

Hernández vs. Argentina: the right to health of detainees in the Inter-American system

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Title: Hernández vs. Argentina: il diritto alla salute dei detenuti nel Sistema interamericano

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1. – The Inter-American Court of Human Rights (hereinafter the Court) released the judgment in the case “Hernández vs. Argentina” on 22 November 2019.

The case pertains to José Luis Hernández’s conviction and detention, the detention’s conditions and the lack of access to healthcare.

While he was detained, he suffered permanent neurological damage, complete loss of vision in one eye, permanent partial impairment to the use of one arm and memory loss.

The Court ruled that the State of Argentina violated, in relation to the obligation stated in Article 1, § 1, ACHR, Hernández’s right to personal integrity (art. 5, § 1 and 5, § 2, ACHR), the right to health (art. 26 ACHR), the right to personal liberty (art. 7, § 1 and 7, § 3, ACHR), the right to the presumption of innocence (art. 8, § 2, ACHR) and the right to judicial protection (art. 25, § 2, ACHR).

2. – José Luis Hernández was arrested on 7 February 1989 for attempted robbery which was then requalified as aggravated robbery due to the use of a firearm. (§24-25)

He was placed in mandatory pretrial detention and he was deprived of his liberty for a year and a half by being held at a police station.

On 28 September 1990 he was convicted and sentenced to five years in prison, which was reduced to two years and eight months on appeal. Ultimately, he was given conditional freedom. In total, he was deprived of his personal liberty for a period of two years and three months. (§ 26)

The day he was arrested and transferred to the *Comisaría de Monte Grande* he was seen by a doctor. According to the *Informe del Médico de Policía*, he appeared lucid and “self-psychically located”, without signs of intoxication and the examination of the body surface did not indicate any recent traumatic injuries. (§ 27)

During his detention at the *Comisaría de Monte Grande*, Hernández started to show symptoms of various diseases. (§85)

His mother, on two different occasions, filed complaints to the judge who was in charge of the case: on 6 July 1989, she reported that Hernandez was exhibiting severe symptoms of flu and that he also suffered from a serious ear infection which needed

medical treatment (§85) and on 1 August 1990 she also reported that he was enduring a severe headache and needed to be transferred to a medical facility.

After the second complaint, Hernández was initially transferred to the *Unidad Carcelaria* and then he was admitted at the Hospital San Juan de Dios de la Plata because of acute meningitis due to T.B.C. (§ 86)

During the time he was detained he received adequate medical assistance in the hospitals of *San Juan de Dios*, *Alejandro Kron* and at *Unidad Carceraria*, except that on three occasions (on 29 August 1990, 27 September 1990 and 24 October 1990) when he could not be admitted due to the unavailability of rooms.

3. – On 30 June 1998, the representatives of the alleged victim submitted the initial petition in front of the Commission that adopted the Informe de *Fondo* No.96/17 on September 2017. (§ 2)

The Inter-American Commission found that the State violated Hernández's right to personal integrity and his right to not to be subjected to cruel, inhuman, or degrading treatment. It concluded that José Luis Hernández could not effectively have access to his right to health; it also found that the victim's right to personal liberty and the right to be presumed innocent were violated because he was placed in a mandatory pre-trial detention, which is incompatible with Inter-American standards. Finally, it found that Hernández's mother's right to personal integrity was also violated.

The Commission solicited the State to comply with the recommendations contained in the *Fondo* within two months. The State never gave any update on the implementations of the solicited measures. (§2)

For such reason, on 8 February 2018, the Commission brought the case before the Inter-American Court of Human Rights. (§2)

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4. – The present case concerns many human rights violations, such as the right to personal integrity or the right to be presumed innocent. Nevertheless, this paper will only focus on the violation of José Luis Hernández's right to health, since it is the Court itself, as stated in paragraph 62, that identified this question as the core juridical issue to deal with in deciding the case at stake.

