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Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas

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RETHINKING THE "LESS AS MORE" THESIS: SUPRANATIONAL LITIGATION OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN THE AMERICAS

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TABLE OF CONTENTS

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I. INTRODUCTION

The judicial enforceability of economic, social, and cultural rights has received increasing attention worldwide over the last decade. Both scholars and practitioners have challenged longstanding conceptions about the nature of such rights and their suitability for case-by-case adjudication, shifting the debate increasingly away from ideology and decontextualized stereotypes of rights toward the technical and jurisdictional issues that accompany case-based litigation in the human rights field: system-specific justiciability doctrine, admissibility requirements, appropriate balancing tests, remedial deference, and supervision of compliance with final orders or settlements. As a result, a small but growing number of contentious cases has been brought before judicial and quasi-judicial bodies at the national and supranational level, seeking to vindicate and remedy through the law discrete injuries caused by arbitrary state conduct that concretely and unreasonably infringe individuals' enjoyment of their rights to adequate health, education, housing, social security, cultural integrity, and just labor conditions.[1]

Some of these cases, particularly at the national level, have met with resounding success and have been instrumental in rationalizing arbitrary state policy and in setting binding framework principles to be built upon in future litigation and social mobilization strategies. Others have been less successful, often as a result of litigant errors in matters of jurisdictional competence. Many falter, as is common in supranational litigation, at the implementation stage. What the evolving jurisprudential record makes plain, however, is that the relative success or non-success of social rights litigation de-

1. For the most up-to-date single-volume source of this jurisprudence, see SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN COMPARATIVE AND INTERNATIONAL LAW (Malcolm Langford ed., forthcoming) [hereinafter SOCIAL RIGHTS JURISPRUDENCE]. This author has two chapters in that book, analyzing the social rights jurisprudence of, respectively, the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights.

pends not on the normative characterization of a given claim as a violation of a "civil and political" or "economic, social, and cultural" right—a distinction of increasingly questionable value in legal settings—but rather on the relative sophistication of the legal and extralegal strategies undertaken by litigants and their on-the-ground partners. This is true, albeit in different ways, in relation to both the technical legal arguments urged before the competent jurisdictional body and the implementation and follow-up strategies undertaken by advocates on the ground.

In their recent article, *Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas*, James L. Cavallaro and Emily J. Schaffer advance a recommended strategy for social rights litigation in the inter-American human rights system that sidelines these positive developments in human rights litigation theory and practice, urging a return instead to unhelpful rights-based stereotypes of the past.[2] Employing such distinctions as a proxy for claim-based justiciability doctrine, they advance a *less-as-more* thesis that contends that *less* direct litigation of social rights will lead to *more* on-the-ground implementation. In this view, "direct approaches" to social rights litigation—whereby advocates rely on legal norms that autonomously guarantee the rights to health, housing, education, social security, or adequate labor conditions when those rights are breached to the detriment of individuals by arbitrary or unreasonable state conduct—are "suspect." Rather, advocates must take a more "thoughtful and responsible" approach to achieving "social justice" in the Americas.[3]

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2. James L. Cavallaro & Emily J. Schaffer, *Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas*, 56 HASTINGS L.J. 217 (2005). A similar approach is taken with respect to the United Nations human rights system in Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, Health?*, 98 AM. J. INT'L L. 462, 464, 467 (2004), which likewise draws on stereotyped dichotomies between rights to question the propriety of creating an international complaints mechanism for social rights adjudication under an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. The conclusions in the present Article, while responding directly to the Cavallaro-Schaffer thesis, are equally relevant to the arguments advanced by Dennis and Stewart.

3. Cavallaro & Schaffer, *supra* note 2, at 263, 267, 281.

This "wiser" and "more restrained" path rests not, however, on ensuring that individual claims are jurisdictionally well-crafted, properly limited to their justiciable elements, or reflect a certain margin of appreciation[4] for the state at issue. Rather, playing on classic stereotypes of the judicial enforceability of different classes of abstract rights, Cavallaro and Schaffer recommend that litigants simply recast social rights claims, including in their broadest, most structural or diffuse dimensions, as violations of classic civil and political rights.[5] Thus, arbitrary government abuses in the areas of health, housing, education, social security, freedom to unionize, or just labor conditions should not be adjudicated as actual violations of those rights—despite their autonomous guarantee in the region's binding human rights instruments and regardless of how broadly or narrowly they might be framed—but rather primarily as breaches of the rights to life, liberty, integrity, property, and non-discrimination.[6] They re-term their proposed strategy an "elements approach," arguing that social

4. "Margin of appreciation," a term used predominantly in the European human rights system, refers to the latitude of deference or error a supranational organ will allow to national legislative, executive, administrative, and judicial bodies in striking a balance between a right guaranteed by a human rights treaty and a permitted derogation, restriction, or limitation thereon, before it is prepared to declare such derogation, restriction, or limitation a violation of one of the treaty's substantive guarantees. *See, e.g.*, HOWARD CHARLES YOUROW, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE 13 (1996) [hereinafter THE MARGIN OF APPRECIATION].

5. *See, e.g.*, Cavallaro & Schaffer, *supra* note 2, at 274-75 ("This Article contends that a strategy that focuses on expansive interpretation of civil and political rights provides greater impetus for the advance of economic, social, and cultural rights within the national legal systems of the Americas by providing guidance for expansive interpretations of civil and political rights, uniformly guaranteed by the constitutions of American States."; "[O]ur focus is on the protection of elements [of civil and political rights] with economic, social, and cultural implications, rather than on formal acceptance of the rights themselves."), 275-80 (commending hypothetical "test cases" that address broad, structural, or diffuse dimensions of social rights claims under frame of civil-political norms).

6. *See id.* at 274 ("In other words, it may be more efficient for the system to recognize the right to medicine or treatment in a particular matter as an element of the right to life or the right to physical integrity than to force the system to recognize, through the individual petitions process, economic, social, and cultural rights not deemed ripe for international litigation by states.").

rights abuses, if adjudicated at all, should be addressed in their "civil and political elements."[7] These, they contend, are the only fully "justiciable" elements.[8] According to the authors, such a norm-based focus—despite its simple name-changing nature in the vast majority of cases—evidences "caution and restraint."[9] It will, in their view, correspondingly increase the "legitimacy" of the litigation, support the "credibility" of the adjudicatory bodies, and hence lead to more effective "real world change" by states otherwise resistant to economic, social, and cultural rights.[10]

This Article questions the legal and factual bases upon which the authors' thesis is constructed, highlighting the inconsistencies, both practical and conceptual, that result from its application and advocating a more technical and jurisdictional approach to social rights litigation. It argues that real-world application of the authors' less-as-more thesis, will lead

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7. The use of norms enshrining classic civil and political rights to protect their constitutive dimensions of a more economic, social or cultural nature has been termed an "integration approach," based on the idea that rights cannot artificially be separated into categories or compartments. That is, the right to life is as much an economic and social as a political right, just as the right to education is as much a civil as a social and cultural right. *See* TARA MELISH, PROTECTING ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM: A MANUAL ON PRESENTING CLAIMS (2002) [hereinafter PROTECTING]. Distinctions between social, economic, civil, political, and cultural rights generally obscure more than they illuminate; rarely are they useful on a practical level. Conceptually, then, the terminology "elements approach" may be problematic in its unhelpful tendency to reinforce the idea of rights as differentiable along subjective lines of categorization. *See infra* notes 43-46 and accompanying text.

8. *See* Cavallaro & Schaffer, *supra* note 2, at 263 (contrasting approach "seeking to incorporate economic, social, and cultural elements within the scope of justiciable civil and political rights" with "a direct approach, in which advocates allege violations of provisions of human rights instruments that specifically refer to economic, social, and cultural rights"). For Cavallaro and Schaffer, economic, social and cultural rights lack corresponding justiciable obligations, and thus are judicially unenforceable. *See id.* at 222, 252, 267-68.

9. *Id.* at 281.

10. *Id.* (suggesting that recommended approach "will enhance [litigants'] chances of success in their legal battles and also increase the likelihood of effecting real-world change, while maintaining the credibility of supranational oversight mechanisms themselves."; "Litigation as part of such broader campaigns may advance economic, social, and cultural rights *even without litigating them directly. Within these constraints,* international litigation may be effective.") (emphasis added).

to neither less frequent litigation nor more implementation at the local level. Neither will it lead to higher levels of legitimacy or credibility in supranational litigation.

To the contrary, having misidentified the source of the problem, it will have precisely the inverse effect: more "distributive justice" claims framed as absolute/immediate entitlements that are undiscerning of core justiciability requirements, political realities, practical implementation time-tables, queue-jumping concerns, and social movement synergies. These are precisely the types of cases that are least likely to be admissible under contentious process or to have long-term real-world impacts. The result, at the practical level, will be to undermine not only the economic, social, and cultural rights for which the authors seek expanded real-world protection—the substantive and procedural contours of which will now be placed off-limits from direct judicial interrogation in concrete individual contexts—but also, through inattentiveness to system-specific justiciability doctrine, the civil and political rights on which they seek to rely and stake the regional system's legitimacy.[11] Indeed, the predictably perverse results that follow from the authors' thesis should serve as a clarion call to both advocates and governments to avoid distinctions between any category or class of rights.[12]

This inverted outcome results inevitably from two critical flaws in the Cavallaro-Schaffer thesis, one conceptual, one technical-jurisdictional. The first is the unexamined distinction between civil and political rights as "immediately enforceable" and economic, social and cultural rights as "lacking enforceable duties," a distinction that lies at the heart of the thesis and, at a broader level, represents one of the most enduring misperceptions in human rights advocacy and litigation today.[13] It is this conceptual error that leads the authors

11. *See* discussion *infra* Part VI.

12. For further discussion on the unintended consequences of distinguishing in litigation contexts between categories of rights and applying different state obligations to each, see Tara J. Melish, *Beyond "Separate But Equal": Desegregating Human Rights Duties and Taking Social Rights Adjudication Seriously* (unpublished manuscript, on file with The New York University Journal of International Law & Politics).

13. This misperception has, in many ways, defined the core arguments of detractors and supporters of social rights litigation alike. While detractors use the distinction to favor civil-political-rights litigation and to distinguish

to posit that the formal renaming of a social rights claim as a civil-political rights case is sufficient to convert an otherwise "non-justiciable" claim into a "justiciable" one. This view underappreciates the complex dimensionality of the legal obligations attaching to human rights guarantees and, fundamentally, the relevance of claim-based justiciability doctrine to the proper framing of an adjudicable case. The second flaw derives from the failure to adequately distinguish four staples of the supranational litigator's daily fare: *subject matter jurisdiction, justiciable breaches, remedy crafting,* and *enforcement/implementation strategies.* The Cavallaro–Schaffer thesis entangles critical elements of each, conflating distinct jurisdictional requisites[14] and stages of litigation,[15] often by superimposing upon them pre-conceived or unexamined notions of the nature of distinct rights and their corresponding obligations.

This Article seeks to respond to the Cavallaro-Schaffer less-as-more thesis by disentangling its constituent elements and reframing it from a technical-jurisdictional perspective. In so doing, it sets out a distinct vision of the adjudicable ambit of social rights claims, one delimited not by outmoded dichotomies between classes of rights, but rather by the jurisdictional limits of supranational bodies in the exercise of adjudicatory, as distinct from promotional, functions. Those limits

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social rights as programmatic, supporters have tended to accept the distinction just as uncritically, focusing on the creation of a priori doctrines and typologies to carve out and define the "immediately enforceable" components of social rights. The two most popular at the moment involve, first, the abstract definition of a right's "minimum core content," the guarantee of which is said to be "immediately enforceable," as contrasted with the right's "progressive" periphery and, second, a division among either the tripartite duties of respect, protect, and fulfill (the former two denominated "immediate," the latter "progressive") or the concepts of an immediate "prohibition on regressivity" verses a non-immediate "duty of progressive realization." It is contended that these standard social rights doctrines fail to hold much explanatory power or practical resonance in litigation contexts. They often lead to absurd results upon application in concrete contexts. The resulting disconnect between currently ascendant social rights theory and litigation practice will be addressed more fully elsewhere, particularly as it is illuminated by the quadrant-based framework set out in Part III of this Article. *See id.*

14. In particular, they conflate subject-matter jurisdiction and the framing of a justiciable controversy. Cavallaro & Schaffer, *supra* note 2, at 264.

15. They particularly conflate case-framing, remedy-crafting, and enforcement initiatives. *Id.* at 268.

correspond to all rights-based claims, regardless of the subjective characterization of the legal norm under which they are framed. In this regard, it is insisted that more focused, responsibly-crafted, higher-quality litigation leads to better results, both jurisprudentially and on the ground. This end, however, requires careful attention to jurisdictional and justiciability concerns at the stage of framing the substantive and remedial scope of a case and not, as the Cavallaro-Schaffer thesis implies, to the outer cloaking of a claim as a "civil and political right." Good lawyering, based on well-crafted claims that adhere to the fundamental elements of a justiciable case, not transparent decoys designed to hoodwink governments into thinking they are dealing with "immediately enforceable" civil and political rights, is needed to expand legitimate judicial protection of economic, social, and cultural rights.

After outlining the contours of the Cavallaro-Schaffer less-as-more thesis in Part II of this Article, Part III.A addresses its principal underlying error: the premise that jurisdictional provisions directly protecting economic, social, and cultural rights in the inter-American system contain no "enforceable rights" and "no definite grounds for state responsibility" cognizable in the individual petitions process.[16] This assessment is based on a faulty reading of the system's jurisdictional instruments, neglect of contrary decisions by the system's supervisory organs, an unwarranted conflation of the frequency and justiciability of certain types of litigation, and an uncritical reliance on one piece of isolated obiter dictum in a recent decision of the Inter-American Court of Human Rights ("Court").

The corresponding error is addressed in two parts, each directed at demonstrating why autonomous social rights claims are no less enforceable in the regional system than those framed under classic civil and political rights. The first clarifies the inter-American organs' uncontested *ratione materiae* jurisdiction over social rights norms in the individual complaints procedure. The second contrasts this *norm*-specific jurisdiction from the equally-important *claim*-specific constraint of justiciability. It describes the parameters of a justiciable controversy in the regional system and highlights the critical jurisdictional role those parameters serve in distinguishing between claims appropriate for case-based *adjudication* and those

16. *Id.* at 267-68.

more suited to *political* mechanisms of control. That dividing line falls not, as the Cavallaro-Schaffer thesis implies, between abstract categories of rights but rather between claims that fulfill and those that fail to fulfill the elements of a justiciable controversy. The point to be underscored is the fundamental difference between the subjective characterization of a given claim—i.e., whether it is normatively described as civil, cultural, economic, political, or social—and the constituent elements of that claim, *whatever its subjective characterization*, that enable rules of decision to be applied to it in an adjudicatory context. Only the latter is relevant in contentious processes once appropriate subject matter jurisdiction is assured.

A new quadrant-based framework for distinguishing the justiciable dimensions of state obligations from those more appropriate to supranational monitoring and promotional mechanisms is thus set out in Part III.A.2. The framework responds to the principal problem underlying the Cavallaro-Schaffer thesis: the view that *different* obligations apply to rights formally categorized as "civil and political" and those as "economic, social, and cultural." By insisting that the same spectrum of legal obligations apply to all human rights, but that only certain dimensions of those obligations are cognizable under adjudicatory process, the framework sets out a general theory for supranational human rights litigation in individual complaints procedures, irrespective of the formal right used in litigation. The critical insight is that the dimension of obligations that any treaty-based supervisory body may properly apply to a given human rights issue or dispute depends not on the subjective right at issue but rather on the nature of the competence used by the supervisory instance in exercising jurisdiction over that issue or dispute. This distinction is too often ignored by international human rights advocates, who often seek to transfer unreflectively rights-based concepts and duties developed or enunciated by supranational supervisory bodies under their promotional or advisory mandates into non-congruent adjudicatory contexts, where issues of justiciability take center stage.[17] Because of historically-restricted

17. This is particularly true of the result-based duty of "progressive realization" and its corresponding "prohibition on regressivity," developed by the U.N. Committee on Economic, Social and Cultural Rights through its periodic reporting procedures and general comments. Advocates have widely

limits on the competence of these supervisory bodies, particularly the U.N. Committee on Economic, Social and Cultural Rights, over-reliance in litigation contexts on their non-case-based "jurisprudences" to characterize the adjudicable dimensions of state obligations tends to lead to misleading, and often perverse, results in practice.

The "legitimacy" of social rights litigation is then addressed in Parts III.B and IV. Cavallaro and Schaffer's generalized assessment that social rights litigation is considered illegitimate by American states is questioned from an empirical perspective. Part IV then turns to legitimacy in supranational litigation more generally, highlighting the key features that most commonly lead to legitimacy critiques and situating Cavallaro and Schaffer's recommended test cases within them. By ignoring these concerns, particularly those related to core justiciability requirements, such as individualized injury-in-fact and defendant-specific causal conduct, Cavallaro and Schaffer recommend a strategic course that, if embraced, will in fact exacerbate legitimacy concerns in supranational litigation.

Part V expands on this analysis by focusing in on the nature of *adjudicable*, as distinct from *monitorable*, breaches of international legal obligations. Cavallaro and Schaffer neglect this distinction and, in so doing, fall into the trap of commending "hypothetical cases" that are not in fact cognizable in the individual petitions process. They are more appropriate to the promotional mandate of the Inter-American Commission on Human Rights ("Commission") and other supranational supervisory bodies, in conjunction with social movement advocacy, protest strategies, and monitoring and lobbying initiatives at the domestic level. That is, by simplistically substituting a façade of civil and political rights for a well-crafted argument attendant to justiciability and implementation concerns, they replicate the same nettlesome issues they sought to avoid in defining their less-as-more approach. In sum, they assume that merely changing the name of the right will somehow make the legitimacy concerns go away. This approach mis-

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attempted to convert these concepts into directly justiciable ones, with often perverse results for the social rights at issue. *See, e.g.*, Tara J. Melish, *A Pyrrhic Victory for Peru's Pensioners: Pensions, Property, and the Perversion of Progressivity*, 1 CEJIL JOURNAL: DEBATES ON HUMAN RIGHTS AND THE INTER-AMERICAN SYSTEM 51 (2005) [hereinafter *A Pyrrhic Victory*].

perceives the legitimacy and justiciability problems facing human rights litigants, problems that are not limited to any particular category of rights but rather attend to how such rights are translated into individual claims.

Part VI then turns to the practical implications of the Cavallaro-Schaffer less-as-more thesis. Using actual cases resolved in the inter-American system it explains why an exclusive focus on classic civil and political rights or an "elements approach" is unwarranted not only in jurisdictional terms but also, most importantly, on a practical level. In this regard, it also addresses the problem of "queue-jumping" raised by Cavallaro and Schaffer and other skeptics of direct case-by-case adjudication of economic, social and cultural rights.[18] The conclusion is drawn that while queue-jumping—the strategic use of rights-based litigation to jump to the head of a line in accessing scarce entitlements—is a serious concern in rights-based adjudication, it in no way supports the notion that advocates should either limit their litigation initiatives to civil and political rights norms or prefer alternative, non-adjudicatory mechanisms for protecting economic, social, and cultural rights, as Cavallaro and Schaffer suggest.[19] Rather, the problem of queue-jumping—which affects *all* categories of rights equally—is appropriately addressed through two interrelated mechanisms: proper construction of the scope of individual rights *vis-à-vis* the rights of others and proper design of remedial orders. The inter-American human rights system is well equipped to deal with these issues within the adjudicatory process.

Finally, Part VII recasts the less-as-more thesis, providing a new definition of what "less" should entail and specifically ex-

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18. *See also* Dennis & Stewart, *supra* note 2, 464-66. The authors, U.S. State Department attorneys, fall into the same conceptual traps as do Cavallaro and Schaffer, both in attempting to draw distinctions between "civil and political" and "economic, social, and cultural" rights and in appreciating the practical legal significance of justiciability doctrine in international complaints procedures.

19. While Cavallaro and Schaffer disavow that they "subscribe fully" to arguments that reject all rights-based litigation given queue-jumping concerns, they conclude that litigation may be effective as part of a broader political strategy to the extent that it does not invoke economic, social, and cultural rights directly. *See* Cavallaro & Schaffer, *supra* note 2, at 281 ("Within these constraints, international litigation may be effective.").

cluding cases framed in terms similar to the Cavallaro-Schaffer hypotheticals. It sets out a general framework for approaching social rights litigation, one which takes into account the distinct jurisdictional requirements and procedural stages of adjudication. Whether utilizing an "indirect," "integration," "direct," or "complex violations" approach,[20] advocates should not choose the strategic focus of their cases based on any superficial or predetermined characterization of the claim at issue but rather on the nature of the specific issue or value they seek to vindicate. To do otherwise is to undermine the very raison d'etre of establishing internationally-recognized human rights; we lose essential aspects of what it is to be human and to live with human dignity.

II. THE CAVALLARO-SCHAFFER THESIS, IN RELIEF

I begin by outlining the contours of the Cavallaro-Schaffer thesis, pulling out the central features that define the argument. Cavallaro and Schaffer in effect offer two disconnected theses, the first set out in Parts I and II of their article, the second in Parts III and IV. The first, uncontroversial and largely unassailable, relates to the implementation stage of human rights litigation and is illustrated by classic civil-political rights cases. The second, falsely premised and unsustainable, refers to the pleading stage and draws conclusions about economic, social, and cultural rights. While presented as if they formed an unbroken crescendo of argument, there is in fact no logical link between the two: They address different stages of litigation and involve distinct sets of strategic decisions by lawyers and advocacy groups. In fact, not only do the evidence and conclusions offered in the first half of the article fail to support the ultimate conclusion that the legitimacy and real-world impact of social rights adjudication requires reliance on civil-and-political-rights norms, they directly undermine it. The two halves of the thesis—the "more" and the "less"—simply fail to correspond in any meaningful way.

20. These four approaches to social rights litigation in the inter-American system are described at length in PROTECTING, *supra* note 7, at 193-357.

A. *Thesis I: Low Rates of Real-World Implementation of Supranational Orders*

Cavallaro-Schaffer Thesis I, referring to the "more" in their less-as-more thesis, addresses the ultimate goal of all human rights litigation: actual on-the-ground implementation of supranational remedial orders.[21] Such remedial orders aim not only at returning the victim-plaintiff to the status quo ante (through measures of restitution, compensation, and rehabilitation) but also at preventing recurrence of the same or similar violations in the future (through measures of satisfaction and guarantees of non-repetition aimed at long-term, structural policy change).[22] As practiced human rights litigants are intimately aware, the implementation stage of litigation—including implementation of negotiated friendly settlements—often presents the most difficult, time-consuming, and resource-intensive hurdle to successful real-world change. This is particularly true at the supranational level, where, given the requirement of exhaustion of domestic remedies,[23] national authorities have already demonstrated a disinclination to enforce human rights guarantees through domestic procedures, often vigorously defending those decisions in supranational proceedings.

In Parts I and II of their article, therefore, Cavallaro and Schaffer embark on the useful and important task of identifying some of the factors that contribute to higher or lower rates

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21. "Supranational remedial orders" or "decisions" is used broadly here, and throughout this Article, as inclusive of final judgments and orders of the Court, recommendations of the Commission, and friendly settlements entered into by both the Commission and Court.

22. The Court recognizes these five distinct elements of reparation under international law: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. *See, e.g.*, Loayza Tamayo v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 42, ¶ 85 (Nov. 27, 1998).

23. In light of the principle of subsidiarity, a foundational admissibility rule in all supranational adjudicatory procedures is the prior exhaustion of domestic remedies. Only when all available remedies have been exhausted and a final decision has been issued from the highest level of appeal (unless a recognized exception applies), may a petition be submitted to the adjudicatory processes of the inter-American human rights system. *See* American Convention on Human Rights, art. 46(a), 1144 U.N.T.S. 123, O.A.S.T.S. No. 36, at 1 (Nov. 22, 1969) [hereinafter American Convention]; *see also* Rules of Procedure, Inter-Am. Ct. H.R., art. 31(1) (Nov. 25, 2003) [hereinafter IACHR Rules of Procedure].

of domestic compliance with supranational orders. To do so, they present five case-studies from the inter-American system in which three member states of the Organization of American States (OAS)—Brazil, Peru, and Trinidad and Tobago—failed to comply, either partially or wholly, with orders of the Commission or the Court in cases involving classic civil and political rights. Oddly, given the focus of their article, not a single case was presented—for illustrative or comparative purposes—in which directly-framed rights of an economic, social, or cultural nature were at issue. Rather, each case involved classic civil-political rights violations: torture, execution, arbitrary detention, physical abuse, and lack of due process. Notably, these cases arose in such nationally-sensitive areas as terrorism prosecutions, capital punishment, and penal conditions.[24]

From these five case-studies—supplemented by an annual survey on state compliance with the Commission's petition-based recommendations—the authors arrive at two factually uncontroversial and normatively neutral theses. First, supranational remedial orders in human rights litigation tend toward low rates of compliance by defendant states.[25] Second, the rate and quality of actual compliance increases when formal litigation is accompanied by active social movements, a diverse set of strategies, a sympathetic victim, and regular media attention. Based on these unassailable observations, they conclude with the equally unassailable recommendation that suprana-

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24. The case studies involved the *Urso Branco Case* and *42nd Police District Case* from Brazil (prison violence), the *Loayza Tamayo Case* and *Castillo Petruzzi Case* from Peru (terrorism prosecutions), and the *Hilaire Case* from Trinidad and Tobago (death penalty). *See* Cavallaro & Schaffer, *supra* note 2, at 240-50.

25. *See id.* at 248-50. Such rates in the inter-American system are generally not quite as "bleak" as Cavallaro and Schaffer suggest, especially with respect to the Latin American states on which the authors focus their article. This would have been clearer had the statistics been further broken down between states that purport to comply with Commission recommendations and those that make few such pretensions. It also would have been clearer if the range of measures reflected in "partial" implementation were further clarified. States tend to have relatively high compliance rates with respect to compensatory orders of a monetary nature. They also frequently engage in legislative or policy modifications, although, unsurprisingly, in most cases this takes time. They are far less good at undertaking serious investigations and sanctioning those responsible, a failure that would consistently render them "partially" compliant even where all or most other required measures were undertaken.

tional litigants should choose their cases carefully, work closely with local level organizations capable of generating popular support, and use a broad diversity of advocacy tools and media strategies to supplement their technical legal arguments.[26]

Few could disagree with this neutrally-framed thesis. Plainly, however, it fails to speak to the central issue addressed in their article: whether the rate and quality of state compliance with supranational orders rises or falls with the framing of a social-rights case in terms of classic civil and political rights or classic economic, social, and cultural rights. It suggests only that states' compliance rates are "bleak" with respect to the former category and that this is particularly true when national security or sovereignty issues are at play. Since these latter concerns do not pertain more readily to economic, social, and cultural rights than to their civil and political counterparts, the relevance of the first half of the article to their stated topic is far from clear.

Nonetheless, if better substantiated and delinked from economic, social, and cultural rights—about which it makes no factual or argumentative mention—Cavallaro-Schaffer Thesis I could have constituted the basis of an important and timely article in itself. Indeed, except for several unwarranted assumptions that could be drawn from it—e.g., that supranational litigation should not be pursued on behalf of "unsympathetic victims" who lack media draw and popular support[27]—this thesis could have provided a useful springboard for a necessary conversation on how to improve low levels of domestic compliance with supranational court orders. An analysis of donor funding priorities, activity restrictions, and timetable contingencies in human rights litigation, and their relationship to both actual compliance levels and the quality, frequency, and scope of litigation-related advocacy efforts would have been particularly useful. Such an analytical focus would have gone far to address the actual reasons why litigation is sometimes insufficiently linked to broader advocacy efforts,

26. *Id.* at 251.

27. *See id.* Indeed, "unsympathetic victims" are often precisely those for whom resort to supranational human rights litigation is most necessary, given their lack of ability to mobilize political and legal support at the national level. Prisoners on death row, accused foreign terrorists, non-citizens, detainees, and racial, ethnic, and religious minorities have historically formed the core of human rights litigation.

rather than attributing it to advocates' unawareness of the usefulness of such strategies or supposed zeal for constructing legal arguments that have no real-world impact.[28]

An equally useful and necessary conversation following naturally from the authors' case-study analysis would involve the reasons why states resist certain supranational orders while complying fully with others. From this vantage point, the authors could have concluded that low levels of domestic compliance with supranational judicial orders correspond directly to the degree with which the defendant state, and majority populations, feel those judgments have encroached on their national sovereignty, constitutionally-entrenched divisions of power, national defense, or ability to pursue their democratically-defined national interests. Such a conclusion—which relates to how litigants and adjudicators construe the nature and scope of state obligations under human rights treaties, craft responsive remedial orders, and understand the bounds of their supervisory role—could easily have been drawn from the case examples cited. These tended to deal with sensitive national security or national interest issues, with which states might feel that, consistent with the principle of subsidiarity, they should have been granted a larger margin of appreciation.[29] The logical denouement to such a line of argument

28. *See id.* at 274, 219 (chastising litigants to "be more interested in advancing guarantees for victims than in advancing rights on paper" and to seek "sustainable, structural, transformative changes of Latin American society—and not merely sterile, judicial recognition of economic, social, and cultural right."). In making their argument, Cavallaro and Schaffer appear to ignore in many ways the reality in which human rights organizations operate, the on-the-ground resources on which they rely, and the actual breadth of strategies utilized in the vast majority of litigation efforts. By contrast, their critique could have proved quite illuminating and useful had they provided actual concrete examples of how advocates, faced with a particular dilemma of implementation, failed to make appropriate use of available resources or ignored opportunities for engagement with a diversity of actors to aid implementation efforts on the ground.

29. See discussion at *supra* note 4. This certainly reflected Peru's understanding. On July 1, 1999, the Peruvian state submitted a note to the Secretary General of the OAS in which it announced that it would not comply with the terrorism-related judgments of the Court in the case of Castillo Petruzzi et al. nor with the judgment on reparations in the Loayza Tamayo case, arguing reasons of law and political considerations. Peru believed that, with the broad support of the population, it had adopted a counter-terrorism strategy that correctly balanced the rights of accused terrorists with the

would, however, have led Cavallaro and Schaffer to focus, in the second half of their article, on constructing a "new analytical framework"[30] that directly addressed these overarching sovereignty and subsidiarity concerns, issues their own case studies identified as giving rise to low levels of domestic compliance with supranational orders.[31] These legitimacy concerns, it is contended, are the chief issue that needs to be addressed in supranational litigation, particularly at the stage of crafting judicial remedies that support democratic accountability, facilitate participatory governance, and keep the door sufficiently open to social movement mobilization and long-term political solutions. Such concerns, however, are unrelated to whether a claim is framed in terms of its civil-political or economic-social-cultural dimensions. They apply equally to all supranational human rights orders.

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rights of the Peruvian population and had thereby, through its considered policy choice, dealt with the internal terrorism threat in a way that avoided recurrence to the systematic human rights abuses that had occurred in Peru in the past. *See* Second Report on the Situation of Human Rights in Peru, Inter-Am. C.H.R., OEA/Ser.L/V/II.106, doc. 59 rev. ¶¶ 11-13 (2000).

30. Cavallaro and Schaffer insist upon the need for "a new analytical framework" for social rights litigation. Cavallaro & Schaffer, *supra* note 2, at 254. They base this insistence, however, on recognition that the classic negative/positive distinction between civil-political and economic-social-cultural rights does not hold water. From this, they appear to conclude that although social rights remain "progressive" in nature, and hence are not judicially enforceable in their own right, their "positive" dimensions can nonetheless be protected through traditional civil-political rights, such as the right to life and non-discrimination, which, in Cavallaro and Schaffer's view, are "immediately enforceable" in their full dimensionality. This strategy of swapping rights to take advantage of their supposedly "progressive" verses "immediate" qualities nonetheless ignores the sovereignty, separation-of-powers, and subsidiarity issues that lie at the heart of traditional critiques of social rights as infringing on the democratic and legislative prerogatives of states—issues that formed the core of the civil-political-rights case-studies Cavallaro and Schaffer analyzed in the first half of their article. Their thesis thus fails as a way to think generally about social rights litigation.

31. This was most clearly demonstrated in the authors' discussion of Hilaire v. Trinidad and Tobago, Inter-Am. Ct. H.R. (ser. C) No. 94 (2002), involving the state's refusal to comply with a Court order to suspend several executions of convicted criminals. According to Cavallaro and Schaffer, "the State's repudiation of the authority of the Inter-American system may be seen not only as an expression of state sovereignty but also as a vindication of popular sentiment and rejection of a system imposed by colonial rule." Cavallaro & Schaffer, *supra* note 2, at 250.

Instead of following either of these natural lines of argument, Cavallaro and Schaffer shift gears entirely, ignoring the direct implications of Thesis I and, with it, the most important challenges facing actors in human rights litigation: the nature and scope of state obligations under human rights instruments, the proper balance to be struck in adjudicating claims implicating competing rights and duties, the margin of appreciation to be afforded to states in honoring these commitments, and the proper scope of remedial orders. Rather, they focus, in Parts III and IV, on the conceptually most inconsequent issue in human rights litigation, particularly at the implementation stage: the normative characterization of a given human rights claim as "economic," "social," "cultural," "political," or "civil."[32] This forms the basis of their Thesis II.

B. *Thesis II: Limiting Legal Pleadings to "Civil and Political Rights" Norms*

Cavallaro-Schaffer Thesis II—referring to the "less" of their less-as-more thesis—has two components. The first is that litigants should pursue quantitatively fewer claims involving economic, social, and cultural rights at the supranational level given that these rights involve issues of "social justice" that are better left to non-litigation political strategies and domestic social-movement advocacy.[33] Second, and most central to their thesis, any exceptional litigation involving such rights that is pursued[34] should be carefully circumscribed at the

32. While these considerations are effectively irrelevant at the implementation stage, they can matter at the case-framing stage in the limited sense that the inter-American organs have recently demonstrated a proclivity—one which should be challenged, not accommodated—toward applying different obligations to rights depending on whether they are included in Chapter II or III of the American Convention on Human Rights. For an analysis of the underlying error, and how it must be corrected, see *A Pyrrhic Victory*, *supra* note 17.

33. Cavallaro & Schaffer, *supra* note 2, at 221 ("[W]e recommend that international human rights lawyers accept the limits inherent in litigation in the inter-American system and seek alternative means of maximizing their impact in advancing the agenda of social justice.").

34. While allowing for some exceptions, such as under the Protocol of San Salvador, Cavallaro and Schaffer nonetheless never explain how such exceptional cases should be chosen. They refer only to the need to actively consult with local social movements. Yet, it is local social movements, disillusioned and frustrated with domestic processes, that are generally the parties

pleading stage to classic civil and political rights.[35] In the view of Cavallaro and Schaffer these rights are capable of immediate judicial enforcement and American states universally view their litigation as legitimate. This stands in contradistinction to economic, social, and cultural rights, which lack either of these essential qualities: They are neither immediately enforceable nor is their adjudication viewed as legitimate by American governments. Consequently, litigation strategies based on direct pleading of social rights are "suspect" and should be avoided in favor of expansive interpretations of classic civil and political rights.

According to Cavallaro and Schaffer, failure to follow this approach may provoke "extreme reactions" from the member states of the OAS, leading to backlash and non-implementation of supranational judgments.[36] A focus on traditional civil and political rights, they argue, will avoid this backlash and lead to greater domestic implementation because civil-political rights adjudication, in contrast to that of economic, social, and cultural rights, is universally deemed "legitimate" by American governments.

In effect, moving from an uncontroversial focus on the usefulness of "mobilizing shame," both domestically and internationally, as an extra-legal strategy to ensure domestic compliance with international human rights norms—a strategy that applies to all categories of rights, regardless of the technical legal arguments handled in litigation briefs—they recast their argument into one related to the technical selection between equally valid jurisdictional bases for litigating certain "types" of cases. Based on this, they chastise litigants in the system for their currently "unwise" approach in seeking to directly adjudicate, in concrete contexts, the rights to health, education, housing, and social security, offering a "new analytical

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pushing most vigorously for supranational litigation. In this sense, the authors' proper insistence on the need for local level consultation with such movements needs to be reconciled with the likely results it entails: more, not less, litigation. *Id.* at 220-21.

35. *See id.* at 274-75.

36. *Id.* at 270, 236 ("As we argue, practitioners must recognize the potential for counterproductive results, either due to overreaching, leading to decisions unlikely to be enforced, or to excessive emphasis on rights-based approaches to the detriment of other, potentially more effective means of seeking change.").

strategy" that simply restates, in *exclusive* terms and under their own terminology, the dominant strategy used *non-exclusively* in virtually all current supranational litigation. They then recommend a set of hypothetical "test cases" that replicate, in stark and dramatic form, the very problems that threaten to create a "crisis of legitimacy" in the system.

The deductions drawn by the authors are eminently curious. Indeed, Cavallaro-Schaffer Thesis I directly subverts Thesis II. While the latter warns that practical on-the-ground implementation depends on casting claims as civil and political rights, the former affirms that American states habitually fail to implement, or even accept the legitimacy of, supranational judgments involving classic civil and political rights. It identifies as "bleak"[37] OAS member states' compliance record with such supranational orders and recognizes the political backlash thereto can be so severe as to provoke the most extreme of reactions from states: The threat to withdraw their consent to the supranational organ's contentious jurisdiction.[38] This backlash and resistance reflects states' view that certain supranational decisions involving traditionally-understood civil and political rights are in fact *illegitimate* and hence unworthy of respect at the domestic level.

Cavallaro-Schaffer Thesis I thus decisively demonstrates that something *other than* the outer cloak of a legal claim as an "immediately enforceable" civil and political right gives rise to higher or lower levels of on-the-ground implementation.[39]

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37. *Id.* at 233.

38. Both Trinidad and Tobago and Peru have threatened to withdraw their consent to the Court's jurisdiction following Court holdings against them—one in relation to capital punishment, the other in relation to treatment of terrorism suspects. Trinidad and Tobago followed through in 1998. In a similar vein, Venezuela has recently submitted an advisory opinion request to the Court following several decisions against it by the Commission, particularly in the area of freedom of expression of journalists and activists critical of the Chavez administration. The request asks the Court to pronounce on the remedies available to states to challenge Commission decisions "that contravene the law." For the Court's response, see Control de Legalidad en el Ejercicio de las Atribuciones de la Comisión Interamericana de Derechos Humanos, Inter-Am. Ct. H.R. (ser. C), Advisory Opinion OC-19/05 (Nov. 28, 2005).

39. While Cavallaro and Schaffer could have argued that an outer cloak of "civil and political rights" may better mobilize domestic social movements, which would then function to counteract and moderate state resistance to

Yet, Thesis II argues precisely that redefining the outer shell of a "social justice" claim as a civil-political right will avoid "provok[ing] extreme reactions"[40] from states and lead to higher rates of real-world implementation, given the uncontested "legitimacy" of the latter in the eyes of American states. Plainly, Cavallaro and Schaffer have misidentified what it is about particular supranational orders that raises legitimacy concerns and provokes extreme reactions from states.

They have also misidentified what it is about a claim that raises problems of justiciability. Indeed, if a particular claim involving the right to health, to education, or to housing is framed in a way that renders it truly unamenable to judicial resolution, despite the formal existence of contentious subject matter jurisdiction over those norms, then adjudicating the *same* claim under a different set of equally-appropriate jurisdictional norms cannot transform the claim into a justiciable controversy.[41] Such an approach divests justiciability doctrine of its substantive content. It elevates the veneer of rights, and any historical baggage conceptually attached thereto, over both commonly-accepted limits on judicial competence and the dignity interests that give meaningful content to rights as legal norms.

It is, in fact, only by attaching the notion of "justiciability" to abstract rights—rather than to the discrete claims framed under them—that the "elements approach" can be advanced as a strategic response to something other than a problem of limited subject matter jurisdiction, which Cavallaro and Schaffer do not assert.[42] It is to be noted in this regard that the

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supranational orders that raise sovereignty issues, they did not do so. More importantly, it is unlikely that they could have, given the lack of any evidence that economic, social, and cultural rights have any less popular appeal, mobilizing capacity, or media draw in Latin America than civil and political rights. In fact, it may be that such rights have greater popular appeal, mobilizing capacity, and media draw, since respect thereof is often viewed as having broader implications over the general public.

40. *See* Cavallaro & Schaffer, *supra* note 2, at 270.

41. Indeed, justiciability refers to the appropriateness for judicial review of a given claim or controversy, not that of an abstract right without reference to a discrete factual dispute between adverse parties. *See infra* Part III A.2.

42. *See* Cavallaro & Schaffer, *supra* note 2, at 224-27, 267 (recognizing that economic, social, and cultural rights are formally guaranteed under the American Declaration, the American Convention, and the Protocol of San

authors effectively bundle under their broad "elements" terminology at least three distinct approaches to rights-based litigation. These three approaches, sharing only the common feature of reliance on classic civil-political rights norms, might usefully be called elements approaches "I," "II," and "III." Only the first is reconcilable with the idea that autonomous social rights, despite proper subject matter jurisdiction, cannot be judicially enforced in the inter-American system.

That approach, the narrowest, eschews classic social rights abuse entirely for purposes of litigation. It encourages advocates to cull from a complex situation of abuse only those factual elements of a classically-narrow civil-political nature: a death, an execution, an arbitrary arrest, torture, or physical violence.[43] The adjudicator's lens is thus focused narrowly around those circumscribed abuses, excluding from the litigation equation the concurrent and often inseparable factual abuses of a more socio-economic or cultural nature: the forced eviction, the unjustified school or job dismissal, the union retaliation, the arbitrary or unreasonable deprivation of health care.[44] Those classic social rights abuses, treated merely as the "underlying factors giving rise to violations of civil or political rights,"[45] are reserved for non-litigation, political strategies on the assumption that they are not, in themselves, justiciable.

By contrast, elements approach II (referred to elsewhere as an integration approach[46]) departs from precisely the opposite supposition: It embraces as unreservedly adjudicable the classic social rights abuse that, under elements approach I, would have been relegated to the political process as beyond the legitimate competence of courts. It merely *calls* those

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Salvador, the inter-American organs' contentious subject matter jurisdiction over them being expressly limited under the latter instrument only, and then only partially).

43. *Id.* at 221, 278-80 (highlighting the strategy of "defending the civil and political rights of leaders of social movements," such as peasant and labor leaders, as well as focusing on physical deaths as a case-framing strategy).

44. *See* discussion *infra* Part VI.A (providing examples and discussion of *Corumbiara v. Brazil* and *Yean and Bosico Girls Case v. Dominican Republic*).

45. Cavallaro & Schaffer, *supra* note 2, at 272.

46. *See* PROTECTING, *supra* note 7, at 233-332 (discussing strategic use of norms under chapter heading "Civil and Political Rights" of the American Convention (arts. 3-25) to protect against classic social rights abuses).

abuses violations of norms classically identified as "civil and political."[47] Thus, a forced eviction is framed in terms of the right to property or due process, rather than the right to housing. An unreasonable denial of medical care is litigated under the right to life or integrity, rather than the right to health. An arbitrary school dismissal is framed as a violation of the right to political participation or non-discrimination, rather than directly as a violation of the right to education.[48] Such discretional choice between equally-appropriate norms is, however, plainly unrelated to justiciability. Indeed, if justiciability doctrine rested on such easily-finessed factors there would be no need for it; it would be subsumed by *ratione materiae* limitations on an adjudicatory body's competence. That is, while exclusive reliance on the "integration" or "elements II" approach necessarily follows as a practical and strategic solution to *ratione materiae* limitations on a tribunal's adjudicatory competence—explaining its prominence in the case-based jurisprudence of the U.N. Human Rights Committee and the European Court of Human Rights, which have far more limited subject matter competence over autonomous social rights than do the inter-American organs—it cannot be reconciled with a thesis that autonomous social rights are themselves not amenable, or are less amenable than other rights, to judicial review.

The same is true of what might be called elements approach III (referred to elsewhere as an "indirect approach"[49]). That approach likewise embraces classic social rights abuse as

47. Cavallaro & Schaffer, *supra* note 2, at 272 ("Thus, for example, an expansive interpretation of the right to physical integrity, a civil right, could include the right to medical treatment, an economic, social, and cultural right. An expansive view of the right to political participation might include the right to be literate, and thus the right to be educated.").

48. *See id.* at 272 (substituting right to integrity for right to health, and right to participation for right to education), 274 ("[I]t may be more efficient for the system to recognize the right to medicine or treatment in a particular matter as an element of the right to life or the right to physical integrity than to force the system to recognize, through the individual petitions process, economic, social, and cultural rights not deemed ripe for international litigation by states."), 278 (substituting right to life/integrity for right to food), 279 (substituting right to life for right to health).

