

**DISSENTING OPINION OF JUDGE EDUARDO VIO GROSSI**  
**INTER-AMERICAN COURT OF HUMAN RIGHTS**  
**CASE OF CASA NINA V. PERU**  
**JUDGMENT OF NOVEMBER 24, 2020**  
**(Preliminary objections, merits, reparations and costs)**

**I. INTRODUCTION**

1. This partially dissenting opinion<sup>1</sup> with regard to the judgment in reference<sup>2</sup> is issued to explain why I disagree with the second operative paragraph<sup>3</sup> in which, based on the provisions of Article 26 of the American Convention on Human Rights,<sup>4</sup> the preliminary objection on the lack of jurisdiction of the Inter-American Court of Human Rights<sup>5</sup> to examine violations of the right to work is rejected.
2. That said, owing to the relevance that this issue has in the Court's case law, I find it necessary to reiterate once again, although with the modifications imposed by the characteristics of this case, what I have set out in other separate opinions.<sup>6</sup>

**II. PRELIMINARY OBSERVATIONS**

3. But, first, it is necessary to mention the function of the separate opinion, the role of the Court, the rules for the interpretation of treaties and the instant case, to then refer to the interpretation, sequentially, of Article 26, of the norms of the Charter of the Organization of American States<sup>7</sup> to which the said article alludes, and of the norms

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<sup>1</sup> 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.

<sup>2</sup> Hereinafter, the judgment.

<sup>3</sup> "To reject the preliminary objection regarding the Court's lack of jurisdiction to examine arguments concerning the right to work, pursuant to paragraphs 26 and 27 of this judgment."

<sup>4</sup> Hereinafter, the Convention.

<sup>5</sup> Hereinafter, the Court.

<sup>6</sup> Partially dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of July 15, 2020; Partially dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, *Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs*. Judgment of November 22, 2019; Partially dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs*, Judgment of March 6, 2019; Partially dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, *Case of San Miguel Sosa et al. v. Venezuela, Merits, reparations and costs*, Judgment of February 8, 2018; Partially dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2017, and Separate Opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, *Case of the Discharged Employees of PetroPeru et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2017.

<sup>7</sup> Hereinafter, the OAS.

relating to the matter in hand in the Pact of San Salvador, all of which can help explain what I am seeking to substantiate in this text.

### **A. Function of the separate opinion**

4. This separate opinion is presented both as an exercise of a right<sup>8</sup> - also recognized by other international courts<sup>9</sup> - and in compliance with an obligation to contribute to improving the understanding of the Court's decisions based on the competence, whether contentious,<sup>10</sup> or advisory and non-contentious,<sup>11</sup> that has been assigned to it and, consequently, to the development of international human rights law.
5. This dissent is also manifested with the hope that the Court will return to its position when it did not consider that the rights mentioned in Article 26 were justiciable. This hope rests on the fact that the Court's judgment is only binding for the State Party to the case in which it is delivered,<sup>12</sup> so that, for all the other States it is only a subsidiary source of international law; in other words, it does not create rights, it merely determines what has been established by an autonomous source.<sup>13</sup>

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<sup>8</sup> *Supra*, footnote 1. Hereinafter each time a footnote refers to an article, "art." will be indicated, and it will be understood that it is an article of the American Convention on Human Rights, which, in turn, will hereafter be referred to as the Convention.

<sup>9</sup> Art. 74(2) of the Rules of Court of the European Court of Human Rights: « Any judge who has taken part in the consideration of the case by a Chamber or by the Grand Chamber shall be entitled to annex to the judgment either a separate opinion, concurring with or dissenting from that judgment, or a bare statement of dissent. »

Art. 44 of the Statute of the African Court of Human and Peoples' Rights: « if the judgment does not represent in whole or in part the unanimous opinion of the Judges, any Judge shall be entitled to deliver a separate or dissenting opinion. »

Art. 57 of the Statute of the International Court of Justice: "If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion."

Art. 74(5) of the Rome Statute of the International Criminal Court: "The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court."

Art. 30(3) of the Statute of the International Tribunal for the Law of the Sea: "If the judgment does not represent in whole or in part the unanimous opinion of the members of the Tribunal, any member shall be entitled to deliver a separate opinion."

<sup>10</sup> 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."

<sup>11</sup> Art. 64: "1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court.

2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments."

<sup>12</sup> 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."

<sup>13</sup> 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:

## B. The Court's role

6. With regard to the Court, it should be recalled that its role is to impart justice in the area of human rights pursuant to the law and, more specifically, pursuant to the Convention. Consequently, it enjoys the broadest possible autonomy in its task, which means that it is essential that it is extremely rigorous in the exercise of its competences and, therefore, in its respect for the principles inherent in every jurisdictional body, such as impartiality, independence, objectivity, political neutrality, equanimity, full equality before the law and justice, non-discrimination and absence of prejudice, and all of this in order not to undermine the efforts it has been making for more than 40 years.
7. Moreover, based on the foregoing and also recalling that the objective sought by the Court in the exercise of its contentious jurisdiction should be the prompt and effective restoration by the State concerned of respect for the violated human rights,<sup>14</sup> it is essential that it proceed pursuant to the principle of "*pacta sunt servanda*";<sup>15</sup> in other words, require of the State what it really freely and sovereignly undertook to comply with.<sup>16</sup> Thus, the legal security that this rule signifies should not be understood as a limitation or restriction for the development of human rights, but rather as the instrument that can best ensure respect for them.
8. Likewise, it should be noted that, although disputes relate to the violation of rights of the individual and even though the latter may, based on the regulations, although not on the Convention, lodge briefs before the Court and be heard by it,<sup>17</sup> the corresponding proceedings continue to be between States Parties to the Convention and, in the Court

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(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."

<sup>14</sup> 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."

<sup>15</sup> Art. 26 of the Vienna Convention on the Law of Treaties: "*Pacta sunt servanda*." Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Hereinafter, the Vienna Convention on the Law of Treaties will be identified as "the Vienna Convention".

<sup>16</sup> 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."

<sup>17</sup> Art. 25(1) of the Court's Rules of Procedure: "Participation of the Alleged Victims or their Representatives. Once notice of the brief submitting a case before the Court has been served, in accordance with Article 39 of the Rules of Procedure, the alleged victims or their representatives may submit their brief containing pleadings, motions and evidence autonomously and shall continue to act autonomously throughout the proceedings."

And Arts. 39(1)(d) and (5), 40, 42(3), 43, 46(1), 50(5), 51(5), (7) and (9), 52(2), 53, 56, 62, 63, 66(2), 66(1) and (6), and 69(1) and (3), all of the Court's Rules of Procedure.

and before the defendant State, they are represented by the Inter-American Commission on Human Rights.<sup>18</sup> Consequently, this is the scenario in which the States have sovereignly consented to partially limit their sovereignty by recognizing the existence of human rights guaranteed by international law. However, it is also true that they have not abdicated their internal, domestic and exclusive competence to regulate those rights in their Constitutions under the heading of fundamental rights, and they have even reserved to themselves the primary responsibility for hearing and settling any disputes that arise with regard to them, especially based on the principle of the complementarity and collaboration of the international jurisdiction in relation to the domestic jurisdiction<sup>19</sup> and the establishment of the requirement of prior exhaustion of domestic remedies.<sup>20</sup>

9. Ultimately, cases do not involve merely a relationship between the State that has presumably violated human rights and the presumed victim, but concern inter-American public order; in other words, these are matters that affect the overall interests of international society and this is why the individual is recognized to be a subject of international law to some extent and, despite its limited scope, this has constituted one of the major advances or changes in international law during the second half of the twentieth century.
10. And perhaps it is a good thing that the individual's status of subject of international law is only partial because, otherwise, the relationship between the State that has presumably violated human rights and the presumed victim would be totally asymmetric, unbalanced, unequal, to the detriment of the latter, because he would not have the political weight or support that the other States can provide, either through the Commission<sup>21</sup> or because the corresponding judgment is complied with.<sup>22</sup>
11. That said, the Court must evidently deliver judgment pursuant to the law expressed, as regards the Court, in the Convention and, consequently, in international human rights law which the latter forms part of. This includes the respective procedural norms that, especially in the area of human rights, are as essential as the substantive norms because respect for them permits the latter to be truly effective. Thus, the form is indissolubly linked to the content. And, to a great extent, the procedural norms, at times considered mere formalities and, consequently susceptible to being disregarded in order to give preference to the substantive norms, condition the applicability of the latter. If this fact is not considered, it could have a devastating effect for the exercise of human rights.
12. Therefore, the Court must respect the principle of public law that it is only possible to do what the norm expressly authorizes; therefore, when something is not regulated,

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<sup>18</sup> Art. 35: "The Commission shall represent all the member countries of the Organization of American States."

