

## Articles

# Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas

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## INTRODUCTION

Human rights activists routinely presume that more is more: that more treaties, more norms, more litigation, more laws, more expansive judgments, etc., necessarily result in greater rights protection. This Article questions that supposition in the context of economic, social, and cultural rights in the Inter-American system. We argue that, given the limited resources of this system, the potentially adverse consequences of developing legal standards that may not be applied, and the potential—inherent in the development of novel jurisprudence—for undermining states’ respect for the system itself, less frequent and more focused litigation may, in fact, be more valuable. In particular, we urge lawyers

and activists in the Inter-American system to recognize the limited and often subsidiary role of legal advocacy in promoting the recognition of economic and social rights and distributive justice. In the end, we conclude that successful promotion of economic, social, and cultural rights in the Inter-American system should be incremental, firmly grounded in established precedent, and always linked to vigorous social movements and effective advocacy strategies.

This Article urges human rights practitioners, petitioners, lawyers, and judges, particularly those at the international level, to think both creatively and critically about strategies for developing the legal and political architecture necessary for the effective enforcement of economic, social, and cultural rights. In particular, we argue for a pragmatic approach to developing this architecture within the Inter-American system that focuses on the real-world impact that litigation of individual cases is likely to have. We posit that those who seek sustainable, structural, transformative changes of Latin American society—and not merely sterile, judicial recognition of economic, social, and cultural rights—are best served by adopting a restrained, incremental, “less as more” approach to expanding these rights in the Inter-American system.

A review of the degree of compliance with the determinations of the Inter-American system, as well as our experience as activists in the international arena, has convinced us that the impact of international litigation is significantly enhanced when cases are accompanied by social pressure on domestic authorities through a variety of other means. By contrast, litigation strategies that are not linked to other forms of pressure rarely achieve major impact and often are irrelevant in a way that undermines the strength of supranational judicial bodies. In many instances, the degree of impact is most closely linked not to the importance of the Inter-American system’s actions in a particular case, but rather to the level of media and public interest in the matter and the extent to which the government is pressured to respond (ordinarily, by social movements and/or the media). Case studies across Latin America, several of which we examine as part of our inquiry, illustrate this point.

Given the relatively solid theoretical and legal basis of human rights in Latin America,<sup>1</sup> this Article focuses on approaches to increasing protection for economic, social, and cultural rights in practice. In particular, we consider the possibilities for expansion of these rights through their recognition and enforcement by the two human rights oversight bodies of the Organization of American States: the Inter-American Commission on Human Rights (the “Commission” or the “Inter-American Commission”) and the Inter-American Court of

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1. See *infra* Part I, Economic, Social, and Cultural Rights in the Americas.

Human Rights (the “Court” or the “Inter-American Court”). We begin by analyzing the conditions necessary for the implementation of economic, social, and cultural rights, then argue for an approach to advocacy in the Inter-American system that most effectively utilizes this intergovernmental mechanism to create these conditions.

To contextualize our analysis, we present a brief overview of the history and operation of the Inter-American human rights enforcement mechanisms, followed by an analysis of the extent to which—and the conditions under which—decisions issued by these mechanisms achieve real-world impact. We emphasize that while the implementation of Commission recommendations and Court orders is one important way in which these decisions can have practical effect, this is certainly not the only means of achieving impact. We explore this point through case studies that highlight a number of ways in which activists may use international decisions as part of an integrated approach to domestic advocacy.

We then examine the ways in which the supervisory bodies of the Inter-American system have approached the enforcement of economic, social, and cultural rights to date. As we will see, both the Commission and the Court have confronted these issues in recent years. We argue that to the extent the Court and the Commission have been instrumental in advancing human rights in the Americas, they have achieved this through largely conventional interpretations of human rights norms that have allowed both bodies to maintain the respect of governments and activists.

Indeed, we urge activists to respect the dialectic nature of the relationship between civil society and the governments and institutions that make up the Inter-American system: civil society may seek enforcement of individual rights through recourse to Inter-American human rights protection mechanisms; yet the system depends on the support of civil society for its legitimacy.<sup>2</sup> Governments provide the required resources to keep the Inter-American system functioning and elect the individuals who will serve as commissioners and judges on its oversight bodies; but these institutions also depend on governments’ voluntary acceptance of their authority and good-faith participation in

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2. In the months leading up to the June 2004 General Assembly of the Organization of American States, for example, rights defenders throughout the Americas rallied to stave off efforts to reduce the operating budget of the Inter-American Commission on Human Rights. A coalition of some 93 entities argued that “Member States must rescind these [proposed] cuts and assume their prior responsibilities and commitments to progressively and substantially increase the budgets of human rights bodies.” See Statement presented at the Thirty-Fourth Regular Session of the Organization of American States General Assembly by International Coalition of Organizations for Human Rights in the Americas, June 6–8, 2004, Quito, Ecuador, available at <http://www.cejil.org/asambleas.cfm?id=153> (last visited Nov. 29, 2004).

the established rules of engagement in order to be effective. And the institutions comprising the system have the authority to resolve claims and to issue decisions requiring action on the part of both governments and civil society actors; but this authority depends on the latter two groups' perception that it is being exercised in a reasonable, appropriate manner.

As actors in this complex web of interdependent institutions, legal operators (i.e., lawyers, commissioners, and judges) seeking progressive transformation of Latin American reality must be mindful of their limited role in promoting economic, social, and cultural rights. It is vital here that our argument not be misconstrued. We do not suggest that human rights lawyers ought to accept gross inequality, nor that they limit their activism to the areas in which the Inter-American system may be used most effectively. Instead, we recommend that international human rights lawyers accept the limits inherent in litigation in the Inter-American system and seek alternative means of maximizing their impact in advancing the agenda of social justice. We outline methods—including defending the civil and political rights of leaders of social movements and filing and winning cases involving a limited set of economic, social, and cultural rights in conjunction with organized social movements—through which international human rights advocates may maximize their impact.

Similarly, we urge the Court and the Commission, as institutions, not to see themselves fundamentally as promoters of visionary jurisprudence but to encourage respect for human rights by acting primarily as adjudicatory and advisory bodies whose decisions and recommendations enable those defending economic, social, and cultural rights on the ground to promote concrete changes in state policy.

This Article is divided into four parts. Part I considers economic, social, and cultural rights in the Americas, examining the current socio-economic and political context as well as the historic development of these rights in the Inter-American system. That section analyzes the limited nature of access to the Inter-American Commission and Court and assesses the degree of compliance with the system's determinations. Part II evaluates the potential of international litigation to effect real-world change. That section begins by examining critiques of rights-based litigation as a means of achieving social justice in both the U.S. domestic and international contexts. It then continues by reviewing case studies from Brazil, Peru, and Trinidad and Tobago, seeking to draw conclusions about the circumstances in which international litigation is most effective. Part III analyzes international human rights jurisprudence, both in the Inter-American system and beyond, drawing out the conceptual differences between economic, social, and cultural rights and their civil and political counterparts. It then focuses on three possible bases for advancing legal protections for economic, social, and cultural

rights. Finally, Part IV focuses on areas for future development, positing both the legal arguments and the kinds of test cases we believe manifest the greatest potential to establish precedents likely to be implemented by states in the Americas.

### I. ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN THE INTER-AMERICAN SYSTEM

In the past twenty years, as Latin America has emerged from a period of intense struggle with civil wars, military dictatorships, and massive, state-sponsored human rights abuse, the terms of the principal human rights debates have undergone a dramatic shift. Civilian rule, periodic elections, and a vast reduction in targeted civil and political rights violations have marked the region for two decades. During the worst years of repression and in the immediate aftermath of systematic violations such as forced disappearances, extra-judicial executions, and torture, the Latin American human rights movement understandably focused on preserving the most basic civil and political rights—to life, to physical integrity, and to due process. In a new era of democratically elected governments, economic integration, and globalization, the movement has now turned its attention to the enforcement of economic, social, and cultural rights.<sup>3</sup>

At the same time, the transition to civilian rule has coincided with the fall of the Berlin Wall and the global advance of free market capitalism as the lone surviving economic model. This advance has displaced socialism, undermining the capacity of leftist discourse and projects to present alternatives to increasing inequality, widespread poverty, unemployment, substandard housing and other chronic forms of suffering. The combination of the shift to relatively stable civilian governments, the maintenance and intensification of widespread poverty, and the demise of the promise of leftist politics as a means of social transformation has provoked significant change in human rights discourse and practice as activists increasingly have embraced economic, social, and cultural rights to respond to Latin America's chronic social problems. With this shift has come a host of new challenges. Activists and policymakers have grappled with legal and political structures—both at the domestic and international levels—incapable of imposing immediate obligations on states to protect and ensure economic, social, and cultural rights.

A broad consensus has gradually emerged, affirming the need for

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3. See, e.g., Paulo Sérgio Pinheiro, *The Rule of Law and the Underprivileged in Latin America: Introduction*, in (UN)RULE OF LAW AND THE UNDERPRIVILEGED IN LATIN AMERICA (Juan E. Méndez et al. eds. 1999) (arguing that in transitional democratic states in Latin America, social class has transcended political affiliation as the key factor in rights enjoyment and deprivation).

increased “justiciability” of economic, social, and cultural rights. This consensus has led to a proliferation of efforts by non-governmental organizations, declarations by intergovernmental organizations, and determinations by international adjudicatory and semi-judicial bodies that seek to expand, often by mere affirmation, the scope of justiciability of economic, social, and cultural rights.

The idea of economic, social, and cultural rights has been recognized alongside civil and political rights since the establishment of basic human rights principles in the Universal Declaration of Human Rights.<sup>4</sup> This idea has been reiterated in the International Covenant on Civil and Political Rights,<sup>5</sup> the International Covenant on Economic, Social and Cultural Rights,<sup>6</sup> and, in the Americas, in the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (the “Protocol of San Salvador”).<sup>7</sup> While early iterations of human rights underscored fundamental differences between civil and political rights on the one hand and economic, social, and cultural rights on the other, recent instruments and declarations have sought to minimize these differences.<sup>8</sup> Indeed, official international discourse has increasingly supported the idea that human rights are interdependent and indivisible, and that economic, social, and cultural protections are no less rights than their civil and political counterparts. Nonetheless, the most fundamental economic, social, and cultural rights of the four-fifths of humanity that live in dire poverty are disregarded on a daily and massive basis.

Latin American nations—in discourse, at least—widely accept that international legal norms on human rights exist and that they bind states.<sup>9</sup> In theory, economic, social, and cultural rights are no exception; yet achieving the justiciability and exigibility of these rights has been more difficult, largely due to the broadly criticized but still prevalent idea that civil and political rights require mere non-interference by the state,

4. *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. GAOR, at 71, U.N. Doc. A/810 (1948).

5. *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 135, U.N. Doc. A/6316, 999 U.N.T.S. 171 (1966) (entered into force Mar. 23, 1976).

6. *International Covenant on Economic, Social, and Cultural Rights*, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, 993 U.N.T.S. 3 (1966) (entered into force Jan. 3, 1976).

7. *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights “Protocol of San Salvador,”* Inter-Am. C.H.R. 67, OEA/ser. L./V./II.82, doc. 6 rev.1 (1992) (hereinafter *Protocol of San Salvador*).

8. See, e.g., *Vienna Declaration and Programme of Action*, U.N. World Conference on Human Rights, U.N. Doc. A/CONF.157/24 (1993) (“All 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.”).

9. A number of Latin American nations have stipulated the binding nature of international human rights norms in their constitutions or in other sources of domestic law. See *infra* Part I.A.3.

while economic, social, and cultural rights demand positive state action. Scholars have criticized this distinction as overly simplistic, stressing the mixed nature (omission and action) of all rights, and in so doing have set out approaches that allow for the justiciability and exigibility of at least some economic, social, and cultural rights.

#### A. ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN THE INTER-AMERICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS

##### I. *Historical Development*

In May 1948, seven months before the United Nations General Assembly approved the Universal Declaration of Human Rights,<sup>10</sup> the Organization of American States (“OAS”) approved the American Declaration of the Rights and Duties of Man (the “American Declaration”).<sup>11</sup> That instrument set forth a series of fundamental human rights—both civil and political, and economic, social, and cultural. In so doing, the OAS juxtaposed alongside the “traditional” fundamental rights to life, liberty, equality, and suffrage, the rights to education (Article XII), culture (Article XIII), work (Article XIV), and even social security (Article XVI).

But the Inter-American system lacked a binding treaty in the area of human rights until 1969, when the OAS member states approved the American Convention on Human Rights.<sup>12</sup> While the American Convention clearly constituted an advance in the defense of human rights in the Americas, in that it provided treaty-level protection to principles previously contained only in non-binding declarations, it also represented a retreat from the broader vision of human rights championed by the American Declaration. The Convention, unlike the Declaration, failed to afford economic, social, and cultural rights the same degree of specificity that had been established in the May 1948 Declaration. Indeed, the entire topic of economic, social, and cultural rights in the American Convention is reduced to a single article, Article 26. That article, entitled “Progressive Development,” establishes that:

The States Parties undertake to adopt measures, both internally and

10. Universal Declaration of Human Rights, *supra* note 4.

11. American Declaration of the Rights and Duties of Man (“The American Declaration”), O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/ser. L.V/II.82, doc. 6 rev. 1, at 17 (1992).

12. American Convention on Human Rights (“Pact of San José, Costa Rica”), Nov. 22, 1969, 1144 U.N.T.S. 123 (hereinafter Am. Conv. H.R.). Although the American Declaration established a long list of rights, it is not a legally binding treaty, as we discuss below in footnote 31 and accompanying text. For an overview of the governing human rights instruments of the OAS, including a discussion of the way in which such instruments become binding, see TARA MELISH, PROTECTING ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM: A MANUAL ON PRESENTING CLAIMS 3–23 (2002).

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.<sup>13</sup>

As we shall see, while this provision mentions economic, social, and cultural rights explicitly, it has proven ineffectual as a basis for individual claims. Indeed, Article 26 fails to establish any specific rights or concrete duties. As we discuss in our review of recent cases, this principle has been affirmed by the Court<sup>14</sup> and represents the dominant, though not unanimous, view of Article 26 among governments, members, and staff of the Inter-American Commission, and petitioning non-governmental organizations (“NGOs”). Expressing the dominant interpretation of the practice of the Inter-American system prior to the recent entry into force of the San Salvador Protocol, scholar and Inter-American Court of Human Rights Justice Antônio Augusto Cançado Trindade has written, “a gap in the protection of economic, social, and cultural rights has remained in the international treaty system in the Americas because Article 26 of the Convention limits itself to the ‘progressive development’ of these rights.”<sup>15</sup>

The Inter-American system’s failure to provide protection for economic, social, and cultural rights is contrasted by its active defense of civil and political rights. In addition to its other functions,<sup>16</sup> the

13. Am. Conv. H.R., *supra* note 12, art. 26.

14. “Five Pensioners” v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 98 (2003).

15. ANTÔNIO AUGUSTO CAÑADO TRINDADE, *TRATADO DE DIREITO INTERNACIONAL DOS DIREITOS HUMANOS* 365–66 (Sergio Antonio Fabris ed. 1997). The original text of the citation reads, “[n]o continente americano . . . persistiu . . . a lacuna no sistema interamericano de proteção no tocante aos direitos econômicos, sociais e culturais, porquanto a Convenção . . . se limitou a dispor (artigo 26) sobre o ‘desenvolvimento progressivo’ destes últimos.”

16. Article 41 of the American Convention on Human Rights sets forth the Commission’s functions:

The main function of the Commission shall be to promote respect for and defense of human rights. In the exercise of its mandate, it shall have the following functions and powers:

to develop an awareness of human rights among the peoples of America;

to make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights;

to prepare such studies or reports as it considers advisable in the performance of its duties;

to request the governments of the member states to supply it with information on the measures adopted by them in matters of human rights;

to respond, through the General Secretariat of the Organization of American States, to inquiries made by the member states on matters related to human rights and, within the limits of its possibilities, to provide those states with the advisory services they request;

to take action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51 of this Convention; and

Commission has, since its creation in 1959, reviewed, processed, and reached conclusions regarding thousands of individual petitions alleging violations of fundamental human rights.<sup>17</sup> The Court, through its advisory opinions and, since 1986, through its work on contentious cases, has adjudicated cases of rights abuse on a more limited scale, rendering justice to individual victims and establishing important precedents.

A 1999 compilation on economic rights prepared by the Inter-American Institute of Human Rights concludes:

To date, the effectiveness of the inter-American system in protecting economic, social and cultural rights has been practically nil. This assertion applies . . . [to countries] across the Americas, among other reasons because human rights protection organs have focused, over the past several decades, on the massive and systematic human rights violations that occurred in the context of the military dictatorships that nearly all Latin American countries suffered.<sup>18</sup>

This gap in the protection of economic, social, and cultural rights was filled—in part—by the Additional Protocol in the Area of Economic, Social and Cultural Rights, known as the “San Salvador Protocol.”<sup>19</sup> The treaty, drafted over a period of years and completed in 1988, sets out a series of economic, social, and cultural rights. Among them are the right to work (Article 6); the right to just and equitable conditions of work (Article 7); labor rights (Article 8); the right to social security (Article 9); the right to health (Article 10); the right to a healthy environment (Article 11); the right to food (Article 12); the right to education (Article 13); the right to the benefits of culture (Article 14); the right to protection of families (Article 15); the rights of children (Article 16); and the protection of the elderly (Article 17) and the handicapped (Article 18).

to submit an annual report to the General Assembly of the Organization of American States.

Am. Conv. H.R., *supra* note 12, art. 41, at 193.

17. Even prior to the adoption of the American Convention, which established the functions of the Commission, this body received and processed complaints of human rights protected by the American Declaration. OAS General Assembly Resolution No. XXII, 721 U.N.T.S. 324, and the 1967 Protocolo de Buenos Aires, OAS Treaty Series, No. 1-A, conferred authority on the Commission to process individual petitions much as it had been doing on a *de facto* basis shortly after its creation in 1959.

18. INTER-AMERICAN INSTITUTE OF HUMAN RIGHTS, LOS DERECHOS ECONÓMICOS, SOCIALES Y CULTURALES: UN DESAFÍO IMPOSTERGABLE 19–20 (San José, Costa Rica 1999) (authors' translation). The original Spanish text reads:

[H]asta el momento la real efectividad del sistema interamericano para proteger los derechos económicos, sociales y culturales ha sido prácticamente nula. Esta afirmación es aplicable . . . [a los países] del continente americano, entre otras razones debido a que la atención de los órganos de protección durante las pasadas décadas estuvo centrada en masivas y sistemáticas violaciones a los derechos humanos, ocurridas en el marco de las dictaduras militares sufridas por gran parte de los países latinoamericanos.

19. *Protocol of San Salvador*, *supra* note 7.

