

Circle of Rights

Economic, Social & Cultural Rights Activism: A Training Resource

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SECTION 10: STRATEGIES AND TOOLS - REGIONAL LEVEL

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MODULE 30

THE INTER-AMERICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS AND ESC RIGHTS [USING MODULE 30 IN A TRAINING PROGRAM](#)

The Purpose of Module 30

The purpose of this module is to provide an overview of possibilities for the protection of ESC rights within the Inter-American system.

The module

- *summarizes ESC rights provisions within regional instruments;*
- *discusses existing monitoring and implementation mechanisms;*
- *reviews the effectiveness to date of the Inter-American system in protecting ESC rights; and*
- *concludes with an evaluation of the possibilities offered by the Inter-American system and an exploration of ways of maximizing the protection of ESC rights.*

Specific Provisions of the Inter-American System in the Area of ESC Rights

The Ninth International Conference of American States, held in Bogotá in 1948, in addition to constituting the Organization of American States (OAS), also approved the American Declaration of the Rights and Duties of Man and an Inter-American Charter of Social Guarantees. The content of the American Declaration is similar to that of the Universal Declaration of Human Rights, adopted in the same year.

Later, the OAS began work on a treaty that set forth fundamental rights and freedoms, in response to the need to define their content, as well as their scope and limitations, in precise terms and to create more effective mechanisms for their protection. At present, the Inter-American system for the protection of human rights has a normative basis consisting of several instruments: the American Declaration of the Rights and Duties of Man [\[1\]](#) and the American Convention on Human Rights; [\[2\]](#) the Protocol to the American Convention on Human Rights on the Abolition of the Death Penalty; [\[3\]](#) the Inter-American Convention to Prevent and Punish Torture; [\[4\]](#) the Inter-American Convention on Forced Disappearance of Persons; [\[5\]](#) the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women; [\[6\]](#) and the Additional

Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San Salvador), which recently entered into force. [\[7\]](#)

The American Declaration recognizes a series of civil, political, economic, social and cultural rights. It includes economic and social rights such as the right to protection for maternity and childhood (art. 7), the right to preserve one's health and well-being (art. 11), the right to education (art. 12), the right to the benefits of culture (art. 13), the right to employment and fair remuneration (art. 14), the right to rest and leisure (art. 15), and the right to social security (art. 16).

The American Convention recognizes a wide array of civil and political rights, and does not explicitly spell out the ESC rights of individuals under the jurisdiction of the states parties. However, it does include a generic formulation that refers back to the provisions on ESC rights in the OAS Charter. In chapter III, article 26, under the heading "Progressive Development," it prescribes:

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. [\[8\]](#)

This article sets forth an obligation that is not very different from that in the ICESCR. [\[9\]](#) Thus, and as established by the Inter-American Court of Human Rights, the supervisory organs of both the American Declaration and the American Convention should interpret the obligations arising from these two texts in light of the provisions in the ICESCR. The Inter-American Court of Human Rights has held that

as regards the interpretation of treaties, it can be said that the rules of a treaty or convention should be interpreted in relation to the provisions that appear in other treaties on the same subject matter. In addition, the norms of a regional treaty should be interpreted in light of the doctrine and provisions of the universal instruments. [\[10\]](#)

In interpreting article 29(b) of the American Convention, the Court concluded that "if in the same situation both the American Convention and another international treaty are applicable, the rule most favorable to the individual must prevail." [\[11\]](#)

Another instrument that sets forth ESC rights is the Inter-American Charter of Social Guarantees. When adopted, the Charter represented a considerable advancement in workers' rights. Nonetheless, given the scant support of states, at present it is of limited, declaratory value. [\[12\]](#)

The Charter of the OAS, as amended by the Protocol of Buenos Aires in 1967, incorporated certain relevant provisions. Articles 33, 44 and 48 were added at that time. Article 33 establishes the basic goals of the American states, offering a frame of reference for interpreting rights. Among the objectives set forth are fair wages, acceptable working conditions, eradicating illiteracy and adequate nutrition and housing. Article 44 expressly articulates the following rights: the right to work (including fair wages and the right to social security), freedom of association (including the right to strike and the right to collective bargaining), and the right of all persons to legal assistance to secure their rights.

In the context of the OAS Charter, special mention should be made of the existence of inter-American specialized agencies in education, development and health, namely the Inter-American Council for Education, Science and Culture, the Inter-American Economic and Social Council and the Pan American Health Organization. However, a framework defined by reference to human rights does not guide the activities of these bodies, and in any event they have had limited impact.

The Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San Salvador) was adopted in 1988, and as mentioned, has recently entered into force. [\[13\]](#) The Protocol sets forth the right to work (art. 6), the right to just, equitable and satisfactory conditions of work (art. 7), trade union rights (art. 8), the right to social security (art. 9), the right to health (art. 10), the right to a healthy environment (art. 11), the right to food (art. 12), the right to education (art. 13), the right to the benefits of culture (art. 14), the right to the formation and the protection of families (art. 15), the rights of children (art. 16), and the protection of the elderly (art. 17) and of the handicapped (art. 18). In addition, the possibility of incorporating other rights, and expanding those already recognized, is left open. [\[14\]](#)

The Protocol stipulates the obligation of the states parties "to adopt the necessary measures, both domestically and through international cooperation, especially economic and technical, to the extent allowed by their available resources, and taking into account their degree of development, for the purpose of achieving progressively and pursuant to their internal legislation, the full observance of the rights recognized in this Protocol." Evidently, the concepts contained in the expressions "to the extent allowed by their available resources" and "progressively" were drawn from article 2 of the ICESCR and article 26 of the American Convention on Human Rights.

The Protocol of San Salvador represents a clear advance in setting forth ESC rights as compared to the treatment of these rights in the Declaration and the Convention. The content of the rights and obligations undertaken by states is defined with greater specificity. In addition, the ESC rights set forth in the Declaration may be interpreted in light of the provisions on such rights in the Protocol, by application of the principle of *pro homine*.

Mechanisms for the Protection of Human Rights in the Inter-American System

Both the American Declaration and the American Convention, like the Protocol of San Salvador, recognize the Inter-American Commission on Human Rights (IACHR) [\[15\]](#) as the supervisory organ, while the Convention established a second supervisory organ, the Inter-American Court of Human Rights. [\[16\]](#)

In the Inter-American system, the first supervisory body with powers to process individual petitions, the IACHR, was not recognized by treaty, but through a resolution of the Fifth Meeting of Consultation of Ministers of Foreign Affairs, held in Santiago, Chile, in 1959. This resolution gave the IACHR the function of promoting respect for human rights. In 1966, the Commission was authorized to hear individual complaints against member states of the OAS alleging the violation of a right protected by the American Declaration. The Commission "thus became the first international body to process individual petitions without the existence of a human rights treaty recognizing its jurisdiction." [\[17\]](#)

Later, in 1969, the adoption of the American Convention gave the IACHR certain areas of competency, and established a second supervisory body, judicial in nature-the Inter-American Court of Human Rights-whose jurisdiction may be recognized by the states in an independent declaration. [\[18\]](#)

The Protocol of San Salvador provides for a system of individual petitions (regulated by articles 44-51 and 61-69 of the American Convention) that is reserved for certain rights, namely trade union rights (art. 8(a) of the Protocol) and the right to education (art. 13).

The fact that the petition system can be used only to uphold trade union rights and the right to education represents clear backsliding with respect to the possibilities offered today by the American Declaration and the American Convention. It would seem that a potentially restrictive interpretation by the IACHR or the Court so as to limit the system of individual petitions to only those rights provided for by the Protocol would be contrary to the provisions of the American Convention (art. 29) and consequently to the principle of *pro homine*.

Petitions to the IACHR

Petitions to the IACHR must meet certain formal and substantive requirements. The formal requirements are as follows:

1. The submission should be written, though it should be noted that on certain occasions the IACHR has admitted complaints presented by other means (e.g., by telephone). [\[19\]](#)
2. Petitions must include information on the petitioner, the victim and the state allegedly responsible for the violation.
3. Petitions must include a description of the facts underlying the complaint and the steps taken domestically to reestablish the exercise of the right considered violated.

For the purposes of submitting a complaint, the IACHR has prepared a simple form that does not require the assistance of an attorney. Of course, this is without prejudice to the petitioner's right to designate an attorney or other representative in the complaint itself or in another document.

The substantive requirements that must be met are:

1. Exhaustion of domestic remedies: The complainant must exhaust judicial remedies that exist in the domestic sphere to give the state an opportunity to remedy the alleged violation. [\[20\]](#) This does not apply when the domestic legislation does not provide for due process of law to protect the right or rights alleged to have been violated; or where the person whose rights are alleged to have been violated is denied access to domestic remedies or has been impeded from exhausting them; or finally, when there is unjustified delay in the decision on those remedies. [\[21\]](#)
2. The petition must be presented within six months of the violation or of the notification of the first judgment that exhausts the domestic remedy, or within a reasonable time when any of the exceptions are alleged. [\[22\]](#)
3. The subject matter of the petition must not be pending in any other international procedure for settlement before an organ with jurisdiction similar to the IACHR. [\[23\]](#)

