Remedies without Rights? : Reparations and ESC Rights in the Inter-American System

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Remedies without Rights?:
Reparations and the Development of Economic, Social and Cultural Rights in the Inter-American System

Student Note Submission

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INTRODUCTION

The function of the law has long been encapsulated in an ancient Roman maxim: “Ubi jus, ubi remedium”, or “Where there is a right, there is a remedy.”¹ Yet in international law, particularly human rights law, this relationship is not always so straightforward. The development of economic, social and cultural (ESC) rights in the Inter-American system illustrates the challenges of providing adequate relief for victims within a legal framework that may not be conducive to the concrete enforcement of the rights at issue. Though the legal codification of ESC rights within the Inter-American system is quite vague, the Inter-American Court provides “perhaps the most comprehensive legal regime on reparations developed in the human rights field”² and is the only international human rights body which has consistently ordered equitable remedies in conjunction with compensation.³ This reparations regime has evolved into a significant tool for the development of ESC rights, for though the Court has failed to comprehensively address ESC rights in its case law, it has repeatedly ordered ESC remedies in its sentences.

This Note argues that in this manner the Inter-American Court’s jurisprudence on ESC rights has turned the aforementioned Roman maxim on its head, as it has been characterized by remedies without rights, with the most significant progress for the protection of these rights found not within the Court’s sentences on the merits, but in its sentences regarding reparations. The objective of this Note is not to determine whether

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this is a positive or negative development in the Court's jurisprudence, but rather to demonstrate the existence of this pattern and examine its implications for the promotion of ESC rights within the Inter-American system. Part I of the Note discusses the existing framework for bringing ESC rights claims in the Inter-American system, as well as what distinguishes these claims from “traditional” civil and political (CP) rights claims. Part II details the various types of reparations available to petitioners. Part III provides a summary of the varied ESC remedies ordered by the Court, both in cases involving CP rights claims and in cases involving ESC rights claims. Part IV analyzes the significance of these ESC remedies within the Court’s jurisprudence. Finally, Part V explores the underlying causes of this trend and suggests possible strategies that ESC rights activists in the Americas should pursue in light of this pattern.

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

A. Economic, Social and Cultural Rights Defined

Economic, social and cultural (ESC) rights have been a part of international human rights law virtually since its creation. The Universal Declaration of Human Rights included provisions related to economic and social development, yet the rights enshrined in the Universal Declaration were later expanded upon in two International Covenants; the International Covenant on Civil and Political Rights and the International Covenant

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4 These are mainly detailed in the second half of the document and include the right to social security (Article 22), the right to work (Article 23), the right to rest and leisure (Article 24), the right to an adequate standard of living (Article 25), the right to education (Article 26) and the right to culture (Article 27), among others. Universal Declaration of Human Rights, U.N. Doc. A/RES/217 A (III) (Dec. 10. 1948) [hereinafter Universal Declaration].
on Economic, Social and Cultural Rights. The categorization of rights as ESC rights or CP rights is not formally elucidated in these documents, which define the rights as those “recognized in the present Covenant[s].” Thus, the listing of the rights serves to define the rights themselves.

In spite of the contemporary adoption of these two types of rights in international human rights documents CP rights have traditionally been given precedence in international human rights activism. There are various distinctions which might explain this phenomenon. One is the progressive nature of ESC rights, which is acknowledged in Article 2 of the ICESC. General Comment 3, which expands on the ICESC, defines state obligations with regards to ESC rights as that of ensuring “minimum essential levels of the rights”. Thus, in contrast to CP rights, which are viewed as absolute, ESC rights entail gradual obligations. This presents practical difficulties for the creation and enforcement of these rights, as the determination of what constitutes an adequate level of protection is subject to contrasting views. Another difference between ESC and CP

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6 ICESC, Preamble. Accord ICCPR, Preamble.

7 Similarly, for the purposes of this Note, reference to each category of rights will be based on their definition in the pertinent legal documents of the Inter-American system. One might argue that this classification of rights is arbitrary given that most human rights violations implicate both categories of rights, yet these standard definitions will be maintained in order to facilitate the analysis. Thus, the ESC rights referred to in the note are those codified in: Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36 1144 U.N.T.S. 123 [hereinafter American Convention]; Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Nov. 17, 1988, O.A.S.T.S. 69 [hereinafter San Salvador Protocol]; Organization of American States, American Declaration on the Rights and Duties of Man, Apr. 1948, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 [hereinafter American Declaration].


9 See ICESC, Preamble, supra note 5 (“[…] with a view to achieving progressively the full realization of the rights recognized in the present Covenant.”) (emphasis added).

rights which is often noted is the contrast between “negative” rights and “positive rights”. CP rights are said to be “negative” rights because they entail freedom from the state, whereas ESC rights are “positive rights” because they entail the freedom to acquire certain goods.\textsuperscript{11} Thus, CP rights are thought to be more easily enforced by a legal system, as it takes fewer resources for a government to refrain from infringing on an individual’s right than for it to provide the necessary resources to affirmatively guarantee a set of rights.\textsuperscript{12}

Yet, some activists are proposing a departure from these traditional negative/positive and immediate/progressive distinctions.\textsuperscript{13} They argue that, like ESC rights, CP rights require a certain level of state intervention and can be protected to varying degrees depending on a country’s resources. Thus, the aforementioned distinctions are actually a reflection of the unequal government focus on CP rights over ESC rights, rather than the inherent nature of the rights themselves.\textsuperscript{14} In spite of these criticisms, CP rights continue to be the subject matter of most human rights claims, not only within domestic courts\textsuperscript{15} but also before regional and international tribunals.\textsuperscript{16}

\textsuperscript{11} See David Kelley, A Life of One’s Own in Louis Henkin, et al., Human Rights in Context 1387(2d ed. 2009) at p. 1387.
\textsuperscript{12} Id. at 1392 (stating that the costs of protecting CP rights are incidental, whereas there are more substantial costs for the economic redistribution needed to assure ESC rights).
\textsuperscript{13} Id. at 1387-1391. (“Some political theorists have challenged the distinction between negative and positive obligations on the grounds that even CP rights require protection by the government in the form of police, courts, and other services. Liberty rights therefore impose on government the positive obligation to supply those services.”); See also Stephen Holmes and Cass Sunstein, The Costs of Rights: Why Liberty Depends on Taxes in Louis Henkin, et al., supra note 11 at 1260 (“Rights are costly because remedies are costly. Enforcement is expensive; therefore all legally enforced rights are necessarily positive rights.”)
\textsuperscript{14} See Tinta, supra note 8 at 433-34 (arguing that all human rights entail positive and negative obligations by states, and that the differences in their interpretation stem primarily from the fact that CP rights have been given more precise meaning because of their legal construction through jurisprudence).
\textsuperscript{15} A recent study regarding litigation of ESC rights shows a stark contrast in the number of cases based on ESC rights and CP rights in key developing countries including Brazil, India and South Africa. The authors found that in Brazil there were nearly 8,000 ESC rights cases per year, while in India there were only about 382 comparable cases. South Africa followed with less than 100. This meant that in Brazil there were only about 125 cases per million individuals, while in South Africa there were just over three
B. Regional Human Rights Framework

The Inter-American system is no exception to this global trend. The Inter-American Court’s founding document, the American Convention on Human Rights, contains a chapter on ESC rights which consists solely of one article, Article 26, which states that:

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

The Article does not list specific rights, instead referring to the standards set forth in the OAS Charter as the basis for interpreting these rights. These standards include the eradication of extreme poverty, the provision of social services as a basis for peace, and education as a tool for promoting values of justice and freedom, among others. However, these principles are presented in a very instrumental manner, with each right explicitly linked to the overarching goal of eliminating conflict between countries in the cases per ten million inhabitants. These averages were much lower than the average number of CP cases brought forth. Brinks, Daniel and Gauri, Varun, Rights-based Approaches to Social and Economic Rights in the Developing World: Law, Politics, and Impact 7-8 (Am. Pol. Sci. Ass’n, Working Paper, Preliminary Draft, 2007). This study is especially significant because these countries have incorporated provisions in their constitutions which facilitate the litigation of ESC rights, meaning their percentage of ESC cases is probably significantly higher than the international average.


American Convention, supra note 7.

Organization of American States, 119 U.N.T.S. 3, Dec. 13, 1951, [hereinafter OAS Charter], Article I(g). (“To eradicate extreme poverty, which constitutes an obstacle to the full democratic development of the peoples of the hemisphere.”).

Id. at Article II (j) (“Social justice and social security are bases of lasting peace.”).

Id. at Article (n) (“The education of peoples should be directed toward justice, freedom, and peace.”).
region. This shows a markedly state-centered justification for the preservation of these rights, which contrasts with the focus on the individual which characterizes the modern human rights movement.

The scope of Article 26 was later expanded with the adoption of the Additional Protocol to the American Convention in the Area of Economic, Social, and Cultural Rights (known as the San Salvador Protocol) which lays out the normative content of Article 26 in very comprehensive terms, though it limits the contentious jurisdiction of Inter-American organs to only two of these explicitly defined rights: education and unionization. The American Declaration on the Rights and Duties of Man, which predates the American Convention, also serves to define the scope of economic and social rights within the region, highlighting the rights to health, education, culture, work, leisure and social security.

Unlike the American Convention, the American Declaration was never intended to be a legally binding instrument. However, the Court has established that the fact that the Declaration is not a legally binding treaty does not lead to the conclusion that the

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22 The rights defined in the protocol include the right to work (Article 6), the right to satisfactory work conditions (Article 7), the right to unionize (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), cultural rights (Article 14), family rights (Article 15), children’s rights (Article 16), elderly rights (Article 17), and rights of the disabled (Article 18). *See* San Salvador Protocol, supra note 7.

