

**INTER-AMERICAN COURT OF HUMAN RIGHTS**

**CASE OF LAGOS DEL CAMPO v. PERU**

**JUDGMENT OF AUGUST 31, 2017**

***(Preliminary objections, merits, reparations and costs)***

In the case of *Lagos del Campo*,

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

Roberto F. Caldas, President  
Eduardo Ferrer Mac-Gregor Poisot, Vice President  
Eduardo Vio Grossi, Judge  
Humberto Antonio Sierra Porto, Judge  
Elizabeth Odio Benito, Judge  
Eugenio Raúl Zaffaroni, Judge, and  
Patricio Pazmiño Freire, Judge,

also present,

Pablo Saavedra Alessandri, Secretary, and  
Emilia Segares Rodríguez, Deputy Secretary,

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and Articles 31, 32, 42, 65 and 67 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure"), delivers this judgment, structured as follows:

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## I

**INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE**

1. *The case submitted to the Court.* On November 28, 2015, the Inter-American Commission on Human Rights (hereinafter "the Commission," "the Inter-American Commission" or "the IACHR") submitted the case of Lagos del Campo versus the Republic of Peru (hereinafter "the State" or "Peru") to the jurisdiction of the Inter-American Court. According to the Commission, the case relates to the dismissal of Alfredo Lagos del Campo (hereinafter "Mr. Lagos del Campo") on June 26, 1989, as a result of statements he made as president of the Electoral Committee of the Industrial Community of the Ceper-Pirelli company. According to the Commission, the purpose of the statements made by Mr. Lagos del Campo was to denounce and call attention to acts of undue interference by the employers in the life of the organizations that represented the company's workers, and in the elections held within the Comunidad Industrial. The dismissal was confirmed by Peru's domestic courts. Also, "[t]he Commission determined that the dismissal of Mr. Lagos del Campo constituted arbitrary interference in the exercise of the right to freedom of expression [...]. The Commission determined that the most severe punishment provided for by law was applied with significant effects on the [presumed] victim's freedom of expression as a leader of workers and on the collective right of workers to receive information on matters that concern them." Lastly, in its Merits Report, the Commission indicated that, in this case, it was necessary to determine whether the State had complied with its duty to guarantee the presumed victim's rights in the context of labor relations, bearing in mind the scope of the rights recognized in the American Convention.

2. *Procedure before the Commission.* The procedure before the Commission was as follows:

- a) *Petition.* On August 5, 1998, the Commission received a petition lodged by the presumed victim, Mr. Lagos del Campo, in which he indicated that Peru was internationally responsible for failing to protect his right, as a labor leader, to express opinions in the context of an electoral labor dispute. Subsequently, the *Asociación Pro Derechos Humanos (APRODEH)* (hereinafter, "the petitioners"), became the representative of the presumed victim in the case.
- b) *Admissibility Report.* On November 1, 2010, the Commission issued Admissibility Report No. 152/10 (hereinafter "the Admissibility Report"), in which it concluded that the petition was admissible in relation to Articles 8 and 13 of the American Convention, in relation to Articles 1(1) and 2 of this instrument, to the detriment of Mr. Lagos del Campo. The Commission also declared that the petition was inadmissible with regard to the possible violation of Articles 24 and 25 of the Convention.
- c) *Merits Report.* On July 21, 2015, the Commission adopted Merits Report No. 27/15, pursuant to Article 50 of the American Convention (hereinafter "the Merits Report" or "Report 27/15"), in which it reached the following conclusion and made several recommendations to the State, as follows:

Conclusion:

- i) The State is responsible for the violation of the rights to a fair trial and to freedom of expression pursuant to Articles 8(1) and 13 of the American Convention in relation to Articles 1(1), 2 and 16(1) of this instrument, to the detriment of Mr. Lagos del Campo.

Recommendations:

- i) Provide comprehensive reparation to Mr. Lagos del Campo for the violations declared in the report. This reparation should include both the pecuniary and the non-pecuniary aspects;
- ii) Adopt measures of non-repetition to guarantee that workers' representatives and labor union leaders can enjoy their right to freedom of expression in accordance with the standards established in this report, and

iii) Adopt measures to ensure that the application and interpretation of laws by the domestic courts are consistent with the principles established by international human rights law with respect to freedom of expression in labor-related contexts, reiterated in this case

d) *Notification of the State.* On August 28, 2015, the Commission notified the Merits Report to the State granting it two months to provide information on compliance with the recommendations.

e) *Report on compliance.* On October 29, 2015, the State presented a report in which it indicated that it had not violated the rights established in Articles 8(1) and 13 of the Convention, in relation to Articles 1(1), 2 and 16(1) of this instrument, to the detriment of Mr. Lagos del Campo.

3. *Submission to the Court.* On November 28, 2015, the Commission decided to submit the case to the Inter-American Court in light of the need to obtain justice. It submitted to the Court's jurisdiction all the facts and human rights violations described in the Merits Report.<sup>1</sup>

4. *Requests by the Inter-American Commission.* Based on the above, the Commission asked the Court to conclude and declare the international responsibility of the State for the violation of the rights indicated in its Merits Report to the detriment of Mr. Lagos del Campo. It also asked the Court to order the State, as measures of reparation, to comply with the recommendations contained in the said report.

## **II PROCEEDINGS BEFORE THE COURT**

5. *Notification of the State<sup>2</sup> and the representatives.* The Commission's submission of the case was notified to the State and to the representatives on February 15, 2016.

6. *Brief with motions, pleadings and evidence.* On April 15, 2016, the representatives presented their brief with motions, pleadings and evidence (hereinafter "motions and pleadings brief"), in which they requested access to the Victims' Legal Assistance Fund of the Inter-American Court (hereinafter "the Court's Assistance Fund" or "the Fund").

7. *Answering brief.* On June 27, 2016, the State presented to the Court its answer to the brief submitting the case, and with observations on the brief with motions, pleadings and evidence (hereinafter "answering brief"). In this brief, the State filed a series of "observations on the Admissibility Report and raised procedural questions concerning the arguments filed by the Commission and the representatives."

8. *Observations on the preliminary objections.* On August 14 and 16, 2016, respectively, the representatives and the Commission forwarded their observations on the "observations on the Admissibility Report and procedural questions" filed by the State.

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<sup>1</sup> The Commission appointed Commissioner James Cavallaro, the Special Rapporteur for Freedom of Expression, Edison Lanza, and the Executive Secretary, Emilio Álvarez Icaza L. as its delegates, and Elizabeth Abi-Mershed, Deputy Executive Secretary, and Ona Flores and Silvia Serrano Guzmán, lawyers of the Commission's Executive Secretariat, as legal advisers.

<sup>2</sup> In a communication of March 11, 2016, the State advised that it had appointed Luis Alberto Huerta Guerrero as its Agent before the Court and the Supranational Deputy Attorney General, Iván Arturo Bazán Chacón, Sofía Janett Donaires Vega and Silvana Lucía Gómez Salazar, as deputy agents (merits file, f. 97).

9. *Victims' Legal Assistance Fund.* In an order of the President of the Court of July 14, 2016 the request for access to the Court's Assistance Fund filed by the presumed victim, through his representatives, was declared admissible.<sup>3</sup>

10. *Public hearing.* In an order of the President of the Court of November 21, 2016,<sup>4</sup> it was decided, *inter alia*: (a) to call the parties to a public hearing<sup>5</sup> to receive the statements of the presumed victim, and two expert witnesses; one proposed by the Commission and the other by the State, and (b) to require, pursuant to the principle of procedural economy and the authority granted by Article 50(1) of the Court's Rules of Procedure, that two expert witnesses, one proposed by the State<sup>6</sup> and the other by the representatives,<sup>7</sup> provide their opinions by affidavit.<sup>8</sup> The public hearing was held on February 7, 2017, in San José, Costa Rica, during the 117<sup>th</sup> regular session of the Court.<sup>9</sup> During the hearing, the Court received the statements of the presumed victim, Mr. Lagos del Campo, expert witness Damián Loreti proposed by the Commission, and expert witness César González Hunt proposed by the State. It also heard the final oral arguments of the representatives and the State, and the final oral observations of the Commission.

11. *Final written arguments and observations.* On March 8, 2017, the State and the representatives presented their final written arguments with annexes, and the Commission presented its final written observations. On March 9, 2017, the Court's Secretariat forwarded the annexes to the final written arguments to the parties and the Commission and asked them to remit any observations they deemed pertinent. In a communication of March 20, 2017, the representatives presented observations on some of the annexes.

12. *Disbursements in application of the Legal Assistance Fund.* On April 7, 2017, the Secretariat, on the instructions of the President of the Court, forwarded information to the State on the disbursements made in application of the Legal Assistance Fund in this case and, as provided for in article 5 of the Rules for the Operation of the Fund, granted it a time frame to present any observations it deemed pertinent. The State presented its observations on April 17, 2017.

13. *Deliberation of the case.* The Court began deliberating this judgment on May 18, 2017, and continued on August 29, 2017.

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<sup>3</sup> *Caso Lagos del Campo v. Peru.* Order of the President of the Court of July 14, 2016. Available at: [http://www.corteidh.or.cr/docs/asuntos/lagos\\_fv\\_16.pdf](http://www.corteidh.or.cr/docs/asuntos/lagos_fv_16.pdf).

<sup>4</sup> *Case of Lagos del Campo v. Peru.* Call to a public hearing. Order of the President of the Court of November 21, 2016. Available at: [http://www.corteidh.or.cr/docs/asuntos/lagos\\_21\\_11\\_16.pdf](http://www.corteidh.or.cr/docs/asuntos/lagos_21_11_16.pdf)

<sup>5</sup> Due to scheduling problems, in a Secretariat note of December 8, 2016, the public hearing in this case was re-scheduled for February 7, 2017, at 9 a.m. Also, the meeting prior to the hearing was re-scheduled for February 6 at the seat of the Court. Consequently, the Court established the date of March 8, 2017, as the deadline for presentation of the final written arguments and final written observations.

<sup>6</sup> In a communication of January 30, 2017, the State withdrew its offer of the expert opinion of Omar Sar Suárez.

<sup>7</sup> The affidavit of Carlos Alberto Jibaja Zárate was received on January 30, 2017.

<sup>8</sup> The President of the Court declared access to the Victims' Legal Assistance Fund of the Inter-American Court admissible and determined that financial assistance would be provided to cover the necessary transportation and accommodation expenses for the presumed victim, Mr. Lagos del Campo, to appear before the Court to give his statement during the public hearing, and also for the reasonable expenses required for the preparation and mailing of the affidavit of expert witness Carlos Alberto Jibaja Zárate offered by the representatives.

<sup>9</sup> There appeared at this hearing: (a) for the Inter-American Commission: Edison Lanza, Special Rapporteur for Freedom of Expression, Silvia Serrano Guzmán, Adviser, and Ona Flores, Adviser; (b) for the representatives of the presumed victim: Christian Henry Huaylinos Camacuari and Caroline Dufour, and (c) for the State: Iván Arturo Bazán Chacón, Sofía Janett Donaires Vega and Silvana Lucía Gómez Salazar.

### III JURISDICTION

14. The Court has jurisdiction to hear this case pursuant to Article 62(3) of the American Convention, because Peru ratified the American Convention on July 28, 1978, and accepted the contentious jurisdiction of the Court on January 21, 1981.

### IV PRELIMINARY OBJECTIONS

#### **A. Arguments of the State and observations of the Commission and the representatives**

15. The **State** asked the Court to review the legality of the Commission's Admissibility Report and raised the following six "procedural questions":

a) *"Review of legality of the IACHR Admissibility Report in this case"*: The State asked the Court to exercise its authority to review the Commission's omissions in relation to the failure to verify the time limit for filing the petition pursuant to Article 46(1)(b) of the Convention. It indicated that the Commission had considered October 14, 1993, as the date of Mr. Lagos del Campo's petition, despite the fact that this had been delivered to the offices of the Organization of American States in Peru on August 5, 1998, thus violating the principles of legal certainty and procedural fairness. In addition, the State considered that the verification made by the Commission was contrary to the procedural rules with regard to compliance with the six months' time frame for the admissibility of the petition, in relation to the alleged violations of the right to freedom of expression and the right to be heard. Consequently, it asked the Court to determine how the Commission should proceed in similar circumstances, and to declare that the action of the IACHR was not in keeping with the procedural rules and its competencies, and that the petition should have been rejected.

b) *"Failure to exhaust domestic remedies in relation to the allegation of the failure to state the reasons for the legal decisions."* The State argued that the Commission had made an incomplete or partial evaluation of the admissibility of the petition in relation to compliance with the obligation to exhaust domestic remedies, and that the reasons why the Commission considered that this requirement had been complied with had been developed insufficiently, without explaining the connection between the remedies filed and the content of the alleged violations. In this regard, it asked the Court to analyze whether the judicial decision taken into account by the Commission as the final remedy exhausted by the petitioner had really sought to reverse each and every violation of the rights alleged in the petition lodged before the Inter-American Commission. The State submitted this aspect to the Court because it considered that clarity and transparency should exist in the criteria used by the Commission to admit petitions, regardless of whether the State had alleged the matter at the opportune procedural moment.

c) *"Observations on the undue inclusion of Article 16 in the IACHR Merits Report."* The State alleged that the Commission had admitted the petition with regard to Articles 8 and 13 in relation to Articles 1(1) and 2 of the Convention but that, in the Merits Report, it had unduly included presumed violations of Article 16(1) of the Convention. It indicated that, neither in the facts of the case submitted by the petitioners, nor in the documents they had provided, was there any mention that, owing to the exercise of the right to freedom of expression and the resulting alleged arbitrary dismissal of Mr. Lagos del Campo, had his freedom of association been violated. Consequently, the State alleged that it had never had the opportunity to submit arguments on this aspect, and

this constituted a violation of its right to defend itself. Accordingly, it asked the Court to reject the arguments related to the presumed violations of Article 16.

d) "*Lack of competence of the IACHR to assume the role of fourth instance.*" The State argued that the petitioner's intention had been for the Commission to act as a domestic court with authority to evaluate evidence and facts related to proceedings in the domestic sphere, and this exceeded its competence. It therefore asked the Court to assess the labor proceedings and the amparo proceeding in order to verify that they were both executed with full respect for the guarantees of due process of law, providing Mr. Lagos del Campo with the opportunity to appeal any judicial rulings that went against him.

e) "*Observations on the brief with motions, pleadings and evidence concerning the delimitation of the legal dispute.*" The State alleged that the remedies that were not examined in order to establish compliance with the admissibility requirements – in other words, those subsequent to the appeal filed on March 15, 1993 – could not be used to consider violations of additional rights to those contained in the Merits Report. Likewise, it alleged that the presumed victim's representatives unduly used the events related to the self-coup of April 5, 1992, and the dissolving of the Court of Constitutional Guarantees to substantiate a suggested infringement of the right to contest court decisions, even when those facts were not considered in the Commission's Merits Report. Consequently, it asked the Court to establish that the arguments presented by the representatives regarding violations of the right to be heard by a judge or court, and the right to contest decisions, as well as the new facts and context mentioned by the representatives, were not considered to be part of the dispute.

f) "*Undue inclusion of additional presumed victims in the motions and pleadings brief.*" The State argued that the presumed victims are those indicated by the Commission in the Merits Report, which, in this case, only considered Mr. Lagos del Campo as a presumed victim. Consequently, the State contested the inclusion of presumed victims by the representatives in whose favor they had requested measures of reparation, because they were not considered in the Commission's Merits Report.

16. The **Commission** argued that the allegations: (a) review of the legality with regard to the Commission's report and (b) failure to exhaust domestic remedies referred to preliminary objections that the State did not present at the proper procedural opportunity and, therefore, should be rejected as time-barred. In addition, it observed that the allegations: (c) inclusion of Article 16 in the Merits Report, and (d) the Commission's lack of competence to assume a fourth instance role, were not preliminary objections, but rather matters relating to the merits of the matter. Regarding allegation (e) delimitation of the legal dispute, the Commission argued that the facts that the State was trying to exclude by this allegation were included in the factual framework defined by the Commission. Lastly, with regard to argument (f) undue inclusion of presumed victims, the Commission agreed with the State that Mr. Lagos del Campo was the only victim declared in the Merits Report. Meanwhile, the **representatives** were in general agreement with the Commission's position. Regarding the inclusion of additional victims, the representatives, in their brief of September 5, 2016, asked the Court to consider that only Mr. Lagos del Campo was a victim.

## **B. Considerations of the Court**

17. Bearing in mind the diverse nature of the arguments submitted by the State, and its express assertion that they were not submitted as preliminary objections, but rather as a request for the Court to "review legality" and respond to certain "procedural questions," the Court recalls that preliminary objections are objections to the admissibility of a petition or to the



competence of the Court to hear a specific case or any of its aspects, based on the person, matter, time or place, provided that such considerations are of a preliminary nature.<sup>10</sup> Therefore, regardless of how the State describes them in its briefs, if, on examination, it is determined that the considerations are of the nature of a preliminary objection – that is, they contest the admissibility of the petition or the Court’s competence to hear the case or any of its aspects – then, it must be decided as such.<sup>11</sup>

18. In this case, the Court points out that the State’s arguments, (a) review of legality with regard to the Commission’s report and (b) failure to exhaust domestic remedies, relate to the Commission’s alleged failure to comply with the admissibility requirements established in Articles 46(1)(a) and (b) of the Convention. Accordingly, and pursuant to its consistent case law, the Court rejects both preliminary objections because they were not submitted at the proper procedural opportunity; that is, during the admissibility procedure before the Commission.<sup>12</sup> Regarding allegation (d) the Commission’s lack of competence to assume a fourth instance role, the Court notes that the State’s request does not seek to contest the admissibility of the case by this Court, and does not allege that its right to defend itself has been violated owing to supposed irregularities committed during the procedure before the Commission; rather it is an argument relating to the merits of the matter and, therefore, it will be decided in the corresponding section (*infra* para. 97). Also, with regard to the State’s argument (f) undue inclusion of presumed victims, the Court concludes that, based on the positions of the parties, the dispute has ended in this regard.

19. The Court will now analyze the State’s arguments (c) inclusion of Article 16 in the Merits Report, and (e) delimitation of the legal dispute.

### **1. Inclusion of Article 16 of the Convention in the Merits Report**

20. The Court reiterates that, regarding the Commission’s inclusion in the Merits Report of rights that were not indicated previously in the Admissibility Report, neither in the American Convention nor in the Inter-American Commission’s Rules of Procedure is there a rule that states that the Admissibility Report must establish all the rights that have presumably been violated.<sup>13</sup> In this regard, Articles 46<sup>14</sup> and 47<sup>15</sup> of the American Convention merely establish

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<sup>10</sup> Cf. *Case of Las Palmeras v. Colombia. Preliminary objections*. Judgment of February 4, 2000. Series C No. 67, para. 34, *Case of Zegarra Marín v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of February 15, 2017. Series C No. 331, para. 16.

<sup>11</sup> 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 Acosta et al. v. Nicaragua, Preliminary objections, merits, reparations and costs*. Judgment of March 25, 2017. Series C No. 334, para. 18.

<sup>12</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary objections*. Judgment of June 26, 1987. Series C No. 1, para. 88, and *Case of Tenorio Roca et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of June 22, 2016. Series C No. 314, para. 21.

<sup>13</sup> Cf. *Case of Furlan and family v. Argentina. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2012. Series C No. 246, para. 52.

<sup>14</sup> Article 46 of the Convention establishes that: “1. Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements: (a) that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law; (b) that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment; (c) that the subject of the petition or communication is not pending in another international proceeding for settlement, and (d) that, in the case of Article 44, the petition contains the name, nationality, profession, domicile, and signature of the person or persons or of the legal representative of the entity lodging the petition. 2. The provisions of paragraphs 1.a and 1.b of this article shall not be applicable when: (a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; (b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them, or (c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.”

the requirements for declaring a petition admissible or inadmissible, but do not impose on the Commission the obligation to determine the rights that will be the purpose of the procedure. In this regard, the rights indicated in the Admissibility Report are the result of a preliminary examination of a petition that is being processed; thus, this does not preclude the possibility that, at later stages, the procedure may include other rights or articles that have presumably been violated, provided the State's right to defend itself within the factual framework of the case analyzed is respected.<sup>16</sup>

21. In the instant case, the Court observes that the State was aware of the facts that substantiate the presumed violation of Article 16, because these were included in the initial petition lodged before the Inter-American Commission on October 13, 1993.<sup>17</sup> In that communication, Mr. Lagos del Campo indicated that the reason for his dismissal related to his position as a labor leader, which is the factual framework used by the Commission to allege the violation of Article 16 of the Convention.<sup>18</sup> In particular, in that petition, Mr. Lagos del Campo stated that he was dismissed when he was president of the Electoral Committee of the Industrial Community of the Ceper-Pirelli company, "merely because I was a [labor leader] who was defending the sacred rights and benefits of workers in my country and, especially, of those who work for Conductores Eléctricos Peruanos S.A. (CEPER PIRELLI)."<sup>19</sup>

22. The Court also considers that there are elements that allow it to infer that, in his initial briefs, Mr. Lagos del Campo argued that, owing to his dismissal, the rights of other workers had been affected. In fact, the presumed victim indicated in the complaint he filed before the labor judge that "it is evident that the sanction applied against me, in addition to being unjustified and unfair, constitutes an act of interference in the internal matters of the Industrial Community."<sup>20</sup> In the Court's opinion, this and other references related to the connection between the presumed victim's dismissal and the impact on the Industrial Community and its members, allow it to be concluded that the State had the opportunity to rule on facts related to the possible violation of the freedom of association of Mr. Lagos del Campo and other workers.

23. Based on the above, the Court concludes that the State had been aware of the facts that substantiate the presumed violation of Article 16 of the Convention to the detriment of Mr. Lagos del Campo since the Commission began to process this matter; therefore, it could have stated its position if it had deemed this pertinent. For the same reason, in its Merits Report, the Commission was able to classify the facts in a different way from in the Admissibility Report, without this involving a violation of the State's right to defend itself. Consequently, the Court concludes that, in this regard, there was no violation of the right of defense during the procedure before the Inter-American Commission in the terms indicated by the State.

## **2. Temporal delimitation of the analysis of judicial actions**

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<sup>15</sup> Article 47 of the Convention establishes that: "The Commission shall consider inadmissible any petition or communication submitted under Articles 44 or 45 if: (a) any of the requirements indicated in Article 46 has not been met; (b) the petition or communication does not state facts that tend to establish a violation of the rights guaranteed by this Convention; (c) the statements of the petitioner or of the state indicate that the petition or communication is manifestly groundless or obviously out of order, or (d) the petition or communication is substantially the same as one previously studied by the Commission or by another international organization."

<sup>16</sup> Cf. *Case of Furlan and family v. Argentina*, *supra*, para. 52.

<sup>17</sup> Cf. Brief of October 13, 1993 (evidence file, annexes to the Merits Report, f. 588).

<sup>18</sup> Cf. Observations of the IACHR on the preliminary objections filed by the State (evidence file, annexes to the Merits Report f. 361, para. 33)

<sup>19</sup> Cf. Brief of October 13, 1993 (evidence file, annexes to the Merits Report, f. 588).

<sup>20</sup> Cf. Complaint of July 26, 1989 (evidence file, annexes to the Merits Report, ff. 231 and 232).

24. The Court has established that the factual framework of the proceedings before it is constituted by the facts contained in the Merits Report submitted to its consideration. Consequently, it is not admissible for the parties to allege new facts that differ from those contained in the Merits Report, without prejudice to submitting those that may explain, clarify or reject the facts mentioned in the said report that have been submitted to the Court's consideration (also known as "supplementary facts").<sup>21</sup> The exception to this principle are facts that are classified as supervening, which may be forwarded to the Court at any stage of the proceedings prior to the delivery of judgment, provided they relate to the facts of the case.

25. In the instant case, the Court notes that, in the Merits Report, the Commission included various remedies filed by Mr. Lagos del Campo, among which are those of March 30, April 28 and May 4, 1993, as well as those filed in 1996 and subsequently. The Commission also referred in the Merits Report to facts related to the self-coup of April 5, 1992, and the dissolving of the Court of Constitutional Guarantees. Therefore, since the Commission has submitted these facts to the jurisdiction of the Court, they may be taken into account when examining the merits of the case. Similarly, the facts narrated by the representatives in the brief with motions, pleadings and evidence will be taken into consideration, insofar as they do not constitute new facts. Consequently, the Court finds the State's request in this regard inadmissible.

## V EVIDENCE

### **A. Documentary, testimonial and expert evidence**

26. The Court has received diverse documents presented as evidence by the Commission, the representatives and the State, attached to their main briefs (*supra* paras. 6 and 7). In addition, the Court has received the affidavits prepared by Carlos Alberto Jibaja Zárate and Omar Sar Suárez, proposed by the representatives and the State, respectively. Regarding the evidence provided during public hearing, the Court received the statements of the presumed victim, Mr. Lagos del Campo, and the expert opinions of Damián Loreti and César Gonzáles Hunt, proposed by the Commission and the State, respectively.<sup>22</sup>

### **B. Admission of the evidence**

#### **1. Admission of the documentary evidence**

27. In this case, as in others, the Court admits those documents presented by the parties and the Commission at the proper procedural opportunity or requested as helpful evidence that were not contested or opposed, and the authenticity of which was not questioned.<sup>23</sup> The documents requested by the Court that were provided by the parties following the public hearing are incorporated into the body of evidence in application of Article 58 of the Rules of Procedure (*supra* para. 10).

28. On March 20, 2017, the representatives presented observations on the annexes forwarded by the State with its final written arguments. In the case of documents that were incomplete or illegible, the Court considers that this does not affect their admissibility, although it may affect their probative weight. However, the Court considers that the said annexes

<sup>21</sup> Cf. *Case of Veliz Franco et al. v. Guatemala. Preliminary objections, merits, reparations and costs*. Judgment of May 19, 2014. Series C No. 277, para. 25, and *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*. Judgment of November 30, 2016. Series C No. 329, para. 45.

<sup>22</sup> *Case of Lagos del Campo v. Peru*. Call to a hearing, *supra*, para. 9.

<sup>23</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*. Judgment of July 29, 1988. Series 04, para. 140; *Case of Tenorio Roca et al. v. Peru, supra*, para. 36, and *Case of Zegarra Marín v. Peru, supra*, para. 58.

respond to helpful evidence requested during the public hearing; they are therefore admitted under Article 58(b) of the Rules of Procedure.

## **2. Admission of the testimonial and expert evidence**

29. The Court finds it pertinent to admit the statements made during the public hearing and by affidavit, insofar as they are in keeping with the purpose defined by the President in the order requiring them and the purpose of this case (*supra* para. 10).

30. In a communication of January 30, 2017, the State withdrew presentation of the expert opinion of Omar Sar Suárez. The representatives contested the withdrawal on February 7, 2017, during the public hearing and in a communication of February 13, 2017. In this regard, the presumed victim's representatives objected to the reasons given for the withdrawal and advised that the opinion had already been given. They therefore requested the expert opinion and the answers to their questions and sent photographs showing that Omar Sar Suárez had apparently prepared his affidavit.

31. Consequently, in a Secretariat note of February 17, 2017, the full Court determined that, pursuant to Article 46(1) of the Rules of Procedure, the proper procedural moment for the Commission and the parties to confirm or withdraw the offer of the statements made in their respective briefs is in the final list requested by the Court; accordingly, once an expert opinion has been required in an order of the President and, especially, when it has been prepared, it is extremely relevant that it be incorporated into the proceedings. On this basis, pursuant to Articles 31, 46(1), 54 and 58 of the Rules of Procedure, as well as operative paragraphs 4, 5, 8 and 11 of the order of the President of November 21, 2016, the State was required to forward the expert opinion of Omar Sar Suárez to the Court by February 24, 2017.

32. On February 24, 2017, the State presented the expert opinion of Omar Sar and its report No. 032-2017-JUS/CDJE-PPES with observations on the Court's requirement that this expert opinion be presented. In these observations, the State expressed its discrepancy with the fact that the Court had not provided it with the procedural opportunity to comment on the withdrawal of the expert opinion. In addition, it asked the Court not to take into account paragraphs 64 to 67, 82, 83 and 96, and the answer to the representatives question 7, because the State considered that these referred directly to the specific case. Despite this, in its final written arguments, the State used the opinion of Omar Sar Suárez with regard to various aspects such as limits to freedom of expression and "serious verbal misconduct."

33. Based on the State's observations in its brief of February 24, 2017, the Court finds that the requirement and admission of the expert opinion of Omar Sar Suárez were decided in both the order calling for the hearing of November 21, 2016, and the decision of the full Court, in a Secretariat note of February 17, 2017 (*supra*, para. 31). Regarding the content of the opinion, the Court has indicated that expert witnesses may refer to specific points of the *litis* and to any other point that is relevant to the litigation, provided they respect the purpose for which they were required.<sup>24</sup> The Court determines that the statements made in the above-mentioned paragraphs referred to the scope, content and legitimate restrictions of the right to freedom of expression in the labor context focused on the representatives of a labor union and of the Electoral Committee of the Industrial Community. Based on the order calling the hearing, the Court admits the said expert opinion to the extent that it is in keeping with the purpose required, and will assess it together with the body of evidence and pursuant to the rules of sound judicial criteria.

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<sup>24</sup> Cf. *Case of Reverón Trujillo v. Venezuela*. Call to a public hearing. Order of the President of the Court of September 24, 2008, *considerandum* 18, and *Case of Castillo González et al. v. Venezuela. Merits*. Judgment of November 27, 2012. Series C No. 256, para. 33.

### **C. Assessment of the evidence**

34. Based on its consistent case law regarding evidence and its assessment, the Court will examine and assess the documentary evidence forwarded by the parties and the Commission, together with the statements, testimony and expert opinions, and also the helpful evidence that has been requested and incorporated by this Court, in order to establish the facts of the case and rule on the merits. To this end, it will abide by the principles of sound judicial criteria, within the corresponding legal framework, taking into account the body of evidence and the arguments submitted during the proceedings.<sup>25</sup>

35. Lastly, pursuant to the Court's case law, the statement made by presumed victim cannot be assessed in isolation, but only within the whole body of evidence, insofar as it may provide further information on the presumed violations and their consequences.<sup>26</sup>

## **VI FACTS**

36. In this chapter, the Court will establish the facts of this case based on the factual framework submitted to its consideration by the Commission, taking into account the body of evidence in the case, and the arguments of the representatives and the State. To this end, the facts will be examined under the following headings: (a) the Industrial Communities in Peru; (b) background information, functions and responsibilities of Mr. Lagos del Campo as a labor leader; (c) the dismissal of Mr. Lagos del Campo and the applicable legal framework; (d) the judicial actions filed by Mr. Lagos del Campo, and (e) his situation following his dismissal.

### **A. The Industrial Communities in Peru**

37. The concept of the Industrial Community was incorporated into the laws of Peru on July 27, 1970, the date on which the General Industries Act was promulgated (Decree-Law 18350).<sup>27</sup> Article 23 of this law establishes that the Industrial Community was a legal entity created within an industrial company as the representative of all its permanent workers, and its purposes were established in Decree-Law 18384.<sup>28</sup>

38. In February 1977, the Industrial Community Act was promulgated ("Decree-Law 21789") amending the previous law.<sup>29</sup> According to the act, "[t]he Industrial Community of an industrial company in the reformed private sector is composed of all its permanent workers, who

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<sup>25</sup> Cf. *Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Merits*. Judgment of March 8, 1998. Series C No. 37, para. 76, and *Case of Tenorio Roca et al. v. Peru, supra* para. 45.

<sup>26</sup> Cf. *Case of Loayza Tamayo v. Peru. Merits*. Judgment of September 17, 1997. Series C No. 33, para. 43, and *Case of Favela Nova Brasilia v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of February 16, 2017. Series C No. 333, para. 98.

<sup>27</sup> President of the Republic of Peru. Decree-Law 18350 General Industries Act. July 7, 1970. May be consulted at: <http://peru.justia.com/federales/decretos-leyes/18350-jul-27-1970/qdoc/>

<sup>28</sup> Purposes: (a) strengthening the industrial company by worker participation in management, productive process, ownership and reinvestment; (b) incorporation of the workers into the management of the industrial company to protect their rights and interests; (c) administration of acquired rights to the benefit of the workers, and (d) promotion of the social, cultural, professional and technical development of the workers. President of the Republic of Peru. Decree-Law 18384 General Industries Act. September 1, 1970. Art. 3. May be consulted at: <http://docs.peru.justia.com/federales/decretos-leyes/18384-sep-1-1970.pdf>

<sup>29</sup> Cf. President of the Republic of Peru. Decree-Law 21789. Industrial Community Act. February 1, 1977. May be consulted at: <http://www4.Congress.gob.pe/ntley/imagenes/Lawes/21789.pdf> (evidence file, annex 1 to the Merits Report, ff. 5 bis to 14 bis).

participate in its ownership, management and profits.”<sup>30</sup> It was constituted as a private legal entity, and its purposes were: (a) to contribute to the establishment of constructive forms of interrelationship in the industrial company; (b) to strengthen the company by the united action of its members in the management and productive process, and their participation in the ownership of the company’s patrimony;<sup>31</sup> (c) to establish an appropriate and rational distribution of the benefits among the investors and permanent workers of an industrial company, and (d) to promote permanent training and stimulate the creativity of the company’s workers.<sup>32</sup>

39. The Industrial Community was a system *sui generis* for industrial and labor promotion, applicable in “all industrial manufacturing companies of the reformed private sector that were governed by the General Industries Act, Decree-Law 18350, whatsoever their administrative regime.”<sup>33</sup> Thus, companies that formed part of the said reformed private sector were obliged to create an Industrial Community.

40. Under this concept, the workers participated in company ownership, management and profits. The Industrial Community was administered and managed by the Community’s General Assembly and Council. The General Assembly was the highest authority of the Community and it was composed of all the workers.<sup>34</sup>

41. Meanwhile, the Community Council was the executive body of the Industrial Community.<sup>35</sup> Among other functions, it was responsible for administering its patrimony, executing the decisions of the General Assembly and ensuring compliance with the Community’s Statute; advising the workers’ representatives on the company’s board; ruling on matters submitted to it by the workers, after consulting the General Assembly if necessary, and convening the General Assembly. The members of the Community Council could not perform or postulate their candidacy for a labor union position of any kind during their term of office.<sup>36</sup>

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<sup>30</sup> Article 1 of the Decree-Law in force at the time of the facts establishes: “Article 1. The Industrial Community of an industrial company of the reformed private sector is composed of all its permanent workers, who participate in its ownership, management and profits. The Industrial Community is a private legal entity and is governed by the provisions of this Act and any others that may be applicable.”

<sup>31</sup> The law established that, every year, the industrial company would deduct 15% of its net income, tax-free, to constitute the patrimony of its workers and to provide resources for the Industrial Community until this attained a sum equivalent to 50% of the company’s social capital. “Article 38. The industrial company shall deduct 15% per year of its net income, tax-free, to constitute the patrimony of its workers and to provide resources to the Industrial Community as follows: (a) 13.5% of the net income to constitute and to increase the patrimony of the workers pursuant to the investment options set forth in Article 40 of this Act, until this attains a sum equivalent to 50% of the company’s social capital. The provisions of this paragraph shall be complied with pursuant to the regulatory provisions corresponding to each investment option; (b) 1.5% of the net income to constitute and to reinforce the patrimony of the Industrial Community, which shall be delivered within 30 days of the presentation of the annual balance sheet to the tax authorities. Article 39. When the amount of the Workers Patrimonial Participation Account, the composition of which is established in the following article, attains a sum equivalent to 50% of the company’s social capital, except in the case of Article 53, only 1.5% of the net income referred to in paragraph (b) of the preceding article shall be deducted. When there is an increase in the social capital not included in the following paragraph or when, due to redemption of the different values that constitute the Workers Patrimonial Participation Account, this amounts to less than 50% of the social capital, the company shall again deduct part of or the whole percentage referred to in paragraph (a) of Article 38 until the amount in this account again attains a sum equivalent to 50% of the social capital. When the social capital increases owing to revaluation of the patrimony or capitalization of reserves, the company shall issue Workers Shares for a sum proportionate to the degree of ownership that the workers possess in relation to the company’s patrimony at the time of the increase in capital, distributing these shares among the workers in the appropriate proportion.”

<sup>32</sup> Article 3 of the Decree-Law in force at the time of the facts.

<sup>33</sup> Article 2 of the Decree-Law in force at the time of the facts.

<sup>34</sup> Article 20 of the Decree-Law in force at the time of the facts.

<sup>35</sup> Article 29 of the Decree-Law in force at the time of the facts.

<sup>36</sup> Article 33 of the Decree-Law in force at the time of the facts.

