

**PARTIALLY DISSENTING OPINION OF JUDGE EDUARDO VIO GROSSI,
INTER-AMERICAN COURT OF HUMAN RIGHTS
CASE OF LAGOS DEL CAMPO v. PERU,
JUDGMENT OF AUGUST 31, 2017,
(Preliminary objections, merits, reparations and costs)**

INTRODUCTION

This partially dissenting opinion is issued¹ with regard to the above-mentioned judgment,² because the author disagrees with the reference it makes to Article 26³ of the American Convention on Human Rights⁴ as grounds for the fifth⁵ and sixth operative paragraphs,⁶ in which it declares that “[t]he State is responsible for the violation of the right to job security” and “the right to freedom of association.”

a. Preliminary observations

This opinion is evidently provided with full and absolute respect for the decision taken in this case by the Inter-American Court of Human Rights,⁷ which must therefore be complied with. Consequently, this text should in no way be interpreted as detracting from the legitimacy of the decision taken in this case. However, this opinion is issued not only in the exercise of a right, but

¹ Art. 66(2) of the Convention: “If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment.”

Art. 24(3) of the Statutes of the Court: “The decisions, judgments and opinions of the Court shall be delivered in public session, and the parties shall be given written notification thereof. In addition, the decisions, judgments and opinions shall be published, along with judges' individual votes and opinions and with such other data or background information that the Court may deem appropriate.”

Art. 65(2) of the Court's Rules of Procedure: “Any Judge who has taken part in the consideration of a case is entitled to append a separate reasoned opinion to the judgment, concurring or dissenting. These opinions shall be submitted within a time limit to be fixed by the President so that the other Judges may take cognizance thereof before notice of the judgment is served. Said opinions shall only refer to the issues covered in the judgment.”

Hereafter, each time that a provision is cited without indicating to which legal instrument it corresponds, it shall be understood that it is from the American Convention on Human Rights.

² Hereinafter, la Judgment.

³ “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, subject to available resources, by legislation or other appropriate means, the full realization of the rights derived from 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.”

Hereinafter, the Organization of American States will be referred to as the OAS.

⁴ Hereinafter, the Convention.

⁵ “The State is responsible for the violation of the right to job security, recognized in Article 26 of the American Convention, in relation to Articles 1(1), 13, 8 and 16 of this instrument, to the detriment of del Campo, pursuant to paragraphs 133 to 154 and 166 of this judgment.”

⁶ “The State is responsible for the violation of the right to freedom of association, recognized in Articles 16 and 26 of the American Convention, in relation to Articles 1(1), 13 and 8 of this instrument, to the detriment of del Campo, pursuant to paragraphs 155 to 163 of this judgment.”

⁷ Hereinafter, the Court.

also to meet an obligation, which is to contribute to a better understanding of the function assigned to the Court.

From that perspective, it should be pointed out that this opinion, such as others issued by the judges in this and other cases, is a clear demonstration of the dialogue and the diversity of opinions that exist in the Court, as well as the deference shown to its members, all of which evidently enhances the delicate and transcendental task with which they are entrusted.

Furthermore, it should be noted that this text is based on the conviction that the work of the Court is to interpret and to apply the Convention;⁸ that is, to indicate the meaning and scope of its provisions, which may be applied in different ways since, to some extent, they are perceived to be obscure or debatable. In this regard, it is not for the Court to amend the Convention, but merely to indicate what it really establishes and not what the Court would like it to establish. Thus, the Court's function is to clarify the intention that the States Parties to the Convention had when signing it and, eventually, how it should be understood in relation to new situations. And, it is in order to determine that intention that it should abide by the rules for the interpretation of treaties contained in the Vienna Convention on the Law of Treaties and, in particular, those established in its Article 31,⁹ understanding that the four elements set out in it should be applied simultaneously and harmoniously.

It is worth adding, in this regard, that the Court's mandate is to impart justice using the law.¹⁰ It is not incumbent on the Court to promote human rights, which is the function that the Convention assigns to the Inter-American Commission on Human Rights.¹¹ Consequently, as a judicial organ, the Court does not have the authority to rule outside or disregarding the legal provisions established, for the purposes of the Court, in the Convention.

This dissent is manifested, therefore, with the hope that, in future, it will be adopted either by the Court's case law or by a new provision of international law. Regarding the former, because the Court's judgment is only binding for the State that is a party to the case in which it is delivered,¹² and thus, the Court's case law, as an ancillary source of international law and,

⁸ Art. 62(3): "The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement."

⁹ "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."

¹⁰ Footnote 8.

¹¹ Hereinafter the Commission.

Art. 41: "The main function of the Commission shall be to promote respect for and defense of human rights. In the exercise of its mandate, it shall have the following functions and powers:

- a) to develop an awareness of human rights among the peoples of America;
- b) to make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights;
- c) to prepare such studies or reports as it considers advisable in the performance of its duties;
- d) to request the governments of the member states to supply it with information on the measures adopted by them in matters of human rights;
- e) to respond, through the General Secretariat of the Organization of American States, to inquiries made by the member states on matters related to human rights and, within the limits of its possibilities, to provide those states with the advisory services they request;
- f) to take action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51 of this Convention; and
- g) to submit an annual report to the General Assembly of the Organization of American States.

