

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)

In the case of *Benites Cabrera et al. v. Peru*,

the Inter-American Court of Human Rights (hereinafter “the Inter-American Court” or “the Court”), composed of the following judges:

Ricardo C. Pérez Manrique, President
Humberto Antonio Sierra Porto, Vice President
Eduardo Ferrer Mac-Gregor Poisot
Nancy Hernández López
Verónica Gómez
Patricia Pérez Goldberg
Rodrigo Mudrovitsch,

also present,

Pablo Saavedra Alessandri, Registrar
Romina I. Sijniensky, Deputy Registrar,

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”) and to Articles 31, 32, 65 and 67 of the Court’s Rules of Procedure (hereinafter “the Rules”), delivers this judgment, structured as follows:

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I

INTRODUCTION OF THE CASE AND THE CAUSE OF ACTION

1. *The case submitted to the Court.* – On July 17, 2020, the Inter-American Commission on Human Rights (hereinafter “the Commission”) submitted to the Court the case of *Carlos Benites Cabrera et al. v. Peru*. The Commission stated that the case involves the alleged violations of Articles 8(1), 25(1) and 26 of the Convention, read in conjunction with Articles 1(1) and 2 thereof, to the detriment of 192 employees who had been dismissed as part of the so-called “streamlining of personnel” program implemented during the government of Alberto Fujimori. These employees were also barred from filing applications of constitutional relief (hereinafter “writs of amparo” or “amparo”) regarding their dismissals and they challenged the results of the competitive examinations that were held to fill the positions left vacant after the “streamlining” process.

2. *The following proceedings took place before the Commission:*

a. *Petition.* – On December 19, 2000, Javier Mujica Petit, as common intervenor, lodged a petition before the Commission in which he alleged the international responsibility of Peru (hereinafter also “the State”) for the dismissal of a group of employees of the Congress of Peru.¹ On September 9, 2003, the Commission received another petition on the same facts concerning a second group of alleged victims, represented by Elizabeth Elisa Ledesma Rojas.² On August 7, 2017, the Commission notified the parties of its decision to join the petitions, under the terms of Article 29(5) of its Rules.

b. *Report on Admissibility and Merits.* – On August 7, 2017, the Commission notified the parties of its decision to defer the decision on admissibility to that on the merits. On May 4, 2019, the Commission adopted its Report on Admissibility and Merits (No. 64/19) (hereinafter “Report on the Merits” or “Merits Report”), pursuant to Article 50 of the Convention..

c. *Notification to the State.* – On July 17, 2019, the Commission notified the Merits Report to the State, granting it a period of two months to report on its compliance with the recommendations contained therein. It subsequently granted three extensions of three months each. In considering the request for a fourth extension, the Commission took into account that the State had not made substantive progress in complying with the only recommendation in the Report and, therefore, decided to submit the case to the Court.

3. *Submission to the Court.* – On July 17, 2020, the Commission submitted to the Court all the facts and the alleged human rights violations described in the Merits Report due to

¹ Petition 728-00, which was transmitted to the State on October 24, 2016.

² Petition 725-03, which was transmitted to the State on June 30, 2011.

“the need to obtain justice.”³ The Court notes with concern that twenty years had elapsed between the presentation of the initial petition and the submission of the case to the Court.

4. *Requests of the Commission.* - The Commission requested that the Court declare the international responsibility of the State for the violation of the rights to a fair trial, to judicial protection and to work set out in Articles 8(1), 25(1) and 26 of the Convention, read in conjunction with Articles 1(1) and 2 thereof, to the detriment of the alleged victims.

II PROCEEDINGS BEFORE THE COURT

5. *Notification to the State and to the representatives.* - On October 5, 2020, the submission of the case was notified to the State⁴ and to the representatives of the alleged victims.⁵

6. *Brief with pleadings, motions and evidence.* - On November 24, 2020, the representatives presented their brief of pleadings, motions and evidence (hereinafter “pleadings and motions brief”), pursuant to Articles 25 and 40 of the Rules. They requested that the Court declare the international responsibility of the State for the violation of the rights to a fair trial (judicial guarantees), to judicial protection and to economic, social and cultural rights, established in Articles 8(1), 25(1) and 26 of the Convention, read in conjunction with Articles 1(1) and 2 thereof. They also requested some measures of reparation.

7. *Answering brief.* - On March 30, 2021,⁶ the State submitted its brief (hereinafter “answering brief”) in response to the submission of the case as well as its observations on the pleadings and motions brief. It presented five preliminary objections and its arguments regarding the number of alleged victims and the inclusion of family members in the pleadings and motions brief. The State also denied the violations and opposed the requests of measures of reparation presented by the Commission and the representatives.

³ The Commission named as its delegates Commissioner Edgar Stuardo Ralón Orellana and Paulo Abrão, Marisol Blanchard Vera and Jorge Humberto Meza Flores, who were then Executive Secretary, Deputy Executive Secretary and Specialist, respectively. It also named Erick Acuña Pereda, specialist of the Commission’s Secretariat, as legal advisor.

⁴ By note of October 20, 2020, Peru named Carlos Miguel Reaño Balarezo, Specialized Public Prosecutor for International Affairs, as its agent for this case and, as alternate agents, Carlos Llaja Villena, Deputy Specialized Public Prosecutor for International Affairs, and Judith Cateriny Córdova Alva, a lawyer.

⁵ The original representative is Javier Mujica Petit. In communications received on June 27 and July 4, 2022, the alleged victims Luis Alberto Sánchez Villanueva, Angelita Jeni Torres Novoa, Valerio Calderón González, Carlo Juan Castillo Salazar and Dante Pedro A. Zegarra Salazar named Elizabeth Elisa Ledesma Rojas, who is also an alleged victim, as a second representative in the case.

⁶ By communication of January 14, 2021, the State requested an extension of the period to present its answering brief. It based its request on (i) the multitude of alleged victims; the alleged procedural issue on the exhaustion of domestic remedies, and the access of the employees, whose dismissals were declared irregular, to the Special Benefits Program; (ii) the regulatory causes for extending the period to present its answering brief, and (iii) the alleged uncertainty regarding the representation of the totality of the alleged victims. The State’s request, repeated on February 1, 2021, asked that the Court also take into account the restrictions to mobility due to Covid-19 pandemic; some issues related to the representation of the alleged victims, and the fact that the representatives did not include the appendices in their pleadings and motions brief. By instruction of the then President of the Court, in a note of February 3, 2021 and in view of the situation described by the State regarding the restrictions imposed in Peru due to the spread of Covid, the State was granted, as an exception, an extension to March 30, 2021 to present its answering brief.

8. *Observations on the preliminary objections.* – On May 19, 2021, the representatives submitted their observations on the State’s preliminary objections. The Commission presented its observations the following day.

9. *Public hearing.* – On December 13, 2021,⁷ the President of the Court called the parties and the Commission to a public hearing, which took place by video conference on February 11, 2022 during the Court’s 146th Regular Session.⁸

10. *Final written arguments and observations.* – On March 11, 2022, the representatives and the State submitted their final written arguments, to which they attached documents, and the Commission presented its final written observations. On March 26, 2022, the representatives offered their observations on the State’s documents. On March 29, 2022, the Commission indicated that it had no observations on those documents.

11. *Evidence and information to facilitate adjudication of the case.* – On March 31, 2022, the Commission requested that the State provide evidence to facilitate the adjudication of the case.⁹ On April 8, 2022, the State presented that documentation (*infra* para. 62). On April 26, the representatives submitted their observations and, on April 28, the Commission stated that it had no observations to make on the documentation.

12. *Deliberations on this case.* – On October 3 and 4, 2022, by virtual means, the Court deliberated this judgment at its 152nd Regular Session.

III JURISDICTION

13. The Court has jurisdiction to hear this case pursuant to Article 62(3) of the Convention, inasmuch as Peru ratified the Convention on July 12, 1978 and accepted the Court’s contentious jurisdiction on January 21, 1981.

IV PRELIMINARY OBJECTIONS

14. Peru presented six procedural issues. The Court will now analyze those dealing with the following preliminary objections: A) the request of control of legality on the procedure followed by the Commission; B) the alleged failure to exhaust domestic remedies; C) the alleged lack of the Court’s competence to act as a fourth instance; D) the alleged inadmissibility of the complaint for the lack of an object, and E) the alleged lack of the Court’s jurisdiction with respect to the alleged violation of Article 26 of the Convention. The Court will analyze the other issue in the chapter on the preliminary question (*infra* paras. 50-59).

⁷ Cf. *Case of Benites Cabrera et al. v. Peru. Call to a public hearing.* Resolution of the President, dated December 13, 2021.

⁸ Appearing at the public hearing for the Commission were Marisol Blanchard, Jorge Meza Flores and Erick Acuña Pereda; for the alleged victims: Javier Antonio Mujica Petit, Norma Inés Ferreyra Guerra, Elizabeth Elisa Ledesma Rojas and Edwin Alfonso Espinoza Chávez; and for the State: Carlos Miguel Reaño Balarezo, Judith Córdova Alva and Dévora Silva Ipince.

⁹ The State was requested to provide the following documents: (1) Decree-Law 25438, published in the Official Gazette “El Peruano” on April 20, 1992; (2) Decree-Law 25640, published in the Official Gazette “El Peruano” on July 24, 1992; (3) Decree-Law 25759, published in the Official Gazette “El Peruano” on October 8, 1992; (4) Law 30484 and (5) Law 31218 of June 16, 2021.

A. Request of control of legality on the procedure followed by the Commission

A.1 Arguments of the parties and of the Commission

15. The **State** argued that the Merits Report claims that 20 alleged victims in this case had exhausted domestic remedies and that there is uncertainty regarding 172 persons. It, thus, requested a control of legality on the Commission's incorporation of those alleged victims because it violated the State's right of defense. It based its request on three arguments. First, the improper application of the Commission's Resolution 1/16 with regard to deferring the question of admissibility until the debate and decision on the merits.¹⁰ It argued that the Commission, by deciding the admissibility together with the merits, did not rule on the exhaustion of domestic remedies even though an analysis of the admissibility of the exceptions to the rules on exhaustion depends on a standard of appreciation that differs than that in determining violations of the Convention.

16. Secondly, the State pointed out that there was no indication as to which of the 172 former congressional employees recurred to the domestic jurisdiction to validate their claims. The State maintained that although Decree-Law 25640 established that a writ of amparo was not appropriate to contest the dismissals directly or indirectly, it did not bar other judicial means to impugn them and that, in its Merits Report, the Commission recognized that some of the alleged victims sought administrative and judicial remedies. The State also claimed that the Commission did not provide anything "that would allow it to request information that could enable an analysis of the exhaustion." According to the State, this lack of information limited its right of defense since it was not then able to dispute the facts of the case of 172 persons.

17. Finally, the State claimed that there is a contradiction in the Commission's pleadings in that it stated that the exhaustion of domestic remedies in this case had not been successful and, at the same time, it recognized that, in comparable cases, the victims exhausted remedies of the domestic jurisdiction.¹¹

18. The **Commission** stated that the authority to exercise "control of legality" of its actions should be exercised restrictively and exceptionally. Otherwise, its autonomy and independence would be placed at risk. It emphasized that such a control is appropriate when it is demonstrated that there is a grave error that prejudices the State's right of defense, which would justify a case being declared inadmissible. Thus, it would exceed the Court's competence to exercise "a control of legality for merely declarative purposes." The Commission also claimed that it had duly notified both parties of its decision to join the petitions and of its decision to apply Article 36(3) of its Rules in the terms of Resolution 1/16 and that the parties had been able to present their observations on those decisions. Thus, the Commission considered that there was no harm to the State's right of defense.

19. The **representatives** argued that a State's authority to question the Commission's actions is not unlimited and may only occur in those cases in which it is shown that, in the proceedings before the Commission, there was a grave error that violated the right of

¹⁰ Resolution 1/16 of the Commission. Available (in Spanish) at: <https://www.oas.org/es/cidh/decisiones/pdf/Resolucion-1-16-es.pdf>

¹¹ See: *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 and *Case of Canales Huapaya et al. v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 24, 2015. Series C No. 296.

defense of the parties and that the harm was relevant and manifestly grave. With respect to the alleged contradiction in the Commission's pleadings, the representatives claimed that it concerned two different situations. One is the absence of effective judicial remedies for those who were dismissed from the Congress and the other is that the employees had filed the remedies established in the subsequent legislation, which were intended to repair the consequences of the irregular dismissals.

A.2 Considerations of the Court

20. The Court recalls that matters under its consideration include a control of legality of the Commission's actions. This, however, does not necessarily presuppose a review *de officio* of the proceedings carried out at that level. In addition, the Court must preserve a fair balance between the protection of human rights, the ultimate purpose of the inter-American system, and legal security and procedural equity that would assure stability and confidence in international protection. Thus, this control is appropriate when a party alleges that there has been a grave error that affects its right of defense, in which event it must effectively demonstrate such prejudice. A complaint or a discrepancy of criteria with respect to the Commission's actions is not sufficient.¹²

21. The State has claimed that its right of defense was affected by the Commission's decision to defer the question of admissibility to the examination of the merits due to the lack of certainty regarding the exhaustion of domestic remedies by a group of alleged victims and because of alleged contradictions in the Commission's arguments.

22. With respect to the first argument, the Court finds that the Commission deferred the examination of admissibility pursuant to the terms of Article 36(3) of its Rules and to the terms of Resolution 1/16 on "Measures to reduce the procedural backlog." As the Commission indicated, this decision was also duly transmitted to the parties, which guaranteed the State's right of defense.¹³ This indicates that the Commission acted within the framework of its regulatory authority, which respects the due process of the parties, and with strict respect for the right of defense. Therefore, the State's request of control of legality is inadmissible.

23. Moreover, the Court finds that the State's other arguments refer to the preliminary objection on the failure to exhaust domestic remedies, which will be considered in the appropriate chapter (*infra* paras. 27-34).

B. The alleged failure to exhaust domestic remedies

B.1 Arguments of the parties and of the Commission

24. The **State** maintained that, at the time of the events, its legal order offered appropriate remedies to contest decisions and that their suitability is shown by the fact that some individuals utilized them and obtained responses that were favorable to their interests. However, 172 of the alleged victims did not exhaust any domestic remedy, while the 20 persons who filed a writ of amparo did not present an action that could contest the inapplicability of Decree-Law 25640. The State argued that "while it was not possible to

¹² Cf. *Case of the Saramake People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, para. 32 and *Case of Moya Chacón et al. v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of May 23, 2022. Series C No. 451, para. 17.

¹³ Cf. Note of the Commission to the Minister of Foreign Affairs of Peru, dated August 7, 2017 (evidence file, f. 1801).

challenge the dismissals by means of a writ of amparo or through administrative remedies," there existed other domestic means that would have enabled the dismissed employees to resolve the controversy; for example, an administrative dispute procedure and a class action. The State also affirmed that the Commission's allegation of the denial of justice lacked grounds. It indicated that the Constitutional Court in some decisions, adopted between 1997 and 1999, exercised a diffuse control of constitutionality of the norms that authorized the dismissal of the employees by not applying those norms, which indicates that it was possible to present writs of amparo and obtain a favorable response.

25. The **Commission** repeated the arguments presented in its Merits Report and recalled the Court's case law regarding dismissed employees during the 1990s, in which it was established that they did not have access to available, suitable and effective remedies that meet inter-American standards. It affirmed that, on the issue of admissibility, the similarity of the situation of all the alleged victims was not determined by the judicial proceedings initiated in the domestic jurisdiction, but rather by the decision on dismissing them by means of laws that were designed to formalize the dismissals in a context of a lack of access to effective remedies. Thus, due to the absence of an available, suitable and effective recourse to exhaust domestic remedies, the Commission considered that it had complied with the terms of Article 46(2)(b) of the Convention.

26. The **representatives** recalled that the alleged victims listed in Petition 728-00 expressly availed themselves of the exception found in Article 46 (2)(b) and explained why they should not be required to file and exhaust the remedies of the domestic jurisdiction; in particular, because they had well-founded reasons to conclude that, while it is true that in some cases judges consider administrative dispute procedures to be appropriate, there existed "absolutely dissimilar" criteria on the procedural course to be followed and that the suitability of that jurisdiction to question the dismissals was not clear. With respect to a class action, they emphasized that its purpose is the total or partial non-application of the challenged norm from the date of the judgment's execution and that it did not include a possibility of restitution and, therefore, was not a suitable remedy for the claims of the employees.

B.2 Considerations of the Court

27. The Court recalls that an objection to the exercise of its jurisdiction based on the alleged failure to exhaust domestic remedies must be presented during the admissibility stage of a case before the Commission.¹⁴ Therefore, the State must, in the first place, detail the remedies that, in its opinion, have not been exhausted. In addition, the grounds of a preliminary objection presented by the State before the Commission during the admissibility stage must coincide with those presented to the Court.

28. The Commission, on October 24, 2016, transmitted Petition 728-00, which had been received on December 19, 2000, to the State and granted it a period of three months to present its observations.¹⁵ The Court recalls that this petition refers to the former employees who did not file a writ of amparo. The State presented its observations on February 1, 2017 in which it opposed the exception to the failure to exhaust domestic remedies and claimed that "the petitioners had not complied, in a timely and suitable fashion, with filing and

¹⁴ Cf. *Velásquez Rodríguez v. Honduras. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 1, para. 88 and *Cuya Lavy et al. v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 28, 2021. Series C No. 438, para. 27.

¹⁵ Note of the Commission to the Minister of Foreign Affairs of Peru, dated October 24, 2016 (evidence file, f. 636).

exhausting the domestic remedies that existed in the national legislation.” With respect to the available remedies, the State maintained that “the appropriate means were an administrative dispute procedure” and that the petitioners could have presented remedies of constitutional guarantees, such as a class action.”¹⁶ In other words, this preliminary objection was presented in a timely fashion and in the terms required under the Court’s case law.