42. The workers participated in company management by appointing their representatives to the company's Board, which was composed of the latter together with the directors appointed by the company's shareholders. The directors who represented the workers were elected for one year and could be re-elected for an additional term. The directors who represented the workers had the same responsibilities and the same rights as the other company directors.<sup>37</sup>

43. According to the Decree-Law, the members of the Industrial Community had the right to elect the workers' representatives on the Board,<sup>38</sup> and also the members of the Community Council.<sup>39</sup> To this end, every year the General Assembly appointed an electoral committee,<sup>40</sup> which was responsible for holding elections for the members of the Community Council and the representatives on the company's Board for each term.<sup>41</sup> The Electoral Committee was also responsible for holding any elections required to elect replacements in cases of resignation, vacancy or removal. The Committee was composed of employees and manual workers in proportion to their total number in the company.<sup>42</sup>

44. In the specific case of Ceper-Pirelli S.A., the Electoral Committee for the period 1988-1989 was composed of five persons, two of them were employees and held the positions of Secretary and First Member of the Committee,<sup>43</sup> and three manual workers.<sup>44</sup> Mr. Lagos del Campo was a representative of the manual workers and also held the position of president of the Electoral Committee. The elections to appoint the members of the Electoral Committee were held on just one day, without affecting working hours, following a procedure established in the Rules of Procedure; that is, by individual, secret, universal and compulsory vote.<sup>45</sup>

45. At the time of the facts, Industrial Communities and labor unions were governed by different regimes. In particular, it was expressly established by law that, under the Industrial

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<sup>37</sup> Article 67 of the Decree-Law in force at the time of the facts.

<sup>38</sup> Article 61 of the Decree-Law in force at the time of the facts.

<sup>39</sup> Article 16 of the Decree-Law in force at the time of the facts.

<sup>40</sup> Article 26 of the Decree-Law in force at the time of the facts established: "Article 26. Each year the General Assembly shall appoint an electoral committee, which shall be responsible for holding elections for the members of the Community Council and the representatives on the company's Board, for each term, as well as those elections that are necessary to elect replacements for any of them in cases of resignation, vacancy or removal pursuant to the law and the Statutes, for the time remaining to complete the corresponding term."

<sup>41</sup> Article 23 of the Decree-Law in force at the time of the facts established: "Article 23. It is the responsibility of the General Assembly of the Industrial Community : (a) To rule on the management, accounts and financial statements of the Community; (b) To adopt the Community's Statute and amend it when necessary; (c) To request the competent authority to investigate the actions of the Community Council; (d) To order audits of the Community's patrimony; (e) To appoint the Electoral Committee for the election of the members of the Community Council and the representatives on the Board; (f) To remove the President and other members of the Community Council; (g) To remove the workers' representatives on the Board; (h) To revoke the Community Council's agreements or decision when these are contrary to the law or the Community's Statute; (i) To appoint the Community's Liquidation Committee in case of liquidation; (j) To take decisions in cases in which the law or the statute so establishes, or in any other important matter related to the Community, and (k) To adopt the annual investment plan for the patrimonial participation of the Industrial Community."

<sup>42</sup> Article 28 of the Decree-Law in force at the time of the facts established: "Article 28. The number of members of the Electoral Committee shall be indicated in the Community's Statute, and it shall be composed of employees and manual workers in proportion to their total number in the company. At least one (1) of the members must be an employee."

<sup>43</sup> President: Alfredo Lagos del Campo (Manual Worker), Secretary: Yolanda Ismodes Ramíres (Employee), First Member: Mercedes Mera Jiménez (Employee), Second Member: Teodomiro Vizcarra Salinas (Manual Worker), Third Member: Aristedes Quispe Altamirano (Manual Worker) (evidence file, annex 4 to the Merits Report, f. 11.).

<sup>44</sup> Cf. Ministry of Industry. Communication No. 1526 ICTI/OGP-38. Inscription of the Electoral Committee. August 9, 1988. Annexes to the communication of the petitioners dated July 23, 1998 (evidence file, annex 4 to the Merits Report, f. 11).

<sup>45</sup> Decree-Law 21789. Article 27. "The Elections shall be held on just one day and without affecting working hours, following the procedure indicated in the specific regime adopted by the competent body. The vote shall be individual, secret, universal and compulsory."

Community, the worker's tenure depended on the existence of the industrial company and his status as a permanent employee while, in the case of the labor unions, their constitution was voluntary and subject to the decision of workers who wished to defend their interests before their employer. In addition, the creation, composition and funding formalities of these two regimes were different. In particular, they had different objectives. The purpose of the Industrial Community was to allow the workers to participate in the ownership, management and profits of the industrial company;<sup>46</sup> while, the purpose of the labor union was to defend the rights and socio-economic and professional interests of the workers.<sup>47</sup> Nevertheless, according to the expert opinions provided in this case, under both regimes, the workers' representatives stood for the sectoral interests of this group vis-à-vis the employer.<sup>48</sup>

***B. Background, functions and responsibilities of Mr. Lagos del Campo as president of the Electoral Committee of the Industrial Community***

46. Mr. Lagos del Campo was born on February 21, 1939. He and his wife, Teresa González Cornejo, have 14 children.<sup>49</sup> On July 12, 1976, Mr. Lagos del Campo began to work as an electrician, a manual worker, in the maintenance department of the company, Conductores Eléctricos Peruanos Ceper-Pirelli S.A.<sup>50</sup>

47. Mr. Lagos del Campo served as labor union leader and labor leader in the company Ceper-Pirelli S.A. He held a number of management positions within the Ceper-Pirelli Labor Union; he served two terms as Secretary for the defense of workers' rights (1982-1983 and 1985-1986), and one as Secretary General (1983-1984).<sup>51</sup> As a permanent worker of the company, and pursuant to Decree-Law 21789, Mr. Lagos del Campo also formed part of the company's Industrial Community, within which the General Assembly elected him as a member

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<sup>46</sup> Article 3 of Decree-Law 21789 in force at the time of the facts establishes: "The purposes of the Industrial Community are: (a) To contribute to the establishment of constructive forms of interrelationship in the industrial company; (b) to strengthen the company by the united action of its members in the management and productive process, and their participation in the ownership of the company's patrimony; (c) to establish an appropriate and rational distribution of the benefits among the investors and permanent workers of an industrial company, and (d) to promote permanent training and stimulate the creativity of the company's workers."

<sup>47</sup> Article 8 of Law 25593 on Collective Labor Relations establishes that: "The purposes and functions of labor unions are: (a) To represent the entire workforce that falls within their ambit in conflicts, disputes, or claims of a collective nature; (b) To negotiate collective working agreements, require compliance with them, and implement the rights and actions that arise from such agreements; (c) To represent or defend their members in individual disputes or claims, unless the worker files a direct action, voluntarily or as the law requires, in which case the labor union may act in an advisory capacity; (d) To promote the creation and encourage the development of cooperatives, credit unions, and funds and, in general, entities for the social promotion and assistance of their members; (e) To promote the cultural, educational, technical and union-related development of their members, and (f) In general, any others that are not contrary to their essential purposes or the law."

<sup>48</sup> Expert opinion of Omar Sar Suárez. "In this section, it has been established that there are differences between labor unions and industrial communities, but it should be noted that, in both cases, the workers' representatives stand for the sectoral interests of the group vis-à-vis the employer." "[...] regarding the right to freedom of expression, these differences, inherent to the nature of the said entities, do not affect their content *prima facie* because, in both cases, their function is to represent the workers" (merits file, ff. 524 to 525). Meanwhile, in the opinion he gave before the Court during the public hearing on February 7, 2017, expert witness César González Hunt explained that, even though there are various differences between the entities, both industrial communities and labor unions "are entities that represent the workers before the employer" (transcript of the hearing on February 7, 2017, p. 73).

<sup>49</sup> National Identification and Civil Registry. DNI of Alfredo Lagos del Campo. (evidence file, annex 30 to the Merits Report, f. 102).

<sup>50</sup> Cf. CEPER-PIRELLI. Pay slip of Alfredo Lagos del Campo. Week of June 26 to July 2, 1989 (evidence file, annex 2 to the Merits Report, f. 5), and Judgment 225-91 handed down on March 5, 1991 (evidence file, annex 8 to the Merits Report, f. 29).

<sup>51</sup> Cf. Note entitled "List of leaders with their respective positions. Period 1982-1983," undated; "CEPER" Labor union. Note addressed to the Head of the Labor Union Registration Division, June 1983; "CEPER" Labor union. Note addressed to the Head of the Labor Union Registration Division, June 1985. Annexes to the communication of the petitioners of March 16, 2011 (evidence file, annex 3 to the Merits Report, ff. 7 to 9).



of the Electoral Committee. He served as President of the Industrial Community's Electoral Committee for the period 1988-1989,<sup>52</sup> the entity responsible for holding the elections for members of the Community Council and representatives on the company's Board (*supra* para. 43).

48. On April 26, 1989, Alfredo Lagos del Campo, in his capacity as president of the Electoral Committee of the Industrial Community and delegate to the National Confederation of Industrial Communities (hereinafter CONACI) denounced before the Participation Directorate of the Ministry of Industry irregularities in the call for elections of the members of the Council of the Industrial Community and the workers' representatives on the company's Board, to be held on April 28 that year. It was alleged that these irregularities were due to the fact that presumably three members<sup>53</sup> of the Electoral Committee, who represented the employers' interests, called for elections without the participation of the workers' representatives (Alfredo Lagos del Campo and Aristedes Quispe Altamirano), in order to benefit the election of a list promoted by the employers.<sup>54</sup>

49. After the elections had been held, a group of workers filed a brief contesting these elections before the Participation Directorate of the Ministry of Industry on April 28, 1989.<sup>55</sup> In this regard, on June 9, 1989, the Participation Directorate of the Ministry of Industry verified that the number of votes was less than 75% of the members of the Industrial Community; it therefore declared that the appeal was admissible and issued a call for a new electoral process.<sup>56</sup> On June 22, 1989, the Electoral Committee, presided by Mr. Lagos del Campo, scheduled a meeting for June 27, 1989, to coordinate the new election, as ordered by the Participation Directorate of the Ministry of Industry.<sup>57</sup>

### **C. The dismissal of Mr. Lagos del Campo and the applicable legal framework**

50. In this context, during his term as president of the Electoral Committee, Mr. Lagos del Campo gave an interview to a journalist of "*La Razón*"<sup>58</sup> in June 1989. The article published two weeks later indicated that "the president of the Electoral Committee of the company's Industrial Community, Mr. Lagos del Campo, a delegate to the CONACI, denounced before public opinion and the competent authorities the destructive maneuvers of the employer who, taking advantage of the hesitation of some workers, organized fraudulent elections that were held

<sup>52</sup> Cf. Ministry of Industry. Participation Directorate. Communication No. 1526 ICTI/OGP-38. Registration of the Electoral Committee. August 9, 1988 (evidence file, annex 4 to the Merits Report, f. 11).

<sup>53</sup> Secretary: Yolanda Ismodes Ramíres (Employee), First Member: Mercedes Mera Jiménez (Employee), Second Member: Teodomiro Vizcarra Salinas (Manual Worker), Third Member: Aristedes Quispe Altamirano (Manual Worker).

<sup>54</sup> Letter of April 28, 1989, addressed to the Participation Directorate of the Ministry of Industry, attaching the letter presented to the company denouncing three members of this Committee for contravening the rules of procedures by seeking to ignore the President of the Committee; for holding informal meetings, and for giving the impression that they were acting under external constraints in order to impose an electoral process that would favor a specific list of candidates promoted by the employer (evidence file of the Commission, annexes to the answering brief, f. 1450).

<sup>55</sup> Signed by José Vargas Purizaga, Leonidas Valdivia Mendoza, Alberto Sánchez Maravi and other members of the Ceper-Pirelli Industrial Community (evidence file, annex 3 to the State's answering brief, f.1455).

<sup>56</sup> Cf. Participation Directorate of the Ministry of Industry. Directorate Resolution No. 23-ICTI/OGP/89 of June 9, 1989 (evidence file Annex 3 to the State's answering brief, f.1455). In the resolution, the Participation Directorate determined that everything related to the electoral process held on April 28, 1989, had been done pursuant to the election rules; however, it declared that the appeal was well-founded and ordered that a new electoral process be held.

<sup>57</sup> Summons to a meeting of the Electoral Committee dated June 22, 1989, attached to an explanatory letter dated June 28, 1989.

<sup>58</sup> Cf. *La Razón*. June 1989. *CEPER. Patronal y Amarillos pretenden liquidar CI*. p. 10 (evidence file, annex 5 to the Merits Report, f. 13).

without the participation of the Electoral Committee and the majority participation of the members of the Community.”<sup>59</sup>

51. In particular, the interview indicated the following:<sup>60</sup>

*“Mr. Lagos, did you agree with the call for elections?*

*I did not agree, because the company’s Board of Directors had used and continues to use blackmail and coercion (sic) against the members of the Community, exerting pressure on a particular group of workers to make them take part in the elections under threat of dismissal.*

*Do you consider the elections to be legal?*

*No, they are not legal. According to article 61 (15) of Supreme Decree. No. 002-77-IT/DS, for the elections to be valid, 75% of the members of the Community must vote. In these fraudulent elections 148 of a total of 210 members of the Community voted; in other words, 62 members did not vote, thus less than the 75% stipulated in the law voted. In my capacity as president of the Electoral Committee, it was my responsibility to call the election. Nevertheless, the company management convened three members and, in the Industrial Relations Office – take note, in the employer’s office – they called elections for the Community, making a mockery of the law. To this end, they used a group of Community members who served their interests, and with these people they established a slate, which was the only one presented for election.*

*Why didn’t the members of the Community present another slate?*

*For one simple reason. The law on Industrial Community elections establishes that a slate must be composed of members who are manual workers and members who are employees. I would like to clarify an important point: the manual workers have a union, which defends their interests and is relatively independent. The employees do not have a union (they had one previously, but it was dissolved by the employers; the employees were unable to defend their rights). These employees are at the mercy of the employer and are constantly blackmailed by the management; therefore, they are afraid of forming part of a slate that is drawn up by the manual workers who do not enjoy the good graces of the employers. I believe that this was the fundamental reason why another slate was not presented.*

*In light of these abuses by the employers, what measures have you taken in your capacity as president of the Electoral Committee?*

*First, I have denounced the irregularities that the employer has been committing and promoting. I submitted this complaint officially in Communication No. 05824 to the Participation Directorate of the Ministry of Industry and Commerce.*

*What has been the response of the Ministry?*

*Here, I have to report that the Ministry’s bureaucracy responded in a vague manner, without making any determination; concluding that the communication was time-barred. As I had presented the communication before the elections, this shows that there was an understanding between the Participation Directorate headed by Alicia Liñán Núñez and the employer.*

*What measures are you considering?*

*I will continue fighting against the fraud, informing public opinion, the Government and other competent authorities, about the attempt by the Ceper-Pirelli company to liquidate the Industrial Community, especially now that the company has been obtaining significant profits, some of which correspond to the workers through the Industrial Community. I call on all the workers of Ceper-Pirelli to close ranks against the fraud, demanding that our legal rights and obligations be respected. I ask for the solidarity of*

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<sup>59</sup> Cf. Ibid.

<sup>60</sup> Cf. Ibid.

*all the country's industrial communities and labor unions to express their rejection of the attempt to liquidate the industrial communities."*

52. Based on the interview given by Mr. Lagos del Campo, the General Manager of Ceper-Pirelli, in a notarized letter of June 26, 1989,<sup>61</sup> "accused" him of work-related misconduct. In particular, the General Manager considered that the employment relationship with Mr. Lagos del Campo could not continue pursuant to paragraphs (a) and (h) of article 5 of Law No. 24514, which consider that unjustified failure to meet work obligations, serious insubordination, and "serious verbal misconduct" against the employer are justified causes for dismissal. According to this letter, Alfredo Lagos del Campo had incurred in these grounds for dismissal. The General Manager of the company considered that the statements made by of Mr. Lagos del Campo regarding the "fraudulent and unlawful understanding" and "complicity" between the Management and the Director of the Participation Directorate was "particularly serious."<sup>62</sup>

53. The company indicated that the opinions expressed in the interview, "in addition to constituting serious work-related misconduct, also constituted the offense of libel." The company also informed Mr. Lagos del Campo that he should respond to the charges made against him. During that process, the company "exonerated" Mr. Lagos del Campo from coming to work, while "paying him his wages and any other benefits to which he was entitled."<sup>63</sup> As a result, Mr. Lagos del Campo was prohibited from entering the company on June 27, 1989, and this prevented him from attending the meeting that he himself had called, in his capacity as president of the Electoral Committee, with the other members of Committee to discuss the issue of a new election.

54. In a letter of June 30, 1989, addressed to the General Manager, Mr. Lagos del Campo sought to disprove the charges that had been brought in the notarized letter. In particular, Mr. Lagos del Campo indicated that: (a) it was not true that he had failed to comply with his work-related obligations or incurred in serious insubordination, because he had always executed the work assigned to him scrupulously; (b) it was not true that he had incurred in "serious verbal misconduct" against the employer or the latter's representatives, because his words had not directly addressed at the employer or with the intention to offend him; (c) since these were not repeat offenses and there had been no previous disciplinary sanction for similar offenses, the company should have proceeded in accordance with the provisions of the Internal Labor Regulations applying, first, the lesser sanctions established by these regulations; (d) it was not true that he had stated that there had been a "fraudulent and unlawful understanding" with the Director of the Participation Directorate; (e) it was evident that his statements had been distorted; (f) also, the notarized letter sought to ascribe disciplinary sanctions in the exercise of his functions, whereas this was a conspicuous act of interference in the internal activities of the Industrial Community, and (g) the accusations made were an attack on his right to freedom of expression and to impart ideas.<sup>64</sup>

55. In a note of July 1, 1989,<sup>65</sup> the company informed Mr. Lagos del Campo of the decision to dismiss him from his employment, because "[...] he had not disproved the charges that had

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<sup>61</sup> The notarized letter was delivered to him in accordance with article 6 of Law No. 24514 and article 11 of Supreme Decree No. 03-88-TR (evidence file annex 34 to the State's answering brief, f. 1457).

<sup>62</sup> Cf. CEPER-PIRELLI. Notarized letter of June 26, 1989 (evidence file, annex 4 to the State's answering brief, ff. 1457 and 1458).

<sup>63</sup> Cf. CEPER-PIRELLI. Notarized letter of June 26, 1989 (evidence file, annex 4 to the State's answering brief, ff. 1457 and 1458).

<sup>64</sup> Cf. Exculpatory communication presented to the company by Mr. Lagos del Campo on June 30, 1989. (evidence file, annex 5, f.1460).

<sup>65</sup> Cf. CEPER-PIRELLI. Notarized letter of July 1, 1989, with receipt stamp of notary Javier Aspauza Gamarra, of July 3, 1989 (evidence file, annex 6 to the Merits Report, ff.15 and 16).

been brought against him in the notarized letter of June 26 [...].” It considered that the dismissal was justified, in particular, because he had committed the serious offenses that were causes for dismissal under paragraphs (a) and (h) of article 5 of Law 24514 of 1986, regulating the right to job security, which considered as serious offenses “serious verbal misconduct against his employer, its representatives, and his fellow workers,” based on the statements he made when he gave the interview.<sup>66</sup> In particular, the company argued that Mr. Lagos had committed a serious offense by accusing the Board of using “blackmail” and “coercion,” of having an understanding with the Participation Directorate of the Ministry of Industry, Tourism and Commerce, have the intention of “liquidating” the Industrial Community, and seeking to “influence” the Industrial Community elections by exerting pressure on a specific group of workers.

56. At that time, Law 24514 of 1986 regulated the right to job security and the procedure for the dismissal of workers.<sup>67</sup> The law stipulated that serious offenses committed by the workers were a just cause for dismissal<sup>68</sup> and established the following, *inter alia*, as serious offenses:<sup>69</sup>

(a) Unjustified failure to meet work obligations; repeated resistance to work-related orders of superiors and failure to observe the Internal Work and Industrial Safety Regulations duly approved by the administrative labor authority, which, in all cases, are serious offenses; [...]

(h) The perpetration of acts of violence, serious insubordination or serious verbal misconduct against the employer, its representatives, senior personnel, or co-workers, in the workplace, or outside this when the facts stem directly from the employment relationship.

57. Regarding the dismissal procedure, when a worker committed a serious infraction, the employer had to inform him in writing of the facts and the opening of an investigation.<sup>70</sup> The worker, in the exercise of his right to defend himself, had six days to disprove the facts of which he was accused, because, if he did not do so, the employer would notify him of his dismissal and the date of termination of employment in a notarized letter; the employer would also communicate the decision to the administrative labor authority.<sup>71</sup> The law stipulated that the worker could have recourse to the labor jurisdiction if he considered that the dismissal was not

<sup>66</sup> Law 24514 established four causes for justified dismissal.

<sup>67</sup> Cf. Congress of the Republic of Peru. Law 24514. Law on the right to job security. June 4, 1986. Article 4.a. May be consulted at: <http://www4.Congress.gob.pe/ntley/imagenes/Lawes/24514.pdf> (evidence file, annex 9 to the Merits Report, ff. 33bis to 38bis).

<sup>68</sup> Article 3 of the Decree-Law in force at the time of the facts established: “Article 3. The workers referred to in Article 2 can only be dismissed for good cause indicated in this law and duly verified.”

<sup>69</sup> Cf. Congress of the Republic of Peru. Law 24514. Law on the right to job security. June 4, 1986. Article 5. May be consulted at: <http://www4.Congress.gob.pe/ntley/imagenes/Lawes/24514.pdf> (evidence file, annex 9 to the Merits Report, ff. 33bis to 38bis).

<sup>70</sup> Cf. Congress of the Republic of Peru. Law 24514. Law on the right to job security. June 4, 1986. Article 6. “Immediately on becoming aware of or investigating the offense that gives rise to the dismissal, the employer shall communicate this situation to the worker concerned in writing. The employment relationship with a worker shall not be terminated without having previously offered him the possibility of defending himself against the charges against him unless the facts are so serious that the employer cannot be reasonably asked to grant him that possibility. In the exercise of the right of defense, the worker may be assisted by a labor union representative or by a lawyers, as he prefers.”

<sup>71</sup> Cf. Congress of the Republic of Peru. Law 24514. Law on the right to job security. June 4, 1986. Article 7. “When the previous procedure has ended, as established in the preceding article, without the worker having disproved that facts that constitute the serious offense, the employer shall notify him of his dismissal through a justice of the peace, if there is no notary, indicating precisely the cause of the dismissal and the date of termination. This dismissal shall be communicated to the Administrative Labor Authority at the same time.”

justified.<sup>72</sup> The law expressly established that the burden of proof for the dismissal corresponded to the employer.<sup>73</sup> If the proceedings were adjudicated in favor of the worker, he could opt to be reinstated or to terminate his contract, which would lead to the payment of the severance package and special compensation.<sup>74</sup>

#### **D. Actions filed by Mr. Lagos del Campo**

##### **1. Application for review of dismissal**

58. On July 26, 1989, Mr. Lagos del Campo filed an action against Ceper-Pirelli S.A. before the Lima Labor Court requesting that the court declare his dismissal "unjustified and unfair."<sup>75</sup> He denied that he had insulted the company or had used the words "blackmail" and "coercion." He stressed that, in any case, the statements that had led to his dismissal had been made in his capacity as president of the Electoral Committee of the company's Industrial Community and referred to internal problems within this community, specifically irregularities in the election of the members of the company's Board of Directors. In this regard, he argued that the sanction imposed on him, in addition to being unfair, was "a serious violation of his right to freedom of opinion, expression and thought, which was guaranteed in the Constitution, and also a serious interference in community and labor union activities." Regarding the latter, Mr. Lagos del Campo indicated that "every worker and, in particular, those who occupy positions in labor unions or communities, as in his case, have not only the right, but also the need to be informed and to speak out about workplace situations and activities."

59. The matter was admitted under file No. 4737-89 before the Fifteenth Labor Court of Lima. In judgment 25-91 of March 5, 1991 the judge ruled that the dismissal was "unlawful and unjustified,"<sup>76</sup> considering that for a dismissal to be admissible, the law required that the serious offense attributed to an employee must be duly proven. In this regard, he considered that the dismissal was based on an article published in a newspaper without it being reliably proved by the representatives of the respondent company that the "defamatory words" could in fact be attributed to the worker. In addition, the judge held that the statements contained in the article did not refer to individual persons, and therefore no members of the company had been directly wronged.

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<sup>72</sup> Cf. Congress of the Republic of Peru. Law 24514. Law on the right to job security. June 4, 1986. Article 8. "The worker who considers that the dismissal was not justified or did not comply with the formal requirements of this law, may have recourse to the Labor Communities and Employment Jurisdiction requesting that it be declared unjustified and unfair. At the request of the worker concerned, during the hearing or following this procedure, without interrupting the effects of the proceedings, the judge may preventively order that the dismissal be suspended and the worker reinstated in his usual job when, based on the conduct of the worker and the characteristics of the act of which he is accused, there is a reasonable presumption that he has not committed a serious offense, or when the dismissal has not complied with the formalities indicated in this law."

<sup>73</sup> Cf. Congress of the Republic of Peru. Law 24514. Law on the right to job security. June 4, 1986. Article 11. "The action referred to in the previous articles shall, in general, abide by the procedure that governs actions on labor matters, that are processed before the Labor Communities and Employment Jurisdiction, with the characteristics established in this law. The Labor Communities and Employment Jurisdiction shall decide these proceedings within no more than four months. The burden of proof concerning the dismissal, in all cases, corresponds to the employer."

<sup>74</sup> Cf. Congress of the Republic of Peru. Law 24514. Law on the right to job security. June 4, 1986. Article 12. "When the decision declaring the dismissal unjustified or unfair has been delivered or an order given for this to be executed immediately, the worker, in execution of the decision and within eight days following its notification, may opt for either immediate reinstatement or the termination of his work contract. If he chooses the latter option, he shall request payment of the special compensation referred to in article 14, and the severance package corresponding to his length of service and other social benefits."

<sup>75</sup> Cf. Action filed by Mr. Lagos del Campo before the Lima Labor Court for unjustified dismissal on July 26, 1989 (evidence file, annex 7 to the Merits Report, ff. 18 to 27).

<sup>76</sup> Cf. Fifteenth Judge del Labor Court of Lima. Judgment 25-91 of March 5, 1991. (evidence file, annex 8 to the Merits Report, ff. 29 to 31).

60. On June 25, 1991, the company filed an appeal against the decision of the Fifteenth Labor Court. In response, Mr. Lagos del Campo filed a brief on August 1, 1991, in which he refuted the arguments submitted by Ceper-Pirelli; however, this brief was processed by the Labor Court after it had delivered judgment.<sup>77</sup> Thus, in a judgment of August 8, 1991, the Second Court reversed the lower court's decision and, consequently, classified the dismissal as "legal and justified."<sup>78</sup> That court found that the statements made by Mr. Lagos del Campo constituted "serious insubordination or a serious verbal offense against the employer" and that "the State's Constitution guarantees freedom of expression, but not to insult the honor and dignity of senior personnel of the employer company."<sup>79</sup>

61. On August 26, 1991, Mr. Lagos del Campo filed a motion for "review and reconsideration" before the Second Labor Court of Lima, but this was declared inadmissible on August 27, 1991.<sup>80</sup>

62. On September 2, 1991, following the denial of his motion for review and reconsideration, Mr. Lagos del Campo filed an appeal for the annulment<sup>81</sup> of the decision issued on August 8, 1991, by that Labor Court. In this regard, the Second Labor Court concluded that the motion did not cite any of the grounds for annulment established in article 1085 of the Code of Civil Procedure.<sup>82</sup>

## **2. Application for amparo and nullity**

63. On October 21, 1991, Mr. Lagos del Campo filed an application for amparo (constitutional protection) before the Civil Chamber of the Superior Court,<sup>83</sup> against the judgment of August 8, 1991, which had decided the appeal against the way in which his dismissal had been classified. Mr. Lagos del Campo argued that:

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<sup>77</sup> Cf. Brief answering the company's appeal submitted by Mr. Lagos del Campo to the Second Labor Court of Lima, on August 1, 1991, File No. 839-91. (evidence file annex 11 to the Merits Report, ff. 43 to 45).

<sup>78</sup> Cf. Second Labor Court of Lima. Judgment 08-0891 of August 8, 1991 (evidence file, annex 12 to the Merits Report, ff. 47 and 48).

<sup>79</sup> Cf. Second Labor Court of Lima. Judgment 08-0891 of August 8, 1991 (evidence file, annex 11 to the Merits Report, ff. 47 and 48).

<sup>80</sup> Cf. Motion for review and reconsideration filed by Mr. Lagos del Campo before the Second Labor Court of Lima. File No. 839-91 of August 26, 1991, and Ruling made by the Second Labor Court of Lima. File No. 839-91. August 21, 1991 (evidence file, annex 11 to the Merits Report, ff. 50 and 51). In this appeal for review and reconsideration, Mr. Lagos argued, "pursuant to articles 1, 2, 4, 15 and 18 of the Constitution," his discrepancy with the ruling issued on August 8, 1991, considering that it violated his rights, interests and benefits as a worker, because the ruling failed to take into consideration the provisions of the domestic laws of Peru for the proper administration of justice. In this regard, the Second Labor Court concluded: "The appeal for review and reconsideration filed was inadmissible and ordered that the case be returned to the original court."

<sup>81</sup> Cf. Appeal for annulment filed by Mr. Lagos del Campo before the Second Labor Court of Lima. File No. 839-91. September 2, 1991, and Decision issued by the Second Labor Court of Lima. File No. 839-91. September 3, 1991 (evidence file annex 14 to the Merits Report, ff. 53 to 56). The motion was filed based on articles 59, 60 and 61 of Supreme Decree 03-80, requesting the annulment of the ruling of August 8, 1991, following the denial of his motion for review and reconsideration by the same court.

<sup>82</sup> Cf. Congress of the Republic of Peru. Code of Civil Procedure, Decree-Law 12760 of August 6, 1975. Article 1085. Nullity of decisions: (9) The order or judgment in the part deciding on a point that is not disputed or claimed; (10) The judgment that fails to decide any of the disputed points, except as provided for in the last part of Article 1086. Article 250. I. The remedy of cassation or nullity shall be admitted to invalidate a final judgment or decision in the cases expressly indicated by law. This may relate to the merits or the form. II. These remedies may be filed simultaneously.

<sup>83</sup> Cf. Application for amparo filed by Mr. Lagos del Campo before the Civil Chamber of the Superior Court of Lima. File No. 2615-91. October 21, 1991 (evidence file, annex 15 to the Merits Report, ff. 58 to 61). Under article 295 of the Constitution, Mr. Lagos requested that his action be admitted and the Second Labor Court of Lima be ordered to annul its judgment and issue a new ruling against the judgment of Second Labor Court of August 8, 1991, that decided the appeal in the proceedings that classified his dismissal. Among other matters, he argued violations of his right to job security and due process of law established in articles 48 and 233 of the Constitution.

## FOURTH:

Thus, by failing to take into account my brief (of August 1, 1991) when delivering the judgment of August 8 and, to the contrary, taking into account the complaint brief, not only has there been a violation of the equal opportunity to be heard, with their respective arguments, that the judge should offer the parties to the litigation, but also the basic right of defense against the arguments submitted by the other party in the said brief.

[...]

By violating my right to due process, my right to job security has been violated. [...] Indeed, job security is subject to special protection under our legal and constitutional order and, in the instant case, this has been violated by the aforementioned irregularities and, also, without allowing the said arguments to be disproved, thus constituting the violation of two constitutional rights: DUE PROCESS and JOB SECURITY.

64. In April 1992, while the appeal was being processed before the Civil Chamber of the Superior Court, the Peruvian Government proceeded to declare a "reorganization" of the Judiciary.<sup>84</sup> In the context of these reforms, on August 3, 1992 the Fifth Civil Chamber of the Superior Court of Lima ruled that the application for amparo was inadmissible.<sup>85</sup>

65. On August 26, 1992, Mr. Lagos del Campo filed an appeal for annulment before the President of the Fifth Civil Chamber of Lima, against the judgment delivered by the Fifth Civil Chamber of Lima;<sup>86</sup> however, the President of the Fifth Civil Chamber did not reply.

66. Consequently, on March 10, 1993, Mr. Lagos del Campo filed a brief before the President of the Social and Constitutional Law Chamber of the Supreme Court in which he indicated that he "respectfully request[ed] that the Court declare the nullity of the judgment, which should be amended, and declare the application for amparo admissible."<sup>87</sup> The Social and Constitutional Law Chamber of the Supreme Court of Justice, in a decision of March 15, 1993, declared that the request for nullity against the judgment of August 8, 1992, was not admissible.<sup>88</sup>

<sup>84</sup> Cf. *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 24, 2006. Para. 89.2 "On April 5, 1992, President Fujimori broadcast the "Manifesto to the Nation" in which he stated, *inter alia*, that he considered that he had "the responsibility to assume an exceptional approach to try and accelerate the process of [...] national reconstruction and ha[d] therefore, [...] decide[d] [...] to temporarily dissolve the Congress of the Republic[, ...] to modernize the public administration, and to reorganize the Judiciary completely."

<sup>85</sup> Cf. Fifth Civil Chamber of the Superior Court of Lima. Decision of August 3, 1992. File. 2615-9 (evidence file, annex 16 to the Merits Report, ff. 63 and 64). The Fifth Civil Chamber of the Superior Court of Lima stated that the grounds for the application before the court referred to the ineffectiveness of the judicial decision; also, that the brief mentioned by Mr. Lagos, which had been processed after the judgment, corresponded only to arguments, rather than to evidentiary elements; that, consequently, it did find that his right to due process – which could be remedied by means of the amparo – had been violated and concluded that the application for amparo was inadmissible.

<sup>86</sup> Cf. Appeal for annulment filed by Mr. Lagos del Campo before the Fifth Civil Chamber of the Superior Court of Lima. File. No. 2615-91. August 26, 1992 (evidence file, annex 17 to the Merits Report, f. 66). In this motion, Mr. Lagos del Campo requested that the court admit his application for annulment and order that the case be raised to the Supreme Court.

<sup>87</sup> Cf. Appeal for annulment and order of the Supreme Court of Justice of the Republic. File 1811-92. March 15, 1993 (evidence file annex 18 to the Merits Report, f. 67). In this motion, Mr. Lagos argued that his constitutional right to legitimate defense and due process had been violated because the brief he had filed before the Second Labor Court, which had been received on August 1, 1991, had not been processed promptly.

<sup>88</sup> Ruling of the Supreme Court of Justice. File No 1811-92; the Chamber indicated "that, based on the decision of the [Supreme Administrative Contentious] Prosecutor; [taking into account] the grounds he had outlined, it declare[d] that nullity was not admissible." The said decision of the Prosecutor indicated that "judicial decisions of the Labor and Labor Communities Jurisdiction that have been determined and are enforceable have the authority of *res judicata*"; therefore, to review such a decision would entail reviving a defunct proceeding and, consequently, an infringement of *res judicata*. He added that "when this decision has been adopted or is enforceable, it shall be published in the Official Gazette, "El Peruano," within the time frame established in article 42 of Law 23506." Cited from the decision. Cf. Congress of the Republic of Peru. Habeas Corpus and Amparo Act. Law 23506. Article 42. It shall be compulsory to

67. On April 28, 1993, Mr. Lagos del Campo filed a motion for reconsideration of the ruling that declared the request for nullity inadmissible before the President of the Social and Constitutional Law Chamber of the Supreme Court.<sup>89</sup> The request was not admitted.

### **3. Application for amparo before the Constitutional Court**

68. On July 26, 1996, and with the inauguration of the Constitutional Court of Peru, Mr. Lagos del Campo filed a brief before the Fifth Civil Chamber of the Superior Court requesting that his application for amparo be reopened and referred to the Constitutional Court.<sup>90</sup> On January 14, 1997, Mr. Lagos del Campo repeated this request because he had not received an answer.<sup>91</sup> On June 24, 1997, the Third Specialized Civil Chamber of the Superior Court of Lima, pursuant to article 298 of the 1979 Constitution,<sup>92</sup> in force at the date of the application for amparo, declared the request inadmissible on the grounds that Mr. Lagos del Campo should have filed a request for cassation based on the denial of the amparo application within 15 days of receiving notice of that decision and before the corresponding court, the Court of Constitutional Guarantees.<sup>93</sup>

69. On July 18, 1997, Mr. Lagos del Campo filed an appeal<sup>94</sup> before the Third Specialized Civil Chamber of the Superior Court, asserting that the Court of Constitutional Guarantees had been placed in "recess by the Government of national reconstruction and pacification" for nearly four years, and he had therefore chosen to file motions for review of judgment before the Constitutional and Social Chamber of the Supreme Court of Justice that had never been decided. On July 25, 1997, the Third Specialized Civil Chamber of the Superior Court declared the appeal inadmissible, because an appeal against the decision of June 24, 1997, was not established in the laws of Peru.<sup>95</sup>

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publish all final decisions on applications for habeas corpus and amparo that have been adopted and are enforceable in the Official Gazette, "*El Peruano*."