Art. 61(1): "Only the States Parties and the Commission shall have the right to submit a case to the Court." Hereinafter, the Commission.

<sup>19</sup> Preamble, para. 3.

<sup>20</sup> 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;

<sup>21</sup> *Supra*, footnote 18.

<sup>22</sup> Art. 65: "To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations."

the respective State's exclusive, internal or domestic jurisdiction applies,<sup>23</sup> a principle expressly established in the OAS Charter<sup>24</sup> and indirectly in the Convention.<sup>25</sup> In this regard, it should be recalled that the theory of implicit powers, which establishes the principle that the international organization concerned must be deemed to have those powers that are essential to the performance of its duties, even if they not provided for in the convention on which it is based<sup>26</sup> – which is expressed by the competence-competence principle<sup>27</sup> – is applied to the Court only when it is necessary for the exercise of its competence, expressly conferred by the Convention, to hear a case or to issue advisory opinions, and not with regard to the possible exercise of powers that are totally unnecessary for this purpose.

13. Therefore, on the one hand, the Court must proceed in keeping only with what the Convention effectively establishes and not with what it would like it to establish and, on the other hand, it must avoid modifying the Convention, which is a power explicitly assigned to its States Parties.<sup>28</sup> Consequently, if the Court does not agree with what the article of the Convention establishes, it should not try to exercise the international legislative function that is the responsibility of the States, but rather advise them of the need to amend the norm in question. Thus, the new provision that possibly results from the exercise of that function by the States will clearly enjoy a broader and more solid democratic legitimacy.

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<sup>23</sup> “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.

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.”

<sup>24</sup> Art. 1(2): “The Organization of American States has no powers other than those expressly conferred upon it by this Charter, none of whose provisions authorizes it to intervene in matters that are within the internal jurisdiction of the Member States.”

<sup>25</sup> 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.

<sup>26</sup> “Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.” ICJ, “Reparation of Injuries Suffered in Service of the United Nations,” pp. 9-12.

<sup>27</sup> Cf. Inter-American Court of Human Rights. *Case of Jenkins v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of November 26, 2019. Series C No. 397, para. 31.

<sup>28</sup> Supra, footnote 25.

14. It is based on all the above that, strictly speaking, the Court is not responsible for promoting and defending human rights, which is the function that the Convention expressly assigned to the Commission,<sup>29</sup> which could be categorized as an activist, understanding this work in the most positive sense possible.<sup>30</sup> To the contrary, let me repeat, the Court is responsible – in the exercise of its contentious jurisdiction – for ruling, with binding effects for the defendant States, in the cases that are submitted to it and, in the exercise of its advisory and non-contentious competence, for issuing its non-binding opinion; in other words, in both situations, applying and interpreting the Convention. Evidently, to this end, it must not only respect the provisions of international human rights law, but also those of general international law and, ultimately, law in general, even in the eventuality that one, some or all of them establish norms that are not shared.
15. And this is necessary, not only to deliver a solid and substantiated judgment or advisory opinion, but also so that, in the case of the former, the State concerned restores as soon as possible the effective enjoyment of the violated human right or, in the case of the latter, proceeds after having been warned that, if it does so in a certain way, it runs the risk of committing a human right violation. In sum, abiding by law allows the Court to be as objective as possible in its decisions and, consequently, more just.

### **C. Interpretation of treaties**

16. Therefore, the Court is responsible for determining, from among the various possibilities, the meaning and scope of the Convention's provisions. Evidently, if the text of the corresponding norm does not offer several alternatives for its application, it would not be necessary to examine it further, because it would not represent an obscure or ambiguous matter whose meaning and scope needed to be determined.
17. This means that the interpretation of the Convention consists in fathoming the intention of its States Parties when they signed it and, eventually, how that intention expressed in the Convention should be understood in relation to new situations. And, for this purpose, it is necessary to consider the Convention not only as an expression of the reality, but also of what it aspires to be. In other words, the Convention not only reflects the society that it regulates, but also the society that it hopes for.

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<sup>29</sup> 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."

<sup>30</sup> Diccionario de la Lengua Española, Real Academia Española, 2020. "Activismo: 1. Tendencia a comportarse de un modo extremadamente dinámico. 2. Ejercicio del proselitismo y acción social de carácter público. Activista: 1. Perteneciente o relativo al activismo. 2. Seguidor del activismo."

18. That said, the principal rule for the interpretation of treaties contained in the Vienna Convention on the Law of Treaties,<sup>31</sup> is that:

"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."

19. This rule includes four means of interpretation.<sup>32</sup> One is the method based on good faith, which means that what was agreed by the States Parties to the treaty concerned should be understood based on what they effectively had the intention of agreeing to so that it is truly applied and has practical effects. In this regard, good faith is closely related to the "*pacta sunt servanda*" principle.<sup>33</sup> The second, is the textual or literal method, which refers to the analysis of the text of the treaty, the wording used, and the ordinary meaning of its terms. The third is the subjective method that seeks to establish the intention of the States Parties to the treaty by analyzing the *travaux préparatoires* and the subsequent conduct of the States Parties with regard to the treaty. And the fourth is the functional or teleological method that seeks to determine the object and purpose of the treaty. Since these four means of interpretation are included in the same phrase, forming a single rule, they should be applied simultaneously and harmoniously, without preferring or downplaying one or the other. This is the main characteristic that distinguishes the interpretation of treaties from that of other norms.<sup>34</sup>

20. Regarding the special rule established in Article 29 of the Convention,<sup>35</sup> known as the *pro personae* principle, it should be recalled that this is a rule relating to the

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<sup>31</sup> Hereinafter, the Vienna Convention.

<sup>32</sup> Art. 31 of the Vienna Convention: "General rule of interpretation.

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

2. "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

c) any relevant rules of international law applicable in the relations between the parties."

4. A special meaning shall be given to a term if it is established that the parties so intended."

<sup>33</sup> *Supra*, footnote 15.

<sup>34</sup> As in the case of article 19 of the Civil Code of Chile: "When the meaning of the law is clear, its literal meaning should not be ignored, on the pretext of consulting its spirit. However, to interpret an obscure expression of the law, it is possible to have recourse to its intention or spirit, clearly apparent in it, or to the reliable history of its creation."

<sup>35</sup> "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;

(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;

interpretation of the Convention, and mandating that, in that exercise, the meaning and scope that is understood cannot permit a limitation of the human right that the Convention ensures or that is recognized by the other legal instruments it indicates. Therefore, this article obliges the Court to interpret the rights ensure in the Convention with the broadest meaning and scope established in this instrument or in other applicable legal instruments.