29. The Court notes that the employees in this case were, with respect to their dismissals, in the situation described in *Aguado Alfaro et al. v. Peru* and in *Canales Huapaya et al. v. Peru*. In the latter, the Court stated that:

Indeed, in the judgment in the case of the *Dismissed Congressional Employees*, the Court noted that, in addition to the amparo, some persons resorted to administrative remedies and others resorted to administrative litigation, without carrying out a differentiated analysis for each group of victims, **precisely because the denial of justice took place in a generalized context of inefficiency of the judicial institutions, absence of guarantees of independence and impartiality, and lack of clarity as to the remedy to be used to challenge collective dismissals.**¹⁷ (emphasis not in original text).

30. Contributing, among others, to this context were the limitations to the independence and impartiality of the Constitutional Court, which was responsible for resolving the special remedies against decisions on amparo. On this issue, the Court in *Aguado Alfaro et al. v. Peru* case stated:

[...] it has also been demonstrated (*supra* para. 89(27)) that the independence and impartiality of the Constitutional Court, as a democratic institution guaranteeing the rule of law, were undermined by the removal of some of its justices, which “violated *erga omnes* the possibility of exercising the control of constitutionality and the consequent examination of the adaptation of the State’s conduct to the Constitution.” The above resulted in a general situation of absence of guarantees and the ineffectiveness of the courts to deal with facts such as those of the instant case, as well as the consequent lack of confidence in these institutions at the time.

31. The Court considers that, in view of the generalized context of the lack of effectiveness of the judicial institutions, the absence of guarantees of independence and impartiality, and the absence of clarity on the manner to appeal, the alleged victims could not be required to file writs of amparo because those writs had been expressly barred nor to file administrative actions since it was not clear that they could contest the dismissals. On this matter, the Court ruled the following in the judgment in *Aguado Alfaro et al. v. Peru*:

The Court observes that, according to the information in the file, six dismissed congressional employees – two who are alleged victims in this case (*supra* para. 89(29)) and four who are not – opted to resort to the administrative-law proceeding to request, *inter alia*, the annulment of one of the decisions ordering their dismissal. The actions were declared admissible in only two of these cases, even though most of the basic facts were almost identical. Also, from the said judgments it is clear that these employees filed recourses for reconsideration and/or of appeal using the administrative proceedings.

Accordingly, from the rulings of the domestic courts in the administrative-law jurisdiction in the six cases provided to the Court’s file, it is unclear whether it was necessary to exhaust the administrative proceeding before filing an action before the courts. In this regard, it is also unclear whether the administrative-law jurisdiction was viable or appropriate for the alleged victims to be able to contest their dismissal; consequently, the State cannot defend itself by

¹⁶ Cf. Ministry of Justice and Human Rights of Peru. Specialized Public Prosecutor for International Affairs. Report 015-2017-JUS/CDJE-PPES of February 1, 2017. Petition ASCHR 728-00 (evidence file, fs. 987 to 989). The State indicated that the Commission’s note of October 24, 2016 was received by electronic mail on November 1, 2016.

¹⁷ *Case of Canales Huapaya et al. v. Peru, supra*, para. 103.

arguing that the alleged victims have not attempted it, in order to allege that its obligation to provide an effective recourse has been fulfilled.¹⁸

32. The Court, likewise, finds that those who filed a writ of amparo, among them 20 of the alleged victims, did so despite the express prohibition that is evidence of a context of denial of justice. While the Court welcomes the information provided by the State, according to which, on various occasions, the rights of persons affected by the dismissals had been guaranteed, those are isolated cases that do not necessarily demonstrate rejection of the referred-to context.¹⁹

33. As to a class action as an available remedy, the Court finds that a decision based on that action would be declaratory and not a restitution *ab initio*. Thus, it was an effective remedy to contest the legality and constitutionality of the decrees applied to the dismissed employees, but not a suitable remedy to resolve their individual claims.²⁰

34. In view of the above, the Court holds that the exceptions provided for in Article 46(2)(b) of the Convention exist. Therefore, the exhaustion of domestic remedies was not required. The Court emphasizes that the fact that the employees were declared victims in *Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru* and in *Canales Huapaya v. Peru* and that some of the alleged victims in this case have accessed the domestic jurisdiction to enforce their rights does not detract from the context identified by the Court in its prior judgments, nor does it imply that there existed a suitable remedy available to the alleged victims in this case.

C. The alleged lack of the Court's competence to act as a fourth instance

C.1 Arguments of the parties and of the Commission

35. The **State** argued that this case seeks a reconsideration of the criteria adopted in the decision that resolved the writ of amparo filed by 20 of the alleged victims without explaining how the decisions had resulted in an infringement of the rights established in the Convention. It underscored that the organs of the inter-American system are not a substitute for domestic courts, nor do they act as higher courts to re-examine judicial decisions adopted within the framework of procedures that respected international standards. The State argued that the Court cannot substitute its assessment of the normative framework for that made by the national courts. Moreover, it considered that this group of 20 alleged victims received a response that was in accord with the law.

¹⁸ Cf. *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru*, *supra*, paras. 115 and 116.

¹⁹ In its final written arguments, the State informed on the existence of three rulings, issued between 1997 and 1999, in which the Constitutional Court exercised a diffuse control of constitutionality of the norms that authorized the dismissals of the employees under the streamlining of personnel process and did not apply them.

²⁰ Class actions are regulated by Law 24968 "Procedural law on class actions," which provides, in its Article 1, for their application "for infractions of the Constitution or the law on administrative regulations and norms and resolutions and decrees of a general nature that the Executive Branch, the Regional and Local Governments and other persons of public law issue." Article 2 of the law establishes that the purpose of class actions was "jurisdictional control of the constitutionality and legality of norms [...] by means of the declaration and the execution of unconstitutionality or unlawfulness, in all or in part [...]. Its Article 22 provides that "a judgment in favor of a class action that, from the date that it is signed or executed, determines the total or partial non-application, when appropriate and with general effect, of the norm subject to the declaration of unconstitutionality or unlawfulness. The judgment is effective as of the day after its publication." Law 24968 of 1988, "Procedural law on class actions" (evidence file, f. 2431).

36. The **Commission** claimed that this objection is appropriate when there is a claim that the Court has reviewed a decision of a domestic court in which the latter incorrectly weighed the evidence, the facts or the domestic law and there is no allegation that such a decision resulted in a violation of the international treaties over which the Court has jurisdiction. However, this case involves establishing whether the domestic procedures were compatible with the Convention and, therefore, the Commission requested that the Court reject the State's argument.

37. The **representatives** stated that this is an issue related to the merits of the controversy in that it refers to an alleged failure to comply with the international obligations regarding the rights to judicial protection and to judicial guarantees, the violation of which has been claimed. They pointed out that the alleged victims did not seek reconsideration of what was decided by the national judges and by the amparo courts.

C.2 Considerations of the Court

38. The Court has stated that the determination of whether the acts of judicial organs are a violation of a State's international obligations can lead to an examination of the respective domestic procedures to establish their compatibility with the American Convention.²¹ Therefore, the Court is not a fourth instance of judicial review in that it examines the conformity of such judicial decisions with the Convention and not their accord with domestic law.²²

39. Here the Court notes that both the Commission and the representatives have presented allegations of violations of rights set out in the American Convention perpetrated by the State and specifically related to domestic procedures. Therefore, it is absolutely necessary to analyze the decisions of the different jurisdictional authorities to determine their compatibility with the State's international obligations. The preliminary objection is, thus, ruled inadmissible.

D. Alleged inadmissibility of the complaint for the lack of an object

D.1 Arguments of the parties and of the Commission

40. The **State** requested that the Court exclude certain former employees who were repaired domestically and, thus, the alleged violations have been indemnified. It reported that, with respect to 141 persons, it had reviewed the dismissals and had recognized their irregularity and that it has carried out specific actions for the revindication of their rights. The State emphasized that 121 persons have been repaired and that the reparations of 20 additional persons is imminent. In addition, it asked that the Court require that the alleged victims or their representatives provide information on payments of financial incentives for voluntary retirements and of social benefits received upon dismissal.

41. The **Commission** repeated the arguments found in its Merits Report in the sense that the effect of the access of some of the alleged victims to the procedures of reinstatement, retraining, indemnification or some other form of reparation for their irregular dismissals is

²¹ Cf. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*. Judgment of November 19, 1999. Series C No. 63, para. 222 and *Case of Sales Pimenta v. Brazil. Preliminary Objections, Merits, Reparations and Costs*. Judgment of June 30, 2022. Series C No. 454, para. 32.

²² Cf. *Case of the "Five Pensioners" v. Peru. Merits, Reparations and Costs*. Judgment of February 28, 2003. Series C No. 98, para. 155 and *Case of Sales Pimenta v. Brazil, supra*, para. 32.

related to the merits of the matter and, if appropriate, could be taken into account by the Court when formulating its recommendations.

42. The **representatives** claimed that the State's objection refers to the remedies to which the alleged victims had access and the reparations that they had received, an issue that is directly related to the State's judicial response to the irregular dismissals, which concerns the merits of the controversy. They argued that, with this objection, the State seeks that reparations for violations of international human rights norms be subject to what is established in the national legislation so that it is the State, and not the Court, that decides the manner to ensure the enjoyment of the right or liberty infringed and the manner to repair the alleged violations. They claimed that the reparations invoked by the State do not meet the standards developed in the inter-American system in cases of irregular dismissals; that not all irregularly dismissed employees can access an administrative instance that could review their dismissals to determine their irregularity, and that not all of those who were included on the list of the irregularly dismissed employees could access the reparations provided by law. They indicated that, in some cases, the alleged victims had to resort to the judiciary in order that the Congress reinstate them in their jobs even though they chose this form of reparation and that an attempt was made to dissuade some of them from their decision to be reincorporated with the argument that there were no budgeted or available positions.

D.2 Considerations of the Court

43. The Court recalls that, under its case law, it only considers as preliminary objections those arguments that have, or could exclusively have, such a nature as regards their content and purpose; in other words, resolving them favorably would impede the continuation of the proceedings or a ruling on the merits.²³ It has been the Court's repeated criterion that a preliminary objection is employed to oppose admissibility or the Court's jurisdiction to hear a specific case or some of its aspects, whether it be based on the person, the matter, the time or the place.²⁴ Therefore, irrespective of the name by which the State presents a procedural objection, if in analyzing such a proposal it is necessary to first consider the merits, it would lose its preliminary nature and could not be analyzed as such.²⁵

44. The Court notes here that the State's main proposal consists in establishing that it had already complied by having repaired some of the alleged victims domestically. The determination of this issue obviously involves the merits and the eventual reparations since it involves evaluating the evidence in the record. Consequently, since the State's argument does not refer to issues of admissibility, the Court rejects the preliminary objection.

E. Alleged lack of the Court's jurisdiction with respect to the alleged violations of Article 26 of the Convention

E.1 Arguments of the parties and of the Commission

²³ Cf. *Case of Cepeda Vargas v. Colombia. Preliminary Objections, Merits, Reparations and Costs*. Judgment of May 26, 2010. Series C No. 213, para. 35 and *Case of Habbal et al. v. Argentina. Preliminary Objections and Merits*. Judgment of August 31, 2022. Series C No. 463, para. 21.

²⁴ Cf. *Case of Las Palmeras v. Colombia. Preliminary Objections*. Judgment of February 4, 2000. Series C No. 67, para. 32 and *Case of Habbal et al. v. Argentina, supra*, para. 21.

²⁵ Cf. *Case of Castañeda Gutman v. Mexico. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 6, 2008. Series C No. 184, para. 39 and *Case of Habbal et al. v. Argentina, supra*, para. 21.

45. The **State** claimed that Article 26 of the American Convention and Articles 6 and 7 of the Protocol of San Salvador were wrongfully included in the Merits Report. It argued that the Court cannot analyze alleged violations of economic, social and cultural rights and it requested that the Court prudently exercise its competences and attributions under the Convention. It also claimed that the representatives referred, in their pleadings and motions brief, to issues that were not claimed domestically nor are found in the factual framework of the Merits Report; in particular, issues of work stability, remuneration, time of service required for a pension, social security and health, adequate food, water, sanitation, clothing, housing and medical care.

46. The **Commission** pointed out that the organs of the inter-American system have repeatedly held that they have jurisdiction to analyze a possible violation of Article 26. Moreover, it indicated that the State's argument is based on a showing that it is not responsible for the alleged violation, which should be resolved with the merits. Consequently, it asked the Court to reject the State's position on the lack of jurisdiction.

47. The **representatives** recalled that in *Acevedo Buendía et al. (Discharged and Retired Employees of the Comptroller) v. Peru* case, the Court held that it has jurisdiction to analyze alleged violations of all the rights recognized in the Convention, including those set out in Article 26, and recalled that this decision has been reiterated in subsequent judgments. They pointed out that Article 26 establishes obligations in the area of economic, social and cultural rights that Peru did not respect with regard to the alleged victims and claimed that the references to the various elements of the right to work sought to clarify and explain aspects that enrich the analysis of the case and its implications on the rights protected by Article 26.

E.2 Considerations of the Court

48. As to the State's argument that the Court cannot analyze violations of the right to work included in Article 26 because it lacks material jurisdiction regarding that right, the Court reaffirms its jurisdiction to hear and resolve controversies concerning that article as an integral part of the rights enumerated in the text of the Convention, with respect to which Article 1(1) confers obligations of respect and guarantee.²⁶ As has been indicated in prior

²⁶ Cf. *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller") v. Peru. Preliminary Objection, Merits, Reparations and Costs*. Judgment of July 1, 2009. Series C No. 198, paras. 97 to 103; *Case of Lagos del Campo v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 31, 2017. Series C No. 340, paras. 142 and 154; *Case of the Dismissed Employees of Petroperú et al. v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 23, 2017. Series C No. 344, para. 192; *Case of San Miguel Sosa et al. v. Venezuela. Merits, Reparations and Costs*. Judgment of February 8, 2018. Series C No. 348, para. 220; *Case of Poblete Vilches et al. v. Chile. Merits, Reparations and Costs*. Judgment of March 8, 2018. Series C No. 349, para. 100; *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary Objection, Merits, Reparations and Costs*. Judgment of August 23, 2018. Series C No. 359, paras. 75 to 97; *Case of Muelle Flores v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of March 6, 2019. Series C No. 375, paras. 34 to 37; *National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 21, 2019. Series C No. 394, paras 33 to 34; *Case of Hernandez v. Argentina. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 22, 2019. Series C No. 395, para 62; *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, Reparations and Costs*. Judgment of February 6, 2020. Serie C No. 400, para 195, *Case of Spoltore v. Argentina. Preliminary Objection, Merits, Reparations and Costs*. Judgment of June 9, 2020. Series C No. 404, para. 85; *Case of the Employees of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 15, 2020. Series C No. 407, para. 23; *Case of Casa Nina v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 24, 2020. Series C No. 419, paras. 26 and 27; *Case of Guachalá Chimbo et al. v. Ecuador. Merits, Reparations and Costs*. Judgment of March 26, 2021. Series C No. 423, para. 97; *Case of the Buzos Miskitos (Lemoth Morris et al.) v. Honduras*. Judgment of August 31, 2021. Series C No. 432, paras. 62 to 66; *Case of Vera Rojas et al. v. Chile. Preliminary Objections, Merits, Reparations and Costs*. Judgment of October

decisions,²⁷ the possible occurrence of such violations should be studied when considering the merits of the matter.

49. Finally, it should be added that, in view of the State's arguments related to the rights included by the representatives in their pleadings and motions brief, the Court has repeatedly held that the representatives or the alleged victims may invoke rights other than those mentioned by the Commission since the alleged victims are holders of the rights established in the Convention. To deny them this capacity would imply an undue restriction on their condition as subjects of the International Law of Human Rights. In any event, the Court's case law requires that such arguments be based on the factual framework of the Report on the Merits.²⁸ As a corollary, the Court holds the preliminary objection inadmissible.

V

PRELIMINARY QUESTION

DETERMINATION OF THE NUMBER OF ALLEGED VICTIMS AND THE ALLEGED IMPROPER INCLUSION OF FAMILY MEMBERS OF THE ALLEGED VICTIMS IN THE PLEADINGS AND MOTIONS BRIEF

A. Arguments of the parties and of the Commission

50. The **State** requested that the alleged victims included by the representatives in their pleadings and motions brief who were not identified in the Merits Report not be taken into account. It also indicated that, through the administrative mechanism created for that purpose, it recognized that 141 of the alleged victims were irregularly dismissed and listed them in the National Registry of Irregularly Dismissed Employees (hereinafter "National Registry"), which enabled them to have access to the Special Benefits Program (Programa Extraordinario de Acceso a Beneficios). Therefore, the State requested that those 141 persons be excluded from the controversy. In addition, it claimed that Carlos Arturo Cobeñas Torres, Juana Isabel Peña Rodríguez, Gudiel Máximo Quiñónez Baldeón and Abelardo Zarazú Salazar are not dismissed employees under Resolutions 1303-"A"-92-CACL and 1303-"B"-92-CACL and, therefore, should be excluded from the controversy.

51. The State also pointed out that the Merits Report does not refer to any impairment to the rights of family members of the former congressional employees and, therefore, in order to guarantee the State's right of defense, the family members of the dismissed employees should not be considered alleged victims.

1, 2021. Series C No. 439, paras. 32 to 35; *Case of the Indigenous Peoples Maya Kaqchikel of Sumpango et al. v. Guatemala. Merits, Reparations and Costs*. Judgment of October 5, 2021. Series C No. 440, para. 118; *Case of Manuela et al. v. El Salvador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 2, 2021. Series C No. 441, para. 182; *Case of the Former Employees of the Judiciary v. Guatemala. Preliminary Objections, Merits and Reparations*. Judgment of November 17, 2021. Series C No. 445, paras. 100 to 104; *Case of Palacio Urrutia et al. v. Ecuador. Merits, Reparations and Costs*. Judgment of November 24, 2021. Series C No. 446, para. 153; *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, paras. 107; *Case of Pavez Pavez v. Chile. Merits, Reparations and Costs*. Judgment of February 4, 2022. Series C No. 449, para. 87; *Case of Guevara Díaz v. Costa Rica. Merits, Reparations and Costs*. Judgment of June 22, 2022. Series C No. 453, paras. 55 to 61 and *Case of Mina Cuero v. Ecuador. Preliminary Objection, Merits, Reparations and Costs*. Judgment of September 7, 2022. Series C No. 464, para. 127.