<sup>89</sup> Cf. Motion addressed to the Social and Constitutional Law Chamber of the Supreme Court of Justice. File No. 1811-92. April 28, 1993. Annexes to the communication of the petitioners dated July 23, 1998 (evidence file, annex 20 to the Merits Report, f. 75).

<sup>90</sup> Cf. Request addressed to the Fifth Civil Chamber of the Superior Court of Lima. File No. 2615-91. July 26, 1996 (evidence file, annex 21 to the Merits Report, f. 77). To substantiate his request, Mr. Lagos cited articles 2.2 and 202.2 of the Constitution which establish: Article 2. Fundamental human rights. Everyone has a right to: 2. Equality before the law. No one may be discriminated against for reasons of origin, race, sex, language, religion, opinion, economic status, or any other condition. Article 202. Attributes of the Constitutional Court. It corresponds to the Constitutional Court: 2. To hear, in final instance, the decisions denying habeas corpus, amparo, habeas data, and mandamus (evidence file, annex 21 to the Merits Report, ff. 77 and 78).

<sup>91</sup> Cf. Request addressed to the Fifth Civil Chamber of the Superior Court of Lima. File No. 2615-91. January 13, 1997 (evidence file, annex 21 to the Merits Report, ff. 79 and 80).

<sup>92</sup> Cf. Congress of the Republic of Peru. Constitution of Peru, July 12, 1979. Article 298. The Court of Constitutional Guarantees has jurisdiction throughout the territory of the Republic. It has jurisdiction: 1. To declare, at the request of a party, the partial or total unconstitutionality of laws, legislative decrees, general regional laws and municipal by-laws that violate the Constitution in form or in content, and 2. To hear in cassation decisions rejecting applications for habeas corpus and amparo that have exhausted the court system. Article 295. The application for amparo protects rights recognized in the Constitution that may have been violated or threatened by any authority, official or individual. The application for amparo follows the same procedure as the application for habeas corpus in cases in which it is applicable.

<sup>93</sup> Cf. Third Specialized Civil Chamber of the Superior Court of Justice of Lima. File. No. 2625-91. Decision of June 24, 1997. (evidence file, annex 23 to the Merits Report, f. 82).

<sup>94</sup> Cf. Appeal filed by Mr. Lagos del Campo before the Third Specialized Civil Chamber of the Superior Court of Lima. A.A.2615-91, July 18, 1997 (evidence file, annex 24 to the Merits Report, ff. 85 and 86).

<sup>95</sup> Cf. Third Specialized Civil Chamber of the Superior Court of Justice of Lima. File. No. 839-97. Ruling of July 25, 1997. (evidence file, annex 25 to the Merits Report, f. 88).



70. On August 19, 1997, Mr. Lago del Campo filed a request for review of the appeal that had been denied<sup>96</sup> before the Third Specialized Civil Chamber of the Superior Court, requesting that his application for amparo to be heard in final instance by the Constitutional Court. On October 2, 1997, Mr. Lagos del Campo submitted the request for review of the appeal that had been denied to the President of the Constitutional Court. On November 27, 1997, the Social and Constitutional Law Chamber of the Supreme Court of Justice decided complaint 447-97, declaring it inadmissible on the grounds that, by law, judgments issued by a higher court in second instance must be contested by an action for annulment rather than an appeal.<sup>97</sup> In view of this decision, Mr. Lagos del Campo requested the President of the Constitutional Court to correct and explain this decision on February 25, 1998, but without obtaining any answer.<sup>98</sup>

### ***E. The situation of Mr. Lagos del Campo after his dismissal***

71. At the time of his dismissal in 1989, Mr. Lagos del Campo was 50 years old and had 14 children, six of whom were of school age. According to the information provided by the representatives, and undisputed by the State, after his dismissal, Mr. Lagos del Campo was unable to access all the social security benefits that depended on his employment. Mr. Lagos underscored in the statement he gave during the public hearing that "according to the law, [he] would have been entitled to a decent subsistence pension in five more years,"<sup>99</sup> having worked in the company for more than 13 years. The economic hardships of the times, his age, and the circumstances of his dismissal, prevented him from obtaining stable employment as an electrician and receiving adequate wages to support his family.

72. Mr. Lagos del Campo also stated during the hearing that his dismissal "resulted in harm to both [his] labor rights and [his] human rights" and added that, following his dismissal, he had no employment possibilities "because there were no jobs for workers who were over 50 years of age [...] [s]o that there were no stable and profitable jobs to maintain a household and a family." Nowadays, both his financial status<sup>100</sup> and his health are precarious.<sup>101</sup>

## **VII MERITS**

73. This case relates to the dismissal of Alfredo Lagos del Campo on June 26, 1989, as a result of statements made during an interview for the newspaper "*La Razón*." This interview was given when he was president of the Electoral Committee of the Industrial Community of the

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<sup>96</sup> Article 403 of the New Code of Civil Procedure in force at the time of the facts established the following: "The complaint shall be filed before the court that is superior to the one that denied the appeal or granted it with an effect other than that requested, or before the court of cassation in the corresponding case."

<sup>97</sup> Cf. Social and Constitutional Law Chamber of the Supreme Court of Justice. Complaint 447-97 (evidence file annex 28 to the Merits Report, f. 97).

<sup>98</sup> Cf. Complaint filed before the Social and Constitutional Law Chamber of the Supreme Court of Justice. File No 839-97. A.A. 2615-91 (evidence file annex 29 to the Merits Report, ff. 99 to 101).

<sup>99</sup> The reference to retirement relates to the "Law implementing the recommendations derived from the committees created by Laws No. 27452 and No. 27586 responsible for reviewing the collective dismissals from State companies subject to processes to promote private investment and from entities in the public sector and local governments." Mr. Lagos also mentioned the following law: "I am owed all my social benefits and other rights that correspond to me under the law since 1976 in order to protect my right to retirement under Law No. 19990" (file of the procedure before the Commission, f. 151).

<sup>100</sup> Cf. Certification of Poverty issued by the Blessed Sacrament Parish of the Archdiocese of Lima on September 10, 2003. Attachment to the petitioners' brief of May 28, 2004; Letter requesting social assistance addressed by Mr. Lagos del Campo to the Ministry for Women and Social Development on April 21, 2005. Attachment to Mr. Lagos del Campo's communication of June 2, 2005 (evidence file, annex 31 to the Merits Report, ff. 106 and 107).

<sup>101</sup> In September 2014, Mr. Lagos del Campo had a hemorrhagic stroke that required him to be hospitalized for 20 days and left him with various aftereffects.

company, Ceper-Pirelli, and in it he reported, *inter alia*, that the company's Board had presumably used "blackmail and coercion" to hold "fraudulent elections outside the purview of the Electoral Committee" (*supra* para. 50). Following his dismissal, Mr. Lagos del Campo filed an action before the Fifteenth Labor Court of Lima, which classified the dismissals as "unfair and unjustified" (*supra* para. 58). However, following an appeal filed by the employer, the Second Labor Court of Lima reversed the first instance judgment and classified the dismissal as "legal and justified" (*supra* para. 60). Subsequently, Mr. Lagos del Campo filed several appeals which were declared inadmissible (*supra* paras. 61 to 70).

74. Based on the above, the Court must analyze whether the judgment of the Second Labor Court, that classified the dismissal of Mr. Lagos del Campo as "legal and justified," respected the provisions of Article 13(2) and 8 of the American Convention by evaluating the need for the restriction imposed by a private individual and duly stating the reasons for its decision. In particular, the Court will examine whether the statements made by Mr. Lagos del Campo had enhanced protection owing to their context and his position as a representative, and also whether the judge who evaluated the said restriction gave proper consideration to these conditions when classifying the legality of the restriction. In addition, the Court must determine whether the sanction imposed, that was ratified by the judge, had an impact on the State's obligation to ensure the individual and collective dimension of the right to freedom of association. Furthermore, whether the dismissal violated the presumed victim's job security, as well as whether he was afforded effective judicial protection of his rights. Lastly, the Court must determine whether the law on which the dismissal of Mr. Lagos was based violated Article 2 of the Convention.

75. To this end, The Court will now analyze the arguments presented by the parties and the Commission, and will develop the pertinent legal considerations related to the alleged violations of freedom of thought and expression (Article 13),<sup>102</sup> right to a free trial (Article 8),<sup>103</sup> freedom of association (Article 16),<sup>104</sup> job security (Article 26<sup>105</sup>), in relation to Article 1(1),<sup>106</sup> and also

<sup>102</sup> Article 13. Freedom of Thought and Expression. 1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

a) respect for the rights or reputations of others; or

b) the protection of national security, public order, or public health or morals.

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

<sup>103</sup> Article 8. Right to a Fair Trial. 1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

<sup>104</sup> Article 16. Freedom of Association. 1. Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.

<sup>105</sup> Article 26. Progressive Development. The 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, subject to available resources, by legislation or other appropriate means, the full realization of the rights derived from 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.

<sup>106</sup> Article 1(1) of the Convention establishes that: "The States [...] undertake to respect the rights and freedoms

the alleged violation of Article 2<sup>107</sup> and Articles 8 and 25,<sup>108</sup> all of the American Convention on Human Rights.

**VII-1  
FREEDOM OF THOUGHT AND EXPRESSION, RIGHT TO A FAIR TRIAL, JOB SECURITY,  
FREEDOM OF ASSOCIATION, AND DOMESTIC LEGAL EFFECTS  
(ARTICLES 13, 8, 26, 16, 1(1) AND 2 OF THE AMERICAN CONVENTION)**

**A. Arguments of the parties and of the Commission**

**1. Freedom of expression and the right to a fair trial**

76. Regarding freedom of expression, the **Commission** argued that the statements made by Mr. Lagos del Campo should be understood as part of his work as a representative of a group of workers, which enjoy greater protection under the American Convention. It was clear from reading the whole interview published in "*La Razón*" that the purpose of the statements was to expose and call attention to acts of undue interference by the employers in the activities of the organizations that represented the workers, and in internal elections of the Industrial Community, because those elections could have an impact on the exercise of the workers' rights. Consequently, it was not proved that the sanction was really necessary in a democratic society, because evident public interest was involved. The Commission added that the State had not proved that the dismissal responded to an urgent social need; moreover, it could not be argued that it was proportionate to the objective sought.<sup>109</sup> Additionally, the Commission argued that the statements made by Mr. Lagos del Campo could have been investigated, corrected or explained by the company and that there were other measures less harmful than dismissal that the company could have used to defend the honor of those who felt that they had been adversely affected. Moreover, the application of restrictions to freedom of expression to protect legitimate aims cannot lead to the imposition of a duty of absolute loyalty to the employer or to subjecting a worker – especially a leader of the workers – to the employer's interests.

77. With regard to judicial guarantees the Commission argued that the Peruvian Courts had violated Article 8(1) of the American Convention in relation to the obligation to substantiate decisions, because the ruling that upheld the dismissal was "equivalent to a mere rubber-stamp approval of the measure taken by the employer." This failure to state the reasons for their decisions is enhanced if its recalled that the decision reversed the first instance judgment that had ruled in favor of the worker.

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recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms [...]."

<sup>107</sup> Article 2. Domestic Legal Effects. Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

<sup>108</sup> Article 25. Judicial Protection. 1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. 2. The States Parties undertake: a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; b) to develop the possibilities of judicial remedy; and c) to ensure that the competent authorities shall enforce such remedies when granted."

<sup>109</sup> Above all, the Commission took into account the position held by Mr. Lagos del Campo, the context in which the statements were made, and the nature and severity of the measure, based on the relationship between the freedom of expression of workers' representatives and the assertion of rights in this area. Also, since the dismissal was such a severe penalty for both the presumed victim and for the workers and their right to information, it could not be justified by the severity of the harm caused, especially when it is considered that this was not proved in court.

78. Regarding freedom of expression, in general, the **representatives** agreed with the Commission and emphasized that the statements made by Mr. Lagos del Campo were published based on his position as a representative, so that the workers who were members of the Industrial Community and public opinion, in general, could learn about how the elections were handled within the conflictive labor environment. Moreover, in view of the conflictive context that surrounded the industrial communities, the information on irregularities within them was of public interest. The representatives argued that this information was important for an open discussion in a democratic society and for the 220 employees and manual workers who worked for Ceper-Pirelli at that time. They indicated that, although the Second Labor Court made an interpretation pursuant to Law No. 24514, since the case related to a restriction of freedom of expression, its decision should have weighed this right against the right to reputation, which had been alleged. In addition, the representatives indicated that the sanction was not necessary in a democratic society and was not proportionate to the alleged harm to the right to honor of the company and the personnel. They considered that a civil sanction such as dismissal could be more daunting than a criminal sanction because it had the potential to compromise personal and family life. Nevertheless, the representatives considered that, in light of the existence of a conflict between the rights presumably violated, the individuals who felt that they had been harmed or insulted could have filed a criminal complaint against Mr. Lagos del Campo for offenses against honor or, if appropriate, requested a rectification pursuant to the Press Freedom Statute.

79. Regarding judicial guarantees, the representatives asserted that the obligation to give reasoned decisions had been violated in both the labor proceeding and in the proceeding on the application for amparo. In addition, they argued that the right to be heard by a judge or court had been violated because the Second Labor Court had not processed Mr. Lagos del Campo's observations and arguments until after it had delivered judgment. They indicated that the right to be heard included not only the possibility of the evidence being examined, but also that of the arguments of the parties being analyzed, and that this had constituted a limitation of the right to contradict the statements and arguments made by the company.

80. The **State** indicated that, since Mr. Lagos del Campo was not a labor union leader, he was not entitled to "greater protection" and his statements were not a matter of public interest. It argued that the fact that the information was relevant for the workers to form an opinion on the situation of the elections made it even more important that such information should not be false or biased. The State also indicated that the Commission had disregarded the importance of generating a respectful discussion of opinions and information. In this regard, it indicated that the Committee on Freedom of Association of the Governing Body of the International Labour Organization (ILO) had indicated that trade unions "should respect the limits of propriety and refrain from the use of insulting language." It argued that the Commission had not analyzed the limits to the use of certain expressions, ignoring the fact that it is necessary to weigh the right to freedom of expression against the right to honor. It also indicated that the Commission had tried to transfer to the "private third party" not only the responsibility for requesting a rectification, but also for corroborating the statement that had been made and proving serious harm. This would have made the defense of those who considered that their honor had been violated unmanageable and unrealistic. Moreover, the Commission had failed to indicate that, if the presumed victim considered that the interview had not reflected his words faithfully, he could have requested a rectification, and he did not do this. The European Court's case law had recognized that employees had an obligation of loyalty towards their employer, even though this was not absolute. In addition, the European Court had differentiated criticism and insult, stating that the employer could use his disciplinary authority when he was insulted by an employee. The State argued that, in the instant case, it was not possible to consider that the statements of the presumed victim were objective criticisms, because he had used injurious terms such as "blackmail" and "coercion." Lastly, it indicated that, in order to analyze the

proportionality of the sanction, it should be considered that Mr. Lagos del Campo had been suspended for acts of insubordination in 1985, a measure that the Labor Directorate had considered justified.

81. Regarding judicial guarantees, **the State** considered that although the court proceedings did not use the same terminology used by the Commission, this did not mean that the Peruvian courts did not weigh the factors mentioned. Indeed, the Second Labor Court of Lima had assessed the statements published in "*La Razón*" and found that they contained phrases that were injurious for employer and co-workers. Also, that court took into consideration other elements, such as Mr. Lagos del Campo's recidivism and that the presumed victim could have requested a rectification and did not do so. Moreover, it is incomprehensible to claim that the domestic courts should have analyzed the case based on a test of proportionality that did not even exist at the time – more than 20 years ago. Regarding the argument of the right to be heard, the State indicated that, even though the brief that Mr. Lagos del Campo submitted to the Second Labor Court was only processed after the judgment, it did not contain probative elements, but rather legal arguments and many of these had been included in previous briefs presented by the plaintiff; therefore, this did not violate his right to defense.

## **2. Freedom of association**

82. The **Commission** argued that, in the workplace, the protection of freedom of expression is especially relevant when it is related to freedom of association for labor-related purposes, because the protection of the right of workers to express themselves in order to impart information and promote their common interests and claims is one of the purposes of the right to freedom of association in the workplace. Consequently, the Commission considered that the strict proportionality of restrictions to freedom of association in the workplace should be judged based on their effects on the right of labor organizations and their leaders to ensure the protection of the interests of those they represent, and on their potential dissuasive effects on other trade union or workers' leaders.

83. The **representatives** argued that the judicial confirmation of Mr. Lagos del Campo's dismissal could have an intimidating effect on other individuals in a similar situation, or other workers who have been mistreated by their employers, leading them to be afraid to report irregularities such as those described in this case. Consequently, they argued that the judgment handed down by the Second Labor Court of Peru contributed to a work environment in which the workers could be afraid to report problems such as those in this case or other conflicts.

84. The **State** argued that, since Mr. Lagos del Campo was not a representative of the workers or a labor union leader, and therefore did not have the corresponding protection, his freedom of association was not violated as a result of the presumed violation of his freedom of expression. The State also argued that there could not be any intimidating effect for other workers in relation to their membership in the Industrial Community, because membership of that Community did not depend on them; rather it was established in the applicable law in force at the time. Lastly, it argued that no proof had been submitted with regard to the presumed intimidation and/or fear caused to the workers owing to possible loss of their jobs.

## **3. Domestic legal effects**

85. The **Commission** considered that the laws on which the dismissal of Mr. Lagos del Campo was based were vague and imprecise, because they failed to delimit their sphere of application so as to protect statements on matters of public interest or declarations made by workers' representatives, speaking in that capacity. In this regard, it indicated that, in light of the fact that Mr. Lagos del Campo's right to freedom of expression having been violated as a

result of the application of a law that did not meet legal requirements, the State also failed to comply with Article 2 of the American Convention.

86. The **representatives** agreed with the Commission's argument on the incompatibility between paragraph (h) of article 5 of Law No. 24514 and Article 2 of the American Convention. In addition, they argued that Legislative Decree No. 728, which derogated Law No. 24514, suffered from the same defects as the law applied in this specific case. Consequently, they asked the Court to examine the compatibility of article 25 of Legislative Decree No. 728 with the American Convention

87. The **State** argued that article 5 of Law No. 24514 was not vague and imprecise because it did not delimit its sphere of application with regard to matters of public interest or with regard to statements made by representatives acting as such. However, Mr. Lagos del Campo was not a workers' representative and, therefore, his statements were not of public interest. Furthermore, and despite the foregoing, it argued that the constitutionality of Law No. 24514 had never been questioned by the respective domestic mechanisms while it was in force, and was never the object of either complaint or criticism before the International Labour Organization. Consequently, the State considered that it did not fail to comply with Article 2 of the American Convention.

## **B. Considerations of the Court**

### **1. Freedom of expression and judicial guarantees**

88. In this section, the Court will analyze whether Mr. Lagos del Campo's statements fell within the sphere of special protection of the right to freedom of expression and, if applicable, whether his freedom of expression was ensured by the State by the decision of the second instance judge. To this end, the Court will analyze this dispute in the following sections: (a) Freedom of expression in labor contexts and (b) Analysis of the necessity and reasonableness of the restriction in this case.

#### **1.1 Freedom of expression in labor contexts**

89. The Court's jurisprudence has provided the right to freedom of thought and expression recognized in Article 13 of the Convention with a wide-ranging content. The Court has indicated that this article protects the right to seek, receive and impart information and ideas of all kinds, as well as to receive and obtain the information and ideas imparted by others.<sup>110</sup> It has also indicated that freedom of expression has both an individual and a social dimension, and from this it has extrapolated a series of rights that are protected by this article.<sup>111</sup> The Court has asserted that the two dimensions are equally important and must be guaranteed absolutely and simultaneously in order to give full effect to the right to freedom of expression in the terms of Article 13 of the Convention.<sup>112</sup> For the ordinary citizen, knowing the opinion of others or the information possessed by others is as important as the right to disseminate his or her own opinion or information.<sup>113</sup> Consequently, in light of the two dimensions, freedom of expression

<sup>110</sup> Cf. *Compulsory Membership of 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. 30, and *Case of López Lone et al. v. Honduras. Preliminary objections, merits, reparations and costs*. Judgment October 5, 2015. Series 302, para. 166.

<sup>111</sup> Cf. *Compulsory Membership of an Association Prescribed by Law for the Practice of Journalism OC-5/85, supra*, paras. 31 and 32, and *Case of López Lone v. Honduras, supra*, para. 166.

<sup>112</sup> Cf. *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile. Merits, reparations and costs*. Judgment of February 5, 2001. Series C No. 73 *supra*, para. 67, and *Case of López Lone v. Honduras, supra*, para. 166.

<sup>113</sup> Cf. *Case of "The Last Temptation of Christ" v. Chile, supra*, para. 66, and *Case of López Lone v. Honduras,*

requires, on the one hand, that no one may be arbitrarily hindered or prevented from expressing his or her own opinion and, thus, represents a right of each individual; while, on the other hand, it also signifies a collective right to receive any kind of information and learn about the opinions of others.<sup>114</sup>

90. The American Convention guarantees everyone's right to freedom of expression, regardless of any other consideration, so that it cannot be restricted to a specific profession or group of persons.<sup>115</sup> Thus, the Court has maintained that freedom of expression is essential for the formation of public opinion in a democratic society. "It is also a condition *sine qua non* to enable [...] labor unions [...] and, in general, those who wish to have an influence over the collectivity to develop their full potential."<sup>116</sup>

91. Consequently, freedom of expression is necessary for the work of labor unions, to protect labor rights and to further legitimate interests and improve conditions, because, without this right, such organizations would be ineffective and devoid of purpose.<sup>117</sup>

92. The Court has also established that the obligation to ensure the rights recognized in the Convention presupposes positive obligations for the State to protect rights, even in the private sphere.<sup>118</sup> In cases such as this one, the competent administrative or judicial authorities have the obligation to monitor whether acts or decisions in the private sphere have consequences on fundamental rights, and whether they are in conformity with domestic law and the State's international obligations. To the contrary, the State must remedy the violation of these rights and protect them adequately.

93. In this regard, the Court has recognized that "in the broad terms of the American Convention, freedom of expression may also be affected without the direct intervention of State actions."<sup>119</sup> In the case of freedom of expression, its real and effective exercise does not depend merely on the State's obligation to abstain from any interference, but may call for positive measures of protection, including in the relationships between individuals. Indeed, in certain cases, the State has the positive obligation to protect the right to freedom of expression, even from attacks by private individuals.<sup>120</sup>

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supra, para. 166.

<sup>114</sup> Cf. *Compulsory Membership of an Association Prescribed by Law for the Practice of Journalism*, OC-5/85, supra, para. 30, and *Case of López Lone v. Honduras*, supra, para. 166.

<sup>115</sup> *Case of Tristán Donoso v. Panama. Preliminary objections, merits, reparations and costs*. Judgment of January 27, 2009. Series C No. 193, para. 114, and *Case of López Lone v. Honduras*, supra, para. 169.

<sup>116</sup> *Compulsory Membership of an Association Prescribed by Law for the Practice of Journalism*, OC-5/85, supra, para. 70, and Cf. *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela. Preliminary objections, merits, reparations and costs*. Judgment of June 22, 2015. Series C No. 293, para. 22. Also, Articles 3 and 4 of the Inter-American Democratic Charter emphasize that "[e]ssential elements of representative democracy include [...] respect for social rights, and freedom of expression and of the press." Cf. *Case of López Lone et al. v. Honduras*, supra, para. 164.

<sup>117</sup> The European Court of Human Rights has recognized in its case law that the right to freedom of expression protects the right of "members of a trade union [...] to express their demands by which they seek to improve the situation of workers in their company." According to the European Court, the freedom of expression of labor unions and their leaders is an essential means of action, without which they would lose their effectiveness and purpose. ECHR, *Case of Vereinigung Demokratischer Soldaten Österreichs and Berthold Gubi v. Austria*, No. 15153/89. Judgment of December 19, 1994 and ECHR, *Case of Palomo Sánchez and Others v. Spain*, [GS] No. 28955/06, 28957/06, 28959/06 and 28964/06. Judgment of September 12, 2011, para. 56.

<sup>118</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*, supra, para. 166, and *Case of Vásquez Durand et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of February 15, 2017. Series C. No. 332, para. 141.

<sup>119</sup> *Compulsory Membership of an Association Prescribed by Law for the Practice of Journalism*, OC-5/85, supra, para. 56, and Cf. *Case of Granier et al. v. Venezuela*, supra, para. 143.

<sup>120</sup> Cf. *Case of Ríos et al. v. Venezuela. Preliminary objections, merits, reparations and costs*. Judgment of January 28, 2009. Series C No. 194, para. 107; *Case of Perozo et al. v. Venezuela. Preliminary objections, merits, reparations*

94. This is why, in the area of labor, the State's responsibility may arise in the situation in which domestic law, as interpreted in final instance by the domestic jurisdictional organ, validates a violation of the right of the appellant, so that, ultimately, the penalty is a result of the decision of the national court, and this may entail an internationally wrongful act.

95. In this regard, the European Court of Human Rights has indicated that Article 10 of the European Convention (Freedom of Expression) prevails not only in relations between employer and employee when these are governed by public law, but may also apply when these relations are governed by private law.<sup>121</sup> In particular, in application of the protection of freedom of expression in labor contexts between private individuals, the European Court has analyzed whether interference in this right may be attributed to court decisions that ratify dismissal or another penalty.<sup>122</sup>

96. This is why, the Court reaffirms that, the sphere of protection of the right to freedom of thought and expression is particularly applicable to workplace contexts such as in the instant case, and in such contexts the State must not only respect this right, but also guarantee it, so that the workers or their representatives may also exercise it. Thus, should a general or public interest be involved, a higher degree of protection of freedom of expression is required,<sup>123</sup> particularly with regard to those who have a mandate to represent others.

97. The Court will therefore ascertain whether, in this case, in relation to preservation of the rights alleged by the presumed victim, the second instance decision endorsing his dismissal constituted a violation of freedom of expression in the context of labor relations.<sup>124</sup>

## **1.2 Analysis of the necessity and reasonableness of the restriction in this case**

98. The Court has repeatedly indicated that freedom of expression is not an absolute right. Article 13(2) of the Convention, which prohibits prior censorship, also establishes the possibility of the subsequent imposition of liability for the abusive exercise of this right, including to ensure "respect for the rights or reputations of others" (subparagraph (a) of Article 13(2)). These restrictions are of an exceptional nature and should not limit, beyond strictly necessary, the full exercise of freedom of expression and become a direct or indirect means of prior censorship.<sup>125</sup> Thus, the Court has established that liability may be imposed subsequently if the right to honor and reputation may have been affected.<sup>126</sup>

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*and costs.* Judgment of January 28, 2009. Series C No. 195, para. 118; *Case of Manuel Cepeda Vargas v. Colombia. Preliminary objections, merits, reparations and costs.* Judgment of May 26, 2010, para. 172. Similarly, ECHR, *Case of Palomo Sánchez and Others v. Spain [GS]*, *supra*, para. 59; *Case of Fuentes Bobo v. Spain*, No. 39293/98. Judgment of February 29, 2000, para. 38; *Case of Özgür Gündem v. Turkey*, No. 23144/1993. Judgment of March 16, 2000, paras. 43 to 50, and *Case of Dink et al. v. Turkey*, No. 2668/2007, 6102/2008, 30079/2008, 7072/2009 and 7124/2009. Judgment of September 14, 2010, para. 106.

<sup>121</sup> Cf. ECHR, *Case of Fuentes Bobo v. Spain*, *supra*, para. 38, *mutatis mutandis*, *Case of Schmidt and Dahlström v. Sweden*, No. 5589/72, Judgment of February 6, 1976, para. 33.

<sup>122</sup> Cf. ECHR, *Case of Khurshid Mustafa and Tarzibachi v. Sweden*, No. 23883/06. Judgment of December 16, 2008, para. 34, and *Case of Remuszko v. Poland*, No. 1562/10. Judgment of July 16, 2013, para. 83.

<sup>123</sup> Cf. ECHR, *Case of Csánics v. Hungary*, No. 12188/06. Judgment of January 20, 2009, para. 441.

<sup>124</sup> Cf. ECHR, *Case of Palomo Sánchez and Others v. Spain [GS]*, *supra*, para. 61.

<sup>125</sup> Cf. *Case of Herrera Ulloa v. Costa Rica. Preliminary objections, merits, reparations and costs.* Judgment of July 2, 2004. Series C No. 107, para. 120, and *Case of Tristán Donoso v. Panama*, *supra*, para. 110.

<sup>126</sup> *Case of Mémoli v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of August 22, 2013. Series C No. 265, para. 123.



99. Article 11 of the Convention establishes that everyone has the right to the protection of his honor and recognition of his dignity. The Court has indicated that the right to honor “recognizes that everyone has the right to have their honor respected, prohibits any unlawful attack on honor and reputation, and imposes on States the obligation to provide the protection of the law against such attacks. In general. The Court has indicated that the right to honor relates to self-esteem and self-worth, while the right to reputation relate to the opinion that others have of a person.”<sup>127</sup>

100. In this regard, the Court has maintained that, “both freedom of expression and the right to honor, rights protected by the Convention, are extremely important, thus the two rights must be guaranteed, so that they may coexist harmoniously.”<sup>128</sup> Each fundamental right must be exercised respecting and safeguarding the other fundamental rights.<sup>129</sup> Consequently, the Court has indicated that “any conflict between the two rights requires that they be weighed and, to this end, each case must be examined taking into account its characteristics and circumstances in order to assess the existence and intensity of the elements on which the said opinion is based.”<sup>130</sup>

101. In this regard, it should be pointed out that Peru contested the application of a proportionality test because, according to the State, this is derived from legal doctrine or jurisprudence subsequent to the facts (*supra* para. 81). The Court notes that Article 13(2) of the Convention expressly establishes the requirement to make an analysis of reasonableness when there has been a restriction of freedom of expression. Furthermore, it should be noted that the criteria on proportionality subsequently developed by this Court merely apply a general principle of legal interpretation derived from the general matrix of rationality. Consequently, the weighing is established in Article 13(2) of the Convention itself.

102. The Court has reiterated in its case law that Article 13(2) of the American Convention establishes that the responsibilities ensuing from the exercise of freedom of expression must comply with the following requirements, concurrently: (i) they must be previously established by law, in form and in content;<sup>131</sup> (ii) they must respond to a purpose permitted by the American Convention (“respect for the rights or reputation of others” or “the protection of national security, public order, or public health or morals”) and (iii) they must be necessary in a democratic society (and must therefore comply with the requirements of appropriateness, necessity and proportionality<sup>132</sup>).

103. In particular, an evaluation of legitimate restrictions to the right to freedom of expression requires an analysis of necessity (Article 13(2)). Thus, the State, through its agents of justice, is required to make an analysis of reasonableness or a weighing up of the limitations or restrictions to a human right recognized in the Convention (Article 13(2)), and also an appropriate reasoning that respects due process of law (Article 8 of the Convention). The specific methodology, argument or analysis is the task of the domestic authorities, provided that it reflects those guarantees. To make this evaluation at the international level, the Court has used different forms of analysis, depending on the rights at stake, but always making an adequate weighing up or balance between the treaty-based rights.<sup>133</sup> Consequently, the

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<sup>127</sup> *Case of Tristán Donoso v. Panama, supra*, para. 57, and *Case of the Santo Domingo Massacres v. Colombia, supra*, para. 286.

<sup>128</sup> *Cf. Case of Kimel v. Argentina. Merits, reparations and costs. Judgment of May 2, 2008. Series C No. 177 para. 51, and Case of Mémoli v. Argentina, supra*, para. 127.

<sup>129</sup> *Cf. Case of Kimel v. Argentina, supra*, para. 75, and *Case of Mémoli v. Argentina, supra*, para. 127.

<sup>130</sup> *Cf. Case of Kimel v. Argentina, supra*, para. 51, and *Case of Granier et al. v. Venezuela, supra*, para. 144.

<sup>131</sup> *Cf. The Word “Law” in Article 30 of the American Convention on Human Rights. Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, paras. 35 and 37.*

<sup>132</sup> *Cf. Case of Tristán Donoso v. Panama, supra*, para. 56 and *Case of López Lone v. Honduras, supra*, para. 168.

<sup>133</sup> *Cf. Case of Kimel v. Argentina, supra*, para. 51, and *Case of Mémoli v. Argentina, supra*, para. 127.

reasoned analysis of necessity made by this Court derives from the international treaty that it must interpret,<sup>134</sup> together with its consistent case law.

104. For the purposes of this case, concerning the interpretation of subsequent responsibilities for the exercise of freedom of expression in the workplace, the Court will analyze the restriction imposed in light of Article 13(2) of the Convention, taking into account the following requirements, concurrently: (i) classification of Mr. Lagos del Campo's statements; (ii) legality and purpose, and (iii) necessity and obligation to state reasons.<sup>135</sup>

### **1.2.1 Classification of Mr. Lagos del Campo's statements**

105. The Court finds it necessary to determine: (a) whether Mr. Lagos del Campo's statements were given in his capacity as the workers' representative (*supra*, para. 96); (b) whether they were of public interest, and (c) the significance of his statements.

106. First, regarding the representation exercised by Mr. Lagos del Campo, the Court observes – based on the principle of immediacy – in the very first exculpatory letter that Mr. Lagos del Campo submitted to the company, he specified that the statements:

“were given in [his] capacity as president of the Electoral Committee of the CEPER Industrial Community, as they were directly and exclusively related to internal matters of an interest to the Community, such as the irregularities in the electoral process [...] that, in any case, had been denounced by the members of the Community themselves, and that had been verified by the Participation Directorate of the Ministry of Industry.”<sup>136</sup>

107. Also, from the body of evidence, the Court finds that: (i) since Mr. Lagos del Campo was president of the Electoral Committee of the company's Industrial Community, a post to which he had been elected by the General Assembly composed of all the members of the Industrial Community – that is, by all the company's permanent workers<sup>137</sup> – and that his functions included holding elections for the members of the Community Council and for its representatives on the company's Board, he undoubtedly held a position that represented the interests of the company's workers;<sup>138</sup> (ii) Mr. Lagos del Campo also represented the workers before the CONACI (*supra* para. 50),<sup>139</sup> and (iii) the statements he made to “*La Razón*” reveal

<sup>134</sup> Article 30 of the American Convention (on the scope of restrictions), indicates that the permitted restrictions “may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.” Cf. *The Word “Laws” in Article 30 of the American Convention on Human Rights OC-6/86, supra*, para. 38. Also, Article 32 of this instrument establishes the relationship between duties and rights, indicating that the rights of each person are limited by the rights of others [...]. Cf. *Compulsory Membership of an Association Prescribed by Law for the Practice of Journalism OC-5/85, supra*, para. 65.

<sup>135</sup> Cf. *Case of Mémoli v. Argentina, supra*, para. 130.

<sup>136</sup> Letter of Mr. Lagos del Campo of June 28, 1989, addressed to Miguel Balbi, Industrial Relations Manager, Conductores Eléctricos Peruanos S.A. CEPER-PIRELLI, with the company received stamp dated June 30, 1989. (evidence file annex 5 to the State's answering brief, ff. 1460 to 1463).

<sup>137</sup> Cf. President of the Republic of Peru. Decree Law 21789. Law of the Industrial Community of February 1, 1977, Arts. 14, 20 and 26 (evidence file, annex 1 of the motions and pleadings brief, ff. 1390 to 1399).

<sup>138</sup> Cf. Expert opinion of César José González Hunt (evidence file, annex 1 final written arguments, f. 1486) and Opinion of Omar Sar Suárez (merits file f. 519).

<sup>139</sup> Written opinion of expert witness Cesar González Hunt before the Inter-American Court. In it, he referred to the fact that “according to the jurisdictional organs,” “[t]he industrial community and the labor union are institutions designed to protect the actions of workers to achieve social and economic benefits and they each have their own characteristics that constitute their independence. The purposes of the industrial community and the labor union are different, which does not mean that they are antagonistic; they must act in a coordinated manner in their respective area of action to the benefit of the workers (File No. 56-56 – Iquitos Court).” Similarly, he noted that “[t]he industrial community and the labor union are institutions designed to protect the actions of workers to achieve social and economic benefits and they each have their own characteristics that constitute their independence. The purposes of the industrial community and the labor union are different, which does not mean that these are antagonistic, and they must

that he denounced supposed irregularities in the internal electoral process, and he made these statements as President of the Committee responsible for regulating that process.<sup>140</sup>

108. Consequently, the Court confirms that Mr. Lagos del Campo made the said statements in his capacity as a workers' representative<sup>141</sup> and within the framework of the exercise of his responsibilities as president of the Electoral Committee.