As regards standing to bring a petition, any person, group of persons, or nongovernmental entity legally recognized in one or more member states of the OAS may have access to the IACHR, submitting petitions that contain allegations of the violation of rights protected in the American Declaration, the American Convention, the Protocol of San Salvador and all the other treaties mentioned above. [\[24\]](#)

The Inter-American system does not require any link whatsoever between the person and the petitioner, when the petitioner is a person or group of persons. The IACHR may choose not to

reveal the identity of the complainant in its communication with the state based on the complainant's express and justified request. [\[25\]](#)

Once the IACHR establishes that the state has violated the rights recognized in the treaties in question, it issues recommendations to the state to remedy the violation. In this regard, it should be noted that the states have the obligation to make their most serious efforts to carry out the recommendations made by the IACHR. This duty is incorporated into articles 33 and 50 of the Convention and is based on the principle of *pacta sunt servanda*, and on the principles of interpretation spelled out in this respect by the Inter-American Court of Human Rights. In the *Loayza Tamayo* case, the Court stated that

in accordance with the principle of good faith, embodied in the aforesaid Article 31(1) of the Vienna Convention, if a State signs and ratifies an international treaty, especially one concerning human rights, such as the American Convention, it has the obligation to make every effort to apply the recommendations of a protection organ such as the Inter-American Commission, which is, indeed, one of the principal organs of the Organization of American States, whose function is "to promote the observance and defense of human rights" in the hemisphere (OAS Charter, Articles 52 and 111). [\[26\]](#)

It also held:

Article 33 of the American Convention states that the Inter-American Commission is, as the Court, competent "with respect to matters relating to the fulfillment of the commitments made by the States Parties," which means that by ratifying said Convention, States Parties engage themselves to apply the recommendations made by the IACHR in its reports. [\[27\]](#)

The IACHR is furthermore endowed with the function of promoting the observance and defense of human rights both in the member states of the OAS and in states parties to the American Convention. The statute includes the following functions and attributes in the exercise of the IACHR's mandate with respect to both sets of states:

1. To develop an awareness of human rights among the peoples of the Americas
2. To make recommendations to the governments of the states on the adoption of progressive measures in favor of human rights in the framework of their legislation, constitutional provisions and international commitments, as well as appropriate measures to further observance of those rights
3. To prepare such studies or reports as it considers advisable for the performance of its duties
4. To request that the governments of the states provide it with reports on measures they adopt in matters of human rights
5. To respond to inquiries made by any member state through the General Secretariat of the OAS on matters related to human rights in the state and, within its possibilities, to provide those states with the advisory services they request
6. To submit an annual report to the General Assembly of the OAS, in which due account shall be taken of the legal regime applicable to those states parties to the American Convention on Human Rights, and of that system applicable to those that are not parties
7. To conduct on-site observations in a state, with the consent or at the invitation of the government in question and
8. To submit the program budget of the IACHR to the Secretary General, so that he may present it to the General Assembly.

As part of the promotion function, both the American Convention and the IACHR's Regulations include provisions that refer specifically to ESC rights. In this regard, article 42 of the Convention provides:

The States Parties shall transmit to the Commission a copy of each of the reports and studies that they submit annually to the Executive Committees of the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture, in their respective fields, so that the Commission may watch over the promotion 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.

For its part, article 64 of the Regulations provides:

1. The States Parties shall forward to the Commission copies of the reports and studies referred to in article 42 of the American Convention on Human Rights on the same date on which they submit them to the pertinent organs.
2. The Commission may request annual reports from the other member states regarding the economic, social and cultural rights recognized in the American Declaration of the Rights and Duties of Man.
3. Any person, group of persons, or organization may present reports, studies or other information to the Commission on the situation of such rights in all or any of the member states.
4. If the Commission does not receive the information referred to in the preceding paragraphs or considers it inadequate, it may send questionnaires to all or any of the member states, setting a deadline for the reply, or it may turn to other available sources of information.
5. Periodically, the Commission may entrust to experts or specialized entities studies on the situation of one or more of the aforementioned rights in a specific country or group of countries.
6. The Commission shall make the pertinent observations and recommendations on the situation of such rights in all or any of the member states and shall include them in the *Annual Report* to the General Assembly or in a Special Report, as it considers most appropriate.
7. The recommendations may include the need for economic aid or some other form of cooperation to be provided among the member states, as called for in the Charter of the Organization and in other agreements of the Inter-American system.

The Protocol of San Salvador includes a reporting system. Pursuant to article 19 of the Protocol, the states parties must submit periodic reports on the progressive steps taken to achieve the realization of the rights set forth in the text. This article also authorizes the IACHR to make observations and recommendations on the situation of ESC rights.