The San Salvador Protocol specifically provides for petition to the Inter-American Commission to enforce the right to education, protected in Article 13, and of certain labor rights, established in Article 8, clause (a). Article 19, clause (6) states that:

Any instance in which the rights established in paragraph a) of Article 8 and in Article 13 are violated by action directly attributable to a state party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights.<sup>20</sup>

The negative inference of the language used in Article 19 is that the violation of other rights enshrined in the Protocol *does not* give rise to the right of petition to the Inter-American system. Although petitioners to the Commission have sought to defend the justiciability of *all* of the rights protected in the Protocol, the Commission has construed Article 19 restrictively.<sup>21</sup>

## 2. *Judicial and Quasi-Judicial Oversight in the Inter-American System*

The OAS has created and developed a human rights system composed of two oversight bodies: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The Commission, created in 1959, is a quasi-judicial body that promotes human rights through a series of functions that go well beyond the adjudication of individual cases. The Court, established by the American Convention on Human Rights, is a purely legal body charged with jurisdiction over individual disputes (contentious jurisdiction). The Court also has the power to issue advisory opinions at the request of member states of the OAS, the Commission, and other OAS bodies, and to issue provisional measures for the urgent protection of individuals it deems to be at imminent risk of violation of one or more protected rights.<sup>22</sup>

Among the functions of the Commission is the receipt and processing of individual petitions alleging violations of the rights guaranteed in the Inter-American system. For those in the Americas whose human rights have been violated, petition to the Commission is often the most effective means of seeking a remedy at the international level. In order to file a petition with the Commission, victims must first exhaust domestic remedies.<sup>23</sup> This petition begins a process of litigation before the Commission, which may lead to transfer of the case to the

20. *Protocol of San Salvador*, *supra* note 7, art. 19.

21. See Jorge Odir Miranda Cortez v. El Salvador, Case 12.249, Inter-Am. C.H.R., Report No. 29/01 para. 35–36, OEA/ser. L./V./II.111, doc. 20 rev. (2000).

22. See Am. Conv. H.R., *supra* note 12, Ch. VIII.

23. Petitioners may request exemption from this requirement in a limited set of circumstances.

Inter-American Court. Before the Court, the Commission is transformed from arbiter to party, becoming the petitioner against the state. Until recently, the Commission was the primary representative of the original petitioner's interests before the Court, but with the entry into force of recent modifications in the Court's Rules of Procedure, victims may now be represented by an individual or organization of their choice, who may present independent evidence and arguments to the Court, alongside the Commission.

a. *The Inter-American Commission on Human Rights*

The Inter-American Commission on Human Rights is composed of seven members selected by the Organization of American States who meet two or three times per year, for periods of two to three weeks.<sup>24</sup> During these sessions, the members of the Commission review and approve reports relating to cases that have been submitted by individuals or NGOs alleging specific violations of rights enshrined in the American Convention on Human Rights, the American Declaration on the Rights and Duties of Man, and various other Inter-American instruments.<sup>25</sup> In addition, the Commission undertakes to resolve structural human rights issues through a number of other activities, including observation and reporting on general human rights conditions in member states, which may include on-site visits and collaboration with local entities and governmental agencies; the publication of reports on specific human rights issues where it deems appropriate; and the organization of conferences, seminars, and meetings with representatives of governments, NGOs, academic institutions, and other groups.<sup>26</sup>

In theory, petition to the Inter-American Commission is open to all residents and rights groups in any member state of the OAS. But of the

24. INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, THE RULES OF PROCEDURE OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, tit. I, ch. V., art. 14, available at <http://www.cidh.oas.org/basicos/basic16.htm> (updated Oct. 2003) ("The Commission shall hold at least two regular periods of sessions per year for the duration previously determined by it and as many special sessions as it deems necessary.")

25. The Commission is empowered to adjudicate cases against any of the OAS member states, including those that have not ratified the American Convention. In the event the state charged has not ratified the Convention, the Commission applies the human rights principles set forth in the American Declaration of the Rights and Duties of Man, applicable to all member states by virtue of their membership in the OAS. In addition to the aforementioned *Protocol of San Salvador*, applicable human rights instruments include the Protocol to the American Convention on Human Rights to Abolish the Death Penalty; the Inter-American Convention to Prevent and Punish Torture; the Inter-American Convention on the Forced Disappearance of Persons; the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women ("Convention of Belém do Pará"); and the Inter-American Convention on the Elimination of all Forms of Discrimination Against Persons with Disabilities. See Am. Conv. H.R., *supra* note 12.

26. As mentioned above, Article 41 of the Convention sets forth the Commission's functions. See also Legal Bases and Activities of the IACHR During 2003, Inter-Am. C.H.R., ch. II, OEA/Ser.LV/II.118, doc. 5, rev. 2, available at <http://www.cidh.org/annualrep/2003eng/chap.2.htm> (description of the Commission's legal bases, functions, and powers).

hundreds of petitions the Commission receives each year, it decides fewer than sixty matters, roughly half of which concern the admissibility of the petition itself. These numbers demonstrate a critical characteristic of the Inter-American system: it is one of limited access and one of even more limited use in terms of obtaining binding, final decisions.

It is important to note that the Commission's role in shaping the policies and practices of member states is through the issuance of *recommendations*. Commission resolutions are not binding in the same sense as determinations by the Court, although states do have a good-faith duty to accept and implement the Commission's recommendations.<sup>27</sup> Nonetheless, states can and often do reject these recommendations, either explicitly or by failing to take measures to ensure their implementation.

In sum, Commission reports are political instruments that may (or may not) be effective as tools to pressure, persuade, or coerce states to effect internal policy changes; but their compulsory effect on states is limited, and, in isolation, tend to be only moderately effective in bringing about meaningful change, as we will discuss in later sections.

b. *The Inter-American Court of Human Rights*

Created in 1978 on the entry into force of the American Convention, the Inter-American Court focused almost exclusively on advisory opinions until 1986, when the Commission submitted the first contentious cases to the Court.<sup>28</sup> From its inception through the end of 2004, the Court has published just 119 decisions in contentious matters and nineteen advisory opinions. Of the decisions issued in contentious matters, many refer to different procedural stages of the same case.

If the Commission is an organ of limited access, the Court is an instance of *extremely* limited access. To begin with, the seven judges of the Court<sup>29</sup> generally convene for regular sessions three or four times a year, for a total of approximately eight weeks. In comparison to the Commission's staff of some two dozen attorneys, the Court depends on only four senior and four junior attorneys to prepare draft reports and to assist the Judges in their duties, thus limiting its productivity, at least in numerical terms.

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27. The Inter-American Court of Human Rights has observed that, "the report or resolution of the Commission does not have those binding effects. Its intervention is intended to enable it, on the basis of good faith, to obtain the State's cooperation." Ad. Op. OC-15, Inter-Am. Ct. H.R. (ser. A) para. 28 (1997).

28. Velásquez-Rodríguez v. Honduras (Preliminary Objections), Inter-Am Ct. H.R. (ser. C) No. 1 (1987); Fairén-Garbi and Solís-Corrales v. Honduras (Preliminary Objections), Inter-Am. Ct. H.R. (ser. C) No. 2 (1987); Godínez-Cruz v. Honduras (Preliminary Objections), Inter-Am. Ct. H.R. (ser. C) No. 3 (1987).

29. The selection of judges is guided by Articles 52-53 of the American Convention. Am. Conv. H.R., *supra* note 12, arts. 52-53.

Aggravating the structural barriers to widespread access is the specialized nature of supranational litigation. Because petitioning the Inter-American system requires knowledge of a particular body of substantive and procedural law, very few advocates have made use of its case resolution capacity, and those who have tend to be repeat players. In Part II, we address critiques by critical legal studies scholars and others who have argued that "queue jumping" through litigation undermines efforts at distributive justice. To the extent that access to the Inter-American system is concentrated in the hands of a small group of practitioners, these concerns intensify.

Finally, the Court's authority to issue compulsory judgments is contingent on the states' voluntary recognition of the Court's jurisdiction, and not all member states have accepted jurisdiction. At this writing, twenty-two states have recognized the Court's jurisdiction to resolve contentious matters.<sup>30</sup> But while formal recognition of the Court's jurisdiction is a necessary condition for the state to be bound by the Court's orders, it is not necessarily a sufficient one for the practical and effective implementation of such orders.

### 3. *Implementation of Commission Recommendations and Court Decisions*

The international obligations that states assume upon joining the Organization of American States and ratifying the American Convention on Human Rights include the duty to respect the rights set forth in the American Declaration of the Rights and Duties of Man and in the American Convention. As a formal matter, the American Declaration is not directly binding on states, as it does not have the status of a treaty according to the Vienna Convention on the Law of Treaties (1969).<sup>31</sup> Both the Commission and the Court, however, have interpreted the Declaration as indirectly binding on all member states by virtue of their ratification of the OAS Charter, which is a legally binding treaty and

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30. The states are: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay and Venezuela. Trinidad and Tobago has repudiated its ratification of the Convention, however, effective May 26, 1998. Three additional countries, Dominica, Grenada, and Jamaica, have signed and ratified the American Convention but do not recognize the jurisdiction of the Court. The United States is a signatory to the Convention but has not ratified it, nor has it recognized the Court's contentious jurisdiction.

31. The Inter-American Court has explicitly held that

"the Declaration is not a treaty as defined by the Vienna Conventions because it was not approved as such. . . .

. . . It was neither conceived nor drafted as a treaty. . . . [T]he Declaration was adopted as a declaration, without provision for any procedure by which it might become a treaty. . . ."

*Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, OC-10 Ad. Op., Inter-Am. Ct. H.R. (ser. A) para. 33-34 (1989).

which establishes state obligations regarding human rights with reference to the American Declaration.<sup>32</sup> The American Convention itself has the status of a treaty and is therefore directly binding on all states that have ratified it. The Convention has been ratified by the majority of the OAS member states (notable exceptions being the United States, Canada, and Cuba), including all Latin American nations, with the exception of Cuba.

According to the first two Articles of the Convention, states have a duty to “respect” and “ensure the free and full exercise of”<sup>33</sup> the rights and freedoms enumerated in the Convention and to “undertake to adopt . . . such legislative or other measures as may be necessary to give effect to those rights or freedoms.”<sup>34</sup> The Commission has interpreted these obligations as imposing a duty on states to comply with Commission recommendations. In its 1997 Annual Report, the Commission explicitly urged states to “comply with the recommendations made by the Commission in its reports on individual cases and to abide by the requests of provisional measures.”<sup>35</sup> The Commission wrote:

The Inter-American Court has indicated that States parties to the American Convention have the obligation to adopt the recommendations issued by the Commission in its reports on individual cases, in the light of the principle of good faith. This obligation extends to the member States in general, provided that, pursuant to the OAS Charter, the Commission remains one of the main organs of the Organization with the function of promoting the observance and defense of human rights in the hemisphere.

Accordingly, the Commission urges the member States, whether they are parties to the American Convention or not, to fulfill their international obligations by following the recommendations issued in the reports on individual cases and abiding by the requests of provisional measures.<sup>36</sup>

The Commission further invited member states “to adopt legal mechanisms for the execution of the recommendations of the Commission in the domestic sphere.”<sup>37</sup> To date, a handful of American

32. *Id.* para. 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.

*Id.*; see also Roach & Pinkerton, Case 9647, Inter-Am. C.H.R., Resolution No. 3/87, paras. 44–49, OEA/Ser.L/V/II.71, doc. 9 rev. I (1987).

33. Am. Conv. H.R., *supra* note 12, art. 1(1), at 166.

34. *Id.* art. 2.

35. Annual Report 1997, Inter-Am. C.H.R., ch. VII, para. 12, OEA/Ser.L/V/II.98, doc. 6 rev. (1998).

36. *Id.*

37. *Id.* para. 13.

states have established special mechanisms or laws to facilitate the implementation of Commission recommendations and/or Court decisions. While it is important to emphasize that the creation of such mechanisms does not necessarily ensure the effective application of Inter-American decisions, such efforts represent an important step toward creating conditions in which such decisions can have practical impact. Below, we cite several examples highlighted in a recent report by the Center for Justice and International Law.<sup>38</sup>

- An agreement between Costa Rica and the Inter-American Court establishes that resolutions issued by the Court or by its President, upon transmission to domestic administrative and judicial authorities, will have the same effect as sentences handed down by the domestic judiciary.<sup>39</sup>
- Colombia's Law 288/96 establishes a mechanism to require the Government to pay damages resulting from human rights violations established by decisions of the Human Rights Committee of the International Covenant on Civil and Political Rights and/or the Inter-American Commission of Human Rights.<sup>40</sup> An important aspect of Law 288 is that it authorizes the application of the procedure even where the applicable limitations period to obtain damages under domestic law has expired.<sup>41</sup> As a result, the statutory limitations that have been one of the primary factors resulting in impunity have been rendered ineffective. Colombia's Government is actively using this mechanism.
- Peru's habeas corpus and constitutional *amparo* law<sup>42</sup> recognizes the obligatory nature of decisions issued by the Inter-American oversight bodies.<sup>43</sup> Article 40 of that law provides for implementation and compliance with international resolutions and establishes that the validity of international resolutions is not contingent on domestic recognition or review.<sup>44</sup> The Peruvian Supreme Court receives resolutions issued by international bodies and orders their execution according to applicable domestic norms and procedures.
- Article 15 of Honduras' 1982 Constitution states that "Honduras makes its own the principles and practices of international law aimed at human solidarity, respect for people's self-determination, non-

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38. See CENTER FOR JUSTICE AND INTERNATIONAL LAW, UN-KEPT PROMISES: THE IMPLEMENTATION OF THE DECISIONS OF THE COMMISSION AND THE COURT, GAZETTE NO. 10, available at <http://www.cejil.org/gacetas.cfm?id=17> (in Spanish). Except where otherwise noted, the CEJIL report was the source of all information summarized in these bullet points.

39. *Id.*

40. Ley 288 de 1996, Diario Oficial, Año CXXXII, N. 42826., Julio, 1996., Pag. 1, available at [http://www.bernatygamboa.com/espanol/textos\\_disponibles/leyes/LEY288\\_96.htm](http://www.bernatygamboa.com/espanol/textos_disponibles/leyes/LEY288_96.htm).

41. *Id.* para. 4

42. Ley No. 23506, Ley de Habeas Corpus y Amparo, available at <http://www.uc3m.es/uc3m/inst/MGP/JCI/02-peru-leyhabeascorpusyamparo.htm>.

43. It should nonetheless be noted that Peru systematically failed to comply with Commission recommendations and repudiated the Court's jurisdiction under the Fujimori administration. It has since retracted its repudiation and has improved compliance with Court Decisions. See *infra* Part III.B.

44. Ley No. 23506, Ley de Habeas Corpus y Amparo, *supra* note 42, art. 40.

interference, and support for universal peace and democracy. Honduras proclaims as unavoidable the validity and mandatory execution of international arbitral and judicial decisions."<sup>45</sup>

- Article 23 of Venezuela's 1999 Constitution affords constitutional status to all human rights accords, treaties and conventions signed and ratified by Venezuela, which are thus hierarchically superior to the domestic law of that country, on par with the Constitution itself.<sup>46</sup>
- The Constitutions of Argentina, Brazil, Chile, Colombia, Guatemala, Nicaragua, and Peru all make explicit reference (in the form of a renvoi) to the rights enshrined in human rights treaties and conventions to which the state is a party.<sup>47</sup> Article 75, section 22 of Argentina's Constitution provides that the American Declaration and the American Convention, among other international treaties, are "hierarchically superior to laws."<sup>48</sup>

While such measures are, without question, insufficient to guarantee the effective implementation of decisions of the Inter-American supervisory bodies, they nonetheless create mechanisms that activists may call upon as part of their broader advocacy work. We will return to this point later when we examine the ways in which social movements have used such mechanisms to put pressure on governments to implement change.

In 2001, the Commission began including in its annual reports a summary of the status of compliance with its recommendations. The most recent annual report published at this writing (2003) provides a table with cumulative data on compliance from the preceding three years.<sup>49</sup> While the Commission notes that compliance "is meant to be successive and not immediate and that some recommendations require a reasonable time to be fully implemented," the table evidences a bleak record overall. Of the sixty cases studied, the Commission found total

45. CONSTITUCIÓN DE LA REPÚBLICA DE HONDURAS, art. 15 (authors' translation), available at [http://www.honduras.net/honduras\\_constitution.html](http://www.honduras.net/honduras_constitution.html). The original Spanish text reads:

Honduras hace suyos los principios y prácticas del derecho internacional que propenden a la solidaridad humana, al respecto de la autodeterminación de los pueblos, a la no intervención y al afianzamiento de la paz y la democracia universales.

Honduras proclama como ineludible la validez y obligatoria ejecución de las sentencias arbitrales y judiciales de carácter internacional.

46. CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA, art. 23. The original Spanish text reads, "Los tratados, pactos y convenciones relativos a derechos humanos, suscritos y ratificados por Venezuela, tienen jerarquía constitucional y prevalecen en el orden interno, en la medida en que contengan normas sobre su goce y ejercicio mas favorable a las establecidas por esta Constitución y la ley de la República, y son de aplicación inmediata y directa por los tribunales y demás órganos del Poder Público."

47. Antônio Augusto Cançado Trindade, *Current State and Perspectives of the Inter-American System of Human Rights Protection at the Dawn of the New Century*, 8 TUL. J. COMP. & INT'L L. 5 (2000).

48. CONSTITUCIÓN DE LA NACIÓN ARGENTINA, art. 75, § 22.

49. ANNUAL REPORT 2003, Inter-Am.C.H.R., ch. III, para. 76, OEA/ser. L./V/II.118, doc. 5 rev. 2 (2003).

compliance in just five; partial compliance, i.e., “those cases in which the state has partially observed the recommendations made by the [Commission] either by having complied with only one or some of them or through incomplete compliance with all of them,”<sup>50</sup> in twenty-nine; and pending compliance, i.e. “those cases in which the [Commission] considers that there has been no compliance with the recommendations because no steps have been taken in that direction; because the state has explicitly indicated that it will not comply with the recommendations made; or because the state has not reported to the [Commission] and the Commission has no information from other sources that would suggest otherwise,”<sup>51</sup> in twenty-six.

Similarly, the Inter-American Court has issued a number of Resolutions on compliance, though in a less systematic fashion than the Commission. Most recently, during its regular sessions held in November 2003, the Court issued fifteen resolutions regarding compliance with sentences that had been issued as many as six years earlier. For example, in the *Caballero Delgado and Santana* case,<sup>52</sup> in which the Court ordered the State of Colombia to make reparations to the victims in 1997, compliance with the majority of the measures ordered was still pending as of November 2003.

An analysis of these resolutions suggests that states generally comply with Court orders to pay monetary damages and costs to victims and/or their next of kin, and sometimes comply with orders to make symbolic reparations, such as naming public parks, schools, or streets after victims or making a public apology or statement of responsibility for violations.<sup>53</sup> In addition, states sometimes report taking steps to investigate the crimes alleged and to punish the individuals responsible, and/or taking steps to modify internal legislation to comply with international human rights standards. It is important to note, however, that these latter types of measures are rarely complied with in full. Some states, such as Peru during the years of Fujimori’s rule, systematically disregarded orders of this nature,<sup>54</sup> while others allege inability under domestic law to comply<sup>55</sup>

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50. *Id.*

51. *Id.*

52. *Caballero Delgado and Santana Case*, Inter-Am. Ct. H.R. (ser. C) No. 22 (1995).

