

REJOINDER:
JUSTICE BEFORE JUSTICIABILITY:
INTER-AMERICAN LITIGATION
AND SOCIAL CHANGE

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I. INTRODUCTION

In this issue of the *N.Y.U. Journal of International Law and Politics*,¹ Tara Melish critiques a piece that we published in volume 56 of the *Hastings Law Journal*.² That piece, based in significant part on our combined experience working with rights defenders and social justice movements in Latin America for two decades and litigating scores of matters before the Inter-

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1. Tara J. Melish, *Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social, and Cultural Rights in the Americas*, 39 N.Y.U. J. INT'L L. & POL. 171 (2007) [hereinafter, Melish, *Rethinking*].

2. James L. Cavallaro & Emily J. Schaffer, *Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas*, 56 HASTINGS L.J. 217 (2004). In the text, we refer to this as the "Hastings" piece or article, or as *Less as More*.

American Commission and Court, challenged some of the conventional wisdom regarding the expansion of the justiciability of economic, social, and cultural (ESC) rights. We expected that those invested in the system might react strongly. Such appears to be the case with Tara Melish, to whose article we now respond. Though we differ as to the interpretation of recent Court jurisprudence, the main tension between our approaches centers on the role of supranational litigation in promoting social justice. While Melish champions ESC justiciability in the inter-American system apparently in a vacuum, we support an approach to litigation in the system that considers the severe limits (in numerical and political terms) on such litigation, as well as the factors that foster or detract from the impact of determinations of the Commission and Court within Latin American states.

Melish's consistent mischaracterization of our arguments might lead the reader to believe that we are diametrically opposed, with Melish as the champion of ESC rights and Cavallo and Schaffer as misinformed opponents. In fact, we neither oppose supranational litigation of ESC rights in principle nor misunderstand (as Melish asserts) the principles of petitioning the inter-American system. The false tensions that Melish emphasizes dissipate when one reviews the arguments in our original piece, rather than those she imputes to us, and when one recognizes that Melish's outline of principles to guide the litigation of ESC rights in the inter-American system is merely her proposal and not an accurate description of actual caselaw.

This Rejoinder summarizes our initial position to clarify our common understandings, seeks to correct the record with regard to Melish's misstatement of our argument,³ responds to her critique where relevant to our initial thesis, and reiterates and refines what we believe to be elements of the wisest path forward to promote social justice through supranational litigation in the inter-American system.⁴

3. It is not possible, in the limited space available, to respond to each of the mischaracterizations, citations out of context, and overstatements of our position that appear in the accompanying article by Tara Melish. See generally Melish, *Rethinking*, *supra* note 1.

4. Unfortunately, throughout her piece, Melish presents an inaccurate understanding of our argument. By taking terms and assertions out of context, overstating our position, and/or by extending the limited framework

II. THE TERMS OF THE DEBATE

A. *The Less As More Argument*

In our Hastings piece, we set out our main thesis in the following terms:

[G]iven the limited resources of [the inter-American system], the potentially adverse consequences of developing legal standards that may not be applied, and the potential—inherent in the development of novel jurisprudence—for undermining states' respect for the system itself, less frequent and more focused litigation may, in fact, be more valuable. In particular, we urge lawyers and activists in the Inter-American system to recognize the limited and often subsidiary role of legal advocacy in promoting the recognition of economic and social rights and distributive justice. In the end, we conclude that successful promotion of economic, social and cultural rights in the Inter-American system should be incremental, firmly grounded in established precedent, and always linked to vigorous social movements and effective advocacy strategies.⁵

The Hastings piece traces the historical development of civil and political and ESC rights in the inter-American system. It recognizes that, historically (and based on the instruments in force in the system today), civil and political and ESC rights have been treated differently. The piece notes that, while the American Declaration includes specifically enumerated ESC rights, the American Convention includes instead a single, general, and vague provision on ESC rights in article 26. The Hastings piece summarizes the theoretical developments over the past few decades that have demonstrated that the classic distinction between civil and political and ESC rights is fraught with problems;⁶ it also asserts that the more coherent under-

within which each statement is made, much of Melish's piece responds to arguments that we have not asserted. In this brief piece, we will not be able to respond to each of the many times that Melish misstates our position. We encourage anyone who has read her text, however, to read our initial Hastings piece.

5. Cavallaro & Schaffer, *supra* note 2, at 218-19.

6. *Id.* at 252-54.

standing focuses on the similar duties that states have with respect to both sets of rights.

In light of the limits of article 26 of the American Convention, as well as states' possible resistance to jurisprudence not firmly grounded in their understanding of the system's instruments, the Hastings article urges practitioners to seek to advance social justice agendas by relying on the safest grounds possible, though without closing off avenues for further, gradual development. While we question the historical bases that have led the inter-American system to treat civil and political rights and ESC rights differently, we also recognize in *Less as More* that real, meaningful differences in the relevant instruments and caselaw limit the possibility of vindicating ESC rights before the Court through the application of article 26. In light of this, we set out a range of ways that litigants might seek to advance social justice by litigating in the inter-American system. Among the techniques that we highlight are those that focus on ESC elements in civil and political rights, progressive interpretations consistent with article 29 of the American Convention, the non-discrimination principle, and the economic and social rights for which access to the Commission and the Court is recognized in the San Salvador Protocol.

We argue in the Hastings piece that practitioners must come to terms with the limited access the system provides in real, numerical terms, as well as the weakness of article 26, when designing litigation strategies to promote social justice. We emphasize that the on-the-ground impact of the system's determinations has not correlated directly with the merits of those determinations but rather has varied in relation to concurrent social justice organization, media engagement, and civil society strategies.⁷ As a consequence of this broader context, we call on practitioners to deploy the system within its limits and to seek means of promoting social justice through well grounded litigation in conjunction with social movements, civil society, and media strategies, rather than through the promotion of isolated and overly broad supranational decisions on ESC rights.

With regard to article 26 and ESC rights, the Hastings piece focuses on matters before the Court or litigation that

7. *Id.* at 240, 251.

might progress to the Court.⁸ We recognize that the American Declaration expressly enumerates ESC rights and therefore may constitute the basis of claims to the Inter-American Commission, though not to the Court. We refer in *Less as More* to claims that incorporate both civil and political and ESC rights (through the Declaration, for example) as hybrid cases and encourage litigants to make use of this strategy. In all cases, we urge litigants to work closely with social movements to ensure that efforts to deploy the inter-American system maximize its potential to promote real change on the ground.

B. *Areas of Consensus and Difference*

Based on this understanding of our position (rather than Melish's version thereof), we contend that the main points on which we and Tara Melish concur include:

- First, while historical circumstances have led to a Manichean dichotomy between civil and political rights on the one hand, and ESC rights on the other hand, the theoretical basis for this understanding is flawed. The preferred understanding is that civil and political, as well as ESC rights, include both positive and negative elements and impose on states a spectrum of obligations that range from refraining from direct violations of rights to providing goods and services.⁹
- The American Declaration on the Rights and Duties of Man (1948) sets forth ESC rights in greater detail than the American Convention. Petitions based on the American Declaration may be taken to the Inter-American Commission, though not to the Court. Petitioners may therefore seek to challenge ESC violations to the Commission by drawing on the rights protected in the American Declaration.
- The Inter-American Court has not, to date, embraced any claim, nor issued any decision, in which it found a violation of article 26. While Melish argues that a proper understanding of article 26 requires the Commission and Court to adjudicate viola-

8. *See id.* at 264-68.

9. *See id.* at 252-53.

tions of certain ESC rights, it is clear that the Court has yet to do so.

- Sweeping Court decisions on the progressive implementation of ESC rights for entire states are unlikely to be enforced and would represent overreaching by the Court. Melish refers to this type of litigation strategy as an inappropriate focus on quadrant 4 elements, that is, progressive, result-oriented duties, appropriate only for monitoring but not judicial resolution.¹⁰ In outlining litigation strategies to advance social justice, we too underscore the need to focus on “specific situations of abuse and victims”¹¹ rather than general conditions affecting broad populations.

- More litigation, if it is not well designed, will promote neither social justice nor the efficacy of the inter-American system. Tara Melish concurs with this analysis, stating in this edition of the *N.Y.U. Journal of International Law and Politics* that she firmly subscribes to the view “that more focused, responsibly-crafted, higher-quality litigation leads to better results, both jurisprudentially and on the ground.”¹²

- In order for a claim to be justiciable, it must involve several elements, including concrete injury to specific persons and proximate cause,¹³ as well as other aspects demanded by the admissibility rules of

10. See Melish, *Rethinking*, *supra* note 1, at 259-64. The concern that we expressed in *Less as More* about broad findings of ESC rights abuse through article 26 may be framed within Melish’s scheme as focusing on quadrant 4 duties. We are less concerned about the potential fallout from an ESC claim framed in quadrant 1 terms. This opinion, however, is largely academic in light of the Court’s refusal to permit direct, article 26 access for any ESC claims, at least to date.

