

**CONCURRING OPINION OF JUDGE EDUARDO FERRER MAC-GREGOR POISOT
TO THE JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS
IN THE CASE OF SUÁREZ PERALTA v. ECUADOR, OF MAY 21, 2013**

I. INITIAL PREMISE: THE POSSIILITY OF HAVING APPROACHED THE RIGHT TO HEALTH DIRECTLY AND AUTONOMOUSLY (ARTICLES 26 AND 1(1) OF THE AMERICAN CONVENTION)

1. In this case, the Inter-American Court of Human Rights (hereinafter “the Court” or “the Inter-American Court”) declared the defendant State internationally responsible for the violation of the rights to judicial guarantees and to judicial protection established in Articles 8(1) and 25(1) of the American Convention on Human Rights (hereinafter “the American Convention” or “the Pact of San José”), as well as of the obligation to guarantee the right to personal integrity contained in Article 5(1), all in relation to Article 1(1) of the Pact of San José.

2. Although I agree with the sense of the judgment delivered unanimously, I consider that the Inter-American Court could have approached the problem taking into account what really caused this case to reach the inter-American system and, in particular, its jurisdictional instance, which was the implications for the “right to health,” owing to medical malpractice with State responsibility that had a serious impact on the health of a woman of 22 years of age, mother of three children, leading to several operations and ailments that affected her human dignity.

3. From my perspective, this situation could have been considered explicitly, so that the considerations of the Judgment on preliminary objections merits, reparations and costs (hereinafter “the Judgment”)¹ could have dealt with the question fully, and the implications in the case for the right to health could have been examined autonomously. The foregoing, based on recognizing the competence granted to the Inter-American Court by Article 26 of the Pact of San José to rule on the right to health, and understanding the direct justiciability of this social right – not only tangentially and in connection with other civil rights – which could, perhaps, have led to declaring that this treaty-based provision had been violated autonomously, in relation to the obligations of respect and guarantee established in Article 1(1) of the Pact of San José.

4. Indeed, the general obligations of “respect” and “guarantee” that are established in this article of the Convention – together with the obligation to “adapt domestic legislation” of Article 2 of the American Convention – apply to *all rights*, whether civil, political, economic, social or cultural, in light of the interdependence and indivisibility that exists among *all the human rights* recognized in the Pact of San José; this “interdependence and indivisibility” was expressly acknowledged with particular emphasis in relation to the right to health in the Judgment that gives rise to this separate opinion,² and this entails a series of

¹ *Case of Suárez Peralta v. Ecuador. Preliminary objections merits, reparations and costs.* Judgment of May 21, 2013.

² See paragraph 131 of the Judgment, which indicates textually that: “The Court also finds it pertinent to recall the interdependence and indivisibility of civil and political rights, and economic, social and cultural rights, because they must be understood integrally as human rights without any specific ranking between them, and as rights that can be required in all cases before those authorities with the relevant competence”; the foregoing following the precedent of the Inter-American Court in the *Case of Acevedo Buendía et al.* (“Discharged and Retired

significant consequences, including that of accepting that human rights do not have a hierarchy, and civil and political rights are justiciable directly, as are economic, social and cultural rights.

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 26,³ 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 opinion⁴ – 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.

6. Indeed, the competence of the Inter-American Court to examine the right to health is found directly in Article 26 (Progressive Development)⁵ 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)⁶ and 2 (Domestic Legal Effects),⁷ as well as to Article 29 (Restrictions regarding Interpretation)⁸ of the American Convention itself. In addition, considering Articles 34(i)⁹ and 45(h)¹⁰ of the Charter of the Organization of American

Employees of the Office of the Comptroller”) v. Peru. Preliminary objection, merits, reparations and costs. Judgment of July 1, 2009 Series C No. 198, para. 101.

³ Cf. *Case of Acevedo Buendía et al. (“Discharged and Retired Employees of the Office of the Comptroller”), supra*, para. 16: “the Court has asserted on other occasions, that the broad terms in which the Convention is written indicate that the Court has full jurisdiction over all matters pertaining to its articles and provisions,” and thus it decided to examine the merits of the matter by rejecting the first preliminary objection filed by the State, precisely with regard to the Inter-American Court’s supposed lack of competence with regard to Article 26 of the American Convention.

⁴ Cf. para. 131 of the Judgment, which refers to the OAS Charter and in footnote 169 establishes: “Article 26 of the American Convention (Pact of San José) refers to the progressive development, “by legislation or other appropriate means, and in keeping with the available resources [...] of the rights implicit in the economic [and] social, standards set forth in the Charter of the [OAS].” The right to health is included in this reference (underlining added).

⁵ “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.”

⁶ “Article 1. *Obligation to Respect Rights*. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”

⁷ “Article 2. *Domestic Legal Effects*. Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.”

⁸ American Convention: “Article 29. *Restrictions regarding Interpretation*. No provision of this Convention shall be interpreted as: (a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein; (b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party; (c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government, or (d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

⁹ Article 34(i) of the OAS Charter establishes among the “basic objectives of integral development,” the “protection of man’s potential through the extension and application of modern medical science” (underlining added).

States, Article XI¹¹ of the American Declaration on the Rights and Duties of Man, and Article 25(1)¹² of the Universal Declaration of Human Rights (the last two instruments pursuant to the provisions of Article 29(d)¹³ 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 rights¹⁴ – such as Articles 10¹⁵ 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,¹⁶ 12(1) and 12(2)(d)¹⁷

¹⁰ Article 45 of the OAS Charter indicates: “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.” In the Judgment this precept is used in relation to Article 26 to arrive at the right to health, see para. 131 and footnote 176 of the Judgment to which this separate opinion refers; although it appears to bear a greater relationship to the issue of Article 34(i) of the OAS Charter.

¹¹ American Declaration: “Article XI. 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” (underlining added).

¹² Universal Declaration: “Article 25(1): Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services... .”

¹³ This expressly states that that the effect that the “American Declaration” and “other international acts of the same nature” may have cannot be limited.

¹⁴ For example, the *Case of the “Mapiripán Massacre” v. Colombia*. Judgment of September 15, 2005. Series C No. 134, para. 153, establishes: “The content and scope of Article 19 of the American Convention must defined, in cases such as this, taking into consideration the pertinent provisions of the Convention on the Rights of the Child, in particular its articles 6, 37, 38 and 39, and of Protocol II Additional to the Geneva Conventions, because these instruments and the American Convention form part of a very comprehensive international *corpus juris* for the protection of children that States must respect.”

Another example is the *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, reparations and costs*. Judgment of August 31, 2001, Series C No. 79, paras. 147 and 148; the latter states that: “By using an evolutive interpretation of the international instruments for the protection of human rights, taking into account the applicable rules of interpretation and, pursuant to Article 29(b) of the Convention – which prohibits a restrictive interpretation of rights – this Court considers that Article 21 of the Convention protects the right to property in a sense that includes, among other matters, the rights of the members of the indigenous communities relating to communal property, which is also recognized in the Nicaraguan Constitution.”

Similarly, in the *Case of Gelman v. Uruguay. Merits and reparations*. Judgment of February 24, 2011, Series C No. 221, para. 121, the Inter-American Court established that: “María Macarena Gelman had a right to special measures of protection [...] [so that] the alleged violations of the rights recognized in Articles 3, 17, 18 and 20 of the Convention must be interpreted in light of the *corpus juris* concerning the rights of the child and, in particular, according to the special circumstances of the case, in harmony with the other relevant norms, especially Articles 7, 8, 9, 11, 16 and 18 of the Convention on the Rights of the Child.”

¹⁵ Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights: “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.”

¹⁶ Social Charter of the Americas, approved by the OAS General Assembly on June 4, 2012, in Cochabamba, Bolivia.

“Chapter III, Article 6. The Member States reaffirm that *the enjoyment of the highest attainable standard of health is a fundamental right of all persons without discrimination and recognize that health is an essential condition for social inclusion and cohesion, integral development and economic growth with equity*. In that context, the States reaffirm their responsibility and commitment to improve the availability of, access to, and quality of health care services. The States are committed to these country efforts in the health area in accordance with the principles promoted by the Health Agenda for the Americas 2008-2017: human rights, universality, comprehensiveness, accessibility and inclusion, Pan American solidarity, equity in health, and social participation.

of the International Covenant on Economic, Social and Cultural Rights, 12(1)¹⁸ of the Convention on the Elimination of all Forms of Discrimination against Women, 24¹⁹ and 25²⁰ of the Convention on the Rights of the Child, among other international instruments²¹ and sources²² — and even national ones by way of Article 29(b)²³ of the American Convention.²⁴ And this, without being limited by Article 19(6)²⁵ of the Protocol of San Salvador, which

Member states affirm their commitment to promote healthy lifestyles and to strengthen their capacity to prevent, detect, and respond to chronic non-communicable diseases, current and emerging infectious diseases, and environmental health concerns. Member states also commit to promote our peoples' well-being through prevention and care strategies and, in partnership with public or private organizations, to improve access to *health care*."

"Chapter V, Article 1: "Integral development encompasses among others, the economic, social, educational, cultural, scientific, technological, labor health, and environmental fields through which the goals that each country sets for accomplishing it should be achieved."

¹⁷ International Covenant on Economic, Social and Cultural Rights: "Article 12(1) The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. (2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: ... (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness."

¹⁸ Convention on the Elimination of all Forms of Discrimination against Women: "Article 12. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning."

¹⁹ Convention on the Rights of the Child: "Article 24. 1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services. 2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures [...]."

²⁰ Convention on the Rights of the Child: "Article 25. States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement."

²¹ For example, the Convention on the Protection of Migrant Workers and Members of their Families: "Article 28. Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment." In general, see the instruments that are mentioned in General Comment No. 14 of the Committee on Economic, Social and Cultural Rights on "The right to the highest attainable standard of health (Article 12)," para. 2.

²² Such as the general recommendations and comments of different Committees. Particularly relevant to the right to health is General Comment No. 14 of the Committee on Economic, Social and Cultural Rights, which interprets Article 12 of the International Covenant on Economic, Social and Cultural Rights, on "The right to enjoy the highest attainable standard of health." Also, the Liburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Right, paragraph 25 of which indicates: "States parties are obligated regardless of the level of economic development, to ensure respect for minimum subsistence rights for all."

In addition, the *Progress Indicators in Respect of Rights Contemplated in the Protocol of San Salvador*, OEA/Ser.L/XXV.2.1, Doc 2/11 rev.2, 16 December 2012, are of interest.

²³ American Convention: "Article 29(b) No provision of this Convention shall be interpreted as restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party."

²⁴ Most of the national Constitutions of the countries that have signed the Pact of San José explicitly regulate, implicit with other precepts or by means of the incorporation of international treaties, the protection of the right to health. See *infra* paras. 74 and 75. In addition, it should be recalled that the Inter-American Court has used the contents of the national Constitutions to grant certain contents to civil rights; for example "in application of Article 29 of the Convention, the provisions of article 44 of the Constitution of the Republic of Colombia should be considered" (fundamental rights of the child). *Case of the "Mapiripán Massacre," supra*, para. 153.

²⁵ Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights: "Article 19. *Measures of protection*. 6. 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,

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.

9. This is why, under Article 66(2) of the American Convention,²⁶ and based on the elements deliberated on and discussed with my esteemed colleagues, I feel the need to add to the Judgment my concurring individual opinion on some of the important implications that this matter has in direct and autonomous relationship to the right to health in cases of medical malpractice. This was the central issue of the facts of the case, which, ultimately, focused on the merits of the matter to declare the international responsibility of the State concerned with regard to other civil rights recognized in the Pact of San José.

10. The intention of this separate opinion is to encourage further thought on the necessary evolution that, in my opinion, should take place in inter-American case law towards the full normative effectiveness of Article 26 of the Pact of San José, thereby granting transparency and real protection to economic, social and cultural rights, which requires accepting their direct justiciability and, if appropriate — as in the case of civil and political rights — eventually being able to declare the autonomous violation of those rights, in relation to the general obligations established in Articles 1 and 2 of the American Convention when the circumstances of a specific case require this.

11. Indeed, without denying the progress achieved indirectly in the protection of economic, social and cultural rights 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

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.”

²⁶ Article 66(2) of the American Convention establishes: “If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment. Also, see Articles 24(3) of the Statute of the Inter-American Court and 32(1)(a), 65(2) and 67(4) of its Rules of Procedure.

of *all the rights* in keeping with the evident progress that can be noted in the domestic sphere and in international human rights law.

12. Bearing in mind these initial premises, I now find it appropriate to examine: (i) the justiciability of economic, social and cultural rights, including the right to health, based on their interdependence and indivisibility with civil and political rights (paragraphs 13 to 32); (ii) the interpretative mechanisms of Article 26 for the direct justiciability of economic, social and cultural rights (paragraphs 33 to 87); (iii) the *iura novit curia* principle and the direct justiciability of the right to health in this case (paragraphs 88 to 96), and (iv) some concluding considerations (paragraphs 97 to 108).

