SEPARATE JOINT OPINION OF JUDGES

EDUARDO FERRER MAC-GREGOR POISOT AND RODRIGO MUDROVITSCH

CASE OF BENITES CABRERA ET AL. V. PERU

JUDGMENT OF OCTOBER 4, 2022
(Preliminary Objections, Merits, Reparations and Costs)

I. INTRODUCTION

1. In this case, the Inter-American Court of Human Rights (hereinafter "the Court") analyzed the arbitrary dismissal of 184 employees under the so-called "streamlining of personnel" process, implemented during the government of Alberto Fujimori, and their impediment to file judicial remedies regarding their dismissals. The Court declared the international responsibility of the State for violating the rights established in Articles 8(1), 23(1)(c), 25(1) and 26 of the American Convention on Human Rights (hereinafter "the Convention"), read in conjunction with Article 1(1) thereof.

2. The judgment addresses the case in the light of the case law on the direct and autonomous justiciability of economic, social, cultural and environmental rights (ESCER) that the Court has been developing since 2017. The Court reaffirms its jurisdiction to hear and resolve violations of the ESCER contained in Article 26 of the Convention, rejecting the preliminary objection on the lack of material jurisdiction presented by the State.[1] The Court declared, on the merits, international responsibility for violating the right to work -with regard to work stability-, which contrasts with the two precedents that presented the same context and similar facts: *Dismissed Congressional Employees et al.* (2006)[2] and *Canales Huapaya et al.* (2015),[3] both against Peru.

3. Another novel aspect of this judgment -not contemplated in those two precedents- is the infringement, through the use of the principle *iura novit curia,* of the right contained in Article 23(1)(c) of the Convention. In addition to protecting the right to work found in Article 26 (expressly alleged as violated by the Inter-American Commission and the representatives of the victims), the Court also found it necessary, due to the arbitrariness of the dismissals of the 184 employees, to protect their stability in their positions or in the public service, because of their status as public employees.

4. We agree with the differentiated manner in which both matters were treated in the judgment.[4] We issue this separate opinion to underscore and to consider more deeply some elements of the case that, in our opinion, represent important advances in inter-American jurisprudence from the perspective of the violation of work stability as a component of the right to work protected by Article 26 and from the perspective of the violation of the right to have access to public service, under general conditions of equality, referred to in Article 23(1)(c). In effect, the most appropriate hermeneutic of the Convention is that which takes it as a whole, without invoking one human right to

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1 *Cf. Case of Benites Cabrera et al. v. Peru*. *Preliminary Objections, Merits, Reparations and Costs*. Judgment of October 4, 2022. Series C No. 465, para. 48 and Operative Paragraph 5.

2 *Cf. Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 24, 2006. Series C No. 158.

3 *Cf. Case of Canales Huapaya et al. v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of June 24, 2015. Series C No. 296.

4 In other words, the Inter-American Court analyzed, in separate chapters, the facts that gave rise to the infringement of Article 23(1)(c) and those that gave rise to the international responsibility for violating Article 26.

the detriment of others.[5] Ensuring the proper protection of the 184 employees depends, therefore, on the simultaneous application of Article 23(1)(c) and of Article 26 since the arbitrarily dismissed were state employees.

5. This dual dimension in the area of the protection of the rights in the Convention cannot, and should not, be a source of confusion. To claim to absorb or subsume, through connectivity, the content of one of the rights within that of the other would denaturalize the content of each right, produce unnecessary overlaps between them and condition the full understanding of the rights in the Convention that should be decided, for example, through a domestic control of conventionality. This distinction is particularly important to create specific standards of protection in the area and, at the same time, to clarify state obligations, enabling the adequate exercise of control of conventionality domestically, which has been made possible by the national authorities within the framework of their respective competences.

6. There are, then, two forms of principle arguments in this opinion: one "hermeneutical" and the other "ontological."[6] In Section II, we will concentrate on the "hermeneutical," where we will argue that an integral focus of human rights is not only possible, but also necessary. In Section III, we will concentrate on the "ontological," specifying the normative content that belongs to the different rights found in Articles 26 and 23(1)(c). In doing so, we wish to reinforce, in support of this judgment, the position that the simultaneous effect of those different rights is indispensable to ensure the full protection of the individual and his or her dignity under the Convention.

II. THE GLOBAL AND INTEGRAL DIMENSION OF RIGHTS FROM THE PERSPECTIVE OF THE AMERICAN CONVENTION

II.1. Conventional hermeneutics and the integrality of human rights

7. To understand human rights globally and integrally, admitting the simultaneous effect of Articles 26 and 23(1)(c) in this specific case, requires that we at least pay attention to the four basic parameters of hermeneutics, which we will explain before specifically dealing with the innovations in the judgment of this case.

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[5] This hermeneutic is reflected from the moment in which the American Convention was adopted in 1969 since its Preamble expressly establishes that "the ideal of free men […] 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."

[6] Separate opinion of Judge A. A. Cançado Trindade in the *Pueblo Bello Massacre v. Colombia*. Judgment of January 31, 2006. Series C No. 140, para. 14-15: "It is axiomatic that each of the rights protected by the human rights treaties has its own content, from which the different formulations arise […]. Here, we are on an essentially *ontological* level. […]. The fact that the protected rights are endowed with autonomy and their own material content does not mean that they cannot or should not be interrelated owing to the circumstances of each case. To the contrary, in my opinion this interrelation is the element that provides more effective protection, in light of the indivisibility of all human rights. Here we pass from the ontological to the *hermeneutical* level."