11. Cavallaro & Schaffer, *supra* note 2, at 272. There, we call on litigants to seek cases involving “clearly specified violations and clearly identified victims” *Id.* at 272-73. We go on to note: “In other words, a petition denouncing the violation of the right to education of a particular community . . . will have a greater chance of implementation than a decision finding a general violation of the right to education affecting all children” *Id.*

12. Melish, *Rethinking*, *supra* note 1 at 179.

13. In one section, Melish devotes several pages to the aspects of petitions not included in our brief sketches of hypothetical cases in *Less as More*. See *id.* at 264-68. The flaws in this aspect of Melish’s critique will be discussed in greater detail below.

the inter-American system. While we do not address these separate requirements, we believe that nothing in our Hastings piece would suggest that we fail to recognize the core elements of an admissible petition in the inter-American system.¹⁴

- The four quadrant proposal for the litigation of ESC rights as described by Melish presents a coherent repackaging of recent scholarship on ESC rights that may be superior to the existing framework developed by supranational bodies, which tend to construe instruments based on the outdated dichotomy between civil and political and ESC rights.¹⁵

It would be difficult to overemphasize the importance of recognizing these broad areas of consensus. When one realizes, for example, that our initial Hastings piece *does not question the justiciability of ESC rights in principle*, nor does it dismiss the possibility of litigating ESC rights using the American Dec-

14. Melish accurately summarizes these elements as:

(1) proper subject matter jurisdiction (*ratione materiae*) over the invoked norm by the adjudicating body; (2) temporal and spatial jurisdiction (*ratione temporis and loci*) over the facts giving rise to the claim; (3) personal jurisdiction (*ratione personae*) over the parties to the litigation; and, closely related to this latter element, (4) the presentation of a justiciable controversy—i.e., one demonstrating concrete harm to individualized rights-holders and a causal nexus between that harm and the conduct of the state.

Id. at 211. She notes in the accompanying footnote that “[t]he Commission addresses each of these categories, along with those previously mentioned, in every case-related admissibility report it issues. Only when the Commission is satisfied it enjoys proper jurisdiction over the contours of each claim presented to it will it proceed to the merits phase in resolving the case.” *Id.* at 211 n.97. We offer readers our apologies if anything in the hypothetical cases section of the initial Hastings piece may legitimately be construed as suggesting otherwise and thank Tara Melish for underscoring the necessity of complying with the requirements of the inter-American system in filing petitions to this system.

15. Again, while we see the benefits of Melish’s approach as academics, as practitioners we must recognize that the instruments and caselaw of the inter-American system recognize differences in the justiciability of civil and political and economic, social, and cultural rights. Cavallaro & Schaffer, *supra* note 2, at 223-24, 267-68. We imagine that Melish would phrase this last point of consensus somewhat differently, minimizing the extent to which dissonance from her theory still exists in the work of the inter-American system.

laration, the basis for much of Melish's critique simply collapses.

Apart from the illusory tensions and mischaracterizations of our thesis that pervade her piece,¹⁶ relatively little of what Melish writes responds to our article.¹⁷ Still, despite these broad areas of consensus, we disagree with Melish in several respects. We address each of these briefly in this Rejoinder.

First, it is clear that we disagree with Melish's current position¹⁸ on the possibility of success in using article 26 to advance ESC rights. Our reading of the instruments of the system, as well as the Court's jurisprudence in this area, leads us to find relatively little hope in what we and Melish term the "direct" approach to litigating ESC rights before the Court. We also differ as to the possibility that states would react negatively to Court decisions extending the reach of article 26. We address Melish's critique of our position on article 26, recent Court jurisprudence in this area, and the likelihood of state resistance to the expansion of article 26 in Part IV.

16. A good example of this is section VI(C). In that section, Melish argues that if one applies her four quadrant approach to ESC litigation, queue-jumping tensions *as between ESC and civil and political rights* are overcome. This argument purports to respond to our opposing view of queue-jumping. In fact, we do not argue in *Less as More* that ESC litigation involves specific queue-jumping but, rather, that all litigation (including international human rights litigation) involves some degree of queue-jumping. Melish's "response," on its own terms, appears to present a coherent challenge to an argument we do not make. However, when one realizes that we nowhere present the argument Melish imputes to us, this section—like many others—loses its purpose. See Melish, *Rethinking*, *supra* note 1, at 182 (mischaracterizing our conclusion about queue-jumping). Compare Melish's portrayal with our analysis of this issue. Cavallaro & Schaffer, *supra* note 2, 236-40, 281.

17. Much of the article promotes Melish's "four quadrant theory" of justiciability.

18. To be more clear, it is evident that the positions in our Hastings piece and in Melish's article in this edition are in conflict. Compare Cavallaro & Schaffer, *supra* note 2, at 267-69 with Melish, *Rethinking*, *supra* note 1, at 220-25. As we discuss in Part IV, *infra*, Melish's earlier writing suggests, at least, the belief that article 26 constitutes weak terrain for advancing ESC rights in the inter-American system. See, e.g., TARA MELISH, PROTECTING ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM: A MANUAL ON PRESENTING CLAIMS (2002) 346 [hereinafter MELISH, PROTECTING] (noting that "[t]he article 26 approach . . . remains quite uncertain").

Second, we differ as to the role of social movements and organized civil society in the litigation process. While Melish contends that she agrees with our position in this regard,¹⁹ her analysis is framed strictly within the legal limits and technical logic of the inter-American judicial and quasi-judicial system. Melish attacks us for viewing litigation as part of a strategy designed to promote social justice or produce effects beyond the litigants.²⁰ By contrast, we argue that recognizing the limits of the system (particularly in numerical terms) renders any approach to litigation that does not seek to produce or at least encourage effects beyond the case at hand inefficient at best and misguided at worst. We also contend that listening to and working with social movements has real consequences for the framing of litigation and for the ways in which supranational bodies are best deployed. Quite simply, if a practitioner focuses on the goal of advancing social justice agendas rather than advancing the justiciability of ESC rights, her litigation strategies will differ. Of course, there may and ordinarily will be significant overlap between these agendas. But this is not always the case.

Third, in large part as a consequence of our distinct approaches to the role of social movements, we differ as to the strategic importance of focusing on cases that involve violations of the right to life. Melish critiques recent jurisprudential developments by the Inter-American Court that expand the scope of state obligations in the context of the right to life. By contrast, we embrace this development as the continuance

19. Melish writes: "Indeed, that litigation—whatever its focus—should ideally always be accompanied by social movements, local-level follow-up, vigorous media advocacy, and national and international pressure campaigns is unquestionable." Melish, *Rethinking*, *supra* note 1, at 341. She further states:

Based on these unassailable observations, [Cavallaro and Schaffer] conclude with the equally unassailable recommendation that supranational litigants should choose their cases carefully, work closely with local level organizations capable of generating popular support, and use a broad diversity of advocacy tools and media strategies to supplement their technical legal arguments. Few could disagree with this neutrally-framed thesis.

Id. at 185-86.

20. Melish writes, for example: "Nonetheless, in focusing their thesis and case-studies on the inter-American organs' *adjudicatory* functions, they misidentify the proper forum for generally 'promoting social justice' in the regional human rights system." *Id.* at 303-04.

of a positive trend that we identified in the Hastings piece, and one that we believe should orient social justice advocacy strategies that deploy the inter-American system. We address these issues in Part VI.

III. BLURRING THE ISSUES: THE JUSTICIABILITY OF ESC RIGHTS IN THEORY AND IN THE INTER-AMERICAN SYSTEM

Responding to a position that we do not advocate, Melish details her approach to the justiciability of ESC and other human rights. Her fundamental premise is that we assume that ESC rights are not justiciable and that we accept traditional distinctions between the two classes of rights.²¹ In fact, we challenge only the wisdom of *direct* litigation of ESC rights via article 26 before the Inter-American Court, terming it a “suspect option,” that is, one unlikely to convince the Court and even less likely to be applied by states. As noted above, we do not question the access to the Commission for ESC violations provided by the American Declaration.²²

Melish argues that there should be no distinction whatsoever, in terms of justiciability, between civil and political and ESC rights, as though this view is juxtaposed to our position. She sets out a four quadrant scheme that seeks to identify the aspects of ESC rights subject to judicial control and those suited only for monitoring. The quadrants consider, on one axis, individual vs. collective obligations, and on the other, obligations based on conduct vs. obligations based on result. Crossing the two axes, Melish divides obligations into four quadrants. Quadrant 1 involves individual-oriented, conduct-based duties; quadrant 2 concerns individual-oriented, result-based duties; quadrant 3 involves collective-oriented, conduct-based duties; and quadrant 4 concerns collective-oriented, result-based duties. Melish argues that only quadrant 1—indi-

21. *See, e.g., id.* at 177-78.

22. Ironically, several of the cases cited by Melish in her piece, including to demonstrate that ESC rights may be addressed in the petitions process through application of the American Declaration, are ones in which one or both of the authors have been involved as counsel. *See, e.g.,* José Pereira v. Brazil, Case 11.289, Inter-Am. C.H.R., Report No. 95/03, OEA/Ser.L/V/II.118, doc. 5 rev. 2 (2003), *cited in* Melish, *Rethinking, supra* note 1, at 287 n.334 (in which petitioners alleged violations of ESC rights protected by the American Declaration).

vidual-oriented, conduct-based duties—are susceptible to judicial resolution. Quadrant 4 duties are appropriate, by contrast, for monitoring.

The differential treatment afforded to civil and political rights, as opposed to ESC rights, Melish argues, is due to a generalized failure of states, practitioners, and academics to appreciate the true nature of rights.²³ Her arguments have merit, insofar as they consider how the two classes of rights *might* or even *ought* to be treated. In fact, we do not question their relevance in future negotiations, such as those concerning the optional protocol on ESC rights.²⁴ But her theoretical approach is not directly responsive to our arguments, which are based on the instruments and jurisprudence of the inter-American system, their interpretation by the Inter-American Court,²⁵ and the institutional and resource limits that constrain the Court.²⁶ As Melish herself notes, “supervisory mech-

23. She writes, in this regard:

Because these supervisory mechanisms have, in recent history, been associated with one category of rights or the other, the particular dimensions of state obligations assessed by the corresponding supervisory instances—as further developed and doctrinally refined by academics, advocates, and U.N. bodies—have been tethered conceptually to the *rights* supervised, rather than to the jurisdictional parameters of the supervisory instance itself.

Id. at 250 (emphasis in original).