49. *See* PROTECTING, *supra* note 7, at 193-230 (discussing strategic use of the rights to non-discrimination, judicial protection, and due process under the American Convention to protect economic, social and cultural rights).

fully adjudicable but resorts to *process* guarantees, i.e., non-discrimination, judicial protection, and due process, to frame the violation.[50] The strategic importance of these norms lies in the fact that they apply not only to the rights recognized autonomously in the regional human rights instruments in which they are enshrined (whether of a classic civil-political or social rights character), but also to the full panoply of rights recognized in domestic constitutional, legislative, and regulatory law. In practice, the approach is vital for social rights adjudication, particularly for ensuring that legal effect is given to domestic social rights protections that may be more robust than the minimum criteria recognized in international law. It can not, however, be squared with the view advanced by Cavallaro and Schaffer that different standards of adjudication apply to civil-political rights and to autonomous social rights. Indeed, under the American Convention a violation of any one of the aforementioned process norms with respect to another autonomous right over which contentious jurisdiction is exercised can, and often does, give rise to a *concurrent* violation of that autonomous right.[51] This is particularly true with respect to non-discrimination, which under the American Convention constitutes at once a freestanding *right* and a general *obligation* applicable to all autonomous Convention-based rights, including those of an economic, social, and cultural rights nature.[52]

The non-discrimination duty in article 1.1, therefore, provides an unequivocally concrete basis for imputing state re-

50. While Cavallaro and Schaffer discuss non-discrimination separately from the "elements approach," they fold due process and judicial protection norms into it. Cavallaro & Schaffer, *supra* note 2, at 255-61.

51. Thus, for example, a failure to provide an adequate or effective remedy for claimed violations of the right to property tends to be treated as a violation of both article 25 (judicial protection) and article 21 (right to property) of the American Convention. *See, e.g.*, Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001); "Five Pensioners" Case v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 98 (Feb. 28, 2003) [hereinafter *Five Pensioners Case*]

52. American Convention, *supra* note 23, arts. 1.1 & 24. The Court has explained that article 1.1 prohibits discriminatory treatment "with regard to the exercise of any of the rights guaranteed under the Convention," whereas article 24 extends that broad protection to the domestic law of the states parties. Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (Ser. A) No. 4, ¶¶ 53-54 (Jan. 19, 1984).

sponsibility in individual complaint procedures for direct violations of the autonomous social rights guaranteed in Convention article 26. It is curious, in this regard, that Cavallaro and Schaffer highlight this Convention-based *duty* as a strategic method to advance social rights protections under the Convention *without* adjudicating social rights directly.[53] To the contrary, reliance on this standard treaty-based dimension of state human rights obligations constitutes one of the clearest examples of the *proper use* of the "direct approach" in supranational litigation. The same is true of the treaty-based duties to ensure that appropriate due process safeguards and effective remedies are available whenever a Convention-protected right, including those in article 26, is threatened with limitation or restriction. That is, these process-oriented guarantees are not only free-standing rights, but also core constitutive elements of the article 1 and 2 mandated "necessary" or "appropriate" measures states are required to adopt to give legal effect to protected rights, including those of an economic, social, and cultural character.

Cavallaro-Schaffer Thesis II thus departs from several unsustainable assumptions. The first, as mentioned, is that the majority of economic, social, and cultural rights in the inter-American system are unenforceable and lack concrete justiciable obligations.[54] According to the authors, this contrasts with civil and political rights, which have concrete, immediately justiciable obligations that are regularly enforced by judicial in-

53. Cavallaro & Schaffer, *supra* note 2, at 254-55 (highlighting and discussing duty of non-discrimination in Convention article. 1.1), 271 ("The advantage of using the non-discrimination principle is that petitioners, the Commission, and the Court may rely on a fundamentally civil right to expand protection of economic, social, and cultural rights."). Cavallaro and Schaffer likewise err by seeking to draw too close a comparison between the jurisprudential work of the inter-American human rights organs and the European Court of Human Rights and Human Rights Committee. These latter bodies lack subject matter jurisdiction over most of the autonomous social rights over which the inter-American organs enjoy direct competence. Consequently, a litigation strategy predicated on the notion of applying process norms to "economic, social and cultural rights *even when these are not the subject of their own protection*," *id.* at 258 (emphasis added), simply does not have the same salience in the inter-American system, where such rights *are* "the subject of their own protection."

54. *Id.* at 267, 268.

stances.[55] Ironically, in making this norm-based distinction, Cavallaro and Schaffer concede that advocates have persuasively demonstrated the flawed nature of classic rights-based dichotomies regarding negative/positive obligations, affirming that all rights have obligations that run the spectrum from negative liberty to positive entitlement. Based on this, they insist that a "new analytical framework" is required.[56] Yet, they then revert back to a reflexive insistence that economic, social, and cultural rights are "unenforceable" and entail no "concrete duties" or "specific grounds for state responsibility."[57] That is, the authors' inability to move beyond classic stereotypes to appreciate the distinct dimensionality of human rights obligations, particularly as they relate to conduct- and result-based duties, keeps them tethered to a dichotomized vision of *rights* as "immediate" or "non-immediate." This, in turn, prevents them from applying their negative/positive revelation in any way other than to insist that civil and political rights, no matter how broadly drawn or how their corresponding obligations are defined, are immediately enforceable by courts.

As discussed further in Part III, this view underappreciates the varied dimensionality of the obligations states assume under human rights treaties and how they may be assessed in litigation versus promotional contexts. Specifically, the error derives from the authors' association of the litigation-*appropriate* dimensions of human rights obligations with claims framed in terms of classic civil-political rights and the litigation-*inap-*

55. *Id.* at 252 ("This approach makes a distinction between civil and political rights on the one hand (which are understood to impose specific, justiciable obligations on states, and which are regularly enforced by mechanisms for human rights protection) and economic, social, and cultural rights on the other (whose concomitant obligations are less clear, and whose enforcement has been more complicated)."). While Cavallaro and Schaffer frame this distinction as the view "of American states," they base their entire litigation strategy on it, accepting it as the underlying predicate to their thesis. Inexplicably, they except only two norms from their broad generalization about social rights: the rights to education and unionization as framed under the Protocol of San Salvador. They make no exception for the same norms as framed under the American Convention, despite the fact that effectively identical obligations clauses attach to each.

56. *Id.* at 252-54.

57. *Id.* at 225 (complicated enforcement of social rights) ("fails to establish any specific rights or concrete duties"), 267 ("provide no definite grounds for state responsibility"), 268 ("article 26 enumerates no specific rights enforceable on an individual basis.").

propriate dimensions with direct-approach claims. It is this externally-imposed error, not the nature of the rights themselves, that compels their call for litigant reliance on classic civil-political rights norms. Once this error is corrected, the basis for their thesis, and any a priori norm-based preference, effectively falls away.

The second asserted ground for Thesis II is the supposed lack of "legitimacy" of social rights litigation in the eyes of Latin American states. That is, although Latin American states "formally accept the theoretical bases for such rights"[58]—and almost universally include them in their domestic legislation and political constitutions[59]—they do not view litigation of them as "legitimate" and, thus, attempts to cast them as legally enforceable rights will be viewed as overreach, leading to resistance, negative backlash, and non-implementation by OAS member states.[60] The authors, however, fail to provide any evidence of this asserted lack of legitimacy—a status belied by actual experience in the American region, in which economic, social, and cultural rights are regularly adjudicated by domestic tribunals and actively embraced by Latin American governments.[61]

Finally, the erroneous premises of Cavallaro-Schaffer Thesis II leads the authors to an ironic set of recommended "test cases," laid out in detail in Part IV of their article, that they believe manifest the greatest potential for actual implementation by states.[62] That is, while intoning litigants to be "more cautious," "restrained," and "thoughtful" in their litigation strategies, they call for cases that, on justiciability grounds, would not likely survive basic admissibility rulings in the inter-American system.[63] Moreover, while calling for a "restrained,

58. *Id.* at 251-52.

59. Cavallaro and Schaffer prefer to highlight only that civil and political rights are "uniformly guaranteed by the constitutions of the Americas." *Id.* at 275.

60. *See id.* at 270 ("To the extent that advocates seek to achieve realistically enforceable Court sentences on economic, social, and cultural rights, they should be attentive to governmental resistance to the enforcement of such rights.").

61. *See* discussion *infra* Part III.B.

62. Cavallaro & Schaffer, *supra* note 2, at 222 ("the kinds of test cases we believe manifest the greatest potential to establish precedents likely to be implemented by states in the Americas").

63. *See* discussion *infra* Part IV.

incremental" approach,[64] they urge litigants to pursue cases that promise to produce jurisprudence with "sweeping" and "potentially revolutionary policy implications" for OAS member states.[65] The fact that such orders will be derived from "immediately enforceable" civil and political rights obligations, rather than those corresponding to economic, social, and cultural rights, will apparently remove the legitimacy objections that OAS member states would otherwise have to such expansively-crafted remedial orders. Indeed, according to Cavallaro and Schaffer this "thoughtful," "responsible," and "pragmatic" approach will avoid the "overreach" that would "provoke extreme reactions from the member states of the OAS"[66] if these same cases—or likely far more limited ones—were litigated under a "direct approach." American states will respond positively to such cases because, simply, they view civil-political rights litigation as "legitimate." Clearly, something is askew in the proposed "less" strategy. Some good rethinking is necessary.

C. *Reconciling the Two Halves: The "More" and "Less"*

In defining the desired "more" of their less-as-more thesis, Cavallaro and Schaffer rightly aim to improve the same thing all human rights activists do: on-the-ground implementation of human rights guarantees. In explaining low rates of actual compliance, they do a good job of identifying *one set* of factors that are often critical for improving compliance rates: collaboration of supporting social movements, constant media atten-

64. Cavallaro & Schaffer, *supra* note 2, at 219 ("We posit that those who seek sustainable, structural, transformative changes of Latin American society—and not merely sterile, judicial recognition of economic, social, and cultural rights—are best served by adopting a restrained, incremental, 'less as more' approach to expanding these rights in the Inter-American system.").

65. *Id.* at 274 ("[P]etitioners should not look to the system as an arbiter of disputes but rather as a mechanism for producing jurisprudence with potentially sweeping policy implications."), 277 ("enable the system to reach conclusions with potentially revolutionary policy implications"). Such supranationally-ordered changes include the "immediate" formal equalization of expenditures to all school districts, provision of vaccines, medications and an "adequate share of nutritional needs on a regular basis" to "all in need," and construction of new structurally-sound housing for large, undifferentiated segments of the urban poor. *Id.* at 276-80.

66. *Id.* at 270.

tion, sympathetic victims, and avoidance of politically "hot" issues of the moment. Yet, these factors are important in relation to *all* supranational judgments ordering remedies for victims of human rights violations in a state's jurisdiction, regardless of normative content. No argument is made that the directly-invoked economic, social, and cultural rights claims they seek to marginalize will be more likely to lack supporting social movements, media draw, sympathetic victims, or to be more "untouchable" at any given moment.[67] Indeed, current reality is quite likely the opposite. Large gaps in the authors' thesis thus need bridging. A critical analysis would distinguish the "compliance" and "implementation" arguments these authors make from their unrelated thesis admonishing advocates to, as the "wisest" strategy, limit their cases to the civil-political rights elements of the abuses they seek to vindicate.

Cavallaro and Schaffer do a far poorer job in identifying the "less" of their thesis. Their "less" refers to two distinct dimensions. The first is a recommendation that advocates pursue quantitatively less overall litigation in the field of economic, social, and cultural rights, preferring non-litigation political strategies and social mobilization to achieve similar ends. This recommendation is curious for two reasons. Most directly, supranational litigation in the area of economic, social, and cultural rights is so infrequent that calls for *less* of it—rather than a different *kind* of it—seem broadly off the mark. Second, the conclusions drawn by Cavallaro and Schaffer in Part II of their article reflect only that litigation should not be pursued to the *exclusion* of other strategies, i.e., that it should be *one element* of a broader strategy for targeted change, one which includes active accompaniment of social movements and multi-pronged advocacy initiatives.[68] The authors' Thesis I conclusions, in this sense, directly contradict their Thesis II conclusion that political strategies should largely *replace* "di-

67. Cavallaro and Schaffer at no time assert, nor could they, that the factors they have identified as leading to non-compliance—lack of larger supporting social movements, insufficient media attention, unsympathetic victims, politically "hot" issues of the moment (e.g., terrorism)—correlate in any meaningful way to whether a claim is framed as a violation of "economic, social and cultural" or "civil and political" rights. *See generally id.*

68. *See id.* at 239 (recommending that "practitioners envision supranational litigation as merely one element among many of an integrated advocacy strategy").

rect-approach" litigation—a core, but unwarranted, piece of the Cavallaro-Schaffer "less" thesis.[69] Historically, successful reform efforts in such areas as labor rights, education, health care, and housing have always relied on a combination of legal and political strategies to achieve their ends, as have political and civil rights movements.[70] Arguments for an exclusive reliance on one or the other challenge history as well as strategic common sense.

Moreover, if Cavallaro and Schaffer truly support less litigation in the inter-American system for the reasons they provide—i.e., limited access to the system, the need for specialized knowledge, limited capacity of oversight bodies, costs involved in litigation, likely failure of states to comply, repeat players, and queue-jumping concerns[71]—they offer no reason why their preference for political strategies should be limited to economic, social, and cultural rights rather than encompassing all human rights claims, including the civil and political rights they champion.[72] This suggests their aversion to so-

69. Their thesis also neglects the fact that a great deal of state action is stimulated by the filing of legal complaints and the credible threat of supranational litigation. In the direct-approach access-to-antiretroviral-medications case, *Odir Miranda v. El Salvador*, cited by Cavallaro and Schaffer on other grounds, see *id.* at 265-67, for example, the state Supreme Court resolved the domestic *amparo* action filed with it (favorably for the petitioners) only after the Commission issued an admissibility decision asserting jurisdiction over the right-to-health claim under article 26 of the American Convention. *See* Jorge Odir Miranda Cortez et al. v. Salvadoran Social Security Institute, April 4, 2001 (Supreme Court of Justice of El Salvador), http://www.uc3m.es/-uc3m/inst/MGP/JCI/04-noticias-els-sida.htm.

70. *See, e.g.*, MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT 1960-1973 (1993) (detailing convergence of social and legal movements in the United States in the area of poverty law). Many modern examples could, of course, be given in all countries of the Americas, where the increased prominence of social movements in the labor, consumer, indigenous, environmental, health, and social justice fields have coincided with increased litigation in the area of economic, social and cultural rights.

71. Cavallaro & Schaffer, *supra* note 2, at 238, 281.

72. *See also* Dennis & Stewart, *supra* note 2, 464 (basing bleak view of prospects offered by international adjudication of economic, social, and cultural rights on their view of a series of factors which are equally applicable to international adjudication of civil and political rights: limited capacity of oversight body, costs involved in litigation, likely failure of states to comply with decisions in individual cases). Cavallaro and Schaffer, like Dennis and Stewart, would do better to take aim at these specific inadequacies—for ex-

cial rights litigation is based not on the neutral reasons they offer, but rather on their particular understanding of the nature of social rights and of the legal obligations states assume with respect thereto.

The second dimension to their "less" thesis refers not to the number of claims litigated but to the number of norms used to frame those claims. That is, Cavallaro and Schaffer argue that, in the limited instances in which litigation to redress social rights abuse is pursued, the object of the claim should either be narrowly restricted to the civil-political elements of the abuse or otherwise framed under civil-political rights norms. This recommendation is peculiar for a number of reasons. First, no legitimate grounds are provided for why this should be true. As referenced above and described in detail in Part III, economic, social, and cultural rights, as autonomous norms, are as fully enforceable in the inter-American system—from both a jurisdictional and justiciability perspective—as are classic civil and political rights. Cavallaro and Schaffer's repeated reference to the infrequency of the direct approach in the Americas in no way speaks to the validity of it.[73] Neither does their repeated reference to the evolving jurisprudence of the European Court of Human Rights and the United Nations Human Rights Committee, bodies which—in sharp contrast to the inter-American organs—must rely (almost exclusively)[74] on classic civil-political rights norms based

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ample, by advocating for higher levels of financing for international adjudicatory mechanisms and for the establishment of a Victims Assistance Fund to facilitate access to international procedures—rather than call for litigants to avoid international adjudication exclusively in the area of economic, social and cultural rights.

73. *See, e.g.*, Cavallaro & Schaffer, *supra* note 2, at 225 ("The Inter-American system's failure to provide protection for economic, social and cultural rights is contrasted by its active defense of civil and political rights.").

74. The European Court of Human Rights does have jurisdiction over the right to education, just as the Human Rights Committee has jurisdiction over the right to culture. *See* Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Mar. 20, 1952, 213 U.N.T.S. 262; *see also* International Covenant on Civil and Political Rights art. 27, G.A. Res. 2200A, ¶ 21, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) [hereinafter ICCPR]. Both bodies, moreover, have jurisdiction over the rights to special protection of the child and the family, which include a wide variety of rights of an educational, health, social, and economic nature. The right to association expressly includes "the right to form and join trade unions," ICCPR, *supra*, art. 22, and both instruments protect

on the substantive limitations in the jurisdictional instruments they are competent to apply. By contrast, the inter-American jurisdictional instruments provide ample tools for the full protection, using a "direct approach," of economic, social, and cultural rights.

Second, it is unclear why litigation of social rights under one set of norms should be any more "legitimate" than litigation of the *same claims* under a different set of norms. If OAS member states will truly have "extreme reactions" to supranational judicial orders requiring them to protect the individual rights to health, housing, social security, education, and labor freedoms, it is not clear why their reaction should be any less "extreme" if they are required to provide the *same protections* for health, education, housing, social security, or labor under otherwise identical supranational orders that simply call those rights "life," "integrity," "property," or "association." Under at least one of the dominant forms of their "elements approach," Cavallaro and Schaffer do not propose that the *subject* of claims should be limited—just that it should be *renamed.* Unless we are to presume that states are politically naïve, this suggests that Cavallaro and Schaffer have substantially missed the mark in identifying what causes states to have extreme reactions to certain supranational human rights orders.

The ultimate irony of the Cavallaro-Schaffer less-as-more thesis is that the authors' definition of "less" does not in fact yield less of anything—either from a quantitative or qualitative standpoint. This is made clear by the recommended "test cases" set out in Part IV of their article, a set of cases that this social rights litigator would be reluctant to touch on justiciability and subsidiarity grounds. Indeed, the proposed hypotheticals replicate the same thorny issues that have histori-

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against "forced or compulsory labor." *Id.* art. 8; Convention for the Protection of Human Rights and Fundamental Freedoms art. 4, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention]. Similarly, both bodies have jurisdiction over the right to "respect for the home," which guarantees against arbitrary interference with the enjoyment of one's home or housing. The broad overlap in rights recognized in the ICCPR and ICESCR puts into relief the lack of sense in distinguishing formally between rights, especially on the basis of "justiciability." *Compare* ICCPR, *supra, with* International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, 993 U.N.T.S. 3 (1966) [hereinafter ICESCR].

cally led to legal ambivalence about economic, social, and cultural rights as judicially-enforceable rights. The smokescreen of "civil and political rights" does not inoculate the recommended test claims from the justiciability ailments they suffer. A proper less-as-more strategy would attend to these disorders, and address the concerns that states in fact manifest when they fail to implement supranational orders. A rewriting of the less-as-more thesis is urgently in order.

III. THE "DIRECT APPROACH" TO LITIGATING ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A SUSPECT OPTION?

Cavallaro and Schaffer assert that the "direct approach" to supranational litigation of economic, social, and cultural rights is "suspect" and should generally be avoided in the Americas.[75] This approach refers to the strategy of framing concrete instances of human rights abuse as violations of the norms that autonomously guarantee classic social rights in three region-specific human rights instruments: the American Convention on Human Rights ("American Convention"),[76] the Additional Protocol to the American Convention in the Area of Economic, Social, and Cultural Rights ("San Salvador Protocol"),[77] and the American Declaration on the Rights and Duties of Man ("American Declaration"[78]). Specifically, the approach refers to direct recourse in contentious disputes to three sets of social rights: the rights enshrined in article 26 of the American Convention, the multivariable umbrella provision under the chapter heading "Economic, Social and Cultural Rights"; "the totality of rights" enshrined in the San Salvador Protocol, a treaty dedicated to social rights guarantees; and roughly half the rights in the American Declaration, an instrument within which civil, cultural, economic, political,

75. Cavallaro & Schaffer, *supra* note 2, at 267-70 (contrasting "suspect option" with a "wiser path").

76. American Convention, *supra* note 23.

77. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, "Protocol of San Salvador," Nov. 17, 1988, O.A.S.T.S. No. 69 [hereinafter San Salvador Protocol]

78. American Declaration of the Rights and Duties of Man, May 2, 1948, *reprinted in* ORG. OF AM. STATES, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 17, OEA/ser.L/V/I.4 rev. 9 (2003) [hereinafter American Declaration].

and social rights are intermingled without distinction.[79] Respectively, these provisions protect, in overlapping and autonomous terms, the rights to health, to education, to housing, to culture, to social security, to unionization, and to just labor conditions.

Cavallaro and Schaffer urge litigants to bypass these express norms, limiting their pleadings to the "civil and political elements" of social rights violations.[80] In this sense, litigants should invoke only those norms in the American Convention found under the formal chapter title "Civil and Political Rights" (articles 3-25) and those norms in the Declaration that might classically be considered "civil and political." They provide two grounds for this discriminating approach to the region's core human rights instruments: First, autonomous social rights are not judicially enforceable and, second, their litigation is viewed as illegitimate by Latin American states. Neither of these assertions withstands scrutiny.

Indeed, as the following two Sections demonstrate, the direct litigation in the inter-American system of economic, social, and cultural rights presents no greater justiciability or legitimacy problems than does direct litigation of classic civil and political rights. This is because neither "justiciability" nor "legitimacy," as legal concepts, correlate meaningfully with the type or class of *right* at issue. Rather, they are concerned with the nature and scope of the *claim or controversy* made with respect to a given right—whatever its subjective categorization—

79. Cavallaro & Schaffer, *supra* note 2, at 263, 263 n.155 (defining the "direct approach" through reference to "article 26 of the American Convention, various provisions of the American Declaration, and the totality of the San Salvador Protocol").

80. Curiously, Cavallaro and Schaffer except two of the rights guaranteed in the San Salvador Protocol from their broad generalizations: education and unionization, norms over which the Commission and Court are granted express subject matter jurisdiction in the individual petitions process. Given the broadness of their justiciability and legitimacy assertions as they relate to economic, social, and cultural rights in general—which, if true, transcend mere subject matter jurisdiction—the basis for this exception is never, however, explained. Indeed, both the Commission and Court are also granted express subject matter in the individual petitions process over the economic, social, and cultural rights protected in the American Convention and/or American Declaration, including the rights to education and unionization therein. *See, e.g.*, American Convention, *supra* note 23, arts. 16, 26, 33, 44, 48, 62, 63.

and, relatedly, the scope of the corresponding *remedy* pursued through adjudicatory procedures. Accordingly, while this Article firmly supports "mixed" approaches in the strategic litigation of controversies involving economic, social, and cultural rights—using jurisdictionally-appropriate procedural and substantive norms of any hue, as called for by the particular factual circumstances of each concrete case—it emphatically rejects the notion that "direct" approaches are inherently suspect and that so-called "indirect" approaches are always to be preferred.[81] To the contrary, when jurisdictional rules and factual circumstances are properly taken into account, the "direct approach" can often be the preferable strategic option. As with all litigation, the precise strategy to be used should not follow predetermined strictures,[82] but should be responsive to the precise factual circumstances and context of the controversy at issue, taking the inherent jurisdictional limitations of adjudicatory process into account. These limitations are not restricted to any particular category or class of rights but rather inhere in the procedures that attend to rights-based claims of any complexion.

The following two Sections address, first, the judicial enforceability of economic, social, and cultural rights in the regional human rights system and, second, the legitimacy of social rights litigation in the Americas more generally. To properly address the former, Section A is divided into a discussion of, first, the contentious *ratione materiae* jurisdiction of the inter-American human rights organs over autonomous social

81. See, for example, chapters 6-9 of PROTECTING, *supra* note 7, at 193-357. These describe how economic, social, and cultural rights can be protected effectively though the individual petitions process of the inter-American system using each of the twenty-three substantive "protected rights" norms of the American Convention on Human Rights. These twenty-three rights are divided between neutrally-framed "process rights" (non-discrimination, due process, and judicial protection), "classic civil-political rights" (life, integrity, liberty, association, etc.) and "classic economic-social-cultural rights" (health, education, housing, social security, etc.). All of these rights may be invoked in legal pleadings to protect economic, social, and cultural rights through four stylized approaches: the "indirect approach," "integration approach," "direct approach," and "complex violations approach."

82. It is for this reason that this author generally rejects attempts to define in the abstract the precise contours of the "minimum core content" of rights, divorced from case-by-case adjudication in which factual violations can be assessed in their context.

rights norms and, second, the justiciability of claims invoking those norms.

A. *The Judicial Enforceability of Economic, Social, and Cultural Rights in the American Region*

The basic error underlying the Cavallaro-Schaffer thesis is that economic, social, and cultural rights, as autonomous rights, are not judicially enforceable in the inter-American human rights system. That is, while accepting that such rights are expressly recognized as "protected rights" in three of the regional system's primary jurisdictional instruments, Cavallaro and Schaffer nonetheless argue that the corresponding provisions "contain no enforceable rights," "no concrete duties," and "no definite grounds for state responsibility";[83] as such, they are not amenable to litigation and should not be invoked in the individual petitions process. The authors chastise advocates, NGOs, inter-governmental organizations, and adjudicatory bodies for a proliferation of efforts seeking to "expand, often by mere affirmation, the scope of justiciability of economic, social, and cultural rights."[84] In their view, only civil and political rights are judicially enforceable in the inter-American system given that only they bear specific, justiciable obligations.[85] Economic, social, and cultural rights, they as-

83. Cavallaro & Schaffer, *supra* note 2, at 267 ("reluctance to enforce economic, social, and cultural rights through the application of provisions that clearly establish such rights, but that provide no definite grounds for state responsibility, or that fail to establish a mechanism for enforcement, such as article 26 of the Convention, or the majority of the San Salvador Protocol"), 268 ("article 26 enumerates no specific rights enforceable on an individual basis."), 274 (recommending focus on civil and political rights "rather than to force the Commission and Court to recognize economic, social, or cultural rights as such, without sufficient basis in law."), 274 ("economic, social, and cultural rights not deemed ripe for international litigation by states").

84. *Id.* at 222-23. Ironically, they do so after recognizing that "[a] broad consensus has gradually emerged, affirming the need for increased 'justiciability' of economic, social, and cultural rights." *Id.*

85. *See id.* at 252 (asserting American states recognize traditional "distinction between civil and political rights on the one hand (which are understood to impose specific, justiciable obligations on states, and which are regularly enforced by mechanisms for human rights protection) and economic, social, and cultural rights on the other (whose concomitant obligations are less clear, and whose enforcement has been more complicated)"), 263-65 (recommending incorporation of economic, social, and cultural rights elements "within the scope of justiciable civil and political rights" and alleging

sert, have proved "incapable of imposing immediate obligations on states."[86]

In making such claims, Cavallaro and Schaffer neglect not only the jurisdictional significance of justiciability doctrine under adjudicatory procedure but, particularly, the critical distinction between *justiciability* and *subject matter jurisdiction.* They appear to conflate justiciability, which refers to the appropriateness for adjudication of a given *claim* (i.e., in the inter-American system, one that properly demonstrates adverse interest, concrete individualized injury, and a causal nexus between that injury and state conduct), with litigant errors regarding the jurisdictional competence of an adjudicatory body over the specific *legal norm* under which that claim, whether justiciable or not, may be made. By failing to distinguish between the two, Cavallaro and Schaffer create a false dichotomy between provisions protecting so-called "civil and political rights" and those protecting "economic, social, and cultural rights," whereby claims made under the former are automatically "justiciable" and those under the latter "non-justiciable," irrespective of the scope of the claims actually made. This leads them to dramatically understate proper usages of the "direct" approach to social rights litigation while dramatically overstating proper usages of their "elements" approach.[87]

The authors' conflation of these concepts is most clearly illustrated by the examples they offer in support of the affirmed non-justiciability of the economic, social, and cultural rights found in the American Declaration, the American Convention, and the San Salvador Protocol. With regard to the

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the violation of civil and political rights to "ensure initial access to the Inter-American system").

86. *Id.* at 222 (asserting that activists and policymakers have been "incapable of imposing immediate obligations on states to protect and ensure economic, social, and cultural rights").

87. In effect, Cavallaro and Schaffer attempt to habilitate non-justiciable claims by wrapping them in the mantle of civil and political rights, while denying judicial competence over claims framed as autonomous social rights that objectively fulfill all the requirements of a justiciable case. Proper attention to subject matter jurisdiction and the existence of a justiciable controversy, as distinct jurisdictional issues, would avoid these errors. The overstatement of proper usages of the "indirect approach" is clear from the test-case hypotheticals that Cavallaro and Schaffer recommend in Part IV of their article. *See* Cavallaro & Schaffer, *supra* note 2, at 274-80; *see* discussion *infra* Part IV.

Declaration and Protocol, Cavallaro and Schaffer offer only two cases in support of their non-justiciability thesis, both involving litigant arguments invoking provisions over which the adjudicating body *lacked subject matter jurisdiction.*[88] They declined to cite the adjudicated cases in which jurisdictionally-appropriate norms protecting economic, social, and cultural rights were invoked under these instruments, thereby properly grounding state responsibility for the harms caused.[89]

Similarly, in making their claim that article 26 of the Convention is not judicially enforceable, Cavallaro and Schaffer do not offer a single case in which article 26 claims were dismissed on the merits as non-justiciable. They refer only to a lone piece of obiter dictum on the obligations attaching to those rights in their *collective* dimension (a dimension not directly cognizable in the system's *individual* petitions process),[90] together with dated statements made by scholarly commentators to the effect that the inter-American system has not resolved many social rights cases and that it has yet to do so

88. Menéndez, Caride et al. v. Argentina, Case No. 11.670, Inter-Am. C.H.R., Report No. 03/01, OEA/Ser. L/V/II.111, doc. 20 rev. (2001); Jorge Odir Miranda Cortez v. El Salvador, Case 12.249, Inter-Am. C.H.R., Report No. 29/01, OEA/Ser.L/V/II.111, doc. 20 rev. (2000) [hereinafter *Odir Miranda*]. In each of these cases, the Commission lacked jurisdictional competence over both the American Declaration and the San Salvador Protocol. As such, litigant claims under both instruments were dismissed on standard subject matter jurisdiction grounds, while only the claims under the American Convention were preserved for adjudication on the merits. The fact that the norms invoked under the jurisdictionally-improper instruments were of a "social and economic" variety (health, social security, work) and those invoked under the jurisdictionally-proper instrument were of a "civil and political" hue (judicial guarantees, property, equal protection, judicial protection, life, integrity) was irrelevant to the Commission's appreciation of the admissibility of the various litigant arguments. This is clear in the *Odir Miranda* case, in which the Commission properly found petitioners' right-to-health claim admissible under article 26 of the American Convention, while dismissing as inadmissible the same claim under the Protocol of San Salvador. *Odir Miranda, supra,* ¶ 45. Though jurisdictionally unimpeachable, the inclusion of article 26 in the admissibility findings, and its treatment, in the words of Cavallaro and Schaffer, "on a similar footing with [allegations] involving the violation of certain civil and political rights" appears to surprise the authors who find the Commission's position in the case with respect to article 26 "unclear." *See* Cavallaro & Schaffer, *supra* note 2, at 266.

89. *See infra* notes 109–14.

90. *See* discussion *infra* Part III.A.2.

under article 26,[91] a fact that is no longer accurate.[92] Plainly however, if the infrequency of litigation were the test of justiciability half of the "protected rights" in the Convention (e.g., those enshrined in articles 3, 6, 9, 10, 12, 14, 15, 17, 18, 20 and 23) would also be "non-justiciable."[93] The infrequency of litigation of particular norms, particularly in light of the historic homogeneity of the system's docket,[94] imports no necessary judgment as to their judicial enforceability.[95]

Rather, in the inter-American system, the judicial enforceability of a given norm—whatever its normative characterization—turns on the existence of four standard prerequisites to

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91. *See* Cavallaro & Schaffer, *supra* note 2, at 225-26.

92. *See, e.g.*, Milton García Fajardo et al v. Nicaragua, Case 11.281, Inter-Am. C.H.R., Report No. 100/01, OEA/Ser./L/V/II.114, doc. 5 rev., at 536 (2001) (finding state responsibility for violating labor rights of workers under article 26). The Commission has found claims admissible under article 26 in many pending cases. *See, e.g.*, Kichwa Peoples of the Sarayaku Community and its Members v. Ecuador, Petition 167/103, Inter-Am. C.H.R., Report No. 64/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 (2005) (right to culture, right to health, right to education under article 26); Jesús Manuel Naranjo Cárdenas et al. v. Venezuela, Petition 667/01, Inter-Am. C.H.R., Report No. 69/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 ¶¶ 61-64 (2005) (right to social security under article 26); Ana Victoria Villalobos et al. v. Costa Rica, Case 12.361, Inter-Am. C.H.R., Report No. 25/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 ¶¶ 52, 70 (2005) (right to health under article 26); *Odir Miranda, supra* note 88, ¶ 47 (right to health under article 26).

93. These Convention provisions protect the rights to juridical personality, freedom from slavery, freedom from ex post facto laws, compensation, freedom of conscience and religion, reply, assembly, family, a name, a nationality, and participation in government, respectively. Long neglected in the system's docket, these conventional norms are only beginning to be explored through case-based adjudication.

94. This homogeneity reflects the region's recent traumatic history with repressive military dictatorships and civil war, and its consequences for the types of cases that have predominated in the caseload of the regional system's organs over the past two decades: forced disappearance, torture, massacres, extrajudicial executions, and unlawful detention. As the conditions in the Americas change, so too have the types of claims that come before the regional human rights organs. Naturally and necessarily, these have taken on a more social, economic, and cultural complexion.

95. A case in point is the Alien Tort Claims Act of 1789, which lay dormant in the United States for almost 200 years, before being rehabilitated in the *Filártiga* line of decisions, beginning in 1980. *See* Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).

the exercise of contentious jurisdiction[96]: (1) proper subject matter jurisdiction (*ratione materiae*) over the invoked norm by the adjudicating body; (2) temporal and spatial jurisdiction (*ratione temporis and loci*) over the facts giving rise to the claim; (3) personal jurisdiction (*ratione personae*) over the parties to the litigation; and, closely related to this latter element, (4) the presentation of a justiciable controversy—i.e., one demonstrating concrete harm to individualized rights-holders and a causal nexus between that harm and the conduct of the state.[97] Where these jurisdictional predicates are met, the direct approach is juridically indistinguishable from indirect approaches. Where they are not met, no claim may be "saved" by recasting it under a civil or political rights norm.

The following two sections discuss how the direct approach may properly be employed in the inter-American system, taking into account, respectively, both subject matter jurisdiction and justiciability considerations.[98] While litigant mistakes are distressingly frequent as to both in the regional system, it must be emphasized that it is these jurisdictional errors, and not the nature of economic, social, and cultural rights as such, that have caused problems with recent attempts to successfully use the direct approach. By presenting such mistakes as "evidence" of the invalidity of the direct approach, rather than exposing and correcting them, Cavallaro and

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96. Where supranational litigation is concerned, additional jurisdictional requisites apply in function of the principles of subsidiarity, fairness, and comity, such as the rule of prior exhaustion of domestic remedies, filing time limits, and non-duplication of international procedures involving the same claims. For more on these jurisdictional rules in the inter-American system, see PROTECTING, *supra* note 7, at 75-110.

97. The Commission addresses each of these categories, along with those previously mentioned, in every case-related admissibility report it issues. *Id.* Only when the Commission is satisfied it enjoys proper jurisdiction over the contours of each claim presented to it will it proceed to the merits phase in resolving the case.

98. Temporal and locational jurisdiction, while critically important in framing the proper contours of a case, will not specifically be addressed here, as they tend to raise case-specific issues that are not implicated in the overgeneralizations made by Cavallaro and Schaffer as to the judicial enforceability of economic, social, and cultural rights as autonomous rights. For discussion of these jurisdictional requisites, see PROTECTING, *supra* note 7, at 75-110; Melish, *The Inter-American Court of Human Rights: Beyond Progressivity*, *in* SOCIAL RIGHTS JURISPRUDENCE, *supra* note 1.

Schaffer do a grave disservice to the regional human rights system.

1. *Proper Subject-Matter Jurisdiction*

The inter-American system is in fact vastly equipped, from a jurisdictional perspective, to enable the direct litigation of economic, social, and cultural rights through the individual petitions process—perhaps more so than any other supranational system, regional or universal.[99] This is true under the American Declaration, the American Convention, and, in more limited fashion, the San Salvador Protocol and the Inter-American Convention on the Elimination of Discrimination Against Women ("Belem do Pará Convention").[100] Indeed,

99. It is for this reason that Cavallaro and Schaffer's attempts to draw conclusions for the inter-American system from the jurisprudence of the U.N. Human Rights Committee (with competence over only the International Covenant on Civil and Political Rights) and the European Court of Human Rights (with a similarly-restricted mandate) are so unwarranted. While the European Committee on Social Rights has direct competence over the autonomous social rights protected in the European Social Charter, it does not enjoy an individual complaints mechanism; neither, at present, does the U.N. Committee on Economic, Social and Cultural Rights. The African Commission on Human Rights does enjoy such a competence, although the tools currently at its disposal for making individual complaints effective are far less sharp than are those of the inter-American human rights organs. The same is true of other U.N. Committees with competence over social rights claims and individual complaints procedures, such as the Committee on the Elimination of Racial Discrimination and the Committee on the Elimination of Discrimination Against Women.

100. This latter instrument is not directly discussed in this Article. Its adjudicable provisions are, however, vital for protecting women from the institutional and private abuse that often trap them in situations of poverty, destitution, and social exclusion and impede them from accessing jobs, education, healthcare, and other essential social rights. The Convention in fact defines "violence against women" as including sexual harassment in the workplace, educational institutions, health facilities, or any other place, by any person, and recognizes that such violence "prevents and nullifies" the exercise of a woman's economic, social, and cultural rights. Though the Commission is jurisdictionally limited to adjudicating article 7 of the Convention—which, oddly, enshrines only state obligations (not "rights")—the Commission reads these obligations in light of the substantive provisions of the Convention. *See* Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, "Convention of Belém do Pará," arts. 2 & 5, Jun. 9, 1994, 33 I.L.M. 1534 (1994) [hereinafter Belem do Pará Convention]; *id.* art. 12 (limiting Court's competence to alleged violations of article 7); Maria da Penha v. Brazil, Case 12.051, Inter-Am.

given the wealth of jurisdictional norms subject to contentious process in the inter-American system that directly protect economic, social, and cultural rights, case-based litigation of the autonomous rights to health, education, housing, social security, adequate labor conditions, fair remuneration, and culture can, as a jurisdictional matter, proceed against *every* OAS member state.[101]

In properly invoking these norms, however, close attention must be paid to the contentious subject matter jurisdiction of the Commission and Court vis-à-vis the defendant state. The Commission and the Court are organs of limited subject matter jurisdiction, and thus failure to allege the correct jurisdictional norm will generally lead to dismissal of one's claim, regardless of its technical justiciability. Litigant errors with respect to subject matter jurisdiction—particularly with regard to improper invocation of the American Declaration and San Salvador Protocol—are in fact the single largest contributing factor to the dismissal of direct-approach claims in the regional system.

For the thirty-five OAS member states, the contentious subject-matter competence of the inter-American organs under the "direct approach" breaks down along three distinct lines: states for whom the norms of the American Declaration are principally applied; states for whom the norms of the American Convention are principally applied; and states for whom two provisions of the San Salvador Protocol may be applied. While the Commission and Court may apply the Convention and Protocol concurrently to a state that has ratified both instruments, they may not generally apply the Declaration and Convention concurrently.[102] "Hybrid" complaints in this regard are generally a red-flag of jurisdictional error.

C.H.R., Report No. 54/01, OEA/Ser.L/V/II.111, doc. 20 rev., at 704 (2000) (finding Brazil responsible for failure to take adequate measures to protect a battered woman from a habitually abusive husband, about whom it had knowledge).

101. While these tools have been insufficiently utilized to date, for a number of historically-contingent reasons, their jurisdictional availability is not subject to question.

102. *See, e.g.*, Statute of the Inter-American Commission on Human Rights art. 2.1, Oct. 10, 1979, OEA/Ser.P/IX.0.2/80, vol. 1, at 88 [hereinafter Commission Statute] (defining "human rights" for purposes of Commission's mandate as "[t]he rights set forth in the American Convention on Human

Taking into account the respective treaty ratifications and denunciations of all thirty-five OAS member states as of February 2006, the "direct approach" may, as a jurisdictional matter, properly be used in supranational litigation before the Commission and Court in three ways. First, contentious complaints alleging violation of the rights to housing, health, education, culture, work, fair remuneration, rest, social security, and property, to the detriment of identifiable individuals, may be adjudicated by the Commission (but not the Court[103]) under

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Rights, in relation to the States Parties thereto" and "[t]he rights set forth in the American Declaration [], in relation to the other member states"). *See also* IACHR Rules of Procedure, *supra* note 23, art. 49. While the Court's contentious competence does not extend to the Declaration's norms on a direct basis, the Commission, through its caselaw and in spite of its Statute, has recognized two exceptions to the general rule that the Convention and Declaration cannot be applied concurrently to the same state—although the necessity and propriety of both are questionable in light of the underlying rationales for their creation. The first arises in the case of "continuing violations" in which the initial acts giving rise to the violation occurred before, and continued after, the defendant state ratified the Convention. *See, e.g.*, Octavio Ruben Gonzalez Acosta v. Paraguay, Case 12.358, Inter-Am. C.H.R., Report No. 83/03 OEA/Ser.L/V/II.118, doc. 70 rev. 2, at 405 (2003); Claudia Ivette González v. Mexico, Petition 281/02, Inter-Am. C.H.R., Report Nº 16/05, OEA/Ser.L/V/II.124, doc. 5 (2006). The second has been recognized where the petition alleges violation, by a state party to the Convention, of rights that are consecrated in the Declaration, but not in the Convention in substantially identical terms. *See, e.g.*, Elba Clotilde Perrone and Juan José Preckel v. Argentina, Case 11.738, Inter-Am. C.H.R., Report Nº 67/98, OEA/Ser.L/V/II.106, doc. 3 rev. ¶¶ 31-33 (1999) (recognizing competence to apply the right to work and to fair remuneration under Declaration article XIV to a state party to the Convention); Amilcar Ménendez et al v. Argentina, Case 11.670, Inter-Am. C.H.R., Report No. 3/01, OEA/Ser.L/V/II.111, doc. 20 rev., at 95 (2001) (recognizing competence to apply rights to health and to social security under Declaration articles XI, XVI, XXXV and XXXVII to a state party to the Convention). This second exception appears to contradict both the plain text of the Convention and the Commission Statute, while overextending Convention article 29.d. It has been rendered effectively obsolescent by the Commission's growing article 26 jurisprudence. For a discussion of the error underlying this exception, see Tara J. Melish, *The Protocol of San Salvador: Riddle, Redemption or Just Plain Redundant?* (unpublished manuscript, on file with New York University Journal of International Law & Politics).

103. The Inter-American Court of Human Rights lacks direct adjudicatory competence over the American Declaration. It can, however, apply it indirectly in interpreting the overlapping norms in the American Convention on Human Rights. *See* American Convention, *supra* note 23, art. 29.d; *see also* Interpretation of the American Declaration of the Rights and Duties of Man

articles IV, XI, XII, XIII, XIV, XV, XVI and XXIII of the American Declaration against eleven American states: Antigua and Barbuda, Bahamas, Belize, Canada, Cuba, Guyana, St. Kitts and Nevis, St. Vincent and the Grenadines, St. Lucia, Trinidad and Tobago, and the United States.

Second, contentious complaints alleging violation of the rights of identifiable individuals to education, health, adequate housing, social security, food, unionization, strike, adequate labor conditions, and fair remuneration may be adjudicated by both the Commission and Court[104] under article 26 of the American Convention against the remaining twenty-four American states: Argentina, Barbados, Bolivian, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela.

Third, contentious complaints alleging violation, to the detriment of specific persons, of the rights to education and unionization may be adjudicated by both the Commission and Court under articles 8.1.a and 13 of the San Salvador Protocol against thirteen American states: Argentina, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Mexico, Panama, Paraguay, Peru, Suriname, and Uruguay.