21. Furthermore, regarding case law as an instrument of interpretation, it should be recalled that the judgment delivered by the Court in a case that has been submitted to its consideration is binding only for the State Party or States Parties to the case.<sup>36</sup> For all the other States, it constitutes a supplementary means for determining the rules of law.<sup>37</sup> And, in the case of advisory opinions, these are not binding and cannot be binding because the States are not obliged to appear before the Court in the process for their elaboration, and it does not involve an adversarial procedure. Moreover, the Convention does not assign a binding nature to advisory opinions since the OAS organs and even the States can request them with regard to the compatibility of any of their laws with the Convention<sup>38</sup> and .<sup>39</sup>
22. Also, with regard to case law, it appears necessary to include some brief comments on the expressions used in several of the Court's judgments, such as that "human rights treaties are living instruments, the interpretation of which must evolve with the times and current circumstances."<sup>40</sup> The first comment is that this is established in Article 31(3)(a) and (b) of the Vienna Convention, when it indicates that, together with the context, there should be taken into account the agreements and the practice of the States regarding the interpretation of the treaty concerned. Thus, the evolutive aspect should refer more to the applicable law than to the case law issued concerning it.
23. The second comment is that, consequently, the said evolutive interpretation should relate specifically to the society regulated by international law and, in particular, by the Convention; in other words, the international society formed of sovereign States that are all equal, among which there is no pre-established hierarchy of power or of laws, or enforceability of submission to an international judicial instance, and where the legislative and executive functions correspond to the States. It is in that context in which, as legal doctrine indicates, the judicial function consisting in transforming the

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(c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government, or

(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.

<sup>36</sup> *Supra*, footnote 12.

<sup>37</sup> *Supra*, footnote 13.

<sup>38</sup> *Supra*, footnote 11.

<sup>39</sup> Separate opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, Advisory Opinion OC-24/17, of November 24, 2017, requested by the Republic of Costa Rica, *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)*, paras. 8 to 16.

<sup>40</sup> *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of July 15, 2020. Series C No. 407, para. 158.

Hereafter, each time that "para." or "paras." Is indicated, it is understood that this refers to a "paragraph" or "paragraphs" of the judgment or document referred to.

general and abstract mandates of the Convention into concrete and specific mandates should be inserted. To this end, the respective judicial instance should not delegate to others its authority to determine the said evolution and the current circumstances, because, if it did, this would lead to assertions unrelated to the justice that it should impart.

24. Moreover, when resorting to evolutive interpretation, the Court should take special care not to devalue what was agreed on literally, leaving it without any practical usefulness, and thus giving rise to legal uncertainty in the States Parties to the Convention and, above all, doubts and fears about adhering to the Convention in those that have not yet done so.

#### **D. The instant case**

25. In this regard, it should be recalled that the judgment indicates that the "Court reaffirms its competence to examine and decide disputes relating to Article 26 of the American Convention as an integral part of the rights listed in its text, regarding which Article 1(1) establishes obligations of respect and guarantee,"<sup>41</sup> adding that "as indicated in previous decisions,<sup>42</sup> the considerations related to the possible occurrence of such violations must be examined when analyzing the merits of the matter."<sup>43</sup>
26. Since the judgment provides no other reason than the one briefly expressed above as justification for this decision, it obliges me, in order to substantiate this dissenting opinion, to resort to the considerations concerning that substantive part where, as we shall see,<sup>44</sup> it provides arguments to support the said decision it has adopted.
27. However, to do this, it is necessary to recall that, when alluding to the said Article 26,<sup>45</sup> the judgment does so referring specifically to the right to work; in other words, it

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<sup>41</sup> Footnote to para. 26 of the judgment: *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. 16, 17 and 100; *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 340, paras. 142 and 154; *Case of the Discharged Employees of PetroPeru et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2017. Series C No. 344, para. 192; *Case of San Miguel Sosa et al. v. Venezuela. Merits, reparations and costs.* Judgment of February 8, 2018. Series C No. 348, para. 220; *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349, para. 100; *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, paras. 75 to 97; *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375, paras. 34 to 37; *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 21, 2019. Series C No. 394, paras. 33 and 34; *Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2019. Series C No. 395, para. 62; *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, reparations and costs.* Judgment of February 6, 2020. Series C No. 400, para. 195; *Case of Spoltore v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of June 9, 2020. Series C No. 404, para. 85, and *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of July 15, 2020. Series C No. 407, para. 23.

<sup>42</sup> Footnote to para. 26: *Cf. Case of Muelle Flores v. Peru, supra*, para. 37, and *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of July 15, 2020. Series C No. 407, para. 23.

<sup>43</sup> Para. 26.

<sup>44</sup> *Infra*, paras. 55 and *ff.*

<sup>45</sup> Hereinafter, Article 26.

justifies the application of the article with regard to that right.<sup>46</sup> Thus, the purpose of this opinion is to present, once more, my position that the rights mentioned in Article 26, including the right to work, are not justiciable before the Court – for the reasons described below – with some exceptions that do not include the situation in the instant case.

28. It is extremely important, therefore, to indicate at once that this opinion does not refer to the existence of the right to work, or to the other economic, social and cultural rights. The existence of those rights is not the purpose of this opinion. To the contrary, what I maintain here, let me insist, is merely that the Court, contrary to what is indicated in the judgment, lacks competence to examine violations of those rights under the provisions of Article 26, and that the right referred to in the instant case is not included among the exceptions to this general rule.
29. However, this does not mean that violations of those rights cannot be litigated before the corresponding domestic jurisdictions. This will depend on what the respective internal laws establish, a matter that, in any case, falls outside the purpose of this text and that is part of the internal, domestic or exclusive jurisdiction of the States Parties to the Convention.<sup>47</sup> Nevertheless, it is feasible that, in the future, all or some of the States Parties to the Convention might agree on protocols that establish the justiciability before the Court of possible violations of other economic, social and cultural rights than those established in the Protocol of San Salvador.
30. Consequently, this opinion holds that it is necessary to distinguish between human rights in general, which must be respected in all circumstances based on the provisions of international law, and those that, in addition, may be justiciable before an international jurisdiction. In this regard, it is worth pointing out that there are only three international human rights courts; namely, the Inter-American Court of Human Rights, the European Court of Human Rights and the African Court of Human and Peoples' Rights. Also, not all the States of the respective regions have accepted the jurisdiction of the corresponding court. Also, not all the regions of the world have an international human rights jurisdiction, nor has a universal court of human rights been created.
31. Therefore, the fact that a State has not accepted to be subject to an international human rights jurisdiction does not mean that such rights do not exist and, consequently, cannot possibly be violated. If this happens, international society can use diplomatic or political measures to achieve the restoration of respect for the said rights, even though such measures may be too weak for this purpose. Thus, one thing is the international recognition of such rights, and another is the international instrument used to achieve the restoration of their effectiveness in situations in which they are violated.

### **III. INTERPRETATION OF ARTICLE 26**

32. Therefore, based on the foregoing – in particular, as regards the interpretation of treaties<sup>48</sup> – Article 26 should be interpreted in keeping with the methods indicated above. This article establishes:

“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

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<sup>46</sup> Paras. 104 and 105.

<sup>47</sup> *Supra*, footnote 23.

<sup>48</sup> *Supra*, II, c.

appropriate means and subject to available resources, the full realization of the rights implicit in [Note: literally “derived from” in the Spanish original] 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.”

33. However, first a preliminary note. Although it is laudable that judgments cite or invoke previous judgments to support a similar line of reasoning, it is also true that the mere reference to them is not sufficient to substantiate this. If this were so, it would be sufficient, as appears to occur in the instant case,<sup>49</sup> to assert that, since the Court has already made a ruling in a certain sense, in this case it will make the same ruling. Moreover, by proceeding in this way, it should be recalled that the Court is confirming the premises that supported the precedents, so that it may be essential for anyone dissenting with the decision, as in the instant case, to refer to them, even though the corresponding judgment did not include any reference in this regard.

