

**THE CRUSADE TO LIMIT AND DEROGATE FROM ECONOMIC, SOCIAL AND
CULTURAL RIGHTS IN THE AMERICAS**

By Carolina Braglia Aloise Bertazolli

LLM Thesis
SUPERVISOR: Oswaldo Ruiz-Chiriboga
Central European University Private University
Quellenstrasse 51-55, 1100 Vienna
Austria

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Abstract:

This thesis aims to examine the rules of limitations and derogations from economic, social and cultural rights (ESCR) in the Inter-American system (IAS). The protection of ESCR is not understood homogeneously in the system because of the Court's approach to include rights in Article 26 of the Convention and the status of the Protocol of San Salvador (PSS). The first chapter of the thesis discusses how this topic is settled in the doctrine and the jurisprudence of the IAS bodies. The research considers that the American Convention on Human Rights (ACHR) does not contain ESCR directly enforceable and the only way to submit a case to the Inter-American Commission on Human Rights (IACmHR or Commission) and the Inter-American Court of Human Rights (IACtHR or Court) is through civil and political rights. The PSS is a continuation of the ACHR, and it is the instrument responsible for the enforceability of ESCR. Hence, the ACHR is applicable to the PSS regarding the rules of procedure, but the PSS brings its general rules. Concerning limitations, the thesis compares the instruments to conclude that Article 5 PSS contains the restriction test created by the Commission and the Court from Articles 30 and 32(2) ACHR. This means that this test is used to assess individual petitions by the Court and reports by the Commission. Regarding derogations, the PSS does not contain a derogation clause. Article 27 ACHR is not applied to the report mechanism of Article 26 because it was not the intention of the States, and it is not listed as non-derogable provision in Article 27(2). In addition, the PSS does not fall under Article 27 since States and the IAS bodies did not apply to any ESCR. Therefore, in the IAS system, ESCR are non-derogable, but are subject to the restriction test under Article 5 PSS. Since derogations are stricter and have more criteria, the limitations rules are enough to protect ESCR in the system.

1. Introduction

The strive towards human rights protection has been a long process and certain rights are still not widely protected. The discussion of human rights restrictions may seem erroneous from this perspective since it is an arduous and constant task to enforce them. Despite this, restrictions are allowed in international law for most rights. Not all rights can be restricted, such as absolute rights. One example of this type of rights is to be free from torture. Restrictions are categorized as limitations, derogations, and reservations.¹ Their aim is similar since they “provide legal avenues for states to break free of obligations that would ordinarily constrain their actions.”² Additionally, they do not “permit [S]tates to ignore their human rights obligations altogether.”³ However, different types of restrictions have different applications. Firstly, limitations are applied “across the spectrum, from every day public order maintenance and policing strategies to national security and large-scale military actions,”⁴ while derogations clauses “were designed to be applicable only in the exceptional case of a grave threat to the survival and security of a nation [...] invoked as temporary measures.”⁵ Lastly, reservations occur when the State issues a document with “the purpose of excluding or modifying the legal effect of certain provisions of the treaty for [it].”⁶ Although relevant, this thesis does not focus on reservations since they are individual statements from States. States can make partial or total reservations from international obligations and the research does not intend to analyze the statements. Instead, the thesis examines the rules of limitations and derogations specifically in a regional system.

In the Inter-American System (IAS), the main treaty is the American Convention on Human Rights (ACHR). The textual difference between the ACHR and other treaties are the terms used by the regional text. Instead of limitations and derogations, the Convention uses restrictions and suspensions. This thesis opted to use restriction as a category in which limitations and derogations are inserted, despite the different terms. The main reason is the use of these terms in the Vienna Convention on the Law of the Treaties (VCLT), such as in Article 53 regarding derogations. Nevertheless, the definitions given previously are similar to the IAS ones. In the IAS, derogations

¹ ‘Handbook for Parliamentarians N° 26’ (Inter-Parliamentary Union and the United Nations (Office of the High Commissioner for Human Rights) 2016), 47.

² Henry J Steiner, Phillip Alston and Ryan Goodman, ‘National Security, Terrorism and the Law of Armed Conflict’, *International Human Rights in Context: Law, Politics, Morals: Text and Materials* (Oxford University Press 2008), 394.

³ *ibid.*

⁴ *ibid.*

⁵ *ibid.*

⁶ ‘Handbook for Parliamentarians N° 26’ (n 1), 51.

and limitations are understood, respectively, as “[i]n exceptional circumstances and under conditions precisely spelled out, the Convention allows the temporary suspension of some of the obligations assumed by the states. Under normal circumstances, there can only be “restrictions” to the enjoyment and exercise of such rights.”⁷ Regardless of the terms of the Convention, limitations and derogations are still relevant because of their negative impact on human rights if unlawful.

Human rights are interdependent and indivisible.⁸ However, to classify them, they are divided into civil and political rights (CPR) and economic, social, and cultural rights (ESCR). The first group is directly enforceable under the ACHR while the second is in the Protocol of San Salvador (PSS). ESCR are protected under the ACHR through the monitoring mechanism in Article 42, which is linked to Article 26 ACHR. Significant research has been done on CPR and their restriction, while research regarding ESCR is scarce. Hence, this thesis aims to study ESCR restriction to comprehend the IAS protection.

The IAS has two main bodies assessing human rights: the Inter-American Commission on Human Rights (IACmHR or Commission) and the Inter-American Court of Human Rights (IACtHR or Court). There are working groups and councils in the IAS. However, the thesis studies only the Commission and the Court due to the scope of analyzing their assessment on limitation and derogations. They have different competencies and protect human rights through different mechanisms. The Commission is responsible for issuing recommendations regarding cases and providing reports regarding countries or topics, beside the annual reports. Additionally, if the country does not comply with the recommendations provided by the Commission in a given case, it can send the case to the Court to rule on the matter. By contrast, the Court issues advisory opinions if requested and adjudicates cases. Both bodies have competence to issue measures in case of urgency, the so-call precautionary measures from the Commission and provisional measures from the Court.⁹ Although in a different way, both have a significant role in the human rights system.

In the IAS, ESCR have been in the spotlight because of the growing number of cases in the IACtHR. These decisions are issued based on Article 26 of the ACHR. One of the most recent decisions is the case *Indigenous Communities of the Lhaka Honhat (Our Land) Association v.*

⁷ *Advisory Opinion OC-6/86* (Inter-American Court of Human Rights), ¶14.

⁸ *Voto Concurrente en el Caso Asociación Nacional de Cesantes y Jubilados de la Superintendencia Nacional de Administración Tributaria (Ancejub-Sunat) vs Perú* (Inter-American Court of Human Rights), ¶2.

⁹ The Commission’s role is under Articles 33 to 51, while the Court’s one is between 51 to 69 ACHR.

Argentina, in which the Court found violations on several ESCR.¹⁰ This direct enforceability of ESCR is at the heart of the debate. It has the support of many scholars, but it attracts dissenting opinions in the Court and academia. The main reasons are the wording of the Convention, the intention of the States when drafting the text, and the existence of the PSS. The Protocol lists which rights are directly enforceable through individual petitions, and which are subjected to reports. Therefore, besides the Court's jurisprudence, there is a vivid debate about enforceability and various positions affect how limitations and derogations shall be ruled: either by the ACHR or by the PSS since they both contain applicable rules.

To date, there is no research conducted on limitation and derogation clauses for ESCR in the IAS. Hence, this thesis aims to analyze the possibility to limit and derogate from them under IAS treaties. Since the thesis focuses on two different aspects of restrictions, it has two different research questions. The first one is *how can a State in the IAS limit ESCR*, while the second is *whether ESCR can be derogated in the IAS*. The structure of the questions varies based on the instruments' provisions. The first question relies on three provisions: Articles 30 and 32(2) ACHR and Article 5 PSS. Concerning derogations, only the ACHR has a provision on derogations, and the PSS is silent on this matter. The first research question seeks to reveal if Article 5 PSS is subjected to the same rules of Articles 30 and 32(2) ACHR. In addition, the second research question examines whether States can derogate from ESCR protected in the PSS at all.

The methodology of the thesis is divided into two different parts since the research questions have dissimilar focuses. Firstly, the research applies qualitative research.¹¹ Both research questions have methods in common, such as doctrinal research, and case law. Regarding the first research question, the study of the case *Gonzales Lluy et al. v. Ecuador* is pertinent since the limitation of the right to education was debated and the Court found a violation of the PSS.¹² This case is the only one connecting limitations and ESCR. Additionally, the research relies on the textual analysis method to compare the four official versions of the ACHR and the PSS. Concerning the sources, the primary sources are international instruments, and the *travaux préparatoires*¹³ available for analysis. Additionally, the case law and advisory opinions of the IACtHR and various

¹⁰ *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v Argentina* (Inter-American Court of Human Rights), ¶202-242.

¹¹ Sharlene Nagy Hesse-Biber, 'An Invitation to Qualitative Research', *The Practice of Qualitative Research* (3rd edn, Thousand Oaks: Sage 2016), 4.

¹² *Caso Gonzales Lluy y Otros vs Ecuador* [2015] Inter-American Court of Human Rights 298.

¹³ Official record of negotiation, such as the treaty's draft. 'Preparatory work' is a synonym.

reports from the IACmHR are included in the study. As secondary sources, academic papers, books, and reports from different origins, such as the reports issued by research centers, are comprised in the research. Most of the research is conducted in English, Spanish, and Portuguese. Any sources quoted from Spanish and Portuguese scholarly literature are translated by the author of this thesis.

The thesis is divided into three chapters. The first chapter is the theoretical framework in which the discussion regards the protection of ESCR in the IAS in three sections. The first section compares arguments in favor and against the inclusion of rights in Article 26 ACHR, while the second section debates the approaches for enforceability of ESCR in the ACHR. Lastly, the third section brings the claims positing the PSS in the system, either as part of the Convention or as an independent treaty. The second chapter concerns limitations and has three sections. The first section describes the limitation rules in the ACHR, while the second one debates mainly the case *Gonzales Lluy et al. v. Ecuador*. The third section focuses on answering the first research question using textual analysis to compare the ACHR and PSS. The third chapter regards derogations with two sections: first it describes the derogation clause provided in the ACHR, and later provides an answer to the second research question.

2. The theoretical framework for economic, social, and cultural rights in the Inter-American System

This chapter is devoted to analyzing the different ways ESCR are protected in the IAS and the approaches for their enforceability. The first section examines the different positions regarding the content of Article 26 ACHR, which is relevant to understand whether the Convention contains ESCR. The second section explains the different approaches for the justiciability of these rights before the IAS bodies. It is fundamental to establish how to enforce ESCR to comprehend how the system works. Finally, the third section compares two different positions concerning the nature of the PSS, if it is a separate treaty or a continuation of the ACHR. This discussion is pertinent to position both instruments and their relationship to protect ESCR.

The main reason to analyze these three points is to determine which are the applicable rules for ESCR. The research reached the conclusion that the ACHR does not have enforceable rights through its Article 26, and the only way to enforce ESCR is indirectly by CPR. Additionally, the PSS is a continuation of the ACHR, which means that it brought new rights and its own rules, but still applies some of the ACHR articles. These findings are relevant for the research questions in

different ways. Concerning limitations, the only directly enforceable ESCR are in the PSS. It means that the rules for limitation are in the Protocol text exclusively, but it is possible to make a comparison between the ACHR and the PSS, as it is shown in the second chapter. In regard to derogations, the PSS does not provide any derogation clause, and the research concerns whether the one in the ACHR is applied in the PSS, as it is demonstrated in the third chapter.

a. Article 26 of the American Convention and the protection of economic, social and cultural rights in the Inter-American System

The first relevant discussion in the theoretical framework chapter is the protection of ESCR in the IAS. This section analyzes the content of Article 26 ACHR and the academic debate about it, together with the evolution of the understanding of the IACtHR over the years. This debate is fundamental for the topics of limitation and derogations. The reason is that the way to enforce ESCR changes in accordance with it. If the enforceability relies on Article 26 ACHR, the limitations rules and derogation clause of the Convention are applied. On the contrary, if the enforceability is solely in the PSS, its rules prevail. The next two chapters focus on dissecting these two subjects based on the findings of this chapter.