²⁷ Cf. *Case of Muelle Flores v. Peru, supra*, para. 37 and *Case of Guevara Díaz v. Costa Rica, supra*, para. 55.

²⁸ Cf. *Case of the "Five Pensioners" v. Peru, supra*, para. 155 and *Case of Cuya Lavy et al. v. Peru, supra*, para. 53.

52. Finally, during the public hearing convoked on this case and in its final written arguments, the State claimed that Jorge Ferradas Núñez and Rómulo Antonio Retuerto Aranda were included on the list of alleged victims offered by the Commission and are also on the list of victims in *Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru*, which was resolved by the Court in November 2006. The State, therefore, requested that they be excluded from any analysis since they were part of a controversy already resolved by the Court and, consequently, had been granted reparations.

53. The **representatives** requested that the Court rectify the list of alleged victims since Rosalía Carrillo Mantilla was erroneously excluded from the list presented by the Commission, even though she was included in the petition of Carlos Benites Cabrera of August 7, 2003. They also stated that they had never requested the inclusion of the family members of the alleged victims.

54. The **Commission** noted that it had erroneously repeated the names of six persons in the annex to the Merits Report and that it did not include the name of Rosalía Flor Carrillo Mantilla. They, therefore, requested that the record show that there are 187 alleged victims.

B. Considerations of the Court

55. The Court notes that the Commission identified 192 alleged victims in its Merits Report. The representatives and the State informed that there were six names repeated,²⁹ which indicates that the true number of alleged victims contained in the Merits Report is 186, which, therefore, in principle, is the total number of victims in this case.

56. On the other hand, the list of 186 alleged victims presented by the Commission erroneously excluded Rosalía Carrillo Mantilla. The Court recalls that, according to its case law and pursuant to Article 50 of the Convention and Article 35(1) of its Rules, the Commission must precisely identify in its Report on the Merits the alleged victims in a case before the Court. Moreover, the exceptions to the Article 35(1) rule are expressly set out in Article 35(2) and neither of them is present here. However, the Court notes that the exclusion of Mrs. Carrillo Mantilla from the Merits Report was due to a material error that prevented her from continuing to participate in the process,³⁰ as the Commission itself has stated. For this reason and since the State was aware of the participation of Mrs. Carrillo Mantilla as a complainant during the proceedings before the Commission, she should be considered an alleged victim, which results in a total of 187 alleged victims.

57. The State also alleged that the persons who received reparations domestically should be excluded, as well as a group of four persons who were included on the list of alleged victims presented by the Commission, but who were not included on the list of dismissed employees. With respect to the former, the Court finds that the value of the reparations awarded domestically is a matter that concerns the merits and eventual reparations and, thus, cannot be resolved as a preliminary question. With respect to the arguments regarding those persons who are not included on the list of dismissed employees and, therefore, should not be considered alleged victims, the Court finds that, in three of the four cases, there are minor inconsistencies between the names reported by the Commission and the names contained on the lists of dismissed employees. Thus, for example, the State indicated that Juana Isabel Peña Rodríguez and Gudiel Máximo Quiñón Baldeón, included in the annex

²⁹ The persons who were counted twice on the lists of alleged victims presented by the Commission are: (1) Flora Amar Cervelión, (2) Nelson Loayza Bezzolo, (3) Susana Isabel Mantilla Correa, (4) Marcelino Meneses Huayra, (5) Ángel Emilio Saavedra Moreyra, and (6) Luis Sánchez Ortiz.

³⁰ Cf. *Case of the Dismissed Employees of Petroperú et al. v. Peru*, *supra*, para. 55.

to the Report on the Merits, were not included on the lists of dismissed employees. However, Juana Peña Rodríguez and Gudiel Quiñones Baldeón,³¹ who were identified with their two last names in different documents included in the record, are listed.³² The Court, thus, concludes that they are the same persons. With respect to Abelardo Zarazú Salazar, the Court finds that, although he is not included on the list of dismissed employees, the list contains Abelardo Zarazú Ruiz, who was also identified with this first name and last names in different documents in the record of the case.³³ In the opinion of the Court, what might have occurred in this case is a minor inconsistency regarding the name included on the Commission's list, which does not affect his correct identification. With respect to Carlos Arturo Cobeñas Torres, the representatives requested that he not be excluded without verifying whether Felix Cobeñas Periamache, who is one of the victims recognized in *Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru*, was mistakenly included in place of Mr. Cobeñas Torres. The Court finds that Mr. Cobeñas Periamache was not included on the Commission's list of alleged victims. In addition, as the State informed, Mr. Cobeñas Torres was not on the list of dismissed employees in the record and, therefore, cannot be considered an alleged victim in this case.

58. With respect to the State's argument that, during the processing of this case, the family members of the dismissed employees were not considered alleged victims, the Court finds that, as has been indicated (*supra* para. 55), the group of alleged victims is comprised of those persons identified at the proper procedural moment by the Commission, with the exception of Ms. Carrillo Mantilla, about whom the pertinent considerations have already been made, and all of these persons are dismissed congressional employees. However, when presenting the respective powers of attorney, the representatives presented six powers by family members of alleged victims who had died during the proceedings of the case and, therefore, the Court considers that that group of persons acted in representation of their deceased family members.

³¹ Cf. Resolution 1303-"B"-92-CACL (evidence file, f. 7).

³² The alleged victim "Juana Isabel Peña Rodríguez" is found in the following documents: Report 002-2001-CERCC/CR of the Special Commission to Review the Collective Dismissals of the Congressional Personnel protected by Law 27487 (evidence file, f. 7); Communication sent on behalf of the petitioners to the Inter-American Commission on December 19, 2000 (evidence file, f. 273); Communication on behalf of the petitioners sent to the Inter-American Commission on April 1, 2016 (evidence file, f. 620); List of the dismissed congressional employees attached to the brief of the State sent to the Inter-American Commission on February 1, 2017 (evidence file, f. 1017); Report 1300-2016-GFRCP-AAP-DRRHH/CR of the Functional Group Registry and Control of Congressional Personnel of December 30, 2016 (evidence file, f. 1025); Technical Administrative Report 815-201fi-GflitCP-AAP-DRRHH/CR of the Functional Group Registry and Control of Congressional Personnel of December 12, 2016 (evidence file, f. 1098); Note 363-2017-ADM-CDG-USJ-CSJLI-PJ of the Superior Court of Lima of February 28, 2017 (evidence file, f. 1231); Certificate of the file of the Superior Court of Lima of February 28, 2017 (evidence file, fs. 1510 to 1518) and document regarding the list of former congressional employees who obtained reparations from the State (evidence file, f. 2488). The alleged victim "Gudiel Máximo Quiñónez Baldeón" is found in the following documents: Communication sent on behalf of the petitioners to the Inter-American Commission on December 19, 2000 (evidence file, f. 459); Communication sent on behalf of the petitioners to the Inter-American Commission on April 1, 2016 (evidence file, f. 621); Report 1300-2016-GFRCP-AAP-DRRHH/CR of the Functional Group Registry and Control of Congressional Personnel of December 30, 2016 (evidence file, f. 1026); Technical Administrative Report 852-2016-GflitCP-AAP-DRRHH/CR of the Functional Group Registry and Control of Congressional Personnel of December 12, 2016 (evidence file, f. 1131); Note 363-2017-ADM-CDG-USJ-CSJLI-PJ of the Superior Court of Lima of February 28, 2017 (evidence file, f. 1231); Report 72-2017-MTPE/2-ST of the Ministry of Work and Promotion of Employment of February 21 2017 (evidence file, f. 1789); Document regarding the list of former congressional employees who obtained reparations from the State (evidence file, f. 2482). Finally, the alleged victim provided a power of representation (evidence file, fs. 2323 to 2325).

³³ The alleged victim "Abelardo Zarazú Ruiz" is found in the following documents: Communication sent on behalf of the petitioners to the Inter-American Commission on April 1, 2016 (evidence file, f. 624); List of the dismissed congressional employees attached to the State's brief to the Commission of February 1, 2017 (evidence file, f. 1021) and Note 363-2017-ADM-CDG-USJ-CSJLI-PJ of the Superior Court of Lima of February 28, 2017 (evidence file, f. 1238).

59. Finally, the Court finds that, in effect, two persons (Jorge Ferradas Núñez and Rómulo Antonio Retuerto Aranda) on the Commission's list of alleged victims were found to be victims in *Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru*, which involved the same facts as this case. Therefore, invoking the international principle of *res judicata*, these two persons will be excluded from this case. Thus, the Court finds that the total number of alleged victims is 184 persons, who are listed in the Annex I of this judgment.

VI EVIDENCE

A. Admissibility of documentary evidence

60. The Court received various documents attached to their briefs and presented as evidence by the Commission, the representatives³⁴ and the State, (*supra* paras. 3, 6 and 7). As in other cases, the Court admits those documents submitted by the parties and by the Commission in a timely fashion (Article 57 of the Rules),³⁵ the admissibility of which was not disputed nor objected to and the authenticity of which was not placed in doubt.³⁶

61. The Court also received annexes to the final written arguments presented by the State.³⁷ On March 28, 2022, the representatives presented their observations to those documents. They indicated that the documents were not requested by the Court nor were they presented by the State at the proper procedural moment and they, therefore, asked that the Court not admit them. The Court notes that the annexes to the State's final written arguments were not offered at the proper procedural moment. However, some of the documents are posterior to the date on which the State submitted its answering brief (*supra* para. 7) and, therefore, those documents will be admitted.³⁸ With respect to the remaining

³⁴ The common intervenor of the alleged victims mentioned in his brief of pleadings and motions a list of documents that offered documentary evidence, which were not sent to the Court. By communication of December 3, 2020, the Secretariat of the Court indicated that "it did not receive the documents identified as documentary evidence (Appendices 1 to 8)" and requested "the remission of these documents, in full and legible, or, if not, the relevant reasons" and granted an extension. Nonetheless, those appendices were not received, which was noted in communications of January 7, 2021, by which his brief of pleadings and motions was sent to the State and to the Commission.

³⁵ Documentary evidence may be presented, in general and in accordance with Article 57(2) of the Rules, together with the briefs of submission of the case, of pleadings and motions and the answering brief, where appropriate. Evidence not presented at the procedural moments is not admissible, unless under the exceptions established in that article (force majeure or serious impediment) or if it concerns a supervening event; in other words, events that occurred after those procedural moments.

³⁶ Cf. Article 57 of the Rules; also *Case of Velásquez Rodríguez v. Honduras. Merits*. Judgment of July 29, 1988. Series C No. 4, para. 140 and *Case of Deras García et al. v. Honduras. Merits, Reparations and Costs*. Judgment of August 25, 2022. Series C No. 462, para. 31.

³⁷ The documents sent by the State were the following: (1) Chart of personnel who opted for the program of voluntary retirement with incentives; (2) Report 091-2022-GFBL-AAP-DRRHH/CR of February 8, 2022, sent by the Congress; (3) Report 037-2022-MTPE/4/11.12 of March 6, 2022; (4) Decision of the Constitutional Court in File 0796-1996-AA of August 13, 1997; (5) Decision of the Constitutional Court in File 00357-1997-AA of October 15, 1997; (6) Decision of the Constitutional Court in File i717- 98-AA/TC of March 17, 1999; (7) Writ of amparo of March 17, 1993, which is in the file submitted by the Commission to the Court; (8) Resolution of September 25, 2002; (9) Internal Regulations on the Functioning and Review Process of the Multisectorial Commission and (10) Supreme Decree 019-2021-TR that approved the regulations of Law 31218, which authorizes review of the cases of former employees who opted for the proceedings under Law 30484, published on September 30, 2021.

³⁸ It concerns the following documents: (1) Report 091-2022-GFBL-AAP-DRRHH/CR of February 6, 2022, sent by the Congress; (2) Report 037-2022-MTPE/4/11.12 of March 10, 2022 and (3) Supreme Decree 019-

documents, the Court notes that they do not fall within any of the exceptions defined in the Rules for the extemporaneous admission of evidence and are, therefore, inadmissible.

62. On March 31, 2022, the State was requested to send documentation to facilitate adjudication of the case. The State, in communication of April 8, sent what had been requested (*supra* para. 11).³⁹ The Court admits this documentation pursuant to the provisions of Article 58 of its Rules.

B. Admissibility of the testimonial and expert evidence

63. On January 25, 2022, the Court received the notarized statements of José Luis Guerra Soto, Yoar Lázaro Flores and Irene Jorge Rojas. Pursuant to the Order of December 13, 2021, the statement of María del Pilar Sosa San Miguel was scheduled to be received at the public hearing held on February 11, 2022. However, the State informed that, due to exceptional circumstances, the expert could not deliver her statement and requested that the Court “permit a change in form of the statement so that it could be a notarized statement.” It also requested “an extension of the period indicated in Point 3 of the Order so that it could be presented after February 11, 2021,” the date of the hearing. The Court, on January 26, 2022, exceptionally admitted, due to the circumstances, the change in the form and the extension of the period. The expert’s statement was received on February 18, 2022 within the period set by the Court. The Court deems it pertinent to admit the notarized statements⁴⁰ provided that they meet the terms defined in the President’s Order to receive them and regarding the object of the case.¹⁷

VII FACTS

64. The Court will now establish the facts of the case based on the factual framework submitted by the Commission and the information provided by the representatives and by the State. It will refer: (A) to the context of the case and to the relevant norms, which were identified by the Court in *Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru* and in *Canales Huapaya v. Peru* and (B) the situation of the dismissed congressional employees in this case.

A. Context and relevant norms

65. This case concerns the dismissal of 1,117 congressional employees in December 1992⁴¹ after the rupture of the democratic-constitutional order in Peru that occurred on April 5, 1992, which was described in detail in *Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru*, involving 257 dismissed employees, and in *Canales Huapaya et al. v. Peru*, involving three victims. In those judgments, the Court held proved a series of facts that preceded the dismissal of the congressional employees, as well as the adoption of laws and administrative resolutions directed to repair the irregular dismissals that occurred during

2021-TR, Supreme Decree that approved the regulations of Law 31218, which authorizes review of the cases of the former employees who opted for the proceedings under Law 30484, published on September 30, 2021.

³⁹ The documents provided by the State are the following: (1) Decree-Law 25438, published in the Official Gazette “El Peruano” on April 20, 1992; (2) Decree-Law 25640, published in the Official Gazette “El Peruano” on July 24, 1992; (3) Decree-Law 25759, published in the Official Gazette “El Peruano” on October 8, 1992; (4) Law 30484, published in the Official Gazette “El Peruano” on July 6, 2016 and (5) Law 31218 published in the Official Gazette “El Peruano” on June 18, 2021.

⁴⁰ Statements of José Luis Guerra Soto, Yoar Lázaro Flores and Irene Jorge Rojas, as well as the notarized statement of María del Pilar Sosa San Miguel, proposed by the State.

⁴¹ Cf. *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru*, *supra*, para. 2.

the reorganization of public institutions that was implemented during the 1990's. Notwithstanding the controversy among the parties regarding alleged differences between those cases and the case *sub judice* (*infra* para. 91), the Court considers proved the following facts in light of the prior cases.

66. On July 28, 1990, Alberto Fujimori Fujimori was elected President of Peru for a term of five years. As President, he temporarily dissolved the Congress in April 1992. He then created the Commission to Administer the Patrimony of Congress (hereinafter "the Administrative Commission"), adopted administrative measures and issued personnel actions.⁴²

67. The Administrative Commission initiated a "streamlining of personnel" process⁴³ under which the employees could resign in exchange for a financial incentive. In addition, the Administrative Commission was mandated to initiate an evaluation and selection process of personnel through competitive examinations. The employees who passed the examinations were eligible to occupy positions in the new "Allocation of Personnel Table" of the Congress and the employees who, after the examinations, did not meet the standards to occupy the vacancies would be dismissed and would only have the right to receive the social benefits to which they were entitled under the law.⁴⁴

68. As a result of this process of evaluation and selection of personnel, two Administrative Resolutions were adopted: 1303-"A"-92-CACL⁴⁵ that, for reasons of reorganization, dismissed the congressional staff and workers who decided not to take the competitive examinations or who, having signed up, did not take the relevant examinations and 1303-"B"-92-CACL⁴⁶ that dismissed, for reasons of reorganization, the congressional staff and workers who took the examination of qualification, evaluation and selection, but did not resign voluntarily with incentives and who did not fill a vacancy.

69. In addition, during the time the facts of this case, a provision was included in diverse decree-laws that barred the filing of writs of amparo to contest the effect of those norms, which denaturalized the amparo procedure and created situations beyond jurisdictional control.⁴⁷

70. Since the installation of the transitional government in 2000, laws and administrative provisions were adopted that ordered the review of the collective dismissals.

71. In 2001, Law 27487 was adopted that derogated the norms that authorized collective dismissals under the reorganization process and ordered the public institutions and bodies to establish special commissions to review the cases of dismissals. These commissions were

⁴² Cf. *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru*, *supra*, para. 89(7). Decree-Law 25438, published in the Official Gazette "El Peruano" on April 20, 1992.

⁴³ Cf. *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru*, *supra*, para. 89(9). Decree-Law 25640, published in the Official Gazette "El Peruano" on July 24, 1992.

⁴⁴ Cf. *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru*, *supra*, para. 89(10).

⁴⁵ Cf. Resolution 1303-"A"-92-CACL. Dismissal of congressional staff and workers (evidence file, fs. 3 to 6).

⁴⁶ Cf. Resolution 1303-"B"-92-CACL. Dismissal of congressional staff and workers (evidence file, fs. 6 to 10).