8. An integral focus of human rights is based, in the first place, on the idea of systematicity. The substantive articles of the Convention are, thus, not a mere list of rights that must be protected and guaranteed by the States. They are, in effect, pieces of the true system of human rights that contains "*particular elements of a structure that make sense intellectually*."[7] This systemical hermeneutic[8] requires that it is not sufficient to declare the non-compliance with one or another norm of the Convention, individually considered, without analyzing its interaction with the totality of the group of norms that the treaty establishes. To do so would demonstrate a lack of respect for the dignity of the individual,[9] because within the idea of systematicity there underlies the imperative that individuals, having been granted reason, must be treated reasonably, in which the norms are not mutually excluded, but are interrelated. Therefore, applying the Convention to a specific case presupposes respect for its integrality and its interpreters cannot accept compromises.[10] This means that there are no trade-offs among the rights in the Convention: by recognizing the effect of a right, the Court does not renounce its duty to elaborate its standards on other rights that are concomitantly applicable.[11] Taking the Convention seriously is to assume that the rights therein have a dimension that makes them resistant to considerations of convenience and, therefore, they cannot be elected at whim.[12] Each of them offers protections that can be "insistently requested, revindicated, and demanded, without modesty or shame."[13]

9. Secondly, the global and integral dimension of rights must comply with the norms of interpretation of the Convention. Its Article 29(a) in particular establishes that "[n]o 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." In the majority of cases, the Court utilizes this provision to prohibit an "abuse" of those rights by the States, whether they be limitations,[14] derogations[15] or by formulating reservations.[16] Moreover, the literal interpretation of the *caput* of that provision and the use the analytic passive voice ("no provision of this Convention shall be interpreted as") demonstrate that its applicability is not restricted to a specific subject (such as the States), as seen in the judgment on jurisdiction in *Baena Ricardo et al. v. Panamá* (2003).[17] Therefore, any interpretation of the Convention, even by the Court

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[7] Jeremy Waldron, *Dignity, Rank, and Rights*, Oxford, Oxford University Press, 2012, p. 54.

[8] Although the systemical method of juridical interpretation does not have its own autonomy and is associated with other methods, this method makes it difficult for the interpreters to broaden the scope of their interpretation. See: Fábio P. Shecaira and Noel Struchiner, *Teoría de la argumentación jurídica: para entender el discurso de los jueces y abogados*, trad. Juan Carlos Panez Solórzano and Israel Sánchez Cerna, Lima, Grijley, 2019, pp. 199-121.

[9] Waldron, *Dignity, Rank, and Rights, op. cit.*, pp. 54-55. See also Waldron, "The Concept and the Rule of Law", 43(1) *Georgia Law Review*, 2008, pp. 1-61.

[10] For the idea of "integrality," see Ronald Dworkin, *Law's Empire*, 2. Ed., Barcelona, Gedisa, 1992, chapters 6 and 7.

[11] *Cf.* Concurring opinion of Judge Rodrigo Mudrovitsch in *Guevara Díaz v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs.* Judgment of June 22, 2022. Series C No. 453, paras. 33-38.

[12] *Ibid*, pp. 160-161.

[13] Joel Feinberg, "Duties, Rights, and Claims", 3(2) *American Philosophical Quarterly*, 1966, p. 143, in Waldron, *Dignity, Rank, and Rights*, *op. cit.,* p. 50.

[14] Art. 30, ACHR.

[15] Art. 27, ACHR. *Cf. Case of J. v. Peru. Preliminary Objection, Merits, Reparations and Costs.* Judgment of November 27, 2013. Series C No. 275, para. 124.

[16] Art. 75, ACHR. Similarly, see *Boyce et al. v. Barbados*. *Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 20, 2007. Series C No. 169, para. 15 and *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights).* Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3, para. 66.

[17] *Case of Baena Ricardo et al. v. Panama. Jurisdiction.* Judgment of November 28, 2003. Series C No. 104, para. 95. This judgment established the juridical basis of the jurisdiction of the Court to monitor compliance of the judgment. In that context, the Court concluded – by its interpretation of Articles 33, 62(1),

itself, that deprives any right in the Convention of its essential content and of its maximum possible scope is contrary to Article 29 and, therefore, would be prohibited.

10. Thirdly, in addition to the hermeneutical norms of Article 29, there are the interpretive provisions of the International Law of Human Rights, such as the principles *pro personae* and *effet utile.*[18] These principles contribute to achieving the object and purpose of the treaties, in the terms of Article 31 of the Vienna Convention on the Law of Treaties, which, in the case of the American Convention, are translated into the effective protection of all the human rights contemplated therein. The *pro personae* principle was defined by the Court in its Advisory Opinion No. 5 (1985) as the requirement that "the rule most favorable to the individual must prevail."[19] It is a norm applicable to all scenarios of interpretation of the human rights in the American Convention and, according to Judge Piza, "*requires that the norms which guarantee or extend human rights be broadly interpreted and those that limit or restrict human rights be narrowly interpreted.*"[20] Therefore, in the event of a factual conjuncture in which two or more rights included in the Convention clash, the reasoning of the Court should not be exclusionary in that one supplants the other. The principle of effectiveness ("*effet utile*"), in turn, states that "the provisions […] should be interpreted and applied in a manner that the guarantee protected is truly practical and effective."[21] As Judge Serghides, Vice President of the European Court of Human Rights, stated, that principle derives from the general rule of the interpretation of treaties found in Article 31(1) of the Vienna Convention, referring to the principles of good faith and effectiveness in the manner in which the ordinary meaning and the object and purpose of the treaty in question should be interpreted.[22] Therefore, to rule out the simultaneous application of overlapping rights in the Convention would make illusory the protection offered by one or even both rights.

11. In the fourth place, the very nature of human rights requires that they be considered in their totality. It is axiomatic to consider human rights as universal, indivisible, independent and interrelated; a way of understanding that they have as a

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62(3) and 65 of the Convention, as well as Article 30 of its Statute– that its monitoring jurisdiction is essential to "*ensure that the State effectively complies with the duty to guarantee established in the referred to provision of the Convention,* in the understanding that, without the monitoring, its judgments would be illusory.

18 Of course, in addition to the general norm of interpretation of treaties established in Article 31 of the Vienna Convention on the Law of Treaties.