#### **A. Good faith**

34. According to the method based on good faith, it is more than evident that the practical effect of this rule is that the States Parties to the Convention should truly adopted measures, both in the domestic sphere and also in the area of international cooperation, to achieve progressively the full realization of the rights derived from the standards of the OAS Charter, and all of this subject to available resources. Thus the State obligation established in Article 26 is to adopt measures to make the said rights effective and not that they really are in effect. The obligation is one of conduct, not of results. This obligation could not be otherwise, when it depends on two factors: available resources and international cooperation, which are beyond the control of the State concerned.

35. In this regard, attention must be drawn to the fact that the provisions of Article 26 are similar to those of Article 2 of the Convention; namely, in the latter, the States are obliged to adopt measures where the exercise of any of the rights or freedoms referred to in Article 1 of the Convention are not already ensured<sup>50</sup> and, in the former, to adopt measures in order to achieve progressively the full realization of the rights that it mentions derived from the standards set forth in the OAS Charter. However, the two articles differ in that the latter conditions compliance with its provisions to international cooperation and the availability of the corresponding resources.

36. Based on the foregoing, it is necessary to reflect on the reason why Article 26 was adopted and, therefore, why the rights that it refers to were not addressed in the same way as the civil and political rights. Based on good faith, the answer can only be that the Convention considered that both types of human rights – although closely linked owing to the ideal to which they aspire, which is, according to its Preamble, to create the conditions that permit their “enjoyment”<sup>51</sup> – are, however, different and, in particular, have been developed differently in the sphere of public international law, so that they required a differentiated treatment, which is precisely what the Convention does as also indicated in its Preamble.<sup>52</sup>

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<sup>49</sup> Paras. 26 and 104.

<sup>50</sup> Art. 2: “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.”.

<sup>51</sup> Para. 4: “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.”

<sup>52</sup> Preambular para. 5: “Considering that the Third Special Inter-American Conference (Buenos Aires, 1967) approved the incorporation into the Charter of the Organization itself of broader standards with respect to

37. Therefore, based on the principle of good faith, it is necessary to underline that although the Preamble to the Convention affirms that “everyone should enjoy his economic, social and cultural rights, as well as his civil and political rights,” this does not mean – as the judgment asserts – that the practical effect of Article 26 is that the violations of the rights it mentions are justiciable before the Court, but merely that the States must adopt the pertinent measures, including through international cooperation, and subject to the available resources, to realize the said rights progressively.
38. Additionally, it is essential to note that it is surprising that the judgment has not referred more extensively to good faith as an element that is as essential as the others established in Article 31(1) of the Vienna Convention for the interpretation of treaties. Likewise, it is also strange that it has not provided any explanation of the inclusion of Article 26 in a separate chapter from the political and civil rights and, in particular, what are its fundamental purpose and its practical effect. The judgment provides no answers with regard to the reason for the existence of Article 26 as a different article from those established for the civil and political rights.
39. In sum, good faith leads to considering Article 26 on its own merits, which means that it should be interpreted not as recognizing rights that it does not list or describe, as in the instant case, but rather as referring to norms other than those of the Convention for more complete information on such rights, such as those of the OAS Charter. Consequently, its special and practical effect is, let me repeat, that the States Parties to the Convention should adopt measures to achieve progressively the rights derived from those norms, and all of this subject to international cooperation and the available resources.
40. The judgment omits any reference to good faith and diverges markedly from what the Vienna Convention establishes in this regard in relation to the interpretation of treaties.

### **B. Literal meaning**

41. When interpreting Article 26 in light of its literal or ordinary meaning, it can be concluded that this article:
- i. is to be found, as the only article, in Chapter III, entitled “Economic, Social and Cultural Rights,”<sup>53</sup> of Part I, entitled “State Obligations and Rights Protected,” which also includes Chapter I “General Obligations,” and Chapter II “Civil and Political Rights”; consequently, it can be seen from this that it is the Convention itself that, contrary to what the Court has considered in its case law,<sup>54</sup> considers the civil and political rights separately from the economic, social and cultural rights, making a clear distinction between them, by providing a special and differentiated consideration to each of them;
  - ii. does not list or provide details or specify the rights to which it alludes; it merely identifies them as those derived<sup>55</sup> “from the economic, social, educational,

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economic, social, and educational rights and resolved that an inter-American convention on human rights should determine the structure, competence, and procedure of the organs responsible for these matters.”

<sup>53</sup> Chapter IV of Part I is entitled “Suspension of Guarantees, Interpretation and Application” and Chapter V is entitled “Personal Responsibilities.”

<sup>54</sup> *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 340, para. 141.

<sup>55</sup> “*Derivar: Dicho de una cosa: Traer su origen de otra.*” Diccionario de la Lengua Española, Real Academia Española, 2020

scientific, and cultural standards set forth in the Charter of the OAS; in other words, rights that can be understood or inferred from<sup>56</sup> the latter's provisions;

- iii. *ergo*, it unambiguously does not recognize the rights referred to and does not ensure their exercise, as the Convention does [in the case of the civil and political rights];
- iv. it does not make such rights effective or enforceable, because if it had wished to do so, it would have stated this directly and without any ambiguity; in other words, contrary to the Court's case law, there is no "reference with a sufficient degree of specificity to the right to just and satisfactory working conditions to derive their existence and implicit recognition in the OAS Charter."<sup>57</sup>
- v. to the contrary, it establishes an obligation for action and not for results, consisting in the States Parties to the Convention undertaking "to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, [...] the full realization of the rights" mentioned, a mandate that the judgment does not observe; and
- vi. it indicates that the obligation of conduct that it establishes must be complied with "by legislation or other appropriate means and subject to available resources," which not only reinforces the lack of effectiveness of such rights, but conditions the possibility of complying with this obligation to the existence of the resources that the pertinent State has available for this and to the cooperation of other States.

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<sup>56</sup> "Inferir: Deducir algo o sacarlo como conclusión de otra cosa", Idem.

<sup>57</sup> *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus v. Brazil. Preliminary objections, merits, reparations and costs. Judgment of July 15, 2020. Series C No. 407, para. 155.*

42. In sum, it may be concluded that the rights in question are not, in the words of the Convention, “recognized,”<sup>58</sup> “set forth,”<sup>59</sup> “guaranteed,”<sup>60</sup> or “protected”<sup>61</sup> and<sup>62</sup> in or by it.
43. It should also be pointed out that the judgment merely affirmed that the Court recalled that it had recognized and protected the right to work under Article 26 in several precedents,<sup>63</sup> indicating the corresponding judgments in the respective footnote.<sup>64</sup>
44. However, the right to work is not “a right protected by Article 26 of the Convention” or “a right recognized” by “Article 26”; rather, it is a right that would be derived “from the

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<sup>58</sup> Art. 1(1): “Obligation to Respect Rights. 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.”

Art. 22(4): “Freedom of Movement and Residence: The exercise of the rights recognized in paragraph 1 may also be restricted by law in designated zones for reasons of public interest.”

Art. 25(1): “Judicial Protection. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.”

Art. 29(a): “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.”

Art. 30: “Scope of Restrictions. The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.”

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.48(1)(f): “When the Commission receives a petition or communication alleging violation of any of the rights protected by this Convention, it shall proceed as follows: ... (f) The Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention.”

<sup>59</sup> 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.”

<sup>60</sup> 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.”

<sup>61</sup> 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: (f) The Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention.”

<sup>62</sup> Art.4(1): “Right to Life. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.”

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.”

<sup>63</sup> Para. 104.

<sup>64</sup> Cf. *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 340, paras. 142 and 145. Similarly: *Case of the Discharged Employees of PetroPeru et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2017. Series C No. 344, and *Case of San Miguel Sosa et al. v. Venezuela. Merits, reparations and costs.* Judgment of February 8, 2018. Series C No. 348.

economic, social, educational, scientific and cultural standards contained in the [OAS] Charter"; in other words, it is a right that has its origin in the latter and not in the Convention.