According to the Inter-American Commission, the State has two main obligations deriving from international law concerning the health status of those who are deprived of their personal liberty: 1) the State has to provide adequate medical assistance in order to achieve a comprehensive medical diagnosis (ECOSOC, *Minimum Rules for the treatment of prisoners*, Resolution 663 C (XXIV), 31-06-1957 and Resolution 2076 (LXII), 13-05-1977), and 2) the State has to provide adequate medical treatment, respecting the principle of equivalence (European Committee for the Prevention of torture and inhumane and degrading treatment, *Third General Report of Activities*, 1-12-1992). Such principle consists of assuring that detained people receive the same medical assistance they would receive if they were free. (Inter-American Commission, *Informe de Fondo n. 96/17*, Caso n. 12818, 5-09-2017)

In relation to the present case, the Commission stressed that in many instances the Argentinian authorities failed to grant Hernández adequate medical assistance for a prolonged and unjustified period of time. (§51)

Considering the symptoms Hernández was showing, the State should have adopted all the necessary measures to establish a clear clinical picture and to arrange an appropriate medical treatment for the meningitis, in accordance with the above-mentioned equivalence principle. (§ 51)

The State of Argentina, for its own part, asserted that there were not sufficient elements to determine that Hernández state of health was affected before 10 July 1990 and that no complaint was filed in front of the judge of the case before that date. Only

after 2 August 1990 the judge was informed that Hernández was diagnosed with a possible meningitis. The State claimed that from that moment on Hernández received constant medical assistance in one of the most prestigious hospitals in the State. (§53)

For the State there was no connection among the diseases that occurred in July 1989 and those that appeared in August 1990 or, at least, there was no medical report supporting a potential link. (§ 53)

Also the Inter-American Court, despite the different arguments of the Commission and of the State of Argentina, warned that the main problem of the case at stake concerned the violation of Hernández right of health. (§ 51)

Even if neither the Commission nor the State claimed the violation of art. 26 of the IACHR, for the principle *iura novit curia*, the Court solemnly expressed that it would have ruled on the violation of the right to health. (§ 54)

Initially, the Court recognized the right to personal integrity (art. 5 IACHR) of all individuals and then of the people deprived of their personal liberty. It stated that the State holds a “special guarantor position” towards the detainees who are subjected to a strict domain of the prison authorities. (§56) (IACHR, Caso Neira Alegría y otros Vs. Perú, 19-01-1955[Fondo] §60)

Since art. 5 § 1 e § 2 of the Convention provides that every person deprived of personal liberty should live in conditions that are respectful of human dignity, the Court concluded that such provision entails the State duty to safeguard their health and welfare. (IACHR, Caso Instituto de Reeducción del Menor vs. Paraguay, 2-09-2004, [Excepciones Preliminares, Fondo, Reparaciones y Costas], §159)

It clearly appears that personal integrity is strictly linked with medical assistance and the failure to provide such assistance results in a violation of art. 5 of the Inter-American Convention. (IACHR, Caso Albán Cornejo y otros vs. Ecuador, 7-09-2004 [Fondo, Reparaciones y Costas] § 117)

Nevertheless the violation of the right to health can be seen as a violation of the right to personal integrity, the Inter-American Court noticed that one of the main juridical problems of the case at stake concerned the extent of the right to health which was intended as an autonomous right deriving from art. 26 of the American Convention. (§ 62) The Court based its reasoning on the case-law inaugurated by the decision issued in the case *Lagos del Campo vs. Perú* (IACHR, Caso Lagos del Campo vs. Perú, 31-08-2017, [Excepciones Preliminares, Fondo, Reparaciones y Costas] § 141-150, 154], and followed by the case *Poblete Vilches y otro vs. Chile* (IACHR, Caso Poblete Vilches y otro Vs. Chile, 8-03-2018, [Fondo, Reparaciones y Costas], §103).

