

CONCURRING OPINION OF JUDGE ALBERTO PÉREZ PÉREZ

CASE OF GONZALES LLUY ET AL. v. ECUADOR

JUDGMENT OF SEPTEMBER 1, 2015

(Preliminary objections, merits, reparations and costs)

1. I share fully the content of the Judgment delivered in this case, and the profound feeling of solidarity with the victim and understanding of her sufferings. However, I have felt the need to issue a concurring opinion in view of the constant proposals made during the deliberation of the case to cite the right to health as the main right violated by the State's actions. In other words, a right that is not included among those recognized by the American Convention on Human Rights, but rather among those recognized by the Protocol of San Salvador, and which is not one of the two rights that Article 19 of the Protocol includes under the specific system of protection; that is, the intervention of the organs of the system: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. I consider that those proposals were totally unfounded, for the following reasons.

I. RECOGNITION OF RIGHTS AND INCLUSION IN THE PROTECTION SYSTEM

2. The American Convention plays a dual role with regard to the rights established therein: on the one hand it recognizes those rights and, on the other hand, it includes them in a protection system that is the substantial innovation made by this instrument.

A. Recognition of rights

3. The American Convention *recognizes the civil and political rights* included in Chapter II of Part I:¹ the right to recognition of juridical personality, the right to life, the right to humane treatment, the prohibition of slavery and servitude, the right to personal liberty, the right to judicial guarantees, the principle of legality and retroactivity, the right to compensation in case of miscarriage of justice, protection of honor and dignity, freedom of conscience and religion, freedom of thought and expression, the right to correction or reply, the right of assembly, freedom of association, protection of the family, the right to a name, the rights of the child, the right to nationality, the right to property, freedom of movement and residence, political rights, equality before the law and judicial protection. These are the rights and freedoms "included in the system of protection of this Convention."²

4. This does not mean that the foregoing are the only rights and freedoms; it merely determines *which of the rights and freedoms are included in the system of protection* of the Convention: on the one hand, Articles 31, 76 and 77 regulate the way in which other rights could be included in the system of protection of the Convention; on the other hand, Article 29 ("Restrictions regarding interpretation," included in Chapter IV, "Suspension of Guarantees, Interpretation, and Application") *recognizes* other rights and guarantees (in particular "that are inherent in the human personality or derived from representative democracy as a form of government"), but mentions nothing about their inclusions in the system of protection.

¹ In the draft considered by the Specialized Conference at which the Convention was adopted, this was entitled "Protected rights," and included the article relating to the progressive development of economic, social and cultural rights.

² Article 31 of the American Convention on Human Rights.

5. Article 31, entitled "Recognition of Other Rights," regulates the way in which these other rights "may be included in the system of protection of this Convention," "in accordance with the procedures established in Articles 76 and 77."

6. This means that there are "other rights," in addition to those recognized by the Convention, that may be justiciable according to domestic law or to another legal order, but they would only be "recognized" for the effects of the Convention (Article 1(1)) and included in the protection system created by this instrument when the procedures established in Article 76 or Article 77 have been followed (either by amendments or protocols).

B. The system of protection

7. The system of protection is established in Part II, "Means of Protection," which assigns this competence to the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights (according to Article 33). The whole of this protection system relates to the human rights established in the Convention or to the rights and freedoms recognized by the Convention. Let us look at the pertinent provisions:

a) *The Commission (Chapter VII)*: the pertinent articles refer to the competence of the Commission, the admissibility of cases, and the procedure. The Commission has *competence* in relation to the "petitions" lodged by "[a]ny person or group of persons, or non-governmental entity legally recognized in one or more Member States of the Organization [of American States]" "containing denunciations or complaints of *violation of this Convention* by a State Party (Article 44) or "communications in which a State Party alleges that another State Party has committed a *violation of a human right set forth in this Convention*" (Article 45). "The petition or communication that does not state facts that tend to establish a violation of the rights guaranteed by this Convention" shall be considered *inadmissible* (Article 47(b)). And the section on "Procedure" refers to the case in which the Commission "receives a petition or communication alleging *violation of any of the rights protected by this Convention*."