53. *See, e.g., Benavides Cevallos v. Ecuador (Compliance with Judgment)*, Inter-Am. Ct. H.R. (2003), available at [http://www.corteidh.or.cr/index\\_ing.html](http://www.corteidh.or.cr/index_ing.html); *Cantoral Benavides v. Peru (Compliance with Judgment)*, Inter-Am. Ct. H.R. (2003), available at [http://www.corteidh.or.cr/index\\_ing.html](http://www.corteidh.or.cr/index_ing.html).

54. *See CENTER FOR JUSTICE AND INTERNATIONAL LAW, supra* note 38.

55. In its resolutions on compliance, the Court expressly held that pursuant to the treaty obligations assumed by the States, no provision of domestic law, including the statute of limitations, may be invoked to fail to comply with the decisions of the Court concerning the investigation and punishment of those responsible for human rights violations. Otherwise, the rights embodied in the American Convention would be deprived of effective protection. This understanding of the Court is in accordance with the letter and the spirit of the Convention and also general principles of law; one of these

or report only partial compliance (for example, taking preliminary steps to investigate crimes, or prosecuting one of several alleged perpetrators).<sup>56</sup> In other instances, states may simply fail provide any information to the Court, either entirely or with respect to particular measures.<sup>57</sup>

## II. THE IMPACT OF INTERNATIONAL LITIGATION: ANALYSIS AND CASE STUDIES FROM THE AMERICAS

Scholars and practitioners have devoted far more energy to the study of jurisprudential aspects of the decisions of the Inter-American human rights system than to assessing the degree to which these decisions are implemented in practice. Yet it is precisely the implementation of decisions and the impact of international oversight on the degree of respect for human rights that should matter most to the human rights community.

While international human rights practitioners seek to ensure that international oversight bodies issue favorable decisions in individual cases, they must also work to ensure that those sentences are implemented. Further, resort to international oversight mechanisms is ordinarily motivated by the desire to affect human rights practices through changes in policy, and therefore aspires (or should aspire) to more than merely achieving results in individual cases. The effect of decisions in particular cases, the degree to which these decisions themselves are implemented, and the connection between individual cases and broader policies are thus topics that should be of vital importance to international human rights practitioners. It should be obvious to those involved in litigating and resolving individual cases in the Inter-American system that the resulting decisions are, at best, one element in a broad web of factors that may promote social change.

Yet, in practice, international human rights litigators frequently ignore the broader web of factors. Faced with massive social inequity, human rights lawyers in the Americas often construct sophisticated legal

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principles is that of *pacta sunt servanda*, which requires that the provisions of a treaty should be ensured *effet util* at the level of the domestic law of the States Parties.

Benavides Cevallos v. Ecuador (Compliance with Judgment), Inter-Am. Ct. H.R. para. 20 (2003), available at [http://www.corteidh.or.cr/index\\_ing.html](http://www.corteidh.or.cr/index_ing.html). In the cases in which the Court ordered compliance resolutions on November 27, 2003, Colombia, Ecuador, and Peru all reported inability under domestic legislation to comply with one or more of the Court's reparations orders. See *id.*; Cantoral Benavides v. Peru (Compliance with Judgment), Inter-Am. Ct. H.R. (2003), available at [http://www.corteidh.or.cr/index\\_ing.html](http://www.corteidh.or.cr/index_ing.html); Caballero Delgado v. Colombia (Compliance with Judgment), Inter-Am. Ct. H.R. (2003), available at [http://www.corteidh.or.cr/index\\_ing.html](http://www.corteidh.or.cr/index_ing.html).

56. See, e.g., Blake v. Guatemala (Compliance with Judgment), Inter-Am. Ct. H.R. (2003), available at [http://www.corteidh.or.cr/index\\_ing.html](http://www.corteidh.or.cr/index_ing.html).

57. See, e.g., Hilaire v. Trinidad and Tobago (Compliance with Judgment), Inter-Am. Ct. H.R. (2003), available at [http://www.corteidh.or.cr/index\\_ing.html](http://www.corteidh.or.cr/index_ing.html).

arguments that cast particular instances of social injustice in the language of state obligations and enforceable, individual rights—the currency of international human rights litigation. Moreover, the lawyers, commissioners, and judges responsible for resolving these claims may view individual decisions as an opportunity to establish visionary jurisprudence, and may respond positively to this approach. But such a strategy has a number of drawbacks. As we argue, practitioners must recognize the potential for counterproductive results, either due to overreaching, leading to decisions unlikely to be enforced, or to excessive emphasis on rights-based approaches to the detriment of other, potentially more effective means of seeking change. Practitioners should realize that, like any tool, litigation of cases is useful in some instances but is less useful—and, in fact, may even be counterproductive—in others.

Indeed, scholars of U.S. domestic practice have critiqued individual, rights-based litigation as a means of effecting systemic change. These scholars observe that rights-based approaches unfairly allow some members of communities of victims to “queue jump.”<sup>58</sup> They also raise fundamental doubts as to the effectiveness of litigation, in addition to its potential to demobilize social movements and to strengthen the state (or by analogy, the international oversight body) while fostering dependence on attorneys. Their critiques consider rights-based approaches generally,<sup>59</sup> as well as specific areas such as women’s rights,<sup>60</sup> race

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58. As David Kennedy argues:

A right or entitlement is a trump card. In emancipating itself, the right holder is, in effect queue jumping. But recognizing, implementing, and enforcing rights is distributional work. Encouraging people to imagine themselves as right holders, and rights as absolute, makes the negotiation of distributive arrangements among individuals and groups less likely and less tenable. There is no one to triage among rights and right holders—except the state. The absolutist legal vocabulary of rights makes it hard to assess distribution among favored and less-favored right holders and forecloses development of a political process for trade-offs among them, leaving only the vague suspicion that the more privileged get theirs at the expense of the less privileged.

DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* 17 (2004).

59. Critical legal scholar Peter Gabel and attorney Paul Harris have argued that “an excessive preoccupation with ‘rights-consciousness’ tends in the long run to reinforce alienation and powerlessness, because the appeal to rights inherently affirms that the source of social power resides in the State rather than in the people themselves.” Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L & SOC. CHANGE 369, 375 (1982–83); Hutchinson and Monahan have noted that “[i]n constructing elaborate schemes of legal rights and entitlements . . . mainstream legal theorists simply justify the prevailing conditions of social life and erect formidable barriers to social change.” Allan Hutchinson & Patrick Monahan, *Law, Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 209 (1984).

60. Some left feminist critics have questioned the campaign for pay equity on the basis that the “legalistic, equal-rights-based strategy” has done more to reinforce an existing ideology that protects privilege than to effect change based on distributive justice. MICHAEL W. McCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* 228 (1994). These critics argue that the

relations,<sup>61</sup> and environmental justice.<sup>62</sup> Similar criticisms have been lodged in the supranational realm. For example, a recent article by Michael J. Dennis and David P. Stewart argues that:

[I]nternational adjudication offers a dubious route toward economic and social progress. In any event, it is certainly not the only or even the best means of holding governments "accountable" for their human rights obligations. . . . At the international level, efforts to articulate a single approach to the promotion and achievement of economic, social, and cultural rights are bound to fail, given the vastly differing circumstances in which states parties find themselves. . . . We fear that instead of advancing respect for, and implementation of, economic, social, and cultural rights in states parties that to date have given them short shrift, there is a significant risk that trying to "enforce" such rights through binding international adjudication will have the opposite result, causing states to deemphasize them and further undermining their stature and acceptability.<sup>63</sup>

Dennis and Stewart contend that "[t]he call for formal, binding, case-by-case adjudication seems to us an example of overreaching legal positivism, borne of the myth that judicial or quasi-judicial processes intrinsically produce better, more insightful policy choices than, for

struggle for pay equity fails to challenge the larger "hegemonic liberal political discourse" with the result that activists "court the danger of strengthening the ideological and social underpinnings of women's subordination." *Id.* (quoting Johanna Brenner, *Feminist Political Discourses: Radical Versus Liberal Approaches to the Feminization of Poverty and Comparable Worth*, in *WOMEN, CLASS AND THE FEMINIST IMAGINATION*, 491, 500 (Karen V. Hansen & Ilene J. Philipson eds. 1990)).

61. Commentators have noted that "[w]hile Critical Race theorists share the disenchantment of Critical Legal Studies with rights jurisprudence, they also recognize the important historical and social role that rights approaches have played in the liberation of persons of color." Darren L. Hutchinson, *Factless Jurisprudence*, 34 *COLUM. HUM. RTS. L. REV.* 615, 632 (2003). Patricia Williams has explored the black community's simultaneous embrace and skepticism of the concept of rights, observing that, "[t]o say that blacks never fully believed in rights is true; yet it is also true that blacks believed in them so much and so hard that we gave them life where there was none before." Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 *HARV. C.R.-C.L. L. REV.* 401, 430 (1987). Roy Brooks has argued that the focus on the enforcement of formal equality between blacks and whites has resulted not only in the movement's failure to achieve substantive equality, but also in the exacerbation of problems affecting the African-American community as a group. *See e.g.*, ROY L. BROOKS, *RETHINKING THE AMERICAN RACE PROBLEM* (1990). Brooks argues that the focus on equality of opportunity has enabled African Americans in the highest economic and social classes to access education, housing and employment opportunities previously restricted to whites. Brooks contends that middle class and working class African Americans, however, have been left behind in communities whose leaders have abandoned them for social mobility. Brooks' solution focuses on the need for a massive program of African American self-help.

62. Luke Cole has argued that litigation places the attorney in a position of control vis-à-vis those affected by environmental abuse and insists that "[t]he lawyer who wants to serve pollution's victims must put her skills to the task of helping those people organize themselves." Luke W. Cole, *Empowerment as the Key to Environmental Law: The Need for Environmental Poverty Law*, 19 *ECOLOG. L.Q.* 619, 649 (1992). Cole also questions whether courtrooms are the most advantageous place for poor victims of environmental injustice and whether winning may be counterproductive.

63. Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, Health?*, 98 *AM J. INT'L L.* 462, 467 (2004).

example, their legislative counterparts.”<sup>64</sup> They base their bleak view of the prospects offered by international adjudication of economic, social, and cultural rights on their view of a series of factors, including the limited capacity of the oversight body, costs involved in litigation, and the likely failure of states to comply with decisions in individual cases.<sup>65</sup>

The critique offered by Dennis and Stewart may well be accurate insofar as it seeks to challenge the notion that an individual complaints mechanism for economic, social, and cultural rights can, by itself, transform societies by effectuating wide scale social justice, economic redistribution, or the like. We agree that no supranational litigation mechanism offers such vast promise. This critique is consistent with our position that economic, social and cultural rights are best advanced through integrated advocacy strategies, including litigation focused on civil and political rights. But the incapacity of supranational litigation to resolve all problems in a given area or to supplant other valuable means of effecting change does not render it of no use.

Notwithstanding the Dennis-Stewart critique, scholars such as Martha Minow have argued—and we agree—that while rights-based litigation of individual cases is insufficient to bring about social change, it can be a valuable tool as part of a “mass movement[] with legislative, regulatory and protest dimensions.”<sup>66</sup> Furthermore, in the context of international human rights litigation, additional factors, specific to the role of international oversight mechanisms, offset the tension that exists in the domestic context between rights-based litigation and grassroots social movements. These factors involve the mobilizing power within countries that is afforded to the intelligent use of international oversight mechanisms.

In varying degrees, states in the Americas (and in the rest of the world) legitimate themselves through their insertion in international organizations, structures and discourse.<sup>67</sup> This internal legitimization process can empower actors—whether social movements, NGOs, or lawyers—to the extent they are able to tap into the strength of international networks and intergovernmental oversight bodies. As the case studies below demonstrate, the force of oversight bodies goes far beyond their legal powers, which are rarely, if ever, what matters most

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64. *Id.* at 466.

65. *Id.*

66. Martha Minow, *Law and Social Change*, 62 *UMKC* 171, 173 (1993). As Minow notes, litigation is frequently used as a means to an end. “Many contemporary reformers file test case lawsuits with the goal of gaining a place on the evening news and influencing legislative agendas, regardless of whether or not they prevail in court.” *Id.* at 173 (citing NAN ARON, *LIBERTY AND JUSTICE FOR ALL: PUBLIC INTEREST LAW IN THE 1980’S AND BEYOND* (1989)).

67. See generally Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, forthcoming, 54 *DUKE L.J.* (2004); Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 *STAN. L. REV.* 1749 (2003).

within the country whose abuses are subject to adjudication. It is the fact of international rebuke or condemnation that is of greatest import to those seeking to challenge state abuses within a given country. And those seeking to challenge the state often include trade unions, student movements, women's organizations, landless peasants, prisoners' rights groups, etc. These social movements may thus be empowered by international litigation rather than marginalized by it. Indeed, as we recommend in this article, when international human rights advocacy is carried out most effectively—that is, *jointly* with social movements and focusing on areas that will strengthen efforts to transform unjust elements of particular societies—the “queue-jumping” tensions dissipate.<sup>68</sup>

Insofar as international litigation resembles the context critiqued by some critical legal studies scholars—that is, in which lawyers are isolated from, rather than collaborate with, social movements—it is indeed likely to be ineffective. Yet if practitioners envision supranational litigation as merely one element among many of an integrated advocacy strategy, and if they work jointly with social movements, they may avoid the dangers observed by critical legal studies in the domestic context.

Douglass Cassel has captured this idea with the following image:

What pulls human rights forward is not a series of separate, parallel cords, but a “rope” of multiple, interwoven strands. Remove one strand, and the entire rope is weakened. International human rights law is a strand woven throughout the length of the rope. Its main value is not in how much rights protection it can pull as a single strand, but in how it strengthens the entire rope.<sup>69</sup>

Although Cassel does not address economic, social, and cultural rights in his analysis,<sup>70</sup> we believe that international human rights law can be an important tool for the expansion of economic, social, and cultural rights in the Inter-American system. As he notes:

[I]nternational human rights law has shown itself to be a useful tool for rights protection. Most important are its indirect effects. International articulation of rights norms has reshaped domestic dialogues in law, politics, academia, public consciousness, civil society, and the press. International human rights law also facilitates international and transnational processes that reinforce, stimulate, and monitor these

68. The sense of litigation as “queue jumping” is clearly present in the case of supranational mechanisms, though with a broader range of potential queue jumpers. Thus, for example, access to supranational mechanisms allows groups that may never gain effective access to domestic litigation to place issues on the national stage. These groups may be the usual insiders, but they may also be groups excluded by virtue of their remote location, the grassroots nature of their work, or other factors.

69. Douglass Cassel, *Does International Human Rights Law Make a Difference?*, 2 CHI. J. INT'L L. 121, 123 (2001).

70. While Cassel does not argue that his analysis is inapplicable to economic, social, and cultural rights, he expressly excludes from the scope of his article an analysis of how international human rights law can shape the promotion of these rights. *See id.* at 124.

domestic dialogues. While reliable quantitative measurement is probably impossible, by strengthening domestic rights institutions, international human rights law has brought incalculable, indirect benefits for rights protection.<sup>71</sup>

#### A. BRAZIL

In Brazil, the degree to which Inter-American decisions have achieved real-world impact has not varied in relation to the importance of the Commission or the Court's action in a particular case, but instead has been a function of media and public interest in the matter, and the extent to which the government has been pressured to respond.<sup>72</sup> In many instances, the media have not reacted to the actions of the Commission at the key moments in the litigation, but rather have responded in accordance with a different agenda established within Brazil:

Thus, for example, when the Commission issued its final report [in April 2000], holding the Brazilian State responsible for the October 1992 massacre of 111 prisoners in the Carandiru prison complex,<sup>73</sup> the most serious single human rights violation in recent Brazilian history, the matter hardly registered in the media. Yet in the days immediately preceding [scheduled] trial dates of the commander of the Carandiru massacre, Col. Ubiratan Guimarães, [and during subsequent coverage of civil suits seeking indemnification,] the media provided ample coverage of the Commission's report.<sup>74</sup>

A similar result followed in the case of a series of homicides of young boys in the state of Maranhão that were denounced to the Commission in July 2001.<sup>75</sup> While the Commission's decision to open the first of two cases provoked a moderate initial media response, the October 2001 murder of two more boys in similar circumstances led the domestic and international press to provide extensive coverage of the Inter-American system's involvement in the matter.<sup>76</sup> This pressure, in

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71. *Id.* at 123.

72. See generally James L. Cavallaro, *Toward Fair Play: A Decade of Transformation and Resistance in International Human Rights Advocacy in Brazil*, 3 CHI. J. INT'L L. 481 (2002).

73. Carandiru, Case 11.291, Inter-Am. C.H.R., Report No. 34/00, OEA/Ser.L/V/II.106, doc. 6 rev. (2000).

74. Cavallaro, *supra* note 72, at 488. See, e.g., Flávia de Leon, *Lider de ação no Carandiru sera julgado em 18 de julho*, FOLHA DE S. PAULO, May 23, 2000 (focusing on the upcoming trial of the police officer responsible for overseeing the massacre and citing, in the course of the article, the proceedings before the Commission); Flávia de Leon, *Começa hoje julgamento de coronel acusado de comandar massacre*, FOLHA DE S. PAULO, Nov. 29, 2000 (focusing on impending trial of commander of the Carandiru massacre and citing the Commission's determinations in the matter); *Parentes de mortos no Massacre do Carandiru aguardam indenização*, FOLHA DE S. PAULO, Sept. 29, 2002 (focusing on the delays in payment of indemnifications to family members of those killed in the massacre and citing the proceedings in the Inter-American Commission.).

75. See Petition on behalf of Raniê Silva Cruz, filed on July 26, 2001, available at <http://www.global.org.br>.

76. Xico Sa, *Castração de garotos assombra o Maranhão*, FOLHA DE S. PAULO, Oct. 28, 2001 (focusing on the most recent homicide and providing extensive information on the petition filed

turn, led the Ministry of Justice to place the Federal Police at the disposition of state authorities to assist in the investigation. The pressure, which stemmed in large part from the Commission's involvement in, and the media coverage of the case, eventually forced Maranhão's governor and then-leading presidential candidate, Roseana Sarney, to allow federal, rather than state, investigation of the killings.

It is apparent that the impact of the Commission's decisions depends largely on a series of extra-legal factors. Primary among these is the role of the media, and its power to affect policy should not be underestimated. A significant part of human rights activism in Brazil, including international rights litigation, involves use of the press to put pressure on the government in individual cases and on policy issues.

### I. *The Urso Branco Case*<sup>77</sup>

In June of 2004, hearings were held in the first case against Brazil to be heard by the Inter-American Court. The case involved the Urso Branco penitentiary in the remote state of Rondônia, in which both official brutality and prisoner-on-prisoner violence have claimed the lives of a shockingly high number of prisoners. The most violent clash prior to the beginning of the Inter-American system's involvement—a two-day riot in which authorities deliberately placed prisoners from rival groups together, under circumstances in which it was clear that a violent clash would result, then failed to take measures to stop the twenty-hour killing spree that ensued—left twenty-seven detainees dead in January 2002. Given the repeated acts of violence after this massacre, several of which resulted in additional fatalities, advocates sought precautionary measures from the Commission. Even after these were granted, five detainees were killed over a period of two months. Based on these killings, incidents of beatings and torture, and constant threats made by guards and police against detainees, the petitioners in the case requested that the Commission seek provisional measures from the Inter-American Court. For the first time in a matter involving Brazil, the Commission solicited these measures from the Court, which, in an unprecedented and

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several weeks earlier); see also Agência Estado, *OEA abre inquérito sobre meninos emasculados no Maranhão*, FOLHA DE S. PAULO, Nov. 29, 2001 (focusing on the second petition to the Inter-American Commission, filed after the October killings), available at <http://www.estado.com.br/ageestado/noticias/2001/nov/29/270.htm>. The extensive coverage provided to the matter in the Brazilian media led foreign journalists to address the ritualistic killings as well. See, e.g., Anthony Faiola, *Witchcraft Murders Cast a Gruesome Spell*, WASH. POST, Nov. 28, 2001, at C1.