¹² Art.68(1): "The States Parties to the Convention undertake to comply with the judgment of the Court in any case

consequently, a means of “determining the rules of law” established by an autonomous source of international law – in other words, treaty, custom, general principle of law or unilateral legal act,¹³ may, in future change when judgment is handed down in another case. And, regarding the latter, because the function of developing international standards is a matter for the States and, in the case of the Convention, its States Parties, by amendments to the Convention.¹⁴

Therefore, I wish to put on record that, the considerations set forth in this opinion do not seek, under any circumstance, to weaken or restrict the effectiveness of human rights, but rather, precisely the contrary. Indeed, the following considerations respond to the certainty that real respect for human rights is achieved if the States Parties to the Convention are required to comply with what they freely and sovereignly accepted. In this regard, legal certainty plays a fundamental role and, consequently, cannot be understood as a limitation or restriction to the development of human rights, but rather as the instrument that can best ensure real respect for them or their prompt re-establishment, if they have been violated.

What underlies this text is, therefore, the fact that law is the means to achieve justice, and justice to achieve peace and, consequently, given that international human rights law forms part of general international law, the interpretation and application of the former should be carried out in harmony with the provisions of the latter.¹⁵

In addition, it is relevant to indicate that this text also responds to the circumstance that the Court, as a judicial organ, enjoys the broadest autonomy in its task, since there is no higher authority that can control its conduct, a characteristic that means that it is essential for the Court to be extremely rigorous in the exercise of its jurisdiction, in order not to distort this and, consequently, weaken the inter-American system for the protection of human rights. In this regard, the following opinion seeks to ensure the broadest possible recognition of the Court by all those who appear before it and, thus, to strengthen its capacity as a judicial organ and,

to which they are parties.”

Art. 46(1) of the European Convention on Human Rights: “The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.”

Art. 46. and 3 of the Statute of the African Court of Justice and Human Rights: “Binding Force and Execution of Judgments. 1. The decision of the Court shall be binding on the parties. ... 3. The parties shall comply with the judgment made by the Court in any dispute to which they are parties within the time stipulated by the Court and shall guarantee its execution.”

Art. 59 of the Statute of the International Court of Justice: “The decision of the Court has no binding force except between the parties and in respect of that particular case.”

¹³ Art. 38 of the Statute of the International Court of Justice: “1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

(b) international custom, as evidence of a general practice accepted as law;

(c) the general principles of law recognized by civilized nations;

(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo* if the parties agree thereto.”

¹⁴ Art. 31: “Recognition of Other Rights. Other rights and freedoms recognized in accordance with the procedures established in Articles 76 and 77 may be included in the system of protection of this Convention.”

Art. 76(1): “Proposals to amend this Convention may be submitted to the General Assembly for the action it deems appropriate by any State Party directly, and by the Commission or the Court through the Secretary General.”

Art. 77(1): “In accordance with Article 31, any State Party and the Commission may submit proposed protocols to this Convention for consideration by the States Parties at the General Assembly with a view to gradually including other rights and freedoms within its system of protection.”

¹⁵ Art. 31.3.c) of the Vienna Convention on the Law of Treaties: ““General rule of interpretation.... There shall be taken into account, together with the context: ... (c) any relevant rules of international law applicable in the relations between the parties.”

consequently, as the most proficient entity of hemispheric scope that has been created to safeguard human rights. Thus, it is necessary to persist in improving and consolidating it, without subjecting it to risks that could affect this effort adversely.

b. The dissent

The partial dissent indicated in this opinion refers, as indicated, to the violation of two rights, the right to job security and the right to freedom of association.

1. Right to job security

Regarding the right to job security, it must be indicated that my dissent in this matter does not refer to the existence of this right, or to that of the other economic, social and cultural rights. There is no doubt about this, because it is evident that they are embodied in the international law applicable in the States of the Americas and, particularly with regard to the right to work, in the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Protocol of San Salvador.

Rather, this opinion relates to the fact that, in the instant case, it was not a matter of determining the existence of the right to job security as the judgment does,¹⁶ but whether its possible violation by the State could be submitted to the consideration and decision of the Court. The disputed issue related, therefore, to whether the right to job security could be heard by the Court; in other words, whether the Court had competence, under the provisions of Article 26 of the Convention, to rule on the possible violation of this right.

The thesis supported by this text is based on the fact that the Court lacks this competence; that is, it asserts, contrary to the judgment, that the right to job security cannot be tried internationally before the Court. And this, based on reasons that will be set forth below, grouped around the provisions of the Convention; the provisions of its Article 26 in particular and, finally, some other considerations with regard to the judgment.

2. Right to freedom of association

Regarding the right to freedom of association, it is sufficient to indicate that the mention made in the judgment to Article 26 of the Convention in this regard seems unnecessary because, on the one hand, the said right is expressly established in Article 16(1) of the Convention¹⁷ and, on the other, its meaning and scope is repeated abundantly in the judgment.¹⁸ Accordingly, it can be deduced that this right can be judicialized before the Court on those grounds and not on the basis of the provisions of the said Article 26, which, incidentally, is alluded to very tangentially or marginally in the judgment in relation to freedom of association, on a level with the Inter-American Democratic Charter¹⁹ and the ILO Convention on Workers' Representatives.²⁰ In other words, it is addressed more appropriately as a means of interpreting its provisions, together with the context of the wording of the Convention,²¹ as regards the existence of the right to freedom of association, but not to substantiate the Court's competence to rule in that regard.

¹⁶ Paras. Nos. 141 to 150. Hereafter, each time a paragraph is cited, it will be indicated as "para." or "paras" if plural, and it shall be understood to correspond to the judgment.

¹⁷ "Freedom of Association. Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes."

¹⁸ Paras 155 to 160.

¹⁹ Para. 158.

²⁰ Para. 159.

²¹ Art. 31.3.c) of the Vienna Convention on the Law of Treaties: "General rule of interpretation.... There shall be taken into account, together with the context: ... (c) any relevant rules of international law applicable in the relations between the parties."

c. Scope of this text

Therefore, the views expressed in this opinion are restricted to the right to job security, even though they could also be considered appropriate as regards the relationship made by the judgment between Article 26 of the Convention and the right to freedom of association.

