

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

CASE OF AGUINAGA AILLÓN v. ECUADOR

**JUDGMENT OF January 30, 2023
(Merits, Reparations and Costs)**

1. This opinion is offered with all due respect for the majority decisions of the Inter-American Court of Human Rights (hereinafter the Court), to explain my disagreement with operative paragraph four, which finds the State of Ecuador (hereinafter “the State” or “Ecuador”) internationally responsible for violating the right to work, in injury of Carlos Julio Aguinaga Aillón.

2. This opinion stands alongside the position I have already taken in my partially dissenting opinions in the cases of *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 Association (Our Land) v. Argentina*,⁷ *Employees of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil*,⁸ *Casa Nina v. Peru*,⁹ *Guachalá Chimbo v. Ecuador*,¹⁰ and *FEMAPOR v. Peru*,¹¹ *Guevara Díaz v. Costa Rica*,¹² *Mina Cuero*

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 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. *Case of 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 Indigenous Communities of the Lhaka Honhat Association (Our Land) 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. *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 *Valencia Campos et al. v. Bolivia*,¹⁴ *Brítez Arce et al. v. Argentina*,¹⁵ and *Nissen Pessonali v. Paraguay*;¹⁶ also as in my concurring opinions in the cases of *Gonzales Lluy et al. v. Ecuador*,¹⁷ *Poblete Vilches et al. v. Chile*,¹⁸ *Cuscul Pivaral et al. v. Guatemala*,¹⁹ *Buzos Miskitos v. Honduras*,²⁰ *Vera Rojas et al. v. Chile*,²¹ *Manuela et al. v. El Salvador*,²² *the Former Employees of the Judiciary v. Guatemala*,²³ *Palacio Urrutia v. Ecuador*²⁴ and *Pavez Pavez v. Chile*,²⁵ concerning the enforceability of economic, social, cultural and environmental rights (hereinafter “ESCERs”) via Article 26 of the American Convention on Human Rights (hereinafter “the Convention”).

3. In my previous opinions, I outlined the reasons why I believe there are logical and legal inconsistencies in the jurisprudential position taken by the majority of the Court on the direct, autonomous enforceability of ESCERs under Article 26 of the Convention. This majority position overlooks the rules of interpretation of the Vienna Convention on the Law of Treaties,²⁶ alters the nature of the obligation of progressivity,²⁷ ignores the will of the states as set forth in the Protocol of San Salvador,²⁸ and undermines the Court’s legitimacy,²⁹ to mention only a few of the arguments. My purpose here, however, is to demonstrate the irrelevance of the analysis of Article 26, as this case specifically addresses a public official serving an entity that performed materially judicial duties, and as a consequence, could be covered thoroughly enough on the basis of Convention Article

¹³ Cf. *Case of Mina Cuero v. Ecuador. Preliminary Objection, Merits, Reparations and Costs*. Judgment of September 7, 2022. Series C No. 464. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

¹⁴ Cf. *Case of Valencia Campos et al. v. Bolivia. Preliminary Objection, Merits, Reparations and Costs*. Judgment of October 18, 2022. Series C No. 469. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

¹⁵ Cf. *Case of Brítez Arce v. Argentina. Merits, Reparations and Costs*. Judgment of November 16, 2022. Series C No. 474. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

¹⁶ Cf. *Case of Nissen Pessonali v. Paraguay. Merits, Reparations and Costs*. Judgment of November 21, 2022. Series C No. 477. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

¹⁷ Cf. *Case of Gonzales Lluy et al. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 1, 2015. Series C No. 298. Concurring opinion of Judge Humberto Antonio Sierra Porto.

¹⁸ 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.

¹⁹ 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.

²⁰ 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.

²¹ 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.

²² 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.

²³ 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.

²⁴ Cf. *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.

²⁵ 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.

²⁶ 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.

²⁷ 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.

²⁸ 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.

²⁹ Cf. *Case of 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.