The Inter-American Convention should have been interpreted as it contained economic, social, cultural and environmental rights (the so-called ESC rights) in its catalogue of protected rights. Such inclusion derives from the norms recognized in the “*Carta de la Organización de los Estados Americanos*” (now on, OAS Charter) and from the rule set forth in art. 29 of the Inter-American Convention itself. (§62)

Following a systematic, evolutionary and teleological interpretation based on art. 29 of the IACHR, the Court used to reference the national and international *corpus iuris* in order to give consistency to the rights protected by art. 26 of the Convention. (§62)

In the case at stake, the Court took the following steps: first, it analysed the existence of the right to health as an autonomous right and also examined its substance, then it considered if Hernández right to health was violated. (§63)

In summation, it is important to stress that initially the Court’s attitude was to identify the right to health as contained in the right to personal integrity stated in art. 5 of the Inter-American Convention (IACHR, Caso Tibi Vs. Ecuador, 7-09-2004, [Excepciones Preliminares, Fondo, Reparaciones y Costas] and Caso Albán Cornejo y otros Vs. Ecuador, 22-11-2007 [Fondo, Reparaciones y Costas]), then the Court in 2017/2018 started to change its jurisprudence and in the decision of the cases *Lagos del Campo vs. Perú* and *Poblete Vilches y otro vs. Chile* affirmed the justiciability of the right to health

autonomously and not in relation to the right to personal integrity. To nowadays, since this case law is not consolidated yet, in the OAS system the right to health on the one hand can be considered as to be protected *per se*, but at the same time it can still be treated as a facet of the right to personal integrity, in accordance with the previous jurisprudence.

5. – The Court took the task of establishing whether or not the right to health should be considered as an autonomous and justiciable right in the Inter-American system.

The starting point was represented by art. 26 of the IACHR, which requires the States Parties “to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.” The clear reference to the OAS Charter is a key factor in order to identify the rights covered by art. 26 IACHR, using an interpretative approach. (§64)

To reach the progressive development stated in art. 26 of the IACHR, the States have to achieve some basic goals. Among these goals the Court recalled, there are art. 34. i) and l) of the OAS Charter which concerns the “defence of the human potential through the extension and application of the modern medical science expertise” and the “urban conditions that make possible to have a dignified, productive and healthy life”. Finally, the Court also remembered that art. 45 of the OAS Charter made a reference to “the development of an efficient social security policy”. (§64)

According to the Court, the OAS Charter contained sufficiently specific references to establish the existence of the right to health. Consequently, the Court concluded that art. 26 of the IACHR, through its allusion to the OAS Charter, definitely enshrined the right to health. (IACHR, Caso Poblete Vilches y otro Vs. Chile, 8-03-2018, [*Fondo, Reparaciones y Costas*], §106)

Then, the Court took the further step of assessing whether or not the right to health also encompassed the right to health of persons deprived of their personal liberty in the light of the international *corpus iuris*. (§65) It is this passage that represents the very novelty in the Court’s jurisprudence.

The conjunction of the principle of the international accountability of a State for the violation of the rights contained in the Inter-American Convention (art. 1 § 1 and § 2, IACHR) with art. 29 of the IACHR and art. 31 of the Vienna Convention allowed the Court to use the international principles and standards as a special legislation to be applied in a complementary way in order to define the content of the right to health. (§ 65-66)

Indeed, art. 29 indexed “Restrictions Regarding Interpretation” contains the *pro persona* principle which allowed the Court to read the right and obligations contained in the Convention in the light of the relevant human rights norms and treaties. (IACHR, Caso Muelle Flores vs. Perú, 6-03-2019 [*Excepciones Preliminares, Fondo, Reparaciones y Costas*] §176).

The Court recognized that there was a widespread consensus among the OAS States regarding the existence of the right to health which is solemnly affirmed in various Constitutions and internal laws. (§75) At the same time the Court pointed out that the right to health was also recognized by art. XI of the American Declaration, by art. 10 of the Protocol of San Salvador, by art. 35 of the Universal Declaration of Human Rights, and by art. 12 of International Covenant on Economic, Social and Cultural Rights. (§70-74)

In conclusion, in the case at stake, the Court ruled that health is a fundamental human right, essential for the exercise of other rights and that every human being has the right to enjoy the highest level of health that allows one to live decently, not only without disorders and diseases, but in a state of physical, mental and social wellness. (IACHR, Caso Poblete Vilches y otros Vs. Chile, 8-03-2018, [*Fondo, Reparaciones y Costas*], §118)

However, the judgment presents a contradiction among its *corpus* and its dispositive part. In fact, the Court in the *corpus* of the judgment expressly assessed the autonomous and essential nature of the right to health but in the dispositive part it affirmed its violation in connection to the right to personal integrity, as if they were inter-dependent.