b) *The Court (Chapter VIII)*: the pertinent articles refer to cases that may be submitted to the Court and its competence. Regarding the *submission of cases*: it may only hear a case submitted by the States Parties or the Commission when the procedures before the Commission have been exhausted (Article 61), so that all the norms cited in relation to the Commission are applicable. Regarding *competence*, the Court must decide whether "there has been a *violation of a right or freedom protected by this Convention*," and, if so, it "shall rule that the injured party be ensured the enjoyment of his *right or freedom that was violated*," and, "if appropriate, that the consequences of the measure or situation that constituted "the *breach of such right or freedom* be remedied."

8. *Scope of the "compétence de la compétence."* Adding rights is not a competence of the Inter-American Court, but rather of the State. The competence to decide, in each contentious case whether or not it has competence does not mean that the Court may modify the meaning and scope of the competence assigned to it by the Convention.

II. A MERE COMMITMENT TO PROGRESSIVE DEVELOPMENT AND NOT A RECOGNITION OF RIGHTS

9. A reading of Article 26, the sole article under Chapter III of Part I (Economic, social and cultural rights) entitled "Progressive Development," reveals that this article does not recognize or establish the economic, social and cultural rights; rather it establishes something very different; the undertaking of the States to achieve progressively the full realization of the

rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires "to the extent permitted by the available resources." The text of the article is absolutely clear, and also its context. This interpretation is corroborated by the subsequent agreements between the parties and by their subsequent conduct. Also, the background information on the article confirm this fully.

A. Rules for the interpretation of treaties

10. According to the general rule of interpretation contained in Article 31 of the Vienna Convention of the Law of Treaties, "1. A treaty shall be interpreted in good faith in *accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*" The context comprises, among other elements, the preamble to the treaty, and "together with the context" any subsequent agreements and practice shall be taken into account:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions, and
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

11. Also, "recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31."³

12. The Inter-American Court's case law, interpreted correctly, does not support a position contrary to the one described. At times, the case of Acevedo Buendía is cited to support the thesis that Article 26 recognizes economic, social and cultural rights as such, but an analysis of that judgment reveals that this is not so.

B. The Protocol of San Salvador as an application of Articles 31 and 77 and as a subsequent agreement or subsequent practice

13. Regarding the economic, social and cultural rights, the States Parties have, indeed, followed the path of Article 77, in the *Protocol of San Salvador* (adopted on November 17, 1988, and entered into force on November 16, 1999). This Protocol:

a) Proclaims "*the close relationship that exists between economic, social and cultural rights, and civil and political rights*, in that the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human person, for which reason both require permanent protection and promotion if they are to be fully realized, and the violation of some rights in favor of the realization of others can never be justified" (Preamble, third paragraph).

b) *Recognizes numerous economic, social and cultural rights:* the right to work and to just, equitable and satisfactory working conditions; trade union rights; the right to social security; the right to health; the right to a healthy environment; the right to food, the right to education; the right to benefits of culture; the right to the formation and protection

³ Supplementary means may also be used "to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable," although that is not the case here.

of the family; the rights of children; protection of the elderly, and protection of the handicapped.

c) But the *system of protection under the Convention only includes two of them* (one only partially): “[a]ny instance in which the rights established in paragraph (a) of Article 8⁴ and in Article 13⁵ are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights” (Article 19(6) of the Protocol of San Salvador). This means that the system under the Protocol is very different from the system under the Convention. While, under the latter, the recognition of a right or freedom entails its inclusion in the system of protection, under the Protocol the recognition does not entail this inclusion, which is exceptional and only occurs in two cases.

14. The Protocol of San Salvador also constitutes an ulterior agreement between the States Parties and an ulterior practice by them that confirms the above interpretation of Article 26.

