

**PARTIALLY DISSENTING OPINION OF
JUDGE HUMBERTO ANTONIO SIERRA PORTO**

CASE OF MUELLE FLORES V. PERU

**JUDGMENT OF MARCH 6, 2019
(Preliminary objection, Merits, Reparations and Costs)**

1. Reiterating my respect for the decisions of the Inter-American Court of Human Rights (hereinafter “the Inter-American Court” or “the Court”), I offer this partially dissenting opinion. My opinion focuses on the in-depth analysis undertaken by the Court regarding the international responsibility of the State (hereinafter “the State”, “Republic of Peru” or “Peru”) for the violation of the right to social security and the principle of progressivity. Specifically, I will explain my disagreement with the position adopted by the Court in relation to Operative Paragraphs 1, 5 and 6, in which it was determined that those rights were violated in the instant case. In that regard, I point out that my thoughts reflect what I have already expressed in my partially dissenting opinions issued in the cases *Lagos of the Campo v. Peru*¹, the *Dismissed Employees of PetroPeru et al. v. Peru*², and *San Miguel Sosa et al v. Venezuela*³; as well as in my concurring opinions in the cases of *Gonzales Lluy et al. v. Ecuador*⁴, *Poblete Vilches et al. v. Chile*⁵ and *Cuscul Pivaral et al. v. Guatemala*.⁶ This analysis will be carried out in the following order: A. Objection to the alleged lack of jurisdiction *ratione materiae*, and B. Direct justiciability of Article 26 of the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”).

I. OBJECTION REGARDING THE ALLEGED LACK OF JURISDICTION *RATIONE MATERIAE*

2. In the instant case, the *State* pointed out that the representatives did not seek to claim the justiciability of the Convention rights, but rather of the economic, social, cultural and environmental rights (hereinafter “ESCR”), specifically the right to social security. The State argued that Article 19(6) of the Additional Protocol to the American Convention on Human Rights in the Area of

¹ Cf. *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2017. Series C No. 340. Partially dissenting opinion of Judge Antonio Humberto Sierra Porto.

² Cf. *Case of Case of Dismissed Employees of PetroPeru et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2017. Series C No. 344. Partially dissenting opinion of Judge Antonio Humberto Sierra Porto.

³ Cf. *Case of San Miguel Sosa et al. v. Venezuela. Merits, reparations and costs*. Judgment of February 8, 2018. Series C No. 348. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

⁴ Cf. *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2015. Series C No. 298. Concurring Opinion of Judge Humberto Antonio Sierra Porto.

⁵ Cf. *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349. Concurring Opinion of Judge Humberto Antonio Sierra Porto.

⁶ Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of August 23, 2018. Series C No. 359. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

Economic, Social and Cultural Rights, "Protocol of San Salvador" (hereinafter "Protocol of San Salvador"), clearly defined the jurisdiction of the Commission and of the Court in relation to the subject-matter, establishing that, under the mechanism of individual petitions before the inter-American system, only the protection of trade union rights and the right to education could be subject to analysis, but not the right to social security. The State considered that it was not acceptable to weaken the content of the provisions of Article 19(6) of the San Salvador Protocol, which was a binding standard for the organs of the system, and that the *pro personae principle* would only be applicable within the jurisdictional framework established by the inter-American order.

3. Furthermore, the State noted the position taken by some Judges of the Court in opposing the direct justiciability of ESCER, and expressed its agreement with that view in all respects. In this regard, it emphasized that the rights included in the protection system of the Convention were those established up to Article 25, and that although other rights and freedoms could exist, these should be included in that protection system via the mechanisms contemplated in Articles 31, 76 and 77 of the Convention. It also stressed that the Court did not have jurisdiction to add rights, only the States. It held that ESCER should not be justiciable through the direct application of Article 26 of the Convention, since that article did not enumerate a catalogue of rights, or recognize or enshrine ESCER; rather, it established the commitment of the States Parties to progressively achieve the full realization of rights that could be derived from the Charter of the Organization of American States, subject to available resources. In this sense, it argued that the obligation implicit in Article 26 that could be directly supervised by the Court was compliance with the obligation of progressive development and the duty of non-retrogression; therefore, it could not be claimed that a case concerning the alleged violation of some of the rights established in Article 26 could be submitted to this Court. It reiterated that this lack of jurisdiction was confirmed through the Protocol of San Salvador, in which the States determined that justiciability applied only in two cases, which constituted a subsequent agreement and practice among the States Parties. In addition, the State subscribed to the view that the Court could not assume jurisdiction in relation to the alleged violation of a right or freedom "not included in the Convention or in the Protocol of San Salvador" and that it was not possible to invoke the principle of progressive interpretation of international instruments in order to add rights to the protection system of the Convention, since this was being applied to attribute to an existing right that was already included in that system, a different and generally broader meaning than that originally given.

