PARTIALLY DISSENTING OPINION OF JUDGE PATRICIA PEREZ GOLDBERG

INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF BENITES CABRERA ET AL. V. PERU

JUDGMENT OF OCTOBER 4, 2022

(Preliminary Objections, Merits, Reparations and Costs)

With full respect for the majority opinion of the Inter-American Court of Human Rights (hereinafter "the Court"), I issue this partially dissenting opinion[1] with the purpose of reiterating my position on the lack of jurisdiction of the Court to declare an autonomous violation of the right to work on the basis of Article 26 of the American Convention on Human Rights (hereinafter "the Convention"), which I already expressed in *Guevara v. Costa Rica* and *Mina Cuero v. Ecuador*.

I. PRELIMINARY QUESTION

I will first consider a preliminary question, which is that of explaining why, having established the State's international responsibility for violating Article 23 of the Convention, it is not necessary to also declare a violation of its Article 26.

As the judgment states, the 184 victims were dismissed from the positions that they held in the Congress during the government of Alberto Fujimori and were restricted in their possibility of filing judicial remedies against their dismissals, which gave rise to the declaration of the international responsibility of Peru for violating Articles 8(1) and 25(1) of the Convention, read in conjunction with Article 1(1) thereof, to the detriment of the victims.

In applying the principle *iura novit curia,*[2] the Court also found a violation of Article 23(1) of the Convention, which establishes the right to have access to public service, under conditions of equality. Since that principle enables the determination of the applicable right, provided that it is a norm within the Court's jurisdiction, the facts submitted to the Court describe a violation of the right of the victims to remain in their positions, under general conditions of equality, by submitting them to a process of dismissal from their positions that did not respect the guarantees of due process.

As is well-known, the Court, in *Yatama v. Nicaragua*, held that Article 23 establishes the rights to participate in the conduct of public affairs, to vote, to be elected and to have access to public service, which must be ensured by the states under conditions of equality[3] and that the states must create the optimum conditions and mechanisms to guarantee that those rights are effectively exercised.[4] The Court also indicated that "the right to have access to public office, under general conditions of equality, protects access to a direct form of participation in the design, implementation, development and execution of the State's political policies through public office. It is understood that these general conditions of equality refer to the access of public

[1] Article 65(2) of the Rules of Procedure of the Court: "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 Presidency 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."

[2] Reflections on the international application of this principle may be found in my partially dissenting opinion in Mina Cuero v. Ecuador, para. 1, points 1-7.

[3] *Cf*. Para. 194.

[4] *Cf*. Para. 195.

office by popular election and by appointment or designation."[5] In *Reverón Trujillo v. Venezuela,* the Court added that Article 23 does not establish the right to have access to public office, but to have such "under general conditions of equality," which signifies that the respect and guarantee of that right are fulfilled when "the criteria and procedures for the appointment, promotion, suspension and dismissal [are] reasonable and objective" and when "the people are not the object of discrimination" in the exercise of this right.[6]

While neither the Commission nor the representatives alleged a violation of Article 23, the facts, as presented in the Merits Report, would permit noting that the victims claimed to have been the object of arbitrary treatment with respect to their right to continue, under conditions of equality, to exercise their positions in the Congress. This was affirmed in the course of the proceedings before the Court and was a manifest violation of Article 23(1)(c) of the Convention. It should also be recalled that the Court has already held that the guarantees contained in that provision are applicable to every person in the public service and that, consequently, when the continuance of persons in the exercise of this type of function is arbitrarily affected, their political rights are not respected.[7]

Although the facts in this case readily fall under the norm of Article 23(1)(c), the decision of the majority also declared[8] that there was an infringement of the work stability of the victims, as a component of the right to work of which they were holders, and, thus, a direct violation of Article 26. That decision was not only not necessary in this specific case,[9] but it was also not pertinent. The pertinent norm of the Convention in this case is that of access to and continuation in public functions under conditions of equality. Those who have public positions are submitted to special rules that can be justified by the nature of the functions that they perform and, therefore, they require specific norms of protection. Thus, the application in this specific case to Article 26 is not appropriate, inasmuch as, as will be explained, the Court cannot declare the autonomous violation of the right to work on the basis of that norm, because it does not have jurisdiction to do so.