The content of Article 26 ACHR is controversial, and there is no considerable consensus on how to protect ESCR. The IACtHR, supported by some scholars such as Tara Melish,¹⁴ defends ESCR as enforceable based on their interpretation of Article 26 ACHR. Others, such as Oswaldo Ruiz-Chiriboga, argue that this provision does not contain direct enforceable rights, which means that the only justiciable ESCR are allowed in Article 19(6) of the PSS¹⁵ for countries that ratified it.¹⁶ These two positions led to different ways to justify the possibility of allowing the Court to adjudicate cases.

There are mainly two positions regarding the enforceability of ESCR: the first one enforces ESCR through Article 26, while the second does not recognize enforce rights in Article 26 and applies the PSS to enforce them. Article 26 ACHR brings the “progressive development” of ESCR through States’ measures. It means that States must progressively achieve ESCR without taking

¹⁴ Tara J Melish, ‘Rethinking the “Less as More” Thesis: Supranational Litigation of Economic, Social, and Cultural Rights in the Americas’ (2006) 13 International Law and Politics 171.

¹⁵ The right to education and the right to form labor unions provided in the PSS are the only ones that justiciable before the Court.

¹⁶ Oswaldo Ruiz-Chiriboga, ‘The American Convention and the Protocol of San Salvador: Two Intertwined Treaties’ (2013) 31 Netherlands Quarterly of Human Rights 159, 62.

regressive measures. The non-regressivity of ESCR can be hard to assess because the act of the State needs to affect the entire population, and not one individual or a group. It indicates that the State may constrain ESCR without necessarily amounting to regressivity.¹⁷ This analysis is relevant to understand how the Court, followed by the Commission, protects ESCR.

The first position regarding Article 26 considers that ESCR are directly enforceable. In a commentary book to the ACHR published in 2014, Christian Courtis defended the idea that Article 26 ACHR contains ESCR because the text mentions the OAS Charter, an idea constructed by the IACtHR. He presented a list of rights that he considers as protected by Article 26.¹⁸ Francesco Seatzu and Amaya Ubeda de Torres presented two different arguments consistent with the inclusion of rights in Article 26. Their first argument is the terminology used by the Convention when dividing the chapters. Part I is named "State Obligations and Rights Protected" and includes Chapter III on ESCR. Therefore, for the authors, Chapter III encompasses rights.¹⁹ Nevertheless, the provision does not cover a list of ESCR that would be enforceable. The second argument is based on the *pro homine* principle, which they define as "the idea that the American Convention and other instruments must be interpreted in the way which is most protective of human rights."²⁰ Article 29 ACHR provides this principle because the treaty shall not be interpreted restrictively. The authors advocate for the inclusion of rights in Article 26 based on the evolution of interpretation.²¹ It alludes that Article 26 is linked directly to Article 62 of the ACHR, which gives the Court jurisdiction to adjudicate individual petitions against States.

The IACtHR explained its position regarding Article 26 in its case law. The *case Acevedo-Buendía et al. v. Peru* was the first case to recognize the competence of the IACtHR to decide on ESCR linked to Article 26 ACHR.²² The Court settled its jurisdiction over Article 26 and analyzed the possible violation of a social right in the case.²³ The IACtHR explained that the rights connected to the third chapter of the Convention are under the obligations provided in Articles 1(1) and 2 of

¹⁷ Thomas Antkowiak, 'The Inter-American Court at a Crossroads', *The Inter-American Court of Human Rights: Theory and Practice, Present and Future* (Intersentia Press 2015), 266-268.

¹⁸ Christian Courtis, 'Artículo 26. Desarrollo Progresivo', *Convención Americana sobre Derechos Humanos: comentada* (Fundación Konrad Adenauer 2014), 264-268.

¹⁹ Francesco Seatzu and Amaya Ubeda de Torres, 'The Social Charter of the Oas: A Step Forward in the Enforcement of Socioeconomic Rights in the Americas?' (2014) 32 *Netherlands Quarterly of Human Rights* 130, 142.

²⁰ *ibid*, 150.

²¹ *ibid*, 149-151.

²² Ruiz-Chiriboga (n 16), 162.

²³ *Caso Acevedo Buendía y Otros ("Cesantes y Jubilados de la Contraloría") vs Perú* [2009] Inter-American Court of Human Rights 198, ¶17.

the ACHR.²⁴ Therefore, from the Court's perspective, ESCR are directly enforceable. Nevertheless, the Court did not find a violation of Article 26 based on the possibility to restrict rights when necessary because it did not constitute a regressivity of ESCR.²⁵ In the Concurring Opinion, Judge Sergio García Ramírez clarified the possibility to complain or request compliance with Article 26. He listed the dimensions of the rights protected under this article (progressive and impossibility to regress) to illustrate the necessity to analyze the case law based on its reality.²⁶

Eight years after this case, the IACtHR found, for the first time, a direct violation under Article 26 ACHR in the *Case Lagos del Campo v. Peru*. The breach was on the matter of the right to job security.²⁷ The IACtHR brought the OAS Charter as the source to explain the violation of the right to job security. Based on the rules of interpretation established in Article 29 of the ACHR, the Court analyzed the Organization of International Labor's documents.²⁸ Nevertheless, the Court still used CPR to justify the decision to condemn Peru, since it connected the violation on Article 26 to the right to a fair trial (Article 8), freedom of thought and expression (Article 13), and freedom of association (Article 16) of the ACHR.²⁹

In the first case mentioned, the Court considered that Article 26 could be violated when a State acts regressively towards the protection of any ESCR. Differently, in the second case, the Court found a direct violation on Article 26 based on an existing right protected in the OAS Charter. There is a clear change in the Court's approach to ESCR when comparing the two mentioned cases. The IACtHR opted for a deeper analysis of the cases related to ESCR and to recognize States' obligations towards them.

The Court's position attracted criticism and led to the second position regarding Article 26 ACHR. As explained, it concerns the premise that the article does not comprehend any ESCR as enforceable. Some judges of the IACtHR and the scholar Oswaldo Ruiz-Chiriboga defend this position.³⁰ The main idea is linked to the intention of States when drafting the ACHR. Firstly, judge

²⁴ *ibid*, ¶100.

²⁵ *ibid*, ¶103-106.

²⁶ *Voto Concurrente en el Caso Acevedo Buendía y Otros ("Cesantes y Jubilados de la Contraloría") vs Perú* (Inter-American Court of Human Rights). ¶21.

²⁷ Viviana Krsticevic, 'The Inter-American System', *Research Handbook on Economic, Social and Cultural Rights as Human Rights* (Edward Elgar Publishing Limited 2020), 85.

²⁸ *Caso Lagos del Campo vs Perú* [2017] Inter-American Court of Human Rights 340, ¶141-150.

²⁹ *ibid*, ¶153.

³⁰ Ruiz-Chiriboga (n 16); *Voto Concurrente en el Caso Asociación Nacional de Cesantes y Jubilados de la Superintendencia Nacional de Administración Tributaria (Ancejub-Sunat) vs. Perú* (n 8); *Partially Dissenting Opinion in the Case Lagos del Campo vs Peru* (Inter-American Court of Human Rights).

Ricardo C. Pérez Manrique argued, in 2019, in favor of what he called a “third” option for the enforceability of ESCR, the “connectedness-simultaneity.” He claims that Article 26 does not contain enforceable rights because of the creation of the PSS, drafted after the Convention. However, he affirmed that the ESCR are enforceable through civil and political rights (CPR) because human rights are connected and interdependent.³¹ Judge Pérez Manrique called it a third option. Nevertheless, his position has the same line of arguments defended by Ruiz-Chiriboga. It signifies that there is no need to call it a third option, since it is categorized inside the second position debated in this section.

Similarly, judge Eduardo Vio Grossi claimed that the rights enforceable in the Convention are between Articles 3 and 25. The judge provided four reasons why Article 26 is not enforceable: i. States have the obligation to provide some measures, which classifies it as a non-result obligation, and it does not recognize rights, ii. the rights provided in the OAS charter are not clear enough to guarantee or recognize rights, iii. the subjection to resources available confirms the lack of result obligation, and iv. the chapter's title is “progressive development,” which does not entitle any duty under Article 2 of the ACHR.³² The judge is in the same line with the Annual Report 1983-1984 from the Commission. In this document, the IACmHR, when dealing with ESCR, clarified the lack of rights enlisted in the Charter since they were objectives, and connected Article 26 directly to Article 42, which gives the Commission only monitoring functions.³³

The scholarly debate is limited to very few contributions since Ruiz-Chiriboga is the only one who questioned the Court’s approach. He argued that the Court oversteps its jurisdiction since Article 26 is subjected to the rules of Article 42 of the ACHR, instead of Article 62, as the Commission stated in the 1980s.³⁴ This means that rather than using individual petitions, the Commission is the one who “watches over” the situations of ESCR violations because of its monitoring function.³⁵ One source of argument in common for the judges and Ruiz-Chiriboga is the *travaux préparatoires* of the ACHR and the intention of the States when drafting the text.

³¹ *Voto Concurrente en el Caso Asociación Nacional de Cesantes y Jubilados de la Superintendencia Nacional de Administración Tributaria (Ancejub-Sunat) vs. Perú* (n 8), ¶6-12.

³² *Partially Dissenting Opinion in the Case Lagos del Campo vs. Peru* (n 30), 10-11.

³³ ‘Areas in Which Further Steps Are Needed to Give Effect to Human Rights Set Forth in the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights’ (Inter-American Commission on Human Rights 1984) Annual Report of the Inter American-Commission on Human Rights 1983-1984 OEA/Ser.L/V/II.63.

³⁴ *ibid.*

³⁵ Ruiz-Chiriboga (n 16), 177-182.

Article 32 VCLT indicates the use of preparatory work of a treaty to verify the intention of States when it is not possible to know the meaning of a provision. The intention of States is clarified in the *travaux préparatoires* of the ACHR. In 1968, when the OAS was drafting the ACHR, Article 26 had a different text in which it obliged State Parties to provide information to the Commission about Article 25, and the same organ was responsible to provide recommendations for States. Additionally, it tasked the Commission to propose a special Convention or Protocol to include the protection of those rights in the IAS. It is relevant to highlight that Article 25(2) of the ACHR's Draft lists some of the ESCR, such as the right to food, the right to adequate life, and the right to labor. Article 25(1) determined the importance of the States to adopt and guarantee the rights provided in the ACHR and ADRDM.³⁶

Articles 25 and 26 of the ACHR's Draft were not maintained. The States debated the necessity to keep the texts. Uruguay, the first country to write observations regarding the text, claimed that Article 25(2) should be only declaratory because it was not politically viable, and it should not be in a Convention.³⁷ Chile argued that ESCR should have a separate topic in the Convention and that Articles 25, 26 and 41³⁸ were not enough to protect them. The country advocated for a better redaction to enumerate the ESCR as the International Covenant on Economic, Social, and Cultural Rights (ICESCR).³⁹ Argentina claimed that Article 26 was beyond the Commission's competence and should be changed regarding the possibility to provide recommendations to States. However, the country acknowledged that Article 25(2) was a copy of the OAS Charter.⁴⁰

Dominican Republic proposed a new text for Article 25 in which it deleted paragraph 1 and claimed that the rights provided in the OAS are objectives of the States. This change in the text showed that the country did not want ESCR to be enforceable, since the Dominican Republic viewed them only as goals for States. Regarding Article 26, the country opted to delete the possibility to provide periodic reports.⁴¹ In a similar line, Mexico claimed the rights enumerated in

³⁶ 'Conferencia Especializada Interamericana sobre Derechos Humanos', 22-23.

³⁷ *ibid*, 37.

³⁸ Article 41 was drafted to provide the procedure of providing information to the Commission regarding the rights of Article 25 with the intent to monitor the States.

³⁹ 'Conferencia Especializada Interamericana sobre Derechos Humanos' (n 36), 42-43.

⁴⁰ *ibid*, 47.

⁴¹ *ibid*, 69-70.