4. For its part, the *Commission* argued that the instant case was submitted to the Court prior to the case law advances related to Article 26 of the American Convention. Therefore, it considered that the analysis of the right to social security in the context of Article 26, in addition to the rights already invoked, "would contribute to insert it precisely in that inter-American evolution and towards a more comprehensive understanding of the scope of the international responsibility."

5. The *representatives* argued that Article 26 of the Convention should be justiciable based on Article 62(3) of the Convention, which establishes the Court's jurisdiction to hear all cases concerning the interpretation and application of the provisions of the Convention that are submitted to it, and that the aforementioned provision was part of the treaty. Likewise, they indicated that the violation of the Protocol of San Salvador had not been invoked, but that its mention was by way of illustration, since it formed part of the inter-American *corpus juris* that could be used as a parameter for interpreting the Convention. Finally, they concluded that "the right to social security is a human right protected by international law and implicit in Article 26 of the Convention."

6. In this regard, it should be recalled that preliminary objections are objections to the admissibility of an application or the jurisdiction of the Court to hear a specific case or any of its aspects, owing to the person, the issue, the time or the place, provided that those assertions are

of a preliminary nature.⁷ If these assertions cannot be considered without prior analysis of the merits of a case, they cannot be analyzed through a preliminary objection.⁸ Accordingly, irrespective of whether an assertion is made by the State in its briefs, if, upon analyzing the argument, it is determined that it constitutes a preliminary objection, that is, it must object to the admissibility of the application or the Court's competence to hear the case or any of its aspects, it must therefore be settled as such.⁹

7. Accordingly, and having regard to the diverse nature of the arguments presented by the State with the aim of arguing that the Court does not have jurisdiction to examine the direct justiciability of the right to social security based on the interpretation of Article 26 of the Convention, I consider that the Court should have decided to treat this matter as a preliminary objection. It is important to note that in the case of *Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru*, the Court had already analyzed arguments of this nature through a preliminary objection related to *ratione materiae*.¹⁰

8. In the instant case, no violation of the Protocol of San Salvador has been alleged; rather, the representatives' petition focuses on the application of Article 26 of the Convention in relation to the right to social security. In this regard, it was up to the Court to determine whether it was competent to analyze, directly, the alleged violation of the right to social security pursuant to Article 26 of the Convention.

9. In the cases of "*Five Pensioners*" v. Peru and *Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru*, this Court settled claims related to the violation of Article 26 of the Convention. Although no violation of that article was declared in either of those cases, and the Court did not conduct an extensive analysis of the State's obligation of progressive development and the duty of non-retrogression, the Court's considerations focused on that obligation, concluding that "retrogression is actionable when economic, social and cultural rights are involved."¹¹ The Court did not undertake a study regarding the violation of an economic, social, cultural or environmental right in its individual dimension, that is, applicable to a specific case; rather, its assessment was based on the collective dimension of the right.¹² Indeed, in the case of the "*Five Pensioners*," the Court established that "economic, social and cultural rights have both an individual and a collective dimension."¹³ In this sense, it is understood that the collective dimension of ESCER is derived from Article 26 of the Convention, through the obligation of progressive development. Thus, for the sake of greater clarity in presenting my arguments, I will refer to the individual dimension of ESCER when alluding to the direct justiciability of a particular right of this nature, applicable to a specific case - for example the victim's right to a pension - and I will refer to the progressive dimension of ESCAR when alluding to the State's obligation to progressive development and non-retrogression.

⁷ Cf. *Case of Las Palmeras v. Colombia. Preliminary objections*. Judgment of February 4, 2000. Series C No. 67, para. 34, and *Case of Herzog et al. v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of March 15, 2018. Series C No. 353, para. 97.

⁸ Cf. *Case of Castañeda Gutman v. Mexico*, para. 39, and *Case of Herzog et al. v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of March 15, 2018. Series C No. 353, para. 97.

⁹ Cf. *Case of Castañeda Gutman v. Mexico. Preliminary objections, Merits, reparations and costs*. Judgment of August 6, 2008. Series C No. 184, para. 39, and *Case of Lagos del Campo v. Peru. Preliminary objections, Merits, reparations and costs*. Judgment of August 31, 2017. Series C No. 340, para. 17.

¹⁰ Cf. *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of July 1, 2009. Series C No. 198, paras. 12 to 19.

¹¹ Cf. *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of July 1, 2009. Series C No. 198, paras. 103.

¹² Cf. *Case of "Five Pensioners" v. Peru. Merits, reparations and costs*, para. 147.