6. – The Court did not reach the above-mentioned outcome unanimously.

In fact, judge Pazmiño issued a partial dissenting opinion on the second “*punto resolutivo*” of the judgment which stated that Hernández’s personal integrity had been violated; also judges Vio Grossi and Humberto Antonio Sierra Porto issued partial dissenting opinions on the third “*punto resolutivo*” of the judgment, which established the violation of the right to personal integrity and the right to health.

He recognized that the judgment in Hernández consolidated the thesis adopted by the Inter-American Court in the case *Lagos del Campo vs. Perú* (IACHR, Caso Lagos del Campo vs. Perú, 31-08-2017 [*Excepciones Preliminares, Fondo, Reparaciones y Costas*]), according to which the economic, social, cultural and environmental rights (ESC rights) are justiciable in front of the Court through art. 26 of the Inter-American Convention.

In his partial dissenting opinion, he recalled that before 2017 the Court never ruled directly on the violation of art. 26 of the Convention but stated the interdependence of the ESC rights with the civil and political rights, affirming the State responsibility only when the second group of rights was violated. Then the Court inverted its praxis and started analysing the violation of ESC right autonomously and affirmed the State accountability for the violation of art. 26 in relation to art. 1 § 1 of the Convention. Indeed, for him the judgment contradicted itself: in fact, the Court affirmed the violation of the right to health, but together with the violation of the right to personal integrity. From the judgment it emerged that the violation of the right to health was not autonomous, but only existed if considered in connection with the violation of the right to personal integrity.

Therefore, considering that the Court concluded that the right to health is an autonomous and justiciable right under art. 26 of the Inter-American Convention, Pazmiño, rightly, wondered why the violation of such right was not declared in a separate “*punto resolutivo*” of the judgment, as already done in the cases *Poblete Vilche* and *Cuscul Pivaral*.

Since the Court jurisprudence had already overcome the question concerning the connection and interdependence of civil and political rights with ESC rights as the only way to affirm the violation of the latter, he underlined that it was unnecessary to reiterate the violation of the right to personal integrity in connection to the right to health, when the violation of the right to personal integrity was already stated in the previous “*punto resolutivo*”.

Vio Grossi, by his own part, issued a partial dissenting opinion concerning the third “*punto resolutivo*” which declared the violation of the right to personal integrity and the right to health.

He stressed that the function of the Inter-American Court is to provide justice in the human rights field in conformity with the law, particularly with the Inter-American Convention. The Court did not have to be a human rights promoter and defender, since

it was the Commission that was invested with this task. Therefore, the role of the Court was to resolve disputes and not to be a human rights activist.

In relation to the interpretation of art. 26, he suggested that the circumstance that Part I of the Inter-American Convention made a reference to the “Protected rights” it was not sufficient to deduce that the Economic Social and Cultural rights mentioned in art. 26 are justiciable in front of the Inter-American Court.

Since the Convention made a clear distinction among civil and political rights and economic social and cultural rights, the right to health was not a right “*reconocido*” in the Convention and for this reason should not have been protected. Only civil and political rights enjoyed the system of protection set forth in the Convention. So, he claimed that in order to make the ESC rights justiciable in front of the Inter-American Court, it would have been necessary to enhance a complementary Protocol that provided for their protection.

He also underlined that he was not denying the existence of the right to health, but only that the question concerning its violation could not be submitted and decided by the Court. It seemed not inconvenient that the organ entitled with judicial competence acquired a creative function. In the light of the principle of the separation of powers, the Court should not have extended its competence and declare the violation of rights not clearly stated in the Convention.

Finally, Antonio Sierra Porto in his partial dissenting opinion highlighted the contradictions and logical inconsistencies that affected the theory of the direct and autonomous justiciability of the ESC rights, inaugurated in the case *Lagos del Campo Vs. Perú*.