Article 25 were a repetition of the OAS Charter and it would be difficult to establish who is entitled for those rights and the authorities responsible for them.⁴²

Ecuador, similar to the Dominican Republic, presented an alternative for the text of the Convention. In Article 25, the country erased the list of rights and provided the obligation to States to produce reports to the Commission regarding ESCR. In addition, Ecuador rewrote Article 26 to allow other international organs to express their opinion, within their competence, about the necessity to adopt measures related to the rights provided in the Convention.⁴³ Brazil, in its observations, opted to rewrite the Draft and the justification provided for the changes in Article 25 was the progressive incorporations of the ESCR established in the ADRDM and the OAS Charter. The reason why States changed the original text was the differences of protections in each American State and the money necessary to guarantee them.⁴⁴

During the discussion to approve the Convention, the content of Article 25 continued to be a problem for States.⁴⁵ In the 10th Session of the Commission “I,” the States, in September 1969, approved the texts of Articles 25 and 26 with modifications⁴⁶ of Article 26 and 42 of the ACHR. This means that when the States drafted the ACHR they did not aim to include enforceable rights in Article 26 and the only country that defended the idea was Chile.

The first attempt to change the protection of ESCR was the adoption of the PSS. Nevertheless, Article 19(6) granted enforceability only for two rights before the Court, the right to unionization and the right to education, and only after the ratification of the Protocol. The possible message that can be extracted is that the OAS members did not want to include the ESCR in the list of enforceable rights. Therefore, this thesis supports the second position that defends the non-enforceability of rights through Article 26 since they are not present in the article. This does not mean that ESCR are not included in the system because they are protected in the PSS and indirectly through the Convention, as it is demonstrated in the next sections.

b. Enforceability of economic, social, and cultural rights: different approaches

Besides the issue of inclusion of ESCR in Article 26 of the ACHR, the second important discussion regarding ESCR is how to enforce them. There are two main approaches, and both can

⁴² *ibid*, 101.

⁴³ *ibid*, 116.

⁴⁴ *ibid*, 124-125.

⁴⁵ *ibid*, 268.

⁴⁶ *ibid*, 276. .

be connected to the debate of Article 26's content. The first approach is the indirect approach, and it relies on CPR to guarantee the protection of ESCR.⁴⁷ Differently, the direct approach recognizes rights on Article 26 and allows the Court to hold States responsible based on this provision, which provides autonomy to ESCR.⁴⁸ The indirect approach was used previously by the Court and ESCR could be ensured when: i. there is a deeper interpretation of a civil or political right that encompasses one of the ESCR; ii. a violation is argued linking one ESCR to due process or effective judicial protection; and iii. it could be argued on discriminatory grounds.⁴⁹ This approach relies on the notion that human rights are universal and indivisible. Nevertheless, some authors criticized this approach because of the large dependency on CPR, and it does not allow the ESCR to be monitored autonomously.⁵⁰

Thomas Antkowiak analyzed the Court's jurisprudence until 2015. The author classified the indirect approach in the Court's case law in four different explanations. The first one is the concept of dignified life that the Court used in Article 4 (right to life) and Article 5 (right to personal integrity) to include ESCR in the decision. This can also be seen in other jurisdictions, such as the ECtHR and the HRC.⁵¹ The author's criticism is the focus of the Court on vulnerable groups, instead of emphasizing all types of groups. The second explanation is the link between Article 21 (right to property) and traditional lands, but Antkowiak perceives this use as weak because this provision is limited.⁵² The third type of case law is the recognition of the right to trade union in Article 16 (right to freedom of association) of the ACHR. In this situation, the PSS recognizes this right in Article 8, and it is justiciable based on Article 19(6). The fourth explanation is the link between Articles 25 (judicial protection) and 21 with pensions and social security. In this part, the author again connects with the *juris practicus* of the ECtHR and the HRC.⁵³ Nevertheless, Antkowiak does not agree with this practice of the IACtHR because the excessive reliance on CPR can lead to a reduction of ESCR, the Court lacks remedies for those situations, and the dignified life doctrine can diminish Article 4 and the meaning of the right to life.⁵⁴ He did not rebut all the points and some of them lacked further explanation.

⁴⁷ 'La protección de los derechos económicos, sociales y culturales y el sistema interamericano' (Centro por la Justicia y el Derecho Internacional 2005), 81.

⁴⁸ *Concurring opinion in the Case of Suárez Peralta vs Ecuador* (Inter-American Court of Human Rights), ¶11.

⁴⁹ 'La protección de los derechos económicos, sociales y culturales y el sistema interamericano' (n 47), 85-107.

⁵⁰ *Concurring opinion in the Case of Suárez Peralta vs. Ecuador* (n 48), ¶11.

⁵¹ Antkowiak (n 17), 271.

⁵² *ibid.*, 270-273.

⁵³ *ibid.*, 273-274.

⁵⁴ *ibid.*, 275-276.

The solution given by some authors and judges is the direct approach that makes ESCR enforceable. This group of scholars argues that the ESCR are protected in the IAS treaties and the States have obligations towards them.⁵⁵ Melish explains that there are three ways that a State can be held responsible for ESCR in the IAS. First, for the countries that did not ratify the ACHR, they are obliged by the ADRDM to ensure ESCR. Second, countries that ratified the ACHR, have obligations under Article 26 of the Convention. The third and last group, countries that ratified the ACHR and the PSS are bound by both documents concerning ESCR.⁵⁶ This approach also evoked criticism from scholars that defend the indirect approach.⁵⁷

With both approaches to enforce ESCR in the IAS, scholars, and judges want to guarantee that States will respect human rights in their integrity and provide a better life to the population in the Americas. In recent jurisprudence, the Court seems to accept the direct approach to enforce ESCR as the one feasible to protect them. Nevertheless, as seen in *Campos del Lago v. Peru*, the Court continues to rely on CPR to find violations.⁵⁸ Even if the Court states that Article 26 was violated, CPR are embedded in the reasoning of the Court. This demonstrates a mix of the approaches, since it recognizes their enforceability directly, but relies on CPR to ensure accountability. The continuous use of CPR to justify ESCR's violations is detectable because the direct approach is not enough to guarantee the full protection of ESCR.

In two decisions from 2018, the Court utilized the same line of mixed approaches. The right to health was recognized in Article 26 in the cases *Poblete Vilches et al v. Chile*⁵⁹ and *Cuscul Pivaral et al v. Guatemala*.⁶⁰ Even after recognizing the violation of Article 26, the Court connected the right to life (Article 4) and the right to personal integrity (Article 5) to confirm the violations. In the case *Poblete Vilches et al v. Chile*, the Court justified the violation of the right to life on the health aspect suffered by the victim.⁶¹ In the case *Cuscul Pivaral et al v. Guatemala*, the Court described the violation of personal integrity based on the suffered caused by HIV and the health conditions aggravated by the lack of medicines offered by the State.⁶² Hence, not only in *Lagos del*

⁵⁵ Melish (n 14); *Concurring opinion in the Case of Suárez Peralta vs. Ecuador* (n 48); *Voto Concurrente Caso Gonzales Lluy Y Otros Vs Ecuador* (Inter-American Court of Human Rights).

⁵⁶ Melish (n 14), 214-215.

⁵⁷ See: James Cavallaro and Emily Schaffer, 'Rejoinder: Justice Before Justiciability: Inter-American Litigation and Social Change' (2006) 39 *International Law and Politics* 345.

⁵⁸ *Caso Lagos del Campo vs. Perú* (n 28).

⁵⁹ *Case Poblete Vilches et al v Chile* (Inter-American Court of Human Rights), ¶100.

⁶⁰ *Case Cuscul Pivaral et al v Guatemala* (Inter-American Court of Human Rights), ¶75.

⁶¹ *Case Poblete Vilches et al v. Chile* (n 59), ¶148.

⁶² *Case Cuscul Pivaral et al v. Guatemala* (n 60), ¶162-163.

Campo v. Peru, the IACtHR does not consider ESCR autonomously and the violations of CPR are based on the same arguments.

In the recent case *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, the Court inserted the rights to healthy environment, to food, to water, and to take part in cultural life in Article 26 ACHR.⁶³ The Court used the PSS as source of interpretation, together with other international documents, to provide the content of those rights.⁶⁴ Nevertheless, only three judges from the IACtHR found the autonomous violation on the provision, while three disagreed from it. Judge Vio Grossi wrote a significant Partially Dissenting Opinion disagreement from the Court's approach to Article 26. He did not debate the direct and indirect approach explicitly, but he claimed being against the Court's position towards ESCR.⁶⁵ Judge Humberto Antonio Sierra Porto also criticized the Court for its position and argued that "this case reveals that the misgivings that [he] felt at that time have materialized and, what is worse, would appear to have no limits."⁶⁶ Judge Pérez Manrique followed a similar line of argumentation and applied his "interdependence-simultaneity" explanation,⁶⁷ which was elucidated previously.

Judge Eduardo Ferrer Mac-Gregor Poisot, in his Concurring Opinion in the *Gonzales Lluy et al. v. Ecuador*, argued that the direct approach is the key to allow ESCR to be enforceable autonomously.⁶⁸ His main argument is the use of interpretative tools to allow the application of the obligations stated in Articles 1(1) and 2 ACHR, including the use of the PSS.⁶⁹ Judge Humberto Antonio Sierra Porto wrote his Concurring Opinion on the same case to justify the direct approach and the use of Article 26. He uses the *pro homine* principle as a tool to include rights in the ACHR and explained that the Court has to evolve its interpretation to protect human rights.⁷⁰ However, in this case, the right to health was linked with the right to life and personal integrity.⁷¹ The Court seems to use the direct approach because it considers being the one that gives autonomous enforceability to ESCR in the IAS and considers it more inclusive. Nevertheless, this approach is

⁶³ *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina* (n 10), ¶202-242.

⁶⁴ *ibid.*

⁶⁵ *Partially Dissenting Opinion in the Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association V Argentina* (Inter-American Court of Human Rights), ¶23-24.

⁶⁶ *Partially Dissenting Opinion in the Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association V Argentina* (Inter-American Court of Human Rights), ¶5.

⁶⁷ *Partially Dissenting Opinion in the Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association V Argentina* (Inter-American Court of Human Rights), ¶4-11.

⁶⁸ *Voto Concurrente Caso Gonzales Lluy Y Otros Vs. Ecuador* (n 55), ¶18.

⁶⁹ *ibid.*, ¶19-20, ¶23.

⁷⁰ *ibid.*

⁷¹ *Caso Gonzales Lluy y Otros vs. Ecuador* (n 12), ¶189-191.

not enough to guarantee that the IACtHR will find a violation related to Article 26, and even when it does, it uses CPR as justification in the majority of the case law.

Hence, the indirect approach is the one to be chosen, since it is the one in line with the arguments expressed on non-enforceability of Article 26 and the Court, in general, mix the approaches when adjudicating ESCR. This means that ESCR, when not argued through CPR, are only monitored, or adjudicated concerning the PSS. The case *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina* does not contain any CPR connection, but it was criticized by half of the judges in the session.⁷² The question that arises is the role of the PSS in the IAS and how ESCR are protected in its text, together with which rules are applicable for ESCR. This discussion is explained in the next section, together with the delimitation, for this thesis, of the content of ESCR in the IAS.

c. *Interdependency or independency between the American Convention and the Protocol of San Salvador*

The last discussion regarding the framework of the IAS is the relationship between the two international documents that provide individual complaints as protection mechanisms. The relationship between the ACHR and the PSS is fundamental for this thesis to determine how States should comply with rules on limitations and derogations from ESCR. The relationship can have two different perspectives: i. the PSS is a tool for interpretation of the ACHR, being considered as a separate treaty, and ii. the PSS and ACHR are one treaty. The main difference between these two arguments is how the rules of the ACHR can be used in cases of ESCR when the State ratified both treaties.

The position defended by the Court is the idea of independence between the ACHR and the PSS. Judge Mac-Gregor Poisot argues that the PSS is a tool of interpretation of the Convention because they are separate international treaties.⁷³ Article 29 of the ACHR provides prohibitions concerning the interpretation of its texts. Article 29(b) determines that it is not possible to restrict any right provided in the Convention⁷⁴, which includes Article 26 as explained by the Court when recognizing the existence of rights in the provision.⁷⁵ Additionally, Article 29(d) does not allow

⁷² *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina* (n 10), ¶370.

⁷³ *Concurring opinion in the Case of Suárez Peralta vs. Ecuador* (n 48), ¶47.