With regard to the Inter-American Court, in the case of matters in contention, it is the IACHR and the interested state that have standing to submit a case. [\[28\]](#) Its final decision is binding on the state. In addition, the Court has been recognized to have advisory jurisdiction. Member states of the OAS, as well as the organs listed in chapter 10 of the OAS Charter, may consult the Court on interpretation of the provisions of the Convention or other treaties on the protection of human rights in the American states. [\[29\]](#) In addition, at the request of a member state of the OAS, the Court may advise it as to the compatibility of any of its internal laws with the above-mentioned international instruments. [\[30\]](#)



Status and Prospects for the Protection of ESC Rights in the Inter-American System

To date, the real effectiveness of the Inter-American system in ESC rights has been practically nil. In part this is because in recent decades the supervisory bodies were focused on the massive and systematic violations of civil and political rights that occurred under the fierce military dictatorships in many Latin American countries. In this context, ESC rights have not been a common subject of

complaints before the Inter-American Commission on Human Rights. [31] Nonetheless, the supervisory organs clearly neglected the functions they were supposed to exercise in respect of ESC rights. Bearing in mind that the dictatorships have been replaced by democratic systems, the Inter-American system of protection has yet to adopt the urgent task of achieving the progressive realization of ESC rights as a serious objective.

The work of the Inter-American Commission on Human Rights

Individual petitions: In the framework of the system of individual petitions, as already noted, the IACHR has done practically nothing to ensure the effective protection of ESC rights. Almost all of the reports prepared on individual cases refer to civil and political rights.

In most of the cases in which the IACHR has recognized a violation of ESC rights, it begins by taking note of violations of civil and political rights. The following cases are illustrative of this approach. In case No. 6091 (Cuba), the IACHR considered that the victim was tortured repeatedly while jailed and held Cuba liable for violating the right to the preservation of health and well-being (art. 11 of the Declaration); [32] in case No. 2137 (Argentina), in which a presidential decree ordered that all activities of Jehovah's Witnesses cease, the IACHR held Argentina responsible for violating the right to education, article 12 of the Declaration, in the context of the right to assembly. [33]

Case No. 7615 (Brazil) is important in so far as the IACHR analyzes the violation of ESC rights separately. [34] In this case, a development plan promoted by the government of Brazil to exploit resources in the Amazon region had led to the construction of a highway that cut through the territory of the Yanomami Indians. The massive penetration of outsiders into the indigenous territory has had grave repercussions on the well-being of the community, involving the breakdown of their traditional organization, introducing prostitution, epidemics and diseases, the loss of lands, the forced displacement to lands that are not adequate for their way of life, and the deaths of hundreds of Yanomami. The IACHR noted: "That those invasions were carried out without prior and adequate protection for the safety and health of the Yanomami Indians, which resulted in a considerable number of deaths caused by epidemics of influenza, tuberculosis, measles, venereal diseases and others; That Indian inhabitants of various villages near the route of highway abandoned their villages and were changed into beggars or prostitutes, without the Government of Brazil's taking the necessary measures to prevent this." [35] The IACHR ruled that the failure of the government of Brazil to adopt timely and effective measures on behalf of the Yanomami people had repercussions on the well-being of the community. The IACHR held the government of Brazil responsible for violations of the rights to life, liberty and personal security, the rights to residence and travel and the right to the preservation of health and well-being. [36]

Reports: The IACHR is also empowered to produce and request reports on the human rights situation in the member states of the OAS, to assess the degree of implementation of the states' obligations and to make recommendations as it sees fit. While the core of the reports has historically been an evaluation of compliance with the obligations in respect of civil and political rights, on some occasions the IACHR has considered the situation of ESC rights based on the rights set forth in the American Declaration.

The IACHR has often expressed the concept of the indivisibility of human rights. In the context of debates on the draft Protocol, the IACHR stated:

[I]n the Commission's view, there is a close relationship between the effectiveness of economic, social and cultural rights and that of civil and political rights, since both groups of rights constitute an indissoluble whole, upon which the recognition of the dignity of the human individual is based, for which reason both groups of rights require constant protection and promotion in order to achieve their full realization, and the sacrifice of some rights for the benefit of others can never be justified.

