appealing directly to the American Declaration as an instrument that forms the basis for the content of the human rights established in the Charter. [The foregoing, taking into account that] Article 26 refers to the rights derived from the economic, social, educational, scientific and cultural standards of the Charter and does not refer to the Declaration.” Víctor Abramovich, and Julieta Rossi, ‘*La Tutela de los Derechos Económicos, Sociales y Culturales en el Artículo 26 de la Convención Americana sobre Derechos Humanos*’, *Estudios Socio-Jurídicos*, Vol. 9, 2007, p. 47.

was to declare that Article 26 had not been violated.¹¹ Furthermore, this consideration in the judgment has not been reiterated in the subsequent case law of the Court, even though cases have been heard in which the alleged violations could have allowed the Court to reaffirm its position; consequently, doubts remain as to whether, six years after that judgment was adopted, it can be considered a consistent precedent. Lastly, there is a significant basic problem with that judgment, in that it makes no mention of the Protocol of San Salvador, which, as we shall see below, is fundamental to understanding the competence of the Court in this matter.

11. Taking the above into account, it is possible to reach a first conclusion, and this is that Article 26 of the American Convention does not contain a list of clearly established subjective rights, owing precisely to the problems resulting from the referral to the OAS Charter. Therefore, the obligation implied by this article, and that the Court may supervise directly, is compliance with the obligation of progressive development – and the consequent obligation of non-regressivity – of the rights that may be derived from the Charter, over and above the mere reference to their name, such as the right to work, for example.¹²

C. The Protocol of San Salvador

12. As indicated previously, the Inter-American Court's competence with regard to ESCR cannot be discussed without taking into account the Protocol of San Salvador. In this regard, during the eighteenth OAS General Assembly, held in 1988, the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San Salvador) was opened to signature. The text of the Protocol was based on a working draft prepared by the Inter-American Commission¹³ and it was adopted on November 17, 1988. The Protocol entered into force on November 16, 1999, after it had been ratified by 11 States and, at the present time, 16 States have ratified it.¹⁴

13. With regard to the nature of protocols, it should be recalled that, under public international law, they are independent agreements, but they are subsidiary to a treaty, that add to, clarify, amend, or supplement the procedural or substantial content of that treaty. The existence of a protocol is directly related to the existence of a treaty; in other words, without a framework treaty, there is no protocol.¹⁵

¹¹ Indeed, the reason why the judgment decided that there had not been a violation is that "considering that the analysis is not centered on some measure adopted by the State that hindered the progressive realization of the right to a pension, but on the State's non-compliance with the payment ordered by the domestic courts, the Court finds that the violated rights are those protected in Articles 25 and 21 of the Convention and does not find grounds to also declare non-compliance with Article 26 of this instrument." *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office v. Peru*, para. 106.

¹² For example, Article 45(b) of the Charter establishes that: "Work is a right and a social duty, it gives dignity to the one who performs it, and it should be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working."

¹³ Inter-American Court of Human Rights, *Documentos Básicos en Materia de Derechos Humanos en el Sistema Interamericano (Actualizado a febrero de 2012)*, 2012, pp 11.

¹⁴ The following States have ratified the Protocol: Argentina, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname and Uruguay. Taken, on September 10, 2015, from: <http://www.oas.org/juridico/spanish/firmas/a-52.html>.

¹⁵ See, Definitionns of key terms used in the UN Treaty Collection. Consulted at: https://treaties.un.org/Pages/Overview.aspx?path=overview/definition/page1_en.xml&clang=en.

14. The relevance of the Protocol stems from the fact that it is on the basis of this agreement that the States of the region took the decision to define the ESCR with which they are obliged to comply. They also established the content of those rights clearly and precisely. For example, Article 10 of the Protocol establishes the right to health as follows:

Article 10
Right to Health

1. Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being.
2. In order to ensure the exercise of the right to health, the States Parties agree to recognize health as a public good and, particularly, to adopt the following measures to ensure that right:
 - a. Primary health care, that is, essential health care made available to all individuals and families in the community;
 - b. Extension of the benefits of health services to all individuals subject to the State's jurisdiction;
 - c. Universal immunization against the principal infectious diseases;
 - d. Prevention and treatment of endemic, occupational and other diseases;
 - e. Education of the population on the prevention and treatment of health problems, and
 - f. Satisfaction of the health needs of the highest risk groups and of those whose poverty makes them the most vulnerable.