I. THE PROVISIONS OF THE CONVENTION

Regarding my discrepancy with the judgment, I will set forth five considerations. One, with regard to the rights "*recognized*" in the Convention. Another, regarding the existence of other rights. The third, on the protection system embodied in the Convention. The fourth, on the extension of this to other rights. And, lastly, on the Protocol of San Salvador.

A. Rights "*recognized*" in the Convention.

Article 1(1) of the Convention establishes that the States Parties undertake to respect and to ensure the enjoyment and exercise of the rights "*recognized herein.*"²² Meanwhile, Article 29(a) of the Convention, on the *pro personae* principle includes the same wording.²³

It should be indicated also that, in other provisions, the Convention refers to "*the rights set forth,*"²⁴ "*guaranteed,*"²⁵ "*protected,*"²⁶ [Translator's note: "*consagrado*" in Spanish] or "*protected*"²⁷ ["*protegido*"] therein; so that, logically, it should be understood that these are rights that have been "*recognized*" in this treaty.²⁸

That said, the rights "*recognized*" in the Convention are the "Civil and Political Rights" (Chapter II); that is, the right to recognition of juridical personality (Art. 3), right to life, (Art. 4), right to personal integrity (Art. 5), freedom from slavery (Art. 6), right to personal liberty (Art. 7), right to a fair trial (Art. 8), freedom from *ex-post facto* laws (Art. 9), right to compensation (Art. 10), right to privacy (Art. 11), freedom of conscience and religion (Art. 12), freedom of thought and expression (Art. 13), right of reply (Art. 14), right of assembly (Art. 15), freedom of association (Art. 16), rights of the family (Art. 17), right to a name (Art. 18), rights of the child (Art. 19), right to nationality (Art. 20), right to property (Art. 21), freedom of movement and residence

²² "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."

²³ "Restrictions Regarding 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."

²⁴ Art. 45(1): "Any State Party may, when it deposits its instrument of ratification of or adherence to this Convention, or at any later time, declare that it recognizes the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention."

²⁵ Art. 47(b) "The Commission shall consider inadmissible any petition or communication submitted under Articles 44 or 45 if: ... the petition or communication does not state facts that tend to establish a violation of the rights guaranteed by this Convention."

²⁶ Art.48(1): "When the Commission receives a petition or communication alleging violation of any of the rights protected by this Convention, it shall proceed as follows: ..."

²⁷ Art. 63(1): "If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

²⁸ Hereafter, each time the rights "*recognized*" in the Convention are referred to, it shall be understood that this also includes those that are "*established,*" "*guaranteed,*" "*embodied*" or "*protected.*"

(Art. 22), right to participate in government (Art. 23), right to equal protection (Art. 24) and right to judicial protection (Art. 25).

In accordance with these provisions, the rights that are the purpose of the Convention and that, consequently, its States Parties “undertake to respect [...] and to ensure to all persons subject to their jurisdiction the[ir] free and full exercise,” and to interpret pursuant to the *pro personae* principle, are, therefore, only those mentioned, and do not include the right to work or the right to job security.

B. The existence of other human rights

Nevertheless, this does not mean that there are no other human rights. To the contrary, the Convention itself alludes to other rights and to different types of categories of human rights that have sources other than international law.²⁹ Thus, in addition to those “recognized” in the Convention, it also mentions “economic, social and cultural rights”;³⁰ those “derived” from the provisions of the Charter of the Organization of American States;³¹ those “recognized” by the laws of the States or in other convention,³² and those “inherent in the human personality or derived from representative democracy as a form of government.”³³

It is clear, therefore, and as the judgment itself affirms when citing Article 26 of the Convention to declare the violation of the right to job security, that this is part of the group of “economic, social and cultural rights.”³⁴ This also reveals that, since these rights derive from provisions of the OAS Charter, the said right does not form part of the rights “recognized” in the Convention.

C. The Convention’s protection system

Considering the foregoing, it is now necessary to refer to the protection system established in Part II of the Convention entitled “Means of Protection” and this consists of two organs: namely, the Commission and the Court.³⁵ Regarding the Court, the harmonious interpretation of Articles 1, 29(a), 33, 45(1), 47(b), 48(1), 62(3), and 63(1), leads to the conclusion that the rights that can be invoked before the Court for it to rule on their alleged violation are those “recognized,” “set forth,” “guaranteed” or “protected,” in the Convention; that is, the “Civil and Political Rights.” Thus, the “economic, social and cultural rights” derived from the Charter of the Organization of

²⁹ It should be pointed out that the Convention also mentioned “principles,” referring to “a system of personal liberty and social justice based on respect for the essential rights of man,” because these “are not derived from one’s being a national of a certain state, but are based upon attributes of the human personality,” and that they “have been set forth in the Charter of the Organization of American States, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights and [...] have been reaffirmed and refined in other international instruments, worldwide as well as regional in scope.” Paras.1, 2 and 3 of the Preamble.

³⁰ Paragraph 4 of the Preamble: “Reiterating that, in accordance with the Universal Declaration of Human Rights, the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights.”

³¹ Art.2, *cit.* in Footnote 3.

³² Art. 29(b): “Restrictions Regarding Interpretation. No provision of this Convention shall be interpreted as... 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.

³³ Art. 29(c): “Restrictions Regarding Interpretation. No provision of this Convention shall be interpreted as... precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government [...]”

³⁴ Paras. 142 and 154.