¹³ Cf. *Case of "Five Pensioners" v. Peru. Merits, reparations and costs*, para. 147.

10. Since the Judgment issued in the case of *Lagos del Campo v. Peru*, this Court has adopted an important jurisprudential stance in interpreting the direct justiciability of Article 26 of the Convention in its individual dimension and establishing, for the first time, a conviction in a specific case, for the violation of that article (job stability), due to the dismissal of Mr. Lagos del Campo, a workers' representative, as a result of his comments made during an interview, published in a magazine, against the company for which he worked. This jurisprudential stance has been reiterated in subsequent judgments by this Court, where the majority of its Members considered that the direct justiciability of certain economic social and cultural rights (the right to work and the right to health) in their individual dimension, was possible under Article 26 of the Convention.

11. However, I consider it appropriate to depart from the case law criterion adopted until now, because I believe that the previous interpretation expands the Court's jurisdiction, disregarding the will of the States, which is expressed not only in the manner in which Article 26 of the American Convention was drafted, but also in the jurisdiction established in Article 19(6) of the Protocol of San Salvador. The latter clearly stipulated the economic, social, cultural and environmental rights that could be examined under the inter-American protection system.

12. This analysis does not deny the interdependence and indivisibility of civil, political, economic, social, cultural and environmental rights, nor does it disregard the obligations derived from the Protocol of San Salvador, for those countries that ratified it. And it does not imply that the Court considers that ESCER, in their individual dimension, should not be protected or be directly justiciable through other channels, such as the domestic courts, for example, or even before the Inter-American Court, provided that their justiciability is accomplished in connection with rights recognized in the Convention, as the Court has done on several previous occasions. The purpose of this partially dissenting opinion is to analyze the jurisdiction of the American Convention in relation to these issues and the manner in which justiciability is achieved in the inter-American system, which is different from the manner in which it operates in the domestic systems of each State.

13. A correct interpretation of Article 26 of the Convention and its relationship with Articles 1(1), 2, 62 and 63 of the American Convention should be aimed at determining the competence of the Court in relation to that article and the scope of the State's obligations derived therefrom. For this, we must refer to the Vienna Convention on the Law of Treaties (hereinafter "Vienna Convention"), which establishes the general and customary rules of interpretation of international treaties, and requires the simultaneous and joint application of good faith, the ordinary meaning and context of the terms used in the treaty in question, as well as the object and purpose of the treaty. Thus, in line with its constant case law, the Court must utilize the methods stipulated in Articles 31 and 32 of the Vienna Convention to make such interpretation¹⁴ (literal, systematic and teleological

¹⁴ Cf. Gender identity, and equality and non-discrimination with regard to same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1 of the American Convention on Human Rights). Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, para. 55; Environment and human rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity - interpretation and scope of Articles 4(1) and 5(1), in relation to Articles 1(1) and 2 of the American Convention on Human Rights). Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23, para. 40; Case of the Workers of Hacienda Brazil Verde v. Brazil. Preliminary objections, Merits, reparations and costs. Judgment of October 20, 2016. Series C No. 318, para. 246; Case of Artavia Murillo et al. ("In-vitro fertilization ") v. Costa Rica. Preliminary objections, Merits, reparations and costs. Judgment of November 28, 2012. Series C No. 257, para. 173, and Case of González et al. ("Cotton Field") v. Mexico. Preliminary objection, merits, reparations and costs. Judgment of November 16, 2009. Series C No. 205, para. 32.

interpretation). Furthermore, the interpretation standards derived from Article 29 of the American Convention should be used, where pertinent.¹⁵

II. DIRECT JUSTICIABILITY OF ARTICLE 26 OF THE AMERICAN CONVENTION ON HUMAN RIGHTS

B.1 Literal Interpretation

14. Article 26 of the American Convention establishes the following:

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, 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, subject to available resources, by legislation or other appropriate means.

15. In making a literal interpretation of Article 26, that is, an interpretation in good faith, based on the ordinary meaning of the terms and derived from the literal meaning of some expressions or words in the Convention and in other treaties, we must understand that this article establishes an obligation to act, in other words, an obligation of conduct, not of result. The scope of that obligation is to "adopt measures" in order to achieve "progressively the full realization of the rights derived from the economic, social, educational, scientific and cultural standards, set forth in the [OAS] Charter," that is, of the rights that are derived from, or can be inferred from, the provisions of the latter instrument, and only of that instrument. Moreover, the obligation to act, established in Article 26 is conditional – it is "subject to available resources," which reinforces the idea that it is not an obligation to produce a result. Although this implies that the progressive development of those rights cannot be achieved within a short period of time, since this "requires a necessarily flexible device reflecting the realities of the world and the difficulties involved for each country in ensuring their realization,"¹⁶ it cannot imply inaction on the part of the State, in light of the undertaking to "adopt measures" "by legislation or other appropriate means."