15. However, the States took the sovereign decision to restrict which of the economic, social and cultural rights established in the Protocol could be monitored by the individual petition mechanism when establishing in Article 19(6) that:

Any instance in which the rights established in paragraph (a) of Article 8 and in Article 13 are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights (underlining added).

16. Thus, by this provision, the States decided to limit the competence of the Commission and of the Court to hear contentious cases that were not related to trade union rights or the right to education. Indeed, in this case, the Court, exercising the competence granted by this article, declared the violation of the right to education established in Article 13 of the Protocol of San Salvador.¹⁶

17. However, this limitation of competence should not be understood as contradictory to Article 26 of the American Convention, bearing in mind that the said article (19(6)) expresses the subsequent and more specific intention of the States with regard to the competence of the Inter-American Court in relation to ESCR. Furthermore, the American Convention should not be read alone, without taking into account its Protocol, because they are complementary treaties that should be read and interpreted together. Thus the Court may hear contentious cases in which the violation of the obligation of progressive realization of the rights that could be derived from the Charter is argued, based on Article 26 of the Convention, and also those cases in which the violation of Articles 8(a) and 13 of the Protocol is alleged.

18. It is also relevant to point out that the general obligation of the States Parties arising from the Protocol are independent of the fact that the Court has competence to declare violations within the framework of its contentious function. The States established other mechanisms merely to ensure compliance with those rights, such as those defined in the other paragraphs of Article 19 of the Protocol, such as the

¹⁶ Para. 291 of this Judgment. .

possibility of the Inter-American Commission formulating observations and recommendations on the status of the ESCR in its annual report.

19. Despite the fact that that Article 19(6) of the Protocol establishes the limitation of competence clearly and precisely, some authors have indicated that evolutive interpretation and the *pro homine* principle should be used in order to update the normative meaning and scope of Article 26 of the Convention. Consequently, I will now examine some of the arguments employed to justify this position.

D. Evolutive interpretation and *pro homine* principle

20. On this point, those who propose the direct justiciability of ESCR by the application of Article 26 of the Convention have argued that one of the ways to overcome the barrier to competence that the Protocol stipulates would be by applying an evolutive interpretation. In particular, they use comparative law as a tool, because several constitutional courts of the countries of the region have accepted the direct justiciability of ESCR. However, I consider that this issue should be tackled in two ways. The first entails an examination of the other interpretive methods under international law, because the evolutive method is not the only one that should be taken into account. Second, I will present my opinion on how the comparative law on this issue should be assessed.

21. Regarding the means of interpretation that should be taken into account, Articles 31 and 32 of the Vienna Convention on the Law of Treaties establish the most important methods. The Inter-American Court has reflected this in its case law; thus, in addition to the evolutive method, it has used other interpretation criteria, such as literal interpretation, systematic interpretation, and teleological interpretation. In this regard, the Court has understood that literal interpretation is the interpretation made in good faith in accordance with the ordinary meaning to be given to the terms used. The Court has used this type of interpretation when considering the literal meaning of some expressions and terms of the Convention and other treaties.¹⁷ Meanwhile, based on a systematic interpretation, the Court has maintained that the norms must be interpreted as part of a whole, the meaning and scope of which should be established in function of the legal system to which it belongs.¹⁸ In the context of this type of interpretation, the Court has analyzed the *travaux préparatoires* of the American Declaration and of the American Convention, as well as of some instruments of the universal system of human rights and other regional systems of protection such as the European and the African systems.¹⁹ The Court has also used the teleological or purposive interpretation. In this regard, the Court has analyzed the purpose of the norms involved in the interpretation, considering that the object and purpose of the treaty and the purposes of the inter-American human rights system are pertinent. Lastly, evolutive interpretation means that:

[H]uman rights treaties are living instruments whose interpretation must consider the changes over time and present day conditions. [...] That evolutive interpretation is consistent with the general

¹⁷ See, for example, *Case of Artavia Murillo et al. (In vitro fertilization) v. Costa Rica. Preliminary objections, merits, reparations and costs*. Judgment of November 28, 2012. Series C No. 257, para. 178, and *Case of Mohamed v. Argentina. Preliminary objection, merits, reparations and costs*. Judgment of November 23, 2012. Series C No. 255, para. 93.