24. Melish closes her piece by emphasizing the importance of an integrated view of civil and political and ESC rights, particularly in light of negotiations on treaties that may provide for direct oversight of ESC rights violations. *See id.* at 341-43. We agree that Melish’s approach to ESC litigation and her critique of the traditional distinction between these two sets of rights are highly relevant to the debates concerning the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights and the new International Convention on the Rights of Persons with Disabilities.

25. In other sections of her article, Melish does challenge our understanding of the rulings of the Inter-American Commission and Court. *See, e.g., id.* at 178-81. We discuss our differences in this regard below.

26. In an ideal world in which the inter-American system had vast resources and in which all the system’s sentences were duly implemented as between the parties *and* for all similarly situated victims, more extensive litigation and more expansive jurisprudence on the scope of the system’s ESC protections would be positive developments. Indeed, under these conditions, supporting Melish’s innovative scheme for expanding the justiciability of ESC rights might make sense. *See id.* at 181-83. However, these ideal conditions do not exist, nor are they likely to develop in the foreseeable future. Based on the extremely limited nature of the system, then, we argue that the

anisms have . . . been associated with one category of rights or the other. . . [a distinction] further developed and doctrinally refined by academics, advocates, and U.N. bodies . . .”²⁷

It is worth noting, as we observe below, that our assessment of the direction of the Court’s developing jurisprudence has been borne out by that body’s decisions on ESC rights issues in the two years since we published the Hastings piece. As we discuss in this Rejoinder, the Court has refused to employ an expansive reading of article 26 that would enable it to find violations of ESC rights. It has also decided cases in line with areas of developing jurisprudence that we identified as promising in *Less as More*.²⁸

IV. THE SCOPE OF ARTICLE 26, HOSTILE STATE RESPONSES, AND THE UTILITY OF THE DIRECT APPROACH

A. *The Scope of Article 26*

In her 2002 guide to litigating ESC rights in the inter-American system Melish assessed the strength of article 26 claims in the following terms:

While the “article 26 approach” is far more direct than the “integration approach,” it is also far less tested. . . . Neither the Commission nor the Court has, moreover, ever *even suggested that article 26, in itself, articulates protected rights*. The article 26 approach therefore remains quite uncertain.²⁹

Since then, the Court has been asked on several occasions to find violations of ESC rights through article 26.³⁰ Melish herself cites five separate opportunities in which the Court,

Court is most effective when it allows highly visible issues to be addressed before an international adjudication body.

27. *Id.* at 250.

28. In particular, we address the Court’s jurisprudence on the right to life in Part VI of this Rejoinder. *See infra* text accompanying notes 88-93.

29. MELISH, PROTECTING, *supra* note 18, at 347 (emphasis added).

30. Melish correctly notes that the Commission has sought to apply article 26, citing several cases. Melish, *Rethinking*, *supra* note 1, at 209-10. We note this in our Hastings piece, though we question the wisdom of this line of jurisprudence and its likelihood to withstand scrutiny by the Court. Since the Hastings piece was published (and after the “obiter dictum” in *Five Pensioners*), the Commission has ceased to present claims to the Court under article 26. *Id.* at 268-70; *see also* Cavallaro & Schaffer, *supra* note 2.

when presented squarely with alleged violations of article 26 of the Convention, has failed or refused to find such violations.³¹ While she seeks to minimize the import of these cases and to mischaracterize an important passage in the *Five Pensioners* case that flatly refuses to entertain the article 26 claims of petitioners and amici, Melish fails to convince the reader that her current understanding of ESC rights should be adopted by the Court. That her understanding constitutes the Court's actual vision is even further afield.³²

In *Five Pensioners*, as Melish notes, the Commission, petitioners, and amici all specifically requested a determination regarding violation of article 26. Their combined arguments allege violations of this article with respect to the petitioners

31. See Melish, *Rethinking*, *supra* note 1, at 267 n.266.

32. Melish's misconstruction of the import of the Court's jurisprudence on article 26 affects her interpretation of the competence of the Commission as well, causing her to discount Commission determinations that reject her view as outliers. It is settled Commission practice that when violations are alleged of rights protected by both the Convention and the Declaration, the Commission will apply the Convention. However, the Commission may, and does, consider violations of the Convention and the Declaration when rights not protected by the Convention are violated. As the Commission wrote in *Menéndez, Caride et al. v. Argentina*, "[t]he rights to the preservation of health and to well-being (Article XI) and to social security in relation with the duty to work and contribute to social security (Articles XVI, XXXV and XXXVII) contained in the Declaration are not specifically protected by the Convention Thus the Commission will also examine the petitioners' allegations on violations of the Declaration." *Menéndez, Caride et al. v. Argentina*, Case No. 11.670, Inter-Am. C.H.R., Report No. 03/01, OEA/Ser.L/V/II.111, doc. 20 rev. ¶ 42 (2001). Other cases have issued similar holdings. See, e.g., *Clotilde Perrone and Preckel v. Argentina*, Case 11.738, Inter-Am. C.H.R., Report No. 67/98, OEA/Ser.L/V/II.106, doc. 3 rev. ¶ 31-33 (1999). While Melish cites these cases, she considers the exception permitting jurisdiction over the Convention and Declaration misdirected. See Melish, *Rethinking*, *supra* note 1, at 213. We suggest that Commission precedents in this regard are, at best, ambiguous, and support litigation of hybrid cases, that is, ones that allege violations of civil and political rights (under the Convention) and ESC rights (under the Declaration). See, e.g., *Cavallaro & Schaffer*, *supra* note 2, at 271. Regarding the ambiguity of the jurisprudence of the Commission on article 26, see *Naranjo Cárdenas et al. v. Venezuela*, Petition 667/01, Inter-Am. C.H.R., Report No. 69/04, OEA/Ser.L/V/II.122, doc. 5 rev. (2005) (reasoned vote of Clare K. Roberts, President, dissenting from finding of admissibility in accordance with holding in *Five Pensioners*), available at <http://www.cidh.org>.

themselves³³ as well as a breach of the state's obligation to realize the right to social security progressively over broader classes of Peruvians.³⁴ The Court responded to these arguments in the following terms:

147. Economic, social and cultural rights have both an individual and a collective dimension. This Court considers that their progressive development, about which the United Nations Committee on Economic, Social and Cultural Rights has already ruled, should be measured in function of the growing coverage of economic, social and cultural rights in general, and of the right to social security and to a pension in particular, over the entire population, bearing in mind the imperatives of social equity, and not in function of the circumstances of a very limited group of pensioners, who do not necessarily represent the prevailing situation.

148. It is evident that this is what is occurring in the instant case; therefore, the Court considers that it is in order to reject the request to rule on the progressive development of economic, social and cultural rights in Peru, in the context of this case.³⁵

33. In this regard, the Court observed, "[t]he Inter-American Commission and the representatives of the alleged victims and their next of kin alleged that Article 26 of the American Convention had been violated because, by reducing the amount of the pensions of the alleged victims, the State failed to comply with its obligation to progressively develop their economic, social and cultural rights and, in particular, did not ensure the progressive development of their right to a pension." Inter-Am. Court H.R., *Five Pensioners Case*, Judgment of February 28, 2003, Series C, No. 98, para. 146 [hereinafter *Five Pensioners*].

34. This latter tendency is, for instance, apparent in the brief presented by amici, which analyzes the general duty of non-regressivity and asserts that Peru violated article 26 by unjustifiably reducing social security benefits for all "individuals who have been adversely affected by the measure [that reduced the pensions]." Brief amicus curiae of the Centro de Estudios Legales y Sociales (CELS) and Professor Christian Courtis, Case No. 12.034, *Benvenuto Torres, Carlos y Otros c. República de Perú*, Inter-Am. Ct. H.R., at 17, available at http://www.cels.org.ar/Site_cels/documentos/amicus_benvenuto_peru.pdf. Authors' translation. Original text reads: *las personas a las que ha perjudicado la medida*.

35. *Five Pensioners* at ¶¶ 147-48.

Melish seeks in two ways to avoid the conclusion that this rejection of the “article 26 approach” undermines her argument. First, she mischaracterizes the role that this passage plays in the Court’s opinion, and second, she misinterprets the passage’s content in a self-contradictory attempt to reconcile it with her preferred view of how ESC litigation ought to proceed in the inter-American system. Neither attempt is persuasive.

Melish initially questions the importance of this section of the Court’s decision by labeling it as obiter dictum.³⁶ However, given that the section is the basis of the Court’s decision not to consider article 26 violations against either the named pensioners or any broader class, Melish’s assessment is subject to serious doubt.

Further, one must consider the relevant context when analyzing the import of the language in Inter-American Court opinions. In Anglo-American law, the holding of a case is limited to those elements of a court’s sentence necessary for resolving the dispute. Because all other language may be considered obiter dictum, courts in this tradition ordinarily refrain from commenting on matters beyond the issues essential to judgment. By contrast in the inter-American system—a hybrid of common and civil law—the Inter-American Court regularly provides crucial interpretation of the system’s instruments well beyond what is necessary to resolve the litigation before the parties. This has been the practice of the Court since its first contentious case. In that matter, *Velásquez Rodríguez v. Honduras*,³⁷ two of the Court’s most important determinations could theoretically be construed as unnecessary. The Court’s analysis of exceptions to the rule of exhaustion of domestic remedies in that case, cited scores of times within the system and beyond, might be deemed largely unnecessary in light of the repeated use of specific domestic remedies made by the victim’s heirs. More importantly, the Court could have omitted entirely the most important analysis and holding in *Velásquez Rodríguez*: its acceptance of the Commission’s theory

36. Obiter dictum has been defined as “[words of an opinion] entirely unnecessary for the decision of the case.” *Noel v. Olds*, 138 F.2d 581, 586 (D.C. Cir. 1943).