The following three sections discuss more fully each of these three categories. The discussion makes clear that, as a jurisdictional matter—and in contrast to the far more limited *ratione materiae* competence of the U.N. Human Rights Committee and European Court of Human Rights, to which Cavallaro and Schaffer seek to draw direct comparisons—the full panoply of classically-recognized economic, social, and cultural rights may be adjudicated in the inter-American system under the direct approach. This is true with respect to every

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within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10, ¶¶ 46-47 (July 14, 1989).

104. In contrast to the other twenty-one OAS member states that are states party the Convention, Dominica, Grenada, and Jamaica have not recognized the mandatory jurisdiction of the Inter-American Court of Human Rights. The Court may exercise contentious jurisdiction over those four states only on a case-by-case basis when accepted by special agreement. *See* American Convention, *supra* note 23, art. 62.

OAS member state, albeit under the instrument(s) jurisdictionally appropriate to each.

a. American Declaration on the Rights and Duties of Man

The 1948 American Declaration provides express jurisdictional protection, subject to the Commission's adjudicatory competence,[105] of the rights to housing (arts. IX and XI), to health (art. XI), to education (art. XII), to culture (art. XIII), to work, fair remuneration, and rest (arts. XIV and XV), to social security (art. XVI), to property (art. XXIII), and to special protection for mothers, children and the family (arts. VI and VII). These provisions are found interspersed among a series of others of more classical civil-political vintage. In accordance with its Statute and Rules of Procedure, the Commission enjoys contentious jurisdiction to examine individual complaints submitted to it that allege violation, to the detriment of determinable individuals, of each of these provisions.[106] Such petitions may, however, be lodged only against the eleven OAS member states that have not yet ratified the American Convention or have denounced it.[107] Once such ratification occurs, the Convention—and not the Declaration—becomes the jurisdictional instrument defining the applicable "human rights" the ratifying state is committed to respect and ensure, and hence the primary instrument the Com-

105. The Commission has jurisdiction to consider individual petitions lodged against all thirty-five OAS member states by virtue of such states' ratification of the OAS Charter and pursuant to the Commission's Statute and Rules of Procedure. *See, e.g.*, Víctor Nicolás Sánchez, et al. v. United States, Case 65/99, Inter-Am. C.H.R., Report No. 104/05, OEA/Ser.L/V/II.124, doc. 5 ¶ 50 (2006).

106. *See* IACHR Rules of Procedure, *supra* note 23, arts. 49 ("The Commission shall receive and examine any petition that contains a denunciation of alleged violations of the human rights set forth in the American Declaration of the Rights and Duties of Man in relation to the Member States of the Organization that are not parties to the American Convention on Human Rights."), & 50 (establishing procedure); Commission Statute, *supra* note 102, arts. 20 & 1.2.

107. Trinidad and Tobago denounced the Convention in 1998. The remaining ten states that have not ratified the Convention include: Antigua and Barbuda, Bahamas, Belize, Canada, Cuba, Guyana, St. Kitts and Nevis, St. Vincent and the Grenadines, St. Lucia, and the United States. *See* Organization of American States, *American Convention on Human Rights, available at* http://www.oas.org/juridico/english/Sigs/b-32.html.

mission is competent to apply in the individual petitions process.[108]

The Commission has never hesitated to utilize this jurisdictional competence to hold states internationally responsible, through the individual petitions process, for a wide spectrum of social rights violations under the Declaration. It has held American states to account for violating the right to education (art. XII),[109] the right to health (art. XI),[110] the right to work and rest (arts. XIV and XV),[111] the right to inviolability of the home (art. IX),[112] the rights to indigenous property and culture (arts. XXIII and XIII),[113] and the right to special pro-

108. Thereafter, the Commission is jurisdictionally competent to apply the American Declaration only indirectly, as an interpretive aid, in determining the scope and content of the provisions of the American Convention. *See* American Convention, *supra* note 23, art. 29.d.

109. Jehova's Witnesses v. Argentina, Case No. 2137, Inter-Am. C.H.R., OEA/Ser.L/V/II.47, doc. 13 rev. 1 (1979) (state responsible under Declaration for violating right to education of 300 children arbitrarily dismissed from school or prevented from taking final exams); Yean and Bosico Girls Case v. Dominican Republic, Inter-Am. Ct. H.R. (ser. C) No. 130, ¶ 29 (2005) (noting Commission's merits-based finding that the state violated the girl's right to education under article XII of the American Declaration by dismissing her from school).

110. Coulter et al. Case v. Brazil, Case 7615, Inter-Am. C.H.R., Report No. 12/85, Inter-Am. C.H.R., OEA/Ser.L/V/II.66, doc. 10 rev. 1 (1985) (failure to offer adequate preventive and responsive health and social services—either before or after building a highway through Yanomami territory with the aim of facilitating miners' access thereto—causing hundreds of Yanomami Indians to die); Case 1802 (Paraguay), Inter-Am. C.H.R., OEA/Ser.L/V/II.43, doc. 21, corr. 1 (1978) (failure to take appropriate measures to protect members of the Aché tribe from a fatal epidemic proximately caused by state conduct and from deprivation of medical attention and medicines during that epidemic); *see also* Case 6091 (Cuba), Inter-Am. C.H.R., Report No. 3/82, OEA/Ser.L/V/II.57, doc. 6 rev.1 (1982) (failure to protect health and well-being in custody); Jorge Luis García Pérez-Antúnez (Cuba), Inter-Am. C.H.R., OEA/Ser./L/V/II.114, doc. 5 rev., ¶ 28 (2002) (failure to provide appropriate medical treatment); Francisco Chaviano González (Cuba), Inter-Am. C.H.R., OEA/Ser.L/V/II.117, doc. 1 rev. 1, ¶ 50 (2003) (precautionary measures).

111. Case 1802 (Paraguay), Inter-Am. C.H.R., OEA/Ser.L/V/II.43, doc. 21 corr. 1 (1978) (imposition of inhuman conditions of work on indigenous population).

112. *See* Case 2006 (Paraguay), Inter-Am. C.H.R., OEA/Ser.L/V/II.43 doc. 21 corr. 1 (1978).

113. *See, e.g.*, Maya Indigenous Communities of the Toledo District v. Belize, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122, doc. 5 rev. 1 (2005) (state responsibility for violating

tection of the family (art. VII).[114] That the numbers of such cases are not large owes principally to the low level of use of the inter-American system by human rights advocates in the countries that have not yet ratified the American Convention, and thus for whom the American Declaration is the principal regional human rights instrument for application in the individual petitions process.[115] The early right-to-education and right-to-health cases adjudicated under the Declaration were in fact presented to the system by advocates in southern-cone states (Argentina, Brazil, Paraguay) that have since ratified the Convention.[116] Such cases must now be brought under the Convention or, where appropriate, the San Salvador Protocol.[117]

In fact, the Commission not only does not hesitate to use the direct approach to protect autonomous social rights under the Declaration but, in a properly-implemented integration approach, has used these rights to protect classic civil-political rights as well. It has, for example, found Cuba responsible for violating the rights of individuals to health and well-being under Declaration article XI for acts involving custodial tor-

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right to ancestral property under Declaration); Mary and Carrie Dann v. United States, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L/V/II.120, doc. 5 rev. 1, at 860 (2002). *See also* Grand Chief Michael Mitchell v. Canada, Case 790/01, Inter-Am. C.H.R., Report No. 74/03, OEA/Ser.L/V/II.118, doc. 70 rev. 2, at 160 (2003) (finding claim admissible regarding right to culture and requesting additional briefing on meaning of right to culture under Declaration and why breached under facts of case).

114. Case 1802 (Paraguay), Inter-Am. C.H.R., OEA/Ser.L/V/II.43, doc. 21 (1978) (sale of indigenous children).

115. Advocates in these countries have tended to either neglect the inter-American system altogether or limit their use of it largely to death penalty challenges. The Commission has, in fact, never fully adjudicated a case presented to it against Antigua and Barbuda, Bahamas, Guyana, St. Kitts and Nevis, St. Vincent and the Grenadines, or St. Lucia.

116. Argentina ratified the American Convention in 1984, whereas Brazil and Paraguay did so in 1992 and 1989, respectively. For signature and ratification status of the American Convention, see ORG. OF AM. STATES, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 56, OEA/Ser.L/V/I.4 rev. 9 (2003).

117. Brazil and Paraguay ratified the San Salvador Protocol in 1996 and 1997, respectively. For these states—along with Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Mexico, Panama, Peru, Suriname, and Uruguay—petitions alleging violations of the right to education and to unionization under the Protocol may be submitted to the inter-American human rights organs. *See id.* at 85.

ture and inhumane treatment.[118] It has done so while also using article XI to protect more classic health-based threats, such as failure to reasonably provide adequate medical attention. In several cases the Commission has invoked article XI in issuing health-related precautionary measures, requesting OAS member states to transfer inmates suffering health ailments to specialized hospitals or to grant them specialized medical attention, often to be administered in collaboration with a physician selected by the victim's family.[119] States generally comply with these orders—indeed, no less than they do with respect to orders issued under indirect approaches.

Cavallaro and Schaffer obscure this reality through two devices. One, they simply fail to mention any of the cases properly litigated under the American Declaration using the direct approach—that is, against states that are *not* parties to the American Convention. Two, they cite only to so-called "hybrid" cases in which the Declaration's social rights norms were invoked by litigants against states that *are* parties to the American Convention, i.e., states for whom the Commission *lacks* adjudicatory competence over the American Declaration.[120] They then use the Commission's unsurprising dismissal of these Declaration norms—together with their adjudicatory embrace of the Convention-based civil-political-rights norms—as evidence that the direct approach should generally be avoided in the inter-American system and that classic civil-political-rights norms should be preferred in supranational litiga-

118. Case No. 6091 (Cuba), Inter-Am. C.H.R., Report No. 3/82, OEA/Ser.L/V/II.57, doc. 6 rev.1 (1982) (finding Cuba responsible for violations under the Declaration of both the right to the preservation of health and to well-being (article XI) and the right to humane treatment while in custody (article XXV)). Interestingly, the American Declaration lacks an express provision guaranteeing the right to personal integrity, freedom from torture, and freedom from cruel, inhuman, and degrading treatment and punishment—the right to humane treatment being textually limited to custodial situations under article XXV. This would lead to the presumption that these fundamental rights were intended to be incorporated into article XI, enshrining the right to preservation of health and well-being.

119. *See, e.g.*, Jorge Luis García Pérez-Antúnez (Cuba), Inter-Am. C.H.R., OEA/Ser./L/V/II.114, doc. 5 rev. ¶ 28 (2002) (precautionary measures); Francisco Chaviano González (Cuba), Inter-Am. Comm. H.R., OEA/Ser.L/V/II.117, doc. 1 rev. 1 ¶ 50 (2003) (precautionary measures).

120. *See* cases cited *supra* note 88.

tion.[121] Obviously, had the same civil-political rights norms been invoked under the Declaration, they too would have been dismissed as jurisdictionally improper, as the Commission's regular jurisprudence makes clear.[122]

In sum, once subject-matter jurisdiction is properly taken into account, the validity of the direct approach under the American Declaration is unquestionable. Litigants should not hesitate to invoke the Declaration's autonomous social rights in any case lodged against one of the eleven OAS member states that are not party to the American Convention.

b. American Convention on Human Rights

For the remaining twenty-four American states—those that are party to the American Convention—the rights to education, health, adequate housing, social security, food, unionization, strike, adequate labor conditions, and fair wages may similarly be alleged in the individual petitions process, albeit using different jurisdictional provisions. For all of these states, the primary norm for the direct approach is article 26 of the American Convention,[123] a single incongruously-titled norm that directly protects, and renders amenable to contentious process, those economic, social, and cultural rights derived from the standards in the OAS Charter, as amended in 1967.[124] Those treaty-based standards, set out in Chapter VI of

121. *See* Cavallaro & Schaffer, *supra* note 2, at 264-67.

122. Indeed, the Commission regularly finds civil-political-rights claims inadmissible when raised under the Declaration in complaints against states party to the Convention. *See, e.g.*, Claudia Ivette González v. Mexico, Petition 281/02, Inter-Am. C.H.R., Report No. 16/05, OEA/Ser.L/V/II.124, doc. 5 ¶¶ 15-16 (2006) (life, liberty, integrity); Fernando A. Colmenares Castillo v. Mexico, Petition 12.170, Inter-Am. C.H.R., Report No. 36/05, OEA/Ser.L/V/II.124, doc. 5 ¶ 30 (2006) (liberty, due process, property).

123. This may be supplemented, for eleven of them, with the San Salvador Protocol, but only in cases involving the rights to education and unionization. *See* San Salvador Protocol, *supra* note 77, art. 19.6.

124. Formally titled "Progressive Development," article 26 provides: "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 [of 1967]*" (emphasis added). The Spanish text, considered the "official" version for purposes of interpretation, uses the decisively more affirmative term "that derive from"

the Charter, refer *expressly* to the "right to education," the "right to material well-being," the "right to work," the "right to unionization," the "right to collective bargaining," and the "right to strike."[125] They refer *implicitly* to the right to health, the right to adequate housing, the right to social security, the right to food, the right to just labor conditions, the right to fair wages, and the right to culture.[126] Each of these classic social rights may be adjudicated under article 26 when violated to the detriment of duly-identified individuals through conduct imputable to the state.

While article 26 is the lone provision under the chapter of the American Convention formally entitled "Economic, Social and Cultural Rights" (Ch. III), it is important to underscore that many of the norms included in Chapter II—formally entitled "Civil and Political Rights"—also expressly protect rights appropriately understood as economic, social, or cultural. These include inviolability of the home, freedom from compulsory labor, freedom of labor association, and the right to property.[127] This is in addition to expansive, textual, or procedural readings of Chapter II norms to protect the rights to health, to education, to labor guarantees, to social security, and to ancestral territory, an interpretive practice that now forms part of the constant jurisprudence of the inter-American human rights organs.[128] Indeed, the integrated nature of

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("*que se derivan de*") rather than the more passive "implicit in." *See* Charter of the Organization of American States, arts. 45, 49, Apr. 30, 1948, 119 U.N.T.S. 3, 2 U.S.T. 2394 (1996) [hereinafter OAS Charter].

125. *Id.*

126. *See id.* arts. 30, 34, 45-52.

127. *See* American Convention, *supra* note 23. For example, article 11 guarantees expressly against arbitrary interference with the home, a simple restatement of the duty to respect the right to housing. Article 6 protects against compulsory labor, while article 16 protects the right to freedom of labor association. The right to property, protected in article 21, is generally conceived as an "economic right" and, in relation to indigenous peoples, a "cultural right." The right to special protection of the child and family (arts. 17 and 19) are included on equal terms in the Convention and San Salvador Protocol, as well as the ICESCR and ICCPR. All other rights in the Convention, moreover—i.e., life, integrity, due process, non-discrimination, judicial protection, etc.—have as many economic, social, and cultural dimensions as they have civil and political dimensions.

128. For an analysis of this jurisprudence, see Melish, *Inter-American Court of Human Rights: Beyond Progressivity, in* SOCIAL RIGHTS JURISPRUDENCE, *supra* note 1; Melish, *Inter-American Commission on Human Rights: Defending Social*

Convention rights underscores the broad illogic in approaches that aim to distinguish as separate categories "economic, social, and cultural" and "civil and political" rights and that then attribute "justiciable" or "enforceable" character exclusively to one. Such distinctions are particularly suspect given the Convention's express grant of contentious competence to the Commission and Court over alleged violations of *all* Convention-guaranteed rights and freedoms—that is, those recognized in Chapters II and III inclusive.[129]

To be sure, article 26 has historically been the subject of neglect in regional adjudication initiatives. Contrary to Cavallaro and Schaffer's suggestion, however, this owes not to any belief that article 26 fails to consecrate discretely-identifiable "specific rights" of an economic, social, or cultural nature.[130] The inter-American human rights organs have repeatedly recognized the protected status of these discrete rights under article 26. The Commission, for example, in addition to making broad statements on the Convention's extensive protection of economic, social, and cultural rights in general,[131] has recog-

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Rights through Case-Based Petitions, in SOCIAL RIGHTS JURISPRUDENCE, *supra* note 1.

129. *See* American Convention, *supra* note 23, arts. 1-2, 44-51, 63.

130. *See* Cavallaro & Schaffer, *supra* note 2, at 225 ("Article 26 fails to establish any specific rights"); *see also id.* at 268 ("Article 26 enumerates no specific rights enforceable on an individual basis."). Such neglect owes principally to two factors: first, the substantive homogeneity of the system's caseload since the Convention entered into force in 1978 and, second, historically-based misperceptions about the nature of the state obligations that attach to economic, social, and cultural rights, these being inappropriately distinguished from those applicable to classic civil and political rights. *See* discussion *infra* Part III.A, III.A.2.

131. According to the Commission, "[t]he Inter-American states have pledged in the Charter and in the Convention [], or through the Declaration, to promote and protect civil and political rights, and economic, social and cultural rights." OEA/Ser.L/V/II.85 doc. 9 rev., at 563 (1994). The 2005 President of the Inter-American Commission affirmed that "the observance by the States of the rule of law and the effective protection of economic, social and cultural rights" are the "foremost challenges" that the Commission must now confront. Dr. Clare K. Roberts, President, Inter-Am. C.H.R., Address before the Permanent Council of the Organization of American States (Apr. 15, 2005). Likewise, a former President has affirmed that "[m]ore than any of the other great human rights instruments of the modern world, the American Convention emphasizes economic rights and economic development, as does the Charter of the Organization of American States." Dr. Alvaro Tirado Mejía, President, Inter-Am. C.H.R., Address

nized expressly that article 26 consecrates the right to health,[132] the right to social security,[133] labor rights protections such as freedom of unionization,[134] and the right to property (in the sense of land distribution).[135] It has likewise issued precautionary measures to protect the right to housing and housing-related land resources[136] and the right

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before the Permanent Council of the Organization of American States (Feb. 6, 1995), *in* OEA/Ser.L/V/II.91, Doc. 7 rev. (1996), at 275, 278.

132. *See, e.g., Odir Miranda, supra* note 88, ¶ 47 ("[T]he IACHR will take into account the provisions related to the right to health in its analysis of the merits of the case, pursuant to the provisions of articles 26 and 29 of the American Convention."); Luis Rolando Cuscul Pivaral and others affected by HIV/AIDS v. Guatemala, Case 642/03, Inter-Am. C.H.R., Report No. 32/05, OEA/Ser.L/V/II.124, doc. 5 ¶ 42 (2006) (recognizing that article 26 protects the right to health, in both its curative and preventative dimensions).

133. *See, e.g., Five Pensioners Case, supra* note 51, ¶ 142 (summarizing Commission's arguments to the Court on the right to social security under Convention article 26); Jesús Manuel Naranjo Cárdenas et al. v. Venezuela, Petition 667/01, Inter-Am. C.H.R., Report No. 69/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1, ¶¶ 61-64 (2005) ("[T]he Commission finds that the nonperformance of the judicial judgment dictated in the internal order guaranteeing the right to social security, alleged by the presumed victims as entitlement, might characterize a violation of the Article 26 of the American Convention.").

134. *See, e.g.*, Milton García Fajardo et al v. Nicaragua, Case 11.281, Inter-Am. C.H.R., Report No. 100/01, OEA/Ser./L/V/II.114, doc. 5 rev., at 536 (2001) (finding state responsibility for violating labor rights of workers under article 26).

135. *See, e.g.*, Report on the Situation of Human Rights in Haiti, Inter-Am. C.H.R., OEA/Ser.L/V.II.88, doc. 9 rev. (1995), at 175-76 (finding, under promotional mandate, state in breach of article 26 by engaging in unjustified delay in the implementation of a program of land transfers to demobilized combatants).

136. *See, e.g.*, Yakye Axa Indigenous Community of the Enxet-Lengua People v. Paraguay, Petition 12.313, Inter-Am. C.H.R., Report No. 2/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1, ¶¶ 11-12 (2003) [hereinafter *Yakye Axa Case*] (requesting that the state "suspend the enforcement of any court or administrative order involving the eviction and/or removal of the homes of the Yakye Axa indigenous community"); Pueblo Indígena Kichwa De Sarayaku y Sus Miembros v. Ecuador, Inter-Am. C.H.R., Report No. 62/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1, at C1 (2005) (precautionary measures), ¶ 16 (Colombia) (requesting Colombia to "adopt the necessary measures to guarantee adequate accommodations and the necessary conditions for the subsistence" of individuals violently evicted from their settlement); Mercedes Julia Huenteao Beroisa et al. v. Chile, Petition 4617/02, Inter-Am. C.H.R., Report No. 30/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1, ¶ 15 (2005) (requesting Chile to "avoid[] or suspend[] any judicial or administrative action that entails eviction of the petitioners from their ancestral lands").

to education[137] with respect to states parties to the Convention.

Similarly, the Court—having more limited opportunities to address the provision in the individual petitions process—has recognized implicitly that article 26 protects the right to social security, the right to health, and the right to education as autonomous individually-held rights.[138] It has made broad statements in favor of economic, social, and cultural rights under its advisory jurisdiction, particularly in relation to the interlinkages between the rights to health and education in article 26 and articles 4 and 19.[139] Indeed, even states that are parties to the Convention readily recognize that article 26 protects a series of rights creating legal obligations for them. In the recent case *Yakye Axa Indigenous Community v. Paraguay*, the state admitted partial international responsibility in proceedings before the Court for violating article 26 of the Convention on the ground that its agents failed to take adequate measures to ensure the rights to food, health care, and other essential social services for a highly vulnerable population to which it owed duties of care.[140]

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137. OEA/Ser.L/V/II.106, doc. 6 rev. ¶ 27 (2000) (Dom. Rep.) (requiring the state to adopt the measures necessary to prevent a young girl "from being deprived of her right to attend school and to receive the education provided to other children of Dominican nationality").

138. *See Five Pensioners Case, supra* note 51, ¶ 147-48 (recognizing that article 26 protects the right to social security, but declining to pronounce on it in the context of the case); Case of Children's Rehabilitation vs. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 112, ¶ 255 (Sept. 2, 2004) [hereinafter *Panchito López Case*] (recognizing that article 26 protects the rights to health, education, and recreation, but declining to pronounce on it in the interests of judicial economy given that violations of articles 4 and 5 already found based on same facts).

139. *See, e.g.*, Juridical Status and Human Rights of the Child, Advisory Opinion OC-17/02, Inter-Am. Ct. H.R. (Ser. A) No. 17, ¶¶ 137(8), 86 (Aug. 28, 2002) (resolving that "true and full protection of children entails their broad enjoyment of all their rights, including their economic, social, and cultural rights" and highlighting that "education and care for the health of children . . . are the key pillars to ensure enjoyment of a decent life"); *Panchito López Case, supra* note 138. *See generally* Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18, Inter-Am. Ct. H.R. (Ser. A) No. 18/03 (Sept. 17, 2003).

140. *See Yakye Axa Case, supra* note 136, ¶ 204. The state, however, defended its omissions on the ground of lack of available resources due to its status as a "less developed country" and the "inequalities in international commerce." *Id.*

Nevertheless, Cavallaro and Schaffer insist that "article 26 fails to establish any specific rights."[141] They base this conclusion on two unwarranted grounds, one referring to the treaty's *travaux préparatoires*, the other to a jurisdictional limitation over rights in an entirely separate treaty. Regarding the first, they purport to rely on the existence of an internal debate between states in the negotiation of the Convention's text about whether to include express protection of autonomous economic, social, and cultural rights. Leaving aside the precept against referral to the *travaux préparatoires* where the text of a treaty provision is not ambiguous or obscure in light of its ordinary meaning and the object and purpose of the treaty[142]—as is the case with article 26—an actual reading of the *travaux* should in fact have led Cavallaro and Schaffer to the opposite conclusion.

Indeed, the treaty negotiation process shows broad support for the inclusion of autonomous economic, social, and cultural rights, as "protected rights," in the American Convention. The objection voiced by most states was that the draft text prepared by the Commission and used as the basis for negotiations was *not strong enough* in its social rights protec-

141. Cavallaro & Schaffer, *supra* note 2, at 225; *see also id.* at 268.

142. According to the Vienna Convention on the Law of Treaties, the preparatory work of international conventions is only a supplementary means of interpreting a treaty and is to be accorded little, if any, weight if the meaning of a treaty provision is not ambiguous or obscure in light of the ordinary meaning to be given to its terms in their context, in light of the treaty's object and purpose, and in the absence of a special meaning affirmatively accorded to a term by the parties. *See* Vienna Convention on the Law of Treaties, art. 32, May 23, 1969, 1155 U.N.T.S. 331. "Preparatory work is an aid to be employed with discretion, since its use may detract from the textual approach, and, particularly in the case of multilateral agreements, the records of conference proceedings, treaty drafts, and so on may be confused or inconclusive." IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 636 (1998). The International Court of Justice, like its predecessor, has generally refused to resort to preparatory work if the text is sufficiently clear in itself. *See, e.g.*, Competence of the General Assembly for the Admission of a State to the United Nations, 44 AM. J. INT'L L. 582, 582-86 (1950). The inter-American human rights organs follow this approach as well. *See, e.g.*, Restrictions to the Death Penalty, Advisory Opinion OC-3/83, Inter-Am. Ct. H.R. (Ser. A) No. 3, ¶ 50 (Sept. 8, 1983) ("[O]bjective criteria of interpretation that look to the texts themselves are more appropriate [in the case of human rights treaties] than subjective criteria that seek to ascertain only the intent of the Parties").

tions.[143] They wanted a clearer, more technically-drafted reference to "rights" with concrete corresponding legal obligations. Thus, Argentina, Brazil, Chile, Colombia, Guatemala, Panama, and Uruguay urged amendments to the Commission's draft text to include explicit reference to "rights" rather than declaratory statements on "standards,"[144] as well as more technical legal wording to ensure the obligations attendant thereto were viewed as "legal" and "effective."[145] They also urged closing the substantial gaps left by the Commission's underinclusive enumeration of the standards in article 31 (now article 34) of the OAS Charter. That enumeration omitted, for example, the rights to strike, to education, and to culture, all of which were directly protected under other provisions of the OAS Charter and merited inclusion as "protected rights" in the American Convention.[146] Even the United States urged

143. Draft Inter-American Convention on the Protection of Human Rights, prepared by the Inter-American Commission on Human Rights, draft arts. 25 & 26, OEA/Ser.L/V/II.19, doc. 48 (1968). The Commission's draft textually replicated, in declaratory and non-legal terms, the standards assumed by OAS member states in what is currently article 34 of the OAS Charter. It then subjected those standards to a periodic state reporting procedure.

144. *See, e.g.*, Inter-American Specialized Conference on Human Rights, Acts and Documents, OEA/Ser.K/XVI/1.2, doc. 6, at 36-37 (Uruguay) (Sept. 26, 1969) [hereinafter Specialized Conference on Human Rights] (noting that such "declaratory text" does not seem appropriate for a convention"); *id.* doc. 53, at 268 (Chile) (urging a better drafting of the economic, social and cultural rights in the Convention, following the technique of the United Nations and European Council).

145. *See, e.g., id.* doc. 53, at 268 (Chile) (suggesting inclusion of clear binding corresponding legal obligations similar to article 2.1 of the ICESCR). As Cavallaro and Schaffer point out, the draft Conventions presented by the American Committee of Jurists, by Panama, and by Chile "gave extensive recognition to economic, social, and cultural rights." Cavallaro & Schaffer, *supra* note 2, at 268 n.175 (quoting Matthew Craven, *The Protection of Economic, Social and Cultural Rights under the Inter-American System of Human Rights, in* THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 289, 297 (David J. Harris & Stephen Livingstone eds., 1998)).

146. Specialized Conference on Human Rights, *supra* note 144, at 121-128 (Brazil). In offering an amendment aimed at giving "economic, social and cultural rights the maximum protection compatible with the peculiar conditions of the great majority of American States," Brazil noted objections to both draft paragraphs 1 and 2 of the Commission's draft: "The drafting of paragraph 1 is vague, limiting itself to a manifestation of intention. For its part, paragraph 2, by reducing the content of article 31 of the Protocol of Buenos Aires, forgot the right to strike which is already consecrated, with

only deletion of the first paragraph of the Commission's draft, on the technical ground that it was already included in a subsequent draft article;[147] it voiced no formal objections to general inclusion in the Convention of norms related to economic, social, and cultural rights. The Dominican Republic was the lone voice in proposing that the provision be moved outside the chapter on protected rights.[148] While Argentina and Mexico did voice concerns, these were not related principally to the inclusion of economic, social, and cultural rights in the Convention. Rather, they were directed to the technical competence of the Commission to formulate recommendations on the measures states might adopt to ensure such rights[149] and to the legal determination of which domestic authority would be responsible for violations thereof.[150] Outside of these technical matters, Argentina otherwise supported inclusion of economic, social, and cultural rights in the protected rights section of the American Convention, following the position of Brazil.[151] Indeed, the argument of most states was that they had already committed to ensuring economic, social, and cultural rights in other legally-binding treaties, and hence the omission of such rights from the Convention was unjustified.[152] Urging an entire chapter on economic, social, and cultural rights, Guatemala in fact implored delegates that "our Governments must lend greater attention to economic,

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certain limitations, by the internal law of the American States, as well as the norms on education, science and culture foreseen in Article 47 of the same Protocol." *Id.*

147. *Id.* doc. 53, at 268 (United States).

148. *Id.* doc. 9, at 50-91 (Dom. Rep.).

149. *Id.* doc. 8, at 45-49 (Arg.).

150. *Id.* doc. 11, at 99-103 (Mex.). Mexico did, however, subsequently express general doubts about the convenience of including in the Convention the "rights" contemplated in the Commission's draft article 25. *Id.* doc. 53, at 268. It did not, however, feel strongly enough to include itself in the final drafting committee of interested states on that article. Mexico is today a reliable supporter of supranational adjudicatory procedures exercising competence over social rights claims.

151. *Id.* doc. 53, at 267 (Arg.).

152. *See id.* Chile urged explicit reference to and enumeration of economic, social, and cultural rights, following the technique of the United Nations and the European Council. *Id.* doc. 7, at 38-44, ¶¶ 14-15 (Chile). Uruguay objected to the lack of reference to rights in the Commission's draft article 25.2, and took issue with restrictions on the right to unionize. *Id.* doc. 6, at 36-37.

social, and cultural rights, given that their full realization is the only hope to solve the multiple problems that lead to underdevelopment."[153]

In response to the objections as to vagueness and underinclusiveness voiced by OAS member states to the Commission's draft discussion text, a Working Group was formed to draft a compromise text based on the various amendments proposed at the Conference.[154] To address the "vagueness" objection, an express reference to "rights" was added to current article 26, together with a specific obligations clause to supplement the general obligations clauses laid out in Chapter I of the Convention. That specific clause was drafted in terms similar to article 2.1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), a treaty adopted just three years prior that established autonomous social rights similar to those referred to in article 26.[155] To address the "underinclusiveness" objection, the Commission's initial textual duplication of the standards enumerated exclusively in one provision of the amended OAS Charter was replaced by a concise, non-exclusive reference to *all* the "rights implicit in the economic, social, educational, scientific, and cultural standards" set forth therein. This shorter, inclusive reference diminished the risk—a constant concern in human rights treaty drafting negotiations—that overly-specific references might, in the future, be construed erroneously as an intention of the drafters to limit rights to precise specifications, rather than to allow them to evolve progressively as circumstances, understandings, and technologies change. The task of deciphering the specific rights protected would fall to interpreting bodies in case-specific contexts as treaty law and jurisprudence devel-

153. *Id.* doc. 24 (Guatemala) (Nov. 8, 1969). The delegate continued, "neither let us forget that in the developed nations there also exist great nuclei of the population in which the promotion of these rights are imperative." *Id.*

154. The Working Group was comprised of delegates from Argentina, Brazil, Chile, Colombia, Ecuador, Guatemala, and the United States. *Id.* at 268.

155. For a general assessment of the critical role played by Latin American states in the drafting process, see generally Paolo G. Carozza, *An Historical View of the Latin American Contribution to the Idea of Economic, Social and Cultural Rights, in* SOCIAL RIGHTS IN THE AMERICAS 74 (Alicia Eli Yamin, ed., forthcoming 2007) [hereinafter *An Historical View*].

oped, as well as through the dialogic work of states, the Commission, and civil society in the periodic reporting process.[156]

Perhaps most tellingly, while the Convention drafters did place the newly-drafted article 26 in a separate Chapter III entitled "Economic, Social and Cultural Rights"—following the recommendation of Chile and the contemporaneous lead of the United Nations[157]—it did not remove it from the overarching section enumerating "Protected Rights" (as the Dominican Republic had proposed). That is, the Commission's original treaty draft had included a single Chapter II entitled "Protected Rights," in which it had placed all of the substantive norms of the Convention—i.e., those of a civil, political, economic, social, and cultural rights nature. Significantly, in creating a new Chapter III for article 26, the framers did not maintain the old title of "Protected Rights" for Chapter II as they could have, had they not wanted to subject Chapter III rights to the same standards as Chapter II. Rather, it renamed Chapter II "Civil and Political Rights" and relocated both Chapters II and III under a new Part I entitled "State Obligations and *Rights Protected.*" By doing so, they made their intention clear that the economic, social, and cultural rights protected in Chapter III were not to be interpreted as second-class rights, but rather were to be treated under the same general obligations, supplemented by those in article 26, and the same individual complaints procedure as were the civil and political rights in Chapter II.[158] The *travaux*, therefore, support the otherwise textually-unambiguous reading of the Convention that article 26 establishes individually enforceable "specific

156. Although a periodic reporting process was formally established under the American Convention for the rights recognized in article 26, *see* American Convention, *supra* note 23, art. 42, it was never systematically put into practice in the inter-American system.

157. As one former Inter-American Court Judge has noted, the separation in the Convention "between civil and political rights and economic, social and cultural rights follows merely historical reasons and not juridical differences among them." Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, *supra* note 52, ¶ 6 (Piza Escalante, J., concurring and dissenting).

158. The synopsis of the Convention's drafting process relied upon by Cavallaro and Schaffer does not appear to reflect the documentary record fully; it tends to draw conclusions from the final draft that do not reflect a reading of the Convention as a whole. *See* Craven, *supra* note 145, at 297-306.

rights" and that these rights—as "protected rights"—are enforceable to the *same degree* and under the *same standards* as the Convention's rights enumerated in Chapter II.[159]

Cavallaro and Schaffer make the equally misplaced argument that, to the extent article 26 is "ambiguous" as to the creation of enforceable rights, the "OAS appears to have resolved these doubts when it drafted and adopted the San Salvador Protocol."[160] According to the authors, this is due to a jurisdiction-granting provision in the San Salvador Protocol, which limits the number of norms *in that treaty* that may be adjudicated in the individual petitions process to two: articles 8.1.a and 13, protecting the rights to education and unionization, respectively. Apparently, this limitation on the contentious *ratione materiae* jurisdiction of the Commission and Court, by its terms applicable exclusively to one treaty, "proves" the unwritten intent of the drafters of a prior treaty, adopted twenty-years earlier, to exempt, sub silencio, a single norm (out of twenty-three) from jurisdiction-granting provisions that otherwise plainly include it.[161]

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159. This view of equal status between rights has been expressly affirmed by one former Judge of the Court. For him, speaking over two decades ago, the "standards of the Convention" are "applicable to the so-called 'economic, social and cultural rights'" in the same way, and under the same circumstances, they are applicable to "civil and political rights." *See* Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, *supra* note 52, ¶ 6 (Piza Escalante, J., concurring and dissenting). Although Judge Piza used different terminology ("reasonably requirable in themselves" vs. "not reasonable requirable in themselves"), he effectively aimed to express the same idea presented in this article regarding the equal applicability to all rights of "quadrant 1" and "quadrant 4" duties. *See infra* Part III.A.2.

160. Cavallaro & Schaffer, *supra* note 2, at 268.

161. *See* American Convention, *supra* note 23, arts. 41.f, 44-51, 61-65. The Commission is authorized to adjudicate alleged violations "of *any* of the rights protected by this Convention." *Id.* art. 48.1 (emphasis added). So, too, does the contentious jurisdiction of the Court comprise "all cases concerning the interpretation and application of the provisions of this Convention." *Id.* art. 62.3. The Court is authorized to issue remedies in such cases whenever it finds "there has been a violation of *a right or freedom protected by this Convention.*" *Id.* art. 63.1 (emphasis added). The rights protected in article 26 are plainly included in this language.

This view not only neglects accepted norms of treaty interpretation,[162] it leads to absurd results. Indeed, if the Cavallaro-Schaffer understanding were extended to other norms and treaties that contained rights similar to Convention norms but that were drafted in more specific language and were not subject to the individual petitions process, numerous Convention-based rights would instantly be excised from the contentious jurisdiction of the Commission and Court. For example, two inter-American treaties were adopted by OAS member states in 1994 and 1999, respectively, to address discrimination and violence against groups in particularly vulnerable situations: women and persons with disabilities. Although the rights of "all persons" (i.e., including women and persons with disabilities) to non-discrimination and to equal protection of the law are expressly protected in articles 1 and 24 of the American Convention, OAS member states determined that, in light of enduring discrimination and violence against these groups, more specifically-worded, reinforcing protections were necessary. Both supplementary treaties, nonetheless, excepted their more precisely-defined guarantees either entirely or mostly, from the regional system's individual petitions process.[163]

Extending the reasoning of Cavallaro and Schaffer to these subsequent treaties, we should draw from this limitation the understanding that Convention articles 1 and 24 were never intended to be adjudicable in the individual petitions process—at least not with respect to women and persons with disabilities. In fact, extending further the Cavallaro-Schaffer view, neither should articles 17 and 19 of the Convention. These provisions protect, respectively, the rights of the family and the rights of children to special measures of protection—rights that, like freedom from non-discrimination, are protected by congruent, more precisely-defined norms in the San

162. *See* Vienna Convention on the Law of Treaties, *supra* note 142, arts. 30-31.

163. *See* Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities, art. 6, Jun. 7, 1999, AG/RES. 1608 (1999) (contemplating a periodic reporting process for the rights enshrined therein, rather than subjection to the individual petitions process); Belem do Pará Convention, *supra* note 100, art. 12 (limiting competence of individual complaints mechanism to alleged violations of article 7).

Salvador Protocol.[164] If the Protocol's jurisdictional limitation in article 19.6 renders Convention article 26 non-adjudicable, so too does it render non-adjudicable Convention articles 1, 17, 19, 24, and potentially many others. The absurd results attendant to the Cavallaro-Schaffer understanding of the inter-American organs' *ratione materiae* jurisdiction should stand as a cautionary tale in efforts to reconstruct article 26 as a programmatic norm lacking adjudicable content.[165]

Indeed, precisely to avoid such untoward interpretations, the San Salvador Protocol includes a "savings provision" in article 4. That provision expressly prohibits invoking norms of the Protocol to restrict or curtail rights that are in effect in a state *by virtue of a different treaty*—such as the American Convention—on the pretext that the Protocol fails to recognize those rights or recognizes them to a lesser degree.[166] That is, correctly understood, article 4 of the San Salvador Protocol prohibits the use of Protocol article 19.6 as a pretext to limit or restrict the adjudicability of the rights consecrated in Convention article 26 for states parties to that instrument.

Cavallaro and Schaffer's view of the impact of Protocol article 19.6 on the adjudicability of Convention article 26[167] also overlooks the fact that the American Convention does not single out in its jurisdictional grant *any* specific provision or set of provisions. It broadly establishes the jurisdictional competence of the Commission and Court to receive contentious

164. *See* San Salvador Protocol, *supra* note 77, arts. 3, 15, 16.

165. There are in fact many reasons why states draft new treaties consecrating established rights in more specific form; the San Salvador Protocol is no exception.

166. San Salvador Protocol, *supra* note 77, art. 4 ("A right which is recognized or in effect in a State by virtue of its internal legislation or *international conventions* may not be restricted or curtailed on the pretext that this Protocol does not recognize the right or recognizes it to a lesser degree.") (emphasis added).

167. Cavallaro and Schaffer seek to draw a non-congruent comparison between the San Salvador Protocol, which affirmatively grants contentious competence to the Commission and Court over two of its treaty provisions, and the American Convention, which does not single out any specific norm in its jurisdictional grant. The authors' seem to find meaning in the absence of an affirmative grant of jurisdiction over article 26, when there is no affirmative grant of jurisdiction over any individual provision. Rather, jurisdiction is granted to "all protected rights." This category includes all those rights recognized in articles 3 through 26 inclusive. *See* Cavallaro & Schaffer, *supra* note 2, at 227.

complaints "alleging violation of *any of the rights protected by this Convention.*"[168] This grant covers all Chapter II and Chapter III rights, including the specific rights to education, health, housing, social security, and labor protections guaranteed under article 26.

c. San Salvador Protocol

In contrast to the Convention's unrestricted grant of adjudicatory competence to the Commission and Court over *all* rights recognized therein, including those in article 26, the San Salvador Protocol grants the inter-American organs contentious competence over only two of its rights-based norms: the rights to education and to unionization.[169] Contrary to popular belief, then—which often views the Protocol as "filling the gap" in regional treaty law—the Protocol is in fact of notably limited direct use in supranational adjudicatory processes at present. This comes in spite of its detailed protections of the rights to health, a healthy environment, food, work, just and equitable conditions of work, social security, the benefits of culture, and special protection for the family, children, elderly, and persons with disabilities,[170] none of which may be directly invoked in the individual petitions process under the Protocol.

This does not mean, however, that these rights do not lend themselves to the direct approach in the inter-American system. As effectively all of the rights protected in the Protocol (plus a few more[171]) are likewise protected by the jurisdictional norms of the American Declaration and American Convention, over which the Commission and/or Court *do* enjoy unrestricted contentious subject-matter jurisdiction, the direct approach may be used to protect these rights vis-à-vis every American state. The Protocol in no way alters the inter-Ameri-

168. *See* American Convention, *supra* note 23, arts. 48 (emphasis added). The Convention similarly grants remedial powers over any "violation of a right or freedom protected by this Convention." *Id.* art. 63.1; *see generally id.* arts. 44-63.

169. *See* San Salvador Protocol, *supra* note 77, art. 19.6.

170. *Id.* arts. 6-18.

171. The right to housing, for example, is not expressly mentioned in the Protocol of San Salvador, while it is expressly protected in both the American Declaration and American Convention. American Declaration, *supra* 78, arts. 9 & 11; American Convention, *supra* note 23, art. 26.

can organs' contentious subject-matter jurisdiction over these prior instruments.

Rather, the primary value of the Protocol in the individual petitions process—as distinct from its broader, unrestricted role in monitoring and promotional work—lies in its fleshing-out, in binding treaty form, of the rights to which American states have previously committed in other less precisely-worded instruments, particularly the American Convention. This interpretive function is textually sanctioned by Convention article 29.b, which prohibits the interpretation of Convention norms, including article 26, in a way that restricts the enjoyment of any right recognized by the San Salvador Protocol for states that are party to both instruments.[172] In the interpretive practice of the Commission and Court, this means that the Protocol's norms can be taken into consideration in interpreting the normative content and scope of the economic, social, and cultural rights protected in Convention article 26.[173] This

172. *See* American Convention, *supra* note 23, art. 29.b ("No provision of this Convention shall be interpreted as . . . restricting the enjoyment or exercise of any right or freedom recognized by virtue of . . . another convention to which one of the said states is a party."); Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, *supra* note 52, ¶ 20 ("[Article 29] was designed specifically to ensure that [the Convention] would in no case be interpreted to permit the denial or restriction of fundamental human rights and liberties, *particularly those that have already been recognized by the State.*") (emphasis added). Finding article 29's "innovating breadth . . . unmatched in any other international document," a former Inter-American Court Judge has in fact described the provision as incorporating into the Convention, to some degree, the "principles in other international instruments, in the country's own internal regulations and in the trends in effect in the matter of human rights." *Id.* ¶ 20 (Piza Escalante, J., concurring and dissenting).

173. In the Court's evolving jurisprudence under the American Convention, for example, it has repeatedly turned to the San Salvador Protocol and the Convention on the Rights of the Child, when ratified by the state in question, to "determine the content and scope" of the general provision established in article 19 on special measures of protection for the child. In the Court's words, this is necessary as these instruments "form part of a very comprehensive corpus juris of protection of children that the Court must respect." *Panchito López Case*, *supra* note 138, ¶ 148; Gómez-Paquiyauri Brothers Case v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 110, ¶ 166 (July 8, 2004); Villagrán Morales et al. v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶¶ 194-95 (Nov. 19, 1999) [hereinafter *Street Children Case*]; Juridical Status and Human Rights of the Child, *supra* note 139, ¶ 24. Accordingly, it has found that the special measures of protection to which article 19 refers in-

is true, at a minimum, for states parties to both instruments. Thus, while litigants should never plead direct violations of the Protocol's substantive norms outside articles 8.1.a and 13, they can use the Protocol's extensive catalogue of social rights as interpretive tools when invoking the broadly overlapping, but more vaguely-defined rights subject to the Commission and Court's contentious jurisdiction through Convention article 26.[174]

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cludes those necessary to ensure children's rights to education and to health, as part of the obligation to ensure an adequate standard of living and what the Court has dubbed a "project of life."