⁴⁷ Cf. *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru*, *supra*, para. 89(4).

charged with preparing a report on the employees who had been dismissed irregularly and to offer recommendations.⁴⁸

72. The Special Commission in charge of reviewing the collective dismissals of congressional personnel, in its report of December 20, 1991, concluded *inter alia*: (i) that there were irregularities in the evaluation and selection of personnel in 1992 because the minimum points established for the competitive examinations were not respected and, in many cases, nor were the applicants' results in the qualifying examination; (ii) that the former employees who received their social benefits and those who opted for incentives by voluntarily resigning agreed with their dismissal, and (iii) that they abstained from pursuing any domestic or international claim that might exist judicially.⁴⁹

73. In November 2001, Law 27586 was adopted, which set a deadline of December 20 for the Special Commissions to conclude their final reports. That law also created a Multisectoral Commission to evaluate the viability of the recommendations of those reports, establish the measures that should be implemented by the heads of the entities and the decrees and the draft laws that should be prepared. The Multisectoral Commission could suggest the reincorporation of employees, a special regime of early retirement, review the grounds for the dismissals and determine the cases in which the payment of remuneration or social benefits was due, provided that their judicial claims were withdrawn.⁵⁰

74. In March 2002, the Multisectoral Commission issued its final report, in which it concluded, *inter alia*, that "the norms that regulated the collective dismissals should not be questioned [...], merely the procedures by which they were implemented." It also agreed "that any recommendation on reinstatement or replacement should be understood as a new labor relationship, which could be a new contract or a new appointment, provided that there are vacant budgeted positions in the entities or that such positions are made available; that the employees comply with the requirements for these positions; that there is legal competence to hire, and that there is a legal norm that authorizes appointments." Based on the recommendations of the Special Commission, it decided that there were 760 cases of irregular dismissals of congressional employees under the 1992 evaluation and selection procedure.⁵¹

75. On July 29, 2002, the State promulgated Law 27803 that created the Special Benefits Program, which gave the employees the option of reinstatement or reassignment, early retirement, financial compensation or job training. In its fourth transitory provision, the law stipulated that the "irregular dismissal of those former employees who had existing legal proceedings are included in this law, provided they [...] withdraw their claim before the jurisdictional body." For the purposes of executing the benefits envisaged, the same law created the National Registry. Law 27803 also established that the State would assume the payment of pension contributions "for the period of time during which the employee was dismissed" and that "in no case does this imply the recovery of unpaid salaries during the same period." In addition, in 2004, a paragraph was added to Article 13 that established

⁴⁸ Cf. *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru*, *supra*, para. 89(32).

⁴⁹ Cf. *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru*, *supra*, para. 89(33).

⁵⁰ Cf. *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru*, *supra*, para. 89(34).

⁵¹ Cf. *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru*, *supra*, para. 89(35).

that “the payment of [pension] contributions by the State shall in no case be for a period longer than 12 years.”⁵²

76. Under that law, between 2002 and 2004, three lists of employees who should be included in the National Registry were published:

First list	Ministerial Resolution No. 347-2002-TR	22/12/2002	7,079 former employees
Second list	Ministerial Resolution No. 059-2003-TR	27/12/2003	10,920 former employees
Third list	Supreme Resolution No. 034-2004-TR	02/10/2004	10,124 former employees
Total			28,123 former employees

77. Later, the State issued a new list of irregularly dismissed employees who “were not able to be included in the initial lists.” As of August 2017, the Ministry of Work and Promotion of Employment published five lists of irregularly dismissed employees:⁵³

Fourth list	Supreme Resolution No. 028-2009-TR	05/08/2009	7,676 former employees
Fifth list	Supreme Resolution No. 142-2017-TR	17/08/2017	8,855 former employees
Total			16,531 former employees

78. In addition, on July 6, 2016, Law 30484 was enacted, which reactivated the Executive Committee of Law 27803. Law 30484 provides for the incorporation of the beneficiaries who had opted for reincorporation or reassignment but had yet to enjoy that benefit. This norm also allowed the beneficiaries to change their option to financial compensation or early retirement.⁵⁴

B. The dismissed congressional employees involved in this case

79. The alleged victims are part of a group of congressional employees dismissed under Resolutions 1303-“A”-92-CACL and 1303-“B”-92-CACL.

80. The 20 alleged victims in Petition 725-03 filed a writ of amparo in which they requested that Resolution 1303-“B”-92-CACL, which ordered their dismissal, be declared null and void and that they be reinstated to their jobs. The Second Specialized Court of Public Law, on September 10, 2001, held their claim inadmissible because a writ of amparo was not an appropriate remedy.⁵⁵ That decision stated:

FIRST: That the writ of amparo is a remedy with a very rapid procedure, without an evidentiary stage, that consists only of the juridical reasoning and logic of the operator of justice, who can only reestablish the right that has been violated; provided that it is through specific

⁵² Cf. *Case of Canales Huapaya et al. v. Peru*, supra, para. 78.

⁵³ Cf. *Case of Canales Huapaya et al. v. Peru*, supra, para. 77 and *Case of the Dismissed Employees of Petroperú et al. v. Peru*, supra, para. 130.

⁵⁴ Between 2001 and 2021, a total of six laws and a decree were adopted on this matter: Law 27487 of June 23, 2001; Law 27586 of December 12, 2001; Law 27803 of July 29, 2002; Law 29059 of July 6, 2007; Law 30484 of July 6, 2016; Law 31218 of June 10, 2021 and Supreme Decree 019-2021-TR of September 30, 2021.

⁵⁵ Decision of the Second Specialized Court of Public Law of September 10, 2001. File 2972-01. Writ of Amparo (evidence file, fs 2439 to 2447).

procedures, whether by administrative and/or ordinary jurisdictional means, due to its broadness it is not only possible to restore the right, but also its declaration, modification and even its extension; [...] THIRD: That, taking into account the claim of the plaintiffs, consisting of their reinstatement to their workplace, recognizing their work rights; and since it concerns an action of guarantee on disputed facts that attempts to discern whether the evaluation that took place in the Congress with the consequent dismissal of the appellants emanated from the rule of law, it must be concluded that this constitutional procedure [...] because it lacks an evidentiary stage it is not the appropriate action to clarify this claim because whenever evidence is necessary, which the parties should provide as is their right in a broader judicial procedure in order to create certainty in the judge, with respect to the reclamation of the orders, making this action insignificant, especially if the plaintiffs have not presented concrete and sufficient evidence to accredit the violation of the invoked constitutional rights; in any event, the plaintiffs may assert it using the corresponding ordinary means.⁵⁶

81. This decision was appealed to the Fifth Chamber of the Superior Court of Lima, which confirmed the decision on June 18, 2002. The Chamber held that the plaintiffs were contesting the results of the process of evaluation and qualification of personnel and that a writ of amparo was not the appropriate remedy because it does not have an evidentiary stage.⁵⁷ This decision was appealed to the Constitutional Court, which on December 6, 2002, confirmed the decision and declared the writ of amparo inadmissible⁵⁸ since it was not possible to restore the *status quo ante* of the dismissals:

Given that in promulgating the Constitution of 1993, the organic structure of the Congress and, therefore, its Allocation of Personnel Table varied substantially, it is not possible, by means of amparo, to restore the *status quo ante* and, therefore, the matter is irreparable [...]. For these reasons, the Constitutional Court, in the use of the attributions conferred upon it by the Constitution of Peru and its Organic Law, CONFIRMS the appeal and, in confirming the appeal, declares the writ of amparo INADMISSIBLE.⁵⁹

82. With respect to the alleged victims who lodged Petition 728-00, there is no information on the judicial or administrative proceedings that have been initiated to contest their dismissals domestically.

VIII MERITS

83. This case concerns alleged violations of Articles 8(1), 25(1) and 26 of the Convention, read in conjunction with the obligations established in Articles 1(1) and 2 thereof, to the detriment of 164 employees who had been dismissed from their employment during the government of Alberto Fujimori and who had been barred from filing judicial remedies regarding their dismissals. In accordance with the allegations of the parties and of the Commission, the Court will proceed to examine: (1) the rights to judicial protection and to judicial guarantees; (2) the right to work and (3) political rights.

VIII-1 RIGHTS TO JUDICIAL PROTECTION AND TO JUDICIAL GUARANTEES IN

⁵⁶ Decision of the Second Specialized Court of Public Law of September 10, 2001. File 2972-01. Writ of Amparo (evidence file, fs. 2443 to 2445).

⁵⁷ Cf. Resolution 11 of the Fifth Civil Chamber of the Superior Court of Lima of June 18, 2002 (evidence file, f. 13).

⁵⁸ Cf. Decision of the Second Chamber of the Constitutional Court of December 6, 2002 (evidence file, fs. 330 to 334).

⁵⁹ Cf. Decision of the Second Chamber of the Constitutional Court of December 6, 2002 (evidence file, fs. 332 to 333).

RELATION TO THE OBLIGATION TO RESPECT AND GUARANTEE THE RIGHTS AND THE DUTY TO ADOPT PROVISIONS OF DOMESTIC LAW⁶⁰

A. Arguments of the parties and of the Commission

84. The **Commission** maintained that, with regard to the issues on the merits, the alleged victims are in a substantially similar position as the 257 victims in *Dismissed Congressional Employees et al.* and the three victims in *Canales Huapaya et al.* and, consequently, argued that the Court's analysis in those cases apply to these persons. Therefore, under the principles of procedural economy and due process that apply to an issue of general interest that has already been resolved, it determined the international responsibility of the State on the basis of the legal analysis and the articles of the Convention that were applied in those judgments and in the Commission's Reports on the Merits in those cases and concluded that the State violated the rights set out in Articles 8(1) and 25(1) of the Convention, read in conjunction with the obligations established in Articles 1(1) and 2 thereof, to the detriment of the alleged victims identified in the Report on the Merits.

85. The **representatives** claimed that the alleged victims were irregularly dismissed in a context in which they lacked access to justice and that the judicial remedies that were available to them to challenge their collective dismissal were uncertain. Consequently, they claimed that the State violated Articles 8(1) and 25(1), read in conjunction with Article 1(1) of the Convention. They also argued that the State, by adopting provisions that legally barred the alleged victims from filing writs of amparo or administrative claims against the results of the evaluation process violated Article 2 of the Convention because it did not take the appropriate measures of domestic law to make effective the rights set out in the Convention.

86. The **State** argued that it is a mistake for the Commission to base its arguments on a comparison of the present case with the decisions in 2006 and 2015 simply because those also refer to the dismissal of congressional employees. It claimed that the situation of the 20 dismissed congressional workers listed in Petition 725-03 differs from *Aguado Alfaro* and *Canales Huapaya* because, when the petition was presented, a different norm was in force, which was applied to dismissals beginning in June 2001. In addition, the State argued that, in the former cases, the dismissed workers exhausted domestic remedies, whereas in this case there is no certainty with respect to a group of claimants. In the opinion of the State, an analysis of the exhaustion of domestic remedies was a requisite for all the dismissed employees. It also claimed that this case cannot be considered similar to those already decided by the Court because the norms in those cases had been modified so that they are not longer necessary and because the State has implemented domestic measures to compensate the employees.

87. The State also questioned that in this case an evaluation was made on the effectiveness of the available remedies when they were not sought by the employees domestically, although, at the time of the events, there were procedural remedies to which the employees had access. With respect to the 20 former employees who presented the writ of amparo, the State argued that the fact that the Constitutional Court's decision had not been favorable to their interests does not necessarily imply a violation of the rights to due process or to judicial protection. In addition, with respect to this group, the State argued that its response did not occur in a generalized context of a lack of effectiveness of its institutions or the absence of guarantees of independence and impartiality since the decision

⁶⁰ Articles 8(1) and 25(1), read in conjunction with Articles 1(1) and 2 of the Convention..

on amparo was adopted when a democratic government had been reinstalled and the authorities had guarantees of judicial independence.

88. Finally, it claimed that, while at the time of the dismissals, there were rules that barred the filing of writs of amparo and of administrative claims, they had not been an impediment for some former employees who filed remedies provided by the State and that, in any case, that norm was derogated and measures for the review of the dismissals and the reparation of those found irregular had been adopted and, therefore, the State was not responsible for the violation of Article 2 of the Convention.

B. Considerations of the Court

89. The Court has pointed out that, pursuant to Article 8(1) of the Convention, "every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal," which includes presenting arguments and providing evidence. The Court has indicated that this provision implies that "the decision produced by the judicial proceedings satisfies the result for which it was conceived." This does not mean that the arguments of the claimants must be accepted, "but rather its ability to produce the result for which it was conceived be ensured."⁶¹

90. With respect to Article 25(1), the Court has stated that this norm includes an obligation for States Parties to ensure to all persons under their jurisdiction access to an effective judicial remedy against acts that violate their fundamental rights. This effectiveness presupposes that, in addition to the formal existence of remedies, those remedies provide results or responses to the violations of the rights contemplated in the Convention, the constitution or by law.⁶² Those remedies that, due to the general conditions of the country or even for the particular circumstances of a case, are illusory cannot be considered effective. This occurs, for example, when their inadequacy has been demonstrated in practice due to a lack of means to execute decisions or for any other situation that gives rise to a context of denial of justice.⁶³ This does not imply that the effectiveness of a remedy be evaluated as to whether it produces a favorable result to the complainant,⁶⁴ but rather in light of its appropriateness and effectiveness to deal with eventual violations.⁶⁵

B.1 The application to the present case of the considerations in Aguado Alfaro et al. and Canales Huapaya et al. and the alleged violation of Articles 8(1) and 25(1) of the Convention

91. The Court notes that the dismissed employees in this case, as well as the three victims in *Canales Huapaya et al.* and the 257 victims in *Aguado Alfaro et al.*: (i) were employees of the Peruvian Congress at the time of the so-called "Government of National Emergency and Reconstruction" and (ii) were collectively dismissed under the so-called "streamlining of

⁶¹ Cf. *Case of Barbani Duarte et al. v. Uruguay. Merits, Reparations and Costs.* Judgment of October 13, 2011. Series C No. 234. para. 122 and *Case of Martínez Esquivia v. Colombia. Preliminary Objections, Merits and Reparations.* Judgment of October 6, 2020. Series C No. 412, para. 131.

⁶² Cf. *Case of Velásquez Rodríguez v. Honduras. Merits, supra*, paras. 62 and 63 and *Case of Habbal et al. v. Argentina, supra*, para. 108.

⁶³ Cf. *Case of Abrill Alosilla et al. v. Peru. Merits, Reparations and Costs.* Judgment of March 4, 2011. Series C No. 223, para. 75 and *Case of Martínez Esquivia v. Colombia, supra*, para. 130.

⁶⁴ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits, supra*, para. 67 and *Case of Habbal et al. v. Argentina, supra*, para. 112.

⁶⁵ Cf. *Case of Maritza Urrutia v. Guatemala. Merits, Reparations and Costs.* Judgment of November 27, 2003. Series C No. 103, para. 117 and *Case of Habbal et al. v. Argentina, supra*, para. 108.

personnel” process in a context of the “inefficiency of the judicial institutions; absence of guarantees of independence and impartiality, and lack of clarity as to the remedy to be used to challenge collective dismissals.”⁶⁶ Therefore, some differences exist among those who were declared to be victims in the above judgment and the alleged victims in this case, in that (iii) only 20 of the alleged victims in the present case filed writs of amparo before judicial bodies, while there is no information on actions filed by the remaining persons, and (iv) to date, the State has adopted measures directed to repair 140⁶⁷ of the 184 alleged victims. This demonstrates that, in spite of the similarities, it is not possible to automatically extrapolate the conclusions that were reached in *Canales Huapaya et al.* and *Aguado Alfaro et al.* as the Commission and the representatives requested. Rather, the Court must analyze the specific situations in order to reach the appropriate conclusions.

B.1.a) Situation of the alleged victims who did not present a writ of amparo

92. The Court recalls that, in *Canales Huapaya et al. v. Peru*, it held that the dismissed congressional employees in the so-called “streamlining of personnel” process confronted a generalized context of the “inefficiency of the judicial institutions, absence of guarantees of independence and impartiality and lack of clarity as to the remedy to be used to contest collective dismissals.”⁶⁸ In that context, norms were issued that barred the filing of writs of amparo against the dismissals that impeded the alleged victims from access to an impartial and competent body with due procedural guarantees, which the Court deems a violation of Article 8(1) of the Convention.

93. The Court also finds that the alleged victims did not have an effective judicial remedy against acts that violated their rights. On this point, although the State maintains that the alleged victims had access to the administrative disputes jurisdiction, the generalized ineffectiveness of the judicial institutions and the lack of guarantees of independence and impartiality demonstrate that such a possibility is illusory (*supra* para. 31). In *Dismissed Congressional Employees (Aguado Alfaro et al. v. Peru)* the Court held that:

this case occurred in the context of a situation of legal uncertainty promoted by laws that limited access to justice in relation to the evaluation procedure and eventual dismissal of the alleged victims, so that they did not have certainty about the proceedings they could or should resort to in order to claim the rights they considered had been violated. Consequently, without needing to determine the nature of the dismissals that have been verified, the Court found that the existing domestic recourses were ineffective, both individually and collectively, to provide an adequate and effective guarantee of the right of access to justice [...]⁶⁹

94. The Court notes that this context continued at least until June 2001 when Law 27487⁷⁰ derogated the norm that authorized the collective dismissals. The derogated norm, Decree-

⁶⁶ *Case of Canales Huapaya et al. v. Peru, supra*, para. 103.

⁶⁷ The State maintained that it had reviewed the dismissals of 141 persons, with respect to which it recognized their irregularity and that it has implemented specific actions to repair those persons. The Court notes that, within this group, the State included Jorge Ferradas Núñez, who was excluded from this case (*supra* para. 59).

⁶⁸ *Cf. Case of Canales Huapaya et al. v. Peru, supra*, para. 103.

⁶⁹ *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru, supra*, para. 146.

⁷⁰ *Cf.* Law 27487 of 2001 “Law that derogates Decree-Law 26093 and authorizes the creation of commissions charged with reviewing the collective dismissals in the public sector (evidence file, fs. 2516 to 2519).

Law 25640 of 1992, had established the inappropriateness of the writ of amparo to directly or indirectly contest its application.⁷¹

95. The State also maintained that the alleged victims could present a class action, but, as indicated in the chapter on preliminary objections (*supra* para. 33), this was not an appropriate remedy for their individual claims. The State also pointed out that, despite the express prohibition, some individuals presented writs of amparo, which demonstrates that it was possible to access this recourse to protect their rights. The Court, however, considers that the mere existence of the prohibition means that the dismissed employees could not be required to file that remedy. This, added to the context of the denial of justice, signifies that amparo was not an effective judicial remedy, which results in a violation of Article 25(1) of the Convention.