⁷⁴ 'American Convention on Human Rights' <<https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>>.

⁷⁵ *Caso Acevedo Buendía y Otros ("Cesantes y Jubilados de la Contraloría") vs. Perú* (n 23), ¶100.

the exclusion of treaties with the same status.⁷⁶ In this sense, the PSS would be a different treaty and a source of interpretation.

Seatzu and Torres did not analyze directly whether the Protocol is a separate treaty, but the best approach for the enforceability of ESCR. The authors agreed that Article 77 provides the possibility of creating protocols for the Convention. Nevertheless, they rejected the argument of the PSS as a continuation of the ACHR because the IACtHR decided on the direct enforceability of ESCR. As they accepted this approach, it signifies the PSS did not include new rights in the ACHR and, therefore, Article 26 contains rights.⁷⁷ The given argument is not based on the ACHR or international law, but the best answer to allow the Court's interpretation.

In November 2020, the IACtHR issued the Advisory Opinion 26/20 related to the denunciation of the ACHR and the OAS Charter. When discussing the impossibility to denounce other treaties, the Court affirms that the PSS is an independent treaty and has a different mechanism of protection of ESCR. The IACtHR highlighted Articles 31 and 77 as the basis for creating protocols and other treaties but still concluded that the protocols are treaties separated from the Convention.⁷⁸ The Court used Article 2(1)(a) VCLT to justify classifying the PSS as an independent treaty. The provision explains that a treaty is an agreement that can be “embodied in a single instrument or in two or more related instruments and whatever its particular designation.”⁷⁹ The Court's argument lies on the last part because it argued that it does not matter the name given to the Protocol since it is still a treaty.

Differently than the Court, some defend the dependency of the PSS to the ACHR. Not only because of its name but the provisions and intentions behind its creations. Article 31 of the ACHR determines the inclusion of rights and freedoms in the system through its Articles 76 and 77. The first article is connected to amendments of the Convention, while the second is the draft of protocols to include rights and freedoms in the IAS. In the IAS, Additional Protocols are connected directly to the American Convention. They aim to improve the list of rights protected in the ACHR since they are created for it.⁸⁰ The Protocols are part of the system. However, the central debate is their role in the adjudication of cases.

⁷⁶ ‘American Convention on Human Rights’ (n 74).

⁷⁷ Seatzu and Torres (n 19), 149.

⁷⁸ *Opinión Consultiva Oc-26/20* (Inter-American Court of Human Rights), ¶83-86.

⁷⁹ ‘Vienna Convention on the Law of Treaties’ <https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf>.

⁸⁰ ‘La justicia directa de los derechos económicos, sociales y culturales’ (Instituto Interamericano de Derechos Humanos 2008), 168.

The PSS's preamble defines that "[...] although fundamental [ESCR] have been recognized in earlier international instruments of both world and regional scope, it is essential that those rights be reaffirmed, developed, perfected and protected to consolidate in America [...]"⁸¹ Based on the preamble's recognition, it is possible to infer a connection between previous instruments and the PSS. Based on it, Ruiz-Chiriboga advocates for the notion of unity between the PSS and the ACHR. The main reasons given for it are the name of the Protocol because it links to the Convention, and the preamble, as mentioned, set a clear goal.⁸² Therefore, the PSS has a list of specific rights that are not provided directly by the ACHR.

Gabriela Rodríguez, when analyzing Article 31 of the ACHR, affirmed that there are two ways of including rights: amendments and protocols. She argued that protocols encompass other rights not protected in the Convention and "[t]he additional protocols are secondary treaties that derive from a main treaty and seek to expand some aspects of the main treaty. In this sense, they are dependent on the main treaty, they are independent treaties inasmuch as their celebration process, entry into force and ratification. Therefore, they only bind those states to adhere to it."⁸³

The arguments presented by the Court and some scholars do not respect international law. The function of the PSS is explicit in the ACHR and the meaning of Articles 31 and 77. They intend to maintain uniformity in the IACtHR's jurisprudence when positioning the PSS as an independent treaty. This incongruence was highlighted by Judges Pérez Manrique and Vio Grossi since both are against the direct enforceability of ESCR through Article 26,⁸⁴ which is the position supported by this thesis. Hence, the PSS is part of the American Convention and expanded its list of rights.

In the 1990s, both Court and Commission issued Annual Reports with chapters connected to the Draft Protocol. The IACmHR assertively defended that "[t]he proposed Additional Protocol should treat [ESCR] as rights that correspond to the human individual as such, and refrain from referring to them as goals and objectives."⁸⁵ The Commission explained that the first five articles

⁸¹ 'Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights' <<https://www.oas.org/juridico/english/treaties/a-52.html>>.

⁸² Ruiz-Chiriboga (n 16), 163-165.

⁸³ Gabriela Rodríguez, 'Artículo 31. Reconocimiento de Otros Derechos', *Convención Americana sobre Derechos Humanos: comentada* (Fundación Konrad Adenauer 2014), 719-720.

⁸⁴ *Voto Concurrente en el Caso Asociación Nacional de Cesantes y Jubilados de la Superintendencia Nacional de Administración Tributaria (Ancejub-Sunat) vs. Perú* (n 8), ¶11-12; *Partially Dissenting Opinion in the Case Lagos del Campo vs. Peru* (n 30), ¶8-10.

⁸⁵ 'Areas in Which Further Steps Are Needed to Give Effect to Human Rights Set Forth in the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights' (n 33).

in the instrument are general provisions, which follow international practices.⁸⁶ In the Annual Report, the Court explained that the rights under individual petition should follow the general rules of the ACHR from Article 61 to 63. Additionally, the Court stated that it “should be an additional protocol, and not a separate convention.”⁸⁷ These documents from the Draft of the PSS demonstrate the regional bodies to use the Convention when the PSS lacks rules.

The thesis focuses on limitations and derogations from ESCR protected by the PSS regardless of which right is under individual petition or monitoring mechanism. The main goal is to establish the general rule for the PSS as a continuation of the ACHR. It alludes that when the PSS has rules in its text, those are the ones to be used, and, differently, the ACHR is supplementary when the PSS lacks them. As explained in the subsequent chapters, Article 5 PSS provides limitations, which means that the Protocol has its rules. On the contrary, derogations are established only in the ACHR, which means that the Convention's rules apply for ESCR in the PSS.

3. Limitations of economic, social, and cultural rights

After ratifying a treaty, States can restrict human rights. One way to do this is limitation because States can limit certain rights under specific conditions during normal periods.⁸⁸ Not all rights are subjected to limitations, such as freedom from torture and inhuman treatment and freedom from slavery, but the rest must follow the rules provided in the IAS. This chapter is divided into three sections. First, the general rules of limitations that are established in the ACHR are introduced. Then, a brief analysis of how the Commission and the Court deal with limitations of ESCR is analyzed. Later, a comparison between the ACHR and the PSS regarding their rules is considered to answer the research question.

a. Discussion on limitations

Human rights' limitations are allowed based on the harmony of human rights. As explained by Rodríguez, “the restrictions refer to the normal limitations that the public authority may impose on the rights of individuals, due to the public interest or the common good, while there are no

⁸⁶ ‘Areas in Which Steps Need to Be Taken Towards Full Observance of the Human Rights Set Forth in the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights’ (Inter-American Commission on Human Rights 1986) Annual Report of the Inter-American Commission on Human Rights 1985-1986 OEA/Ser.L/V/II.68.

⁸⁷ ‘Observations of the Court on the Preliminary Draft Additional Protocol to the American Convention’ (Inter-American Court of Human Rights 1986) Annual Report of the Inter-American Court of Human Rights 1986, 43-44.

⁸⁸ Steiner, Alston and Goodman (n 2), 394.

absolute rights.”⁸⁹ States Parties cannot apply limitations’ rules from the ACHR implicitly. However, some of the terms used in the Convention are indeterminate. Consequently, the Court provides some clarification for States on how to limit rights.⁹⁰

The IACtHR developed a test to check whether the limitation of a right leads to a violation of it, the so-called restriction test. The legal basis for limitations in the ACHR is Article 30 and 32(2). The first one refers to “laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established,”⁹¹ while the second is limiting rights because of “rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.”⁹² The Court issued two advisory opinions regarding those articles, which are the basis for the restriction test.

Advisory Opinion 6/86 interprets Article 30 concerning the connotation of the term “laws.” The Court clarified that it would provide meaning to “laws” only in articles dedicated for limitations. Any other expression similar to it in the Convention should have its analysis and interpretation.⁹³ The Court explained that “laws” in this context mean “a law passed by the Legislature in accordance with the Constitution”⁹⁴ since it can avoid arbitrary power. The ground is the principle of legality expressed in the Convention’s preamble, which connects the treaty to democracy. Therefore, the law is the one approved by the legislature.⁹⁵ The Advisory Opinion 5/85 refers to the analysis of Article 32(2). The Court determined that general welfare is understood as the “conditions of social life that allow members of society to reach the highest level of personal development and the optimum achievement of democratic values.”⁹⁶

Some scholars point out that Article 30 applies to rights that already have a limitation clause in its provision, such as freedom of expression.⁹⁷ Those limitations are exceptional, and States must follow certain criteria specified in the same provisions that recognize the relevant right.⁹⁸ For example, Article 15 allows States to limit freedom of assembly based on democratic

⁸⁹ Gabriela Rodríguez, ‘Artículo 30. Alcance de las Restricciones’, *Convención Americana sobre Derechos Humanos: comentada* (Fundación Konrad Adenauer 2014), 715.

⁹⁰ *ibid.*, 715-716.

⁹¹ ‘American Convention on Human Rights’ (n 74).

⁹² *ibid.*

⁹³ *Advisory Opinion OC-6/86* (n 7), ¶16.

⁹⁴ *ibid.*, ¶23-24.

⁹⁵ *ibid.*

⁹⁶ *Advisory Opinion OC-5/85* (Inter-American Court of Human Rights), ¶66.

⁹⁷ Flávia Piovesan, Melina Girardi Fachin and Valério de Oliveira Mazzuoli, *Comentários à Convenção Americana Sobre Direitos Humanos* (Editora Forense 2019), 273.

⁹⁸ *ibid.*

necessity. The IACtHR affirmed that Article 30 “refers to the restrictions that the Convention itself authorizes with respect to the different rights and freedoms recognized therein.”⁹⁹

Over time, the Court developed the restriction test combining those provisions and decided to apply it on all rights in the Convention, regardless of whether the provision incorporates a limitation clause.¹⁰⁰ Therefore, in this understanding, the restriction test could be applied from Article 3 to Article 25 of the Convention. The terms used by the Convention are broad and cannot provide States a clear direction on how to limit rights. The only direct criterion from the text is that only laws can allow rights to be limited,¹⁰¹ which means “a legal norm passed by the legislature and promulgated by the Executive Branch, pursuant to the procedure set out in the domestic law of each State.”¹⁰² Therefore, this is the first criterion of the restriction test, namely the strict legality from Article 30 ACHR.

The second criterion is a legitimate aim. The combination of Articles 30 and 32(2) amounts to this criterion. The legitimate aim is the purpose of the limitation, which is within general welfare, rights of others, and security of all, as expressed in these provisions. The Convention brings some other terms in the provisions that already have limitation clauses, such as public health in freedom of association. However, all those terms used by the Convention are considered vague and open. The task to define them is challenging.¹⁰³ The legitimate aim is the reason for the limitation provided by international treaties.¹⁰⁴ As a result, Daniel Vázquez attempted to provide meaning to those expressions to clarify which situations allow limitations under the ACHR.¹⁰⁵

The concept of general welfare was directly provided by the Court as already discussed¹⁰⁶ but Vázquez explained the others. National security is related to situations in which the entire State (territorial or political independence) is under attack with “effective threat or use of force.”¹⁰⁷ Public safety is connected to possible dangers to people or their goods, and public order is, for the Court, “the conditions that ensure the harmonious and normal functioning of the institutions on the

⁹⁹ *Advisory Opinion OC-6/86* (n 7), ¶14.

¹⁰⁰ *Opinión Consultiva OC-21/14* (Inter-American Court of Human Rights), ¶275-278.