³⁵ Art. 33: “The following organs shall have competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to this Convention:

- a. the Inter-American Commission on Human Rights, referred to as “The Commission;” and
- b. the Inter-American Court of Human Rights, referred to as “The Court.”

American States, those “*recognized*” by State laws or other conventions and others “*inherent to the human being or derived from representative democratic government*” should be excluded from this judicialization. Evidently, those rights cannot be judicialized before the Court because their source is a treaty or source of international law other than the Convention. Since they are not part of the category of rights “*recognized*” in the Convention, the right to work and the right to job security cannot be judicialized before the Court, with the exception, as regards the former, but only in relation to the specific matters established in the Protocol of San Salvador.

D. Extension of the protection system to other rights

However, the fact that a right is not “*recognized*” in the Convention does not prevent it from being included among the rights that may be invoked before the Court. To this end, it would be necessary to adopt a protocol that established this.³⁶

Indeed, Article 31 of the Convention, in connection with Articles 76(1) and 77(1)³⁷ of this instrument, expressly establishes that “*other rights and freedoms may be included in the system of protection of this Convention*” based on the normative function with regard to the Convention which is exercised by its States Parties. Accordingly, that area is implicitly prohibited to the Court, which therefore cannot include the right to job security among the rights that may be judicialized before it. If it does so, it is evidently exceeding its powers. Indeed, and contrary to what may be deduced from the judgment,³⁸ the authority to determine its own competence, pursuant to the principle of “*kompetenz-kompetenz*,” does not authorize the Court to violate the principle of public law that it is only possible to do what the law permits or stipulates.

E. The Protocol of San Salvador

As already noted, the judicialization, even though partial, of the right to work occurred, precisely, with the 1988 “*Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Protocol of San Salvador*,” which was adopted under the provisions of Articles 76(1) and 77(1) of the Convention; that is, “for the purpose of gradually incorporating other rights and freedoms into the protective system thereof,” as expressly indicated in its Preamble.³⁹

This Protocol “*recognizes*”⁴⁰ the right to work (Art. 6), the right to just, equitable, and satisfactory conditions of work (Art. 7), trade union rights (Art. 8), the right to social security (Art. 9), the right to health (Art. 10), the right to a healthy environment (Art. 11), the right to food (Art. 12), the right to education (Art. 13), the right to the benefits of culture (Art. 14), the right to the

³⁶ The possibility also exists that protocols are signed that do not involve the incorporation of rights into the protection system. Thus, for example, the 1990 Protocol to the American Convention on Human Rights to Abolish the Death Penalty, was adopted because, according to its sixth preambular paragraph “*an international agreement must be arrived at that will entail a progressive development of the American Convention on Human Rights.*”

³⁷ Footnote 14.

³⁸ Para. 142.

³⁹ Preambular paragraph 7: “Considering that the American Convention on Human Rights provides that draft additional protocols to that Convention may be submitted for consideration to the States Parties, meeting together on the occasion of the General Assembly of the Organization of American States, for the purpose of gradually incorporating other rights and freedoms into the protective system thereof, Have agreed upon the following Additional Protocol to the American Convention on Human Rights “Protocol of San Salvador.”

⁴⁰ Art. 1 of the Protocol of San Salvador: “Obligation to Adopt Measures. The States Parties to this Additional Protocol to the American Convention on Human Rights undertake to adopt the necessary measures, both domestically and through international cooperation, especially economic and technical, to the extent allowed by their available resources, and taking into account their degree of development, for the purpose of achieving progressively and pursuant to their internal legislations, the full observance of the rights recognized in this Protocol.”

formation and the protection of families (Art. 15), the rights of children (Art. 16), the protection of the elderly (Art. 17) and the protection of the handicapped (Art. 18).

Nevertheless, this Protocol established that the violation of only some of those rights may be submitted to the Court⁴¹ and these relate to the right to organize trade unions and join them⁴² and the right to education.⁴³ Regarding the right to work, although it has been recognized and even judicialized, this has only been done partially; that is, as regards the right to organize trade unions and to join them. Nothing else. The other issues involved, including the possible violation of the right to job security, which is not mentioned in the said Protocol, are consequently excluded from being submitted to the Court's consideration and decision. If there was a possibility that violations of the right to work and the right to job security could be submitted to, examined and decided by the Court under Article 26 of the Convention, the provisions of the Protocol of San Salvador would be pointless.

II. THE INTERPRETATION OF ARTICLE 26

Based on the foregoing and considering that the judgment finds its decision in the fifth operative paragraph⁴⁴ on Article 26 of the Convention,⁴⁵ it is necessary to interpret this article, refer to the preparatory work, analyze the rights referred to, and derive the consequences of the decision taken in this regard in the judgment.

A. The article

As indicated,⁴⁶ the said article establishes:

⁴¹ Art. 19(6) of this Protocol: "Any instance in which the rights established in paragraph a) of Article 8 and in Article 13 are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights."

⁴² Art. 8(a) of this Protocol: "The States Parties shall ensure: (a) The right of workers to organize labor unions and to join the union of their choice for the purpose of protecting and promoting their interests. As an extension of that right, the States Parties shall permit labor unions to establish national federations or confederations, or to affiliate with those that already exist, as well as to form international labor union organizations and to affiliate with that of their choice. The States Parties shall also permit labor unions, federations and confederations to function freely."