37. See *Velásquez Rodríguez v. Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988).

of state responsibility for acts of third parties through proof of a pattern of forced disappearances and the inclusion of Manfredo Velásquez Rodríguez in that pattern. Indeed, it could have found the same violations based solely on its express finding that state agents *were* directly responsible for the disappearance of the victim.³⁸ At a minimum, then, the Court's observation regarding the viability of direct access via article 26 in *Five Pensioners* should place petitioners on notice that invoking this article to litigate ESC rights is a suspect option.

Perhaps aware that litigants familiar with inter-American jurisprudence are unlikely to accept her classification of this passage as mere obiter dictum, Melish seeks to save her argument by asserting that the *Five Pensioners* ruling is reconcilable with direct ESC litigation within the framework of her four quadrant theory. In this regard, she asserts in this journal that "the Court's dictum should be understood as rejecting only *one particular type* of article 26 claim: claims on which state responsibility for substantive rights infringement rests on alleged breach of quadrant 4, rather than quadrant 1, duties."³⁹ However, far from suggesting that there are two "types" of article 26 claims—one justiciable and the other not—the more natural reading of this passage supports the view that article 26 does not recognize individual, immediately-justiciable rights. As a consequence, the article 26 approach remains unpromising as a means of ESC litigation (precisely the view that we adopt in *Less as More*).⁴⁰

38. On this point, the Court wrote:

The Court is convinced, and has so found, that the disappearance of Manfredo Velásquez was carried out by agents who acted under cover of public authority. However, even had that fact not been proven, the failure of the State apparatus to act, which is clearly proven, is a failure on the part of Honduras to fulfill the duties it assumed under article 1 (1) of the Convention, which obligated it to ensure Manfredo Velásquez the free and full exercise of his human rights.

Id. at ¶ 182.

39. Melish, *Rethinking*, *supra* note 1, at 268 (emphasis in original).

40. An additional argument in support of our interpretation of article 26 involves the plain language of the text of the American Convention itself. That instrument establishes civil and political rights in articles 3 to 25. Each of those articles is drafted in express terms that establish the particular right with reference to the rights holder or in language that proscribes particular state behavior. These articles typically employ phrases such as "everyone has

Moreover, it is difficult to take seriously Melish's current position with respect to this passage, given that her past writings assert contradictory interpretations. Worth noting in this regard is Melish's evaluation of the possibility of employing article 26 as the basis for directly litigating ESC rights in an article she drafted shortly after the *Five Pensioners* decision. In that piece, while characterizing the relevant text as obiter dictum, Melish wrote, "the Court effectively obliterated article 26 as a repository for individually-protectable rights under the contentious jurisdiction of the inter-American human rights organs."⁴¹ This candid assessment undermines the credibility of Melish's current challenge to our view that the Court has provided little basis for expecting direct access via article 26. Further reinforcing the implausibility of Melish's latest characterization of the *Five Pensioners* passage is another argument she made in an earlier version of the piece that now appears in this journal. There, Melish characterized the same *Five Pensioners* passage as "plainly-erroneous" and so detrimental to the article 26 approach that it must be "buried and forgotten" if future ESC litigation is to take place according to her preferred model.⁴² Melish's constantly changing interpretation of the *Five Pensioners* language, rather than advancing her (current) thesis, instead undermines her credibility.

Equally revealing of the unsustainable nature of Melish's position is her novel interpretation of several subsequent cases in which the Court failed to find violations of article 26 alleged by litigants. Melish manages to construe these cases as support for her position—arguing that the Court's failure to cite *Five Pensioners* when refusing to recognize these claims establishes that the assessment of article 26 claims in *Five Pensioners* consti-

the right" and "every person has the right" when describing the right from the perspective of the rights holder, and "no one shall be" when proscribing state conduct. Such language is conspicuously absent from the text of article 26, which provides only that states "undertake to adopt measures . . . with a view to achieving progressively" the realization of ESC rights for their populations. American Convention on Human Rights, art. 26, Nov. 22, 1969, 1144 U.N.T.S. 123.

41. Tara J. Melish, *A Pyrrhic Victory for Peru's Pensioners: Pensions, Property and the Prevention of Progressivity*, 1 JURÍDICA 51, 56-57 (2005).

42. Tara J. Melish, *Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas*, N.Y.U. Center for Human Rights and Global Justice Working Paper Series No. 2 (2006), at 50 (version available online May 2006-January 2007; on file with authors).

tutes mere obiter dictum.⁴³ The less strained and more convincing explanation would be that the judges in *Five Pensioners* believed that article 26 simply does not provide the basis for direct access to the Court, a belief that a majority of the justices apparently continue to hold.⁴⁴ It is also worth noting that the Commission appears to hold the same view, based on its choice *not* to allege violations of article 26 to the Court⁴⁵ after the decision in *Five Pensioners*.

Melish further critiques our analysis⁴⁶ of article 26 in light of article 19 of the San Salvador Protocol. Article 19 expressly limits access to the inter-American system's petitions process to articles 8(a) and 13 of the Protocol (which protect rights to labor association and education, respectively). We suggested that this article, in conjunction with the terms of the American Convention, leads to the conclusion that the American states drafting those two instruments did not intend to authorize the Court to adjudicate petitions alleging ESC rights abuse through article 26. Melish counters by arguing that the exist-

43. She writes in this regard: "The Court's manifest discomfort with its article 26 dictum has led it not only to avoid extending or even referring to it again in any subsequent case but also, unfortunately—given the lack of a clear vision for resolving the quadrant 1/quadrant 4 difficulty—pronouncing on article 26 at all." Melish, *Rethinking*, *supra* note 1, at 267 n.266. The four subsequent cases cited by Melish in which the Court declined the opportunity to find a violation of article 26 are: *Case of Children's Rehabilitation v. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 112, ¶ 255 (Sept. 2, 2004); *Yakye Axa Indigenous Community of the Enxet-Lengua People v. Paraguay*, Petition 12.313, Inter-Am. C.H.R., Report No. 2/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1, ¶¶ 11-12 (2003); *Yean and Bosico Case v. Dominican Republic*, Inter-Am. Ct. H.R. (ser. C) No. 130 (Sep. 8, 2005); *Acevedo Jaramillo et al. v. Perú*, Inter-Am. Ct. H.R. (ser. C) No. 144, at 86 (Feb. 7, 2006).

44. We recognize, as the Court has, that article 26 may be relevant to interpreting other rights or in crafting remedies. *See, e.g., Five Pensioners*, *supra* note 34, at 62. In this regard, other instruments, such as the American Declaration, that may not serve as the basis for a claim to the Court are also considered by this body in interpreting and applying those instruments which provide access.

45. In this regard, see *Acevedo Jaramillo et al. v. Perú*, Inter-Am. Ct. H.R. (ser. C) No. 144, at 86 (Feb. 7, 2006). In that case concerning violation of among others, labor rights, "the Commission did not allege that article 26 of the Convention had been violated." Authors' translation. Original text reads: *la Comisión no alegó que se hubiera violado el artículo 26 de la Convención*.

46. Melish also devotes attention to the *travaux préparatoires*, challenging the research of Matthew Craven in this regard, which is cited in our Hastings piece. *See Melish, Rethinking*, *supra* note 1, at 225-27.

tence of two other treaties in the inter-American system that specify rights beyond the terms of the American Convention, and which do not grant access to the petitions process for some of those rights, proves that our analysis is misguided.⁴⁷

What Melish fails to consider, however, is the relevant context in which each treaty was drafted and approved. To begin, we emphasize that the San Salvador Protocol, unlike the treaties cited by Melish, is a protocol to the American Convention on Human Rights and thus maintains a special relationship with it.⁴⁸ The full name of the instrument is the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights. In this context, Melish's citation of other treaties in the inter-American system is not relevant to a discussion of the interpretation of the American Convention in conjunction with its additional protocol. Further, in the case of the San Salvador Protocol, the background understanding of the drafters regarding ESC rights and the American Convention was that those rights could not be litigated through article 26 of the Convention. This background understanding was based on the fact that article 26 had never been employed successfully to defend ESC rights through the petitions process. Based on this understanding, the decision by the states drafting the San Salvador Protocol to grant access to the petitions process (potentially leading to the Inter-American Court) for violations of articles 8(a) and 13 should be read to reflect the understanding by American states at the time in two respects: First, the American Convention, through article 26, at least at the time, did not provide direct access to the Commission and Court and, second, states ratifying the San Salvador Protocol could be made to answer to individual petitions only for violations of articles 8(a) and 13. Other, strained interpretations are possible, but less convincing.

47. *See id.* at 213-15.

48. Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, November 17, 1988, O.A.S.T.S No. 69.