II. LACK OF JURISDICTION OF THE COURT TO DECLARE THE AUTONOMOUS VIOLATION OF THE RIGHT TO WORK ON THE BASIS OF ARTICLE 26 OF THE CONVENTION

As I expressed in my opinions in *Guevara Díaz v. Costa Rica*, *Mina Cuero v. Ecuador* and *Valencia Campos v. Bolivia,* I repeat my position regarding the Court's lack of jurisdiction in the area of economic, social, cultural and environmental rights.

I will divide my explanation into three parts, inspired by the always rigorous analysis of Judge Eduardo Vio Grossi, whose recent passing leaves a valuable legacy in inter-American legal reasoning. In the first place, I will refer to the scope of the content of the Convention (which definitively fixes the jurisdiction of the Convention), then to an analysis of the content of the Protocol of San Salvador and, finally, to the interpretation that should be given to both instruments.

II.1 Content of the Convention

As is well-known, the law of treaties refers to the obligations that emanate from the

[5] *Cf*. Para. 200.
[6] *Cf*. Para. 138.
[7] *Cf*. *Case of Moya Solís v. Peru* and *Case of Mina Cuero v. Ecuador*.
[8] *Cf*. Para. 118.
[9] It should be remembered that the Court did not consider it necessary to declare the infringement of work stability as as a component of the right to work in *Canales Huapaya et al. v. Peru* nor in *Aguado Alfaro et al. v. Peru*, cases that share the same underlying facts with this case.

express consent of the States. If their wills converge on a certain matter, that consent must be manifested in the manner established by Article 2(a) of the Vienna Convention on the Law of Treaties.[10]

By virtue of this type of international agreements, States may agree to create international courts with the authority to apply and interpret the provisions of those agreements and may broaden the jurisdiction of those bodies through subsequent instruments. Therefore, international courts must exercise their jurisdiction within the framework established in the pertinent treaties. Those juridical instruments are their basis and also the limit of their activity. From a democratic perspective, what is expressed is coherent with due respect for the processes of internal deliberations that take place regarding ratification of a treaty and with the type of interpretation that the international courts develop. This hermeneutical work is exercised with respect to the norms of international law and not those of a constitution.

In light of these considerations, and considering that the Court declared the violation of the right to work, based on the provisions of Article 26 of the Convention, it should be asked whether the Court has or does not have jurisdiction to proceed in this manner. The answer is no. Article 1(1) of the Convention is clear in pointing out that the States Parties "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 […]". At the same time, the norms on the jurisdiction and functions of the Court also are clear in establishing that the Court is subject to the provisions of the Convention. Thus, Article 62(3) 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 […]" and, similarly, Article 63(1) states that "[i]f 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."

For its part, Chapter III of the Convention entitled "Economic, Social and Cultural Rights" contains only one article, Article 26, which is entitled "Progressive Development." In line with its title and in view of the above-mentioned provision, "[t]he States Parties undertake to adopt **measures**, both internally and through international cooperation, especially those of an economic and technical nature, with a view **to achieving progressively**, **by legislation** or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires."[11]

A reading of this norm demonstrates that, in contrast to the purpose announced for the civil and political rights that are listed and developed in Chapter II of the Convention, here there is an obligation on the part of the States Parties to adopt "measures;" in other words, actions, measures or public policies necessary to achieve "progressively" the full effectiveness of the norms derived from the OAS Charter "in accordance with their resources" (which is congruent with the progressive nature of the obligation) and by "legislation or other appropriate means." Thus, each State Party has the obligation to formulate definitions and to make pronounced progress in these matters, in accordance with their domestic deliberative procedures.

To conceive Article 26 as a norm of the remittance of all the ESCER that are included in the OAS Charter disregards the commitment adopted by the States Parties and

[10] A "'treaty'" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."
[11] Emphasis added.

opens the door of uncertainty with respect to the catalogue of justiciable rights before the Court, which affects the legitimacy of its acts.