23 *Id.* at Article 19.6 (“Any instance in which the rights established in paragraph a) of Article 8 and in Article 13 are violated by action directly attributable to a State Party to this Protocol may give rise, 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.”) *See also* Tara J. Melish, *Counter Rejoinder: Justice vs. Justiciability?: Normative Neutrality and Technical Precision, the Role of the Lawyer in Supranational Social Rights Litigation*, 39 N.Y.U. Int’l L. & Pol. 385, 395.

24 *See* American Declaration, *supra* note 7 at Articles XI, XII, XIII, XIV, XI and XVI, respectively.

document does not have legal effect. The Court still has the power to interpret its provisions, particularly when it may help to elucidate the meaning of the American Convention.26 Also, since some OAS member states have yet to ratify or accede to the Convention, the Declaration has become a default human rights instrument, as human rights are understood to be the rights set forth in the American Declaration in relation to States not parties to the Convention.27

C. ESC Claims at the Inter-American Court

1. Rationae Materiae Competence

As evidenced by the above documents, the Inter-American Court has broad jurisdiction to judge ESC claims due to its *rationae materiae* competence. Any articles of the American Convention and/or Declaration, as well as Articles 8 and 13 of the San Salvador Protocol,28 may serve as the basis for bringing a claim before the Court. Yet, determining the subject matter of a case may be complicated by the fact that the distinctions between ESC and CP rights are not exact, so that claimants often frame ESC rights claims in CP rights language in the hopes of a better outcome.29 However, the fact that few ESC claims are brought before the Court is not dispositive with regards to their judicial enforceability. In fact, there are many articles in the aforementioned documents,

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26 I/A Court of H.R., *Advisory Opinion OC-10/89*, 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, Requested by Colombia, July 14, 1989, paras. 36 and 47.
28 There is no explicit justification in the Protocol for reserving contentious jurisdiction to Articles 8 and 13. However, from a pragmatic point of view, the rights to education and unionization are the easiest to incorporate into the Court’s jurisprudence owing to the fact that they have already been recognized by state parties. (The right to unionization is a corollary to the CP right of freedom of expression enshrined in national constitutions, while all countries in the Americas provide some form of public education.)
29 Tara J. Melish, *Rethinking the “Less as More” Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas*, 39 N.Y.U. Int’L & Pol. 171, 194 (2006) (providing some examples of this strategy, such as housing issues framed in terms of right to property or due process, right to health cases litigated under the right to life or integrity, and school dismissal framed as an infringement of the right to political participation or non-discrimination.).
all pertaining to CP rights, which have rarely been litigated within the system.\textsuperscript{30} This is because during the first two decades of the Court’s existence, almost all cases were based on a handful of articles commonly violated by practices such as forced disappearance and arbitrary detention, as these crimes made up the majority of the Court’s docket.\textsuperscript{31}

2. Procedural Requirements

The Court has various procedural mechanisms which allow for ESC rights to be litigated. First, domestic remedies must be exhausted before a case is brought before the Inter-American Commission. This requirement is waived if the party has been denied access to remedies under domestic law or the domestic legislation of the State concerned does not afford protection for the right in question.\textsuperscript{32} Most American states do not have effective mechanisms for bringing forth ESC rights claims;\textsuperscript{33} therefore this exception will often apply in ESC cases. Secondly, though there are no collective actions in the Inter-American system, a petition before the Court may allege general and widespread human rights violations and may be brought on behalf of numerous victims.\textsuperscript{34} This procedural framework can serve to overcome another common assumption about ESC rights, which

\textsuperscript{30} Id. at 210. These include articles 3, 6, 9, 10, 12, 14, 15, 17, 18, 20, 23.

\textsuperscript{31} These oft-litigated articles include Article 4 (right to life), Article 5 (the right to bodily integrity) Article 7 (right to freedom), and Articles 8 and 25 (concerning judicial and due process guarantees) of the American Convention.

\textsuperscript{32} See American Convention, supra note 7 at Article 46.

\textsuperscript{33} This is a function of both economic and political factors. See U.N. Econ. & Soc. Council [ECOSOC], Commission on Human Rights, Working Group on the Right to Development, \textit{Review of Progress and Obstacles in the Promotion, Implementation, Operationalization and Enjoyment of the Right to Development} (Feb. 17, 2004) at 17. (finding that the liberal economic model known as the “Washington Consensus” which was used as a development framework throughout Latin America in the past decade was very limited in both the development goals that it addressed and its tools for achieving these goals); and Ricardo Gil Lavedra, \textit{Un Vistazo a las Reformas Constitucionales en Lationamerica}, [A Glance at Constitutional Reforms in Latin America] (author’s translation), available at http://islandia.law.yale.edu/sela/avedras.pdf (finding that though social rights have been enshrined in the constitutions of countries such as Brazil, Argentina, Colombia, Paraguay, Peru, and most recently, Venezuela, actual ESC litigation is not possible in these countries, with the notable exception of Brazil).

is that since ESC rights are more collective in nature than CP rights, ESC rights are less apt for litigation.

This issue was discussed in the *Five Pensioners* case, the first Article 26 claim before the Court, where the Court stated that ESC rights had “both an individual and a collective nature”. In *Five Pensioners*, the Court concluded that the pension rights claimed by the petitioners in the case should be measured “bearing in mind the imperatives of social equity [and] the development of these rights by the rest of the population”, and found that since similar rights were not guaranteed to others, the claim should be rejected. This stance is highly problematic, for it seems to question the very validity of the rights at issue. The Court could have used this individualized claim to enforce pension rights at a broader level, instead of denying these rights to both the individual litigants and the rest of the population.

In his concurring opinion in the case, Judge Ventura Robles reacted to the Court’s reasoning by asserting that:

“[… ] this individual dimension also translates into individual ownership . . . of a corresponding right that may be shared, with other members of a population . . . [T]he issue is not merely reduced to the existence of a State duty that should orient its tasks as established by this obligation, considering individuals as merely witnesses waiting for the State to comply with its obligations under the Convention. […] The existence of an individual dimension to the rights supports the so-called ‘justiciable nature’ of the latter.”

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36 Id.
37 Id. at para. 148 (“This Court considers that their progressive development, about which the United Nations Committee on Economic, Social and Cultural Rights has already ruled, should be measured in function of 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 not in function of the circumstances of a very limited group of pensioners, who do not necessarily represent the prevailing situation. […] It is evident that this is what is occurring in the instant case; therefore, the Court considers that it is in order to reject the request to rule on the progressive development of economic, social and cultural rights in Peru, in the context of this case.”).
38 Concurring Opinion of Judge García Ramírez in *Five Pensioners*, supra note 25 at para. 3.
Another procedural difficulty for litigating ESC rights is that litigation attempts to provide a particularized remedy to a discrete plaintiff or class of plaintiffs, while a general omission by the state may be difficult to link to a particular victim. However, the Court itself has awarded collective reparations in various cases involving omissions with respect to CP rights, particularly in the areas of employment and indigenous rights. In these cases, the Court found that a state’s failure to act when it had a duty to do so constituted a violation for which all those affected were entitled to gain redress.

In fact, much of CP rights litigation shares this attribute of being at once collective and individual, as it seeks to prove an individual harm as a way to highlight a broader injustice which goes beyond that individual. This strategy, often referred to as “cause lawyering” has been employed successfully in CP rights cases in United States courts and is currently being used in various other countries. In CP rights litigation of this kind, it would be problematic for a Court to argue, for example, that a man claiming a violation of the right to a fair trial should have his claim rejected because the rest of the population is not also on trial. Yet this seems to be what the court is suggesting in Five Pensioners, by implying that unless all citizens are similarly situated than the right cannot

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42 See, e.g. AUSTIN SARAT AND STUART SCHEINGOLD, CAUSE LAWYERING IN A GLOBAL ERA 2001 (discussing the use of this strategy in Ghana, Israel, U.K., South Africa and Chile as well as the U.S.).
be granted to individual petitioners. The perverse outcome of this position would be that petitioners would have to wait for the state to willingly comply with its legal obligations on a national level before they could bring an individual case before the court, a situation which is clearly contrary to the notion of state accountability.

3. State Duties

The American Convention clearly establishes that States must prevent, investigate and punish any violation of the rights recognized by the Convention and does not make any distinction between ESC rights and CP rights in relation to this obligation.43 Furthermore, Article 1 of the Convention describes this duty as that of organizing the governmental apparatus and the structure through which public power is exercised in order to ensure that the state is capable of judicially ensuring the free and full enjoyment of human rights.44 Based on this obligation, the Court has requested that states modify their constitutions, as well as repeal laws that are not compatible with the Convention or that impede the exercise of the rights enshrined therein.45

Thus, States have a duty to uphold ESC rights and the Court has the power to ensure compliance with this duty. This was affirmed in a recent case before the court, Acevedo Buendia v. Peru. After briefly discussing the travaux préparatoires leading up to the adoption of Article 26, the Court established that it is subject to the general state

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44 See American Convention, supra note 7 at Article 1.
obligations codified in Articles 1.1 and 2. The Court also emphasized the equality of ESC rights and CP rights, stating that they should be “integrally considered as human rights, without any hierarchy between them.”

Thus, it is apparent from the Court’s own admissions, as well as from the procedural and substantive requirements for litigation before the Inter-American Court, that ESC rights are justiciable within the Inter-American system. This is an essential assumption for the purposes of the Note, as it shows that the system has the tools needed to create an enforceable right or “jus”: ESC rights are codified in relevant legal instruments, petitioners are procedurally able to bring ESC claims before the Court, and states have an obligation to remedy violations of these rights. However, as will be shown in Section III, the Court has repeatedly failed to enforce ESC rights in its jurisprudence. Instead, it has focused on granting broad ESC remedies as part of its reparations regime.

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47 Id.