77. On June 6, 2002, the Inter-American Commission submitted to the Inter-American Court a petition requesting that it order the State of Brazil to take urgent measures to protect the lives and physical integrity of inmates at the Jose Mario Alyes Detention Center—known as “Urso Branco.” The facts summarized in this section are recited in the Court's Order. See Order, Case of Urso Branco Prison, Inter-Am. Ct. H.R. (June 18, 2002), available at [http://www.corteidh.or.cr/index\\_ing.html](http://www.corteidh.or.cr/index_ing.html) (last viewed Nov. 28, 2004).

sweeping decision, granted the request in June 2002.<sup>78</sup>

Nevertheless, despite repeated orders by both the Commission<sup>79</sup> and the Court,<sup>80</sup> it has been extremely difficult to force the isolated authorities in Rondônia to cede to international pressure. While federal authorities—far more sensitive now to the international stigma attached to litigation before the Inter-American Court—have demonstrated interest in complying with the system's orders, they have been either unwilling or unable to force local prison administrators, guards, and police to alter their abusive policies. Indeed, a recent violent episode in which at least nine people were killed and over 160 held hostage by rioting prisoners led the Commission to issue a public appeal to the Brazilian government, on April 21, 2004, to take adequate measures to comply with the Court's orders.<sup>81</sup> Unlike determinations made by the Commission and the Court at early stages of the process, the Court's decision to order a hearing in the matter provoked a significant media response. After holding hearings in June 2004, the Court issued a third resolution enjoining Brazil to take specific steps to protect the lives and physical integrity of Urso Branco prisoners.<sup>82</sup> In responding to events in Brazil, the media were able to point to the Court's determination to convey the gravity of the situation and the failure of the government.<sup>83</sup> Yet even this response by the national media and the successive orders of the Inter-American Court have resulted in limited impact in Rondônia,

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78. *Id.* at para. 5–6. In this first-ever decision on Brazil, the Court based its order that Brazil provide updated information on the detainees held at the Urso Branco prison on guidelines established in the United Nations Standard Minimum Rules on the Treatment of Prisoners. In so doing, the Court granted binding status to at least some of the provisions in the Standard Minimum Rules, a significant legal advance in the protection of persons in detention in the Americas. *Id.* at para. 7, n.3 (citing United Nations, Office of the High Commissioner for Human Rights, *Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Geneva in 1955, and adopted by the Economic and Social Council through resolutions 663C (XXIV) of July 31, 1957 and 2076 (LXII) of May 13, 1977, Rule 7(1)).

79. The Commission does not publish the text of its determinations granting precautionary measures, but it does summarize these decisions in its annual reports. See *Precautionary Measures Granted or Extended by the Commission in 2002*, Inter-Am. C.H.R., ch. III(C)(1), para. 14, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2002). The full text of the Commission's decision is on file with the authors.

80. Orders, Case of Urso Branco Prison, Inter-Am. Ct. H.R. (June 18, 2002; Aug. 29, 2002; and Apr. 22, 2004), available at [http://www.corteidh.or.cr/serie\\_ing/index.html](http://www.corteidh.or.cr/serie_ing/index.html).

81. Press Release, Inter-American Commission on Human Rights Expresses its Concern Over the Situation in the Urso Branco Prison in Brazil, Inter-Am. C.H.R., No. 13/04 (Mar. 19, 2004), available at <http://www.cidh.org/comunicados/English/2004/13.04.htm> (last visited Oct. 31, 2004).

82. Order, Urso Branco Prison Case, Inter-Am. Ct. H.R., (July 7, 2004), available at [http://www.corteidh.or.cr/serie\\_ing/index.html](http://www.corteidh.or.cr/serie_ing/index.html).

83. See, e.g., Agência Estado, *Crise na prisão, Urso Branco leva o Brasil a se explicar na OEA*, AGENCIA ESTADO, May 20, 2004 (focusing on the Court's grave concerns with abuses at the Urso Branco prison, upcoming sessions, and the government's failure to comply with measures ordered previously), available at <http://www.Estadao.com.br/print/2004/mai/20/176.htm>.

due largely to the state's isolation within Brazil and the weak constituency in defense of the rights of prisoners.

2. *42nd Police District Case*<sup>84</sup>

This case, which involved the massacre of eighteen prisoners following an aborted escape attempt in February 1989, illustrates that a final determination on the merits of a particular case may not always be the most effective means of achieving justice, even in the individual case. After eight years of litigation in which the Brazilian State consistently and repeatedly missed deadlines and failed to engage the Inter-American system seriously, the Commission prepared a final report condemning the State of Brazil for violations of both the Convention and the Declaration. Shortly before that report was to be published, the Brazilian government expressed its interest in reaching a friendly solution with the petitioners.

The petitioners were initially loath to agree to a friendly settlement, as it seemed that to do so would merely reward the State for its repeated failures with the opportunity to avoid public condemnation by the Commission in what would have been the first case holding Brazil responsible for human rights violations since the State's 1992 ratification of the American Convention on Human Rights. Ultimately, however, petitioners perceived that the position of the Brazilian State was far from monolithic. While the authorities formally responsible for responding to proceedings in the Inter-American system had demonstrated little concern with the case, the National Human Rights Secretariat—recently created at that time—and the local authorities in São Paulo State showed genuine interest in resolving the matter.

Petitioners agreed to meet with representatives of the Commission and Brazil's Ministry of Foreign Relations. It soon became clear that while the Ministry representatives were prepared to offer very little in terms of a solution, their counterparts in São Paulo, where the violations had occurred, were more willing to make critical concessions. In follow-up negotiations with the authorities in São Paulo, which were attended by high-ranking state officials and the National Human Rights Secretary, petitioners managed to obtain the key points that the victims were seeking in the case: substantial compensation for their families, prosecution of those responsible in the ordinary courts rather than in specialized military tribunals, and public recognition by the government of its responsibility for the killings. The decision to overlook repeated procedural violations, even at the expense of an immediate public condemnation of the State, paid off. The terms that the petitioners were

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84. The facts recited in this section are set forth in the *Parque São Lucas v. Brazil*, Case 10.301, Inter-Am. C.H.R., Report No. 40/03, OEA/Ser.L/V/II.114, doc. 5 rev. 1 (2003), available at <http://www.cidh.org/annualrep/2003eng/brazil.10301.htm>.

able to negotiate through the friendly settlement process exceeded any reasonable expectations of government implementation if these recommendations had been included in a final report at the time.

Ultimately, Brazil failed to comply with the all of the provisions agreed to in the friendly settlement, and the Commission published a report condemning Brazil in October of 2003.<sup>85</sup> The report notes, however, that a number of the agreed provisions had been implemented, including the prosecution and subsequent conviction and incarceration of one of the individuals responsible for the violations; the payment of damages to the next of kin of a number of the victims; and relevant changes in Brazilian legislation. Much like in the *Urso Branco* case, despite elite pressure and the existence of some sympathetic government officials, the absence of a popular constituency or broad social movement in support of the prison victims undermined the effect of the Commission's determination in the matter.

## B. PERU

Peru's relationship with the Inter-American system suffered a series of radical transformations resulting from internal political pressures on successive governments. The low point, from the perspective of rights defenders, was the Fujimori administration's 1999 attempt to withdraw the State's recognition of the Court's jurisdiction. Although Peru's attempted withdrawal, which the Court itself flatly rejected,<sup>86</sup> was a direct response to the Court's adverse decision in the *Castillo Petruzzi* case,<sup>87</sup> it also sought to avoid the possibility of further adverse decisions in two important and highly politicized matters.<sup>88</sup> A comparison of two cases, *Loayza Tamayo*<sup>89</sup> and *Castillo Petruzzi*, allows us to examine some of the factors that determine the extent to which Court decisions have achieved real-world impact in Peru.

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85. *See id.*

86. *See Ivcher Bronstein Case Competence*, Inter-Am. Ct. H.R. (ser. C) No. 54 para 56(1) (1999). The Court held "[t]here is no provision in the Convention that expressly permits the States Parties to withdraw their declaration of recognition of the Court's binding jurisdiction. Nor does the instrument in which Peru recognizes the Court's jurisdiction, dated January 21, 1981, allow for that possibility." *Id.* para. 39. The Court further held that it would continue to adjudicate the pending matters against Peru, *id.* para. 55-56, and ultimately declared Peru responsible for violations of the Convention in both cases. *Ivcher Bronstein Case*, Inter-Am. Ct. H.R. (ser. C) No. 74 para. 191(1)-(5) (2001).

87. *Castillo Petruzzi v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 33 (1997). We discuss this case in depth below.

88. The *Ivcher Bronstein* case and the *Constitutional Court* case, both of which were pending before the Court, implicated allies of the President. Some human rights groups claim that Fujimori's response to the *Castillo Petruzzi* decision was at least partly motivated by his desire for the Court not to hear these cases.

89. *Loayza Tamayo v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 33 (1997).

### I. *Loayza Tamayo*<sup>90</sup>

Peruvian security forces seized Maria Elena Loayza Tamayo, a Peruvian national and university professor, without a warrant, on February 6, 1993 after she was named as a member of the guerrilla group Shining Path. Peruvian security forces held Loayza Tamayo incommunicado for ten days, during which time they tortured her and subjected her to cruel and degrading treatment and unlawful pressure. Then Peruvian authorities accused her of treason and brought her before a special military tribunal. A series of trials in both military and civil jurisdictions led to conviction by a “faceless” special tribunal of the civil courts, which sentenced Loayza Tamayo to twenty years’ imprisonment.

The Inter-American Commission determined that Peru had violated Loayza Tamayo’s rights to personal liberty, humane treatment, and judicial protection as enshrined in the American Convention and recommended that she be released immediately. Peru rejected the Commission’s analysis and failed to implement its recommendations on the ground that domestic remedies had not been exhausted. The Commission forwarded the case to the Court and urged Peru to take precautionary measures on her behalf.

The Court confirmed the Commission’s allegations and ordered Loayza Tamayo’s release, her reinstatement as a university professor, and a series of compensatory measures.<sup>91</sup> She was released from prison shortly thereafter.

The *Loayza Tamayo* case captured the interest of both the domestic and the international communities. From the time of Loayza Tamayo’s arrest in 1993 until her release in 1997, a strong popular movement on her behalf generated substantial media attention. In addition, the facts that came to light tended to inspire sympathy among observers. This factor, among others, contributed to making this a “good” case—one in which a decision by the Inter-American Court would be difficult for the state to ignore.

Loayza Tamayo was a university professor, educated, and articulate. In addition, she had educated and articulate advocates with access to substantial resources and ties to the human rights movement: her sister, Carolina Loayza was a professor of humanitarian law at the University of Lima who was able to enlist the help of CEJIL, an international human rights organization, to bring the case to the Commission. Furthermore, Loayza Tamayo’s guilt was far from clear, and her story resonated with the public, as it brought to light abusive state practices from which hundreds of other Peruvians suffered.

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90. See *id.*, para. 3, for this factual summary.

91. *Id.*

The Loayza sisters did not merely fight the State in the courts, they also mounted a media campaign to influence public opinion. In 1995, Maria Elena sent a letter from prison to Amnesty International describing in explicit detail how she had been tortured, and specifically how she had been raped repeatedly throughout her ten days of incommunicado detention. Furthermore, she publicly refuted the charges against her, and denounced the activities of the Shining Path.

Carolina, meanwhile, brought local attention to the case. In spite of Fujimori's tight control over the media, a number of journalists reported on Maria Elena's arrest, detention, and abuse. Rights activists in Peru and abroad, including Carolina herself, attribute much of their success to media pressure in the case.<sup>92</sup>

Indeed, while the Inter-American Court's decision in the case was undoubtedly an important factor in the Peruvian government's decision to release Maria Elena Loayza Tamayo, it was only one of a number of factors working in her favor. In fact, other elements of the Court's decision—including its order that Peru ensure payment of the victim's full retirement benefits, and that it modify the internal legislation under which she had been convicted to conform with Inter-American human rights norms—that had not been the object of public attention or concern in the way that her release from prison had, still had not been implemented as of the Court's Resolution on Compliance of November 27, 2003.<sup>93</sup>

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92. After her sister's release and the fall of Fujimori, Carolina wrote a letter to the magazine *Caretas*, in which she publicly thanked a journalist for reporting on her sister's case, which she believed influenced its positive outcome. Carolina Loayza, Letter, *Nos Escriben y Contestamos*, *CARETAS*, Oct. 9, 1997, available at <http://www.caretas.com.pe/1486/cartas/cartas.htm>. The original Spanish text reads: Lima, 2 de octubre de 1997.

En nombre de mi hermana María Elena Loayza Tamayo deseo expresarles mi profundo agradecimiento por el apoyo que desde el primer momento tuvieron a bien brindarle, en este caso el de una inocente injustamente condenada. Especial mención quiero hacer al periodista Jimmy Torres por su solidaridad y humanidad. Si bien María Elena aún no obtiene su libertad tal como lo ha ordenado la Corte Interamericana de Derechos Humanos, en un fallo histórico y sin precedentes, considera que éste es el momento de agradecer a quienes creyeron en ella y asumieron su defensa en todo momento.

Carolina Loayza

*Id.*

93. See *Loayza Tamayo v. Peru (Compliance with Judgment)*, Inter-Am. Ct. H.R. (2003). In its merits and reparations judgments, the Court ordered Peru to release Maria Elena from prison; to reinstate her to her public university position; to ensure payment of her retirement benefits; to vacate any adverse domestic sentences against her based on the facts related to the case; to investigate and punish the individuals responsible for her abuse; to pay damages and costs to Maria Elena and her next of kin; and to modify internal legislation to conform to inter-American standards. *Id.* at 1–2. As of November 2003, the State had only fully complied with its obligations to release Maria Elena and to pay damages and costs, and had partially complied with its obligation to reinstate her. *Id.* at 8–10. The Court found that compliance with the remaining provisions of its order was still pending. *Id.*

## 2. *Castillo Petruzzi*<sup>94</sup>

The *Castillo Petruzzi* case involved four Chilean nationals serving life sentences in Peru after being arrested on terrorism charges and convicted of treason by a “faceless” military tribunal. Upon receiving a petition on behalf of the victims, the Commission issued a report in which it found Peru responsible for a number of Convention violations. The Commission recommended that the State nullify the proceedings against the victims and grant them “a new trial in the regular court system, with full guarantees of due process.”<sup>95</sup> Peru rejected the Commission’s analysis and declined to implement its recommendations. The Commission then forwarded the case to the Inter-American Court, which upheld the Commission’s findings and ordered that the victims be retried. The Court further ordered Peru “to adopt the appropriate measures to amend those laws that this judgment has declared to be in violation of the American Convention on Human Rights.”<sup>96</sup>

The State quickly responded to the Court’s decision, forwarding an Order of the Plenary Court of the Supreme Council of Military Justice, which held that the Inter-American Court’s decision “lack[ed] impartiality and infringe[d] on the Political Constitution of the State, being, therefore, impossible to execute.”<sup>97</sup> Fujimori publicly announced that his government had no intention of carrying out the Court’s sentence on the purported basis that implementation of the ruling would lead to the release of thousands of convicted terrorists—an argument that, according to Human Rights Watch “had no basis in fact and seriously misled the Peruvian public.”<sup>98</sup> Indeed, the argument seemed calculated to appeal to the public’s fear of terrorist activity in a time of social upheaval. Shortly thereafter, a Peruvian Council of Ministers proposed a legislative resolution purporting to retract the State’s recognition of the Court’s jurisdiction, and on July 8, 1999, the Peruvian Congress approved the resolution.<sup>99</sup>

The decision by Congress was taken amid a heated debate in the

94. This factual summary is based on the recitation of the facts in *Castillo Petruzzi v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 52 (1999).

95. *Id.*, para. 16.

96. *Id.*, para. 226.

97. *Castillo Petruzzi v. Peru* (Compliance With Judgment), Inter-Am. Ct. H.R. (1999) (quoting June 11, 1999 Order of the Plenary Court of the Supreme Council of Military Justice).

98. HUMAN RIGHTS WATCH, WORLD REPORT 2000, PERU, HUMAN RIGHTS DEVELOPMENTS, available at <http://www.hrw.org/wr2k/americas-08.html> (last visited Oct. 31, 2004).

99. Legislative Resolution No. 27152, of July 8, 1999. This legislation was repealed by Legislative Resolution No. 27401, published Jan. 19, 2001 in the official gazette *El Peruano*. See *Withdrawal from the jurisdiction of the Court by the Peruvian State*, reprinted in Annual Report 1998, Inter-Am. Ct. H.R. 351, OEA/Ser.L/V/III.47, doc. 6 (2000), available at <http://www1.umn.edu/humanrts/iachr/Annals/app16-99.html>; Draft Follow-up Report on Compliance by the Peruvian State with the Recommendations made by the IACHR in the IACHR’s Report on the Situation of Human Rights in Peru (2000), Inter-Am. C.H.R., OEA/ser.L/V/II.114, doc. 5 rev. 16 (2002).

media. The government framed the debate in terms of state sovereignty and the appropriate limits on the authority of the Inter-American Court, avoiding the issue of respect for substantive human rights norms. Groups opposing the government's position followed the government's lead and grounded their positions in formalistic arguments about international law.<sup>100</sup> With the debate cast in these terms, issues such as justice with respect to the victims in the particular case were obscured. Furthermore, the victims themselves were less sympathetic than Maria Elena Loayza Tamayo had been. Their innocence was not clear, and their status as outsiders (Chilean nationals being tried for crimes allegedly committed in Peru) was regularly evoked by the Peruvian media. For all of these reasons, the case failed to gain the support of the Peruvian public.

At the end of 2000, the Fujimori government collapsed amid a major political corruption scandal, during which Vladimiro Montesinos—Fujimori's advisor and head of the National Intelligence Service—was filmed accepting bribes, and the Peruvian Congress declared Fujimori himself morally unfit for service.<sup>101</sup> After the regime change, the new government repealed the legislative resolution purporting to withdraw Peru's recognition of the Court's jurisdiction.<sup>102</sup> Both the Court and the Commission continued to monitor Peru's compliance with Inter-American decisions. The Commission issued a report in 2000 in which it reiterated, among other recommendations, the Court's orders in *Castillo Petruzzi*.<sup>103</sup> When the Commission revisited these issues in 2002, it found that some progress had been made toward compliance, particularly in the judicial sphere, but that the legislative changes ordered by the Court and reiterated by the Commission had not been implemented.<sup>104</sup>

Peru's failure to comply fully with the Court's decision in *Castillo Petruzzi*, even after the fall of Fujimori and the State's renewed recognition of the Court's jurisdiction, is attributable, in part, to the public's inability or unwillingness to exert pressure on the State to comply with the decision. That is, in the absence of a robust, popular movement to demand respect for the rights embodied in Court decisions

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100. See, e.g., Francisco Soberón Garrido, *Las falacias del gobierno peruano*, in Agencia Latinoamericana de Información, *América Latina en Movimiento* (July 28, 1999), available at <http://alainet.org/docs/476.html> (last visited Oct. 31, 2004).