B. *Possible Hostile State Responses to the Direct Application of Article 26*

Throughout her piece, Melish questions our concern that a Court decision applying article 26 directly might meet with state resistance. To frame her critique, Melish posits a theory of state resistance apparently drawn from democratic theory and the role of courts in domestic contexts.⁴⁹ Her focus on the proper role of courts, however, is largely inappropriate to the analysis of the conditions that lead states to react negatively to measures taken by supranational bodies. Melish suggests that courts risk undermining their legitimacy by overstepping their appropriate role.⁵⁰ But legitimacy, in the terms that Melish proposes, cannot explain the case studies on hostile responses that we included in *Less as More*. For example, the Court's reasoning regarding the application of the death penalty in Trinidad and Tobago is firmly grounded in law and did not overstep the Court's legitimate judicial function. Yet Trinidad and Tobago's response to that holding was decidedly hostile: It led to that country's withdrawal from the inter-American system.⁵¹

Legal scholar Lawrence Helfer's work is relevant in this context. In a 2002 article investigating the phenomenon of Caribbean rejection of supranational efforts to restrict application of the death penalty, Helfer explains the phenomenon of hostile state reaction to supranational decisions in terms of overlegalization. While one variant of overlegalization involves expansion of the initial terms of a treaty (by expansion of a supranational body's jurisdiction, for example), another variant "occurs where opportunities to detect, expose, or remedy noncompliance increase over time, forcing states closer to the commitments formally enshrined in a treaty's text."⁵² Helfer

49. See, Melish, *Rethinking*, *supra* note 1, at 287-92.

50. See *id.* at 290-92.

51. See Cavallaro & Schaffer, *supra* note 2, at 249-50.

52. Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes*, 102 COLUM. L. REV. 1832, 1856 (2002). In this regard, the authors recognize a debt to Prof. Helfer for his contribution to the debate through development of the concept and operation of overlegalization. This term, rather than "legitimacy" better explains the phenomenon that we sought to address in the *Hastings* article and which Melish purports to attack. The concept of overlegalization also serves to avoid confusion created by Melish's

argues that this form of overlegalization may be prevalent in states outside of Europe in which treaty compliance is limited. Overlegalization, Helfer argues, may lead states to reject supranational engagement. On this theory of overlegalization, a Court interpretation of the scope of article 26 that would permit direct access for ESC violations could constitute either broadening of the jurisdiction, or expansion of the “opportunities to detect, expose or remedy noncompliance”—in either case, results likely to produce hostile state reaction. Again, in both cases, a given state’s hostility would flow primarily from its belief that the supranational body is engaging in more or a different kind of oversight than the state initially accepted. In this model, state perception is more important than the correctness (to the extent that this may be judged objectively) of the supranational decision. If, as we argue, states understand the terms of the American Convention and the Court’s rulings in *Five Pensioners* and subsequent cases as limits on direct access for ESC litigation via article 26, a broader interpretation of that article by the Court would constitute overlegalization, as Helfer explains the phenomenon.

Melish’s critique further fails to appreciate the very delicate balance that exists in the inter-American system. State pressure to reduce the reach and resources of the Commission and Court constitute a permanent element of the context in which cases are litigated and decided.⁵³ In addition to renouncing acceptance of the Court’s jurisdiction or withdrawing ratification of the American Convention, a state may also publicly refuse to implement a Court sentence or simply fail to apply its orders. Recognizing these factors, along with the system’s highly limited resources and capacity to resolve cases,⁵⁴ is essential to any realistic approach to litigation in the system. Such an approach must seek to work within the established limits of the system (or to move them, incrementally) and to engage a range of social forces to avoid placing a controversial Court sentence at the center of the advocacy strategy.⁵⁵

inappropriate application of domestic institutional political legitimacy theory to state responses to supranational decisions.

53. See Cavallaro & Schaffer, *supra* note 2, at 220 n.2.

54. We discuss this at some length in the Hastings piece. See *id.*, *passim*.

55. We suggest that in those instances in which state opposition to Court sentences has been high for the reasons outlined above, states have been able to focus on decisions of the Court as the centerpiece of conflict. That

Melish is correct that state rejection of Court sentences is not specific to litigation of ESC rights; indeed our case studies demonstrate this. She attacks us, however, for failing to provide direct evidence to support our contention.⁵⁶ Our contention, though, is that a Court sentence based exclusively on article 26 would likely provoke a strong, negative reaction from the relevant state. Because there have been no Court sentences applying article 26 directly, we cannot cite state reactions to such sentences; instead, we analogize based on state response to Court determinations on civil and political rights, as well as state perception of the legitimacy of supranational oversight of ESC rights as manifested elsewhere.⁵⁷

Seeking to support her critique of our argument that application of article 26 to grant access to the Court for ESC claims might provoke negative state response, Melish dedicates several pages to demonstrating that domestic courts and legislatures in the Americas have embraced ESC rights. Yet the extent of domestic constitutional acceptance of human rights, including ESC rights *by and within* Latin American domestic legal

is, by focusing on a relatively isolated Court decision, states were able to frame the conflict (whether to apply the death penalty in Trinidad and Tobago; whether to accept supranational control of the battle against terrorism in Peru) in terms of national sovereignty vs. supranational intervention in domestic affairs. State efforts to delegitimize the determinations of the inter-American system are more likely to succeed when those decisions lack sufficient grounding or involve extreme interpretations of the system's instruments. The combination of isolated supranational litigation efforts together with relatively weak legal support is what most concerned us in *Less as More* and continues to concern us now.

56. From here, Melish proceeds to devote several pages to summarizing *domestic* decisions on ESC rights in the Americas, a matter not relevant to our position. See Melish, *Rethinking*, *supra* note 1, at 280-83.

57. Melish argues that state response to reference to ESC rights in friendly settlements and precautionary measures ordered by the Commission and, in a few instances, in provisional measures by the Court, undermines our concerns about possible hostile responses to a Court ruling on ESC rights through article 26. See *id.* at 283-87. These instances are simply not relevant. First, we do not question the Commission's authority to address ESC issues by applying the Declaration. And voluntary acceptance of friendly settlements tells us little about state reaction to Court judgments that go beyond the bounds of their jurisdictional scope. Second, and more importantly, precautionary measures and provisional measures, unlike sentences in contentious cases, do not involve final determinations of state responsibility for rights abuse, and instead seek to protect persons at risk through state cooperation.

structures, is a point that we not only do not challenge, but affirmatively recognize in our Hastings piece.⁵⁸ The question we raise concerns potential state response to supranational decisions that go beyond the text of the instruments establishing jurisdiction. That Latin American states accept domestic judicial oversight of ESC rights does not speak to their potential resistance to supranational exercise of jurisdiction over these issues without clear, conventional basis. If, as we argue, states understand the treaties and jurisprudence of the Inter-American Court as precluding direct article 26 access to adjudicate ESC rights, then they are likely to react much as they would were the Court to overstep its competence in another area, as for instance in an exercise of jurisdiction over a state that had not yet ratified the American Convention.

C. *The Utility—or Lack Thereof—of the Article 26 Approach*

Melish herself has recognized that the direct approach is largely unnecessary to achieve practical gains. In her guide to litigating ESC rights in the inter-American system, Melish compared the “article 26 approach” with the “integration approach,” the latter referring to framing the same situations of abuse in terms of violations of the civil and political rights protected in articles 3 to 25 of the American Convention:

As a practical matter, virtually identical results can generally be achieved using the “article 26 approach” and the “integration approach.” . . . [A]ll of the “rights implicit in the OAS Charter” can, in most cases, be protected through articles 3-25 (using the integration approach). A violation of the right to health, for example, might be alleged just as easily under Convention article 5 (personal integrity) as it could be under Convention article 26 (“the rights implicit in the OAS Charter”). The two approaches are thus, in many ways, substitutes for one another.⁵⁹

58. See Cavallaro & Schaffer, *supra* note 2, at 223 n.9, 233 n.48.

59. See MELISH, PROTECTING, *supra* note 18, at 346. In her piece in this edition, Melish reiterates this principle, noting, “many of the norms included in Chapter II—formally entitled ‘Civil and Political Rights’—also expressly protect rights appropriately understood as economic, social, or cultural . . . [such as] inviolability of the home, freedom from compulsory la-

This “integration approach” squares with what we term an elements approach, that is, one that seeks to vindicate ESC elements inherent in civil and political rights through broad interpretations of the latter set of rights. Melish thus acknowledges that such an elements approach will achieve “virtually identical results” as the article 26 approach in ESC litigation. Why, then, insist on article 26? Melish’s current preference for framing violations in terms of article 26 appears to flow from a focus on promoting the jurisprudential development of ESC rights themselves, rather than advancing social justice by achieving concrete results in ESC-related cases.⁶⁰ While advancing supranational justiciability of ESC rights may be valuable at some level, to the extent that it conflicts with advancing the work of social movements and promoting social justice, we contend—as we did in *Less as More*—that the latter concerns must be given priority. Melish purports to accept our argument that litigators must work closely with social movements and seek to advance the agendas of these groups, but, as we explain further below, her suggested approach favors detached jurisprudential advances at the expense of social justice.

V. LISTENING TO SOCIAL MOVEMENTS AND CIVIL SOCIETY

Much of Melish’s misunderstanding of our argument stems from her failure to appreciate our conception of the role of social movements, civil society, and media advocacy in developing campaigns to foster social justice. Melish purports to accept the importance of working with social movements and civil society to advance this goal.⁶¹ As she writes:

bor, freedom of labor association, and the right to property.” Melish, *Rethinking*, *supra* note 1, at 221.

60. Of course, to the extent that promotion of ESC rights itself advances social justice, this might constitute a separate justification for such framing. Where there is tension, however, we favor social justice over jurisprudential expansion. *See id.* at 181-82.

61. Her acceptance of this position is tempered in other parts of her piece. Thus, she asserts that we “misidentify the proper forum for generally ‘promoting social justice’ in the regional human rights system . . . [because] the Commission and Court may not legitimately assume that broad undertaking through their adjudicatory competence.” *Id.* at 304. Here, Melish makes two mistakes. First, she discourages practitioners from employing the contentious jurisdiction of the Commission and Court to promote social justice, perhaps the most serious error in Melish’s argument for her four quad-

Cavallaro and Schaffer's . . . insistence on the imperative of a more concerted focus on practical on-the-ground enforcement and implementation of supranational decisions is firmly supported. Indeed, that litigation—whatever its focus—should ideally always be accompanied by social movements, local-level follow-up, vigorous media advocacy, and national and international pressure campaigns is unquestionable.⁶²

We do not contend that litigation ought to be merely accompanied by social movements, media advocacy, and other forms of domestic and international pressure.⁶³ This phrasing, and Melish's implicit understanding of "accompan[y]" suggests that litigation should drive the advocacy strategy and that other elements should support it. We argue that the reverse is true. That is, broader advocacy campaigns may include litigation in the inter-American system, as appropriate, but supranational litigation preferences should not impose limits on advocacy for social justice. Social justice advocacy strategies, however, may lead to restrictions or modifications of methods of litigation.