45. In summary, the Convention does not "make a direct referral to the economic, social, educational, scientific, and cultural standards contained in the OAS Charter," as the Court's case law indicates; rather, at the most and as indicated here textually, the rights in question "may be derived interpretively from Article 26" and "their existence and recognition" would be "implicit in the Charter." Therefore, to determine those rights and consider them, in the terms of the Convention, "recognized," "established," "guaranteed," or "protected" in or by it – which are the only rights the violation of which is justiciable before the Court – it would be necessary to interpret the articles of the OAS Charter that are invoked, derive from them the corresponding rights and consider them recognized by that treaty – but not expressly, rather only implicitly – an intellectual exercise that is too far removed from the direct and clear statements of the Convention with regard to the rights to which it refers to take them into account to conclude that the latter are included in the Convention.
46. By taking this position, the Court's case law undoubtedly disregards the literal meaning of Article 26 and, consequently, does not apply to it, harmoniously, the provisions of Article 31(1) of the Vienna Convention or, strictly speaking, make an interpretation of this article. It would seem that, for the Court's case law, the literal meaning of what was agreed has no relevance and, therefore, it considers this a mere formality, which allows it to attribute to that article a meaning and scope that is very far from what the States expressly agreed, as if, in reality, they had wanted to agree something else, which, evidently, is totally illogical.

### **C. Subjective method**

47. When trying to take into account the context of the terms of the Convention, it is necessary to allude to the system established in the Convention in which this is inserted; which means that:
- a) This system is composed of the duties and rights that it establishes, the organs responsible for ensuring their respect and requiring compliance with them, and provisions relating to the Convention.<sup>65</sup>
  - b) Regarding the duties, these are two, namely: the "Obligation to Respect Rights"<sup>66</sup> and the obligation to ensure "Domestic Legal Effects,"<sup>67</sup> and with

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<sup>65</sup> "Part III, "General and Transitory Provisions."

<sup>66</sup> *Supra*, footnote 58.

<sup>67</sup> *Supra*, footnote 50.

regard to the rights, they are the "Civil and Political Rights"<sup>68</sup> and the "Economic, Social and Cultural Rights."<sup>69</sup>

- c) In the case of the organs, these are Commission, the Court and the OAS General Assembly; the first is responsible for the promotion and defense of human rights,<sup>70</sup> the second, for interpreting and applying the Convention<sup>71</sup> and the third for adopting the necessary measures to ensure compliance with the pertinent rulings;<sup>72</sup>

48. The harmonious interpretation of these provisions reveals that States that have accepted the Court's contentious jurisdiction can only be required – in relation to a case that has been submitted to the Court – to duly respect the civil and political rights "recognized," established," "guaranteed," or "protected" by the Convention and also, provided it eventually becomes necessary, to adopt "in accordance with [the] constitutional processes [of the corresponding State] and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."

49. To the contrary, with regard to the rights derived "from the economic, social, educational, scientific and cultural standards contained in the [OAS] Charter," the States can only be required to adopt, "by legislation or other appropriate means," "measures both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively [...] the full realization" of the said rights, and this "subject to available resources."

50. That said, it is necessary to place on record, with regard to the application of this method of interpretation, that the OAS Charter incorporated "broader standards with respect to economic, social, and educational rights," and that the Convention determined "the structure, competence, and procedure of the organs responsible for these matters."<sup>73</sup>

51. In other words, it was the Convention itself that, in compliance with this mandate, gave civil and political rights a differentiated treatment from the economic, social and cultural rights, expressed, the former, in Chapter II of Part I of the Convention and the latter in Chapter III of the same part and instrument. Thus, the indivisibility of the civil and political rights and of the economic, social and cultural rights to which the Preamble of

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<sup>68</sup> Part I, Chapter II, arts. 3 to 25. 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 (Art. 22), right to participate in government (Art. 23), right to equal protection (Art. 24) and right to judicial protection (Art. 25).

<sup>69</sup> *Supra*, para. 32.

<sup>70</sup> *Supra*, footnote 18.

<sup>71</sup> *Supra*, footnote 10.

<sup>72</sup> Art. 65: "To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations."

<sup>73</sup> Preamble to the Convention, para. 5.

the Convention refers is to the "enjoyment" of both types of human rights and not that they should be subject to the same rules for their exercise and international monitoring.

52. It is also necessary to bear in mind that, regarding what Article 31(2) of the Vienna Convention considers as context, there is no "agreement relating to the [Convention] which was made between all the parties in connection with the conclusion of the treaty" or "any instrument which was made by one or more parties in connection with the conclusion of the" Convention and "accepted by the other parties as an instrument related to" it.
53. Nor does there exist, together with the context, as established by Article 31(3) of the Vienna Convention, "any subsequent agreement between the parties regarding the interpretation" of the Convention "or the application of its provisions" or "any subsequent practice in the application of the treaty, which establishes the agreement of the parties regarding its interpretation," except for the Protocol of San Salvador.
54. Consequently, it is not acceptable that, in the absence of what is known in legal doctrine as the "authentic interpretation," the meaning and scope of the Convention are determined by the Court unrelated, and even in contradiction, to what was agreed by its States Parties. The Convention, as every treaty, does not exist outside of what the latter expressly agreed.
55. In support of its decision, the judgment mentions Article XIV of the American Declaration of the Rights and Duties of Man, Article 29(d) of the Convention, and General Comment No. 18 on the right to work of the United Nations Committee on Economic, Social and Cultural Rights. Regarding the first, it should be pointed out that, logically, it does not establish the justiciability before the Court of the right to work because, at the date of the Declaration, the Court did not exist.
56. Regarding the second, it is necessary to insist that it refers to the interpretation of the Convention that could limit or exclude the enjoyment and exercise or the effects of human rights recognized in the Convention, which is not the case of the rights derived from the OAS Charter. Moreover, neither does it refer to the justiciability of the right to work.
57. Lastly, regarding the reference to the United Nations Committee on Economic, Social and Cultural Rights, this is a body composed of 18 independent experts. In other words, it is not formed of State representatives and, moreover, it oversees the application of the International Covenant on Economic, Social and Cultural Rights by its States parties. Consequently, it bears no relationship to the Convention and thus it cannot possibly establish the justiciability before the Court of the right to work and, evidently, does not do so. In addition, it should be added that the comments of the said Committee constitute an aspiration, which is entirely legitimate, of change or development of the relevant international law.
58. Therefore, it is irrefutable that none of the texts cited – let me repeat, none – involves or establishes that presumed violations of the right to work, or of any of the other economic, social and cultural rights derived from the economic, social, educational, scientific, and cultural standards set forth in the OAS Charter can be submitted to the Court for it to rule on them.
59. It is necessary to add to the foregoing that nor do the references in the judgment to the domestic law of the State<sup>74</sup> justify its thesis that they provide authorization to have recourse to the Court for violations of the rights mentioned above. The Court's

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<sup>74</sup> Para. 105.

competence is derived from the authority granted by the Convention and not by a provision of domestic law of the State in question even though evidently, as the said Article 29 indicates, this domestic law should be taken into account when interpreting the Convention to ensure that it does not limit the enjoyment and exercise of a right recognized by the Convention.