19 *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights).* Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 52.

20 Separate opinion of Judge Rodolfo E. Piza Escalante in *Enforcement of the Right to Reply or Correction (Arts. 14(1), 1(1) and 2 American Convention on Human Rights).* Advisory Opinion OC-7/86 of August 29, 1986. Series A No. 7, para. 36.

21 *Case of Baena Ricardo et al. v. Panama. Jurisdiction.* Judgment of November 28, 2003. Series C No. 104, para. 66.

22 Ver: Georgios A. Serghides, *The principle of effectiveness and its overarching role in the interpretation and application of the ECHR: the norm of all norms and the method of all methods*, Strasbourg: [Georgios A. Serghides], 2022. *Cf.* paras. 15 and 22 of the concurring opinion of Judge Serghides in *S.M. v. Croatia* [ECHR, Grand Chamber], No. 60561/14, June 25, 2020; para. 19 of the concurring opinion of Judge Serghides in *Obote Vs. Russia* [ECHR, Third Section], No. 58954/09, November 19, 2019; paras. 8-12 of the dissenting opinion of Judge Serghides in *Rashkin v. Russia* [ECHR, Third Section], No. 69575/10, July 7, 2020; and para. 6 of the concurring opinion of Judge Serghides in *OOO Regnum v. Russia* [Third Section], No. 22649/08, September 8, 2020.

paradigmatic source[23] the Vienna Declaration and Action Program of 1993.[24] To affirm them as such signifies that there exist, among the human rights, relationships of mutual support, sometimes expressed in the manner of linkage arguments,[25] in which an attempt is made to justify the cases of the simultaneous effect of rights for conceptual, normative, epistemical or determinative reasons.[26] These relationships of mutual support qualify and reinforce the systemical nature of the Convention and have been examined by the Court in various of its judgments.[27] In view of the interdependent nature of human rights, it is not surprising that the phenomenon of overlapping norms sometimes occurs. Therefore, the concomitant effect of the rights and the invocation to the global dimension of the Convention need not be viewed as a defect of the system, a conceptual confusion or an interpretive artifice. On the contrary, it is one of the most widespread, distinctive and valuable characteristics of the systems of human rights.

12. As it is in complete agreement with the aforementioned four hermeneutical parameters, the judgment in *Benites Cabrera et al. v. Peru* is an undeniable advance from the point of view of the global and integral protection of human rights. A first aspect, as mentioned, was the recognition, on the basis of Article 26 of the Convention, of international responsibility for the violation of the right to work with respect to the component of work stability. A second fundamental aspect that furthers this global and integral understanding of events that result in infringements of the rights of the Convention was the declaration of international responsibility for violating Article 23(1)(c). We will now reconstruct the manner in which this advance was produced in relation to the Court's precedents that share the same context of facts.

II.2. The integrality of human rights and the transcendental step in *Benites Cabrera:* the infringement of the right to work stability.

13. This case inserts itself into the context of the dismissal of 1,117 Peruvian congressional employees in December 1992 after the rupture of the democratic-constitutional order of April 5, 1992 that was described by the Court in *Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru,* which referred to 257 dismissed employees, and *Canales Huapaya et al. v. Peru,* concerning three victims. In those judgments, the Court declared proved a series of facts that preceded the dismissal of those congressional employees, as well as the adoption of laws and administrative resolutions designed to repair the irregular dismissals during the reorganization of public bodies implemented during the 1990s.[28]

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[23] However, this understanding was already verifiable; for example, in the resolution of the UN General Assembly that decided to draft one binding convention that contemplated all the rights of the Universal Declaration of Human Rights (cf. Res. 421(V) of 1950). Although this decision was changed in the "*separation resolution*" (Res. 543(VI)/1951-1952), which was responsible for the division into the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, that resolution reaffirmed the same principles.

[24] Part I, para. 5: "All human rights are universal, indivisible and interdependent and are interrelated." This phrase also appears in the Declaration of Montreal, in the Yogyakarta Principles and in the International Convention on the Rights of Persons with Disabilities.

[25] See James W. Nickel, "Rethinking Indivisibility: Towards a Theory of Supporting Relations between Human Rights," 30(4) *Human Rights Quarterly,* 2008, pp. 984–1001; Pablo Gilabert, "The Importance of Linkage Arguments for the Theory and Practice of Human Rights: A Response to James Nickel," 32(2) *Human Rights Quarterly*, 2010, pp. 425–438.

[26] Gilabert, *op. cit.*, pp. 427-428.

[27] *Cf. Case of Gonzales Lluy et al. v. Ecuador*. *Preliminary Objections, Merits, Reparations and Costs.* Judgment of September 1, 2015. Series C No. 298, para. 172. Similarly: *Case of Suárez Peralta v. Ecuador. Preliminary Objections, Merits, Reparations and Costs.* Judgment of May 21, 2013. Series C No. 261, para. 131 and *Case of Lagos del Campo v. Peru*. *Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 31, 2017. Series C No. 340, para. 141.

[28] *Cf. Case of Benites Cabrera et al. v. Peru*, *op. cit*., para. 65.

14. In other words, the three judgments have common facts that resulted in human rights violations. However, as we shall see, the scope of international responsibility has changed due to the Court's current jurisprudential advances.

15. It should be noted that, in *Dismissed Congressional Employees (Aguado Alfaro et al.)* of 2006, the representatives of the victims alleged the infringement of the right to work under Article 26 of the Convention.[29] However, the judgment considered that "the purpose of the judgment is not to determine the alleged arbitrary nature of the alleged victims' dismissals or their non-reinstatement, […] The Court has declared that the State violated Articles 8(1) and 25 of the Convention, relating to judicial guarantees and judicial protection, […] owing to the lack of certainty of the proceeding they should or could resort to in order to reclaim the rights they considered violated, and to the existence of normative and practical impediments to an effective access to justice."[30]

16. The Court, however, left clear in that case that it was "aware that the violation of these guarantees necessarily had prejudicial consequences for the alleged victims, to the extent that any dismissal has consequences for the exercise and enjoyment of other rights inherent in labor relations."[31] Subsequently, *Canales Huapaya et al.* (2015) essentially followed what had been decided in *Dismissed Congressional Employees,* without considering the possible harm to the right to work.