23; this is consistent with the position I already held in my partially dissenting opinions in the cases of *Mina Cuero v. Ecuador*³⁰ and *Nissen Pessonali v. Paraguay*.³¹

4. In the instant case, in addition to laying grounds for violation of judicial guarantees and judicial protection, with which I fully agree, the Court felt that there had been a violation of the right to remain in the job under general conditions of equality, as in Article 23(1)(c) and the right to work, particularly regarding the employment stability guaranteed in Article 26 of the Convention. The Court has drawn on the principle of *iura novit curia* in holding that the arbitrary dismissal of Mr. Aguinaga Aillón from his position as a member of the Supreme Electoral Tribunal (hereinafter "TSE") was also a violation of the right to job stability as part of the right to work.³²

5. The Court furthermore considered the right to remain in the job under general conditions of equality, finding that the dismissal of Mr. Aguinaga Aillón "[...] was arbitrary because it was conducted by a body that was not authorized to do so, via a procedure that was not legally established."³³ The Court also found violation of the right to job stability, finding "in the case at hand that the decision of the National Congress to dismiss Mr. Aguinaga Aillón from his post as a member of the TSE was arbitrary because it was made outside the bounds of congressional power. It did not satisfy the requirements of guaranteeing due process and thus also constituted a violation of the right to job stability as part of the right to work, which pertained to him as an employee of the TSE during his entire term of office."³⁴ It is therefore clear that although the Court found the procedure not legally established and added that the process did not respect the guarantees of due process, nevertheless, both claims were built materially on the same arguments of fact and law, using two different legal foundations—first Article 23(1)(c) and then Article 26 of the Convention.

6. I think that, as I said in my partially dissenting opinion in the Case of *Mina Cuero v. Ecuador*, the correct approach would have been to apply Article 23 only. As the judgment rightly states, Article 23(1)(c) of the Convention provides, "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." I therefore believe that once again the Court made the right decision when it included analysis of this article and declared violation of the right to have access to the public service under conditions of equality, as it is clear that, because this was a position on the TSE that also materially entailed judicial duties, Mr. Aguinaga Aillón was indeed working in the public service. The Court also rightly followed the provisions given in the United Nations Human Rights Committee's General Comment No. 25,³⁵ to the effect that Article 23(1)(c) establishes the right not only to have access to a public service position, but also to hold that position under general conditions of equality and to remain in that position. The implication is

³⁰ Cf. Case of *Mina Cuero v. Ecuador*. Preliminary Objection, Merits, Reparations and Costs. Judgment of September 7, 2022. Series C No. 464. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

³¹ Case of *Nissen Pessonali v. Paraguay*. Merits, Reparations and Costs. Judgment of November 21, 2022. Series C No. 477. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

³² Cf. Case of *Aguinaga Aillón v. Ecuador*. Merits, Reparations and Costs. Judgment of January 30, 2023. Series C No. 483, para. 100.

³³ Cf. Case of *Aguinaga Aillón v. Ecuador*. Merits, Reparations and Costs. Judgment of January 30, 2023. Series C No. 483, para. 93.

³⁴ Cf. Case of *Aguinaga Aillón v. Ecuador*. Merits, Reparations and Costs. Judgment of January 30, 2023. Series C No. 483, para. 100.

³⁵ Cf. United Nations. Human Rights Committee. General Comment No. 25, Article 25: The right to participate in public affairs, voting rights and the right of equal access to public service, CCPR/C/21/Rev. 1/Add. 7, July 12, 1996, para. 23.

that reasonable criteria and procedures and clear objectives should be respected and guaranteed for appointment, promotion, suspension and dismissal, and that people must not be the target of discrimination in the implementation of these procedures.³⁶ This was the essence of the obligation that was infringed in this case, because Mr. Aguinaga Aillón was dismissed from his position by an authority that was acting outside the bounds of its competence and using a procedure that had no legal footing.

7. This distinction is not strictly a matter of form; as I have said in previous opinions, using Convention Article 26 to hold the State responsible is legally inappropriate and undermines the legitimacy of the overall decision. Thus, holding the State of Ecuador responsible based solely on Article 23(1)(c) of the Convention not only provided a more accurate response to the facts affecting Mr. Aguinaga Aillón and allowed the Court to mark progress in its case law on the scope of the right contained in the American Convention, but also would have avoided undermining the effectiveness of the decision by overlooking the inconsistencies of direct enforcement of Convention Article 26. It is thus demonstrated once again that the use of this provision of the Convention serves only to reaffirm a line of jurisprudence on the ESCERs, regardless of whether this is relevant or necessary for the purposes of guaranteeing justice in the specific case at hand.

Humberto A. Sierra Porto
Judge

Pablo Saavedra Alessandri
Registrar

³⁶ 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.