⁴³ Art.13 of this Protocol: "Right to Education. 1. 1. Everyone has the right to education. 2. The States Parties to this Protocol agree that education should be directed towards the full development of the human personality and human dignity and should strengthen respect for human rights, ideological pluralism, fundamental freedoms, justice and peace. They further agree that education ought to enable everyone to participate effectively in a democratic and pluralistic society and achieve a decent existence and should foster understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups and promote activities for the maintenance of peace. 3. The States Parties to this Protocol recognize that in order to achieve the full exercise of the right to education: a. Primary education should be compulsory and accessible to all without cost; b. Secondary education in its different forms, including technical and vocational secondary education, should be made generally available and accessible to all by every appropriate means, and in particular, by the progressive introduction of free education; c. Higher education should be made equally accessible to all, on the basis of individual capacity, by every appropriate means, and in particular, by the progressive introduction of free education; d. Basic education should be encouraged or intensified as far as possible for those persons who have not received or completed the whole cycle of primary instruction; e. Programs of special education should be established for the handicapped, so as to provide special instruction and training to persons with physical disabilities or mental deficiencies. 4. In conformity with the domestic legislation of the States Parties, parents should have the right to select the type of education to be given to their children, provided that it conforms to the principles set forth above. 5. Nothing in this Protocol shall be interpreted as a restriction of the freedom of individuals and entities to establish and direct educational institutions in accordance with the domestic legislation of the States Parties."

⁴⁴ Footnote 5.

⁴⁵ Footnote 3.

⁴⁶ Idem.

"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 subject to available resources, the full realization of the rights derived from 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."

In this regard, attention should be drawn to the fact that:

a) First, this provision establishes a State obligation of action, and not of result, which is "*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*" mentioned. Thus, it does not "*recognize*" rights; rather it establishes the obligation of the States to achieve certain rights progressively, precisely because they are not fully effective.

b) Second, this provision refers to "*rights derived from the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States*"; in other words, rights that emanate from or can be inferred from the provisions of the latter and not that it establishes or recognizes.

c) Third, the said provision makes compliance with this obligation of action "*subject to available resources,*" which reinforces the idea that this is not an obligation of result.

d) And, lastly, the said Article 26 indicates the means to comply with the obligation of action that it establishes: namely "*by legislation or other appropriate means.*" Thus – and as its title indicates – the article refers to the "*Progressive Development*" of the said rights which, although it concurs with the obligation established in Article 2 of the Convention,⁴⁷ evidently does not constitute, in any way, grounds for asserting that it is possible to submit a case to the Court that involves the presumed violation of any of the rights to which the article refers.

Consequently, it is plain that the said rights are different from those regulated by the Convention in its Articles 3 to 25 cited above – that is the "*civil and political rights*" – and are therefore subject to a different protection regime.

B. Preparatory work⁴⁸

It should be noted that during the Specialized Inter-American Conference on Human Rights at which the final text of the Convention was adopted, "*[f]ollowing some discussions in which some of the previous positions were reiterated without reaching a consensus and, in none of which, it was proposed to include the economic, social and cultural rights in the protection regime established for the civil and political rights, a chapter was drafted with two articles.*"⁴⁹ As a result of the respective vote, the first was included in the final text of the Convention, as Article 26. The

⁴⁷ "Domestic Legal Effects. Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."

⁴⁸ Art. 32 of the Vienna Convention on the Law of Treaties: "Supplementary means of interpretation. 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, or 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."

⁴⁹ 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).

second, which would have been Article 27, established: "*Control of Compliance with Obligations. The States Parties shall forward the Inter-American Commission on Human Rights a copy of the reports that, in their respective areas, the Executive Committees of the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture submit each year so that the Commission may verify compliance with the preceding obligations, that are essential for the exercise of the other rights established in this Convention.*"

It should be noted that the proposal for the said Article 27 distinguished between "*the preceding obligations,*" obviously in Article 26, and "*the other rights established in this Convention.*" It should also be recalled that the said article was, however, eliminated; from which it can be concluded that, at no time, were the economic, social and cultural rights that "derive" from the provisions of the OAS Charter, including the right to job security, included under the protection regime for the civil and political rights "*recognized*" in the Convention.

C. The rights derived from the economic, social, educational, scientific and cultural provisions contained in the OAS Charter

The judgment cited Articles 45(b) and (c),⁵⁰ 46⁵¹ and 34(g)⁵² of the OAS Charter to rule on the right to work and, more specifically, on the right to job security. However, these provisions establish either "*principles and mechanisms*" to "*achieve the full realization of [man's] aspirations within a just social order, along with economic development and true peace,*" or a "*goal*" "*to facilitate the process of Latin American regional integration,*" or "*basic goals*" to achieve "*basic objectives of integral development*"; and, in all these hypotheses, they established an obligation of conduct that is expressed in devoting the "*utmost efforts*" to achieve the said goals.

In other words, strictly speaking, these provisions do not establish rights, but rather the obligation of the respective State to devote its "*utmost efforts*" to achieve the goal of economic development and peace, Latin American integration or comprehensive development, as appropriate. Consequently, and also based on the general wording used in the OAS Charter to refer to the matters addressed in the said provisions, it can be concluded that they are considered to be "*goals*" or "*objectives*" to achieve or as "*principles and mechanisms*" to be followed, rather than rights that the individual can judicialize internationally.

Furthermore, it should be pointed out that the provisions of the OAS Charter cited in the judgment are placed in Chapter VII of this international legal instrument, which is entitled "*Integral*

⁵⁰ "The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms:

[...] b) Work is a right and a social duty, it gives dignity to the one who performs it, and it should be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working.

c) Employers and workers, both rural and urban, have the right to associate themselves freely for the defense and promotion of their interests, including the right to collective bargaining and the workers' right to strike, and recognition of the juridical personality of associations and the protection of their freedom and independence, all in accordance with applicable laws;

⁵¹ "The Member States recognize that, in order to facilitate the process of Latin American regional integration, it is necessary to harmonize the social legislation of the developing countries, especially in the labor and social security fields, so that the rights of the workers shall be equally protected, and they agree to make the greatest efforts possible to achieve this goal."