II.2 Content of the Protocol of San Salvador

Articles 76(1) and 77(1) of the Convention[12] set forth the system accepted by the States to modify what had been agreed upon, be it by amendment or by an additional protocol. It was by the latter that the "Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, "Protocol of San Salvador" of 1988 (hereinafter "the Protocol") was adopted with the purpose of progressively including other rights and freedoms within the protective regime of the Convention.

Notwithstanding that the Protocol recognizes and develops a group of ESCER in its text,[13] Article 19(6), on the Means of Protection, gives the Court jurisdiction to hear eventual violations with regard to only two rights: trade union rights and the right to education. That provision establishes that, in any situation in which those rights "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."

Thus, according to the treaty (comprised of two instruments: the Convention and the Additional Protocol),[14] the Court lacks jurisdiction to declare an autonomous right to work.

As I have argued previously, I reaffirm that the lack of the direct justiciability of ESCER before the Court does not imply not recognizing their existence; nor the enormous importance of those rights; nor the interdependent and indivisible nature that they have with respect to civil and political rights; nor that they lack protection or that they must not be protected. It is the States' duty to enable the individual's autonomy to be made a reality, which implies that he or she can count on access to the primary goods (broader than those defined within the political philosophy of John Rawls)[15] that would enable the development of his or her capabilities; in other words, access to economic, social and cultural rights.[16]

It is then necessary to distinguish two levels – related but different. One is on the national level where, by means of democratic procedures, the citizenry decides to include ESCER in their respective juridical order and to incorporate international law on the matter, as occurs in the vast majority of the member states of the inter-American system of human rights. In that context, it is the national courts that - within their jurisdictions– exercise their powers on the interpretation and justiciability of those rights, in conformity with their constitutions and laws.

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[12] Article 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.". Article 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."

[13] The right to work, just, equitable and satisfactory conditions of work, trade union rights, right to social security, to health, to a healthy environment, to food, to education, to the benefits of culture, to the formation and protection of families, of children, to the protection of the elderly and to the protection of the handicapped (*sic*).

[14] According to Article 2(a) of the Vienna Convention, a treaty may consist in a single instrument or two or more related instruments.

[15] For RAWLS primary goods are a group of goods necessary "for formulating and executing a rational plan of life," such as liberty, opportunities, income, wealth and self-respect, "Theory of Justice" (1995:393).

[16] PÉREZ GOLDBERG, "Las mujeres privadas de libertad y el enfoque de capacidades" (2021:94-109).

The other, distinct, is the international level. As an international court, the role of the Inter-American Court on this level is to decide whether a State, whose responsibility is claimed, has or has not violated one or more of the rights established in the treaty. As has been explained, in light of the normative design of the Convention and in accordance with its Article 26, the Court is empowered to establish the international responsibility of a State if it has not complied with its obligations of progressive development and of non-retrogression, but not of the ESCER considered individually. In that context, nothing prevents the Court from considering the economic, social and cultural dimensions of the rights contemplated in the norms of the Convention and to exercise its adjudicatory jurisdiction by means of connectivity. That was how the Court proceeded in cases prior to *Lagos del Campo v. Peru* (2017); for example, in *Ximenes Lopes Brazil* (2006);[17] *Gonzáles Lluy et al. v. Ecuador*[18] (2015) and *Chinchilla Sandoval v. Guatemala* (2016)[19] and that constitutes the correct doctrine to follow. Subsequent to *Lagos del Campo*, the Court has been upholding the direct justiciability of ESCR on the basis of Article 26, except in *Rodríguez Revolorio v. Guatemala* (2019) and *Martínez Esquivia v. Colombia* (2020).