II. THE JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS, INCLUDING THE RIGHT TO HEALTH, BASED ON THEIR INTERDEPENDENCE AND INDIVISIBILITY WITH CIVIL AND POLITICAL RIGHTS

A) Precedents and current state of the debate

13. The Inter-American Court has had the occasion to rule previously on some of the implications of the protection of the right to health. In some cases in relation to the rights to life or to personal integrity,²⁷ in others in the context of the concept of a “decent life,”²⁸ and in others based on the medical care provided in detention centers or similar institutions,²⁹ even, in yet other cases, in relation to sexual or reproductive rights.³⁰

14. In very few cases has it analyzed the implications of Article 26 of the American Convention, generally limiting itself to interpreting certain normative parts of this treaty-based provision in relation to economic, social and cultural rights. It has never declared, directly and autonomously, the violation of the said provision.³¹

²⁷ Irrespective of specific references in provisional measures and in advisory opinions, the following judgments are relevant: *Case of Furlan and family members v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2012, Series C No. 246; *Case of Vera Vera et al. v. Ecuador. Preliminary objection, merits, reparations and costs.* Judgment of May 19, 2011, Series C No. 226; *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of August 24, 2010, Series C No. 214; *Case of Albán Cornejo et al. v. Ecuador. Merits, reparations and costs.* Judgment of November 22, 2007, Series C No. 171, and *Case of Ximenes Lopes v. Brazil.* Judgment of July 4, 2006, Series C No. 149.

²⁸ Cf. *Case of the Xákmok Kásek Indigenous Community, supra*; *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of June 17, 2005, Series C No. 125; *Case of the “Children’s Rehabilitation Institute” v. Paraguay. Preliminary objections, merits, reparations and costs.* Judgment of September 2, 2004, Series C No. 112, and *Case of the “Street Children” (Villagrán Morales et al.) v. Guatemala. Merits.* Judgment of November 19, 1999. Series C No. 63.

²⁹ Cf. *Case of Díaz Peña v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of May 19, 2011. Series C No. 226; *Case of Vera Vera et al., supra*; *Case of Vélez Loor v. Panama. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2010. Series C No. 218; *Case of the Miguel Castro Castro Prison v. Peru. Merits, reparations and costs.* Judgment of November 25, 2006. Series C No. 160, and *Case of the “Children’s Rehabilitation Institute,” supra*.

³⁰ Cf. *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; *Case of Rosendo Cantú et al. v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of August 31, 2010. Series C No. 216; *Case of Fernández Ortega et al. v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of August 30, 2010, Series C No. 215; *Case of the Xákmok Kásek Indigenous Community, supra*; *Case of the Miguel Castro Castro Prison, supra*, and *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of March 29, 2006, Series C No. 146.

³¹ The Inter-American Court has referred to Article 26 of the American Convention and analyzed it specifically on very few occasions. However, it did so in the following cases: *Case of Acevedo Buendía et al. (“Discharged and Retired Employees of the Office of the Comptroller”), supra*, paras. 99 a 103; *Case of the Yean*

B) The interdependence and indivisibility of all the rights as an essential element to grant direct justiciability to economic, social and cultural rights

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.³² 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.³³

16. We consider that the above is of the greatest importance for the progressive development and justiciability of economic, social and cultural rights. The Inter-American Court bases itself on a 2009 precedent – decided by the former composition of the Court – in which it had already recognized the “interdependence” of human rights. Indeed, on that occasion, the Court stated:³⁴

101. In this regard, the Court finds it pertinent to recall the interdependence that exists between civil and political rights and economic, social and cultural rights, because they should be understood integrally as human rights, without any specific hierarchy, and may be required at all times before those authorities who have the respective competence.

17. In addition to establishing “the interdependence” of human rights in that case, the Inter-American Court endorsed the ruling of the European Court of Human Rights on interpretative extensions towards the protection of social and economic rights. On that occasion, it stated:³⁵

In this regard, the case law of the European Court of Human Rights should be quoted, which, in the case of *Airey*, indicated that:

The Court is aware that the further realisation of social and economic rights is largely dependent on the situation - notably financial - reigning in the State in question. On the other hand, the [European] Convention must be interpreted in the light of present-day conditions [...] and it is designed to safeguard the individual in a real and practical way as regards those areas with which it deals [...]. Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.³⁶

and Bosico Girls v. Dominican Republic. Judgment of September 8, 2005. Series C No. 130, para. 158, and *Case of the “Five Pensioners” v. Peru. Merits, reparations and costs*. Judgment of February 28, 2003, Series C No. 98, paras. 147 and 148; and *Case of the Yakye Axa Indigenous Community, supra*, para. 163. In this last case, the State acquiesced to its responsibility for the violation of Article 26, but the Court only referred to this article in its narrative on the violation of the right to life.

³² Paragraph 5 of the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on June 25, 1993, states categorically that: “[a]ll human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.”

³³ Cf. para. 131 of the Judgment.

³⁴ *Case of Acevedo Buendía et al. (“Discharged and Retired Employees of the Office of the Comptroller”)*, *supra*, para. 101.

³⁵ *Idem*. Similarly, see United Nations, Economic and Social Council, Committee on Economic, Social and Cultural Rights. General Comment No. 9, E/C.12/1998/24, 3 December 1998, para. 10, and ECHR. *Sidabras and Dziautas v. Lithuania*. Nos. 55480/00 and 59330/0. Second Section. Judgment of 27 July 2004, para. 47.

³⁶ ECHR. *Airey v. Ireland*. No. 6289/73. Judgment of 9 October 1979, para. 26.

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 interpretative 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.³⁷ 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:³⁸

[...] the State argued that the right to social security fell outside the sphere of competence of the Court owing to the subject-matter, because it is not included in the American Convention, and is not one of the two rights (trade union rights and the right to education) that, exceptionally, are justiciable before the inter-American system, as indicated in Article 19(6) of the Protocol of San Salvador.

19. The Inter-American Court, without mentioning the Protocol of San Salvador to determine whether it had competence in this regard,³⁹ 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) supposes the acceptance of the Court's right to decide *any dispute relating to its jurisdiction* by the States that present this instrument."⁴⁰ 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*.⁴¹

20. In this important precedent, the Inter-American Court rejected the preliminary objection of the defendant State that expressly argued that this jurisdictional organ lacked competence to rule on a non-justiciable right under Article 19(6)⁴² 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.⁴³ 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

³⁷ See the content of this provision, *supra*, nota 25.

³⁸ *Case of Acevedo Buendía et al. v. Peru* ("Discharged and Retired Employees of the Office of the Comptroller"), *supra*, para. 12.

³⁹ In this regard, see the criticisms of Ruiz-Chiriboga, Oswaldo, *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, pp. 156 to 183, on p. 167.

⁴⁰ Cf. *Case of Ivcher Bronstein v. Peru. Competence*. Judgment of September 24, 1999. Series C No. 54, paras. 32 and 34; *Case of Heliodoro Portugal v. Panama. Preliminary objections, merits, reparations and costs*. Judgment of August 12, 2008. Series C No. 186, para. 23, and *Case of García Prieto et al. v. El Salvador. Preliminary objection, merits, reparations and costs*. Judgment of November 20, 2007. Series C No. 168, para. 38.

⁴¹ Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary objections*. Judgment of June 26, 1987. Series C No. 1, para. 29, and *Case of the 19 Tradesmen v. Colombia. Preliminary objection*. Judgment of June 12, 2002. Series C No. 93, para. 27.

⁴² See the content of this article, *supra* nota 25.

⁴³ Cf. *Case of Acevedo Buendía et al. v. Peru* ("Discharged and Retired Employees of the Office of the Comptroller"), *supra*, third operative paragraph.

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 25.⁴⁴

21. The competence of the Inter-American Court to rule on economic, social and cultural rights, under the normative content of Article 26 of the Pact of San José, can also be seen in the considerations expressed in the 2009 concurring opinion of the former president of the Inter-American Court, Sergio García Ramírez, in the *Case of Acevedo Buendía et al. v. Peru*, which, to some extent, explains the decision of the said jurisdictional organ.⁴⁵

22. Thus, in his concurring opinion, the former inter-American judge recognized that, up until that time, the treatment of economic, social and cultural rights “has been very limited” and that, in that case, the Inter-American Court “had made progress” on the issue of those rights when “reaffirming its competence – which should now be well-established” – to rule on possible failures to comply with Article 26” of the American Convention. Accordingly, the Inter-American Court “understands that the observance of Article 26 may be claimed and required.”

23. In this sense, in the *Case of Acevedo Buendía et al.*, the Inter-American Court made express reference to the “interdependence” of rights in order to examine the economic, social and cultural rights referred to in Article 26 of the Pact of San José.⁴⁶ However, it found that, together with the interdependence, it was necessary to emphasize the “indivisible” nature of human rights, as it explicitly established in the judgment to which this separate opinion refers, when considering the two concepts: “interdependence and indivisibility”⁴⁷.

24. Based on their interdependence (reciprocal dependence), the enjoyment of some rights depends on the realization of others, while their indivisibility denies any separation, categorization or hierarchy among rights for the effects of their respect, protection and guarantee. Moreover, some judges of previous compositions of the Inter-American Court have referred to the “interdependence and indivisibility” of human rights.⁴⁸

25. In this sense, I consider that the “interdependence and indivisibility” should be dealt with as an inseparable duo, as indicated in the main human rights instruments.⁴⁹ This is in

⁴⁴ Cf. *Case of Acevedo Buendía et al. v. Peru* (“Discharged and Retired Employees of the Office of the Comptroller”), *supra*, para. 100. It should not be forgotten that, in this matter, the Commission in its Merits Report did not find that the content of Article 26 had been violated, but the representatives of the victims did allege this when expressly stating that “the State is responsible for non-compliance with Article 26 (Progressive development of economic, social and cultural rights) of the Convention, in relation to Article 1(1) (Obligation to Respect Rights) thereof,” para. 4 of the judgment in the *Case of Acevedo Buendía*.

⁴⁵ Concurring opinion of Judge Sergio García Ramírez with regard to the Judgment of the Inter-American Court of Human Rights in the *Case of Acevedo Buendía et al.* (“Discharged and Retired Employees of the Office of the Comptroller”) of July 1, 2009, paras. 15 to 21.

⁴⁶ Cf. *Case of Acevedo Buendía et al. v. Peru* (“Discharged and Retired Employees of the Office of the Comptroller”), *supra*, para. 101.

⁴⁷ Para. 131 of the Judgment.

⁴⁸ See, for example, the partially concurrent and partially dissenting opinion of Judge *ad hoc* Ramon Fogel, paras. 23 and 30, in the *Case of the Yakye Axa Indigenous Community v. Paraguay*, *supra*, and the opinion of Judge Antonio Cançado Trindade, para. 7, in the *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 24, 2006. Series C No. 158.

⁴⁹ See the Preamble to the American Convention on Human Rights, to the International Covenant on Civil and Political Rights, and to the International Covenant on Economic, Social and Cultural Rights. Proclamation of Teheran 1948, para. 13.

order to assume the challenge of their interpretation and implementation as a holistic task that obliges us not to lose sight of the implications of the respect, protection and guarantee of civil and political rights in relation to economic, social and cultural rights, and *vice versa*. The application, promotion and protection of economic, social and cultural rights call for the same attention and urgent consideration as that of the civil and political rights.⁵⁰

26. In the case that underlies this separate opinion, the Inter-American Court had an opportunity to develop in its case law the implications of the concepts of the interdependence and indivisibility of human rights, which are very useful tools for achieving the “direct” justiciability of economic, social and cultural rights, particularly “the right to health,” and to achieve its full realization and effectiveness.

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.

C) The implications of the interdependence and indivisibility of the right to health in this case

28. Now, in the Judgment to which this separate opinion refers, the Inter-American Court made specific reference to the concepts of interdependence and indivisibility in order to define the scope of the right to health, when examining the violation of the obligation to guarantee the right to personal integrity (Articles 5(1) in relation to 1(1) of the Pact of San José),⁵¹ and concluding “that although the relevant Ecuadorian regulations established mechanisms of control and supervision of medical care, this supervision and control was not carried out in the instant case, as regards control of both the services provided in the State facility, the Polyclinic of the Guayas Traffic Commission, and those provided in the private institution, the Minchala Clinic. The Court finds that this resulted in a situation of risk, which the State was aware of, that materialized in adverse effects on the health of Melba Suárez Peralta.”⁵² In addition, the Inter-American Court affirmed that “the State’s supervision and inspection should be designed to ensure the principles of availability, accessibility, acceptability, and quality of the medical services” and, to this end, it emphasized that

⁵⁰ Cf. Resolution 32/130 of the General Assembly of the United Nations, of 16 September 1977, paragraph 1, subparagraph (a); Declaration on the Right to Development made by the General Assembly in its resolution 41/128 of 4 December 1986, para. 10 of the preamble and art. 6; the 1986 Limburg Principles, especially No. 3, and the 1997 Maastricht Guidelines on Violations of Economic, Social and Cultural rights, particularly No. 3.