¹⁰¹ Humberto Nogueira Alcalá, ‘Las Limitaciones Legítimas a Los Derechos Humanos’, *Teoría y dogmática de los derechos fundamentales, primera reimpresión* (2nd edn, Instituto de Investigaciones Jurídicas 2018), 142.

¹⁰² *Advisory Opinion OC-6/86* (n 7), ¶27.

¹⁰³ Alcalá (n 101), 142.

¹⁰⁴ Daniel Vázquez, *Test de Razonabilidad y Derechos Humanos: Instrucciones Para Armar. Restricción, Igualdad y No Discriminación, Ponderación, Contenido Esencial de Derechos, Progresividad, Prohibición de Regresión y Máximo Uso de Recursos Disponibles* (2nd edn, Instituto de Investigaciones Jurídicas 2016), 75.

¹⁰⁵ *ibid.*

¹⁰⁶ *Advisory Opinion OC-5/85* (n 96), ¶66.

¹⁰⁷ Vázquez (n 104), 58.

basis of a coherent system of values and principles.”¹⁰⁸ Public health regards any threat to people’s health, and the limitations aim to avoid or solve it. Lastly, the rights and freedoms of others are a legitimate aim when the limitation is necessary to allow “the harmonious and orderly exercise of all of them.”¹⁰⁹ Hence, if the aim of the limitation is connected to any of these situations, the criterion is fulfilled.

Appropriateness, necessity, and proportionality, the three other criteria, were added from the Court’s understanding. Their goal is to balance the limitation’s purpose and the right’s protection. They can be understood as derived from “democratic society” since it “takes account of the need to balance the competing interests involved and the need to preserve the object and purpose of the Convention.”¹¹⁰ According to Vázquez, necessity justifies the limitation, while appropriateness is “the existence of a clear causality relationship between the restriction as a means to reach the legitimate aim sought.”¹¹¹ Lastly, proportionality measures the limitation imposed on people’s rights and the result created.¹¹² Although these concepts may seem straightforward, the Court may vary its application when analyzing each right.

As a brief comparison, freedom of expression and children’s rights did not have the same understanding. In the case of freedom of expression, the IACtHR affirmed that appropriateness is connected to the goal of safeguarding “the legal right to be protected,” necessity relates to “the existence of a pressing social need to justify the restriction,” while proportionality is how the State handled the limitation in the specific case.¹¹³ Differently, in children’s rights, the Court determined that limitation is: appropriate when the purpose relies on the ACHR, necessary when the measure was the best one considering effectiveness and least harmful, and proportional when the limitation is as narrow as possible, and in connection to the legitimate aim.¹¹⁴ Hence, more than being aware of the restriction test, States must understand the meaning of appropriateness, necessity, and proportionality for the Court in each right provided by the Convention in its case-law and advisory jurisdiction.

The Commission also has its understanding of the criteria of the restriction test. Necessity is prescribed by “whether the limitations appropriately contribute to the attainment of aims

¹⁰⁸ *ibid*, 58.

¹⁰⁹ *ibid*.

¹¹⁰ *Advisory Opinion OC-5/85* (n 96), ¶67.

¹¹¹ Vázquez (n 104), 61.

¹¹² *ibid*, 64.

¹¹³ *Case of Fontevecchia and D’amico v Argentina* (Inter-American Court of Human Rights), ¶53-75.

¹¹⁴ *Opinión Consultiva OC-21/14* (n 100), ¶276-278.

compatible with the American Convention, or whether they are able to contribute to the realization of those objectives.”¹¹⁵ Appropriateness is characterized as “[t]he need for the measure is determined by evaluating whether the restrictions are essential for the achievement of the legitimate aim, or whether there are other, less harmful measures.”¹¹⁶ Lastly, proportionality is “whether the sacrifice of freedom of expression that it entails is exaggerated or disproportionate to the advantages obtained through its use.”¹¹⁷

The IACmHR follows the test created by the Court but does not use it in all its case reports. For instance, in the merits report for the *Lagos del Campo v. Peru*, the Commission assessed how freedom of expression was limited unlawfully by Peru and the consequences for other human rights.¹¹⁸ Differently, in the merits report for the *Gonzales Lluy et al v. Ecuador*, the Commission did not analyze the right to education, and consequently, it did not assess any limitation.¹¹⁹

The restriction test is the main assessment for limitations in the IAS. It is relevant to address the test applied by both the Commission and the Court regarding discrimination, which is different than the restriction one. The reason to discuss the strict equality test is a possible confusion between the two since they are similar. The restriction test is used to determine if the State lawfully limited people’s rights, while the test to assess discrimination is to establish whether an act of the State is discriminatory or creates a distinction among people.

There are two concepts of equality in the ACHR: equality before the law, connected to the prohibition of arbitrariness, and prohibition of discrimination. The first one is provided in Article 24 ACHR and is the classic concept of equality, in which the State must refrain from making any differentiation among people. The second concept is in Article 1(1) and is a positive obligation of the State to treat certain vulnerable groups differently to achieve equality.¹²⁰ Both IAS bodies apply a test to assess whether an act amounts to discrimination. The Court calls it a strict equality test,¹²¹ while the Commission refers to it as proportional judgment.¹²²

¹¹⁵ *Report No 27/15* (Interamerican Commission on Human Rights), ¶88.

¹¹⁶ *ibid.*

¹¹⁷ *ibid.*

¹¹⁸ *ibid.*, ¶73-90.

¹¹⁹ *Report No 102/13* (Inter-American Commission on Human Rights).

¹²⁰ Marianne González Le Saux and Óscar Parra Vera, ‘Concepciones y cláusulas de igualdad en la jurisprudencia de la Corte Interamericana. A propósito del Caso Apitz’ (2008) 47 *Revista IIDH* 127, 129-134, 136.

¹²¹ *Caso Gonzales Lluy y Otros vs. Ecuador* (n 12), ¶257.

¹²² ‘Compendio sobre la igualdad y no discriminación. Estándares Interamericanos’ (Inter-American Commission on Human Rights 2019) Compendio, ¶55-56.

When the State makes a differentiation between groups of people, the Court analyzes the legitimate aim, appropriateness, necessity, and proportionality of the measure to determine if it resulted in discrimination or distinction.¹²³ The Commission explained that the test was created based on Article 1(1). Nevertheless, it can be read together with Article 24 ACHR.¹²⁴ This test is unconnected to the limitations of human rights. However, it is a relevant test since it has the same elements as the restriction test, excluding the strict legality. Additionally, the IACtHR already applied the strict legality test to assess unlawful limitations, a topic addressed in the next section. In *Gonzales Lluy et al v. Ecuador*, the Court brought this test in connection to limitations. Hence, the further section is devoted to checking how the regional bodies assessed ESCR and the strict legality test application in the Gonzales case.

b. Commission and Court cases on limitations on economic, social, and cultural rights

Before analyzing whether the restriction test applies to the PSS, it is fundamental to examine the cases that amounted to violations of ESCR involving the PSS. The reason to analyze these cases is to verify how the bodies of the IAS deal with limitations connected to the PSS exclusively. Although the Court adjudicated cases regarding ESCR under the ACHR, they are not connected to the PSS and would not guide the topic.

The Commission issued five reports on ESCR under the PSS, four regarding the right to education and one about the right to unionization. There is no mention of limitations on any of them, although there could be discussions in the cases. For example, in the Report n° 147/11 against Ecuador, children were not enrolled in an American school because the parents complained about the prices and won the right to be reimbursed. The Commission decided that the right to education should be discussed because it was Ecuadorian responsibility to ensure that private schools obey the law and decisions.¹²⁵

There are few cases in which the Court found a violation based on the PSS.¹²⁶ One of those cases is *Gonzales Lluy et al v. Ecuador* related to the right to education and its limitation, connecting to the PSS. Nevertheless, the decision demonstrated how the Court avoids the rules of

¹²³ Le Saux and Vera (n 120), 129-130.

¹²⁴ 'Compendio sobre la igualdad y no discriminación. Estándares Interamericanos' (n 122), 57-18.

¹²⁵ *Report No 147/11* (Inter-American Commission on Human Rights), ¶9-18, ¶64.

¹²⁶ *Opinión Consultiva OC-22/16* (Inter-American Court of human rights), ¶22.

the PSS, even in cases regarding the document. As mentioned, the PSS has a list of obligations and a limitation clause, but these were neglected in the case by the IACtHR.

Talía Gabriela Gonzales Lluy, the victim, was expelled, by the director, from the school she was studying because she has HIV, which constituted discrimination against her right to education. The Court dismissed the violation of Article 24 ACHR because the discrimination against a right not provided in the Convention “refers to an unequal protection of domestic law or its application.”¹²⁷ Instead, the IACtHR applied Article 1(1), which establishes general obligations of States and determines it cannot amount to discrimination. The Court explained that “if a State discriminates with regard to the respect or guarantee of a right recognized in the Convention, it would violate Article 1(1) and the substantive right in question.”¹²⁸

There are two technical shortcomings in this decision. Firstly, the right to education argued by the applicants is grounded in Article 13 PSS. The PSS provides in Article 3 the obligation of nondiscrimination. It indicates that the Court should have used this provision to justify the analysis of discrimination. Secondly, Article 24 ACHR does not deal with rights that are not provided in the Convention since the PSS brought new rights and rules to expand human rights protection. Therefore, the basis of the discrimination is neither Article 1(1) nor Article 24. The accurate justification is Article 3 PSS, which was neglected completely by the Court.

The Court examined whether the expulsion of Talía was considered a limitation on her right to education, and it concluded that it was. However, the Court used the strict equality test to assess the limitation, which is linked nondiscrimination. As already explained, both tests have similar elements but different functions. The restriction test aims to determine if a limitation is in accordance with the ACHR. While the strict equality test assesses whether a measure is discriminatory or not based on Article 1(1) ACHR. This is the first shortcoming of the decision: the Court mixed the two tests when assessing the limitation. The Court concluded that Ecuador limited Talía’s right to education because the measure was discriminatory as her expulsion was not based on medical proof.¹²⁹ However, the words of the Court were misleading because the test applied does not imply a limitation in terms described by the Convention, but discrimination against her.

¹²⁷ *Caso Gonzales Lluy y Otros vs. Ecuador* (n 12), ¶243.

¹²⁸ *ibid.*

¹²⁹ *ibid.*, ¶273-274.

There was no issue with the assessment of the Court regarding the four elements of the strict legality test. The analysis of the IACtHR regarding the legitimate aim assessed that although protecting children's health is a valid argument to limit someone's rights, the reasons behind the limitation on Talía's right to education were based on stereotypes and were not grounded on real findings. The Court explained that there was no real conflict between Talía's rights and the other children's rights since there was no real risk.¹³⁰ Based on this, the Court argued that Talía's expulsion was not a necessary measure since she did not represent any risk and the school could have opted for other less harmful forms of solving the situation. Additionally, the Court criticized the lack of argumentation and strong evidence that the national judge used in the case.¹³¹ Hence, in the eyes of the Court, the limitation was not legitimate.¹³² The Court assessed that the national judge did not decide proportionally when determined that Talía should be kept out of the schools because the judge's decision had been based on misinformation and stereotypes.¹³³

Another shortcoming of the Court was the basis of the strict legality test. The PSS has Article 3 with the same wording as the ACHR, which means that the Court should have used the PSS' rules instead of Article 1(1) ACHR when assessing whether there was discrimination against Talía. The examination of the Court also disregarded the PSS provision on the right to education. There was a lack of deeper analysis of the right to education provided in Article 13 PSS. Ecuador was sanctioned for violating Article 13 PSS because Talía was not allowed to study at a regular school based on her health condition. Nevertheless, the Court's assessment of the right to education was based on discrimination¹³⁴ and not in the right to education per se. The Court did not specify which part of the right to education was directly violated and how the country could have avoided the violation.

Although the Court considers the PSS an independent treaty,¹³⁵ it did not consider Articles 3, 5, and 13 of the instrument, and applied the ACHR. This leads to questioning the real importance the Court gives to the PSS and the decision made by States when ratifying the PSS. The decision issued by the Court in *Gonzales Lluy et al v. Ecuador* contains shortcomings, and it does not provide any clarification regarding limitations to ESCR in the PSS. Since the strict equality test

¹³⁰ *ibid*, ¶266-269.