60. Regarding the above, it should be pointed out that the judgment itself indicates that “the legal issue raised by the presumed victim relates to the scope of the right to work and, in particular, the right to job stability, understood as a right protected by Article 26 of the American Convention.”<sup>75</sup> Thus, the matter submitted to the Court was not the judicialization before the Court of the violations of this right, but rather its scope.
61. In addition, it should be noted that in other judgments handed down by the Court, a similar result to that sought in the instant case was achieved merely by applying the provisions of the Convention concerning rights that it does recognize and, logically, within their limits, without needing to resort to Article 26. Consequently, there appears to be no reason for the insistence in indicating the said article as grounds for the Court being able to examine violations of the human rights derived from the OAS Charter, when it is evident that this is not only superfluous but, in addition, could result in the violation of other rights – also considered to be derived from the economic, social, educational, scientific and cultural rights contained in the OAS Charter – being submitted to the Court’s consideration and decision.
62. Therefore, from the foregoing it can be concluded that the application of the subjective method for the interpretation of treaties leads to the result indicated above: namely, and contrary to what the judgment indicates, that at no time were the economic, social and cultural rights derived from the standards of the OAS Charter, including the right to work, incorporated into the protection system established in the Convention.

#### **D. Functional or teleological method**

63. When trying to define the object and purpose of the article of the Convention in question, it can be affirmed that:
  - a) The purpose of the States when signing the Convention was “to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man”;<sup>76</sup>
  - b) To this end, “the Third Special Inter-American Conference (Buenos Aires, 1967) approved the incorporation into the Charter of the Organization [of American States] itself of broader standards with respect to economic, social, and educational rights and resolved that an inter-American convention on human rights should determine the structure, competence, and procedure of the organs responsible for these matters”;
  - c) Accordingly, it is clear that what was decided at the said Conference with regard to the economic, social, and educational rights was fulfilled with the Protocol of Buenos Aires and with regard to the structure, competence, and procedure of the organs responsible for these matters, with the Convention; and
  - d) Therefore, it was to comply with that mandate that Article 26 was included in the Convention in a separate chapter from the one concerning the political

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<sup>75</sup> Para. 104.

<sup>76</sup> Preamble, para. 1.

and civil rights and, also, establishing a special obligation for the States Parties to the Convention, which does not exist with regard to the latter rights; namely, that of adopting "measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, [...] the full realization of the rights" to which it referred and that, "by legislation or other appropriate means and subject to available resources."

64. In other words, the object and purpose of Article 26 is that the measures it indicates should be adopted to achieve the realization of the rights it indicates and not that they are enforceable immediately or, especially, that they are justiciable before the Court. In this regard, it should be recalled that the title of the article is "Progressive Development" and that of Chapter III – of which it is the only article – "Economic, Social and Cultural Rights," from which it can be understood that what this article establishes – its object and purpose – is that measures should be adopted to achieve, progressively, the realization of the rights to which it refers, and not that they have already been realized.
65. Accepting that, in order to interpret a specific provision of the Convention, it would be sufficient to evoke its general object and purpose as indicated above, which is very vague and imprecise, would affect the legal security and certainty that should characterize all the Court's rulings, because it would leave to the Court with a wide margin of discretion to determine the rights that derive from the said standards of the OAS Charter, so that the States Parties to the Convention would not know which these rights were prior to the corresponding proceedings.
66. This is why I am unable to share the opinion set forth in the Court's case law that, based on the provisions of Articles 1 and 2 of the Convention, Article 26 differentiates between "aspects that can be enforced immediately" and "aspects that have a progressive nature,"<sup>77</sup> because this is far removed from what is stipulated in the said articles which establish that the rights to which they refer are only those "recognized," "established," "guaranteed," or "protected" in or by the Convention, which is not the case of those alluded to in Article 26. In addition, this distinction made in the judgment would, in itself, be confusing and even contradictory because, on the one hand, it would not be possible to know with certainty and prior to the proceedings, which aspects, or more exactly, which of the rights that Article 26 alludes to would be enforceable immediately and which would require progress to be made towards this end and, on the other hand, the former would not require the adoption of measures to be enforceable, while the others could not be enforced until measures had been adopted.
67. In addition, a process such as the one mentioned would lead the Court to assume the international legislative function that, in the case of the Convention, only corresponds to its States Parties.<sup>78</sup> And, this is because, in the absence of the specification of the rights that are derived from the standards of the OAS Charter, the Court could establish rights that were not expressly included in the said standards and determine that they are justiciable before it.
68. Ultimately, dissenting from the judgment, it can be asserted that the application of the functional or teleological method for the interpretation of treaties to Article 26 of the Convention leads to the same conclusion that was reached by using the other means for the interpretation of treaties; namely, that the purpose of the said article is not to

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<sup>77</sup> *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of July 15, 2020. Series C No. 407, Para. 172.

<sup>78</sup> *Supra*, footnote 25.

establish any human right, but merely to enshrine the duty of its States Parties to adopt measures to realize the economic, social and cultural rights that are derived from the OAS Charter.

### **E. Supplementary means**

69. With regard to the supplementary means for the interpretation of treaties,<sup>79</sup> it should be underlined that, during the 1969 Inter-American Specialized Conference on Human Rights at which the definitive text of the Convention was adopted, two articles were proposed on this matter. One was Article 26 as it appears in the Convention. This article was adopted.<sup>80</sup>

70. The other proposed article, number 27, indicated:

“Monitoring Compliance with the Obligations. The States Parties shall transmit to the Inter-American Commission of Human Rights a copy of each of the reports and studies that they submit annually to the Executive Committees of the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture, in their respective fields, so that the Commission can verify their compliance with the obligations determined previously, which are the essential basis for the exercise of the other rights enshrined in this Convention.”

71. It should be noted that the said draft article 27, which was not adopted,<sup>81</sup> referred to “reports and studies” for the Commission to verify whether the States were complying with the said obligations and, therefore, distinguished between, on the one hand, “the obligations determined previously,” obviously in Article 26 – in other words, those relating to 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” and, on the other hand, “the other rights enshrined in this Convention”; that is, the “civil and political rights.”

72. Thus, the adoption of Article 26 was not intended to incorporate the economic, social and cultural rights into the protection system established in the Convention. The only intention was that compliance with the obligations concerning those rights should be submitted to the examination of the OAS organs, considering that this compliance was the basis for the exercise of the civil and political rights. Moreover, as indicated, this proposal was not adopted. This confirms that the States Parties to the Convention had no intention whatsoever of including the economic, social and cultural rights in the protection system that the Convention does establish for the civil and political rights.<sup>82</sup>

## **IV. THE OAS CHARTER**

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<sup>79</sup> Art. 32 of the Vienna Convention: “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.”

<sup>80</sup> *Actas de la Conferencia Especializada Interamericana sobre Derechos Humanos*, November 7 to 22, 1969, OEA/Ser.K/XVI/1.2, p. 318.

<sup>81</sup> *Actas de la Conferencia Especializada Interamericana sobre Derechos Humanos*, November 7 to 22, 1969, OEA/Ser.K/XVI/1.2, p. 448.

<sup>82</sup> Concurring opinion of Judge Alberto Pérez Pérez, *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2015.

73. Consequently, since Article 26 refers to "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 order to understand the scope of the article it is essential to refer to the content of the said standards and, in particular, those cited in the judgment.

74. Regarding the right to work, the judgment cites Articles 45(b) and (c),<sup>83</sup> 46<sup>84</sup> and 34(g)<sup>85</sup> of the OAS Charter.

75. A single reading of the said standards is sufficient to understand, clearly and without the slightest doubt, that they establish obligations of action or conduct, expressed by "every effort" that the States should make to achieve the application of the "principles" and "mechanisms" indicated (which include the right to work), or to facilitate the process of Latin American regional integration, the harmonization of the social legislation and the protection of workers' rights, or to achieve the "basic objectives" of "fair wages, employment opportunities, and acceptable working conditions for all."

76. It should not be forgotten that all the articles cited are to be found in Chapter VII of the Charter, entitled "Integral Development." In this regard, it should be borne in mind that this Chapter begins by establishing that:

"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."