III. DIFFERENCE WITH PROGRESSIVE INTERPRETATION

15. Consequently, the Inter-American Court is unable to assume competence with regard to the presumed violation of a right or freedom that is not included under the system of protection by either the American Convention or the Protocol of San Salvador. On some occasions, it may achieve an analogous result – and it has done so in several cases, including this one – by applying, correctly, other provisions, such as those that protect the right to personal integrity, to property, or to judicial guarantees and judicial protection.

16. Furthermore, the Court may not cite a principle such as the progressive interpretation of international instruments in order to add rights to the system of protection. The appropriate sphere for the application of that principle is in the interpretation of a right or freedom or of a State obligation, which exists and is included under the system of protection of the Convention or the Protocol, in a different and generally broader sense than the one given originally by the authors. An example of this is the inclusion of the gender approach within the mention of “any other social condition,” as one of the reasons of discrimination prohibited by Article 1(1) of the Convention.⁶

IV. THE TRAVAUX PRÉPARATOIRES

17. The preparation of the American Convention extended over many years and some of the drafts recognized various economic, social and cultural rights, although this did not necessarily involve their inclusion in the same system of protection established for civil and political rights. We consider it preferable to limit our analysis to the Inter-American Specialized Conference on Human Rights during which the final text of the American Convention was adopted.

⁴ Right to organize trade unions, and also national and international federations and confederations, and freedom to choose whether or not to join a trade union.

⁵ Right to education.

⁶ See, for example, *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*. Judgment of February 24, 2012. Series C No. 239, para. 91.

18. Above all, it is necessary to indicate that the characterization of these preliminary discussions in the judgment in the *case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office")* is incorrect. The judgment indicates the following:

In this regard, the Court notes that the content of Article 26 of the Convention was the subject of intense discussion during the *travaux préparatoires* of the Convention, as a result of the States Parties' interest in including a "direct reference" to economic, social and cultural "rights"; "a provision establishing a certain binding legal force [...] in compliance and application" [Chile]; as well as "the [respective] mechanisms [for its] promotion and protection" [Chile], since the preliminary draft of the treaty prepared by the Inter-American Commission referred to such mechanisms in two articles that, according to some States, only "referred, in a merely declarative text, to the conclusions reached at the Buenos Aires Conference" [Uruguay]. A review of said *travaux préparatoires* of the Convention also reveals that the main observations, based on which the Convention was adopted, placed special emphasis on "granting the economic, social and cultural rights the maximum protection compatible with the particular conditions of most of the States of the Americas" [Brazil]. In this way, as part of the debate during the *travaux préparatoires*, it was also proposed "to make it possible to implement [the said rights] by means of the action of the courts" [Guatemala]. (The footnotes have been substituted by the name of the State to which the different proposals are attributed.)

19. A review of the proceedings of the Specialized Conference reveals a very different panorama. To begin with, the judgment of the Court includes fragments of observations made by four States from a total of 23 participating States, which is far from indicating a massive or majority movement in a specific direction. In reality, several other States made observations. These are transcribed below:

*Observations of Uruguay*⁷

10. Article 25, paragraph 2, reflects, in a text that is merely declarative, conclusions reached in the Conference of Buenos Aires. Its content does not appear to be suitable for a convention, but it may not be politically correct to oppose the inclusion of this text.

*Observations of Chile*⁸

14. The provisions concerning economic, social and cultural rights that have remained in the draft are those that warrant the most objections as regards form and content. These are Articles 25, 26 and 41. Any direct mention of those rights has been eliminated; indirectly, in Article 25, paragraph 1, there is an insufficient recognition of "the need for the States Parties to take every effort to ensure that they are adopted in domestic law and, as appropriate, guaranteeing the other rights established in the American Declaration of the Rights and Duties of Man that have not been included in the preceding articles." If, as it has been sought to justify it, the omission of these rights – which are not even referred to in a separate chapter of the draft – is due to their inclusion in special chapters of the OAS Charter, once the amendments contained in the Protocol of Buenos Aires have been adopted, the text should at least contain an explicit reference to the norms adopted in that Protocol, which mentions economic, social and cultural rights.