48 At first glance, it might seem that not all ESC rights are equally justiciable. For example, as mentioned in Section I (B), supra, Articles 8 and 13 are the only explicitly justiciable rights in the San Salvador Protocol. However, based on the Courts’ advisory opinion on the American Declaration (supra note 26) and the Protocol’s stated purpose as that of elucidating the meaning of Article 26, it seems that all rights contained in both the Declaration and the Protocol could be incorporated via Article 26 and fall under the Court’s contentious jurisdiction. Past cases brought under Article 26 which involved issues such as the right to health and the right to a pension (see Section III, infra) support this view, as both the Commission and the Court accepted these cases.
II. REPARATIONS IN THE INTER-AMERICAN SYSTEM

A. Categories of Reparations

Under international law, the term “reparations” may encompass restitution, financial compensation, rehabilitation, and satisfaction. The Inter-American Court follows this general pattern of categorization of reparations. Thus, the first concept used by the Court is that of *restituio in integrum*, which entails putting the victim back in the position they were in before the violation occurred. This may include remedies for the victim’s “*plan de vida*” (life project), which refers to what the victim would have achieved if their life plan had not been curtailed by the human rights violation. This often includes lost wages, among other things. This type of reparation can only occur to the extent that it is materially and physically possible.

The second category of reparations is compensation. The Court has stated that compensation cannot imply “either enrichment or impoverishment by the victims”. Compensation, which is of an economic nature, can be awarded for various types of harm, be they physical, material or moral. This category of reparations is especially significant for ESC rights, because apart from pecuniary damages it may include the reallocation of economic resources for housing, education, health care or employment.

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The third category of reparations is satisfaction. This involves measures which provide a representative or symbolic reparation, aimed at changing the societal or community structures that gave rise to the offense. Satisfaction goes beyond strict monetary compensation, as this type of remedy normally involves non-material harms. The Court has been very proactive in this type of reparation, often calling for the commemoration of victims through educational programs, public ceremonies, or permanent monuments. This category of reparations has strong ties to cultural rights.

The final category of reparations is measures of non-repetition. These types of measures usually involve legislative or judicial reforms within nation states aimed at preventing further violations. The UN Basic Guidelines on Reparations also include a fifth category, rehabilitation, which explicitly calls for the provision of medical and psychological care as well as legal and social services to the victims. Though the Court has ordered reparations involving medical and psychological care, it has not used the term “rehabilitation” to justify these reparations.

B. Emphasis on Reparation Sentences

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54 See Rojas, supra note 51 at 111.
55 Id. at 112.
56 See Section III infra.
57 See Rojas, supra note 51 at 120.
59 See, Section III infra.
Overall, the Inter-American Court has a broad margin for awarding reparations, particularly in comparison to the European Court of Human Rights. Both Courts have inherent and treaty-based powers to award non-monetary remedies, yet the European Court has interpreted its powers narrowly, generally framing its awarding of reparations as “just satisfaction.” Another crucial difference is that the European Court allows member states to determine suitable reparations at the domestic level, whereas the Inter-American Court does not. In addition to having the authority to order wide-ranging remedies, the Inter-American Court also retains jurisdiction over its cases and supervises state compliance with reparation sentences. As a result, the Inter-American Court has a much larger role in defining the scope of the remedies that states must implement.

To date, the Court has reserved most decisions on reparations for a subsequent phase of proceedings. In these cases, the Court has allowed the Inter-American Commission and the State Party a period of six months following the judgment on the merits to agree on reparations. The Court always takes great pains to detail the reparations it awards and how these should be put into place, even with regards to non-monetary reparations. In contrast, the European Court of Human Rights, though it also

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60 See American Convention, supra note 7 at Article 63, (setting out the Court’s reparations regime and stating that the Court has the power to ensure “if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.”) (emphasis added) Thus, though it explicitly refers to fair compensation, it also leaves a lot of leeway in terms of how the violation may be remedied. See also Rojas, supra note 51 at 125. (“It is clear that the jurisprudence of the Court has established broader and more adequate criteria in terms of reparations for human rights violations than those established by the Draft Articles.”).

61 Cf. Article 41 of the European Convention, supra note 16 (“If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”) (emphasis added).

62 Id. Article 41 shows the ECHR’s limited reach in awarding reparations, as it only intervenes to ensure just satisfaction after the Member State’s capacity to award a just remedy is found to be insufficient.

63 Id.

64 See Antkowiak, supra note 3 at 365.

65 See Rojas, supra note 51 at 114.
awards non-pecuniary reparations, rarely explains its reasons for granting these remedies.  

The Court usually orders a series of clear, specific steps and then observes whether states in fact comply with those measures. The Court has the authority to supervise cases after the judgment has been rendered until there is complete compliance. However, the Court suffers from endemic problems of non-compliance or incomplete compliance with reparation orders. In spite of close monitoring by the Court, the majority of cases (76%) have resulted in only partial compliance, with alarming rates of noncompliance (17%) and very rare instances of full compliance (7%).

Yet, beyond achieving individual compliance, part of the rationale behind the Inter-American Court’s lengthy reparation sentences is the creation of a human rights doctrine that will help the states in the hemisphere design effective policy initiatives which take into account the relief awarded by the Court. Even though other states in the region do not have to comply with reparations awarded against a specific state party, the Court often cites to its own jurisprudence in future cases. Thus, other states are aware that past reparation sentences might have an influence in determining the outcome of a similar case brought against them in the system. Even in the absence of full compliance, such cases are costly for states. Thus, detailed reparation sentences serve to reiterate states’ general responsibility and give them an incentive to prevent future violations.

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67 See Darren Hawkins and Wade Jacoby, *Partial Compliance: A Comparison of the European and Inter-American American Courts for Human Rights* 5 (Paper prepared for delivery at the Annual Meeting of the Am. Pol. Sci. Ass’n, 2008) The ECHR has a much higher compliance rate, but this may be attributed to the fact that states are able to decide the method of compliance, and thus logically more likely to fulfill their own standards.
68 See Rojas, *supra* note 51 at 126.
III. SUMMARY OF ESC REMEDIES

A. Cases before the Inter-American Commission

According to the procedural rules of the system, in order to reach the Court, petitioners must first present their claims before the Inter-American Commission. Until 2001, the Commission exercised full discretionary control over whether to submit matters to the Court and only forwarded a relatively small number of cases to the Court. Thus, the Commission’s response to ESC claims is very useful for analyzing both the volume and nature of ESC cases which are brought before the Court. Interestingly, the Commission’s treatment of ESC cases has been somewhat similar to the Court’s, with most ESC claims being rejected on the merits. Yet, some ESC cases have been settled, often resulting in comprehensive remedies in the absence of judicial vindication of the rights at issue.

In the years 2001 to 2005, various cases were declared admissible by the Commission based on Article 26 claims. These included three main categories: right to health, right to social security and right to labor claims. Yet only a handful of Article

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69 See American Convention, supra note 7 at Articles 44 to 51.
70 As of 2001, the Commission’s default procedure is to submit the case to the Court, which has resulted in a marked increase in the number of cases before the Court. See James L. Cavallaro and Stephanie E. Brewer, Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court, 102 Am. J. Int’l L. 768, 780 (2008), citing Inter-American Court of Human Rights, Annual Report 2007, available at http://www.corteidh.or.cr.
26 cases reached the Court during this period. A number of Article 26 cases have also been declared inadmissible by the Commission in the past four years. These included a broader range of ESC rights such as social benefits, labor rights, medical malpractice, and the rights of disabled people.

Still, significant ESC reparations have resulted from cases involving reproductive rights before the Commission which have not been litigated, but instead settled by the parties. In the case of Mamérita Mestanza v. Peru, the government was obliged to provide education, medical attention and housing to the family of a victim of forced sterilization. In the case of Paula Ramírez v. México, a raped fourteen year old girl was coerced into refusing abortion procedures. In the settlement which ensued, the state agreed to pay the victim’s medical expenses, as well as full health, education and housing costs for the victim’s son until he reached the age of eighteen or until he finished his studies, including, if applicable, university studies.

Apart from serving as a forum for litigation, the Commission is also charged with playing a role in advocacy throughout the region and has broad authority “to promote respect for and defense of human rights.” In 2007, the Commission published a special

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76 See PETITION NO. 4416-02. INADMISSIBILITY. LUIS EDGAR VERA FLORES v. Peru. (2005);
77 See PETITION 860-01. INADMISSIBILITY. SEGUNDO RAFAEL CARTAGENA v. ECUADOR (2007).
78 See PETITION 625-01. INADMISSIBILITY. LUIS FERNANDO ASTORGA ET AL v. COSTA RICA (2007.)
80 REPORT NO. 21/07. PETITION 161-02. FRIENDLY SETTLEMENT. PAULINA DEL CARMEN RAMÍREZ JACINTO. MEXICO. March 9, 2007. para. 16.
81 See American Convention, supra note 7 at Article 41.
report regarding access to justice as a means of enforcing social, economic and cultural rights.\textsuperscript{82} It has also published a report focusing on access to justice for women victims of violence.\textsuperscript{83} However, both of these reports focused mainly on procedural access to justice issues, analyzing the dimensions of this CP right without significantly discussing the nature or relevance of the ESC claims for which the victims were trying to access the judicial system.

B. Cases before the Inter-American Court

The first category of cases discussed below is CP rights cases where the Court awarded reparations of an ESC nature. ESC remedies resulting from CP rights cases are especially significant because all the judgments during the Court’s first twenty years involved gross human rights violations causing death or other physical harm which implicated basic CP rights.\textsuperscript{84} The second category of cases discussed below is those where petitioners based their claims directly on articles related to ESC rights. The pattern evidenced by these latter cases is that the Court has repeatedly failed to provide an adequate discussion on the meaning and application of those rights on which the claims were based. However, in both CP and ESC rights cases, the Court has often awarded broad ESC remedies. For purposes of the analysis, I have divided these ESC remedies into four main categories; the right to health, the right to education, employment rights and cultural rights.