⁵¹ The analysis of the right to personal integrity is made in paras. 123 to 160 of the Judgment, although many passages are related to the right to health.

⁵² Para. 154 of the Judgment.

“regarding the quality of the service, [...] health facilities must have satisfactory conditions of hygiene and trained medical personnel.”⁵³

29. In this analysis, the Inter-American Court referred expressly to different international instruments, resolutions and sources that regulate or have direct implications for the protection of the right to health:

(i) Article 26 of the American Convention on Human Rights;⁵⁴

(ii) 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, which establishes that everyone shall have 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 good.⁵⁵

(iii) Article XI of the American Declaration on the Rights and Duties of Man, which indicates 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”;⁵⁶

(iv) Article 45 of the Charter of the Organization of American States, when stating that the Member States are required “[t]o dedicate every effort to the [...] development of an efficient social security policy”;⁵⁷

(v) Article 12 del International Covenant on Economic, Social and Cultural Rights.⁵⁸

(vi) The Social Charter of the Americas of June 2012, adopted by the General Assembly of the Organization of American States, which emphasizes the quality of the health establishments, goods and services, which require the presence of qualified medical personnel, as well as satisfactory conditions of hygiene;⁵⁹

(vii) The Progress Indicators in Respect of Rights Contemplated in the Protocol of San Salvador.⁶⁰ ◊

⁵³ Para. 152 of the Judgment.

⁵⁴ Footnote 176 [Nota: not 176] of the Judgment. This note refers to the mention made to the OAS Charter in para. 131, from which the Inter-American Court derives the right to health; although I consider that it should have considered article 34(i) of the OAS Charter.

⁵⁵ Cf. para. 131 of the Judgment. The *Case of Vera Vera et al.*, *supra*, para. 43, is cited.

⁵⁶ Cf. para. 131 of the Judgment.

⁵⁷ Cf. para. 131 of the Judgment.

⁵⁸ Cf. para. 152 of the Judgment.

⁵⁹ Cf. para. 131, *in fine*, of the Judgment.

⁶⁰ Cf. Footnote 172 of the Judgment: Organization of American States, Progress Indicators in Respect of Rights Contemplated in the Protocol of San Salvador, adopted by the General Assembly, Resolution 2713 (XLII-0/12), forty-second regular session, Cochabamba, Bolivia, June 2012, paras. 66 and 67. In footnote 172 of the Judgment, the Inter-American Court transcribes part of this document: “The Protocol refers to observance of the right in the framework of a health system that, however basic it may be, should ensure access to primary health care and the progressive development of a system that provides coverage to the country’s entire population. [...] as well as being culturally acceptable, health facilities, goods and services must also be scientifically and medically appropriate and of good quality. This requires, *inter alia*, skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation.” In addition, the said indicators include: “Existence of administrative instances to submit complaints in matters of non-compliance with

(viii) General comment No. 14 of the United Nations Committee on Economic, Social and Cultural Rights, on “The right to the highest attainable standard of health (Article 12)”;⁶¹ ~~Article~~

(ix) General comment No. 9 of the United Nations Committee on Economic, Social and Cultural Rights, on “The domestic application of the Covenant.”⁶²

(x) General comment No. 3 of the United Nations Committee on Economic, Social and Cultural Rights, on “The nature of States parties' obligations (paragraph 1 of Article 2 of the Covenant).”⁶³

30. Similarly, when the Judgment examines the violation of the right to judicial guarantees and to judicial protection established in Articles 8(1) and 25(1) of the American Convention, in relation to the obligations of respect and guarantee of Article 1(1) of this instrument, the Inter-American Court determined that there had been errors, delays and omissions in the criminal investigation proceedings, and that therefore “the State authorities did not act with due diligence or in keeping with the obligations to investigate and to ensure effective judicial protection within a reasonable time, in order to guarantee to Melba Suárez Peralta a reparation enabling her to have access to the medical treatment required by her health problems”⁶⁴ (underlining added).

31. I consider that, with all these precedents in the *corpus juris* with regard to protection of the right to health — in the sphere of the inter-American and the universal system — mentioned and used in the Judgment that prompts this separate opinion, even having recourse to very relevant decisions of the United Nations Committee on Economic, Social and Cultural Rights, as well as other recent international sources, such as the Social Charter of the Americas, adopted in June 2012 by the OAS General Assembly, the Inter-American Court could have approached this social rights Article autonomously, in relation to the obligation of guarantee referred to in 1(1) of the Pact of San José.

32. This is so, because, on the one hand, the interdependence and indivisibility of rights and the absence of a hierarchy among them is expressly recognized in the Judgment and, on the other hand, the OAS Charter and the American Declaration on the Rights and Duties of Man are used, even deriving the right to health from that instrument in relation to the provisions of Article 26 of the American Convention.⁶⁵ In addition, reference is made to Article 10 of the Protocol of San Salvador, which I consider would have provided an opportunity to make an evolutive and systematic interpretation of this precept and of Article 26 of the American Convention, in light of other treaty-based provisions, such as Article 29 of the Pact of San José and Articles 4 and 19(6) of the Protocol of San Salvador.

obligations related to the right to health. Competences of Ministries or of Superintendences to receive complaints from the health system users. Policies for training judges and lawyers on the right to health.”

⁶¹ Cf. footnotes 175, 182, 217, 220, 221 and 222 of the Judgment.

⁶² Cf. footnotes 175 and 179 of the Judgment.

⁶³ Footnote 176 of the Judgment.

⁶⁴ Para. 122 of the Judgment.

⁶⁵ The reference is found in footnote 176 to para. 131 of the Judgment, from which the Inter-American Court considers that the right to health is derived.

III. THE WAY TO INTERPRET ARTICLE 26 OF THE AMERICAN CONVENTION FOR THE DIRECT JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

33. In addition to the interdependence and indivisibility of rights, explicitly recognized in the Judgment, the implications of which were demonstrated in the preceding section, the direct justiciability of economic, social and cultural rights, derives from the American Convention itself, the instrument at the core of the inter-American system that constitutes the main object of “application and interpretation”⁶⁶ of the Inter-American Court, which has “competence with respect to matters relating to the fulfillment of the commitments made by the States Parties”⁶⁷ to the Pact of San José.

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*.⁶⁸ 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.

A) The apparent conflict between the Pact of San José and the Protocol of San Salvador

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*,⁶⁹ 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

⁶⁶ Cf. Article 1 of the Statute of the Inter-American Court of Human Rights, approved by the OAS General Assembly in October 1979.

⁶⁷ Cf. Article 33 of the American Convention on Human Rights.

⁶⁸ *Case of Acevedo Buendía et al. (“Discharged and Retired Employees of the Office of the Comptroller”)*, *supra*, paras. 16, 17 and 100.

⁶⁹ *Case of Furlan and family members, supra*.

provision intended to restrict the scope of the American Convention.”⁷⁰ In addition, she stated that:⁷¹

[...] when interpreting the Convention [and the Protocol of San Salvador], a systematic interpretation of the two treaties should be made, taking their purpose into account. In addition, the Vienna Convention requires an interpretation in good faith of the terms of Article 26, as made previously to determine the scope of the textual reference to the said article in relation to the OAS Charter and its relationship to Articles 1(1) and 2 of the Convention. This interpretation in good faith requires recognizing that the American Convention does not establish distinctions when indicating that its jurisdiction covers all the rights established from Article 3 to Article 26 of the Convention. Furthermore, Article 4 of the Protocol of San Salvador establishes that no right recognized or in force in a State may be restricted or infringed by international instruments, under the pretext that the said Protocol does not recognize it or recognizes it to a lesser degree. Lastly, the Vienna Convention declares that an interpretation should not lead to a manifestly absurd or unreasonable result. In this regard, the conclusion that the Protocol of San Salvador limits the scope of the Convention would lead to the absurd consideration that the American Convention could have certain effects for the States Parties to the Protocol of San Salvador while having a different effect for the States that are not a party to this Protocol.⁷²

38. Judge Macaulay specified that it was incumbent on the Inter-American Court to update the normative meaning of Article 26 as follows:⁷³

[...] what matters is not the subjective intention of the delegates of the States at the time of the Conference of San José or during the discussion of the Protocol of San Salvador, but the objective intention of the text of the American Convention, taking into account that the interpreter's obligation is to update the normative meaning of the international instrument. Moreover, it is not possible to discredit the explicit content of the American Convention using a historical interpretation, based on the hypothetical intention that the delegates who adopted the Protocol of San Salvador would have had with regard to the Convention.

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 en el case of *Acevedo Buendía et al. v. Peru*:⁷⁴

100. Furthermore, it is pertinent to note that even though Article 26 is contained in Chapter III of the Convention, entitled “Economic, Social and Cultural Rights,” it is also located in Part I of the said instrument, entitled “State Obligations and Rights Protected” and, therefore, is subject to the general obligations contained in Articles 1(1) and 2 mentioned in Chapter I (entitled “General Obligations”), as well as Articles 3 to 25 indicated in Chapter II (entitled “Civil and Political Rights”).

⁷⁰ Concurring opinion of Judge Margarette May Macaulay in the *Case of Furlan vs. Argentina*, *supra*, para. 8.

⁷¹ *Idem*.

⁷² Only 15 States have ratified the Protocol of El Salvador. Source: <http://www.cidh.oas.org/Basicos/basicos4.htm>.

⁷³ Concurring opinion of Judge Margarette May Macaulay in the *Case of Furlan v. Argentina*, *supra*, para. 9.

⁷⁴ *Case of Acevedo Buendía et al. (“Discharged and Retired Employees of the Office of the Comptroller”)*, *supra*, para. 100.

41. This interpretation by the Inter-American Court, adopted unanimously,⁷⁵ constitutes a fundamental precedent for the direct justiciability of economic, social and cultural rights, by stating that, when dealing with the rights that can be derived from Article 26, it is possible to apply the general obligations of respect, guarantee, and adaptation contained in Articles 1(1) and 2 of the American Convention. Given that, in this case, the Inter-American Court did not rule on these interpretative implications in relation to the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, I consider that the Judgment to which this separate opinion refers would have provided a significant opportunity to allude to this, because the Protocol of San Salvador, the OAS Charter, the American Declaration, and even Article 26 of the American Convention were used expressly to give content to the right to health (see *supra* para. 29).⁷⁶

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.⁷⁷ 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.⁷⁸

43. Differing positions have arisen with regard to the interpretation of Article 26 and its relationship with the Protocol of San Salvador.⁷⁹ In my opinion, the principle of the most

⁷⁵ With separate opinions of Judge Sergio García Ramírez and Judge *ad hoc* Víctor Oscar Shiyin García Toma.

⁷⁶ Also, see para. 131 and footnote 176 of the Judgment.

⁷⁷ American Convention: "Article 76(1) Proposals to amend this Convention may be submitted to the General Assembly for the action it deems appropriate by any State Party directly, and by the Commission or the Court through the Secretary General."

⁷⁸ Cf. *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller")*, *supra*, para. 100.

⁷⁹ Cf., in alphabetical order, among others, Abramovich, Víctor and Rossi, Julieta, "La tutela de los derechos económicos, sociales y culturales en el artículo 26 de la Convención Americana sobre Derechos Humanos," in *Revista Estudios Socio-Jurídicos*, year/vol. 9, Special No., Universidad del Rosario, Bogotá, 34-53; Burgorgue-Larsen, Laurence, and Úbeda de Torres, Amaya, in particular Chapter 24 written by the first author: "Economic and social rights," *The Inter-American Court of Human Rights. Case Law and Commentary*, New York, Oxford University Press, 2011, pp. 613-639; Cavallaro, James L. and Brewer, Stephanie Erin "La función del litigio interamericano en la promoción de la justicia social," in *Sur. Revista Internacional de Derechos Humanos*, No. 8, 2008, pp. 85- 99; Cavallaro, James L. and Schaffer, Emily, "Less as More: rethinking Supranational Litigation of Economic and Social Rights in the Americas," in *Hastings Law Journal*, No. 56, No. 2, 2004, pp. 217-281; Cavallaro, James and Schaffer, Emily, "Rejoinder: Finding Common Ground to Promote Social Justice and Economic, Social and Cultural Rights in the Americas," in *New York University Journal of International Law and Politics*, No. 39, 2006, pp. 345-383; Courtis, Christian, "La protección de los derechos económicos, sociales y culturales a través del artículo 26 de la Convención Americana sobre Derechos Humanos" in Eduardo Ferrer Mac-Gregor and Arturo Zaldívar Lelo de Larrea (coords.), *La ciencia del derecho procesal constitucional. Estudios en homenaje a Héctor Fix-Zamudio en sus cincuenta años como investigador del derecho*, Mexico, UNAM-Marcial Pons-IMDPC, 2008, volume IX: "Derechos humanos y tribunales internacionales," pp. 361-438; Melish, Tara J., *La Protección de los Derechos Económicos, Sociales y Culturales en el Sistema Interamericano de Derechos Humanos*, Quito, CDES, Yale Law School, 2003, pp. 379-392; by the same author: "Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas," in *New York University Journal of International Law and Politics*, No. 39, 2006, pp. 171-343; by the same author: "Counter-Rejoinder. Justice vs. justiciability?: Normative Neutrality and Technical Precision, The Role of the Lawyer in Supranational Social Rights Litigation," in *New York University Journal of International Law and Politics*, No. 39, 2006, pp. 385-415; Parra Vera, Oscar, *Justiciabilidad de los derechos económicos, sociales y culturales ante el Sistema Interamericano*, Mexico, CNDH, 2011; Pelayo Moller, Carlos María. El "mínimo vital" como estándar para la justiciabilidad de los derechos económicos, sociales y culturales. *Revista Methodos*, Federal District Human Rights

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.⁸⁰ Moreover, in the terms of Article 29(b) of the American Convention, a restrictive interpretation of the rights is not permitted.⁸¹

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.