17. In *Benites Cabrera et al.,* which motivates this joint separate opinion, the transcendental step taken is to materialize the consideration previously omitted regarding the right to work: the determination of the consequences on the employees due to the arbitrariness of their dismissals. While, as in the two prior judgments, there were normative obstacles that directly impacted the access to justice (Articles 8 and 25 of the Convention), that harm also had an effect on other rights since the employees were deprived not only of access to a judicial remedy, but also to what they claimed through this recourse: their right to work.

18. The Court concludes that the 184 alleged victims were employees of the Peruvian Congress who were dismissed arbitrarily and that the dismissals were an infringement to work stability, as a component of the right to work of which they were holders.[32] Definitively, "the State proceeded in an arbitrary manner in dismissing the former congressional employees identified in this judgment because they were removed from their positions without having been offered justifiable reasons and because they were barred from filing an action of amparo to contest their dismissals."[33]

19. However, respect for the integral dimension of the human rights of the Convention is demonstrated in the judgment beyond the application of Article 26 to the specific case. Global attention to the Convention requires the concomitant application of Article 23(1)(c), which protects the right of all citizens to have access to the public service of their country, under general conditions of equality. We will now explain the different scopes of protection of the overlapping articles in this case, emphasizing the importance of their simultaneous application.

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[29] *Cf. Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru. Preliminary Objections, Merits, Reparations and Costs*, *op. cit.*, para. 134(c).

[30] *Cf. Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 24, 2006, *op. cit.*, para. 136.

[31] *Cf. Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru, op. cit.*, para. 136.

[32] *Cf. Case of Benites Cabrera et al. v. Peru*, *op. cit.*, para. 118.

[33] *Cf. Case of Benites Cabrera et al. v. Peru*, *op. cit.*, para. 115.

III. SCOPE OF THE DIFFERENTIATED PROTECTION AND SIMULTANEOUS EFFECT OF THE RIGHTS CONTAINED IN ARTICLES 23(1)(C) AND 26 OF THE CONVENTION

20. Another of the novel aspects of this judgment relative to the precedents of *Dismissed Congressional Employees* (2006) and *Canales Huapaya et al.* (2015) was the declaration of the violation of the right of all citizens to have access to the public service of their country, under general conditions of equality, contained in Article 23(1)(c). It is a matter of a civic exercise, the participation of the citizenry in the *polis* from the perspective of isocracy. This right is, in reality, a general right to participate in government, the right of all to participate in the administration of public matters, which includes access to the functions of public institutions.[34]

21. Traditionally, the Court has specified that the violation of Article 23(1)(c) is closely tied to the guarantee of stability or irremoveability of the position of operators of justice (as part of the principle of judicial independence).[35]

22. This conception is the product of an historical evolution of the Court's case law towards a desirable broadening of the scope of protection under Article 23(1)(c). In *Dismissed Congressional Employees v. Peru* (2001), the Court's hermeneutical exercise placed a greater attachment to a literal reading of the article when it held that the provision only protected the right to have access to, but not continuance in, public service under conditions of equality.[36] There the Court considered that, although the three magistrates had been dismissed for procedural errors during the processing of a constitutional claim, they had "access" to public service and, therefore, it was not appropriate to apply that provision.

23. Since *Apitz Barbera v. Venezuela (2008)*, the Court has broadened, by *obiter dictum,* a margin of protection of the right regarding not only access, but also continuance in public service.[37] This position would be materialized the following year in *Reverón Trujillo v. Venezuela (2009),*[38] in which the Court noted that "*the access in equal conditions would constitute an insufficient guarantee if it were not accompanied by the effective protection of the continuance in what is accessed.*"

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[34] See Concurring Opinion of Judge Rodrigo Mudrovitsch in *Guevara Díaz v. Costa Rica*, *op. cit.*, paras. 113 to 116.

[35] *Cf. Case of Reverón Trujillo v. Venezuela. Preliminary Objection, Merits, Reparations and Costs.* Judgment of June 30, 2009. Series C No. 197, para. 141; *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 28, 2013. Series C No. 268, para. 222*; Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador. Preliminary Objection, Merits, Reparations and Costs.* Judgment of August 23, 2013. Series C No. 266, para. 180; *Case of Colindres Schonenberg v. El Salvador. Merits, Reparations and Costs*. Judgment of February 4, 2019. Series C No. 373*,* paras. 94 and 95*; Case of Martínez Esquivia v. Colombia. Preliminary Objections, Merits and Reparations.* Judgment of October 6, 2020. Series C No. 412, paras. 116 and 117*; Case of Casa Nina v. Peru. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 24, 2020. Series C No. 419, paras. 98 to 99*; Case of Moya Solís v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of June 3, 2021. Series C No. 425*,* paras. 110 and 111 and *Case of Cuya Lavy et al. v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 28, 2021. Series C No. 438*,* paras. 160 and 161.

[36] *Cf. Case of the Constitutional Tribunal v. Peru. Merits, Reparations and Costs.* Judgment of January 31, 2001. Series C No. 71, para. 103.

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

[38] *Case of Reverón Trujillo v. Venezuela. Preliminary Objection, Merits, Reparations and Costs.* Judgment of June 30, 2009. Series C No. 197, para. 108.

24. In this line of jurisprudence,[39] *Casa Nina v. Peru* (2020)[40] was a turning point when the Court also incorporated a violation of the right to work contained in Article 26 in addition to the right to "access to […] public service, under conditions of equality" established in Article 23. What was responsible for the infringement of Articles 23 and 26 in *Casa Nina* was the arbitrary decision that resulted in 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.