1. The Right to Health


\textsuperscript{84} See Melish, \textit{Less as More}, supra note 29 at 225.
Perhaps the most common ESC remedy awarded in the Court’s jurisprudence has been the provision of medical services. The right to health is codified in Article XI of the American Declaration. The Court’s basis for awarding medical services has been that victims and family members have suffered a detriment to their health as a result of the trauma they have endured. Thus, the awards usually include the provision of psychological treatment as part of the remedy. The Court explained this rationale in the *Ticona Estrada v. Bolivia* case, stating that:

“The Court deems, as it has done in other cases, that it is necessary to provide a means of reparation which seeks to reduce the suffering that the facts of the present case have caused the victims, seeing that as has been established [that] family members have shown effects on their psychological state and morale because of the disappearance of their loved one.”

The Court reiterated this justification in the *19 Tradesmen v. Colombia* case, asserting that: “it is necessary to order a measure designed to reduce the physical and psychological sufferings of the next of kin resulting from the violations”. Apart from psychological treatment, the Court has also awarded the provision of medical services in relation to physical injuries established to have been caused by the human rights violations.

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85 The right to health is found in Article 10 of the San Salvador Protocol, as well as Article XI of the American Declaration.  
violation. The language of many of these cases is quite broad, both in its definition of the injury endured by the victims and in the scope of medical services provided. The Court has found that the emotional distress caused by the violations can impair not just the life project of the victim itself, but of their relatives as well. In line with this reasoning, in the *Molina Thiessen v. Guatemala* case the Court defined the notion of “family assets” to include health services.

Various cases state that the medical services should be provided through public health systems, while others give the state the option of choosing where and how these services will be provided. In cases where the victims were no longer in the country, the Court has required the State to contribute a lump sum so that their medical needs may be

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92 See *García-Prieto*, supra note 42 at para. 200 (stating that medical treatment should be awarded through the state’s public health services, free of charge); I/A Court H.R., *Case of Cantoral-Huamani and García-Santa Cruz v. Peru*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 10, 2007. Series C No. 167, para. 200 (“the State has the obligation to provide, immediately, free of charge, and through its specialized health care institutions, the medical and psychological treatment required”); *Vargas-Areco*, supra note 90 at para. 160 (finding that treatment should be provided through public health institutions); I/A Court H.R., *Case of the Pueblo Bello Massacre v. Colombia*. Merits, Reparations and Costs. Judgment of January 31, 2006. Series C No. 140, para. 274 (requiring that services be provided through the state’s national health service).

93 See I/A Court H.R., *Case of Baldeón-García v. Peru*. Merits, Reparations and Costs. Judgment of April 06, 2006. Series C No. 147, para. 207 (finding that the state should provide the service free of charge at the public health facility of its choice).
met abroad. In addition to emphasizing the need for the victims' consent for providing medical treatment, the Court has often made reference to culturally sensitive health services. The Court has also allowed the involvement of non-governmental groups, as well as specialized governmental institutions, both in assessing the needs of the victims and in providing these services.

Furthermore, many cases go beyond describing a specific injury which is directly attributable to the violation, and refer to a wider range of medical services which should be offered to the victim. For example, in the Barrios Altos v. Peru case, the victims were awarded free services for out-patient consultation, specialized care, diagnostic procedures, hospitalization, surgery, and even childbirth, while in the 19 Tradesmen case the Court emphasized the need to take into consideration the victim’s struggles with drug addiction and alcoholism. The provision of medical services is never given temporal limits, and in some cases, the Court has explicitly established that the state's obligation will endure for the life of the beneficiaries. These remedies were all awarded in cases based on violations of CP rights.

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95 See I/A Court H.R., Case of Escué-Zapata v. Colombia. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 165, para. 172 (finding that treatment must take into account the specific conditions and needs of each individual, especially their customs and traditions).

96 See I/A Court H.R., Case of Serrano-Cruz Sisters v. El Salvador. Merits, Reparations and Costs. Judgment of March 1, 2005. Series C No. 120, para. 198 (where the Court considered it desirable that a specialized non-governmental institution take part in the medical evaluation and treatment); I/A Court H.R., Case of Durand and Ugarte v. Peru. Reparations and Costs. Judgment of December 3, 2001. Series C No. 89, para. 37 (finding that the State should enroll the beneficiaries in any relevant programs run by the Ministry for the Advancement of Women and Human Development).


98 See 19 Tradesmen, supra note 87 at para. 278.

99 See Durand and Ugarte, supra note 96 at para. 36.
The Court has also indirectly addressed the right to health in its CP jurisprudence by adopting an expansive definition of the right to life codified in Article 4 of the American Convention. In Villagran-Morales v. Guatemala, the court imposed a positive obligation on states to protect the right to life and stated that the right entails that individuals “will not be prevented from having access to the conditions that guarantee a dignified existence.” The Court understood this obligation to include taking “all possible measures” to reduce infant mortality and increase life expectancy. The 2006 case of Ximenes-Lopez v. Brazil further expanded the positive obligation to protect the right to life to an affirmative duty to regulate healthcare systems. The Court found that the state had failed to take action within the scope of its authority when it failed to address a pattern of abuse in mental health hospitals, as “States are responsible for regulating and supervising … the performance of public quality health care services so that they may deter any threat to the right to life and the physical integrity of the individuals undergoing medical treatment.” It is notable that even though health services were specifically mentioned, the Court framed the matter as an Article 4 violation, and made no mention of a state obligation to provide health services.

In a more recent case, Albán Cornejo v. Ecuador, the Court had to deal directly with an alleged violation of the right to health, as the petitioner brought an Article 26 claim based on allegations of medical malpractice. In Cornejo, the Court found the state responsible for violations of the rights of judicial protection, bodily integrity, and the

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101 Id.

right to life, to the detriment of the alleged victims.\textsuperscript{103} The Court made significant expressions on the state’s duty to provide for the right to health, finding that States are responsible for the regulation and provision of medical services in order to ensure effective protection of said rights to life and bodily integrity. The Court also quoted Article 10 of the San Salvador Protocol as a basis for the notion that health is a public good.\textsuperscript{104} In spite of this reasoning, the Court ultimately failed to find an Article 26 violation.\textsuperscript{105} In its reparations sentence, it ordered the state to implement an education and training program for health care professionals and carry out a “know your rights campaign” at hospitals in order to provide information about malpractice.\textsuperscript{106}

2. The Right to Education

Though the provision of health services often stems directly from the injury caused by a human rights violation, the Court has also provided victims with other services which do not have such a direct causal link to the injury. Prime among these is education. The right to education is codified in Article XII of the American Declaration, as well as Article 13 of the San Salvador Protocol. One of the first cases to feature this type of remedy was \textit{Aloeboetoe v. Suriname}, where the Court ordered the state to reopen a school and staff it with teaching and administrative personnel.\textsuperscript{107} The school was located in an area inhabited by the Saramaka tribe, and several of its members had been the victims of extra-judicial killing by government officials.\textsuperscript{108} The outcome in this case was influenced by the fact that the killings were found to affect the entire Saramaka

\textsuperscript{104} Id. at para. 117.
\textsuperscript{105} Id. at para. 176.
\textsuperscript{106} Id.
\textsuperscript{108} Id, at pars. 4 - 5.
community, including the children of the tribe. The remedies were thus meant to ensure the children's future well-being.\textsuperscript{109}

Several cases have also included the provision of scholarships or other types of education aid for the victims,\textsuperscript{110} while others have required that the state honor the victims by creating a scholarship or similar educational program in their name.\textsuperscript{111} As with the right to health, the Court has said that states may use the institutions and non-governmental organizations at their disposal to provide these benefits.\textsuperscript{112} The rationale behind these types of reparations is similar to that for granting medical reparations, which is

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\item \textsuperscript{109} Id. at para. 96 (“The compensation fixed for the victims’ heirs includes an amount that will enable the minor children to continue their education until they reach a certain age. Nevertheless, these goals will not be met merely by granting compensatory damages; it is also essential that the children be offered a school where they can receive adequate education and basic medical attention. At the present time, this is not available in several of the Saramaka villages.”)
\item \textsuperscript{110} See Huamani, supra note 92 at paras. 12 and 194 (granting a scholarship for the victim’s children and other family members which will cover their education all the way to technical or university studies); Escué Zapata, supra note 95 at para. 170 (finding that the state should pay for a university career in a Colombian public university chosen between the victim and the state, as well as cover all related expenses, including transportation, academic materials and lodging; the Court also emphasized the importance of transportation as a means for the victim to keep ties with the community); García Asto, supra note 88 at para. 281 (finding that the court should grant the victim’s relatives a scholarship to allow them to complete their studies and receive professional training subsequent to university graduation); I/A Court H.R., Case of Benavides-Cevallos v. Ecuador. Merits, Reparations and Costs. Judgment of June 19, 1998. Series C No. 38, Operative Paragraph 6 (finding that the state should provide the victim with a fellowship to pursue university studies, as well as to cover living expenses during this period.); I/A Court H.R., Case of the Gómez-Paquiyauri Brothers v. Peru. Merits, Reparations and Costs. Judgment of July 8, 2004. Series C No. 11, para. 237 (stating that the provision of a scholarship, including educational materials, is a form of satisfaction).
\item \textsuperscript{111} See Myrna Mack-Chang, supra note 87 at para. 285 (deciding that the state must grant the complete cost of a year of study in anthropology at a prestigious national university in name of the victim and that the scholarship must be granted annually). I/A Court H.R., Case of Huilca-Tecse v. Peru. Merits, Reparations and Costs. Judgment of March 3, 2005. Series C No. 121 (requiring the creation of a university course on human rights as a guarantee of non-repetition) Molina Thiessen, supra note 91 (establishing that an educational center should be named for the victims). I/A Court H.R., Case of the “Street Children” (Villagrán-Morales et al.) v. Guatemala. Reparations and Costs. Judgment of May 26, 2001. Series C No. 77 (ordering Guatemala to name a school in memory of five adolescents killed by state security forces); Paquiyauri Brothers, para. 236 (finding that a school in the brothers’ province should be named in their honor); I/A Court H.R., Case of Cantoral-Benavides v. Peru. Reparations and Costs. Judgment of December 3, 2001. Series C No. 88, para. 80 (ordering the state to provide the victim with a fellowship for advanced or university studies, including living expenses).
\item \textsuperscript{112} See Barrios Altos, supra note 94 at para. 43 (finding that the state must provide scholarships for the beneficiaries through the National Scholarship Institute or the Ministry of Education, while textbooks can be provided by national textbook publishers).
\end{itemize}
that the victim’s family’s life project has been curtailed by the violation.\textsuperscript{113} Yet, there is an additional element to the granting of educational reparations. As expressed by Judge Trindade, “it will only be possible to meet effectively many of the national and international challenges to human rights protection through education.”\textsuperscript{114} Trindade has stated that these measures are both a form of reparation and a prevention measure. The Court has reasoned that providing education for future generations is a way of remediying the negative changes brought about by the human rights violation,\textsuperscript{115} even though in most cases the victims did not have comparable educational opportunities before the violation occurred.