15. However, based on correct legal standards, these rights should be included appropriately in the draft Convention so that their application can be monitored. Naturally, the list should be consistent with the norms of the Protocol of Buenos Aires. For example, in the document we are examining, the wording of the economic provisions of that Protocol, which are the only ones that are found in the draft Convention (art. 5, paragraph 2), has no relationship to a draft human rights convention. A simple reading of this paragraph confirms this. If the concept of drafting a

⁷ Proceedings of the Inter-American Specialized Conference on Human Rights, November 7 to 22, 1969, OEA/Ser.K/XVI/1.2, p. 37.

⁸ Proceedings of the Inter-American Specialized Conference on Human Rights, November 7 to 22, 1969, OEA/Ser.K/XVI/1.2, pp. 42 and 43.

single convention is retained, the technique followed by the United Nations and the Council of Europe would be recommendable, which is listing the economic, social and cultural rights, and also establishing in detail the means to promote and control them.

16. In this regard, it should be considered whether the Commission on Human Rights, as it has been conceived – that is, as a legal and quasi-judicial organ – is the appropriate organ to receive periodic reports on these rights. If the Organization of American States is going to have an Inter-American Economic and Social Council and an Inter-American Cultural Council, both with Permanent Executive Committees, perhaps we should analyze whether it should not correspond rather to these OAS organs to examine the periodic reports referred to in Article 41. In this way, the Commission on Human Rights would only have competence to consider petitions and complaints concerning civil and political rights, in accordance with its origin, composition, and rules of procedure.

17. In any case, as regards the economic, social and cultural rights a provision should be included that establishes a certain legal enforceability (to the full extent permitted by the nature of these rights) of compliance with them and their application. To this end, *it would be necessary to consider a clause similar Article 2, paragraph 1, of the United Nations Covenant on this matter. That paragraph is as follows:*

"1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Observations of Argentina⁹

Articles 25, second part, and 26: It can be seen that, although the second part of article 25 is a literal transcription of Article 31 of the OAS Charter, amended by the Protocol of Buenos Aires, article 26 obliges the States to report periodically to the Commission on Human Rights on the measures they have adopted to achieve the goals mentioned in article 25. In addition, Article 26 recognizes to the Commission the right to make recommendations to the States in this regard, which, evidently, exceeds its competence and possibilities. Furthermore, the States are not granted the possibility of making observations on these recommendations by the Commission. Consequently, I suggest that article 26 be reconsidered and revised.

Observations of Dominican Republic¹⁰ Article 25 (note the change in order)

Paragraph 1: We believe it is preferable to eliminate this *paragraph because Article 70 already establishes a procedure for gradually expanding the protection to include other rights that appear in the American Declaration of the Rights and Duties of Man. The obligations of the States Parties should be stipulated clearly and without trying imprecisely to incorporate other obligations by allusion.*

Paragraph 2: Given that this paragraph reaffirms the economic and social goals agreed on when the amendments to the OAS Charter were signed in 1967, this article should also reaffirm this, and in the same words as in the amended Charter.

The proposed title and the amended text would be:

Article 25. Economic and Social Goals. The States Parties reaffirm the agreement established in the amendments to the OAS Charter signed in 1967 to devote their utmost efforts to accomplishing the following basic goals in order to accelerate their economic and social development, in accordance with their own methods and procedures and within the framework of the democratic principles and the institutions of the inter-American system: (a)

⁹ Proceedings of the Inter-American Specialized Conference on Human Rights, November 7 to 22, 1969, OEA/Ser.K/XVI/1.2, p. 47.

¹⁰ Proceedings of the Inter-American Specialized Conference on Human Rights, November 7 to 22, 1969, OEA/Ser.K/XVI/1.2, pp. 69 and 70.