¹³¹ *ibid*, ¶271-272.

¹³² *ibid*, ¶266

¹³³ *ibid*, ¶274.

¹³⁴ *ibid*, ¶243-244.

¹³⁵ *Opinión Consultiva OC-26/20* (n 78), ¶83-86.

can only be used in cases of discrimination, it is not an answer for how States can limit ESCR. The case law does not provide any guidance regarding limitations to ESCR in the Protocol. Thereby, the next section focuses on answering this question.

c. *Limitations on economic, social, and cultural rights*

The PSS is part of the Convention, and it has its own rules, such as the obligation to nondiscrimination provided in Article 3 and how to limit rights under Article 5. The latter has the same goal as Articles 30 and 32(2) ACHR, but the words that were chosen by the drafters changed. Article 5 is applied for all rights in the PSS, regardless of which protection mechanisms they are under, either individual petitions or report mechanisms. Since both IAS bodies apply the restriction test for the ACHR, it is necessary to conduct a comparison of the documents' text to conclude whether the restriction test is inserted in the PSS.

The VCLT, in its Article 33(1), regulates the equal importance of all official languages of a treaty. In the IAS, there are four official languages: English, Spanish, Portuguese, and French. Therefore, the comparison needs to be in all of them to achieve an answer regarding the wording of the documents. The first criterion is strict legality. In the English version, Article 30 expresses "laws enacted" and Article 5 provides "laws promulgated." In accordance with the Oxford dictionary, enact means "to pass a law," while promulgating means "to announce a new law or system officially or publicly."¹³⁶ Clearly, those two words are not synonyms in the English version of the ACHR, which would mean that the strict legality read in Article 30 is not present in Article 5.

The same answer cannot be given in all official languages. In the Portuguese version, Article 30 uses "promulgada"¹³⁷ (promulgation), the same word is used in the Portuguese version of the PSS. Michaelis dictionary explains that this word means that the law or decree was made officially public.¹³⁸ In Spanish, the ACHR is silent regarding which type of laws should be used, since it says "leyes que se dictaren por [...]" (laws that are dictated by [...]). The PSS uses "promulgadas,"¹³⁹ same word as the other two versions, and it refers to something published

¹³⁶ 'Oxford Dictionary' <<https://www.oxfordlearnersdictionaries.com/>>.

¹³⁷ "Publicar oficialmente" or "Fazer com que se cumpra a publicação de lei, decreto ou outro documento legislativo."

¹³⁸ 'Michaelis dicionário' <<https://michaelis.uol.com.br/moderno-portugues/>>.

¹³⁹ "Publicar algo solemnemente," "Hacer que algo se divulgue y propague mucho en el público," or "Publicar formalmente una ley u otra disposición de la autoridad, a fin de que sea cumplida y hecha cumplir como obligatoria."

solemnly, according to the Real Academia Española.¹⁴⁰ The French version of the ACHR and the PSS apply the word “édictées”¹⁴¹ in the texts. This word means, according to Le Petit Robert dictionary, laws that are established, expressed in a peremptory way.¹⁴²

There is a clear difference among the four official languages in the ACHR, which may lead to confusion. Nevertheless, the VCLT solves this problem in Article 33(3) because it determines that “[t]he terms of the treaty are presumed to have the same meaning in each authentic text.” As a source of interpretation, the preparatory work shows that the States were not concerned about enactment or promulgation, since they approved the draft without any of them. The document is in Spanish and none of the State Parties were preoccupied in adding the words in the Uruguayan version of Article 30 ACHR.¹⁴³

The Court followed the same logic when interpreting the provision since the principle of legality is connected to democracy enshrined in the preamble, which entitles both enactment and promulgation of laws.¹⁴⁴ Both the ACHR and the PSS have the same text in the preamble determining the States’ “intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man.” Hence, strict legality can be applied on the PSS based on all these arguments, together with the fact that the PSS’s official versions do not have any difference.

The second criterion is a legitimate aim, and as explained, is connected to the reasoning of certain limitations. Both documents provide aims in their texts but in different terms. In the English version, Article 30 determines that limitations have as a goal the “reasons of general interest” with the “purpose for which such restrictions have been established,” and Article 32(2) brings rights of others, general welfare, and security of all. Differently, Article 5 determines that limitations should preserve general welfare and without being “incompatible with the purpose and reason underlying those rights.” The other versions bring similar wording, as can be seen below in Table 1.

Table 1: comparison between Article 32(2) of the ACHR and Article 5 of the PSS

Language	ACHR	PSS
Spanish	“razones de interés general y con el propósito para el cual han sido establecidas”	“preservar el bienestar general [...] no contradigan el

¹⁴⁰ ‘Diccionario de la lengua española’ <<https://dle.rae.es/>>.

¹⁴¹ “Établir, prescrire par une loi, par un règlement,” or “Exprimer, prononcer d’une manière péremptoire.”

¹⁴² ‘Le Petit Robert dictionary’ <<https://www.lerobert.com/>>.

¹⁴³ ‘Conferencia Especializada Interamericana sobre Derechos Humanos’ (n 36), 274.

¹⁴⁴ *Advisory Opinion OC-6/86* (n 7), ¶35.

	“derechos de los demás, por la seguridad de todos y por las justas exigencias del bien común”	propósito y razón de los mismos”
Portuguese	“motivo de interesse geral e com o propósito para o qual houverem sido estabelecidas” “ direitos dos demais , pela segurança de todos e pelas justas exigências do bem comum ”	“preservar o bem-estar geral [...] não contrariem o propósito e razão dos mesmos”
French	“ l'intérêt général et uniquement aux fins pour lesquelles ces lois ont été prévues” “ droits d'autrui , par la sécurité de tous et par les justes exigences du bien commun ”	“préserv ^{er} le bien-être général [...] ne vont pas à l'encontre de l'objet et de la raison de ces droits”

Source line: Spanish, Portuguese and French versions of the American Convention on Human Rights and Protocol of San Salvador.

Although Article 5 provides fewer options for a legitimate aim, the PSS brings some other options along with the text. As an example, Article 8, the right to unionization, establishes the possibility to limit rights to safeguard “public order or for protecting public health or morals or the rights and freedoms of others.”¹⁴⁵ Since both instruments bring similar aims and structure, it is possible to conclude that the legitimate aim as a criterion is fulfilled in the PSS. Lastly, appropriateness, necessity, and proportionality are extracted from a democratic society, a term seen in Article 32(2) and Article 5, which leads to the maintenance of them as criteria for determining whether limitations are lawful. In all versions of the ACHR and the PSS the expression democratic society is used: “sociedade democrática” in Portuguese, “sociedad democrática” in Spanish, and “société démocratique” in French. Hence, this part of the test can also be kept when analyzing limitations in the PSS.

To conclude, the restriction test could be applied to any ESCR since all criteria are present in Article 5. This means that both IAS bodies should apply the test. According to Article 19(7), the Commission can issue observations and recommendations regarding ESCR. Therefore, in case a State limits a non-enforceable right, the Commission can assess whether it respected the test within its competences on the PSS. The same way, the Court should adjudicate cases based on the restriction test if it concerns the two directly enforceable rights established in Article 19(6).

¹⁴⁵ ‘Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights’ (n 81).

4. Derogations from economic, social, and cultural rights

This chapter focuses on derogations as the second type of human rights restriction. The first section discusses general rules of derogations in the IAS. Additionally, it explores how the regional bodies assess whether derogations followed the ACHR. The second section examines how ESCR can be derogated under the system since the PSS does not contain a derogation clause.

a. *Discussion on derogations*

Derogations from human rights are allowed in abnormal times, aiming to solve imminent problems, with strict criteria to suspend international obligations.¹⁴⁶ Not all human rights are exposed to derogations. The VCLT stipulates that jus cogens or peremptory norms are rights not subject to any derogation.¹⁴⁷ Derogations have a common ground in all systems. Nevertheless, the IAS has its peculiarities regarding which rights are not subject to derogations. In addition, it establishes criteria on how the American States can derogate from human rights.

Article 27 ACHR has three parts divided into rules of suspension, rights not subject to suspension, and how to proceed in the system to announce it. This provision generates four different notions of suspensions. The first is ‘suspension of guarantees’ and is connected to suspension of “the enjoyment and exercise of some rights.”¹⁴⁸ The second type is ‘suspension of contracted obligations,’ which allows States to comply with their obligations during a certain period. The third is ‘suspension of rights’ and it does not signify that those rights disappear, but States can refrain from interfering or protecting rights.¹⁴⁹ The fourth one is the ‘right to suspend’ of States. According to Mac-Gregor Poisot and Alfonso Herrera García, in effect, States are not human rights holders. Consequently, they are not entitled to a “real” right in this notion of suspensions because it is an authorization in case of necessity.¹⁵⁰

During the drafting of the Convention, the two main instruments presented as sources for the derogation clause were the International Covenant on Civil and Political Rights (ICCPR) and the European Court of Human Rights (ECHR), both focused on CPR.¹⁵¹ The debates in the

¹⁴⁶ Steiner, Alston and Goodman (n 2), 394.

¹⁴⁷ Article 53 of the VCLT.

¹⁴⁸ Eduardo Ferrer Mac-Gregor and Alfonso Herrera García, ‘La suspensión de derechos humanos y garantías. Una perspectiva de derecho comparado y desde la Convención Americana sobre Derechos Humanos’, *Constitución Política de los Estados Unidos Mexicanos, tomo 2: Estudios jurídicos* (Instituto de Investigaciones Jurídicas 2017), 110-112.

¹⁴⁹ *ibid.*

¹⁵⁰ *ibid.*, 112.

¹⁵¹ ‘Conferencia Especializada Interamericana sobre Derechos Humanos’ (n 36), 264.

American continent were centered on the reasons for derogating and the list of rights not subjected to this derogation. Regarding the first point, El Salvador suggested the inclusion of the expression “other emergency” to include any situation that could threaten States. The second debate started with Mexico because its constitution allowed derogations from all rights provided in its constitution necessary to secure the country. Other countries had the same issue, but they achieved a compromise and agreed to have a list of rights not exposed to derogations.¹⁵² Relevant to remark that in the debate there was no mention of any ESCR. Costa Rica, supporter of the Mexican position, used “individual guarantees” as example. The US, in favor of list of non-derogable rights, based its arguments in the North American revolution, which was founded in freedom.

The IACtHR delivered two different advisory opinions regarding derogations. In the Advisory Opinion 8/87, the Court clarified that in “certain circumstances the suspension of guarantees may be the only way to deal with emergency situations and, thereby, to preserve the highest values of a democratic society.”¹⁵³ The Court alluded to the preservation of democracy in connection with the rule of law and the principle of legality.¹⁵⁴ Advisory Opinion 9/89 elucidates that Article 27(1) contains the criteria that States must fulfill if they want to derogate from rights. The Court affirms that in “any state of emergency there [should] be appropriate means to control the measures taken so that they are proportionate to the needs and do not exceed the strict limits imposed by the Convention or derived from it.”¹⁵⁵

The Court affirmed that to assess the situation under which States want to derogation from rights, “[t]he lawfulness of the measures taken to deal [...] will depend, moreover, upon the character, intensity, pervasiveness, and particular context of the emergency and upon the corresponding proportionality and reasonableness of the measures.”¹⁵⁶ Abuses indeed may happen during this suspension. The Convention provided strict criteria in Article 27(1) to allow derogations and a list of absolute underogable rights.

Derogations are possible under five criteria presented in the Convention. The first part of Article 27(1) relates to which situations can permit derogations. The Draft of the Convention demonstrated that States did not want to limit the possibilities.¹⁵⁷ Thus, the article provides some

¹⁵² *ibid*, 264-266.

¹⁵³ *Advisory Opinion OC-8/87* (Inter-American Court of Human Rights), ¶21.

¹⁵⁴ *ibid*, ¶24.

¹⁵⁵ *Advisory Opinion OC-9/87* (Inter-American Court of Human Rights), ¶21.

¹⁵⁶ *Advisory Opinion OC-8/87* (n 153), ¶22.