109. Second, regarding the general interest of the statements, the Court has indicated that Article 13 of the Convention protects statements, ideas or information "of any kind, whether or not it is of public interest. However, when such statements relate to issues of public interest, the judge must evaluate the need to limit freedom of expression with special care."<sup>142</sup>

110. Thus, the Court has considered of public interest information or opinions regarding matters on which society has a legitimate interest to know and to be informed about concerning issues relating to the functioning of the State or that affect general rights or interests or that may have significant consequences.<sup>143</sup>

111. The Court recognizes that information concerning labor questions is usually of general interest. First, there is a collective interest for the corresponding workers, and this has an even greater importance when it refers to relevant aspects, for example, in relation to a specific sector,<sup>144</sup> and especially when the opinions refer to an organizational model of the State or its institutions in a democratic society.<sup>145</sup>

112. Regarding public interest, expert witness Damián Loreti stated during the hearing before the Court that:

[On the one hand], when placing the analysis [...] of public interest] in context, it is necessary to take into account the content of the opinion or publication, whether it contributes to the

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act in a coordinated manner in their respective area of action to the benefit of the workers (*Actualidad Laboral*, August T1976)" (evidence file, annexes to the final arguments, f. 1416).

<sup>140</sup> The question asked by *La Razón* was "In light of these abuses by the employers' association, what measures have you taken as president of the Electoral Committee?"

<sup>141</sup> Cf. ILO, Recommendation on Workers' Representatives, 1971 (No. 143), Recommendation on protection and facilities that should be afforded to workers' representatives. Fifty-sixth Session of the ILO General Conference; date adopted, June 23, 1971.

<sup>142</sup> Cf. *Case of Memolí v. Argentina*, *supra*, para. 145.

<sup>143</sup> Cf. *Case of Tristán Donoso v. Panama*, *supra*, para. 51, and *Case of Fontevecchia and D'Amico v. Argentina*, *supra*, para. 61, and *Case of Memolí v. Argentina*, *supra*, paras. 145 and 146.

<sup>144</sup> Cf. ECHR *Case of Palomo Sánchez and Others v. Spain* [GS], No. 28955/06, No. 28957, No. 28959/06; No. 28964/06. Judgment of September 12, 2011, para. 72. In this case, the European Court indicated that "it did not share the Government's view that the content of the impugned articles did not concern any matter of general interest. The publication at issue took place in the context of a labour dispute inside the company to which the applicants had presented certain demands. The primary role of publications of this type 'should be to deal with matters essentially relating to the defence and furtherance of the interests of the unions' members in particular and with labour questions in general' (see paragraph 24 above, in particular point 170 of the International Labour Office Digest cited therein). The debate was therefore not a purely private one; it was at least a matter of general interest for the workers of the company P. (see, *mutatis mutandis*, *Fressoz and Roire v. France* [GC], No. 29183/95, § 50, ECHR 1999-I, and *Boldea v. Romania*, No. 19997/02, § 57, 15 February 2007). 73. That being said, the existence of such a matter cannot justify the use of offensive cartoons or expressions, even in the context of labour relations (see paragraph 24 above, point 154 of the *Digest* cited therein). Moreover, the remarks did not constitute an instantaneous and ill-considered reaction, in the context of a rapid and spontaneous oral exchange, as is the case with verbal exaggeration. On the contrary, they were written assertions, published in a quite lucid manner and displayed publicly on the premises of the company P. (compare *De Diego Nafría*, cited above, § 41). ECHR, *Case of Boldea v. Romania*, No. 19997/62. Judgment of February 15, 2007).

<sup>145</sup> Cf. *Case of Baena Ricardo et al. v. Panama*. Merits, reparations and costs. Judgment of February 2, 2001. Series C No. 72, para. 166; Articles 3 and 4 of the Inter-American Democratic Charter, *supra*.

discussion or to the interests of labor union or worker activities. The means used, the social context, including the timeliness. The nature of the position of the employee, whether or not he is a representative. The type of company [...], the content of the opinion or publication that contributes to the discussion or to the defense of interests; the means used. The context includes the timeliness, the nature, the position of the employee; in other words, if the opinion is given in defense of others or of the individual himself; the nature of the company, whether it is public or private; the way in which the criticism was expressed; whether it was spontaneous; what were the intentions; whether it was based on facts, and whether there have been previous actions by the employee and the employer that would justify the statements.

[On the other hand], it is possible to systematize the cases in which the statements [...] are not of public interest. [For example,] when they refer to or affect the product offered by the company; [...] criticism of the quality of the service offered when there is no [general] interest that justifies this or it is not a public service [...], or when someone's private life is affected without this being justified [...]; collaboration with the competition, breach of confidentiality [...] of any kind. The existence of [...] disparaging information that is not justified towards co-workers with better jobs, which alters the normal co-existence in the workplace, and when the statements are unnecessary and do not defend the interests of the workers, or are not based on facts [...].

113. The Court considers that, in principle, statements aimed at promoting the proper functioning and improvement of working conditions, or workers' demands, represent, in themselves, a legitimate and coherent purpose within the framework of worker organizations.<sup>146</sup> Also, statements made in the context of an internal electoral process contribute to the debate during the process as an essential tool of the collective interest and of voters.

114. In this regard, the European Court of Human Rights has recognized certain statements made by workers in the specific context of the private sphere as of general interest in light of the right to freedom of expression under the European Convention.<sup>147</sup>

115. In order to evaluate the public interest in this specific case, the Court finds that it must consider the following elements: (i) The article examined was published in the context of an internal labor conflict based on presumed irregularities in the electoral process that the competent authority had been informed of, prior to the its publication; (ii) in the published interview, Mr. Lagos del Campo indicated that he would "*continue fighting against the fraud, and call[ed] on all the workers to close ranks, demanding that [their] legal rights and obligations be respected. [He also asked] for the solidarity of all the country's industrial communities and labor unions to express their rejection of the attempt to liquidate the industrial communities,*" and this reveals the collective nature of his statements; (iii) in Peru, one of the purposes of the industrial communities is to promote the participation of the workers in a company's patrimony and ensure an adequate distribution of profits; (iv) his statements referred to the intervention of the Participation Directorate of the Ministry of Industry; (iv) the newspaper requested the interview with Mr. Lagos del Campo and published the interview in the written media, considering that he referred to matters that were relevant for the interested sector of society (industry) (*supra*, para. 111).

<sup>146</sup> Cf. ECHR. *Case of Palomo Sánchez and Others v. Spain* [GS], *supra*, paras. 56 and 61. In *Palomo Sánchez and Others v. Spain*, the European Court determined that the personal opinions of the members of the Executive Committee of a trade union are protected by the right to freedom of association, so that "the members of a trade union must be able to express to their employer the demands by which they seek to improve the situation of workers in their company."

<sup>147</sup> ECHR. *Case of Palomo Sánchez and Others v. Spain; Case of Fuentes Bobo v. Spain*, No. 39293/98. Judgment of February 29, 2000.

116. Consequently, the Court notes that, in the context of the said electoral process, the statements made by Mr. Lagos del Campo, as a representative of the workers, in addition to exceeding the private sphere, had a relevance or impact that went beyond not only the collective interest of the company's workers,<sup>148</sup> but of members of the industrial communities as it related to the industrial communities in general. Therefore, the facts of this case reveal that the information contained in Mr. Lagos del Campo's statements was of general interest and, consequently, was subject to a greater level of protection.

117. Third, regarding the significance of the statements published in "*La Razón*," the Court recalls that freedom of expression, particularly in matters of general or public interest, "constitutes one of the essential foundations of a democratic society."<sup>149</sup> It must be guaranteed not only in relation to the dissemination of information and ideas that are favorably received or regarded as inoffensive or as a matter of indifference, but also as regards those that offend the State or any sector of the population.<sup>150</sup> In addition, the Court has indicated that "[i]n discussions on issues of great public interest, it protects not only statements that are inoffensive or well-received by public opinion, but also those that shock, offend or disturb public officials or any sector of the population."<sup>151</sup> In a democratic society, the media must provide extensive information on matters of public interest, which affect social rights [...].<sup>152</sup> Nevertheless, the Court is aware that the extent of acceptable criticism when directed against a private individual is narrower than that directed against politicians or public officials in the exercise of their functions.<sup>153</sup>

118. With regard to the statements published in the interview, the Court considers that, in general, they reveal that the purpose sought by Mr. Lagos del Campo was to denounce alleged irregularities; in other words, to provide information on a situation that, in his opinion, violated the interests he represented,<sup>154</sup> accompanied perhaps by critical comments and opinions. Conversely, the content of those statements in this context does not reveal that they had an evident offensive, defamatory, degrading or malicious intent against anyone in particular or that they were aimed at harming the company's product (*supra* para. 112). Although the publication contained bombastic phrases concerning the situation denounced, their content did not exceed the threshold of special protection for the nature of the complaints made in the said context.<sup>155</sup>

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<sup>148</sup> ECHR. *Case of Palomo Sánchez and Others v. Spain [GS]*, *supra*, para. 72, and ECHR, *Case of Fuentes Bobo v. Spain*, *supra*, para. 40. In this regard: the Court, while acknowledging that the expressions used were offensive, concluded that they were included in a context of a long public discussions that concerned matters of general interest concerning the administration of public television.

<sup>149</sup> Cf. *Compulsory Membership of an Association Prescribed by Law for the Practice of Journalism*. OC-5/85, *supra*, para. 70, and *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*. *supra*, para. 140.

<sup>150</sup> Cf. *Case of "The Last Temptation of Christ" v. Chile*. *supra*, para. 69, and *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, *supra*, para. 140.

<sup>151</sup> Cf. *Case of "The Last Temptation of Christ" v. Chile*, *supra*, para. 69, and *Case of Kimel v. Argentina*, *supra*, para. 88; ECHR, *Case of Palomo Sánchez and Others v. Spain [GS]*, *supra*, para. 53 to 62.

<sup>152</sup> *Case of Kimel v. Argentina*, *supra*, para. 88.

<sup>153</sup> *Case of Palomo Sánchez and Others v. Spain [GS]*, *supra*, para. 42. and ECHR. *Case of Nikula v. Finland*, No. 31611/96. Judgment of March 21, 2002. para. 48

<sup>154</sup> *Mutatis mutandis*: ILO Convention 98: Right to Organize and Collective Bargaining, 1949 (Entry into force: July 18, 1951). Adopted: Geneva, Thirty-second meeting of the ILO General Conference (July 1, 1949). 2.1 Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration. 2.2 In particular, acts which are designed to promote the establishment of workers' organisations under the domination of employers or employers' organisations, or to support workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations, shall be deemed to constitute acts of interference within the meaning of this Article.

<sup>155</sup> ECHR. *Case of Fuentes Bobo v. Spain*. No. 39293/98. Judgment of February 29, 2009. para. 40. The Court, while acknowledging that the phrases used were offensive, concluded that they occurred in a context of a "prolonged public debate concerning matters of general interest relating to the management of public television." Cf. ILO,

### 1.2.2. Legality and purpose

119. According to Article 13(2), to evaluate whether a restriction of a right established in the American Convention is permitted in light of this treaty it is necessary to analyze whether the restrictive measure complies with the requirement of legality. This means that the general circumstances and conditions that authorize restrictions of a human right must be clearly established by law, in both the formal and the substantial sense.<sup>156</sup>

120. Regarding restrictions of a criminal nature, the Court has established that it is necessary to abide strictly by the requirements that are characteristic of the definition of the crime in order to comply with the principle of legality.<sup>157</sup> However, the Court notes that the law applied to justify Mr. Lagos del Campo's dismissal was not of a criminal nature, but rather a labor law. Therefore, it considers that compliance with the requirement of legality does not require the same evaluation as that made in cases that involve the violation of rights protected by criminal law because, as the Court has indicated when evaluating compliance with the requirement of legality in cases that do not involve criminal matters, "the degree of precision required of domestic legislation depends significantly on the subject matter."<sup>158</sup> Thus, the same degree of precision cannot be required for all legal norms that establish restrictions of a right protected by the Convention because:

[T]he law must be formulated with sufficient precision to enable people to regulate their conduct so as to be able to predict the consequences that a given action may entail to a degree that is reasonable under the circumstances. As has been noted, while the certainty of the law is highly desirable, it may bring with it excessive rigidity. On the other hand, the law must be able to remain in force despite changing circumstances. Consequently, many laws are formulated in terms, that to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.<sup>159</sup>

121. In addition, the Court notes that the law examined was designed to protect a legitimate purpose that was compatible with the Convention, which is the protection of the honor and dignity of the employers and other workers in company or in the workplace. In this regard, the Court considers that the fact that paragraph (h) of article 5 of Law 24514 does not expressly establish a delimitation of its application to protect statements of public interest, or those statements made by workers' representatives in the exercise of their functions, is not *per se* incompatible with the Convention. This is because the State is not obliged to make an exhaustive determination in the law of which statements require special protection; rather, it will be the authorities responsible for its enforcement that must ensure the protection of other rights that are in play, in keeping with the legitimate purposes of the norm, by an adequate control of legality.

122. In this regard, the Court recalls that, under Article 2 of the Convention, States have the obligation to implement actions leading to the effective observance of the rights protected by the Convention, because the existence of a law does not, in itself, ensure that it is enforced

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Recommendation on Workers' Representatives, 1971 (No. 143), Recommendation on protection and facilities that should be afforded to workers' representatives. Fifty-sixth Session of the ILO General Conference; date adopted June 23, 1971. See also. *Mutatis mutandis*: ILO, Freedom of Association and Collective Bargaining" para. 212, p. 96.

<sup>156</sup> Cf. *The Word "Laws" in Article 30 of the American Convention on Human Rights*. OC-6/86, *supra*, paras. 35 and 37; *Case of Mémoli v. Argentina*, *supra*, para. 130, and *Case of Granier et al. v. Venezuela*, *supra*, para. 119.

<sup>157</sup> Cf. *Case of Castillo Petruzzi et al. v. Peru. Merits, reparations and costs*. Judgment of May 30, 1999. Series C No. 52. para. 121; *Case of Kimel v. Argentina*, *supra*, para. 63, and *Case of Memolí v. Argentina*, *supra*, para. 154

<sup>158</sup> Cf. *Case of Fontevecchia and D'Amico v. Argentina*, *supra*, para. 89.

<sup>159</sup> *Case of Fontevecchia and D'Amico v. Argentina*, *supra*, para. 90.

adequately. Thus, the Court has indicated that it is necessary that the application of laws or their interpretation, as jurisdictional practices and an expression of state public order, is adapted to the purpose sought by Article 2 of the Convention.<sup>160</sup> Accordingly, even though the Court finds that paragraph (h) of Article 5 of Law 24514 did not *per se* violate Article 13(2) of the American Convention, this did not exempt the authorities from ensuring that this provision was applied with due consideration for the other constitutional and treaty-based rights of the workers and their representatives (*infra*, para. 129).

123. Consequently the Court considers that paragraph (h) of Article 5 of Law 24514 does not, *per se*, violate Article 13(2) of the American Convention and that, therefore, it had a valid purpose in light of the Convention and thus did not violate the requirement of legality.

### **1.2.3. Necessity for the restriction and obligation to state reasons**

124. The Court has established the standard that, "for a restriction of freedom of expression to be compatible with the American Convention, it must be necessary in a democratic society, understanding by 'necessary' the existence of an essential social need that would justify the restriction."<sup>161</sup> Specifically, the Court must determine whether, in light of all the circumstances, the sanction imposed on the presumed victim was proportionate to the legitimate purpose sought,<sup>162</sup> and whether the reasons given by the internal authorities to justify it were pertinent and sufficient.<sup>163</sup>

125. In this regard, the Court understand that dismissal is probably the maximum penalty in the employment relationship;<sup>164</sup> therefore, it must respond to an imperative need in relation to freedom of expression and it must be duly justified ("justified dismissal")<sup>165</sup>.

126. In this regard, paragraphs 5 and 6 of ILO Recommendation No. 143 on Workers' Representatives are relevant when establishing "the special protection that workers' representatives should have against any act prejudicial to them, including dismissal, based on their status as workers' representatives, among other matters, insofar as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements."<sup>166</sup>

<sup>160</sup> Cf. *Case of Castillo Petruzzi et al. v. Peru*, *supra*, para. 207, and *Case of Lopez Lone et al. v. Honduras*, *supra*, para. 214.

<sup>161</sup> *Compulsory Membership of an Association Prescribed by Law for the Practice of Journalism OC-5/85*, *supra* footnote 36, paras. 41 to 46. In the latter paragraph, the Court indicated: "[i]t is important to note that the European Court of Human Rights, in interpreting Article 10 of the European Convention, concluded that 'necessary,' while not synonymous with 'indispensable,' implied 'the existence of a 'pressing social need' and that for a restriction to be 'necessary,' it is not enough to show that it is 'useful,' 'reasonable' or 'desirable.' [...]. This conclusion, which is equally applicable to the American Convention, suggests that the 'necessity' and, hence, the legality of restrictions imposed under Article 13(2) on freedom of expression, depend upon showing that the restrictions are required by a compelling public interest." Also, Cf. ECHR, *Case of Editions Plon v. France*, Judgment of May 18, 2004, para. 42, and ECHR. *Case of MGN Limited v. The United Kingdom*. No. 39401/04. Judgment of January 18, 2011. para. 139.

<sup>162</sup> Cf. *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile*, *supra*, para. 69 and *Case of López Lone et al. v. Honduras*, *supra*, para. 168.

<sup>163</sup> Cf. ECHR, *Case of Fuentes Bobo v. Spain*, Judgment of February 29, 2000, *supra*, para. 42 and ECHR. *Case of Palomo Sánchez and Others v. Spain [GS]*, *supra*, para. 63.

<sup>164</sup> Cf. ECHR. *Case of Heinisch v. Germany*. No. 28274/08. Judgment of July 21, 2011, para. 91, and ECHR. *Case of Palomo Sánchez v. Spain [GS]*, *supra*, paras. 75 and 76; and Expert opinion of Damián Loreti (hearing transcript pp. 43 and 44).

<sup>165</sup> UN. ECOSOC. General Comment 18 affirms the obligation of States to assure individuals their right to work, including the right not to be deprived of work unfairly. See also: Committee on Economic, Social and Cultural Rights, General Comment 18, "The right to work," E/C.12/GC/18.

<sup>166</sup> Cf. ILO, Recommendation on Workers' Representatives, 1971 (No. 143), Recommendation on protection and facilities that should be afforded to workers' representatives. Fifty-sixth Session of the ILO General Conference; date adopted, June 23, 1971.

127. First, in this case, in a letter informing him of his dismissal, the employer considered that Mr. Lagos del Campo had not disproved the charges against him, so that it was in order to sanction him with dismissal, pursuant to the procedure established in Article 6 of the Decree-Law (*supra*, para. 55), informing the administrative labor authority, and with the corresponding consequences (*supra*, para. 57).

128. In a complaint dated July 26, 1989, Mr. Lagos del Campo contested the dismissal as "unjustified and unfair," Accordingly, Peru's labor jurisdiction was called on to assess the necessity of the restriction imposed, and was expressly asked to evaluate the necessity of applying the penalty (*supra*, para. 58).

129. In consequence, the Second Labor Court, which evaluated the dismissal, indicated that "in reiterated final judgments of this Court [...] it has been established that the worker who makes statements or whose opinions published in newspapers offends the honor and image of the employer commits the serious offense established in paragraphs (a) and (h) of Article 5 of Law 24514." In addition, after quoting some lines from the interview in dispute it concluded that "the offensive words indicated in the preceding paragraph constitute[d] serious insubordination or serious verbal misconduct against the employer, its representatives and co-workers, as the newspaper statements of the plaintiff referred to members of the Board of Directors and co-workers in his workplace."<sup>167</sup> It also indicated that "the Constitution guarantees freedom of expression, but not to offend the honor and dignity of senior members of the employer's company."

130. Regarding the requirement of necessity in relation to the sanction imposed, the Court notes that the State, through the Second Labor Court, which delivered the final decision, did not consider the following fundamental elements in its analysis: (i) Mr. Lagos del Campo was a representative elected by the workers and was acting in exercise of his mandate (*supra* para. 108); (ii) his statements were made in the context of his functions and of an electoral debate and, consequently, were of general and collective interest; (iii) his statements were subject to enhanced protection in the exercise of his functions; (iv) the statements were not of such import that they exceeded the threshold of protection in view of the electoral and labor context, and (v) it was not proved that there was an overriding necessity to protect the rights to reputation and honor in this specific case. Even though freedom of expression was explicitly mentioned, the ruling does not indicate that either the rights in play or their consequences had been weighed in light of the requirement of necessity (*supra*, para. 124) (specifically established by Article 13(2) of the American Convention). Moreover, the arguments that justified the first instance decision were not disproved, in order to make it essential to reverse it. Consequently, the heavy penalty of dismissal was ratified by that court without considering these fundamental elements of special protection (*supra* paras. 108 and 116), so that the sanction imposed was unnecessary in the specific case.

131. Accordingly, the Court finds that the ruling of the Second Labor Court failed to state the reasons for the decision<sup>168</sup> that would have analyzed the rights in play in light of the above-

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Paragraph 6. Where there are not sufficient relevant protective measures applicable to workers in general, specific measures should be taken in which a detailed and precise definition is given of the reasons justifying termination of employment; also, a consultation with, an advisory opinion from, or agreement of an independent body, public or private, or a joint body, before the dismissal of a worker becomes final; and a special recourse procedure open to workers' representatives who consider that their employment has been unjustifiably terminated.

<sup>167</sup> Second Labor Court of Lima. Judgment 08-0891 of August 8, 1991 (evidence file, annex 12 to the Merits Report, ff. 47 and 48).

<sup>168</sup> According to Article 233 of the 1979 Peruvian Constitution, to ensure the proper administration of justice, it was required that, "in all the instances, a decision shall include a statement of reasons that expressly mentions the applicable law and the grounds for that decision." Regarding the obligation to state the reasons, the Court has indicated



mentioned elements, and would have assessed the arguments of the parties and the decision that was reversed. Therefore, the failure to provide a statement of reasons had a direct impact on due process, because that court failed to provide the legal grounds substantiating its decision to ratify the dismissal of Mr. Lagos del Campo in the context described above.

132. Based on the above, the Court concludes that the State endorsed a restriction of the right to freedom of thought and expression of Mr. Lagos del Campo, by an unnecessary sanction in relation to the objective sought and without a due justification. This was because, based on the circumstances of this case, there was no overriding necessity that would have justified the dismissal of Mr. Lagos del Campo. In particular, his freedom of expression was restricted without taking into consideration that his statements referred to matters of general interest, as part of his remit, and were protected also by his capacity as a workers' representative, as president of the Electoral Committee. Therefore, the Peruvian State violated Articles 13(2) and 8(2) of the American Convention, to the detriment of Mr. Lagos del Campo.

## **2. Violation of job security**

### **2.1 Arguments on labor rights**

133. In this case, the Court notes that, in the litigation before this Court, neither the representatives nor the Commission expressly mentioned the presumed violation of labor rights in light of the American Convention. However, the Court has noted that, in all the instances, both at the domestic level and before the Commission, the presumed victim repeatedly alleged that his labor rights had been violated, in particular his right to job security, and also the consequences of the dismissal. For instance:<sup>169</sup>

a. In a communication of October 13, 1993, addressed to the President of the Inter-American Commission, and received in the OAS offices in Peru on October 14, 1993, Mr. Lagos del Campo stated that, in the judgment delivered by the Second Labor Court "[there were] procedural irregularities that infringed [his] judicial protection, thus violating the provisions of [his] country's Constitution that guaranteed to every Peruvian citizen *the right to due process of law and the right to work.*" In annex 1 to this communication, the petitioner clarified, among other matters, that his "**right to job security** indicated in article 48 of the Constitution and articles 27 and 26 of the proposed new constitution" had been violated."<sup>170</sup>

b. In a communication dated September 30, 1994, addressed to the Inter-American Commission and received in the OAS offices in Peru on October 4, 1994, the petitioner stated that "the violation of [his] constitutional and human rights, such as *the right to a fair trial and*

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that "it is one of the 'due guarantees' included in Article 8(1) to safeguard the right to due process." "[...] It is a guarantee linked to the proper administration of justice [...] that protects the right [...] to be tried based on legal grounds in a democratic society." "The decisions taken by domestic organs that may affect human rights must be duly substantiated because, to the contrary, they would be arbitrary decisions." Nevertheless, it should be recalled that the obligation to state reasons does not require a detailed answer to every argument of the parties, but it may vary according to the nature of the decision, and must be determined in light of the circumstances of the case, so that "in each case, it is necessary to analyze whether this guarantee has been complied with." 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. 90; *Case of Zegarra Marín v. Peru, supra*, para. 178. Cf. ECHR *Case of Hiro Balani v. Spain*. No. 18064/91. Judgment of December 9, 1994. Para. 27; *Case of Ruiz Torija v. Spain*. No. 18390/91. Judgment of December 9, 1994, para. 29; *Case of Suominen v. Finland*. No. 49684/99. Judgment of September 27, 2011, and *Case of Hirvisaari v. Finland* No. 49684/99. Judgment of September 27, 2011, para. 30.

<sup>169</sup> The italics and bold letters have been added.

<sup>170</sup> Initial petition before the IACHR (evidence file, procedure before the IACHR, ff. 271, 436, 439, 510 and 558 to 561).

**the right to work** that the senior authorities of [his] country were aware of, [and] up until [then] there [had not been] any judicial action or justice [...]."<sup>171</sup>

c. In a communication of the Workers' Federation of the Metallurgical Industry of Peru (FETIMP) on behalf of Mr. Lagos del Campo, addressed to the President of the Inter-American Commission dated June 4, 1997, and received by the Commission on August 5, 1998, the Federation "describe[d] the case of the Peruvian citizen and member of [its] union organization, Mr. Lagos del Campo, who was [...] *unjustly dismissed from his workplace* in CEPER PIRELLI, S.A. on June 26, 1989. He was a victim of poor administration of justice when he had recourse to the domestic courts and, is still demanding a response to application for amparo No. 2651-91." It also mentioned that, at that date, no answer had been received to the letter sent to the Commission on October 14, 1993, through the OAS Office in Lima.<sup>172</sup>

d. In a petition addressed to the Commission on June 30, 1997, Mr. Lagos del Campo "file[d] a complaint of a human rights violation against the Peruvian Government for violating the *right to equal protection of the law (Art. 22) and also the right to judicial protection against violations of fundamental rights (Art. 23) [...]*." He also asked that the petition be admitted and processed "**to achieve the re-establishment of [his] rights to equal protection of the law, due process, and the right to work**, which [had been] violated by the Second Labor Court and CC.LL., by the decision resulting from an irregular process [...]"<sup>173</sup>.

e. The Commission responded to Mr. Lagos del Campo in a communication of September 2, 1997, received on September 24, 1997, by the FETIMP, in which the Commission advised the petitioner that his petition had "not met the requirements established in the [IACHR] Rules of Procedure, in particular Articles 32, 33, 34 and 37 [...]." The Commission also asked the petitioner to indicate the facts and the articles of the Convention that he considered had been violated, and the final judgment of the domestic jurisdiction.<sup>174</sup>

f. In an "updated and regularized" petition dated July 22, 1998, addressed to the President of the Inter-American Commission (which does not indicate the date on which it was received), Mr. Lagos del Campo stated "[t]hat, pursuant to the provisions of the American Convention on Human Rights, which [his] country had ratified, [he was] lodging a complaint of violation of human rights against the Peruvian Government because it had violated *the right to equal protection of the law (Art. 22) and also the right to judicial protection against violations of fundamental rights (Art. 23) [...]*." In the same document, the petitioner asked for the petition also to be admitted and processed "*to re-establish [his] rights to equal protection of the law, due process and **the right to work***, which [had been] violated by the Second Labor Court and CC.LL., by the decision resulting from an irregular process [...]"<sup>175</sup>

g. In the petition addressed to the Executive Secretary of the Commission on January 21, 2002, receive by the Commission on the same date, the petitioner stated that "the competent authorities and public opinion in general [were] fully aware of the violation of [his] constitutional and human rights: *the right to a fair trial and **the right to work***."<sup>176</sup>

h. In a communication of February 20, 2003, addressed to the President of the Commission, and received on February 26, 2003, Mr. Lagos del Campo stated that, "as the updated and regularized petition of July 23, 1998, [had] opportunely substantiated before the international jurisdiction that you preside, in Peru there had been a flagrant violation of [his] human rights ; to wit: *the right to be heard by a competent court, the right of equal protection of the law, the right*

<sup>171</sup> Brief of September 30, 1994, presented to the OAS Office in Peru (evidence file, procedure before the IACHR, ff. 516 and 594).

<sup>172</sup> Brief of the FETIMP dated June 4, 1997 (evidence file, procedure before the IACHR, f. 525).

<sup>173</sup> Petition lodged before the IACHR (evidence file, procedure before the IACHR, ff. 371 and 377).

<sup>174</sup> IACHR brief of September 2, 1997 (evidence file, procedure before the IACHR, f. 182).

<sup>175</sup> Petition updated and formalized addressed to the Inter-American Commission on July 22, 1998 (evidence file, procedure before the IACHR, ff. 186, 192, 426, 432, 451 and 457).

<sup>176</sup> Brief submitted to the IACHR of January 21, 2002 (evidence file, procedure before the IACHR, f. 380).

to protection of the family, the right to judicial protection against the violation of fundamental rights and the **right to work**, rights protected by the American Convention on Human Rights, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 'Protocol of San Salvador,' and other international human rights instruments."<sup>177</sup>

i. Reports Nos. 21-2003-JUS/CNDH-SE and 57-2007-JUS/CNDH/SE/CESAPI of the Executive Secretariat of the National Human Rights Council of Peru (the State) dated March 7, 2003, and May 15, 2007, indicated in the section on "Grounds for the petition or rights presumably violated" that, in the petition lodged before the IACHR, Mr. Lagos del Campo had requested "immediate reinstatement in his job at CEPER-PIRELLI, with the corresponding salary and benefits."<sup>178</sup>

j. A communication of the Commission of November 12, 2010, addressed to Mr. Lagos del Campo, indicated "that the Commission [...had] examined petition No. 459-97 and [had] adopted Admissibility Report No. 152/10 on November 1, 2010. [...] Pursuant to article 37(1) of its Rules of Procedure, the IACHR establishe[d] a time frame of three months from the date of transmission of th[e] communication for presentation of any additional observations on the merits of the matter."<sup>179</sup>

k. In Admissibility Report No. 152/10, petition 459-97, adopted on November 1, 2010, the IACHR decided "[t]o declare this case admissible with regard to the alleged violations of the rights recognized in Articles 8 and 13 in conjunction with Article 1(1) of the American Convention." However, the Commission decided "[t]o declare inadmissible the arguments regarding the alleged characterization of violations of Articles 24 and 25."<sup>180</sup> In paragraph 15 of the Admissibility Report, the Commission indicated that:

"The petitioner believed that his right to due process enshrined in Article 8 of the American Convention was violated in connection with Article 14(1) of the International Covenant on Civil and Political Rights, **the right to work**, the right to equality before the law, and the right to judicial protection. The petitioner likewise indicates that, according to Article 39 of the Amparo Law, in conjunction with Article 303 of the Constitution, his constitutional rights were violated.

l. The brief of APRODEH, on behalf of Mr. Lagos del Campo, dated March 16, 2011, addressed to the Commission's Executive Secretary and received on March 24, 2011, indicated that it presented observations on the Admissibility Report. In the part with requests, it asked "[t]hat, based on these conclusions, the State be required: (a) to facilitate the conditions for Alfredo Lagos del Campo to be able to take the necessary steps to recover **the use and enjoyment of his labor rights**, lost as a result of his dismissal [...]."<sup>181</sup>

134. Based on all the above, this Court has verified that, starting with the first communications he sent to the Commission, the petitioner requested protection of his rights "to a fair trial (due process) and the right to work." Also, the State indicated expressly that, in the petition he lodged before the Commission, Mr. Lagos del Campo requested "immediate reinstatement in his job at CEPER-PIRELLI, with the corresponding salary and benefits."

135. The Court points out that although the Commission noted this request in its Admissibility Report (*supra*, para. 133 (k)), it failed to rule on the alleged right to work and its possible

<sup>177</sup> Brief submitted to the IACHR of February 20, 2003 (evidence file, procedure before the IACHR, ff. 272 and 296).

<sup>178</sup> Report No. 21-2003-JUS/CNDH-SE of the Executive Secretariat of the National Human Rights Council of Peru of March 7, 2003 (evidence file, procedure before the IACHR, f. 224) and Report No. 57-2007-JUS/CNDH/SE/CESAPI of the Special Committee for Monitoring International Proceedings of May 15, 2007 (evidence file, procedure before the IACHR, f. 947).

<sup>179</sup> Communication of the IACHR of November 12, 2010 (evidence file, procedure before the IACHR, f. 773).

<sup>180</sup> Admissibility Report No. 152/10 adopted on November 1, 2010 (evidence file, procedure before the IACHR, ff. 776 and 784).

<sup>181</sup> Brief of APRODEH on behalf of Mr. Lagos del Campo of March 16, 2011 (evidence file, procedure before the IACHR, f. 703).

admissibility. The Court also notes that, from the early stage, the State was aware of this claim by the presumed victim (*supra*, para. 133(i)), which is also evident in the factual framework presented by the Commission.

136. In this regard, the State expressly indicated before the Court that:

"The whole dispute [is] centered on Mr. Lagos del Campo's dismissal by Ceper-Pirelli, because he committed an offense that was established in article 5(a) and (h) of Law No. 24514 – the law that regulates the right to job security" (merits file, folio 224). During the public hearing, the State considered that the case related to a context in which the "labor laws were highly protective of the worker," because "they provided a legal means of absolute protection of the workers' job security."

137. Consequently, the Court notes that the facts corresponding to the dismissal of Mr. Lagos del Campo have constantly been aired before the domestic judicial instances,<sup>182</sup> and also in the proceedings before the inter-American system<sup>183</sup> (*supra*, para. 133). Moreover, the argument on the right to work was repeatedly substantiated by the petitioner as of the initial procedural stages before the Commission. In this regard, the parties have had abundant possibilities of referring to the scope of the rights involved in the facts analyzed.<sup>184</sup>

138. In addition, the Court notes that both the 1979 and the 1993 Constitution of Peru, and labor laws at the time of the facts, explicitly recognized the right to job security,<sup>185</sup> as follows:

1979 Constitution. Article 48. "The State recognizes the right to job security. The employee may only be dismissed for just cause, established by law and duly proven."

139. Consequently, this Court has competence – in light of the American Convention and based on the *iura novit curia* principle, which is firmly supported by international jurisprudence<sup>186</sup> – to examine the possible violation of articles of the Convention that have not been alleged in the briefs submitted to it, in the understanding that the parties have had the opportunity to express their respective positions in relation to the facts that substantiate them, and as it has on numerous occasions.<sup>187</sup>

<sup>182</sup> His complaint before the Labor Court reveals the labor dispute. In his petition, he indicated that "since the unfair and unjustified nature of the dismissal is well-known [...], [he] ask[ed] the court [...] to order the suspension of the dismissal and [his] reinstatement in [his] usual job" (evidence file, procedure before the IACHR, f. 27).

<sup>183</sup> In particular, the Court underlines that, in his first communication addressed to the Inter-American Commission on October 13, 1993, the petitioner stated, among other matters, that his "right to job security indicated in article 48 of the Constitution and articles 27 and 26 of the proposed new constitution" had been violated. Initial petition lodged before the IACHR (evidence file, procedure before the IACHR, f. 439).

<sup>184</sup> Cf. *Case of Godínez Cruz v. Honduras. Merits.* Judgment of January 20, 1989. Series C No. 5, para. 172, and *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of March 29, 2006. Series C No. 146, para. 186.

<sup>185</sup> Cf. Congress of the Republic of Peru. Constitution of Peru of July 12, 1979. Article 48: "The State recognizes the right to job security. [...]"; Congress of the Republic of Peru. Constitution of Peru of December 29, 1993. Article 22: "Work is a duty and a right. It is the basis of social well-being and a means for self-realization" and in article 27: "[t]he law accords the worker adequate protection against arbitrary dismissal," and Congress of the Republic of Peru. Law No. 24514. Article 2: "This law protects workers in the private sector or in public companies subject to the private sector regime [...]."

<sup>186</sup> Cf. PCIJ, *Case of the S.S. Lotus (France v. Turkey)*. Judgment No. 9, September 7, 1927. Series A; PCIJ, *Case relating to the Territorial Jurisdiction of the International Commission of the River Oder (United Kingdom, Czechoslovakia, Denmark, France, Germany, Sweden v. Poland)*. Judgment No. 23, September 10, 1929. Series A; PCIJ, *Case of the Free Zones of Upper Savor and the District of Gex (France v. Switzerland)*. Judgment No. 46, June 7, 1932. Series A/B; ECHR, *Case of Guerra and Others v. Italy*. No. 14967/89. Judgment of February 19, 1998, para. 45. See also: ECHR, *Case of Handyside v. The United Kingdom*. No. 5493/72. Judgment of December 7, 1976, para. 41, and ECHR, *Case of Phillis v. Greece*. Nos. 12750/87, 13780/88 and 14003/88. Judgment of August 27, 1991, para. 56.

<sup>187</sup> Cf. *Inter alia*, *Case of Velásquez Rodríguez v. Honduras. Merits, supra*, para. 163, and *Case of Acosta et al. v. Nicaragua, supra*, para. 189.