⁵² "The Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development. To achieve them, they likewise agree to devote their utmost efforts to accomplishing the following basic goals: g) Fair wages, employment opportunities, and acceptable working conditions for all."

Development," and that the first article in this chapter, Article 30,⁵³ considers this development as an objective to achieve through compliance with the provisions that follow. It should also be noted that the other articles in this chapter reaffirm the concept that these are "goals" that the States undertake to achieve and not rights that may be judicialized internationally.

In other words, it is plain that, applying the rule of harmonious interpretation established in Article 31 of the Vienna Convention on the Law of Treaties,⁵⁴ it is not possible to infer that it was agreed that the standards established in the said Chapter VII established rights for the individual; rather they are State obligations when elaborating and applying their corresponding public policies for the benefit of those who are subject to their respective jurisdictions. Thus, the object and purpose of such standards is not related to human rights, but to the integral development of the nations.

D. Consequences

Regarding the interpretation made in the judgment that the rights referred to in Article 26 of the Convention would also be "enforceable in all cases before the competent authorities,"⁵⁵ this begs the question of why the said rights were not directly included in the articles of the Convention, as the *Civil and Political Rights* expressly were and, to the contrary, it was chosen to make a general statement in the said article, situated in a special chapter, Chapter III of Part I, entitled *Economic, Social and Cultural Rights*. Thus, the issue is to determine the reason for the existence of the said provision and, consequently, for the regulation of the latter rights. The answer would seem evident; namely, that the *economic, social and cultural rights* are not subject to the same protection regime as the *civil and political rights*, described in Chapter II. Thus, although it is true that there is a close connection between both types of rights, it is also true that the Convention gives them a differentiated treatment, which is indicated precisely in Article 26.

Furthermore, if we accept what the judgment indicates in relation to the said Article 26, this would make the provisions of Articles 31, 76(1) and 77(1)⁵⁶ of the Convention unnecessary and useless; in other words, the signature of additional protocols in order to recognize rights other than those already in the Convention and to include them in the protection regime that it establishes, because it would be sufficient to apply the first of the said articles to achieve this. In this regard, even, as already indicated, the "Protocol of San Salvador" and, especially, its articles on the right to organize and join trade unions, and the right to education,⁵⁷ would not be necessary to claim the violation of those rights before the Court, because the said Article 26 alone would be sufficient.

In other words, based on the principle that "*Ubi eadem est ratio, eadem est o debet esse juris dispositivo*" [for the same reason, the same legal provision], if the criteria adopted in the judgment is followed and taken to its extreme, there would seem to be no reason why the presumed violations of all the human rights that the provisions of Chapter VII of the OAS Charter would imply could not also be invoked before the Court.⁵⁸

⁵³ "The Member States, inspired by the principles of inter-American solidarity and cooperation, pledge themselves to a united effort to ensure international social justice in their relations and integral development for their peoples, as conditions essential to peace and security. Integral development encompasses the economic, social, educational, cultural, scientific, and technological fields through which the goals that each country sets for accomplishing it should be achieved."

⁵⁴ Footnote 9.

⁵⁵ Para. 141.

⁵⁶ Footnote 14.

⁵⁷ Footnote 42.

⁵⁸ Thus, for example, according to this criteria and restricting the reference only to the articles of the OAS Charter cited in the judgments – that is Articles 34, 45 and 46 – the rights that "derive" from the "basic goals" "principles and mechanisms" or "goal," as applicable, could be judicialized before the Court, and they establish:

Art. 34: "The Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development. To achieve them, they likewise agree to devote their utmost efforts to accomplishing the following basic goals:

- a) 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."

Art.45: "The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms:

- a) All human beings, without distinction as to race, sex, nationality, creed, or social condition, have a right to material well-being and to their spiritual development, under circumstances of liberty, dignity, equality of opportunity, and economic security;
- b) Work is a right and a social duty, it gives dignity to the one who performs it, and it should be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working.
- c) Employers and workers, both rural and urban, have the right to associate themselves freely for the defense and promotion of their interests, including the right to collective bargaining and the workers' right to strike, and recognition of the juridical personality of associations and the protection of their freedom and independence, all in accordance with applicable laws;
- d) Fair and efficient systems and procedures for consultation and collaboration among the sectors of production, with due regard for safeguarding the interests of the entire society;
- e) The operation of systems of public administration, banking and credit, enterprise, and distribution and sales, in such a way, in harmony with the private sector, as to meet the requirements and interests of the community;
- f) The incorporation and increasing participation of the marginal sectors of the population, in both rural and urban areas, in the economic, social, civic, cultural, and political life of the nation, in order to achieve the full integration of the national community, acceleration of the process of social mobility, and the consolidation of the democratic system. The encouragement of all efforts of popular promotion and cooperation that have as their purpose the development and progress of the community;
- g) Recognition of the importance of the contribution of organizations such as labor unions, cooperatives, and cultural, professional, business, neighborhood, and community associations to the life of the society and to the development process;
- h) Development of an efficient social security policy; and
- i) Adequate provision for all persons to have due legal aid in order to secure their rights."

Art.46: "The Member States recognize that, in order to facilitate the process of Latin American regional integration, it is necessary to harmonize the social legislation of the developing countries, especially in the labor and social security fields, so that the rights of the workers shall be equally protected, and they agree to make the greatest efforts possible to achieve this goal."

The same would result from other provisions of Chapter VII of the OAS Charter (Articles 30 to 52), all of which concern "*integral development*"; thus, as could be deduced from the judgment, rights could also be derived from these provisions, the violation of which could be argued before the Court.