101. See, e.g., *The Charges Against Montesinos*, BBC News, June 25, 2001, available at <http://news.bbc.co.uk/1/hi/world/americas/1407621.stm> (last visited Oct. 31, 2004); HUMAN RIGHTS WATCH, *WORLD REPORT 2002, PERU, HUMAN RIGHTS DEVELOPMENTS*, available at <http://hrw.org/wr2k2/americas9.html>.

102. See Draft Follow-up Report on Compliance by the Peruvian State with the Recommendations made by the IACHR in the IACHR's Report on the Situation of Human Rights in Peru (2000), Inter-Am. C.H.R., OEA/ser.L/V/II.114, doc. 5 rev. (2002).

103. Second Report on Human Rights in Peru (2000), Inter-Am. C.H.R., ch. V, OEA/ser.L/V/II.106, doc. 59 rev. (2000), available at <http://www.cidh.org/countryrep/Peru2000en/TOC.htm>.

104. *Id.* ch. III(B)(1)(c).

(absent either because repressive measures have stifled any such movement, or because of public support for stringent security measures in the context of social unrest, even at the expense of respect for human rights), such decisions have provoked little real-world impact, as in the *Castillo Petruzzi* case.

### C. TRINIDAD AND TOBAGO: DENUNCIATION OF THE AMERICAN CONVENTION

Another striking example in which adverse rulings gave rise to an extreme reaction by the state was Trinidad and Tobago's denunciation of the Convention in May of 1998. The move came as a response to the Commission's ongoing investigation of the State's application of the death penalty<sup>105</sup> and after the Court ordered the State to suspend a number of scheduled executions while it examined the practice in several cases pending before it.<sup>106</sup> In blatant violation of the Court's order, Trinidad and Tobago proceeded with the execution of six individuals convicted in a domestically significant case.

The State alleged that the Court lacked jurisdiction in the pending cases. Rejecting the State's argument, the Court found that Trinidad and Tobago's application of the death penalty violated the Convention and ordered that the State "abstain from applying the Offences Against the Person Act of 1925 and within a reasonable period of time [to] modify said Act to comply with international norms of human rights protection."<sup>107</sup> The Court also ordered the State to take measures to compensate the family members of the victims, and to review and retry specific cases in which the death penalty had been applied.<sup>108</sup> Although the Court directed the State to report periodically on its compliance with the Court's orders, the Court issued an opinion regarding compliance on November 27, 2003, in which it observed that the State had not made any such reports.<sup>109</sup>

The social climate in which the State defied the Court's orders was characterized by deep-seated tensions between the local population's overwhelming support for capital punishment and the international community's sustained pressure on Trinidad and Tobago and other Caribbean nations to modify their current practice.<sup>110</sup> One salient feature

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105. See e.g., Anthony Briggs, Case 11.815, Inter-Am. C.H.R., Report No. 44/99, OEA/ser.L/V.II.102, doc. 6 rev. (1999). In the course of the Commission's investigation of this case, the Attorney General of Trinidad and Tobago stated that the "Commission has no power to challenge the implementation of a sentence of death imposed by a court of competent jurisdiction in Trinidad and Tobago." *Id.* para. 4.

106. *Hilaire v. Trinidad and Tobago*, Inter-Am. Ct. H.R. (ser. C) No. 94 (2002).

107. *Id.* para. 223(8).

108. *Id.* para. 223(10)-(13).

109. *Hilaire v. Trinidad and Tobago (Compliance with Judgment)*, Inter-Am. Ct. H.R. (Nov. 27, 2003), available at [http://www.corteidh.or.cr/index\\_ing.html](http://www.corteidh.or.cr/index_ing.html).

110. See *Privy Council Blocks Executions*, BBC NEWS, May 18, 1999, available at

of this tension is the fact that although Trinidad and Tobago has been an independent nation since 1976, the judicial instance of last resort in the country is the British Privy Council, which has the authority to stay the executions of individuals sentenced to death under local law. In fact, the Privy Council has stayed several executions in Trinidad and Tobago, including several cases giving rise to petitions in the Inter-American system.<sup>111</sup> While the United Kingdom has tried to persuade its former colonies to abolish the death penalty for years, local support for capital punishment has neutralized international pressure.

In this context, the State's repudiation of the authority of the Inter-American system may be seen not only as an expression of state sovereignty, but also as a vindication of popular sentiment and rejection of a system imposed by colonial rule. Trinidad and Tobago's response to the Court's orders underscores the limits of what Inter-American decisions can achieve when they run counter not only to state interest (as is often the case) but also to popular sentiment. In this regard, one is reminded of the limited impact of the Urso Branco resolutions in Brazil, largely due to the absence of popular support for the underlying cause—respect for the rights of prisoners.

#### D. CASE STUDIES—CONCLUSIONS

Experience counsels that governments accept the sentences of the Court when a series of conditions are met. The first concerns the legitimacy of the Court and of the Inter-American system itself. A state will accept and implement decisions of the Court to the extent that within its internal political system, the Inter-American system, and the Court in particular, are recognized as legitimate. As a legal matter, this recognition may be codified in law.<sup>112</sup> But the legitimacy inquiry should not be limited to legislation. In order for states to recognize and implement decisions—particularly ones that are not favorable politically—the legitimacy of the Court must be accepted by political forces, civil society, and the media.

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<http://news.bbc.co.uk/1/hi/world/americas/346513.stm>.

111. See, e.g., *Hilaire v. Trinidad and Tobago*, Inter-Am. Ct. H.R. (ser. C) No. 94 (2002) (consolidating a number of cases involving the death penalty in Trinidad and Tobago); see also *Haniff Hilaire v. Trinidad and Tobago*, Case 11.816, Inter-Am. C.H.R., Report No. 43/98, OEA/Ser.L/V/II.102, doc. 6 rev. (1999); *Mohammed v. Trinidad and Tobago*, Petition 12.401, Inter-Am. C.H.R., Report No. 50/02, OEA/ser. L/V/II.117, doc. 1 rev. 1 (2003); *Ramlogan v. Trinidad and Tobago*, Petition 12.355, Inter-Am. C.H.R., Report No. 48/02, OEA/ser. L/V/II.117, doc. 1 rev. 1 (2003). It is worth noting that in the vast majority of these cases, victims were represented in the inter-American system by London-based solicitors.

112. See, e.g., VICTOR MANUEL RODRÍGUEZ RESCIA, *LA EJECUCIÓN DE SENTENCIAS DE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS* (Dr. Hugo Alfonso Muñoz Quesada et al. eds. 1997) (surveying the constitutional and sub-constitutional norms giving legal force to determinations of the Inter-American Court of Human Rights in Latin American nations, in particular, Colombia, Peru, Costa Rica, Venezuela, and Nicaragua).

Even when a state accepts the legitimacy of the Inter-American system in principle, it may fail or refuse to implement particular decisions, as the examples of Peru and Trinidad and Tobago illustrate. Thus, we posit that in order for states to implement decisions of the Commission or Court, at a minimum, they must be convinced of their legitimacy as a matter of law. In this regard, to the extent these bodies seek to extend legal protections to economic, social, and cultural rights, they should seek firm ground on which to anchor their decisions.

The case studies also demonstrate several important principles that enable us to understand when cases are likely to have an impact domestically. First, it appears vital, if not indispensable, that international litigation be one element of a broader strategy to mobilize for change. Other elements in this strategy include work with supportive journalists, as in *Loayza Tamayo* and several of the Brazilian cases cited, and with grassroots and international movements. Litigation strategies not linked in this way, as has been the case with the death penalty challenges in Trinidad and Tobago, are almost certainly destined to fail, regardless of the outcome achieved in Court.

Second, advocates must bear in mind that a final determination on the merits of a case by the Commission or the Court may not be the most effective tool for achieving justice, even in the individual case, as states may be more likely in some cases to enforce negotiated settlements than Commission or Court orders. Again, this point serves as a lesson to lawyers that they must be mindful of their role in the larger movement, and should not remain obstinately focused on achieving legal judgments that may have little effect.

Finally, a few important lessons may be drawn with regard to timing. First, advocates must accept a great deal of unpredictability. Regime change and national political agendas are forces that are difficult to foresee with any degree of certainty. Litigants must recognize this and be ready and able to advocate for their case or issue when the political moment in the country so permits. They must also recognize that the impact of cases will rarely be established by the timetable of litigation. Rather, as the case studies above have demonstrated, points in which pressure will be effective are primarily set by domestic political agendas, social movements, and other non-legal forces. To be effective, international litigants must accept their often secondary or supporting roles and be prepared to advocate domestically when advantageous.

### III. ADVANCING ECONOMIC, SOCIAL, AND CULTURAL RIGHTS THROUGH CIVIL AND POLITICAL RIGHTS: THEORY AND PRACTICE

While most of the American States have formally accepted the theoretical basis for recognizing economic, social, and cultural rights, practice tends to reflect the traditional, generational approach to human

rights. This approach makes a distinction between civil and political rights on the one hand (which are understood to impose specific, justiciable obligations on states, and which are regularly enforced by mechanisms for human rights protection) and economic, social, and cultural rights on the other (whose concomitant obligations are less clear, and whose enforcement has been more complicated).

The traditional classification framework posits that civil and political rights are fundamentally different in nature from economic, social, and cultural rights in that the former are rights of "negative liberty," requiring only that the state abstain from particular acts that would violate individual freedoms, while the latter require action on the part of the state to assure their implementation. Thus, for example, on this view, to guarantee civil and political rights, such as the right to life or the right to freedom of speech, the state need only not kill, in the first case, and not limit free speech, in the second. By contrast, to ensure the enjoyment of economic, social, and cultural rights, such as the right to education or the right to health, the state must engage in positive action: construction of schools, hiring of professors, etc., to ensure educational rights; training of medical staff, construction of hospitals, provision of medicine, etc., to guarantee the right to health.

More recent analyses of the traditional distinction between civil and political rights and economic, social, and cultural rights have demonstrated the many flaws in the rationale ordinarily employed to justify a differential treatment for these different classes of rights.<sup>113</sup> The most convincing critique of the generational distinction focuses on the elements of negative liberty and positive action inherent in rights from both generations. According to numerous scholarly views synthesized by Victor Abramovich and Christian Courtis, the distinction is untenable when subjected to closer examination, given that civil and political rights contain elements that require positive action by the state, while economic, social, and cultural rights contain elements that require the state to abstain from actions that violates these rights.<sup>114</sup> As they write,

Even those rights that appear to entail what may be characterized as a "negative obligation," that is, those that entail restrictions on the State's activities in order not to interfere with individual liberties—for

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113. See e.g., *THE RIGHT TO COMPLAIN ABOUT ECONOMIC, SOCIAL AND CULTURAL RIGHTS* (Fons Coomans & Fried van Hoof, eds. 1995) (series of essays in defense of the justiciability of the rights to education, housing, health and food); *INTER-AMERICAN INSTITUTE OF HUMAN RIGHTS, LOS DERECHOS ECONÓMICOS, SOCIALES Y CULTURALES: UN DESAFÍO IMPOSTERGABLE* (San Jose, Costa Rica 1999) (collection of articles on the advance of economic, social, and cultural rights in Argentina, the Dominican Republic, Venezuela and Nicaragua).

114. Victor Abramovich & Christian Courtis, *Hacia la exigibilidad de los derechos económicos, sociales y culturales. Estándares internacionales y criterios de aplicación ante los tribunales locales, in LA APLICACIÓN DE LOS TRATADOS INTERNACIONALES SOBRE DERECHOS HUMANOS POR LOS TRIBUNALES LOCALES* 283-350 (Martín Abregú & Christian Courtis eds. 1997).

example, prohibitions against arbitrary detention, censorship of the press through prior restraint, or the violation of correspondence and private documents—also entail substantial activity on the part of the State. The State must guarantee that non-State actors do not interfere with individual freedoms, the exercise of which necessitates activity by police, public security and defense forces, and the judiciary. Obviously, carrying out these functions entails positive obligations.<sup>115</sup>

At the same time, at the other extreme, one finds that inherent in economic, social, and cultural rights, is:

[t]he concomitant existence of obligations to refrain from action: the right to health entails the State's obligation not to harm an individual's health; the right to education presumes the obligation not to worsen education; the right to cultural preservation implies the obligation not to destroy cultural patrimony . . . many of the legal actions giving rise to judicial enforcement of economic, social and cultural rights are directed at correcting activities by the State that violate its obligation not to act.<sup>116</sup>

Beginning with this realization, Abramovich and Courtis set out the basic components of rights, ranging from negative liberty, at one extreme, to provision of goods and services directly by the state at the other. In this scheme, rights—both civil and political and economic, social, and cultural—include, in differing degrees, these varying elements.

Abramovich and Courtis demonstrate that economic, social, and cultural rights demand not only affirmative actions to guarantee and promote, but also require that the state respect and protect.<sup>117</sup> Citing the example of the right to food, the authors argue that states must not:

expropriate lands from a community whose sustenance depends principally or entirely upon access to that resource, without taking appropriate alternative measures. The State's obligation to protect rights includes the obligation to ensure that individuals are not deprived—for example, by the actions of third parties, such as

115. *Id.* at 286 (authors' translation). The original Spanish text reads:

Aun aquellos derechos que parecen ajustarse más fácilmente a la caracterización de 'obligación negativa', es decir, los que requieren una limitación en la actividad del Estado a fin de no interferir la libertad de los particulares—por ejemplo, la prohibición de detención arbitraria, la prohibición del establecimiento de censura previa a la prensa, o bien la prohibición de violar la correspondencia y los papeles privados—, conllevan una intensa actividad estatal destinada a que otros particulares no interfieran esa libertad, de modo tal que la contracara del ejercicio de estos derechos está dada por el cumplimiento de funciones de policía, seguridad, defensa y justicia por parte del Estado. Evidentemente, el cumplimiento de estas funciones reclama obligaciones positivas.

116. *Id.* at 287 (authors' translation). The original Spanish text reads:

[!]a existencia concomitante de obligaciones de no hacer: el derecho a la salud conlleva la obligación estatal de no dañar la salud; el derecho a la educación supone la obligación de no empeorar la educación; el derecho a la preservación del patrimonio cultural implica la obligación de no destruir el patrimonio cultural. . . . muchas de las acciones legales tendentes a la aplicación judicial de los derechos económicos, sociales y culturales se dirigen a corregir la actividad estatal cuando ésta incumple con obligaciones de no hacer.

117. *Id.*

dominant economic groups—of the basic resources such as access to land, water, or the labor market, which are necessary to satisfy their need for food.<sup>118</sup>

In light of the above, it is clear that a new analytical framework is required to ensure the protection of economic, social, and cultural rights. Indeed, a study of cases from the European and universal (i.e., United Nations) human rights systems, as well as recent decisions issued by the Inter-American Commission and Court, suggests several approaches for expanding the protection afforded to economic, social, and cultural rights.

Two approaches that have emerged in the European, universal, and, increasingly, Inter-American contexts—and which we believe are the most promising in terms of achieving real-world results—are based on expansive interpretations of well-established rights. As we discuss below, the first approach entails an analysis of economic, social, and cultural rights in the context of a general principle of non-discrimination. In the second approach, economic, social, and cultural “elements” of rights traditionally understood as civil and political are considered integral components of these rights, such that the state’s failure to respect them may result in violations of applicable human rights instruments.

#### A. THE NON-DISCRIMINATION PRINCIPLE

Article 1 of the American Convention, which sets forth states’ general obligations establishes that:

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.*<sup>119</sup>

Neither the Commission nor the Court has referred explicitly to the non-discrimination element of Article 1 in finding a violation of economic, social, or cultural rights. Yet the Court recently held, in Advisory Opinion OC-18,<sup>120</sup> relating to the rights of migrant workers in the Americas, that the principles of non-discrimination precluded states from denying workers fundamental rights on the basis of their migratory

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118. *Id.* (authors’ translation). The original Spanish text reads:

expropiar tierras a una población para la cual el acceso a ese recurso constituye la única o principal forma de asegurar su alimentación, salvo que se adopten medidas alternativas apropiadas.

La obligación estatal de proteger el derecho incluye el deber de prevenir que las personas resulten de una u otra manera privadas de sus recursos básicos para satisfacer sus necesidades de alimentación, por otras personas, por ejemplo grupos económicos dominantes, en aspectos diversos como acceso a la tierra, al agua, al mercado, al trabajo.

119. Am. Conv. H.R., *supra* note 12, art. 1(1) (emphasis added).

120. OC-18 Ad. Op., Inter-Am. Ct. H.R. (ser. A) (2003).

status.<sup>121</sup> The Court held that “the migratory status of a person cannot constitute a justification to deprive him of the enjoyment and exercise of human rights, including those of a labor-related nature.”<sup>122</sup> The Court went so far as to hold that non-discrimination and equal protection principles have attained the status of *jus cogens* norms (i.e., peremptory norms of international law based on universal consensus regarding certain elemental values that states cannot legitimately oppose through domestic legislation).

The Court’s reasoning in OC-18 reflects two separate theoretical bases for its expansion of economic, social, and cultural rights. The first involves increased protection for certain labor rights directly by recognizing their fundamental and inalienable nature, and which thus entails stricter duties on the part of states.<sup>123</sup> The second basis for expanding these rights is indirect. This basis works through application of the non-discrimination principle to ensure that these rights are guaranteed with respect to all classes of workers, including undocumented migrants. While the Court’s holding in OC-18—as in all advisory opinions—is intended to resolve abstract questions of law and does not determine any concrete violations, it suggests that given the right factual circumstances, the Court may be disposed to expand protection of economic, social, and cultural rights in both of these ways.<sup>124</sup>

Prior to its decision in OC-18, the Court had applied the non-discrimination principle in a less explicit fashion in promoting certain economic, social, and cultural rights. In OC-11, the Court considered whether the indigence of a petitioner could constitute legitimate grounds for an exception to the rule that domestic remedies must be exhausted before seeking recourse to the Commission and concluded that:

If a person who is seeking the protection of the law in order to assert rights which the Convention guarantees finds that his economic status

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121. *Id.*

122. *Id.* para. 173(8).

123. Support for the direct justiciability of labor rights can be found in Article 8(a) of the San Salvador Protocol, which specifically provides for the litigation of labor-related claims. *See supra* note 7.