B.1.b) Situation of the alleged victims who filed a writ of amparo

96. In this case, 20 alleged victims filed a writ of amparo to contest their dismissal, which was resolved after November 2000 when democratic order was restored in Peru.⁷² The State maintains that this demonstrates that its authorities had guarantees of judicial independence and that the 20 persons did have access to an effective judicial remedy and, thus, there was no violation in those cases.

97. Nonetheless, while the writ of amparo was formally admitted, it was not an effective remedy since the judges did not analyze the merits of the arguments of the alleged victims. The judges of the first and second instances declared the writ of amparo inadmissible, arguing that it was not the appropriate remedy to resolve the claims of the alleged victims because it lacked an evidentiary stage. In turn, on September 10, 2001, the Second Specialized Court of Public Law held that it was a "remedy with a very rapid procedure, without an evidentiary stage, which consists only of the juridical reasoning and logic of the operator of justice, who can only reestablish the right that has been violated."⁷³

98. For its part, the Constitutional Court, in resolving the special remedy that appealed the decision of the second instance, confirmed the decision but maintained that "in promulgating the Constitution of 1993, the organic structure of the Congress and, therefore, its Allocation of Personnel Table substantially changed" so that amparo could not restore the *status quo ante* the violation:

Given that in promulgating the Constitution of 1993, the organic structure of the Congress and, therefore, its Allocation of Personnel Table substantially changed, **it is not possible [,] by means of amparo to restore the status quo ante, therefore it has become irreparable [...]**. For these reasons, the Constitutional Court, using the attributions conferred upon it by the Constitution of Peru and its organic law CONFIRMS the appeal, and, by confirming the appeal, declares the writ of amparo INADMISSIBLE.⁷⁴ (emphasis added)

⁷¹ Article 9 of Decree-Law 25640 of 1992, which authorized the Administrative Commission to implement a streamlining of personnel process, established that "a writ of amparo to contest, directly or indirectly, the application of this Decree-Law is inadmissible" (evidence file, f. 2910). This norm was derogated by Law 27487 of June 23, 2001, which, in turn, derogated "the express norms that authorized collective dismissals under the process of reorganization" (evidence file, f. 2517).

⁷² The so-called "Government of transition" in Perú was in place between November 22, 2000 and July 28, 2001.

⁷³ Cf. Decision of the Second Specialized Court in Public Law of September 10, 2001 (evidence file, f. 2443).

⁷⁴ Cf. Decision of the Second Chamber of the Constitutional Court of December 6, 2002 (evidence file, fs. 332 al 333).

99. In other words, the Constitutional Court recognized that there was a violation of the rights of the claimants and yet declared the writ of amparo inadmissible. Amparo was, thus, not an effective remedy to protect the dismissed employees from an act that violated their rights, in violation of Article 25(1) of the Convention.

100. The right to judicial guarantees presupposes that a controversy be resolved within a reasonable period, since a prolonged delay may constitute, per se, a violation of judicial guarantees. The Court has also established that the assessment of a reasonable period should be analyzed in each specific case in relation to the total duration of the proceedings, including the remedies that may be filed.⁷⁵ The four elements to analyze whether the guarantee of a reasonable period has been complied with are: (i) the complexity of the case, (ii) the procedural activity of the interested party, (iii) the conduct of the judicial authorities, and (iv) the harm to the juridical situation of the alleged victim.⁷⁶ In this case, the writ of amparo was filed on March 17, 1993 and the decisions of the first and second instances were adopted on September 10, 2001⁷⁷ and June 18, 2002,⁷⁸ respectively. In addition, a special remedy was filed against the decision of the second instance, which was resolved on December 6, 2002.⁷⁹ This indicates that the remedy of amparo was resolved after the restoration of democracy. Nonetheless, it occurred eight years after the filing, which demonstrates that the alleged victims were not heard within a reasonable period, nor did they have access to a prompt remedy for the protection of their rights.

101. The Court finds that a delay of more than eight years in processing a constitutional remedy that the same judicial authorities qualified as very rapid and that did not admit evidence surpasses any period that could be considered reasonable and, thus, violates Article 8(1) of the Convention and, therefore, the Court does not consider it necessary to analyze each of the elements identified in its case law to establish the violation of this guarantee. In any case, it should be emphasized that this matter is not very complex in that the decision of the second instance and that which resolved the special remedy were adopted in a period of 15 months and the record does not indicate the existence of any conduct of the claimants that would have delayed the proceedings.

102. Therefore, the Court holds that, with respect to the 20 persons who filed a writ of amparo, there was a violation of Articles 8(1) and 25(1) of the Convention. The excessive delay in the administration of justice is additional evidence of the context of denial of justice, the ineffectiveness of the judicial institutions and the lack of judicial guarantees in Peru at the time of the facts.

B.2 Duty to adopt provisions of domestic law

103. The Court has established that, pursuant to Article 2 of the Convention, States not only have a positive obligation to adopt the necessary measures to guarantee the exercise

⁷⁵ Cf. *Case of Suárez Rosero v. Ecuador. Merits*. Judgment of November 12, 1997. Series C No. 35, para. 71 and *Case of Sales Pimenta v. Brazil, supra*, para. 107.

⁷⁶ Cf. *Case of Genie Lacayo v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 29, 1997. Series C No. 30, para. 78 and *Case of Sales Pimenta v. Brazil, supra*, para. 107.

⁷⁷ Cf. Decision of the Second Specialized Court of Public Law of September 10, 2001. File No. 2972-01. Writ of Amparo (evidence file, fs. 2439 to 2447).

⁷⁸ Cf. Resolution No 11 of the Fifth Civil Chamber, Superior Court of Lima of June 18, 2002 (evidence file, f. 13).

⁷⁹ Cf. Decision of the Second Chamber of the Constitutional Court of December 6, 2002 (evidence file, fs. 330 to 334)

of the rights found in the Convention, but they also must not promulgate norms that impede the free exercise of those rights and must avoid the suppression or modification of the norms that protect them.⁸⁰ The Court has, likewise, determined that it "is competent to order a State to annul a domestic law when its terms violate the rights established in the Convention."⁸¹

104. The Court also recalls that, due to the subsidiary nature of the international jurisdiction, the State is "the principle guarantor of human rights and that, as a consequence, if a violation of said rights occurs, the State must resolve the issue in the domestic system [...] before resorting to international forums."⁸² The Court finds that, in this case, Peru adopted a law that limited the right of the dismissed employees to be heard by an impartial and competent body and the right to a prompt and effective judicial recourse. The State, however, claimed that it had derogated the norms that had impeded the filing of writs of amparo. The Court welcomes these normative changes and, therefore, it will not declare a violation of Article 2 of the Convention.

C. Conclusion

105. In view of the preceding paragraphs, the Court finds that the 184 persons listed in Annex 1 of this judgment were victims of the violation of their right to be heard with the due guarantees and within a reasonable period by a competent, independent and impartial judge or court and to have a simple and prompt remedy before competent judges or courts, as established 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) therein.

VIII-2 RIGHT TO WORK IN RELATION TO THE OBLIGATIONS TO RESPECT AND GUARANTEE THE RIGHTS⁸³

A. Arguments of the parties and of the Commission

106. The **Commission** maintained that the State violated Article 26 of the Convention with respect to the right to work. It did not, however, present specific arguments related to this issue.

107. The **representatives** indicated that, as a consequence of the dismissals, the alleged victims claimed that (i) they were deprived of job stability; (ii) the accumulation of the legally required time of service for a pension was interrupted; (iii) their access and that of their dependents to the social security system of health was abruptly interrupted; (iv) they no longer receive remuneration to sustain their right to aspire to an adequate living standard, including food, water, sanitation, clothing and housing, and (v) their life plan was

⁸⁰ Cf. *Case of Castillo Petruzzi et al. v. Peru. Merits, Reparations and Costs*. Judgment of May 30, 1999. Series C No. 52, para. 207 and *Case of the National Federation of Maritime and Port Workers (FEMAPOR) v. Peru, supra*, para. 99.

⁸¹ Cf. *Case of Garibaldi v. Brazil. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 23, 2009. Series C No. 203, para. 173 and *Case of the Dismissed Employees of Petroperú et al. v. Peru, supra*, para. 186.

⁸² Cf. *Case of Acevedo Jaramillo et al. v. Peru. Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 24, 2006. Series C No. 157, para. 66 and *Case of Petro Urrego v. Colombia. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 8, 2020. Series C No. 406, para. 103.

⁸³ Article 26, read in conjunction with Article 1(1) of the Convention.

curtailed. They claimed, therefore, that the State violated diverse rights protected by Article 26 of the Convention, such as the rights to work, enjoy a fair salary, employment opportunities and proper working conditions for all, adequate nutrition and housing, health, proper working conditions and social security. Consequently, they argued that the State is responsible for the violation of Article 26 of the Convention, read in conjunction with Articles 1(1) and 2 thereof.

108. The **State** insisted that the arguments regarding the violation of Article 26 do not appear in the Commission's factual framework. It maintained that it does not ignore its international human rights obligations in the area of economic, social and cultural rights; that it has been adopting measures, including laws, to progressively develop labor rights and that it has not only made efforts to repair the alleged victims and correct the possible harm to their work rights domestically, but that it also has granted reparations to dismissed workers, pursuant to domestic norms.

B. Considerations of the Court

109. The Court must establish whether the dismissal of the congressional employees involves a violation of the right to work; in particular, with respect to work stability, understood as a right protected by Article 26 of the Convention.

110. The Court recalls that, on different occasions, economic, social, cultural and environmental rights have been rights recognized and protected under Article 26.⁸⁴ The Court has held that "a literal, systematic, teleological and evolutive interpretation of the scope of its competence leads to the conclusion" that Article 26 protects those rights that are derived from the economic, social, educational, scientific and cultural standards contained in the OAS Charter. It has also recognized that "the scope of these rights must be understood in relation with other articles of the Convention [since] they are subject to the general obligations contained in Articles 1(1) and 2 of the Convention" and may be monitored by the Court pursuant to Articles 62 and 63. This conclusion is based not only on formal matters, but on the interdependence and the indivisibility of civil and political rights and economic, social, cultural and environmental rights,⁸⁵ as well as on their compatibility with the object and purpose of the Convention, which is the protection of the fundamental rights of the individual. The Court has, thus, established that each specific case requires an

⁸⁴ Cf. *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of Comptroller") v. Peru*, *supra*, paras. 97 to 103; *Case of Lagos del Campo v. Peru*, *supra*, paras. 142 and 154; *Case of the Dismissed Employees of Petroperú et al. v. Peru*, *supra*, para. 192; *Case of San Miguel Sosa et al. v. Venezuela*, *supra*, para. 220; *Case of Poblete Vilches et al. v. Chile*, *supra*, para. 100; *Case of Cuscul Pivaral et al. v. Guatemala*, *supra*, paras. 75 to 97; *Case of Muelle Flores v. Peru*, *supra*, paras. 34 to 37; *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru*, *supra*, paras. 33 to 34; *Case of Hernández v. Argentina*, *supra*, para. 62; *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, *supra*, para. 195; *Case of Spoltore v. Argentina*, *supra*, para. 85; *Case of the Employees of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil*, *supra*, para. 23; *Case of Casa Nina v. Peru*, *supra*, paras. 26 and 27; *Case of Guachalá Chimbo et al. v. Ecuador*, *supra*, para. 97; *Case of the Buzos Miskitos (Lemoth Morris et al.) v. Honduras*, *supra*, paras. 62 to 66; *Case of Vera Rojas et al. v. Chile*, *supra*, paras. 32 to 35; *Case of the Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala*, *supra*, para. 118; *Case of Manuela et al. v. El Salvador*, *supra*, para. 182; *Case of the Former Employees of the Judiciary v. Guatemala*, *supra*, paras. 100 to 104; *Case of Palacio Urrutia et al. v. Ecuador* *supra*, para. 153; *Case of the National Federation of Maritime and Port Workers (FEMAPOR) v. Peru*, *supra*, para. 107; *Case of Pavez Pavez v. Chile*, *supra*, para. 87; *Case of Guevara Díaz v. Costa Rica*, *supra*, paras. 55 to 61 and *Case of Mina Cuero v. Ecuador*, *supra*, para. 127.

⁸⁵ The Court has "repeatedly maintained the interdependence and indivisibility of civil and political rights and economic, social and cultural rights, because they should all be understood integrally as human rights, without any specific hierarchy, and be enforceable in all cases before the competent authorities." Cf. *Case of Lagos del Campo v. Peru*, *supra*, para. 141.

analysis of the economic, social, cultural and environmental rights and that it must determine whether, explicitly or implicitly, a human right protected by Article 26 can be derived from the OAS Charter, as well as the scope of that protection.⁸⁶

111. The Court has already held that the right to work is a right protected under Article 26 of the Convention.⁸⁷ It has also noted that Articles 45(b) and (c),⁸⁸ 46⁸⁹ and 34(g)⁹⁰ of the OAS Charter establish a series of norms that define the right to work. The Court has especially noted that Article 45(b) establishes that “b) Work is a right and a social duty, it gives dignity to the one who performs it, and it should be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working.” The Court has, thus, considered that there is a reference, with a sufficient degree of specificity, to the right to work to derive its existence and recognition in the Charter.

112. With respect to the content and scope of this right, the Court recalls that Article XIV of the American Declaration of the Rights and Duties of Man states that “[e]very person has the right to work under proper conditions and to follow his vocation freely [...].” For its part, Article 6 of the Protocol of San Salvador establishes that “[e]veryone has the right to work, which includes the opportunity to secure the means for living a dignified and decent existence by performing a freely elected or accepted lawful activity.” Globally, the Universal Declaration of Human Rights establishes that “everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.” In addition, the International Covenant on Economic, Social and Cultural Rights establishes that “[t]he States Parties to the present Covenant recognize the right to

⁸⁶ Cf. *Case of Cuscul Pivaral et al. v. Guatemala*, *supra*, paras. 75 to 97; *Case of the National Association of the Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru*, *supra*, para. 34 and *Case of Mina Cuero v. Ecuador*, *supra*, para. 128.

⁸⁷ Cf. *Case of Lagos del Campo v. Peru*, *supra*, para. 145; *Case of the Dismissed Employees of Petroperú et al. v. Peru*, *supra*, para. 192; *Case of San Miguel Sosa et al. v. Venezuela*, *supra*, paras. 219 and 220; *Case of Spoltore v. Argentina*, *supra*, para. 82; *Case of the Employees of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil*, *supra*, para. 68; *Case of Casa Nina v. Peru*, *supra*, para. 104; *Case of the Buzos Miskitos (Lemoth Morris et al.) v. Honduras*, *supra*, para. 68; *Case of the Former Employees of the Judiciary v. Guatemala*, *supra*, paras. 128 to 133; *Case of Palacio Urrutia et al. v. Ecuador*, *supra*, para. 153; *Case of the National Federation of Maritime and Port Workers (FEMAPOR) v. Peru*, *supra*, para. 107; *Case of Pavez Pavez v. Chile*, *supra*, para. 87 and *Case of Mina Cuero v. Ecuador*, *supra*, para. 130.

⁸⁸ Cf. Article 45 of the OAS Charter. – “The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms: [...] (b) Work is a right and a social duty, it gives dignity to the one who performs it, and it should be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working; (c) Employers and workers, both rural and urban, have the right to associate themselves freely for the defense and promotion of their interests, including the right to collective bargaining and the workers' right to strike, and recognition of the juridical personality of associations and the protection of their freedom and independence, all in accordance with applicable laws [...]”.

⁸⁹ Cf. Article 46 of the OAS Charter. – “The Member States recognize that, in order to facilitate the process of Latin American regional integration, it is necessary to harmonize the social legislation of the developing countries, especially in the labor and social security fields, so that the rights of the workers shall be equally protected, and they agree to make the greatest efforts possible to achieve this goal.”

⁹⁰ Cf. Article 34(g) of the OAS Charter. – “The Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development. To achieve them, they likewise agree to devote their utmost efforts to accomplishing the following basic goals: [...] (g) fair wages, employment opportunities and acceptable working conditions for all.”

work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts...".⁹¹

113. In addition, the Committee on Economic, Social and Cultural Rights, in its General Comment No. 18 on the right to work, affirmed the obligations of the States "to guarantee to assure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly."⁹² The Committee also established that the States have the obligation to respect this right, which implies that they "refrain from interfering directly or indirectly with the enjoyment of that right."⁹³

114. With respect to work stability as a component of the right to work, the Court has been clear that it does not consist in "an unrestricted permanence in the post; but rather, to respect this right, among other measures, by granting due guarantees of protection to the worker so that, if he or she is dismissed this is with justification, which means that the employer must provide sufficient reasons to impose this sanction with the due guarantees, and that the worker may appeal this decision before the domestic authorities, who must verify that the justification given is not arbitrary or unlawful."⁹⁴ The Court held in *San Miguel Sosa et al. v. Venezuela* that the State did not comply with its obligation to guarantee the right to work and, therefore, work stability, when it does not protect state officials from arbitrary dismissals.⁹⁵

115. The Court finds that 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 provided justifiable grounds and because they were barred from filing a writ of amparo to contest their dismissals. The irregularity of these dismissals was judicially recognized with respect to 20 of the alleged victims (*infra* para. 81) and has been recognized on a larger scale by implementation of the National Registry, which contains 140 of the 184 persons involved in this judgment. The Court, thus, concludes that State conduct affected the right to the work stability of the alleged victims and is a violation of Article 26 of the Convention, read in conjunction with Article 1(1) thereof.

116. The Court notes that the representatives also argued that the alleged victims had their life plan curtailed and that other economic, social and cultural rights were infringed; in particular, the rights to the enjoyment of fair salaries, opportunities of employment, proper working conditions for all, social security, nutrition, adequate housing and health. However, the record in this case contains neither facts nor evidence on such violations. Nor does the factual framework in the Merits Report have information on the consequences that the dismissal of the alleged victims had on their life plans. Thus, the Court will not rule on these allegations.