¹⁵ Article 29 of the Convention establishes: "Standards of interpretation: No provision of this Convention shall be interpreted as: a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein; b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said States is a party; c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; and, d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have."

¹⁶ Cf. *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2009. Series C No. 198, para. 102, and *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, para. 80. See also, Committee on Economic, Social and Cultural Rights, General Comment No. 3: The nature of States Parties' obligations (Article 2, paragraph 1 of the Covenant), December 14, 1990, U.N. Doc. E/1991/23, para. 9.

16. Progressive realization means that the States parties have the specific and constant obligation to advance as rapidly and efficiently as possible towards the full realization of ESCER.¹⁷ This should not be interpreted to mean that, during their implementation, those obligations are divested of their specific content, or that the States can indefinitely postpone the adoption of measures to realize the rights in question - particularly after nearly forty years since the Inter-American Convention entered into force. Therefore, it is necessary to ensure the duty of *non-retrogression* regarding the rights achieved.

17. In other words, in relation to the scope of Article 26, the Court has indicated that the main obligation derived from this article is to adopt measures to achieve the progressive development of economic, social and cultural rights.¹⁸ This entails "a duty – albeit conditioned– of non-retrogression, which should not always be understood as a prohibition to adopt measures that restrict the exercise of a right."¹⁹

18. Article 26 does not "recognize" rights, nor does it establish a specific catalogue of rights; instead, it establishes the obligation of the States to progressively develop certain rights, precisely because these have not been fully realized. In order to identify those rights that must be developed progressively, Article 26 makes direct reference to the Charter of the Organization of American States (hereinafter "Charter" or "OAS Charter"). However, from a reading of the Charter, we may conclude that it, too, does not contain a clear and precise catalogue of subjective rights; therefore, it is necessary to undertake interpretative work to conclude that a right is derived from the Charter. It is important to stress that, if it is determined that a right is derived from the Charter, it must be interpreted in conjunction with the provisions of Article 26 of the Convention and within the established limits; in other words, the right in question could be directly justiciable, provided that an analysis of progressivity is carried out.

19. From a literal reading of Article 26, there are no valid arguments to affirm that it is possible to submit to the Court a case concerning the alleged violation of a specific right in its individual dimension, based on the reference in question, since the scope of the protection afforded by Article 26 differs from that of the civil and political rights enshrined in Articles 3 to 25. Indeed, the terms used in drafting those articles, such as "every person", "no one shall be," "every citizen," as well as the clearer development of the content of each right, denotes the clear intention of the States to protect these through the inter-American system in specific cases in which their violation is

¹⁷ Cf. U.N. Committee on Rights Economic, Social and Cultural, General Comment No. 14: The right to the highest attainable standard of health, E/C.12/2000/4, August 11, 2000, para. 31, and *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, para. 104.

¹⁸ Cf. *Case of "Five Pensioners" v Peru. Merits, reparations and costs*. Judgment of February 28, 2003. Series C No. 98, para. 147.

¹⁹ In this regard, the Court has endorsed the view expressed by the CDESCR in the sense that "any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the [International] Covenant [on Economic, Social and Cultural Rights] and in the context of the full use of the maximum available resources [to the State]." Cf. *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of July 1, 2009. Series C No. 198, para. 103; Committee on Economic, Social and Cultural Rights, General Comment No. 3: The nature of States Parties' obligations (Article 2, paragraph 1 of the Covenant), December 14, 1990, U.N. Doc. E/1991/23.

Similarly, the Inter-American Commission has considered that in order to determine whether a retrogressive measure is compatible with the American Convention, it is necessary to "determine if it is justified by strong reasons." Cf. *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of July 1, 2009. Series C No. 198, para. 103, and Reports on Admissibility and Merits No. 38/09, Case 12.670, National Association of Ex-Employees of the Peruvian Social Security Institute et al. v. Peru, issued by the Inter-American Commission of Human Rights, on March 27, 2009, paras.140 to 147.

alleged, but not in relation to their progressive development or non-retrogression, unlike what is stipulated in Article 26. The obligation established in this article implies that the Court can directly supervise compliance with the obligation of progressive development and the consequent duty of non-retrogression of the rights that could be derived from the Charter. Accordingly, it is important to note that this facet of the principle of progressive development is justiciable when economic, social, cultural and environmental rights are involved. An interpretation to the contrary would imply expanding the scope of the protection afforded by Article 26, which is not the task of this Court, but of the States. In doing so, the Court would be overstepping the limits of its jurisdiction.