77. In other words, it establishes the general obligation of the States of the Americas to make a united effort to ensure social justice and integral development. It does not establish that they respect or ensure human rights. And, it is that premise that underlines the whole of the said Chapter VII.

78. Thus, the said standards do not establish obligations of result; that is, they do not establish that the human rights derived from the said standards must be respected, but rather that "every effort" must be made to achieve the "principles," "mechanisms," and "goals" that it indicates. In other words, the standards in question, although they allude to the right to work, to the rights of workers, and to working conditions, do so

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<sup>83</sup> 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: [...] (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; [...]"

<sup>84</sup> 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."

<sup>85</sup> Art. 34(g) of the OAS Charter: "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."

insofar as this is the basis, origin, reason or goal<sup>86</sup> for or towards which every effort must be made to achieve them or for them to become a reality.

79. With that in mind, the range of possibilities from which the interpreter could “derive” human rights not expressly established in any international norm would be enormous, not to say unlimited. It is sufficient to read what the articles of the OAS Charter indicated in the judgment mention as “basic goals”<sup>87</sup> or as “*principles and mechanisms*”<sup>88</sup> or as the “*goal*,”<sup>89</sup> to realize, without any room for doubt, that the purpose of the said articles is not to establish any right and, especially, the justiciability before the Court of its violation, but simply to set forth aspirations that should be achieved by compliance with obligations of conduct, expressed by the deployment of “every effort” that the OAS Member States should make to this end.
80. If the Court continues with this course of action, and takes it to its extreme, all the States Parties to the Convention that have accepted its jurisdiction could eventually be brought before it because they had not fully achieved one of the “principles,” “goals,” “mechanisms” or “objectives” contemplated in the OAS Charter from which the judgment derives rights, which would clearly appear to be very far from what the States Parties intended when signing the Convention or, at least, from the logic implicit in it, especially, due to the way in which the said Chapter VII was drafted.

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<sup>86</sup> Diccionario de la Lengua Española, Real Academia Española, 2020.

<sup>87</sup> 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.”

<sup>88</sup> 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.”

<sup>89</sup> *Supra*, footnote 86.

81. This is particularly evident, for example, as regards the “[a]ccelerated and diversified industrialization, especially of capital and intermediate goods,” the “[s]tability of domestic price levels, compatible with sustained economic development and the attainment of social justice,” the “[p]romotion of private initiative and investment in harmony with action in the public sector,” the “[e]xpansion and diversification of exports, “[t]he 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,” and the facilitation of “the process of Latin American regional integration.” It is, at the very least, questionable that, on the basis of these assertions, the Court has wanted to derive human rights relating to these issues which, anyway, are part of the State’s internal, domestic and exclusive jurisdiction.<sup>90</sup>

82. Therefore, based on all the foregoing, it is evident that, contrary to what is indicated in the instant case, “the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires” to which Article 26 refers do not signify the competence of the Court to hear and decide possible violations of the rights “derived” from them.

## V. THE PROTOCOL OF SAN SALVADOR

83. Furthermore, it is necessary to refer to the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), which is also cited in the Court’s case law to support its interpretation of Article 26;<sup>91</sup> however, to the contrary, the undersigned considers that its signature and validity support what is maintained in this opinion.

84. This instrument<sup>92</sup> was adopted as a result of the provisions of Articles 31, 76 and 77<sup>93</sup> of the Convention, and this is indicated in its Preamble which indicates that:

“Bearing in mind that, although fundamental economic, social and cultural rights have been recognized in earlier international instruments of both world and regional scope, it is essential that those rights be reaffirmed, developed, perfected and protected in order to consolidate in America, on the basis of full respect for the rights of the individual, the democratic representative form of government as well as the right of its peoples to development, self-determination, and the free disposal of their wealth and natural resources; and [c]onsidering 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.”

85. The above reveals that this is an agreement additional to the Convention, whose specific purpose is to reaffirm, develop, perfect and protect the economic, social and cultural rights and to gradually incorporated them into the Convention’s protection system and achieve their full realization.

86. In other words, the Protocol was adopted because, at the date of its signature, the economic, social and cultural rights had not been reaffirmed, developed, perfected and

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<sup>90</sup> *Supra*, footnote 23.

<sup>91</sup> *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of July 15, 2020. Series C No. 407, para. 161.

<sup>92</sup> Hereinafter, the Protocol.

<sup>93</sup> *Supra*, footnote 25.

protected or included in the protection system of the Convention, which means that they had not been fully realized based on Article 26. Otherwise, it would be difficult to understand either the purpose or the utility of the Protocol.

87. From this perspective, the Protocol recognizes,<sup>94</sup> establishes,<sup>95</sup> sets forth<sup>96</sup> and<sup>97</sup> the following rights: 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 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). It should be recalled that, to the contrary, Article 26 does not establish or set forth any right, it merely refers to those derived from the OAS Charter.
88. And regarding those rights recognized by the Protocol, the States Parties undertake to adopt, gradually, measures to ensure their full effectiveness (Arts. 6(2), 10(2), 11(2) and 12(2)). This coincides with the provisions of Article 26; that is, both the Protocol and the said article relate to rights that have not been realized or not fully.
89. The Protocol also includes a provision, Article 19, concerning the means of protection of the above-mentioned rights. Those means consist in the reports that the States Parties must present to the OAS General Assembly "on the progressive measures they have taken to ensure due respect for the rights set forth in this Protocol," in the treatment accorded to those reports by the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture of the OAS, and in the opinion that the Commission may eventually provide on the matter.<sup>98</sup> It should be

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<sup>94</sup> Art. 1: "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."

Art. 4: "*Inadmissibility of Restrictions*. A right which is recognized or in effect in a State by virtue of its internal legislation or international conventions may not be restricted or curtailed on the pretext that this Protocol does not recognize the right or recognizes it to a lesser degree.

<sup>95</sup> Art. 5: "Scope of Restrictions and Limitations. The State Parties may establish restrictions and limitations on the enjoyment and exercise of the rights established herein by means of laws promulgated for the purpose of preserving the general welfare in a democratic society only to the extent that they are not incompatible with the purpose and reason underlying those rights.

Art. 19(6): "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.

<sup>96</sup> Art. 2: "Obligation to Enact Domestic Legislation. If the exercise of the rights set forth in this Protocol is not already guaranteed by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Protocol, such legislative or other measures as may be necessary for making those rights a reality."

Art. 3: "Obligation of Non-discrimination. The State Parties to this Protocol undertake to guarantee the exercise of the rights set forth herein without discrimination of any kind for reasons related to race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition."

<sup>97</sup> Art. 19: "Means of Protection. 1. Pursuant to the provisions of this article and the corresponding rules to be formulated for this purpose by the General Assembly of the Organization of American States, the States Parties to this Protocol undertake to submit periodic reports on the progressive measures they have taken to ensure due respect for the rights set forth in this Protocol."

<sup>98</sup> Art. 19: "Means of Protection. 1. Pursuant to the provisions of this article and the corresponding rules to be formulated for this purpose by the General Assembly of the Organization of American States, the States Parties to this Protocol undertake to submit periodic reports on the progressive measures they have taken to ensure due respect for the rights set forth in this Protocol.

noted that this provision is similar to draft article 27 of the Convention that was rejected by the corresponding Conference.

