

**CONCURRING OPINION OF
JUDGE RICARDO C. PÉREZ MANRIQUE**

CASE OF CASA NINA V. PERU

**JUDGMENT OF NOVEMBER 24, 2020
(Preliminary objections, merits, reparations and costs)**

I. Introduction

1. The judgment declares the violation of Articles 8(1), 23(1)(c) and 26 of the American Convention on Human Rights (hereinafter “the Convention”), among others, owing to the violation of judicial guarantees, the right to remain in the post under general conditions of equality and the right to work. The case relates to a series of violations that took place in the context of the procedure that culminated with the removal of Julio Casa Nina from the post of Provisional Deputy Prosecutor of the Second Criminal Prosecution Office of the province of Huamanga, Ayacucho, Peru.
2. In its judgment, the Inter-American Court of Human Rights (hereinafter “the IACtHR” or “the Court”) rejected the preliminary objections relating to the fourth instance and to the Court’s lack of jurisdiction to examine arguments concerning the right to work, and concluded that the Republic of Peru was responsible for the violation of the right to judicial guarantees, the right to remain in the post under general conditions of equality and the right to work, in relation to the obligations to respect and ensure those rights.
3. In this opinion, I concur with the decisions taken in the judgment and submit this opinion in order to: (i) analyze the way in which I consider that the IACtHR should address cases that involve violations of the economic, social, cultural and environmental rights, based on the universality, indivisibility, interdependence and interrelationship of all human rights as grounds for their justiciability, and (ii) examine the protection of participation in public service, its relationship with the human right to work, and the independence of prosecutors under the democratic rule of law.

II. The issue of the justiciability of the economic, social, cultural and environmental rights. Jurisdiction of the IACtHR

a) Objection of lack of jurisdiction *ratione materiae*

4. The State indicated that the IACtHR is unable to assume jurisdiction with regard to the presumed violation of a right or freedom that is not included in the protection system of the Convention and the Protocol of San Salvador. Therefore, it submitted that the Court was not competent to rule on the violation of the right to work under Article 26 of the Convention because the economic, social, cultural and environmental rights cannot be submitted to the system of individual petitions (paragraph 22 of the judgment). For its part, the Inter-American Commission on Human Rights (hereinafter “the Commission”) and the representative asked the Court to reject the objection because the rights should be understood integrally and are enforceable in all cases (paragraphs 24 and 25 of the judgment).
5. Ultimately, the Court rejected the preliminary objection and reaffirmed “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" (paragraph 26 of the judgment).

6. It was in this sense that I voted to reject the objection raised, considering that the arguments expressed by the IACtHR in the case of *Acevedo Buendía et al.* ("*Discharged and Retired Employees of the Comptroller's Office*") v. Peru¹ could be transferred to the position held in this case. In particular, I share the premises set forth in that case as regards: (1) the Court "has the power inherent in its attributes to determine the scope of its own jurisdiction (*compétence de la compétence*)"; (2) when a State accepts the optional clause on the compulsory jurisdiction established in Article 62(1) of the Convention, this results in the State's acceptance of the Court's authority to decide any dispute concerning its jurisdiction; (3) the Court exercises full jurisdiction over all the articles and provisions of the Convention, therefore, this encompasses its Article 26; (4) if a State is a party to the American Convention and has accepted the Court's contentious jurisdiction, the Court is competent to decide whether the said State has incurred in a violation or failed to comply with any of the rights recognized in the Convention, even as regards its Article 26. Therefore, I agree with the decisions made, in the understanding that the analysis of this dispute – that is, the determination of whether the State is responsible for non-compliance with Article 26 of the Convention – corresponded to be addressed in the chapter on merits of this judgment.

b) The justiciability of the economic, social, cultural and environmental rights: history, the debate within the Court, and the different positions. My position.

7. The justiciability of the economic, social, cultural and environmental rights has been a subject of discussion both in legal doctrine and within the IACtHR, and three positions exist in this regard, as I mentioned, *inter alia*, in my concurring opinion to the judgment of November 21, 2019, in the case of *the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru*.² The first position proposes that the analysis of individual violations of the economic, social, cultural and environmental rights must be made exclusively in relation to the rights explicitly recognized by Articles 3 to 25 of the Convention and based on what is expressly permitted by the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (hereinafter "the Protocol of San Salvador") in its Article 19(6).³ While the second viewpoint asserts that the Court has competence to examine autonomous violations of the economic, social, cultural and

¹ 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 and 17.

² Cf. *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.