46. In this regard, the Inter-American Court has indicated on previous occasions⁸² 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.⁸³ When making an evolutive interpretation, the Court has given special relevance to comparative law, and has therefore used domestic laws⁸⁴ or the case law of domestic courts⁸⁵ when analyzing specific disputes in contentious cases.

Commission, No. 3, 2012, pp. 31-51; Ruiz-Chiriboga, Oswaldo, *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*, op. cit. supra 39; Uprimny, Rodrigo, and Diana Guarnizo, “¿Es posible una dogmática adecuada sobre la prohibición de regresividad? Un enfoque desde la jurisprudencia constitucional colombiana,” in Eduardo Ferrer MacGregor and Arturo Zaldívar Lelo de Larrea (coords.), *La ciencia del derecho procesal constitucional. Estudios en homenaje a Héctor Fix-Zamudio en sus cincuenta años como investigador del derecho*, Mexico, UNAM-Marcial Pons-IMDPC, 2008, volume IV: “Derechos fundamentales y tutela constitucional,” pp. 361-438; and Urquilla, Carlos, *La justiciabilidad directa de los derechos económicos, sociales y culturales*, San José, IIDH, 2009.

⁸⁰ Protocol of San Salvador: “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.”

⁸¹ Cf. *Case of the “Mapiripán Massacre,” supra*, para. 188;

⁸² Cf. *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, and *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*. Judgment of February 24, 2012. Series C No. 239, para. 83.

⁸³ Cf. *The Right to Information on Consular Assistance within the Framework of the Guarantees of Due Process of Law*. Advisory Opinion OC-16/99, *supra*, para. 114, and *Case of Atala Riffo and daughters, supra*, para. 83.

⁸⁴ In the *Case of Kawas Fernández v. Honduras. Merits, reparations and costs*. Judgment of April 3, 2009. Series C No. 196, para. 148, the Court took into account for its analysis that it noted: “that a significant number of States Parties to the American Convention have adopted constitutional provisions expressly recognizing the right to a healthy environment.”

⁸⁵ In the *Case of Heliodoro Portugal v. Panama, supra*, and the *Case of Tiu Tojín v. Guatemala. Merits, reparations and costs*. Judgment of November 26, 2008. Series C No. 190, the Inter-American Court took into account judgments of the domestic courts of Bolivia, Colombia, Mexico, Panama, Peru and Venezuela on the non-prescription of permanent offenses such as forced disappearance. In addition, in the *Case of Anzualdo Castro v.*

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.

48. The possibility of using the Protocol of San Salvador in order to define the scope of the protection of the right to health contained in Article 26 of the American Convention is not unfamiliar to the case law of the Inter-American Court; neither is the use of other international sources or the OAS Progress Indicators in Respect of Rights Contemplated in that Protocol, in order to define different State obligations in this regard. Indeed, the Inter-American Court performed this exercise in the *Case of the “Children’s Rehabilitation Institute” v. Paraguay*, in which it expressly stated that, in order to establish the content and scope of Article 19 of the Pact of San José, it would take into consideration the Convention on the Rights of the Child and the Protocol of San Salvador, because these international instruments formed part of a very comprehensive international *corpus juris* for the protection of the child.⁸⁶

49. In the same way, in the *Case of the Yakye Axa Indigenous Community v. Paraguay*, when analyzing whether the State had created the conditions that increased the difficulties of access to a decent life of the members of the Community and whether, in that context, it had adopted the appropriate positive measures, the Court chose to interpret Article 4 of the American Convention in light of the international *corpus juris* on the special protection required by members of indigenous communities. Among other provisions, it mentioned Article 26 of the Pact de San José, and Articles 10 (Right to Health), 11 (Right to a Healthy Environment), 12 (Right to Food), 13 (Right to Education) and 14 (Right to the Benefits of Culture) of the Protocol of San Salvador (on Economic, Social and Cultural Rights), and the pertinent provisions of ILO Convention No. 169. The Court also noted the observations of the United Nations Committee on Economic, Social and Cultural Rights in its General Comment No. 14.⁸⁷

50. The *Case of the Xákmok Kásek Indigenous Community v. Paraguay* is another example of a matter in which the Inter-American Court made an even more thorough analysis in order to determine that the assistance provided by the State with regard to the access to and quality of water, food, and health and education services had been insufficient to overcome the situation of special vulnerability of the Community. When determining this,

Peru. Preliminary objection, merits, reparations and costs. Judgment of September 22, 2009. Series C No. 202, the Inter-American Court used the rulings of constitutional courts of the countries of the Americas to support its definition of the concept of forced disappearance. Other examples are the *Case of Atala Rizzo and daughters, supra*, and the *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations.* Judgment of June 27, 2012. Series C No. 245.

⁸⁶ *Case of the “Children’s Rehabilitation Institute,” supra*, para. 148. Similarly, the *Case of the Yean and Bosico Girls, supra*, para. 185. In my opinion, implicit in the concept of the *corpus juris* is the interdependence and indivisibility of the rights of which it is composed. Regarding the indicators, see Abramovich, Víctor and Pautassi, Laura (comps.), *La medición de derechos en las políticas sociales*, Buenos Aires, Editores del Puerto, 2010.

⁸⁷ Cf. *Case of the Yakye Axa Indigenous Community, supra*, para. 163; *mutatis mutandi*, *Case of the Sawhoyamaya Indigenous Community, supra*, para. 155, and *Case of the Xákmok Kásek Indigenous Community, supra*, paras. 215 and 216.

the Inter-American Court evaluated the provision of each of these services in a separate section, in light of the main relevant international standards and the measures adopted by the State, using the General Comments of the United Nations Committee on Economic, Social and Cultural Rights.⁸⁸

51. Furthermore, in the *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, the Court interpreted the right to prior, free and informed consultation of the indigenous and tribal peoples and communities within the rights to their own culture and cultural identity recognized in ILO Convention No. 169. Thus, the absence of consultation in this specific case gave rise to the violation “of the right to the communal property of the Sarayaku People, recognized in Article 21 of the Convention, in relation to the right to cultural identity, in the terms of Articles 1(1) and 2 of this instrument.”⁸⁹

52. In the *Case of Chitay Nech v. Guatemala*, the Inter-American Court established that the general obligation of States to promote and protect the cultural diversity of the indigenous peoples gives rise to the special obligation to guarantee the *right to cultural life of indigenous children* and, to this end, it interpreted Article 30 of the Convention on the Rights of the Child and comments of its Committee, which provide content to Article 19 of the American Convention, and determined that, to ensure the full and harmonious development of their personality in keeping with their world view, indigenous children preferably need to develop and grow up in their own natural and cultural surroundings, because they possess a distinctive identity that connects them to their land, culture, religion and language.⁹⁰

53. In the *Case of the Las Dos Erres Massacre v. Guatemala*, in order to analyze State 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 everyone to receive protection against arbitrary and illegal interference in their family is an implicit part of the rights to the protection of the family and of the child. This is based on the express recognition in Articles 12(1) of the Universal Declaration of Human Rights, V of the American Declaration of the Rights and Duties of Man, 17 of the International Covenant on Civil and Political Rights, 11(2) of the American Convention on Human Rights, 8 of the European Convention on Human Rights, 4(3) of Protocol (II) Additional to the Geneva Conventions of 12 August 1949 (hereinafter “Protocol II”) and the Convention on the Rights of the Child.⁹¹

⁸⁸ Cf. *Case of the Xákmok Kásek Indigenous Community*, *supra*, paras. 215 and 216, paras. 194 to 217. Citing the following: U.N. Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 15. The right to water (arts. 11 and 12 of the Covenant), (twenty-ninth session, 2002), U.N. Doc. HRI/GEN/1/Rev.7 at 117 (2002); CESCR, General Comment No. 12, 12 May 1999, E/C.12/1999/5, paras. 6 to 8; CESCR, General Comment No. 13, 8 December 1999, E/C.12/1999/10, para. 50; CESCR, General Comment No. 21, 21 December 2009, E/C.12/GC/21, para. 38; ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, Article 27.1; Paul Hunt. Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of health, A/HRC/14/20/Add.2, 15 April 2010.

⁸⁹ *Case of the Kichwa Indigenous People of Sarayaku*, *supra*, para. 232.

⁹⁰ Cf. *Case of Chitay Nech et al. v. Guatemala. Preliminary objections, merits, reparations and costs*. Judgment of May 25, 2010. Series C No. 212, paras. 164 to 170. See also, UN. Committee on the Rights of the Child. General Comment No. 11 (2009). *Indigenous children and their rights under the Convention*, 12 February 2009, para. 82.

⁹¹ Cf. *Case of the Las Dos Erres Massacre v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of November 24, 2009. Series C No. 211, paras. 188, 190 and 191.

54. 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) on the basis of the provisions of article 8 of the Convention on the Rights of the Child, which establishes that this right includes, among other elements, the right to nationality, to a name, and to family relationships. Thus, the alleged violations of the rights recognized in Articles 3, 17, 18, 19 and 20 of the Convention were interpreted pursuant to the *corpus juris* of the law concerning children, especially articles 7, 8, 9, 11, 16 and 18 of the Convention on the Rights of the Child.⁹²

55. Meanwhile, in the *Case of the Massacres of El Mozote and nearby places v. El Salvador*, the Court complemented its case law with regard to the right to private 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 8 June 1977.⁹³ Subsequently, in the *Case of the Massacre of Santo Domingo v. Colombia*, the 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, concerning pillage,⁹⁴ to provide content to the right to property established in Article 21 of the American Convention.

56. As can be observed from these examples of inter-American case law, it has been the reiterated practice of the Inter-American Court to use international instruments and sources other than the Pact of San José to define the content and even to expand the scope of the rights established in the American Convention and to stipulate the obligations of the States,⁹⁵ since the said international instruments and sources form part of a very comprehensive international *corpus juris* on 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 instrument, is viable in the way in which the Inter-American Court has been using them to provide content to many treaty-based rights using treaties and sources other than the Pact of San José. Thus, it could also use the 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.

B) Articles 26 and 29 of the American Convention in light of the *pro persona* principle

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 (see *supra* para. 13). 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

⁹² Cf. *Case of Gelman*, *supra*, paras. 121 and 122.

⁹³ Cf. *Case of the Massacres of El Mozote and nearby places v. El Salvador*. Merits, reparations and costs. Judgment of October 25, 2012 Series C No. 252, para. 179.

⁹⁴ Cf. *Case of the Massacre of Santo Domingo v. Colombia*. Preliminary objections, Merits and reparations. Judgment of November 30, 2012. Series C No. 259, paras. 270 to 272.

⁹⁵ For example, *The 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, 2012, could also be used.

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.⁹⁶ 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).”⁹⁷

58. Considering that, in its evolutive case law, the Inter-American Court has already explicitly accepted the justiciability of Article 26 (see *supra* paras. 18 to 22),⁹⁸ 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. Evidently, my intention is not to try and decide these questions in this individual opinion. My desire is merely to establish a basis that could serve as a reflection for future developments of the case law of this Inter-American Court.

59. Different positions exist with regard to the rights protected by Article 26 of the American Convention. Some people consider that this article constitutes a mere programmatic norm, without any type of effectiveness in itself. We do not find this conception adequate in view of the spirit of the Convention, which is inspired by the absence of hierarchy among the rights, as revealed by its Preamble, and by the need for all its provisions to have practical effects.

