

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

CASE OF MINA CUERO V. ECUADOR

JUDGMENT OF SEPTEMBER 7, 2022

(Preliminary objections, Merits, Reparations and Costs)

1. With due respect to the majority decisions of the Inter-American Court of Human Rights (hereinafter the Court), this vote aims to explain my dissent regarding resolution point 5, in which the international responsibility of the State of Ecuador (hereinafter "the State" or Ecuador) was declared for the violation of the right to work, to the detriment of Víctor Henry Mina Cuero.

2. This vote complements the position already expressed 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 in Santo Antônio de Jesus and their families v. Brazil*,⁸ *Casa Nina v. Peru*,⁹ *Guachalá Chimbo v.*

¹ *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 *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 *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 *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 *Case of Hernández v. Argentina. Preliminary objections, Merits, Reparations, and Costs.* Judgment of November 22, 2019. Series C No. 395. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

⁶ *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 *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 *Case of the Employees of the Fireworks Factory in Santo Antônio de Jesus and their families 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 *Case of Casa Nina v. Peru. Preliminary objections, Merits, Reparations, and Costs.* Judgment of November 24, 2020. Series C No. 419. Concurrent and partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

Ecuador,¹⁰ *FEMAPOR v. Peru*,¹¹ and *Guevara Díaz v. Costa Rica*¹²; as well as in my concurring opinions in the cases *Gonzales Lluy et al. v. Ecuador*,¹³ *Poblete Vilches et al. v. Chile*,¹⁴ *Cuscul Pivaral et al. v. Guatemala*,¹⁵ *Buzos Miskito 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. Ecuador*,²⁰ and *Pavez Pavez v. Chile*,²¹ in relation to the justiciability of economic, social, cultural, and environmental rights (hereinafter "ES CER") through Article 26 of the American Convention on Human Rights (hereinafter "the Convention" or "ACHR").

3. On previous occasions, I have expressed the reasons why I consider that there are logical and legal inconsistencies in the legal opinion adopted by the majority of the Court regarding the direct and autonomous justiciability of the ESCER through Article 26 of the Convention. This position ignores the rules of interpretation of the Vienna Convention on the Rights of Treaties,²² changes the nature of the obligation of progressivity,²³ ignores the will of the States expressed in the Protocol of San Salvador,²⁴ and undermines the legitimacy of the Court²⁵; just to mention a few arguments. However, my purpose on this occasion is to highlight the irrelevance of the analysis of Article 26 in the case of a case that specifically concerns public officials and can be adequately addressed through Article 23 of the Convention.

4. In the case, in addition to substantiating the violations of judicial guarantees, which I fully concur with, the Court considered that there was a violation of the right of

¹⁰ *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 *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 *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.

¹³ *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.

¹⁴ *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 *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objections, Merits, Reparations, and Costs.* Judgment of August 23, 2018. Series C No. 359. Concurring opinion of Judge Humberto Antonio Sierra Porto.

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

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

¹⁸ *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 *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 *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.

²¹ *Case of Pavez Pavez vs. 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 objections, 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 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.

access to public service under equal conditions, as stated in Article 23(1) (c), and the right to work under Article 26 of the American Convention on Human Rights (ACHR). Making use of principle *iura novit curia*, the Court pointed out that the dismissal of Mr. Mina Cuero arbitrarily affected his tenure as a police officer and, as a consequence, disregarded the obligation to ensure job stability.²⁶ Furthermore, the Court stated that the right to work was violated because the necessary guarantees were not provided to ensure that the dismissal was not arbitrary and was carried out with justifiable reasons. To provide further context, as stated in " [...] *Case of San Miguel Sosa et al. v. Venezuela* [...] the State fails to fulfill its obligation to guarantee the right to work and, consequently, job stability when it does not protect its state officials from arbitrary dismissals."²⁷ So, it is evident that it is the same factual and legal argumentation but with a different normative basis, on one hand, Article 23(1) (c), and on the other hand, Article 26 of the Convention.

5. I believe it would have been appropriate to refer exclusively to Article 23. As the judgment correctly points out, Article 23(1) (c) of the American Convention on Human Rights states that "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.*" The Court is right on this occasion to include the analysis of this article and declare the violation of the right to access public service under equal conditions, because it is evident that Mr. Mina Cuero was a public official as he held a position in the National Police. Indeed, as this Court has pointed out, as provided in General Comment 25 of the United Nations Human Rights Committee,²⁸ does not only establish the right to access a public office, but also the right to do so under conditions of equality and to remain in employment. This implies the criteria and processes for appointment, promotion, suspension, and dismissal must be objective and reasonable, and must be respected and guaranteed, and that individuals must not be subject to discrimination in the course of such procedures.²⁹ This was precisely the breached obligation in the case, as Mr. Mina Cuero was dismissed from his position without the fulfillment of a reasonable and objective procedure.

6. The above is not merely a nominal distinction, as I have stated in other separate opinions, using Article 26 of the Convention to declare the State's liability is legally unacceptable and affects the legitimacy of the decision. Therefore, determining Ecuador's liability solely based on Article 23(1) (c) of the American Convention on Human Rights would not only have provided a more precise response to Mr. Mina Cuero's factual situation and allowed the Court to advance its case law on the scope of this right in the American Convention, but it would have also avoided affecting the effectiveness of the decision due to the inconsistencies of the direct justiciability of Article 26 of the American Convention on Human Rights. Therefore, once again, it is demonstrated that the use of this treaty provision serves the sole purpose of reaffirming a case law approach to ESCER, regardless of whether it is pertinent or necessary to ensure justice in the specific case.

²⁶ *Case of Mina Cuervo v. Ecuador. Preliminary objections, Merits, Reparations, and Costs.* Judgment of August 5, 2008. Judgment of September 7, 2022, para. 110.

²⁷ *Case of Mina Cuervo v. Ecuador. Preliminary objections, Merits, Reparations, and Costs.* Judgment of August 5, 2008. Judgment of September 7, 2022, para. 134.

²⁸ Cf. United Nations. Human Rights Committee. General Comment No. 25, Article 25: The Right to Participate in Public Affairs and Voting Right, CCPR/C/21/Rev. 1/Add. 7, July 12, 1996, para. 23.

²⁹ 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

Humberto Antonio Sierra Porto
Judge

Pablo Saavedra Alessandri
Registrar