³ Cf. *Case of the "Juvenile Re-education Institute" v. Paraguay. Preliminary objections, merits, reparations and costs.* Judgment of September 2, 2004. Series C No. 112, or the *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of June 17, 2005. Series C No. 125, to mention just two examples, as well as the *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 1, 2015. Series C No. 298.

- environmental rights based on Article 26 of the Convention, understanding that they would be justiciable individually.⁴
8. As I have mentioned in previous concurring opinions and reiterating the arguments presented in them,⁵ I adhere to a different position, which I have called “the thesis of indivisibility-simultaneity” which is based on the universality, indivisibility, interdependence and interrelationship of the human rights, to maintain that the Court has competence to examine violations of the economic, social, cultural and environmental rights. And this is due to the conviction that human rights are interdependent and indivisible so that the civil and political rights are interwoven with the economic, social, cultural and environmental rights. This interdependence and indivisibility allow the individual to be observed integrally as the titleholder of all rights. If he/she is not seen in this way, the rights and human dignity would be artificially fragmented.
 9. A similar perspective is asserted in the Preamble to the Protocol of San Salvador: “Considering the close relationship that exists between economic, social and cultural rights, and civil and political rights, in that the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human person, for which reason both require permanent protection and promotion if they are to be fully realized, and the violation of some rights in favor of the realization of others can never be justified.”
 10. In this perspective, Article 26 of the Convention functions as a framework article, in the understanding that it makes a general reference to the economic, social, cultural and environmental rights, and refers us to the OAS Charter for their description and determination. The Protocol of San Salvador individualizes and provides content to the economic, social, cultural and environmental rights, explaining that cases related to trade union rights and education are justiciable before the Court by means of individual petitions (Art. 19(6)). The Protocol mentions that it is essential that those rights be reaffirmed, developed, perfected and protected (see Preamble). Finally, a series of instruments of the inter-American *corpus juris* also refer to the ESCER.
 11. I have already underlined the importance of Article 4 of the Protocol of San Salvador insofar as it does not admit restrictions of the ESCER. Article 4 of the Protocol of San

⁴ 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 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, and *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.

⁵ Cf. Concurring opinion to the judgment of November 21, 2019, in the *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru.* and to the judgment of November 22, 2019, in the *Case of Hernández v. Argentina*; *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, and *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil*.

Salvador indicates that: "[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." In application of this provision, the Monitoring Mechanism of the Working Group on the Protocol of San Salvador has been established responsible for defining the indicators that should be included in the reports of the States Parties and for monitoring compliance with the obligations under the Protocol.

12. In my opinion, based on the foregoing and its precedents, it is necessary to conclude that it is not possible to restrict access to inter-American justice in the case of alleged violations of economic, social, cultural and environmental rights. That position would even be contrary to the principle of the *pro persona* interpretation of human rights established in Article 29 of the Convention understanding this as a hermeneutic tool from the systemic perspective of the inter-American system for the protection of human rights.
13. I have also noted that the Protocol of San Salvador, while developing the content of the economic, social and cultural rights, expressly prescribes the use of the system of individual petition in Article 19(6) for the rights to work and education. Consequently, in those cases, it is not necessary to make any effort to argue this, because the Court's competence results from the text of the treaty.
14. In addition, it should be borne in mind that Part II of the Convention indicates in its Article 44 that: "Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party." Meanwhile, Article 48 indicates that: "[w]hen the Commission receives a petition or communication alleging violation of any of the rights protected by this Convention, it shall proceed as follows" Similarly, Article 62(3) of the Convention indicates that: "[t]he jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it ..." (underlining added).
15. The analysis of the preceding articles reveals that: (1) the civil, political, economic, social, cultural and environmental rights may be submitted to the consideration of both organs of protection; (2) the Commission and the IACtHR can have competence over the cases lodged in this regard; (3) no distinction is made between civil, political, economic, social, cultural and environmental rights as regards their protection, and (4) to claim that the inter-American organs of protection can only examine the civil and political rights would be contrary to the notions of universality, indivisibility, interdependence and interrelationship of the human rights, and entail a fragmentation of the international protection of the individual that would be directly detrimental to human dignity, which is the basis and purpose of human rights
16. In the case of the removal of Sr. Casa Nina, it is argued that there was a failure to provide an objective resolutive condition prior to his appointment to office establishing the termination of his appointment as a provisional prosecutor. Thus, the Court understood " that Mr. Casa Nina occupied the post without the security of tenure,⁶ that is without an essential safeguard to ensure his independence"

⁶ The witness Rita Arleny Figueroa Vásquez stated that "one of the rights of prosecutors is permanence in the service until they are seventy (70) years of age, pursuant to the Peruvian Constitution; however, in the case of the non-career provisional prosecutor this benefit cannot be required, because their permanence depends on the

(paragraph 86). It should be indicated that over and above the provisional nature of the post, the State had the duty to ensure objective criteria for the termination of the provisional appointment in order to guarantee independence in the exercise of the adversarial function.