Similarly, the Court has turned to domestic law, customary law, and a series of ratified ILO Conventions—often in conjunction with the San Salvador Protocol—to determine the content and scope, in a labor context, of the Convention's guarantee of the right to association, as well as the right to property for indigenous peoples. Baena Ricardo et al. v. Panama, Inter-Am. Ct. H.R. (ser. C) No. 72, ¶ 159 (Feb. 2, 2001); Pedro Huilca Tecse v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 121 (Mar. 12, 2005) (labor association); *Awas Tingni Case, supra* note 51 (indigenous property). Significantly, in addition to the jurisprudence of the U.N. Human Rights Committee and the European Court of Human Rights, to which it frequently turns, the Court has also looked to the interpretive jurisprudence of the ILO Labor Union Freedom Committee, ILO Committee of Experts, and the U.N. Committee on Economic, Social and Cultural Rights, including its General Comments, to assist it in interpreting the content and scope of Convention provisions. *See, e.g., Baena Ricardo Case, supra,* ¶ 162-65; *Five Pensioners Case, supra* note 51, ¶ 147; Plan de Sánchez Massacre Case v. Guatemala, Reparations, Inter-Am. Ct. H.R. (ser. C) No. 105 (Apr. 29, 2004) [hereinafter *Plan de Sánchez*].

This integrative practice stems from the Court's expansive view of the Convention as a "living instrument," for which "dynamic interpretation" is needed, corresponding not to the circumstances that existed at the time of its drafting, but rather to the new juridical and factual circumstances in which a controversy arises. *See, e.g.,* Juridical Status and Human Rights of the Child, *supra* note 139, ¶ 28; *Street Children Case, supra,* ¶ 193; The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law, Advisory Opinion, 1999 Inter-Am. Ct. H.R. (ser. A) No. 16, ¶ 114 (Oct. 1, 1999). This characteristic of the Court's constant jurisprudence is vital for the progressive inclusion in the regional human rights system of more detailed and nuanced guidelines—such as those developed in relation to the critical guideposts of availability, accessibility, adequacy, and acceptability in the General Comments of the U.N. Committee on Economic, Social and Cultural Rights—for the effective protection of fundamental social rights.

174. This "indirect" use of the Protocol is particularly important given that the Protocol did not enter into force until November 1999 and has been ratified by only thirteen of thirty-five American states. Because of jurisdictional limitations that require available remedies to be exhausted, together

Cavallaro and Schaffer overlook this proper use of the Protocol and instead conflate the Protocol's restricted grant of contentious *subject-matter jurisdiction* over its norms with the *justiciability* of the rights therein.[175] They thus arrive at the conclusion that, given article 19.6, the Protocol-based rights to education and unionization are the only justiciable economic, social, and cultural rights in the inter-American system. This leads them to their overall, and distinctly contradictory,[176] thesis that, outside these two Protocol-based rights, social rights litigation in the regional system should be based on expansive constructions of classic civil and political rights, "rather than on formal acceptance of [economic, social, and cultural] rights themselves."[177]

The authors' jurisdictional analysis thus errs in two critical ways. First, it neglects the inter-American organs' indisputable contentious competence over the array of social rights guaranteed autonomously in the Declaration and Convention, rights that may be applied in the individual petitions process against *all* OAS member states, not only the thirteen that have ratified the Protocol. These norms include, but are not limited to, the rights to education and unionization; they extend to the rights

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with a requirement that the facts giving rise to a violation take place after a given instrument takes effect, a significant mass of cases in which the Protocol may properly be alleged directly will not, in practice, reach the inter-American system for another several years. For a discussion of the "indirect application" of economic, social and cultural rights norms over which the inter-American organs lack contentious jurisdiction, see PROTECTING, *supra* note 7, at 125-51.

175. *See* Cavallaro & Schaffer, *supra* note 2, at 227 ("Although petitioners to the Commission have sought to defend the justiciability of all of the rights protected in the Protocol, the Commission has construed Article 19 restrictively.").

176. Indeed, Cavallaro and Schaffer never explain why the Protocol-based rights to education and unionization are enforceable if—as they likewise assert—economic, social and cultural rights have proved "incapable of imposing immediate obligations on states." *Id.* at 222. They appear to overlook the fact that the duties corresponding to the education and unionization provisions in the Convention and Protocol are effectively *identical.* Given that subject-matter jurisdiction exists over the relevant rights in *both* instruments and the corresponding obligations do not differ in any material way, why adjudication is proper under *one* instrument and not under the other is never explained. *See id.* at 274-75.

177. *Id.* at 275 (describing strategy as based on two Protocol norms plus expansive interpretations of civil and political rights).

to health, housing, culture, social security, fair remuneration, and adequate labor conditions. Second, and just as importantly, by conflating subject-matter jurisdiction with justiciability Cavallaro and Schaffer not only *understate* the scope of justiciable claims that may be presented in the system using the direct approach, but substantially *overstate* those that may be brought under either the elements approach or the Protocol's education and unionization provisions. Emphatically, not all claims made under jurisdictionally-appropriate norms are in fact justiciable. It is to this critical point that the next section turns.

2. *The Justiciability of Direct-Approach Claims*

To be cognizable through contentious process, a legal claim must not only encompass norms, parties, and facts over which the adjudicatory body exercises jurisdiction;[178] the claim itself must also be "justiciable": *appropriate* for judicial or adjudicatory review.[179] Advocates and scholars often err by talking about the "justiciability" or "non-justiciability" of *rights*. In fact, it is not rights that are or are not justiciable; it is the *claims* crafted under them that fulfill, or fail to fulfill, the elements of a justiciable controversy. In this sense, the number of justiciable claims properly made under jurisdictionally-appropriate norms cuts equally across all civil, cultural, economic, political, and social rights.[180]

178. That is, the contentious body must exercise *ratione materiae, ratione personae, ratione temporis,* and *ratione loci* competence over the claim. All admissibility reports of the Commission address each of these aspects as a condition for proceeding to the merits stage of litigation. The Commission also assures itself that the claim "tends to establish a violation" of the instrument under consideration, in which it considers additional admissibility factors that speak directly to "justiciability," such as causation and concrete harm. *See* Diaz et al. v. Colombia, Case 11.227, Inter-Am. C.H.R., Report No. 5/97, OEA/Ser.L/V/II.95 Doc. 7 rev. ¶ 34 (1997).

179. BLACK'S LAW DICTIONARY 865 (6th ed. 1990).

180. The Commission regularly holds cases involving both civil-political and economic-social-cultural rights inadmissible under its contentious jurisdiction where they fail to fulfill the requirements of a justiciable case. *See, e.g.*, Janet Espinoza Feria et al. v. Peru, Case 12.404, Inter-Am. C.H.R., Report No. 51/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2003); Felix Roman Esparragoza Gonzalez and Nerio Molina Peñaloza v. Venezuela, Case 12.210, Inter-Am. C.H.R., Report No. 48/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 (2005); Queenan v. Canada, Communication No. 13/9/2005, CCPR/C/84/D/1379/2005 (Aug. 28, 2005); Santana et al. v. Venezuela, Case 453/01, In-

The precise contours of a justiciable case or claim can vary at the margins across jurisdictions, depending on the respective rules governing access to the judiciary, particularly those related to party standing.[181] A justiciable claim is nevertheless generally described as one involving a live controversy between adverse parties in which breach of a legally-defined duty held by one party is alleged to have proximately caused concrete injury to an identified rights-holder or set of similarly-situated rights-holders to which that duty is held. Its contours serve to concretize disputes in judicially-manageable ways, delimiting the types of claims appropriate for judicial review and for party-specific remedies.

As is true with most supranational bodies that concurrently exercise adjudicatory and promotional/advisory functions, the inter-American organs jealously guard the boundary between their distinct competences,[182] limiting their contentious jurisdiction to what has been defined as a concrete "case."[183] The Commission, for example, regularly culls from

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ter-Am. C.H.R., Report No. 92/03, OEA/Ser.L/V/II.118, doc. 70 rev. 2 (2004); Metropolitan Nature Reserve v. Panama (2003), Case 11.533, Inter-Am. C.H.R., Report No. 88/03, OEA/Ser.L/V/II.118, doc. 70 rev. 2 (2003).

181. These rules often reflect distinct levels of political accountability at the domestic level. Standing rules tend to become more expansive—blurring the line between adjudicatory and promotional/advisory functions—where the democratic branches are viewed as unaccountable and courts are compelled to take on a more political role. Courts will often accommodate the relative intrusiveness of their orders to the political reality of the day, pulling back or forging forward according to their domestic appreciation of separation-of-powers considerations. Because domestic courts may operate under distinct standing and justiciability rules it is important that supranational adjudicatory bodies operate under a set of rules viewed as legitimate by all states subject to their jurisdiction. As a practical matter, this will generally mean that justiciability should be viewed narrowly, keeping the boundary between adjudicatory and promotional functions sharp. This has been the time-tested approach of the European Court of Human Rights, which, like the inter-American system, exercises jurisdiction over states with differing rules governing litigant access to the domestic judiciary.

182. Article 2 of the Court's Statute, for example, underscores that the rules governing the Court's "adjudicatory jurisdiction" are distinct from those governing its "advisory jurisdiction." The former are constituted in the "case-based" provisions of articles 61-63 of the American Convention, while the latter are separated in article 64. *See* American Convention, *supra* note 23, arts. 61-64.

183. The American Convention limits the claims the Court may consider under its contentious jurisdiction to judicial "cases." American Convention,

contentious complaints presented to it claims deemed inappropriate for contentious resolution.[184] These "non-justiciable" claims are either dismissed entirely or, in function of the gravity of the situation, reserved for consideration under the system's non-contentious *promotional* mandate, pursuant to Convention article 41(a-d).[185]

A "justiciable case" in the inter-American system must, at a minimum, demonstrate two critical features: *injury-in-fact* to

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supra note 23, art. 62.3 ("The jurisdiction of the Court shall comprise all *cases* concerning the interpretation and application of the provisions of this Convention that are submitted to it [after completing the procedures in articles 48-50], provided that the States Parties to the *case* recognize or have recognized such jurisdiction. . . .") (emphasis added). The Commission's competence over "petitions" is not so confined, but in practice is exercised in a "case-based" manner under justiciability rules similar to those of the Court.

184. Conversely, the Court regularly vets requests for advisory opinions to ensure that they are not in fact dressed up petitions for the resolution of justiciable controversies; it will not entertain an advisory request that "is likely to undermine the Court's contentious jurisdiction." *See, e.g.*, Certain Attributes of the Inter-American Commission on Human Rights, Advisory Opinion, 1993 Inter-Am. Ct. H.R. (ser. A) No. 13, ¶ 15 (July 16, 1993); "Other Treaties" Subject to the Consultative Jurisdiction of the Court, Advisory Opinion, 1982 Inter-Am. Ct. H.R. (ser A) No. 1, ¶ 31 (Sept. 24, 1982); Compatibility of Draft Legislation with Article 8(2)(h) of the American Convention on Human Rights, Advisory Opinion, 1991 Inter-Am. Ct. H.R. (ser. A) No. 12, OC-12/91, ¶ 30 (Dec. 6, 1991).

185. *See, e.g.*, Víctor Nicolás Sánchez et al. v. United States, Petition 65/99, Inter-Am. C.H.R., Report No. 104/05, OEA/Ser.L/V/II.124, doc. 5 ¶ 76 (2006) [hereinafter *Operation Gatekeeper*] (finding inadmissible complaint regarding right to life of border-crossing migrants—including because not sufficiently identified by name—but deciding to "continue to supervise the situation, in accordance with its broad mandate to promote the observance and protection of human rights in the Hemisphere" given the gravity of the situation); Elias Santana et al. v. Venezuela, Case 453/01, Inter-Am. C.H.R., Report No. 92/03, OEA/Ser.L/V/II.118, doc. 70 rev. 2 ¶¶ 90-92 (2004) (finding inadmissible complaint involving freedom of association, but instructing the Commission's Special Rapporteur for Freedom of Expression to prepare a special report on the situation given its gravity and importance for the region); *see also* Corumbiara v. Brazil, Case 11.556, Inter-Am. C.H.R., Report No. 32/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 ¶ 124 (2005); Statehood Solidarity Committee v. United States, Case 11.204, Inter-Am. C.H.R., Report No. 98/03, OEA/Ser./L/V/II.114, doc. 70 rev. 2 ¶ 18 (2003) ("I am of the view that the type of issues dealt with in the present case can and should be dealt with by the Commission and other organs of the Organization of American States through their promotional functions rather than by deciding on a claim or communication.").

the rights of a specific person or persons and a *causal nexus* between that injury and the conduct of a state in breach of a legally-held duty to the alleged victim. These elements serve to ensure that the case under consideration is sufficiently specific and contextual to allow the adjudicatory body to determine, under accepted rules of international law, the nature and scope of state responsibility for specific alleged harms and, consequently, to order claimant-specific remedial redress.

Claims advanced in abstracto, without reference to specific, concretely injured victims and the specific conduct alleged to have caused that injury, are not deemed appropriate for "case-based" adjudication in the regional system. They may be considered only in a non-adjudicatory manner through the inter-American organs' promotional and advisory powers.[186] Both the Commission and Court have repeatedly insisted that they will not entertain *actio popularis*, public interest actions, or other abstract claims under their contentious jurisdiction in which alleged victims are not specified, determinate, and duly-identifiable.[187] This is particularly true in proceedings before

186. *See, e.g.*, International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2, American Convention on Human Rights), Advisory Opinion, 1991 Inter-Am. Ct. H.R. (ser. A) No. 14, OC-14/94, ¶ 49 (Dec. 9, 1994) ("The contentious jurisdiction of the Court is intended to protect the rights and freedoms of specific individuals, not to resolve abstract questions. There is no provision in the Convention authorizing the Court, under its contentious jurisdiction, to determine whether a law [or other conduct imputable to the state] that has not yet affected the guaranteed rights and freedoms of specific individuals is in violation of the Convention. As has already been noted, the Commission has that power and, in exercising it, would fulfill its main function of promoting respect for and defense of human rights. The Court also could do so in the exercise of its advisory jurisdiction, pursuant to Article 64(2).").

187. *See, e.g.*, Janet Espinoza Feria et al. v. Peru, *supra* note 180 (finding inadmissible petition submitted by Ombudsman "on the collective behalf of the women who are potential voters" in certain electoral districts); Felix Roman Esparragoza Gonzalez and Nerio Molina Peñaloza v. Venezuela, *supra* note 180, ¶ 40 ("The IACHR finds the petition inadmissible where it claims the infringement of the rights of 'the great majority of Venezuelan citizens who voted in the elections on Sunday' . . . because the petition constitutes an *actio popularis* presented in the name of an indeterminate group of persons."). The same is true of the Human Rights Committee. *See, e.g.*, Queenan v. Canada, *supra* note 180, ¶ 4.2 ("The Committee considers that in the absence of specific claimants who can be individually identified, the author's communication amounts to an *actio popularis* and is therefore inadmissible under Article 1 of the Optional Protocol.").

the Court, in which every alleged victim must not only be determinable, as required by the Commission, but identified *by name.*[188] Equally important, the harm alleged to each such person must be concrete in a classic, personal sense; it cannot be abstract, speculative or diffusely shared among a large number of people.[189] Claims alleging such abstract or diffuse harms, especially to broad or undifferentiated collectivities, are regularly dismissed from the regional organs' contentious jurisdiction as non-justiciable.

A claim appropriate for adjudicatory review also requires a *causal nexus* between the claimed injury and the *conduct* of the defendant state in breach of a legal duty held to the victim.[190] Without such a nexus between conduct and injury, the international responsibility of the state for the specific concrete harm at issue could not be established. This follows from the fact that the inter-American system does not recognize strict liability as a basis for state responsibility in the individual petitions process. State responsibility is judicially assessable only where the *cause* of concrete injury can be imputed to the state through the direct acts of its agents or their failure to take measures that, under the circumstances, they were legally required to take. In other words, imputation of state responsibility in the inter-American system requires breach of a "con-

188. *Panchito López Case, supra* note 138, ¶ 109; Plan de Sánchez v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 62 (Nov. 9, 2004); Moiwana Community v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶¶ 177-78 (June 15, 2005); *cf.* Acevedo Jaramillo et al. v. Perú, Inter-Am. Ct. H.R. (ser. C) No. 144, ¶ 227 (Feb. 7, 2006) (appearing to open door to potential future class actions).

189. *See, e.g.,* Elias Santana et al. v. Venezuela, *supra* note 180, ¶ 45 (finding complaint inadmissible given that "petitioners have not submitted sufficient evidence to demonstrate the specific manner in which their personal situation was injured by the operative portion of the judgment"); Metropolitan Nature Reserve v. Panama, *supra* note 180, ¶¶ 27-31 (finding inadmissible petition challenging highway authorization because "it is overly broad"; "the Commission requires a petition denouncing a concrete violation with respect to a specific individual").

190. *See, e.g., Operation Gatekeeper, supra* note 185, Concurring Opinion of President Clare K. Roberts (concluding case "manifestly unfounded" on ground that state not legally responsible through its conduct for alleged harm). Many cases are submitted to the system with this problem, although they are often returned to the petitioner without a formal admissibility decision being rendered.

duct-based duty" held by the state to the alleged victim or victims at issue.

In principle, the regional system's doctrine on justiciability functions to safeguard the interests of litigants and non-litigants alike. It safeguards the interests of litigants by ensuring that, in any adjudication that purports to bind party conduct directly, those parties' individualized interests and circumstances are fully represented in the context of an actual controversy, in which factual and legal issues can be squarely confronted. It safeguards the interests of non-litigants by helping to ensure that the adjudicatory organ's decisions do not unfairly burden the rights and duties of persons whose distinct interests, perspectives, and circumstances were not taken into account in rendering a final order.[191]

The importance of establishing the elements of a justiciable controversy in supranational litigation cannot be overstated. Just as litigants often make subject-matter jurisdiction mistakes in employing the direct approach—e.g., improperly invoking norms of the American Declaration or San Salvador Protocol—they also frequently engage in justiciability errors. These errors, closely associated with the inter-American organs' law on legal standing, most often relate to improper victim identification (alleging harm to broad or undifferentiated collectivities rather than to specific, duly-identified individuals),[192] failure to allege concrete (as distinct from abstract, speculative or diffuse) harm,[193] and failure to properly identify causal conduct through which the harm is imputable to the

191. It is contended in this regard that "collective complaints" procedures that presuppose unitary interest and experienced harm among members of a non-self-defined collective are generally more akin to promotional or advisory procedures than to adjudicatory ones.

192. See cases cited *supra* note 187. A case in point is a petition presented in 1999 to the Commission against the United States challenging the Personal Responsibility and Work Opportunity Reconciliation Act ("Welfare Reform Act") of 1996. The challenge was based on the law's generalized effects over the population of welfare-benefit recipients and the poor in general, as measured in statistical and testimonial reports. Nonetheless, without reference to any particular victim around which a justiciable controversy could be grounded for purposes of assessing state responsibility for distinct types of factual harm, the petition was properly dismissed without prejudice by the Commission in pre-admissibility vetting procedures.

193. See cases cited *supra* note 189.

defendant state.[194] These errors cut across all categories of rights, arising most commonly in the inter-American system in classic civil-political rights cases—involving, for example, the right to vote or freedom of expression—where advocates err by aiming "too big," seeking broad diffuse, structural, or sectoral vindication without reference to concrete individualized injury.[195]

The same justiciability errors arise in social rights cases, particularly where viewed improperly as "distributive justice" claims for broad collectivities, rather than concrete violations of individual rights.[196] Cavallaro and Schaffer replicate these errors in many of their proposed "social rights" hypothetical cases,[197] rendering them inappropriate for consideration under the adjudicatory jurisdiction of the inter-American system.[198] These case-framing errors are addressed more directly in Part IV, *infra.*

A larger, more invidious justiciability error must be addressed here, one which underlines the Cavallaro-Schaffer approach to social rights litigation as a whole. Indeed, even where all of the core elements of a justiciable controversy are presented in a petition—individualization, concrete harm, and state-specific causal conduct—social rights litigation in the inter-American system (and beyond) often faces an additional *externally-imposed* justiciability hurdle. This critical barrier will be the focus of the remainder of this section, as it is the basis on which Cavallaro and Schaffer, assuming that it inheres in the rights at issue, rather than being improperly applied thereto, establish their "non-justiciability" thesis for economic, social and cultural rights. Undoubtedly, it represents the sin-

194. See case cited *supra* note 190.

195. Social rights claims presented to the system also frequently suffer from these maladies, although the Commission often appears more inclined to return the claim to the victims for correction or reassessment without a formal admissibility finding.

196. The frequency with which Cavallaro and Schaffer equate "economic and social rights" with "distributive justice" and "social justice" is concerning. *See, e.g.,* Cavallaro & Schaffer, *supra* note 2, at 218-19 ("[W]e urge lawyers and activists in the Inter-American system to recognize the limited and often subsidiary role of legal advocacy in promoting the recognition of economic and social rights and distributive justice.").

197. *Id.* at 274-80.

198. *See* discussion *infra* Part IV.

gle gravest threat to rational social rights litigation in the Americas.

This externally-imposed justiciability hurdle lies in the application, for purposes of establishing state responsibility in individual complaints procedures, of the *improper dimensions* of human rights obligations to direct-approach claims, distinguishing them from the dimensions applied uniformly to classic civil-political rights claims under adjudicatory process. That is, the corresponding legal duties undertaken by states upon ratification of human rights treaties are complex and multi-dimensional. They have many orientations, including but not limited to those of a negative, positive, individual, collective, conduct-based, and result-based nature. All of these dimensions are binding, politically-enforceable, and apply to all human rights. Only some, however, correspond to the classic dictates of a justiciable controversy in the inter-American system. Hence only some may be applied directly to human rights claims under that system's contentious individual complaints mechanism. Cavallaro and Schaffer err by associating the litigation-*appropriate* dimensions of human rights obligations with civil and political rights and the litigation-*inappropriate* dimensions with economic, social, and cultural rights.[199] When direct-approach claims, judicially assessed under this latter standard, are predictably not cognizable in the system, they blame the nature of the rights, rather than their own improper standard.

The distinct dimensions of human rights obligations may be visualized spatially along multiple and intersecting planes. For purposes of the present analysis, two such planes are considered.[200] Each corresponds to one of the core justiciability

199. In practical application, they in fact rely on the litigation-*inappropriate* dimensions of human rights obligations with respect to civil-political rights claims as well. This follows from their reliance on classic rights-based stereotypes, rather than on the dimensions of duties that render claims amenable to adjudicatory process. *See infra* Parts IV & VI.

200. Other distinct dimensions exist that are not specifically dealt with here. For example, the conduct-based plane may be divided between "negative" and "positive" duties, referring to what a state *must not do* and what it *must do* in terms of its conduct to ensure respect for human rights. The fact that these duties are located in the "conduct-based" plane—and not in the "result-based" plane—helps to explain why Cavallaro and Schaffer's recognition of the falsity of the negative/positive dichotomy between civil-political/economic-social-cultural rights was unable to assist them in overcoming their

requirements of contentious process in the inter-American human rights system: *individual injury* and *causal conduct.*

The first refers to duties of an *individual-oriented* and *collective-oriented* nature. That is, under human rights treaties states assume legal obligations to "respect," "ensure," "secure," or "guarantee" the protected rights of "*all individuals*" or "*everyone*" subject to their jurisdiction.[201] Such duties extend to individual rights-holders qua individuals as well as to "everyone" as represented by the collective. This latter dimension is often represented by the duty to achieve or realize rights over the population as a whole or disaggregated populations within it. While neither the individual nor the collective dimension can be considered wholly in isolation, the distinct nature of each demands different forms of general supervision, measurement, and assessment. The individual-oriented dimension of state obligations, for example, is most frequently assessed through individual complaints procedures, which require a focus on individualized concrete harm. The collective-oriented dimension, by contrast, is most frequently assessed through periodic reporting processes, collective complaints procedures,[202] and general monitoring of the human rights situa-

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view of an immediate/progressive dichotomy (a distinction that straddles the conduct/result-based plane) between those rights.

201. *See, e.g.*, ICCPR, *supra* note 74, art. 2.1 ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant."); ICESCR, *supra* note 78, arts. 6-15 ("The States Parties to the present Covenant recognize [or "undertake to ensure"] the right of everyone to [right x]"); American Convention, *supra* note 23, art. 1.1 ("The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms."); European Convention, *supra* note 74, art. 1 ("The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."); African Charter on Human and Peoples' Rights, "Banjul Charter," art. 2, Jun. 27, 1981, 21 I.L.M. 59 (1981), ("Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter.").

202. Although collective or diffuse actions are recognized at the domestic level by many OAS member states, the inter-American system does not recognize a collective complaints procedure. In this author's opinion, collective complaints procedures—when not predicated on concrete harm to specific individuals, such as in class actions—often serve more of an advisory or promotional role, rather than a strictly adjudicatory one.

tion in a particular jurisdiction. These latter procedures measure state compliance with obligations over the sum of the population or with respect to disaggregated sub-groups within it, rather than with respect to specific individuals.

The second plane considered here refers to duties in their *conduct-based* and *result-based* dimensions.[203] These distinct dimensions of state obligations are likewise reflected in all major human rights treaties. The former is reflected in the duty to "adopt the necessary/appropriate measures" (or to "take the necessary/appropriate steps") to "respect and ensure," "give effect to," "secure," "fully realize" and/or "progressively achieve the full realization of" protected rights.[204] Its flexible qualifier of "appropriateness," "necessity" or, most fre-

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203. Legal distinctions between "obligations of conduct" and "obligations of result" have long been debated in international law. Because the two have been interpreted in different ways in different legal systems and because they may so easily be finessed, the International Law Commission ultimately decided to omit the distinction from its Draft Articles on State Responsibility. This author does not purport to reopen sterile and unuseful debates on the scope of these terms; they elucidate little when discussed in the abstract. Rather, she seeks to affirm and recover the conceptually useful distinction between "conduct-based" and "result-based" obligations in the sense that it is only through states' *conduct* that they may be held *causally* responsible for distinct harms in non-strict-liability jurisdictions. The distinction is thus conceptually of extreme utility from the perspective of delimiting the arguments that may be made as a function of classic justiciability doctrine. It is also critical for differentiating the dimensions of obligations that are better dealt with through monitoring initiatives, rather than case-by-case adjudication. The distinction is particularly important given that so much work has been done in the area of economic, social, and cultural rights at the international level in defining the scope of states' "result-based obligations." It is imperative that these concepts not be transferred uncritically into adjudicatory contexts for purposes of establishing state responsibility.

204. ICCPR, *supra* note 74, art. 2.2 ("[E]ach State Party to the present Covenant *undertakes to take the necessary steps* . . . to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.") (emphasis added); ICESCR, *supra* note 74, art. 2.1 ("Each State Party to the present Covenant *undertakes to take steps* . . . *by all appropriate means* [to achieve progressively "the full realization of the rights recognized in the present Covenant].") (emphasis added); American Convention, *supra* note 23, art. 2 ("States Parties *undertake to adopt* . . . *such legislative or other measures* as may be necessary to give effect to those rights or freedoms."), art. 26 ("States Parties *undertake to adopt measures* . . . *by legislation or other appropriate means* [to achieve] the full realization of the rights . . . .") (emphasis added); African Charter, *supra* note 201, art. 1 ("undertake to adopt legislative or other measures to give effect to [enshrined rights]").

quently in practice, "reasonableness" allows a spectrum of contextual and circumstantial factors to be taken into account in each discrete assessment of whether or not a state has complied with its conduct-based duties. Given this, conduct-based duties are always of "immediate" enforceability in individual and collective settings alike. Result-based duties, by contrast, correspond to whether or not protected rights have, as a factual matter, been "respected and ensured," "given effect," "secured," "realized fully," or "progressively achieved." Such a standard is relative and progressive, adjusting as rights understandings, conditions, and technologies evolve with time and over space. It can, however, be empirically assessed or statistically measured at temporal junctures. This is true with respect to individuals, the collective, or any given sub-group of the collective. Such temporal snapshots can then be tracked over time to assess progress or setbacks in state achievement with respect to their result-based duties. They can also provide critical information for determining the scope of states' conduct-based obligations and whether a failure to change course or adopt new measures constitutes breach thereof.

Accordingly, while assessment of conduct-based duties measures *what states have done or are doing* to achieve a particular end, assessment of result-based duties measures the factual *results achieved* at any given juncture. Both are critical for supervising state compliance with human rights commitments; indeed, each requires the other for meaningful assessment. As with individual- and collective-oriented duties, however, their direct assessment tends to be the respective focus of different types of supranational procedures. While results-based duties tend to be the primary but non-exclusive focus of monitoring procedures,[205] conduct-based duties are the focal point of con-

205. Periodic reporting procedures tend to require states to report on both the "measures they have adopted" to give effect to rights and the "progress made" in achieving the observance of those rights. *See, e.g.*, ICESCR, *supra* note 74, art. 16.1; ICCPR, *supra* note 74, art. 40.1; Convention on the Elimination of All Forms of Discrimination Against Women, art. 18.1, Sept. 3, 1981, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 19.1, June 26, 1987, G.A. Res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51; Convention on the Rights of the Child, art. 44.1, Sept. 2, 1990, G.A. Res. 44/25, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49.

tentious processes. This follows from the centrality of *causal conduct* in the definition of a justiciable controversy in most supranational human rights adjudicatory procedures.

The two planes considered above, when they intersect, indicate the dimensions of state legal duties that may properly be applied by supervisory bodies in the exercise of their distinct and discrete functions, both promotional and contentious. We are particularly interested in how they correspond to the core requirements of a justiciable case in the inter-American system, although their implications extend to other jurisdictions that define justiciability similarly. Arrayed in a two-by-two matrix, the intersected planes result in what may be called quadrant 1, quadrant 2, quadrant 3, and quadrant 4 duties. Only quadrant 1 duties, it is contended, are appropriate for direct application in supranational individual complaints procedures.

FIG. 1: THE DIMENSIONALITY OF HUMAN RIGHTS OBLIGATIONS: A PERSPECTIVE

	Conduct-based	Result-based
Individual-oriented	Quadrant 1 Duties: *Duty to adopt appropriate measures to respect and ensure rights to individuals*	Quadrant 2 Duties: *Duty to (factually) respect and ensure rights to individuals*
Collective-oriented	Quadrant 3 Duties: *Duty to adopt appropriate measures to progressively achieve rights for collective*	Quadrant 4 Duties: *Duty to (factually) achieve rights progressively for collective*

In this matrix, the upper left quadrant (quadrant 1)—representing individual-oriented and conduct-based obligations—corresponds to the *adjudicable* dimension of applicable human rights duties in supranational individual complaint procedures, where the justiciability requirements of concrete individualized injury and causal conduct delimit the competence of the supervisory instance. That is, it is the only dimension that allows assessment of whether concrete individualized harm can be imputed to the state through breach of a *conduct-based* duty held to the *individual* victim. By contrast, the lower

right quadrant (quadrant 4)—encompassing duties of a collective- and result-based nature—corresponds most directly to traditional periodic-reporting, indicator-monitoring, benchmark-setting, and other non-individual-specific mechanisms of a promotional nature, where statistical progress and set-backs in human rights enjoyment over the population as a whole and disaggregated sub-groups within it take center stage, and where justiciability issues, such as party standing, are not decisive, or even relevant.[206]

The folly of the Cavallaro-Schaffer thesis is that it is based on the uncritical assumption that the obligations in quadrant 4—broadly developed by the U.N. Committee on Economic, Social and Cultural Rights pursuant to its monitoring mandate[207]—attach by nature to economic, social, and cultural rights, while those in quadrant 1 attach axiomatically to civil and political rights.[208] That is, they view the distinct dimensions of obligations as inhering in separate categories of rights, rather than reflecting the jurisdictional parameters of the two primary types of human rights enforcement mechanisms at the international (and national) level: *contentious individual*

206. Quadrants 2 and 3, representing individual-oriented/result-based duties and collective-oriented/conduct-based duties, also play critical roles in litigation and promotional work. Neither, however, can be *directly* applied for purposes of establishing state responsibility in contentious individual petitions processes given standing rules, on the one hand, and causation requirements, on the other. This quadrant-based perspective helps to explain why popular social rights concepts, such as minimum core content (which corresponds to quadrant 2) are critical for monitoring, assessment and advocacy, but are not directly justiciable in themselves.

207. Under its competence to review states parties' periodic reports under the ICESCR, the Committee monitors the progress and setbacks achieved in the realization of the rights recognized in the Covenant. While the Committee reviews both conduct and results, advocates have tended to focus on the Committee's development of the concept of "progressive realization" in its results-based dimension. *See, e.g.*, General Comment No. 3, *The nature of States parties obligations (art. 2 para. 1 of the Covenant)*, U.N. Comm. on Econ., Soc. & Cultural Rights, 5th Sess., Supp. No. 3, ¶ 10, U.N. Doc. E/1991/23 (1990) [hereinafter General Comment No. 3] ("[A] State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant.").

208. As demonstrated in their test-case hypotheticals, Cavallaro and Schaffer also transpose quadrant 1 and quadrant 2 duties under their elements approach. *See infra* Part IV.

complaints procedures and *monitoring of the general human rights situation.* Because these supervisory mechanisms have, in recent history, been associated with one category of rights or the other,[209] the particular dimensions of state obligations assessed by the corresponding supervisory instances—as further developed and doctrinally refined by academics, advocates, and U.N. bodies—have been tethered conceptually to the *rights* supervised, rather than to the jurisdictional parameters of the supervisory instance itself. It is this subjective association, moored in the doctrinal imagination but lacking any logical or objective basis, that stands as the principal barrier to social rights litigation.[210]

In human rights vernacular, quadrant 1 duties are typically described as the duty to adopt all necessary, reasonable, or appropriate measures to respect and ensure the rights of every person within a state's jurisdiction. Quadrant 4 duties are synopsized in the duty of progressive realization. Both sets of duties apply to all human rights, irrespective of subjective

209. This distinction stems from the decision taken in 1966 by the U.N. Commission on Human Rights to establish an individual communications procedure under the ICCPR, through the adoption of an Optional Protocol, while declining to adopt a congruent Optional Protocol under the ICESCR. Consequently, the exclusive supervisory procedure under the ICESCR has been a periodic state reporting procedure, while the ICCPR has benefited additionally from a contentious procedure to resolve adverse controversies between individuals and states parties. *See* Optional Protocol to the International Covenant on Civil and Political Rights, Mar. 23, 1976, G.A. Res. 2200A, 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316, 999 U.N.T.S. 302. It is often overlooked that a periodic state reporting procedure—under which distinct collectively-oriented obligations are applied—is also contemplated under the ICCPR. *See* ICCPR, *supra* note 74, art. 40. The historic discrepancy in supervisory procedures at the U.N. level is currently in the process of being reassessed and corrected by member states, which have agreed to begin drafting an Optional Protocol to the ICESCR, establishing an individual complaints procedure thereunder. *See* Open-ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Hum. Rts. Council, Res. 2006/3 (June 29, 2006), http://www.ohchr.org/english/issues/escr/docs/res2006_3.pdf (deciding to begin drafting process).

210. This is true both of advocates who are skeptical of direct approaches to social rights litigation, like Cavallaro and Schaffer, and those who strongly advocate it but under standards derived from quadrant 2 and 4 duties, such as "minimum core content" and "prohibitions on regressivity." These latter standards are beyond the scope of this Article, and will be addressed elsewhere.

categorization,[211] interacting in dynamic synergy in both human rights advocacy and litigation initiatives. Only quadrant 1 duties, however, may be applied directly in victim-centered adjudicatory contexts, such as individual complaints procedures, as only they are capable of establishing the critical justiciability elements of individual injury and causal responsibility for that injury.[212] Such duties, assessed under a reasonableness-in-the-circumstances standard, are of immediate effect, as are all duties of conduct. By contrast, quadrant 4 duties, as result-based obligations, are not immediately enforceable in adjudicatory contexts.

Cavallaro and Schaffer focus on this *immediacy* verses *non-immediacy* (or *progressivity*) dichotomy as the basis for their claim that economic, social, and cultural rights are non-justiciable ("lack concrete duties" and "provide no definite grounds for state responsibility"[213]) and that civil and political rights should therefore be preferred. They contend that, despite noble attempts, advocates have been "incapable of imposing *immediate obligations* on states to protect and ensure economic, social, and cultural rights."[214] They contrast this with civil and political rights, which decidedly, in their view, are "immediately enforceable" and hence justiciable.[215]

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211. Under the Commission's promotional mandate, for example, it is expressly empowered "to make recommendations to the governments of the member states when it considers such action advisable, for the *adoption of progressive measures in favor of human rights* within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights." American Convention, *supra* note 23, art. 41.b (emphasis added).

212. Quadrant 2, 3 and 4 duties may be applied *indirectly* to establish the broader *context* within which quadrant 1 duties may be assessed. For example, population-based statistical information, particularly when disaggregated, or the measures adopted by a state to progressively achieve rights from a macro-perspective can be highly useful in litigation contexts to the extent they are offered to prove the *context* or *framework* in which a particular individual violation takes place. They may be used, for example, to establish a "policy" or "practice" on the part of the state of which directly-challenged state conduct is part. It may also be useful in helping to establish a necessary *scienter* requirement (e.g., knowledge, negligence) for purposes of establishing state responsibility.

213. Cavallaro & Schaffer, *supra* note 2, at 225 & 267.

214. *See id.* at 222 (emphasis added).

215. Cavallaro and Schaffer set up a progressively false dichotomy by which civil and political rights are "immediate," hence "justiciable," hence

This view, however, underappreciates the complex and detailed nature of human rights obligations. All human rights bear corresponding "immediate" and "progressive" obligations. As longstanding jurisprudence at the international and regional levels makes clear, these correspond in significant part to their *conduct*- and *result*-based dimensions. The U.N. Committee on Economic, Social and Cultural Rights, for example, has addressed this distinction in the context of interpreting the constitutive dimensions that inhere in the general obligations clause, article 2.1, of the ICESCR.[216] The Committee has explained that while "progressive realization" represents the "principal obligation of *result*" under the Covenant, the "central obligation" under article 2.1 is the obligation (of *conduct*) to "take steps . . . by all appropriate means" to give effect to the individually-held economic, social and cultural rights consecrated therein. That obligation, the Committee asserts, is of "*immediate effect*" and is not, in itself, "qualified or limited by other considerations."[217] That is, the Committee has made clear that a state can never use progressive realization or resource constraints as a justification for not *immediately* taking "all appropriate measures" to respect and ensure (protect/fulfill) human rights.[218]

"legitimate." By contrast, economic-social-cultural rights are "non-immediate," thus "non-justiciable," and thus "not legitimate." *Id.* at 225.

216. ICESCR, *supra* note 74, art. 2.1 ("Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.").

217. General Comment No. 3, *supra* note 207, ¶ 2. The U.N. Human Rights Committee has come to the same conclusion with respect to the obligation of conduct under the congruent article 2 of the ICCPR: "The requirement under Article 2, paragraph 2, to take steps to give effect to the Covenant rights is unqualified and of immediate effect. A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State." General Comment No. 31, *The Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Human Rights Comm., 80th Sess., ¶ 14, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

218. What is "appropriate" or "reasonable" cannot generally be determined a priori, but rather is subject to judicial determination based on assessment of the concrete facts under consideration, including the gravity of the immediate harm, the capacity and involvement of the state, and the con-

The same approach is taken by the inter-American human rights organs (as well as the European Court of Human Rights[219]). Both the Commission and Court restrict the dimensions of human rights obligations that they apply directly under the individual petitions process to quadrant 1 duties. That is, they apply to contentious complaints the duty to "adopt all appropriate measures" to respect and ensure protected rights, reserving assessment of states' result-based obligations, particularly over the collective, for its broader promotional mandate.[220] As a review of their jurisprudence reveals, this is true equally of their treatment of classic civil and political rights and of autonomous economic, social, and cultural rights.

Cavallaro and Schaffer neglect this longstanding jurisprudence in arriving at their concluding assessment that economic, social, and cultural rights "lack concrete duties" and "provide no definite grounds for state responsibility."[221] Curiously, in making this claim, they provide no independent analysis of either the text of the respective obligation clauses of the regional human rights instruments or the constant jurisprudence developed thereunder by the Commission and Court. Rather, they appear to base their thesis, unconditionally and uncritically, on two grounds: the classic critique that economic, social, and cultural rights, subject only to a duty of "progressive realization," are not immediately enforceable,[222]

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flicting rights of others in a democratic society. In this sense, any assessment of what constitutes *appropriate* measures must necessarily take resource constraints and the reasonable possibilities available to a state into account, as it must with classic civil-political rights.

219. *See, e.g.*, Plattform "Arzte fur das Leben" v. Austria, App. No. 10126-82, Eur. Ct. H.R., ¶ 34 (1988) (concluding that obligation undertaken by states parties under provisions of European Convention on Human Rights and Fundamental Freedoms "*is an obligation as to measures to be taken and not as to results to be achieved*") (emphasis added).

220. While the inter-American organs sometimes short-hand this duty as the obligation to "respect and ensure," they assess state responsibility consistently on the basis of the "measures" states have taken or failed to take in order to ensure respect for rights in particular discrete contexts. The precise measures that are required depend on the circumstances of each concrete case. *See* American Convention, *supra* note 23, art. 1(1).

221. Cavallaro & Schaffer, *supra* note 2, at 225, 267.

222. *See id.* at 225 (citing private view of one member of Court). The assertion is particularly curious given the authors' recognition that traditional negative/positive distinctions between categories of rights are misdirected

and a single piece of misplaced obiter dictum on Convention article 26 in a recent Court decision that, read outside the context of the arguments urged by litigants, appeared to reflect a similar understanding.[223] The authors accept this dicta so unconditionally that they reflexively extend it to all autonomous economic, social, and cultural rights, under not only the Convention but also the American Declaration.[224]

A slightly closer interrogation is warranted. The following three sections address the nature of state obligations corresponding to the social rights provisions found in the American Declaration, the San Salvador Protocol, and the American Convention, assaying both the respective treaty texts and their jurisprudential interpretation by the inter-American human rights organs. Such a review evidences that the obligations in the inter-American system attaching to economic, social, and cultural rights are no different than those attaching to civil and political rights. That is, when the directly justiciable (quadrant 1) dimensions of state obligations are properly taken into account, the "direct" approach to social rights litigation is indistinguishable from indirect approaches.

a. American Declaration

The American Declaration, like its universal counterpart, does not textually contain a general obligations clause.[225] Nonetheless, in exercising its treaty-based mandate to "promote the observance and protection of human rights,"[226] which since 1966 has included the examination of individual complaints,[227] the Inter-American Commission has been con-

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and do not constitute a valid ground for differentiating the nature of their corresponding state obligations.

223. For an analysis of this decision, see *A Pyrrhic Victory*, *supra* note 17.

224. This is apparent from the authors' advocacy of a generic strategy that avoids litigation under the "direct approach" of economic, social, and cultural rights in the inter-American system, excepting—without explanation—only articles 8.1.a and 13 of the San Salvador Protocol. *See* Cavallaro & Schaffer, *supra* note 2, at 263-65.

225. *See* American Declaration, *supra* note 78; Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A, U.N. GAOR, 3d Sess., 67th plen. mtg., U.N. Doc. A/810 (1948).

226. *See* OAS Charter, *supra* note 124, art. 106.

227. Following authorization by the OAS member states in 1965, OEA/Ser.C/I.13, at 32-34 (1965), the Commission amended its Statute in 1966 to include the examination of individual petitions as part of its regular compe-

sistent in applying to each of the rights in the Declaration's twenty-seven substantive provisions a single set of general state obligations. This consists in the conduct-based obligation to take all appropriate and necessary measures to respect and ensure (or "give proper effect to") the free and full exercise of the rights consecrated therein to all individuals subject to an OAS member state's jurisdiction.[228] These measures are broken down into those corresponding to "negative" duties of abstention or restraint in the exercise of arbitrary state conduct and to "positive" duties of reasonable prevention, diligent response, and appropriate provision when individuals' rights are threatened or harmed by the conduct of either state agents or private actors.[229] State responsibility for a given human rights violation is thus determined on the basis of whether or not concrete individualized harm, once established, may reasonably be imputed to the state through the unreasonable acts or omissions of its agents.

