

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

**CASE OF BENITES CABRERA ET AL. V. PERU
JUDGMENT OF OCTOBER 4, 2022**

(Preliminary Objections, Merits, Reparations and Costs)

1. With the customary respect for the majority decisions of the Inter-American Court of Human Rights (hereinafter “the Court”), this opinion has the purpose of explaining my disagreement with Operating Paragraph 7, which declares the international responsibility of the State of Peru (hereinafter “the State” or “Peru”) for violating the right to work to the detriment of 184 employees who were dismissed from their jobs during the government of Alberto Fujimori.

2. This opinion complements the position expressed in my partially dissenting opinions in *Lagos del Campo v. Peru*,¹ *Dismissed Employees of Petroperú et al. v. Peru*,² *San Miguel Sosa et al. v. Venezuela*,³ *Muelle Flores v. Peru*,⁴ *Hernández v. Argentina*,⁵ *ANCEJUB-SUNAT V. Peru*,⁶ *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*,⁷ *Employees of the Fireworks Factory of Santo Antônio de Jesus v. Brazil*,⁸ *Casa Nina v. Peru*,⁹ *Guachalá Chimbo v. Ecuador*,¹⁰ *FEMAPOR v. Peru*,¹¹ and *Guevara Díaz v. Costa Rica*;¹² as well as my concurring opinions in *Gonzales Lluy et al.*

¹ Cf. *Case of Lagos del Campo v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 31, 2017. Series C No. 340. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

² Cf. *Case of the Dismissed Employees of Petroperú et al. v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 23, 2017. Series C No. 344. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

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

⁴ Cf. *Case of Muelle Flores v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of March 6, 2019. Series C No. 375. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

⁵ Cf. *Caso Hernández v. Argentina. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 22, 2019. Series C No. 395. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

⁶ 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. 39. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

⁷ Cf. *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. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

⁸ Cf. *Case of the Employees 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. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

⁹ Cf. *Case of Casa Nina v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 24, 2020. Series C No. 419. Concurring and partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

¹⁰ Cf. *Case of Guachalá Chimbo et al. v. Ecuador. Merits, Reparations and Costs*. Judgment of March 26, 2021. Series C No. 423. Concurring and partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

¹¹ Cf. *Case of the National Federation of Maritime and Port Workers (FEMAPOR) v. Peru. Preliminary Objections, Merits and Reparations*. Judgment of February 1, 2022. Series C No. 448. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

¹² Cf. *Case of Guevara Díaz v. Costa Rica. Merits, Reparations and Costs*. Judgment of June 22, 2022. Series C No. 453. Concurring and partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

v. Ecuador,¹³ Poblete Vilches et al. v. Chile,¹⁴ Cuscul Pivaral et al. v. Guatemala,¹⁵ Buzos Miskitos v. Honduras,¹⁶ Vera Rojas et al. v. Chile,¹⁷ Manuela et al. v. El Salvador,¹⁸ Former Employees of the Judiciary v. Guatemala,¹⁹ Palacio Urrutia v. Ecuador²⁰ and Pavez Pavez v. Chile,²¹ with respect to the justiciability of economic, social, cultural and environmental rights (hereinafter “ESCER”) through the use of Article 26 of the American Convention on Human Rights (hereinafter “the Convention”).

3. I have previously expressed my reasons for considering that there are ideological and juridical inconsistencies in the jurisprudential position of the majority of the Court regarding the direct or autonomous justiciability of ESCER by invoking Article 26. This position ignores the rules of interpretation of the Vienna Convention on the Law of Treaties,²² changes the nature of the obligation of progressivity,²³ ignores the will of the States embodied in the Protocol of San Salvador²⁴ and undermines the legitimacy of the Court,²⁵ to mention only a few of the arguments. In any case, my purpose here is to point out the irrelevance of the analysis of Article 26 in a case that specifically refers to public officials and that, consequently, could be developed with sufficient depth under Article 23 of the Convention.

4. As the Court stated in its judgment, this case is similar to others that the Court has heard; for example, *Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru* (2006), in which it declared the State’s international responsibility for the lack of effective recourses to challenge the dismissal of 257 congressional employees in 1992 and the lack of effective judicial remedies to contest that decision. Also, the Court, in *Canales Huapaya v. Peru* (2015), declared the State’s responsibility for violating the rights to judicial guarantees and to judicial protection, to the detriment of Carlos Alberto Canales Huapaya, José Castro Ballena and María Gracia Barriga Oré, and for the lack of an effective judicial response to their dismissal from the Congress in 1992. The present case refers to the violation of the rights of 164 persons, who were part of a group of

¹³ Cf. *Caso Gonzales Lluy et al. vs. Ecuador. Preliminary Objections, Merits, Reparations and Costs.* Judgment of September 1, 2015. Series C No. 298. Concurring opinion of Judge Humberto Antonio Sierra Porto.