140. Therefore, for the purposes of this case, in light of Article 29 of the American Convention,<sup>188</sup> the Court will now examine the scope of the right to job security pursuant to Article 26 of the American Convention.

## **2.2 The right to job security as a protected right**

141. 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.<sup>189</sup>

142. As indicated in the case of *Case of Acevedo Buendía et al. v. Peru*,<sup>190</sup> the Court has the authority to decide any dispute concerning its jurisdiction.<sup>191</sup> Thus, the Court has previously asserted that the broad terms in which the Convention was drafted signify that the Court exercises full jurisdiction over all its articles and provisions.<sup>192</sup> It should also be noted that although Article 26 appears in Chapter III of the Convention, entitled "Economic, Social and Cultural Rights," it is also located in Part I of this instrument, entitled "State Obligations and Rights Protected" and, consequently, it is subject to the general obligations contained in Articles 1(1) and 2 in Chapter I (entitled "General Obligations"), as also are Articles 3 to 25 that appear in Chapter II (entitled "Civil and Political Rights").<sup>193</sup>

143. Regarding the specific labor rights protected by Article 26 of the American Convention, the Court observed that the wording indicates that these are right derived from the economic, social, educational, scientific, and cultural standards set forth in the OAS Charter. In this

<sup>188</sup> Cf. In this regard, Article 29(b) and (d) of the Convention establish that: "[n]o provision of this Convention shall be interpreted as: [...] b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party; [...] d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have." Thus, pursuant to the said Article 29, labor rights, such as the right to job security recognized in the 1979 and 1993 Constitutions of Peru, should incorporate, for the purposes of this case, the interpretation and scope of the right protected in Article 26 of the American Convention. Cf. *Compulsory Membership of an Association Prescribed by Law for the Practice of Journalism. Advisory Opinion OC-5/85 of November 13, 1985*, Series A No. 5, para. 44.

<sup>189</sup> Cf. *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller") v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of July 1, 2009 Series C No. 198, para. 101; *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 Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2015. Series C No. 298, para. 172, and Preamble to the American Convention. Similarly: Cf. UN. Committee on Economic, Social and Cultural Rights, General Comment No. 9, E/C.12/1998/24, December 3, 1998, para. 10. See also: ECHR, *Case of Airey v. Ireland*, No. 6289/73. Judgment of October 9, 1979, para. 26, and *Case of Sidabras and Dziautas v. Lithuania*, Nos. 55480/00 and 59330/00. Judgment of July 27, 2004, para. 47. In the *Case of Airey v. Ireland*, the European Court indicated that "[w]hilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention."

<sup>190</sup> Cf. *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller") v. Peru*, *supra*, paras. 16, 17 and 100.

<sup>191</sup> Cf. *Case of Ivcher Bronstein v. Peru. Jurisdiction*. Judgment of September 24, 1999. Series C No. 54, paras. 32 and 34, and *Case of Espinoza Gonzáles v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 20, 2014. Series C No. 289, para. 27.

<sup>192</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary objections, supra*, para. 29, and *Case of Garibaldi v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of September 23, 2009. Series C No. 203, para. 41.

<sup>193</sup> Cf. *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller") v. Peru*, *supra*, paras. 99 and 100. Cf. UN. Committee on Economic, Social and Cultural Rights. General Comment No. 18, E/GC.18/2005, November 24, 2005, paras. 48 to 50.

regard, Articles 45(b) and (c),<sup>194</sup> 46<sup>195</sup> and 34.g<sup>196</sup> of the Charter establish that “[w]ork is a right and a social duty,” and that this should be performed with “fair wages, employment opportunities, and acceptable working conditions for all.” These articles also establish the right of workers to “associate themselves freely for the defense and promotion of their interests.” In addition, they indicate that State must “harmonize the social legislation” for the protection of such rights. In its Advisory Opinion OC-10/89, the Court indicated that:

[...] The member States of the Organization have signaled their agreement that the Declaration contains and defines the fundamental human rights referred to in the Charter. Thus, the Charter of the Organization cannot be interpreted and applied as far as human rights are concerned without relating its norms, consistent with the practice of the organs of the OAS, to the corresponding provisions of the Declaration.<sup>197</sup>

144. In this regard, Article XIV of the American Declaration stipulates that: “[e]very person has the right to work, under proper conditions, and to follow his vocation freely.” This provision is relevant to define the scope of Article 26, because “the American Declaration constitutes, as applicable and in relation to the OAS Charter, a source of international obligations.”<sup>198</sup> Furthermore, Article 29(d) of the American Convention expressly establishes that “no provision of this Convention shall be interpreted as: [...] (d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature have.”

145. In addition to derivation of the right to work based on an interpretation of Article 26 in relation to the OAS Charter, together with the American Declaration, the right to work is explicitly recognized in different domestic laws of the States in the region,<sup>199</sup> as well as in a vast international *corpus iuris*; *inter alia*: Article 6 of the International Covenant on Economic, Social

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<sup>194</sup> Article 45 of the OAS Charter. “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: (a) All human beings, without distinction as to race, sex, nationality, creed, or social condition, have a right to material well-being and to their spiritual development, under circumstances of liberty, dignity, equality of opportunity, and economic security; (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. [...]”

<sup>195</sup> 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.”

<sup>196</sup> 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.”

<sup>197</sup> Interpretation of the American Declaration of the Rights and Duties of Man within the framework of Article 64 of the American Convention on Human Rights. Advisory Opinion OC-10/89 of July 14, 1989. Series A No. 10, para. 43.

<sup>198</sup> Cf. OC-10/89, *supra*, paras. 43 and 45.

<sup>199</sup> The constitutional articles of the States Parties to the American Convention that refer to some form of protection of the right to work are: Argentina (art. 14 bis), Bolivia (arts. 46 and 48), Brazil (art. 6), Colombia (art. 25), Costa Rica (art. 56), Chile (art. 19), Dominican Republic (art. 62), Ecuador (art. 33), El Salvador (arts. 37 and 38), Guatemala (art. 101), Haiti (art. 35), Honduras (arts. 127 and 129), Mexico (art. 123), Nicaragua (arts. 57 and 80), Panama (art. 64), Paraguay (art. 86), Peru (art. 2), Suriname (art. 4), and Uruguay (art. 36), and Venezuela (art. 87).

and Cultural Rights;<sup>200</sup> Article 23 of the Universal Declaration of Human Rights;<sup>201</sup> Articles 7 and 8 of the Social Charter of the Americas,<sup>202</sup> Articles 6 and 7 of the Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights,<sup>203</sup> Article 11 of the Convention on the Elimination of All Forms of Discrimination against Women,<sup>204</sup> Article 32(1) of the Convention on the Rights of the Child;<sup>205</sup> Article 1 of the European Social Charter<sup>206</sup> and Article 15 of the African Charter on Human and Peoples' Rights.<sup>207</sup>

146. Consequently, when analyzing the meaning and scope of Article 26 of the Convention in this case, the Court will take into account, in light of the general rules of interpretation established in Article 29(b), (c) and (d) of this instrument,<sup>208</sup> the aforementioned protection of job security<sup>209</sup> as applicable to the specific case.

<sup>200</sup> Article 6(1). The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right. [...].

<sup>201</sup> Article 23. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. 2. Everyone, without any discrimination, has the right to equal pay for equal work. 3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. 4. Everyone has the right to form and to join trade unions for the protection of his interests.

<sup>202</sup> Article 8. The promotion of decent work, the fight against unemployment and underemployment, as well as addressing the challenges of informal labor are essential elements for achieving economic development with equity. Respect for workers' rights, equal employment opportunities, and improved working conditions are essential to attaining prosperity. Cooperation and social dialogue among government representatives, workers, employers, and other stakeholders promote good governance and a stable economy.

<sup>203</sup> Article 6. Everyone 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. The State Parties undertake to adopt measures that will make the right to work fully effective, especially with regard to the achievement of full employment, vocational guidance, and the development of technical and vocational training projects, in particular those directed to the disabled. [...]

Article 7. Just, Equitable, and Satisfactory Conditions of Work. The States Parties to this Protocol recognize that the right to work to which the foregoing article refers presupposes that everyone shall enjoy that right under just, equitable, and satisfactory conditions, which the States Parties undertake to guarantee in their internal legislation, particularly with respect to: c. the right of every worker to promotion or upward mobility in his employment, for which purpose account shall be taken of his qualifications, competence, integrity and seniority; d. Stability of employment, subject to the nature of each industry and occupation and the causes for just separation. In cases of unjustified dismissal, the worker shall have the right to indemnity or to reinstatement on the job or any other benefits provided by domestic legislation [...].

<sup>204</sup> Article 11(1). States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights [...].

<sup>205</sup> Article 32. [...] 2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular: a) (a) Provide for a minimum age or minimum ages for admission to employment; (b) Provide for appropriate regulation of the hours and conditions of employment; (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

<sup>206</sup> Article 1. The right to work. With a view to ensuring the effective exercise of the right to work, the Contracting Parties undertake: 1. To accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment; 2. To protect effectively the right of the worker to earn his living in an occupation freely entered upon; 3. To establish or maintain free employment services for all workers; 4. To provide or promote appropriate vocational guidance, training and rehabilitation.

<sup>207</sup> Article 15. Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.

<sup>208</sup> Cf. *Compulsory Membership of an Association Prescribed by Law for the Practice of Journalism (arts. 13 and 29 American Convention on Human Rights)*, OC-5/85, *supra*, paras. 51 and 52; *Juridical Status and Rights of Undocumented Migrants*, OC-18/2003 of September 17, 2003. Series A No. 18, para. 156. Regarding the scope of labor rights, in order to identify a group of rights that have a crucial importance for migrant workers, the Court applied the *pro persona* principle, indicating that if there are several instruments that regulate the same situation, the domestic or international instrument that best protects the worker must be preferred.

<sup>209</sup> Cf. *Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs*. Judgment of February 2, 2001. Series C No. 72, para. 134.

147. In this regard, the Committee on Economic, Social and Cultural Rights, in its General Comment No. 18 on the right to work, indicated that this included “the right not to be deprived of work unfairly.”<sup>210</sup> It has also indicated that “[v]iolations of the obligation to protect follow from the failure of States parties to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to work by third parties,” which include “failure to protect workers against unlawful dismissal.”<sup>211</sup>

148. For example, Convention 158 of the International Labour Organization (ILO) on termination of employment (1982),<sup>212</sup> establishes that the right to work includes the lawfulness of termination in its article 4<sup>213</sup> but stipulates, in particular, the need to provide “a valid reason for such termination”<sup>214</sup> as well as the right to effective legal remedies in case of an unjustifiable termination. Likewise, ILO Recommendation No. 143<sup>215</sup> on workers’ representatives requires that appropriate measures be taken and resources made available for the protection of the workers’ representatives. (*supra*, para. 126).<sup>216</sup>

149. In correlation to the above, it can be understood that, in the private sphere, the state obligation to protect the right to job security results, in principle, in the following duties: (a) to adopt the appropriate measures for the due regulation and monitoring<sup>217</sup> of this right; (b) to

<sup>210</sup> UN. Committee on Economic, Social and Cultural Rights, *General Comment No. 18: The right to work*, UN Doc. E/C.12/GC/18, November 24, 2005.

<sup>211</sup> UN. Committee on Economic, Social and Cultural Rights, *General Comment No.18: The right to work, supra*.

<sup>212</sup> ILO. *Convention No. 158 on termination of employment*, November 23, 1985. It should be pointed out that, as the Peruvian State indicate, Convention No. 158 has not been ratified by Peru.

<sup>213</sup> Article 4 of Convention No. 158. The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

<sup>214</sup> Article 5 of Convention No. 158. The following, inter alia, shall not constitute valid reasons for termination: (a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours; (b) seeking office as, or acting or having acted in the capacity of, a workers' representative; (c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;[...].

<sup>215</sup> Cf. ILO, Recommendation on Workers’ Representatives, 1971 (No. 143), Recommendation on protection and facilities that should be afforded to workers’ representatives. Fifty-sixth Session of the ILO General Conference; date adopted June 23, 1971. Paragraph 5: Workers' representatives in the undertaking should enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers' representative or on union membership or participation in union activities, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements. Paragraph 6: (1) Where there are not sufficient relevant protective measures applicable to workers in general, specific measures should be taken to ensure effective protection of workers' representatives. (2) These might include such measures as the following: (a) detailed and precise definition of the reasons justifying termination of employment of workers' representatives; (b) a requirement of consultation with, an advisory opinion from, or agreement of an independent body, public or private, or a joint body, before the dismissal of a workers' representative becomes final; (c) a special recourse procedure open to workers' representatives who consider that their employment has been unjustifiably terminated, or that they have been subjected to an unfavourable change in their conditions of employment or to unfair treatment; (d) in respect of the unjustified termination of employment of workers' representatives, provision for an effective remedy which, unless this is contrary to basic principles of the law of the country concerned, should include the reinstatement of such representatives in their job, with payment of unpaid wages and with maintenance of their acquired rights; (e) provision for laying upon the employer, in the case of any alleged discriminatory dismissal or unfavourable change in the conditions of employment of a workers' representative, the burden of proving that such action was justified; (f) recognition of a priority to be given to workers' representatives with regard to their retention in employment in case of reduction of the workforce.

<sup>216</sup> Also, the United Nations General Assembly adopted Agenda 2030, which includes 17 Sustainable Development Goals and 169 targets to benefit people, the planet and prosperity. In particular, Goal 8 promotes sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all. Targets 8.5 and 8.8 are addressed at protecting workers’ rights and promoting a safe and secure working environment.

<sup>217</sup> *Mutatis mutandis, Case of Ximenes Lopes v. Brazil*. Judgment of July 4, 2006. Serie C No. 149, para. 99; *Case of Suárez Peralta v. Ecuador, supra*, para. 133, and *Case of the Kaliña and Lokono Peoples v. Suriname. Merits, reparations and costs*. Judgment of November 25, 2015, Serie C No. 309, para. 216.



protect the workers against unjustified dismissal through its competent organs; (c) in case of unjustified dismissal, to rectify the situation (either by reinstatement or, if appropriate, by compensation and other social benefits established in domestic law). Consequently, (d) the State should provide effective grievance mechanisms in cases of unjustified dismissal, to ensure access to justice and the effective judicial protection of such rights (*infra*, paras. 174, 176 and 180).

150. It should be noted that job security 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.

151. In this specific case, Mr. Lagos del Campo had been employed by the aforementioned company as a manual worker for approximately 13 years and, at the time of the facts, he was president of the Electoral Committee of the company's Industrial Community and the delegate to CONACI. Based on statements made during an interview published in "La Razón" in the context of internal elections, Mr. Lagos del Campo was dismissed for having committed a serious verbal offense against his employer. He contested this decision before the competent organs, but it was ratified in second instance, considering that he had been dismissed for a justified reason. He appealed this decision before various domestic instances, without finding protection, particularly for his right to job security, alleging that the reasons for his dismissal were unjustified or unwarranted and that due process had been violated. That is to say, in light of the arbitrary dismissal by the company (*supra*, para. 132) the State failed to adopt adequate measures to protect the violation of the right to work by third parties. Thus, Mr. Lagos del Campo was not reinstated in his job and did not receive any compensation or the corresponding benefits.

152. Consequently, Mr. Lagos del Campo lost his job, the possibility of a retirement pension, and also the exercise of his rights as a workers' representative. This also had an impact on his professional, personal and family life (*supra*, para. 72). In this regard, during the public hearing before the Court, Mr. Lagos del Campo stated that the following were among the consequences of his dismissal:

[He was unable to obtain a pension because,] according to the law, [he needed to work] five more years in order to obtain a decent pension to be able to survive; but all that was violated because [he] did not meet the requirement of the President's law. [...] During that Government's dictatorship [...], unfortunately, any citizen or worker who was over 50 years of age no longer had access to any company or well-paid job. [...] Furthermore,] after so many long years of suffering, of trying to obtain justice at the national level, during this international case, [..., in 2015, he had] experienced [health problems].

153. Based on the foregoing, the Court concludes that, owing to his arbitrary dismissal, Mr. Lagos del Campo was deprived of his employment and other benefits resulting from social security. Therefore, the Peruvian State failed to protect his right to job security, in interpretation of Article 26 of the American Convention, in relation to Articles 1(1), 13, 8 and 16 of this instrument, to the detriment of Mr. Lagos del Campo.

154. Lastly, it should be pointed out that the Court has established previously that it has jurisdiction to examine and decide disputes relating to Article 26 of the American Convention, as an integral part of the rights named in it and, regarding which, Article 1(1) establishes the general obligations of the States to respect and to ensure rights (*supra* para. 142). The Court has also developed important case law on this matter, in light of different articles of the Convention. On this basis, the present judgment develops and substantiates a specific

condemnation for the violation of Article 26 of the American Convention on Human Rights, established in Chapter III of this treaty, entitled Economic, Social and Cultural Rights.

### **3. Violations of freedom of association**

155. Article 16(1) recognizes the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes. The right to freedom of association is characterized by enabling individuals to create or take part in entities or organizations in order to act collectively to achieve very diverse objectives, provided these are legitimate.<sup>218</sup> The Court has established that those persons who are subject to the jurisdiction of the States Parties have the right to associate freely with others, without the intervention of the public authorities limiting or obstructing the exercise of the said right. This signifies that they have the right to associate in order to seek the common attainment of a lawful goal, and the correlative negative obligation of the State not to exert pressure or interfere so as to change or denature this goal.<sup>219</sup> Additionally, the Court has observed that positive obligations also arise from freedom of association; these are to prevent attacks against this right, protect those who exercise it, and investigate any violations against it. These positive obligations must be met even in the context of relations between private individuals, if applicable.<sup>220</sup>

156. In labor matters, the Court has established that freedom of association protects the ability to constitute labor unions and implement their internal structure, activities and programs of action, without the intervention of the public authorities limiting or hindering the exercise of this right.<sup>221</sup> This freedom also supposes that each individual may determine, without any coercion whatsoever, whether he or she wishes to form part of the association.<sup>222</sup> In addition, the State has the obligation to guarantee that everyone can exercise freely their freedom of association without fear that they will be subject to any kind of violence because, to the contrary, the ability of groups of people to organize themselves to protect their interests could be reduced.<sup>223</sup> In this regard, the Court has stressed labor-related freedom of association "is not exhausted with the theoretical recognition of the right to constitute (unions), but also includes, inseparably, the right to exercise this freedom."<sup>224</sup>

157. In this regard, the Court finds that the protection of the right to labor-related freedom of association is subsumed not only in the protection of labor unions, their members and their representatives. Indeed, unions and their representatives enjoy specific protection for the proper performance of their functions because, as the Court has established in its case law<sup>225</sup> and as can be observed in different international instruments,<sup>226</sup> including Article 8 of the Protocol of San Salvador, freedom of association in union matters is extremely important to

<sup>218</sup> Cf. *Case of Escher et al. v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of July 6, 2009. Series C No. 200, para. 169.

<sup>219</sup> Cf. *Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs, supra*, para. 156, and *Case of the Members of the Village of Chichupac and neighboring communities of the Municipality of Rabinal v. Guatemala. Preliminary objections, merits, reparations and costs*. Judgment of November 30, 2016. Series C No. 328, para. 205.

<sup>220</sup> Cf. *Case of Huilca Tecse v. Peru. Merits, reparations and costs*. Judgment of March 3, 2005. Series C No. 121, para. 121, and *Case of Yarce et al. v. Colombia, supra*, para. 271.

<sup>221</sup> Cf. *Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs, supra*, para. 156.

<sup>222</sup> Cf. *Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs, supra*, para. 158.

<sup>223</sup> Cf. *Case of Huilca Tecse v. Peru, supra*, para. 77, and *Case of Cantoral Huamaní and García Santa Cruz v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of July 10, 2007. Series C No. 167, para. 146.

<sup>224</sup> Cf. *Case of Huilca Tecse v. Peru, supra*, para. 70.

<sup>225</sup> Cf. *Case of Baena Ricardo et al. v. Panama. Merits, supra*, para. 156, and *Case of Cantoral Huamaní and García Santa Cruz v. Peru, supra*, paras. 144 to 146.

<sup>226</sup> Cf. ILO. Convention No. 87 Freedom of Association and Protection of the Right to Organize, of June 17, 1948 and Convention No. 98 Right to Organize and Collective Bargaining, of June 8, 1949.

defend the legitimate interests of the workers and is included in the human rights *corpus juris*.<sup>227</sup> Moreover, the importance that States have recognized to union rights is reflected in the fact that Article 19 of the Protocol of San Salvador gives the Court competence to rule on violations of the State obligation to allow labor unions, federations and confederations to function freely.<sup>228</sup>

158. However, the protection recognized to the right to freedom of association in the context of labor extends to organizations that, even though their nature differs from that of labor unions, seek to represent the legitimate interests of workers. This protection is derived from Article 16 of the American Convention, which protects freedom of association for any purpose, as well as from other international instruments that recognize special protection to freedom of association to protect the interests of workers, without specifying that this protection is restricted to the labor union sphere.<sup>229</sup> Thus Article 26 of the American Convention, which relates to the economic, social, educational, scientific and cultural standards set forth in the Charter of the Organization of American States, recognizes the right of employers and workers to associate freely for the defense and promotion of their interests. Additionally, the Preamble to the Inter-American Democratic Charter recognizes that the right of workers to associate themselves freely for the defense and promotion of their interests is fundamental to the achievement of democratic ideals.

159. These principles concur with the protection recognized by the ILO, which has clarified that the expression “workers’ representatives” includes those recognized as such under domestic law or practice, whether union representatives or “elected representatives, namely, representatives who are freely elected by the workers of the undertaking in accordance with the provisions of national laws or regulations or of collective agreements and whose functions do not include activities which are recognized as the exclusive prerogative of trade unions in the country concerned.”<sup>230</sup>

160. Similarly, it has been interpreted that the representatives of the workers of an undertaking should enjoy effective protection against any act that could prejudice them, including dismissal based on their condition as workers’ representatives, or on their activities arising from this representation.<sup>231</sup> Also, the national authorities must ensure that disproportionate penalties do not dissuade the representatives from seeking to express and defend the workers’ interests.<sup>232</sup>

161. On this point, the Court has verified that Mr. Lagos del Campo was dismissed owing to the complaints made in the context of an electoral process that the presumed victim, together with other workers, were called on to supervise. Additionally, it is a proven fact that, as a result of his dismissal, Mr. Lagos del Campo was unable to continue his work representing the workers

<sup>227</sup> Cf. *Case of Baena Ricardo et al. v. Panama. Merits*, *supra*, para. 158.

<sup>228</sup> Cf. Protocol of San Salvador, Article 19(6); *Entitlement of Legal Entities to Hold Rights under the Inter-American Human Rights System (Interpretation and scope of Article 1.2, in relation to Articles 1(1), 8, 11(2), 13, 16, 21, 24, 25, 29, 30, 44, 46, and 62(3) of the American Convention on Human Rights, and of Article 8(1) A and B of the Protocol of San Salvador)*. *Advisory Opinion OC-22/16* of February 26, 2016. Series A No. 22, para. 87, and *Case of Huilca Tecse v. Peru*, *supra*, para. 74.

<sup>229</sup> Cf. American Declaration of the Rights and Duties of Man, Article XXII; Charter of the Organization of American States, Article 45(c); Inter-American Democratic Charter, Preamble, and ILO Convention on workers’ representatives, *supra*, Article 3(b).

<sup>230</sup> Convention on Worker’s Representatives, *supra*, Article 3(b).

<sup>231</sup> Cf. ILO, *Recommendation on Workers’ Representatives*, 1971 (No. 143), *supra*, paragraph 5, and *mutatis mutandis*, ECHR, *Case of Csánics v. Hungary*, No. 12188/06. Judgment of January 20, 2009; ECHR, *Case of Szima v. Hungary*, No. 29723/11. Judgment of October 9, 2012, and ECHR, *Case of Heinisch v. Germany*, No. 28274/08. Judgment of July 21, 2011.

<sup>232</sup> ECHR. *Case of Palomo Sánchez and Others v. Spain [GS]*, *supra*, para. 56.

on the Electoral Committee, and could not even attend a meeting that he himself, in the exercise of his functions, had convened on June 27, 1989, before being dismissed (*supra*, para. 53); also he was not able to continue being a member of the Industrial Community since he no longer worked for the company. In this regard, the Court notes that the Second Labor Court of Lima, in its decision of August 8, 1991, in which it classified the presumed victim's dismissal as "legal and justified" (*supra* para. 60), ratified a sanction that had an impact on the possibility of Mr. Lagos del Campo being able to continue to work for the said company and to represent the interests of the other workers.

162. In addition, the Court has established that freedom of association has two dimensions, because it relates both to the right of the individual to associate freely and to use the appropriate means to exercise this freedom, and to the right of the members of a group to achieve certain objectives together and to benefit from them.<sup>233</sup> The Court has also established that the rights derived from representing the interests of a group are twofold, because they relate both to the right of the individual who exercises the mandate or appointment, and the right of the collectivity to be represented, so that the violation of the right of the former (the representative) results in the violation of the right of the latter (the person or collectivity represented).<sup>234</sup> Consequently, the Court finds that the dismissal of Mr. Lagos del Campo transcended the violation of his individual right to freedom of association, because it deprived the workers of the Industrial Community of the representation of one of their leaders, especially in the election that should have been held under his supervision as president of the Electoral Committee. The Court also notes that, since Mr. Lagos del Campo's dismissal was carried out in reprisal for his representation work, this could have had an intimidating and threatening impact on the other members of the Industrial Community.

163. Based on the above, the Court concludes that the State is responsible for the violation of Articles 16(1) and 26 in relation to Articles 1(1), 13 and 8 of the American Convention, to the detriment of Mr. Lagos del Campo.

#### **4. Domestic legal effects**

164. In relation to the argument concerning Article 5(h) of Law No. 24514 (*supra* paras. 85 and 86), in force at the time of the facts, based on the reasons given in the preceding section (*supra* para. 123 ), the Court concludes that the State is not responsible for the violation of Article 2 of the Convention.

165. Regarding the argument concerning the law currently in force, in relation to article 25 of Legislative Decree No. 728 of March 27, 1997 (*supra* para. 86), the Court notes that this law derogated Law No. 24514 of June 5, 1986 (*supra* para. 55), that it was not applied to the facts of this case, and that this was expressly recognized by the representatives. In this regard, the Court considers that it does not have to issue a ruling or make an analysis of this instrument, because the purpose of its contentious jurisdiction is not to review domestic laws in abstract.<sup>235</sup>

#### **5. General conclusion**

166. Therefore, the Court finds that the State, based on the dismissal of Mr. Lagos del Campo from his job, violated his rights to job security (Article 26 in relation to Articles 1(1), 13, 8 and

<sup>233</sup> Cf. *Case of Huilca Tecse v. Peru*, *supra*, paras. 70 to 72, and *Case of Cantoral Huamani and García Santa Cruz v. Peru*, *supra*, para. 148.

<sup>234</sup> *Mutatis mutandis*, *Case of Chitay Nech et al. v. Guatemala. Preliminary objections, merits, reparations and costs*. Judgment of May 25, 2010. Series C No. 212, para. 115.

<sup>235</sup> Cf. *Case of Genie Lacayo v. Nicaragua*. Preliminary objections. Judgment of January 27, 1995. Series C No. 21, para. 50, and *Case of J. v. Peru*, *supra*, para. 213.

16 of the Convention) and to freedom of expression (Articles 13 and 8 in relation to Article 1(1) of the Convention). This had repercussions on his labor representation and right to freedom of association (Articles 16 and 26 in relation to Article 1(1), 13 and 8 of the Convention), which had an impact on his professional, personal and family life.

**VII-2**  
**ACCESS TO JUSTICE**  
**(ARTICLES 8 AND 25 OF THE AMERICAN CONVENTIONA)**

**A. Arguments of the parties and of the Commission**

167. The **representatives** alleged the violation of Article 8 of the Convention, particularly in relation to the right to appeal a judgment. In this regard, they referred to the actions taken by Mr. Lagos del Campo as a result of his dismissal, when "he took various measures addressed, first, to obtain reinstatement in his job [...]." They then referred to the different actions filed by Mr. Lagos del Campo, in which he alleged the violation of his right to job security and to due process of law established in articles 48 and 233 of the Constitution, and requested the annulment of the second instance decision claiming that it had been arbitrary. They added that on August 13, 1992, the Fifth Civil Chamber decided to declare that the application for amparo was inadmissible without considering that the Second Labor Court's failure to process Mr. Lagos del Campo's brief constituted a breach of due process. They also indicated that, during the amparo proceedings, the Constitutional and Social Chamber decided to declare that the said decision was valid, which also violated the obligation to give a reasoned judgment, because it merely reproduced the arguments of the Public Prosecution Service. They added that Mr. Lagos del Campo was unable to contest the judicial decisions because the Court of Constitutional Guarantees had been suspended following the 1992 coup d'état by Alberto Fujimori and the removal of the justices of the Constitutional Court. They also indicated that, when the Constitutional Court was re-established in 1996, Mr. Lagos del Campo requested that the amparo proceedings be raised before that court but, "incredibly," the Third Specialized Civil Chamber declared his request inadmissible, requiring that he file a cassation appeal, "which was not available at that time owing to the cessation of the justices who were members of the Court of Constitutional Guarantees, therefore violating his right to contest judicial decisions.

168. The **State** indicated that the right to contest judicial decisions did not form part of the dispute submitted by the Commission. However, it clarified that, with regard to the appeal for annulment filed on September 2, 1991, the Second Labor Court had stated that none of the causes established in article 1085 of the Code of Civil Procedure had been identified and, therefore, declared that nullification was not admissible. Furthermore, the Habeas Corpus and Amparo Law established that the appeal for annulment should be filed before the Supreme Court of Justice. In this regard, Mr. Lagos filed this appeal on August 26, 1992. The Constitutional and Social Chamber of the Supreme Court ruled on this remedy on March 15, 1993, declaring that annulment was not admissible. In light of the dismissal of the appeal for annulment, he should have filed the appeal for cassation in relation to the judicial decisions rejecting applications for amparo, and this appeal should have been filed within 15 days of the decision rejecting the application. The Third Specialized Civil Chamber's ruling of June 24, 1997, determined that the time frame for filing the cassation had expired. And this was so because, even though the Court of Constitutional Guarantees was not functioning, those cassation appeals that had been filed opportunely at the time when the presumed victim should have filed his appeal, were decided by the Constitutional Court years later. Regarding the appeals filed by Mr. Lagos del Campo before the Social and Constitutional Law Chamber and the Supreme Court, the State argued that the appeal for review and reconsideration was not established in Peruvian legislation in the context of labor proceedings; therefore, it was logical to conclude that the filing of an appeal that was not established by law was inherently inadmissible and the same could be said for the appeals filed on March 30 and April 28, 1993. In addition, the State

underlined that, regarding the appeals filed after July 1996, these “were not established by law or were subject to the statute of limitations; therefore, it was foreseeable that they would be ineffective.” The State indicated that many of the appeals filed had serious flaws in their elaboration and with regard to compliance with procedural requirements; in other words, they were preordained to be declared inadmissible immediately [...].”

169. The **Commission** did not address this matter.

## **B. Considerations of the Court**

170. The Court recalls that, with the second instance decision, the State annulled the judgment of the lower court and declared that Mr. Lagos del Campo’s dismissal was “justified.” Consequently, he had recourse to different courts in order to assert his rights (*supra* paras. 63 to 70). In this regard, the dispute in this section consists in determining whether Mr. Lagos del Campo had access to justice to protect his labor rights, in particular the right to job security in light of his dismissal, a right recognized in the State’s domestic laws.

171. In the instant case, although, before this Court,<sup>236</sup> the representatives have alluded to the absence of a remedy to contest the final judgment under Article 8 of the Convention, the Court finds that, based on the *iura novit curia* principle (*supra*, para. 139), the said arguments relating to the appeals made following the final decision of the Second Labor Court, should be analyzed in light of Articles 8 and 25 (access to justice) of the American Convention.

172. In this regard, the Court notes that the facts relating to this analysis have been aired constantly starting with the domestic proceedings<sup>237</sup> and as of the very first petitions before the inter-American system (*supra*, para. 133).<sup>238</sup> In this regard, the parties have had abundant possibilities of referring to the scope of the rights affected by the facts analyzed.

### **1. Access to justice to protect job security as a right recognized in the Constitution**

173. Article 25 of the Convention indicates expressly that:

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
2. The States Parties undertake:
  - (a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the State; [...]

<sup>236</sup> It should be noted that, before the Commission, they alleged violations of Articles 8 and 25 of the Convention; However, in the Admissibility Report, the IACHR declared Article 25 inadmissible, considering that “it d[id] not have enough evidence to infer an alleged characterization of violations of Articles 24 and 25 of the Convention.”

<sup>237</sup> The labor dispute is evident from the complaint he filed before the Labor Court. In his complaint, he indicated that “since the unfair and unjustified nature of the dismissal is well-known [...], [he] ask[ed] the court [...] to order the suspension of the dismissal and [his] reinstatement in [his] usual job.”

<sup>238</sup> In particular, the Court underlines that, in the first communication he addressed to the Inter-American Commission of October 13, 1993, the petitioner stated, among other matters, that his “right to job security indicated in article 48 of the Constitution and articles 27 and 26 of the proposed new constitution” had been violated. Initial petition lodged before the IACHR (File of procedure before the IACHR, f. 439).

174. This Court has declared that judicial protection, “is one of the basic pillars of the American Convention and of the rule of law in a democratic society,”<sup>239</sup> and has indicated that “Articles 8 and 25 of the Convention also establish the right of access to justice, a peremptory norm of international law.”<sup>240</sup> In addition, the principle of effective judicial protection requires that judicial proceedings are accessible to the parties, without any undue obstacles or delays, so that they may achieve their purpose promptly, simply and fully.<sup>241</sup> Furthermore, the Court has indicated that Article 25(1) of the Convention establishes the obligation of the States Parties to ensure to everyone subject to their jurisdiction an effective judicial remedy against acts that have violated their fundamental rights,<sup>242</sup> which are recognized in either the Constitution, or the laws or the Convention.<sup>243</sup>

175. As already mentioned, both the 1979 and the 1993 Constitutions of Peru, and the labor laws at the time of the facts, explicitly recognized the right to job security<sup>244</sup> (*supra*, para. 138).

176. In this regard, the Court’s case law has identified a close connection between the scope of the rights recognized in Articles 8 and 25 of the American Convention. Thus, it has established that States have the obligation to design and legislate effective remedies for the comprehensive protection of human rights, but also the obligation to ensure the due application of these remedies by their judicial authorities in proceedings that respect adequate guarantees,<sup>245</sup> and these must be conducted in keeping with the rules of due process of law.<sup>246</sup> Thus, an effective remedy means that the competent authority’s analysis of a judicial remedy cannot be reduced to a mere formality; rather it must examine the reasons cited by the plaintiff and rule on them expressly.<sup>247</sup> Accordingly, this effectiveness supposes that, in addition to the formal existence of remedies, these must provide results or answers to the violations of rights established in either the Convention or the Constitution or by law.

177. The Court will now analyze whether, based on his dismissal, Mr. Lagos del Campo was guaranteed access to justice in relation to the rights alleged at the appeals stage.

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<sup>239</sup> *Case of Castillo Páez v. Peru. Merits.* Judgment of November 3, 1997. Series C No. 34, para. 82, and *Case of Mohamed v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2012. Series C No. 255, para. 82.

<sup>240</sup> *Case of Goiburú et al. v. Paraguay. Merits, reparations and costs.* Judgment of September 22, 2006. Series C No. 153, para. 131.

<sup>241</sup> *Mutatis mutandis, Case of Mejía Idrovo v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of July 5, 2011. Series C No. 228, para. 106, and *Case of Furlan and family v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2012. Series C No. 246, para. 211.

<sup>242</sup> *Cf. Case of Velásquez Rodríguez v. Honduras, supra*, footnote 23, para. 219, and *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs.* Judgment of February 26, 2016. Series C No. 310, para. 148.

<sup>243</sup> *Cf. Case of Baena Ricardo et al. v. Panama. Jurisdiction.* Judgment of November 28, 2003. Series C No. 104, para. 73, and *Case of Acevedo Buendía et al. (“Discharged and Retired Employees of the Office of the Comptroller”) v. Perú, supra*, para. 69.

<sup>244</sup> *Cf. Congress of the Republic of Peru. Constitution of Peru July 12, 1979. Article 48 “The State recognizes the right to job security. The employee may only be dismissed for just cause, indicated by law and duly proven.” Congress of the Republic of Peru. Constitution of Peru, December 29, 1993 Article 22. Work is a duty and a right. It is the basis of social well-being and a means for self-realization” and in article 27: “[t]he law accords the worker adequate protection against arbitrary dismissal.” Congress of the Republic of Peru Law No.24514. Article 2. This law protects workers in the private sector or in public companies subject to the private sector regime [...].”*

<sup>245</sup> *Cf. Case of the “Street Children” (Villagrán Morales et al.) v. Guatemala. Merits.* Judgment of November 19, 1999. Series C No. 63, para. 237, *Case of Duque v. Colombia, supra*, para. 177, and Inter-American Commission on Human Rights. Access to Justice as a Guarantee of Economic, Social and Cultural Rights. A review of the standards adopted by the inter-American system of human rights, para. 17.