Significantly, the Commission applies these general conduct-based duties to all rights-based Declaration norms in the individual petitions process. That is, what matters for establishing state responsibility is not the subjective characterization of a given norm as civil-political or economic-social-cultural, but rather how the state in fact responded or failed to respond to alleged rights-based harms. This is perhaps best exemplified by the Commission's jurisprudence in which concurrent breaches of classic social rights (e.g. health, education, work,

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tence. OEA/Ser.L/V/II.14, doc. 35, at 26-27 (1996). That competence is currently reflected in its Rules of Procedure and Statute. *See* IACHR Rules of Procedure, *supra* note 23, arts. 49-50; Commission Statute, *supra* note 102, art. 20.

228. *See, e.g., Maya Indigenous Communities*, *supra* note 113, ¶¶ 132, 134, 143 (finding Belize responsible for failures regarding "the positive steps that the State must take to respect and ensure . . . rights," including their failure "to take the appropriate measures to protect the right" at issue and their failure "to take appropriate or adequate measures" to consult affected populations)

229. "Negative" and "positive" duties held by states to honor human rights commitments refer, by definition, to duties in their "conduct-based" dimensions. It is for this reason that Cavallaro and Schaffer's acceptance of the falsity of classic negative/positive dichotomies and of the consequent need for a "a new analytical framework" for social rights litigation, Cavallaro & Schaffer, *supra* note 2, at 254, was not able to shake their view that "progressive realization," in its result-based dimension, was the exclusive duty applicable to economic, social, and cultural rights.

family) and classic civil and political rights (e.g. life, integrity, religion) are imputed under the Declaration on the basis of common state conduct.

With regard to the right to health, for example, the Commission has decided multiple cases in which the same acts and omissions, under the same circumstances, have given rise to concurrent violations of the right-to-health and right-to-life norms of the American Declaration (articles XI and I). In *Coulter v. Brazil*, the Commission found the state responsible for violating both rights with respect to a group of Yanomami Indians whose health, integrity, culture, and lives were concretely injured by a state policy affecting their territory. Specifically, after finding valuable mineral deposits under Yanomami ancestral territory, Brazil approved a plan for their extraction. That plan, for which no consultation or prior impact studies had been undertaken, included the building of a large highway through Yanomami territory to facilitate access by miners and prospectors to the minerals. State responsibility arose from the Government's "failure . . . to take timely and effective measures" to both consult with the affected Yanomami and to protect them from new diseases brought in by third parties who, with the government's active assistance, were exploiting natural resources on Yanomami ancestral territory and exposing them to serious, even deadly, health risks. Indeed, as a result of the government's acts and omissions in unreasonably failing to offer appropriate preventive and responsive measures, hundreds of Yanomami died and even more suffered concrete injuries to their health, their form of life, and their free movement and residence.[230] There was no need to limit the health-related findings to the "right to life." Neither was the "progressive" dimension of any applicable duty relevant to

230. Coulter et al. Case v. Brazil, Case 7615, Inter-Am. C.H.R., Report No. 12/85, OEA/Ser.L/V/II.66, doc. 10 rev. 1, at 24, 33 (1985). The Commission also found violations of articles I and VIII, protecting the rights to "life, liberty, and personal security" and "residence and movement," respectively. The highway construction, which brought mining companies, independent prospectors, construction workers, and new farmers into Yanomami territory for the first time, resulted in the introduction of new diseases that killed hundreds of Yanomami. The tribe was forced to abandon its traditional land, its culture and social organization were fractured, and prostitution was introduced. The Brazilian government tried to resettle the tribe, but failed to respond with adequate social or health services.

the state's unreasonable conduct in the context-specific circumstances of the case.

Similarly, in an earlier case, the Commission held Paraguay internationally responsible for concretely violating, to the detriment of members of the Aché tribe, its obligations with respect to the rights to health, to work, to rest, and to special protection of the family, under Declaration articles XI, XIV, XV and VI. State responsibility for violating the right to health arose from Paraguay's failure to take appropriate and necessary preventive and responsive measures to protect members of the tribe from concrete harm caused by the onset of a fatal epidemic. Not only was that epidemic foreseeable and largely preventable given the nature of known state and third-party conduct in the victims' ancestral habitat, but the state was found to have actively deprived the tribal members of medical attention and medicines. International responsibility for violation of the right to work and the right to special protection of the family was similarly imputed on the basis of the state's failures to take reasonable measures to, respectively, protect against the inhuman conditions of work imposed on members of the Aché tribe and prevent the sale of Aché children.[231] With respect to all of these concrete personal harms (illness, inhuman conditions of work, death, and sale of children), the Commission had little difficulty, under the case-specific factual circumstances presented, finding state responsibility for breach of Paraguay's conduct-based legal obligations to take all appropriate measures to respect and ensure the individual rights to health, work, rest, life, and family.

The conduct-based obligations corresponding to the right to health under the Declaration have also been understood by the Commission to include the duty to reasonably *provide*

231. Case 1802 (Paraguay), Inter-Am. C.H.R., OEA/Ser.L/V/II.43 doc. 21 corr. 1, at 36-37 (1978). A companion case concerning the indigenous population of Paraguay was resolved and published in the same Annual Report. In that case, the Paraguayan government detained a group of persons working in the "Project Marandú" (an initiative "designed to improve economic and social conditions of the indigenous population") raided its offices and sequestered documents. The Commission resolved that Paraguay had violated the rights to inviolability of the home (art. IX), inviolability of correspondence (art. X), and freedom of association (art. XXII). *See* Case No. 2006 (Para.), Inter-Am. C.H.R., OEA/Ser.L/V/II.43 doc. 21 corr. 1, at 37-39 (1978).

health care services and medicines to persons within a state's jurisdiction, especially those in state custody.[232] Invoking its power to request urgent measures of protection on the part of OAS member states, the Commission has, for example, requested Cuba to transfer an inmate suffering lung cancer to a specialized hospital and to grant him specialized medical attention, to be administered in collaboration with a physician selected by his family. Although the request was returned to the Commission—the Cuban government having been excluded from the OAS in 1962—the inmate was in fact transferred to a specialized hospital, where he began to receive specialized treatment.[233] Similar measures were requested in 2002 for another prisoner suffering a series of health ailments, asking Cuban authorities to provide the inmate with specialized medical care.[234]

The right to education, under Declaration article XII, is also understood by the Commission to have clear-cut corresponding state obligations permitting case-by-case adjudication in distinct factual contexts. In *Jehova's Witnesses v. Argentina,* for example, the Commission held Argentina responsible for violating the article XII right to education of three-hundred primary school children. State responsibility arose from discrete state conduct—i.e., the issuance of a presidential decree ordering the prohibition of all activities of the Jehova's Witness religious order in Argentina—and its foreseeable effects in both public and private schools on the individual victims, who refused to give up their religious faith. Indeed, as a result of the order, each of the petitioning children was either expelled from school, denied enrollment, or prevented from taking final exams because of his or her religious faith.[235] This concrete harm inflicted on each child's right to education was

232. For a general overview of states' positive obligations in the inter-American system to take all appropriate or reasonable measures to prevent, respond and fulfill rights-based guarantees, see Tara J. Melish & Ana Aliverti, *Positive Obligations in the Inter-American Human Rights System,* 15 INTERIGHTS BULLETIN (Issue 3) 120 (2006).

233. Jorge Luis García Pérez-Antúnez (Cuba), Inter-Am. C.H.R., OEA/Ser./L/V/II.114, doc. 5 rev. ¶ 28 (2002) (precautionary measures).

234. Francisco Chaviano González (Cuba), Inter-Am. C.H.R. OEA/Ser.L/V/II.117, doc. 1 rev. 1 ¶ 50 (2003) (precautionary measures).

235. Jehova's Witnesses v. Argentina, Case No. 2137, Inter-Am. Comm. H.R., OEA/Ser.L/V/II.47, doc. 13 rev. 1 (1979).

caused by the state's breach of its obligation to take all appropriate and necessary measures to respect and ensure the free and full enjoyment of the right to education for all persons within its jurisdiction.

The Commission has similarly found state responsibility in the Dominican Republic for violation of the right to education of a young girl arbitrarily dismissed from school on account of her nationality. In that case, like others, responsibility arose as a result of the state's breach of its unvarying obligation to take all appropriate measures to respect and ensure the right to education for all persons within its jurisdiction.[236]

The right to property, protected under Declaration article XXIII, may also be highlighted. Though oft-considered a civil and political right, the right to property in the Declaration is defined expressly in terms of its social-welfare function: "Every person has a right to own such private property *as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.*"[237] The Commission has decided several cases in which it has found OAS member states responsible for violating the right to property under the American Declaration by failing to take appropriate measures to protect this essential entitlement. This has particularly been true for indigenous communities, for whom ancestral territory is often vital for the physical subsistence, economic livelihood, and cultural integrity of the membership group.

In the *Maya Toledo v. Belize Case*, for example, the Commission found Belize responsible for violating article XXIII of the Declaration to the detriment of the members of the Mopan and Ke'kchi Maya people of the Toledo District of southern Belize.[238] Responsibility was generated by the state's failure

236. While the Commission's final report on the case is not published given its submission to the Court, its main recommendations are included in the Court record. *See Yean and Bosico Girls Case*, *supra* note 109, ¶ 29 (noting Commission's finding that the state violated the girls' right to education under article XII of the American Declaration).

237. American Declaration, *supra* note 78, art. 23 (emphasis added). This underscores yet again the unusefulness of trying to place rights into distinct categories, each carrying different legal consequences.

238. Importantly, given the centrality of ancestral territory to the culture, health, religion, identity, and well-being of indigenous populations, the Commission found the petitioners' allegations with respect to the rights to health (XI), to life (I) and to religious freedom (III) subsumed in the article XXIII violation. *See Maya Indigenous Communities*, *supra* note 113, ¶¶ 153-55.

"to take the appropriate measures to protect the right of the Maya people in their territory"—both through its failure to take appropriate measures to delimit, demarcate, and title their territory "on which their rights exists," and to "take appropriate or adequate measures to consult" with the Maya people concerning extractive-resource concessions granted to their lands by the state.[239] The state thus took insufficient measures to respect and to ensure the right to property of the case-specific victims.[240]

The record evidences, therefore, that the Commission has little difficulty identifying the "concrete duties" and "grounds for state responsibility" that correspond to the full range of social rights consecrated in the Declaration. These duties are no different than those that correspond, in an undifferentiated manner, to the civil-political rights protected in the same instrument.

b. San Salvador Protocol

The San Salvador Protocol also imposes clearly-identifiable and concrete obligations on states to adopt all appropriate and necessary measures to respect and ensure the economic, social, and cultural rights consecrated therein.[241] Given that the inter-American organs have yet to resolve a case under the Protocol in the individual petitions process,[242] the nature of these obligations is discernable not through a jurisprudential analysis—as with the Declaration—but rather through textual analysis of its general and specific obligations clauses.

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239. *Id.* ¶¶ 131, 134, 142-43, 151 & 186-87.

240. *Id.* ¶ 133. The same was true in Mary and Carrie Dann v. United States, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, doc. 5 rev. 1, at 860 (2002).

241. The Protocol also imposes obligations of result. These, however, are not directly enforceable in the individual petitions process; they are appropriately applied in contentious proceedings only to establish context and, hence, the "reasonableness" or "appropriateness" of state conduct in distinct circumstances.

242. The Commission issued its first admissibility report finding a claim admissible under the San Salvador Protocol in 2002. *See* Adolescents in the Custody of the Febem v. Brazil, Case 12.328, Inter-Am. C.H.R., Report No. 39/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2003).

The San Salvador Protocol includes three general obligations clauses in articles 1, 2 and 3 that apply to the exercise by individuals of all of the rights set forth therein, including the right to work, satisfactory conditions of work, unionization, social security, health, a healthy environment, food, education, and culture, among others. Under the first clause, states that are party to the Protocol undertake to "adopt the necessary measures" to achieve progressively the "full observance" of the individual rights recognized within it.[243] The second reinforces this obligation by requiring states to "guarantee" the exercise of these rights in the domestic legal order by adopting all "measures as may be necessary for making those rights a reality."[244] Finally, states undertake to "guarantee" the exercise of the rights set forth "without discrimination of any kind."[245] In this sense, the general obligations found in the San Salvador Protocol closely track those applied by the Commission in adjudicating violations of the rights under the American Declaration. They also closely track those found in articles 1 and 2 of the American Convention, discussed *infra*, which require states to adopt all appropriate and necessary measures to respect and ensure the treaty's recognized rights on a non-discriminatory basis.

These general obligations are supplemented by specific obligations found in the substantive provisions of the treaty, which clarify or reinforce them in discrete contexts. Thus, with regard to the right to work, states undertake to adopt measures that will make that right "fully effective" and to "guarantee" in their internal legislation just, equitable and satisfactory conditions of work.[246] Under article 8, states "shall ensure" both the right to free unionization and the right to strike. Under articles 9, 10 and 14, states commit that they "shall" take certain actions, including measures to "ensure" the right to health and to "ensure" the right to culture. Again, these obligations closely track those found in provisions of other human rights instruments protecting classic civil and political rights. As with those instruments, when applied in con-

243. San Salvador Protocol, *supra* note 77, art. 1.

244. *Id.* art. 2.

245. *Id.* art. 3.

246. *Id.* arts. 6-7.

tentious processes it is the conduct-based, individual-oriented dimensions of those obligations that should prevail.

The Protocol's textual language thus undermines assertions that the jurisdictional limitation in Protocol article 19.6 owes in any way to the "lack of concrete duties" attaching to social rights other than those to education and unionization. Indeed, the corresponding obligations are identical for all rights enshrined in the Protocol: to adopt all appropriate and necessary measures to guarantee the full observance of those rights, both for individuals and for the collective. While the Protocol's result-based obligation of "progressive achievement" or "full observance" is not *absolute* and *immediate*—in that, as with all rights, it is limited by available resources and technologies, internal constraints and contingencies, and the equal rights of others in a democratic society—the conduct-based obligation to "adopt all necessary measures" within those constraints *is* immediate and absolute.[247] It is this obligation, one which leaves broad discretion to OAS member states in experimenting with how best to guarantee the full observance of rights in differing and evolving circumstances, that is directly justiciable in the individual petitions process. It leads to state responsibility when states fail to comply *reasonably* with it under the circumstances, as determined by an independent and impartial adjudicator in the context of a concrete case, and individuals suffer concrete, personal injury as a result.

c. American Convention

The American Convention is likewise unambiguous in identifying the "concrete duties" that correspond to the economic, social, and cultural rights enshrined therein. While the Convention does, unnecessarily, separate the treaty norms consecrating its "protected rights" into two substantive chapters—one entitled "Civil and Political Rights," the other "Economic, Social and Cultural Rights"—it subordinates the rights in both chapters equally to the two general obligations clauses established in Chapter I. These Chapter I duties, articulated

247. This is also the approach taken by the U.N. Committee on Economic, Social and Cultural Rights in interpreting the nature and scope of the general obligation clause (article 2.1) of the ICESCR. *See* General Comment No. 3, *supra* note 207, ¶ 2.

in articles 1 and 2, apply by their terms to all of "the rights and freedoms recognized" in the Convention, that is, in articles 3 through 26 inclusive. Seen in this light, the affirmation by Cavallaro and Schaffer that the rights in article 26 lack corresponding "concrete duties" and are not "enforceable on an individual basis"[248] would not seem to have a basis in the text of the Convention. Neither does it have a reliable basis in the inter-American organs' jurisprudence.

The Convention's general obligations clauses include the duties to respect and to ensure, to all persons subject to a state's jurisdiction, the free and full exercise of all the rights and freedoms recognized in articles 3 through 26 of the Convention on a non-discriminatory basis.[249] To achieve this result, states "undertake to adopt . . . such legislative or other measures as may be necessary to give effect to those rights and freedoms."[250] Though this duty is generally short-handed as the duty to "respect and ensure," states are uniformly held to it in adjudicatory contexts through their *conduct-based* obligation to adopt all necessary and appropriate measures to ensure that protected rights have legal effect. That is, state responsibility arises not because a person is objectively impaired in his or her enjoyment of a protected right but rather because the state failed to *adopt the measures* required of it in the particular circumstances to reasonably prevent the harm or to respond to it appropriately and with "due diligence."[251] As the Court has

248. Cavallaro & Schaffer, *supra* note 2, at 225 ("Article 26 fails to establish any specific rights or concrete duties."), 268 ("Article 26 enumerates no specific rights enforceable on an individual basis.").

249. American Convention, *supra* note 23, art. 1; Velásquez Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 162-64 (July 29, 1998) [hereinafter *Velásquez Rodríguez Case*] ("[Article 1.1] specifies the obligation assumed by the States Parties in relation to *each of the rights* protected [in the Convention].") (emphasis added); Godínez Cruz Case, Inter-Am. Ct. H.R. (ser. C) No. 5, ¶¶ 171-73 (Jan. 20, 1989); Neira Alegría et al. Case, Inter-Am. Ct. H.R. (ser. C) No. 20, ¶ 85 (Jan. 19, 1995).

250. American Convention, *supra* note 23, art. 2.

251. *See, e.g.*, *Velásquez Rodríguez Case*, *supra* note 249, ¶ 175 (underscoring that "the existence of a particular violation does not, in itself, prove the failure to take preventive measures" and hence give rise to state responsibility); Pueblo Bello Massacre v. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 123 (Jan. 31, 2006) [hereinafter *Pueblo Bello Case*]; Juan Hernández v. Guatemala, Case 11.297, Inter-Am. C.H.R., Report No. 28/96, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 61 (1997) (finding state responsible for violating the right to health and life of a detainee by failing to act with "due diligence" given

stated, "[i]t is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State Party."[252] Nevertheless, the Court insists on its ability to determine, in discrete factual contexts and on a case-by-case basis, when the measures adopted by the state have been "unreasonable," "inappropriate," "inadequate," or "insufficiently diligent" to appropriately ensure an aggrieved individual's rights, and hence when such measures (or lack thereof) are generative of state responsibility for the alleged harm.[253] Emphatically, such a determination in no way hinges on whether a claim looks more "civil and political" or more "economic, social, and cultural."

The article 1.1 obligation to "respect" all protected rights constitutes the negative duty of abstention or restraint in arbitrary state conduct, requiring that state agents refrain from conduct that affirmatively harms individuals' enjoyment of their protected rights, without *first* providing appropriate procedural safeguards.[254] By contrast, the article 1.1 obligation to "ensure" goes a step beyond, requiring states to take affirma-

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that the death was caused by cholera-induced dehydration, easily cured through the provision of sufficient rehydration formula and transfer to a hospital, which prison authorities negligently failed to provide).

252. *Velásquez Rodríguez Case, supra* note 249, ¶ 175. What is "appropriate" or "reasonable" in the circumstances will also vary with the nature and gravity of the harm, evolving norms of decency, legislative priorities, and resource availabilities, including new technologies.

253. As the Court has stated, "Article 1 (1) is essential in determining whether a violation of the human rights recognized by the Convention can be imputed to a State Party. . . . Any impairment of those rights which can be attributed under the rules of international law to the *action or omission* of any public authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by the Convention." *Id.* ¶ 164 (emphasis added). The Court regularly refers to the legal duty to take "reasonable" steps to ensure rights. *See, e.g., id.* ¶ 174 ("The State has a legal duty to take reasonable steps"); *Pueblo Bello Case, supra* note 251, ¶ 123 (noting that the obligation to adopt measures is conditioned on "reasonable possibilities" of preventing or avoiding the noted harm).

254. For example, the state may deprive a person of their liberty or property only after due process has affirmatively been provided in advance. This includes housing evictions, which are lawful only after proper notice and an opportunity to be heard has been granted, along with other procedural protections. *See, e.g., General Comment No. 7, Forced evictions, and the right to adequate housing*, U.N. Comm. on Econ., Soc. & Cultural Rts., 16th Sess., Annex IV, at 113, U.N. Doc. E/1998/22 (1998) [hereinafter General Comment No. 7].

tive measures, of a judicial, legislative, and executive nature, "to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights."[255] This obligation includes specific state duties to take all reasonable measures to "prevent," "investigate," "punish," and "repair" any violation of rights recognized by the Convention.[256] This is true whether the violation was committed in the first instance by state agents or by private third parties.[257] Where the state fails to undertake reasonable or appropriate measures in each of these categories it in a sense "aids" the abusive conduct at issue, "thereby making the State responsible on the international plane."[258]

In certain contexts, the role of the state goes beyond that of reasonable prevention and appropriate response to direct provider of the goods and services required for the enjoyment of human rights—e.g., court services, health interventions, ac-

255. *Velásquez Rodríguez Case, supra* note 249, ¶ 166.

256. *Id.* ¶ 174 ("The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.").

257. The Court has repeatedly recognized the "horizontal" dimension of human rights guarantees and insisted that article 1.1 generates extensive positive duties on the state to regulate "inter-individual relations" in society that may violate the interests safeguarded by human rights. *See Pueblo Bello Case, supra* note 251, ¶¶ 113-14 (citing Court's many cases, opinions, and orders that have affirmed this principle). See, in particular, *Velásquez Rodríguez Case, supra* note 249, ¶ 176 ("when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention . . . the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction."); *id.* ¶ 172 ("[Acts of private persons] lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention."); *id.* ¶ 173 ("What is decisive is whether a violation of the rights recognized by the Convention has occurred with the support or the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible.").

258. *Velásquez Rodríguez Case, supra* note 249, ¶ 177; *see also Pueblo Bello Case, supra* note 251, ¶ 145; Mapiripán Massacre v. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶ 137, 233 (Sept. 15, 2005); *Panchito Lopez Case, supra* note 138, ¶ 158.

cess to voting facilities, housing accommodation, schools, and emergency food aid. This conduct-based duty, applied in concrete contexts on the basis of "reasonableness in the circumstances,"[259] is heightened with respect to custodial populations (e.g., detainees, institutionalized persons)[260] and persons in vulnerable situations who cannot meet their needs in the absence of state facilitative or direct-provider assistance.[261]

The Commission and Court have unvaryingly applied these principles since the Convention entered into force in 1979.[262] Their application has not turned on whether a particular claim looked more "social," "cultural," "economic," or "civil-political." That is, the inter-American organs have consistently applied an integration approach to the Convention's norms, recognizing that these constitutive dimensions cut across all rights in the Convention. Thus, the Commission and Court have resolved an increasing variety of cases, under a spectrum of Convention norms, involving the rights to health, to social security, to housing, to education, to union freedoms, to property and cultural integrity, to food, and to sanitation,[263] holding states accountable to their duties to adopt all appropriate measures to respect and ensure to all individuals the rights protected in the Convention. Most recently, they have insisted on states' meeting their positive duties, under article

259. *See, e.g.*, Sawhoyamaxa Indigenous Community v. Paraguay Case, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 178 (Mar. 29, 2006) [hereinafter *Sawhoyamaxa Case*] (declaring Paraguay responsible for violating article 4.1 of the Convention "for not having adopted the necessary positive measures within the scope of its authority that reasonably were to be expected to prevent or avoid the risk to the right to life of the members of the Sawhoyamaxa Community") (author's translation).

260. *See, e.g., Panchito López Case, supra* note 138 (state correctional facility for children and adults).

261. *See, e.g., Yakye Axa Case, supra* note 136 (displaced indigenous population living in desperate conditions on the side of a highway); *Sawhoyamaxa Case, supra* note 259.

262. The Court resolved its first merits case in 1988, in which it enunciated these principles. *See Velásquez Rodríguez Case, supra* note 249. The Commission has been applying them in regular fashion since it began operation in 1959, first under the Declaration, then under the Convention.

263. For an analysis of the growing jurisprudence of both the Court and Commission in this regard, see Melish, *The Inter-American Court of Human Rights: Beyond Progressivity, in* SOCIAL RIGHTS JURISPRUDENCE, *supra* note 1; Melish, *The Inter-American Commission on Human Rights: Defending Social Rights through Case-based Petitions, in* SOCIAL RIGHTS JURISPRUDENCE, *supra* note 1.

2, to implement short, medium, and long term plans of actions adequately targeting the most vulnerable sectors to ensure the full spectrum of human rights, particularly those related to health, education, housing, land demarcation, water access, and social assistance.[264]

In a single piece of case-based obiter dictum in 2003, however, the Inter-American Court appeared to depart from the system's longstanding tradition of indivisibility in which the same conduct-based obligations are applied to all rights in contentious processes. In it, the Court appeared to suggest a distinction between the obligations attaching to the rights protected through Chapter II norms and Chapter III norms, suggesting that quadrant 4 rather than quadrant 1 duties might apply to the latter. Cavallaro and Schaffer seize on this isolated dictum as a justification to reject as non-justiciable article 26 and all the autonomous social rights it and other binding provisions guarantee in the regional system. As correctly recognized by one judge on the Court, however, that dictum "does not appear to find any basis in the American Convention."[265] Significantly, the Court has never repeated it, consistently declining to extend that dictum into its binding jurisprudence or even to refer to it again—despite four square opportunities to do so.[266]

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264. *See, e.g.*, *Panchito López Case*, *supra* note 138, ¶¶ 316-17; Plan de Sánchez Massacre Case v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 105, ¶ 105 (Apr. 29, 2004).

265. *Five Pensioners Case*, *supra* note 51 (Reasoned Opinion of Judge de Roux Rengifo).

266. The Court's manifest discomfort with its article 26 dictum has led it not only to avoid extending or even referring to it again in any subsequent case but also, unfortunately—given the lack of a clear vision for resolving the quadrant 1/quadrant 4 difficulty—pronouncing on article 26 at all. *See Panchito López Case*, *supra* note 138, ¶ 255 (recognizing that article 26 protects the rights to health, education, and recreation, but declining to pronounce on it in interests of judicial economy given previous findings, on same facts, of violations of articles 4 and 5); *Yakye Axa Case*, *supra* note 136, ¶ 163 (using article 26's protection of the right to health to assist Court in interpreting article 4); *Yean and Bosico Girls Case*, *supra* note 111, ¶¶ 38 and 185 (recognizing arguments alleging violation of the right to education consecrated in article 26, but using them to assist in the interpretation of article 19 only); Acevedo Jaramillo et al. v. Perú v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 144, ¶ 285 (Feb. 7, 2006) (resolving to consider the "particularly grave effects" of the article 26 claim at the reparations stage only).

Cavallaro and Schaffer's rejection of article 26 as a basis for contentious complaints is thus unjustified.[267] Indeed, given the dramatic departure such a result would entail for the system's jurisprudence (and the Court's credibility as a human rights tribunal), the failure to critically unpack and examine the meaning and motivation of the Court's two paragraph dictum before accepting it as precluding all article 26 litigation is deeply troubling.[268] The following section briefly examines the case in which the referenced dictum was enunciated.[269] It concludes that, read in context, the Court's dictum should be understood as rejecting only *one particular type* of article 26 claim: claims on which state responsibility for substantive rights infringement rests on alleged breach of quadrant 4, rather than quadrant 1, duties. Once attention in social rights litigation is properly returned to the *quadrant 1* dimensions of state obligations, the perceived difficulties in adjudicating article 26 claims are revealed as no different than those attending any other norm.

d. The Five Pensioners *Dictum*

On February 23, 2003, the Court decided the *Five Pensioners Case*,[270] its first opportunity to consider an article 26 claim in a concrete contentious case. Involving the individual right to a pension as part of the broader right to social security, the case arose in the context of national pension reform in Peru. Initiated in 1992 and aimed at rationalizing distortions in the

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267. Cavallaro and Schaffer conclude that the *Five Pensioners Case, supra* note 51, is a "significant and revealing decision" that "leaves no doubt as to [the Court's intention to limit the scope of Article 26 as a basis for the protection of individual economic, social, and cultural rights," "preclud[ing] consideration of Article 26 violations in any contentious case." *See* Cavallaro & Schaffer, *supra* note 2, at 259-60, 264.

268. It is effectively upon this obiter dictum alone that they build their thesis that economic, social, and cultural rights are "non-justiciable" in the inter-American human rights system, and hence civil and political rights should form the basis of all supranational litigation at the regional level. *See* Cavallaro & Schaffer, *supra* note 2, at 259-60 (calling the *Five Pensioners case, supra* note 51, a "significant and revealing decision" and using the Court's dictum as "evidence that article 26 is generally a weak tool for enforcing economic, social, and cultural rights").

269. A more extensive analysis of the opinion can be found in *A Pyrrhic Victory, supra* note 17.

270. *Five Pensioners Case, supra* note 51.

Peruvian pension regime, that reform reduced by a hefty seventy-eight percent the specialized pension benefits enjoyed since at least 1990 by the five alleged victims, all high-level civil-service banking retirees receiving privileged benefit packages. Relying on a skillfully-inserted provision in the 1993 Constitution aimed at neutralizing, for public sector employees, the effects of the impending pension reform, the affected pensioners sued and won each of their *amparo* actions before the Supreme and Constitutional Courts of Peru. The Peruvian authorities, in clear defiance of their article 25 obligations under the American Convention, nonetheless refused to execute the orders of the nation's two highest courts.

In December 2001, after processing by the Commission, the case was presented to the Court. In addition to the article 25 violation for failure to enforce the domestic judicial orders, the pleadings centered on the legality of the reductions in the five individual pensioners' benefit levels. The Commission, the victims' representatives, and amicus curiae all alleged that, given the pensions' prior vesting at fixed benefit levels, the reductions breached the pensioners' rights to property and to social security, under Convention articles 21 and 26, respectively. Inappropriately focusing on the formal title of article 26 ("Progressive Development") rather than its substance,[271] the parties nonetheless characterized the article 26 claim as a breach of the state's duty to "progressively develop" economic, social, and cultural rights in general, and the right to a pension in particular. That is, in framing their pension claim under article 26, they focused on the quadrant 4, rather than quadrant 1, duties corresponding to that right—attempting to

271. The difficulties that have dogged article 26 can, in many ways, be traced to the provision's incongruous title, "Progressive Development," together with its particular phraseology, which draws heavily from article 2.1 of the ICESCR. These have led not only to a view that different obligations apply to Chapter II and Chapter III rights, but also that article 26 protects a so-called "right to progressive development," rather than a set of autonomous rights derived from article 26 corresponding to individual titulaires and subject to the corresponding individual-oriented general obligations in articles 1 and 2 to "respect and ensure." That is, "progressive development" has been interpreted as constituting, simultaneously, the principal *right* protected in article 26 and the adjudicable *obligation* corresponding to that right. Both of these suppositions are flawed—the former as a matter of treaty interpretation, the latter as a matter of justiciability. *See* American Convention, *supra* note 23.

import into the inter-American system's case-based procedures standards developed on "progressivity" and the correlative "prohibition of regressivity" by U.N. bodies under non-parallel periodic reporting procedures.[272] By contrast, they alleged a breach of the standard quadrant 1 duties with respect to the right-to-property and judicial-protection claims under articles 21 and 25 of the Convention.

The Court responded, as only it could, by adjudicating the claims argued under quadrant 1 duties while declining to consider the merits of the claim argued under quadrant 4, over which it lacked competence. With respect to the article 21 and 25 claims, the Court applied to the case's facts the standard individual-oriented, conduct-based obligations and, basing its determination on the state's unreasonable conduct in failing to execute the domestic judicial orders in the alleged victims' favor, unanimously found state responsibility for the violation of the pensioners' individual rights to property and to judicial protection. By contrast, despite the "social security" and "property" claims being but logical flip-sides of each other,[273] the Court then declined to pronounce on the alleged social-security violation under article 26. Cavallaro and Schaf-

272. Indeed, the litigants relied heavily on these standards. Notable amongst the texts cited are General Comment No. 3, *supra* note 207; The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, U.N. GAOR, Hum. Rts. Comm., 43rd Sess., Annex, U.N. Doc. E/CN.4/1987/17 (1987); The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 20 HUM. RTS. Q. 691 (1998); Quito Declaration on the Enforcement and Realization of Economic, Social, and Cultural Rights in Latin America and the Caribbean (July 24, 1998), *reprinted in* 2 YALE HUM. RT. & DEV. L.J. 215 (1999).

In focusing their arguments on "progressivity/regressivity," litigants and amici nonetheless only partially represented the content of these interpretations. The critical piece omitted from their arguments is that international doctrine on state obligations under the ICESCR has tended to proceed along two distinct, though often conflated, tracks. One focuses on a tripartite set of obligations that extends to all human rights: the duties to "respect," "protect" and "fulfill" rights. The other focuses on the concept of "progressive realization." Only the former is adjudicable in *individual* complaints procedures (in its conduct-based dimensions); the latter is the reserve of reporting, monitoring and promotional activities of advocates, states, and human rights organs, without reference to specific individuals.

273. Indeed, the right to property claim was characterized simply as failure to appropriately ensure "the patrimonial effects of their pensions." *See Five Pensioners Case, supra* note 51, ¶ 103.

fer attribute this to the nature of the rights at issue. In fact, it is because the petitioning parties—intent on transferring the quadrant 4 standard of "progressive realization" into the individual complaints procedure—failed to offer a manageable judicial standard upon which the Court could assess state responsibility under its case-based jurisdiction.[274]

The Court, accordingly, rejected the request urged upon it by petitioners: "to rule on the progressive development of economic, social and cultural rights in Peru." It then proceeded to make a general dicta-based statement on that particular type of claim in the context of a concrete case. Critically, it did not do so before first recognizing that such rights also have an "individual" dimension. The Court's full response to the article 26 claim is as follows:

> Economic, social and cultural rights have *both an individual and a collective dimension.* 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, *o[ver] 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.

274. The concept of "progressive realization," as currently understood in international law, is incapable of illuminating the classic hallmarks of a justiciable case. Indeed, developed in the context of monitoring state periodic-reporting commitments, it was designed to assess neither *individual injury* nor *causal responsibility* for such harm. Rather, it principally serves to assess statistical achievement of rights over broad collectivities (the entire population or vulnerable subgroups within it), usually through the use of indicators and benchmarks, the nomenclature of "progress" and "backsliding" (or retrogressions), and the collection and analysis of relevant demographic, legislative, jurisprudential, educational, health and other statistical data. The goal is to raise states' awareness about worrisome trends and best practices, not to assess individual circumstances nor to disaggregate the often complex and interlocking causes of general progress or setbacks at different levels or dimensions of achievement. For a discussion of the often perverse results that follow from attempting to force "progressive realization" into the mold of a justiciable case, see Melish, *A Pyrrhic Victory, supra* note 17, at 63.

> 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.*[275]

Understood by reference to petitioners' quadrant 4 arguments, the Court's response is thus unremarkable. The tribunal would have reached the same conclusion had "progressivity/regressivity" arguments been urged as the basis of state responsibility under any other Convention-based norm.[276] Indeed, the Court can never rule, in the context of a concrete case, on the "growing coverage" of any right—much less of "economic, social and cultural rights in general"—"over the entire population." Such a collective-oriented, result-based ruling would be *ultra vires* as exceeding the Court's limited case-based jurisdiction.[277] This was recognized formally in a separate opinion by Judge de Roux Rengifo:

> [T]he reasoning according to which only State actions that affect the entire population could be submitted to the test of Article 26 does not appear to have a basis in the Convention, among other reasons because, contrary to the Commission, *the Inter-American Court cannot monitor the general situation of human rights,* whether they be civil and political, or economic, social and cultural. *The Court can only act when the human rights of specific persons are violated,* and the Convention does not require that there should be a specific number of such persons.[278]

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275. *Five Pensioners Case, supra* note 51, ¶¶ 147-48 (emphasis added).

276. The Court has repeatedly referred in dicta to the "individual" and "social" dimensions of Chapter II rights as well, although it has not drawn the necessary analytical conclusions attendant to the distinction from the standpoint of justiciability. *See, e.g.,* Huilca Tecse v. Perú, Inter-Am. Ct. H.R. (ser. C) No. 121, ¶¶ 77-78 (Mar. 3, 2005) (right to labor association).

277. That jurisdiction restricts the Court's contentious competence to the determination of state responsibility for concrete harm to the rights of duly-identified individual rights-holders (not broad, undifferentiated collectivities) that can be imputed to the state through the acts and omissions of its agents (not through the general situation of human rights achievement in a country). *See supra* notes 186-190 and accompanying text.

278. *Five Pensioners Case, supra* note 51 (Reasoned Opinion of Judge de Roux Rengifo) (emphasis added).

The appropriate aspect, then, of the two paragraph dictum for future article 26 litigants to focus on is not the "collective," "result-based" aspect urged by petitioners and amici. Rather, it is the Court's implicit acceptance that article 26 is a repository of a variety of autonomously-conceived economic, social, and cultural rights, including the right to social security, and that each of these autonomous rights has an "*individual*" dimension. It is this dimension, and *only this dimension*, that, in the words of the Court's President, Judge Sergio Garcia-Ramírez, supports their "justiciable nature."[279] While the Court was unable or unwilling—either because arguments focused exclusively on quadrant 4, or because the case was so weak under quadrant 1—to recognize this individual justiciable nature in the context of the *Five Pensioners* case, the Court's express recognition of its existence lays the basis for moving forward in future litigation efforts.

In this view, the solution to the article 26 "problem" is not to avoid litigation of claims under the norm, as the Cavallaro-Schaffer thesis urges, but rather to insist on application of appropriate *individual-oriented, conduct-based (quadrant 1)* duties to those claims. Had the Court done so in the *Five Pensioners* case, there would have been no difference between the pension claim adjudicated under the "right to social security" and the same pension claim adjudicated under the "right to property."[280] In sum, once the proper dimensions of state obligations are taken into account, Convention-based claims framed

279. *Five Pensioners Case, supra* note 51 (Reasoned Concurring Opinion of Judge Sergio García Ramírez) ("The Convention is a body of rules on human rights precisely, and not just on general State obligations. The existence of an individual dimension to the rights supports the so-called 'justiciable nature' of the latter, which has advanced at the national level and has a broad horizon at the international level.").

280. In this author's view, given the peculiar factual circumstances of the case, the Court should have found that Peru violated *neither* article 21 nor article 26 of the Convention with respect to the pension reductions. That is, Peru's conduct in initiating national pension reform that had the effect of reducing the benefit-levels of certain pensioners receiving disproportionately high benefits was justified in the circumstances, in light of articles 30 and 32.2, and did not rise to the level of constituting a breach of the state's duties under the Convention. Meanwhile, Peru *did* clearly violate the pensioners' right to judicial protection under article 25 through failure to execute the domestic judicial orders in the pensioners' favor. *See A Pyrrhic Victory, supra* note 17.

under Chapter II and Chapter III are equally adjudicable in individual complaints procedures. That is, from a justiciability perspective, the direct approach is indistinguishable from indirect approaches.

B. *The "Legitimacy" of Economic, Social, and Cultural Rights Litigation in the Americas*

Cavallaro and Schaffer appear to caution against the direct approach, however, even if the judicial enforceability of autonomous economic, social, and cultural rights is not called into question. Indeed, they offer a second, "realpolitik" justification for their thesis that civil-political rights should a priori be privileged in supranational litigation: Economic, social, and cultural rights are "not deemed ripe for international litigation by states."[281] That is, regardless of their technical justiciability and proper contentious subject-matter jurisdiction over them, adjudication of such rights is considered "illegitimate" by American states, who will resist and ignore supranational orders purporting to give them effect, given their perceived "[in]sufficient basis in law."[282]

Cavallaro and Schaffer assert that "governments tend to support the view that economic, social, and cultural rights should not be afforded the same protection given to civil and political rights"[283] and that, "[w]hile most of the American states have formally accepted the theoretical basis for recognizing economic, social, and cultural rights, practice tends to reflect the traditional, generational approach to human rights," whereby states make a distinction between immediately enforceable civil and political rights and non-enforceable economic, social, and cultural rights.[284] They advise that advocates should be attentive to governmental resistance to the enforcement of such rights, attributing this to "a number of practical, political, and historical reasons,"[285] although they never specify these.[286]

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281. Cavallaro & Schaffer, *supra* note 2, at 274.
282. *Id.*
283. *Id.* at 270.
284. *Id.* at 251-52.
285. *Id.* at 269.
286. For a view on Latin America's historic support of and contribution to the development of economic, social and cultural rights, see Carozza, *An Historical View*, *supra* note 155.

Cavallaro and Schaffer in fact do not offer any empirical support for their assertion that social rights litigation is perceived as illegitimate by Latin American states. They make no mention of the substantial legal protections for economic, social, and cultural rights found in the constitutions, legislation, and national jurisprudence of American states or the regular subjection of such norms to judicial process under a wide range of causes of action. The existence of such protective law and related jurisprudence undermines the claim that direct adjudication of economic, social, and cultural rights will somehow "provoke extreme reactions from the member states of the OAS."[287] Indeed, adjudication of social rights matters is scarcely new or revolutionary to American governments and society. It is also now a central demand of regional social movements, particularly in Latin America.[288] Ironically, Cavallaro and Schaffer themselves admonish potential litigants to "confer with and respect the decisions of social movements," being "careful not to set the agenda on their own," and to "avoid taking the lead on strategic decision-making regarding the use of the Inter-American system."[289] Taking their own advice, they might reach different conclusions on economic, social, and cultural rights in the Americas.

Particularly in light of the failure to provide any practical examples of American states' "resistance" or "extreme reactions" to litigation in the area of economic, social, and cultural rights, assertions in this regard appear unsustainable and overwrought. They also appear to contradict social reality in the region, including the processes of norm legitimatization and consensus formation around these rights that have taken place there, processes that are central to legitimacy considerations in national and supranational litigation alike.[290] The Ameri-

287. Cavallaro & Schaffer, *supra* note 2, at 270.

288. Social rights groups in North America have also long incorporated social rights litigation into their advocacy strategies. While this has tended not to be pursued under the rubric of "human rights" or international treaty law—but rather under federal and state constitutional or statutory law—that too is beginning to change as social rights groups increasingly incorporate human rights standards and comparative jurisprudence into their work.

289. Cavallaro & Schaffer, *supra* note 2, at 275.

290. While Cavallaro and Schaffer formally advocate use of an "evolutionary approach" to norm interpretation in the inter-American system—one that, properly applied, ties international norm interpretation to a regional consensus principle based on evolving understandings at the local level—

can region has in fact historically been among the most progressive on the world stage with respect to economic, social, and cultural rights. This is true with regard to the development of international treaty law, national constitutions, domestic protective legislation, and national-level jurisprudence, although implementation of these norms and jurisprudence is always—as with civil-political rights—a complex work-in-progress.

Latin American states, for example, have almost universally ratified, and subjected themselves to individual complaints procedures under, all of the major international human rights treaties protecting economic, social, and cultural rights: the ICESCR, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Elimi-

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they in fact advocate something very different. That is, when it comes to economic, social, and cultural rights they appear to eschew any use at all of the "evolutionary approach." For these rights, they prefer an "original intent" or "historical approach" that keeps modern societies tied to prior historically-based understandings. In fact, they even reject a "textual approach." By contrast, when it comes to classic civil-political rights, Cavallaro and Schaffer trumpet the "evolutionary approach" in name, but in fact subscribe to something very different: an "autonomous approach" to international human rights law that looks to what *other international human rights bodies* are doing in other regions of the world, rather than what is occurring at the domestic and regional levels in terms of norm development. They refer repeatedly to the jurisprudential precedents of the U.N. Human Rights Committee and the European Court of Human Rights, which they commend the inter-American organs to replicate in order to have a "basis in law." *See* Cavallaro & Schaffer, *supra* note 2, at 271 (asserting that new lines of precedent in the inter-American system "must be the logical culmination of *trends in international human rights law*") (emphasis added). Yet, in the sixty-four pages in which their article develops, they make not a single reference to *national level* precedents in the American region (which would reflect legitimacy considerations). They make no mention of the rapidly-evolving laws or jurisprudence of the thirty-five American states. Nor do they refer to the increasingly active and savvy social movements that have made economic, social, and cultural rights their principal demand. Traditional human rights groups, labor organizations, environmental advocates, consumer groups, indigenous movements, and health rights advocates are increasingly cooperating and leading the charge for new understandings of human rights in the region—among both government authorities and civil society more broadly. These are the critical considerations that must be taken into account in any discussion of "legitimacy" in supranational litigation.

nation of All Forms of Racial Discrimination.[291] They have also broadly ratified the core labor rights conventions of the International Labor Organization (ILO), as well as those protecting indigenous rights, such as ILO Convention 169.[292] They regularly submit to the ILO's contentious jurisdiction over violations of freedom of association and other core rights.[293] Latin American states have also been instrumental at the international level in pushing through individual complaints mechanisms in new treaties under development, with the aim of subjecting economic, social, and cultural rights to supranational adjudicatory process. This is true under the draft Optional Protocol to the ICESCR,[294] which would create

291. Each of these treaties have been ratified by Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela. *See* Office of the United Nations High Commissioner for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties, http://www.unhchr.ch/pdf/report.pdf (updated to June 9, 2004). Cuba is the single major Latin American state that has not ratified the ICESCR, although it is party to the CRC, CEDAW, and CERD. *Id.*

292. Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 72 I.L.O. Official Bull. 59 (Sept. 5, 1991). ILO Convention 169 has been ratified by Argentina, Bolivia, Brazil, Colombia, Costa Rica, Dominica, Ecuador, Guatemala, Honduras, Mexico, Paraguay, Peru, and Venezuela. In fact, all but four of the ratifying states are American. For more information on the ratification status of the core ILO conventions, see ILOLEX: Database of International Labour Standards, http://www.ilo.org/ilolex/english/index.htm.