¹⁴ Cf. *Case of Poblete Vilches et al. v. Chile. Merits, Reparations and Costs.* Judgment of March 8, 2018. Series C No. 349. Concurring opinion of Judge Humberto Antonio Sierra Porto.

¹⁵ Cf. *Case of Cuscul Pivaral et al. vs. Guatemala. Preliminary Objection, Merits, Reparations and Costs.* Judgment of August 23, 2018. Series C No. 359. Concurring opinion of Judge Humberto Antonio Sierra Porto.

¹⁶ Cf. *Case of the Buzos Miskitos (Lemoth Morris et al.) v. Honduras.* Judgment of August 31, 2021. Series C No. 432. Concurring opinion of Judge Humberto Antonio Sierra Porto.

¹⁷ Cf. *Case of Vera Rojas et al. v. Chile. Preliminary Objections, Merits, Reparations and Costs.* Judgment of September 1, 2021. Series C No. 439. Concurring opinion of Judge Humberto Antonio Sierra Porto.

¹⁸ Cf. *Case of Manuela et al. v. El Salvador. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 2, 2021. Series C No. 441. Concurring opinion of Judge Humberto Antonio Sierra Porto.

¹⁹ Cf. *Case of the Former Employees of the Judiciary v. Guatemala. Preliminary Objections, Merits and Reparations.* Judgment of November 17, 2021. Series C No. 445. Concurring opinion of Judge Humberto Antonio Sierra Porto.

²⁰ Cf. *Case of Palacio Urrutia et al. v. Ecuador. Merits, Reparations and Costs.* Judgment of November 23, 2021. Series C No. 446. Concurring opinion of Judge Humberto Antonio Sierra Porto.

²¹ Cf. *Case of Pavez Pavez v. Chile. Merits, Reparations and Costs.* Judgment of February 4, 2022. Series C No. 449. Concurring opinion of Judge Humberto Antonio Sierra Porto.

²² Cf. *Case of Muelle Flores v. Peru. Preliminary Objections, Merits, Reparations and Costs.* Judgment of March 6, 2019. Series C No. 375. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

²³ Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary Objection, Merits, Reparations and Costs.* Judgment of August 23, 2018. Series C No. 359. Concurring opinion of Judge Humberto Antonio Sierra Porto.

²⁴ Cf. *Case of Poblete Vilches et al. v. Chile. Merits, Reparations and Costs.* Judgment of March 8, 2018. Series C No. 349. Concurring opinion of Judge Humberto Antonio Sierra Porto.

²⁵ Cf. *Case of the Dismissed Employees of Petroperú et al. v. Peru. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 23, 2017. Series C No. 344. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

1,117 employees who were dismissed from the supreme legislative body by resolutions issued in 1992 at the time of the so-called "Government of National Emergency and Reconstruction."

5. The Court points out in its judgment that, although they have same context, the three cases differ because in the latest of them "*only 20 of the alleged victims [...] filed writs of amparo before judicial bodies, while there is no information on actions filed by the remaining persons, and [...] to date, the State has adopted measures directed to repair 140 of the 184 alleged victims.*"²⁶ It was, perhaps, these elements that led the Court to rule on this occasion on the arbitrary nature of the dismissals and not to limit its analysis exclusively on the lack of remedies to contest them, as it did in *Aguado Alfaro* and *Canales Huapaya*.

6. I consider this approach not only to be pertinent, but also an important advance. The protection of the right to job stability of public officials is fundamental, not only for the implications that it has with respect to the employees but also because the arbitrary dismissal of public servants in our region affects the balance of powers and institutional stability. What I do not share, however, is that this exercise was developed on an analysis of Article 26 of the Convention and also because this provision is excluded from the Court's contentious jurisdiction, as has been pointed out in other recent opinions,²⁷ the analysis of the facts should have been made under Article 23(1)(c) of the Convention.