He stressed that no normative reference could be found in order to establish that ESC rights could be analysed by the Inter-American Court. Indeed, in the OAS Charter, the references in art 34 i), l) and 45 did not have a sufficient degree of specificity to conclude that a concrete right to health exists. They constituted simple and generic declaration that did not permit one to attest the existence of a right to health in the international legal framework. Moreover art. 10 of the Protocol of San Salvador envisages the right to health, so it was not possible to derive this right from the OAS Charter.

He then criticized the interpretation of art. 29 of the Convention by affirming that, even if the Court warned that it would have used the international legislation in a complementary manner, ultimately, it was used to give art. 26 a content, which clearly this disposition did not entail. In fact, starting from the *Lagos del Campo vs. Perú* judgment, the Court used art. 26 as a “*carta en blanco*” in order to transfer obligations established in other treaties into the Convention, but such interpretation was not sustainable since the Court lacked competence with regard to these obligations.

From the analysis of the previous cases decided by the Court, like the case *Poblete Vilches vs. Chile* and the case *Cuscul Pivaral vs. Guatemala*, and that of the present judgment, emerged an intimate connection between the violations of the right to personal integrity and the right to health. So, it appeared difficult to discern where the obligations regarding each right started and finished. The obligation concerning the right to health had a “*sentido practico una vez que se reflejan en el análisis del artículo 5*”.

Therefore, the violation of the right to health was only relevant when it resulted in a violation of art. 5 of the IACHR.

For him, the right thesis was to analyse the right to health in its individual dimension, in relation to those civil and political rights that could be affected, like the right to personal integrity in the present case, and in its “progressive” dimension in relation to the sufficiency of the health services provided by the State.

According to him, the expression used in the “*punto resolutivos*” of the judgment, which strictly linked the violation of the right to health to the violation of the right to personal integrity, was reasonable. At the same time, the fact that the judgment

reiterated the violation of the right to personal integrity in two different “*punto resolutivos*” did not appear acceptable. From such reiteration, he concluded that the analysis of art. 26 appeared to be useless since in the end, the Court had to necessarily refer to the violation of the right to personal integrity.

It is also interesting to recall the concurrent opinion of Judge Pérez Manrique. He rejected the first thesis according to which the analysis of the violation of ESC rights had to be necessarily conducted in relation to the rights stated in art. 3 and 25 of the Convention; he also rejected the second thesis according to which the Court was competent to hear cases in relation to the violations of ESC rights as autonomous rights that derive from the OAS Charter. He embraced a third thesis, known as “*conexidad-simultaneidad*”, according to which the analysis of the violation of the ESC rights should have been admitted only when there was a strict connection among them and the civil and political rights.

He emphasized that this was the path walked by the European Court of Human Rights: indeed art. 2 (right to life), art. 3 (prohibition of torture) and art. 14 (non-discrimination) of the European Human Rights Convention represent key dispositions used in order to assess the right to health that otherwise would not be justiciable.

Lastly, Judge Ferrer in his “*voto razonado*” concluded that *Hernández vs. Argentina* should have been considered as a leading case, since it was the first case in which the Inter-American Court, in the context of person deprived of personal liberty, directly upheld the violation of the right to health, from an individual prospective, and the consequent accountability of the State.

7. – In the light of the different opinions provided by the San José Court judges, it seems necessary to make some considerations.

Without digging into the question of whether or not the Court ruled fairly in relation to the right to health and personal integrity, which has been diffusely analysed in the previous paragraphs, our intention is to reflect on whether or not the Court has respected the boundaries of its jurisdictional competence in ruling about the violation of the right to health.

The premise is that, on the one hand, there is no disposition that enshrines the right to health in the Inter-American Convention, and on the other hand, there is art. 10 of the Protocol of San Salvador that establishes the right to health.

Starting from the case *Lagos do Campo vs. Perú*, the Court has tried to find a normative reference in order to extend its jurisdictional competence over this right.