¹⁸ Cf. *Case of Artavia Murillo et al. (In vitro fertilization) v. Costa Rica*, para. 191, and *Case of González et al. ("Cotton Field") v. Mexico. Preliminary objection, Merits, reparations and costs*. Judgment of November 16, 2009. Series C No. 205, para. 43.

¹⁹ Cf. *Case of Artavia Murillo et al. (In vitro fertilization) v. Costa Rica*, paras. 191 a 244.

rules of treaty interpretation established in Article 29 of the American Convention, and in the 1969 Vienna Convention on the Law of Treaties. By making an evolutive interpretation, the Court has given special relevance to comparative law, and for this reasons has used domestic law or the case law of domestic courts when examining specific disputes in contentious cases.²⁰

22. In this regard, it should be pointed out that a method of interpretation should be used when a norm is ambiguous, and I do not consider that this is the case as regards the limitation of competence stipulated in Article 19(6) of the Protocol of San Salvador in relation to Article 26 of the Convention, because, as indicated above, the meaning of the norm is clear. Nevertheless, when a norm must be interpreted, it is not sufficient to use one of the different methods of interpretation that exists, because they are complementary and none of them outranks the others.

23. For example, I will use the other methods of interpretation to show that, instead of upholding the direct justiciability of ESCR by means of Article 26 of the Convention, they support the position that I have been defending in this opinion. The literal interpretation of the two norms: namely, Article 26 of the Convention and Article 19(6) of the Protocol, implies exactly what I have been doing, and that is to conclude that a reading of the two norms reveals that it was not the intention of the States to establish an option of direct justiciability of Article 26 and, to the contrary, in Article 19(6) they determined a limitation of competence. The literal interpretation refers to the good faith with which treaties should be interpreted, which is relevant in this regard, because it would appear that, in some cases, the aim of reaching a specific result leads to confusing the literal meaning of the norm or to disregarding norms or factors that are relevant for the interpretation.

24. Regarding the systematic interpretation, in order to determine the scope of Article 26 of the Convention, the provisions of the Protocol should not be forgotten, because, as I mentioned previously, the two treaties must be read together. Accordingly, a systematic interpretation that only uses the other articles of the Convention cannot be considered valid. In addition, some authors indicate that a systematic interpretation based on Article 4 of the Protocol could lead to the conclusions that Article 19(6) of the Protocol is inapplicable. In this regard, the said article stipulates that:

Article 4
Inadmissibility of Restrictions

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

25. In this regard, I consider that this article would be applicable if Article 26 of the Convention had stipulated a list where the ESCR were clearly established, but, as I have already indicated, this is not so; hence, it cannot be argued that the two norms compete with each other. In addition, it would not be logical to think that Article 26 cancels or annuls the limitation of competence under Article 19(6), because this does not restrict rights, but rather limits the competences of the Commission and of the Court. Confusing the restriction of a right with the limitation of competences could lead to the absurd result of opening up the Court's competence completely, even contrary to the wishes of the States.

²⁰ *Case of Artavia Murillo et al. (In vitro fertilization) v. Costa Rica*, para. 245, and *The Right to Information on Consular Assistance within the Framework of the Guarantees of Due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 114.

26. With regard to the teleological or purposive interpretation, it has been affirmed that this method favors the direct justiciability of ESCR in two ways: (i) the ultimate purpose of the inter-American system is the protection of human rights and this means trying to make the greatest possible number of rights enforceable, and (ii) when Article 26 of the Convention was established, the States' intention was not to exclude the possibility of the direct enforceability of ESCR. Regarding the first affirmation, it should be pointed out that the Protocol of San Salvador had the specific purpose of incorporating the ESCR into the inter-American system more precisely, and expanding the system's sphere of protection, so that it is not fair to situate the Protocol as a treaty that would contravene the purpose of the inter-American system simply by establishing rules of competence. In addition, on this point it should be stressed that "[i]f the ordinary meaning of a provision is clear in not granting jurisdiction to the IAS bodies, the object and purpose of the Convention cannot be used to overthrow that result."²¹

27. Regarding the second affirmation, although the preparatory work of the treaty is a supplementary means of interpretation, in some cases, the Inter-American Court has used this to try and discern the objective or purpose that the States had when creating the treaty. Thus, in the judgment in the *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru*, the Court referred to the preparatory work with the intention of demonstrating that, perhaps, the State had agreed on the direct justiciability of the ESCR when they discussed Article 26 of the Convention. In this regard, it is worth noting that:

The Court put forward the points of view of only those States which tried to materialize the exercise of ESC rights by means of the activity of the Court. No mention was made of the countries which opposed the enforceability of ESC rights and, more importantly, as Burgorgue-Larsen recalls: nothing was said about the process which ultimately gave rise to the drafting of Article 26 as such. Nor was anything said about the scope the different States were prepared to confer on this article. Does this mean that the article was the result of a compromise, or did it represent those States which were in favor of giving economic and social rights such an important place? Clearly, the silences of the Court were part of its strategy to reach its objective, come what may, namely conferring the widest scope possible on Article 26. But Brazil and Guatemala aside, the preparatory works show just how reluctant the majority of States were to recognize that what was to become Article 26 should be actionable²² (underlining added).

28. Regarding the use of comparative law as a means of reinforcing a possible evolutive interpretation in this regard, although it is true that most of the Constitutions of the countries of the region include a list of ESCR, and many of them admit the possibility of the direct justiciability of such rights, I consider that this is not a sufficient argument to expand the scope of Article 26 of the Convention. In this regard, I repeat that it was the States themselves that took the decision not to guarantee direct justiciability in this article and, to the contrary, when they established a list of rights in the Protocol, they decided to limit the Court's competence. Thus, even though, internally, the State have gradually expanded their position, it is not for the Court to modify the intention originally expressed in the Protocol. In this regard, Articles 31, 76 and 77 of the American Convention determine that, if the States wish to recognize other rights, they may propose amendments or protocols that allow this.

²¹ Oswaldo Ruiz Chiriboga, *The American Convention and the Protocol of San Salvador: Two Intertwined Treaties, Non-Enforceability of Economic, Social and Cultural Rights in the Inter-American System*, *Netherlands Quarterly of Human Rights*, Vol. 31/2 (2013), p. 170.

²² Oswaldo Ruiz Chiriboga, *The American Convention and the Protocol of San Salvador: Two Intertwined Treaties, Non-Enforceability of Economic, Social and Cultural Rights in the Inter-American System*, *Netherlands Quarterly of Human Rights*, Vol. 31/2 (2013), p. 170.

Accordingly, I agree that “[i]f the States really want to take this issue seriously, it is urgent that they revise the relevant treaties so that it is the States themselves that decide to update their obligations in this area.”²³

29. Meanwhile, some authors have used the *pro homine* principle established in Article 29 of the Convention to affirm that this tends towards the direct enforceability of the ESCR via Article 26, given that this position would provide more extensive protection. Regarding this principle, the Court has established that “the international system of protection should be understood to be comprehensive, a principle established in Article 29 of the American Convention, which imposes a protection framework that always accords preference to the interpretation or the norm that is most favorable to human rights, the cornerstone for protection of the whole inter-American system. In this regard, the adoption of a restrictive interpretation of the scope of the Court’s competence would not only run counter to the object and purpose of the Convention, but would also affect the practical effects of the treaty itself and the guarantee of protection that it establishes, with negative consequences for the presumed victim in the exercise of his right of access to justice.”²⁴ Thus, the *pro homine* principle should be applied when the Court is faced with two possible precise and valid interpretations. Indeed, what the analysis made in this opinion has demonstrated is that the direct justiciability of the ESCR based on Article 26 of the Convention is not a valid interpretation because its intention is to generate a normative statement that does not correspond to that article.²⁵

E. Conclusion and final considerations

30. Having set out the legal arguments that support my decision in this judgment, I also find it appropriate to present other reasons that reinforce my position. To start, one of the reasons why I consider that the arguments of those who are in favor of the direct justiciability of the ESCR under Article 26 are not persuasive is because they have not been able to justify how this approach, which contravenes what is expressly stated in the Protocol, is a better option than the other means of protection that the Court has used, such as the connectivity with the right to life or the right to personal integrity, or the concept of a “decent life.” Some authors affirm that that approach is necessary in order to provide a specific sphere of protection for the ESCR, without taking into account that the Protocol of San Salvador created this sphere of protection, but concluded that the Court would only consider directly the rights established in Article 8(a) and 13 of the Protocol. In addition, it has not been proved that the use of connectivity or the concept of a “decent life” as mechanisms for the indirect protection of the ESCR²⁶ is not effective for the protection and guarantee of the victims’ rights, or that it is not an option that provides extensive protection. I agree that it is important that case law must be progressive and provide all possible guarantees, but in those cases in which protection can be achieved by less problematic and controversial