124. The Court’s extension of the principle of *jus cogens* to protect the labor rights of migrant workers raises some concerns. In particular, the Court’s willingness to apply broadly a previously limited doctrine of international law may suggest that the Court is more interested in establishing novel and forward-looking precedent than in adjudicating cases in a way likely to effectuate real-world change. Because OC-18 involved the request for an advisory opinion rather than a contentious matter, no particular state is obligated to implement its terms in the short run. This fact renders assessment of its effectiveness more difficult. Yet, given its sweeping determinations, and the prevalence of state abuse of migrant labor rights in the Americas (*See* Brief Amici Curiae of the Harvard Immigration and Refugee Clinic, Student Working Group on Human Rights in the Americas of Harvard and Boston College Law Schools, & Global Justice Center, Jan. 11, 2003, available at <http://www.global.org.br>), there is every reason to suspect that OAS member states will fail to comply with the opinion expressed in OC-18.

(in this case, his indigency), prevents him from so doing because he cannot afford either the necessary legal counsel or the costs of the proceedings, that person is being discriminated against by reason of his economic status and, hence, is not receiving equal protection before the law.

[P]rotection of the law consists, fundamentally, of the remedies the law provides for the protection of the rights guaranteed by the Convention.<sup>125</sup>

While the Court stopped short of declaring that states have an affirmative duty to provide free legal services to indigent individuals, it found that the non-provision of such services could give rise to a violation of the Convention's fair trial guarantees. In this way, the Court used a non-discrimination rationale to expand state responsibility beyond the traditional realm of upholding "negative liberties."

For its part, the Inter-American Commission effectively advanced the economic, social, and cultural rights of women by application of the anti-discrimination principles in *María Eugenia Morales de Sierra v. Guatemala*.<sup>126</sup> In that case, the Commission considered provisions of the Guatemalan Civil Code that relate to the roles of men and women within the family. The Commission found that provisions that limited the rights of married women by according their husbands the right to determine whether or not their spouses could work outside the home violated article 17(4) of the Convention (rights of the family), in conjunction with article 16(1) of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW).<sup>127</sup>

Precedent for the Inter-American Court's use of the non-discrimination principle can be found in both the European and universal human rights contexts. In fact, for two decades the European Court of Human Rights ("ECHR" or the "European Court") has consistently and explicitly referred to the European Convention's non-discrimination provisions in decisions that have expanded protection for economic, social, and cultural rights. Article 14 of the European Convention reads:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or

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125. Exceptions to the Exhaustion of Domestic Remedies (Art. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights), OC-11 Ad. Op., Inter-Am. Ct. H.R. (ser. A) paras. 22-23 (1990).

126. *María Eugenia Morales de Sierra v. Guatemala*, Case 11.625, Inter-Am. C.H.R., Report No. 4/01, OEA/ser. L./V./II.111, doc. 20 rev. (2001).

127. This case illustrates the tendency of the Commission to apply norms established in universal treaties. A detailed examination of the ways in which these norms may be used to advance respect for human rights in general terms is beyond the scope of this article. We do, however, cite a few of the most important precedents for the promotion of economic, social, and cultural rights.

other status.<sup>128</sup>

The European Court has found violations of this Article in several cases with important economic, social, and cultural elements. For example, in *Abdulaziz, Cabales, and Balkandali v. The United Kingdom*,<sup>129</sup> petitioners (non-native, permanent residents of the United Kingdom) questioned distinctions in British immigration law that effectively denied the right of entry to their male spouses in circumstances in which female spouses would have been granted residence. Each of the petitioners lawfully resided in the United Kingdom and had sought permission for her husband to join her in residence. In each case, such permission was denied by immigration authorities. The petitioners argued that the refusal to grant residence to their male spouses in circumstances in which female spouses of male applicants would have been granted violated, *inter alia*, Article 14 of the Convention. The Court upheld their claim.

Critical to the Court's analysis was the evaluation of economic rights. The United Kingdom argued that it could rationally and legitimately distinguish between female and male spouses because the latter were far more likely to seek employment than female spouses. The government presented evidence concerning the then-current economic crisis and level of unemployment in the United Kingdom, as well as support for the position that male immigrants were more likely to seek work than female immigrants. While the *Abdulaziz* Court analyzed the issues before it in the context of family rights (Article 8) and the prohibition of discrimination (Article 14), it is clear that the decision has implications for fundamental economic rights, such as the right to seek employment.

In *Schuler-Zgraggen v. Switzerland*,<sup>130</sup> the European Court went further in establishing the application of the principle of non-discrimination to economic, social, and cultural rights. In that case, the Court reviewed a Swiss court's denial of unemployment benefits to a married woman with a two-year old child on the theory that she was unlikely to seek work outside her home. Had she been a childless man, the Swiss court would presumably have recognized the right to unemployment benefits. The European Court held that the decision violated the non-discrimination clause of Article 14 of the European Convention. As in *Abdulaziz*, the Court explicitly held that economic rights that would not otherwise be protected by the Convention would be guaranteed against discriminatory application.

Several decisions of the United Nations Human Rights Committee,

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128. Eur. Conv. on H.R., art. 14.

129. *Abdulaziz v. United Kingdom*, 94 Eur. Ct. H.R. (ser. A) (1985).

130. *Schuler-Zgraggen v. Switzerland*, 263 Eur. Ct. H.R. (ser. A) (1993).

the body charged with interpreting and applying the International Covenant on Civil and Political Rights, support the doctrine of the European Court of Human Rights in applying the principle of non-discrimination to economic, social, and cultural rights even when these are not the subject of protection on their own. In *Zwaan de Vries v. The Netherlands*, the Committee issued a ruling extending the right to non-discrimination to economic rights otherwise clearly beyond the scope of the Civil and Political Rights Covenant.<sup>131</sup> In *Zwaan de Vries*, the Committee considered legislation that required married women seeking unemployment compensation to show that their income had been the primary source of income for their families. Neither married men, nor single men or women were required to make such a showing. In rejecting the undue burden on married women, the Human Rights Committee wrote:

Although article 26 requires that legislation should prohibit discrimination, it does not of itself contain any obligation with respect to the matters that may be provided for by legislation. Thus it does not, for example, require any State to enact legislation to provide for social security. However, when such legislation is adopted in the exercise of a State's sovereign power, then such legislation must comply with article 26 of the Covenant.<sup>132</sup>

The *Zwaan de Vries* holding allowed the Human Rights Committee to establish with crystal clarity the expansive nature of the principle of non-discrimination. Whatever the economic, social, or cultural right—social security, in these cases, or any other benefit or program that a state may provide—it may never be provided in a discriminatory fashion under the principles of international human rights law. As we consider below, petitioners may achieve significant results by defining discrimination expansively, as well as by finding applications of this principle to an increasing range of state activity.

#### B. THE "ELEMENTS" APPROACH

In a number of recent decisions, the Inter-American Court and Commission—as well as individual judges in separate opinions—have construed classic civil and political rights expansively so as to include economic, social or cultural elements. The first example of this approach by the Court was in the *Baena Ricardo* case, in which the Panamanian government summarily dismissed 270 employees in retaliation for their participation in a demonstration.<sup>133</sup> While the Court considered violations of Convention articles traditionally associated with civil and political

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131. *Zwaan-de Vries v. The Netherlands*, U.N. GAOR, Hum. Rts. Comm., U.N. Doc. Supp. No. 40 (A/42/40), at 160 (1987).

132. *Id.* para. 12.4.

133. *Baena Ricardo et al. v. Panama*, Inter-Am. Ct. H.R. (ser. C) No. 72 (2001).

rights,<sup>134</sup> its discussion of the right to due process included an acknowledgment of the way in which violations of this right may have serious economic, social, and cultural implications.

In support of its holding in favor of the dismissed workers, the Court made specific reference to the severe social and economic consequences of the State's violation of due process:

The Court is not oblivious to the fact that the dismissals, made without the guarantees of Article 8 of the Convention, had serious social and economic consequences for the persons dismissed and their relatives and dependants, such as the loss of income and a reduction of the living pattern. There is no doubt that, in applying a sanction with such serious consequences, the State should have ensured to the worker a due process with the guarantees provided for in the American Convention.<sup>135</sup>

The Court's holding in *Baena Ricardo* indicates its willingness to consider the economic and social consequences of violations of civil and political rights. Though the Court did not explicitly construe these consequences as "elements" of rights established in the Convention—though it would do that in later cases, as we shall see—the mere recognition that such consequences were relevant to the Court's holding was an important first step to expanding protection of economic, social, and cultural rights.<sup>136</sup>

In *Five Pensioners v. Peru*<sup>137</sup> the Court took a step further in examining economic, social, and cultural rights in the context of a petition alleging the violation of civil and political rights. In *Five Pensioners*, a group of retirees alleged that Peru had arbitrarily and drastically reduced pension payments to which they were entitled. Petitioners argued their case on two separate grounds: first, that the State's action constituted a violation of Article 21 of the Convention (right to private property—a classic civil and political right), and, second, that it constituted a violation of Article 26 of the Convention (relating to state obligations to advance economic, social, and cultural rights).

In a significant and revealing decision, the Court upheld the Commission's claims based on Article 21 but refused to adjudicate its claims based on Article 26. The Court held the right to social security

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134. *Id.* para. 1.

The Commission submitted the case in order for the Court to decide whether or not Panama had violated Articles 1(1) (Obligation to Respect Rights); 2 (Domestic Legal Effects); 8 (Right to a Fair Trial); 9 (Freedom from Ex Post Facto Laws); 10 (Right to Compensation); 15 (Right of Assembly); 16 (Freedom of Association); [and] 25 (Right to Judicial Protection) . . . of the Convention.

135. *Id.* para. 134.

136. It is worth noting that Panama has failed to comply fully with the Court's orders and has recently challenged the Court's jurisdiction to monitor compliance with the judgment. *See id.*

137. "Five Pensioners" v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 98 (2003).

payments to be a property right, and therefore fully protected by the guarantees of Article 21. It based this holding on “a progressively developing interpretation of international instruments that protect human rights.”<sup>138</sup> The Court’s broad construction of property rights is an example of how it may incrementally expand economic, social, and cultural rights through an expansive interpretation of substantive rights traditionally understood as civil and political.

We will discuss the Court’s terse holding with respect to the Commission’s Article 26 claim in a later section, but note here our view that the Court’s refusal to adjudicate the claim is evidence that Article 26 is generally a weak tool for enforcing economic, social, and cultural rights.

The *Five Pensioners* case was not the first time the Court had addressed economic, social, and cultural imperatives through an expansive view of property rights. In August of 2001, the Court issued a landmark decision in the matter of *The Mayagna (Sumo) Indigenous Community of Awas Tingni v. The Republic of Nicaragua*.<sup>139</sup> In that case, the Court addressed the scope of property rights under Article 21 in the context of a claim by an indigenous community seeking to assert collective property rights against the Nicaraguan government.

Noting that human rights treaties are living instruments subject to change over time, the Court concluded that:

Through an evolutionary interpretation of international instruments for the protection of human rights, taking into account applicable norms of interpretation and pursuant to article 29(b) of the Convention—which precludes a restrictive interpretation of rights—, it is the opinion of this Court that article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property, which is also recognized by the Constitution of Nicaragua.<sup>140</sup>

The Court is currently considering a second case involving indigenous rights, *Yakye Axa v. Paraguay*.<sup>141</sup> Petitioners in that case allege, among other claims, that the State failed to provide the community with adequate assistance during the processing of their territorial claims. This failure, they argue, rendered the community’s situation with respect to food security, medical care, and sanitation extremely precarious, and thus constituted a violation of Article 27 of the International Covenant on Civil and Political Rights (rights of

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138. *Id.*

139. *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Inter-Am. Ct. H.R. (ser. C) No. 79 (2001).

140. *Id.* para. 148.

141. *Yakye Axa Indigenous Community of the Enxet-Lengua People, Paraguay*, Case No. 12.313, Inter-Am. C.H.R., Report No. 2/02, OEA/ser. L/V.II.117, doc. 1 rev. 1 (2002).

minorities) as well as of several articles of the International Labor Organization Convention 169 concerning tribal and indigenous peoples. While the Court's analysis of this claim remains to be seen, the case presents an opportunity for it to determine whether the State has an affirmative obligation to provide economic assistance to the community pending procedures to formalize its territorial claim.

The Court's holdings in *Baena Ricardo, Five Pensioners*, and *Awax Tingni* resonate with a quarter century of jurisprudence of the European Court. In 1979 the Court issued its judgment in *Airey v. Ireland*,<sup>142</sup> a case involving an Irish woman, Johanna Airey, who had unsuccessfully sought to conclude a separation agreement from her husband. Under Irish law, while divorce was not available at the time of the case, the High Court could issue a decree relieving spouses from the duty to cohabit. The legal costs involved in obtaining such a decree varied from 500–700 pounds when not contested, and 800–1200 pounds when contested. The Court found that Ms. Airey lacked the means to pay these fees. Ireland did not provide free legal aid to persons like Ms. Airey seeking such judicial decrees. The petitioner alleged a series of violations of the European Convention on Human Rights, in particular, the right to legal assistance (Article 6), the right to family life (Article 8), the right to an effective remedy (Article 13), and the right to be free from discrimination (Article 14 in conjunction with Article 6 on right to legal assistance). While the Court did not reach the question of non-discrimination (as the Inter-American Court would later do with respect to similar issues in OC-11), it responded to Ireland's claim that it had no duty under the European Convention to provide legal aid (an economic right), with the following observations:

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 Convention . . . 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.<sup>143</sup>

Thus, despite the Court's recognition that the Convention protected "essentially civil and political rights," it imposed duties of an economic nature on the Irish government and recognized what, in practice, was an economic demand of Ms. Airey.

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142. *Airey v. Ireland*, 32 Eur. Ct. H.R. (ser. A) (1979).

143. *Id.* para. 26.

The Human Rights Committee of the United Nations, in its sixth official comment, supported the “elements” approach in the context of the right to life.<sup>144</sup> In that comment, the Committee defended this interpretation of the right to life:

[T]he Committee has noted that the right to life has been too often narrowly interpreted. The expression “inherent right to life” cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.<sup>145</sup>

This expansive view of the right to life was first expressed in the Inter-American context by Judges Cançado Trindade and Abreu Morelli in their concurring opinion in the *Villagrán Morales*<sup>146</sup> case. In that case, the two judges found that “the arbitrary deprivation of life is not limited . . . to the illicit act of homicide; it extends itself likewise to the deprivation of the right to live with dignity.”<sup>147</sup> As Judge Cançado Trindade wrote, “[t]his outlook conceptualizes the right to life as belonging, at the same time, to the domain of civil and political rights, as well as economic, social, and cultural rights, thus illustrating the interrelation and indivisibility of all human rights.”<sup>148</sup>

The Court as a whole echoed this analysis in Advisory Opinion OC-17,<sup>149</sup> when it construed the Convention’s right to life provision expansively as applied to children:

Regarding conditions for care of children, the right to life that is enshrined in Article 4 of the American Convention does not only involve the prohibitions set forth in that provision, but also the obligation to provide the measures required for life to develop under decent conditions.<sup>150</sup>

On the basis of this reasoning, the Court concluded that

respect for life, regarding children, encompasses not only prohibitions, including that of arbitrarily depriving a person of this right, as set forth in Article 4 of the American Convention on Human Rights, but also the obligation to adopt the measures required for children’s existence

144. *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. GAOR, Hum. Rts. Comm., 16th Sess., Gen. cmt. 6, art. 6, para. 6, U.N. doc. HRI/GEN/1/Rev.1 (1994).

145. *Id.* para. 5.

146. *Villagrán-Morales v. Guatemala* (“Street Children” Case), Inter-Am. Ct. H.R. (ser. C) No. 63 (1999).

147. *Id.* para. 4 (Cançado Trindade, J. & Abreu-Burelli, J., concurring).

148. *Id.* (Cançado Trindade, J. & Abreu-Burelli, J., concurring).

149. OC-17 Ad. Op., Inter-Am. Ct. H.R. (ser. A) (2002).

150. *Id.* para. 80 (citing *Villagrán-Morales v. Guatemala* (“Street Children” Case), Inter-Am. Ct. H.R. (ser. C) No. 63 (1999)).

to develop under decent conditions;<sup>151</sup>

and that

true and full protection of children entails their broad enjoyment of all their rights, including their economic, social, and cultural rights, embodied in various international instruments. The States Parties to international human rights treaties have the obligation to take positive steps to ensure protection of all rights of children.<sup>152</sup>

In *Children's Rehabilitation v. Paraguay*,<sup>153</sup> a number of minors in state custody suffered injuries resulting from the unsanitary and inhumane conditions that prevailed in the institution in which they were interned. In this recent case, the Court affirmed that both the right to life and the right to physical integrity contain economic, social, and cultural elements, particularly with respect to children.<sup>154</sup>

### C. CONTRAST: THE DIRECT APPROACH

Both of the indirect approaches discussed above for advancing economic, social, and cultural rights—by applying a non-discrimination principle, or by seeking to incorporate economic, social, and cultural elements within the scope of justiciable civil and political rights—may be contrasted with a direct approach, in which advocates allege violations of provisions of human rights instruments that specifically refer to economic, social, and cultural rights.<sup>155</sup> To date, the direct approach has met with little success for a variety of theoretical, practical, and political reasons that we discuss throughout this Article. Though petitioners before the Court have claimed violations of Article 26—the only Convention article specifically referring to economic, social, and cultural rights—in several recent cases,<sup>156</sup> the Court has refused consistently to adjudicate these claims.

In *Five Pensioners*, the Court reasoned that economic, social, and cultural rights have both an individual and a collective dimension, and that any analysis of state compliance with its obligation to undertake progressive development of economic, social, and cultural rights must consider:

the growing coverage of economic, social and cultural rights in general, and of the right to social security and to a pension in particular, of the entire population bearing in mind the imperatives of social equity, and

151. *Id.* para. 137(7).

152. *Id.* para. 137(8). See also *Children's Rehabilitation vs. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 112 para. 158 (2004).

153. *Children's Rehabilitation v. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 112 (2004).

154. *Id.* para. 149.

155. Such provisions include Article 26 of the American Convention, various provisions of the American Declaration, and the totality of the San Salvador Protocol.

156. "Five Pensioners" v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 98 (2003); *Children's Rehabilitation v. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 112 (2004).

not in function of the circumstances of a very limited group of pensioners, who do not necessarily represent the prevailing situation.<sup>157</sup>

The Court's brief analysis leaves no doubt as to its intention to limit the scope of Article 26 as a basis for the protection of *individual* economic, social, and cultural rights. In fact, the Court seems to have precluded consideration of Article 26 violations in any contentious case. On the one hand, its jurisprudence clearly establishes that it is competent to hear contentious cases only where individual victims or, at most, discrete, clearly identifiable groups of victims have been injured.<sup>158</sup> On the other hand, it appears, in *Five Pensioners*, to be saying that Article 26 violations can be determined only with respect to the state's population as a whole.

In *Children's Rehabilitation v. Paraguay*,<sup>159</sup> the Court again declined to adjudicate the Article 26 claims.<sup>160</sup> This time, the Court merely found that resolution of the Article 26 claims was unnecessary in light of its consideration of the economic, social, and cultural elements inherent in the claims based on Articles 4 (the right to life) and 5 (the right to physical integrity).<sup>161</sup>

As we will discuss in detail in the following section, petitioners in several cases pending in the Inter-American system have taken the direct approach, alleging violations of Article 26 of the Convention, of the San Salvador Protocol, or of provisions of the American Declaration that deal with economic, social, and cultural rights. It remains to be seen how the Commission and Court will address these claims in light of the emerging trend in favor of indirect adjudication.