Melish thus fails to grasp fully that the relationship between litigation and other strategies will have real conse-

rant theory. Second, she misunderstands our arguments. We do not urge the Commission and Court to issue sweeping verdicts on the promotion of social justice. Rather, we urge them to resolve cases in accordance with their caselaw. We do, however, urge practitioners to think creatively about the system and ways to employ it jointly with other forms of activism and media pressure to advance social justice. That is, we call on petitioners to work with social movements to frame cases in ways that raise vital social issues. By so doing, petitioners may leverage litigation before the system (not just final determinations, but the ongoing litigation itself) to increase awareness and provide a moral compass for broader campaigns.

62. *Id.* at 341.

63. We meant our use of the term "accompany" in the Hastings piece to refer to integrated strategies in which supranational litigation plays a role, as opposed to strategies that privilege litigation and engage other methods of advocacy as secondary, "accompanying" elements. In *Less as More*, for example, we wrote, "[e]xperience demonstrates that international litigation not accompanied by parallel, coordinated campaigns by social movements and/or the media is unlikely to produce effective results. In light of this, we underscore the need for supranational litigators to avoid taking the lead on strategic decision-making regarding the use of the Inter-American system." Cavallaro & Schaffer, *supra* note 2, at 275.

quences for the nature of petitions submitted to the system as well as the way they are framed and litigated. In practice, social movements are often more interested in the Court as an avenue for raising the profile of particular agendas rather than as a forum in which the justiciability of ESC rights may be advanced. Moreover, in light of the extremely limited access to the Court in numerical terms, these two objectives often come into conflict. As we stressed in our Hastings piece, the Commission and Court adjudicate a handful of cases per year. The Court, for example, has failed to address even an average of one case per country per year since its inception. Since 1979, eighty-seven contentious cases have been presented to the Court, leading to 162 determinations; the Court has resolved an additional seventy-two requests for precautionary measures, and has issued nineteen advisory opinions.⁶⁴ Taken over the twenty-seven years of its existence, this yields an average of just over three contentious cases per year. Even if one begins the count in 1986, the year the first contentious cases were forwarded to the Court, one finds an average of just four such cases per year. While these numbers have increased in recent years, particularly after the reforms of 2001, the likelihood that a case will be brought to the Court in a given year against any particular country are less than fifty percent. Based on these severe limits, we argue that petitioners must rethink their understanding of the system. With such remarkable limits on its access, the system cannot reasonably be viewed as capable of responding to every injustice in the Americas.⁶⁵ Instead, it should be seen as a tool that must be used sparingly to magnify a very, very limited universe of cases. Which universe of cases, we argue, is the fundamental question. If framed intelligently, litigation before the system may provide opportunities for thoughtful practitioners to promote social justice more broadly. The hypothetical cases in the Hastings piece seek to identify areas in which litigation may serve to raise the profile

64. Inter-Am. Ct. H.R., *Jurisprudencia*, available at <http://www.corteidh.or.cr/> (last visited Jan. 28, 2007).

65. We cannot underscore this point enough. Our analysis of litigation strategies is entirely contextual. If the inter-American system were expanded and were provided with greater resources and state support, we would support expansion of litigation of all types. However, given that very, very few cases are able to proceed to the Court, we argue for greater care in selecting cases to be petitioned.

of vital areas of social injustice in Latin America. The bottom line is very often one that involves real tradeoffs. Should the one case in any given year that the Court addresses from Ecuador focus on extending the justiciability of protections against forced eviction or on the killing of an indigenous leader seeking control of resources on traditional lands? Should the one case likely to proceed to the Court against Brazil in a given year address the concerns of persons with mental health issues, through the prism of a patient beaten to death in a closed mental hospital, or on efforts to encourage the Court to recognize an article 26 claim to ESC rights? Admittedly, these questions are not presented in absolute terms to any individual petitioner, but they flow directly from the extremely limited capacity of the system and, in particular, the Court.

If, as we argue, the main objective of supranational litigants in the inter-American system should be to place issues before supranational bodies in conjunction with other advocacy strategies, then it should not matter whether the Commission or Court addresses a particular question from the framework of civil and political or ESC rights. More important, we contend, is which issues are addressed and what broader efforts are included in the advocacy campaign. If the civil and political rights frame offers greater opportunity for advocacy and promotion of change, then this frame, rather than the ESC frame, should be given priority.⁶⁶

It is precisely our focus on the real world impact of cases, jointly with our observations about the instruments and jurisprudence of the system (rather than idealized theories about how ESC rights *ought* to be litigated), that led us to identify areas in which deploying the inter-American system could advance social justice in the Americas. The hypothetical cases that we present, therefore, seek to demonstrate areas in which social justice movements might promote their agendas through litigation; each hypothetical case identifies a possible

66. However, if the objective of accessing the system is to promote the justiciability of ESC rights—as it appears Melish believes—then one's preferred litigation strategies will necessarily be different. That is, one will seek to ensure that particular types of claims involving particular rights progress through the system, with less regard for whether these cases are likely to produce impact on the ground. See Melish, *Rethinking, supra* note 1, at 181-82.

point of entry for practitioners to engage the inter-American system.

Note that these thumbnail sketches, from which petitioners might seek to develop test cases, are presented in precisely this fashion—as situations of social injustice within which a case might be framed to promote and provoke societal responses. Each hypothetical case takes up less than a single page of text in the Hastings piece and none purports to establish all the elements necessary for a case to be admitted and processed by the inter-American system. Before filing a petition before the Commission, a petitioner would, of course, have to ensure compliance with the system's requirements for filing cases.⁶⁷ In this regard, Melish dedicates a great deal of space to finding gaps in the hypotheticals' fulfillment of certain admissibility or justiciability requirements. However, her critiques are unwarranted given that the hypothetical cases do not purport to present complete petitions, ready for litigation. Rather, the hypotheticals represent areas of profound social injustice that might be cognizable and reviewable by the inter-American human rights system if framed in accordance with the rules and procedures of the system.

A. *Corumbiara and Eldorado dos Carajás:
Working with Social Movements*

Melish's analysis of the Corumbiara case demonstrates her failure to understand fully that advocacy strategies do not begin and end with litigation before the inter-American system, as well as her failure to see that advocacy strategies that do not place the system at their center often demonstrate greater promise to promote social justice.

Melish chastises the litigants and the Commission for focusing in Corumbiara on the killings and instances of torture. From her vantage point, Melish sees a missed opportunity, one

67. Here, we thank Melish for raising the ambiguity in some of the hypothetical cases. To the extent the language of those cases suggests that a broad, poorly defined claim would be admissible merely by invoking a civil or political right, let us correct that misunderstanding now. Further, when we refer to the potentially revolutionary impact that a Court determination might have, we seek to refer to the impact that a determination in a specific case, litigated within the constraints of the system, would have in conjunction with broad advocacy jointly with social movements, civil society, and the media. *Id.* at 181.

in which her vision of ESC litigation might have been advanced. In Brazil at the time, the vision of those working with landless and human rights leaders was quite different.⁶⁸ The extreme violence employed by the police, particularly after seizing control of the Santa Elina ranch, was an issue that helped to catapult and maintain the land reform debate—in its many dimensions—to national prominence.

The choice to emphasize conflicts involving extreme violence was important for the broader land reform strategy. A similar strategic decision was made the following year when police attacked a group of landless squatters pressing for expropriation in Pará state. In that incident, the squatters were occupying the main road connecting the south of Pará state with the capital, Belém, when military police opened fire on them and attacked the squatters with hoes and machetes, killing nineteen and wounding scores of others.⁶⁹

In both cases, the advocacy agenda focused on highlighting the violations of the right to life in an effort to mobilize domestic and international public opinion against the use of police violence to resolve land conflicts. This, rather than a pronouncement by the inter-American system on forced evictions, was the main goal of the litigation strategy. The landless movement, most probably Latin America's best developed social movement, deployed a range of strategies designed to end forced evictions and to bring about change in land tenure patterns. These included pressure for legislative change, litigation within Brazil, and, primarily, land occupations. Because the last element was so central to its overall strategy, reducing the threat of future massacres by police was vital to the landless movement and far more important than the development of supranational doctrine unlikely to produce significant effects within Brazil.

Melish incorrectly assumes that because the case before the Inter-American Commission did not focus on litigating ESC rights that these issues were not part of the broader advo-

68. James L. Cavallaro, at the time, director of CEJIL/BRASIL and Brazil office director of Human Rights Watch, was one of several petitioners in both the Corumbiara case and in the Eldorado dos Carajás matter.

69. Admissibility El Dorado Dos Carajás, Petition no. 11.820, Inter-Am. C.H.R., Report No. 4/03, available at <http://www.cidh.org/annualrep/2003eng/Brasil.11820.htm>.

cacy campaign. For one, the submissions to the Commission focused on the context of gross inequality in which the killings occurred. During the time period framed by the initial Corumbiara case (October 1995), the Eldorado dos Carajás massacre (April 1996), the filing in that matter, and the litigation of the two cases (over the next several years), those engaged in promoting land reform routinely addressed the underlying ESC claims in a range of fora (including in domestic courts, the Brazilian parliament, and international debates). Melish chastises the petitioners in the Corumbiara case for not expanding their claims to include forced eviction. But those involved in the advocacy campaign *did* address the broader issues of forced eviction, as well as questions related to land distribution, financing, and credit for land reform, even beyond the scope of what could have been presented to the Inter-American Commission.⁷⁰ Media sources as well, in their coverage of the Corumbiara matter, routinely analyzed the broader context of land reform, squatter occupations, the demand for land settlement, and respect for housing rights.⁷¹

Interestingly, the record demonstrates the partial success of this strategy. While land conflicts still continue to dominate rural Brazil, incidents of multiple deaths caused by police firing at squatters virtually ceased after the Corumbiara and Eldorado massacres. After the killings of twenty-eight people in the Corumbiara and Eldorado incidents in a period of just eight months, the number of people killed by police in rural land conflicts decreased dramatically—likely in response to this mobilization and joint strategy. Over the next four years, police killed a total of eight civilians in this context. All but one of the conflicts involved a single victim; the bloodiest caused two⁷² fatalities.⁷³ One of Brazil's leading weekly

70. Mario Osava, *Brazil: Fear of Social Unrest Revives Land Reform*, IPS – INTER PRESS SERVICE, Sept. 28, 1995; see *Corumbiara: Deadly Eviction*, TIME, Aug. 28, 1995, at 8; *Land Question Develops into Crisis: Military Fear Conflicts May Lead to Guerrilla Violence*, 1995 LATIN AMERICAN WKLY. REP. 447-48.