B.2 Internal context-systematic interpretation

20. The Court has held that norms should be interpreted as part of a whole, whose meaning and scope must be defined on the basis of the legal system to which they belong.²⁰ In this regard, the Court has considered that in interpreting a treaty it is not only necessary to take into account all its provisions, but also any agreement or instruments formally related thereto (Article 31, subparagraph 2 of the Vienna Convention), as well as the system within which it is inserted (Article 31, subparagraph 3), that is, the Inter-American System for the Protection of Human Rights.²¹

21. As to the rest of the provisions of the Convention, the Court has indicated that Article 26 is embodied in Chapter III of the Convention, entitled "Economic, Social and Cultural Rights", but is also included in Part I of that instrument, entitled "State Obligations and Rights Protected;" therefore, it is subject to the general obligations contained in Articles 1(1) and 2 of Chapter I (entitled "General Obligations"), as well as Articles 3 to 25 included in Chapter II (entitled "Civil and Political Rights"). Accordingly, the Court has considered that the general obligations of "respect" and "guarantee," together with the obligation to "adopt" in Article 2 of the Convention, applies to all rights, whether civil, political, economic, social, cultural or environmental.²²

22. This does not imply an interpretation of the direct enforceability of a particular right, in its individual dimension, nor does it grant the Court competence for its judicialization. What the preceding paragraph establishes is simply that the provisions of Articles 1(1) and 2 of the Convention also apply to the obligation of progressive development of rights; that is, to the progressive aspect of the rights that could be derived from the OAS Charter, which implies the adoption of measures, either legislative or other types of measures, to achieve the progressive development of ESCER. The manner in which the violation of these rights operates in conjunction with the obligations to guarantee and respect, must be analyzed by this Court in each specific case.

23. Furthermore, a systematic interpretation of Article 26 of the Convention cannot ignore the Protocol of San Salvador adopted on November 17, 1988, and in force since November 16, 1999.²³ With regard to the nature of protocols, it should be recalled that in international public law these

²⁰ Cf. *Case of González et al ("Cotton Field") v. Mexico. Preliminary objection, merits, reparations and costs*. Judgment of November 16, 2009. Series C No. 205, para. 43, and *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of August 23, 2018. Series C No. 359, para. 82.

²¹ Cf. *The Right to Information on Consular Assistance in the framework of the Guarantees of Due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 113, and *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of August 23, 2018. Series C No. 359, para. 82.

²² Cf. *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") V. Peru. Preliminary objection, merits, reparations and costs*. Judgment of July 1, 2009. Series C No 198, para. 100, and *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of August 23, 2018. Series C No. 359, para. 83.

²³ To date, 16 States have ratified the Protocol of San Salvador, namely: Argentina, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, El Salvador, Guatemala, Surinam and Uruguay.

are separate but supplementary agreements to a treaty that add, clarify, amend or supplement the procedural or substantial content thereof. The existence of a protocol is directly linked to the existence of the treaty; in other words, without a foundation treaty there can be no protocol.²⁴ In this sense, the American Convention should not be interpreted in isolation, without taking into account its Protocol, given that these are complementary instruments that should be read and interpreted jointly.

24. That said, based on Article 77(1) of the Convention, the States Parties adopted the Protocol of San Salvador with a view to "gradually including other rights and freedoms within its system of protection," this being understood as other rights and freedoms *not* established in the Convention. In other words, the Protocol was adopted in order to establish, in a clear and precise manner, a catalogue of economic, social, cultural and environmental rights that were not expressly recognized in the American Convention, although some of these could be derived from the Charter, as mentioned previously *supra*. However, although the Protocol establishes a clearer catalogue of ESCER, this does not mean that this Court has jurisdiction to examine violations of any of its articles. On the contrary, Article 19(6) of the Protocol clearly stipulates that the only rights that can be subject to supervision through the mechanism of individual petitions are "the rights established in paragraph a) of Article 8 and in Article 13." Thus, it is through the Protocol of San Salvador that the States of the region have, for the first time, defined those ESCER that may be directly justiciable, in their individual dimension, in specific cases.