<sup>246</sup> *Cf. Case of Velásquez Rodríguez v. Honduras, supra*, footnote 12, para. 91, and *Case of Favela Nova Brasília v. Brazil, supra*, para. 183.

<sup>247</sup> *Cf. Case of López Álvarez v. Honduras. Merits, reparations and costs.* Judgment of February 1, 2006. Series C No. 141, para. 96, and *Case of Zegarra Marín v. Peru, supra*, para. 179.

178. The Court recalls that, in light of the decision of the trial judge of June 25, 1991, that the dismissal was unjustified, Ceper-Pirelli filed an appeal before the Second Labor Court to revoke the first instance judgment.<sup>248</sup> That same day, the Second Labor Court heard the oral submissions of the company's representatives. Subsequently, the company presented two briefs on June 25 and July 3, 1991, which were processed on July 15, 1991. Mr. Lagos del Campo received the respective notification on July 23, 1991.

179. Mr. Lagos del Campo submitted his answer to those briefs to the Second Labor Court on August 1, 1991.<sup>249</sup> However, his brief was only processed by the Labor Court on August 9, 1991, after it had delivered judgment deciding to revoke the first instance judgment (August 8, 1991).

180. In this regard, the Court reiterates that States have the obligation to ensure the effectiveness of the said remedies with adequate guarantees and with rules to ensure due process of law (*supra*, para. 76). It should be pointed out that, pursuant to article 233 of the 1979 Peruvian Constitution, the proper administration of justice required "the statement of the reasons for the decisions, in all instances, that expressly mention[ed] the applicable law and the grounds that substantiate[d] them."<sup>250</sup>

181. The Court notes that, at the domestic level, Mr. Lagos del Campo filed at least seven appeals and several requests before the judicial organs of Peru<sup>251</sup> – all of which were rejected for different procedural reasons – by which he tried to have the judgment that ratified the alleged unjustified dismissal annulled, referring, in particular, to his constitutional rights *to job security and due process*. This Court finds that the filing of the appeals for annulment and amparo at the appeal stage were particularly pertinent. In this regard, the Court points out the following relevant omissions in relation to these remedies.

182. First, in view of the fact that his defense brief of August 1, 1991, before the Second Court – in which he alleged that the reasons for his dismissal were unjustified – was not taken into consideration, in violation of article 9 of Supreme Decree 03-80-TR,<sup>252</sup> Mr. Lagos continued

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<sup>248</sup> The company argued that the statements included in "La Razón" corresponded to Mr. Lagos del Campo, because he had not attributed those words to the interviewer when answering the company's letter outlining the charges; he had merely argued that they had been made in the exercise of his constitutional right to freedom of expression and in his capacity as president of the Electoral Committee (evidence file, annexes to the Merits Report 9 and 10, folios 33 to 41).

<sup>249</sup> Cf. Brief in answer to the appeal addressed by Mr. Lagos del Campo to the Second Labor Court of Lima. August 1, 1991, File No. 839-91. Annexes to the communication of the petitioners dated July 23, 1998 (evidence file, ff. 43 to 45). In this brief, he indicated that, in both the exculpatory letter and in the brief of the complaint, he had stated that he was not the author of the interview; consequently, the responsibility for the publication of the interview corresponded to the journalist and Director of "La Razón." Regarding the brief filed by the company on June 25, 1991, Mr. Lagos del Campo mentioned that the company had attributed to him the authorship of words that had not been published in the interview in "La Razón."

<sup>250</sup> Cf. Constitution of Peru July 12, 1979. "Article 233. Proper administration of justice: (4) The statement of the reasons for the decisions, in all instances, that expressly mentions the applicable law and the grounds that substantiate them." Congress of the Republic of Peru. Law 24514. Law on the right to job security. June 4, 1986 (evidence file, ff. 33bis to 38bis.) "Article 3. The workers referred to in art. 2 may only be dismissed for just cause indicated in this law, duly stating the reasons."

<sup>251</sup> Namely: (a) action requesting classification of the dismissal on July 26, 1989; (b) appeal for "review and reconsideration" on August 26, 1991; (c) appeal for annulment on September 2, 1991; (d) application for amparo on November 8, 1991; (e) appeal for annulment on August 26, 1992; (f) communication before the President of the Social and Constitutional Law Chamber of the Supreme Court of Justice on March 30, 1993; (g) appeal for review and request that the matter be heard by the Full Chamber of the Supreme Court of Justice on April 28 and May 4, 1993; (h) appeal on July 18, 1997; (i) remedy of complaint filed on August 19, 1997; (j) remedy of complaint filed before the President of the Constitutional Court, on October 2, 1997.

<sup>252</sup> Supreme Decree 03-80-TR. "Action in the labor and Labor Communities jurisdiction. Art. 9. The briefs that the



contesting this omission before different courts. This Court notes that, in light of the appeal for annulment which was established in Supreme Decree 03-80-TR (*supra*, para. 62), the court that ratified the dismissal merely indicated that none of the causes for annulment had been met, without any further reasoning and without ruling on Mr. Lagos del Campo's arguments or his constitutional rights. Subsequently, in the case of the application for amparo, the Fifth Civil Chamber of the Superior Court of Lima indicated that the said answering brief only contained arguments and not evidence. The omission was also expressly alleged before the Social and Constitutional Law Chamber of the Supreme Court, which did not rule in this regard. The Court notes that, according to the evidence provided in the instant case, when deciding the appeal, the Second Labor Court did not assess the brief filed by Mr. Lagos del Campo or his arguments concerning the rights allegedly violated in light of the dismissal, thus violating the adversarial principle (*supra* para. 66).

183. Second, Mr. Lagos filed a first application for amparo (1991) before the Civil Chamber of the Superior Court of Lima in which he alleged, among other matters, violations of his right to job security and due process of law, established in articles 48 and 233 of the Constitution. The Civil Chamber failed to decide the allegations relating to the substantive (constitutional) rights, and merely indicated that it had not determined a violation of due process and, therefore, declared the appeal inadmissible (*supra*, para. 63). In this regard, article 295 of the Constitution<sup>253</sup> establishes the application for amparo, the purpose of which is to protect the rights recognized in the Constitution.

184. Thus, the Court considers that, even though the remedy of amparo was designed to protect constitutional rights, in this case the failure to consider the *rights to job security and due process* prevented the application for amparo from producing the result for which it was conceived.<sup>254</sup> In this regard, the Court has indicated that the analysis that the competent authority makes of a judicial appeal – which contests constitutional rights such as job security and the right to due process – cannot be reduced to a mere formality and omit arguments submitted by the parties, because it must examine their reasons and rule on them pursuant to the standards established by the American Convention.<sup>255</sup>

185. Third, Mr. Lagos filed another appeal for annulment (1993) before the Constitutional and Social Chamber of the Supreme Court, which declared that the judgment of the Fifth Civil Chamber was valid. In its decision of March 15, 1993, the Chamber merely indicated "that, pursuant to the arguments of the [Supreme] Prosecutor [for Administrative Disputes, and taking into account] his reasoning, [it] declare[d] that the judgment was valid." The prosecutor's opinion indicated that "the judicial decisions of the Labor and Labor Communities Jurisdiction that are final and enforceable have the authority of *res judicata*"; therefore, to review such a decision would entail reviving a defunct proceeding and, consequently, an infringement of *res judicata*. In this regard, the Court notes that, according to this decision, following an appeal in a labor matter, there was no possibility of reviewing or contesting key aspects of the final decision.

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parties submit to third parties shall be processed within 48 hours of their reception, under penalty of incurring responsibility" (evidence file, annex 2 del procedure before the IACHR, folio 720).

<sup>253</sup> Cf. Congress of the Republic of Peru. Constitution of Peru July 12, 1979. Article 295. The application for amparo protects the rights recognized by the Constitution that have been violated or threatened by any authority, official or individual. The application for amparo follows the same procedure as the application for habeas corpus in the cases in which it is appropriate.

<sup>254</sup> The Court has stressed that the obligation of Article 25 supposes that the remedy is "adequate," which means that it function within the system of domestic law should be "appropriate" to protect the legal situation violated. Cf. *Case of Velásquez Rodríguez v. Honduras*, *supra*, para. 64, and *Case of Maldonado Ordóñez v. Guatemala. Preliminary objections, merits, reparations and costs*. Judgment of May 3, 2016. Series C No. 311, para. 109.

<sup>255</sup> Cf. *Case of Duque v. Colombia*. *supra*, para. 96, and *Case of Favela Nova Brasília v. Brazil*, *supra*, para. 233.

186. Fourth, after his application for amparo was rejected in 1992, Mr. Lagos del Campo continued filing appeals. Following the establishment of the Constitutional Court in 1996, he requested that the amparo proceedings be raised before that court, but the Third Specialized Civil Chamber declared his request inadmissible, and indicated that he should have filed a cassation appeal within 15 days of the rejection (August 3, 1992).

187. In this regard, the Court notes that, when the application for amparo was rejected, the Court of Constitutional Guarantees had been suspended, owing to the dismissal of the justices by Decree Law No. 25422 of April 9, 1992.<sup>256</sup> Consequently, the victim could not be required to exhaust a remedy that, at the time of the facts, was not available or that it would be illusory to exhaust, because the court was not functioning (Article 46(2)(b) of the Convention<sup>257</sup>).

188. The Court recalls that the inexistence of an effective remedy for violations of the rights recognized in the Convention constitutes a breach of this instrument by the State Party. Thus, it should be emphasized that, for such a remedy to exist, it is not enough that it is established by the Constitution or the law or that it is formally admissible; rather it must be truly appropriate to establish whether a violation of human rights has been committed and to provide the necessary means to remedy this. Those remedies that, owing to the general situation of the country or even the particular circumstances of a case, are unrealistic cannot be considered effective.<sup>258</sup>

189. It is relevant to mention that the penalty established in this case was the maximum established by labor legislation: justified or legal dismissal, in which the sanction terminated the individual's status as a worker. In other words, he was expelled from a specific category and deprived of a fundamental right that, at times, is even essential for survival and the realization of other rights. The arbitrary harm to job security may even affect a person's subjective identity and even exceed this affecting third parties concerned.

190. Although any dismissal entails a sanction of the greatest severity, the Court underscores that, in some cases, it has particular characteristics that entail greater or special severity as a punishment that require full judicial protection. In this case, the particular severity of the punishment of dismissal arises because the harm to job security was reinforced by the presumed victim's condition as a democratically elected representative and by the violation of the right to express his ideas freely.

## **2. Conclusion**

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<sup>256</sup> See, for example, *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru*, *supra*, para. 89.2. "On April 5, 1992, President Fujimori broadcast the "Manifesto to the Nation" in which he stated, *inter alia*, that he considered that he had "the responsibility to assume an exceptional approach to try and accelerate the process of [...] national reconstruction and ha[d] therefore, [...] decide[d] [...] to temporarily dissolve the Congress of the Republic[, ...] to modernize the public administration, and to reorganize the Judiciary completely."

<sup>257</sup> Article 46(2). The provisions of paragraphs 1.a and 1.b of this article shall not be applicable when:

- a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
- b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
- c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

<sup>258</sup> Cf. *Case of the Constitutional Court*, *supra* para. 89, and *Case of Favela Nova Brasília v. Brazil*. *supra*, para. 233; and *Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 American Convention on Human Rights)*, OC-9/87, *supra*, paras. 23 and 24.

191. Based on the above, it has been established that: (i) the second instance proceedings failed to assess the victim's defense arguments, and several other courts failed to correct this; (ii) the first appeal for annulment was heard and rejected by the same court that had ratified the dismissal; (iii) the amparo proceedings did not rule on the substantive (constitutional) rights alleged by Mr. Lagos del Campo, considering that the matter was *res judicata*, and (iv) he was required to exhaust a remedy that, at the time of the facts, was illusory. Therefore, this Court finds that the State violated Articles 8(1) and 25(1) of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of Mr. Lagos del Campo.

### **VIII REPARATIONS (APPLICATION OF ARTICLE 63(1) OF THE AMERICAN CONVENTION)**

192. Based on the provisions of Article 63(1) of the American Convention,<sup>259</sup> the Court has indicated that any violation of an international obligation that has produced harm entails the obligation to repair it adequately, and that this provisions "reflects a customary norm that is one of the fundamental principles of contemporary international law on State responsibility."<sup>260</sup>

193. The Court has established that reparations should have a causal nexus to the facts of the case, the violations that have been declared, the harm proved, and the measures requested to redress the respective harm. Therefore, the Court must analyze the concurrence of these factors to rule appropriately and pursuant to the law.<sup>261</sup>

194. Reparation of the harm caused by the violation of an international obligation requires, whenever possible, full restitution, which consists in the re-establishment of the previous situation. If this is not feasible, the Court will determine measures to ensure the violated rights and to redress the consequences of the violations.<sup>262</sup>

195. Based on the violations of the Convention declared in the previous chapters, the Court will proceed to examine the claims submitted by the Commission and the representatives, as well as the arguments of the State, in light of the criteria established in its case law concerning the nature and scope of the obligation to make reparation,<sup>263</sup> in order to establish measures addressed at redressing the harm caused to the victim.

#### **A. Injured party**

196. The Court confirms that, in accordance with Article 35(1) of the Rules of Procedure, only Alfredo Lagos del Campo, in his capacity as victim of the violations declared in this judgment, will be considered a beneficiary of the reparations ordered by the Court. Consequently, the

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<sup>259</sup> Article 63(1) of the American Convention establishes: "If 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. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

<sup>260</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs*. Judgment of July 21, 1989. Series C No. 7, para. 25, and *Case of Acosta et al. v. Nicaragua, supra*, para. 209.

<sup>261</sup> Cf. *Case of Ticona Estrada et al. v. Bolivia. Merits, reparations and costs*. Judgment of November 27, 2008. Series C No. 191, para. 110, and *Case of Acosta et al. v. Nicaragua, supra*, para. 210.

<sup>262</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations, supra*, para. 26, and *Case of Acosta et al. v. Nicaragua, supra*, para. 210.

<sup>263</sup> Cf. *Case of Velásquez Rodríguez. Reparations, supra*, para. 189, and *Case of Acosta et al. v. Nicaragua, supra*, para. 211.

Court will not refer to the arguments that sought reparations for other individuals.

## **B. Measures of satisfaction**

### **1. Publications**

197. The **representatives** asked that the Court's judgment be published in the Official Gazette and in a national newspaper within six months, as well as on the website of the Ministry of Justice and Human Rights, at no more than three links from the main webpage, and that it remain there until the judgment had been executed fully. In particular, they asked that, at the very least, the sections of the judgment on context, proven facts and the operative paragraphs be published.

198. The **State** indicated that it was not appropriate to grant the publication of the judgment as a reparation because there were no facts that the publication would clarify. However, should the Court order this, the inclusion of the context of the internal armed conflict experienced by Peru between 1980 and 2000 was not appropriate, because it was not part of the factual framework established by the Merits Report. Furthermore it was not incumbent on a Ministry of the Executive to make the publication because the said publication had always fallen within the State's legitimate margin of discretion.

199. The **Commission** made no mention of this measure.

200. In this regard, the Court considers, as it has in other cases,<sup>264</sup> that the State must publish, within six months of notification of this judgment: (a) the official summary of this judgment prepared by the Court, once, in the Official Gazette, in an appropriate and legible font size; (b) the official summary of this judgment prepared by the Court, once, in a national newspaper with widespread circulation, in an appropriate and legible font size, and (c) this judgment in full, available for one year, on an official website accessible to the public from the site's home page.

201. The State must advise the Court immediately when it has made each of the publications ordered, irrespective of the one-year time frame for presenting its first report established in the thirteenth operative paragraph of the judgment.

## **C. Other measures requested**

202. International case law and, in particular, that of this Court, has established repeatedly that the judgment constitutes, in itself, a form of reparation. Nevertheless, the Court notes the other measures requested by the parties and will rule in this regard.

203. Regarding the other measures of satisfaction requested, the **representatives** asked that the State organize an act during which its most senior authorities would make a public apology. The **State** argued that the Court had not ordered a public act of apology in the case of *Aguado Alfaro (Dismissed Congressional Employees v. Peru* of November 24, 2006), which concerned a collective dismissal; thus, with greater justification, it was not appropriate to organize an act in this case in which the presumed victim is a single individual.

204. In this specific case, the Court considers that the delivery of this judgment and its publication in different media are sufficient and adequate measures of satisfaction to remedy

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<sup>264</sup> Cf. *Case of Chitay Nech et al. v. Guatemala*, *supra*, para. 244, and *Case of Zegarra Marín v. Peru*, *supra*, para. 205.

the violations against the victim and to comply with the purpose indicated by the representatives.

205. Regarding the measures of *rehabilitation* requested, the **representatives** asked that the State guarantee permanent medical and psychological treatment, free of charge, for the victim and his family. During the hearing and in their final written arguments, the representatives indicated – reiterating the opinion of expert witness Carlos Jibaja Zárate – that the conditions of his dismissal and the violation of his human rights, as well as the impossibility of obtaining justice to date, have been significant sources of stress, anxiety and worry that, over the years, have affected Mr. Lagos del Campo's health. They indicated that, currently, Mr. Lagos del Campo's health is not good, owing to his age but, above all, since his hemorrhagic stroke. The **State** argued that there was no causal nexus between the acts or omissions attributed to the State and the family situation. The allegation that Mr. Lagos del Campo had experienced stigmatization had no basis in the facts, and had not been revealed in specific circumstances. It also indicated that, in other cases relating to dismissals, medical and psychological treatment had not been granted. Despite this, in Peru, people living in poverty received free medical and psychological care. Lastly, in its final written arguments, the State indicated that, in relation to the deterioration in Mr. Lagos del Campo's health, his situation following the stroke had not been proved or the existence of a diagnosis by a neurologist that could prove, scientifically, that the alleged episode of the stroke was due to this case.

206. In the instant case, the Court notes that, although there is a causal nexus between the facts of the case and the problems suffered by Mr. Lagos, especially the psychological effects, it considers that, in response to the representatives' request and based on the time that has elapsed, in this case it is not in order to require the State to provide adequate treatment, and that this item may be considered under the heading of compensation for non-pecuniary damage. Regarding the physical harm, the Court does not find that a causal nexus with the violations declared has been proved.

207. In relation to *guarantees of non-repetition*, the **Commission** requested the adoption of measures of non-repetition to guarantee that workers' representatives and union leaders may enjoy their right to freedom of expression, in accordance with the standards established in the Merits Report, and also the adoption of measures to ensure that the laws and their interpretation by the domestic courts are consistent with the principles established by international human rights law with respect to freedom of expression in labor-related contexts. The **representatives** also asked the Court to order the State to ensure that workers' representatives and union leaders may enjoy their right to freedom of expression, in accordance with the standards established in the Merits Report, and to adopt measures to ensure that the laws and their interpretation by the domestic courts are consistent with the principles established by international human rights law with respect to freedom of expression in labor-related contexts. In particular, the representatives referred to the Commission's considerations in its Merits Report with regard to Legislative Decree 24514; specifically, that the decree was vague and imprecise and allegedly failed to comply with Article 2 of the Convention. The **State** argued that its right to defend itself had been contravened because it had not had the real possibility of knowing the specific type of measure it was required to adopt, since the Commission had not indicated the specific measures that the State should implement.

208. The Court notes that neither the representatives nor the Commission indicated the precise scope of the measures that the State should adopt. However, in this case, the Court concludes that paragraph (h) of article 5 of Law 24514 was not, *per se*, incompatible with the requirement of legality of Article 13(2) of the Convention. In addition, it has determined that it was not appropriate to rule on the compatibility of the norm that is currently in force (*supra* para. 165). Consequently, in this case, it is not admissible to order the adoption, amendment or adaptation of specific provisions of domestic law. However, this is without prejudice to the

provisions of paragraph 122 of this judgment.

209. In conclusion, the Court reiterates that the delivery of this judgment and the reparations ordered in this chapter are sufficient and adequate to remedy the violations suffered by the victim, so that it does not find it necessary to order other measures of a comprehensive nature.

#### **D. Compensation**

##### **1. Pecuniary damage**

210. The **Commission** asked the Court to establish both pecuniary and non-pecuniary damage as part of the reparation.

211. The **representatives** asked for compensation for the expenses incurred by the victim in his search for justice with a sum established based on equity. They also asked that a sum be established for loss of earnings, in equity, considering that Mr. Lagos del Campo had not been reinstated in his job, curtailing his labor rights. In this regard, during the hearing, the representatives alleged that Mr. Lagos del Campo was not old enough to have access to a legitimate pension, or health insurance, as this expectation was destroyed as a result of the dismissal. In their final written arguments, the representatives indicated, since the expenses incurred by Mr. Lagos del Campo had taken place over a period of almost 28 years, Mr. Lagos del Campo had not kept the vouchers.

212. The **State** argued that the representatives had failed to indicate the causal nexus between the acts and omissions of the State and the alleged harm. It argued that it was not possible to compensate general and unreasonable allegations; moreover, amparo and labor proceedings were free in Peru. It also argued that the source of work was private, not public, so that the State did not owe the presumed victim anything. Regarding loss of earnings, it argued that it was not appropriate to examine harm arising from a violation of his right to work, because the dispute centered on a violation of his right to free expression. It also alleged that no arguments or evidence had been presented concerning the salary that the presumed victim had received. In relation to Mr. Lagos del Campo's rights to retirement and to a pension, in its final arguments, the State observed that the representatives had not provided any arguments or evidence in this regard in the motions and pleadings brief.

213. The Court has developed the concepts of pecuniary<sup>265</sup> and non-pecuniary damage<sup>266</sup> and the situations in which they should be compensated. In particular, in its case law, the Court has developed the concept of pecuniary damage and has established that this supposes "the loss or detriment to the victims' income, the expenses incurred as a result of the facts, and the consequences of a pecuniary nature that have a causal nexus to the facts of the case."<sup>267</sup> On this basis, the Court will determine the pertinence of granting pecuniary reparations and the respective sums owed in this case.

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<sup>265</sup> The Court has established that pecuniary damage supposes "the loss or detriment to the victims' income, the expenses incurred as a result of the facts, and the consequences of a pecuniary nature that have a causal nexus to the facts of the case." *Case of Bámaca Velásquez v. Guatemala. Reparations and costs*. Judgment of February 22, 2002. Series C No. 91, para. 43, and *Case of Acosta et al. v. Nicaragua, supra*, para. 233.

<sup>266</sup> The Court has established that non-pecuniary damage "may include both the suffering and affliction caused to the direct victim and his family, the impairment of values that are of great significance for the individual, and also any changes, of a non-pecuniary nature, in the living conditions of the victim or his family." *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and costs*. Judgment of May 26, 2001. Series C No. 77, para. 84, and *Case of Vásquez Durand et al. v. Ecuador, supra*, para. 332.

<sup>267</sup> *Cf. Case of Bámaca Velásquez v. Guatemala. Reparations, supra*, para. 43, and *Case of Vásquez Durand v. Ecuador, supra*, para. 227.

214. In the case of *indirect damage*, the Court considers that the representatives' claim refers to the expenses incurred by Mr. Lagos del Campo in the domestic judicial proceedings, so that this will be analyzed in the section on "costs and expenses" (*infra*, paras. 223 to 227).

215. With regard to *loss of earnings*, the Court observes that the representatives merely indicated that "Mr. Lagos del Campo was not reinstated in his job, and this curtailed his labor rights and, consequently, his social rights and benefits"; however, they did not provide specific evidence of the salary that Mr. Lagos del Campo received before the facts in their motions and pleadings brief, and the Court does not have specific information on the time that he was unemployed and the economic impact arising from the facts of this case. Despite this, the Court notes that, annex 2 of the Merits Report consists of "the pay slip of Mr. Lagos del Campo. Week of June 26 to July 2, 1989," and annex 8 of the Merits Report contains the decision of the judge of the Fifteenth Labor Court of Lima of March 5, 1991, which records that, at the time of the facts, Mr. Lagos received as his last day's wage the sum of 19,258.53 Intis.<sup>268</sup> The Court finds that, owing to the dismissal and lack of judicial protection, the victim found himself in a difficulties with regard to his employment situation, and this affected his living conditions. Therefore, the Court finds that he shall be granted the sum of US\$28,000 (twenty-eight thousand United States dollars).

216. Regarding the arguments concerning Mr. Lagos del Campo's access to a legitimate retirement pension, the Court finds that, as a result of the violations that have been established stemming from his arbitrary dismissal, the violation of job security, and the subsequent lack of judicial protection, Mr. Lagos del Campo lost the possibility of having access to a pension and social benefits. Consequently, the Court finds that he shall be granted the reasonable sum of US\$30,000 (thirty thousand United States dollars).

## **2. Non-pecuniary damage**

217. The **Commission** requested that both pecuniary and non-pecuniary damage be included in the reparation.

218. The **representatives** asked the Court to establish, in equity, reparation for non-pecuniary damage, because the violation suffered by both the victim and his family had harsh consequences and signified serious mental and moral harm for each of them, especially the victim.

219. The **State** argued that the criteria cited by the representatives was based on case law that was unrelated to the facts of this case, because the case did not involve an egregious violation of human rights or the presumed violation of a right belonging to the "hard core" of human rights. Therefore, based on the violations in this case, the non-pecuniary damage would be of another nature and less serious than in the case of egregious human rights violations.

220. In its case law, the Court has developed the concept of non-pecuniary damage and has established that this "may include both the suffering and affliction caused to the direct victim and his family, the impairment of values that are of great significance for the individual, and also any changes, of a non-pecuniary nature, in the living conditions of the victim or his family."<sup>269</sup> The said harm must be proved in cases such as this one.

<sup>268</sup> Cf. Fifteenth Judge of the Labor Court of Lima. Judgment 25-91 of March 5, 1991. Annexes to the petitioners' communication of July 23, 1998 (evidence file, annex 8 to the Merits Report, f. 29); CEPER-PIRELLI. Pay slip of Alfredo Lagos del Campo. Week of June 26 to July 2, 1989. Annexes to the petitioners' communication of July 23, 1998. Annex 2 to the Merits Report 27/15 (19,258.53 Intis = approximately US\$6.41).

<sup>269</sup> Cf. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala, Reparations, supra*, para. 84, and

221. The Court takes into consideration that Mr. Lagos del Campo was declared a victim of the violation of Articles 13, 8, 26, 16 and 25 of the Convention. These violations resulted in evident harm: the victim was diagnosed with the clinical disorder, classified by the ICD-10 [Translator's note: the 10th revision of the International Statistical Classification of Diseases and Related Health Problems] as a persistent personality disorder following a traumatic and/or catastrophic experience, following the situation denounced and the prolonged judicial proceedings.<sup>270</sup> Moreover, it has been proved that his dismissal and the violation of his human rights, as well as the impossibility of obtaining justice to date, have been significant sources of stress, anxiety and worry and, with the passage of time, this has affected Mr. Lagos del Campo's health.

222. As a result of these violations, the Court finds it pertinent to establish, in equity, compensation for non-pecuniary damage of US\$20,000 (twenty thousand United States dollars).

### **E. Costs and expenses**

223. The **representatives** explained that Mr. Lagos del Campo incurred expenses in the different judicial proceedings, including when he had recourse to the Commission. Later, he was sponsored by APRODEH. Accordingly, they asked the Court to establish, in equity, an amount for expenses corresponding to Mr. Lagos del Campo, and those corresponding to APRODEH as the victim's representatives. They also asked to be given the opportunity to present amounts and vouchers for future expenses at the corresponding procedural stage.<sup>271</sup>

224. The **State** argued that vouchers must be submitted in order to obtain reimbursement of costs and expenses. Regarding future expenditure, it indicated that the representative's request appeared reasonable, but it reserved the right to examine the expenses at the corresponding procedural opportunity.

225. The Court reiterates that, pursuant to its case law,<sup>272</sup> costs and expenses form part of the concept of reparation, because the efforts made by the victims to obtain justice at both the national and the international level involve disbursements that should be compensated when the international responsibility of the State has been declared in a judgment. Regarding the reimbursement of costs and expenses, it is for the Court to make a prudent assessment of their scope, which includes the expenses arising before the authorities of the domestic jurisdiction and also those incurred in the course of the proceedings before the inter-American system, taking into account the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment must be made taking into account the expenses indicated by the parties, provided that the *quantum* is reasonable.<sup>273</sup>

226. The Court has indicated that "the claims of the victims or their representatives for costs and expenses, and the supporting evidence, must be presented to the Court at the first procedural opportunity granted to them; that is, in the motions and pleadings brief, without prejudice to those claims being updated subsequently, with the new costs and expenses arising

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*Case of Acosta et al. v. Nicaragua, supra*, para. 236.

<sup>270</sup> Expert opinion of Carlos Jibaja Zárate (merits file, f. 463).

<sup>271</sup> For future expenses they merely submitted the voucher for the air fare of Christian Huaylinos Camacuari for US\$450.11 (merits file, ff. 444.3 to 444.5).

<sup>272</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations, supra*, para. 42, and *Case of Zegarra Marín v. Peru, supra*, para. 229.

<sup>273</sup> Cf. *Case of Garrido and Baigorria v. Argentina. Reparations and costs. Judgment of August 27, 1998. Series C No. 39*, para. 82, and *Case of Zegarra Marín v. Peru, supra*, para. 229.



from the proceedings before this Court.”<sup>274</sup> Furthermore, the Court reiterates that it is not sufficient to merely forward the probative documents; rather, the parties are required to include arguments that relate the evidence to the fact it represents and, in the case of alleged financial disbursements, that establish clearly the items and their justification.<sup>275</sup>

227. In the instant case, the Court notes that the representatives did not indicate the amount of the expenditure incurred during the litigation at the domestic level, and did not provide any evidence in this regard, because the facts occurred approximately 28 years ago and the domestic proceedings began in 1998; that is, approximately 19 years ago. Therefore, the Court has no evidence to determine the expenses incurred. Regarding the expenses incurred by the *Asociación Pro Rights Humanos* (APRODEH) during the international proceedings, no evidence was provided to establish these. However, the Court considers it reasonable to suppose that the victim made financial disbursements during the years this case was processed before the internal jurisdiction. The Court also finds it reasonable that Mr. Lagos del Campo and his representatives have incurred different expenses such as for honoraria, gathering of evidence, transportation, and communication services during the international processing of this case. Consequently, the Court decides to establish the reasonable amount of US\$20,000 (twenty thousand United States dollars) for the work carried out in the litigation of this case, which must be delivered to Mr. Lagos del Campo, who shall deliver the corresponding sum to his representatives based on the assistance they have provided.

#### **F. Reimbursement of expenditure to the Victims’ Legal Assistance Fund**

228. The victim requested access to the Court’s Legal Assistance Fund. In an order of the President of July 14, 2016, it was established that the financial assistance would be allocated to cover, *inter alia*, the necessary travel and accommodation expenses for the victim to attend the public hearing, and the expenses relating to the preparation and mailing of the affidavit of expert witness Carlos Jibaja Zárate.<sup>276</sup>

229. In a Secretariat note of April 7, 2017, a report on the disbursements made from the Victims’ Assistance Fund in this case, which amounted to US\$1,336.81 (one thousand three hundred and thirty-six United States dollars and eighty-one cents),<sup>277</sup> was sent to the State. Pursuant to article 5 of the Rules for the Operation of this Fund, Peru was granted a specific time frame for presenting any observations it deemed pertinent,<sup>278</sup> and advised that the said

<sup>274</sup> Cf. *Case of Garrido and Baigorria v. Argentina. Reparations*, *supra*, para.79, and *Case of Zegarra Marín v. Peru*, *supra*, para. 230.

<sup>275</sup> Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of November 21, 2007. Series C No. 170, para. 277, and *Case of Zegarra Marín v. Peru*, *supra*, para. 230.

<sup>276</sup> *Case of Lagos del Campo v. Peru*. Victims’ Legal Assistance Fund. Order of the President of the Inter-American Court of Human Rights of July 14, 2016, first operative paragraph. Available at: [http://www.corteidh.or.cr/docs/asuntos/lagos\\_fv\\_16.pdf](http://www.corteidh.or.cr/docs/asuntos/lagos_fv_16.pdf)

<sup>277</sup> The amount requested corresponds to: (i) air fare: US\$457.81 (four hundred and fifty-seven United States dollars and 81 cents); (ii) per diem: US\$636.00 (six hundred and thirty-six United States dollars); (iii) miscellaneous transportation costs: US\$100.00 (one hundred United States dollars), and (iv) affidavit: US\$143.00 (one hundred and forty-three United States dollars) (merits file, f. 759).

<sup>278</sup> The State presented its observations on April 17, 2017. Peru argued that the amount disbursed for the per diem of \$636,00 (six hundred and thirty-six United States dollars) equaled \$212 (two hundred and twelve United States dollars) a day, without any explanation as to how that amount was allocated. In addition, there was no indication why the Court had chosen the category “PS” with the per diem of \$212; the State therefore asked the Court to explain the criteria used to choose a category and, in this specific case, why it had chosen the category “PS.” Also, as it had no information on what the item of miscellaneous transportation expenses referred to, the State asked the Court to explain how it calculated this item, and how it had applied its calculation in this specific case. In a communication of May 2, 2017 (CIDH-322-17 of April 27, 2017), the Court’s Secretariat responded to the State’s observations (merits file, ff. 795-798).

amount must be reimbursed within 90 days of notification of this judgment.

***G. Method of complying with the payments ordered***

230. The State shall make the payments of compensation for pecuniary and non-pecuniary damage and to reimburse costs and expenses established in this judgment directly to the person indicated herein, within one year of notification of this judgment in accordance with the following paragraphs.

231. If the beneficiary is deceased or dies before he receives the respective compensation, this shall be delivered directly to his heirs, pursuant to the applicable domestic law.

232. 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 on the New York Stock Exchange (United States of America), on the day before payment to make the respective calculation.

233. If, for reasons that can be attributed to the beneficiary of the compensation or his heirs, it is not possible to pay the amounts established within the time frame indicated, the State shall deposit the said amounts in his favor in a deposit account or certificate in a solvent Peruvian financial institution, in United States dollars, and in the most favorable financial conditions permitted by banking law and practice. If the corresponding compensation is not claimed after ten years, the sums shall be returned to the State with the interest accrued.

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

235. If the State should fall in arrears, including in the reimbursement of disbursements to the Victims' Legal Assistance Fund, it shall pay interest on the amount owing corresponding to banking interest on arrears in the Republic of Peru.

**IX  
OPERATIVE PARAGRAPHS**

Therefore,

**THE COURT**

**DECIDES,**

Unanimously:

1. To reject the objections filed by the State concerning control of legality in relation to the Admissibility Report of the Commission, the alleged failure to exhaust domestic remedies, and the lack of competence of the Commission, pursuant to paragraphs 17 and 18 of this judgment.
2. To reject the objection filed by the State concerning the inclusion of Article 16 of the Convention in the Merits Report, pursuant to paragraphs 20 to 23 of this judgment.
3. To reject the objections filed by the State concerning the temporal delimitation of the analysis of judicial actions and the factual framework, and the inclusion of violations that were not included in the Merits Report, pursuant to paragraphs 24 and 25 of this judgment.

**DECLARES:**

Unanimously, that:

4. The State is responsible for the violation of the rights to freedom of thought and expression and to judicial guarantees recognized in Articles 13(2) and 8(2) of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of Mr. Lagos del Campo, pursuant to paragraphs 88 to 132 of this judgment.

By five votes to two, that:

5. The State is responsible for the violation of the right to job security, recognized in Article 26 of the American Convention, in relation to Articles 1(1), 13, 8 and 16 of this instrument, to the detriment of Mr. Lagos del Campo, pursuant to paragraphs 133 to 154 and 166 of this judgment."

6. The State is responsible for the violation of the right to freedom of association, recognized in Articles 16 and 26 of the American Convention, in relation to Articles 1(1), 13 and 8 of this instrument, to the detriment of Mr. Lagos del Campo, pursuant to paragraphs 155 to 163 of this judgment.

Dissenting Judges Eduardo Vio Grossi and Humberto Antonio Sierra Porto.

Unanimously, that:

7. The State is responsible for the violation of the rights to judicial protection and to a fair trial, in accordance with Articles 8 and 25 of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of Mr. Lagos del Campo, pursuant to paragraphs 170 to 191 of this judgment.

8. The State is not responsible for the violation of Article 2 of the Convention, in relation to paragraph (h) of article 5 of Law 24514 and article 25 of Legislative Decree No. 728, pursuant to paragraphs 164 and 165 of this judgment.

**AND ESTABLISHES:**

Unanimously, that:

9. This judgment constitutes, *per se*, a form of reparation.

10. The State shall make the publications indicated in paragraph 200 and advise this Court immediately, as indicated in paragraph 201 of this judgment.