25. The judgment in that case specified the following guarantees to safeguard the principle of the independence of operators of justice (judges and prosecutors): i) an appropriate appointment; ii) protection from external pressures; iii) irremoveability from office[41] (or job stability) and iv) work stability.[42] We will refer to the implications of the differences between the latter two in the framework of *Casa Nina* from the viewpoint of Articles 23 and 26, respectively.

26. The Court held that the decision to terminate the victim's appointment had been *arbitrary* because it was not based on any of the grounds permitted to *safeguard [his] independence*[43] as provincial prosecutor and, therefore, the arbitrary dismissal improperly affected his right to remain in the post under conditions of equality.[44] In other words, the violation of this provision was due, on the one hand, to the lack of grounds for applying "the needs of the service" (an arbitrary decision) and, on the other hand, that the provisional prosecutors do not have any guarantee of job stability due to the nature of the appointment as compared to that of career prosecutors,[45] which explains the difference in treatment or in equality of opportunities.

27. This provision of the Convention is affected precisely when these "conditions of equality" are not respected, which results in decisions or acts that are arbitrary. The arbitrariness may be reflected in the absence of objective and reasonable criteria in the

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[39] *See: Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 28, 2013. Series C No. 268, para. 222*; Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador. Preliminary Objection, Merits, Reparations and Costs.* Judgment of August 23, 2013. Series C No. 266, para. 180; *Case of Colindres Schonenberg v. El Salvador. Merits, Reparations and Costs*. Judgment of February 4, 2019. Series C No. 373*,* paras. 94 and 95*; Case of Martínez Esquivia v. Colombia. Preliminary Objections, Merits and Reparations.* Judgment of October 6, 2020. Series C No. 412, paras. 116 and 117*; Case of Casa Nina v. Peru. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 24, 2020. Series C No. 419, paras. 98 and 99*; Case of Moya Solís v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of June 3, 2021. Series C No. 425*,* paras. 110 and 111 and *Case of Cuya Lavy et al. v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 28, 2021. Series C No. 438*,* paras. 160 and 161.

[40] *Cf. Case of Casa Nina v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 24, 2020. Series C No. 419.

[41] *Cf. Case of Casa Nina v. Peru, op. cit.,* paras. 72 and 79.

[42] *Cf. Case of Casa Nina v. Peru, op. cit.,* para. 78.

[43] Therefore, this dimension of the arbitrariness of the decisions that have a negative effect on the guarantee of independence and that impact on human rights. The Court has stated that "[….] i) respect for judicial guarantees entails respect for judicial independence; ii) the dimensions of judicial independence result in the subjective right of the judge that his removal from office is exclusively for the causes permitted, either by means of a procedure that complies with judicial guarantees or because the term or period of his mandate has ended, and iii) when the permanence of judges in office is arbitrarily affected, the right to judicial independence established in Article 8(1) of the American Convention is violated, in conjunction with the right of access to and permanence in public service, under general conditions of equality, established in Article 23(1)(c) of the American Convention." *Case of the Constitutional Tribunal (Camba Campos et al.)*, *op. cit.* para. 199 and *Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, *op. cit.*, para. 155.

[44] *Cf. Case of Casa Nina v. Peru, op. cit.,* paras. 97 to 99.

[45] This unequal treatment, although it is not set out in the analyzed clause of Article 23, is fully made manifest in paras 119 to 121 and 123 of the aforementioned *Casa Nina* case*.*

dismissal or separation from the position or that the separation is decided for reasons that are discriminatory.[46] Another manifestation of "arbitrariness"[47] is when decisions are taken without offering any grounds. Therefore, especially in the case of operators of justice, the lack of grounds –the resulting arbitrary decision– is related to the specific guarantee of stability and irremoveability since these guarantees are not respected when the separation does not exclusively fall within the permitted causes during a procedure that complies with the guarantees of due process (among them, the grounds).[48]

28. The Court in *Casa Nina* also considered that the "arbitrariness of the decision to dismiss" had an additional effect with respect to the *right to work* in its aspect of "work stability." It, therefore, held that among the special guarantees that operators of justice required was work stability as a basic condition for the independence necessary to properly fulfill their procedural functions.[49] In that case, termination without grounds other than "the needs of the service" interfered with this right that he had as a provisional prosecutor.[50] In other words, what Article 26 protected was the *employee-employer work relationship that was abruptly terminated without any justification,* other than the mere mention of the needs of the service.

29. However, in *Mina Cuero v. Ecuador* (2022),[51] the Court's current judges extended the application of Article 23(1)(c) to employees other than operators of justice (in that case, a policeman). The standard that was used to find the international responsibility of the State under Article 23 was that, unlike in previous cases, that provision was applicable ""to all who exercise public functions, *under a literal reading of Article 23(1)(c)*."[52] Thus, when the continuance of public servants in their positions is arbitrarily affected, they fall under the analysis of the right "to access, continuance or stability" in the public positions or functions.

30. Moreover, the *right to work* under Article 26 guarantees the right not to be unfairly deprived of work.[53] Thus, it must be understood that "work stability" implies that the employees must be ensured that they will only be removed or dismissed for justifiable cause, which means that the employer must provide sufficient grounds to impose this sanction with due guarantees and that the employees can appeal such decision before the competent domestic authorities who must verify that the justification is not arbitrary nor unlawful.[54] The Court has already held that an arbitrary dismissal is one that is unjustified, one that lacks grounds for dismissal,[55] or one that is based on discrimination[56] by a public or private employer.

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46 *Cf. Case of Reverón Trujillo v. Venezuela. Preliminary Objection, Merits, Reparations and Costs.* Judgment of June 30, 2009. Series C No. 197, para. 138.