However, the Court has yet to fully address the right to education in its discussions on the merits of a case. In the \textit{Yean y Bosico} case, the petitioners brought forth an Article 26 claim because children of Haitian descent in the Dominican Republic were being denied the right to enroll in school. Though the Court admitted that education was one of the rights found in Article 26, the Court focused on a violation of the right to nationality instead.\textsuperscript{116} In another case involving the right to education, \textit{Reeducation Institute}, the petitioners also brought an Article 26 claim.\textsuperscript{117} In the judgment, the Court analyzed the petitioners’ claims with regard to Articles 1, 4, 5 and 19 of the American

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\textsuperscript{113} See \textit{I/A Court H.R., Case of Gómez-Palomino v. Peru}. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 136, para. 144 (linking the disappearance of Mr. Gómez-Palomino, to the fact that his family members quit their studies, as this was due not only to financial reasons, but also to emotional factors such as depression).
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\textsuperscript{114} Concurring opinion of Judge Cançado Trindade in \textit{I/A Court H.R., Case of Blanco-Romero et al v. Venezuela}. Merits, Reparations and Costs. Judgment of November 28, 2005. Series C No. 138, para. 17. See Gomez-Palomino, supra note 113 at para. 146 (finding that human rights violations leave lingering after-effects on the victims and next of kin directly harmed and giving the beneficiaries the option of assigning the educational benefits awarded as part of their reparation to their next of kin).
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\textsuperscript{115} See \textit{Gomez-Palomino}, supra note 113 at para. 146 (finding that human rights violations leave lingering after-effects on the victims and next of kin directly harmed and giving the beneficiaries the option of assigning the educational benefits awarded as part of their reparation to their next of kin).
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\textsuperscript{117} \textit{I/A Court H.R., Case of the "Juvenile Reeducation Institute" v. Paraguay}. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 2, 2004 at paras. 118 and 252.
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Convention. Interestingly, they also addressed Article 13 of the San Salvador Protocol. As mentioned before, the right to education contained in this article is one of only two rights in the Protocol which were deemed to be justiciable before the Court. The Court concluded that in light of its analysis of Article 13, addressing the violation of Article 26 would be redundant. However, in traditional CP cases such as those involving forced disappearance, the Court has simultaneously found states guilty of a violation of the American Convention and of another human rights instrument, even where both documents codified the same rights. Interestingly, though the Court did not analyze the Article 26 claim in Reeducation Institute, it called for vocational guidance and special education programs for the inmates at the center as reparations.

3. Labor Rights

Employment benefits are another area in which the Court has awarded varied remedies. The right to employment is found in Article XIV of the American Declaration, as well as Article 6 of the San Salvador Protocol. In the Loayaza-Tamayo v. Peru case, the Court focused on employment reparations as part of the victim’s life project, stating that the victim should be re-instated to a teaching position at an equal salary to the one she was receiving for her services at the time of her disappearance. The Court also awarded Ms. Tamayo the right to a pension which included money owed for the period...

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118 Id. at para. 255.
119 See supra note 23.
120 See, e.g. Ticona Estrada, supra note 86 (finding a violation of Articles 8(1) and 25(1) of the American Convention as well as Articles I(d) and III of the Inter-American Convention on Forced Disappearance) and I/A Court H.R., Case of Tiu-Tojin v. Guatemala. Merits, Reparations and Costs. Judgment of November 26, 2008. Series C No. 190, para. 136 (“[T]he State is responsible for the violation of the rights enshrined in Articles 4(1); 5(1) and 5(2); 7(1) and 7(2); 8(1) and 25(1) of the American Convention [. . .] and Article I of the Inter-American Convention on Forced Disappearance.”).
121 See Juvenile Reeducation Institute, supra note 117 Operative Paragraphs 12 and 13.
122 See Loayaza Tamayo, supra note 50 at Operative Paragraph 1.
that had transpired since the time of her detention.\textsuperscript{123} Similarly, in the \textit{Ricardo Baena} case, the Court required the state to either reinstate 270 laid off workers or provide equal employment alternatives for them, as well as pension or retirement retribution.\textsuperscript{124} These remedies were awarded even though the case was brought under Article 8 and 25 claims,\textsuperscript{125} and did not directly address employment rights.

The \textit{Five Pensioners} case, an employment case decided in 2003, was the first Court case to address an Article 26 claim. In his concurring opinion in the case, Judge Garcia Ramirez commented on the progressive development of ESC rights, stating that the Court would be able to examine the meaning of ESC rights in the future and stressing that they “do not rank lower than civil and political rights”\textsuperscript{126} In spite of this optimism, the Court failed to find an Article 26 violation, instead finding violations of various CP rights, such as the right to property and judicial protection.\textsuperscript{127} Furthermore, the reparations given by the Court consisted solely of pecuniary damages.\textsuperscript{128}

In another case related to labor rights, \textit{Dismissed Congressional Employees v. Perú}, the Commission failed to bring forth an Article 26 claim, though the alleged victims themselves had insisted on this being part of their petition. This discrepancy arose from a provision which allows the alleged victims to invoke different rights from those included in the complaint filed by the Commission as long as they are based on the same facts.\textsuperscript{129}

\textsuperscript{123} Id, Operative Paragraph 2.
\textsuperscript{125} Which involve access to justice and the right to a fair trial.
\textsuperscript{126} Concurring opinion of Judge Sergio García Ramírez in \textit{Five Pensioners}, supra note 35.
\textsuperscript{127} \textit{See Five Pensioners}, supra note 35 at para. 87.
\textsuperscript{128} The Court justified this remedy based on a right to property claim which was also included in the case. Id at para. 187.
\textsuperscript{129} \textit{Cf. Gómez-Palomino}, supra note 79 at para. 59; I/A Court H.R., \textit{Case of Palamara-Iribarne v. Chile}. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 135, para. 120; I/A
The petitioners asserted that the state’s failure to re-institute the dismissed employees constituted a violation of their labor and social security rights and also violated the state’s progressive development obligation. The Court responded to this argument by declaring that the purpose of the judgment was not to determine the arbitrary nature of the dismissal itself, but rather the lack of procedural safeguards enabling the petitioners to bring a claim against the government regarding the dismissal. The Court then concluded that there had been a violation of the right to judicial protection but answered the Article 26 claim ambivalently by deciding not to rule on whether the arbitrary dismissal alleged by the petitioners constituted an Article 26 violation.

In the case of *Acevedo Jaramillo v. Peru*, the Court once again deferred an analysis of an alleged violation of Article 26 in relation to labor rights, stating that it had already addressed the consequences of the state’s failure to comply with the requirements of its own internal law. Still, when discussing reparations, the Court found that the state had an obligation to provide pensions for the victims, and that these should be based on their age, health condition, and other circumstances prescribed in the state’s domestic laws.

In its most recent case related to labor rights, *Acevedo Buendía v. Perú*, the Court was again faced with an Article 26 claim. In this instance, the petitioners specifically claimed a violation of the right to social security. The Court took this opportunity to discuss the

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131 Id. at para. 136.
132 Id. at para. 150. (“Since they did not have effective access to judicial guarantees and judicial protection for the competent authorities to take the pertinent decisions, the victims found themselves in a situation of defenselessness and uncertainty with regard to their future employment, which led them to seek justice and may have made it difficult for them to improve their living conditions.”).
134 Id. at Operative Paragraph 8.
meaning of Article 26 in its most comprehensive manner to date. The Court emphasized the progressive nature of ESC rights and reiterated that their “retroactivity is justiciable.” The Court found that though articles 21 and 25 had been violated in this case, there was no violation of Article 26 because “what [was] being analyzed [was] not a measure adopted by states which hindered the progressive development of the right to a pension, but rather a lack of state compliance with existing judicial norms.” Thus, the Court seems to be establishing that Article 26 claims can only be successful when there are clear retroactive measures taken by the state; whereas in cases involving omissions by the state the Court will not find an Article 26 violation. This position seems to rely on the classic positive/negative distinction between CP and ESC rights, and is contradictory to the Court’s statement, made earlier in the same case, that “there is no hierarchy” between ESC and CP rights.

4. Cultural Rights

Cultural rights are codified in both Article XIII of the American Declaration and Article 14 of the San Salvador Protocol. In various cases involving CP violations, the Court has ordered diverse types of commemoration for the victims of human rights violations which have symbolic aspects related to the right to participate in the cultural life of the community. Examples include the naming of public places in honor of the victims and public acts of acknowledgement by the state of the violations that

135 See Acevedo Buendia, supra note 46 at para. 106.
136 Id.
137 Id.
138 Discussed in Section I, supra.
139 See supra note 46.
140 See Ticona-Estrada, supra note 86 (requiring the naming of a public plaza after Mr. Ticona); I/A Court H.R., Case of Godínez-Cruz v. Honduras, Reparations and Costs. Judgment of July 21, 1989, Series C No. 8 (finding that a street, park, school or hospital should be named for the victims of the disappearance); Vargas-Areco, supra note 93 at Operative Paragraph 10 (finding that the state should
occurred. The Court has stressed the importance of having these commemorations in highly visible public places so that they may serve as a tool to educate the wider population about the human rights violation.