11. The State shall pay the amounts established in paragraphs 215, 216, 222 and 227 of this judgment, as compensation for pecuniary damage and non-pecuniary damage and to reimburse costs and expenses, in the terms of those paragraphs and also of paragraphs 230 to 235 of this judgment.

12. The State shall reimburse the Victims' Legal Assistance Fund of the Inter-American Court of Human Rights the amount disbursed during the processing of this case, pursuant to paragraph 229 of this judgment.

13. The State shall, within one year of notification of this judgment, provide the Court with a report on the measures adopted to comply with it, without prejudice to the provisions of

paragraph 201 of this judgment.

14. The Court will monitor full compliance with this judgment, in exercise of its attributes and in fulfillment of its obligations under the American Convention on Human Rights, and will close this case when the State has complied fully with its provisions.

Judges Roberto F. Caldas and Eduardo Ferrer Mac-Gregor Poisot advised the Court of their individual concurring opinions, and Judges Eduardo Vio Grossi and Humberto Antonio Sierra Porto, of their individual partially dissenting opinions, which are attached to this judgment.

DONE, at San José, Costa Rica, on August 31, 2017, in the Spanish language.

I/A Court HR. Case of *Lagos del Campo v. Peru*. Preliminary objections, merits, reparations and costs. Judgment of August 31, 2017.

Roberto F. Caldas  
President

Eduardo Ferrer Mac-Gregor Poisot

Eduardo Vio Grossi

Humberto A. Sierra Porto

Elizabeth Odio Benito

Eugenio Raúl Zaffaroni

L. Patricio Pazmiño Freire

Pablo Saavedra Alessandri  
Secretary

So ordered,

Roberto F. Caldas  
President

Pablo Saavedra Alessandri  
Secretary

**SEPARATE OPINION OF JUDGE ROBERTO F. CALDAS**  
**INTER-AMERICAN COURT OF HUMAN RIGHTS**  
**CASE OF LAGOS DEL CAMPO v. PERU**  
**JUDGMENT OF AUGUST 31, 2017**  
***(Preliminary objections, merits, reparations and costs)***

**I. Introduction and relevance of the judgment**

1. This is a historic decision that represents an important step forward in case law. Even though it has taken time, it is a step with regard to the justiciability of the economic, social, cultural and environmental rights (hereinafter “the ESCER”)<sup>1</sup> that has been duly studied, reflected on, weighed and worked on over many years by diverse panels of judges of this Court in San José, as has this decision to declare, for the first time in the history of its case law, the violation of Article 26 of the American Convention on Human Rights (hereinafter “the Convention” or “the ACHR”). This decision has been taken in such a mature and deliberate manner that I find it important to reflect on the combined strength of all the panels of judges that have now reached the same conclusion. Although a significant majority of the Court voted in favor (five votes to two), we believe that it will still take some time to achieve the always desirable unanimity owing to the different backgrounds or national experiences.

2. However, it should be clearly understood that the Inter-American Court has been protecting the ESCER for many years. The Court has been doing so by considering the respective ESCER a secondary or indirect right of a civil or political right, when in many cases it was really the main right claimed. Thus, to date, many people, including jurists, considered that there was no point in submitting a direct petition on the ESCER to the inter-American system.

3. By this separate opinion, in which I fully share the conclusions reached by this Inter-American Court of Human Rights (hereinafter “the Court”) and the reparations resulting from them, I express my support for this judgment, merely differing on the issue of the breadth of a simple – but still important – procedural matter concerning the application of the *iura novit curia* principle.

4. Notwithstanding other advances to be described below, I would like to emphasize that, with this milestone judgment, the right to work and, particularly, job security, is recognized as an autonomous right. Thus, it is the first occasion on which the Inter-American Court declares that Article 26 of the American Convention and the rights derived from it are justiciable.

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<sup>1</sup> The expression “economic, social and cultural rights (ESCR)” has recently been expanded by the word “environmental,” thus, this is now “economic, social, cultural and environmental rights (ESCER)” in light of the emergence of the focus on and protection of environmental rights as a human right. Some legal doctrine and some parts of civil society had been claiming this for some time. It also makes a great deal of sense in view of the fluid dialogue that the Court is developing with the Inter-American Commission, which has created a new Rapporteurship on the issue: Special Rapporteurship on economic, social, cultural and environmental rights (REESCRA). I am therefore using the expanded name, in the understanding that environmental rights are a fundamental and interdependent part of social rights.

5. I would also underscore the innovative treatment that this judgment has accorded to the different issues examined, such as the freedoms of expression and association, and access to justice, in order to guarantee workers' rights – particularly, in a case originated in the private sector – and thus effective judicial protection for such rights, the lack of which also violated the obligation to ensure the substantive rights analyzed in the judgment.

6. But, above all, I consider that it is especially relevant to emphasize the historic decision taken by the Court when declaring the justiciability of the ESCER under Article 26 in relation to the obligations contained in Articles 1(1) and 2 of the American Convention. As mentioned in paragraph 154 of the judgment, this precedent develops and substantiates the first precedent on this issue and thus opens the way to the interpretation of other rights derived from Article 26 of the Convention. Although the American Convention, which this Court has jurisdiction to interpret, was adopted in 1969, the possibility contained in its text that it be interpreted in an evolutive manner with regard to the economic and social norms, and regarding the educational, scientific, cultural and environmental standards set forth in the OAS Charter in light of Article 29 of the Convention was of great relevance for the Court, finally, to take this step forward in the consolidation of the interdependence and comprehensiveness of human rights.

7. It is essential to stress the importance of this precedent because it goes beyond the inter-American system. It provides an excellent example of judicial dialogue in which judicial decisions in the domestic sphere that have already recognized the justiciability of the ESCER<sup>2</sup> add to such decisions in the international sphere. In taking this decision, the Inter-American Court reveals that it heeds the domestic and constitutional jurisdictions and raises this necessary recognition to the sphere of international human rights law.

8. I will now develop the following additional points to be considered: *Iura novit curia* and the right to work protected by Articles 26 and 25 of the Convention.

## ***II. Iura novit curia***

9. I would like to emphasize a point that, in my opinion, is crucial as regards the application of the *iura novit curia* principle in this specific case, regarding which I differ on its need in this case. I have joined the majority of my colleagues who decided to use the *iura novit curia* principle to examine the matter. I decided to vote with them because I accepted the argument and considered that labor rights had been violated, and even because I believe that it was not even necessary to apply this principle. In the instant case, it was not necessary to apply the principle to examine and declare that the right to work had been violated, because the victim himself had already claimed violation of the right to work and to job security without having indicated the specific article of the American Convention that had been violated.

10. The Latin phrase "*iura novit curia*" signifies "the Court knows the law." In other words, the party who resorts to the courts with a petition and submits the facts – just the facts – has the legitimate expectation that the judge or court will examine the matter and apply the law. It follows the same legal logic as another similar principle "*mihi factum, dabo tibi ius*" (give me

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<sup>2</sup> For example, in the 1980s, the Supreme Court of India was a pioneer in interpreting the right to life broadly to include a series of economic and social rights. The South African Constitutional Court, in the paradigmatic 2000 case of *Grootboom*, examined the situation of a group of individuals who, evicted from informal housing, went to live in tents in a sporting stadium. The court considered that their right to adequate housing had been violated and required various government bodies to take effective measures in their favor. In our hemisphere, the Constitutional Court of Colombia has developed the doctrine of the unconstitutional situation to respond to violations of economic and social rights.

the facts, I will give you law). These principles are coherent with the broad judicial protection that is especially valid and applicable by a human rights court.

11. In other words, in certain circumstances, the Court must accept that the facts are sufficient to form the basis for a claim without the interested party expressly alleging the violation of a specific article or provision of the law. And especially when the other party (in this case, the State) has had the opportunity to contest or to respond to the allegation, respecting the adversarial principle.

12. As mentioned in paragraph 133 of the judgment, the Court noted that, in this case, neither the representatives nor the Commission expressly mentioned the violation of labor rights in relation to articles of the Convention. However, it emphasized that the victim had repeatedly alleged before the domestic courts and before the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the IACHR") the violation of his labor rights, particularly to job security, as well as the consequences of the dismissal.

13. In this regard, the victim mentioned the violation of his right to work and to job security in at least seven briefs in the domestic jurisdiction. Also, on nine different occasions, the briefs submitted to the Commission mention the violation of his rights as a worker (paras. 133 to 135 of the judgment). Consequently, the Court considered that the facts surrounding the dismissal had always been indicated before the Peruvian courts and before the IACHR (para. 137 of the judgment).

14. The Court decided that it should cite the *iura novit curia* principle in order to rule on the violation of the right to work and to job security based on Article 26 of the Convention. However, I disagree with this decision as I consider it unnecessary because the *iura novit curia* principle is applicable only when a fact is alleged without alleging the law while, in this case, the law was alleged, and therefore the claim and its form are absolutely appropriate.

15. It would be unreasonable to require the parties to allege, concurrently, before a non-judicial or quasi-judicial organs such as the Inter-American Commission the facts, the rights and also specific articles of the law or international norm, as this could result in a violation of the right to a simple and prompt remedy established in Article 25 of the Convention.

16. In this specific case, it was the victim himself who, on repeated occasions, cited these rights (and not merely facts), which were ignored by the Commission.<sup>3</sup> However, pursuant to a systematic interpretation with practical effects of the treaty and its organs of application, the Court is empowered to assess and provide a meaning to the initial petition that contains the claim for justice of the victim who has recourse to the inter-American system.

17. Thus, the rights alleged by the victim must also be assessed by the Court, without this meaning that it is exceeding procedural limits. This is because the initial petition is the most immediate expression of the petitioner's voice.

18. In this regard, other international organs have responded to the essential arguments of the victims by expressly qualifying them, even if they have not necessarily cited the specific right and without expressly mentioning the *iura novit curia* principle.<sup>4</sup>

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<sup>3</sup> This omission should not be interpreted as having a negative connotation for the Commission because, at the time, the Court's case law had not recognized labor rights as such, or other social rights.

<sup>4</sup> For example: in the *Case of Antoine Bissangou v. The Republic of Congo*, the African Commission found violations of Articles 3, 7 and 14 of the African Charter of Human and Peoples' Rights, when the petition had alleged



19. Thus, it is evident that the main purpose of the petitioner, Mr. Lagos del Campo, was always the protection of his labor rights, seeking re-establishment of those rights.

### **III. The right to work protected by Articles 26 and 25 of the Convention**

20. I would point out that in the *Cases of Canales Huapaya et al. v. Peru* and *Chinchilla Sandoval et al. v. Guatemala*, I expressed my opinion on the justiciability of the rights derived from Article 26 of the Convention. In particular, in the dissenting opinion I submitted together with Judge Ferrer Mac-Gregor Poisot in the *Case of Canales Huapaya et al. v. Peru*, we underlined the need to make an evolutive interpretation of the scope of the rights established in Article 26 of the Convention, and to examine the justiciability of the right to work more thoroughly. In addition, we noted that the right to work is regulated in most Constitutions of the member countries of the Organization of American States. Furthermore, we emphasized that the right to work did not involve an absolute right, and thus it could have limits. In that opinion, we considered that Peru had violated the right to work of the victims and we stated that the right to work was an autonomous right under comparative law.

21. Meanwhile, in my separate opinion in the case of *Chinchilla Sandoval et al. v. Guatemala*, I indicated that the jurisdictional protection of the right to health should be more explicit and direct than merely reiterating its protection in relation to the rights to life and to personal integrity. In addition, I mentioned that the Court and the American continent were prepared to make the ESCER justiciable and, thus, possible victims could understand that the inter-American system was a channel open to those who need to realize such rights.

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violations of Articles 2, 3 and 21(2). African Commission on Human and Peoples' Rights, Communication No. 253/2002. Judgment of November 2006, paras. 5, 73 to 76. *See also*, cases of the UN Human Rights Committee: *Case of Olimzhon Eshonov v. Uzbekistan*: "The State party contested the admissibility of the communication, arguing that the author has failed to substantiate his claims under article 2 and article 7 of the Covenant. The Committee considers, however, that the arguments advanced by the State party are closely linked to the merits of the communication and should be taken up when the merits of the communication are examined. The Committee considers that the author has sufficiently substantiated his claims, for purposes of admissibility, in that they appear to raise issues under article 2, article 6, paragraph 1, and article 7 of the Covenant, and declares them admissible." Human Rights Committee, Communication No. 1225/2003, U.N. Doc. CCPR/C/99/D/1225/2003 of August 18, 2010, paras. 1.1 3.3, 8.3, 9.7, 9.9 and 10; *Case of Mariano Pimentel and Others v. The Philippines*: "The authors claim that their proceedings in the Philippines on the enforcement of the US judgement have been unreasonably prolonged and that the exorbitant filing fee amounts to a *de facto* denial of their right to an effective remedy to obtain compensation for their injuries, under Article 2 of the Covenant. They argue that they are not required to exhaust domestic remedies, as the proceedings before the Philippine courts have been unreasonably prolonged. The communication also appears to raise issues under Article 14, paragraph 1, of the Covenant. [...] The Committee observes that since the authors brought their action before the Regional Trial Court in 1997, the same Court and the Supreme Court considered the issue of the required filing fee arising from the authors claim on three subsequent occasions (9 September 1998, 28 July 1999 and 15 April 2005) and over a period of eight years before reaching a conclusion in favour of the authors. The Committee considers that the length of time taken to resolve this issue raises an admissible issue under article 14, paragraph 1, as well as article 2, paragraph 3, and should be considered on the merits." Human Rights Committee, Communication No. 1320/2004, U.N. Doc. CCPR/C/89/D/1320/2004 of April 3, 2007, paras. 1, 3, 8.3, 9.2 and 10; *Case of Davlatbibi Shukurova v. Tajikistan*: "The author claims that the facts set out above amount to a violation of the rights of Sherali and Dovud Nazriev under articles 6, 7, 9 and 14, paragraphs 1, 3 (b), (d), (e), (f), (g), and 5 of the Covenant. Although the author does not specifically invoke article 7 in her own respect, the communication also appears to raise issues under this provision." Human Rights Committee, Communication No. 1044/2002, U.N. Doc. CCPR/C/86/D/1044/2002, of March 2006, paras.1.1, 3, 8.2, 8.7 and 9. *Cf. Case of Weerawansa v. Sri Lanka*, Human Rights Committee, Communication No. 1406/2005, U.N. Doc CCPR/C/95/D/1406/2005 of May 14, 2009, paras. 1, 3.3, 7.4 and 8; *Case of Boudjemai v. Algeria*, Human Rights Committee, Communication No. 1791/2008, U.N. Doc CCPR/C/107/D/1791/2008 of June 5, 2013, para. 8.1 and 9. *Case of Benaziza v. Algeria*, Human Rights Committee, Communication No. 1588/2007 CCPR/C/99/D/1588/2007 of September 16, 2010, paras. 9.9 and 10; *Cf. UN Doc. CCPR/C/107/D/1917, 1918, 1925/2009 & 1953/2010 (2013)*, Independent opinion of Fabián Omar Salvioli, Committee member.

22. Thus, it is very relevant to reiterate that the right to work is a right that is regulated by most Constitutions of the OAS member countries, either explicitly, implicitly with other precepts, or by the incorporation of international treaties. In the case of Peru, the right to job security was regulated in its Constitution at the time of the facts and at the present time (para. 138 of the judgment).

23. Based on the above, it is pertinent to mention that the right to work is not a new or emerging right. To the contrary, it consists in a right that is solidly consolidated and has been recognized for a long time in the countries of the region, as established in paragraph 145 of the judgment. Similarly, the different States of the Americas have established domestic labor courts to protect the rights of workers and, in many cases, this may lead to proceedings that even reach a country's highest courts. Consequently, the recognition of the autonomy of the right to work as an autonomous human right protected by the American Convention should not have significant effects in the domestic sphere of the countries that, for decades, have protected this right at the domestic level; rather, it contributes to strengthening the mechanisms to guarantee its effectiveness. This is also evident from the need to guarantee judicial protection (access to justice) to the rights recognized in domestic laws, as established in Articles 25 and 29 of the American Convention (paras. 173 to 176 of the judgment).

24. In this regard, the Preamble to the American Convention (1969) clearly establishes the inclusiveness and validity of the ESCER:

"[...] 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**, and

Considering that the Third Special Inter-American Conference (Buenos Aires, 1967) approved the incorporation into the Charter of the Organization itself of **broader standards with respect to economic, social, and educational rights** and resolved that an inter-American convention on human rights should determine the structure, competence, and procedure of the organs responsible for these matters [...]."<sup>5</sup>

25. In addition, to the provisions of the American Convention, and reaffirming this purpose, in 2012, the States of the Americas adopted, unanimously, the Social Charter of the Americas with the clear purpose established in its Preamble:

**Recognizing the need to strengthen the inter-American system with an instrument to guide action and partnership-for-development activities designed to promote integral development and observance of economic, social, and cultural rights, as well as the elimination of poverty and inequality.**

26. Therefore, all these social and State efforts addressed at strengthening the implementation of the ESCER would not be reasonable if the Inter-American Court continued to examine these rights only indirectly, even when they were the main issue of the victim's petition and of the whole proceedings, as in this case.

27. Indeed, the right to work has been recognized in different international instruments and in contemporary constitutional texts as one of the basic elements for the full realization of human rights, in their two dimensions: that of the so-called civil and political rights, and that of the social, economic, cultural and environmental rights. As an essential element of social

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<sup>5</sup> See also Articles 112 and 150 of the Protocol of Amendment to the Charter of the Organization of American States (B-31) "Protocol of Buenos Aires," signed at the Third Special Inter-American Conference. Buenos Aires, February 27, 1967.

integration and a material presumption on the existence of those rights, work should be, in itself, definitively incorporated into the normative rationale of human rights.

28. Notwithstanding the above, it is appropriate to recall the considerations in our opinion in the *Case of Canales Huapaya et al. v. Peru* on the scope of the right to work in light of the Convention, that: "this understanding of the right to work as directly fundamental in the States, or of the direct justiciability of the right to work under the American Convention, does not mean understanding the right to work as an absolute right, as a right without limits, or that it must be protected every time it is cited." Also, each time a presumed victim alleges that a right has been violated, the Court analyzes the obligations of the State to guarantee and to ensure rights in each specific case.

#### **IV. Final considerations**

29. Based on the above, I reaffirm my support for this important judgment, with the simple procedural exception that, in my opinion, in this case it was not necessary to apply the *iura novit curia* principle to be able to declare the violation of Article 26 of the Convention. This detail does not change the result. I repeat that this Court has taken a significant and historic step forward by declaring the justiciable nature of the right to work and of job security and, with this, a new era for the more comprehensive protection of all interdependent and indivisible human rights.

Roberto F. Caldas  
President

Pablo Saavedra Alessandri  
Secretary

**CONCURRING OPINION OF  
JUDGE EDUARDO FERRER MAC-GREGOR POISOT**

**CASE OF LAGOS DEL CAMPO V. PERU**

**JUDGMENT OF AUGUST 31, 2017  
(PRELIMINARY OBJECTIONS, MERITS, REPARATIONS AND COSTS)**

*THE DIRECT JUSTICIABILITY OF ECONOMIC, SOCIAL, CULTURAL AND ENVIRONMENTAL  
RIGHTS: A NEW STAGE IN INTER-AMERICAN CASE LAW*

1. The case of *Lagos del Campos v. Peru* opens a new and promising horizon for the inter-American human rights system. This is due to the evolutive interpretation<sup>1</sup> that the Inter-American Court of Human Rights (hereinafter “the Inter-American Court” or “the Court”) has made of Article 26 of the American Convention on Human Rights (hereinafter “the American Convention” or “the Pact of San José”). And, particularly, to the step taken towards the full and direct justiciability of the economic, social, cultural and environmental rights (hereinafter “the ESCER” or “the social rights”).

2. First, the judgment approaches the violation of the right to freedom of expression from the perspective of relations between private individuals in labor contexts – worker/company. The judgment finds that “there was no overriding necessity that would have justified the dismissal of Mr. Lagos del Campo,” which occurred owing to his public statements as a labor leader. Thus, his freedom of expression was restricted without taking into consideration that, in essence, those statements referred to matters of general interest and it was appropriate for Mr. Lagos del Campo to give them in his capacity as workers’ representative and president of the Electoral Committee. In this regard, the extensive inter-American case law on the right to freedom of thought and expression recognized in Article 13 of the Pact of San José<sup>2</sup> was expanded and consolidated.

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<sup>1</sup> The Inter-American Court has indicated that human rights treaties are living instrument and their interpretation has to evolve with the times and current conditions. This evolutive interpretation is consequent with the general rules of interpretation established in Article 29 of the American Convention, and also those established by the Vienna Convention on the Law of Treaties. *Cf. The Right to Information on Consular Assistance within the Framework of the Guarantees of Due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 114; and *Case of the Hacienda Brasil Verde Workers v. Brazil*. Preliminary objections, merits, reparations and costs. Judgment of October 20, 2016. Series C No. 318, para. 245.

<sup>2</sup> *Compulsory Membership of 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 No. 5; *Case of “The Last Temptation of Christ” (Olmedo Bustos et al.) v. Chile*. Merits, reparations and costs. Judgment of February 5, 2011. Series C No. 73; *Case of Ivcher Bronstein v. Peru*. Reparations and costs. Judgment of February 6, 2001. Series C No. 74; *Case of Herrera Ulloa v. Costa Rica*. Preliminary objections, merits, reparations and costs. Judgment of July 2, 2004. Series C No. 107; *Case of Ricardo Canese v. Paraguay*. Merits, reparations and costs. Judgment of August 31, 2004. Series C No. 111; *Case of Palamara Iribarne v. Chile*. Merits, reparations and costs. Judgment of November 22, 2005. Series C No. 135; *Case of Claude Reyes et al. v. Chile*. Merits, reparations and costs. Judgment of September 19, 2006. Series C No. 151; *Case of Kimel v. Argentina*. Merits, reparations and costs. Judgment of May 2, 2008. Series C No. 177; *Case of Tristán Donoso v. Panama*. Preliminary objection, merits, reparations and costs. Judgment of January 27, 2009. Series C No. 193; *Case of Ríos et al. v. Venezuela*. Preliminary objections, merits, reparations and costs. Judgment of January 28, 2009. Series C No. 194; *Case of Perozo et al. v. Venezuela*. Preliminary objections, merits, reparations and costs. Judgment of January 28, 2009. Series C No. 195; *Case of Usón Ramírez v. Venezuela*. Preliminary objections, merits, reparations and costs. Judgment of November 20, 2009. Series C No. 207; *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*. Preliminary objections, merits, reparations and costs. Judgment of November 24, 2010. Series C No. 219; *Case of Fontevecchia and D’Amico v. Argentina*. Merits, reparations and costs. Judgment of November 29, 2011. Series C No. 238; *Case of Mémoli v. Argentina*. Preliminary objections, merits, reparations and costs. Judgment of August 22, 2013. Series C No. 265; *Case of Norín Catrimán et al. (Leaders, members and activity of the Mapuche Indigenous People) v. Chile*. Merits, reparations and costs. Judgment of May 29, 2014. Series C No. 279; and *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*. Preliminary objections, merits, reparations and costs. Judgment of June 22, 2015. Series C No. 293.

3. Second, in this historic judgment, the Court declared,<sup>3</sup> for the first time, the violation of Article 26 of the American Convention in relation to Article 1(1),<sup>4</sup> owing to the violation of the job security of Mr. Lagos del Campo.<sup>5</sup> Using an evolutive interpretation and distancing itself from its traditional case law, the Inter-American Court provided new normative content to Article 26 of the Pact of San José, read in light of Article 29 of this instrument. Thus, the said article is not merely a programmatic standard for the States Parties to the American Convention, but rather a provision that imposes on the Inter-American Court the obligation to refer to the Charter of the Organization of American States (hereinafter “the OAS Charter”) to achieve the full effectiveness of the rights derived from the economic, social, educational, scientific, and cultural standards set forth in that Charter.<sup>6</sup> I referred to the possibility of considering the ESCER justiciable via Article 26 of the American Convention in the first case that I heard as a judge of the Inter-American Court in 2013.<sup>7</sup> And I have repeated this in subsequent cases concerning the right to health (2015-2016),<sup>8</sup> the right to work (2015),<sup>9</sup> and the right to decent housing (2016);<sup>10</sup> matters on which I have had the opportunity to give my opinion to date.

4. In this way, the Inter-American Court considered the right to job security as a right protected by Article 26 of the American Convention and, consequently, declared that the Peruvian State was internationally responsible for failing to adopt adequate measures to protect the violation of the right to work that could be attributed to third parties.<sup>11</sup> That said, in order to analyze the meaning and scope of Article 26 of the Pact of San José, the Court took into consideration the general rules of interpretation established in Article 29(b), (c) and (d) of this treaty and, thus, specific labor rights were derived from Articles 34(g), 45(b) and (c), and 46 of the OAS Charter.<sup>12</sup> The Court also took into account the American Declaration of the Rights and Duties of Man,<sup>13</sup> the explicit acknowledgement of the rights that were in dispute in the

<sup>3</sup> Cf. *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2017, Series C No. 340, paras. 153, 154 and 166, also fifth operative paragraph. This is the first time in its almost 40 years of existence and 30 years of contentious jurisdiction that the Inter-American Court has declared the violation of this precept of the Convention.

<sup>4</sup> The Court also declared that the rights established in Articles 8, 13 and 16 had been violated in relation to job security. Cf. *Case of Lagos del Campo v. Peru, supra*, para. 153.

<sup>5</sup> In the judgment, in relation to Article 1(1), it was considered that “[...] in light of the arbitrary dismissal by the company [...] the State failed to adopt adequate measures to protect the violation of the right to work by third parties”. Cf. *Case of Lagos del Campo v. Peru, supra*, para. 151.

<sup>6</sup> Cf. *Case of Lagos del Campo v. Peru, supra*, para. 141 to 154. Also, see my concurring opinion in the *Case of Yarce et al. v. Colombia. Preliminary objections, merits, reparations and costs*. Judgment of November 22, 2016. Series C No. 325, paras. 22 to 26.

<sup>7</sup> Cf. Concurring opinion in the *Case of Suárez Peralta v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of May 21, 2013. Series C No. 261.

<sup>8</sup> Cf. Concurring opinions: *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2015. Series C No. 298 (endorsed by Judges Roberto Caldas and Manuel Ventura Robles); *Case of Chinchilla Sandoval et al. v. Guatemala. Preliminary objections, merits, reparations and costs*. Judgment of February 29, 2016. Series C No. 312, and *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*. Judgment of November 30, 2016. Series C No. 329.

<sup>9</sup> See the concurring opinion that I developed with Judge Roberto Caldas in the *Case of Canales Huapaya et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of June 24, 2015. Series C No. 296.

<sup>10</sup> See the concurring opinion in the *Case of Yarce et al. v. Colombia, supra*.

<sup>11</sup> Cf. *Case of Lagos del Campo v. Peru, supra*, para. 151.

<sup>12</sup> In para. 143 of the judgment, the Inter-American Court explained that: “[w]ork is a right and a social duty,” and that this should be performed with “fair wages, employment opportunities, and acceptable working conditions for all.” They [the articles of the OAS Charter] also establish the right of workers to “associate themselves freely for the defense and promotion of their interests.” In addition, they indicate that State must “harmonize the social legislation” for the protection of such rights.” Cf. *Case of Lagos del Campo v. Peru, supra*, para. 143.

<sup>13</sup> The 1948 American Declaration of the Rights and Duties of Man expressly indicates in its Article XIV: “Every person has the right to work, under proper conditions, and to follow his vocation freely [...]”

Constitution and laws of Peru (noting regional tendencies), and the vast international *corpus iuris* on the matter that has been reflected, for example, in the United Nations 17 Goals for 2030.<sup>14</sup>

5. Third, the Inter-American Court applied the protection of Article 16 in relation to Article 26 of the Pact of San José, due to the violation of the right to *the freedom of association of labor*. This is of vital importance, bearing in mind that it also constitutes the first occasion on which the Inter-American Court addresses the protection of freedom of association exclusively with regard to labor matters and not, as in previous cases, only “labor union” matters. Specifically, it is this new aspect of inter-American case law that I find it pertinent to develop in this opinion.

6. In the instant case, the Inter-American Court addressed the rights that were violated comprehensively and collectively, declaring the direct violation of Article 26 of the American Convention. And this contrasted with its previous case law that did this by connectivity with the civil and political rights. Consequently, I concur, in essence, with all the violations declared in the judgment. However, owing to the importance of the decision as regard the full justiciability of the ESCER, I consider it opportune to establish some elements of the *right to freedom of association in labor matters for the defense and promotion of workers’ interests* under Articles 26 and 16 of the American Convention. And, I do so to highlight how different international instruments can act in synergy to delimit the scope of the protection of inter-American social rights through the Pact of San José.

7. Taking the foregoing into account, I will now elaborate on: **I**. The justiciability of the right to work using Article 26 of the American Convention and the application of the *iura novit curia* principle; **II**. The right to freedom of association in the case law of the Inter-American Court.; **III**. The right to the freedom of association of labor for the protection and promotion of workers’ interests as part of the right to work, and **IV**. Conclusions.

#### I. THE JUSTICIABILITY OF THE RIGHT TO WORK USING ARTICLE 26 OF THE AMERICAN CONVENTION AND THE APPLICATION OF THE *IURA NOVIT CURIA* PRINCIPLE

8. As mentioned, in this case the Inter-American Court declared, for the first time, that Article 26 of the American Convention had been violated in relation to the right to job security<sup>15</sup> and the right to freedom of association;<sup>16</sup> in both cases invoking the *iura novit curia* principle. In this regard, the Inter-American Court has established an important precedent for the justiciability of the social rights under the inter-American system, by opening up the possibility that rights which were not expressly established in Article 19(6) of the Protocol of San Salvador<sup>17</sup> — such as the right to work and its different facets – can be protected directly by the American Convention.

9. In the judgment, the Inter-American Court reinforces the principles of interdependence

<sup>14</sup> Particularly, in the judgment, the Inter-American Court also considered that “[...], the United Nations General Assembly adopted Agenda 2030, which includes 17 Sustainable Development Goals and 169 targets to benefit people, the planet and prosperity. In particular, Goal 8 promotes sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all. Targets 8.5 and 8.8 are addressed at protecting workers’ rights and promoting a safe and secure working environment,” *Case of Lagos del Campo v. Peru, supra*, footnote 216.

<sup>15</sup> *Cf. Case of Lagos del Campo v. Peru, supra*, paras. 133 to 154.

<sup>16</sup> *Cf. Case of Lagos del Campo v. Peru, supra*, paras. 155 to 163.

<sup>17</sup> Article 19. Means of Protection [...] 6. 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.

and indivisibility between the economic, social, cultural and environmental rights and the civil and political rights. And, it does so based on its belief that human rights should be understood comprehensively and collectively, without any hierarchy, and enforceable in all cases before the competent authority.<sup>18</sup> In other words, the judgment recognizes that a reciprocal dependency exists between all human rights, which has been incorporated into the international framework of human rights, without establishing a hierarchy or subsuming some rights in the content of others.<sup>19</sup>

10. Thus, to derive job security as part of the right to work using Article 26 of the American Convention, the Inter-American Court considered four aspects of special relevance. The first, relating to the rights that may be protected by Article 26 of the American Convention, which are those derived or identified from the economic, social, educational, scientific and cultural standards contained in the OAS Charter. In particular, for the purposes of the case of *Lagos del Campos*, the Inter-American Court considered that Article 34(g), Article 45(b) and (c), and Article 46 of the OAS Charter establish various aspects of the right to work.<sup>20</sup> Thus, Article 26 contains social rights and is not a mere programmatic norm as some believe. In this regard, I would like to reproduce part of my Concurring Opinion to the judgment in the *Case of Yarce et al. v. Colombia*:<sup>21</sup>

19. A recurring argument to try and deny the Inter-American Court's jurisdiction in relation to the "rights" established in Article 26 is based on an understanding that this article does not truly establish "rights," but merely the commitment to "progressive development"; in other words, a programmatic objective. I consider that this perspective is limited in light of the protection that the inter-American system should provide, and therefore do not share this view for different reasons.

20. First, according to the text of Article 26, the commitment to progressive development refers to "rights," according to the literal meaning of the article; that is, the obligation could only be established in relation to "rights," so that it is essential to deduce that the article refers to "rights" and not to mere objectives.

21. This understanding accords with the provisions of the Vienna Convention on the Law of Treaties, which requires that a treaty be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."<sup>22</sup> Thus, it is evident that an understanding in good faith of the word "rights" included in the said Article 26, that is "in accordance with the ordinary meaning" of the term, indicates that it refers

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<sup>18</sup> Cf. *Case of Lagos del Campo v. Peru*, *supra*, para. 141.

<sup>19</sup> I have been referring to "interdependence and indivisibility" as an inseparable duo in my separate opinions in previous cases. Cf. Concurring opinion in the *Case of Yarce et al. v. Colombia*, *supra*, paras. 13 to 15; Concurring opinion in the *Suárez Peralta v. Ecuador*, *supra*, para. 24. Also, see Resolution 32/130 of the United Nations General Assembly of September 16, 1977, paragraph 1(a); Declaration on the Right to Development, General Assembly Resolution 41/128, of December 4, 1986, para. 10 of the Preamble and Art. 6; Limburg Principles, 1986, especially No. 3, and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 1997, particularly, No. 3.

<sup>20</sup> *Case of Lagos del Campo v. Peru*, *supra*, para. 143.

<sup>21</sup> Concurring opinion with regard to the *Case of Yarce et al. v. Colombia*, *supra*, paras. 19 to 26.

<sup>22</sup> Articles 31 and 32, on the interpretation of treaties, establish: Article 31: "General rule of interpretation. 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended." Article 32: Supplementary means of interpretation: Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."

to actual "rights," of the same nature as the other "rights" mentioned in the American Convention. This is corroborated when noting that Article 26 is the only article of Chapter III entitled "Economic, Social and Cultural Rights." This understanding is in keeping with the object and purpose of the treaty, which is the protection of human rights.

22. Thus, Article 26 is not merely a programmatic norm for the States Parties to the American Convention; rather it is a provision that imposes on the Inter-American Court the duty to derive rights from the articles of the OAS Charter, which in this specific case contain rights of an economic, social or cultural nature and not mere objectives. [...].

23. Second, and continuing the preceding argument, it cannot be overlooked that Article 26 of the American Convention expressly indicates that the rights are derived from the pertinent articles of the OAS Charter.<sup>23</sup> The literal meaning is clear:<sup>24</sup> the article does not indicate that, in order to clarify which "rights" Article 26 refers to, it is necessary to identify those rights that are expressly recognized as such in the OAS Charter; to the contrary, this provision indicates – as the main provision of Article 26 – that there are rights that derive from certain articles of the Charter: "the economic, social, educational, scientific, and cultural norms."

24. According to the dictionary of the *Real Academia Española*, the pertinent meaning of "derivar," is: "[d]icho de una cosa: Traer su origen de otra[; dicho de una palabra: Proceder de cierta base léxica[, y] establecer una relación morfológica o etimológica entre dos voces."<sup>25</sup> [Derive: said of a thing: originate from something else; said of a word: proceed from a specific lexical basis, and establish a morphological or etymological relationship between two words.]

25. Therefore, the understanding of the rights referred in Article 26 of the American Convention should not be restricted merely to those rights that can be found literally as such – as the "right to work" could be understood<sup>26</sup> – in the text of the OAS Charter. To the contrary, a "derivation" should be made from the corresponding articles mentioned previously: "proceed from a specific lexical basis" to find a right. The text of Article 26, which refers to "rights" derived from "the economic, social, educational, scientific, and cultural standards set forth in the Charter," obligates the interpreter, who cannot disregard the said text and validly maintain that the norms corresponding to the OAS Charter do not offer sufficient grounds to "derive" rights, because this is ordered by the text of the Convention. This does not preclude the admissibility of methods of interpretation that entail taking other norms into consideration, including the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador";<sup>27</sup> I have referred to this on other occasions.

26. The foregoing reveals that the Inter-American Court must make an evolutive and dynamic interpretation and that even though evidently interpretive difficulties exist owing to the way in which the American Convention has established the economic, social and cultural rights that it contains, this is not a difficulty that the interpretive and hermeneutic effort cannot overcome. Precisely, it is the function of the Inter-American Court to interpret the American Convention, without excusing itself based on the obscurity, vagueness or ambiguity of the terms of the treaty, and taking into consideration the *pro persona* principle contained in Article 29 of the Pact of San José.