60. In addition, the said argument would be an evident step backward from the progressiveness that Article 26 itself expressly establishes for the States and that, of necessity, also applies to the Inter-American Court itself, because inter-American case law has already recognized the possibility of ruling on the contents of this article as indicated in the preceding paragraph, and has also recognized the full validity of all the provisions of the Pact of San Jose, precisely when deciding on the State's argument concerning its lack of competence *ratione materiae* in relation to Article 26 of the Pact of San José:⁹⁹

[...] the Court must take into account that the instruments accepting the optional clause concerning obligatory jurisdiction (Article 62(1) of the Convention) suppose the acknowledgement by the States that submit them of the Court's right to decide any dispute relating to its jurisdiction.¹⁰⁰ In addition, the Court has indicated previously that the broad terms used in the wording of the Convention indicate that the Court exercises full jurisdiction over all its articles and provisions.¹⁰¹ (Underlining added)

⁹⁶ On this aspect, see Melish, Tara J. “The Inter-American Court of Human Rights: Beyond Progressivity,” in Langford, Malcolm (ed.), *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law*, Cambridge University Press, 2008, chapter 19.

⁹⁷ Parra Vera, Oscar, *Justiciabilidad de los derechos económicos, sociales y culturales ante el Sistema Interamericano*, Mexico, CNDH, 2011, p. 60.

⁹⁸ *Case of Acevedo Buendía et al. (“Discharged and Retired Employees of the Office of the Comptroller”)*, *supra*, paras. 92 to 106, particularly paras. 99 to 103; the last paragraph, *in fine*, indicates: “it should be stated that regressiveness is justiciable when economic, social and cultural right are at issue.”

⁹⁹ *Case of Acevedo Buendía et al. (“Discharged and Retired Employees of the Office of the Comptroller”)*, *supra*, para. 16.

¹⁰⁰ Cf. *Case of Ivcher Bronstein*, *supra*, paras. 32 and 34; *Case of Heliodoro Portugal*, *supra*, para. 23, and *Case of García Prieto et al. v. El Salvador. Preliminary objection, merits, reparations and costs*. Judgment of November 20, 2007. Series C No. 168, para. 38.

¹⁰¹ Cf. *Case of Velásquez Rodríguez*, *Preliminary objections*, *supra*, para. 29, and *Case of the 19 Tradesmen v. Colombia. Preliminary objection*. Judgment of June 12, 2002. Series C No. 93, para. 27.

61. Another interpretative position in relation to Article 26 is addressed at granting full effectiveness to economic, social and cultural rights. This school of thought is the one that, for some time, has been defended by an important sector of legal doctrine in order to accord this treaty-based article normative nature, as the Inter-American Court did in the *Case of Acevedo Buendía v. Peru* in 2009, constituting a firm step in that direction, and abandoning the precedent of the 2005 *Case of the Five Pensioners v. Peru*.¹⁰²

62. For some, the rights protected by Article 26 of the American Convention are those derived from the economic, social, educational, scientific and cultural norms contained in the OAS Charter, without any possibility of referral to the American Declaration.¹⁰³ Once it has been determined that a rights is implicit in the Charter and, therefore, included in Article 26, it can then be interpreted with the aid of the American Declaration or of other human rights treaties in force in the respective State.¹⁰⁴ On the other hand, it is also affirmed that, in addition to the *pro persona* principle, in order to know which rights are derived from the goals established in the OAS Charter, it is necessary to resort to other international instruments, such as the American Declaration, constitutional texts, and the work of international monitoring mechanisms.¹⁰⁵

63. Regarding the possible integration of the OAS Charter with the American Declaration on the Rights and Duties of Man, it is pertinent to take into account Advisory Opinion OC-10/89 "Interpretation of the American Declaration on the Rights and Duties of Man within the framework of Article 64 of the American Convention on Human Rights", of July 14, 1989, especially paragraphs 43 and 45:

43. Hence it may be said that by means of an authoritative interpretation, the Member States of the Organization have signaled their agreement that the Declaration contains and defines the fundamental human rights referred to in the Charter. Thus the Charter of the Organization cannot be interpreted and applied as far as human rights are concerned without relating its norms, consistent with the practice of the organs of the OAS, to the corresponding provisions of the Declaration.

[...]

45. For the Member States of the Organization, the Declaration is the text that defines the human rights referred to in the Charter. Moreover, Articles 1(2)(b) and 20 of the Commission's Statute define the competence of that body with respect to the human rights enunciated in the Declaration, with the result that, to this extent, the American Declaration is for these States a source of international obligations related to the Charter of the Organization.

¹⁰² Regarding the critiques of this judgment, see, for example, Courtis, Christian, "Luces and sombras. La exigibilidad de los derechos económicos, sociales y culturales en la sentencia de los "Cinco Pensionistas" de la Corte Interamericana de Derechos Humanos," in *Revista Mexicana de Derecho Público*, No. 6, ITAM, Law Department, Mexico, 2004.

¹⁰³ Abramovich, Víctor, and Rossi, Julieta, "La tutela de los derechos económicos, sociales y culturales en el artículo 26 de la Convención Americana sobre Derechos Humanos", *Estudios Socios Jurídicos*, Bogotá, Special No. 9, April 2007, pp. 46 and 47.

¹⁰⁴ *Ibidem*, p. 48.

¹⁰⁵ With certain variations, see Courtis, Christian, "La protección de los derechos económicos, sociales y culturales a través del artículo 26 de la Convención Americana sobre Derechos Humanos," *op. cit. supra* note 79; and Melish, Tara J., "El litigio supranacional de los derechos económicos, sociales y culturales: avances y retrocesos en el Sistema Interamericano," in *Memorias del seminario internacional sobre derechos económicos, sociales y culturales*, Mexico, Foreign Affairs Secretariat, pp. 173 to 219; by the same author, *La Protección de los Derechos Económicos, Sociales y Culturales en el Sistema Interamericano de Derechos Humanos*, *op. cit. supra* note 79.

64. I consider that another possible means of interpretation, in keeping with the latter position, would be to consider the relationship of Articles 26 and 29 of the Pact of San José with the *pro persona* principle. Indeed, based on the norms established in Article 29 of the American Convention, none of the provisions of the Convention may be interpreted in the sense of limiting the enjoyment and exercise of any right or freedom that may be recognized under the laws of any of the States Parties, or under any other convention to which one of the said States is a party, or to exclude or limit the potential effects of the American Declaration of the Rights and Duties of Man and other international acts of the same nature (such as the Universal Declaration of Human Rights) that, in the same way as the American Declaration, establish social rights without distinction from civil and political rights.

65. These rules of interpretation established in Article 29 of the American Convention should also be interpreted. If we read these criteria pursuant to the *pro persona* principle, the interpretation of Article 26 should not only not limit the enjoyment and exercise of the rights established in the laws of the States Parties, which include the Constitution of these States, or the rights established in other conventions, but these laws and conventions must be used to ensure *the highest degree of protection*. Hence, in order to know what rights are derived from the economic, social, educational, scientific and cultural norms contained in the OAS Charter (in the terms set out in Article 26 of the American Convention), in addition to abiding by its text, recourse could be had to domestic laws and to other international instruments, including the American Declaration.¹⁰⁶ Likewise, Article 25 of the American Convention establishes the right of the individual to an effective recourse “for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention [...]”.¹⁰⁷

66. In other words, a possible way to interpret Article 26 of the American Convention would lead to finding that a literal interpretation of this article is not sufficient, and neither are the criteria established in Article 29 of the Pact of San José, but rather, first, the latter article must be interpreted in accordance with the *pro persona* principle. Once this has been done, it is possible to understand that, according to the said Article 29, the economic, social and cultural rights established in other laws, including the Constitutions of the States Parties and the American Declaration,¹⁰⁸ are incorporated into Article 26 in order to interpret and develop it.

67. On some occasions, the Inter-American Court itself has used the basic national laws and different international instruments to give increased content and context to civil rights by means of the interpretation of Article 29(b) of the American Convention. Thus, for example, article 44 of the Constitution of the Republic of Colombia (fundamental rights of

¹⁰⁶ Cf. OC-10/89 “Interpretation of the American Declaration on the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights,” of July 14, 1989, paras. 43 and 45.

¹⁰⁷ Cf. *Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs*. Judgment February 2, 2001. Series C No. 72, para. 141 (dismissal of employees); *Case of the “Five Pensioners,” supra*, paras. 116 to 121 (pensions), and *Case of Castañeda Gutman v. Mexico. Preliminary objections, merits, reparations and costs*. Judgment of August 6, 2008. Series C No. 184, para. 163 (electoral laws).

¹⁰⁸ Even the Universal Declaration of Human Rights, because Article 29(d) of the American Convention establishes that no provision of the Convention shall be interpreted as: “excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other *international acts of the same nature* may have”; and the Universal Declaration, owing to its essence, has the same nature as the American Convention.

the child), together with different international instruments and the American Convention, were used in the *Case of the “Mapiripán Massacre” v. Colombia*.¹⁰⁹

153. The content and scope of Article 19 of the American Convention must be defined, in cases such as this, taking into consideration the pertinent provisions of the Convention on the Rights of the Child,¹¹⁰ in particular articles 6, 37, 38 and 39, and of Protocol II Additional to the Geneva Conventions, because these instruments and the American Convention form part of a very comprehensive international *corpus juris* for the protection of children that States must respect.¹¹¹ Added to this, in application of Article 29 of the Convention, the provisions of article 44 of the Constitution of the Republic of Colombia must be taken into consideration.¹¹²

68. As we have indicated previously, the *pro persona* principle implies, *inter alia*, making the most favorable interpretation for the effective enjoyment and exercise of the fundamental rights and freedoms, which, also, prevents using other international instruments to restrict the rights of the American Convention.¹¹³ The Inter-American Court has indicated:¹¹⁴

51. With respect to the comparison between the American Convention and the other treaties already mentioned, the Court cannot avoid a comment concerning an interpretation suggested by Costa Rica in the hearing of November 8, 1985. According to this argument, if a right recognized by the American Convention were regulated in a more restrictive way in another international human rights instrument, the interpretation of the American Convention would have to take those additional restrictions into account for the following reasons:

“If it were not so, we would have to accept that what is legal and permissible on the universal plane would constitute a violation in this hemisphere, which cannot obviously be correct. We think rather that with respect to the interpretation of treaties, the criterion can be established that the rules of a treaty or a convention must be interpreted in relation to the provisions that appear in other treaties that cover the same subject. It can also be contended that the provisions of a regional treaty must be interpreted in the light of the concepts and provisions of instruments of a universal character. (Underlining in original text)

It is true, of course, that it is frequently useful – and the Court has just done this – to compare the American Convention with the provisions of other international instruments in order to stress certain aspects concerning the manner in which a certain right has been formulated, but that

¹⁰⁹ *Case of the “Mapiripán Massacre,” supra*, para. 153, and *Case of the Mayagna (Sumo) Awajitjuna Community, supra*, para. 148.

¹¹⁰ Ratified by Colombia on January 28, 1991, and entering into force on February 27, 1991.

¹¹¹ Cf. *Case of the “Children’s Rehabilitation Institute,” supra*, para. 148; *Case of the Gómez Paquiyauri Brothers. Merits, reparations and costs*. Judgment of July 8, 2004. Series C No. 110, para. 166; *Case of the “Street Children” (Villagrán Morales et al.)*, *supra*, para. 194, and *Legal Status and Human Rights of the Child, Advisory Opinion OC- 17/02*, para. 24.

¹¹² Cf. Article 44 of the Constitution of the Republic of Colombia: “The fundamental rights of the child are: life, physical integrity, health and social security, a balanced diet, name and nationality, to have a family and not be separated from it, love and care, education and culture, recreation and freedom of expression. They shall be protected against any form of abandon, physical or moral violence, kidnapping, sale, sexual abuse, economic or labor exploitation, and hazardous work. They shall also enjoy the other rights embodied in the Constitution, in the laws and in the international treaties ratified by Colombia. The family, society and the State have the obligation to assist and protect the child in order to ensure his or her comprehensive and harmonious development and the full exercise of his or her rights. Anyone may require the competent authority to ensure compliance with the foregoing and to punish offenders.

¹¹³ See the separate opinion in the *Case of Cabrera García and Montiel Flores v. Mexico. Preliminary objections, merits, reparations and costs*. Judgment of November 26, 2010. Series C No. 220, para. 38.

¹¹⁴ Advisory Opinion OC-5/85. November 13, 1985. Series A No. 5, concerning *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights)* paras. 51 and 52.

approach should never be used to read into the Convention restrictions that are not grounded in its text. This is true even if these restrictions exist in another international treaty.¹¹⁵

52. The foregoing conclusion clearly follows from the language of Article 29 which sets out the relevant rules for the interpretation of the Convention. Paragraph (b) of Article 29 indicates that no provision of the Convention may be interpreted as “restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party.”

Hence, if in the same situation both the American Convention and another international treaty are applicable, the rule most favorable to the individual must prevail. Considering that the Convention itself establishes that its provisions should not have a restrictive effect on the enjoyment of the rights guaranteed in other international instruments, it makes even less sense to invoke restrictions contained in those other international instruments, but which are not found in the Convention, to limit the exercise of the rights and freedoms that the latter recognizes.