293. The ILO Committee on Freedom of Association was established in 1951 for the purpose of examining complaints about violations of freedom of association and has since become one of the most widely used international human rights complaints procedures. For more information on the supervisory procedure of the ILO Committee on Freedom of Association, see Committee on Freedom of Association, http://www.ilo.org/public/english/standards/norm/applying/freedom.htm and Lee Swepston, *Human Rights Complaints Procedures of the International Labor Organization, in* GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 89 (Hurst Hannum ed., 4th ed. 2004).

294. Latin American states, as a group, supported the immediate drafting, under a comprehensive approach, of the Optional Protocol at the third session (Feb. 2006) of the Open-Ended Working Group (OEWG) for the Optional Protocol. This support was reflected in Decision No. 586 of 2004 of the Andean Parliament—comprised of the governments of Bolivia, Colombia, Ecuador, Peru, and Venezuela—in which the Parliament made an explicit commitment to the elaboration of the Optional Protocol, viewed as

an individual communications procedure for the rights in the ICESCR, as well as under the draft U.N. Convention on the Rights of Persons with Disabilities, which broadly protects economic, social, and cultural rights (including the rights to health, to education, to work, and to social security) and in which Latin American support has been instrumental.[295] Indeed, it is fair to conclude that the Latin American and Caribbean block in the United Nations (GRULAC) is the most vocal and reliable in supporting international litigation of economic, social, and cultural rights, on an equal basis to civil and political rights, under individual complaints procedures.[296]

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part of its obligations according to the Andean Charter for the Promotion of Human Rights. According to the Parliament's Secretary-General, the "Protocol will guarantee the fulfillment of the economic, social, and cultural rights of the citizens of all states, and equally of the civil and political rights through an international petition system which could contribute to a major understanding of the substantial contents of international norms and provoke real changes in the lives of people." *See* Andean Parliament, Press release, *General Secretary of the Andean Parliament supports elaboration of Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (Feb. 3, 2006), *available at* http://www.parlamentoandino.org/content/modules/general.jsp?ID=2198&param4=100&param3=1&param2=2&param1=1. Likewise, at an international seminar on economic, social, and cultural rights in Mexico City (August 18-19, 2005) organized by the Mexico/European Commission Program for Cooperation in Human Rights, the General Director of the Office of Human Rights and Democracy of the Ministry of Foreign Affairs of Mexico, Juan José Gómez Camacho, emphasized that the Government of Mexico would propose that drafting begin on a comprehensive protocol.

295. Brazil, Costa Rica, and Mexico have been particularly vocal in expressing the support of GRULAC states for a strong international monitoring mechanism for the new treaty, including an individual complaints procedure and competence to issue precautionary measures and undertake onsite visits. *See* Transcript of Proceedings, Sixth, Seventh, and Eighth Sessions of the U.N. Ad Hoc Committee on a Comprehensive and Integral International Convention on the Rights and Dignity of Persons with Disabilities (August 2005, January 2006, August 2006) (author's transcript from U.N. floor debate, on file with The New York University Journal of International Law & Politics).

296. Latin American support for economic, social, and cultural rights as equally-protected fundamental human rights dates back to the United Nations' founding and, specifically, the drafting of the Universal Declaration of Human Rights and American Declaration on the Rights and Duties of Man, both adopted in 1948 and both including all rights on an equal, undifferentiated basis. For some of the history of Latin America's influence on the drafting of the Universal Declaration of Human Rights and, particularly, the

Latin American states stand out internationally as well in granting constitutional hierarchy (i.e., priority over domestic law) to international human rights treaties that protect economic, social, and cultural rights[297] and in enshrining explicit autonomous protections for such rights in their political constitutions—including subjecting them to adjudicatory complaints mechanisms at the domestic level (such as *amparo* and *tutela* actions).[298] This is important since international treaty ratification can be an empty exercise when not reflected in domestic law. The rights to social security, to health, to education, and to labor unionization, for example, are guaranteed in the political constitutions of most Latin American states, including Argentina, Bolivia, Chile, Uruguay, Paraguay, Brazil, Peru, Ecuador, Colombia, Venezuela, Haiti, Cuba, the Dominican Republic, and Mexico.[299] The same is true of the rights to health, to education, and to food. Indeed, since the adoption of the 1917 Mexican Constitution, virtually every American state has broadly incorporated a wide array of economic, social, and cultural rights into its political constitution and domestic legislation.[300] These norms have become increasingly expansive with the adoption of new constitutions in many Latin American states over the past decade and a half, such as Colombia's in 1991 and Argentina's in 1994.

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incorporation of economic, social, and cultural rights, see MARY ANN GLENDON, A WORLD MADE NEW 57-58, 140-41, 158, 164 (2001).

297. The Constitution of Argentina, for example, incorporates eleven human rights instruments, including the ICESCR, the Universal Declaration on Human Rights, and the Convention on the Rights of the Child. The rights consecrated in these constitutionalized instruments take precedence over those found in the Political Constitution and laws of Argentina. *See* CONST.ARG. art. 22 (1994). The same is true of Colombia. *See* COLOM. CONST. art. 93 (1991).

298. This is true, for example, in Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Paraguay, Uruguay, and Venezuela.

299. *See, e.g.*, DERECHO HUMANO A LA SEGURIDAD SOCIAL: APUNTES Y REFLEXIONES DESDE LA EXPERIENCIA DE AMÉRICA LATINA 39-45 (Plataforma Interamericana de Derechos Humanos, Democracia y Desarrollo, 2003).

300. In this regard, see, for example, PIDHDD, COMPILACIÓN DE LA LEGISLACIÓN DE DERECHOS ECONÓMICOS, SOCIALES Y CULTURALES EN EL MERCOSUR 11-15 (2005) (compiling references to internal legislation in Argentina, Bolivia, Brazil, Chile, Paraguay, and Uruguay protecting the rights to education, culture, health, work, social security, food, housing, and access to land). *See also* Carozza, *An Historical View, supra* note 155.

Given this broad incorporation of economic, social, and cultural rights into domestic law by the representative branches of government, national courts in the Americas are also adjudicating an increasing number of social rights cases. While labor rights cases are common fare in all American states—most of which have specialized labor courts, boards, or commissions with adjudicatory powers—the region's social rights jurisprudence increasingly spans the spectrum of rights, including the rights to education, to health, to food, to water, to housing, and to a clean environment. The jurisprudence of the courts of Argentina and Colombia stand out particularly in this regard,[301] although they are far from alone; increasing social rights jurisprudence is emerging in Brazil, Ecuador, Peru, and Venezuela, among others.[302]

Interestingly, in one recent study of the use of human rights treaty law by Brazilian trial court judges in Rio de Janeiro, judges self-reported using the ICESCR in the resolution of cases in effectively equal percentages as the ICCPR (twenty-three and twenty-four percent, respectively).[303] They also reported proportional use of the San Salvador Protocol and the American Convention (thirty-one and thirty-three per-

301. The Argentine courts have, for example, adjudicated numerous high-profile cases involving the right to health and, as a component thereof, the right to water. *See, e.g.*, Corte Suprema de Justicia [CSJN], 24/10/2000, "Campodónico de Beviacqua, Ana Carina v. Ministry of Health," JA 2001-I-464 (Arg.) (ordering uninterrupted medical supply for treatment of child with Kostman's Syndrome); Viceconte, M. v. Estado Nacional, C.Nac.Cont.Adm.Fed., Sala 4, 2/6/1998, JA 1999-I-485 (ordering federal government to comply "strictly and without delay" with a timetable for the production of a vaccine for endemic disease in southern zone of Buenos Aires). The Colombian Constitutional Court has likewise adjudicated numerous important constitutional cases in the social rights area, including those related to the rights to health, education, and culture. *See, e.g.*, Magdalena Sepúlveda, *Colombia*, *in* SOCIAL RIGHTS JURISPRUDENCE, *supra* note 1 (reviewing cases).

302. This is particularly true with regard to HIV/AIDS cases and other health rights litigation.

303. *See* José Ricardo Cunha, *Human Rights and Justiciability: A Survey Conducted in Rio de Janeiro*, SUR: INT'L J. HUM. RTS. 2005, Issue 3, at 133, 146-49 (2005). These percentages were broken down between "frequent" and "rare" use, as contrasted with "no" use. Five and three percent of judges reported "frequent" use of the ICCPR and ICESCR, respectively, while nineteen and twenty percent, respectively, reported "rare" use.

cent, respectively).[304] These percentages, though not high, indicate plainly that Brazilian trial court judges do not evade judicial enforcement of economic, social, and cultural rights on the ground that they are any less "legitimate" than civil-political rights. To the contrary, to the extent judges in Latin America resort to human rights treaty law at all, they do not distinguish between legal norms protecting one "set" of rights or the other. All ratified treaty rights are deemed legally enforceable on an equal basis by virtue of the state's equal legal commitment to them under law. Courts also readily recognize the inherent indivisibility and interdependence of rights, making differentiation between them a largely arbitrary and unhelpful exercise.

Though many examples could be provided in the areas of education, social security, housing, food, water, environmental, and labor rights, the right to health—and, within this broad category, the right to treatment for persons living with HIV/AIDS—has met with a particularly favorable response from Latin American courts, civil society, and governmental authorities in recent years. Litigation on behalf of persons living with HIV/AIDS has resulted in favorable decisions in Argentina,[305] Brazil,[306] Chile,[307] Colombia,[308] Costa Rica,[309] the

304. *Id.* at 148-49. Slightly lower but congruent percentages were self-reported for CERD (23%), CEDAW (25%), the OAS Women's Convention (25%), the OAS Torture Convention (26%), the U.N. Torture Convention (25%), the Convention on the Rights of the Child (30%), and the OAS Disability Convention (28%). *Id.* at 150-55.

305. *See, e.g.*, Corte Suprema de Justicia [CSJN], 17/12/1996, "B.R.E. c/ Policía Federal Argentina s/amparo," La Ley [L.L.] (1997-B-77) (Arg.); Cámara Nacional de Apelaciones en lo Civil y Comercial Federal [CNCiv.], 01/06/2000, "Asociación Benghalensis y otros c/ Ministerio de Salud y Acción Social – Estado Nacional s/ amparo Ley 16.986," La Ley [L.L.] (2000-A-186) (Arg.); Cámara Nacional de Apelaciones en lo Civil y Comercial Federal [CNCiv.], 19/04/2001, "Farell-De Las Carreras, O.G.L.G. c/Instituto Nacional de Servicios Sociales Para Jubilados y Pensionados s/Amparo," Causa No. 7982/99 (Arg.).

306. *See, e.g.*, Reuters NewMedia, *Brazil Judge Orders State to Supply AIDS Medication*, July 10, 1996, http://www.aegis.com/news/re/1996/RE960773.html. The decision, based on the right-to-health guarantee of the Brazilian Constitution, established that the state of Sao Paulo had an obligation of regular and timely delivery of all treatments that were medically required for the petitioner, as determined by her doctor. *See id.* Thousands of similar decisions have been favorably decided by Brazilian courts. The state responded in 1996 by passing Law 9313 guaranteeing the right to antire-

Dominican Republic,[310] Ecuador,[311] El Salvador,[312] Mexico,[313] Peru,[314] and Venezuela.[315] These decisions—brought under both right-to-health and right-to-life provisions of national laws or constitutions—have tended to require states to provide comprehensive medical attention to persons living with HIV/

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troviral drugs free of charge by the public health system for all people living with HIV/AIDS in Brazil. *See* Lei No. 9.313, de 13 de Novembro de 1996 (Brazil), *available at* http://www.pge.sp.gov.br/centrodeestudos/biblioteca virtual/dh/volume%20i/saudelei9313.htm.

307. *See, e.g.*, Court of Appeals of Santiago, petition for protection, no. 2,614-99, 14/6/99, "García López c/ Servicio de Salud Metropolitano Sur-Oriente y otros" (Chile).

308. *See, e.g.*, Judgment T-271/95, 23.6.1995 (Colom.); Judgment T-505/92, 22.8.1992 (Colom.).

309. *See, e.g.*, William García Álvarez v. Caja Costarricense de Seguro Social (1997), Sala Constitucional de la Corte Suprema de Justicia 05934 (Costa Rica), *available at* http://www.poder-judicial.go.cr/transparencia/rendicion decuentas/magistrado%-20adrian%20vargas/1997-05934.htm.

310. HIV/AIDS cases have been decided in favor of persons living with this ailment with respect to their constitutional right to privacy (confidentiality of HIV/AIDS status) and their labor rights. *See, e.g.*, Latin American and the Caribbean Counsel of AIDS Services Organizations (LACCASO), *Diagnóstico de La Situación de los Derechos Humanos en la República Dominicana*, 3-4, *available at* http://www.laccaso.org/pdfs/minirepdoc.pdf.

311. *See, e.g.*, Edgar Carpio Castro Jofre Mendoza & Ors v. Ministry of Public Health and the Director of the HIV-AIDS National Programme (*amparo* writ), Resolution No. 0749-2003-RA (Constitutional Court of Ecuador), Jan. 28, 2004, *available at* http://www.dlh.lahora.com.ec/paginas/judicial/PAGINAS/R.O.Febrero.11.2004.htm.

312. *See, e.g.*, Jorge Odir Miranda Cortez et al. v. Salvadoran Social Security Institute, *supra* note 69.

313. *See, e.g.*, Castro v. Instituto Mexicano del Seguro Social, Amparo Decision 2231/97 (Plenary Court of the Supreme Court of Justice, April 2000), *available at* http://200.38.86.53/NR/rdonlyres/9D918A95-F4DB-4700-B0993FC584B1BDD-B/0/AmparoenRevision223197delPelno.doc; *see also* Antonio Medina, *Historico Fallo de la Suprema Corte de Justicia*, LA JORNADA (Mexico), Apr. 6, 2000, *available at* http://www.jornada.unam.mx/2000/04/06/ls-fallo.html.

314. *See, e.g.*, Azanca Alhelí Meza Garcia v. el Estado Peruano, Exp. No. 2945-2003-AA/TC (Peruvian Constitutional Court).

315. *See, e.g.*, Bermúdez Bermúdez v. Ministerio de Sanidad y Asistencia Social, File Nº 15.789 Supreme Court of Justice, Judgment Nº 916 (1999) (Venez.), *available at* http://www.tsj.gov.ve/sentencias/SPA/spa15071999-15789.html; Antonio A. v. Instituto Venezolano de Seguros Sociales (1997); JRB et al v. Ministerio de la Defensa, Decision 14000 (Administrative Law Court of the Supreme Court of Justice, January 20, 1998); NA et al v. Ministry of Health, Decision 916 (Administrative Law Court of the Supreme Court of Justice, Aug. 14, 1998).

AIDS and have generally been complied with by Latin American states. Often they are followed by national decrees, adopted as a function of the constitutional right to health, explicitly establishing the responsibility of the state to provide necessary medications to persons living with HIV/AIDS.[316] In protecting this right, moreover, national courts have often referred directly to the American Declaration, the San Salvador Protocol, and the ICESCR—which are viewed as creating binding, legally-enforceable commitments for Latin American states.[317] The strong acknowledgment by Latin American states of their legal duty to ensure the right to health has been affirmed, also, in contentious supranational cases before the Commission. In a 2004 Commission hearing on an HIV/AIDS case filed against Guatemala, for example, the Guatemalan authorities insisted that the state recognized the right to health of all persons in Guatemala and that it was taking action to fulfill the health rights of the petitioning parties. They urged the petitioners to continue with their case before the Commission, as a matter of right.[318]

It is noteworthy as well that Latin American states have not reacted negatively (even if they might have been expected to) with respect to proliferating protective orders issued by the Inter-American Commission on Human Rights, requesting them to provide antiretroviral drugs and other essential life-saving medicines to persons with HIV/AIDS. Between 2000 and 2002, the Commission granted precautionary measures—urgent interim measures of protection—on behalf of over four hundred persons carrying HIV/AIDS in Bolivia, Chile, Colombia, the Dominican Republic, Ecuador, El Salvador, Guate-

316. Such has been the case in Brazil and Colombia, for example. *See* Lei No. 9.313, *supra* note 306 (establishing that right-to-health guarantee for persons with HIV/AIDS includes free integral health care and access to treatment); Decree No. 1543 (Colom. 1997).

317. This, for example, was true in Argentina (ICESCR), Costa Rica (ICESCR), and Ecuador (American Declaration and San Salvador Protocol). *See* Hans V. Hogerzeil et. al., *Is access to essential medicines as part of the fulfilment of the right to health enforceable through the courts?*, 368 THE LANCET 305, 306, *available at* http://www.who.int/entity/medicines/news/Lancet_EssMedHumanRight.pdf.

318. The author was present in the hearing. An audio transcript is available through the parties.

mala, Honduras, Nicaragua, and Peru.[319] In almost all of these cases it requested the state to provide the beneficiaries with the "medical examination and treatment indispensable for their survival." In some cases it specified that this should include comprehensive treatment and the antiretroviral medications necessary to prevent death, as well as the necessary hospital, pharmacological, and nutritional care needed to strengthen their immunological systems and prevent the development of infections.[320] States have, for the most part, complied with these measures, at least with respect to the named parties. At the very least, no American state has formally objected to the Commission's intervention in ordering such health-based remedies to individuals within the state's jurisdiction.

American states have also responded positively (i.e., without protest or "extreme reactions") to the issuance of health-related precautionary measures by the Commission involving the inadequate provision of health care in custodial settings. Such measures are most frequently granted in prison contexts, but have also been granted in other custodial settings such as state-run psychiatric hospitals, often with important physical and mental health consequences for the beneficiaries. In December 2003, for example, the Commission ordered precautionary measures on behalf of 460 patients at a Neuropsychiatric Hospital in Paraguay who were living in grossly inhuman, degrading, and unhygienic conditions, without access to adequate physical or mental health care.[321] The Commission requested that, given the grave health risks presented, the state urgently adopt the sanitary and medical measures necessary to avoid harm to the personal integrity of the patients of the hospital. It also ordered the state to elaborate a medical diagnostic for each patient to assure that medical interventions were

319. *See* OEA/Ser./L/V/II.111, doc. 20 rev., ch. III.C.1 (2001); OEA/Ser./L/V/II.114, doc. 5 rev., ch. III.C.1 (2002); OEA/Ser.L/V/II.117, doc. 1 rev. 1, ch. III.C.1 (2003) ("Precautionary measures granted or extended by the Commission").

320. *See, e.g.*, OEA/Ser.L/V/II.106, doc.6 rev., at 1283 (2000), ch. III.C.1, ¶ 32 (El Salvador).

321. OEA/Ser.L/V/II.118, doc. 5 rev. 2 (2003), ch. III.C.1, ¶ 60 (Paraguay). For a fuller description of these measures, see Alison A. Hillman, *Protecting Mental Disability Rights: A Success Story in the Inter-American Human Rights System*, 12 No. 3 HUM. RTS. BRIEF 25 (2005).

individualized. Consequently—triggered by the personal intervention of the President of Paraguay himself after visiting the hospital to observe the denounced conditions (as well as the credible threat of litigation if the precautionary measures were ignored)—the state took immediate responsive action, firing the hospital's director, reconstructing and modernizing patient facilities, reassessing intake procedures, and beginning a reform process aimed at providing community-based, rather than institution-based, care to persons with psychosocial and intellectual disabilities. A process of mediated supervision of the reform process has continued with the participation of the state, the Commission, and the petitioning parties.[322]

Moreover, by 2003 the Commission had granted nine sets of precautionary measures on behalf of prison inmates in need of specialized medical treatment in Cuba, Jamaica, Peru, and Guatemala. Faced with credible information that sick patients were being refused treatment, the Commission asked the states to transfer each respective inmate to a hospital specializing in the kind of physical ailments suffered and to grant specialized medical attention, to be administered in collaboration with a physician selected by the beneficiary's family.[323] In another case, upon learning that the inmate's health treatment had been terminated upon his transfer to another prison, where his health status worsened, the Commission requested that the state provide the inmate with a medical exam, including a diagnosis, prognosis, and recommended treatment for his illness, as well as the treatment prescribed as a result of that exam.[324] As a result of the intervention, the state transferred the prisoner to a facility that both provided medical care and accommodated family visits. In a series of similar cases, the Commission requested the state to immediately provide the medical examinations necessary to protect the inmates'

322. The petitioners included Mental Disability Rights International (MDRI) and the Center for Justice and International Law (CEJIL). This author represented CEJIL in the proceedings.

323. *See, e.g.*, OEA/Ser./L/V/II.114, doc. 5 rev., ch. III.C.1, ¶ 21 (2002) (Cuba) (inmate suffering from lung cancer and refused medical attention); OEA/Ser.L/V/II.117, doc. 1 rev. 1, ch. III.C.1, ¶ 50 (2003) (Cuba) (inmate suffering from back tumors, respiratory difficulties, a chronic ear infection, and a peptic ulcer).

324. OEA/Ser.L/V/II.117, doc. 1 rev. 1, ch. III.C.1, ¶ 73 (2003) (Peru) (detainee suffering prostate condition).

health, which the state reportedly did in some cases.[325] In other cases, the Commission has requested not only that individual detainees be provided treatment and medical exams, but also that unhealthy detention conditions and facilities that cause or exacerbate ill-health be remedied.[326]

The Court, too, has intervened in extreme situations to protect the right to health of detainee populations. It has ordered a state to urgently provide "proper medical treatment" to a detainee with heart disease,[327] and to ensure that such treatment be received "from a doctor of [the beneficiary's] choosing."[328] The Court has also ordered provisional measures to urgently protect the life and personal integrity of detainees and employees in an Argentine penitentiary that, in terms of sanitation, overcrowding, and poor nutrition, lacked "the minimum conditions compatible with their dignity."[329]

That Latin American governments do not automatically reject claims involving economic, social, and cultural rights is further evident in the many friendly settlement agreements—akin to consent decrees—they enter, through which they *voluntarily* accept their international responsibility for violations of social rights and agree *voluntarily* to take comprehensive steps to repair the resulting abuse. Such amicable settlements have, following approval by the Inter-American Commission, been entered and enforced in such areas as the right to education,[330] the right to health,[331] the right to work,[332] the right to

325. OEA/Ser./L/V/II.114, doc. 5 rev., ch. III.C.1, ¶ 50 (2002) (Peru) (inmate suffering mobile breast lumps); *see also* OEA/Ser.L/V/II.106, doc. 6 rev., ch. III.C.1, ¶ 48 (2000) (Peru); OEA/Ser.L/V/II.102, doc. 6 rev., ch. III.C.1, ¶ 49 (1999) (Peru); OEA/Ser.L/V/II.98, doc. 6 rev., ch. III.C.1 (1998) (Peru) (inmate dying of cancer); OEA/Ser.L/V/II.117, doc. 1 rev. 1, ch. III.C.1, ¶ 66 (2003) (Jamaica).

326. OEA/Ser.L/V/II.102, doc. 6 rev. ¶ 24 (1999) (Guatemala) (poor health conditions in preventive detention).

327. Cesti Hurtado Case, Inter-Am. Ct. H.R. (ser. E) (Sept. 11, 1997) (Provisional Measures, considering 6 (ratifying President's July order requiring provision of adequate medical treatment in reference to the detainee's state of health, and maintaining measures)).

328. Cesti Hurtado Case, Inter-Am. Ct. H.R. (ser. E) (Jan. 21, 1998) (Provisional Measures, Resolution 2).

329. Mendoza Prison Case, Inter-Am. Ct. H.R. (ser. E) (Nov. 22, 2004) (Provisional Measures).

330. Mónica Carabantes Galleguillos v. Chile, Case 12.046, Inter-Am. C.H.R., Report No. 33/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2003) (school dismissal for pregnancy).

housing and land,[333] and freedom from slave labor,[334] among others.

Similar positive examples, while beyond the scope of this Article, can be given with respect to other orders involving the right to education, labor rights, indigenous rights, and the right to housing.[335] The point is that American states regularly comply with Commission recommendations in the area of economic, social, and cultural rights—at least to the same degree they comply with recommendations in classic civil and political rights cases. There is no evidence that American states find litigation of such rights, as a category, "illegitimate" or that they will have "extreme reactions" to judicial orders concerning them. If intransigence arises with respect to a particular case, it tends to result from standard legitimacy concerns regarding the scope of the remedial order issued in the case or the degree of deference believed better left to local authorities in striking a proper balance between the rights of alleged victims and the rights of others, regardless of the formal set of norms used in the litigation.

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331. María Mamérita Mestansa Chaves v. Peru, Case 12.191, Inter-Am. C.H.R., Report No. 71/03, OEA/Ser.L/V/II.118 Doc. 70 rev. 2, at 668 (2003) (forced sterilization in public hospital).

332. Pablo Ignacio Livia Robles v. Peru, Case 12.035, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2003); Ricardo Manuel Semosa Di Carlo v. Peru, Petition 12.078, Inter-Am. C.H.R., Report No. 31/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 (2005); Raúl Savala Málaga y Jorge Pacheco Rondón v. Bolivia, Petition 241/01, Inter-Am. C.H.R., Report No. 98/05, OEA/Ser.L/V/II.122, doc. 5 rev. 1 (2005).

333. Community of San Vicente los Cimientos v. Guatemala, Case 11.197, Inter-Am. C.H.R., Report No. 68/03, OEA/Ser.L/V/II.118 Doc. 70 rev. 2, at 642 (2003); Enxet-Lamenxay et al Indigenous Communities ('Riachito') v. Paraguay, Inter-Am. C.H.R., Report No. 90/99, OEA/Ser.L/V/II.106, doc. 3 rev. at 350 (1999); Mercedes Julia Huenteao Beroisa et al. v. Chile, Petition 4617/02, Inter-Am. C.H.R., Report No. 30/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 (2005).

334. José Pereira v. Brazil, Case 11.289, Inter-Am. C.H.R., Report No. 95/03, OEA/Ser.L/V/II.118, doc. 5 rev. 2 (2003) (slave labor).

335. For a fuller account of these measures, see sources cited *supra* note 128.

IV. ENSURING THE LEGITIMACY OF SUPRANATIONAL HUMAN RIGHTS JURISPRUDENCE

The chief difficulty with Cavallaro and Schaffer's unexamined affirmation that judicial enforcement of economic, social, and cultural rights is illegitimate in the eyes of American states goes beyond the fact that it is factually unsustainable and conceptually inconsistent with the suggested elements approach.[336] More consequentially, it leads them to overlook the *actual* judicial-overreach factors that cause legitimacy criticisms in the first place. Doing so, the authors offer a litigation strategy and set of proposed "clear cut cases" that in fact amplify, rather than avoid, classic legitimacy concerns arising where judicial organs intervene inappropriately or prematurely in the setting of public policies. Instead of trying to build a litigation strategy around a predetermined view of social rights litigation as illegitimate, Cavallaro and Schaffer would have done better to ask what it is that makes a judicial decision illegitimate in the eyes of states, and then build a strategy from there.[337] Had they done so, they likely would have offered a very different strategy and set of recommended "test cases."

"Legitimacy," as a term applied to the judicial function, generally refers to the political-institutional role of an adjudicatory body in a system of law based on democratic accountability, separation of powers, and evolving norms of decency. At the national level, a court weakens its legitimacy by exceeding its proper adjudicatory role and arrogating to itself the functions of the "representative branches." At the supranational level, these horizontal separation-of-powers and countermajoritarian difficulties are compounded by the vertical

336. In its two broadest variants, II and III. *See supra* text accompanying notes 43-51.

337. That the authors misconstrue the legitimacy issues at stake is most clearly demonstrated by the fact that they declare litigation of economic, social, and cultural rights illegitimate in the eyes of OAS member states while simultaneously urging that those very rights be litigated under expansive interpretations of civil and political rights. If OAS member states truly believed it illegitimate for a court to intervene in the health, education, social security, and housing policies and programs they create to protect the social rights of individuals (which they clearly do not, provided jurisdictional rules are respected), then there is little reason to believe the legitimacy problems would go away by litigating under a different set of norms.

ones of *subsidiarity*—i.e., the supplementary role played by supranational organs vis-à-vis their domestic counterparts.[338] Supranational adjudicatory bodies tend to preserve their legitimacy by, first, respecting the lawmaking function of national legislatures in the first instance and, second, by respecting their secondary role in the protection of human rights, deferring where possible to the greater appreciation domestic authorities (pressed by civil society groups) tend to have over local conditions and concrete solutions. At the same time, they must respect the jurisdictional limitations inherent in the adjudicatory function, declining to exercise competence over cases that fail to present justiciable controversies, as defined in the applicable system. In exercising their competence over discrete disputes, adjudicatory bodies must keep these factors constantly in mind. This is true irrespective of whether an invoked norm facially looks more civil, cultural, economic, social, or political.

"Legitimacy" has little to do, therefore, with enforcement of any particular abstract right or set of rights. Rather, it has to do with how tribunals, in resolving the discrete controversies presented to them, respect their role in a democratic political system, one in which their functions are limited.[339] An adjudicatory body or system jeopardizes its democratic legitimacy when it appears to exceed its proper competence and take on functions committed to other departments or repositories of power. This can occur in varied ways, each compounded at the supranational level. Three are particularly rel-

338. The subsidiary role of the inter-American human rights system in the protection of human rights is referenced expressly in the American Convention, which refers to international efforts as necessarily "reinforcing or complementing the protection provided by the domestic law of the American states." American Convention, *supra* note 23, pmbl., ¶ 2. It is ensured through the rule of prior exhaustion of domestic remedies, allowing states to resolve problems under their internal law before being confronted with an international proceeding, and the "fourth instance formula," which prevents an international body from examining internal issues unless a violation of a provision of international law is alleged. *See, e.g., Velásquez Rodríguez Case, supra* note 249, ¶¶ 60-61; Juan Carlos Abella v. Argentina, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, OEA/Ser.L/V/II.98, doc. 6 rev. (1998), ¶¶ 141-42.

339. Litigants should take this expressly into account, framing their cases in ways to which judges can legitimately respond, respecting basic autonomy, democratic-accountability, separation-of-powers, and subsidiarity principles.

evant to the present discussion: by exercising regular competence over non-justiciable claims; by appearing to engage in judicial-lawmaking, such as by creating new rights without sufficient consensus formation through overbroad norm interpretation; and by crafting detailed remedial orders mandating judicial rather than legislative, or international rather than national, prerogatives in the first instance. Cavallaro and Schaffer, treading carelessly, fall into each of these legitimacy pitfalls in presenting their thesis and test cases. The following Section discusses the first. The latter two will be addressed generally in Parts VI and VII, *infra.*

A. *Exceeding Judicial Competence: Adjudicating "Non-Justiciable Claims"*

Courts and tribunals play a decisive but circumscribed role in the democratic political system. In contradistinction to the representative branches, they serve the democratic process by limiting their interventions as far as possible to those concrete "interpretive" disputes that arise under law when, in discrete factual settings, conflicting rights and duties are interpreted under differing suppositions by adverse parties.[340] While courts may surpass that traditional role when lapses in representative democracy become acute, their sustained legitimacy tends to depend on their self-restraint in limiting the exercise of their competence to the principled and rule-based resolution of discrete factual controversies. Abstract or generalized grievances over large sectors of the population that cannot be reduced for adjudicatory purposes to concrete factual injury to specific persons are rarely conducive to a realistic appreciation of the consequences of judicial action, and hence are generally best reserved for the messier, more open political process.[341] In this equation, Cavallaro and Schaffer's urg-

340. Courts sometimes go beyond this, but in so doing generally are not acting under their *adjudicatory* competence, but rather under something more akin to an *advisory* jurisdiction.

341. This is especially true for non-parties, whose interests and perspectives are not necessarily represented in the proceedings. In this regard, it is important to mention that many Latin American countries recognize collective *amparo* actions and other "diffuse" causes of action. These actions—when not predicated on concrete demonstrable injury to a named party—are often more akin to promotional or advisory mechanisms of protection. Given inter-American justiciability doctrine, they often present serious ad-

ing of advocates *not* to look at the inter-American system as an "arbiter of disputes" between specific individuals and the state, but rather as a mechanism for evaluating broad state policies and for "producing jurisprudence with potentially sweeping policy implications" and "revolutionary" impacts,[342] appears largely misdirected as a strategic device, especially if its aim is to increase judicial legitimacy and on-the-ground implementation rates.[343]

The circumscribed role adjudicatory bodies play in most democracies is reflected in justiciability doctrine. It is encapsulated in the notion of a "justiciable controversy" or "concrete case," the threshold requirement for an adjudicatory body taking legitimate cognizance of a legal claim of right. As previously discussed, the precise contours of a justiciable controversy vary across jurisdictions, often reflecting distinct levels of political accountability or accepted balances of power. In the inter-American system—as under the jurisdiction of the European Court of Human Rights and U.N. Human Rights Committee—a justiciable controversy is one characterized by the core elements of injury-in-fact to a specific person or persons and a causal nexus between that injury and the conduct of the defendant state. Where these elements are not met, the Commission or Court exceeds its limited jurisdictional competence and, from a legitimacy standpoint, enters impermissibly into an area of struggle properly reserved for the political process.

Ironically, while Cavallaro and Schaffer reproach human rights lawyers in the Americas for "cast[ing] particular instances of social injustice in the language of state obligations

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missibility problems when used as a basis for exhausting domestic remedies in the inter-American human rights system. To avoid these problems, this author generally advises potential litigants who have favorably relied on diffuse causes of action at the domestic level, to limit their regional-level complaints to alleged violations of the right to judicial protection, for failure to enforce the diffuse remedy domestically. Only in that way may concrete injury, suffered by individual beneficiaries of the domestic action and attributable to state conduct, potentially be demonstrated and hence standing rules respected.

342. Cavallaro & Schaffer, *supra* note 2, at 274, 277. They instruct petitioners to "focus on the potential impact that the litigation of cases may have beyond the parties involved." *Id.* at 274.

343. *Id.* at 222 (characterizing their test cases as those manifesting "the greatest potential to establish precedents likely to be implemented by states in the Americas").

and enforceable, individual rights"[344] on the ground that these instances fall outside the legitimate sphere of judicial competence,[345] the "test cases" they commend in Part IV of their article *themselves* fall outside this permissible area. Specifically, by undervaluing the legal significance of a justiciable controversy in the inter-American system and, relatedly, the legal obligations that attach to human rights claims in adjudicatory contexts—for economic-social-cultural and civil-political rights alike—Cavallaro and Schaffer offer test cases and a line of argument that recreate the legitimacy concerns they caution against.

1. *Failing to Establish Concrete Injury to Individualized Persons*

The first major legitimacy-related difficulty evident in the Cavallaro-Schaffer approach to supranational social rights litigation lies in the authors' general inattention to personalized injury-in-fact as a core requirement for the exercise of the regional system's adjudicatory function. They characterize this jurisdictional element in mere prudential terms,[346] seemingly on the belief that general "distributive justice" claims with effects over broad collectivities are both justiciable and politically legitimate so long as litigants invoke immediately-enforceable civil-political rights in adjudicating them.

The right-to-education cases commended to litigants reflect this jurisdictional error most directly. They are framed not in terms of concrete, personal harm to any specific individual, but exclusively by reference to general budgetary inequalities between *bureaucratic subdivisions*—horizontally, in terms of school districts, and vertically, in terms of primary, secondary, and tertiary levels of education. Neither provides a proper basis for the exercise of the inter-American organs' adjudicatory competence.

Cavallaro and Schaffer first hypothesize a situation in which two schools or school districts—one poorer and more

344. *Id.* at 235-36.

345. *Id.* at 221 (warning of "limited role" of Commission and Court "in promoting economic, social, and cultural rights").

346. *Id.* at 272-73 (describing "preference" for individualization in the inter-American system as a means of increasing the likelihood of implementation of international decisions, rather than as a jurisdictional prerequisite to the exercise of adjudicatory competence).

"ethnic"—receive unequal per-student resource allocations.[347] They contend that, on these facts, the Commission and Court "would be on firm ground were they to find a violation in the unequal distribution of resources in the two communities."[348] The authors, however, fail to identify any method of demonstrating concrete personal injury to *particular children* in the poorer school district owing to the differential school budgets. The fact of unequal resource allocation to the *district* or *school* tells the adjudicator little to nothing about the relative adequacy of the education received by *individual students* in that district or school. We are told nothing about the quality of teachers, the quality of the facilities, the respective need levels of the students in each school, or the precise reasons why one school is receiving greater funding than the other.[349] Without framing the legal question of inequality in a concrete factual context of a specific child or specific children's actual access to education or educational opportunity—one conducive to a realistic appreciation of the consequences of judicial action—an adjudicatory body, particularly a supranational one, should hesitate to enter into the rocky terrain of appropriate school budgeting. More to the point, it would exceed its contentious competence in doing so.

Incidentally, it was this practical litigation problem that in many ways helped lead the early architects of the legal strategy to end racial segregation in the United States to focus their court arguments not on unequal per-student expenditures in white and black primary and secondary schools, which were grotesquely unequal and unjust, but rather on a distinct set of cases through which concrete personalized injury resulting from segregated education policies could most clearly be

347. Cavallaro & Schaffer, *supra* note 2, at 276.

348. *Id.* They further contend that "as a remedy, the [inter-American] system could order that the state afford roughly equal resources to the communities." *Id.*

349. Indeed, educational needs vary widely according to diverse factors. The right to education and to educational equality turns not on the bare quantity of resources assigned to schools, but rather on the "quality" or "adequacy" of education, as measured by educational needs fulfillment. As one U.S. state supreme court has stated in an important case on equal educational opportunity: "The very uncertainty of the extent of the nexus between dollar input and quality of educational opportunity requires allowance for variances as to individual and group disadvantages and local conditions." Horton v. Meskill, 652 A.2d 359 (Conn. 1977).

demonstrated to a court of law.[350] These included suits seeking to equalize the salaries of black and white teachers in the same school system,[351] suits seeking access by qualified blacks to graduate and professional schools for which no in-state alternatives were available,[352] and, ultimately, a direct attack on segregated primary and secondary schooling based on its effects on students' "hearts and minds."[353] This approach allowed U.S. civil rights advocates to turn discrete, strategically-chosen aspects of the larger political struggle against segregation into "justiciable cases" cognizable by the judicial department. In a similar manner, human rights advocates who wish to bring their struggles to adjudicatory tribunals, whether domestic or international, need to recognize that the types of claims such bodies are competent to hear are limited, and frame their cases accordingly.

Cavallaro and Schaffer next propose an even more starkly inappropriate "test case." They posit suing a state for spending more per-student on the maintenance of a free and open public *university system* than it does on a free and open public *elementary-school system*, on the assumption that a greater percentage of poor and minority students attend the latter than the former.[354] Beyond the causation problems inherent in the case as proposed,[355] its appropriateness for judicial resolution is further placed into question by the difficulty, if not impossi-

350. For a description of the complex factors and motivations underlying this strategy, see generally MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION 1925-1950 (1987); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *Brown v. Board of Education* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (Alfred A. Knopf ed., 2004) (1974); Jack M. Balkin, *The History of the* Brown *Litigation*, *in* WHAT "BROWN V. BOARD OF EDUCATION" SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION 29 (Jack M. Balkin ed., 2001).

351. *See* sources cited *supra* note 350.

352. *See, e.g.*, Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938); Sweatt v. Painter, 339 U.S. 629 (1950).

353. *See, e.g.*, Brown v. Board of Education of Topeka, Kansas, 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954).

354. Cavallaro & Schaffer, *supra* note 2, at 277.

355. On their hypothesized facts, no identified state conduct inhibits poor and minority students, either directly or indirectly, from accessing higher education (e.g., both systems are "open" and "free"). *See id.* at 277. Given that no financial or other obstacle to attendance is specified at either elementary or university levels, the emphasis of Cavallaro and Schaffer on the state's failure to "maintain effective affirmative action programs to guarantee

bility, of proving injury-in-fact to any particular elementary student as a result of the policy. This follows not only from the lack of direct correlation between educational budget allocations and the quality of education received by individual students, but—more fundamentally—from the lack of any cognizable standard of comparison between similarly-situated persons treated differently in the particular case, a necessary element for proving unjustified unequal treatment under international human rights law.[356] Primary-school and university students simply are insufficiently "similarly situated" to establish a judicially-cognizable standard of comparison from which concrete individualized injury could be assessed.[357] Without such a standard, a legal finding of discrimination in a concrete case—particularly if accompanied by a remedial order requir-

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access to superior education to persons from historically disadvantaged groups" is not entirely clear. *See id.*

356. *See, e.g.*, Carlos García Saccone v. Argentina, Case 11.671, Inter-Am. C.H.R., Report No. 8/98, OEA/Ser.L/V/II.98, doc. 6 rev. ¶¶ 40-41 (1998) (citing E.W. VIERDAG, THE CONCEPT OF DISCRIMINATION IN INTERNATIONAL LAW 44 (1973) for purposes of case analysis under article 24 of American Convention).

357. It may also be noted that factual situations such as the one hypothesized by Cavallaro and Schaffer—in which per-student expenditures in public university systems exceed those in public elementary schools by a factor of *ten to twenty*, *see* Cavallaro & Schaffer, *supra* note 2, at 277—are not likely to exist in Latin America. *Id.* at 277 ("These hypothetical facts—which no doubt exist in Brazil and elsewhere in the Americas"). Indeed, as reported in a 2003 World Bank report, the countries of the region tend to reflect three patterns of spending across primary, secondary, and tertiary levels. The first, exemplified by Chile, demonstrates a large, equalizing convergence across vertical education levels such that per-student expenditures at each was roughly equalized by 2001. The second, exemplified by Mexico, has experienced steady growth at all levels, thereby maintaining patterns of inequality (by a factor of about eight). These statistics, however, reflect federal dollars and thus do not take into account the local and state dollars that contribute to primary, but not tertiary education—thus decreasing the per-student inequality across these levels. Finally, the third trend, exemplified by Brazil, demonstrates a bias toward tertiary education, which receives seven times more federal funding than does secondary education. Again, however, this does not take into account the primary role in education finance of local and state dollars in the federalized state. *See* David de Ferranti et al., *Inequality in Latin America and the Caribbean: Breaking with History?*, at 7-11, Fig. 7.4, *available at* http://wbln0018.worldbank.org/LAC/lacinfoclient.nsf/d29684951174975c85256735007fef12/32d7c0bacee5752a85256dba00545d3f/$FILE/Inequality%20in%20Latin%20America%20-%20complete.pdf.

ing vertical resource equalization—would exceed accepted limits to the inter-American organs' adjudicatory competence and place their legitimacy at risk.[358]

While Cavallaro and Schaffer assert that judicial entry into this budgetary field would have "potentially revolutionary policy implications" and that their hypothesized facts "would provide the inter-American system an opportunity to evaluate—through the individual case mechanism—the educational policies of a given state"[359] they overlook the fact that basic justiciability and subsidiarity considerations prevent the inter-American organs from legitimately stepping over that threshold, through the individual case mechanism, in the ways they propose. Broad evaluation of state policies, in the absence of case-defining harm suffered concretely by individuals as a result of their application, is better left to the promotional or advisory functions of the inter-American human rights organs.

By elevating the importance of abstract norms over the concrete claims that underlie them, the authors thus stumble into the very trap they admonish social rights advocates for falling into: They attempt to force a situation of generalized, abstract *social injustice* into a legal case. They believe they are "on firm ground" simply because they invoke a "civil and political" rather than an "economic, social and cultural" right. As the Commission's jurisprudence makes clear, once justiciability and other jurisdictional criteria are taken into account, the precise selection between equally-appropriate norms is all but irrelevant.[360] A proper concern for the legiti-

358. For a general discussion of ways to litigate the non-discrimination principle in the context of social, economic, and cultural rights cases in the inter-American human rights system, see PROTECTING, *supra* note 7, at 194-206.

359. Cavallaro & Schaffer, *supra* note 2, at 277.

360. Indeed, the Commission has adjudicated several right-to-education cases, finding violations of the right to education on an autonomous basis even where state responsibility rested, in part, on breach of the state's duty of non-discrimination with respect to the education norm. *See* Jehova's Witnesses v. Argentina, Case No. 2137, Inter-Am. C.H.R., OEA/Ser.L/V/II.47, doc. 13 rev. 1 (1979) (finding state responsible for violating right to education, under article XII of American Declaration, of 300 primary-school children expelled from school, denied school enrollment or prevented from taking final exams on basis of their religious beliefs); *Yean and Bosico Girls Case*, *supra* note 109, ¶ 29 (noting Commission's finding that the state violated the girl's right to education under article XII of the American Declara-

macy of supranational judicial action would take these core claim-based jurisdictional issues into account.