Substantial and self-sustained increase of per capita national product; (b) Equitable distribution of national income; (c) Adequate and equitable systems of taxation; (d) Modernization of rural life and reforms leading to equitable and efficient land-tenure systems, increased agricultural productivity, expanded use of land, diversification of production and improved processing and marketing systems for agricultural products; and the strengthening and expansion of the means to attain these ends; (e) Accelerated and diversified industrialization, especially of capital and intermediate goods; (f) Stability of domestic price levels, compatible with sustained economic development and the attainment of social justice; (g) Fair wages, employment opportunities, and acceptable working conditions for all; (h) Rapid eradication of illiteracy and expansion of educational opportunities for all; (i) Protection of man's potential through the extension and application of modern medical science; (j) Proper nutrition, especially through the acceleration of national efforts to increase the production and availability of food; (k) Adequate housing for all sectors of the population; (l) Urban conditions that offer the opportunity for a healthful, productive, and full life; (m) Promotion of private initiative and investment in harmony with action in the public sector; and (n) Expansion and diversification of exports.

*Observations of Mexico*¹¹

III-3. We have serious doubts as to whether the rights established in article 25 of the preliminary draft should be included in this final version. First, this statement could be repetitive, because it already appears in article 51 of the Protocol on amendments to the OAS Charter. Second, contrary to all the other rights referred to in the draft – which are rights that the individual enjoys as a person or as a member of a specific social group – it would be difficult at any given moment to establish precisely who would be the person or persons that would be directly affected if the rights contained in the said article 25 were to be violated. The same could be said as regard the degree of difficulty implicit in determining who would be, when applicable, the authority responsible for that violation.

*Observations of Guatemala*¹²

III) In the case of the economic, social and cultural rights

Article 24. In order to protect and promote respect for the economic, social and cultural rights proclaimed in this Convention, the American Commission on Human Rights, in addition to using other measures admitted by international law in force in the Americas, shall have competence to:

- a) Obtain reports from the States Parties on the measures they have adopted and the progress made in order to ensure respect for such rights;
- b) Undertake research and prepare reports on those rights, separately, or in cooperation with the governments concerned;
- c) Adopt recommendations of a general or specific nature for one or several States;
- d) Obtain from the General Assembly or other organs of the Organization of American States the necessary cooperation and the adoption of pertinent measures;
- e) Hold technical and regional meetings;
- e) Encourage the signature of international conventions and agreements in this area;
- f) Sign agreements with national and international technical entities.

Article 25. The States Parties undertake to submit periodic reports to the Commission on the measures taken in order to ensure respect for economic, social and cultural rights. The frequency of these reports shall be determined by the Commission. They also undertake to

¹¹ Proceedings of the Inter-American Specialized Conference on Human Rights, November 7 to 22, 1969, OEA/Ser.K/XVI/1.2, p. 101.

¹² Proceedings of the Inter-American Specialized Conference on Human Rights, November 7 to 22, 1969, OEA/Ser.K/XVI/1.2, pp. 115 and 116.

present to the Commission a copy of the reports they send to other international bodies, agencies or organizations in relation to respect for these rights.

Article 26. (i) The Commission may call the attention of the international cooperation or technical assistance agencies or any other relevant international body to any matter that arises from the reports referred to in the preceding articles of this Convention that may assist the said bodies when ruling, each one within its own terms of reference, on the desirability of adopting international measures capable of contributing to the progressive application of this Convention.

(ii) The Commission shall ask the said bodies to forward the result of the reviews they carry out, as well as the measures they adopt on their own initiative based on those reports.

Article 27. The Commission shall consider the reports received from the States, from national and international entities, and from individuals or groups of individuals and, if it finds it desirable, may publish the reports it receives, as well as the measures it has adopted or the requests sent to other entities, in order to allow national and international public opinion to assess the situation.