In its 1978 *Report on the Situation of Human Rights in El Salvador*, the IACHR noted:

The Commission has considered it advisable to include in this report a chapter outlining some socio-economic indicators on El Salvador, for the purpose of presenting a more complete picture of the general situation of the country. With this background information it may be possible to point out some factors that might have an effect on respect for and observance of human rights in El Salvador. [\[37\]](#)

Among its conclusions, the IACHR stated:

The social and economic conditions explain, to a considerable extent, serious violations of human rights that have occurred and continue to occur in El Salvador and, at the same time, obstruct the enjoyment of the economic and social rights set forth in the American Declaration of the Rights and Duties of Man, the Charter of the OAS, article 26 of the American Convention on Human Rights, and other international instruments. [\[38\]](#)

The following year, in its report on Haiti, the IACHR gave consideration to the rights to education, health and work, whereupon it concluded:

As regards the effectiveness of the rights to education, preservation of health and well-being, as well as the right to work and to fair remuneration, it can be said that it is practically nil, due mainly to the conditions of extreme poverty, illiteracy, poor hygienic conditions, a high birth rate and high infant mortality, unemployment, the lack of sanitary facilities, low per capita income, etc., that prevents the enjoyment of the economic, social and cultural rights set forth in the Charter of the OAS and in several international instruments. [\[39\]](#)

In its *Annual Report, 1979-1980*, the IACHR underscored the organic relationship between civil and political rights, and economic, social and cultural rights, as follows:

When examining the situation of human rights in the various countries, the Commission has had to establish the organic relationship between the violation of the rights to physical safety on the one hand, and neglect of economic and social rights and suppression of political participation, on the other. That relationship, as has been shown, is in large measure one of cause and effect. In other words, neglect of economic and social rights, especially when political participation has been

suppressed, produces the kind of social polarization that then leads to acts of terrorism by and against the government . . . [\[40\]](#)

After recognizing that extreme poverty of the masses of the population-resulting in part from very unequal distribution of productive resources-has been the fundamental cause of the terror that afflicted and continues to afflict those countries, the IACHR limited its own powers to assess the extent to which these rights are implemented. It held, in effect, that:

In general, the Commission has been extremely cautious in this sensitive area, because it recognized the difficulty of establishing criteria that would enable it to measure the states' fulfillment of their obligations. It has also seen the very difficult options that the governments face when allocating resources between consumption and investment, and, hence, between current and future generations. Economic policy and national defense policy are closely related to national sovereignty. However, in light of the competence it has been given, the Commission wishes to make the following observations with respect to economic, social and cultural rights. The essence of the legal obligation incurred by any government in this area is to strive to attain the economic and social aspirations of its people, by following an order that assigns priority to the basic needs of health, nutrition and education. The priority of the "rights of survival" and "basic needs" is a natural consequence of the right to personal security. [\[41\]](#)

In summary, the IACHR's formulations with respect to ESC rights have been generic. It has not made a serious effort to specify the content of the obligations in this regard, nor has it taken into account the specific contours of each right. [\[42\]](#) Unfortunately, "the studies done to date merely transcribe some of the reports submitted by the states to other organs of the OAS on the socio-economic status of their countries, providing macroeconomic figures, most of which are out-of-date; the IACHR has not used this opportunity to develop a systematic approach." [\[43\]](#)

Nonetheless, it has been argued that "there are signs that the Inter-American Commission is willing to give more careful consideration to the situation of economic, social and cultural rights, at least in the states parties to the American Convention." [\[44\]](#). In its 1991 *Annual Report*, for example, it gave special attention to such rights based on the reports presented by some member states of the OAS (Chile, Mexico, Argentina, Colombia, Jamaica, Dominican Republic and Costa Rica) to international agencies, and on a study by the Pan American Health Organization (PAHO). [\[45\]](#)

In conclusion, the work of the IACHR in this area has truly been deficient. While one may observe a faint indication of change, in view of the current socioeconomic situation in the vast majority of the countries of the Americas, the work of the IACHR in this area should have been substantially different from what it has been to date.

US Welfare Reform and the Inter-American System [43](#)

In October 1999, the Poor People's Economic Human Rights Campaign (PPEHRC) and a number of individuals and other organizations in the United States filed a petition with the IACHR charging the US government with ignoring the principle in the ICESCR that governments should work to "achieve progressively" the full realization of basic economic and social rights.

PPEHRC provided a detailed analysis of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). PRWORA was a "welfare to work" reform program. However, PPEHRC's petition provided evidence that PRWORA has resulted in a plethora of

negative changes to the lives of poor people in the US. As a result of PRWORA, for example, an arbitrary lifetime limit of five years on the receipt of cash assistance was imposed on the poor without any guarantee of work or alternative means of support. PRWORA also limits available vocational training or secondary training to one year, which is oftentimes not enough for an individual to acquire the skills needed to secure a solid job. It also eliminated the Aid to Families with Dependent Children legislation, which automatically provided children with medical insurance. PRWORA has forced the poor to take "welfare to working poverty" jobs without providing any economic or social security net, thus violating the basic economic and social rights of the poor.