It found that art. 26 of the Inter-American Convention was a key disposition. (Christian Courtis, *Convención Americana sobre Derechos Humanos, Comentario*, Konrad Adenauer Stiftung, pp. 665-667)

However, art. 26 poses some interpretative problems, since it does not explicitly identify the rights to which it is referred, but realizes a cross reference to the economic, social and cultural rights contained in the OAS Charter. After identifying such norms, the next step is to determine “*cuales son lo derechos que se derivan*”. (Christian Courtis, *Convención Americana...*, p.665)

Thus, it is art. 26 of the Convention that gives the “status of rights” to the normative references of the OAS Charter, transforming public policy principles and objectives in rights.

In doing so, the interpreter has to refer to international instruments like the International Covenant on Economic, Social and Cultural Rights or the Protocol of San Salvador or the American Declaration. (Christian Courtis, *Convención Americana...*, p. 666)

Through this process, the Inter-American Court has recognized the right to social security, the right to health and the workers' rights as economic, social and cultural rights deriving from the OAS Charter.

The fact that a right is inferred by the Court through the above-mentioned process, it does not resolve the problem of determining the content of the right. In fact, in the majority of the cases, the reference contained in the OAS Charter was only sufficient to identify and name a right, but for determining the actual content of the right, it was necessary to invoke dispositions contained in other human rights instruments. (Christian Courtis, *Convención Americana...*, p. 666)

The core question is whether the obligations entailed in art. 1 of the Inter-American Convention can be referred to the right derived from art. 26 IACHR. Art. 1 and 2 are the very initial dispositions of the Convention. As such, there is no reason to distinguish among their application to the rights affirmed in Chapter I (Civil and Political Rights) and Chapter III (Economic, Social and Cultural rights).

Art. 1 clearly establishes that “the Member States undertake to respect the rights and liberties recognized in the Convention”, without any distinction among Chapter I and Chapter III.

If some doubts arise, it is necessary to refer to art. 29 of the Inter-American Convention which establishes the principle of interpretation *pro persona*, meaning that, as stated in art. 29 d) of IACHR, it is not allowed to interpret the Convention in a sense that excludes or limits the effect of the American Declaration. (Christian Courtis, *Convención Americana...*, p. 669).

Therefore, it appears that one plausible path, which is the one chosen by the Court in the present case, is to assess the existence of the right to health through art. 26.

This approach has been criticized, as it results by the above-mentioned dissenting opinions.

In fact, it could seem that the Court tried to overcome the limits of its jurisdictional competence, adopting an extensive approach.

As pointed out before, on the other hand, the right to health is clearly established in the Protocol of San Salvador.

The Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San Salvador) was adopted on November 17, 1988 and ratified by Argentina in 2003.

As stated in the Preamble, such Protocol considers “the close relationship that exists between economic, social and cultural rights, and civil and political rights, in that the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human person, for which reason both require permanent protection and promotion”.

Article 10 of the Protocol of San Salvador enshrines the right to health as “the enjoyment of the highest level of physical, mental and social well-being”. In order to ensure the exercise of the right to health, the States Parties agree to recognize health as a public good and, particularly, to adopt a number of measures to ensure that right.

In order to achieve this aim, the States have to grant, among other things, the “extension of the benefits of health services to all individuals subject to the State's jurisdiction” (art. 10, § 2 lett.d), Protocol of San Salvador). The right to health of people deprived of their personal liberty should be linked to this provision.

Accordingly, it is pacific that an OAS instrument recognizes the right to health.

The problem, however, concerns the justiciability of this right. In fact, art. 19 of the Protocol of San Salvador, indexed “Means of Protection”, states that “any instance in which the rights established in paragraph a) of Article 8 and in Article 13 are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when

applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights.”

On this ground, only the right to education and trade union rights are expressly given protection through the recourse to the Inter-American Court.

Therefore, the Protocol of San Salvador recognizes that only the above-mentioned rights are justiciable in front of the Court. Thus, the right to health, as intended by the OAS State, could not be actioned in front of the Court. (Oscar Parra Vera, *La protección del derecho a la salud a través de Casos Contenciosos ante el Sistema Inter-Americano de Derechos Humanos*, 2013, p.765)

According to my opinion, the attempt of the Court to extend its jurisdiction to include the right to health may appear as an unduly overcoming of the jurisdictional limits set forth in art. 19 of the Protocol.