7. In the present judgment, in addition to substantiating violations to the rights to judicial guarantees and to judicial protection, which I fully share, the Court held that there was a violation to the right to work of Article 26 and the right to have access to public service, under conditions of equality, of Article 23(1)(c). The Court held that Peru violated the right to work because 184 of the victims in the case "*were removed from their positions without having been offered justifiable grounds and because they were barred from filing a writ of amparo to contest their dismissals.*"²⁸ In addition, it indicated that the irregularity of the dismissals was indirectly recognized by the State when it created the National Registry of Irregularly Dismissed Employees, which compensated various former employees, including some of the victims in this case.²⁹

8. On the other hand, by invoking the principle *iura novit curia*, the Court found that the dismissal of the 184 congressional employees did not respect the criteria of objectivity and reasonability required by Article 23(1)(c), which sets out the right to have access to public service, under conditions of equality, and, consequently, was arbitrary.³⁰ In particular, it stated that "*the dismissal of the 184 persons listed in Annex 1 of this judgment did not adhere to the guarantees of due process, which arbitrarily affected their continuance in their positions.*"³¹ The Court, thus, focused its analysis of

²⁶ *Case of Benites Cabrera et al. v. Peru. Preliminary Objections, Merits, Reparations and Costs.* Judgment of October 4, 2022, para. 91.

²⁷ *Cf. Case of the Former Employees of the Judiciary v. Guatemala. Preliminary Objections, Merits and Reparations.* Judgment of November 17, 2021. Series C No. 445. Concurring opinion of Judge Humberto Antonio Sierra Porto; *Case of Palacio Urrutia et al. v. Ecuador. Merits, Reparations and Costs.* Judgment of November 24, 2021. Series C No. 446. Concurring opinion of Judge Humberto Antonio Sierra Porto; *Case of Pavez Pavez v. Chile. Merits, Reparations and Costs.* Judgment of February 4, 2022. Series C No. 449. Concurring opinion of Judge Humberto Antonio Sierra Porto.

²⁸ *Case of Benites Cabrera et al. v. Peru. Preliminary Objections, Merits, Reparations and Costs.* Judgment of October 4, 2022, para. 115.

²⁹ *Ibid.*

³⁰ *Case of Benites Cabrera et al. v. Peru. Preliminary Objections, Merits, Reparations and Costs.* Judgment of October 4, 2022, paras. 119 to 123.

³¹ *Case of Benites Cabrera et al. v. Peru. Preliminary Objections, Merits, Reparations and Costs.* Judgment of October 4, 2022, para. 122.

the violation of the political rights of the former employees on the failure to comply with the rules of due process, without referring to its case law on job stability and its corresponding rules; in particular, the criteria for deciding to leave the position or the nature of and the competent judge in disciplinary proceedings.

9. I believe that it would have been preferable to refer exclusively to Article 23 and not to opt for a differentiated analysis that limits the scope of the guarantees regarding compliance of political rights; in particular, access to public service under conditions of equality. Article 23(1)(c) states that “1. *Every citizen shall enjoy the rights and opportunities: [...] c) to have access, under general conditions of equality, to the public service of his country.*” The Court determines on this occasion to include an analysis of that article and to declare the violation of the right to access to public service under conditions of equality, understood also as the right to job stability of public servants. Needless to say that the victims in this case, since they were congressional employees, were exercising this right that was not recognized by the State.

10. Thus, as the Court has indicated, in line with General Comment No. 25 of the UN Committee on Human Rights,³² Article 23(1)(c) does not only ensure the right to have access to public service, but rather it does so under conditions of equality and the right to continue in the position. This implies that criteria and reasonable and objective procedures are respected and ensured for appointments, promotions, suspensions and dismissals and that individuals are not discriminated against during those procedures.³³ This was precisely the obligatory content that was violated in this case, as 184 employees were dismissed from their positions in the absence of a reasonable and objective proceeding.

11. This is not a merely a lexical difference. As I have stated in other separate opinions, the use of Article 26 of the Convention to declare State responsibility is juridically inadequate and affects the legitimacy of the judgment. To determine the responsibility of Peru exclusively from the point of view of Article 23(1)(c) not only responds more precisely to the factual situation and would allow the Court to advance its jurisprudence on the scope of this right, but it would also have avoided affecting the effectiveness of the decision due to the inconsistencies of the direct justiciability of Article 26. Thus, it is once again demonstrated that the use of this provision of the Convention has as its only purpose to reaffirm a jurisprudential line on ESCER, regardless of whether it is pertinent or necessary to ensure justice in the specific case.

Humberto Antonio Sierra Porto
Judge

Pablo Saavedra Alessandri
Registrar

³² Cf. United Nations Committee of Human Rights. General Comment No. 25, Article 25: Participation in Public Affairs and the Right to Vote, CCPR/C/21/Rev. 1/Add. 7, July 12, 1996, para. 23.

³³ Cf. *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 5, 2008. Series C No. 182, para. 206