117. Finally, the Court notes that the normative evolution in Peru has set aside the norms that served as a basis to implement the collective dismissals that were a violation of Article 26. The Court welcomes those changes to the extent that they have effectively guaranteed

⁹¹ International Covenant on Economic, Social and Cultural Rights, Article 7(b).

⁹² Cf. Committee on Economic, Social and Cultural Rights. General Comment 18. The right to work (Art. 6), E/C.12/GC/18, of November 24, 2005, para. 4.

⁹³ Cf. Committee on Economic, Social and Cultural Rights, General Comment 18, *supra*, para. 22.

⁹⁴ Cf. *Case of Lagos del Campo v. Peru*, *supra*, para. 150 and *Case of Mina Cuero v. Ecuador*, *supra*, para. 134.

⁹⁵ Cf. *Case of San Miguel Sosa et al. v. Venezuela*, *supra*, para. 221 and *Case of Mina Cuero v. Ecuador*, *supra*, para. 134.

the rights that are alleged to have been violated. Thus, the Court will not declare a violation of Article 2 of the Convention.

C. Conclusion

118. In view of the above considerations, the Court finds that the 184 alleged victims listed in Annex 1 of this judgment were all congressional employees who were dismissed arbitrarily. The Court finds that the dismissals were an infringement of work stability, which is a component of the right to work and of which they were holders. Therefore, the State violated Article 26 of the Convention, read in conjunction with the obligations to respect and guarantee the rights contained in Article 1(1) thereof.

VIII-3 POLITICAL RIGHTS IN RELATION TO THE OBLIGATIONS TO RESPECT AND GUARANTEE THE RIGHTS⁹⁶

119. 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,⁹⁷ 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.⁹⁸

120. 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 irremovability in the position.⁹⁹

121. In any case, 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.¹⁰⁰

122. In view of the above and in application of the principle *iura novit curia*, the Court finds that, as is evident in this case, 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.

123. Consequently, the Court rules that the State improperly affected the rights of the alleged victims to continue in their positions, under conditions of equality, in violation of the right set out in Article 23(1)(c) of the Convention, read in conjunction with Article 1(1) thereof.

⁹⁶ Article 23 of the Convention, read in conjunction with Article 1(1) thereof.

⁹⁷ *Cr. 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.

⁹⁸ *Cf. Case of Moya Solís v. Peru. Preliminary Objections, Merits, Reparations and Costs.* Judgment of June 3, 2021. Series C No. 425, para. 108 and *Case of Cuya Lavy et al. v. Peru, supra*, para. 159.

⁹⁹ *Cf. Case of Reverón Trujillo v. Venezuela, supra*, para. 138 and *Case of Mina Cuero v. Ecuador, supra*, para. 135.

¹⁰⁰ *Cf. Case of Moya Solís v. Peru, supra*, para. 109.

IX REPARATIONS

124. On the basis of Article 63(1) of the Convention, the Court has indicated that any violation of an international obligation that has caused harm entails the duty to make adequate reparation and that this provision reflects a customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility.¹⁰¹

125. Reparation for the harm caused by the infringement of an international obligation requires, to the extent possible, full restitution (*restitutio in integrum*), which consists in the restoration of the prior situation. If this is not possible, as occurs in most cases of human rights violations, the Court will determine measures to guarantee the infringed rights and to redress the consequences of the violations.¹⁰²

126. International case law and, in particular, that of the Court have repeatedly established that this judgment is, per se, a form of reparation.¹⁰³ Nevertheless, in view of the circumstances of this case and the harm that the violations caused to the victims, the Court finds it pertinent to decree other measures.

A. Injured Party

127. The Court reiterates that, pursuant to Article 63(1) of the Convention, it considers an injured party to be anyone who has been declared a victim of a violation of a right recognized in the Convention. Therefore, the Court considers as the injured parties the 184 persons listed in Annex 1 of this judgment, who as victims of the violations declared in Chapters VVV-1, VIII-2 and VIII-3 are the beneficiaries of the following orders of the Court.

B. Prior considerations in the matter of reparations

B.1 Arguments of the parties and of the Commission

128. The **Commission** maintained that, in the area of reparations, this case should follow what was resolved in *Canales Huapaya et al. v. Peru* and in *Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru*. Therefore, it referred to the “the propriety of directly establishing appropriate reparations in the context of its recommendations, without resorting to mechanisms at the domestic level that might delay obtaining that reparation even more.”

129. The **representatives** did not present arguments on this matter.

130. The **State** argued that the standards of reparation established in *Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru*, in *Canales Huapaya et al. v. Peru* and *Dismissed Employees of Petroperú et al. v. Peru* “had notable differences” with this case. It pointed out that Special, Multisectoral and Executive Commissions were created in the domestic order to evaluate the dismissals of the congressional employees. In addition,

¹⁰¹ Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and Costs*. Judgment of July 21, 1989. Series C No. 7, para. 25 and *Case of Deras García et al. v. Honduras*, supra, para. 90.

¹⁰² Cf., *Case of Velásquez Rodríguez v. Honduras. Reparations and Costs*, supra, para. 26 and *Case of Deras García et al. v. Honduras*, supra, para. 91.

¹⁰³ Cf. *Case of Neira Alegría et al. v. Peru. Reparations and Costs*. Judgment of September 19, 1996. Series C No. 29, para. 56 and *Case of López et al. v. Argentina. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 25, 2019. Series C No. 396, para. 233.

it implemented mechanisms of reparation, such as the National Registry and the Special Benefits Program so that those former employees who were irregularly dismissed had access to integral reparation, which occurred with respect to 44,654 former workers, among them 140 former congressional workers involved in this case. It indicated that, with respect to 44 persons, the domestic jurisdiction has not ruled on the irregularity of the dismissals, but there is a possibility that they will be repaired by the State.

131. The State claimed that the Special Benefits Program is a measure of reparation that includes benefits that are accessible, alternatively and exclusively for the persons on the list of the National Registry. Upon being listed in the Registry, a person has merely to choose the benefit preferred. The benefits for those who can accede, alternatively and exclusively, are: (1) reincorporation or job reassignment, (2) early retirement; (3) financial compensation¹⁰⁴ or (4) technical training and redeployment.¹⁰⁵ The State informed that due to this program, 140 of the victims declared in this judgment received benefits, as follows: 57 persons: financial compensation;¹⁰⁶ 60 persons: reinstatement;¹⁰⁷ 19 persons: early

¹⁰⁴ Under Law 27803, the amount of such compensation is the equivalent of two minimum salaries for each year of work, with a maximum of 15 years (evidence file, fs. 2496 to 2500).

¹⁰⁵ Cf. Law 27803, of July 29, 2002 (evidence file, fs. 2496 to 2500).

¹⁰⁶ The 57 persons are: 1. Allja Machuca Víctor Elías; 2. Ambrosio Samaniego Antenor Alejandro; 3. Becerra Acero José Luis Becerra Acero José Luis; 4. Campos Ramirez Dusnara Amelia; 5. Cerna Bailón Edhem Denis; 6. Cuadros Yngar Carmen Cecilia; 7. Durand Guerra Jorge Luis – Dead; 8. Eulogio Farfán Elizabeth Amancia; 9. Garcia-Milla Balbín María Consuelo; 10. Geldres Gálvez Juan José; 11. López Victory Martin Omar; 12. Malásquez Navarro Raquel Elvira; 13. Mestanza Garcia Sylvia; 14. Miranda Villanueva Rómulo; 15. Núñez Cebedón Rosa Prosperina; 16. Olavarria Candiotty Carlos Felipe; 17. Ortega Bartolo Salvador Enrique; 18. Perez Lojas Julián Alberto; 19. Quiñones Baldeón Gudiel Máximo; 20. Ramirez Cuevas Jacinto; 21. Rey Sánchez Hurtado Lilianna Patricia; 22. Reyes Barrera María Del Pilar Juana; 23. Reyes Tueros Luvia Marina; 24. Salvador Vega William Cesar; 25. Sánchez Ortiz Luis Alberto; 26. Soria Cañas Luz Angelica; 27. Suarez Arroyo De Ponce Carmen Elena; 28. Timoteo Neyra Elva Cristina; 29. Torrey Medina Liuva María Del Rosario; 30. Vergara Tirado Daniel; 31. Villalobos Tinoco José Manuel; 32. Yañez Matallana Catterina Carmen; 33. Canales Carrizales Iván Raymundo; 34. Guzmán Collazos Nelly Tomasa; 35. Huaranga Vasquez Ermelinda Alda; 36. Luna Chavez Maria Aurora; 37. Izquierdo Castro Carmen Esperanza; 38. Luna Chávez María Aurora; 39. Madrid Moscol Walter; 40. Andonayre Aspillaga Cesar Eduardo; 41. Benites Cabrera Carlos Miguel; 42. Chávez Mendoza Dany Maida; 43. Huaquisto Alatrasta, Yuri Tofano; 44. Machado Huayanca Víctor Eloy; 45. Manyari Aguilar, Grimaldo Amador; 46. Mejía Cárdenas, Gladys Hilda; 47. Rivera Acevedo Fredy Fidel – Dead; 48. Ruiz Huapaya, Sully Rosario; 49. Sánchez Muñoz, Avelino; 50. Zegarra Salazar Dante Pedro Armando; 51. Ferreyra Guerra Norma Ines; 52. Kam De Serna Maria Elizabeth; 53. Zarazu Seclen Luis Abelardo; 54. Dávila Escalante Augusto Jorge; 55. Pacheco Ormeño Enna Marita; 56. Perez Vera Julia Rosa and 57. Torres Agreda Diógenes Adolfo.

¹⁰⁷ The 60 persons are: 1. Arnaldo Alava Merino; 2. Fernando Aliaga Alejos; 3. Rita Alvarado Jaico de Seminario; 4. María Alvarado Solís; 5. Silvia Lourdes Baca Cornejo; 6. Nayu Mercedes Carmelo Bautista; 7. Carlos Juan Castillo Salazar; 8. Hilda Victoria Castro León; 9. Ana Yolanda Cerón Salazar; 10. María Dolores Coz Tamayo; 11. José Manfredo Estrada Polar; 12. Miguel Angel López Victory; 13. Inés Catalina Momota Yano; 14. José Montoya Calle; 15. Adalberto Morante Arguedas; 16. Juan Carlos Muñoz Echevarría; 17. Jorge Emiliano Peláez Rodríguez; 18. Juana Isabel Peña Rodríguez; 19. Julio Cesar Proaño Leith; 20. Edith Maritza Quiroz Pedroza; 21. Julio Alberto Ramírez Izaga; 22. Sergio Melchor Ramos Galagarza; 23. Nicanor Saldaña Arroyo; 24. Américo José Samamé Castañeda; 25. María Estela Samame Castañeda; 26. Alberto Sánchez Rivera; 27. Nilo Santa Cruz Becerra; 28. Robinson Santos Tamashiro; 29. Luis Aldhemir Sevilla Valencia; 30. Luis Miguel Alvarado Sulca; 31. Mónica Flor Cárdenas Riquelme; 32. Segundo Ramón Gines Espinoza; 33. Manuel David Huidobro Castro; 34. Erika Magally Ibáñez Alaba; 35. Mario Fidel Luján Sánchez; 36. Francisco Javier Olano Aguilar; 37. Juan Palomino Gutiérrez; 38. Gloria Elizabeth Euribe De Machado; 39. Lizeth Elena Paniagua Alosilla; 40. Mauro Rojas Guzmán; 41. Clara Villa Ortiz; 42. Ricardo Encalada Ormeño; 43. Armando Augusto Huanasca Sulca; 44. Mario Gerardo Huaroto Conisilia; 45. Rosario Soledad Oyola Armas; 46. Oscar Ricardo Palma Hillpha; 47. Paul Ruiz Vargas; 48. Luis Alberto Salazar Montero; 49. Luis Alberto Sánchez Villanueva; 50. Esperanza Trujillo Collazos; 51. Valerio Calderón Gonzales; 52. E. Saul Fernández Ramírez; 53. Alfredo Grados Huamán; 54. Elizabeth Ledesma Rojas; 55. Sergio Pereira Pompilla; 56. Juan Alberto Ramos Durán; 57. Vilma Ravelo Velásquez; 58. Ángel Emilio Saavedra Moreyra; 59. Felicita Valenzuela Rodríguez and 60. Flora Valenzuela Rodríguez.

retirement;¹⁰⁸ three persons did not choose a type of benefit,¹⁰⁹ and one person requested redeployment.¹¹⁰

132. With respect to the persons who had not joined the Special Benefits Program, the State indicated that this was because a) they did not request to be listed in the National Registry; b) their request was rejected by the Executive Commission because they were not entitled to join the Program; c) their request was rejected because they did not present any administrative or judicial claim against Supreme Resolution 028-2009-TR; d) after being rejected, they presented claims but not within the period designated for such act, or e) they were not entitled to join the Program.

B.2 Considerations of the Court

133. The **Court** recalls that the subsidiary nature of the international jurisdiction implies that the system of protection created by the Convention is not a substitute for national jurisdictions, but rather a complement.¹¹¹ The State, thus, is the principal guarantor of rights of the individual so that, if there is an act that violates such rights, it is the State that must resolve the matter domestically and, if appropriate, repair it before having to respond before international bodies.¹¹²

134. In addition and in view of the principle of complementarity, the Court has pointed out that, in order to declare the inadmissibility of the reparations requested of the Court, it is not sufficient that the State recognize that these have already been granted or may be granted through administrative or judicial measures domestically, but rather an assessment must be made to decide whether the State effectively repaired the consequences of the measure or situation that caused the human rights infringement in a specific case, whether the reparations are adequate, or whether there exist guarantees that the domestic mechanisms of reparation are sufficient.¹¹³ Consequently, it is not sufficient to argue that access was given to a domestic mechanism to repair the human rights violation of the irregular dismissals or that such mechanism is available to meet future claims, but rather the State must present clear information on how, should it be found to owe reparations, the domestic mechanism would be an effective means to repair the alleged victims, with the

¹⁰⁸ The 19 persons are: 1. César Alfredo Andavisa Montero; 2. Elsa Ofelia Dávila Ames; 3. Doris Bertha Franco Flores de Cabrada; 4. María Luz Hinojosa Hurtado; 5. Amparo Aurea Medianero Mena; 6. Maritza Málaga Calderón; 7. Yolanda Nuñez Patiño de Camac; 8. Alberto Nery Rioja Ordóñez; 9. Bertha Jesús Saco Costa; 10. Jorge Eleodoro Santibáñez Espinoza; 11. Flora Amar Cervelió; 12. Facunda Fernández Saavedra; 13. Hortencia (f) Semino Door Valencia; 14. Graciela Enriqueta Jauregui Laveriano; 15. José Santos Mendivil Nina; 16. Ana María Poves Lizano; 17. Guty Petronila Ramos Herreta De Vega; 18. Ludecino Rivas Carrera and 19. Blanca Sobrevilla Gonzales.

¹⁰⁹ The three persons are: 1. Luisa Guerra Patiño; 2. Priscila Elizabeth Rojas Adrianzan and 3. Manuel Amilcar Revollo Chávez.

¹¹⁰ Cecilia Meneses Tumba.

¹¹¹ Cf. *Case of Tarazona Arrieta et al. v. Peru. Preliminary Objection, Merits, Reparations and Costs*. Judgment of October 15, 2014. Series C No. 286, para. 137 and *Case of Vera Rojas et al. v. Chile, supra*, para. 138.

¹¹² Cf. *Case of Acevedo Jaramillo et al. v. Peru. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 26, 2006. Series C No. 157, para. 66 and *Case of Vera Rojas et al. v. Chile, supra*, para. 138.

¹¹³ Cf. *Case of the Santo Domingo Massacre v. Colombia*, para. 143 and *Case of the Dismissed Employees of Petroperú et al. v. Peru, supra*, para. 208.

goal of determining whether, in view of the principle of complementarity, a remission to the domestic mechanisms is appropriate.¹¹⁴

135. The Court has already analyzed the situation of dismissed congressional workers in two judgments: *Dismissed Congressional Employees (Aguado Alfaro et al. v. Peru*, of 2006, and *Canales Huapaya et al. v. Peru*, of 2015. In the former, the Court ordered the State to “establish, as soon as possible, an independent and impartial body with powers to decide, in a binding and final manner, whether or not the said persons were dismissed in a justified and regular manner from the Congress of the Republic, and to establish the respective legal consequences, including, if applicable, the relevant compensation based on the specific circumstances of each individual constituted person.”¹¹⁵ The State complied by establishing a “Special Commission of Evaluation” with the purpose of deciding “in a binding and final manner” whether the victims were justly dismissed. In April 2009, the Special Commission declared that 257 victims in the case had been irregularly and unjustly dismissed.¹¹⁶ In line with the Court’s order, the State also established the National Registry, charged with determining the irregularity of the dismissals of the other employees and as a means to access the legal benefits for those irregularly dismissed. The State, thus, has made progress by executing the Court’s order and the effects of those decisions have spread to all the employees, including those persons declared victims in this case.

136. Therefore, the Court recognizes and welcomes the State’s efforts to repair the employees irregularly dismissed during the 1990s, which are the consequence of the decisions adopted by the Court. It, therefore, considers that the mechanism of domestic reparation, as well as the benefits that have already been granted, may be taken into account with respect to the obligation to integrally repair the violations declared in this judgment.¹¹⁷ In setting the corresponding reparations and within the framework of its attributions and in compliance with its obligations under Article 63 of the Convention, the Court shall take into account, where appropriate, the extent and the results of the programs adopted by the State domestically.¹¹⁸

C. Measures of Satisfaction

C.1 Publication and dissemination of the judgment

137. The **Commission** did not present arguments on this matter.

¹¹⁴ Cf. *Case of Yarce et al. v. Colombia. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 22, 2016. Series C No. 325, para. 328 and *Case of the Dismissed Employees of Petroperú et al. v. Peru, supra*, para. 208.

¹¹⁵ *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru, supra*, para. 148.

¹¹⁶ Cf. *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru. Monitoring Compliance of the Judgment*. Resolution of the Inter-American Court of September 1, 2021, para. 5.