17. Thus, by a harmonious interpretation of the inter-American instruments considering the interdependence and indivisibility of the civil and political rights on the one hand, and the economic, social, cultural and environmental rights on the other, the Court is able to rule on the violations of one or the other. Therefore, the same fact based on act or omission may simultaneously signify the violation of a civil and political right and of an economic, social, cultural or environmental right.
18. As can be seen from the third operative paragraph the judgment: "The State is responsible for the violation of judicial guarantees, the right to remain in the post under general conditions of equality and the right to work recognized in Articles 8(1), 23(1)(c) and 26 of the American Convention on Human Rights, in relation to Articles 1(1) and 2 of this instrument."
19. I agree with this paragraph inasmuch as it reveals that there was a joint and simultaneous violation of the rights: to special protection for access to and permanence in public office and independence of the prosecutor established in Article 23(1) of the Convention, and the right to work, because the independence guaranteed by job stability, pursuant to Article 26 of the Convention, was not respected or ensured. Moreover, this right is also recognized by Article XIV of the American Declaration which establishes that: "Every person who works has the right to receive such remuneration as will, in proportion to his capacity and skill, assure him a standard of living suitable for himself and for his family." In my opinion, in the instant case, this joint and indivisible violation of rights provides the grounds for the competence of the Inter-American Court of Human Rights.
20. This is so because I consider that the violated civil and political rights are indivisible from the right to work, because the violations of the right recognized in Article 23(1) of the American Convention are directly related and constitute facts that are inseparable from the violation of the right to work. On this basis, I will now examine the importance of the protection of participation in public service, its relationship to the human right to work and the independence of prosecutors under the democratic rule of law.

III. Protection of participation in public service, its relationship to the human right to work and the independence of prosecutors under the democratic rule of law

21. As the judgment indicates, the protection of participation in public service in relation to the human right to work and the protection of the independence of prosecutors is essential under the democratic rule of law. Consequently, in order to examine the arguments of the Court, I will present my thoughts on some concepts related to this issue linking the protection of the universal system of human rights to the regional system.

decision of the service, that is, the Prosecutor General, because due to 'needs for the service' he/she may terminate his 'designation.'" Cf. Statement made by Rita Arleny Figueroa Vásquez (evidence file, volume VI, affidavits, folio 1243).

22. When addressing this matter, the Court started by clarifying the issue of recognition of the specific guarantees for judges and prosecutors. To this end, it based itself on three premises: (i) the State's duty to ensure the provision of judicial services; (ii) the fundamental need that those who intervene in the provision of such services are tenured officials, with pre-established causes for removal or dismissal, and (iii) in exceptional cases in which the designation of provisional officials is required, the appointment, permanence and termination of the exercise of the function is subject to predetermined conditions" (paragraph 69).
23. Therefore, in this opinion, I underscore that the Court has indicated the need that, with regard to violations of human rights and, in general, in criminal cases, "States must ensure an independent and objective investigation,"⁷ and "has emphasized that the authorities responsible for the investigation must enjoy *de jure* and *de facto* independence, which requires not only hierarchical or institutional independence, but also real independence"" (paragraph 69).⁸ Added to which, "in order to safeguard the independence and objectivity of prosecutors in the exercise of their functions, they are also protected by the following guarantees: (i) guarantees of appropriate appointment; (ii) to irremovability from office, and (iii) to be protected against external pressures" (paragraph 79).
24. It is bearing this in mind that I stress the special importance of safeguarding the independence of prosecutors in order to preserve the rule of law. This has already been developed by the Court in the case of *Martínez Esquivia v. Colombia*, in which it concluded that the guarantee of stability and irremovability of judges, addressed at safeguarding their independence was applicable to prosecutors owing to the nature of their functions. This assertion is especially significant in the inter-American environment where, in recent decades, almost all the countries have put in practice adversarial systems of criminal investigation. The impartiality of the Public Prosecution Service is essential to avoid arbitrariness and to ensure fairness in the exercise of criminal investigations.
25. Those who work in public service are also encompassed by the right to work. I emphasize the provisions of the International Labour Organization's Convention 151