2. *Failing to Establish Causal Conduct as a Requisite to State Responsibility*

The second way the Cavallaro-Schaffer thesis overlooks the actual judicial overreach factors that often cause legitimacy criticisms lies in their underestimation of the need to prove defendant-specific causal conduct, in breach of a legally-defined duty, as a prerequisite to finding state responsibility under adjudicatory procedures for human rights violations. Except in jurisdictions that recognize strict liability, an adjudicatory body exceeds its limited mandate, weakening its legitimacy as neutral interpreter of the law, when it holds defendant parties accountable for injuries their conduct did not or cannot be shown to have proximately caused.[361] The "test cases" on the rights to food, to health, and to housing proposed by Cavallaro and Schaffer fail to take this critical justiciability dimension sufficiently into account.

With respect to the right to food, for example, the authors hypothesize a "firmly grounded" case in which a group of individuals "receive less than an adequate share of calories, protein, carbohydrates, or other essential nutrients on a regular basis."[362] Having been informed of the situation, the state fails to promptly ensure access to sufficient nutrition and health care and, consequently, "one or more members of this

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tion by dismissing her from school on basis of arbitrary requirement related to nationality); *see also* Adolescents in the Custody of the Febem v. Brazil, Case 12.328, Inter-Am. C.H.R., Report No. 39/02 OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2003) (finding admissible claims that Brazil violated right to education under article 13 of San Salvador Protocol, to detriment of adolescents held in state prison).

361. Inter-American human rights law has not developed a strict liability doctrine, whereby a state may be held internationally responsible through contentious processes for violating an individual's rights in the absence of proof that the state's conduct, whether by act or omission, was a proximate cause of the injury suffered. Such a strict liability system would largely remove the incentives for states to make their best efforts to ensure all human rights, as they could be held internationally responsible even where they took every reasonable and appropriate measure to prevent the violation. Without the link between state conduct and individual injury, judicial decisions would be little more than advisory opinions.

362. Cavallaro & Schaffer, *supra* note 2, at 278.

group fail to develop as they would have had they received the adequate nutritional intake that fate, and official failure has denied them."[363] According to Cavallaro and Schaffer, such a situation would give rise to clear state responsibility for violation of the "right to life" and "right to physical integrity" under the Convention in relation to anyone who subsequently died, suffered preventable or curable disease, or *failed to develop as they would have* as a result of the state's failure to provide for her or his nutritional needs.[364]

Such a litigation theory fails, however, to take causation and its role in establishing state responsibility in adjudicatory contexts sufficiently into account. At core, it converts the law of state responsibility into a *strict-liability-plus-knowledge* doctrine whenever civil-political rights are formally alleged in litigation. This is evident from the authors' proposed test case: because the rights to life and integrity were formally invoked—rather than the right to food[365]—state responsibility is claimed to rest on the state's breach of its immediate duty to factually "ensure" the rights in question through the provision of all nutritional and health needs required to prevent illness or death. In Cavallaro and Schaffer's view, that result-based duty began as soon as the state had knowledge of the alleged situation of nutritional vulnerability. That is, under their theory, the focus is not on the *conduct-based* duty to take all appropriate or reasonable measures to ensure the right in the fact-specific circumstances of the case, but rather on the *result-based* duty to ensure it as a factual matter in practice, irrespective of broader circumstances, capacities, and constraints.

The implications of this position are truly remarkable. If applied in the real world, states could effectively be held internationally responsible through individual complaints mechanisms for virtually *every* health-related death, illness, or epidemiological vulnerability that occurred within their borders. That is, a petitioner's litigation burden would be satisfied by demonstrating two circumstances: one, that a state had knowl-

363. *Id.*

364. *Id.*

365. *Id.* ("We may view this situation as a violation of the right to food. However, given that the *right to food does not provide the basis for an individual petition* to the Inter-American system, regardless of whether domestic remedies have been exhausted, we would be unable to help these victims.") (emphasis added).

edge of a situation of vulnerability and, two, that one or more affected persons became sick, died, or "failed to develop as they would have had they received" state assistance. Given extreme levels of poverty and low-level service capacity in the region, there is virtually no disadvantage that would escape a state's international liability under this standard. By failing to take states' reasonable capabilities into account and by holding states responsible for injuries their conduct cannot reasonably be said to have proximately caused,[366] there are few legal doctrines that would create graver legitimacy problems in supranational adjudication. That Cavallaro and Schaffer characterize this approach to social rights litigation as "cautious" and "responsible" demonstrates how far afield their stylized view of civil-political rights as immediately enforceable has taken them.

Conceptually, the problem lies, again, in the authors' application of the improper dimensions of human rights obligations to rights-based claims. While they render direct-approach claims non-justiciable by associating them exclusively with quadrant 4 obligations, they reproduce a situation of non-justiciability with respect to the civil-political claims they privilege by applying to them quadrant 2 duties. Such duties are not directly cognizable in individual petition processes because, though directed to individual rights-holders, their assessment is based on "results" not "conduct." That is, they are designed to assess the extent to which rights are *as a factual matter* ensured in a given situation, rather than *what the state reasonably did* under the circumstances to prevent or respond appropriately to that harm, taking competing commitments in a democratic society into account.

Thus, irrespective of how concrete and individualized a given harm might be (e.g., physiological death), quadrant 2 duties are incapable of providing a standard upon which

366. To each of their hypotheticals, Cavallaro and Schaffer tag on the otherwise case-engulfing qualifier that the "authorities' failure is *not the result of lack of resources.*" Given the nature of their hypotheticals and the economic reality of the region, they never explain why this would not swallow every case they have imagined. Most importantly, they fail to explain how "lack of resources" would be proved in discrete contexts (this is generally not an area courts should tread) or how it would otherwise be judicially assessed given their reliance on the *result-based* dimension of the "duty to respect and ensure," rather than on its conduct-based dimension. *Id.* at 274-80.

causal responsibility may be imputed to the state. Only quadrant 1 duties are capable of doing that. By underappreciating these important duty-based distinctions and, specifically, by employing norm-based distinctions as a proxy for claim-based justiciability doctrine, the Cavallaro-Schaffer thesis for social rights litigation leads to a distinctly untoward result: It renders *all* social rights claims, whether framed under "direct" or "indirect" approaches, inappropriate for judicial review. It is precisely when supranational instances exercise regular contentious competence over claims such as these (framed directly under quadrant 2, 3, or 4 duties) that they risk backlash for decisions that exceed proper adjudicatory limits, and hence loss of legitimacy that will likewise affect on-the-ground implementation rates.

Cavallaro and Schaffer fall into the same causation-related trap in framing their health and housing rights "test cases." In the first, they posit that a state violates the right to life and integrity of children for whom it has not provided vaccines if one of those children contracts a preventable illness leading to death.[367] In the second, they conclude that a state violates the same rights where it fails to respond to requests for adequate shelter by poor urban dwellers in makeshift hillside housing and, subsequently, those persons die or are seriously injured in a torrential shower that washes their homes away.[368] In both of these examples, the element of causation is missing: How, *precisely*, is the state responsible for the deaths of the alleged victims? Could the state have *reasonably* prevented the deaths through the taking of specific measures for which it had a le-

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367. *See* Cavallaro & Schaffer, *supra* note 2, at 279. In suggesting this case, Cavallaro and Schaffer may have been thinking of an Argentine case in which the federal government was required, by a domestic court, to comply "strictly and without delay" with a legislatively-defined time-table for the building of a facility for the production of a vaccine for a disease endemic to the southern zone of Buenos Aires. *See* Viceconte, M. v. Estado Nacional, C.Nac.Cont.Adm.Fed., Sala 4, 2/6/1998, JA 1999-I-485, Mariela v National State-Ministry of Health and Social ac/ amparo, C.Nac.Cont.Adm.Fed., 2/6/98, JA 1999-I-485. State responsibility in that case rested not, however, on the bare fact that someone might die without the vaccine, but rather on the state's arbitrary and unreasonable lack of compliance with commitments and a timetable it had already made to build the facility. The case was based on unreasonable conduct, not results. The two cases, in this sense, are not meaningfully comparable.

368. *See* Cavallaro & Schaffer, *supra* note 2, at 279-80.

gal obligation to take? Would such measures have prevented the death *in this case*? Is there convincing evidence of that or is it merely speculative?

In this regard, the Cavallaro-Schaffer approach to social rights litigation succumbs to an additional causation-related difficulty. The majority of their case hypotheticals focus on physical loss of life—*deaths*—as a case-defining vehicle employed to facilitate invocation of "civil-political rights." This makes evidentiary sense from the perspective of proving concrete individualized injury. It makes far less sense, however, from the perspective of proving *causation.* This is true in all cases in which state responsibility for individual deaths is predicated not on direct acts, whether by state agents or private individuals, but rather on *omissions in the provision of goods or services.* In such cases, proof of state responsibility for loss of life would, in most cases, need to be predicated on reasonable evidence that the specific death *could have been avoided* had the government in fact fulfilled its conduct-based obligations to the deceased in his or her individual capacity. This case-specific evidentiary burden, in both practical and legal terms, is not easy to meet. This is particularly true in non-custodial contexts, where legal duties are not necessarily heightened[369] and where the scope of the state's legal obligation to the alleged victim must be determined in light of the state's concurrent and competing obligations to other individuals subject to its jurisdiction.

This was concretely demonstrated in a 2005 case decided by the Inter-American Court, a case which *itself* involved exceptionally heightened case-specific duties to the individual victims at issue. Resolving a claim closely resembling the Cavallaro-Schaffer test case, the Court found against the plaintiffs precisely on the legal ground of *insufficient proof of causation* with respect to the deaths of the individualized victims. In *Yakye Axa v. Paraguay,* an extremely impoverished indigenous community was forced off its ancestral lands by private land-

369. State legal obligations to persons in state custody are heightened by virtue of the fact that the individual in state custody has "no means to turn to his relatives and friends, to an attorney or to a private physician; the State, therefore, ha[s] complete control over his life and personal safety." Juan Hernández v. Guatemala, Case 11.297, Inter-Am. C.H.R., Report No. 28/96, ¶ 60 (Oct. 16, 1996).

owners. The community responded by building makeshift housing on the side of a highway adjacent to the territory from which it had been displaced. The state responded to the resulting health and nutritional crisis by declaring a state of emergency and promising assistance, only some of which was provided. It failed to take other reasonable or appropriate actions that would have eased the food crisis while the territorial dispute was pending.[370] Because of the extremely miserable human conditions in the highway settlement, sixteen community members died from tuberculosis, malnutrition, or meningitis. In proceedings before the Court, both the Commission and the petitioning parties argued that the state had violated the right to life of the sixteen who had died, on the ground that the deaths could have been prevented with adequate food and medical assistance, especially if the state had assured the Community the free utilization of its territory.[371] The Court responded that it "lacked sufficient probatory elements to establish the *causes* of the mentioned deaths" and, as such, could not find a violation of the right to life to the detriment of the sixteen decedent members of the Yakye Axa Indigenous Community.[372]

Meanwhile, the Court had little trouble finding a violation of the right to a *dignified* life, understood as a range of health, housing, educational, labor, and cultural rights, with respect to "all members of the Yakye Axa Community." It did so based on the state's failure to adopt appropriate measures in response to the conditions that affected the individual Community members' possibility of having "dignified lives," particularly given the importance of ancestral land to the indigenous community. This expansive interpretation of life, together with the heightened duty held by the state to provide this particular community with food and health assistance, softened the evidentiary burden held by the plaintiffs in establishing causal responsibility for the concrete harm alleged to their detriment. The lesson to be taken is that, where omissions in the

370. *See Yakye Axa Case, supra* note 136, ¶ 50. The state did not act, for example, to ensure that the community members could enter their ancestral habitat, while the territorial dispute was ongoing, to engage in traditional hunting and collection activities nor to access available water supplies thereon. *See id.* ¶¶ 50.85 & 50.93.

371. *Id.* ¶ 177.

372. *Id.* ¶ 177-78 (author's translation) (emphasis added).

provision of goods and services are being challenged, evidentiary requirements associated with causation in fact favor "integration" or "direct" approaches over the narrowest "elements" one (focused on discrete physiological deaths) that Cavallaro and Schaffer privilege in their case-based hypotheticals.[373]

This issue, in its practical manifestations, will be returned to in Part VI. The point to be underscored here is that *causation must be proved* in contentious proceedings with regard to *each identified victim.* It is not enough to identify a condition of poverty, deprivation, or inequality and claim that the state, if it has not acted promptly to prevent all associated harms, is responsible for human rights violations. A supranational body could potentially do so under its advisory or promotional jurisdiction; it cannot in its adjudicatory role.

373. This does not mean causation for deaths in such circumstances can never be proved; just that the burden of proof is high. In the 2006 *Sawhoyamaxa Case, supra* note 259, the Court did in fact find individual violations of the right to life for nineteen of twenty-six deceased members of the Community, eighteen of whom were children and all nineteen of whom died of reasonably preventable diseases with available low cost treatments. While the Court insisted, as a technical matter, on proof of individualized harm, a causal nexus, and conduct-based omissions as the basis for state responsibility ("insufficient and inadequate measures"), its holding was based principally on the state's exceptionally heightened duty to the Sawhoyamaxa—undertaken expressly through presidential decree—in the area of health care and nutrition. Thus, the Court underscored that "the measures to which the State committed for the members of the Sawhoyamaxa Community *differed* in their urgency from those the State should have adopted to guarantee the rights of the population and of indigenous communities in general." *Id.* ¶ 173 (author's translation) (emphasis added). This heightened duty lowered the threshold for proving proximate cause (much like a custodial setting would). Nevertheless, the consequent diminution in vigor of the causation test led the Court to several seemingly careless conclusions that a more rigorous approach would hopefully have avoided. *See, e.g., id.* ¶ 180 (finding no state responsibility for deaths of three adults who died of tuberculosis and pneumonia, without individualized assessment of cause, solely on ground that their age approached or exceeded the average life expectancy in Paraguay; meanwhile, state responsibility was affirmed for all infant and child deaths, likewise without individualized assessment, yet without parallel attention given to national infant or child mortality rates nor to how the deaths could have practically and reasonably been averted in the factual circumstances of the case).

V. DISTINGUISHING THE *ADJUDICATORY* FROM *PROMOTIONAL* FUNCTIONS OF SUPRANATIONAL ORGANS

Cavallaro and Schaffer assert that their goal "is not to discourage human rights practitioners from using the Inter-American system as a means of promoting social justice, but rather to encourage them to do so in a thoughtful and responsible fashion."[374] Nonetheless, in focusing their thesis and case-studies on the inter-American organs' *adjudicatory* functions, they misidentify the proper forum for generally "promoting social justice" in the regional human rights system. While the Commission and Court may not legitimately assume that broad undertaking through their adjudicatory competence, they are specifically authorized and even required to do so under their promotional and/or advisory competences.

Effective and efficient use of the regional human rights system requires that advocates properly distinguish between the *adjudicatory* and *promotional* functions of the inter-American organs. These functions are complementary, and should be used together, but each serves a distinct human rights purpose and belongs to different jurisdictional mandates of the Commission and Court. Cavallaro and Schaffer appear to conflate them and as a result offer test cases that are inappropriate for adjudication in the inter-American system. Advocates should be aware that issues and arguments that will be successful before one will not necessarily be successful before the other.

A. *Adjudicatory Competence*

As described throughout this Article, the adjudicatory competence of the inter-American human rights organs is *case-based* in the classic sense, meaning that all judicially cognizable cases must fulfill the requirements not only of proper subject matter jurisdiction, but also of a "concrete case" or "justiciable controversy." The narrowness of the inter-American organs' contentious jurisdiction is further accentuated by a series of additional admissibility requirements. Thus, in addition to assuring itself that it enjoys *ratione materiae, ratione temporis, ratione loci,* and *ratione personae* competence over the alleged legal norms, facts, and parties to a case before taking cognizance of

374. Cavallaro & Schaffer, *supra* note 2, at 281.

it, the Commission or Court when exercising adjudicatory functions must also assure itself that the petitioners have exhausted domestic remedies, submitted their claim within a reasonable time, identified themselves, and chosen a single international forum for pursuit of their contentious legal claim.[375] Where these requirements cannot be demonstrated, the petition will be dismissed as beyond the limited adjudicatory competence of the inter-American human rights organs.

The Commission and Court guard their contentious function closely. Rarely will they use it to intrude into areas better attended by other actors in the democratic process, *including themselves* under their promotional or advisory jurisdictions. Accordingly, issues of a broader, more structural, or diffuse non-"case" nature that are not appropriate for the inter-American organs' case-based jurisdiction are regularly culled from contentious petitions by the Commission itself.[376] These issues are then reserved by the Commission for its promotional and advisory functions under article 41 of the American Convention,[377] including "the specific authority its Statute assigns to it to formulate recommendations to State governments concerning the adoption of progressive measures in favor of human rights."[378] Emphatically, the subject matter of the claims and issues removed from such complaints do not correspond to whether they look more civil-political or more economic-social-cultural. What matters, as always, is whether they correspond or fail to correspond to a justiciable case.

The right to health, for example—like the right to life, integrity, discrimination, or association—can give rise to justi-

375. These jurisdictional requisites are laid out broadly in articles 44-51 of the Convention, as well as in the Commission and Court's rules of procedure. For a full description of the procedure for submitting contentious complaints, see PROTECTING, *supra* note 7, at 75-110.

376. *See* cases cited *supra* note 185.

377. Article 41 lays out the functions and powers held by the Commission in the exercise of its mandate to "promote respect for and defense of human rights." These include, among its properly "promotional" functions, the powers "to develop an awareness of human rights among the peoples of America," "to make recommendations to the governments of the member states when it considers such action advisable, for the adoption of progressive measures in favor of human rights," "to prepare such studies or reports as it considers advisable," and "to provide those states with the advisory services they request." American Convention, *supra* note 23, art. 41.

378. *Operation Gatekeeper*, *supra* note 185, ¶ 76.

ciable controversies and non-justiciable controversies. A justiciable controversy might arise where a public hospital denied admission to persons with HIV/AIDS as a matter of policy and, based on that policy, a person with HIV/AIDS was denied treatment upon seeking medical care to which he or she would otherwise have been entitled. By contrast, a claim brought by that individual challenging the percentage of the national budget allocated to HIV/AIDS treatment and prevention would be found non-justiciable. The former, fulfilling the elements of a justiciable controversy, is fully appropriate for judicial resolution. The latter, incapable of fulfilling those elements, falls outside judicial competence; it is the proper domain of the political branches, prodded and urged by civil-society protest, lobbying campaigns, political mobilizations, and the oversight of international supervisory mechanisms and special mandates in the exercise of their promotional and advisory functions.

B. *Promotional Competence*

The narrow rule-bound nature of the individual petitions process contrasts with the broadness and flexibility of the *promotional* functions of the inter-American human rights organs. Indeed, the issues and complaints that *cannot* or *should not* be adjudicated supranationally in the region can always be brought instead to the attention of the inter-American organs under their promotional or advisory mandates. This is particularly true in relation to the Commission, widely seen as the "engine" of the system. That sobriquet is due not only to the fact that it receives and reviews all individual complaints submitted to the system—sending only a small number on to the Court—but, much more importantly, because its promotional mandate is so exceptionally broad and useful to social movement advocacy and mobilization in the region. While it is beyond the scope of this Article to deal with its full breadth, mention must be made of several of the most useful tools it offers to human rights advocates in the region as they advance, in the political-promotional sphere, the protection of economic, social, and cultural rights.

1. *Thematic Hearings*

Human rights advocates in the Americas can bring key concerns related to economic, social, and cultural rights, as with all rights, to the attention of the inter-American system by asking the Commission to grant a "general" or "thematic hearing" on a chosen subject.[379] The Commission meets in Washington, D.C. for two regular three-week sessions per year, with at least one week of each session reserved for public hearings. While approximately half of the hearings granted each session are "case-based" (referring to the various procedural stages of litigation), the other half are "thematic" or "general in nature."[380] That is, any human rights concern arising in the Americas of a general or diffuse nature can be brought to the Commission's attention. Where particular states are concerned, the Commission may invite state representatives to observe the hearing and to respond appropriately. The Commission itself may then opt to take certain "promotional" measures to highlight the abuses discussed, without exercising any sort of formal adjudicatory role. These may include the preparation of a special study or report on the matter, the issuing of a press release, a request for responsive information from the state, or the preparation of general recommendations directed to the OAS member state at issue or to member states more generally.[381]

Over the last two years social rights advocates have presented general hearings before the Commission on a variety of important issues, including justiciability standards for social rights claims, the right to adequate housing in North America, the right to food in distinct countries of the region, labor rights in Mexico and the southern cone, the slave trade, the condition of migrant laborers, the rights of indigenous peoples, the effects of extractive industries on indigenous peoples, the situation of HIV/AIDS and budgets in the region,

379. For the rules on requesting a general hearing, see IACHR Rules of Procedure, *supra* note 23, art. 64. Requests must generally be submitted no latter than two months in advance of the session.

380. The rules for both types of hearings are set out in *id.* arts. 59-68.

381. These responses parallel those the U.N. Committee on Economic, Social and Cultural Rights is able to take in response to information presented to it, either in "days of general discussion" or through the periodic reporting process.

contamination of human settlements from regional garbage dumps, and the human rights impacts of free trade agreements.[382] Each of these issues was approached from a framework perspective, often tied to exemplary case-studies, but not to a particular victim or concrete controversy. Information and general assessment was thus offered to the Commission for use in its general promotional and adjudicatory work in stimulating respect and observance of human rights in the region.

The "hearings" tool is extremely important for economic, social, and cultural rights advocacy, especially when used in conjunction with discrete litigation initiatives involving narrow, concretized examples of the larger abuses discussed in hearings. It allows advocates to raise regional awareness about issues of grave concern, stimulating media interest and organizing constituencies on the ground. It also serves as an opportunity to interact directly with the members and staff of the system's organs in an effort to raise their awareness about, and sensitivity to, concrete violations of economic, social, and cultural rights in the region. This, in turn, may help lay the ground-work for litigation in the social rights field, highlighting to the Commissioners the importance and gravity of the issues at stake. It may also be used to complement ongoing litigation that tackles one discrete aspect of the broader, more structural, or diffuse problem addressed in the thematic hearing. In this way, the promotional and adjudicatory functions of the Commission, though jurisdictionally distinct, are dynamically linked and should be used in concurrent and complimentary fashion by advocates in supporting efforts to protect economic, social, and cultural rights on the ground.

2. *Onsite Visits, Reports, Press Releases, Special Rapporteurs*

Also of extreme importance is the ability to request that Commissioners and Commission staff undertake onsite visits to areas where human rights abuse has occurred. In this way, they may speak directly to victims, appreciate firsthand the ac-

382. Minutes or records of these hearings are not formally published, but rather are considered "internal working documents of the Commission." IACHR Rules of Procedure, *supra* note 23, art. 68. Audio transcripts are made available to the parties upon request. *Id.* This author participated in or observed each of the above hearings.

tual conditions in which people live and interact, and thereby be in a better position to decide concrete cases involving economic, social, and cultural rights. In a related manner, these onsite visits often lead to the production of special country or thematic reports that highlight the key findings of the Commission in relation to particular types of abuse, including those within the field of economic, social, and cultural rights. The Commission often follows up on these visits by issuing press releases covering the nature and findings of their visits or, sometimes, by issuing a special country or thematic report. These are often critical tools in local efforts to organize and mobilize around particular human rights abuses.

In a related manner, each of the seven members of the Commission serves as Country and Thematic Rapporteurs. Over the last several years the Commission has had thematic rapporteurships in some or all of the following areas: women's rights, children, indigenous peoples, persons deprived of liberty, refugees, migrant workers and their families, freedom of expression, and, most recently, racial discrimination and the rights of persons of African descent. A new rapporteurship on economic, social, and cultural rights is under consideration at this writing. Each of these rapporteurships can be used strategically—through onsite visits, the preparation of special reports or studies, or the issuance of general recommendations or observations—to focus national and international attention on distinct contours of human rights abuse at the local level and, particularly, on the special measures required to address such abuses as they effect groups in particularly vulnerable situations.

3. *Periodic State Reporting & Shadow Reports*

Both the American Convention and the San Salvador Protocol, moreover, envision periodic state reporting mechanisms on the progressive measures taken and setbacks encountered in the realization of economic, social, and cultural rights.[383] These mechanisms, once effectively implemented, can play an important role in further refining the system's understanding of how and why economic, social, and cultural rights are violated. That is, periodic reporting processes serve critical roles

383. *See* American Convention, *supra* note 23, art. 42; San Salvador Protocol, *supra* note 77, art. 19.1.

in drawing the attention of governments, civil society, and international supervisory bodies to the ways in which rights are *in fact* achieved or not achieved on the ground. By monitoring *indicators* of rights achievement (e.g., infant mortality rates, access to potable water, ratios of HIV-AIDS treatment to need, etc.), reporting processes can alert governments and civil society to problem areas—for example, where indicators are "regressing" or stagnant—as well as to areas where progress is being made, and hence where "best practices" may be identified. Through consultation between government and civil society, *benchmarks* can then be set for the achievement over the population, within distinct time-frames, of certain levels of rights enjoyment. Although state failure to "progress" in indicators or to achieve benchmarks at agreed intervals (as breaches of quadrant 3 and 4 duties) cannot *in themselves* constitute a justiciable basis for litigation,[384] such failure is often relevant in establishing the *context* in which discrete violations of a justiciable nature do take place. In this way, state periodic reporting procedures promise useful synergistic effects in the individual petitions process, even while serving far broader purposes of a political-promotional nature.

Unfortunately, both mechanisms have laid effectively dormant since 1979 and 1999 when the two instruments entered into effect. In 2005, the OAS General Assembly issued Resolution 2074 (XXXV-O/05) calling for the establishment of a Working Group under the San Salvador Protocol to monitor states progressive realization of the economic, social, and cultural rights enshrined therein. Although there are many troublesome aspects to the envisioned Working Group—such as its functioning within the Inter-American Commission on Integral Development, rather than the Inter-American Commission on Human Rights—advocates will have to work tirelessly to turn this procedure into one that is useful for both monitoring and adjudicatory work in the field of economic, social, and cultural rights.

384. Litigant attempts to advance such arguments—pressing for the adjudicability of social rights in their collective and result-oriented dimensions—currently constitutes, in this author's view, one of the most formidable obstacles to regular and effective judicial enforcement of economic, social, and cultural rights.

4. *Advisory Opinions*

Finally, advocates may seek advisory opinions from the Commission or Court as to the compatibility with treaty-based human rights commitments of broad policies, laws, or practices that affect the enjoyment of economic, social, and cultural rights in OAS member states.[385] The Court, in particular, has broad powers under its advisory jurisdiction vis-à-vis social rights: It is empowered to interpret *any* treaty dealing with the protection of human rights that is applicable to the American states, including assessing the compatibility of domestic legislation or trade agreements therewith.[386] Authoritative guidance may thus be requested from the Court on the regional impact of specific norms of the ICESCR, the San Salvador Protocol, the full spectrum of ILO Conventions, CEDAW, and many others. Indeed, the Court has stated that it's advisory jurisdiction is "more extensive than that enjoyed by any international tribunal in existence today" and that, given this, the Court has "an important role to play in the promotion and protection of economic, social and cultural rights."[387] The Commission also has important advisory powers,[388] although it

385. Advocates may not request an advisory opinion directly. With respect to the Court's advisory jurisdiction, only OAS member states, the Commission, or other organs of the OAS (within their spheres of competence) may do so. Congruently, only OAS member states may request the advisory services of the Commission. Advocates may, however, actively lobby or petition these states and OAS organs to submit advisory requests that seek to clarify key human rights concerns in the region. *See* American Convention, *supra* note 23, art. 62.2.

386. *See id.* art. 64.1. As the Court has recognized, the advisory jurisdiction conferred upon the Court by Convention article 64 "can be exercised, in general, with regard to any provision dealing with the protection of human rights set forth in any international treaty applicable to the American States, regardless of whether it be bilateral or multilateral, whatever by the principal purpose of such a treaty, and whether or not non-Member States of the Inter-American system are or have the right to become parties thereto." "Other Treaties" Subject to the Advisory Jurisdiction of the Court (Art. 64 of the American Convention on Human Rights), Advisory Opinion, Inter-Am. Ct. H.R. (ser. A) No. 1, OC-1/82, ¶ 52 (1982).

387. Organization of American States, *Annual Report of the Inter-American Court of Human Rights 1986*, at 44-45, ¶ 14, OEA/Ser.L/III.15 Doc. 13 (Aug. 29, 1986).

388. *See* American Convention, *supra* note 23, art. 41.e (empowering the Commission "to respond . . . to inquiries made by the member states on

has tended not to exercise them on a formal basis, preferring to direct requests for advisory opinions to the Court.

While advisory opinions are not directly binding on any particular state, they provide useful guidance on how human rights principles must be incorporated into distinct state policies as a function of states' obligations under international human rights law, quadrants 1-4 inclusive. This authoritative guidance may be invoked, in turn, in both promotional and adjudicatory work at the domestic and international levels in support of economic, social, and cultural rights.

VI. Practical Implications of the Cavallaro-Schaffer Less-as-More Thesis

This Article has concentrated to this point on the conceptual and jurisdictional difficulties in the Cavallaro-Schaffer less-as-more thesis. Nevertheless, it is the practical implications of the thesis for effective on-the-ground protection of economic, social, and cultural rights that should most concern regional human rights advocates. Three important dangers must be highlighted in this respect.[389] The first is the significant *underbreadth* of coverage in human rights protection that the "elements" proposal entails, especially in its narrowest version. That is, exclusive reliance on the classically-understood civil-political "elements" of social rights abuse means, in practice, that the focus of litigation initiatives—and, consequently, of the remedial response—frequently targets areas tangential to the core abuse. As a result, the social rights violation *itself* often remains unvindicated. This has important consequences not only for the individual victims of discrete social rights violations, who are denied a fully effective remedy in the context of their case, but also for similarly-situated non-litigants who are likewise denied the protective benefit of remedial measures tailored to guarantee against future repetition of case-specific but often more widely experienced abuses.

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matters related to human rights and, within the limits of its possibilities, to provide those states with the advisory services they request").

389. Other dangers arise that will not specifically be covered here. For more on the practical implications of associating the quadrant 4 duty of "progressive realization" exclusively with economic, social and cultural rights, see *A Pyrrhic Victory*, *supra* note 17.

Second, given the unique specificity of rights in addressing from distinct dimensions all aspects of human dignity, heavy reliance on expansive interpretations of civil-political rights norms to redress violations of economic, social, and cultural rights risks real and meaningful *norm dilution* with respect to the small category of rights invoked exclusively in litigation. Thus, the "integration" or "elements II" approach, when used exclusively, can lead not only to insufficient protections of the contours of social rights abuse—which rarely can be interrogated fully through the broader generic "umbrella" protections—but also to a weakening of classic civil-political rights, which can lose their specificity and grow at a rate that exceeds local level expectations and commonly-held normative understandings. This, in turn, can lead to a loss of legitimacy in the work of the supervisory body, whose decisions may be viewed as "visionary" and not adhering to consensus-based understandings of the scope and content of rights, even as those understandings progressively evolve.[390]

The third relates to litigant reliance on a stylized understanding of civil-political rights as immediately enforceable in their *result-based* dimensions. Such a view reinforces claims of *absoluteness* in human rights protection that ignore the legitimate rights of others, the reasonable limitations facing the state, and the general welfare in a democratic society. It is this absolutist approach to rights—not the nature of any particular right—that leads to the much-maligned "queue-jumping" concerns that Cavallaro and Schaffer reference, as well as to other counter-majoritarian critiques of judicial intervention in human rights matters. Effective protection of economic, social and cultural rights in the region requires that advocates avoid all three of these litigation hazards.

390. The Inter-American Court of Human Rights currently walks this line closely. The problem is accentuated by the regular use of "separate votes" by several of the Court's judges, often employed as a vehicle to pontificate abstractly on personal views of international law and visionary paths for the future. These personal reflections may at times be confused with inter-American law or recited by advocates as semi-authority for increasingly broad, often ungrounded interpretations. *See, e.g.*, Separate Opinion, *supra* note 172.

A. *Framing Violations Exclusively in their "Civil-Political Elements": Obscuring Core Social Rights Abuse and Diverting Remedial Attention*

This Article firmly supports "mixed" approaches to social rights litigation.[391] That is, within the constraints of a concrete case, advocates should not limit themselves artificially to certain "dimensions" or "elements" of rights—a strategy that in fact undermines, rather than respects, indivisibility doctrine. Rather, once a concrete situation of abuse is identified, advocates should address frontally each of the human rights factually implicated therein. Only in this way may proper attention be drawn to the complex and intersecting ways in which abuse is generated in discrete factual contexts and circumstances. This, in turn, will allow authoritative judicial assessments to be made of the unlawfulness of the contours of abuse, and hence the issuance of merits-based remedies that address those contours directly, and around which broader advocacy initiatives may be organized.

The elements approach advocated by Cavallaro and Schaffer urges advocates to neglect these important contours, focusing instead on the civil-political "elements" of social rights abuse: the death in a landslide, the killing of labor or peasant leaders who struggle for land reform. While this approach is characterized as being "cautious" and "responsible," it in fact often distorts the primary issues at play in a given concrete controversy, diverting critical organizing, media, and legal attention away from solutions for the social rights violations themselves, toward remedies narrowly tailored to address the classic civil-political issues. It also reinforces the view that the killings or deaths are "human rights violations" while the land abuses, housing evictions, school dismissals and lack of reasonable access to healthcare are mere "context" or "political issues."[392] To the victims of social rights abuse left out of corre-

391. *See also* PROTECTING, *supra* note 7, at 117-21, 193-357 (advocating mixed approach to social rights litigation).

392. Indeed, Cavallaro-Schaffer elements approach I is predicated on the notion that economic, social and cultural rights abuses should be viewed as the "*underlying factors* giving rise to violations of civil or political rights," Cavallaro & Schaffer, *supra* note 2, at 272 (emphasis added), and otherwise reserved to non-litigation political strategies.

sponding remedial solutions, the strategy can be anything but responsible.

This difficulty is demonstrated in the "test cases" Cavallaro and Schaffer offer, most of which require a person to have *died* before any redress may be pursued for violation of the rights to *housing*, to *health*, or to *food*—rights which have far broader and more nuanced contours and dimensions than "life" in its narrowest physiological sense. Such a focus narrows the adjudicability of such rights exclusively to their "emergency" right-to-life aspects, necessarily distorting the types of remedies that follow and, in fact, making the cases harder to litigate given the difficulties in proving causation for death on the basis of state omissions in the provision of goods and services.[393]

Unfortunately, this underbreadth problem is manifest in far too many cases adjudicated by the inter-American human rights organs. The following two case examples illustrate the practical underbreadth consequences of the elements I approach to social rights litigation. They involve, first, the right to housing and associated land resources in Brazil and, second, the right to education in the Dominican Republic. In each, a "direct" approach, combined with other approaches, would in fact have been the more advisable strategy for keeping state, media, and civil society attention effectively focused on the core underlying social rights abuses and, consequently, for ensuring on-the-ground reform.

1. *Corumbiara v. Brazil*

Corumbiara v. Brazil[394] involved a state-sponsored forced eviction of five hundred impoverished families of landless workers from an unproductive, privately-owned farm in Northern Brazil. The families, without access to employment, credit, or land, had illegally occupied the farm in response to the massive land shortage in Brazil, a problem resulting from the country's highly concentrated land ownership pattern—one of

393. *See* discussion *supra* Part IV.A.2. The Commission, influenced by the Court's "reflections" in the *Five Pensioners Case* has, in one recent admissibility report, taken a halting step down this dangerous path. *See* Luis Rolando Cuscul Pivaral and Others Affected by HIV/AIDS v. Guatemala, Petition 642/05, Inter-Am. C.H.R., Report No. 32/05, OEA/Ser.L/V/II.124, doc. 5 ¶¶ 42-44 (2006).

394. Corumbiara v. Brazil, Case 11.556, Inter-Am. C.H.R., Report No. 77/98, OEA/Ser.L/V/II.95 Doc. 7 rev., at 62 (1998).

the most unequal in the world—and extreme slowness and constant delays in land reform. According to the evictees, ownership of a small parcel of land represented one of their few hopes for surviving in dignity, far from the poverty of urban areas and from the abusive exploitation of cheap labor by the large landowners in rural areas.[395]

Brazilian authorities responded by sending in heavily-armed military police to assist private security guards paid for by local landowners in forcefully ejecting the squatters, pursuant to a local judge-issued eviction order. In a surprise night ambush, faces painted black, they violently evicted the families using brutal and excessive force. At least nine squatters were killed, most shot in the back or at close range, and over one hundred were wounded as a result of the violent confrontation. The entire settlement, including all of the evictees' belongings, was then destroyed and set ablaze. Although they had nowhere else to go, the five hundred impoverished families were forced to abandon the otherwise unused land on which they had settled. No plan was in place to assist them in finding temporary housing or land resources on which they could meet their immediate subsistence needs. To the contrary, in the view of the Brazilian state, the private property rights of the large landowners took complete precedence over the rights to housing, to food, and to subsistence of the five hundred landless families. No balancing of interests was undertaken or required.

The case was presented to the Inter-American Commission on Human Rights. Nonetheless, in a litigation strategy closely hewing to the Cavallaro-Schaffer elements I approach, the petitioners chose to focus narrowly only on the excessive force used by police and, within that narrow spotlight, only to the extent it caused unjustified *physical injury* or *death* to a small number of the evictees. That is, they did not challenge the forced eviction itself, which, on multiple levels, violated the rights of all of the evictees to adequate housing and related land resources under both Brazilian and international law.[396] Neither did they challenge the victims' right to have

395. *Id.* ¶ 11.

396. *See, e.g.*, General Comment No. 4, *The Right to Adequate Housing*, U.N. Comm. on Econ., Soc. & Cultural Rts., 6th Sess., Annex III, at 114, U.N. Doc. E/1992/23 (1991); General Comment No. 7, *supra* note 254 (forced evic-

access to a dignified life through access to a small parcel of land on which they could survive. Violation of these rights stood, uncontestedly, at the core of the underlying controversy, a controversy reproduced on a daily basis in Northern Brazil.[397]

Rather, the petitioners focused, narrowly and exclusively, on the excessive physical force used in the eviction—force that had led to the death of ten, the torture of several, and the physical wounding of roughly four percent of the evictees. In the view of petitioners, these were the "victims" of the forced eviction—their right to life and right to integrity, in the narrowest sense of being killed and tortured, becoming the focus of international litigation. In this equation, the other ninety-six percent of the evictees—those who could not show physical wounds, but whose internationally-protected right to housing was violated through both the illegally-undertaken eviction itself and the arbitrary and illegal destruction and deprivation of their belongings, their homes, their security, and their dignity—fell out of the picture. They were not "victims" in the framework of the litigation.

As a result, their Convention-guaranteed right to adequate housing and right to live a dignified life,[398] protected under articles 26, 11, and 4, were not addressed on the merits of the case. Had authoritative case-specific findings of fact and law been issued on those rights, the inter-American system

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tions). Brazilian legislation specifically prohibits evictions from taking place at night—a prohibition the Commission found irrelevant to its limited inquiry. *See* discussion *infra* note 402.

397. Indeed, the case was exemplary of a systematic pattern of abuse involving land conflicts in Northern Brazil. According to reports, in 1995 (the year of the Corumbiara forced eviction) and 1996, 1.3 million people were involved in 1,304 separate conflicts over land, mining rights and labor issues in Brazil's vast and lawless interior. Of the 750 conflicts in the countryside in 1996, 653 involved disputes over land ownership. *See* Amnesty International, *Brazil: Corumbiara and Eldorado de Carajás: Rural Violence, Police Brutality and Impunity* (Jan. 19, 1998), *available at* http://web.amnesty.org/library/Index/ENGAMR190011998?open&of=ENG-BRA.

398. The Court has recognized that article 4 of the Convention must be interpreted expansively as including not only a right to not be arbitrarily deprived of life, but also to the conditions necessary for a dignified life. *See, e.g., Panchito López Case, supra* note 138; *Yakye Axa Case, supra* note 136. For a discussion of the development of the concept of a "dignified life" or "life project" under article 4, see Melish, *The Inter-American Court of Human Rights: Beyond Progressivity, in* SOCIAL RIGHTS JURISPRUDENCE, *supra* note 1.

could have been leveraged, through a case-based controversy, to address a discrete aspect of state policy with respect to a social rights problem of massive proportions in Brazil. That is, the Commission could have directly addressed the substantive and procedural limits that regional human rights law places on the circumstances and conditions under which housing and land evictions, particularly of landless families with no access to alternative accommodation, may lawfully take place in the Americas. While no judicial order can solve Brazil's complex and imposing land problems, a supranational order finding that Brazil had exceeded those limits in the context of this case and recommending, as part of a targeted remedial order, that Brazil amend its legislation to ensure that procedures through which evictions are carried out respect not only the rights of affected individuals to life and integrity in their narrowest of senses, but also their rights to adequate housing and to a dignified life more generally, could have functioned to galvanize the national debate in Brazil on "the land problem." Specifically, it could have focused that debate on when, and subject to what procedural safeguards, private property rights must cede to the rights of others and to the larger social interest.[399] While Brazil would necessarily have to determine the details of that policy for itself, a supranational order crafted in the above terms could have stimulated a mediated process of dialogue—between local and federal authorities in Brazil, the case-specific victims, civil society more generally, and the inter-American human rights organs—on how to effectively and concretely address these problems in accordance with internationally-accepted human rights principles. The direct participation of the Commission or Court in that dialogue, through their powers in supervising compliance with their case-based recommendations and orders, would function to ensure that human rights principles regarding the right to adequate housing were placed at the center of the national debate and larger political struggle.

399. *See* American Convention, *supra* note 23, art. 21.1 ("Everyone has the right to the use and enjoyment of his property. *The law may subordinate such use and enjoyment to the interest of society.*"), art. 32.2 ("The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.").

The lost opportunity of the *Corumbiara* litigation for generating framework principles and a formalized process for stimulating discrete but meaningful forward-looking reform in Brazil's land and eviction policies is demonstrated both by the narrowness of the Commission's final recommendations and by looking at how other adjudicatory bodies, adopting a "direct" approach, have dealt with similar case-based controversies in congruent factual settings.[400] In these latter settings, the right to adequate housing has been placed at the center of litigation initiatives, rather than being subordinated to the narrowly-construed civil-political "elements" of the abusive situation, as in *Corumbiara.*

Indeed, following the extreme restrictiveness of the *Corumbiara* petitioners' claims, the Commission's conclusions of law and formal recommendations were congruently restricted. The petitioners, for instance, recognized as "victims" only the decedent and physically wounded evictees, relegating to "context" the thousands of others whose homes and possessions were destroyed by the state's arbitrary conduct in carrying out the unlawful eviction. Consequently, the Commission ordered adequate reparation exclusively for them (or their next of kin) and exclusively in terms of the breach of their physiological lives and bodily integrity.[401] Moreover, constrained to determining state responsibility for the *unjustified* killings and physical abuse, the Commission's attention was diverted away from the state's direct conduct in *authorizing and undertaking the evictions* toward the state's omission in failing to properly *investigate the individual killings.* These post-abuse investigatory deficiencies became the principal basis on which state responsibility came to be grounded given that, in the Commission's view, the use of force by the state in carrying out the eviction could not be deemed "unjustified" while the evictees were actively resisting. The result was an excessively narrow set of remedial recommendations, largely limited to the transfer of formal competence over eviction-related investigations from the military to civilian police forces. While that

400. *See* South Africa v. Irene Grootboom, 2000 (1) SA 46 (CC) at 11 (S. Afr.).