69. In any case, whatever the interpretation we accord to Article 26 of the American Convention, there are, as we have seen, several valid and reasonable lines of interpretation and argument that lead us to grant direct justiciability to economic, social and cultural rights, and that the Inter-American Court could eventually admit on future occasions. Based on the presumption, let me reiterate, that the Inter-American Court already took this step of accepting the justiciability of the rights derived from Article 26 of the Pact of San José in the important precedent of the *Case of Acevedo Buendía v. Peru*.

70. The second question is the type of obligations that States have under Article 26 of the Convention. According to this article, States “undertake to adopt measures” to achieve progressively the full realization of the economic, social and cultural rights “subject to available resources.” Here, the question is to clarify what this measures consists of.

71. Once again, we refer to the precedent of the *Case of Acevedo Buendía et al. v. Peru*, which considered the nature of the obligations derived from Article 26 of the Pact of San José, and which dealt with the failure to comply with the payment of pension equalizations, which, according to the Inter-American Court — with its preceding composition — violated the rights to property and to judicial protection established in Articles 21 and 25 of the American Convention, although not Article 26, because, in the Inter-American Court’s opinion, that article requires economic and technical measures subject to available resources, which was not the case. Thus, the Court considered that this was a different type of obligation and, therefore, found that the said provision of the Convention had not been violated.¹¹⁶ Nevertheless, the Inter-American Court established clearly that “regression is justiciable when economic, social and cultural rights are involved,”¹¹⁷ which left open the possibility of further development of its case law in the future.

72. Furthermore, it should not be forgotten that the Inter-American Court has indicated that, in addition to regulating the progressive development of social rights, in light of Article 26 of the American Convention, a systematic interpretation of this article includes applying

¹¹⁵ Cf. Inter-American Court. “*Other Treaties*” subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human rights). Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1. Other treaties used.

¹¹⁶ *Case of Acevedo Buendía et al. (“Discharged and Retired Employees of the Office of the Comptroller”)*, *supra*, Series C No. 198, paras. 105 and 106.

¹¹⁷ *Case of Acevedo Buendía et al. (“Discharged and Retired Employees of the Office of the Comptroller”)*, *supra*, para. 103.

to economic, social and cultural rights the obligations of respect and guarantee¹¹⁸ derived from Articles 1(1) and 2 of the Pact of San José.

C) The evolutive interpretation of Article 26 of the American Convention in light of the constitutional norms and the practice of the high national jurisdictions, for the justiciability of the right to health

73. In order to examine further the direct justiciability of the right to health, it is particularly useful to make an evolutive interpretation of the scope of the rights recognized in Article 26 of the American Convention. In this regard, the practice of different domestic courts offers important examples of analyses based on the obligation of respect and guarantee with regard to the right to health and the use of the *corpus juris* on international obligations in relation to the right to health in order to promote direct judicial protection of this right.

74. It is important to indicate, however, that the high national jurisdictions use their own constitutional provisions – in addition to international instruments and sources. Today, the normative progress made in the States in the area of social rights cannot be denied, particularly as regards the constitutional scope of the protection of the right to health (either expressly, derived from other rights, or owing to its recognition by the incorporation of international treaties into the Constitution).

75. The following are among the constitutional provisions of the States Parties to the American Convention that refer in some way to the protection of the right to health: Argentina (art. 42),¹¹⁹ Bolivia (art. 35),¹²⁰ Brazil (art. 196),¹²¹ Colombia (art. 49),¹²² Costa Rica (art. 46),¹²³ Chile (art. 19, paragraph 9),¹²⁴ Ecuador (art. 32),¹²⁵ El Salvador (art.

¹¹⁸ *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller")*, *supra*, para. 100: "even though Article 26 is found in chapter III of the Convention, entitled "Economic, Social and Cultural Rights," it is also located in Part I of the said instrument, entitled "State Obligations and Rights Protected" and, therefore, is subject to the general obligations contained in Articles 1(1) and 2."

¹¹⁹ "Article 42. Consumers and users of goods and services have the right, in relation to consumption, to the protection of their health, safety and financial interests; to adequate and truthful information; to freedom of choice and to conditions of equal and dignified treatment [...]."

¹²⁰ "Article 35. I. The State, at all levels, shall protect the right to health, promoting public policies designed to improve the quality of life, the collective well-being, and the access of the population to free health care services. II. There is just one health system and it includes the traditional medicine of the original indigenous peasant peoples and nations."

¹²¹ "Article 196. Health is a right for every person and an obligation of the State, guaranteed by social and economic policies designed to reduce the risk of disease and other risks, and to provide universal and equal access to actions and services that its promotion, protection and recovery."

¹²² "Article 49. Health care and environmental sanitation are public services under the responsibility of the State. Everyone is guaranteed access to the services of health promotion, protection and recovery. It is incumbent on the State to organize, direct and regulate the provisions of health care services for the inhabitants, as well as of environmental sanitation, based on the principles of efficiency, universality and solidarity. Also, to establish policies for the provision of health care services by private entities, and to supervise and control these. In addition, to establish the competences of the Nation, and territorial and private entities, and to determine their contributions pursuant to the legal terms and conditions. Health care services shall be decentralized, by levels of attention, and with the participation of the community. The law shall indicate the terms in which basic health care for all the inhabitants shall be free and obligatory. Everyone has the obligation to ensure the comprehensive care of his or her health and that of their community."

¹²³ "Article 46. [...] Consumers and users have the right to the protection of their health, environment, safety and financial interests; to receive adequate and truthful information; freedom of choice and fair treatment. The State shall support the mechanisms that they establish for the defense of their rights. The law shall regulate these matters."

65),¹²⁶ Guatemala (arts. 93 and 94),¹²⁷ Haiti (art. 19),¹²⁸ Honduras (art. 145),¹²⁹ Mexico (art. 4),¹³⁰ Nicaragua (art. 59),¹³¹ Panama (art. 109),¹³² Paraguay (art. 68),¹³³ Peru (art. 7),¹³⁴ Dominican Republic (art. 61),¹³⁵ Suriname (art. 36),¹³⁶ Uruguay (art. 44)¹³⁷ and Venezuela (art. 83).¹³⁸

¹²⁴ "Article 19. The Constitution ensures to all persons: ... 9. The right to *protection of health*. The State protects free and equal access to the actions for health promotion, protection and recovery, and for the rehabilitation of the individual. The State shall also coordinate and control actions related to health, whether these are provided by public or private institutions, in the way and under the conditions determined by law, which may establish obligatory contributions. Everyone shall have the right to choose the health care system that he or she wishes to use, either public or private"

¹²⁵ "Article 32. *Health* is a right guaranteed by the State, and its realization is related to the exercise of other rights, including the right to water, food, education, physical culture, work, social security, a healthy environment and others that support well-being. The State shall guarantee this right by economic, social, cultural, educational and environmental policies, and the permanent, opportune and inclusive access to programs, actions and services for the promotion of and integral attention to health care, sexual health and reproductive health. The provision of health care services shall be governed by the principles of equity, universality, solidarity, interculturalism, quality, efficiency, efficacy, care and bioethics, with a gender-based and generational approach."

¹²⁶ "Article 65. The health of the inhabitants of the Republic is a right. The State and the individual are obliged to ensure its conservations and restoration."

¹²⁷ "Article 93. The right to health. The enjoyment of health is a fundamental right of the human being, without any discrimination whatsoever."

"Article 94. Obligation of the State concerning health and social assistance. *The State shall ensure the health and the social assistance of all the inhabitants*. It shall develop through its institutions, actions of prevention, promotion, recovery, rehabilitation, coordination and any pertinent complementary measures in order to ensure the most complete physical, mental and social well-being."

¹²⁸ "Article 19. The State has the absolute obligation to guarantee the right to life, health and respect for the persona of all citizens without any distinction, pursuant to the Universal Declaration of Human Rights."

¹²⁹ "Article 145. The right to protection of health is recognized. It is the obligation of everyone to participate in the promotion and preservation of his or her personal health and that of the community. The State shall conserve an adequate environment to protect the health of the individual."

¹³⁰ "Article 4. Every person has the *right to the protection of his or her health*. The law shall define the bases and methods of access to health care services and shall establish the contribution of the Federation and of the federative entities as regards general health care, pursuant to paragraph XVI of article 73 of this Constitution." See the recent study by Carbonell, José, and Carbonell, Miguel, *El derecho a la salud: una propuesta para México*, Mexico, UNAM-IIJ, 2013.

¹³¹ "Article 59. All Nicaraguans have an equal right to health. The State shall establish the basic conditions for its promotion, protection, recovery and rehabilitation. The State is responsible for heading and organizing health care programs, services and actions and promoting the participation of the population in its defense. The citizens have the obligation to obey the public health measures that are determined."

¹³² "Article 109. It is an essential function of the State to ensure the health of the population of the Republic. The individual, as a member of the community has a right to the promotion, protection, conservations, restoration, and rehabilitation of health and the obligation to conserve his or her health, understood as complete physical, mental and social well-being."

¹³³ "Article 68. *On the right to health*. The State shall protect and promote health as a fundamental right of the individual and in the interest of the community. No one shall be deprived of public assistance to prevent or to treat diseases, pests or plagues, and of aid in cases of catastrophes and accidents. Everyone is obliged to submit to the public health measures established by law, within the respect for human dignity."

¹³⁴ "Article 7. *Everyone has the right to the protection of his or her health*, that of the family, and that of the community, *as well as the obligation to contribute to its promotion and defense*. All those who are incapable of protecting themselves owing to a physical or mental disability have the right to respect for their dignity and a legal regime of protection, attention, rehabilitation and safety."

¹³⁵ "Article 61. *The right to health*. Everyone has the right to integral health. Consequently: (1) The State must ensure protection of the health of everyone, access to potable water, and improvement of the diet, public health services, conditions of hygiene, and environmental health, and also procure the means to prevent and treat all diseases, ensuring access to high-quality medicines and providing medical and hospitalized assistance free of

76. These norms have been used on many occasions by the high national jurisdictions, even to ensure “direct” protection, and citing different international sources and treaties.

77. In this regard, the experience of the Constitutional Court of Colombia is relevant. The argument “by connectivity” was used, particularly to delimit the content of the right requiring judicial protection by means of the action for constitutional protection.¹³⁹ In Judgment T-016 of 2007, that Court indicated that it was possible to go beyond a dogma based on connectivity and initiate an analysis of the right to health as a direct fundamental right:¹⁴⁰

... Nowadays, it is specious to advocate the requirement of connectivity with regard to fundamental rights, which all have – some more than others – an undeniable connotation of social benefits. That requirement should be understood in other terms; in other words, as a close connection between a series of circumstances that occur in the specific case and the need to have recourse to the action for *amparo* as a way to make a fundamental right effective. Thus, with regard to the fundamental right to health, it can be said that, regarding the social benefits excluded from legal and regulatory categories, it is only possible to have recourse to protection by means of the action for *amparo* in those cases in which it can be proved that the failure to recognize the fundamental right to health: (i) also signifies harming, seriously and directly, the human dignity of the person affected by the violation of the right; (ii) it is argued with regard to a subject of special constitutional protection, and/or (iii) it implies placing the person affected in a situation of defenselessness owing to the inability to pay to claim this right.

The foregoing, precisely because the State – in application of the principles of equity, solidarity, subsidiarity and efficiency – must rationalize the satisfactory provision of the health care services for which it is responsible or for which private individuals who function as public authorities are responsible, giving priority to those who are in any of the above-mentioned circumstances. In this regard, the Constitutional Court has indicated in its reiterated case law that, under these circumstances, even in the case of social benefits excluded from the POS, the POSS, the PAB, the PAC and from those obligations established in General Comment 14, the *amparo* is in order as a mechanism to obtain the protection of the fundamental constitutional right to health.

78. Furthermore, it is important to stress that all the rights have some aspects that relate to social benefits and some aspects that do not. In other words, establishing the characteristic of rights requiring social services only for the social rights does not appear to

charge to those who require this; (2) the State shall guarantee, by legislation and public policies, the exercise of the economic and social rights of the lower-income population and, consequently, shall provide its protection and assistance to vulnerable groups and sectors; and combat social evils with appropriate means and with the assistance of international organizations and agreements.”

¹³⁶ “Article 36. *Everyone has the right to good health*. The State shall promote general health care by the systematic improvement of living conditions and conditions in the workplace, and shall provide information on health protection.”

¹³⁷ “Article 44. The State shall legislate all matters related to health and public hygiene, in order to ensure the physical, moral and social improvement of all the inhabitants of the country. *All the inhabitants have the obligation to take care of their health, as well as that of seeking assistance in case of illness*. The State shall provide, free of charge, the means of prevention and assistance only to the poor and those without sufficient resources.” (Italics added)

¹³⁸ “Article 83. Health is a fundamental social right, an obligation of the State, which shall guarantee it as part of the right to life. The State shall promote and implement policies designed to increase the quality of life, the collective well-being, and access to services. Everyone has a right to the protection of his or her health, as well as the obligation to play an active role in its promotion and defense, and to comply with the public health and hygiene measures established by law pursuant to the international conventions and treaties signed and ratified by the Republic.”