25. Although the Court's jurisdiction in relation to Article 26 refers solely to direct supervision of compliance with the obligation of progressive development and its correlative duty of non-retrogression of rights that could be derived from the Charter, the Protocol of San Salvador supplements the substance, and especially the procedural content, of the Convention. It does so by granting, for the first time, jurisdiction to the Commission and to the Court to hear contentious cases involving the violation of certain trade union rights and the right to education, in specific cases concerning the individual dimension. Such jurisdiction is not established in the Convention. In other words, the Protocol not only incorporates ESCER more specifically, but also expands the sphere of their protection, particularly for the States parties. Thus, Article 19(6) of the Protocol should not be seen as contradictory to the provisions of Article 26 of the American Convention, but rather as complementary, given that, as mentioned previously, the latter does not grant the Court jurisdiction to analyze violations of economic, social, cultural and environmental rights in their individual dimension, but only in the context of the obligation of progressive development. Thus, the Protocol does not modify the American Convention in the sense of weakening its jurisdiction in relation to Article 26 with regard to the individual dimension of ESCER, because this was never granted in the Convention. Rather, the Protocol grants jurisdiction for the first time in relation to the two articles previously cited.

26. That said, it is important to point out that the rights recognized by the Protocol and the obligations of the States Parties derived therefrom, are separate to the fact that the Court has jurisdiction to declare violations within the context of its contentious role. Simply put, in order to monitor compliance with these rights the States devised other mechanisms, such as those established in the other subparagraphs of Article 19 of the Protocol.

27. Based on the foregoing, I consider that the Court can hear contentious cases in which a violation is alleged of the obligation of progressive development of rights that could be derived from the Charter, by virtue of Article 26 of the Convention, as well as those cases in which a violation of Articles 8(a) and 13 of the Protocol is alleged.

²⁴ See, Definitions of basic terms in the United Nations Treaty Collection. Consulted at: <http://www.un.org/es/treaty/untc.shtml#protocols>.

B.3 Teleological Interpretation

28. It is useful to recall that a teleological interpretation seeks to analyze the purpose of a particular norm. To this end, it is pertinent to examine the object and purpose of the treaty itself and, if applicable, to analyze the purpose of the regional protection system.²⁵ As the Court has indicated, the object and purpose of the American Convention is “the protection of the fundamental rights of human beings.” Likewise, the American Convention expressly contemplates certain interpretation guidelines set forth in Article 29,²⁶ including the *pro personae* principle.

29. However, with regard to an interpretation based on the object and purpose of the American Convention, and the *pro personae* principle, it is important to emphasize that in its interpretative work, the Court should not consider this approach in isolation, but in conjunction with the other methods of interpretation. Thus, although the object and purpose of the American Convention is “the protection of the fundamental rights of human beings,” that object is to be understood as being within the limits set by the treaty itself and in accordance with the guarantees recognized therein.²⁷

30. The *pro personae* principle, in turn, implies that in interpreting a treaty provision, precedence should be given to applying the rule that gives the greatest protection to the rights of the individual and/or interpreting those rights in a broad manner that favors him or her. However, the application of this principle cannot displace the use of other interpretation methods, nor can it disregard their results, since all of these must be understood as a whole. Otherwise, the unrestricted application of the *pro personae* principle would lead to the invalidation of the interpreter’s actions.²⁸

31. From the aforementioned interpretation methods it is clear that the Convention does not grant the organs of the inter-American system the jurisdiction to directly protect ESCER in their individual dimension; thus, neither the object and purpose of the Convention nor the *pro personae principle* may be used to arrive at a different result. These cannot be used to validate an interpretative option that is not apparent from the rule itself and that, on the contrary, implies a modification thereof. In this case we are not contemplating a more protective or guarantee-oriented interpretation of the rule that allows for the application of the *pro personae* principle, since this must be applied when the Court is confronted with two possible valid and true interpretations of a conventional precept. Indeed, the direct justiciability of ESCER as individual rights, based on Article 26 of the Convention, is not a valid interpretation, given that, what is being attempted is to infer

²⁵ Cf. *Case of González et al. (“Cotton Field”) v. Mexico. Preliminary objection, merits, reparations and costs*. Judgment of November 16, 2009. Series C No. 205, para. 59, and *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of August 23, 2018. Series C No. 359, para. 90.

²⁶ Article 29 of the American Convention establishes the following: “Standards of Interpretation: No provision of this Convention shall be interpreted as: a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein; b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said States is a party; c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; and, d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.”

²⁷ Cf. *The Institution of Asylum and its Recognition as a Human Right in the Inter-American System of Protection (Interpretation and Scope of Articles 5, 22(7) and 22(8), in relation to Article 1(1) of the American Convention on Human Rights)*. Advisory Opinion OC-25/18 of May 30, 2018. Series A No. 25, para. 148.

²⁸ Cf. *The Institution of Asylum and its Recognition as a Human Right in the Inter-American System of Protection (Interpretation and Scope of Articles 5, 22(7) and 22(8), in relation to Article 1(1) of the American Convention on Human Rights)*. Advisory Opinion OC-25/18 of May 30, 2018. Series A No. 25, para. 149.

an interpretive principle that does not correspond to the provision interpreted.²⁹ Therefore, the Inter-American Court cannot assume jurisdiction for the alleged violation of a right or freedom not included in the protection system of the American Convention or in the Protocol of San Salvador.

