

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

**CASE OF VALENCIA CAMPOS ET AL. V. BOLIVIA
JUDGMENT OF OCTOBER 18, 2022**

1. With my usual respect for the decisions of the Inter-American Court of Human Rights (hereinafter “the Court”), the purpose of this opinion is to explain my dissent with the fifteenth operative paragraph in which the international responsibility of the State of Bolivia (hereinafter “the State” or “Bolivia”) is declared for the violation of the right to health based on Article 26 of the American Convention on Human Rights (hereinafter “the ACHR” or “the Convention”), to the detriment of Genaro Ahuacho Luna, Alfredo Bazán and Rosas, Freddy Cáceres Castro, Carlos Eladio Cruz Añez, Patricia Gallardo Ardúz, Oswaldo Lulleman Antezana, Luis Lulleman, Raúl Oswaldo Lulleman Gutiérrez, Elacio Peña Córdova, F.E.P.M., Edwin Rodríguez Alarcón, Gabriel Valencia Alarcón, Blas Valencia Campos and Mauricio Valenzuela Valencia.

2. This opinion supplements the position already expressed in my partially dissenting opinions in the cases of *Lagos del Campo v. Peru*,¹ *Dismissed Workers of PetroPeru 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 *Workers of the Firework 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 in my

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 the Dismissed Workers of PetroPeru 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 objection, 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 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 *Case of the Workers of the Firework 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 *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 *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.

concurring opinions in the cases of *Gonzales Lluy et al. v. Ecuador*,¹³ *Poblete Vilches et al. v. Chile*,¹⁴ *Cuscul Pivaral et al. v. Guatemala*,¹⁵ *Miskito Divers 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 the economic, social, cultural and environmental rights (hereinafter ESCER) under Article 26 of the American Convention on Human Rights.

3. Since 2017 and without interruption, I have emphasized the logical and legal inconsistencies of the direct and autonomous justiciability of the ESCER under Article 26 of the Convention. The position assumed by the majority of the Court disregards the rules of interpretation of the Vienna Convention on the Law of Treaties,²² alters the nature of the obligation of progressivity textually established in Article 26,²³ ignores the intention of the States reflected in the Protocol of San Salvador²⁴ and undermines the legitimacy of the Court by unjustifiably expanding its competence;²⁵ to mention only some arguments.

4. On this occasion, I am not going to examine further, either this point or the difficulties in relation to the case law concerning the right to health; in this regard, I refer back to my previous opinions.²⁶ In the instant case, I wish to point out how the majority position of the Court in relation to the right to health derived from Article

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 objection, 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 Miskito Divers (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. 439. 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 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 the Dismissed Workers of PetroPeru 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.

²⁶ *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; *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; *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; *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; *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.

26 of the ACHR erodes the strength of the standards established in its dear case law on the minimum conditions for the deprivation of liberty, and the State's obligations in relation to the rights to life and to integrity of those who are detained.

5. For more than 30 years, the Court has been ruling on prison conditions in the Americas, making a literal, systematic and finalist interpretation of the right to personal integrity contained in Article 5 of the Convention.²⁷ On this normative basis, the Court has developed standards according to which States have the obligation to guarantee the rights of persons deprived of liberty, and to ensure that they have the minimum conditions of food, health and infrastructure for a decent existence while they are in their custody.²⁸ Also, on several occasions, the Court has convicted States Parties owing to the lack of appropriate and effective measures to guarantee these rights and has ordered them to implement adequate measures to comply with their international obligations.²⁹

6. More precisely, the Court has established that Articles 1(1) and 5 of the ACHR reveal the obligation to provide persons deprived of liberty with, among other elements, ventilation and natural light, a bed to rest on, basic nutrition, access to potable water, and regular medical check-ups and appropriate treatment.³⁰ It has also indicated that these conditions are mandatory given a prisoner's situation of subjection in relation to the State.³¹ Consequently, in cases in which these conditions are not met due to overcrowding, isolation or solitary confinement, this constitutes a violation of the right to personal integrity and, thus, grounds for the international responsibility of the State.³² Evidently, it was not necessary to make any mention of the justiciability of the ESCER to achieve this level of protection.

7. However, in this case, the majority opted for a different reasoning to the one that the Court had used historically. The protection of the personal integrity of prisoners by Article 5 of the Convention was examined exclusively in relation to the acts of torture that the victims suffered in the context of an investigation.³³ Meanwhile, the obligation to provide them with adequate medical assessment, care and attention was examined solely in relation to the right to health derived from Article 26 of the Convention.³⁴

²⁷ Article 5. Right to humane treatment. 1. Every person has the right to have his physical, mental, and moral integrity respected. 2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person. 3. Punishment shall not be extended to any person other than the criminal. 4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons. 5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors. 6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

²⁸ Cf. *Case of the "Juvenile Re-education Institute" v. Paraguay. Preliminary objections, merits, reparations and costs.* Judgment of September 2, 2004. Series C No. 112, para. 170.

²⁹ Cf. *Case of Tibi v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 7, 2004. Series C No. 114; *Case of the Miguel Castro Castro Prison v. Peru. Merits, reparations and costs.* Judgment of November 25, 2006. Series C No. 160; *Case of Pacheco Teruel et al. v. Honduras. Merits, reparations and costs.* Judgment of April 27, 2012. Series C No. 241; *Case of Chinchilla Sandoval et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of February 29, 2016. Series C No. 312.