One of the goals of PPEHRC's petition is to inform people and governments worldwide that overcoming poverty is not issue that applies only to the countries of the South, but is a live issue in the "richest" country in the world-the United States.

The work of the Inter-American Court of Human Rights

The case law of the Inter-American Court of Human Rights with respect to ESC rights, under its contentious jurisdiction, is nonexistent. Even so, the Court has issued opinions on the justiciability of ESC rights in the context of its general pronouncements and under its advisory jurisdiction.

During the drafting of the Protocol of San Salvador, the Court was asked whether ESC rights could be subjected to judicial or quasi-judicial examination. It stated that they

are authentic fundamental rights . . . Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible.[44](#)

With regard to justiciability, the Court said:

The so-called civil and political rights, in general, are easier to individualize and make required in accordance with a legal procedure capable of resulting in a jurisdictional protection. The Court considers that, among the so-called economic, social and cultural rights, there are also some that act or can act as subjective rights jurisdictionally requirable.

It goes on to add: "Some economic, social and cultural rights cannot be protected by a judicial or quasi-judicial system identical to the present system to protect civil and political rights."[45](#)

The general lines offered by the Court are contrary to the doctrine that is being established by the UN Committee on Economic, Social and Cultural Rights. In addition, in the formulation stated above the Court appears to ignore that the Convention has given jurisdiction to both the IACHR and the Court in respect of ESC rights.

The Court's advisory jurisdiction has not been used directly by the actors with standing to do so to spell out the obligations of the states in the area of ESC rights nor their specific contents. The Court itself has indicated that it would view this as a positive way to contribute to the observance of this grouping of rights. In this respect, the Court has said:

As the Court suggested in its earlier observations, it may have an important role to play in the promotion and protection of economic, social and cultural rights, by virtue of its advisory jurisdiction (art. 64 of the Convention) in reference to "the interpretation of this Convention or of



other treaties concerning the protection of human rights in the American State” (art. 64[1]), or to the "compatibility of any of its domestic laws with the aforesaid international instruments.” (art. 64[2]). This is particularly clear in light of what article 29 says about the interpretation of the Convention. All the criteria of the article (a), (b), (c) and (d) are applicable, but paragraph (d) should be particularly noted, since the American Declaration of the Rights and Duties of Man includes economic, social and cultural rights, and the Inter-American

Charter of Social Guarantees is an international declaratory act approved by the same supreme organ of the system that adopted the Charter of the Organization and the American Declaration of the Rights and Duties of Man.[46](#)

While, as noted, the Court has not issued any advisory opinion directly related ESC rights, Advisory Opinion 11/1990[47](#) is important in view of its broad interpretation of civil and political rights, which touches on ESC rights. The consultation refers to the rule of prior exhaustion of domestic remedies in the framework of the mechanism for individual petitioners in relation to indigents who have no access to the legal system to protect rights guaranteed by the Convention. The Court stipulated:

If it can be shown that an indigent needs legal counsel to effectively protect a right which the Convention guarantees and his indigency prevents him from obtaining such counsel, he does not have to exhaust the relevant domestic remedies.[48](#)

Consequently, with respect to the right of access to justice guaranteed by articles 8 and 25 of the Convention, the state would have the obligation to make effective such access with regard to those indigent persons, removing the material obstacles that cause the impediment. In addition, that opinion considered that a person suffers discrimination when, because of his or her economic position, s/he does not have access to the courts of justice. The Court said, in this regard:

the meaning of the term discrimination employed by article 24 must, then, be interpreted by reference to the list enumerated in article 1(1). If a person who is seeking the protection of the law in order to assert rights which the Convention guarantees finds that his economic status (in this case, his indigency) prevents him from so doing because he cannot afford either the necessary legal counsel or the costs of the proceedings, that person is being discriminated against by reason of his economic status and, hence, is not receiving equal protection before the law. Protection of the law consists, fundamentally, of the remedies the law provides for the protection of the rights guaranteed by the Convention.[49](#)

Conclusion

To date, the organs of the Inter-American system have not made a commitment to safeguard ESC rights. As noted above, the individual petition mechanism has gone virtually unused as a way to call for compliance. Human rights groups face the urgent task of helping to address the imbalance between ESC rights, on the one hand, and civil and political rights, on the other, in the normative provisions and in practice. Taking up this task requires a systematic study of the possibilities offered by the system, and the consequent mapping out of possible strategies for achieving the effective observance of these rights.