*Observations of Brazil*¹³

Article 25. The text of the draft should be substituted as follows:

1. The States Parties to this Convention undertake to *incorporate progressively into their domestic law*:

a) the rights included in the American Declaration of the Rights and Duties of Man that have not been included among the rights defined in the preceding articles;

b) the rights and benefits contained in the economic and social norms, and on education, science and culture established in Articles 31, 43 and 47 of the Charter of the Organization of American States established by the Protocol of Buenos Aires.

2. The law may exclude public services and essential activities from the right to strike.

Justification

Civil and political rights require an effective jurisdictional protection, at both the domestic and the international level, against violations perpetrated by the organs of the State or their representatives. To the contrary, economic, social and cultural rights are included in very diverse ways and to different degrees by the laws of the different States of the Americas, and although the Governments wish to recognize all of them, their exercise depends, above all, on the availability of material resources that permit their implementation. Article 25 of the draft is inspired by this concept, but its text does not correspond to its intention. The wording of paragraph 1 is imprecise, and limited to a statement of intention. Meanwhile, paragraph 2, by reproducing the content of Article 31 of the Protocol of Buenos Aires, forgot the right to strike, which is already established, with certain limitations, by the domestic law of the States of the Americas, as are the norms on education, science and culture established in Article 47 of that Protocol. The purpose of the amendment is to give economic, social and cultural rights the maximum protection compatible with the specific conditions in most of the States of the Americas.

20. Following discussions, during which some of the preceding positions were repeated without reaching a consensus, and during which it was never proposed to include economic, social and cultural rights under the protection system established for civil and political rights, a chapter was drafted with two articles. The first one was the same as Article 26 included in the final text of the Convention, while the second one established a limited and indirect

¹³ Proceedings of the Inter-American Specialized Conference on Human Rights, November 7 to 22, 1969, OEA/Ser.K/XVI/1.2, pp. 124 and 125.

system of "control of compliance with the obligations." The part entitled "Articles revised by the Style Committee," includes the text of Articles 26 and 27 that were submitted to a vote:¹⁴

Chapter III

ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Article 26. Progressive Development

The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means and in keeping with the resources available, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires,

Article 27. Control of Compliance with Obligations

The States Parties shall transmit to the Inter-American Commission on Human Rights a copy of the reports and studies that they submit every year to the Executive Committees of the Inter-American Economic and Social Council and of the Inter-American Council for Education, Science and Culture, respectively, so that the Commission may verify compliance with the preceding obligations, which provide the essential foundation for the exercise of the other rights established in this Convention.

21. In the second plenary session,¹⁵ the following decision was taken:

Article 26 is adopted without any change, and article 27 is eliminated. The numbering of the following articles is amended accordingly.

Thus, at no time was it proposed to include the economic, social and cultural rights under the system of protection established by the Convention, which remained limited to the civil and political rights recognized therein.

V. CONCLUSIONS

22. In conclusion, neither the specific recognition of the economic, social and cultural rights nor their inclusion in the system of protection established by the Convention can be inferred from Article 26 of the American Convention. The recognition of other rights and their inclusion in the system of protection does not correspond to the Court, but rather to the Member States by means of amendments (Article 76) or protocols (Article 77) that apply Article 31.

23. This is not a case in which the Court can make a legitimate progressive interpretation in which it defines or varies the way in which a right or freedom recognized by the Convention should be understood. The *compétence de la compétence* does not allow the Court to modify its own competence, but rather to decide in each specific case, and pursuant to the pertinent norms, whether or not it has competence in that case.

24. Consequently, it is not incumbent on the Court to consider, and eventually declare, a violation of the right to health.

¹⁴ Proceedings of the Inter-American Specialized Conference on Human Rights, November 7 to 22, 1969, OEA/Ser.K/XVI/1.2, p. 318.

¹⁵ Proceedings of the Inter-American Specialized Conference on Human Rights, November 7 to 22, 1969, OEA/Ser.K/XVI/1.2, p. 448.

Alberto Pérez Pérez
Judge

Pablo Saavedra Alessandri
Secretary