71. Mario Osava, *Brazil*, *supra* note 7; *Corumbiara: Deadly Eviction*, *supra* note 70; *Eleven Die in Land Conflict: Lula Claims Cardoso Has No Interest in Agrarian Reform*, 1995 LATIN AMERICAN WKLY. REP. 374-75; Diana Jean Schemo, *Brazilian Squatters Fall in Deadly Police Raid*, N.Y. TIMES, Sept. 19, 1995, at A1.

72. It is possible to interpret this figure as three. According to CPT data, military police and gunmen killed two civilians on March 2, 2001 in the municipality of Confresa, state of Mato Grosso. Two days later, they killed an-

magazines, *IstoÉ*, reported months after the Eldorado massacre that the State Government in Pará—the epicenter of Brazil’s most violent rural clashes—expressly ordered its military police to avoid all situations that might lead to violent conflict similar to that in the Eldorado massacre.⁷⁴

At the same time, while multiple killings by police in rural conflicts practically ceased, land occupations intensified, leading to the settlement of hundreds of thousands of squatters.⁷⁵ According to official data, in relation to the preceding twenty-five years, between 1995 and 1999 the average number of families settled per year increased by all accounts. By some, the surge was as much as five hundred percent.⁷⁶ According to

other civilian in the same municipality. It is unclear whether these should be considered two separate conflicts. See COMISSÃO PASTORAL DA TERRA, CONFLITOS NO CAMPO: BRASIL '97 10-11 (1998). After 2001, CPT stopped including information on the identity of murder suspects.

73. Nevertheless, despite the reduction in the numbers of landless squatters and protesters killed by police after Corumbiara and Eldorado dos Carajás, rights groups in Brazil have documented an increase in other forms of repression. For instance, according to Landless Movement (MST) data, instances of arrests of landless peasants vastly increased in the years after 1996, suggesting a displacement in repressive techniques and highlighting the continued need for advocacy related to civil and political rights that would allow the landless movement to continue its land reform push. See Movimento dos Trabalhadores Rurais Sem Terra, *Prisões – 1989 a 2003*, available at <http://www.mst.org.br/mst/pagina.php?cd=1501>.

74. According to *IstoÉ*, “[t]he Government of Pará, after the massacre of Eldorado dos Carajás, ordered the Military Police not to involve itself in any situation that might result in confrontation.” The original in Portuguese reads: *O governo do Pará, após o massacre de Eldorado do[s] Carajás, determinou ao comando da Polícia Militar paraense que não se envolva em nenhuma situação que possa resultar em confronto.* See Mário Chimanovitch, *Tensão permanente: Relatórios reservados informam que os sem-terra pretendem criar versão nacional de Chipas no Pará*, *IstoÉ*, Aug. 7, 1996, <http://www.zaz.com.br/istoe/politica/140112.htm> [hereinafter *Tensão permanente*].

75. According to the MST data, from 1990 until 1995, the number of land occupations [*acampamentos*] fluctuated from a low of seventy-eight in 1991, with 9203 families, to a high of 214 in 1993, with 40,109 families. Then, from a low, in 1995, of 101 land occupations representing 31,619 families, the number of occupations grew each year to 538 with 69,804 families in 1999. [*A participação da polícia em assassinatos e chacinas não é novidade, mas ela vem crescendo nos últimos anos.*] COMISSÃO PASTORAL DA TERRA, CONFLITOS NO CAMPO: BRASIL 95 5 (1996).

76. According to the government, an average of 11,870 families were settled per year from 1970 through 1984. That figure increased modestly to 15,013 over the next ten years. From 1995 through 1999, the average num-

the Landless Movement, the number of land occupations more than doubled from 1995 to 1999, compared to the previous five years.⁷⁷ Official figures demonstrate that more families were settled from 1995 through 1999 than in the twenty-five years preceding that period.⁷⁸ As for land expropriation (*desapropriação*)—areas ordered redistributed for land reform purposes—more than double the number of hectares were expropriated in the 1995 through 1999 period than in either of the two previous five year periods.⁷⁹

Notably, among the areas expropriated by the federal government was the Macaxeira *fazenda*, the focus of the highway occupation and brutal police response that resulted in the killing of nineteen squatters in the Eldorado case.⁸⁰ In addition, in response to the domestic and international outrage over the Corumbiara and Eldorado massacres, federal authorities implemented a range of other measures, including expediting expropriations for land reform and providing additional funding for landless settlements.

Rather than supporting Melish's thesis, the Corumbiara and Eldorado cases underscore the importance of understand-

ber of families settled each year, according to government reports, surged to 74,644. See Instituto Nacional de Colonização e Reforma Agrária, *Relatório de Atividades INCRA 30 Anos*, available at <http://incra.gov.br/arquivos/0173400476.pdf> [hereinafter *Relatório de Atividades*]. Different INCRA reports provide somewhat contradictory figures, though all affirm the stated trend of increasing settlements from 1995 through 1999, in varying degrees. Another INCRA report released some time after the thirty-year retrospective, asserts that only 218,000 families were settled from 1964—the year of the passage of the Land Statute [Estatuto da Terra]—until 1995. Then, from 1995 through 1999, 372,866 families were reported settled. See Instituto Nacional de Colonização e Reforma Agrária, *O Futuro Nasce da Terra*, available at <http://www.incra.gov.br/arquivos/0173500477.pdf> [hereinafter *O Futuro Nasce da Terra*].

77. Movimento dos Trabalhadores Rurais Sem Terra, *Acampamentos – Total dos Acampamentos, 1990-2001*, available at <http://www.mst.org.br/mst/pagina.php?cd=897>.

78. In its thirty year retrospective, the Instituto Nacional de Colonização e Reforma Agrária (INCRA) reported that while 316,327 families were settled from 1970 until 1995, in the five years that followed, a total of 373,220 families were settled. See *Relatório de Atividades*, *supra* note 75.

79. According to the government, 4,191,147 hectares were expropriated from 1985 through 1989, falling to 3,858,828 hectares from 1990 through 1994 before jumping to 8,785,114 hectares from 1995 through 1999. See *O Futuro Nasce da Terra*, *supra* note 75.

80. See *Tensão permanente*, *supra* note 73.

ing that social movements, not lawyers, should take the lead in designing social change strategies. Lawyers, of course, must understand and apply legal rules. But they should do this in a way that supports the objectives of those directly affected by grave social injustice, rather than in ways that promote their particular jurisprudential agendas.⁸¹ The Corumbiara case is one example among many in which the need for litigants to work more closely with social movements shapes the legal strategies adopted.⁸²

Melish's analysis of the *Yean and Bosico* case warrants similar scrutiny. There, Melish criticizes the Court, questioning its decision to focus on the nationality of the children involved, rather than on the right to education (an issue that might have been addressed, she argues, had the Court accepted petitioners' article 26 arguments). Melish suggests that this focus is responsible for the backlash against the decision in the Dominican Republic.

Just as likely, though, is that the governmental response to the Court decision is based on the centrality of the Court litigation in the advocacy campaign, as well as the relative lack of force of the social movements, civil society, and media supporting the issue at the center of the litigation.⁸³ We argue that supranational litigation in controversial areas that is not

81. The potential benefits of an advantageous ruling on the right to be free from forced evictions in the Corumbiara case must also be weighed against the possibility of an adverse judgment and the negative precedent it would create. Given the limited experience of the Inter-American Commission with forced eviction up to 1995, these considerations should weigh more prominently in Melish's analysis.

82. In this section, as in her discussion of the application of ESC rights by domestic courts in Latin America, Melish conflates supranational and domestic litigation, two very different creatures. The holdings and implementation of the *Grootboom* decision, while interesting from a jurisprudential perspective, are not particularly relevant to the discussion of the most effective role for supranational litigation for particular national contexts. In Brazil, at the time of the Corumbiara filing, a range of efforts were being taken nationally to promote land reform and minimize forced evictions, in concert with the international focus on the most egregious forms of state violence in the context of the struggle for land. See Melish, *Rethinking*, *supra* note 1, at 315-19.

83. The opinion in *Yean and Bosico* notes testimony regarding the unpopularity of the issue of equal rights for Dominicans of Haitian descent. *Yean and Bosico Case v. Dominican Republic*, Inter-Am. Ct. H.R. (ser. C) No. 130, ¶¶ 85-86 (Sep. 8, 2005).

well supported in the domestic agenda is unlikely to produce social change and may produce a backlash against international litigation. While full examination of this issue is beyond the scope of this article,⁸⁴ this explanation is at least as plausible as the analysis promoted by Melish.