47 The Court has stated that: "Decisions adopted by domestic bodies that could affect human rights […] should be duly reasoned; otherwise, they would be arbitrary decisions." *Case of Yatama v. Nicaragua. Preliminary Objections, Merits, Reparations and Costs*. Judgment of June 23, 2005. Series C No. 127, para. 152 and *Case of Martínez Esquivia v. Colombia. Preliminary Objections, Merits and Reparations.* Judgment of October 6, 2020. Series C No. 412, para. 106.

48 *Cf. Case of Casa Nina v. Peru, op. cit.*, para. 80.

49 *Cf. Case of Casa Nina v. Peru, op. cit.,* paras. 78, 108 and 109.

50 *Cf. Case of Casa Nina v. Peru, op. cit.,* para. 109.

51 *Cf. Case of Mina Cuero v. Ecuador. Preliminary Objection, Merits, Reparations and Costs.* Judgment of September 7, 2022. Series C No. 464.

52 *Cf. Case of Mina Cuero, op. cit*., para. 108.

53 *Cf. Case of Lagos del Campo v. Peru. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 31, 2017. Series C No. 340, para. 147.

54 *Cf. Case of Lagos del Campo v. Peru, op. cit.,* para.150.

55 *Cf. Case of Lagos del Campo v. Peru, op. cit.*, paras. 151 and 153.

56 *Cf Case of San Miguel Sosa et al. v. Venezuela. Merits, Reparations and Costs.* Judgment of February 8, 2018. Series C No. 348, para. 221

31. The judgment in this case not only declares an autonomous violation of the right to work under Article 26, expressly invoked both by the Commission and by the representatives of the victims, but also, by means of *iura novit,* it declares the violation of the right established in Article 23(1)(c) since "the dismissal of 184 persons […], did not adhere to the guarantees of due process, which affected their continuation in their positions, under conditions of equality."[57]

32. The above was based on the following considerations:

> 120. Article 23(1)(c) of the Convention establishes the right to have access, under general conditions of equality, to public service. The Court has interpreted that access under conditions of equality would be an insufficient guarantee if it were not accompanied by the effective protection of continuance in the position,[58] which means that the procedures of appointment, promotion, suspension and dismissal of public officials must be objective and reasonable; in other words, they must respect the guarantees of due process.
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> 121. The Court has repeatedly ruled on this right in relation to the procedures used to remove public officials and has held that it is related to the guarantee of stability or irremoveability in the position.
>
> 122. In any event, the Court notes that a literal reading of the guarantees contained in Article 23(1)(c) are applicable to all those who exercise public functions. Therefore, when the continuance of persons in the exercise of those functions is arbitrarily affected, their political rights are not recognized.

33. We agree with this new global and integral dimension that were given to the violations in this case, which reinforces the precedent established in *Casa Nina* and which shall surely serve as a national and international reference for understanding the scope of the eventual international responsibility of the States. Although the premise of all rights is that they are *interdependent and indivisible,* it should not be forgotten that each one of the rights contained and protected by the Convention has a defined and distinct field of application and, therefore, of guarantee. We believe that it is evident that the concepts of "job/function stability" (Article 23) should not be confused with "work stability" (Article 26).

34. In general, the Court's case law has specified that, in the first place, Article 23(1)(c) protects the right to have "access to public service under general conditions of equality and protects the access to a direct form of the participation in the design, implementation, development, and execution of the state's political guidelines through public service."[59] Secondly, it understands that these general conditions of equality refer both to access to public service whether by popular election, by appointment or by

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[57] *Cf. Case of Benites Cabrera et al. op. cit*., paras. 122 and 123.

[58] *Cf. Case of Reverón Trujillo v. Venezuela. Preliminary Objection, Merits, Reparations and Costs.* Judgment of June 30, 2009. Series C No. 197, para. 138 and *Case of Cuya Lavy et al. vs. Peru, supra*, para. 159.

[59] *Case of Reverón Trujillo v. Venezuela, op. cit.,* para. 139; *Case of Chitay Nech et al. v. Guatemala. Preliminary Objections, Merits, Reparations and Costs*. Judgment of May 25, 2010. Series C No. 212, footnote 120; and *Indefinite Presidential Re-election in Presidential Systems in the context of the Inter-American System of Human Rights (Interpretation and scope of Articles 1, 23, 24 and 32 of the American Convention on Human Rights, XX of the American Declaration of the Rights and Duties of Man, 3(d) of the Charter of the Organization of American States and of the Inter-American Democratic Charter). Advisory Opinion OC-28/21 of June 7, 2021. Series A No 28*, para. 64.

designation."[60] Thirdly, the article operates not only for certain categories of public servants (operators of justice) but also for all persons who "exercise *public functions*."[61]

35. Thus, job stability, from the perspective of Article 23(1)(c), derives from the fact of being a public servant per se;[62] while work stability, from the perspective of Article 26, is based on the essence of "being a worker," regardless of whether of being employed privately or publicly. A public servant is clearly a worker,[63] but not every worker is a public servant; therefore, there is a double protection for workers who hold a public position, under Article 23(1)(c) (political rights) and under Article 26 (right to work), as in *Benites Cabrera et al.,* the subject of this opinion,

36. This distinction is reflected in the scope of the application of the right to "access to […] public service, under general conditions of equality," that is found in Article 23(1)(c) of the American Convention,[64] Article 25 of the International Covenant on Civil and Political Rights[65] and Article 13 of the African Charter of Human and Peoples' Rights.[66] All of these provisions have in common that they only apply when there is an analysis of possible violations of access or continuation in the "*public functions*" and, therefore, public service positions.