#### IV. FUTURE DEVELOPMENT

At this writing, both the Commission and the Court have before them several petitions seeking determinations regarding abuses of economic, social, and cultural rights in which to develop its treatment of these issues. In these cases, the technique most frequently employed by petitioners is the presentation of "hybrid" petitions, which present violations of both civil and political *and* economic, social, and cultural rights. The alleged violation of the civil or political right or rights guarantees initial access to the Inter-American system and facilitates the

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157. *Id.* para. 147.

158. See OC-14 Ad. Op., Inter-Am. Ct. H.R. (ser. A) para. 49 (1994). ("The contentious jurisdiction of the Court is intended to protect the rights and freedoms of specific individuals, not to resolve abstract questions.")

159. *Children's Rehabilitation v. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 112 (2004).

160. In *Five Pensioners*, the Commission brought the Article 26 claim. In *Children's Rehabilitation*, the Commission declined to allege violations under that Article, but the representatives of the victims did choose to bring the claim. This suggests to us that the Commission may have retreated from its earlier, more aggressive posture.

161. *Children's Rehabilitation v. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 112, para. 225 (2004).

consideration of the alleged violations of economic, social, and cultural “elements” of these rights.

In *Menéndez, Caride et al. v. Argentina*,<sup>162</sup> a case pending before the Commission that presents similar claims to those adjudicated in *Five Pensioners*,<sup>163</sup> a group of retirees whose pensions were discontinued allege the violation of rights enshrined in the American Convention (Articles 8 (judicial guarantees), 21 (property), 24 (equal protection) and 25 (effective remedy)), as well as of rights recognized in the American Declaration (Article XI (to the preservation of health and well-being) and Articles XVI, XXXV and XXXVII (to social security, in relation to the obligation to work and contribute to social security)).

The petitioners assert that the right to property includes the right to receive a dignified pension, i.e., that one’s lifetime of work creates property that cannot be unduly seized by the state. The petition exemplifies both the “elements” approach, in that it seeks to recognize the right to receive a pension (an economic right) as a component of the right to private property, and the direct approach, in that it asserts specific economic, social, and cultural rights recognized in the Declaration but not contained in the Convention. The Court upheld the Convention-based position in *Five Pensioners*, in which domestic law expressly created an “acquired right” to certain social security payments, but it remains to be seen whether the Commission will reach the same result in *Menéndez*, where petitioners do not allege the existence or violation of any such right expressly created under domestic law.

In *Odir Miranda v. El Salvador*,<sup>164</sup> petitioners similarly take an “elements” approach, asserting that the right to life should be construed broadly to include questions of health, and that states parties to the American Declaration and the San Salvador Protocol have the affirmative duty to guarantee the right to health as provided for in these two instruments.

Odir Miranda learned that he was HIV-positive in 1997 after being hospitalized at the Salvadoran Social Security Institute (Instituto de Seguridad Social—ISSS). After his health improved markedly following a course of anti-retroviral therapy, Miranda petitioned the ISSS to purchase and administer the elements of the anti-retroviral treatment. After the ISSS denied his petition and domestic recourse proved inadequate, Miranda submitted a petition to the Inter-American Commission seeking to compel the State to provide the treatment.

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162. *Menéndez v. Argentina*, Case No. 11.670, Inter-Am. C.H.R., Report No. 03/01, OEA/ser. L./V./II.111, doc. 20 rev. (2001).

163. “Five Pensioners” v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 98 (2003).

164. *Jorge Odir Miranda Cortez v. El Salvador*, Case 12.249, Inter-Am. C.H.R., Report No. 29/01, OEA/Ser.L/V/II.111, doc. 20 rev. (2000).

In the case pending before the Commission, Miranda and other alleged victims contend that El Salvador is responsible for the violation of the rights to life (Article 4), humane treatment (Article 5), equal protection before the law (Article 24), judicial protection (Article 25), and economic, social, and cultural rights (Article 26) under the American Convention. In addition, the petitioners allege violation of Article 10 of the San Salvador Protocol and Article XI of the American Declaration. Petitioners assert that

the right to life encompasses much more than not dying as a result of action or negligence attributable to the State, in accordance with the rules of international law. The right to life, in that broader sense, presupposes, *inter alia*, that a person lives under conditions that are conducive to his well being.<sup>165</sup>

The petitioners maintained that the State's failure to provide anti-retroviral treatment violated Article 10 of the San Salvador Protocol and Article XI of the American Declaration, which guarantee the right to health, and that these instruments, in conjunction with the provisions of Article 26 of the American Convention (progressive development of economic, social, and cultural rights), give rise to an "immediate legal obligation." They argue that the State must "conduct all acts . . . necessary to improve health, leading to the highest level of physical, mental, and social well being through the use of modern advances and scientific medical discoveries."<sup>166</sup>

The Commission found the case admissible<sup>167</sup> but specifically stated that it would not determine El Salvador's responsibility under Article 10 of the San Salvador Protocol, construing Article 19(6) of that instrument to limit the Commission's competence to determinations on alleged violations of Articles 8(a) and 13 only.<sup>168</sup>

The Commission's position with respect to violations of Article 26 was less clear. The Commission appeared to consider these allegations on a similar footing to those involving the violation of certain civil and political rights.<sup>169</sup> Since the Commission's decision, however, the Court has held, in the *Five Pensioners*<sup>170</sup> case, that it would *not* adjudicate alleged violations of Article 26 in individual cases. In light of the Court's holding, it is unlikely that the Commission will sustain the petitioner's allegations in this regard.

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165. *Id.* para. 24.

166. *Id.* para. 26.

167. *Id.* para. 49(1).

168. As discussed above, the San Salvador Protocol specifically allows for individual complaints to be brought under articles 8(a) and 13 (pertaining to certain labor rights and the right to education).

169. "In the view of the Inter-American Commission, these allegations must be examined during the phase related to the merits of the case, in order to determine whether the facts reported violated articles 2, 24, 25 and 26 of the American Convention." *Id.* para. 45.

170. "Five Pensioners" v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 98 (2003).

In the meantime, Odir Miranda and his case have gained international renown among HIV/AIDS activists, and progress has been made towards the State's fulfillment of his demands. In February of 2000, the Commission granted precautionary measures on behalf of Odir Miranda and twenty-six other members of the Asociación Atlacatl, in which it urged the State of El Salvador to provide them with treatment and antiretroviral drugs; as well as hospital, pharmacological, and nutritional care.<sup>171</sup> In June of 2000, the Board of Directors of the ISSS authorized the procurement of the antiretroviral therapy for persons who are HIV-positive or have AIDS, and the ISSS began providing treatment.<sup>172</sup> It is impossible to say whether the State would have implemented the Commission's request in the absence of the concerted efforts by HIV/AIDS activists, or, conversely, whether the State would have heeded the activists' demands in the absence of a request by the Commission. What this case illustrates is the potential success of an integrated strategy that includes individual case litigation and also measures to raise grassroots support for a particular issue.

As we illustrated in Part III, recent decisions affirm that economic, social, and cultural rights are indivisible from civil and political guarantees. Further, the Court is open to construing both substantive and procedural provisions liberally, in such a way as to protect economic, social, and cultural rights through implementation of norms traditionally understood as guaranteeing civil and political rights. These decisions also suggest a reluctance to enforce economic, social, and cultural rights through the application of provisions that clearly establish such rights, but that provide no definite grounds for state responsibility, or that fail to establish a mechanism for enforcement, such as Article 26 of the Convention, or the majority of the San Salvador Protocol (with the exception of Articles 8(a) and 13). In light of these decisions and of real-world progress that has been made on these issues, we can construct a goal-oriented strategy for future development that effectively utilizes the tools available in the Inter-American system. Below, we analyze the various options available to advocates, weighing the pros and cons of each.

#### A. EXPANSION OF ARTICLE 26: A SUSPECT OPTION

One avenue by which economic, social, and cultural rights may be promoted through the case law of the Inter-American system is through an expansive interpretation of Article 26 of the American Convention. Although the Commission has not precluded the possibility of finding states responsible for violations of Article 26, the Court's holding in *Five*

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171. See Annual Report 2000, Inter-Am. C.H.R., OEA/Ser.L/V/II.111, doc. 20 rev. 16 (2001).

172. *Id.*

*Pensioners* substantially limits the extent to which either body can determine, in individual cases, state responsibility for failure to develop economic, social, and cultural rights progressively.

There can be little doubt that a broad interpretation of Article 26 along the lines requested would be the easiest formula for incorporating economic, social, and cultural rights in the case law of the Inter-American system. However, the Commission should, for a number of reasons, proceed with great caution should it pursue this line of legal reasoning.

First is the fact that Article 26 enumerates no specific rights enforceable on an individual basis.<sup>173</sup> In fact, the *travaux préparatoires* leading up to the final draft of the Convention suggest that there was some debate about whether the instrument should include protection for economic, social, and cultural rights at all.<sup>174</sup> The failure to provide specific protection for these rights appears to be not an oversight, but rather a conscious effort to weaken state obligations in this respect.<sup>175</sup> Indeed, the Commission itself has noted that Article 26 tends to view "economic, social, and cultural rights as objectives of development and not as values in themselves."<sup>176</sup>

Second, to the extent one may nonetheless argue that Article 26 is ambiguous as to the creation of enforceable rights, the OAS appears to have resolved these doubts when it drafted and adopted the San Salvador Protocol. Unlike Article 26 of the Convention, the San Salvador Protocol, which specifically addresses the enforceability of economic, social, and cultural rights in the Americas, clearly establishes the circumstances in which a violation may be considered in a petition to the Inter-American Commission on Human Rights. Article 19 states that violation of articles 8(a) and 13 give rise to the right of individual petition to the Inter-American Commission on Human Rights.<sup>177</sup> As we have

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173. See Matthew Craven, *Economic, Social, and Cultural Rights*, in *THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS* 299 (David J. Harris & Stephen Livingstone, eds. 1998).

174. See *id.* at 297-301.

175. See *id.* at 297. Craven notes that "Although each of the draft Conventions presented by the American Committee of Jurists, by Panama, and by Chile, gave extensive recognition to economic, social and cultural rights . . . the final 'working draft' presented by the inter-American Commission virtually excluded all reference to them." *Id.* (internal citations omitted).

176. Annual Report 1983-84, Inter-Am. C.H.R., ch. V(II) para. 4, OEA/ser. L/V/II.63, doc. 10 (1984).

177. Article 19(6) of the San Salvador Protocol states:

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

*Protocol of San Salvador*, *supra* note 7, art. 19(6).

noted, the clear implication of that article is that violations of the other articles of the San Salvador Protocol *do not* give rise to the right of individual petition to the Inter-American Commission.

The Inter-American Commission itself echoed this understanding of Article 19 of the San Salvador Protocol in its May 2001 revision of its Rules of Procedure.<sup>178</sup> Article 23 of those Rules states:

Any person or group of persons or nongovernmental entity legally recognized in one or more of the member states of the OAS may submit petitions to the Commission, on their own behalf or on behalf of third persons, concerning alleged violations of a human right recognized in, as the case may be, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, the Additional Protocol in the Area of Economic, Social and Cultural Rights, the Protocol to Abolish the Death Penalty, the Inter-American Convention to Prevent and Punish Torture, the Inter-American Convention on Forced Disappearance of Persons, and/or the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, *in accordance with their respective provisions*, the Statute of the Commission, and these Rules of Procedure.<sup>179</sup>

The text on “their respective provisions” refers to Articles 8(a) and 13 of the Additional Protocol in the Area of Economic, Social and Cultural Rights<sup>180</sup> and Article 7 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women,<sup>181</sup> each of which limits access to the Commission to the violation of certain rights.

The Court, unlike the Commission, exercises the luxury of reviewing each case over a period of months. That body is conscious of the import of its sentences both as the final word within the Inter-American system (i.e., the role of structuring jurisprudence for the Commission) and as measures of vast political significance. This fact, among others, has made the Court somewhat more cautious in establishing new precedents. Notwithstanding its interest in advancing the promotion of economic, social, and cultural rights, the Commission, in construing Article 26 of the American Convention, must be careful not to establish case law that will fail to survive the scrutiny of the Court.

#### B. THE WISER PATH: RESTRAINED DEVELOPMENT OF PRECEDENT IN CONJUNCTION WITH MOBILIZATION STRATEGIES

For a number of practical, political, and historical reasons,

178. Regulations of the Inter-Am. Comm'n on Hum. Rts., available at <http://www1.umn.edu/humanrts/oasinstr/iachrregulations.html>.

179. *Id.* art. 23 (emphasis added).

180. *Protocol of San Salvador*, *supra* note 7.

181. Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, entered into force Mar. 5, 1995, 33 I.L.M. 1534.

governments tend to support the view that economic, social, and cultural rights should not be afforded the same protection given to civil and political rights. To the extent that advocates seek to achieve realistically enforceable Court sentences on economic, social, and cultural rights, they should be attentive to governmental resistance to the enforcement of such rights. A sentence imposing obligations on governments based exclusively on a broad interpretation of Article 26 and its use as a vehicle to render other treaty obligations immediately justiciable may be doomed to failure and is likely to provoke extreme reactions from the member states of the OAS.

I. *General Principle: Towards an Evolutionary Interpretation of Human Rights*

Expansion of human rights norms in the Inter-American system will remain on relatively firm ground to the extent that it may be justified as legitimate construction of evolving norms of international human rights law. On at least three occasions, a majority of the Inter-American Court has invoked “evolutionary” interpretation as the justification of expanding the reach of existing human rights norms. In the *Awas Tingni* case, the Court held that human rights evolve, and that elements not considered present within given rights at their drafting may be found to be present in later interpretations.<sup>182</sup> Similarly, as Judge Cançado Trindade wrote in his concurring opinion in the *Villagrán Morales* case, the Court had already found,

in its 16th Advisory Opinion, on *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (1999), that the interpretation of an international instrument of protection ought to ‘accompany the evolution of times and the present-day conditions of life’, and that such evolutive interpretation, in accordance with the general rules of interpretation of treaties, has contributed decisively to the advances of the International Law of Human Rights.<sup>183</sup>

Indeed, in OC-16, the Court wrote:

That evolutive interpretation is consistent with the general rules of treaty interpretation established in the 1969 Vienna Convention. Both this Court . . . and the European Court of Human Rights . . . have held that human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions.<sup>184</sup>

Thus, the Court has established a clear line of precedent regarding

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182. See *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R. (ser. C) No. 79, para. 147 (2001) (applying an evolutionary understanding of interpretation of human rights treaties to find the right to communal ownership present in the right to property).

183. *Villagrán Morales v. Guatemala* (“Street Children” Case), Inter-Am. Ct. H.R. (ser. C) No. 63, para. 5 (1999) (Cançado Trindade, J. and Abreu-Burelli, J., concurring) (internal citations omitted).

184. *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Ad. Op. OC-16/99, Inter-Am. Ct. H.R. (ser. A) para. 114 (1999).

evolutionary interpretation. Future petitioners and the Commission must be attentive to this guidance by the Court. New lines of precedent must be the logical culmination of trends in international human rights law, rather than innovative (and sparsely supported) constructions. Below, we set forth five such trends.

a. *Non-Discrimination*

As illustrated in Part III above, the non-discrimination principle has been a valuable basis for extending economic, social, and cultural rights, particularly in circumstances in which these rights would otherwise not be the basis of any protection. The advantage of using the non-discrimination principle is that petitioners, the Commission, and the Court may rely on a fundamentally *civil* right to expand protection of economic, social, and cultural rights. In order to make effective use of this principle, petitioners must seek out situations that allow for expanding constructions of the idea of discrimination. As we set out in the proposed cases, allegations of differential resource allocation to communities with disparate impact on different ethnic groups, for example, may be an important means of forcing change in governmental policies concerning a wide range of economic, social, and cultural rights. In these cases, as in others suggested below, this litigation should be undertaken jointly with social movements to ensure coordination of strategies and maximum practical impact.

b. *Hybrid Cases*

A second guiding principle in the extension of economic, social, and cultural rights, is what we would term the “hybrid case” approach. By this, we refer to cases in which the violations denounced by petitioners and treated by the Inter-American system include abuses of both civil and political, and economic, social, and cultural rights. In other words, those cases in which the situation denounced contains intertwined elements of both classes of rights provide greater possibilities for successful implementation. The advantage here is that the existence of violations of civil and political rights guarantee that a case will be considered admissible by the system. This admissibility will allow the system to apply the other interpretative principles outlined herein. At the same time, even if the Commission and Court are unable to adjudicate the economic, social, and cultural rights allegedly violated due to mandate limitations, their examination of the case may well provide the pressure necessary for the entire matter—civil and political as well as economic, social, and cultural rights—to be placed on the agenda of the state.<sup>185</sup>

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185. For example, international pressure (through the use of the Inter-American system, among other techniques) applied in the 1996 El Dorado dos Carajás massacre of nineteen landless peasants by Brazilian police forced authorities to address not only issues related to police impunity and rural

c. *Economic, Social, and Cultural Interpretations of Civil and Political Rights—The Elements Approach*

Within this concept of hybrid rights, special attention must be paid to the economic, social, and cultural elements of civil and political rights. In this way, cases that present facts amounting to the abuse of particular economic, social, or cultural elements of a particular civil or political right will allow the Court to consider these elements without the need for an express finding with respect to economic, social, or cultural rights. This idea may also be expressed in terms of the harmful incidence of violations of economic, social, or cultural rights on one or more civil or political rights. In this way, economic, social, and cultural “elements” may be addressed, either as the underlying factors giving rise to violations of civil or political rights, or as elements inherent in civil and political rights that have been violated.

In the Inter-American context, the “elements” approach has resulted in expansive construction of the right to property<sup>186</sup> and the right to life.<sup>187</sup> An example of this type of interpretation is found in the analysis of the right to life in Judge Cançado Trindade’s concurring opinion in *Villagrán Morales*.<sup>188</sup> There, Cançado Trindade analyzed the right to life as including a much broader set of guarantees than those envisioned by a strictly civil rights interpretation. His vision includes elements of economic, social, and cultural rights and is not limited to the classic, restrictive vision that contemplates the guarantee of life only within civil rights parameters.

Similar reasoning may be applied to other traditionally civil and political rights to include in their scope elements of economic, social, and cultural rights. Thus, for example, an expansive interpretation of the right to physical integrity, a civil right, could include the right to medical treatment, an economic, social, and cultural right. An expansive view of the right to political participation might include the right to be literate, and thus the right to be educated. This approach is considered in greater depth in the proposed hypothetical cases.

d. *Specification of Situations of Abuse and of Victims*

By this fourth guideline, we refer to the preference for clearly specified violations and clearly identified victims, rather than amorphous

violence, but also the underlying economic, social, and cultural rights violations, including the need for greater land reform and credit for landless squatters and farmers. See *El Dorado dos Carajás*, Petition 11.820, Inter-Am. C.H.R., Report No. 4/03, OEA/ser. L./V./II.118, doc. 5 rev. 2 (2003).