Nevertheless, if this extreme conclusion was reached, all the States Parties to the Convention that have accepted the Court's jurisdiction could eventually be taken before the Court because they were underdeveloped or developing countries – in other words, because they had not fully achieved integral development or any of its facets, which is plainly very far from what the States Parties were intending when they signed the Convention or, at least, from the logic implicit in this instrument, especially owing to the way in which the said Chapter VII was drafted.

Lastly, as a supplementary comment to the thesis upheld in this opinion, it should be recalled that, in other judgments of the Court, a similar result to the one sought in this case was achieved applying only the provisions of the Convention concerning rights that it recognizes, such as those that protect the right to personal integrity, to property or to judicial guarantees and judicial protection, without needing to resort to the said Article 26.⁵⁹

III. OTHER ARGUMENTS INCLUDED IN THE JUDGMENT

To reinforce the thesis set out in this text, it would appear useful to refer, although in a supplementary manner, to certain assertions in the judgment, and I will now do this.

1. The assertion concerning "*the interdependence and indivisibility of civil and political rights and economic, social and cultural rights,*" so that "*they should all be understood integrally as human rights, without any specific hierarchy, and be enforceable in all cases before the competent authorities,*"⁶⁰ does not mean that the violation of both types of rights can be invoked before the Court. I could agree with what is indicated in the judgment to the extent that it is understood that, although the enjoyment of all human rights, including the economic, social and cultural rights should be respected and that, consequently, they are all enforceable before the competent authorities, this does not signify that the latter, always and in every circumstance, can be claimed before the domestic courts and, eventually, before the Court. Indeed, and as indicated, I am not disputing that the presumed violations of any human right can and even should be claimed before the competent domestic courts.⁶¹ However, what this opinion asserts is that only some of the

⁵⁹ The most recent example, *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*. Judgment of November 30, 2016. Series C No. 329, paras. 154, 155 and *ff.*

⁶⁰ Para. 141.

⁶¹ Preamble, second para: "Recognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states."

Art. 46: "1. Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:

- a) that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law;
- b) that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment;
- c) that the subject of the petition or communication is not pending in another international proceeding for settlement; and
- d) that, in the case of Article 44, the petition contains the name, nationality, profession, domicile, and signature of the person or persons or of the legal representative of the entity lodging the petition.

2. The provisions of paragraphs 1.a and 1.b of this article shall not be applicable when:

- a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
- b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
- c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

Art. 61: 1. Only the States Parties and the Commission shall have the right to submit a case to the Court.

2. In order for the Court to hear a case, it is necessary that the procedures set forth in Articles 48 and 50 shall have been completed."

violations of the economic, social and cultural rights, specifically those established in the Protocol of San Salvador, can be submitted to the consideration and decision of the Court.

2. Similarly, the statement that "*Article 26 [...] it is subject to the general obligations contained in Articles 1(1) and 2 in Chapter I (entitled "General Obligations"), as also are Articles 3 to 25 that appear in Chapter II (entitled "Civil and Political Rights"),*⁶² does not mean that the rights derived from the OAS Charter may be judicialized before the Court. It merely signifies, as stated previously, that all human rights, including the economic, social and cultural rights to which Chapter III of the Convention alludes, should be respected and ensured, because this is required by the said Articles 1 and 2.

3. Furthermore, the allusion to Articles "*6 of the International Covenant on Economic, Social and Cultural Rights," "23 of the Universal Declaration of Human Rights," "7 and 8 of the Social Charter of the Americas," "6 and 7 of the Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights," "11 of the Convention on the Elimination of All Forms of Discrimination against Women," "32.1 of the Convention on the Rights of the Child," "1 of the European Social Charter" and "15 of the African Charter on Human and Peoples' Rights,"*⁶³ does not provide grounds to affirm that the violation of the right to work and more specifically, of the right to job security, can be examined and decided by the Court pursuant to Article 26 of the Convention.

4. The same is true in the case of the references to the Committee on Economic, Social and Cultural Rights, in its General Comment No. 18 on the right to work,⁶⁴ and to Convention 158 of the International Labour Organization on termination of employment (1982).⁶⁵ The said provisions do not refer to this and it is not in their remit, either because they are treaties that have no relationship to the possibility of judicializing the economic, social and cultural rights, or because they are resolutions of international organizations that are not binding for the States; that is, they are merely resolutions that either reflect political aspirations that they be incorporated into law, which may be very legitimate, or they do not interpret a treaty of any kind.

5. The statement that "*the American Declaration constitutes, as applicable and in relation to the OAS Charter, a source of international obligations*"⁶⁶ and the reference to the provisions of Article 29(d) of the Convention,⁶⁷ do not contradict the indisputable fact in international law that the American Declaration is a declarative legal decision of an international organization or institution and, consequently, even though it is not established among the sources of international law stipulated in Article 38 of the Statute of the International Court of Justice⁶⁸ – the only provision that does this – it is a subsidiary means of international law; that is, it serves "*for the determination of rules of law*" established by an autonomous source of international law. Thus, the said Declaration is a "*source of international obligations*" to the extent that it interprets rights or obligations established in any autonomous source of international law.

⁶² Para. 142.

⁶³ Para. 145.

⁶⁴ Para. 147.

⁶⁵ Para. 148.

⁶⁶ Para. 144.

⁶⁷ "No provision of this Convention shall be interpreted as: [...] (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."

⁶⁸ "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo* if the parties agree thereto."