32. With regard to the evolutive interpretation, the Court has reiterated that human rights treaties are living instruments, whose interpretation must go hand in hand with evolving times and current living conditions. Thus, an evolutive interpretation is consistent with the general rules of interpretation established in Article 29 of the American Convention, as well as those established in the Vienna Convention on the Law of Treaties.³⁰

33. However, this method of interpretation cannot be invoked to add rights to the protection system of the Convention or to grant the Court jurisdiction where it does not have it. The appropriate sphere for its application is in the evolutive interpretation of an existing right or freedom, or of a State obligation, already included in the protection system of the Convention or in the Protocol, but in a different and generally broader sense than originally envisaged by its authors, as the Court has done on different occasions, especially when defining or expanding the content of the rights recognized in the Convention, with recourse to the international *corpus iuris*. An example of this is the inclusion of "gender orientation" in the reference to "any other social condition" as one of the grounds for discrimination prohibited by Article 1(1) of the Convention.³¹

34. At the same time, the Court recalls that, under Article 32 of the Vienna Convention, supplementary means of interpretation, especially the preparatory work of the treaty, may be used to confirm the meaning resulting from the application of the methods mentioned in Article 31. This implies that they are used in a subsidiary manner.³² I note that the characterization of the debate on the inclusion and scope of Article 26 since the judgment in the case *Acevedo Buendía et al. v. Peru* and up to the case of *Cuscul Pivaral et al. v. Guatemala*,³³ is not correct. The references made to the preparatory works in those judgments, suggesting that these demonstrated the States' probable intention to allow the direct justiciability of ESCER through Article 26 of the Convention, is biased, since they only mentioned fragments of the observations made by four States out of a

²⁹ Similarly, see: *Case of González et al. ("Cotton Field") v. Mexico*. Preliminary objection, merits, reparations and costs. Judgment of November 16, 2009. Series C No. 205, para. 78.

³⁰ Cf. Advisory Opinion OC-16/99, *supra*, para. 114, and Advisory Opinion OC-24/17, *supra*, para. 58. *Cuscul*, para. 102.

³¹ *Case of Atala Riffo and Daughters v. Chile*. Merits, reparations and costs. Judgment of February 24, 2012. Series C No. 239, para. 91.

³² Cf. *Case of Cuscul Pivaral et al. v. Guatemala*. Preliminary objection, merits, reparations and costs. Judgment of August 23, f 2018. Series C No. 359, para. 94.

³³ In such cases: "[t]he Court recalls that the content of Article 26 of the Convention was the subject of intense debate in the preparatory works, arising from the interest of the States Parties to assign a "direct reference" to economic, social and cultural "rights;" "a provision establishing certain legal mandates [...] for its 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 made reference to such mechanisms in two Articles which, according to some States, only "contemplated, in a merely declarative text, the conclusions reached at the Buenos Aires Conference" [Uruguay]. The review of said preparatory works of the Convention also proves that the main observations, upon which the approval of the Convention was based, placed a special emphasis on "granting the economic, social and cultural rights the maximum protection compatible with the specific conditions in most of the American States." [Brazil]. Accordingly, as part of the debate during the preparatory works, it was also proposed that "[the] exercise [of those rights] be made possible through the action of the courts" [Guatemala]". Cf. *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru*. Preliminary objection, merits, reparations and costs. Judgment of July 1, 2009. Series C No. 198, para. 99; *Case of Poblete Vilches et al. v. Chile*. Merits, reparations and costs. Judgment of March 8, 2018. Series C No. 349, para. 101, and *Case of Cuscul Pivaral et al. v. Guatemala*. Preliminary objection, merits, reparations and costs. Judgment of August 23, 2018. Series C No. 359, para. 95.

total of 23 participating States, which hardly reflects a majority position in this regard. No mention was made of the countries that opposed the enforceability of ESCER or the fact that the majority of these countries did not express a clear position.