37. The Human Rights Committee in its General Comment No. 25 has stated that its Article 25(c) refers to the right and to the possibilities of citizens to have access, under general conditions of equality, to *public service positions*. The Committee makes special mention of the concepts of "public administration" or "public service positions."[67]

38. This preciseness of the content of Article 23(1)(c) with respect to the right to work under Article 26 is relevant. Any claim that it is not necessary to distinguish the content of the right to work stability with respect to the right to job stability (as an

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60 *Case of Yatama v. Nicaragua. Preliminary Objections, Merits, Reparations and Costs.* Judgment of June 23, 2005. Series C No. 127. para. 200 Indefinite *Presidential Re-election in Presidential Systems in the context of the Inter-American System of Human Rights (Interpretation and scope of Articles 1, 23, 24 and 32 of the American Convention on Human Rights, XX of the American Declaration of the Rights and Duties of Man, 3(d) of the Charter of the Organization of American States and of the Inter-American Democratic Charter). Advisory Opinion OC-28/21 of June 7, 2021. Series A No 28.* para. 64.

61 *Case of Mina Cuero*, *op. cit*., para. 108.

62 Not every public servant as a worker is, *prima facie*, protected by all of the facets of the right to work. Although one of the facets of the right to work is the possibility to join together to form trade unions; for example, Article 16 of the Convention indicates that the right of association does "not bar the imposition of legal restrictions, including even deprivation of the exercise of the right of association, on the members of the armed forces and the police," who nonetheless are public servants, but whose rights would not be protected by this facet. The European Convention on Human Rights is more restrictive regarding this facet of the right to work in that it may limit it for "members […] of the administration of the State." That treaty indicates that: "11.2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State." Nonetheless, the European Court has recognized the possibility of the protection of certain workers, such as "municipal workers" in *Demir and Baykara*. *Case of Demir and Baykara v. Turkey*, Judgment of November 12, 2008.

63 There may even be public jobs that are not protected by the right to work; for example, honorary public jobs where there is no "remuneration" or "salary," an element protected by the right to work.

64 Article 23. Right to Participate in Government. 1. Every citizen shall enjoy the following rights and opportunities: […] c) to have access, under general conditions of equality, to the public service of his country.

65 Article 25. Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without reasonable restrictions: […] c) To have access, on general terms of equality, to public service in his country.

66 Article 13 […] Every citizen shall have the right to participate freely in the government of his country.

67 UN Human Rights Committee, General Comment No. 25, HRI/GEN/1/REV.7 at 194 (1996), paras. 23 and 24.

expression of the right to access public office), with the objective that the work issues are subsumed to the former, would result in an *emptying* of the content of Article 26, but it would also create unresolvable practical problems when dealing with arbitrary dismissals in the area of private labor relations, as happened in the emblematic *Lagos del Campo* case of 2017, which opened the way for the interpretation of the direct and autonomous justiciability of the right to work established in Article 26.

39. In accordance with the Court's case law,[68] the right to work under Article 26 is much broader and protects arbitrary separations or dismissals. Thus, it would not be possible to subsume the allegations of violations to the right to work into the content of Article 23(1)(c), since the content of each right is distinct, the protection of the right to work is broader as it includes the public and private areas, while the right to access to public service (public service position) is limited to the former.

40. A second aspect that differentiates Article 23(1)(c) from Article 26 requires specifying the scope of protection with which it impacts on the content of that right. While Article 23(1)(c) focuses on i) the possibility (access), ii) having achieved this access, continuance in the position and iii) having achieved continuance in the position, any separation must be for established grouds and in accordance with the guarantees of due process; the right to work contained in Article 26 protects other components in addition to work stability, such as salary,[69] freely accepting or deciding on a job, access to a system of protection that ensures to each worker access to a job, the dignity of work, the possibility of forming trade unions,[70] working conditions (decent, equitable, satisfactory health and sanitary conditions)[71] or even the vocation to perform a job[72]. For example, the European Social Charter has a catalogue of broad contents that protect the right to work.[73]

41. Thirdly, the focus of the right contained in Article 23(1)(c) is primarily to have an impact on society; in other words, a citizen occupies a public service position to serve society in that the presumed intent of that person is to access such position in order to have an impact on the "design, implementation, development and execution of State policies through public service." On the other hand, the right to work is mainly focused on its individual dimension (without ignoring its collective importance[74]), since the essence of this right -and of its facets- has the purpose that the worker through his or her work achieves the conditions of a life with dignity or in the words of the UN

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68 *Cf. Case of Lagos del Campo v. Peru, op. cit.*, para. 145; *Case of the Dismissed Employees of Petroperú et al. v. Peru, op. cit.,* para. 192; *Case of San Miguel Sosa et al. v. Venezuela, op. cit.*, paras. 219 and 220; *Case of Spoltore v. Argentina, op. cit.,* para. 82; *Case of the Employees of the Fireworks Factory de Santo Antônio de Jesus and their families v. Brazil, op. cit.,* para. 68; *Case of Casa Nina v. Peru, op. cit.*, para. 104; *Case of the Buzos Miskitos (Lemoth Morris et al.) v. Honduras, op. cit.,* para. 68; *Case of the Former Employees of the Judiciary v. Guatemala, op. cit.,* paras. 128 to 133; *Case of Palacio Urrutia et al. v. Ecuador, op. cit.,* para. 153; *Case of the National Federation of Maritime and Port Workers (FEMAPOR) v. Peru, op. cit.,* para. 107; Case of *Pavez Pavez v. Chile, op. cit.*, para. 87; *Case of Guevara Díaz v. Costa Rica*, *op. cit., para. 58;* and *Case of Benites Cabrera et al. v. Peru*, *op. cit*., para. 110.

69 See: *Case of the National Federation of Maritime and Port Workers (FEMAPOR) v. Peru. op. cit*.

70 UN ESCR Committee, General Comment No. 18, right to work, E/C.12/GC/18 (2006), paras. 6, 7 and 12(c).

71 *See: Case of Spoltore v. Argentina, op. cit.; Case of the Employees of the Fireworks Factory of Santo Antonio de Jesús and their families v. Brazil, op. cit.,* and *Case of the Buzos Miskitos v. Honduras, op. cit.*

72 See: *Case of Pavez Pavez v. Chile, op. cit.*

73 See: Provisions of the European Social Charter included in Articles 1 to 10, 19 to 22 and 24 to 29.

74 However, this "collective" facet, unlike the content of the right contained in Article 23, is mainly focused on the defense of the interests of trade unions and associations of workers and not on society as a whole.