¹³⁹ The Colombian action for constitutional protection corresponds to the application, appeal or trial for *amparo* in most countries of Latin America. In Chile it is called the “remedy of protection” (*recurso de protección*), and in Brazil an “injunction” (*mandado de segurança*).

¹⁴⁰ Constitutional Court of Colombia, Judgment T-016 of 2007 (Judge Rapporteur: Humberto Sierra Porto), para. 12.

be a viable answer in our times and would seem to be an equivocation or a “categorical error,” as the Constitutional Court of Colombia itself indicated in Judgment T-760 of 2008.¹⁴¹ The Colombian Court has also specified the different implications of the judicial protection of the social benefit dimension of the fundamental rights, clarifying those obligations with immediate effect and those obligations to be complied with gradually.

79. In the above-mentioned Judgment T-760 of 2008 of the Constitutional Court of Colombia, it is indicated that some obligation associated with these social benefit aspects must be complied with immediately, “either because this requires a simple action by the State that does not involve significant resources – for example, the obligation to provide information on their rights to patients before they are subject to a medical treatment” – or “because, despite the mobilization of resources that the task entails, the gravity and urgency of the matter call for an immediate action by the State (for example, the obligation to adopt the adequate and necessary measures to guarantee health care to every infant during its first year of life).”¹⁴²

80. Other obligations of a social benefit nature derived from a fundamental right require *progressive* compliance, owing to the complex nature of the actions and resources that are needed to guarantee the real enjoyment of these aspects of protection of a right. However, the Colombian Court reiterated the precedent established in Judgment T-595 of 2002, according to which “the fact that a social benefit protected by a right is of a programmatic nature does not mean that it may not be claimed or that it may be omitted eternally.”¹⁴³

81. Several examples taken from comparative law illustrate the direct justiciability of the right to health. For example, in the *Case of Viceconte*, decided by an Argentine Federal National Contentious-Administrative Chamber,¹⁴⁴ the courts were asked to order the Government to produce a vaccine in order to provide protection against Argentine hemorrhagic fever for a significant number of Argentines. In light of the incorporation into the Constitution of the international treaties that recognize the right to health, the Chamber determined that, by omission, the Government had failed to comply with its obligation to provide the vaccine. As the private sector considered that the production of the vaccine was not profitable, the Chamber ordered the State to produce it. The Chamber ordered the investment in the production of the vaccine, and required compliance with an investment timetable already established by the Government itself.

¹⁴¹ Cf. Constitutional Court of Colombia, Judgment T-760 de 2008 (Judge Rapporteur: Manuel José Cepeda Espinosa), para. 3.3.5.

¹⁴² Constitutional Court of Colombia, Judgment T-760 de 2008 (Judge Rapporteur: Manuel José Cepeda Espinosa), para. 3.3.6.

¹⁴³ In this regard, following this judgment delivered in 2002, it was indicated that the social benefit and progressive aspect of a constitutional right allows its holder to claim judicially, at the very least: (a) the existence of a public policy; (b) that it is not symbolic or merely formal, which means it is clearly designed to guarantee the effective enjoyment of the right. This point is important because “the Constitution is violated when a plan or program exists, but it is verified that: (i) “*it only exists in writing* and its implementation has not started,” or (ii) “that even if it is being implement, this is evidently *pointless*, either because it does not respond to the real problems and needs of the holders of the right in question, or because its implementation has been delayed indefinitely, or for an unreasonable time,” and (c) that includes mechanisms for the participation of the interested parties that encourages the greatest accountability possible. Cf. Constitutional Court of Colombia, Judgment T-760 of 2008 (Judge Rapporteur: Manuel José Cepeda Espinosa).

¹⁴⁴ Federal National Contentious-Administrative Appeals Chamber of Argentina, Chamber IV, *Case of Viceconte, Mariela Cecilia v/National State – Ministry of Health and Social Action: ref/protection law 16,986. Case No. 31,777/96*, Judgment of June 2, 1998. An analysis of this case can be seen in Abramovich, Víctor and Courtis, Christian, *Los derechos sociales como derechos exigibles*, Madrid, Trotta, 2002, pp. 146 to 154.

82. In addition, the Constitutional Chamber of the Supreme Court of Costa Rica, in the recent Judgment 3691 of March 2013,¹⁴⁵ examined the serious obstacles in access to health care owing to the “waiting lists” that were delaying the provision of medical attention to many Costa Ricans. The Constitutional Chamber ordered that gradual, but genuine, steps be taken to eradicate unreasonable waiting lists for the provision of health care services. It requested that technical studies be undertaken that would allow a plan to be drawn up within the 12 months following the judgment. According to the Constitutional Chamber, this plan should define reasonable waiting times for pathology or urgent cases, as well as objective criteria for defining the inclusion and placement of a patient on the waiting lists. The Chamber also indicated that it was necessary to establish a timetable showing progress, and the administrative or technical measures to comply with the goals of the plan, so that, once the plan had been approved, in these first 12 months, within the following 12 months at the most, the waiting lists establish reasonable waiting times, according to the respective medical specialty and diagnosis.

83. Meanwhile, the Constitutional Court of Guatemala¹⁴⁶ has ordered the necessary medical services that people with HIV/AIDS may require, “understanding that this obligation entails the necessary medical assistance (consultation and hospitalization as applicable), medical treatment (provisions of the necessary medicines required by the said patients, once their situation has been verified based on studies performed by professionals with the relevant expertise), and the other services designed to preserve the health and life of these individuals, with the appropriate speed called for by the circumstances.”

84. Similarly, the Mexican Supreme Court of Justice of the Nation has established that the right to protection of health “includes the reception of the basic medicines for the treatment of an illness, as an integral part of the basic health care services consisting in the medical care, the curative activities of which signify providing opportune treatment to the person who is ill, which evidently includes the application of the respective basic medicines, in keeping with a basic table of health sector inputs. The foregoing, notwithstanding medicines that have been discovered recently and that there are other ailments that warrant the same or greater attention from the health care sector, because these are matters that go beyond the right of the individual to receive the basic medicines for the treatment of his illness, as an integral part of the right to the protection of health that is recognized as an individual guarantee, and of the obligation to provide them of the entities and departments that offer the respective services.”¹⁴⁷ In addition, the Supreme Court has recognized the normative nature of the right to health established as a fundamental right.¹⁴⁸

¹⁴⁵ Supreme Court of Costa Rica, Constitutional Chamber, *Judgment 3691*, March 13, 2013.

¹⁴⁶ Constitutional Court of Guatemala, *Case file 1055*, June 25, 2008.

¹⁴⁷ Ruling of the Court in plenary XIX/2000, entitled: “Health. The right to its protection, which, as an individual guarantee, is recognized in article 4 of the Constitution, includes the reception of basic medicines for the treatment of illnesses and their provision by the entities and departments that offer the respective services” (*Semanario Judicial de la Federación y su Gaceta*, Ninth period, Volume XI, March 2000, p. 112). *Amparo* under review 2231/97. José Luis Castro Ramírez. October 25, 1999. Rapporteur: Justice Mariano Azuela Güitrón; Justice Sergio Salvador Aguirre Anguiano who was absent endorsed the text. Secretary: Lourdes Ferrer Mac-Gregor Poisot.

¹⁴⁸ See ruling of the Court in plenary XV/2011, entitled: “The right to health. Its normative nature”; the text of which reads: “Our country is experiencing a stage of intense changes in the way in which the normative substance of the Constitution of the United Mexican States is identified and its consequences for how the *amparo* proceeding functions. A specific example of this phenomenon is the change in the understanding, which to date has been traditional, of rights such as the right to health or to education. In other words, despite their embodiment in the text of the Constitution, these rights have traditionally be understood as mere declarations of intent, without much real binding power over the action of citizens and public authorities. It has been understood that their effective realization was subordinated to specific legislative and administrative actions, in the absence of which the constitutional justices could not do very much. Now, to the contrary, the basic premise is that, even though in a

85. At the international level, many States that are not members of the OAS or that have not signed the American Convention have also established the right to health by constitutional, legislative or judicial mechanisms; for example, the Constitutions of South Africa (art. 27),¹⁴⁹ Cuba (art. 50),¹⁵⁰ Spain (art. 43),¹⁵¹ Philippines (art. 13)¹⁵² and Puerto Rico (art. 2).¹⁵³ In addition, the Supreme Court of Canada has established that certain constitutional provisions include the right to health.¹⁵⁴ England, on the other hand, is an example of a State that has enacted progressive legislation based on the right to health as a fundamental right for social well-being.”¹⁵⁵

86. For its part in the *Case of the Treatment Action Campaign*,¹⁵⁶ the Constitutional Court of South Africa analyzed a complaint against the public policy for the distribution of Nevirapine, an antiretroviral medicine used to avoid the transmission of HIV from mothers to babies during birth. The court determined that the Ministry of Health was not doing everything that it reasonably could to promote the accessibility of the medicine, and ordered that the restrictions to the use of Nevirapine in public clinics and hospitals be removed in cases where it had been recommended by a doctor, and it also ordered the promotion of a global and coordinated program to recognize gradually the right of pregnant women and their newborns to access medical services to avoid mother-to-child transmission of HIV. It is possible to find many other cases similar to these examples of judicial protection of the right to health.¹⁵⁷ Some of these matters involve understanding the right to health autonomously, without ignoring its interactions with the rights to life and to personal integrity.

87. It is important to underscore that this understanding of the right to health as directly fundamental in the national States, or of the direct justiciability of the right to health within the framework of the American Convention, does not imply understanding the right to health as an absolute right, as a right that has no limits, or that must be protected every

democratic constitutional State, the ordinary legislator and the government and administrative authorities have a broad margin to articulate their vision of the Constitution and, in particular, to deploy the public policies and regulations that must substantiate the effective guarantee of the rights in one direction or another, the constitutional judge is able to compare his work with the standards contained in the Constitution itself and in the human rights treaties that form part of the laws and that are binding on all the State authorities” (*Semanario Judicial de la Federación y su Gaceta*, Ninth period, Volume XXXIV, August 2011, p. 31). *Amparo* under review 315/2010. Jorge Francisco Balderas Woolrich. March 28, 2011. Rapporteur: Justice José Ramón Cossío Díaz. Secretaries: Francisca María Pou Giménez, Fabiana Estrada Tena and Paula María García Villegas Sánchez Cordero.

¹⁴⁹ “Article 27. Everyone has the *right to have access to health care services*, even reproductive health care.”

¹⁵⁰ “Article 50. Everyone has the *right to his or health being cared for and protected*. The State guarantees this right.”

¹⁵¹ “Article 43. The *right to the protection of health* is recognized. The public authorities must organize and protect public health by preventive measures and the necessary services and social benefits. The law shall establish the rights and obligations of everyone in this regard.”

¹⁵² “Article 13. The State shall adopt an integrated and comprehensive approach to health development.”

¹⁵³ “Article 2. The right of every person to a standard of living adequate for the *health* and well-being of himself and of his family, and especially to food, clothing, housing and medical care and necessary social services.”

¹⁵⁴ *Chaoulli v. Quebec (Prosecutor General)* [2005] 1 S.C.R. 791, 2005.

¹⁵⁵ Cf. National Health Service Act 2006, and the Health and Social Care Act. 2012 No. 1319 (C. 47) (2012).

¹⁵⁶ Constitutional Court of South Africa, *Minister of Health et al. v. Treatment Action Campaign (TAC) et al.* Case CCT 8/02, 5 July 2002.

¹⁵⁷ For an analysis of cases in Colombia, Costa Rica, Argentina, India, Brazil and South Africa, see the documents assembled in 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.

time it is invoked. The absolute protection of a civil or social right in any litigation is not derived from its justiciability. Every case, whether it relates to a civil or social right, must be decided making an analysis of imputation and to verify how the obligations of respect and guarantee function in relation to each situation that is alleged to have violated a specific right.

IV. THE *IURA NOVIT CURIA* PRINCIPLE AND THE DIRECT JUSTICIABILITY OF THE RIGHT TO HEALTH IN THIS CASE

88. In the instant case, the Inter-American Court declared the international responsibility of the State owing to: (a) the errors, delays and omissions in the criminal investigation, which led to the declaration of the prescription of the case in the proceedings; in other words, owing to violation of effective judicial protection (Articles 8(1) and 25(1), in relation to Article 1(1) of the American Convention), and (b) the failure to guarantee and prevent a violation of the right to personal integrity (Article 5, in relation to Article 1(1) of the Pact of San José), owing to the absence of State supervision and control of the clinics (public and private) where one of the victims was attended. In both analyses, especially in the second, the right to health was discussed, without considering this right to be an essential aspect of this case, and without considering its full justiciability, despite the citation of numerous international instruments and sources on this social right.