³⁰ Cf. *Case of Tibi v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 7, 2004. Series C No. 114, paras. 150 to 157. Similarly, *Case of Fleury et al. v. Haiti. Merits and reparations.* Judgment of November 23, 2011. Series C No. 236, paras. 85 and 86.

³¹ Cf. *Matter of the Mendoza Prison with regard to Argentina. Provisional measures.* Order of the Inter-American Court of Human Rights of November 22, 2004, considering paragraph 10.

³² Cf. *Case of the Miguel Castro Castro Prison v. Peru. Merits, reparations and costs.* Judgment of November 25, 2006, para. 315.

³³ *Case of Valencia Campos v. Bolivia*, paras. 170 ff.

³⁴ *Case of Valencia Campos v. Bolivia*, paras. 241 ff.

8. Thus, in relation to the right to personal integrity, the Court referred to the acts that constituted torture and ill-treatment during the raids and detentions and, in particular, examined the sexual violence and torture suffered by women, the situation of the children who were affected in the case, and the measures of solitary confinement. It also referred to the detention conditions, but only as regards the size of the cells and the absence of beds. In the latter case, it indicated that *"the alleged victims who were taken to the PTJ were detained in small cells, without beds, which forced them to sleep on the floor, and they did not have access to bathrooms [...]; therefore, it finds that there was a situation of overcrowding contrary to the personal integrity of the persons detained in the PTJ."*³⁵

9. Then, in relation to the right to health, the Court took into consideration four circumstances: (i) the lack of medical attention for Patricia Gallardo, which had a negative effect on her physical and mental condition during her house arrest; (ii) the delay in providing medical attention to Genaro Ahuacho Luna, which might have had an impact on his death; (iii) the failure to conduct a medical examination at the time of the detention of Blas Valencia Campos, Edwin Rodríguez Alarcón, Gabriel Valencia Alarcón, Alexis Valencia Alarcón, Claudio Centeno Valencia, Elacio Peña Córdoba, Genaro Ahuacho Luna, Alfredo Bazán la Rosas, Mauricio Valenzuela Valencia, Oswaldo Lulleman Antezana, Raúl Oswaldo Lulleman Gutiérrez, Luis Lulleman Gutiérrez, Carlos Eladio Cruz Añez and Patricia Catalina Gallardo Ardúz, and (iv) the lack of medical attention for F.E.P.M. following her miscarriage *"as a result of the beating she suffered at the hands of police agents."*³⁶

10. Therefore, even though the facts mentioned all constituted violations of the right to personal integrity and even to life because the failure to guarantee the obligations of assessment, care and treatment had an impact on the physical and mental condition of the victims, the Court chose to compartmentalize its analysis, excluding the relationship between those facts and the obligations arising from Articles 5 and 1(1) of the Convention.

11. This new reasoning adopted by the Court for the first time in a contentious case does not suppose a merely rhetorical differentiation. To the contrary, analyzing the obligation of medical assessment, care and treatment of persons deprived of liberty only in light of Article 26 of the Convention may have a negative impact on the effectiveness of the orders issued by the Court. As I indicated in my recent opinion in Advisory Opinion 29, *"[i]t is natural that the juridical inconsistencies of the concept of the justiciability of the ESCER, [...], are transferred to the standards for the minimum conditions of detention and that, in this way, the degree of efficacy that the States have is reduced. Although a majority within the Court have opted for the justiciability of Article 26, the Court should take into account that, internally, discussions still exist on the binding nature of the obligations arising from this article."*³⁷

12. Based on the above, I believe that this judgment could have been more effective and legitimate if it had upheld its case law associated with Article 5 of the Convention. On the one hand, because there would be no doubt about the content, binding nature, and justiciability of the obligation to provide medical assessment, care and treatment to prisoners as part of the minimum conditions of imprisonment; on the other, because compliance with the obligation would not depend on the State's financial capacity. It should not be overlooked that Article 1(1) read in relation to

³⁵ *Case of Valencia Campos v. Bolivia*, paras. 197 ff.

³⁶ *Case of Valencia Campos v. Bolivia*, paras. 242 ff.

³⁷ *Differentiated approaches with respect to certain groups of persons in detention (Interpretation and scope of Articles 1(1), 4(1), 5, 11(2), 12, 13, 17(1), 19, 24 and 26 of the American Convention on Human Rights and other human rights instruments)*. Advisory Opinion OC-29/22 of May 30, 2022. Series A No 29. Concurring opinion of Judge Humberto Antonio Sierra Porto. Para. 8.

Article 5 of the ACHR establishes an obligation of immediate compliance. To the contrary, the obligations derived from Article 26 of the Convention are subject to progressive development and may be implemented gradually in keeping with the conditions in each State. Consequently, as a result of the position formulated in this case, the urgency is lost that gave substance to the obligation to maintain decent detention conditions based on the right to personal integrity. This is the reason why I dissented from the fifteenth operative paragraph of the judgment.

Humberto Antonio Sierra Porto
Judge

Pablo Saavedra Alessandri
Registrar