

SEPARATE OPINION
CANTORAL-HUAMANÍ AND GARCÍA-SANTA CRUZ v. PERU

I have cast my vote to approve, unanimously, this Judgment in Cantoral-Huamaní and García-Santa Cruz v. Perú, but I feel it necessary to clarify my position on an issue that has been considered during the deliberation of this case and in various cases before the Court over the last three years.

This is the interpretation and application of Articles 8(1) and 25 of the Convention in relation to Article 1(1) and, hence, the nature and purpose of these provisions.

Chapter I of the American Convention (General Obligations) refers to the obligations of the States Parties under this instrument: Article 1 (Obligation to Respect Rights) and Article 2 (Domestic Legal Effects). These are provisions of a general nature that permeate all the rights protected in Chapter II (Civil and Political Rights). The latter are protected rights have their own ontological nature, they protect inherent juridical rights, which may be violated by the State Party as a result of certain acts that also entail the violation of Article 1(1) and, if applicable, Article 2, which, as I have indicated, are general provisions. This is not the nature of Articles 8 and 25, which also have a specific ontological content, but not as provisions of the Convention with general application and, consequently, they can be violated by the State, together with other rights, always in relation to Article 1(1), which establishes the general obligation of the States Parties to respect and ensure the rights included in Chapter II of the Convention.¹

Article 1(1) of the Convention establishes that:

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

Article 8(1) indicates textually that:

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

While Article 25 states that:

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

2. The States Parties undertake:

a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;

¹ Cf. IACHR, *Case of the Constitutional Court v. Peru*. Judgment of January 31, 2001. Series C No. 71; IACHR, *Case of Cantos v. Argentina*. Judgment of November 28, 2002. Series C No. 97; ICHR, *Case of Almonacid-Arellano et al. v. Chile*. Judgment of September 26, 2006. Series C No. 154; ICHR, *Case of the Dismissed Congressional Employees (Aguado-Alfaro et al.) v. Peru*. Judgment of November 24, 2006. Series C No. 158.

- b) to develop the possibilities of judicial remedy; and
- c) to ensure that the competent authorities shall enforce such remedies when granted.

The Court has also decreed the violation of Article 1(1) of the Convention independently of other violations of other articles.² In addition, the violation of Articles 8(1) and 25 has been considered and declared autonomously, without considering them in relation to Article 1(1) of the Convention.³ In addition, the Court has applied Articles 8(1) and 25 in relation to articles of the Convention other than Article 1(1).⁴

Consequently, suggesting that the Court should consider that it cannot declare the violation of Articles 8(1) and 25 independently, as an autonomous violation, but only in relation to another basic right which cannot be Article 1(1), is to affirm that the American Convention does not protect the right to justice and would be attempting to bestow on Articles 8(1) and 25 the nature of general provisions which, as in the case of Article 1(1), permeate the entire Convention, and the result of this would be to denature the very content of Articles 8(1) and 25.

To change the Court's case law on this issue, after the more than 20 years that it has been exercising its jurisdictional function, is confusing, in addition to being inappropriate and unnecessary. It introduces an element of distortion in the deliberation of future cases.

Manuel E. Ventura Robles
Judge

Pablo Saavedra Alessandri
Secretary

² Cf. IACHR, *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala*. Judgment of November 19, 1999. Series C No. 63.

³ Cf. IACHR, *Case of Baena-Ricardo et al. v. Panama*. Judgment of February 2, 2001. Series C No. 72; and ICHR, *Case of Las Palmeras v. Colombia*. Judgment of December 6, 2001. Series C No. 90.

⁴ Cf. IACHR, *Case of Servellón-García et al. v. Honduras*. Judgment of September 21, 2006. Series C No. 152; ICHR, *Case of Vargas-Areco v. Paraguay*. Judgment of September 26, 2006. Series C No. 155.