90. All the foregoing means, first, that for the States Parties to the Protocol, the realization of the economic, social and cultural rights is of a progressive nature; *a contrario sensu*, they are not in force or, at least, not fully in force.
91. Second, consequently, this signifies for the said States that the provisions of Article 26 mean that the said rights are not included among those to which the protection system established in the Convention applies or that are in force; because, to the contrary, the adoption of the Protocol would have been unnecessary.
92. It should also be borne in mind that the OAS created the Working Group to Examine the Progress Reports of the States Parties to the Protocol<sup>99</sup> as a mechanism to monitor compliance with the undertakings made in the said instrument. This undoubtedly confirms that the intention of the said State was to create a non-jurisdictional mechanism for the international supervision of compliance with the Protocol.
93. The only exception to this system is established in Article 19(6), which states that:  
"Any instance in which the rights established in paragraph a) of Article 8<sup>100</sup> and in Article 13<sup>101</sup> are violated by action directly attributable to a State Party to this

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2. All reports shall be submitted to the Secretary General of the OAS, who shall transmit them to the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture so that they may examine them in accordance with the provisions of this article. The Secretary General shall send a copy of such reports to the Inter-American Commission on Human Rights.

3. The Secretary General of the Organization of American States shall also transmit to the specialized organizations of the inter-American system of which the States Parties to the present Protocol are members, copies or pertinent portions of the reports submitted, insofar as they relate to matters within the purview of those organizations, as established by their constituent instruments.

4. The specialized organizations of the inter-American system may submit reports to the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture relative to compliance with the provisions of the present Protocol in their fields of activity.

5. The annual reports submitted to the General Assembly by the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture shall contain a summary of the information received from the States Parties to the present Protocol and the specialized organizations concerning the progressive measures adopted in order to ensure respect for the rights acknowledged in the Protocol itself and the general recommendations they consider to be appropriate in this respect.

6. 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.

7. Without prejudice to the provisions of the preceding paragraph, the Inter-American Commission on Human Rights may formulate such observations and recommendations as it deems pertinent concerning the status of the economic, social and cultural rights established in the present Protocol in all or some of the States Parties, which it may include in its Annual Report to the General Assembly or in a special report, whichever it considers more appropriate.

8. The Councils and the Inter-American Commission on Human Rights, in discharging the functions conferred upon them in this article, shall take into account the progressive nature of the observance of the rights subject to protection by this Protocol.

<sup>99</sup> AG/RES. 2262 (XXXVII-O/07) of June 5, 2007.

<sup>100</sup> Art. 8: "Trade Union Rights. 1. The States Parties shall ensure: (a) The right of workers to organize trade 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 trade unions to establish national federations or confederations, or to affiliate with those that already exist, as well as to form international trade union organizations and to affiliate with that of their choice. The States Parties shall also permit trade unions, federations and confederations to function freely."

<sup>101</sup> Art. 13: "Right to Education. 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

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.”

94. This means that only in the event of a violation of the rights relating to trade unions and to education are the pertinent cases justiciable before the Court. To the contrary, with regard to the violation of the other rights, which include the other aspects of the right to work, only the system of reports established in Article 19 of the Protocol is in order.
95. Consequently, the Protocol is an amendment to the Convention. This is revealed by its very text because it is considered a protocol, a mechanism expressly established in the Convention.<sup>102</sup> Also, its Preamble places on record that it is adopted considering that the Convention establishes that possibility.<sup>103</sup> Thus, it is an “additional protocol” to the Convention signed “for the purpose of gradually incorporating other rights and freedoms into the protective system thereof,” which, therefore, did not include them.
96. Consequently, this instrument, by establishing in its Article 19 the competence of the Court to examine possible violations of the rights concerning trade unions and education is not limiting the Court; rather, to the contrary, it is expanding its competence. If the Protocol did not exist, the Court could not even examine the possible violation of those rights.
97. All the foregoing is, consequently, evident proof that, for the States Parties to the Protocol, the provisions of Article 26 of the Convention cannot be interpreted to mean that it establishes or recognizes economic, social and cultural rights or that it authorizes cases in which they are violated to be submitted to the consideration of the Court. Let me repeat that, if it had established this, obviously there would have been no need for the Protocol. It was for that reason that it was necessary to adopt it. Its signature cannot be explained in any other way.
98. Based on the above, it can be concluded that the Protocol is, consequently, the clear demonstration that the provisions of Article 26 do not establish any human right.

## **VI. CONCLUSIONS**

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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.”

<sup>102</sup> *Supra*, footnote 25.

<sup>103</sup> *Supra*, para. 84.

99. Therefore, it is based on all the above, including the comments in the Preliminary observations,<sup>104</sup> that I dissent from the judgment; in particular, from the text of its second operative paragraph.<sup>105</sup>
100. In this regard, it is necessary to point out that, by rejecting the preliminary objection of lack of jurisdiction to examine violations of human rights invoking the application of Article 26, the judgment leaves no space for this dissenting opinion to rule on its other operative paragraphs. In other words, by maintaining in this opinion that the Court lacks the said jurisdiction, logically, I am asserting that it was not in order for it to rule on the merits of the case, as it has. The only exception to this is the contents of the eleventh operative paragraph, which I have voted in favor of simply because it repeats what is established in the Court's Rules of Procedure,<sup>106</sup> and therefore, even if it had not been included, it would be applied.
101. In addition, it would appear desirable to insist, once again, that this opinion does not concern the existence of the right to work in the sphere of international law. This falls outside its purpose. It merely maintains that the possible violation of this right cannot be submitted to the consideration and decision of the Court.
102. 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. In this regard, I consider that, if the jurisdictional competence is established, this should be done by those responsible for the international legislative function. It does not seem desirable that the organ responsible for the inter-American judicial function should assume that other function, especially when the States to which the latter corresponds are democratic and, in this regard, governed by the Inter-American Democratic Charter,<sup>107</sup> which establishes the separation of powers and civic participation in public affairs, and which, without doubt, the Court should also respect within its own area of activity.
103. It is also essential to repeat that, if the Court persists in the direction adopted by this judgment, the inter-American system of human rights as a whole could be seriously constrained. And this is because very probably, on the one hand, it would not provide an incentive, but rather the contrary, for the adherence to the Convention of new States, or the acceptance of the Court's contentious jurisdiction by those who have not done so and, on the other hand, the tendency of the States Parties to the Convention not to comply fully and promptly with its rulings could be renewed or even increased. In sum,

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<sup>104</sup> *Supra*, II.

<sup>105</sup> *Supra*, footnote 3.

<sup>106</sup> Art. 69. "Monitoring compliance with judgments and other decisions of the Court.

1. The procedure for monitoring compliance with the judgments and other decisions of the Court shall be carried out through the submission of reports by the State and observations to those reports by the victims or their legal representatives. The Commission shall present observations to the State's reports and to the observations of the victims or their representatives.

2. The Court may require from other sources of information relevant data regarding the case in order to evaluate compliance therewith. To that end, the Court may also request the expert opinions or reports that it considers appropriate.

3. When it deems it appropriate, the Court may call the State and the victims' representatives to a hearing in order to monitor compliance with its decisions; the Court shall hear the opinion of the Commission at that hearing.

4. Once the Court has obtained all relevant information, it shall determine the state of compliance with its decisions and issue the relevant orders.

5. These rules also apply to cases that have not been submitted by the Commission.

<sup>107</sup> Adopted at the twenty-eighth special session of the OAS General Assembly held in Lima, Peru, on September 11, 2001.

it would weaken the principles of legal security and certainty, which, in the case of human rights, also benefit the victims of their violation by ensuring compliance with the Court's judgments because they are solidly based on the undertakings sovereignly made by the States.

104. Regarding the last point, it should be recalled that, in practice and over and above any theoretical consideration, the Court's function is, in particular, to deliver judgments that re-establish as soon as possible respect for the human rights violated in any specific case. It is not so sure that this is achieved with regard to violations of rights that were not considered justiciable before the Court in the Convention, or when, rather than trying to decide the case submitted to it, it would appear that the main concern has been to establish norms, rules or standards of general application and not to specifically deliver judgment in a case and that, based on this and on several judgments delivered in the same sense or in the same direction, case law is consequently developed composed of several similar precedents.

Eduardo Vio Grossi  
Judge

Pablo Saavedra Alessandri  
Secretary