Committee on Economic, Social and Cultural Rights, decent work should at least offer "an income allowing workers to support themselves and their families."[75]

42. An analysis of obligations also plays a fundamental role in the case of the right to work, since, as the ESCER Committee has pointed out, the State has obligations of a progressive nature (and a prohibition of retrogressive measures) under this right,[76] which cannot be evaluated from the scope of the application of Article 23(1)(c).

43. In sum, this jurisprudential advance is important since it adequately measures the global and integral impediments that may arise in each case. This new jurisprudential dimension crystallizes the notion that all human rights are interdependent and indivisible and that there is no hierarchy among them, making possible the international responsibility of the States for the failure to respect or guarantee in light of Article 1(1) of the Convention.

IV. CONCLUSION

44. More than 15 years ago, the Court delivered *Dismissed Congressional Employees v. Peru,* which is intimately related, contextually and factually, to this case. In his separate opinion, then Judge Antônio Cançado Trindade —whose recent loss we deeply lament— reflected on the interpretative scope of Article 26 of the Convention:[77]

> 7. Regarding the unsatisfactory paragraph 136 of this judgment, which is similar to the unsatisfactory wording of Article 26 of the American Convention (a product of its time), owing to absolute lack of time, in view of the accelerated work "methodology" adopted recently by the Court, over my objection, I will merely reiterate my understanding, expressed in numerous publications over the years, that *all* human rights, even economic, social and cultural rights, are promptly and immediately *demandable and justiciable*, once the interrelation and indivisibility of all human rights are affirmed at both the doctrinal and the operational levels – in other words, both in legal writings and in hermeneutics and the application of human rights.[78]

45. Today, more than ever, the illuminating reflections of the Court's former president are clear on the necessity that all human rights are promptly and immediately *enforceable and justiciable*. The illustrious jurist repeated this longing in the resolution on monitoring compliance of the judgment in that case.[79] The steps taken in inter-American jurisprudence on the immediate autonomy and justiciability of economic, social, cultural and environmental rights has, thus, become a chain novel written by the

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[75] UN ESCR Committee, General Comment No. 18, right to work, E/C.12/GC/18 (2006), para. 7.

[76] UN ESCR Committee, General Comment No. 18, right to work, E/C.12/GC/18 (2006), paras. 19, 20 and 21.

[77] Separate opinion of Judge A.A. Cançado Trindade in *Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 24, 2006. Series C No. 158, para. 7.

[78]. A.A. Cançado Trindade, *La Cuestión de la Protección Internacional de los Derechos Económicos, Sociales y Culturales: Evolución y Tendencias Actuales*, San José, Costa Rica, IIDH (Series for NGOs, vol. 6), 1992, pp. 1-61; A.A. Cançado Trindade, "La question de la protection internationale des droits économiques, sociaux et culturels: évolution et tendances actuelles", 44 *Boletín de la Sociedad Brasileña de Derecho Internacional* (1991), pp. 13-41; A.A. Cançado Trindade, "La Protección Internacional de los Derechos Económicos, Sociales y Culturales en el Final del Siglo", en *El Derecho Internacional en un Mundo en Transformación - Liber Amicorum en Homenaje al Prof. E. Jiménez de Aréchaga*, vol. I, Montevideo, Fundación de Cultura Universitaria, 1994, pp. 345-363; A.A. Cançado Trindade, *El Derecho Internacional de los Derechos Humanos en el Siglo XXI*, 1a. ed., Santiago, Editorial Jurídica de Chile, 2001, pp. 91-142, among other writings.

[79] Dissenting opinion of Judge A.A. Cançado Trindade in *Request of Interpretation of Judgment in the Case of The Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru*. Judgment of November 30, 2007, para. 60.

judges of yesterday, today and assuredly tomorrow with a "trans-generational perspective." In addition, the justiciability of those rights has been "fully absorbed into the language of the American human rights protection system, transforming it into a category that is fundamental for addressing the urgent problems facing the peoples of the continent, impacted by profound material inequalities."[80]

46. This jurisprudential viewpoint enables the visualization of the effective protection of *all* rights, be they civil, political, economic, social, cultural or environmental. This furthers their interdependence and indivisibility, without any hierarchy among them, making possible a greater clarity on their content and scope of protection, as well as on the inter-American standards concerning the States' obligations in the area of social justice.

47. Granting to each right its differentiated autonomy and scope of protection is in accord with the Court's interpretative advances during the past five years. It also is in accord with current times and with interpretations made by national courts -especially the tribunals, courts and constitutional chambers in Latin America- granting full justiciability to claims of violations of the right to work not only in the light of the national constitutions and the international treaties that contemplate them, but also taking into account the Court's case law, which enables a greater intensity in the jurisprudential dialogue and in the dynamic of the control of constitutionality that has occurred in the region during recent years.

48. Specifying the content and distinct scopes of the protection of the right to work (Article 26) and the right to have access to public service under general conditions of equality (Article 23) —frontally and without unnecessary overlapping- furthers the full understanding of the facts and violations that might arise in each specific case. This distinction also contributes to consolidating a regional *ius commune* in the area of human rights, especially relevant in view of the incommensurable challenges that we confront in the area of social justice due to the toxic effects of the pandemic.[81]

Eduardo Ferrer Mac-Gregor Poisot
Judge

Rodrigo Mudrovitsch
Judge

Pablo Saavedra Alessandri
Registrar

[80] Concurring opinion of Judge Rodrigo Mudrovitsch in *Guevara Díaz v. Costa Rica, op. cit.*, paras. 144 and 145.

[81] *Cf.* Economic Commission for Latin America and the Caribbean (ECLA), *Social Panorama of Latin America, 2021* (LC/PUB.2021/17-P), Santiago, 2022.