¹⁵⁷ ‘Conferencia Especializada Interamericana sobre Derechos Humanos’ (n 36), 264-265.

situations that allow derogations, but those are not exhaustive.¹⁵⁸ In accordance with the Commission, “[i]t is understood that such situations must first be extremely grave, and second, must be actually happening or, in fact, imminent.”¹⁵⁹

Although the first criterion is an open clause, the Convention established two situations under which derogations are allowed: time of war and a public danger. The first one is understood by scholars as “(1) a contention; (2) between two or more states; (3) that involves their armed forces; and (4) constitutes an emergency that threatens the independence or security of the derogating state.”¹⁶⁰ The expression public danger is broad and may lead to confusion regarding its meaning. The concept of this expression is connected to natural disasters that may happen in any American State.¹⁶¹ Nevertheless, this inclusion was criticized by Robert E Norris and Paula Desio Reiton. The reason is that the limitation clause includes natural disasters in relation to safety and order.¹⁶² Hence, the first criterion is characterized by the situation under which the State is.

The second criterion is proportionality. Article 27(1) ACHR determines that the measures are taken “to the extent [...] strictly required by the exigencies of the situation.” The IACmHR expressed those derogations follow the “principles of proportionality, necessity and nondiscrimination.”¹⁶³ The Commission ensured that derogation “precludes the unnecessary suspension of rights, the imposition of restrictions more severe than necessary, or the unnecessary extension of suspension to regions or areas not affected by the emergency.”¹⁶⁴ In the case *J. v. Peru*, the Court connected this requirement to the Advisory Opinion, which means that the measure is proportionate and necessary depending on the character, intensity, pervasiveness, and context.¹⁶⁵ Those characteristics of the situation are analyzed by the Court based on the facts of the case.¹⁶⁶

The third criterion is the temporal and geographic limitation of the state of emergency, which is linked to the proportionality one. The Court clarified that States do not have limited

¹⁵⁸ Gabriela Rodríguez, ‘Artículo 27. Suspensión de garantías’, *Convención Americana sobre Derechos Humanos: comentada* (Fundación Konrad Adenauer 2014). 679-680.

¹⁵⁹ ‘Situation of Human Rights in Several States’ (Inter-American Commission on Human Rights 1986) Annual Report of the Inter-American Commission on Human Rights 1985-1986.

¹⁶⁰ Robert E Norris and Paula Desio Reiton, ‘The Suspension of Guarantees: A Comparative Analysis of the American Convention on Human Rights and the Constitutions of the States Parties’ (1980) 30 American University Law Review 189, 195.

¹⁶¹ *ibid.*

¹⁶² *ibid.*, 198-199.

¹⁶³ ‘Report on Terrorism and Human Rights’ (Inter-American Commission on Human Rights 2002) L/V/II.116, ¶51.

¹⁶⁴ *ibid.*

¹⁶⁵ *Caso J vs Perú* [2013] Inter-American Court of Human Rights 275, ¶139.

¹⁶⁶ Rodríguez, ‘Artículo 27. Suspensión de garantías’ (n 158), 681.

discretion to act, even under a state of emergency. Hence, the law that declares the state of emergency must bring the period and the area under crisis.¹⁶⁷ The fourth criterion is consistency with international obligations. Rodríguez explains that this criterion means that States cannot use the lawful state of emergency to violate other treaties or areas, such as international humanitarian law. The author defends that in regard to other treaties in the IAS without derogation clause, States must preserve their international obligation regardless of the derogations from the ACHR.¹⁶⁸

The fifth criterion is the non-discrimination rule. The IACtHR affirmed in the Advisory Opinion 18/03 that the principle of equality and non-discrimination is a *jus cogens* norm. It indicates the non-derogable characteristic of this norm.¹⁶⁹ According to the Commission, “even if a state takes legitimate measures of derogation in accordance with Article 27(1) of the Convention, the measures can never discriminate on the grounds mentioned under that article.”¹⁷⁰

These five criteria are general requirements for States. Nevertheless, they still must meet the ones under Articles 27(2) and 27(3) to avoid violating Article 27. Article 27(2) brings the list of rights under the Convention that are considered non-derogable. There is not much of a discussion regarding those rights since the list is straightforward.¹⁷¹

Two points need to be addressed regarding the list of rights presented in Article 27(2). First, Article 42 provides the reporting mechanism for the Commission and Article 26 is connected to it since it established the monitoring of “economic, social, educational, scientific, and cultural standards.” Article 26 does not encompass individual petitions, but the Commission still can assess whether the measures are in accordance with the Convention. In the Draft of the Convention, States did not mention Article 26 or any of the standards listed. States, on the contrary, mentioned “individual guarantees” as the most in need of protection.¹⁷² Hence, it leads to the conclusion that States did not intent to include this article.

The second point relates to Articles 17 and 19 ACHR, rights of the family and rights of the children, respectively. The PSS also protect those groups of rights in its text, which may create the false impression that ACHR protects ESCR through these provisions. However, the scope of protection of the instruments are different. In the Draft of the Protocol, the Commission stressed

¹⁶⁷ *Caso Zambrano Vélez y otros vs Ecuador* [2007] Inter-American Court of Human Rights 166, ¶47-48.

¹⁶⁸ Rodríguez, ‘Artículo 27. Suspensión de garantías’ (n 158), 682.

¹⁶⁹ *Opinión Consultiva OC-18/03* (Inter-American Court of Human Rights), ¶97-101.

¹⁷⁰ ‘Report on Terrorism and Human Rights’ (n 163), ¶343.

¹⁷¹ *Caso Zambrano Vélez y otros vs. Ecuador* (n 167), ¶80-81.

¹⁷² ‘Conferencia Especializada Interamericana sobre Derechos Humanos’ (n 36), 265.

the importance of protecting children in relation to the right to education because they need special attention.¹⁷³ In addition, the Commission acknowledge the existence of provisions in the ACHR but defended special measures for children and families.¹⁷⁴

In the ACHR, the instrument is concerned about equality, consent, and responsibility regarding the rights of the family. For instance, Article 17(4) stipulates the obligation “ensure the equality of rights.” Concerning the rights of the children, Article 19 is a general provision guaranteeing protection of rights.¹⁷⁵ In contrast, Article 15(3) PSS ensures the families, for example, nursing, nutrition, and schooling. Article 16, protecting children’s rights, assures more rights than the ACHR, including “the right to free and compulsory education, at least in the elementary phase.” As argued, the PSS came into force to expand the number of rights protected in the ACHR and the rights of the family and the rights of the children prove this point. Hence, the ACHR does not protect directly ESCR, and it does not interfere in the debate of derogations from ESCR.

Furthermore, the end of Article 27(2) provides the non-derogability to “the judicial guarantees essential for the protection of such rights.” The Court affirmed that these judicial guarantees mean those that “effectively guarantee the full exercise of the rights and freedoms protected by that provision and whose denial or restriction would endanger their full enjoyment.”¹⁷⁶ The judicial guarantees included in Article 27(2) are habeas corpus and “amparo”¹⁷⁷ protected by Articles 7(6) and 25(1).¹⁷⁸ Additionally, the Court included the due process of law in Article 8 as underogable during states of emergency.¹⁷⁹ Rule of law and the principle of legality are underogable aspects to preserve democracy.¹⁸⁰ The Court concluded “[i]t is neither possible nor advisable to try to list all the possible “essential” judicial guarantees that cannot be suspended under

¹⁷³ ‘Areas in Which Steps Need to Be Taken Towards Full Observance of the Human Rights Set Forth in the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights’ (n 86).

¹⁷⁴ *ibid.*

¹⁷⁵ Although the ACHR establishes a general protection in Article 19, the Court included many rights from the Convention on the Rights of the Child. This opens the scope of protection of the right and includes obligations not listed in the ACHR. This approach can be seen in the Advisory Opinion 21/14 and Ezequiel Malarino described as judicial activism. See: *Opinión Consultiva OC-21/14* (n 100), ¶69; Ezequiel Malarino, ‘Judicial Activism, Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights’ (2012) 12 International Criminal Law Review 665, 671-672.

¹⁷⁶ *Advisory Opinion OC-8/87* (n 153), ¶29.

¹⁷⁷ As explained by the Court in the same document on ¶32: “amparo” “is a simple and prompt remedy designed for the protection of all of the rights recognized by the constitutions and laws of the States Parties and by the Convention.”

¹⁷⁸ *Advisory Opinion OC-8/87* (n 153), ¶42-32.

¹⁷⁹ *Advisory Opinion OC-9/87* (n 155), ¶29.

¹⁸⁰ ‘Report on Terrorism and Human Rights’ (n 163), ¶52.

Article 27(2). Those will depend in each case upon an analysis of the juridical order and practice of each State Party, which rights are involved, and the facts which give rise to the question.”¹⁸¹

Article 27(3) determines the need to inform the Secretary General of the OAS regarding derogations. The notification must have the list of derogated rights, the reasons for and the period of the state of emergency. The IACtHR already expressed that in case a State does not notify the Secretary with the information required, it shall analyze “the alleged violation of such articles of said Convention as relates to the protected rights claimed in the application, without regard to the rule applicable to the states of exception, that is, Article 27 of the American Convention.”¹⁸² Hence, derogations have more requirements and are more strict than limitations due to the seriousness of the measure.

b. Derogations from economic, social, and cultural rights

Different than limitations, the PSS does not contain a derogation clause in it. This brings into question whether ESCR protected in the PSS are derogable. The jurisprudence of the Court and the Reports from the Commission do not provide clarification since the states of emergencies’ violations deal with CPR. Firstly, to answer this question, the *travaux préparatoires* of the Convention demonstrate that the States were exclusively thinking of CPR when drafting Article 27. The inspiration of the clause derived from the European Convention and the ICCPR.¹⁸³ Both documents provided basically only CPR¹⁸⁴ and the derogation clause was connected to those rights.

The Commission issued three reports in the 1980s concerning the PSS and it did not provide a derogation clause to the draft or any discussion about it,¹⁸⁵ neither did the Court in its annual reports from the period.¹⁸⁶ Nevertheless, as explained in the first chapter in the third section, the Court affirmed that the ACHR should be used when the PSS does not provide the rules that are

¹⁸¹ *Advisory Opinion OC-9/87* (n 155), ¶40.

¹⁸² *Caso Baena Ricardo y otros Vs Panamá* [2001] Inter-American Court of Human Rights 72, ¶94.

¹⁸³ ‘Conferencia Especializada Interamericana sobre Derechos Humanos’ (n 36), 264.

¹⁸⁴ The European Convention protects the right to education in Protocol no. 1.

¹⁸⁵ ‘Areas in Which Further Steps Are Needed to Give Effect to Human Rights Set Forth in the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights’ (n 33); ‘Areas in Which Further Steps Are Needed to Give Effect to the Human Rights Set Forth in the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights’ (Inter-American Commission on Human Rights 1985) Annual Report of the Inter American-Commission on Human Rights 1984-1985 OEA/Ser.L/V/II.66; ‘Areas in Which Steps Need to Be Taken Towards Full Observance of the Human Rights Set Forth in the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights’ (n 86).

¹⁸⁶ ‘Annual Report of the Inter-American Court of Human Rights 1985’ (Inter-American Court of Human Rights 1986) OEA/Ser.LIV/111.12, 17-18; ‘Annual Report of the Inter-American Court of Human Rights 1986’ (Inter-American Court of Human Rights 1986) OEA/Ser. L/III.15, 41-46.

relevant for individual petitions.¹⁸⁷ These documents do not provide a clear answer on whether ESCR are derogable, but there are minor discussions either about derogations or about the PSS that may contribute to this thesis.

The Report on Terrorism and Human Rights from the IACmHR discussed the possibility to derogate rights under terrorist threats. It analyzes many of the points already brought in this chapter. However, the Commission examined the role of the ADRDM regarding derogations. It affirmed that “[w]hile the American Declaration does not explicitly contemplate the possibility of restricting or suspending the rights prescribed thereunder, the Commission has considered that the derogation criteria derived from the American Convention on Human Rights embody the Hemisphere’s deliberations on the issue and are properly considered and applied in the context of the Declaration.”¹⁸⁸ It alludes to the idea of complementary of instruments.