35. Based on a study of the preparatory works, there is no clear indication of the States' intention to include economic, social, cultural and environmental rights in the protection system contemplated by the Convention. For example, opinions were proffered pointing out that the content of the article did not appear to be typical of a convention, "but that perhaps it [was] not politically convenient to oppose the inclusion of that text."³⁴ The Dominican Republic, in its intervention regarding Article 25(1) of the draft Convention, stressed that it was preferable to eliminate paragraph 1 proposing that the States dedicate their efforts to guarantee, in their domestic laws, the other rights enshrined in the American Declaration.³⁵ Likewise, Chile emphasized that any direct mention of the ESCER had been eliminated;³⁶ Mexico pointed out that "unlike all the other rights alluded to in the draft –which are rights enjoyed by a person as an individual or as a member of a particular social group – it is difficult at a given moment to precisely establish which person or persons would be directly affected in the event of a violation of the rights contained in Article 25."³⁷ The observations of Guatemala³⁸ and Brazil³⁹ were aimed at proposing articles in the context of the obligation of progressive development, or proposing that the States submit reports to the Commission on the measures adopted and the progress made in ensuring respect for ESCAR. In particular, Brazil emphasized that "economic, social and cultural rights are contemplated in very different degrees and forms by the legislation of the different American States and, although governments may wish to recognize them all, their enforcement depends substantially on the availability of material resources that enable their implementation."

36. I would also point out that, based on the positions adopted by the States, the only consensus reached was to include the obligation of progressive development of rights, pursuant to Article 26 of the Convention; however, there was no proposal to include ESCER in the same system of protection contemplated for other civil and political rights, at least not from an individual standpoint. Accordingly, the interpretation made using the methods cited is confirmed in the preparatory works of the American Convention.

37. Despite my comments in this section, I am not unaware of the importance of the justiciability of ESCER and their protection through the inter-American system. However, to accomplish this we can turn to less problematic approaches in terms of interpretation, which are consistent with the jurisdiction granted to the Court by the States and with the stipulations of international law. Thus, as this Court has done on several occasions prior to its current jurisprudential stance, it can still protect ESCER in conjunction with other rights recognized in the Convention, in other words, through an indirect mechanism of protection.

³⁴ Cf. Uruguay. Records of the Inter-American Specialized Conference on Human Rights, November 7-22, 1969, OEA/Ser.K/XVI/1.2, p. 37.

³⁵ Cf. Dominican Republic. Records of the Inter-American Specialized Conference on Human Rights, November 7-22, 1969, OEA/Ser.K/XVI/1.2, pp. 69 and 70.

³⁶ Cf. Chile. Records of the Inter-American Specialized Conference on Human Rights, November 7-22, 1969, OEA/Ser.K/XVI/1.2, pp. 42 and 43.

³⁷ Cf. Mexico. Records of the Inter-American Specialized Conference on Human Rights, November 7-22, 1969, OEA/Ser.K/XVI/1.2, p. 101.

³⁸ Cf. Guatemala. Records of the Inter-American Specialized Conference on Human Rights, November 7-22, 1969, OEA/Ser.K/XVI/1.2, pp. 115 and 116.

³⁹ Cf. Brazil. Records of the Inter-American Specialized Conference on Human Rights, November 7-22, 1969, OEA/Ser.K/XVI/1.2, pp. 124 and 125.

38. Article 26 of the American Convention establishes the obligation of progressive development and the consequent duty of non-retrogression of rights that may be derived from the OAS Charter; therefore, the Court may directly supervise compliance with those obligations. However, this is not the case with the economic, social, cultural and environmental rights in their individual dimension, since the Court is not competent to do so, based on the methods of interpretation previously applied. In this sense, I consider that this Court does not have jurisdiction to examine the alleged violation of the right to social security that would be contained in that article.

39. Given that the dispute in this case concerns the alleged responsibility of the State for the failure to execute domestic judgments issued in favor of Mr. Muelle Flores, ordering the payment of a pension to which he was entitled, this Court should have considered that it is not competent to analyze the right to social security based on an interpretation of Article 26 of the American Convention. Thus, the Court should have admitted the preliminary objection filed by the State, and therefore it was not appropriate to continue with the in-depth analysis of the right to social security.

40. For all the foregoing reasons, I consider that this Court could not assume jurisdiction for the presumed violation of a right or freedom not included in the protection system of the American Convention or in the Protocol of San Salvador; therefore, it is unnecessary to issue a statement on the right to social security.

41. Finally, I wish to emphasize that, for practical purposes, it became irrelevant in this specific case to declare the violation of Article 26 of the Convention to the detriment of the victim, given that the discussion in this case focused on the failure to execute domestic judicial rulings that had already declared Mr. Muelle Flores' right to a pension. In that sense it was sufficient for this Court to declare, as indeed it did, the violation of Articles 8(1), 25(1) and 25(2)(c) of the Convention, as well as Article 21(1) and 21(2) thereof, to the detriment of Oscar Muelle Flores, to reach the same legal consequences derived from an incorrect interpretation by this Court regarding its jurisdiction and the analysis of the right to social security based on Article 26 of the American Convention.

Humberto Antonio Sierra Porto
Judge

Pablo Saavedra Alessandri
Secretary