186. See, e.g., *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R. (ser. C) No. 79 (2001); *Baena Ricardo (270 Workers v. Panama)* Inter-Am. Ct. H.R. (ser. C) No. 72 (2001); “Five Pensioners” v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 98 (2003).

187. See, e.g., *Villagrán-Morales v. Guatemala* (“Street Children” Case), Inter-Am. Ct. H.R. (ser. C) No. 63 (1999) (Cançado Trindade, J. and Abreu-Burelli, J., concurring).

188. *Id.*

violations and undefined classes. In other words, a petition denouncing the violation of the right to education of a particular community (for instance, an indigenous community or a group of settled landless laborers) will have a greater chance of implementation than a decision finding a general violation of the right to education affecting all children in a particular nation or political subdivision. While one may prefer the more general ruling, given that it implies the possibility to alter state policy at a broader level, in practice, we may anticipate that such a ruling might not be applied at all by the state affected. On the other hand, a more limited decision that could be implemented by the state affected, would establish the same precedent, and would create international legal bases for the efforts of local rights groups and progressive movements to implement the principles included in the given sentence on a wider basis. The decision, of course, would also serve as precedent for legal activists in other American States.

Commentators Abramovich and Courtis have emphasized the need to focus on particular victims rather than on generic violations in domestic cases, and their analysis is instructive here:

[I]n many cases, the State's failure to comply can be reformulated in terms of concrete and individualized violations rather than generically. The generic violation of right to health can be recast or reformulated by the articulation of a particular action, led by an identifiable individual, that gives rise to a violation, such as the non-provision of a vaccine or refusal to provide medical services necessary for the individual's life or health.<sup>189</sup>

Petitioners seeking to employ this principle must be careful to debate thoroughly and to consider fully the choice of victims and communities in bringing cases before the Inter-American system. Too often, rights groups choose to represent victims and groups affected based on convenience—either in locating the person or persons affected, amassing evidence, or working with counsel. While these criteria may be important, potential petitioners must ask themselves whether the victim(s) selected are representative of the broader class, whether they are tied to social movements capable of exerting pressure on governmental authorities, and whether the media are likely to find the selected petitioner an attractive one for advocacy.

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189. Abramovich & Courtis, *supra* note 114, at 301 (authors' translation). The original Spanish text reads:

en muchos casos el incumplimiento del Estado puede reformularse en términos de violación individualizada y concreta, en lugar de forma genérica. La violación general al derecho a la salud puede reconducirse o reformularse a través de la articulación de una acción particular, encabezada en un titular individual, que alegue una violación producida o la no producción de una vacuna, o por la negación de un servicio médico del que dependa la vida o salud de esa persona . . . .

e. *Focus on Rights with Unquestioned Access*

Here, we refer to the preference for denunciation and adjudication of violations of rights that clearly provide access to the individual petition system. To date, by means of the San Salvador Protocol, petitioners may denounce violations of Article 8(a), concerning associational labor rights, and Article 13, which protects the right to education. We can expect less resistance from states to decisions upholding these rights than to determinations extending existing jurisprudence to other economic, social, and cultural rights.

Cases focusing on these rights, denounced and analyzed within the limits of these Articles, will have the greatest chance of implementation by states parties against whom decisions are issued by the Commission or the Court.

C. PROPOSED HYPOTHETICAL CASES

Before setting out proposed cases designed to maximize the efficient use of the Inter-American system, it will be helpful to emphasize a few of the principles that should orient a strategic litigation approach. First, we must recall that the Inter-American system is one of limited access and limited resources. As such, petitioners should not look to the system as an arbiter of disputes but rather as a mechanism for producing jurisprudence with potentially sweeping policy implications. In this regard, petitioners must focus on the potential impact that the litigation of cases may have beyond the parties involved.

Second, one must understand the structural limits of the system and the political forces (e.g., reactionary states) that would gladly seize on poorly structured precedent as a basis for non-implementation of the system's rulings, as well as to undermine the already limited resources and political support afforded the Commission and the Court.

Third, petitioners must be clear about their objectives. This Article proposes a concrete litigation strategy designed to foster respect for economic, social, and cultural rights. To this end, it may be necessary in some cases to emphasize civil and political rights and to seek expansive interpretations of these rights, rather than to force the Commission and Court to recognize economic, social, or cultural rights as such, without sufficient basis in law. In other words, it may be more efficient for the system to recognize the right to medicine or treatment in a particular matter as an element of the right to life or the right to physical integrity than to force the system to recognize, through the individual petitions process, economic, social, and cultural rights not deemed ripe for international litigation by states. In short, petitioners should be more interested in advancing *guarantees for victims* than in advancing *rights on paper*. This Article contends that a strategy that focuses on expansive interpretation of civil and political rights provides greater impetus for the

advance of economic, social, and cultural rights within the national legal systems of the Americas by providing guidance for expansive interpretations of civil and political rights, uniformly guaranteed by the constitutions of American States.

Finally, petitioners must understand and respect the subsidiary role of supranational litigation in broader efforts to achieve distributive justice. This understanding and respect requires that potential litigants confer with and accept the decisions of social movements and other actors regarding what issues to address internationally, which victims to represent, and so forth. Potential litigants at the international level must be careful not to set the agenda on their own, based exclusively on legal criteria. Experience demonstrates that international litigation not accompanied by parallel, coordinated campaigns by social movements and/or the media is unlikely to produce effective results. In light of this, we underscore the need for supranational litigators to avoid taking the lead on strategic decision-making regarding the use of the Inter-American system.<sup>190</sup>

Below, we set out strategies based on several hypothetical and real cases that litigants in the Inter-American system may employ to advance respect for economic, social, and cultural rights. We begin with those rights guaranteed by the San Salvador Protocol and then proceed to those for which direct access has not been explicitly recognized by the treaties of the system. With this second group, our focus is on the protection of *elements* with economic, social, and cultural implications, rather than on formal acceptance of the rights themselves.

### 1. *The Right to Education*

Given the recent entry into force of the San Salvador Protocol, petitions alleging violations of the right to education now enjoy a solid basis for acceptance by the Inter-American system. Article 13 of the San Salvador Protocol sets out the right to education in some detail. Article 19(6) assures access to the Inter-American system in the case of violations of the right to education.<sup>191</sup>

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190. Of course, once litigation has begun, strategic decisions regarding litigation should involve counsel. But even at these stages, legal concerns should not be the only factors employed in designing advocacy plans.

191. Protocol of San Salvador, *supra* note 7, art. 19(6). Article 13 of the Right to Education includes a series of guarantees, with differing levels of immediacy in their application:

Article 13—Right to Education

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

- a. Primary education should be compulsory and accessible to all without cost;
- b. Secondary education in its different forms, including technical and vocational secondary education, should be made generally available and accessible to all by every appropriate

We may imagine a clear-cut case of abuse of Article 13 in which an individual child or group of children is denied access to free public education due to any of a series of factors that may range from the absence of a school within a reasonable distance from a given community to excessively high fees for registration or the purchase of mandatory texts. No doubt, it is important that these cases be brought to the attention of the Commission to enable it to make clear pronouncements about the nature of the state's obligation to provide free, basic education to all citizens. Beyond this, however, it will be important to develop cases that allow the Commission and Court to speak to the contours of this right. Thus, cases that focus on particular elements of free education (such as required purchase of uniforms or textbooks, failure to provide free meals to students, etc.) will permit the system to establish useful precedents on the range of the rights guaranteed in Article 13.

On a second level, one may imagine a situation in which resources are distributed to public school districts or to individual schools on a very unequal basis. One may further imagine that these inequalities correspond to divisions between and among neighborhoods which, in turn, manifest different socio-economic and ethnic characteristics. For example, it will not be difficult for us to imagine two or more schools or school districts in neighborhoods of different social classes somewhere in the Americas (preferably in a state that has ratified the San Salvador Protocol). Further, let us imagine that in the poorer neighborhood, the resource allocation per student is significantly lower than in a middle or upper class neighborhood in the same city. We may also imagine that the two neighborhoods have very different racial compositions. In the poorer neighborhood, we may imagine a greater percentage of persons of African and/or indigenous descent, while in the wealthier neighborhood, residents would be lighter-skinned.

On this set of facts, petitioners may present a powerful case of violation of the principle of non-discrimination in combination with the right to education. Were the Commission and Court presented with such a case, they would be on firm ground were they to find a violation in the unequal distribution of resources to the two communities. Further, as a remedy, the system could order that the state afford roughly equal resources to the communities. The state would be required to distribute

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means, and in particular, by the progressive introduction of free education;

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

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

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

educational resources on a more equal basis.

Or suppose that in a given country, the state maintains systems of free elementary and university education. Suppose further that the level of expenditure per student in the university system exceeds (by a factor of ten to twenty) the expenditure per student in the elementary school system. We may imagine that the composition of the student body in public schools at the elementary school level is very different from the composition at the university level. At the former level, the student population reflects the racial diversity of the country. At the latter level, the student population reflects the highest social classes (and we may reasonably suppose that this population is disproportionately lighter skinned and largely excludes persons of African and indigenous descent). Let us assume that the state with these differences at the elementary school and university level does not maintain effective affirmative action programs to guarantee access to superior education to persons from historically disadvantaged groups.

On these facts, a petition alleging violation of the right to education in conjunction with the principle of non-discrimination would enable the system to reach conclusions with potentially revolutionary policy implications. To make the case stronger, one may imagine a petition that juxtaposes two communities in the same geographic area. In the first, a poor community, composed primarily of persons of African or indigenous descent, some number of children do not have access to elementary school education. At the same time, in an adjacent or nearby upper-middle class community composed largely of lighter-skinned persons, a disproportionate number of residents attend free public university.

On these facts, a petition alleging violation of the non-discrimination principle in conjunction with the right to education would provide the Inter-American system an opportunity to evaluate—through the individual case mechanism—the educational policies of a given state.<sup>192</sup> A word of caution is warranted here. These hypothetical facts—which no doubt exist in Brazil and elsewhere in the Americas—involve highly volatile issues in which privileged classes may react to perceived attacks on their children's access to free university education. Before undertaking an international litigation strategy that targets the status

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192. One case pending before the Inter-American system that addresses the issue of discriminatory treatment in access to education is *Dilcia Yean and Violeta Boscía v. Dominican Republic*, Case 12.189, Inter-Am. C.H.R., Report No. 28/01, OEA/ser. L./V./II.111, doc. 20 rev. (2000). In that matter, petitioners argue that the discriminatory refusal to issue birth certificates to two girls born in the Dominican Republic to Haitian mothers led to their inability to enroll in school and thus violation of their right to education. The *Yean and Boscía* case, though likely to force consideration of the Dominican Republic's discriminatory treatment of Haitian-Dominicans, may not result in judicial pronouncement on inequity in Dominican education more generally.

quo, petitioners must carefully diagnose the potential cases and consult social movements with which they may partner. Litigating these types of cases without ensuring sufficiently organized support networks and supportive media may lead to disastrous results.

### 2. *The Right to Food*

Let us imagine an individual, or group of individuals, who receive less than an adequate share of calories, protein, carbohydrates, or other essential nutrients on a regular basis. Let us further assume that this group of persons informs the relevant authorities of its circumstances and that these authorities fail to take measures either to *respect* or to *ensure* this right. Let us further assume that the authorities have the resources necessary to provide for the nutritional needs of the group in question. As a direct consequence of this failure, one or more individual members of this group die and/or suffer from otherwise preventable diseases. We may also assume that one or more members of this group fail to develop as they would have had they received the adequate nutritional intake that fate, and official failure has denied them.

We may view this situation as a violation of the right to food. However, given that the right to food does not provide the basis for an individual petition to the Inter-American system, regardless of whether domestic remedies have been exhausted, we would be unable to help these victims. On the other hand, we may just as easily characterize the situation as a violation of the right to life, in the case of the member or members of the group who have died due to inadequate nutrition, or as a violation of the right to physical integrity, in the case of those who have suffered from otherwise curable diseases. Again, as in the previous hypothetical cases, petitioners should ensure the involvement of social movements and supportive media prior to embarking on the international litigation strategy.

### 3. *The Right to Health*

In the case of *Odir Miranda*,<sup>193</sup> the issue of the right to health has been placed squarely before the Commission. In that matter, the petitioners have argued that the state's failure to provide adequate medication for persons suffering from HIV and AIDS constitutes a violation of the right to health. The petitioners have argued that the right to health is guaranteed, through Article 26, in international treaties ratified by El Salvador. They have also placed before the Commission the issue of violation of the right to life. As we have argued above, this latter line of argument finds more solid support in existing international precedent both within and without the Inter-American system.

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193. Jorge Odir Miranda Cortez v. El Salvador, Case 12.249, Inter-Am. C.H.R., Report No. 29/01, OEA/ser. L/V/II.111, doc. 20 rev. (2000).

We may imagine other instances in which a broad interpretation of the right to life (or the right to physical integrity) may include elements of protection, guarantee, or provision of health services, and thus where the failure to protect, guarantee, or provide such services, constitutes a violation of the right to life. We may imagine, for example, an instance in which an individual or group of children does not have access to vaccines. Let us further imagine that the failure to provide these vaccines is not the result of lack of resources on the part of the state and that one or more of the children who do not receive necessary vaccines suffer from preventable illness leading to death. As in the hypothetical case regarding the right to nutrition, we may argue that the failure to provide health services (in this case, vaccines) is the direct cause of serious illness and death, and thus constitutes a violation of the rights to physical integrity and health. Selecting a child or children as the petitioner in advocating the right to well-being (either to physical integrity or, if applicable, to life) would be a wise strategy from both legal and advocacy perspectives. In legal terms, international human rights law provides special protection and guarantees for children, thus enhancing the chances of a victory on the merits. From a broader advocacy perspective, the focus on children generates a broad range of allies both within organized social groups and in the mass media.<sup>194</sup>

#### 4 *Right to Housing: Focus on Correcting Injustice in Housing Policy*

We may imagine as potential petitioners a group of poor urban dwellers in makeshift houses established in the less desirable areas of a Latin American city. These residents may establish homes in hillside communities, on steep inclines without adequate structural support. It is likely that many of these shelters will not support the heavy rains that afflict subtropical environments. Indeed, a number of such houses are washed away every year, in torrential summer showers, leaving many dead and injured. Let us imagine that these residents have petitioned local authorities for assistance to build adequate structural support for their homes or, in the alternative, housing or income subsidies to rent or buy adequate shelter elsewhere. Let us further assume that these pleas have failed to provoke the requested response from authorities and, also, that the authorities' failure is not the result of lack of resources.

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194. One issue that has mobilized significant constituencies in Latin America, particularly in Brazil, has been HIV/AIDS. See Jane Galvão, "Community Mobilization and Access to HIV/AIDS Medicines: The Brazilian Experience," paper presented at Harvard Medical School (Nov. 3, 2003) (attributing relative success of efforts to expand access to HIV medication to social movement's organization and strategic partnership with government authorities). Regardless of the focus of the case used to advance the Court's jurisprudence and state practice on health care, it is essential that a local constituency capable of mobilizing authorities exist and that litigants coordinate efforts with social movements and forces.

The picture that we have described no doubt constitutes a failure to ensure the right to housing. But it may also constitute a violation of the right to life or the right to physical integrity of persons killed or injured in predictably violent rains. Advocates may argue these claims in this context.

An alternative approach to advancing the right to housing by denouncing injustices in housing policy is through application of the non-discrimination principle. Let us imagine a state that maintains, at a limited or more comprehensive level, public housing programs. These programs may range from regulation of the housing market, to tax subsidies for housing development, to direct provision of housing through construction programs of shelter for persons of limited means. We may imagine a number of situations in which this regulation, guarantee, or provision of housing is tainted by some degree of discrimination. In a particularly clear case, we may imagine a public housing program in which construction of houses is tied to political affiliation in a particularly obvious and vulgar fashion.<sup>195</sup>

On these facts, we may imagine an individual or group of individuals that has sought and has been denied access to a particular housing program based on its lack of affiliation with the relevant (ruling) party of a political coalition. Here, a petitioner denied access to participation, in other words, a petitioner denied the right to housing, ordinarily would not be able to petition directly to the Inter-American system given that the right to housing is not a right for which the right to petition is recognized either in the American Convention or the San Salvador Pact. However, following the precedent of the European system, set out in the *Abdulaziz*,<sup>196</sup> and *Schuler-Zraggen v. Switzerland*<sup>197</sup> cases, and the case law of the universal system in *Zwaan de Vries v. the Netherlands*,<sup>198</sup> the Inter-American system could determine that the failure to provide housing rights on a discriminatory basis constitutes a violation of the American Convention *even though immediate access for violation of these rights is not afforded by the norms of the system.*

#### CONCLUSION

Supranational litigation has been, and will continue to be, an

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195. It would be difficult to imagine a situation in which there were absolutely no political element in the choice of which communities would benefit from state investment in low-cost or free housing; thus, we emphasize in this hypothetical case, the existence of an evident link between political affiliation and participation in a given housing program.

196. *Abdulaziz v. United Kingdom*, 94 Eur. Ct. H.R. (ser. A) (1985).

197. *Schuler-Zraggen v. Switzerland*, 263 Eur. Ct. H.R. (ser. A) (1993).

198. *Zwaan de Vries v. The Netherlands*, Communication No. 182/1984 (Human Rights Committee), para. 12.4, available at <http://www1.umn.edu/humanrts/undocs/session42/182-1984.htm> (last accessed Dec. 1, 2004).

important tool in the efforts to promote respect for economic, social, and cultural rights in the Americas. But it is merely one tool among many available to social activists. If employed unwisely—indiscriminately, excessively, or without due consideration for non-legal factors that influence economic, social, and cultural rights—it carries the potential to produce more harm than good. We have sought to demonstrate the circumstances that have come together to create a context that requires advocates of economic, social, and cultural rights in the Americas to exercise caution and restraint to be effective. These circumstances include severe limits on access to the Inter-American system, the fragile nature of supranational bodies, and the potential for non-compliance by states.

Critiques developed in the realm of social justice in the United States, as well as recent analysis of the proposed individual case mechanism of the Committee on Economic, Social and Cultural Rights, have raised concerns about the potential for rights-based litigation to result in counterproductive “queue jumping.” We do not subscribe fully to these views; instead, we argue that litigation *has* a role to play, provided practitioners engage international oversight mechanisms as part of broader strategies that also involve social movements, the media and other forms of pressure.

Litigation as part of such broader campaigns may advance economic, social, and cultural rights even without litigating them directly. Within these constraints, international litigation may be effective. We maintain that when supranational litigation takes on economic, social, and cultural rights directly, it should be firmly grounded in solid precedent and doctrine, effectively eliminating the possibility of state challenge to its legitimacy.

Finally, we have attempted to chart a course that reflects a pragmatic approach, in which litigation is closely tied to vigorous social movements and non-legal campaigns, providing examples of possible cases to be litigated and lines of argument. Our hope in presenting this approach to supranational economic, social, and cultural litigation is not to discourage human rights practitioners from using the Inter-American system as a means of promoting social justice, but rather to encourage them to do so in a thoughtful and responsible fashion. In this way, we suggest, they will enhance their chances of success in their legal battles and also increase the likelihood of effecting real-world change, while maintaining the credibility of supranational oversight mechanisms themselves.

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