The Inter-American system, unlike the international and European systems, has an invaluable advantage, which is the possibility of alleging violations by the states via the submission of individual petitions. In this regard, we can mention the following possible strategies for enforcement before the IACHR:

- ESC rights issues should be pursued in light of the protection of civil and political rights.
- The right to not suffer discrimination in relation ESC rights should be argued as falling within the scope of civil and political rights.
- The right to judicial protection and the due process clause should be pursued as an alternative means of protection for ESC rights.
- Pursuant to article 26 of the American Convention, the obligation of non-regressivity should be interpreted in light of the General Comments issued by the United Nations Committee on Economic, Social and Cultural Rights.[50](#)

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[USING MODULE 30 IN A TRAINING PROGRAM](#)

NOTES

[1.](#) Adopted at the Ninth International Conference of American States, held in Bogotá, Colombia, in 1948, along with the Charter of the Organization of American States (OAS).

[2.](#) Adopted at the Inter-American Specialized Conference on Human Rights, in San José, Costa Rica, in 1969, and in effect since 18 July 1978, pursuant to article 74(2) of the American Convention.

[3.](#) Adopted in Asunción, Paraguay, on 8 June 1990, at the Twentieth Regular Session of the OAS General Assembly, and in force since 28 August 1991.

[4.](#) Signed in Cartagena, Colombia, 9 December 1985, at the Fifteenth Regular Session of the OAS General Assembly, and in force since 28 February 1987.

[5.](#) Adopted at Belém do Pará, Brazil, on 9 June 1994, at the Twenty-fourth Regular Session of the OAS General Assembly, and in force since 29 March 1991.

[6.](#) Adopted at Belém do Pará, Brazil, on 9 June 1994, at the Twenty-fourth Regular Session of the OAS General Assembly, and in force since 5 March 1995.

[7.](#) Signed in San Salvador, El Salvador, 17 November 1988, at the Eighteenth Regular Session of the General Assembly, and in force since 16 November 1999.

[8.](#) Chapter VII of the Charter of the Organization of American States is on economic standards, chapter VIII on social standards, and chapter IX on educational, scientific, and cultural standards.

[9.](#) Michael J. Reed Hurtado, "*Los derechos económicos, sociales y culturales en el sistema interamericano de derechos humanos*," Seminar on Economic, Social and Cultural Rights, Bogotá, Colombia, May 1996 (International Commission of Jurists, May 1996), 65.

- [10.](#) Inter-American Court of Human Rights, Advisory Opinion OC-5/85 of 13 November 1985, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (arts. 13 and 29 of the American Convention on Human Rights), Series A, No. 5, para. 55.
- [11.](#) Inter-American Court of Human Rights, Advisory Opinion OC-5/85, para. 52.
- [12.](#) Reed Hurtado, op. cit.
- [13.](#) Signed in San Salvador, El Salvador, 17 November 1988, at the Eighteenth Regular Session of the OAS General Assembly.
- [14.](#) See Antonio A. Cançado Trindade, "A *justiciabilidade dos direitos economicos, sociais e culturais no plano internacional*," in *Presente y Futuro de los Derechos Humanos: Ensayos en honor a Fernando Volio Jiménez* (San José, Costa Rica: Inter-American Institute of Human Rights, 1998), 190.
- [15.](#) Statute of the Inter-American Commission on Human Rights, adopted by Resolution 447 of the OAS General Assembly at its Ninth Regular Session, held in La Paz, Bolivia, October 1979, arts. 19(a) and 20(b). Regulations of the Inter-American Commission on Human Rights, adopted by the Commission at its Forty-ninth Session, in session 660, held 8 April 1980, and modified at its Sixty-fourth Session, in session 840, held 7 March 1985; at its Seventieth Session, in session 938, held 29 June 1987; at its Ninetieth Session, in session 1282, held 21 September 1995; and at its Ninety-second Special Session, in session 1311, held 3 May 1996, arts. 31 and 51.
- [16.](#) American Convention on Human Rights (hereafter cited as American Convention), article 33.
- [17.](#) Mónica Pinto, *La denuncia ante la Commission Interamericana de Derechos Humanos* (Buenos Aires: Del Puerto, 1993), 28.
- [18.](#) American Convention, article 62.
- [19.](#) Resolution No. 11/84, Case No. 9274, *Annual Report of the IACHR 1984-1985*, OEA/Ser.L/V/II.66 doc. 10 rev. 1, 127.
- [20.](#) American Convention, article 46(1)(a); IACHR Regulations, article 37(1).
- [21.](#) American Convention, article 46(2); IACHR Regulations, article 37(2).
- [22.](#) American Convention, article 46(1)(b); IACHR Regulations, articles 38(1), 52, and 38(2).
- [23.](#) American Convention, article 46(1)(c); IACHR Regulations, article 39(2)(a) and (b).
- [24.](#) American Convention, article 44; IACHR Regulations, article 26(1).
- [25.](#) IACHR Regulations, article 34(4).
- [26.](#) Inter-American Court of Human Rights, Case of Loayza Tamayo, Judgment of 17 September 1997, Series C No. 33, para. 80.
- [27.](#) Inter-American Court of Human Rights, Case of Loayza Tamayo, para. 81.