²³ Juan Carlos Upegui Mejía, *Diálogos Judiciales en el Sistema Interamericano de Garantía de los Derechos Humanos*. Barcelona, España, February 26, 2015. Available at <https://www.youtube.com/watch?v=7cAls8PSzmo&feature=youtu.be>

²⁴ *Case of Vélez Loor v. Panamá. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2010. Series C No. 218, para. 34.

²⁵ Similarly see: *Case of González et al. (“Cotton Field”) v. Mexico. Preliminary objection, Merits, reparations and costs*. Judgment of November 16, 2009. Series C No. 205, para. 79.

²⁶ Similarly, during the public hearing in this case, expert witness Courtis stated that: “Conceptually, [he had ...] no objection [to the interpretation of the right to health by means of the right to physical integrity, because] rights [are] indivisible, interdependent, and of equal rank.”

mechanisms, it is better to choose the most effective means and leave academic pretensions to one side.

31. Thus, in this judgment, the Court decided to examine Talía Gonzales Lluy's health problems as a persons living with HIV under the rights to life and to personal integrity recognized in Articles 4 and 5 of the Convention. The fact that the Court chose to argue the case in this way, did not prevent it from making important progress as regards the requirements of availability, accessibility, acceptability and quality in the provision of health care services, as well as the obligation to regulate, monitor and supervise the provision of services in private health care centers. This does not entail the creation of a new right, but merely provides content and scope to rights such as to life and to integrity that are recognized in the Convention and, therefore, accepted by the States Parties.

32. Furthermore, another of my concerns is that expanding the Court's competence, in disregard of the will of the States, delegitimizes the Court and calls into question the progress made, with considerable effort, on other issues in its case law. The legitimacy of the courts stems, in the first place, from the will of the States that decided to establish them, as well as from their judgments, the reasoning that they present in those judgments, and their adherence to the law. If the Court exceeds the functions assigned to it under the American Convention and other treaties of the inter-American system, it would be undermining the legitimacy and confidence that the States have deposited in it. A decision that involved disregarding the will of the States on this point could give rise to a negative reaction or displeasure that jeopardizes the system. Even though the Court was not established to please the States, because its mandate is to rule on their international responsibility, it should not create an imbalance that could lead to a lack of protection for the human rights that it seeks to safeguard. In this regard, I agree that:

"A Court interpretation of the scope of article 26 that would permit direct access for ESC violations could constitute either broadening of the jurisdiction, or expansion of the "opportunities to detect, expose or remedy noncompliance" - in either case, results likely to produce hostile state reaction. Again, in both cases, a given state's hostility would flow primarily from its belief that the supranational body is engaging in more or a different kind of oversight than the state initially accepted. In this model, state perception is more important than the correctness (to the extent that this may be judged objectively) of the supranational decision. If, as we argue, states understand the terms of the American Convention and the Court's rulings in *Five Pensioners* and subsequent cases as limits on direct access for ESC litigation via article 26, a broader interpretation of that article by the Court would constitute overlegalization."²⁷

33. Lastly, I consider that human rights courts, such as the Inter-American Court, cannot try and make up for the democratic deficiencies of the countries, and should therefore exercise caution in this regard.²⁸ Human rights courts should seek to protect the rights of minorities, but based always on the competences that have been assigned to them. The stability and future of the inter-American system depends to a great extent on the balance that the Court achieves between the temptation to over expand its competences and the need to make progress in legal standards for the effective protection and guarantee of human rights.

²⁷ James L. Cavallaro and Emily Schaffer. Rejoinder: Justice before Justiciability: Inter-American Litigation and Social Change, *New York University Journal of International Law and Politics*, Vol. 39, Issue 2 (Winter 2006), p. 365.

²⁸ In this regard, see: *"Sin lugar para la soberanía popular. Democracia, derechos and castigo en el caso Gelman"*. Roberto Gargarella (2012).

Humberto Antonio Sierra Porto
Judge

Pablo Saavedra Alessandri
Secretary