II.3 Interpretation of the Convention and its Protocol

With respect to the system of interpretation applicable to the norms of a convention, the rules of interpretation of the Vienna Convention must be followed, which implies considering good faith, the ordinary meaning to be given to its terms in their context and its object and purpose as elements of interpretation. From this final element – as Cecilia Medina points out – two specific criteria of the hermeneutic of human rights treaties are derived: their dynamic nature and *pro persona*, which enable the judges to entertain a "wide margin for a highly creative interpretation."[20]

One of the most relevant canons of interpretation in the international law of human rights is evolutive interpretation. Thus, for example, the Court, in *Bámaca Velásquez v. Guatemala*, broadened the definition of victim to include both the direct and the indirect victim (family members of Efraín Bámaca, on the one hand, and Jennifer Harbury, on the other). This evolutive interpretation is faithful to the intention of the States Parties. However, here the Court does not apply that interpretive criterion, but rather assumes its jurisdiction in areas that the respective instruments have not conferred upon it; in other words, without the States having consented to it. Stated differently, it is an error to employ the use of these hermeneutical tools as a basis to artificially broaden the jurisdiction of the Court in view of the express norm that precisely and clearly limits it.

The judgment makes reference to one provision of the Protocol -the right to work established in Article 6 (paragraph 113)-, but it omits any allusion to a basic norm, Article 19, on the mechanisms of protection recognized in the treaty.

This omission is relevant because Article 19 defines two types of mechanisms of protection. One general –applicable to all the rights recognized in the Protocol- consisting of the examination, observations and recommendations that the different

[17] Mr. Ximenes Lopes died in a psychiatric institution approximately two hours after having been medicated by the clinical director of the hospital and without having been seen by a doctor. He was not given adequate care and was, because of the care at the mercy of aggression and accidents that could have put his life in danger. The Court found state responsibility for the violation of the rights to life and personal integrity.
[18] In this case, which concerned a child infected with the HIV virus upon receiving a blood transfusion, the Court protected the right to health of the victim by means of a connection with the rights to life and to personal integrity, by declaring "the obligation to monitor and supervise the provision of health care within the framework of the right to personal integrity and of the obligation not to endanger life."
[19] The victim was a woman with a disability deprived of liberty who was not given adequate health care for her multiple illnesses and who finally died in prison. This lack of health care resulted in the Court declaring the violation of the rights to life and to personal integrity.
[20] MEDINA, "The American Convention on Human Rights" (2018:115).

bodies of the inter-American system may formulate on the reports that the States present on the progressive development of ESCER. And the other –applicable only with respect to trade unions rights and the right to education– the eventual violation of which may be heard by the Court.

The Court here declares the responsibility of the State by considering that the 184 victims were the object of the violation of their rights to be heard with due guarantees and within a reasonable period by a competent judge, independent and impartial, and to have a simple and prompt recourse before judges or courts, as stated in Articles 8(1) and 25(1) of the Convention, read in conjunction with the obligations to respect and guarantee the rights contained in Article 1(1) thereof, and also a violation of Article 23(1)(c) of the Convention as the Court found a violation of their work stability, as a component of the right to work of which they were holders. I share the considerations expressed in the judgment, with the exception of those that refer to the direct violation of the right to work on the basis of Article 26, as has been indicated.

As Judge Vio Grossi has stated,[21] "it is for the Court to interpret and apply the Convention; in other words, state what the law expresses and not what it wants the law to express." This implies that no matter how noble and well-intentioned a proposal might be, a court can only act within the framework of its attributions.

Definitively and unfortunately, as Medina and David have written, "the position of the majority undermines the effectiveness not only of the Protocol of San Salvador but also of Article 26 itself."[22] That norm has a specific content that the Court can and should develop in the cases that it is called upon to hear. This manner of proceeding affects both the juridical security that an international court must guarantee and the legitimacy of its decisions since the arguments offered simply ignore a norm that does not grant jurisdiction to the Court to hear eventual violations to the right to work.

Patricia Pérez Goldberg
Judge

Pablo Saavedra Alessandri
Registrar

[21] Dissenting opinion of Judge Eduardo Vio Grossi in *Gómez Murillo et al. v. Costa Rica.*
[22] MEDINA AND DAVID, "The American Convention on Human Rights" (2022:28).