A case decided in 2006 by the Inter-American Court in which both authors served as counsel reaffirms many of the points we argued in *Less as More* and which Melish attacks in this journal. The case, *Ximenes Lopes v. Brazil*,⁸⁵ concerned a killing within a psychiatric clinic operating pursuant to a contract with authorities in Brazil. While the case was framed in terms of civil and political rights, it provided an important vehicle for addressing the situation of persons with mental health disabilities, particularly those in closed institutions in Brazil. The discussion fostered by the supranational litigation occurred not only in the broader debate within Brazil, but also within the terms of the litigation itself.

After finding that the death of the victim, Damião Ximenes Lopes, was attributable to the state, the Inter-American Commission recommended that Brazil take necessary measures to avoid the recurrence of such violations in the future. The death had occurred in a closed mental institution. While Brazil could have limited its arguments regarding measures to prevent recurrence to those that would ensure investigation and prosecution of incidents of abuse within psychiatric centers, it instead also entered evidence regarding steps it had taken to reduce the frequency of confinement of persons with mental health problems and to restructure its national mental health program.⁸⁶ In so doing, representatives of the Brazilian state sought to demonstrate to the Court their efforts to com-

84. In addition, we observe that while our experience and direct involvement in the Brazilian litigation and advocacy strategy qualify us to analyze the role and impact of the inter-American system there, our analysis of the *Yean and Bosico* case is based instead on review of media reports and discussions with some of those close to the litigation.

85. *Ximenes Lopes v. Brazil*, Inter-Am. Ct. H.R. (ser. C) No. 149 (Jul. 4, 2006).

86. One of the witnesses presented by Brazil was Pedro Gabriel Godinho Delgado, National Coordinator of the Mental Health Program of the Ministry of Health. Godinho Delgado's testimony focused on measures taken by the state to increase outpatient care, as opposed to confinement, as well as measures designed to promote and respect human rights within the mental health system. *See id.* at ¶ 47.3.b.

ply with the spirit of the Commission's recommendations. This, in turn, fostered broad debate in the litigation, and more widely within Brazil, about national public health policy. This also led the Court to address other mental health issues, including "the special attention due to persons who suffer mental health disabilities as a result of their particular vulnerability."⁸⁷ In sum, the *Ximenes* case demonstrates, among other things, how an issue framed legally in terms of civil and political rights may serve to address questions of social justice that might also be framed in ESC terms.

VI. JURISPRUDENCE AND INTEGRATED ADVOCACY MEET:
THE COURT'S DEVELOPING JURISPRUDENCE
ON THE RIGHT TO LIFE

Recent expansion of Court jurisprudence on the right to life is consistent with the approach that we outlined in *Less as More*, rendering our suggestions there even more relevant. Melish, however, questions our reliance on the right to life in our hypothetical cases, asserting that this focus serves to exclude other victims and their ESC rights claims.⁸⁸ One of the key points that we drive home in our initial piece is that litigation in the inter-American system, by its inherent, limited nature, excludes the overwhelming majority of victims of rights abuse in the Americas and will continue to do so until and only if the system is radically overhauled.⁸⁹ Until such time, cases should be chosen carefully and, we argue, jointly with social movements and organized civil society. When this is done, violations of the right to life—in whatever context—are likely to be given priority. There are at least two important reasons to maintain this focus. The first concerns the development of the Court's jurisprudence in this regard; the second involves the practical advocacy value of a petition involving violations of this right.

Over the past several years, the Court has developed an increasingly broad understanding of the right to life.

87. See *id.* at ¶¶ 101-11 (addressing this issue in the Spanish original, *La especial atención a las personas que sufren de discapacidades mentales en razón de su particular vulnerabilidad*).

88. See Melish, *Rethinking*, *supra* note 1, at 317-20.

89. We would support such an overhaul, if its objective were to enhance access to the system.

Whatever this may imply for the viability of Melish's four quadrant scheme, as a practitioner one must at some point accept the Court's jurisprudence and apply it to advance the interests of the individuals or groups whose interests one represents.

Prior to our article, the Court had already established promising lines of argument in this regard that we cited as potential areas for petitioners to utilize. In the past two years, the Court has gone further in expanding its right-to-life jurisprudence. In the *Sawhoyamaxa* case,⁹⁰ the Court found the state of Paraguay responsible for the death of eighteen indigenous children due to the state's failure to provide adequate conditions to ensure their well being.

Rather than embrace such developments as providing additional protection to the excluded in the Americas, Melish derides the Court for expanding the right to life and warns of "dire" consequences should that body fail to apply her four quadrant theory to limit its jurisdiction. As she writes: "Article 4 of the Convention has already, in fact, been interpreted by the Court to encompass, in some way, virtually all economic, social, and cultural rights. . . . The Court has to date enunciated no limiting principle for article 4's normative expanse."⁹¹

While the Court has not enunciated principles in the language of Melish's proposed four quadrant scheme, in the *Sawhoyamaxa* case it did establish standards to be applied to limit state responsibility for violations of the right to life. The Court held Paraguay liable only for the deaths that occurred after the state had been put on notice in very clear terms about the imminent risk to the lives of community members. As the Court wrote, in defining the basis for state responsibility:

In order for this positive obligation to arise, it must be established that at the time of the facts the authorities knew or should have known of a situation of real and immediate risk to the life of a specific individual or group of individuals and that they did not take the measures necessary within the scope of their attribu-

90. *Sawhoyamaxa Indigenous Community v. Paraguay Case*, Inter-Am. Ct. H.R. (ser. C) No. 146 (March 29, 2006).

91. Melish, *Rethinking*, *supra* note 1, at 326.

tions that, judged reasonably, could be expected to prevent or avoid this risk.⁹²

Contrary to Melish's assertions, then, the standard elaborated by the Court establishes clear limits on the scope of state liability under article 4. First, the risk must be "real and immediate." Second, the authorities must have real or constructive knowledge. Third, the state authorities must fail to take measures to address the risk. Fourth, these measures must be within the attributions of authorities, and fifth, they must be judged necessary to prevent or avoid the risk. In addition, the measures to be taken are subject to a criterion of reasonability. This test provides ample room for American states to limit liability for deaths within their territory. Indeed, notwithstanding its use of terms distinct from those chosen by Melish, much of the Court's reasoning squares with the principles underlying justiciability as she understands the term. Thus, for example, the Court establishes in the passage from *Sawhoyamaxa* above that it will focus on instances involving "a specific individual or group of individuals," as opposed to national communities. This approach is consistent with Melish's focus on instances that involve identifiable individuals, rather than classes of victims. The Court's language on necessary measures and reasonability are, in effect, assessments of conduct, as opposed to results, in Melish's terms. It appears, then, that Melish would be well served to reassess her critique of the Court's evolving jurisprudence regarding the right to life.

Moreover, the advocacy value of a claim involving the right to life goes to the core of what gives an issue salience for media campaigns, grassroots organizing, and networking with civil society. Violations of the right to life—whether in the context of urban police killings, prison revolts, conflicts over land, failure to treat HIV patients, or failure to prevent precarious housing from flooding⁹³—tend to carry more weight

92. *Sawhoyamaxa* case, *supra* note 89, at ¶ 155 (The original Spanish reads: *Para que surja esta obligación positiva, debe establecerse que al momento de los hechos las autoridades sabían o debían saber de la existencia de una situación de riesgo real e inmediato para la vida de un individuo o grupo de individuos determinados, y no tomaron las medidas necesarias dentro del ámbito de sus atribuciones que, juzgadas razonablemente, podían esperarse para prevenir o evitar ese riesgo.*).

93. See, in this regard, our discussion of the right to housing in the hypothetical cases section, Cavallaro & Schaffer, *supra* note 2, at 279-80.

than violations that do not threaten life. When we wrote that working with advocacy groups (social movements, NGOs, etc.) and taking one's cues from them as a litigator has consequences for litigation strategy, this is part of what we meant. For example, if one is listening to these groups, one will hear a preference for focusing on those who have died in their struggles, rather than all those who, on a daily basis, suffer other rights abuses. Not surprisingly, social movements tend to value quite highly the sacrifices made by their members whose lives are lost in the course of their struggles for social justice. Recognizing this—rather than fighting against it—makes good sense from the perspective of a legal practitioner focused on social justice rather than jurisprudential development. The key, as we explain in our initial piece, is to find ways to use this right-to-life focus to advance other aspects of social justice campaigns—including ESC rights.

VII. MOVING FORWARD

In thinking about future avenues of litigation in the inter-American system, we draw on the areas that we cited in the initial *Less as More* piece. In that article, we called on practitioners to employ gradual, evolutionary interpretations of human rights. We urged them to use what we term the “elements” approach, that is, expansive construction of civil and political rights to embrace economic, social, or cultural rights elements; to frame cases as instances of discrimination, in violation of the non-discrimination principle; to file petitions that involve violations of both civil and political and ESC rights in order to ensure access; and to make use of articles 8(a) and 13 of the San Salvador Protocol (which protect labor association and education). Most importantly, we urged them then, as we do now, to work closely with social movements, organized civil society groups, and the media to avoid attempts to combat social injustice by isolated supranational litigation. We continue to advocate these strategies.

Our article does not consider future development of ESC litigation before other supranational bodies, nor does it consider broad reform of the inter-American system. Melish's article clearly seeks to outline approaches for other supranational judicial fora. Her model strikes us as thoughtful and worthy of consideration, particularly, as she notes, in the process of ne-

gotiation of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (to establish an individual complaints mechanism) and the drafting of a new International Convention on the Rights of Persons with Disabilities.⁹⁴ Were the inter-American system to modify its current treaty law on ESC rights, her approach would be worthy of consideration in that context as well. In the short term, practitioners should work with the system that exists. In that regard, our arguments about deploying the inter-American system, about listening to and working with social movements and civil society, and about the role of litigation in the inter-American system in light of all its current limitations are not fundamentally challenged by Melish's piece.

94. See Melish, *Rethinking*, *supra* note 1, at 343.