The Court has been especially proactive regarding the protection of culture in cases affecting indigenous communities. In the *Plan de Sánchez Massacre v. Guatemala* case, which involved the murder of hundreds at the site of an indigenous market, the Court emphasized the loss of cultural values caused by the deaths, as the slain individuals had the responsibility of orally transmitting the group's traditions. The Court qualified this consequence as a moral harm which needed to be remedied. In its petition, the Commission had requested collective reparations and the Court considered that “a significant component of the remedy should be reparations to the communities as a place a plaque in memory of victim); I/A Court H.R., *Case of Servellón-García et al. v. Honduras*. Merits, Reparations and Costs. Judgment of September 21, 2006. Series C No. 152, para. 199, (finding that the state must place a plaque on a street or plaza with the names of the victims); I/A Court H.R., *Case of Baldeón-García v. Peru*. Merits, Reparations and Costs. Judgment of April 06, 2006. Series C No. 147, Operative paragraph 11 (requiring that the state name a street, park or school in name of the victim); *Huilca Tecse, supra* note 77, Operative Paragraph 1(f), (requiring that the state erect a bust in memory of the victim); I/A Court H.R., *Case of the Moiwana Community v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 15, 2005. Series C No. 124, para. 218 (finding that the state should build a memorial for the victims in a suitable public location).

See *Heliodoro Portugal, supra* note 86 at para. 249, (finding that the state must carry out a public act recognizing its international responsibility for the declared violations within a period of six months); I/A Court H.R., *Case of Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177, par.126 (finding that the state should hold a public act of recognition with the presence of state officials); *19 Tradesmen*, Series C No. 109, para. 273, (finding that the state should erect a monument in memory of the victims, as well as place a plaque with the names of the victims in a public place).

See *Colombia Massacres*, para. 408 (finding that plaques must be erected in various public places “so that new generations know about the events that took place in the case”); *Mack Chang, supra* note 87 at para. 286 (finding that the plaque in memory of the victim should also include reference to the activities she carried out as a human rights activist before the human rights violation occurred).


Id.
whole.” Similarly, in the *Aloeboetoe* case, the Court gave precedence to Saramaka tribe family law in determining who was entitled to monetary reparations.

In the case of the *Saramaka People v. Suriname*, which involved a claim regarding indigenous peoples’ land brought under Article 21 of the American Convention (right to property), the Court found that the State should grant the land “in accordance with their [the members of the Saramaka tribe's] customary laws”. In another indigenous rights case, *Mayagna Awas Tingni Community v. Nicaragua*, the Court stated that indigenous property rights arise and are enforceable by virtue of traditional occupation and use, as well as by virtue of indigenous law, and thus are not dependent on an act or grant by the state. The Court explained its reasoning by stating that “for indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, [in order to] preserve their cultural legacy.”

In the *Sawhoyamaxa Indigenous Community v. Paraguay* case, the Court decided to establish a community development fund which would be used to implement educational, housing, and agricultural and health projects, as well as sanitation infrastructure. The concurring opinions in the case emphasized the links between the right to life and the right to culture.

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146 See IWGIA, *supra* note 34 at 96.
148 See IWGIA, *supra* note 34 at 94.
151 See Concurring Opinions of Judges Garcia-Ramírez, Canclavid Trindade and Ventura Robles in *Sawhoyamaxa*, *supra* note 150.
Indigenous rights cases are thus a perfect example of the intersection between CP and ESC rights cases, for though the violations at issue included massacres, disappearances and other “traditional” human rights violations, the ties between this political oppression and the economic, social and cultural elements inherent in these violations were quite strong. Some scholars believe that the Court’s recent decisions have recognized not only the individual rights of members of indigenous groups, but also collective rights more generally.\textsuperscript{152}

However, the \textit{Yakye Awa v. Paraguay} case might counter this view, as it involved a violation of collective rights and included an Article 26 claim to which the state acquiesced. Though it acknowledged the Article 26 violation, the state of Paraguay established that its low level of economic development constrained its ability to remedy this violation.\textsuperscript{153} Even though the state was willing to accept its culpability, the Court failed to find an Article 26 violation in its judgment on the merits.\textsuperscript{154} Interestingly, the Court’s chosen remedy mirrored the one taken in another indigenous case, \textit{Sawhoyamaxa}, in which the Court deemed it pertinent for the state to create a community development program.\textsuperscript{155} Beyond the Court's jurisprudence, recent developments within the Inter-American system highlight a similar reluctance to explicitly define ESC rights for indigenous peoples.\textsuperscript{156}

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\textsuperscript{152} See Symposium, supra note 145 at 54.  \\
\textsuperscript{154} Id. at Operative Paragraph 5.  \\
\textsuperscript{155} Id. at para. 205.  \\
\textsuperscript{156} A draft Inter-American Declaration on the Rights of Indigenous Peoples, which adopts an expansive treatment of ESC rights, including the right to ecological protection, education, health and wellbeing, development, and a substantive article on worker’s rights, was drafted in 1995 but has not yet been presented to the OAS General Assembly in its final form. No American state has signed or ratified it.  \\
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IV. WHAT IS THE RELEVANCE OF ESC REMEDIES?

As evidenced by the empirical information presented in Section III, the Court has engaged in a pattern of deferring legal analysis of ESC claims while increasingly ordering reparations that have significant ESC components. This pattern breaks away from the traditional legal framework of first establishing the violation of a right and then establishing remedies that correspond to that rights violation. There are various possible views regarding the significance of this trend.

One possible view is that this trend’s impact is actually minimal, because ESC reparations ultimately pale in significance to the actual holdings of a case. In the majority of its case law, the Court provides very extensive analysis of the claims involved, often discussing each article included in the petition even when it does not find that those articles have been violated in the case. Thus, the main consequence of the Court’s treatment of Article 26 cases is that due to its lack of meaningful discussion of the claims at issue, the Court has been unable to provide significant guidance on the meaning of ESC rights, both for states and for possible petitioners within the system. Since reparations fall outside of the discussions of the merits of the case, they have no impact on the broader development of ESC rights within the system. However, an alternate view would posit that it is precisely because of this gap in ESC jurisprudence that reference to ESC rights in the Court’s reparation sentences take on an increased importance.

Another argument for diminishing the importance of this pattern is that in the case of CP cases, the ESC remedies that are instituted are really no different from traditional

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157 See, e.g. Ticona Estrada, supra note 86 (discussing the meaning of Article 3 of the Convention even though the Court determined there was no violation of this article).
monetary compensation. Instead of awarding the victims a greater lump sum of money, the state is providing the victims with services they would likely invest in, making the compensation more efficient. For example, the awarding of free medical services by the state does not imply that there is an underlying right to health; only that given the needs of the particular victims, the state has decided to provide this added benefit.

Yet, as detailed in Section II, reparations serve different functions. In most cases, ESC remedies were given in conjunction with strictly pecuniary compensation. Thus, there must be an added purpose to the provision of non-monetary remedies which do not directly correspond to the CP violation. When a state pays pecuniary compensation for the disappearance of an individual, this compensation implies that the state deprived the victim of something it had no right to take, for example, human life. If someone is killed, it is impossible to remedy this deprivation through non-monetary means; therefore victims are awarded pecuniary damages. Specific compensation for losses in education, employment and health necessarily imply a similar unlawful taking by the government, albeit one that is better remedied through non-monetary means. Since the reparations stem from unlawful action by the government, then a right to that which the victim is now being compensated for is indirectly implied in the act of reparation.

Another possible view regarding this trend is that the Court is actually undermining ESC rights by proceeding in this manner, as it is ordering states to provide a service to individual victims which they should be providing to the general population. By concentrating on individual reparations instead of ordering legislative changes or other structural remedies, the Court is negating the inherently collective nature of these rights. Yet, this is not necessarily true. In CP rights cases, remedies are often granted on
an individual basis, yet this does not serve to lessen the rights of others who could bring similar claims before a court.

In fact, cause lawyering rests precisely on this feature of the law which allows litigants to achieve systematic change through focusing on a particular violation. This type of strategy, often used in CP rights cases, is characterized by seeking not only to vindicate the right in that specific instance, but to also simultaneously achieve reforms that can guarantee the protection of the right on a broader scale.¹⁵⁸ In the case of ESC cases before the Court, however, there has been a notable lack of systematic changes resulting from individual litigation. Yet the ESC reparations that have been ordered in these cases still serve three important purposes for the protection of ESC rights.

The first is the ability of these remedies to contribute to the expressive value of law and its constitutive relation to the customs and discourse of a civil society which is a fundamental feature of human rights litigation.¹⁵⁹ The Court’s recognition of the victim through the act of reparation, limited as it may be, may be seen as what Daniel Kahan has termed a “gentle nudge” for the internalization of changed social values.¹⁶⁰ The granting of individual remedies could be seen as a way for the Court to make a larger statement about the value of the rights themselves. Without an explicit statement in the merits portion of its decisions to support this implied value, the strength of this statement is significantly curtailed, yet acknowledgment of these rights through remedies is helping to propagate awareness of these rights in a gradual way.