- [28.](#) American Convention, article 51.
- [29.](#) American Convention, article 64(1).
- [30.](#) American Convention, article 64(2).
- [31.](#) Victor Ambramovich, "*Los derechos económicos, sociales y culturales en la denuncia ante la Comisión Interamericana de Derechos Humanos*", in *Presente y Futuro de los Derechos Humanos: Ensayos en honor a Fernando Volio Jiménez*, op. cit., 137.
- [32.](#) IACHR, *Capote Rodríguez*, Resolution No. 3/82, Case 6091, Cuba, March 8, 1982, OAS/Ser.L/V/II.57, 20 September 1982.
- [33.](#) IACHR, Case 2137, Argentina, OEA/Ser.L/V/II.47, doc. 13, rev.1, 29 June 1979.
- [34.](#) Inter-American Commission on Human Rights, Case No. 7615 (Brazil), *Annual Report, 1984-1985*, 24-34.
- [35.](#) Ibid., 32.
- [36.](#) Ibid., 33.
- [37.](#) Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in El Salvador*, OEA/Ser.L/V/II.45, Doc. 23, Rev.1, 17 November 1978, 162.
- [38.](#) Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in El Salvador*, OEA/Ser.L/V/II.46, Doc. 23, Rev. 1, 17 November 1978, 162-66.
- [39.](#) Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Haiti*, OEA/Ser.L/V/II.46, Doc. 46, Rev. 1, 12 December 1979, 76.
- [40.](#) Inter-American Commission of Human Rights, *Annual Report 1979-1980*, OEA/Ser.L/V/II.50, Doc. 13, Rev.1, 1980, 151.
- [41.](#) Ibid.
- [42.](#) Similar criticisms have been made by Reed Hurtado, op. cit., 73 and 74.
- [43.](#) Reed Hurtado, op. cit., 79.
- [44.](#) Cançado Trindade, op. cit, 190-91.
- [45.](#) Inter-American Commission on Human Rights, *Annual Report 1991*, OEA/Ser.L/V/II.81 Rev. 1, Doc. 6. The Commission has stated: "The IACHR has prepared this preliminary study on the status of economic, social and cultural rights in the hemisphere in response to the recommendation contained in paragraph 15 of Resolution AG/RES. 1044, adopted by the General Assembly of the Organization of American States at its twentieth regular session, held in Asunción, Paraguay, from June 4 to 9, 1990. The information on the situation of these rights is based on reports presented by a number of States to international agencies and a study conducted by the Pan American Health Organization. The first point to be noted is that implementation and effective respect for economic,

social and cultural rights has been hampered by difficulties stemming from the economic crisis faced by the countries of the Inter-American system. Since promoting and bringing about effective respect for these rights is a progressive process, in step with each member country's development, the requirement to implement them has been tied to each government's effective capacity to do so. It should be noted also that, especially for the countries of the Latin American region, the decade of the 1980s was, as it has been called, the 'lost decade' because most of them had to contend with the debt crisis and their consequent further impoverishment. For that reason the external debt issue has been mentioned as one more obstacle to implementing those rights. Attention is also drawn to a number of reports by international agencies which point out that many Latin American countries used the external loan resources that gave rise to the debt to buy arms." (302-303).

[46.](#) Inter-American Court of Human Rights, *Annual Report 1986*, OEA/Ser.L/III.15, Doc. 13, 29 August 1986, 42.

[47.](#) *Ibid.*, 43.

[48.](#) *Ibid.*, 45.

[49.](#) Inter-American Court of Human Rights, Advisory Opinion OC-11/90, of 10 August 1990. Series A, No. 11, Exceptions to the Exhaustion of Domestic Remedies.

[50.](#) *Ibid.*, para. 31.

[51.](#) *Ibid.*, paras. 22-23.

[52.](#) These possible strategies of enforcement of economic, social and cultural rights are developed in fuller form in the paper prepared by the author entitled "Strategies for Enforcing Economic, Social and Cultural Rights" also presented in the March 1999 IHRIP/Forum-Asia workshop on Phi Phi Island, Thailand (see Preface).

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