The Court had a different opinion regarding the lack of provisions on instruments. As explained in the first chapter, the IACtHR argued in the Advisory Opinion 26/20 that the rules do not apply when treaties do not have a specific provision. The Court affirmed it in connection to the denouncement clause of treaties. However, in this logic, if the PSS does not contain a derogation clause, it signifies that it is not possible to derogate from ESCR. The Court did not consider what the Advisory Opinion would mean for derogations, which maintains the question open.

This debate is not well developed scholarly, but some authors gave their opinion discretely on the topic. Rodríguez claimed that human rights treaties that do not possess a derogation clause in the IAS continue to keep their obligations and are non-derogable.¹⁸⁹ She does not mention the PSS, but it is possible to infer that in her view, rights protected under the PSS cannot be derogated from. Ferrer Mac-Gregor and Alfonso Herrera García had a different perspective regarding documents that do not bring the derogation clause. They argued that some IAS instruments confirm Article 27(2) ACHR. The authors explained that the Protocol to the American Convention on Human Rights to Abolish the Death Penalty determines on the preamble the impossibility to derogate from the right to life.¹⁹⁰ It is not directly a provision. However, the preamble was considered an integral part of this Protocol. It prohibits the derogation of the right to life.

¹⁸⁷ ‘Annual Report of the Inter-American Court of Human Rights 1985’ (n 186), 43-44.

¹⁸⁸ ‘Report on Terrorism and Human Rights’ (n 163), ¶50.

¹⁸⁹ Rodríguez, ‘Artículo 27. Suspensión de garantías’ (n 158), 682.

¹⁹⁰ Ferrer Mac-Gregor and Herrera García (n 148), 117.

To answer the question concerning derogations, a closer look at the Protocol is needed. The PSS preamble provides a similar text to the ACHR. Different than the Death Penalty, the PSS does not mention suspension or any possible danger. Thereby, the preamble does not guarantee that ESCR can be derogable, as Ferrer Mac-Gregor and Herrera García proposed with the death penalty. Rodríguez chose the structure of the documents. It signifies that either the instrument has an explicit provision, or it cannot derogate from rights. Those two academic positions are straightforward and are not contradictory since they rely on explicit permission for States.

The main issue derives from the positions defended by the IAS bodies. In the Draft of the PSS, the Court said that the ACHR's rule should be applied when connected to individual petitions. Later, concerning the denouncement clause, it claimed that the PSS is a separate treaty, and it cannot be denounced since there is no clause for it. The Court understood relevant provisions of the ACHR in different manners because if the provision is clearly applicable to the PSS, the ACHR is complementary, but if not pertinent, there is no need to use the ACHR in the Court's perspective. The Commission drafted the Protocol with its main rules in the beginning, and it did not include a derogation clause. The Commission indeed has applied derogation rules in the ADRDM, however, in connection with CPR. For example, in 1987, the Commission debated the derogation of CPR under the Declaration. The only ESCR included was the trade union, but no derogation was considered for this right.¹⁹¹ The intention and practice of the Commission lead to infer that derogation rules do not apply to the PSS.

The case law discussed in this chapter did not include any ESCR.¹⁹² Reports issued by the Commission also do not focus on derogations from ESCR. Some reports, for instance, concentrate the debate related to work around Article 6 ACHR (freedom from slavery). This provision is enlisted in Article 27(2) as non-derogable. The PSS stipulates the right to work through three provisions, from Article 6 to 8, but here is no inclusion of any of those in the Commission reports.¹⁹³ Hence, the Commission did not engage with the debate of derogations from ESCR.

¹⁹¹ 'Report on the Situation of Human Rights in Paraguay' (Inter-American Commission on Human Rights 1987) Country Report OEA/Ser.L/V/II.71 Doc. 19 rev. 1.

¹⁹² *Caso Baena Ricardo y otros Vs. Panamá* (n 182); *Caso Zambrano Vélez y otros vs. Ecuador* (n 167); *Caso J. vs. Perú* (n 165).

¹⁹³ 'Case 12,066. Admissibility and Merits. Hacienda Brasil Verde. Brazil' (Inter-American Commission on Human Rights 2011) Reports on Cases Report No. 169/11, ¶123; 'Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American System of Human Rights.' (Inter-American Commission on Human Rights 2015) Thematic Report OAS/Ser.L/V/II.Doc.46/15, ¶218; 'Report on the Situation of Human Rights in the Dominican Republic.' (Inter-American Commission on Human Rights 2015) Country Report OAS/Ser.L/V/II.Doc. 45/15, ¶639.

This thesis argues for the complementary nature of the ACHR and the PSS, which means they are one body of norms. The PSS has the necessary rules in its text, and the ones for individual petitions follow the ACHR. Regarding derogations from ESCR, there is no reason to apply Article 27 because that was not the intention behind the Draft of the Protocol, and it is not in connection to either general rules of treaties or to individual petitions' rules. The American States debated the derogation clause in the ACHR exclusively for CPR and did not include the clause in the Protocol. The aim of not derogating from ESCR did not change over time.

Although this chapter focused on the PSS, Article 26 comes into the debate again. This article does not contain a list of rights and it is not directly enforceable. However, this does not mean that the derogation clause does not affect its application. States must report to the Commission their improvement in the “economic, social, educational, scientific, and cultural standards,” which could be undermined in an emergency. The question that arises is whether Article 26 falls under Article 27(1) and the Commission could recommend States to improve it. The *travaux préparatoires* of the Convention reveals that Article 26 was not considered for the debate and no connection to ESCR was made. Nevertheless, none of those standards are explicitly enlisted in Article 27(2), which directs to the assumption that States cannot derogate from the obligation to report to the Commission, unless in connection to derogable rights. For instance, if a social standard, such as education,¹⁹⁴ was influenced by the derogation of Article 7 and it followed Article 27, no breach could be found by the Commission. But if education, the same social standard, suffered from an unlawful derogation from Article 12, the violation may be found.

Hence, the possible conclusion is that Rodríguez was correct regarding instruments without derogation clause. It means that ESCR are non-derogable. Moreover, the IAS bodies already determined the non-derogable nature of the right to equality. It alludes to that Article 3 of the PSS, explained in chapter 2 of this thesis, cannot be derogable because of its *jus cogens* characteristic. Neither ESCR nor nondiscrimination obligation can be derogated under any circumstances. One explanation for the lack of derogation clause in the PSS is its limitation clause. The PSS provides Article 5, and it is more direct than then ACHR, as demonstrated in the previous chapter. It signifies that States can limit rights under the PSS and it would demand less steps from them. Instead of all the criteria of Article 27(1) and the notification process of Article 27(3), States would limit rights

¹⁹⁴ Education is mentioned in the OAS charter as a principle of the OAS in Article 3, as a goal in Article 34(h) and as a right in Article 49.

and the IAS bodies could assess through the restriction test. This choice transforms the restriction of rights more straightforward and effective.

5. Conclusion

This thesis focused on the ESCR restriction under the IAS standards, namely limitations and derogations. The main goal of the thesis was to emphasize the importance of considering ESCR when assessing restrictions and perceiving them as fundamental. Derived from this, the research answered two research questions with different scopes. The first one is *how can a State in the IAS limit ESCR* and it relied on different IAS instruments. The thesis compared the rules of limitations in the ACHR, and the PSS and it concluded that the ACHR rules are valid for the assessment of limitations under the PSS, the so-called restriction test. The second research question is *whether ESCR can be derogated in the IAS* because the PSS does not contain a derogation clause. This second part centered on derogations from ESCR in the PSS. The ACHR was part of the analysis because the PSS is part of the Convention. The research aimed at answering whether the derogation clause was applicable to the PSS, and it concluded that ESCR are non-derogable because of the lack of the derogation clause. This research provides valuable contribution to existing research as few previous studies have focused on limitations on ESCR and the lack of research on derogations from ESCR.

The theoretical framework is central to answer both questions since the protection of ESCR is still under debate. In this regard, the thesis examined three topics around ESCR: the content of Article 26 ACHR, approaches to enforce ESCR in the ACHR, and the connection between the ACHR and the PSS. The thesis concluded that Article 26 ACHR is not directly enforceable and only subjected to the monitoring mechanism of the IACmHR. Consequently, the only possible approach to enforce ESCR in the ACHR is the indirect one, which means that ESCR are enforceable through other Convention rights. Those two conclusions are possible because the ESCR are solely protected by the PSS, either through a monitoring system or individual petitions. Hence, the third part of the theoretical framework considers the PSS as part of the Convention, not an independent treaty. This debate is fundamental to answer the research questions. It explains that the PSS is the document that should be analyzed when examining limitations and derogations from ESCR.

The ACHR allows limitations in Articles 30 and 32(2), and the IAS bodies follow the restriction test to assess limitations on human rights. This test has five criteria derived from the

Convention: strict legality, legitimate aim, appropriateness, necessity, and proportionally. The Commission and Court have substantive jurisprudence regarding limitations on CPR but have inexpressive regarding ESCR and the PSS. *Gonzales Lluy et al. v. Ecuador* is relevant since the Court found a violation of the right to education of the PSS and sanctioned the State for limiting the right because of discriminatory actions. The Court did not apply the general rules of the PSS and did not use the restriction test. Instead, the strict legality test was the basis for the limitation. Although similar in criteria, the tests have different purposes, and the Court did not use Article 5 PSS to justify the unlawful limitation of the right to education.

The analysis of the case law demonstrated misuse of the tests from the Court. Thereby, it did not answer the research question. The Commission does not provide information on the topic in its reports, not even when analyzing the PSS. Here lies the importance of textual analysis for the thesis. While doctrine and case law could not provide an answer, the comparison of the four official languages of the ACHR and the PSS led to conclusions. The main difference between Articles 30 ACHR and 5 PSS is the word stated before the word “laws,” according to the strict legality criterion. In the Protocol, all versions use “promulgation,” while in the ACHR it appears in the Portuguese version only. The English version uses “enacted,” the French is “edited,” and the Spanish one is silent. Since the VCLT presumes the equal meaning of all versions and the Spanish version was the one used for the preparatory work, there is no practical difference between the wording of the provisions. Regarding the rest of the restriction test, both the ACHR and the PSS have the criteria present. Hence, the restriction test is suitable for the PSS.

The derogation chapter had less doctrinal and jurisprudence basis since the IAS is understudied. Article 27 ACHR is composed of three paragraphs with different purposes. Article 27(1) focuses on the criteria for derogating from human rights, Article 27(2) provides the list of non-derogable rights in the ACHR, and Article 27(3) determines the rules of notification. The Draft of the Convention and Advisory Opinions had some debates regarding the criteria to derogate from rights. However, the outcome of them is strict and must be followed. The provision establishes five criteria: emergencies, proportionality, temporal and geographic limitation, consistency with other international obligations, and nondiscrimination rule. After meeting these five criteria, the States must refrain from derogating from any right listed in Article 27(2).

The first important point for the ESCR discussion is Article 26. The States did not mention this provision in the preparatory work for the ACHR, and they did not consider ESCR for derogations. It signifies that when States are reporting the situation for the IACmHR, they cannot

evade any obligations related to the provision. The thesis concluded that States do not consider ESCR for derogations. The IACtHR included in Article 27(2) some specific judicial guarantees but no consideration concerning ESCR. After analyzing the *travaux préparatoires* of the ACHR and the PSS, the reports from the Commission, and the related literature, the thesis deduced that ESCR are non-derogable.

The States' intention was clear regarding the non-inclusion of a derogation clause in the PSS because they did not debate the possibility. The IACmHR uses the derogation clause for the CPR present in the ADRDM but is silent concerning the ESCR. Both IAS bodies affirmed that the PSS contains general provisions, and the ACHR is the appropriate source for the proceeding rules of the individual petitions. Hence, there is no suggestion that the derogation clause applies to ESCR. The scope of Article 5 PSS is enough to allow States to limit rights without the need for a derogation clause.

Due to space and time for the research, the thesis focused on recent and paradigmatic cases of the Court and specific reports of the Commission. Further research may enrich the study of both areas of topics by addressing exclusively the case law of the Court and the Commission's reports with the aim to verify if States tried to combat the IAS bodies' opinion. Nevertheless, this research tracked the Court and the Commission's input on limitations and derogations as general rules and added doctrinal research on ESCR in the IAS. The value of this research is centered on connecting the ACHR and the PSS to protect ESCR from States' abuse when limiting and derogating from them.

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