¹⁵⁸ This strategy has been highly successful in a number of U.S. cases, most notably Brown v. Board of Education, and it has also become a favored strategy in countries such as South Africa, India, Israel and Nigeria. See Helen Herkshoff, Public Interest Litigation: Selected Issues and Examples”, a note written for the World Bank 2001, pp. 1-18. See also Cause Lawyering, supra note 42.
Secondly, as stated before, the Court takes great pains to detail its reparations in its sentences. The Court’s case law builds upon earlier decisions and looks to its past judgment not only with regards to the substance of cases, but also with regards to what constitutes an adequate remedy.\textsuperscript{161} Therefore any development in this regard is setting a precedent which other litigants can use to receive adequate redress. Third, consistent ESC reparations contribute to incentivizing the relevant political actors to make advances in the field of ESC rights. All states who have submitted to the Court’s jurisdiction are obliged to abide by its decisions.\textsuperscript{162} Beyond the impact of specific reparation orders, Thomas Antkowiak has argued that reparation orders by the Court put those countries without adequate redress measures on notice and spur them to design broader programs in order to avoid another costly appearance before the Court.\textsuperscript{163} By establishing state responsibility for providing for these rights on a case by case basis, albeit through reparations, the Court is thus promoting the development of a broader system for enforcing ESC rights.

A final possible view regarding the meaning of this trend is that an analysis of this pattern is much ado about nothing, because the remedy \textit{is} the right. This brings up the

\textsuperscript{161} Though other states are not bound by the outcomes of a case, and there is no official precedent set by the Court, the language of previous cases is often quoted in later cases and the Court is reluctant to disregard its previous decisions. \textit{See e.g.} I/A Court H.R., \textit{Case of Apitz-Barbera et al. ("First Court of Administrative Disputes") v. Venezuela}. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182 at para. 11 (citing prior decisions regarding evidence and its assessment); I/A Court H.R., \textit{Case of Kawas-Fernández v. Honduras}. Merits, Reparations and Costs. Judgment of April 3, 2009. Series C No. 196 at para. 191 (providing a summary of past case law); I/A Court H.R., \textit{Case of Valle-Jaramillo v. Colombia}. Merits, Reparations and Costs. Judgment of November 27, 2008. Series C No. 192 at para. 227 (citing prior cases in its analysis regarding adequate measures of reparation). In fact, though it is technically able to do so, the Court has yet to formally overturn a single case.

\textsuperscript{162} \textit{See} Loayza-Tamayo, \textit{supra} note 50 (stating that in accordance with Article 31 of the Vienna Convention on Treaties, states have the obligation to “make every effort” to comply with the recommendations made by the Commission and the Court.); Velazquez Rodríguez, \textit{supra} note 43 at para. 50. (finding that the Inter-American Court’s judgments are self-executing, and thus require that domestic governmental bodies order compliance should the state fail to give effect to the Court’s judgment.).

\textsuperscript{163} \textit{See} Antkowiak, \textit{supra} note 3 at 402.
issue of how to define the “jus”, and whether it is simply an instrumentality which exists to the extent that it can provide remedies for victims. Black’s Law Dictionary has many definitions of a “right”, including “a recognized and protected interest the violation of which is a wrong”. When the Inter-American system frames ESC violations in the language of CP rights, the only rights acknowledged in the rights discourse are CP rights. Rights language matters in defining the existence of a right for those that are in a position to claim it, and more importantly, for defining the obligations of the state in light of that right. This is why though the right may exist in some abstract sense in spite of the language used to address the violation, the formal codification and elucidation of the right has great significance for its concrete application.

In fact, the Inter-American Commission has clearly stated that though the social functions of the state may have expanded into areas such as education and labor, this does not translate into the creation of concrete rights, for the social and economic effects of those functions do not necessarily assign rights, whether of an individual or a collective nature. Both the Commission and the Court have also repeatedly emphasized petitioners' rights to a reasoned decision in judicial proceedings which includes a comprehensive analysis of the merits of a particular matter. With its jurisprudence on ESC rights, it seems that the Court is failing to live up to the very standard it is imposing on state courts.

165 See Inter-American Commission Report, supra note 133 at 20.
166 Id. at 54.
V. THE MEANING OF THIS TREND FOR ESC RIGHTS ACTIVISM

There is no single overriding reason for the existence of this pattern in the Court’s jurisprudence. Instead, it has been the result of actions taken by diverse actors within the system, which in turn have been influenced by varying political and economic concerns. After highlighting some of these factors, I will offer suggestions on how different actors within the Inter-American system can adapt their strategies in accordance with this pattern in a way that better suits their goals.

A. The Role of the Court

One could argue that reparations are driven by the claims of petitioners, as well as by governments’ willingness to offer them, not by the Court itself. The cases resulting in settlements before the Commission would seem to support this argument. However, there is not a clear correlation between the claims asserted by petitioners and the quantity and quality of ESC reparations awarded. The phenomenon seems to be more of a chronological progression by the Court, influenced by its focus on broadening the scope of reparations more generally. As admitted to by one of the Court’s own members, the Court is well aware of the impact that reparation sentences can have: “The American Convention only has one short and brief article on reparations. This is not a model of legislative technique, but it is all we have. […] I would . . . describe judges as legislators in both the national and international arenas.”\footnote{Sergio García Ramírez, Reparations in the Inter-American System: A Comparative Approach, 56 Am. U.L. Rev 1375, 1430 (2007).}

The concept of judges as legislators and whether this is an accurate view of a judge’s role is a theme which deserves separate analysis beyond the scope of this paper. Yet, what is most significant about this quote is that it shows that at least some judges on
the Court recognize the need to go beyond what is established in the American Convention, particularly in the area of reparations. The only way this can be achieved is through case by case determinations of both the scope and limits on reparations which can be read into this framework. As expressed by Judge García Ramírez:

“One of the functions of reparations is to create conditions of security, peace, and of justice that permit the flow of manageable social relations. Without those conditions, the system would be constantly stumbling. … By protecting each small subjective right, we are also protecting the rights of everyone. […] All of it has a rational purpose because all of it contributes to reestablishing the legal order, creating new conditions for peace and justice, and protecting the rights of the individual victim.”

In a more recent opinion, Judge García Ramírez also spoke candidly about the constraints for developing a more robust jurisprudence on ESC rights. He recognized that “the Court’s jurisprudence to the date has been very limited regarding rights of this nature”, but attributed this limited jurisprudence “not just [to] the explicit limited justiciability of these rights in the Inter-American corpus juris, but also [to] the characteristics of the actual cases that have gone before the Court.” He also reiterated the Court’s “well established” competence to make judgments regarding noncompliance with Article 26 while at the same time delineating two strict dimensions of this authority: supervising the progressivity of these rights and states’ maximum efforts in this regard, and ensuring that there is no regression in the development of these rights.

When taken together, Judge García Ramírez’ statements regarding the role of reparations and the limits of Article 26 justiciability could be interpreted as a recognition of reparations as an alternative tool in advancing ESC rights in a way that goes beyond

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168 Id.
169 Concurring Opinion of Judge García Ramírez in Acevedo Buendia, supra note 46.
170 Id. at para. 16.
171 Id.
172 Id. at para. 18.
173 Id. at para. 21 (emphasis added).
the *corpus juris* of the system. The American Convention gives the Court equal authority to interpret both Article 26 and Article 63. Yet the articles themselves are codified differently. Article 63 contains broad language and calls for the violation to be remedied without imposing any constraints on what constitutes adequate reparation. Article 26 in turn, includes qualifying language, such as “progressively”. Given that the exact boundaries of Article 26’s constraints are unclear, the Court may have chosen not to actively engage the issue of ESC rights for fear that its interpretation may be different to those of other actors, and may lead it to be labeled as an activist court. Instead, it has chosen the safer route of pursuing broad ESC remedies because the wording of Article 63 welcomes a more flexible approach.

B. Economic Factors

Article 26’s wording reflects the traditional conception of ESC rights as being of a progressive nature. Therefore, as mentioned above, judges may be afraid of making an arbitrary determination regarding what reasonable progress entails given the economic reality of the region. Decisions regarding state responsibilities are not taken in a vacuum, and judges are likely aware of the economic situation of a country when they determine its obligations to provide for the needs of its citizenry.

The Inter-American Commission has adopted the formulation of General Comment 3 with regards to the meaning of ESC rights:

“"The obligation of member states to observe and defend the human rights of individuals within their jurisdictions, as set forth in both the American Declaration and the American Convention, obligates them, regardless of the level of economic development, to guarantee a minimum threshold of these rights. A state's level of development may be a factor that is calculated into the analysis of its implementation of these rights, but this is not a factor that precludes the state's obligation to implement, to the best of its abilities, these rights. Rather the principle of progressivity demands that as the level of development in a state improves, so must its level of commitment to guaranteeing economic, social and cultural rights."”\(^{174}\)

\(^{174}\) Inter-American Commission, 1993 Annual Report (emphasis added).
This shows the essential challenge of promoting ESC rights in a supranational court. A defining feature of ESC rights is that “there is no universal or non-arbitrary standard for their definition, as they depend on the wealth of a given society.”\textsuperscript{175} The Inter-American Court is thus charged with the difficult task of determining what the adequate minimum level of protection of ESC rights should be for a whole region.