89. In the Judgment an analysis was made of different aspects of the protection of the right to health in connection with the civil rights that were declared to have been violated:

A) Regarding the violation of the rights established in Articles 8(1) and 25(1) of the Convention, in relation to Article 1(1) thereof, owing to the “errors, delays and omissions in the criminal investigation” that “reveal that the State authorities did not act with due diligence or in keeping with the obligations to investigate and to ensure effective judicial protection within a reasonable time, in order to guarantee to Melba Suárez Peralta a reparation enabling her to have access to the medical treatment required by her health problems”¹⁵⁸ (underlining added); and

B) Regarding the failure to guarantee and to prevent the violation of the right to personal integrity (Article 5(1) in relation to Article 1(1) of the American Convention) of one of the victims, owing to the absence of supervision and control, “as regards both control of the services provided in the State facility, the Polyclinic of the Guayas Traffic Commission, and those provided in the private institution, the Minchala Clinic,” so that the Inter-American Court “considered that “this resulted in a situation of risk, which the State was aware of, that materialized in adverse effects on the health of Melba Suárez Peralta”¹⁵⁹ (underlining added).

90. In the Judgment, the analysis of the adverse effects on the right to health of Melba del Carmen Suárez Peralta based on certain precedents of the Inter-American Court by means of the connectivity of rights is particularly relevant. The examination of the right to health was immersed in the effects on the right to personal integrity established in Article 5(1) of the American Convention on Human Rights, in relation to Article 1(1) of the Pact of

¹⁵⁸ Para. 122 of the Judgment. In addition, the expert opinion of Dr. Laura Pautassi is useful concerning the case law of the European Court of Human Rights, that in cases such as this one, where civil compensation is subject to the conclusion of the criminal proceedings, the obligation to investigate within a reasonable time is increased depending on the health situation of the person concerned; see para. 102, and footnote 135 of the Judgment.

¹⁵⁹ Para. 154 of the Judgment.

San José. Thus, the Judgment states that “the right to personal integrity is directly and immediately linked to attention to human health.”¹⁶⁰ It then indicates that “the absence of adequate medical care can lead to the violation of Article 5(1) of the Convention.”¹⁶¹ And, subsequently, it stipulates “that the protection of the right to personal integrity supposes the regulation of the health care services in the domestic sphere, as well as the implementation of a series of mechanisms designed to ensure the effectiveness of this regulation.”¹⁶²

91. However, I consider that the right to health should be approached autonomously owing to the proven facts and the effects suffered by one of the victims owing to the medical malpractice with State responsibility. In this regard, since, from my perspective, the right to health of one of the victims is directly involved, the Court could have approached the implications of these effects, which could even have led to declaring a violation of the obligation to guarantee the right to health under Article 26 of the American Convention.

92. The fact that the direct violation of this social right was not claimed by the Inter-American Commission or by the representatives of the victims does not represent an obstacle to the analysis of whether there was a violation of the obligation to guarantee the right to health derived from Article 26 of the American Convention, in relation to Article 1(1) the Pact of San José.¹⁶³ The absence of the explicit citing of the violation of a right or freedom does not prevent the Inter-American Court from analyzing it based on the general principle of law *iura novit curia*, “which international case law has used repeatedly, (understanding it) in the sense that the judge has the power and even the obligation to apply the pertinent legal provisions in a litigation, even when the parties do not cite it expressly.”¹⁶⁴

93. Indeed, the citing of this principle has been a practice of the international courts,¹⁶⁵ as it has also been the practice of the Inter-American Court starting with its first judgment on merits,¹⁶⁶ to examine violations of rights that were not expressly cited by the parties. The Inter-American Court has done this on many occasions in relation to different civil rights; for example, regarding the general obligations and rights contained in en Articles 1(1) (respect and guarantee),¹⁶⁷ 2 (domestic legal provisions),¹⁶⁸ 3 (recognition of juridical personality),¹⁶⁹ 4 (right to life),¹⁷⁰ 5 (personal integrity),¹⁷¹ 7 (personal liberty),¹⁷² 9

¹⁶⁰ *Case of Suárez Peralta, supra*, para. 130.

¹⁶¹ *Idem*.

¹⁶² *Idem*.

¹⁶³ Even though the Merits Report of the Inter-American Commission, the brief with pleadings, motions and evidence of the representatives of the victims, and the State's answering brief all refer to the right to health, see *infra* footnotes 174, 175 and 176.

¹⁶⁴ *Cf. Case of Cantos v. Argentina. Merits, reparations and costs. Judgment of November 28, 2002, Series C No. 97, para. 58; Case of Castillo Petrucci et al. v. Peru. Merits, reparations and costs. Judgment of May 30, 1999. Series C No. 52, para. 166, and Case of Kimel v. Argentina. Merits, reparations and costs. Judgment of May 2, 2008, Series C No. 177, para. 61.*

¹⁶⁵ *Cf. PCIJ. Case of S.S. “Lotus.” Series A No. 10. Judgment of 27 September 1927, p. 31, and ECHR. Handyside v. United Kingdom. No. 5493/72. Judgment of 7 December 1976, para. 41. Cf. Case of Godínez Cruz v. Honduras. Merits. Judgment of January 20, 1989, Series C No. 5, para. 172.*

¹⁶⁶ *Cf. Case of Velásquez Rodríguez v. Honduras, Preliminary objections, supra*, para. 163.

¹⁶⁷ *Cf. Case of Godínez Cruz, supra*, para. 172.

¹⁶⁸ *Cf. Case of Cantos v. Argentina, supra*, para. 58

¹⁶⁹ *Cf. Case of the Sawhoyamaya Indigenous Community, paras. 186 and 187.*

(freedom from *ex post facto* laws),¹⁷³ 8 (judicial guarantees),¹⁷⁴ 11 (protection of honor and dignity)¹⁷⁵ and 22 (movement and residence),¹⁷⁶ among others.

94. There is no reason not to examine the possible violation of the guarantee of a social right, derived from Article 26 in relation to Article 1(1) of the Pact of San José, even though it was not expressly cited by one of the parties. It is the obligation of the Inter-American Court to apply the *iura novit curia* principle — and the preceding paragraph reveals that it constitutes the Inter-American Court's practice with regard to civil rights — if, based on the factual framework of the case and the proven facts, clear implications can be observed for the right to health, as in this case, that arise from the impact of medical malpractice with the State's responsibility on the health of one of the victims. In addition, it can be seen that the Merits Report of the Inter-American Commission cites this social right,¹⁷⁷ as does the brief with pleadings, motions and evidence of the representatives of the victims,¹⁷⁸ and there are also precise references to the right to health in the State's answering brief,¹⁷⁹ while the parties have had ample opportunity to refer to the facts in the instant case.

95. In any case, the implications for the right to health are revealed, also, by the citing and use in the Judgment of numerous international instruments and sources relating to this social right, such as Articles XI of the American Declaration on the Rights and Duties of Man, 10 of the Protocol of San Salvador, 12 of the International Covenant on Economic, Social and Cultural Rights. The Social Charter of the Americas of June 2012, and General Comments 3, 9 and 14 of the Committee on Economic, Social and Cultural Rights are even cited, as well as the OAS Charter and, expressly, the derivation of the “right to health” from Article 26 of the American Convention (see *supra* paras. 28 to 32).¹⁸⁰

96. Accordingly, it is valid for the Inter-American Court, in application of the *iura novit curia* principle and based on the factual framework of the case, to be able to analyze, directly and autonomously, the guarantee of the right to health — and not only connected

¹⁷⁰ Cf. *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago. Merits, reparations and costs.* Judgment of June 21, 2002. Series C No. 94, para. 107.

¹⁷¹ Cf. *Case of Vera Vera et al., supra*, paras. 100 and 101, and *Case of Ximenes Lopes, supra*, para. 155.

¹⁷² Cf. *Case of Acosta Calderón v. Ecuador. Merits, reparations and costs.* Judgment of June 24, 2005. Series C No. 129, para. 85.

¹⁷³ Cf. *Case of Vélez Loo, supra*, para. 184, and *Case of Usón Ramírez v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of November 20, 2009. Series C No. 207, paras. 53 and 54.

¹⁷⁴ Cf. *Case of Herrera Ulloa v. Costa Rica. Preliminary objections, merits, reparations and costs.* Judgment of July 2, 2004. Series C No. 107, para. 137.

¹⁷⁵ Cf. *Case of Contreras et al. v. El Salvador. Merits, reparations and costs.* Judgment of August 31, 2011. Series C No. 232, para. 109.

¹⁷⁶ Cf. *Case of Gudiel Álvarez (Diario Militar) v. Guatemala. Merits, reparations and costs.* Judgment of November 20, 2012. Series C No. 253, para. 308.

¹⁷⁷ Merits Report 75/2011, of July 20, 2011, p. 22, para. 83: “[...] when the actions of the State's authorities lead to a failure in the guarantees protected at the domestic and inter-American levels — hindering the right of access to justice associated with a claim related to the right to health, a public service protected by the States (underlining added).”

¹⁷⁸ Also, brief with pleadings, motions and evidence of the representatives of the victims dated April 28, 2012, p. 42: “the laws of Ecuador establish the right to health as a fundamental human right and establish the obligation of the State to regulate the health care of the persons subject to its jurisdiction, either directly or through third parties.”

¹⁷⁹ Cf. the State's answering brief, pp. 221 to 226.

¹⁸⁰ Also, see in particular para. 131, and footnote 176 of the Judgment.

to the civil rights that it declared violated – in the understanding that the right to health is one of the justiciable economic, social and cultural rights that are derived from Article 26 of the American Convention, in relation to the general obligations of Article 1(1) of the Pact of San José, as analyzed above.

V. IN CONCLUSION: TOWARDS THE FULL JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE INTER-AMERICAN SYSTEM

97. More than three decades after the entry into force of the American Convention, discussions continue on the nature and scope of the economic, social and cultural rights referred to in the only article included in its Chapter III: Article 26. It is my understanding that this article of the Convention needs to be interpreted in light of our times and in accordance with the relevant advances in international human rights law, and in constitutional law. Indeed, regarding the former, it is sufficient to indicate that a few days before the Judgment to which this separate opinion refers was handed down, the Optional Protocol of the International Covenant on Economic, Social and Cultural Rights entered into force,¹⁸¹ and this represents a real potential opening towards the justiciability of these rights under the universal system.

98. Furthermore, the progress made in the area of social rights within the States Parties to the Pact of San José is undeniable. The necessary evolutive interpretation of Article 26 of the American Convention must also be derived from the full recognition in many Constitutions of the protection of the right to health as a social right, which represents a regional trend. And this trend can also be appreciated in the evolution of the case law of the highest national jurisdictions granting effectiveness to this social right; at times even directly and not only in connection with civil and political rights.

99. In this individual opinion, I have tried to defend an interpretation that attempts to grant primacy to the normative value of Article 26 of the American Convention. It has been said – with some reason – that the Inter-American Court should not ignore the Protocol of San Salvador;¹⁸² neither should it ignore Article 26 of the Pact of San José; it should interpret it in light of both instruments. In this understanding, the Additional Protocol is not able to reduce the normative value of 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 rights, even economic, social and cultural rights, as the Inter-American Court has explicitly recognized.¹⁸³

100. The evolutive interpretation referred to seeks to grant real efficacy to inter-American protection in this area, the effectiveness of which is minimal 25 years after the adoption of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, and almost 15 years after its entry into force. And this calls for an interpretation addressed at establishing the greatest practical effects possible for

¹⁸¹ Resolution A/RES/63/117 adopted on 10 December 2008 by the UN General Assembly, which entered into force on May 5, 2013. Ecuador is one of the 10 countries that have ratified it. The signatories undertake to recognize the competence of the Committee on Economic, Social and Cultural Rights to examine communications from individuals or groups who affirm that there has been a violation of the International Covenant on Economic, Social and Cultural Rights.

¹⁸² Ruiz-Chiriboga, Oswaldo, *op. cit. supra*, note 39, p. 160.

¹⁸³ Cf. *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller")*, *supra*, para. 100.

the inter-American norms as a whole, as the Inter-American Court has been doing with regard to civil and political rights.

101. The essence 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 autonomy to the scope of that social right based on Article 26 of the American Convention in relation to the obligations of respect and guarantee contained in Article 1(1) of the Pact, and this requires interpreting the Pact of San José in light of the *corpus juris* on the right to health — as is done in the *Case of Suárez Peralta* that prompts this separate opinion, even though it is called personal integrity, limiting significantly by way of connectivity the real scope of the right to health.

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 measures. 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.¹⁸⁴ 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.

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, 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

¹⁸⁴ Cf. *Case of Ticona Estrada et al. v. Bolivia. Merits, reparations and costs*. Judgment of November 27, 2008, Series C No. 191, para. 110.

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 rights¹⁸⁵ — 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 2009.¹⁸⁶

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.

Eduardo Ferrer Mac-Gregor Poisot
Judge

¹⁸⁵ 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 öffentliches Recht und Völkerrecht, 2011.

¹⁸⁶ Cf. *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller")*, *supra*, paras. 99-103.

Pablo Saavedra Alessandri
Secretary