¹¹⁷ *Mutatis mutandis, Case of the "Mapiripán Massacre" v. Colombia*. Judgment of September 15, 2005. Series C No. 134, para. 214; *Case of the Rochela Massacre v. Colombia. Merits, Reparations and Costs*. Judgment of May 11, 2007. Series C No. 163, para. 219; *Case of the Ituango Massacres v. Colombia*. Judgment of July 1, 2006. Series C No. 148, para. 339; *Case of the Pueblo Bello Massacre v. Colombia. Merits, Reparations and Costs*. Judgment of January 31, 2006. Series C No. 140, para. 206, *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 14, 2014. Series C No. 287, para. 548 and *Case of the Dismissed Employees of Petroperú et al. v. Peru, supra*, para. 209.

¹¹⁸ Cf. *Case of the Ituango Massacres v. Colombia, supra*, para. 343 and *Case of the Dismissed Employees of Petroperú et al. v. Peru, supra*, para. 209.

138. The **representative** requested “a public apology for the damage to dignity and the life plan” by means of “the publication of a notice, of an appropriate size, in the national newspaper with the widest circulation.”

139. The **State** alleged that “it did not consider acts of public apology as an essential part of the integral reparation.”

140. The **Court** holds, as it has done in other cases,¹¹⁹ that the State publish, within six months of notification of this judgment: (a) the Court’s official summary of this judgment, once, in the Official Gazette in a legible and adequate font; (b) the Court’s official summary of this judgment, once, in a newspaper of broad national circulation, in a legible and adequate font and (c) the complete judgment, available for at least one year, on the official Web site of the Congress of Peru in a manner that is available to the public. The State must immediately inform the Court once it has published each of the above, irrespective of the period of one year to present its first report, as ordered in Operative Paragraph 13 of this judgment.

C.2 National Registry of Dismissed Employees

141. Neither the **Commission** nor the **representative** referred to this matter.

142. The **State** claimed that the National Registry is the means to access the Special Benefits Program and to be recognized as a victim of an irregular dismissal. It pointed out that, to be part of National Registry, the request must have been presented within the period set out in Article 5 of Law 27803, although it is now possible, under some special circumstances, to do so under Law 31218. The State maintained that, by creating the National Registry, by recognizing the irregularity of the dismissals and by having published the lists in *El Peruano*, the dignity of the victims was recognized and a message of official severe disapproval of the human rights violations was sent.

143. The **Court** recognizes that the State established the National Registry, charged with determining the irregularity of the dismissals and as a means to access legal benefits. In the opinion of the Court, the State has made progress in repairing the victims with this measure.

144. The State has informed that the irregularity of the dismissals of 44 persons has not been determined due to circumstances that were not individualized. Consequently, these persons have not been able to access the legal benefits for irregularly dismissed employees. In the opinion of the Court, as was determined in Chapter VIII-2 of this judgment, the dismissals of those 44 persons were irregular since the State did not provide sufficient grounds to separate them from their employment and that the employees could not appeal the decision. Therefore, the Court orders the inclusion of the persons declared victims in this judgment in the National Registry (*infra* para. 154).

D. Compensation

D.1 Arguments regarding pecuniary damages

145. The **Commission** argued that “more than 20 years on from the employee dismissals in this case, the reinstatement of the victims in their old positions or relocation in other

¹¹⁹ Cf. *Case of the National Federation of Maritime and Port Workers (FEMAPOR) v. Peru*, para. 128 and *Case of the Dismissed Employees of Petroperú et al. v. Peru*, *supra*, para. 209.

similar ones face varying levels of complexity in their operationalization," for which reason the reintegration of the victims was not requested and that this be "taken into account in calculating the compensatory reparations." With respect to the remunerations that were not received, the Commission pointed out that "a significant group of victims in this case acceded to a different option of the Special Program," and thus it requested that, "with regard to the victims who obtained some form of reparation under the Special Program," consideration should be given to the partial nature of that reparation, which could be deducted from the "amount finally set."

146. The **representatives** requested that, rather than the reincorporation of the victims to their position, a compensation equal to "an ordinary month and a half's wages for each year of service with a maximum of twelve (12) wages be paid." However, it did not provide information on the value of the wages received by the dismissed employees.

147. With regards to the wages that were not received, the representatives argued that the amounts of the compensation should be calculated on the basis of the monthly pay received by the victims as if they had continued to work in the Congress, deducting the wages received by those who went back to work for the State. They requested that recognition be given "as time of service the period in which they had not worked for the Congress due to the irregular and unjust dismissal to which they had been subjected." They also requested that "any other sum that they might have been granted and might have been paid as wages or compensation [...] in the event that the victims had availed themselves of the system of reparations under Law 27803 and any of its amendments and the like" be deducted from the amount fixed in the judgment.

148. Finally, they argued that it was necessary to recognize "the years of contributions to the pension system in which the victims were affiliated when dismissed," as well as "to make the contributions that are legally obligatory to the Social Security System of Health so that the workers and their families recover, if they do not have it, the right to the pertinent care and benefits."

149. The **State** claimed that "it has ensured that the alleged victims can accede, according to their preference, to a financial compensation, to reincorporation or to the recognition of contributions for an early retirement as measures of reparation for the collective dismissals that occurred during the 1990s" and that it is not appropriate to recognize as time of service the period in which they did not work in the Congress. It also maintained that it is not possible to pay the requested years of health and retirement contributions because those amounts are for the active employees.

D.2 Arguments regarding non-pecuniary damages

150. The **Commission** argued that part of the integral reparation necessarily includes compensation for non-pecuniary damages.

151. The **representatives** argued that the victims suffered "harm to their dignity and life plan" and, therefore, requested that "the State be ordered to adequately repair the non-pecuniary damages suffered due to the violations of human rights that occurred in this case."

152. The **State** argued that "it is not possible to attribute supposed harm to the life plans of the former employees on the basis of dismissals that occurred in the 1990s."

D.3 Considerations of the Court

153. The Court notes that the State has recognized the irregularity of the dismissals of the majority of the victims in this judgment and has adopted a series of provisions directed to repair them. Thus, 140 of the 184 victims have received a declaration of the irregularity of their dismissal by means of their inclusion in the National Registry. With respect to these persons, 120 have been repaired, while the reparation of 20 more is pending.

154. In view of the above, the Court orders that the State proceed, within a period of three months, to repair the 20 victims who were already included in the Registry and have not been repaired. With respect to the 44 victims¹²⁰ who have not been included in the Registry, the Court orders the State to include them (*supra* para. 144) and to take the necessary actions so that, within a period of six months, they effectively accede, as they wish, to one of the options of reparation offered by the State for the revindication of their rights (*supra* para. 131).

155. Finally, the Court considers it necessary to set a compensatory compensation of the non-pecuniary damages suffered because of the declared violations. Taking into account the distinct aspects of non-pecuniary damages, the Court sets, in equity, the sum of USD 25,000 (twenty-five thousand United States dollars) that the State must pay, within one year, to each of the victims declared in this judgment.

E. Costs and expenses

156. One of the **representatives** (the common intervenor) indicated that “he had not charged any amount for the services that he had been providing since 2000” and, therefore, the victims “do not have any evidence that would allow them to justify the expenses incurred during the proceedings.” Therefore, he requested that “the Court fix, in equity, the amount that the State should pay for the concept of costs and expenses in the litigation of this case.”

157. The **State** maintained that “the request of costs and expenses presupposes the presentation of the receipts and other documentation that justify the appropriateness of the reparation” and, thus, the lack of “documentation that sustains the expenses incurred for the proceedings before the inter-American system makes the claim unacceptable.” Nevertheless, the State indicated that “it reserved the right to question, at the appropriate time, the amounts and documentation that support the costs and expenses related to the proceedings.”

158. There is no evidentiary support in the record relating to the costs and expenses that were incurred during the proceedings of this case before the inter-American system nor did the request for costs and expenses mention a specific amount. Nevertheless, the Court considers that those proceedings necessarily implies monetary disbursements and so orders

¹²⁰ It concerns the following persons: 1. Alicia Amelia Miranda Cruz, 2. Ana María Montejó Soto, 3. Andrea Rosa Bohórquez Romero, 4. Angelita Jeni Torres Novoa, 5. Benedicta Borjas Bustamante, 6. Carlos Fernando Mesía Ramírez, 7. Carlos Jurado Silva, 8. Cevis Heredia Denis, 9. Cristina Córdova Anclito, 10. Edgar Reateguí Casanova, 11. Eduardo Sarmiento García, 12. Edwin Alfonso Espinoza Chávez, 13. Elva Rosa Castillo Arana, 14. Estela María Flores Silva, 15. Felicita Valenzuela Rodríguez, 16. Fermín Vicente Berrio Huane, 17. Gerardo Tejada Vargas, 18. Gloria Stella Rosa Bertalmio Bacigalupo, 19. Guillerma Romero, 20. Gustavo Raúl Sierra Ortiz, 21. Jacqueline Chong Acosta, 22. José Elías Flores Oyola, 23. José Ferreira Echevarría, 24. José Manuel Pacora San Martín, 25. José Rodríguez Incio, 26. Juan Urbano Palomino, 27. Lilia Norma Breña Pantoja, 28. Luis Alberto Ortiz Guarda, 29. Luis Gálvez Mendoza, 30. Manuel Arturo Gálvez Montero, 31. Marcelino Meneses Huayra, 32. María Solimano Cornejo, 33. Nelson Martín Loayza Bezzolo, 34. Pilar del Rocío Acosta Bardales, 35. Ricardo Dagoberto Sánchez Carlessi, 36. Richard Víctor Calderón Ocharán, 37. Rómulo Landeón Cotera, 38. Rosalía Carrillo Mantilla, 39. Rosario Teresa Zurita Gutiérrez, 40. Susana Isabel Mantilla Correa, 41. Hermógenes Tupac Yupanqui Ochoa, 42. Víctor Alberto Ángeles Cueto, 43. Víctor Jorge Salinas Patiño and 44. Wilfredo Mendieta Torres.

the State to pay the common intervenor the amount, in equity, of USD 20,000 (twenty thousand United States dollars) for costs and expenses. At the monitoring stage of compliance of this judgment, the Court will order that the State reimburse the representatives the reasonable expenses that they might incur.

F. Method of compliance of the payments ordered

159. The State shall pay compensation for pecuniary and non-pecuniary damage and the reimbursement of costs and expenses, as established in this judgment, directly to the persons listed in Annex 1 and the reintegration of the costs and expenses of the common intervenor, within the period of one year, as of the date of notification of this judgment.

160. If a beneficiary has died or dies before he or she receives the respective payment, this shall be paid directly to his or her heirs, in accordance with the applicable domestic law.

161. The State shall comply with its monetary obligations by payment in United States dollars or the equivalent in Peruvian currency, using the exchange rate in force published or calculated by a relevant bank or financial institution, on the day before payment to make the respective payment.

162. If, for reasons attributable to the beneficiaries of the compensation or their heirs, it is not possible to pay the compensation established within the time frame indicated, the State shall deposit these amounts in an account or certificate of deposit in a Peruvian solvent financial institution, in United States dollars, and on the most favorable financial terms permitted by banking law and practice. If the corresponding compensation is not claimed within ten years, the amounts shall be returned to the State with the accrued interest.

163. The amounts allocated in this judgment as compensation for pecuniary and non-pecuniary damages and the reimbursement of costs and expenses shall be delivered in full to the persons indicated, as established in this judgment, without any deductions arising from possible charges or taxes.

164. If the State should fall into arrears, it shall pay interest on the amount owed corresponding to banking interest on arrears in Peru.

X OPERATIVE PARAGRAPHS

165. Therefore,

THE COURT

DECIDES,

Unanimously:

1. To reject the preliminary objection relating to the request for control of legality of the proceedings before the Inter-American Commission, in the terms of paragraphs 20 to 23 of this judgment.

Unanimously:

2. To reject the preliminary objection relating to the failure to exhaust domestic

remedies, in the terms of paragraphs 27 to 34 of this judgment.

Unanimously:

3. To reject the preliminary objection of the lack of jurisdiction of the Inter-American Court to act as a fourth instance, in the terms of paragraphs 38 to 39 of this judgment.

Unanimously:

4. To reject the preliminary objection of the inappropriateness of the petition for lack of an object, in the terms of paragraphs 43 to 44 of this judgment.

By six votes in favor and one vote against, that:

5. To reject the preliminary objection on the alleged lack of jurisdiction of the Court with respect to Article 26 of the American Convention on Human Rights, in the terms of paragraphs 48 to 49 of this judgment.

Dissenting: Judge Patricia Pérez Goldberg.

DECLARES,

Unanimously, that:

6. The State is responsible for violating the rights to judicial guarantees and to judicial protection, recognized in Articles 8(1) and 25(1) of the American Convention on Human Rights, read in conjunction with Article 1(1) thereof, to the detriment of the persons listed in Annex 1 of this judgment, in the terms of paragraphs 89 to 105 of this judgment.

By five votes in favor and two votes against, that:

7. The State is responsible for violating the right to work, recognized in Article 26 of the American Convention on Human Rights, read in conjunction with Article 1(1) thereof, to the detriment of the persons listed in Annex 1 of this judgment, in the terms of paragraphs 109 to 118 of this judgment.

Dissenting: Judges Humberto Sierra Porto and Patricia Pérez Goldberg.

Unanimously:

8. The State is responsible for violating political rights, recognized in Article 23(1)(c) of the American Convention on Human Rights, read in conjunction with Article 1(1) thereof, to the detriment of the persons listed in Annex 1 of this judgment, in the terms of paragraphs 119 to 123 of this judgment.

AND ESTABLISHES,

unanimously, that:

9. This judgment is, per se, a form of reparation.

10. The State shall issue the publications ordered in paragraph 140 of this judgment.

11. The State shall proceed to include all the victims declared in this judgment in the National Registry of Dismissed Employees and their reparation in the terms of paragraphs 144 and 154 of this judgment.

12. The State shall pay the amounts fixed in paragraph 155 as compensation for non-pecuniary damages and in paragraph 158 for the reimbursement of costs and expenses, in the terms of paragraphs 159 to 164 of this judgment.

13. The State shall, within one year of notification of this judgment, present the Court with a report on the measures adopted to comply with this judgment, notwithstanding what is established in paragraph 140 of this judgment.

14. The Court will monitor the full compliance of this judgment, in exercise of its attributions and in compliance with its duties under the American Convention on Human Rights, and will close this case once the State has fully complied with this judgment.

Judge Ricardo C. Pérez Manrique advised the Court of his individual concurring opinion, Judges Eduardo Ferrer Mac-Gregor Poisot and Rodrigo Mudrovitsch advised the Court of their joint concurring opinion. Judges Humberto Antonio Sierra Porto and Patricia Pérez Goldberg advised the Court of their individual partially dissenting opinions.

Done in the Spanish language at San José, Costa Rica on October 4, 2022.

I/A Court H.R. *Case of Benites Cabrera et al. v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 4, 2022.

Ricardo C. Pérez Manrique
President

Humberto Antonio Sierra Porto

Eduardo Ferrer Mac-Gregor Poisot

Nancy Hernández López

Verónica Gómez

Patricia Pérez Goldberg

Rodrigo Mudrovitsch

Pablo Saavedra Alessandri
Registrar

So ordered,

Ricardo C. Pérez Manrique
President

Pablo Saavedra Alessandri
Registrar

Annex 1

List of victims

No.	Victims
1	Abelardo Zarazú Ruiz
2	Adalberto Morante Arguedas
3	Alberto Nery Rioja Ordóñez
4	Alberto Sánchez Rivera
5	Alfredo Grados Huamán
6	Alicia Amelia Miranda Cruz
7	Américo José Samamé Castañeda
8	Amparo Aurea Medianero Mena
9	Ana María Montejo Soto
10	Ana María Poves Lizano
11	Ana Yolanda Cerón Salazar
12	Andrea Rosa Bohórquez Romero
13	Ángel Emilio Saavedra Moreyra
14	Angelita Jeni Torres Novoa
15	Antenor Alejandro Ambrosio Samaniego
16	Armando Augusto Huanasca Sulca
17	Arnaldo Alava Merino
18	Augusto Jorge Dávila Escalante
19	Avelino Sánchez Muñoz
20	Benedicta Borjas Bustamante
21	Bertha Saco Costa
22	Blanca Consuelo Sobrevilla González
23	Elena Suárez Arroyo
24	Carlos Felipe Olavarria Candiotty
25	Carlos Fernando Mesia Ramírez
26	Carlos Juan Castillo Salazar
27	Carlos Jurado Silva
28	Carlos Miguel Benites Cabrera
29	Carmen Cecilia Cuadros Ingar
30	Carmen Esperanza Izquierdo Castro
31	Catterina Carmen Yáñez Matallana
32	Cecilia Meneses Tumba
33	César Alfredo Andavisa Montero
34	César Eduardo Andonaire Aspíllaga
35	Cevis Heredia Denis
36	Clara Villa Ortiz
37	Cristina Córdova Ancleto
38	Daniel Vergara Tirado
39	Dante Pedro Zegarra Salazar
40	Dany Maida Chávez Mendoza
41	Denis Cerna Bailón
42	Diógenes Adolfo Torres Agreda
43	Dora Luisa Rodríguez Grández
44	Doris Bertha Franco Flores
45	Dusnara Amelia Campos Ramírez
46	Edward Saúl Fernández Ramírez
47	Edgar Reateguá Casanova