The reality of limited resources in the region also presents the possibility of various adverse consequences which the Court may have implicitly factored into its decisions to defer analysis of ESC claims. The first possible adverse consequence is that if stricter legal standards for protection of ESC rights are advocated by the Court, they will not be complied with by the states, thus eroding the legitimacy of the system and failing to produce any tangible gains to the victims. This is certainly a valid concern given the unsatisfactory levels of compliance with past court judgments.\textsuperscript{176} Therefore, the Court may not want to impose a requirement on a state which it knows will involve a high financial burden and will likely lead to non-compliance. States may be more likely to comply with individual monetary compensation than with broader legal changes, which will be costlier and require greater political effort.\textsuperscript{177}

A second problem is that a stricter legal approach has the potential to undermine public opinion about the legitimacy of the Court,\textsuperscript{178} as some might think that the Court should focus on the most heinous violations, which have traditionally been viewed as CP rights violations. Thus, diverting resources for addressing ESC rights violations might be

\textsuperscript{175} See Kelley, \textit{supra} note 11 at 1391.
\textsuperscript{176} See Section II \textit{supra}.
\textsuperscript{177} See Hawkins, \textit{supra} note 67 at 5 (“[S]tates are more likely to comply with judgments requiring monetary compensation than with those requiring action.”).
\textsuperscript{178} James Cavallaro and Emily Schaffer, \textit{Rejoinder: Justice before Justiciability: Inter-American Litigation and Social Change}, 39 N.Y.U. Int’l L. & Pol 345, 347 (2006) (stating that this risk is so great that activists in the Inter-American system should consider giving litigation a subsidiary role).
seen as a waste of the Court’s limited assets. Furthermore, supranational litigation in controversial areas related to ESC rights that is not well supported in the domestic agenda is not only unlikely to produce social change, but may also produce a backlash against litigation in the system.\(^{179}\) Apart from backlash at the domestic level, the member states could react against the system itself. The Court is wholly dependent on the financial contributions of member states of the OAS.\(^{180}\) Inevitably, those states, especially those who contribute a larger portion of this funding,\(^{181}\) may be able to exert some political influence in the way that the system operates, no matter how neutral and independent the Court tries to be. Finally, states have the ability to withdraw from the jurisdiction of the Court whenever they choose, which might further erode the legitimacy of the Court.\(^{182}\)

Ultimately, the Court will likely rely on the various mechanisms at its disposal in order to inform itself of the specific situation of each country. These mechanisms include the naming of ad-hoc judges from the defendant state and the use of expert witnesses, among others.\(^{183}\) It may also take account of the broader human rights situation in the

\(^{179}\) *Id.*, 377-378. See also Cavallaro, *supra* note 70 at 789-90 (citing examples including the Castillo Petruzzi and Yean and Bosico case where there was no sympathetic media coverage and/or public support and the Court’s judgments were met not only by failure to comply by the government, but also with public backlash).


\(^{181}\) The most notable contributors in recent years have been Mexico, Colombia, Brazil and Paraguay. See Inter-American Court of Human Rights, Annual Report 2006 at 64.

\(^{182}\) However, it seems that this preoccupation may be largely unfounded, as states also have a political interest in remaining in the system and benefiting from other aspects of membership in the OAS. See Morse Tan, *Member State Compliance With the Judgments of the Inter-American Court of Human Rights*, International Journal of Legal Information, Vol. 33, p. 319, 329, 2005; U of St. Thomas Legal Studies Research Paper No. 07-02. Available at SSRN: [http://ssrn.com/abstract=958832](http://ssrn.com/abstract=958832). (“The initial apprehension that the member states would withdraw their acceptance of the Court’s jurisdiction or denounce the American Convention has not generally met with reality. Only one State, Trinidad and Tobago, has denounced the Convention and the Court’s jurisdiction, but it later returned with reservations.”).

\(^{183}\) See American Convention, *supra* note 7 at Article 42 (requiring that states submit annual reports to various Inter-American organs regarding their progress in various human rights issues) and art. 55
region through tools such as thematic hearings and reports by the Inter-American Commission. Through these mechanisms, the Court can bridge the gap between reality and the text of human rights instrument, creating a successful judicial balance between the competing interests at stake. It is no small task to create an enforceable standard for what constitutes an adequate level of protection of ESC rights in the region. Yet if the Court is truly committed to the development of ESC rights, as it claims to be, it will ultimately have to rise to this challenge.

C. Implications for ESC Rights Advocates

For litigants, the pattern described in this Note means that there must be a profound examination of the goals for bringing ESC cases before the system. In order to effect sustainable change, lawyers should regard litigation as just one of various strategies for the promotion of ESC rights. In order to be truly successful, activists should adopt a three pronged approach: targeted litigation before the system, the use of Inter-American organs for regional advocacy, and advocacy for ESC rights at the local level.

With regards to litigation, petitioners should always be mindful to submit detailed requests for remedies in their petitions, and incorporate evidence of the victim's life plan and how the violations have affected all aspects of this life plan beyond monetary losses. In order to ensure a more favorable decision for the victim, it is wisest to include both ESC claims and CP claims in the petition. However, if the purpose is to shape policies in the region, then activists should focus solely on ESC claims. Though this strategy is riskier because it presents a higher possibility that the petition will be deemed inadmissible, it could force the Court to address these claims fully instead of deferring to

\[^{184}\text{See Rojas, supra note 51 at 23-24. (author’s translation).}\]
CP rights to frame the analysis. If CP rights are included, as has been shown, the Court will often move away from an Article 26 violation and focus on the CP violation. This allows the Court to grant a remedy to the victim without having to fully address the ESC right at issue. Another alternative in this same vein is to increase the volume of ESC rights cases brought before the Commission, so that there will be better odds that some of these cases will eventually be addressed by the Inter-American Court.185

However, just bringing a higher volume of Article 26 cases will not be successful, unless these cases have the capacity of fulfilling the criteria which has been described as lacking in past cases by Judge Garcia Ramirez. Thus, the ideal case would be either one where there is a clear regression in the enforcement of an ESC right or one where there is a significant gap between the level of state resources and the state’s efforts to enforce the ESC right, evidencing a clear lack of “maximum efforts” for achieving the progressive realization of said right. Evidence of a country’s economic resources will be essential for proving these circumstances and the use of expert opinions will be very valuable in this regard. The use of amici curae is another important tool for emphasizing the importance of ESC rights both for the particular case and beyond, as they can be a means for diverse actors within the system to impress upon the Court their solidarity with these rights. Finally, litigation often gives rise to the possibility of settlement and advocates should take advantage of their bargaining position to pressure states to not only grant individual remedies, but to also undertake broader changes within the domestic sphere.

185 Cavallaro and Schaffer, supra note 178 at 350, argue that increased litigation which is not well designed will actually be counterproductive for the advancement of ESC rights. Though I agree that litigation should be of the highest quality possible, it remains unclear who is in the best position to judge what constitutes “quality” litigation. Increasing the number of cases brought before the Commission also means greater opportunity for institutional learning and better crafted claims. Furthermore, “low quality” cases will likely be filtered out by the Commission. Thus, the end result of an increase in litigation will be favorable to the enforcement of ESC rights in the region.
Secondly, the advocacy tools available at the Inter-American system can help human rights advocates achieve the twin goals of complementing the progress made in litigation while also engaging with state parties in a non-adversarial manner. The Inter-American Commission has a broad mandate to “develop an awareness of human rights”. Two tools commonly used by the Commission in its exercise of this authority are thematic hearings and the preparation and publication of reports. Thematic hearings may range in their specificity from the general human rights situation in a country to a region-wide issue of concern. The Commission has similar discretion in choosing which countries and/or issues to focus on in its reports. In the past, Commission reports related to ESC rights have focused on access to justice, yet the Commission could also use its reporting authority to explore the enforcement of the rights themselves. Thematic hearings, in turn, can serve as a great forum because they allow state parties and other actors to discuss the progress of ESC rights beyond the judicial sphere. Reports and thematic hearings can also be used as a means for highlighting positive achievements in the development of ESC rights by specific state parties, which can then serve as a model for other countries in the region. Another tool available within the system is the Court’s authority to issue advisory opinions on any issue within its jurisdiction.

186 See American Convention, supra note 4 at 41.
188 See American Convention, supra note 7 at Article 64.
is exercised with much less frequency than the Court’s contentious jurisdiction, yet it is a fitting tool for the Court to speak coherently about the significance of Article 26.

Finally, the impact of a Court ruling and/or favorable remedies will be insignificant unless they are accepted and implemented at the domestic level. Thus, apart from litigation strategies, advocates should work within domestic systems, alongside civil society as well as government actors to build support for domestic institutions which can ensure the enforcement of ESC rights. They should particularly focus on civil society efforts to bring about constitutional and legislative reforms which enable the codification of these rights at the domestic level. The media also has an important role to play in informing the citizenry of the Court’s developments and its application to the domestic legal sphere.

In all these endeavors, advocates should be mindful that the discussion of ESC rights must be geared towards a concrete definition of what a reasonable minimum level of protection by states entails. Advocacy should focus on the need to establish this minimum standard as well as the concrete implications of a failure to do so, so that these protections translate into a tangible right for petitioners. There is a growing global trend towards acknowledging the importance of ESC rights and the Inter-American system should continue to be an innovator in this regard, no longer addressing a select group of rights, but expanding its jurisprudence to give equal footing to ESC rights. As the most

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189 As of 2009, only 20 advisory opinions have been rendered by the Court. See Inter-American Court of Human Rights Website, Jurisprudence, Advisory Opinions, available at: http://www.corteidh.or.cr/opiniones.cfm.

190 See Cavallaro, supra note 70 at 775 (stating that the Court will have the greatest impact when its procedures and judgments are relevant to the actors working to advance specific human rights in these countries).

191 For example, an activist in Brazil has observed that the impact of IA Court decisions in the country has varied not according to their content, but rather, in accordance with the degree of pressure brought to bear by the public and especially by the media. See Cavallaro, supra note 70 at 792-93.
unequal region in the world,\footnote{See UN Economic Commission for Latin America and the Caribbean (September 26, 2001); “Social Panorama of Latin America 2000-2001” (revealing that the wealthiest 10% of the region's households held a share of total income that averaged 19 times higher than that received by the poorest 40%; making it the region with the most unequal distribution of income, even more unequal than sub-Saharan Africa) http://www.unwire.org/unwire/20011002/18917_story.asp} there is no place where this should be a higher priority than in the Americas.

CONCLUSION

The Inter-American system's experience highlights some of the challenges in the ongoing global struggle to create legal orders which recognize the validity of ESC rights and provide tangible remedies for victims of ESC rights violations. The Court's creative approach showcases the difficulty of fitting this category of rights within a traditional legal framework. However, the law is nothing if not responsive to the needs of those who use it and shape it. The Court has already provided one of the two key elements needed for the functioning of the law with its innovative remedies. Yet, it is up to human rights advocates, member states and others, in conjunction with the Court, to solidify the second element of the Roman truism by creating enforceable ESC rights. Perhaps then the Inter-American system could add its own twist to the legal adage, by asserting that where there is a remedy, there is also a right.