6. The basic reason for the reference to all the documents cited above⁶⁹ seems to have been to support the interpretation as regards the existence of the right to work and the right to job security, which, we repeat, is not contradicted or opposed in this opinion. However, this does not mean that the said texts establish that the violation of those rights can be submitted to the consideration and decision of the Court pursuant to the oft cited Article 26.

7. The phrase that "*the Court exercises full jurisdiction over all its articles and provisions*";⁷⁰ similarly, no matter that Article 26 of the Convention includes rights whose violation can be submitted to the consideration of the Court for a decision, it also indicates that the Court should rule applying and interpreting the provisions of the Convention,⁷¹ which it should do – as stated previously – respecting the public law principle that only what the law allows or prescribes is admissible.

8. Regarding the phrase that "*the Court has the authority to decide any dispute concerning its jurisdiction*,"⁷² it should be recalled that the instant case did not refer to the presumed violation of labor rights in light of the Convention. It was only the petitioner who did this, and only before the Commission;⁷³ moreover, without invoking the application of Article 26. Thus, strictly speaking there was no dispute in this regard.

9. The mention of "*important case law on this matter, in light of different articles of the Convention*"⁷⁴ should also be understood as the use of the Court's own case law as a supplementary source of international law and not as the creation, *per se*, of international obligations or rights.

10. Lastly, the statement that "*the right to work is explicitly recognized in different domestic laws of the States in the region*"⁷⁵ only supposes that there is no doubt that in the domestic sphere or at the national level, the presumed violation of the right to work can and should be invoked before the competent domestic courts, and not that there is a right to claim the violation of that right before the Inter-American Court pursuant to Article 26 of the Convention.

CONCLUSION

In sum, I disagree with the decision in the judgment because, since the Convention makes a clear distinction between political and civil rights and economic, social and cultural rights, the right to work, including the right to job security, as part of the latter rights is not a right "recognized" in the Convention and, consequently, is not safeguarded by the system of protection that is established therein only for the political and civil rights. For the economic, social and cultural rights to be judicialized before the Court, the signature of an additional protocol would be necessary, and this has not happened, except partially with the Protocol of San Salvador, but for matters other than those in the instant case.

I also dissent because Article 26 of the Convention establishes obligations of conduct for the States, and not a recognition of human rights. Moreover, this provisions cites the OAS Charter, which, in turn, does not recognize human rights, but rather stipulates "*goals*" or "*principles and mechanisms*" that the States undertake to achieve or to implement, as applicable. In addition, I

⁶⁹ Paras. 143 to 149.

⁷⁰ Para. 142.

⁷¹ Art. 62(3) *cit.*

⁷² Para. 142.

⁷³ Paras. 133 to 137.

⁷⁴ Para. 154.

⁷⁵ Para. 145.

do not share the decisions taken because permitting the provisions of the said Article 26 to be judicialized before the Court not only renders meaningless the provisions of Articles 31, 76(1) and 77(1) of the Convention and of the Protocol of San Salvador, but would also allow this for all the rights derived from the OAS Charter, an eventuality that is evidently totally alien to what was intended.

Based on the foregoing, I reiterate that I am not denying the existence of the right to job security which, incidentally, does not appear as such in the OAS Charter from the provisions of which it would derive according to Article 26 of the Convention. I merely indicate that its eventual violation cannot be submitted to the consideration and decision of the Court.

Furthermore, this opinion should not be understood to signify that I would not be in favor of the eventual judicialization of the economic, social and cultural rights. I merely consider that, if this occurs, it should be accomplished by the entity responsible for setting international legal standards; namely, the States, through treaties, international custom, general principles of law, or unilateral legal acts. It does not appear desirable that the organ responsible for the inter-American judicial function should assume the role of setting international standards, particularly when the States Parties to the Convention are democratic and, in this regard, governed by the Inter-American Democratic Charter that establishes the separation of powers and civic participation in public affairs,⁷⁶ which should also be reflected in matters relating to the role of setting international legal standards, particularly those standards that concern them most directly.

Finally, this opinion records my discrepancy with the fact that the judgment develops and expresses, for the first time, "*a specific condemnation for the violation of Article 26 of the American Convention on Human Rights, established in Chapter III of this treaty, entitled Economic, Social and Cultural Rights.*"⁷⁷

And this is so, also, based not only on the negative consequences that this decision could have, but also because it appears that it does not take into consideration the circumstance that the sphere of the domestic jurisdiction, or the jurisdiction that is exclusive to the State⁷⁸ - also known as the margin of discretion⁷⁹ - still exists, although to a lesser extent than in the past. And this shows that not everything is regulated by international law, and in the case of the Convention, it is expressed, *inter alia*, both in the provision that establishes that it is the State Party in the

⁷⁶ Adopted at the twenty-eighth OAS General Assembly on September 11, 2001, Lima, Peru.

"Art. 3: Essential elements of representative democracy include, *inter alia*, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government.

Art. 6: It is the right and responsibility of all citizens to participate in decisions relating to their own development. This is also a necessary condition for the full and effective exercise of democracy. Promoting and fostering diverse forms of participation strengthens democracy."

⁷⁷ Para. 154.

⁷⁸ "The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain." Permanent Court of International Justice, Advisory Opinion on Nationality Decrees issued in Tunisia and Morocco (French zone), Series B No. 4, p.24.

⁷⁹ Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, "Art.1: At the end of the preamble to the Convention, a new recital shall be added, which shall read as follows: "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention."

respective case that must comply with the corresponding judgment,⁸⁰ and in its Article 26, which leaves the prosecution of violations of the economic, social and cultural rights to the said sphere.

Eduardo Vio Grossi
Judge

Pablo Saavedra Alessandri
Secretary

⁸⁰ Art. 68: "1. The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties.

2. That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state.