Indeed, the text of the Protocol is very clear on the part in which provides for the jurisdiction of the Court. So, the Court itself, through the praxis of the interpretation of art. 26 of the IACHR, may seem to betray the intention of the American States that drafted the Protocol of San Salvador. The Court recalled the existence of the Protocol of San Salvador and used it as a complementary source to define the content of the right to health, without mentioning art. 19 of the same Protocol.

However, the Protocol is dated back to 1988. The Court, now in 2018, perhaps may have felt forced to adopt an evolutive approach and extend its jurisdiction to the right to health, whose protection would otherwise be ineffective. Thus, from this perspective, the Court cannot be blamed to have used the Protocol as an interpretative tool, without respecting the boundaries of art. 19 of the same Protocol.

It is true that the separation of powers should be respected, but it is also undeniable that the Court has a key role in pointing out loopholes in the positive law, such as the lack of a disposition that provides for the justiciability of the right to health.

For this reason, it may be desirable that the OAS States, conscious of this shortcoming, undertake a revision of the Protocol of San Salvador in order to dispel any doubt on the actionability of the right to health in front of the Inter-American Court. It should not be necessary to use of art. 26 of the IACHR, which results into a weak and questionable tool for safeguarding the ESC rights.

Verily, the same Court in the “*punto resolutivos*” appears to be aware of this problem. In fact, even if affirming the justiciability of the right to health as an autonomous right in the *corpus of the judgment*, in the end, instead of assessing the violation of the right to health *per se*, it preferred to affirm the violation of the right to health in conjunction with the right to personal integrity, so as not to overstep the boundaries of its jurisdiction.

8. – It may also be interesting to briefly analyse how the other regional human rights system have dealt with the problem of the justiciability of the Economic, Social and Cultural Rights, in particular of the right to health.

A reference to the right to health is absent in the European Convention on Human Rights. However, the European Court was inevitably called upon to consider cases having a socio-economic dimension. In cases where the right to health was concerned, it found that the relevant normative references were represented by art. 2, which entails the right to life, in order to affirm the violation of such right, as in the cases *Cyprus vs. Turkey*, *Senturk vs. Turkey*, *Asiye Genc vs Turkey*, *Aydogdu vs Turkey*. It also referenced other provisions such as art. 3 in *M.S. vs. the United Kingdom*, art. 5 in *Stanev vs. Bulgaria* and art. 8 in *Glass vs. the United Kingdom* and *Tysiac vs. Poland*.

Accordingly, the European Court of Human Rights approach is to not consider the right to life autonomously, but to establish its violation as a result of the violation of other rights as the right to life, the right to personal liberty or the right to respect for private and family life.

On the other hand, as far as the African Human Rights system is concerned, art. 16 of the African Charter expressly recognizes the right to health, stating that “every individual shall have the right to enjoy the best attainable state of physical and mental health”. Consequently, since the African Court on Human and People’s Rights has jurisdiction over the Charter (*ratione materiae* competence), the right to health is actionable before the African Court in a direct and autonomous manner, without the need to be linked to the violation of civil and political rights.

9. – In accordance with art. 63, par. 1 of the Convention, the San José Court provided for adequate remedies, since the violation of an international obligation entails the obligation to grant an appropriate reparation. (Corte IDH, *Velásquez Rodríguez vs. Honduras*, 21-7-1989, [*Reparaciones y costas*]).

First of all, the Court ordered the State to publish a summary of the judgment of the Court and the judgment itself and to pay 20.000 dollars to San Martín Hernández, as a beneficiary, in order to compensate for the material damage suffered by José Luis Hernández. It also established that the State should inform the tribunal of the measures taken in order to conform to the present judgment, especially in order to prevent TBC and similar diseases among the detainees and to treat those who were affected by TBC and should adopt a suitable legislation to improve the conditions of the prison facilities in the province of Buenos Aires, in order to make them compatible with the human rights standards. The Court declared it would monitor the compliance with the present judgment.