48	Edith Maritza Quiroz Pedroza
49	Eduardo Sarmiento García
50	Edwin Alfonso Espinoza Chávez
51	Elsa Ofelia Dávila Ames
52	Elizabeth Amancia Eulogio Farfán
53	Elizabeth Elisa Ledesma Rojas
54	Elva Cristina Timoteo Neyra
55	Elva Rosa Castillo Arana
56	Enna Marita Pacheco Ormeño
57	Erika Ibáñez Alaba
58	Ermelinda Alda Huaranga Vásquez
59	Esperanza Trujillo Collazos
60	Estela María Flores Silva
61	Facunda Aurora Fernández Saavedra
62	Felicita Valenzuela Rodríguez
63	Fermín Vicente Berrio Huane
64	Fernando Aliaga Alejo
65	Flora Amar Cervelión
66	Flora Valenzuela Rodríguez
67	Francisco Javier Olano Aguilar
68	Fidel Rivera Acevedo
69	Gerardo Tejada Vargas
70	Gladys Hilda Mejía Cárdenas
71	Gloria Elizabeth Euribe
72	Gloria Stella Rosa Bertalmio Bacigalupo
73	Graciela Enriqueta Jauregui Laveriano
74	Grimaldo Amador Manyari Aguilar
75	Gudiel Quiñones Baldeón
76	Guillerma Romero
77	Gustavo Raúl Sierra Ortiz
78	Guty Petronila Ramos Herrera
79	Hilda Victoria Castro León
80	Hortencia Semino Door Santos
81	Liliana Rey Sánchez
82	Iván Raymundo Canales Carrizales
83	Jacinto Ramírez Cueva
84	Jacqueline Chong Acosta
85	Jorge Eleodoro Santibáñez Espinoza
86	Jorge Emiliano Peláez Rodríguez
87	Jorge Luis Durand Guerra
88	José Antonio Montoya Calle
89	José Elías Flores Oyola
90	José Ferreira Echevarría
91	José Luis Becerra Acero
92	José Manfredo Estrada Polar
93	José Manuel Pacora San Martín
94	José Manuel Villalobos Tinoco
95	José Rodríguez Incio
96	José Santos Mendivil Nina
97	Juan Alberto Ramos Durán
98	Juan Carlos Muñoz Echeverría

99	Juan José Geldres Gálvez
100	Juan Palomino Gutiérrez
101	Juan Urbano Palomino
102	Juana Peña Rodríguez
103	Julia Rosa Pérez Vera
104	Julián Alberto Pérez Loja
105	Julio Alberto Ramírez Izaga
106	Julio Proaño Leith
107	Lilia Norma Breña Pantoja
108	Liuva María del Rosario Torrey Medina
109	Lizett Elena Paniagua Alosilla
110	Inés Catalina Momota Yano
111	Ludecino Rivas Carrera
112	Luis Alberto Ortiz Guarda
113	Luis Alberto Salazar Montero
114	Luis Alberto Sánchez Villanueva
115	Luis Aldhemir Sevilla Valencia
116	Luis Gálvez Mendoza
117	Luis Miguel Alvarado Sulca
118	Luis Sánchez Ortiz
119	Luisa Guerra Patiño
120	Luvia Marina Reyes Tueros
121	Luz Angélica Soria Cañas
122	Manuel Amilcar Revolledo Chávez
123	Manuel Arturo Gálvez Montero
124	Manuel David Huidobro Castro
125	Marcelino Meneses Huayra
126	María Alvarado Solís
127	María Aurora Luna Chávez
128	María Consuelo García Milla Balbín
129	María del Pilar Reyes Barrera
130	María Dolores Coz Tamayo
131	María Elizabeth Kam Morón
132	María Estela Samamé Castañeda
133	María Luz Hinostroza Hurtado
134	María Solimano Cornejo
135	Mario Fidel Luján Sánchez
136	Mercedes Gerardo Huaroto Conisilia
137	Maritza Moraima Málaga Calderón
138	Martín Omar López Victory
139	Mauro Rojas Guzmán
140	Miguel Ángel López Victory
141	Mónica Flor Cárdenas Riquelme
142	Nayu Mercedes Carmelo Bautista
143	Nelly Tomasa Guzmán Collazos
144	Nelson Martín Loayza Bezzolo
145	Nicanor Saldaña Arroyo
146	Nilo Santa Cruz Becerra
147	Norma Inés Ferreyra Guerra
148	Oscar Ricardo Palma Hillpha
149	Paul Ruiz Vargas

150	Pilar del Rocío Acosta Bardales
151	Priscilla Elizabeth Rojas Adrianzen
152	Raquel Elvira Malásquez Navarro
153	Ricardo Arturo Carrillo Mantilla
154	Ricardo Dagoberto Sánchez Carlessi
155	Ricardo Encalada Ormeño
156	Richard Víctor Calderón Ocharán
157	Rita Alvarado Jaico
158	Robinson Santos Tamashiro
159	Rómulo Landeón Coterá
160	Rómulo Miranda Villanueva
161	Rosa Prosperina Núñez Cebedón
162	Rosalía Carrillo Mantilla
163	Rosario Soledad Oyola Armas
164	Rosario Teresa Zurita Gutiérrez
165	Salvador Ortega Bartolo
166	Segundo Ramón Gines Espinoza
167	Sergio Melchor Ramos Galagarza
168	Sergio Pereira Pompilla
169	Silvia Lourdes Baca Cornejo
170	Sully Rosario Ruiz Huapaya
171	Susana Isabel Mantilla Correa
172	Sylvia Mestanza García
173	Hermógenes Tupac Yupanqui Ochoa
174	Valerio Calderón Gonzales
175	Víctor Alberto Angeles Cueto
176	Víctor Elías Allja Machuca
177	Víctor Eloy Machado Huayanca
178	Víctor Jorge Salinas Patiño
179	Vilma Ravello Velásquez
180	Walter Madrid Moscol
181	Wilfredo Mendieta Torres
182	William Salvador Vega
183	Yolanda Núñez Patiño
184	Yuri Tofano Huaquisto Alatrística

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

INTER-AMERICAN COURT OF HUMAN RIGHTS

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

I. INTRODUCTION

1. This judgment, in the terms of its paragraphs 89 to 105, declares the violation of the rights to judicial guarantees and to judicial protection, recognized in Articles 8(1) and 25(1) of the American Convention, read in conjunction with Article 1(1) thereof, to the detriment of the persons listed in Annex 1 of the judgment. It also declares, in the terms of its paragraphs 109 to 118, the violation of the right to work, recognized in Article 26 of the Convention, read in conjunction with Article 1(1) thereof, to the detriment of the persons listed in Annex 1 of the judgment. Lastly, it declares, in the terms of its paragraphs 119 to 123, the violation of political rights, recognized in Article 23 of the Convention, read in conjunction with Article 1(1) thereof, to the detriment of the persons listed in Annex 1 of the judgment.

2. I hereby present this concurring opinion, but I believe it necessary to refer to the reasons for my views on the justiciability of economic, social, cultural and environments rights (ESCER), repeating the basis of prior opinions and presenting some ideas on the case in question.

3. This concurring opinion is structured as follows: 1) The direct justiciability of ESCER; 2) The infringement of the political rights of the victims; 3) Conclusions.

II. THE DIRECT JUSTICIABILITY OF ESCER

4. The justiciability of ESCER has been debated, in the doctrine and by the Court, and has resulted in at least three perspectives or approaches, among other issues that I mentioned in my concurring opinion in *National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru* of November 21, 2019.¹

5. The first perspective proposes that individual violations of ESCER lack “direct justiciability.” This is not to say that they are not justiciable, but rather that they are so “indirectly.” In order to analyze a violation of those rights, the Court can only do so in relation to the civil and political rights expressly recognized in Articles 3 to 25 of the Convention, with the exception that the infringement of two ESCER rights may be declared directly: the right to education and the trade union rights. Both those rights are expressly recognized as “justiciable” by Article 19(6) of the

¹ 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 November 21, 2019. Series C No. 394, among others.

Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (hereinafter "Protocol of San Salvador").²³

6. The second perspective, in contrast to the first, argues for "direct justiciability." It claims that the Court has jurisdiction to hear autonomous violations of economic, social, cultural and environmental rights on the basis of Article 26 of the Convention, in the understanding that they are justiciable on an individual basis.⁴ This approach subsumes the analysis of the violations of ESCER to Article 26, recognizing a direct remittance to the economic, social, educational, scientific and cultural standards found in the OAS Charter. An analysis of infringements of ESCER will always be seen as a violation of Article 26 with reference to the OAS Charter or the American Declaration, leaving aside an integration with civil and political rights.

7. The third perspective, which is the one that I endorse, is that which we could call "the perspective of simultaneity." As I have mentioned in previous concurring opinions and repeating my reasoning there,⁵ my view on this option derives from a full recognition of the universality, indivisibility, interdependence and inter-relationship among the human rights, which serves as the foundation of the Court's jurisdiction when it hears cases of violations of economic, social, cultural and environmental rights. I state this in the belief that human rights are interdependent and indivisible in such a way that civil and political rights are intertwined with economic, social, cultural and environmental rights: some rights cannot be fully enjoyed without the others. I endorse the "perspective of simultaneity" and I reaffirm that this interdependence and indivisibility allows us to view the individual integrally as a full holder of rights, which affects the justiciability of his or her rights. They are especially inseparable in circumstances such as those encountered in the present case.

² This was the majority approach of the Inter-American Court until the judgment in *Lagos del Campo v. Peru*. Among the other cases that have followed this approach are: *"Juvenile Reeducation Institute" v. Paraguay. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 2, 2004. Series C No. 112 and *Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, to mention two examples, as well as *Gonzales Lluy et al. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 1, 2015. Series C No. 298.

³ "Any instance in which the rights established in paragraph a) of Article 8 and in Article 13 are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights." Article 19(6), Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights. "Protocol of San Salvador."

⁴ Cf. *Case of Lagos del Campo v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 31, 2017. Series C No. 340, paras. 142 and 154; *Case of the Dismissed Employees of Petroperú et al. v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 23, 2017. Series C No. 344, para. 192; *Case of San Miguel Sosa et al. v. Venezuela. Merits, Reparations and Costs*. Judgment of February 8, 2018. Series C No. 348, para. 220; *Case of Poblete Vilches et al. v. Chile. Merits, Reparations and Costs*. Judgment of March 8, 2018. Series C No. 349, para. 100; *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary Objection, Merits, Reparations and Costs*. Judgment of August 23, 2018. Series C No. 359, paras. 75 to 97; *Case of Muelle Flores v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of March 6, 2019. Series C No. 375, paras. 34 to 37; *Case of National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 21, 2019. Series C No. 394, paras. 33 to 34; *Case of Hernández v. Argentina. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 22, 2019. Series C No. 395, para. 62 and *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, Reparations and Costs*. Judgment of February 6, 2020. Series C No. 400, para. 195.

⁵ Cf. Concurring opinion to the judgment of November 21, 2019 in *National Association of the Discharged and Retired Employees of the National Tax Administration Superintendence (Ancejub-Sunat) v. Peru*; to the judgment of November 22, 2019 in *Hernández v. Argentina*, to the judgment of November 24, 2020 in *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina* and to the judgment of July 15, 2020 in *Employees of the Fireworks Factory in Santo Antonio de Jesús and their families v. Brazil*.

8. It is for this reason that I have stated that the interdependence and indivisibility enables viewing the individual integrally as a full holder of rights, which has an impact on the justiciability of his or her rights. The American Declaration on Human Rights recognizes civil and political rights and economic, social and cultural rights. This is reaffirmed in the Preamble of the American Convention: "*Reiterating that, in accordance with the Universal Declaration of Human Rights, the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights...*". The next paragraph mandated the drafting of a convention on ESCER. In turn, the Preamble to the Protocol of San Salvador states: "*Considering the close relationship that exists between economic, social and cultural rights, and civil and political rights, in that the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human person, for which reason both require permanent protection and promotion if they are to be fully realized, and the violation of some rights in favor of the realization of others can never be justified.*"

9. According to this perspective, Article 26 of the Convention functions as a framework article in that it refers in general terms to economic, social, cultural and environmental rights, the reading and the determination of which remits us to the OAS Charter. The Protocol of San Salvador, in turn, individualizes and gives content to those rights. I underline that, in view of the great importance of these rights, the Protocol states that they should be reaffirmed, developed, perfected and protected (see Preamble). Finally, there is a group of instruments of the inter-American *corpus juris* that also refer to ESCER.

10. Thus, as a framework article, Article 26 of the Convention enables a greater and more coherent confluence with the other articles of the Convention when determining the meaning and scope of the violations. This interpretation transcends the artificial division between rights of different categories with different degrees of effectiveness that in the case of ESCER denies access to inter-American justice for their safeguarding. This is especially so when the Court intervenes in cases involving the most unequal zone of the planet. In reaffirming the perspective of simultaneity, we seek to ignore the reductionisms that might denote the aforementioned two perspectives. On the one hand, a perspective that eliminates the possibility of declaring an infringement of Article 26, which ultimately completely invisibilizes the autonomy and existence of ESCER as truly justiciable rights and, therefore, in force. On the other hand, a perspective that considers Article 26 as the only instrument of application when dealing with ESCER, which would ignore the interdependence and interrelationship with civil and political rights.

11. This case perfectly demonstrates the necessity of a coherent and congruent protection not only within the scope of ESCER, but also from a broad analysis of violations in simultaneity with civil and political rights. I repeat that, in no case, may human rights be treated in an isolated manner and without considering them as a whole, because the complex reality requires an analysis that privileges the interdependence and inter-relationship among them. This case exemplifies that confluence since the Court finds that the 184 persons were victims of the violation of their right to be heard with due guarantees and within a reasonable period, by competent judges or courts, as required by Articles 8(1) and 25(1) of the Convention, read in conjunction with the obligation to respect and ensure the rights contained in Article 1(1) thereof. It must be underscored that, therefore, the guarantees of due process, access to justice and political rights regarding dismissals from employment and the violation of the right to work, especially with regard to the right to work stability, must be treated jointly. We thus need a full analysis in the light of those rights that comprise, as one of the components, the right to work stability and the right to protection from dismissal without the possibility of an effective appeal. In contrast, to approach the analysis only from the civil and political rights involved would be limiting, as it would also be to focus only on the issue of work.

12. In interpreting and applying the Convention, the Court is, more than anything, a regional court of human rights and its perspective is such that it must be able to understand the general panorama. It is, therefore, necessary to approach these violations from the viewpoint of the co-existence of the various rights of the victims, which are indivisible and justiciable, per se, by the Court. Access to inter-American justice in this case, just as in others already heard by the Court, is going to be a key to the access of all rights. I note that the metaphor of the key does not mean that we are faced with a viewpoint that directly restricts the right to work (or any other ESCER), but rather that it concerns a simultaneous justiciability due to the interrelationship among rights. I repeat that we are not dealing with the thesis of connectivity, but rather simultaneity. Therefore, Article 19(6) of the Protocol of San Salvador cannot be considered an obstacle for the Court to consider the violation of economic, social, cultural and environmental rights different than those established in that article, since by applying the principle *pro persona* (Art. 29 (c) and (d)) of the Convention), it is not reasonable to argue that there are human rights that do not contemplate their protection in the inter-American system by means of the mechanism of individual petitions.

13. That is why I underscore the majority decision that, through the principle *iura novit curia*, declared a violation of Article 23(1)(c) by considering that the dismissal from employment of 184 victims did not abide by the rules of due process, which arbitrarily affected their continuance in their positions and constituted a violation of their political rights. This perspective, in my opinion, reflects the interdependence and indivisibility of human rights by demonstrating that the dismissal from their positions implied a violation both of the right to work stability and the right to access and remain in public functions, under general conditions of equality, which are inalienable in circumstances such as in this case.

III. THE INFRINGEMENT OF POLITICAL RIGHTS IN THE DISMISSAL OF A PUBLIC OFFICIAL

14. This judgment deals with an issue that has been heard by the Court on several occasions and that is fundamental in maintaining the rule of law in the region. I refer to the guarantee established in Article 23(1)(c) of access to public service, under conditions of equality. As the judgment recognizes, the Court "has interpreted that the guarantee of protection covers both the access and the continuance in equal conditions and non-discrimination with regard to the suspension and dismissal procedures,"⁶ which "indicates that the procedures for appointment, promotion, suspension and dismissal of public officers must be objective and reasonable, that is, they must respect the applicable guarantees of due process."⁷

15. On different occasions, the Court has ruled on the procedures of the dismissal of public officials, specifically regarding the guarantee of stability or continuance in the position.⁸ In this specific case, the Court held that the State unduly affected the rights of the alleged victims to remain in their positions, under conditions of equality, in violation of the right established in Article 23(1)(c) of the Convention, read in conjunction with Article 1(1) thereof.

16. A dismissal involves the right to due process, to access to justice, to political rights and to the right to work. It is not possible to understand the violations in isolation since their division does not reflect the joint violation that exists in this case, regardless of whether it concerns civil and political rights or economic, social, cultural and environmental rights.

6 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 Pavez Pavez v. Chile, supra*, para. 85.

7 Cf. *Case of Moya Solís v. Peru, supra*, para. 108 and *Case of Pavez Pavez v. Chile, supra*, para. 85.

8 Cf. *Case of Reverón Trujillo v. Venezuela, supra*, para. 138 and *Case of Cuya Lavy et al. v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 28, 2021. Series C No. 438, para. 160.

IV. CONCLUSIONS

1. Economic, Social, Cultural and Environmental Rights are directly justiciable before the Inter-American Court of Human Rights because Human Rights are universal, indivisible, interdependent and their violation is simultaneous with other rights.
2. Thus, the reference to Article 26 of the American Convention is as a normative framework that enables access to its definition and content jointly with the Protocol of San Salvador and the international *corpus iuris*, but it is not sufficient to justify access to the Court.
3. In this case, the violation of various civil and political rights is simultaneous and indivisible with the right to remain in the position and not to be subject to arbitrary dismissal.
4. In this case, the simultaneous violation merits special relevance, at the same time as Article 23(1)(c) of the Convention.

Ricardo C. Pérez Manrique
Judge

Pablo Saavedra Alessandri
Registrar

**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

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.

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 systematical hermeneutic⁸ 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 derogations¹⁵ 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

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

⁸ Although the systematical 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 Panes 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

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 source²³ 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

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.

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 irremovability 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.*"

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) irremovability from office⁴¹ (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

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 irremovability 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 discrimination⁵⁶ by a public or private employer.

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.

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 irremovability 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

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 Rights⁶⁵ 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

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 grounds 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 job⁷². 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 importance⁷⁴), 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

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

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.

**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 Lluay 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 "ES CER") 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

**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 opinion¹ 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 equality³ 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 declared⁸ 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 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 Convention¹² 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.

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 *González 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).