401. Corumbiara v. Brazil, *supra* note 394, ¶ 307(2) ("Make adequate reparation to the victims specified in this report or to their next of kin, as appropriate, for the human rights violations determined in this report.").

narrow issue was undoubtedly important, it was tangential to the core housing and land rights issues suffered by the five hundred evicted families: *first*, the lack of adequate legislative and other procedural protections to ensure that evictions are carried out only when strictly necessary and only in strict accordance with the procedures established under national law and consistent with international human rights norms;[402] *second*, the lack of a reasonable plan and effective procedures for accessing short-term land and housing assistance for the landless.[403]

That these core housing-rights issues could have been addressed through the *Corumbiara* litigation is illustrated by comparison with similar cases, such as *South Africa v. Grootboom.*[404] That case, decided under the "direct" approach by the Constitutional Court of South Africa, was based on specific and contextual facts virtually identical to those in *Corumbiara.* As in *Corumbiara*, it involved a land invasion of vacant, privately-owned property by a large group of impoverished landless families who, given the extent of the land and housing crisis in South Africa, had no realistic prospect of moving out of their intolerable living conditions in their lifetimes.[405] As in *Corumbiara*, they too faced a forcible eviction "done prematurely and inhumanely: reminiscent of apartheid-style evictions," in which their "homes were bulldozed and burnt and their possessions destroyed."[406]

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402. Focused on the "massacre," the Commission declined to rule on the illegality of the eviction procedure itself. Indeed, the Commission found that the fact that the eviction was initiated at dawn, in violation of Brazilian law, was not relevant to its determination of whether "the use of force to enforce judicial order of eviction was unnecessary or disproportionate." *Id.* ¶ 179.

403. The Commission and Court have increasingly addressed through their case-based competence the lack of effective procedures in the region for the delimitation, demarcation, and titling of the ancestral land of indigenous communities. *See, e.g., Awas Tingni Case, supra* note 51; *Yakye Axa Case, supra* note 136; *Maya Indigenous Communities, supra* note 113. This jurisprudence could have been built upon to extend the Court's case-based precedents in this area to non-indigenous groups for whom access to land is a predicate for meeting subsistence needs.

404. *See* South Africa v. Irene Grootboom, *supra* note 399.

405. *Id.* ¶¶ 3-10.

406. *Id.* ¶ 10. The Constitutional Court of South Africa described the *Grootboom* case in terms that could equally have been used to describe *Corumbiara*:

Yet, unlike in *Corumbiara*, the Court did not focus narrowly and exclusively on the brutal and excessive force used in the "apartheid-style eviction." Rather, it addressed directly the core issue at stake in the case: *the right to adequate housing of the evictees.* Doing so, it issued one of the most respected decisions rendered internationally on the obligations states bear to the poorest of the landless poor who have no access to adequate housing, are living in intolerable conditions, and, because of those intolerable living conditions, are impelled to resort to land invasions.

Corumbiara and *Grootboom* thus stand in stark contrast. The former, litigated under the limited elements I approach, bypassed entirely the land and housing issues faced by the squatters in its findings of fact and law and, hence, in its remedial order. The only specific policy change it recommended was a transfer of *competence over investigations* from one police force to another. By contrast, the latter, litigated under a "direct" approach, addressed the housing and land issues head-on. The remedial order required the state to amend its national housing policy so that it catered not only to medium- and long-term land and housing needs, but also ensured short-term "relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations."[407] Though the specific details of that policy would be left to the state to craft in the first instance, prompted and prodded by organized civil society, the *Grootboom* court sought to ensure that the state addressed not only the inhumane and excessive force used so frequently in evictions, but also, more fundamentally, the preconditions—the intolerable living conditions and lack of available land—that impel people to resort to land invasions in the first place.

Clearly, while people lack access to the means necessary for their survival there will be no end to land invasions in Bra-

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> The group of people with whom we are concerned in these proceedings lived in appalling conditions, decided to move out and illegally occupied someone else's land. They were evicted and left homeless. The root cause of their problems is the intolerable conditions under which they were living while waiting in the queue for their turn to be allocated low-cost housing. They are the people whose constitutional rights have to be determined in this case.

Id. ¶ 3.

407. *Id.* ¶ 99(2).

zil, South Africa, or anywhere else. Transferring competence over investigations and taking measures to ensure that "excessive" physical force is not used (addressed exclusively in *Corumbiara*) will not remedy the underlying human rights problem: *lack of effective procedures* for accessing adequate housing and land, necessary for basic subsistence and human dignity. The South African Constitutional Court, recognizing this reality, has since reaffirmed the principle that, subject to recognized exceptions, governments have the obligation to reasonably ensure that replacement housing or alternative land is available for evictees to settle, whether temporarily or permanently, before eviction orders are carried out.[408] Meanwhile, states cannot foist the burden of accommodating the landless entirely on private property-holders.[409] Rather, if alternative accommodation cannot reasonably be found for squatters unlawfully occupying private lands, the state must identify other ways to satisfy its parallel duties to the landed and landless, such as by compensating private landowners for the temporary "taking" of their property while alternative accommodation is being located, or by formally expropriating for public use the private property at issue, respecting legal safeguards for the property owner.[410] Based on these important rulings, local courts have been declining in many instances to issue eviction orders against homeless or landless persons on vacant lands until the state complies with its obligations to take appropriate measures to ensure the rights of potential evictees.[411]

Faced with a discrete controversy between the competing rights of the landed and the landless, the *Grootboom* court thus engaged in a balancing test, establishing an equitable and transparent legal principle that government officials must take into account in setting land, housing, and zoning policies—and thus around which the landed and landless can gain legal certainty, broader social movements may organize, and future litigation may depart. By contrast, the Commission in *Corumbiara*, given the narrowness of petitioners' elements I ar-

408. *See* President of the Republic of South Africa & Ors. v. Modderklip Boerdery (Pty) Ltd. 2005 (5) SA 3 (CC) (S. Afr.).

409. *Id.* ¶ 45 ("It is unreasonable for a private entity such as Modderklip to be forced to bear the burden which should be borne by the state of providing the occupiers with accommodation.").

410. *Id.* ¶ 51; see also discussion of appropriate relief, *id.* ¶¶ 53-65.

411. *See, e.g.*, City of Cape Town v. Rudolph, 2005 (5) SA 39 (C) (S. Afr.).

guments, did not address the basic conflict between competing rights-holders. The implication drawn—and that will not have been lost upon stakeholders—is that the private property rights of large landowners prevail over the housing and subsistence rights of the landless.

2. Yean and Bosico Girls v. Dominican Republic

Yean and Bosico Girls v. Dominican Republic, decided by the Inter-American Court in 2005,[412] provides another example of how the narrow elements approach can lead to lost opportunities for effective social rights protection. A right-to-education case at heart, it involved the arbitrary dismissal from public school of a young, disadvantaged Dominican girl for failure to present a birth certificate, a document denied her on account of her Haitian ancestry. Consequently, the thirteen-year old girl, arbitrarily prevented from attending middle school, was left with no educational recourse other than to attend night literacy classes for adults. State responsibility for violation of her right to education was incontrovertible on these facts and constituted the core issue in the case, especially from the perspective of the keenly-motivated girl who viewed schooling as the key to her future and the primary means of overcoming her family's impoverishment.

Nonetheless, despite the plain protection of the right to education under article 26 of the American Convention,[413] the Court bypassed the extensive briefing and testimonial evidence presented to it regarding the state's direct breach, through its arbitrary conduct, of that right. Rather, in line with the elements I approach, it focused narrowly only on the

412. *See Yean and Bosico Girls Case*, *supra* note 109.

413. Article 26 protects the rights derived from the economic, social, and cultural standards set forth in the OAS Charter, among which the "right to education" is expressly included. *See* OAS Charter, *supra* note 124, art. 49 ("The Member States will exert the greatest efforts, in accordance with their constitutional processes, to ensure the effective exercise of the *right to education*, on the following bases: a) Elementary education, compulsory for children of school age, shall also be offered to all others who can benefit from it. When provided by the State it shall be free of charge; b) Middle-level education . . . c) Higher education . . . .") (emphasis added). The right to education is also guaranteed in express terms under the Constitution of the Dominican Republic for all persons within the state's jurisdiction, as it is in virtually all political constitutions in the hemisphere.

civil-political aspects of the case associated with the denial of the birth certificate: the rights to nationality, to equal protection, to a name, and to legal personality.[414]

The tragedy of the case is that without a clear finding on the merits of state responsibility for breach of the girl's right to education, that critical violation remained unvindicated and unremedied on a practical level. That is, while the Court's final and binding order required the state to adopt all necessary measures to reform its procedures for the *granting of birth certificates*, it was silent on the necessary reforms to the regulatory norms governing *public school registration*, i.e., the deficient regulatory framework that had initially authorized and permitted the direct violation by state agents of the girl's protected right to education. Thus, no reparation order was issued either to repair the personal harm caused by the young girl's arbitrary school dismissal or to ensure that similar violations do not recur in the future to other young people on the same grounds. That is, there was no order for appropriate sanctions to be taken against the school officials responsible for authorizing the arbitrary dismissal, for state recognition through a public act that the girl's right to education had been violated, or for the modification of educational policy to prohibit the use of arbitrary grounds—including possession of a birth certificate where alternative forms of identification are available—to justify school dismissals. Again, exclusive reliance on a narrow elements approach neither aided the cause of social rights nor led to "more" implementation on the ground for those rights. To the contrary, it ignored the social rights aspect entirely, providing no basis or point of leverage upon which local social movements could continue to build and advocate domestically to ensure against further arbitrary abuses of the right to education for all persons within the Dominican Republic.[415]

414. The Court considered her denial of education exclusively at the stage of reparations for purposes of fixing appropriate pecuniary compensation. *See Yean and Bosico Girls Case, supra* note 109, ¶ 244.

415. Given the acute political tension associated with Haitian immigration in the Dominican Republic, a focus on the right to education may in fact have assisted implementation of the Court's order by serving to diffuse local volatility around "nationality" issues, acting as a focal point around which broader constituencies could have organized from a less-politicized vantage.

B. *Expansive Interpretation of Classic Civil-Political Rights: Norm-Dilution and Underbreadth*

A second practical danger arising from the Cavallaro-Schaffer thesis relates to the second variant of their elements approach. As discussed in Part II, Cavallaro and Schaffer bundle under their "elements" terminology several distinct strategies, each carrying significantly different implications for human rights enforcement. While the first, exemplified by *Corumbiara* and *Yean*, envisions culling from a complex situation of human rights abuse only those abuses of a classic civil-political nature and litigating them through *narrow interpretations* of civil-political rights norms, the second strategy envisions litigating the economic-social-cultural abuses directly, but through *expansive interpretations* of civil-political rights. Given limits to the elasticity of such norms, this latter strategy carries its own underbreadth problems, while also raising distinct concerns about norm dilution with respect to civil and political rights. These latter rights, under the elements model, are compelled to absorb the full impact of economic, social, and cultural rights litigation in the Americas.

In light of the indivisible and interdependent nature of rights, this latter approach is unproblematic, and indeed entirely proper, in the ample spectrum of cases in which classic social rights abuses correspond directly to breaches of rights that have traditionally been interpreted as "civil and political"—like property (for land claims), association (for union freedoms), involuntary servitude (for labor exploitation), inviolability of the home (for evictions or other housing infringements), and neutral "process" norms (like due process, judicial protection, and non-discrimination).[416] In all of these cases, "expansive" interpretations are not necessary; a mere textual approach is sufficient, linked with a consensus-based evolutionary principle.[417]

Problems arise, however, in the equally ample set of cases in which classic civil-political rights cannot easily or naturally be extended to embrace all aspects of core social rights abuse as experienced by victims. In those circumstances, either the

416. Such an approach is particularly indispensable in those jurisdictions that, unlike the inter-American system, do not autonomously protect economic, social and cultural rights.

417. *See supra* note 289 and accompanying text.

relevant social rights abuse must be ignored (leading to underbreadth problems) or the civil-political rights privileged in litigation must be stretched beyond consensus-based understandings of their scope and content. This is particularly problematic in attempts to litigate concrete violations involving adequacy, availability, accessibility, and quality as core components of the rights to health, education, and housing. These contours, as experienced by victims in discrete contexts, often cannot be captured by the broadness of "life," "integrity," "property," or "participation"—at least not without norm dilution or underbreadth of coverage. The right to health, for example, has distinct dimensions—including physical accessibility, cultural adequacy, and quality goods and services—that often cannot sufficiently be targeted or addressed under a broad undifferentiating "right to life" analysis. The same is true of the right to culture for indigenous populations. That right goes beyond ties to property; it must be dealt with on its own terms, as both an autonomous and transversal right. The integration or elements II approach is thus insufficient as an exclusive strategy for addressing violations of social rights in the Americas.

The problem of limited elasticity of civil-political-rights norms also raises the distinct specter of norm dilution, as these rights are interpreted in increasingly expansive ways to cover core elements of social rights abuse. The consequences are particularly dire for the right to life, a norm the Court already interprets in its most expansive sense as a right to "*a dignified life*" or to "*a life project*," understood as "the measures required for life to develop under decent conditions."[418] These concepts are of potentially illimitable scope, capable of subsuming into their protective embrace virtually all nationally and internationally recognized human rights. Article 4 of the Convention has already, in fact, been interpreted by the Court to encompass, in some way, virtually all economic, social, and cultural rights, including decent health care, education, access to

418. Juridical Condition and Human Rights of the Child, Advisory Opinion, Inter-Am. Ct. H.R. (ser. A) No. 17, OC-17/02, ¶ 80 (2002). For an analysis of the development and status up to early 2006 of this jurisprudence, see Melish, *Inter-American Court of Human Rights*, *in* SOCIAL RIGHTS JURISPRUDENCE, *supra* note 1.

potable water, and adequate food.[419] Caution must be exercised in going too far with these expansive interpretations. That is, care must be taken to ensure that rights and obligations in the system have predictable consequences for states and that the right to life does not become a free-for-all provision, implicated by default in all human rights abuses that affect a person's "dignity" or "life prospects." The Court has to date enunciated no limiting principle for article 4's normative expanse.[420] Going too far will lead to decisions that appear arbitrary, "visionary," and lacking a "basis in law," precisely the sorts of cases that lead to classic legitimacy problems.[421]

By contrast, a properly implemented "direct" approach would advance by hewing closely to the normative (contour-specific, contextually-based) development that has already been achieved at the domestic and regional levels with respect to the rights to adequate health, education, housing, and so-

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419. *See, e.g., Panchito López Case, supra* note 138, ¶¶ 173-74 (focusing on state's obligations to guarantee health and education under article 4); *Yakye Axa Case, supra* note 136, ¶ 78 (highlighting state's obligation under article 4 to ensure "*right to adequate food, to access to clean water and to health attention,*" particularly with regard to children and the elderly) (emphasis added).

420. The jurisprudential dangers attendant to the Court's "life project" approach have not yet fully materialized in the Court's work. This is due to the limited number and complex nature of the social rights cases the Court has considered to date. Indeed, from *Panchito López* (children's detention facility), to *Plan de Sánchez* (annihilation of indigenous community), to *Yakye Axsa* (intolerable living conditions of displaced indigenous community), the violation of rights in these cases have been so sweeping, diffuse and all-encompassing as to, in many ways, transcend individual treatment of specific rights. In these exceptional circumstances, in which the totality of conditions necessary for a dignified existence is lacking and unentangling specific violations largely impossible, the Court's "life project" jurisprudence constitutes, in many ways, the most appropriate and effective jurisprudential response. In these cases the heft of the Court's response must be directed to the remedial order. *See, e.g., Panchito López, supra* note 138; *Plan de Sánchez, supra* note 173, *Yakye Axsa, supra* note 136. Most social rights cases, however, do not fit into this exceptional rubric. As such, the Court's "life project" jurisprudence, as a methodology, is inadequate for dealing with the vast bulk of run-of-the-mill, but nuanced, economic, social, and cultural rights claims that arise in the American continent on a daily basis. These claims need to be addressed for what they are: claims for protection against arbitrary or unreasonable conduct, imputable to the state, that concretely harms persons' enjoyment of their individually-held rights to health, education, housing, employment, or culture.

421. *See supra* notes 290, 390 & accompanying text.

cial security. Such developments must be *informed* and *supplemented* by internationally-articulated normative developments, while not being *dominated* or *replaced* by them.[422] In this way, supranational litigation of economic, social, and cultural rights may properly attend to basic separation-of-powers, subsidiarity, and other legitimacy considerations, while simultaneously ensuring its effectiveness by preserving the distinct identity and dimensionality of each internationally-recognized human right. In this way, supranational litigation may effectively address the vital contours of human rights abuse as it is personally experienced, in discrete and diverse factual contexts, by victims on the ground.

C. *Absolute Claims: Queue-Jumping and the Rights of Others*

A third practical danger in the Cavallaro-Schaffer approach to social rights litigation arises from the consequences of putting into effect the understanding of civil and political rights as "immediately enforceable" in adjudicatory contexts in their result-based dimensions. That is, like many advocates of

422. Cavallaro and Schaffer make the mistake of advocating the linking of inter-American jurisprudence to "trends in international . . . law" rather than to what is happening in terms of norm development at the domestic level. *See supra* note 289. The European Court of Human Rights avoids this error through use of its "margin of appreciation" doctrine, a doctrine through which it mediates the scope of its supervisory powers vis-à-vis the scope of discretion vested in national authorities for the definition, interpretation, and application of basic human rights. By effectively pinning itself to a European consensus principle that looks to legal developments at the national and regional levels—rather than relying on its own autonomous interpretation of Convention provisions, divorced from on-the-ground realities—the Court slowly legitimizes regional human rights consensus, absorbing and emanating social change as it develops on the ground, among states that are parties to the European Convention on Human Rights. In this way, it consistently maintains its legitimacy as a supranational human rights court. For an excellent discussion of the margin of appreciation doctrine, see THE MARGIN OF APPRECIATION, *supra* note 4, at 50-117. Given the weaker levels of democracy in the American region, it is not self-evident that the inter-American human rights organs should follow this distinctly European path in all circumstances. Nonetheless, the processes of legitimization and consensus formation that underlie the European Court's approach to its supervisory powers are equally important in the inter-American region. Indeed, they are necessary to ensure real-world, on-the-ground change for victim communities; any rational approach to supranational litigation of social rights must attend to them closely.

the exclusive use of civil-political rights, Cavallaro and Schaffer embrace the rhetorical view that these rights are non-contingent and absolute. They contrast this with economic, social, and cultural rights, which, subject to progressivity and resource constraints, are better left to political processes of supervision, mediation, and control. It is, in fact, precisely on the basis of this rhetorical and stylized view of rights that they advocate their "elements approach," reasoning that it is only through civil-political rights that social rights can be made "immediately enforceable" and hence amenable to judicial process.[423]

While the corresponding duties attendant to civil and political rights are undeniably immediate in their *conduct-based* dimensions (as they are with respect to economic, social, and cultural rights), the practical danger of the Cavallaro-Schaffer thesis lies in its inappropriate application of the "immediacy" tag to the *result-based* dimension of individually-held civil and political rights (quadrant 2). Thus, states have an immediate obligation to "ensure" individually-held civil and political rights in an *absolute, factual* sense, this being true whether such norms are interpreted narrowly (under elements I) or expansively (under elements II).[424]

The problem with this approach (beyond the causation-related justiciability errors it implies) lies in its denial of the legitimate restrictions and the necessary balancing between competing rights that attend all rights enforcement. No right is absolute, whether civil-political or social. As both the American Declaration and American Convention make clear, "[t]he rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare,

423. Contending that advocates and policymakers have been "incapable of imposing *immediate obligations* on states to protect and ensure economic, social, and cultural rights," Cavallaro & Schaffer, *supra* note 2, at 222 (emphasis added), and that the economic, social and cultural rights guaranteed in Convention article 26 lack "concrete duties" and are "unenforceable," *id.* at 225 & 268, they commend a litigation strategy based on incorporating "economic, social, and cultural elements within the scope of justiciable civil and political rights . . . ." *Id.* at 263.

424. This is made clear in their proposed hypothetical "test cases." *See id.* at 274-80.

in a democratic society."[425] These legitimate restrictions, as they apply to individually-held rights in discrete factual contexts, must be determined through balancing processes that take the rights of others and the reasonable capacities of the state directly into account. Indeed, the balancing between competing rights and obligations in concrete factual contexts is the core task of supranational adjudicatory bodies, as it is with national ones.

In this sense, while civil-political rights advocates have long insisted on the rhetorical notion that civil-political rights are non-negotiable and absolute, rarely has that view been accepted by courts in practice. Where it has—where rights have been judicially viewed as absolute entitlements irrespective of context, resource constraints, and the competing rights of others—the inevitable result has been countermajoritarian critique and unjustified queue-jumping. This latter concept refers to the strategy of using rights-based litigation as a tool to jump to the head of the line of all those entitled to receive a given entitlement, unfairly displacing those higher-ranked on a waiting list. Cavallaro and Schaffer cite both grounds as general reasons to avoid social rights litigation and to prefer alternative, non-adjudicatory mechanisms for protecting economic, social, and cultural rights.[426] What they fail to recognize is that it is not the nature of any particular right that gives rise to these concerns in the first place. It is advocates' *absolutist* understanding of rights as immediately-enforceable entitlements that does. Indeed, queue-jumping succeeds only to the extent adjudicatory bodies accept the notion that individual rights are absolute entitlements, irrespective of the rights of others in a democratic society.

Clearly, neither the removal of autonomous social rights from the contentious competence of courts nor the reframing of social-rights claims as "absolute" civil-political-rights claims will have any effect on the queue-jumping potential of human rights litigation. To the contrary, these "solutions" simply reproduce the concerns they purport to avoid. The underly-

425. American Convention, *supra* note 23, art. 32.2; American Declaration, *supra* note 78, art. 28 ("The rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy.").

426. *See supra* note 19.

ing problem must be addressed. This can be achieved through two interrelated mechanisms: a realistic recognition of the *judicially-enforceable* content of rights and proper design of remedial orders.

First, rights may only be enforced in distinct adjudicatory settings to the extent they have judicially-enforceable counterpart obligations. A proper appreciation of the judicially-enforceable content of rights in the inter-American system would, therefore, recognize the distinction between quadrant 1 and quadrant 2 duties, and apply only the former to rights-based claims. This recognition is important for queue-jumping concerns in that quadrant 1 duties require that states do only what is *reasonable* or *appropriate* in the circumstances to respect and ensure individually-held rights. What is "reasonable" with respect to a given individual in a given context will necessarily depend on what the state is doing to ensure respect for the rights of others and what the legitimate constraints facing the state are. That is, it is this "reasonable conduct" inquiry that delimits the proper scope of *enforceable* rights in adjudicatory contexts, rather than the *factual* guarantee or failure to guarantee rights in their absolute sense.

The second mechanism for avoiding queue-jumping concerns in individual cases is through the proper crafting of the remedial order. Indeed, queue-jumping cannot occur unless courts give expression, through the remedies they order, to rights as absolute entitlements irrespective of social and financial context. Avoiding the problem requires framing remedies in ways that do not privilege litigants over similarly-situated non-litigants in terms of who may access goods and services provided by the state. This is generally achieved by requiring that, where budgetary or other legitimate constraints prevent full enjoyment of rights on an immediate basis, states have reasonable rights-based *plans of action* and *waiting lists* in place to rationally establish the order of receipt of rationed goods and services by similarly-situated individuals.

Those plans of action and waiting lists must be based on reasonable grounds and must be implemented in a rational non-arbitrary manner. Where this is done, however, the state will generally have complied with its enforceable obligations with respect to the individual. Where it is not done, a proper remedial order would identify the deficiencies in the plan of action or the waiting list criteria and order that the deficien-

cies be remedied. Only where it is shown that the individual *should have* received goods or services under the state's own reasonable rationing plan would an individual order of entitlement to the good or service necessarily follow.

The important role of courts in facilitating or preventing queue-jumping through their remedial responses can be seen in the distinct approaches taken by various high courts around the world. Perhaps most starkly, the general approach to individual rights enforcement of the Constitutional Court of Colombia may be contrasted with the general approach taken by the Constitutional Court of South Africa and the United States Supreme Court, among others. The former high court tends, in many of its opinions, to actively facilitate queue-jumping in rights-based litigation. It does so by consciously ignoring resource constraints in many cases where individual litigants claim that fundamental rights are imperiled due to lack of access to needed goods and services. It regularly orders the state to, for example, provide immediately the health treatments necessary to save the life or preserve the health of a given litigant before it, irrespective of cost, proportionality, or broader implications to the health system.[427] The latter two high courts, by contrast, actively aim to prevent queue-jumping in their case-based jurisprudence. They generally do so by viewing individual claims for discrete remedies in the larger context of what the state is *reasonably* doing to ensure access to a *reasonably*-moving queue within a rational plan of action.[428]

427. *See, e.g.*, Judgment T-1207/01, 16.11.2001 (Colom.); Judgment T-165/95, 18.9.1995 (Colom.); Judgment No. SU-225/98, 10.3.1998 (Colom.); Judgment T-236/98, 16.3.1998 (Colom.). The most notable of these are those referred to as the "overseas treatment cases," in which the Constitutional Court orders the Colombian state to pay for expensive medical treatments abroad for individual litigants when their life or health is affected, they cannot pay for the treatment themselves, and the treatment is not available in Colombia but would be effective for their health ailment.

428. *See, e.g.*, Thiagraj Soobramoney v. Minister of Health (Kwazulu-Natal) 1997 (1) SA 32 (CC) at 97 (S. Afr.) (Constitutional Court of South Africa) (affirming that appellant had enforceable right to health, but that no remedy was proper in case given that rationale guidelines for access to desired health treatment had been established by responsible health authorities and those guidelines had been applied in the case); Olmstead v. L.C., 527 U.S. 581 (1999) ("If, for example, the State were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institu-

The Cavallaro-Schaffer approach fails to take these remedial possibilities into account, assuming that civil-political rights, wherever invoked, give rise to immediately-enforceable entitlements on the part of the state. Far from aiding implementation on the ground, this view merely reinforces prejudices against social rights as countermajoritarian, undermining the legitimacy of social rights litigation as a whole. This is true whether those rights are framed under classic civil-political or classic social rights norms.

VII. A PROPERLY-CONCEIVED LESS-AS-MORE STRATEGY

Common ground is shared on an important core point: To achieve *more* success on the ground in our communities we should be doing *less* of what we are currently doing.[429] In framing their less-as-more thesis, Cavallaro and Schaffer nonetheless got their "less" wrong. We do not need less social rights litigation. And we certainly do not need less direct approach claims. What we need "less" of are claims that fail to attend to system-specific justiciability doctrine and to subject-matter jurisdiction constraints, that attempt to hold states accountable for harms their conduct did not proximately cause, that subordinate social rights abuse, and that fail to recognize the competing demands made on states' resources. In many ways, we need "less" claims like those framed in *Less as More.* Instead, we need to make sure that when we frame claims under human rights norms for adjudication in national and supranational instances we keep justiciability issues front and center.

This, of course, does not mean that we step back from our full-time advocacy and promotional work, including networking with on-the-ground partners, working with the media, negotiating with and lobbying governments, proposing new

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tions fully populated, the reasonable-modifications standard would be met. In such circumstances, a court would have no warrant effectively to order displacement of persons at the top of the community-based treatment waiting list by individuals lower down who commenced civil actions."). Many more cases from both jurisdictions could be given, but exceed the scope of this Article.

429. *See* Cavallaro & Schaffer, *supra* note 2, at 218 ("Human rights activists routinely presume that more is more: that more treaties, more norms, more litigation, more laws, more expansive judgments, etc., necessarily result in greater rights protection.").

rights-protective legislation, coordinating promotional and litigation efforts with NGO partners, supporting civil society initiatives, engaging in social movement mobilization, and generally calling attention to human suffering in every effective way possible. It simply means that we must be acutely aware that the claims properly made in the political-promotional sphere do not necessarily translate into cognizable claims in the adjudicatory sphere. We err by trying to force standards, frameworks, and duties applicable in one into the other.

A properly-conceived less-as-more strategy would focus on what matters in litigation contexts: jurisdiction, justiciability, remedies, separation-of-powers, and subsidiary concerns. It would not seek to trick governments and the courts into thinking they are dealing with "immediately enforceable" civil and political rights—a tactic that misunderstands the nature of state human rights obligations in adjudicatory contexts, particularly in the regional system. Rather, it would strictly limit the number of cases presented to supranational adjudicatory bodies to those that adhered to the fundamental elements of a jurisdictionally-proper and justiciable case—those framed in terms of concrete injury to individualized persons, causal conduct implicating breach of a state duty held to the victim, credible allegations, and strong evidence. Beyond that, strategic decisions between jurisdictionally proper rights must be made, but in no case should the decision turn on whether a norm is more classically "civil and political" or more classically "economic, social, and cultural." In the inter-American system, that question, as a jurisdictional matter, is irrelevant.

The following brief Sections detail the principal strategic decisions that arise in crafting a properly justiciable and jurisdictionally-appropriate social-rights case for presentation to the inter-American human rights system.

A. *Focusing on a Justiciable Controversy: Victim Identification and Causal Responsibility*

Once a decision is made to pursue supranational litigation, a very careful assessment must be made to ensure that any claim presented in fact conforms to the jurisdictional requirements of the adjudicating body. In the inter-American system, this requires the establishment of a "justiciable controversy"—i.e., a dispute involving individual injury to a protected

right on the part of the alleged victim and causal responsibility for that harm on the part of the defendant state. The first strategic decision to be made, therefore, involves identification of the *contours of the controversy* to be litigated. That determination, in turn, requires identification of the conduct upon which state responsibility is allegedly based and identification of the alleged victim.

All of these decisions should be taken in close collaboration with the affected community or group, proceeding on the basis of a common understanding that the "case-based" jurisdiction of the Commission and Court is limited and that the envisioned litigation should be only one small piece of a much larger advocacy and media effort aimed at pressing state authorities—through strategies of accompaniment, consultation, incentives, and shaming—into taking specific actions. It is useful, in this regard, to constantly keep in mind that a *big* case need not be a *broad* one. The best judicial cases are generally the ones that address specifically identifiable conduct and discrete facts that raise clear, uncomplicated grounds for state responsibility. Rarely should breadth and coverage be privileged over detail and specificity in a judicial case or controversy. In this sense, direct challenges to broad state policies or programs, including funding decisions or budgetary allocations, should generally be avoided, and instead, cases that focus judicial radar on particular *discrete instances of abuse* within that larger policy and, in particular, the concrete harms they cause to the rights of specific individuals, should be preferred.

Once a concrete instance of abuse is identified (e.g., a forced sterilization, a forced housing or land eviction, an arbitrary job dismissal, a negligent failure to provide treatment, an arbitrary school dismissal), it must be verified that it occurred on a date after which the applicable regional instrument entered into force for the state—i.e., after the state contracted its duties to the alleged victim as rights-holder. From there, the basis for state responsibility must be established: *How, precisely, is the state responsible for the discrete harm caused?* To do this, a clear understanding of state *conduct-based* duties must be possessed, including the rules for imputing causal responsibility for harm to the state through its agents' unreasonable or inappropriate acts and omissions. In this regard, the easiest cases to litigate arise where state agents themselves, through their affirmative acts, directly caused the alleged harm. Litigation

becomes marginally more complex where harm must be imputed to the state through the omissions of its agents—either through their failures to take appropriate measures to prevent privately-caused harm from occurring or to respond reasonably and with due diligence to such harm after it has occurred. State responsibility may also arise through failures to reasonably provide goods and services to persons in need. Establishing this basis for state responsibility is straightforward where alleged victims are held in state custody. It is more challenging where they are not. These causation considerations and their corresponding evidentiary burdens should play a key role in determining which concrete abuses will be pursued through litigation, and which will be reserved for larger political struggles. Where the more difficult bases for state responsibility are at issue, advocates must approach the litigation with a clear appreciation of the complexity of their claim, a precise understanding of the state legal obligation held to the individual victim vis-à-vis others in a democratic society, and a well thought out strategy for requesting a remedy that attends to the alleged victim's rights on par with the rights of similarly-situated non-litigants.

Once the factual contours of a discrete controversy are established and litigants are confident that there is a strong case for state responsibility, the alleged victim or victims must be identified. Where the challenged conduct has harmed more than one person this decision should be based on a number of factors, including, most importantly, the availability of evidence to prove concrete injury to a protected right of the individual (e.g., medical reports, letters of dismissal, news accounts, eye-witnesses, police reports, etc.), but also his or her "likeability" and figurative "clean-hands," and his or her availability and willingness to pursue the claim at both political and judicial levels. The precise number of alleged victims is not important as long as each is *specifically identified or identifiable* and concrete *individualized injury* can be proved affirmatively for each. Given this latter requirement, smaller numbers clearly ease the litigation burden and simplify the assessment task of the adjudicatory organ, although larger numbers are sometimes inevitable. The focus of litigation can then turn to the crafting of an appropriate remedial order to respond to the precise injuries exemplified by the chosen victim or victims. Such remedial orders should address both victim-spe-

cific restitution, compensation, and rehabilitation and broader issues of satisfaction and guarantees of non-repetition.

Whenever, at any point, it become evident that either of the two core justiciability requirements—concrete individualized injury and causal responsibility of the state—cannot be established with respect to the particular contours of the controversy identified, the claim should be either amended or dropped for pursuit through *political* mechanisms of redress.

B. *Jurisdiction and Choosing Amongst Jurisdictionally-Appropriate Norms: Indivisibility and the Shoe-that-Fits-the-Circumstances*

Once a justiciable controversy is defined, the second stage of framing a case involves the strategic determination of which *jurisdictional norms* will form the basis of the legal claim. In the inter-American system, this will involve a selection of norms primarily from either the American Declaration or the American Convention, as appropriately supplemented by other instruments over which the Commission and Court exercise jurisdiction in the particular case. In this sense, close attention needs to be paid to the ratification history of the defendant state with respect to the region's instruments. A claim that invokes the norms of the American Declaration with respect to a state party to the American Convention is as jurisdictionally improper as a claim that invokes the ICESCR or the Universal Declaration of Human Rights. Likewise, litigants wishing to invoke the Protocol of San Salvador must verify that the defendant state has in fact ratified the treaty, that their claims are limited to articles 8.1.a and/or 13, and that the alleged injury giving rise to the claim occurred after the Protocol entered into force for the state at issue. All of these jurisdictional issues must be closely attended at the initial stages of framing a case for submission to the inter-American system.

Once the full set of norms jurisdictionally appropriate to the case are determined, a strategic decision must be taken about the litigation "approach" that will be pursued under one or several of those norms. This decision should not follow preconceived notions about the nature of any particular right. Rather, it should attend to the articulated desires of the affected client group in terms of what they wish the "outcome," "remedial focus," or "theme" of the litigation to be and how

this fits into their larger political strategy of redress. Given the indivisibility and diversity of rights, a wide spectrum of strategic options is open to litigants. At least four distinct approaches to social rights litigation have been written about elsewhere: an indirect approach, an integration approach, a direct approach, and a complex violations approach.[430] All have their strengths and weaknesses in distinct factual contexts, and are generally most effective when used in conjunction. None should be privileged a priori over others.

While the integration and direct approaches have been the subject of this Article, special mention should be made of the *indirect approach* given its strategic significance for litigation in the region, particularly in light of legitimacy concerns. This approach refers to the use of neutral "process" guarantees in the regional instruments to protect social rights from substantive infringement. Specifically, it refers to the use of guarantees regarding effective judicial protection, due process, and non-discrimination. The strength of the approach lies in the fact that these norms apply not only to all rights protected in the Declaration and Convention, but also to all rights recognized in the internal *domestic legal order* of states—i.e., irrespective of whether they are congruently protected at the international level in similar terms.

This extension is particularly significant in light of principles of subsidiarity and evolutionary processes of norm development. That is, through use of these "process" norms, supranational procedures can be used to ensure effective domestic application of rights that are protected in more expansive ways through national legislation than they are at the supranational level. The benefit is that—based on a state's failure to enforce its *own* democratically-adopted law—the Commission and Court can enforce social rights guarantees without incorporating those higher protections directly into the regional human rights instruments faster than regional consensus-based understandings will allow. From a legitimacy perspective, this ap-

430. *See* PROTECTING, *supra* note 7, at 193-357. This author would not include an elements approach—in its primary, narrow sense—amongst recognized approaches to protecting economic, social, and cultural rights, on the ground that it does not purport to address, but rather expressly aims to ignore, social rights abuses in situations where they occur alongside narrowly-construed civil-political rights abuses.

proach allows regional guarantees to remain a minimum floor at which regional consensus has largely been reached, but which national-level guarantees are free to surpass. By frequent utilization of process norms in its jurisprudence, the Commission and Court may thus absorb and emanate social change as it develops on the ground, slowly legitimizing a regional human rights consensus in relation to those norms, which, when matured, can then be legitimately incorporated—through "direct" or "integration" approaches—into the substantive provisions of the regional human rights instruments.

In this way, the various approaches to social rights litigation can and must be used together to ensure effective, case-specific, but evolving protections of economic, social, and cultural rights in the Americas. Again, in no case should civil and political rights be a priori preferred to economic, social, and cultural rights in making these case-specific strategic decisions.

C. *Envisioning a Remedy: Interstices and Dialogues*

Litigants must also pay close attention to the remedial stage of adjudicatory procedures. Indeed, it is the envisioned and actual remedy that will form the basis for social movement advocacy aimed at ensuring domestic implementation of any final order. Advocates should thus envision the remedy they desire from the very start of litigation. In doing so, they should keep two central factors in mind. First, litigants should imagine the precise contours of the remedy they would like to see the Commission or Court issue, ensuring that they have sufficient evidence to prove causal responsibility for each of the necessary harms that will justify a corresponding remedial solution. Second, litigants should conceive of remedies in a way that will ensure that they and civil society more generally have a continuing active role in the implementation stage.

Indeed, in crafting the remedial order adjudicatory bodies should generally distinguish between victim-specific relief (e.g., measures of restitution, compensation, and rehabilitation) and relief that has broader, more structural effects with foreseeable impacts beyond the victim party (e.g., measures of satisfaction and guarantees of non-repetition). The details of the former fall clearly to the determination of the supervisory organ, based on the concrete evidence produced by the par-

ties in adjudicatory proceedings. By contrast, subject to the general guidelines and legal principles enunciated by the adjudicatory organ, the precise details of the latter should generally be deferred in the first instance to the "representative branches," in consultation with the victims and subject to both a reasonable time-frame and the organ's continuing supervisory jurisdiction.

The challenge to litigants is to ensure that, particularly in these latter aspects, the supranational remedial order creates the *interstices* necessary for civil society to remain actively involved in continually pressing the government to comply with its human rights obligations. In the 2004 *Panchito López* case, for example, the Court took an important step in requiring not only that the state "adopt its domestic legislation," but that it do so by elaborating, within six months and *in collaboration with civil society*, "a State policy of short, medium and long-term related to children in conflict with the law that is fully consistent with Paraguay's international commitments."[431] *Participation-facilitating orders* of this kind are crucial for ensuring on-the-ground implementation of supranational judgments, given inevitable inertia, inefficiencies, lack of coordination, and foot-dragging by responsible implementing authorities. Social movement mobilization is most critical here: It builds momentum and social consensus around the small apertures created by law. The Commission and Court, moreover, each insist on their powers to monitor compliance with their case-based recommendations or orders, maintaining supervisory jurisdiction over them and requiring states to submit periodic reports, usually every six months or year, on the compliance measures undertaken. This continued involvement—exercised through the organs' insistence on the receipt of periodic compliance reports from the parties, onsite visits to the affected areas, and working group meetings at the Commission's headquarters—can often add the extra leverage necessary for social movements and victim groups to achieve their goals on the ground.

Indeed, it is here that supranational litigation plays its most valued role. After issuing rulings recognizing state responsibility for arbitrary or unreasonable conduct and requiring remedial action to be taken, the Commission and Court then step into their flexible role as international monitors and

431. *See Panchito López Case, supra* note 138, ¶¶ 316-17.

mediators of those adjudicated legal commitments—requiring states to constantly report on the measures they have taken to comply with legal decisions, to create participatory spaces for victims and other interested parties, and to sit down periodically to assess results. On-the-ground monitoring and continual use of the rapidly-evolving compliance and supervisory mechanisms offered by the inter-American system itself is thus essential for rights enforcement. The challenge facing advocates in the system is to work effectively and cooperatively with the Commission, the Court, and other actors to improve constantly these supervisory mechanisms, ensuring effective, mutually-reinforcing interaction between domestic and international social movements, advocacy efforts, media campaigns, and monitored supervision.

D. *Working within Broader Movements*

Though unrelated to their norm-based preference for civil-political rights, Cavallaro and Schaffer's parallel insistence on the imperative of a more concerted focus on practical on-the-ground enforcement and implementation of supranational decisions is firmly supported. Indeed, that litigation—whatever its focus—should ideally always be accompanied by social movements, local-level follow-up, vigorous media advocacy, and national and international pressure campaigns is unquestionable. Few if any human rights organizations in the Americas do not subscribe to, and incorporate into every litigation strategy, these well-understood practical insights.[432]

While implementation strategies will vary widely according to the particular national (cultural, political, social) context, the identity and preferences[433] of the victims, the sophistication of corresponding social movements, the substantive is-

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432. This does not, however, mean that they necessarily do a good job. More can always be done—new strategies devised, more opportunities opened, better synergies established. In this sense, Cavallaro and Schaffer would have done better to offer case-specific practical examples of where they feel litigants have insufficiently focused on the implementation stage and what, given their circumstances, such litigants could have done better.

433. It is important to note that human rights lawyers, like all lawyers, have professional duties to defend zealously their particular clients' interests. This can, at times, conflict with more general strategies to create broad, structural "real-world" change. Human rights lawyers must walk this line very carefully.

sues at stake, and the precise nature of the given remedial order, the challenge of implementation is always the same: to go beyond rhetorical or cosmetic changes in state policy to change the political culture that allows human rights abuses to recur. That requires coordinated, intersecting campaigns at domestic, regional, and international levels.

VIII. CONCLUSION: TAKING RIGHTS INTER-DEPENDENCE SERIOUSLY

That all human rights are "indivisible, interdependent, and interrelated" has become the lodestar of international human rights discourse.[434] While such indivisibility is insisted upon at the rhetorical level, however, it is repeatedly undermined in practice by the persistent view that different legal obligations apply to civil-political rights and economic-social-cultural rights. Taking rights interdependence seriously requires overcoming this conceptual hang-up and treating rights as equal in practice as well as in name. This requires applying, in adjudicatory and promotional contexts alike, the same legal obligations and standards to all rights, regardless of their subjective characterization.

This Article has attempted to take a step in this direction by drawing two clear lines. First, it has attempted to show that there are no objective differences between economic, social, and cultural rights, on the one hand, and civil and political rights, on the other—from a justiciability perspective, an obligations standpoint, or at the stage of crafting remedies. Distinctions between "immediacy" and "progressivity," as conceptual descriptors of "sets" of rights have no place in human rights law. Rather, the proper distinctions to be drawn correspond to the *dimensions* of obligations (characterized here as quadrant 1, 2, 3, and 4 duties) that apply congruently to all rights, yet differently for purposes of judicial verses promotional enforcement. Second, this Article has aimed to demonstrate that not all claimed violations of a right over which an adjudicatory body exercises subject-matter jurisdiction are ap-

434. *See, e.g.*, Vienna Declaration and Programme of Action, U.N. World Conference on Human Rights, U.N. Doc. A/CONF.157/24 ¶ 5 (1993) ("All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.").

propriate for judicial resolution. Rather, the focus of litigants must be on ensuring that the cases and claims they present to adjudicatory bodies, especially at the supranational level, gather the elements of a "justiciable controversy" and attend to other core jurisdictional requirements of case-based litigation. Any cases that fail to do so must be reserved for the political process, including international monitoring and periodic reporting procedures.

By turning us back in the direction of decontextualized stereotypes of rights, away from the basic technical and jurisdictional issues that accompany case-based litigation in the human rights field, the Cavallaro-Schaffer less-as-more thesis takes a decisive step backward in the debate on the judicial enforceability of economic, social, and cultural rights. It is hoped that the present "rethinking" of the *less* in that thesis brings us at least back to the initial point of departure, if not several steps beyond. This is particularly important given ongoing efforts to create new supervisory instances at the international level with adjudicatory competence over economic, social, and cultural rights. These include, most notably, initiatives in support of the drafting of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights and finalization of the soon-to-be adopted U.N. Convention on the Rights of Persons with Disabilities, which also includes an individual complaints procedure in a corresponding Optional Protocol.[435] It is imperative that the adjudicatory functions of the corresponding instances remain well-defined and distinct from any broader functions they may enjoy. Indeed, once jurisdictional issues are properly taken into account, the horizon for social rights litigation, both at national and supranational levels, is vast.

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435. This treaty, which includes a wide spectrum of economic, social and cultural rights, was adopted on August 25, 2006 by the United Nations Ad Hoc Committee charged with its drafting by the Commission on Human Rights (now Council) at the conclusion of the Committee's Eighth Session. After review by a Technical Committee, both the treaty and its optional protocol will be sent to the U.N. General Assembly for adoption at its 61st session in December 2006. The two instruments will thereupon be opened for signature/accession/ratification and are expected to draw a large number of states parties. *See generally* Press Release, U.N. General Assembly, Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, U.N. Doc. AC.265/2006/L.6 (Aug. 25, 2006).