⁷ Cf. *inter alia*, *Case of Bueno Alves v. Argentina. Merits, reparations and costs*. Judgment of May 11, 2007. Series C No. 164, para. 108, and *Case of Isaza Uribe et al. v. Colombia. Merits, reparations and costs*. Judgment of November 20, 2018. Series C No. 363, para. 150. These requirements, among others, are referred to in the following instruments: the Convention against Torture and Other Cruel, inhuman or Degrading Treatment or Punishment, 1984, Article 12; Inter-American Convention to Prevent and Punish Torture, 1985, Article 8; United Nations Convention against Corruption, 2003, Article 11(2), and International Convention for the Protection of All Persons from Enforced Disappearance, 2006, Article 12. See also: Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary or Summary Executions, Recommended by the United Nations Economic and Social Council in its Resolution 1989/65, of May 24, 1989, Principle 9; Principles on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted by the United Nations General Assembly in the annex to its Resolution 55/89 of December 4, 2000, Principle 2, and Committee against Torture, General Comment No. 2, *Application of Article 2 by the States Parties*, CAT/C/GC/2, January 24, 2008, para. 26.

⁸ Cf. *Case of Baldeón García v. Peru. Merits, reparations and costs*. Judgment of April 6, 2006. Series C No. 147, para. 95; *Case of Montero Aranguren et al. (Retén de Catia) v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of July 5, 2006. Series C No. 150, para. 81, and *Case of Zambrano Vélez et al. v. Ecuador. Merits, reparations and costs*. Judgment of July 4, 2007. Series C No. 166, para. 122.

on Labour Relations (Public Service), 1978.⁹ Article 9 of the Convention recognizes the civil and political rights of public employees and indicates that: "Public employees shall have, as other workers, the civil and political rights which are essential for the normal exercise of freedom of association, subject only to the obligations arising from their status and the nature of their functions." Also, Article 8 of this Convention establishes that the settlement of disputes, "shall be sought, as may be appropriate to national conditions, through negotiation between the parties or through independent and impartial machinery, such as mediation, conciliation and arbitration, established in such a manner as to ensure the confidence of the parties involved."

26. With regard to the instant case, Mr. Casa Nina, as a prosecutor which is a public official, also receives a protection of labor law in the exercise of his functions, and the analysis made in the judgment is appropriate. Taking into account the provisions of Convention No. 151, it is important to emphasize the protection of the civil and political rights of public officials and the recommendation as regards the settlement of disputes concerning working conditions or the permanence in office using systems of collective bargaining or others such as mediation. Owing to his dual condition as a public official and a prosecutor, the victim enjoyed the essential legal protection to be able to exercise his functions with independence, a guarantee that is intrinsically related to the democratic rule of law.
27. The foregoing is complemented by the United Nations "Guidelines on the Role of Prosecutors" mentioned in the judgment, which establish the status and conditions of services of those who are appointed as prosecutors, establishing that "States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability."¹⁰ The principle of independence of the public functions of the prosecutor may also be interpreted based on the "Basic Principles on the Independence of the Judiciary" adopted by the Seventh United Nations Congress held in Milan from August 26 to September 6, 1985.¹¹

IV. Conclusion

28. The Court should not lose sight of the fact that its primary function is to hear cases that require the interpretation and application of the provisions of the Convention when these are submitted to it in order to decide whether there has been a violation of a protected right or freedom, and to rule that the injured party should be ensured the enjoyment of his violated right or freedom. In this regard, the Court has a vocation to do justice in concrete cases within the limits established by the law of treaties. But it also has a function of contributing to achieve the purposes of the Convention and that entails responding to the problems from which our societies suffer. It is important to consider that the Court's legitimacy is founded on the solidity of its reasoning, on its compliance with the law and on the prudence of its rulings.

⁹ International Labour Organization. Convention 151 on Labour Relations (Public Service), 1978. Available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C151.

¹⁰ Guidelines on the Role of Prosecutors. Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27 to September 7, 1990. UN Doc. A/CONF.144/28/Rev.1, para. 4. <https://www.ohchr.org/en/professionalinterest/pages/roleofprosecutors.aspx>.

¹¹ "Basic Principles on the Independence of the Judiciary," available at: <https://www.ohchr.org/en/professionalinterest/pages/independencejudiciary.aspx>.

29. In the instant case, Mr. Casa Nina had to exercise the function of prosecutor without the security of permanence in office owing to the provisional nature of his appointment, which signified the lack of a safeguard to ensure his independence. It is in this regard that this opinion concurs with the judgment and stresses the importance of protecting the performance of public service also as an integral part of labor law, especially taking into account in this case the importance of the independence of prosecutors under the democratic rule of law.

Ricardo C. Pérez Manrique
Judge

Pablo Saavedra Alessandri
Secretary