11. The second relevant aspect relates to Advisory Opinion No. 10 – on the interpretation of the American Declaration of the Rights and Duties of Man within the framework of Article 64 of the American Convention<sup>28</sup> – which the Inter-American Court used when delivering its

<sup>23</sup> Adopted on April 30, 1948. Entered into force, December 13, 1951. Amended by the Protocol of Amendment to the Charter of the Organization of American States "Protocol of Buenos Aires", signed on February 27, 1967, at the Third Special Inter-American Conference; by the Protocol of Amendment to the Charter of the Organization of American States "Protocol of Cartagena de Indias", adopted on December 5, 1985, at the Fourteenth Special Session of the General Assembly; by the Protocol of Amendment to the Charter of the Organization of American States "Protocol of Washington", adopted on December 14, 1992, at the Sixteenth Special Session of the General Assembly, and by the Protocol of Amendment to the Charter of the Organization of American States "Protocol of Managua", adopted on June 10, 1993, at the Nineteenth Special Session of the General Assembly.

<sup>24</sup> Taking into account Article 31 of the Vienna Convention on the Law of Treaties (transcribed above), it is valid to have recourse to the ordinary meaning of the words that, in addition, in this case, correspond to the understanding that best accords with the object and purpose of the Convention, that is the protection of human rights.

<sup>25</sup> Consulted on website: <http://dle.rae.es>.

<sup>26</sup> Article 45(b) of the Charter of the Organization of American States establishes that "[w]ork is a right and a social duty [...]."

<sup>27</sup> Adopted on November 17, 1988. Entered into force on November 16, 1999.

<sup>28</sup> Cf. *Interpretation of the American Declaration of the Rights and Duties of Man within the framework of Article*



judgment. This is because, in that opinion, the Inter-American Court considered that “[t]he Member States have understood that the Declaration contains and defines those essential human rights referred to in the Charter [...].” Thus, the Inter-American Court observed that the right to work is found in Article XIV of the American Declaration.<sup>29</sup> The third relevant aspect consists in the national and international *corpus iuris* that protects the right to work as an autonomous right,<sup>30</sup> and the Inter-American Court took this into consideration when taking its decision in the instant case. Lastly, the fourth relevant aspect refers to the development of the right to job security under the laws of Peru, in the Constitutions (of 1979 and 1993) and the labor legislation.<sup>31</sup>

12. In addition, in the judgment, the Inter-American Court used three of the paragraphs of Article 29 (b, c and d) of the American Convention.<sup>32</sup> In other words, the Inter-American Court granted a broader protection derived from the recognition of the right to work in both the law and the Constitution of Peru, as well as the rights recognized in any treaty to which the State was a party, and the effects produce by the American Declaration of the Rights and Duties of Man. In this case, their effect was to delimit the rights that were expressed in the provisions of the OAS Charter. It should be stressed that the said three paragraphs do not have, *prima facie*, to be concurrent to makes the social rights justiciable. In other words, perhaps the right is not expressly recognized in domestic law, but it is to be found in an international treaty to which the State is a party. Or, inversely, perhaps the right is not expressly contemplated in the international treaties to which the State is a party, but it is established in domestic law.

13. Furthermore, it is necessary to take into consideration the effects of the American Declaration of the Rights and Duties of Man, by the derivation of rights via Article 26, which delimits more clearly the list of rights that are contained in the OAS Charter. Thus, depending on the case and the right analyzed, the Inter-America Court must verify the rules of interpretation that should be applied to provide greater protection to the victim and to assess whether or not the social rights that have been alleged have been violated.

14. Complementing this analysis, the Inter-American Court concluded a series of obligations that, in principle, result in the following duties: “(a) to adopt the appropriate measures for the due regulation and monitoring [of the right to work]; (b) to protect workers against unjustified dismissal through its competent organs; (c) in case of unjustified dismissal, to rectify the situation (either by reinstatement or, if appropriate, by compensation and other social benefits established in domestic law). Consequently, (d) the State should provide effective grievance mechanisms in cases of unjustified dismissal, to ensure access to justice and the effective judicial protection of such rights.”<sup>33</sup> In other words, the Inter-American Court identified specific obligations in relation to the right to work (job security).

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64 of the American Convention on Human Rights, Advisory Opinion OC-10/89 of July 14, 1989, paras. 43 and 45.

<sup>29</sup> *Case of Lagos del Campo v. Peru, supra*, para. 144. In addition, it is worth underlining the fourth paragraph of the Preamble to the American Convention which states: “Considering that these principles [rights] have been set forth in the Charter of the Organization of American States, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights, and that they have been reaffirmed and refined in other international instruments, worldwide as well as regional in scope.”

<sup>30</sup> *Case of Lagos del Campo v. Peru, supra*, para. 145.

<sup>31</sup> *Case of Lagos del Campo v. Peru, supra*, para. 138.

<sup>32</sup> “Article 29. Restrictions regarding Interpretation. No provision of this Convention shall be interpreted as: “[...] (b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party; (c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or (d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.”

<sup>33</sup> *Case of Lagos del Campo v. Peru, supra*, para. 149.

15. Regarding the violation of the right to job security as part of the right to work, the Inter-American Court concluded that:

151. In this specific case, Mr. Lagos del Campo had been employed by the aforementioned company as a manual worker for approximately 13 years and, at the time of the facts, he was president of the Electoral Committee of the company's Industrial Community and the delegate to CONACI. Based on statements made during an interview published in "La Razón" in the context of internal elections, Mr. Lagos del Campo was dismissed for having committed a serious verbal offense against his employer. He contested this decision before the competent organs, but it was ratified in second instance, considering that he had been dismissed for a justified reason. He appealed this decision before various domestic instances, without finding protection, particularly for his right to job security, alleging that the reasons for his dismissal were unjustified or unwarranted and that due process had been violated. That is to say, in light of the arbitrary dismissal by the company (*supra*, para. 132) the State failed to adopt adequate measures to protect the violation of the right to work by third parties. Thus, Mr. Lagos del Campo was not reinstated in his job and did not receive any compensation or the corresponding benefits.

152. Consequently, Mr. Lagos del Campo lost his job, the possibility of a retirement pension, and also the exercise of his rights as a workers' representative. This also had an impact on his professional, personal and family life (*supra*, para. 72). [...]

153. Based on the foregoing, the Court concludes that, owing to his arbitrary dismissal, Mr. Lagos del Campo was deprived of his employment and other benefits resulting from social security. Therefore, **the Peruvian State failed to protect his right to job security, in interpretation of Article 26 of the American Convention, in relation to Articles 1(1), 13, 8 and 16** of this instrument, to the detriment of Mr. Lagos del Campo.<sup>34</sup>

16. As mentioned in the judgment: "[...] the Court has established [...] that it has jurisdiction to examine and decide disputes relating to Article 26 of the American Convention, as an integral part of the rights named in it and, regarding which, Article 1(1) establishes the general obligations of the States to respect and to ensure rights [in the area of economic, social, cultural and environmental rights]. The Court has also developed important case law on this matter, in light of different articles of the Convention [...]" And, it added:

154. [...] On this basis, **the present judgment develops and substantiates a specific condemnation for the violation of Article 26 of the American Convention on Human Rights, established in Chapter III of this treaty, entitled Economic, Social and Cultural Rights.**<sup>35</sup>

17. This initial analysis has allowed us to observe that the Inter-American Court developed the violation of Article 26 of the American Convention specifically in relation to job security. In this regard – and this is the essence of this opinion – the same analysis could have been made regarding the violation of the right to freedom of association for the protection and promotion of workers' interests. In this way, the Court could have established the differences with previous case law that related to labor unions.

## II. THE RIGHT TO FREEDOM OF ASSOCIATION IN THE CASE LAW OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

18. In the Inter-American Court's case law, the right to "associate freely for labor purpose" has been addressed only in relation to the issue of labor or trade unions; that is, the right to organize and join trade unions. In addition, it is important to point out that even though Article 19(6) of the Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights (hereinafter "the Protocol of San Salvador") includes the right to organize and join trade unions (Article 8(1)(a) of the Protocol of San Salvador) as one of the two rights expressly mentioned as enforceable before organs of the inter-American system, the previous

<sup>34</sup> Cf. *Case of Lagos del Campo v. Peru*, *supra*, paras. 151, 152 and 153.

<sup>35</sup> Cf. *Case of Lagos del Campo v. Peru*, *supra*, para. 154.

case law of the Inter-American Court subsumed this within the content of Article 16 of the American Convention. In this regard, it is illustrative to mention the standards that have been applied to the organization of, and membership in, trade unions derived from the word "labor" in Article 16 of the Pact of San José.

19. In relation to the Inter-American Court's contentious function, the matters concerning labor or trade unions and freedom of association submitted to its consideration have referred to the dismissal of members of labor unions and the execution of labor union leaders. In the cases of *Baena Ricardo v. Panama*,<sup>36</sup> *Huilca Tecse v. Peru*<sup>37</sup> and *Cantoral Huamaní and García Santa Cruz v. Peru*,<sup>38</sup> the Inter-American Court developed the content of the right to associate for "labor" purposes established in Article 16 of the American Convention in relation to violations of freedom of association in a trade or labor union.

20. In the case of *Baena Ricardo v. Panama*, the Inter-American Court considered that, in order to analyze whether the right to freedom of association had been violated, this should be examined in relation to labor union freedom. Thus, it considered that, in labor unions matters, freedom of association consisted basically in the ability to constitute labor unions and set in motion their internal structure, activities and program of action, without any intervention by the public authorities that could limit or impair the exercise of the respective right. This freedom also supposed that each person could determine, without any pressure, whether or not they wished to form part of the association. In other words, this related to the basic right to associate in order to achieve a legitimate purpose without pressure or interference that could alter or denature that purpose.<sup>39</sup>

21. In this regard, the Inter-American Court considered that freedom of association, in relation to labor unions, was of great importance for the defense of the legitimate interests of workers and was part of the *corpus juris* of human rights.<sup>40</sup> In labor matters, freedom of association, according to Article 16 of the American Convention, includes a right and a freedom: (i) the right to form associations, subject only to the restrictions established in paragraphs 2 and 3 of the said Article 16,<sup>41</sup> and (ii) the freedom of everyone not to be compelled or obliged to join a labor union.<sup>42</sup>

22. In the case of *Huilca Tecse*, following the Peruvian State's acknowledgement of international responsibility, the Inter-American Court considered that the extrajudicial execution of Pedro Huilca Tecse had constituted a violation of the content of the right to freedom of association, in relation to freedom to join a labor union.<sup>43</sup> The Inter-American Court also established that the execution of a labor union leader, not only restricted the freedom of association of an individual, but also the right and the freedom of a specific group to associate

<sup>36</sup> *Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs.* Judgment of February 2, 2001. Series C No. 72.

<sup>37</sup> *Case of Huilca Tecse v. Peru. Merits, reparations and costs.* Judgment of March 3, 2005. Series C No. 121.

<sup>38</sup> *Case of Cantoral Huamaní and García Santa Cruz v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of July 10, 2007. Series C No. 167.

<sup>39</sup> *Case of Baena Ricardo et al. v. Panama, supra*, para. 156.

<sup>40</sup> *Case of Baena Ricardo et al. v. Panama, supra*, para. 157 and *Case of Huilca Tecse v. Peru, supra*, para. 73.

<sup>41</sup> In the same case, the Court also considered that the American Convention was very clear when it pointed out, in Article 16, that freedom of association "shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others." *Case of Baena Ricardo et al. v. Panama, supra*, para. 168.

<sup>42</sup> *Case of Baena Ricardo et al. v. Panama, supra*, para. 159.

<sup>43</sup> *Case of Huilca Tecse v. Peru, supra*, para. 67.

freely, without fear, so that the right protected by Article 16 had a special scope and nature. This revealed the two dimensions of freedom of association.<sup>44</sup>

23. Regarding the two dimensions of the right to freedom of association, the individual and the social, the Inter-American Court added that:

70. In its individual dimension, labor-related freedom of association is not exhausted by the theoretical recognition of the right to form trade unions, but also corresponds, inseparably, to the right to use any appropriate means to exercise this freedom. When the Convention proclaims that freedom of association includes the right to freely associate "for [... any] other purpose," it is emphasizing that the freedom to associate and to pursue certain collective goals are indivisible, so that a limitation of the possibilities of association represents directly, and to the same extent, a limitation of the right of the collectivity to achieve its proposed purposes. Hence the importance of adapting to the Convention the legal regime applicable to trade unions and the State's actions, or those that occur with it tolerance, that could render this right inoperative in the practice.

71. In its social dimension, freedom of association is a mechanism that allows the members of a labor collectivity or group to achieve certain objectives together and to obtain benefits for themselves.

72. The two above-mentioned dimensions of freedom of association must be guaranteed simultaneously, respecting the restrictions allowed in paragraph 2 of Article 16 of the Convention.<sup>45</sup>

24. In the same case, the Inter-American Court referred, for the first time, to the Protocol of San Salvador and to Convention No. 87 of the International Labour Organization, which in their Articles 8(1)(a) and 11, respectively, include the obligation of the State to allow labor unions, federations and confederations to function freely.<sup>46</sup>

25. In the case of *Cantoral Huamaní and García Santa Cruz*, the Inter-American Court considered that Article 16 of the Pact of San José had been violated, because the execution of the victims had an intimidating and frightening effect on the workers members of the Peruvian mining unions. Those executions not only restricted the freedom of a specific group to associate freely without fear, but they affected the freedom of the miners to exercise this right.<sup>47</sup> In this case, the Inter-American Court made a distinction between the two types of obligations (negative and positive) that are present in Article 16, considering that:

144. Article 16(1) of the Convention establishes that those who are subject to the jurisdiction of the States Parties have the right to associate freely with other persons, without the intervention of the public authorities limiting or obstructing the exercise of this right. In addition, they have the right and the freedom to associate in order to seek together a lawful purpose, without pressure or interference that can alter or denature this purpose. In addition to these negative obligations, freedom of association also gives rise to positive obligations, such as to prevent attacks on it, to protect those who exercise it, and to investigate violations. These positive obligations must be adopted, even in the sphere of relations between individuals, if the case merits it. As it has determined in other cases, the Court considers that the sphere of protection of Article 16(1) includes the exercise of the right to organize trade unions.<sup>48</sup>

26. Also, in Advisory Opinion No. 22 on the *Entitlement of Legal Entities to Hold Rights under the Inter-American Human Rights System*, the Inter-American Court considered that "when Article 8(1)(a) indicates that 'as an extension of that right [of the workers], the States Parties shall permit trade unions, federations and confederations to function freely, and trade unions to associate and form national federations and confederations and international trade union organizations,' what the provision does is give a broader scope to the right of the workers than the mere fact of being able to organize unions and join the one they choose. The

<sup>44</sup> *Case of Huilca Tecse v. Peru, supra*, para. 69.

<sup>45</sup> *Case of Huilca Tecse v. Peru, supra*, paras. 70, 71 and 72.

<sup>46</sup> *Case of Huilca Tecse v. Peru, supra*, para.74.

<sup>47</sup> *Case of Cantoral Huamaní and García Santa Cruz v. Peru, supra*, para. 148.

<sup>48</sup> *Case of Cantoral Huamaní and García Santa Cruz v. Peru, supra*, para. 144.

Inter-American Court achieved this by specifying the minimum means by which the States should guarantee the exercise of this right. Consequently, the right that the provision recognizes in favor of the workers establishes a framework under which more specific rights are generated for labor or trade unions, federations and confederations as autonomous subjects of rights, the purpose of which is to allow them to be interlocutors for their members and, through this function, facilitating a more extensive protection and the effective enjoyment of this right of the workers."<sup>49</sup>

27. In sum, the right to freedom of association has been protected by connectivity, subsuming it in the right to freedom of association recognized in Article 16 of the American Convention (indirect justiciability by connectivity). However, in the instant case, as we shall see in the following section, the Inter-American Court extended the protection of labor associations and institutions that are not labor unions and, contrary to the cases referred to above, the Inter-American Court addressed directly the right to the freedom of association of labor *from the perspective of Article 26 of the American Convention*.

### III. THE RIGHT TO THE FREEDOM OF ASSOCIATION OF LABOR FOR THE PROTECTION AND PROMOTION OF WORKERS' INTERESTS AS PART OF THE RIGHT TO WORK

28. In the judgment, the Inter-American Court concluded that Articles 16(1) and 26 of the American Convention had been violated, in relation to Articles 8, 11, and 13 of this instrument, to the detriment of Mr. Lagos del Campos, as follows:

162. [...] the Court finds that the dismissal of Mr. Lagos del Campo went beyond the violation of his individual right to freedom of association, because it deprived the workers of the Industrial Community of the representation of one of their leaders, especially in the election that should have been held under his supervision as president of the Electoral Committee. The Court also notes that, since Mr. Lagos del Campo's dismissal was carried out in reprisal for his task of representation, this could have had an intimidating and threatening impact on the other members of the Industrial Community [...].<sup>50</sup>

29. In this regard, even though I agree with the judgment, I believe it important to make some clarifications in relation to the violation of the right to freedom of association and its impact on labor matters. And this is taking into consideration that the judgment does not indicate the reasons why it relates Article 26 of the Pact of San José to the labor-related right to freedom of association for the protection and promotion of the victim's interests, contained expressly in Article 45(c) of the OAS Charter, or its relationship to Article 16 of the American Convention.<sup>51</sup>

30. In the instant case, the Inter-American Court recognized that the issue of freedom of association in relation to labor unions is of particular importance. Moreover, Article 19(6) of the Protocol of San Salvador confers on the Inter-American Court the express competence to rule on violations of the State's obligation to permit unions, federations and confederations to function freely, as established in Article 8(1)(a).<sup>52</sup> In addition, the Inter-American Court referred to one aspect of labor union rights when it stated that "freedom of association in

<sup>49</sup> *Entitlement of Legal Entities to Hold Rights under the Inter-American Human Rights System (Interpretation and scope of Article 1(2), in relation to Articles 1(1), 8, 11(2), 13, 16, 21, 24, 25, 29, 30, 44, 46, and 62(3) of the American Convention on Human Rights, as well as of Article 8(1) A and B of the Protocol of San Salvador)*. Advisory Opinion OC-22/16 of February 26, 2016. Series A No. 22, para. 92.

<sup>50</sup> *Cf. Case of Lagos del Campo v. Peru, supra*, para. 162.

<sup>51</sup> In this regard, it should be noted that the judgment itself recognizes, in a synergetic manner, the relationship that exists between the American Declaration of the Rights and Duties of Man, the OAS Charter, the Inter-American Democratic Charter and the 1971 Convention on Workers' Representatives, which also protects the right of workers to associate to defend their interests. *Cf. Case of Lagos del Campo v. Peru, supra*, para. 158 and footnote 230.

<sup>52</sup> *Cf. Case of Lagos del Campo v. Peru, supra*, para. 157.

relation to labor unions is of the greatest importance for the defense of the legitimate interests of the workers, and is established in the *corpus juris* of human rights.<sup>53</sup> However, Article 8(1)(a) of the Protocol of San Salvador does not include all the situations in which a violation could be declared when labor union association is affected.

31. For example, in Advisory Opinion No. 22 on *Entitlement of Legal Entities to Hold Rights under the Inter-American Human Rights System*, when establishing the regime of State obligations with regard to trade or labor unions, the Inter-American Court did not delimit or establish an exhaustive or restricted series of rights<sup>54</sup> that would be contemplated in Article 8(1)(a) of the Protocol of San Salvador. Rather, the Inter-American Court merely established and interpreted some “examples” of obligations and that, if those obligations were not respected and ensured, Article 8(1)(a) of the Protocol of San Salvador could be violated. Thus, the Inter-American Court considered that:

32.

101. Additionally, the Court considers that the **general obligation of States to ensure trade union rights contained in Article 8(1)(a) of the Protocol translates into the positive obligations to permit and encourage the creation of appropriate conditions to ensure that such rights can be realized effectively.** In this regard, **the Court referred to ILO Convention 87 in order to mention examples** that illustrate the positive obligations that arise from the general obligation to ensure the rights recognized to trade unions, federations and confederations. Thus, the Court notes that Article 3(1) of that Convention establishes the right of workers’ organisations “to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programmes.”

102. In keeping with the foregoing, **the general obligation of the States to respect rights entails negative obligations such as refraining from creating legal or political barriers that could prevent unions, federations and confederations from being able to function freely and, in addition, trade unions from being able to associate.** In this regard, **the Court notes that the said Article 3.2 of Convention 87** establishes that “[t]he public authorities shall refrain from any interference which would restrict [the rights recognized in the preceding paragraph of the article] or impede the lawful exercise thereof.”<sup>55</sup>

33. This example in the area of labor union matters is extremely relevant. Indeed, by referring to Article 45(c) of the OAS Charter, the judgment in the case of *Lagos del Campo* implicitly accepts – although not in relation to the litigation in this case – that even though the Protocol of San Salvador is the main instrument in the area of ESCER under the inter-American system, when it was drawn up, it did not contemplate exhaustively all the facets and angles of the rights that the said treaty recognized (such as the right of workers to associate freely for the defense and promotion of their interests). Thus, it is the Inter-American Court that, by an evolutive interpretation,<sup>56</sup> has undertaken to determine the content of the rights and their

<sup>53</sup> Cf. *Case of Lagos del Campo v. Peru*, *supra*, para. 157; *Case of Baena Ricardo et al. v. Panama*, *supra*, paras. 156 and 158; *Case of Huilca Tecse v. Peru*, *supra*, paras. 67, 69, 70, 73, 75, 77, and *Case of Cantoral Huamaní and García Santa Cruz v. Peru*, *supra*, paras. 144, 145, 146 and Cf. ILO. Convention No. 87 on Freedom of Association and Protection of the Right to Organize, of June 17, 1948, and Convention No. 98 on Right to Organize and Collective Bargaining, of June 8, 1949.

<sup>54</sup> Consequently, the Court considered that the most favorable interpretation of Article 8(1)(a) entailed understanding that it **establishes rights** in favor of trade unions, federations and confederations, because they are interlocutors of their members and seek to safeguard and ensure their rights and interests. Reaching any other conclusion would mean excluding the effects of the OAS Charter and, consequently, prejudicing the effective enjoyment of the rights it recognizes. *Entitlement of Legal Entities to Hold Rights under the Inter-American Human Rights System (Interpretation and scope of Article 1(2), in relation to Articles 1(1), 8, 11(2), 13, 16, 21, 24, 25, 29, 30, 44, 46, and 62(3) of the American Convention on Human Rights, as well as of Article 8(1) A and B of the Protocol of San Salvador)*. OC-22/16, *supra*, para. 97.

<sup>55</sup> *Entitlement of Legal Entities to Hold Rights under the Inter-American Human Rights System (Interpretation and scope of Article 1(2), in relation to Articles 1(1), 8, 11(2), 13, 16, 21, 24, 25, 29, 30, 44, 46, and 62(3) of the American Convention on Human Rights, as well as of Article 8(1) A and B of the Protocol of San Salvador)*. OC-22/16, *supra*, para. 101 and 102.

<sup>56</sup> Cf. *The Right to Information on Consular Assistance within the Framework of the Guarantees of Due Process of*

application to specific cases, either economic, social, cultural and environmental rights or civil and political rights (determining their content in the particular case); and this, when any right mentioned above has been violated in relation to the general obligations established in Articles 1 and 2 of the American Convention, as has been its consistent practice by resorting to other international instruments to supplement the provisions of the Pact of San José<sup>57</sup> or the Protocol of San Salvador.<sup>58</sup>

34. In addition, although Article 16 of the American Convention establishes that “[e]veryone has the right to *associate freely for [...] labor [...] purposes*,” in general, associations are not formed only for labor purposes, but as this article of the Convention itself indicates, there are other types of associations – ideological, religious, political, economic, social, cultural, sports, or others. I believe that this clarification is of crucial importance, because although, to date, the Inter-American Court has declared the violation of the right to freedom of association for “labor” purposes (focused on labor unions), it has never ruled directly on the right to unionize as an autonomous rights under the Protocol of San Salvador, and the different facts that this right encompasses as delineated, to a great extent, in Advisory Opinion No. 22.

35. When Article 16 of the American Convention establishes “association for labor purposes,” the truth is that “the right to freedom of association” – *lato sensu* – is, in reality, the genus, so that it may have different species or associations *stricto sensu* (labor,<sup>59</sup> trade union, ideological, religious, political, economic, social, cultural, sports, or others). This distinction provides greater specificity to the right that has been violated and the scope of the area of social rights. For example, while labor associations and trade unions may be protected by the content of social rights, religious or ideological associations would fall within the sphere of the content of civil and political rights.

36. In this regard, to illustrate the foregoing, it is important to mentioned the case of *Kawas Fernández v. Honduras*, where the Inter-American Court declared that Article 16 of the American Convention had been violated in a non-trade union context. At the time of the facts, “Blanca Jeannette Kawas Fernández was president of the PROLANSATE foundation, and in that capacity she promoted the establishment of public policies on environmental protection in the department of Atlántida, Honduras, as well as awareness regarding natural resource preservation through education, and reported environmental degradation in the area.”<sup>60</sup> In this regard, it specified that “[t]he recognition of work in defense of the environment and its connection to human rights is becoming more prominent across the countries of the region, in which an increasing number of incidents have been reported involving murders and threats and acts of violence against environmentalists owing to their work.”<sup>61</sup> In that case, the Inter-American Court considered that “Article 16 of the American Convention also includes the right of

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Law. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 114.

<sup>57</sup> For example, this has been reflected in case law on indigenous matters in relation to Article 21 of the American Convention, *Cf. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, reparations and costs.* Judgment of August 31, 2001. Series C No. 79 and *Case of the Kaliña and Lokono Peoples v. Suriname. Merits, reparations and costs.* Judgment of November 25, 2015. Series C No. 309.

<sup>58</sup> See particularly the construct developed by the Inter-American Court in the case of *Gonzales Lluy* with regard to the right to education. *Case of Gonzales Lluy et al. v. Ecuador, supra*, paras. 233 to 291.

<sup>59</sup> There are nuances even in the area of labor matters: for example, there may be people who work in an organization or association who are prevented from performing their work, which would mean that their work-related right to freedom of association had been infringed. However, in the case of *Lagos del Campos*, the purpose was the defense and promotion of his labor-related interests, which made even more specific the right to labor-related freedom of association for labor-related contexts of non-trade union labor associations.

<sup>60</sup> *Cf. Case of Kawas Fernández v. Honduras. Merits, reparations and costs.* Judgment of April 3, 2009. Series C No. 196, para. 151.

<sup>61</sup> *Cf. Case of Kawas Fernández v. Honduras, supra*, para. 149.

individuals to set up and participate freely in non-governmental organizations, associations or groups involved in human rights monitoring, reporting and promotion."<sup>62</sup>

37. In the instant case, it has been proved that Mr. Lagos del Campo was dismissed owing to statements made in the context of an electoral process that he was called on to supervise as part of his responsibilities. In addition, as a result of his dismissal, the victim could not continue his work of representing the workers on the Electoral Committee. In addition, he was unable to continue his membership in the Industrial Community, since he no longer worked for the company, because the Second Labor Court of Lima determined that the victim's dismissal was "legal and justified," endorsing a sanction that had an impact on the possibility of Mr. Lagos del Campo being able to continue belonging to that company and representing the interests of the other workers.<sup>63</sup> The Inter-American Court concluded that:

162. In addition, the Court has established that freedom of association has two dimensions, because it relates both to the right of the individual to associate freely and to use the appropriate means to exercise this freedom, and to the right of the members of a group to achieve certain objectives together and to benefit from them. The Court has also established that the rights derived from representing the interests of a group are twofold, because they relate both to the right of the individual who exercises the mandate or appointment, and the right of the collectivity to be represented, so that the violation of the right of the former (the representative) results in the violation of the right of the latter (the person or collectivity represented). [...] <sup>64</sup>

38. There can be no doubt that the violations experienced by Mr. Campos del Lago do not fall within an analysis of the rights of labor unions, union members or union representatives and their correlative rights. To the contrary, this case has a different particularity than the cases that this Inter-American Court has examined in relation to the right to freedom of association, because Mr. Lagos del Campo was a representative of a workers' association. Thus, I agree fully with the judgment when it indicates that:

157. In this regard, the Court finds that the protection of the right to labor-related freedom of association is subsumed not only in the protection of labor unions, their members and their representatives. [...]

158. However, the protection recognized to the right to freedom of association in the context of labor extends to organizations that, even though their nature differs from that of labor unions, seek to represent the legitimate interests of workers. This protection is derived from Article 16 of the American Convention, which protects freedom of association for any purpose, as well as from other international instruments that recognize special protection to freedom of association to protect the interests of workers, without specifying that this protection is restricted to the labor union sphere. [...] <sup>65</sup>

39. Moreover, the Inter-American Court added that:

159. These principles concur with the protection recognized by the ILO, which has clarified that the expression "**workers' representatives**" **includes those recognized as such under domestic law or practice, whether union representatives or "elected representatives, namely, representatives who are freely elected by the workers of the undertaking in accordance with the provisions of national laws or regulations or of collective agreements and whose functions do not include activities which are recognized as the exclusive prerogative of trade unions in the country concerned."**

160. Similarly, it has been interpreted [by the European Court] that the representatives of the workers of an undertaking should enjoy effective protection against any act that could prejudice them, including dismissal based on their condition as workers' representatives, or on their activities

<sup>62</sup> Cf. *Case of Kawas Fernández v. Honduras*, *supra*, para. 146.

<sup>63</sup> Cf. *Case of Lagos del Campo v. Peru*, *supra*, para. 161.

<sup>64</sup> Cf. *Case of Lagos del Campo v. Peru*, *supra*, para. 162.

<sup>65</sup> Cf. *Case of Lagos del Campo v. Peru*, *supra*, paras. 157 and 158.



arising from this representation. Also, the national authorities must ensure that disproportionate penalties do not dissuade the representatives from seeking to express and defend the workers' interests.<sup>66</sup>

40. As can be seen, what the Inter-American Court reflects with these findings is that both labor unions and their representatives, and workers' associations and their representatives, *enjoy a specific protection* for the proper performance of their functions,<sup>67</sup> without any distinction between them. In this regard, the Inter-American Court concluded that:

158. [...] Thus Article 26 of the American Convention, which relates to the economic, social, educational, scientific and cultural standards set forth in the Charter of the Organization of American States, recognizes the right of employers and workers to associate freely for the defense and promotion of their interests. Additionally, the Preamble to the Inter-American Democratic Charter recognizes that the right of workers to associate themselves freely for the defense and promotion of their interests is fundamental to the achievement of democratic ideals.

163. Based on the above, the Court concludes that the State is responsible for the violation of Articles 16(1) and 26 in relation to Articles 1(1), 13 and 8 of the American Convention, to the detriment of Mr. Lagos del Campo.<sup>68</sup>

41. In this regard, the intention is not to establish that Article 8(1)(a) of the Protocol of San Salvador is applicable, through Article 19(6) of the American Convention, to the situation of Mr. Lagos del Campos. This is because this is not a case of a labor union representative acting in the legitimate defense of the interests of union members. To the contrary, the situation of Mr. Lagos del Campos falls within the protection that labor associations and their representatives *have to associate, and that even though they are of a different nature to that of labor unions, they pursue legitimate interests and rights of the workers*;<sup>69</sup> a protection that is not to be found in the Protocol of San Salvador in the article on the right to work (Article 6 of the Protocol of San Salvador),<sup>70</sup> but is established expressly in Article 45(c), of the OAS Charter.

42. A comparison of Article 8(1)(a) of the Protocol of San Salvador and Article 45(c) of the OAS Charter leads to some conclusions that are essential for understanding the scope of the right to freedom of association for the defense and promotion of workers' interests in this case:

#### **45(c) OAS Charter**

**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.

#### **8(1)(a) Labor union rights under the Protocol of San Salvador**

1. The States Parties shall ensure: a. **The right of workers to organize trade unions and to join the union of their choice for the purpose of protecting and promoting their interests.** As an extension of that right, the States Parties shall permit trade unions to establish national federations or confederations, or to affiliate with those that already exist, as well as to form international trade

<sup>66</sup> Cf. *Case of Lagos del Campo v. Peru*, *supra*, paras. 159 and 160.

<sup>67</sup> Cf. *Case of Lagos del Campo v. Peru*, *supra*, para. 157.

<sup>68</sup> Cf. *Case of Lagos del Campo v. Peru*, *supra*, paras. 158 and 163.

<sup>69</sup> Cf. *Case of Lagos del Campo v. Peru*, *supra*, para. 158.

<sup>70</sup> The Protocol of San Salvador establishes: "Art. 6. Right to Work. 1. Everyone 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. 2. The State Parties undertake to adopt measures that will make the right to work fully effective, especially with regard to the achievement of full employment, vocational guidance, and the development of technical and vocational training projects, in particular those directed to the disabled. The States Parties also undertake to implement and strengthen programs that help to ensure suitable family care, so that women may enjoy a real opportunity to exercise the right to work."

union organizations and to affiliate with that of their choice. The States Parties shall also permit trade unions, federations and confederations to function freely.

43. A comparison of Article 8(1)(a) of the Protocol of San Salvador and Article 45(c) of the OAS Charter reveals that the differences resides in the entity *entitled to the right to associate for the defense/promotion of their interests* recognized in the two instruments. That is, while the latter recognizes labor unions (specifically), the former recognizes workers' associations more generally without conditioning them to consist of labor unions.

44. Thus, the Inter-American Court, also, when declaring the violation of Article 26 of the American Convention, concluded that the right *to defend and promote workers' interests by an association* is enforceable (derived from the mandate of the Convention), through Article 26 of the Pact of San José; because, as the judgment indicates, there is no difference between representatives of labor unions and representatives of labor associations. Thus, while association in a labor union for the defense of such interests may be invoked via the Protocol of San Salvador (8(1)(a)), if it has not been made justiciable via Article 26 of the American Convention, the right to "associate of labor for the defense of their interests" would have risked leaving individuals who also merit protection in this regard in labor contexts without international protection.<sup>71</sup>

45. On this point, I consider that the fact that the Inter-American Court ruled on the justiciability of rights that were not established in Article 19(6) of the Protocol of San Salvador, by means of Article 26 of the American Convention, is especially relevant. First, because, as explained, not all social rights, or all their aspects, were contemplated in the Protocol of San Salvador when it was drafted. Second, because it avoids making distinctions of degrees regarding who or what may or may not be protected under this right, owing to the restriction made in Article 19(6) of the Protocol of San Salvador (in that case, only labor or trade unions and their representatives).

46. Notwithstanding the foregoing, to provide greater clarity to the violation of the right to freedom of association, I consider that the Inter-American Court could have used Article 29(b) and (d) of the American Convention, as norms of interpretation in relation to Article 26 of the American Convention and Article 45(c) of the OAS Charter; and not only referred to Article 16 of the Pact of San José. This is because there is a risk that the content of the right to freedom of association for the promotion and defense of the interests of workers (*stricto sensu*) is diluted in the content of the right to associate (*lato sensu*).<sup>72</sup>

#### IV. CONCLUSIONS

47. The Inter-American Court has ruled on the content of Article 26 of the American Convention in very few cases. The Inter-American Commission has directly alleged that it had been violated on only two occasions,<sup>73</sup> and the representatives of the victims only six times.<sup>74</sup>

<sup>71</sup> Although, the Inter-American Court examined the violation of Article 16 of the American Convention in the case of *Kawas Fernández*, this referred to work as a human rights defender (of the environment; in other words, for being a member of and taking part freely in organizations, associations, or non-governmental groups working in the area of monitoring, denouncing and promoting human rights, and not for being a member of a labor union. Cf. *Case of Kawas Fernández v. Honduras. Merits, reparations and costs*. Judgment of April 3, 2009. Series C No. 196, para. 146.

<sup>72</sup> The situation of Mr. Lagos del Campo is a specific type of labor relationship (for the defense and promotion of workers' interests).

<sup>73</sup> Cf. *Case of the "Five Pensioners" v. Peru. Merits, reparations and costs*. Judgment of February 28, 2003. Series C No. 98, para. 142. In the *Case of Yakye Axa v. Paraguay* (2005), the Inter-American Commission made a connection between Article 26 of the American Convention and the violation of Article 4. In this regard it indicated that: " 157. [...] (e) the situation of risk or vulnerability of the Yakye Axa Indigenous Community has been created by State negligence, a fact that has not been challenged; quite the contrary, the State itself declared a "state of emergency in the Community" in 1999. This negligence took place in a context in which Paraguay had the obligation to ensure the

Thus, the great significance of this judgment stems from the fact that the Inter-American Court, for the first time in its almost 40 years of existence, declares the violation of Article 26 of the Pact of San José.

48. At this historic moment of the Inter-American Court's case law, it is essential that the parties and the Inter-American Commission make the ESCER that can be protected by the inter-American system more visible, by specific arguments concerning the violation of the inter-American social rights contained in Article 26 of the Pact of San José. Nowadays, the social rights are no longer "good intention" rights established in international instrument, but are enforceable before the competent instances.<sup>75</sup> This charts a new course for the inter-American system.<sup>76</sup>

49. Thus, the intention of this separate opinion is, on the one hand, to stress the important advance that this judgment makes in case law within the inter-American system by according direct justiciability to the ESCER and, on the other, to clarify the scope, differences and synergy between Article 16 of the American Convention which protects freedom of association (*lato sensu*) and Article 26 of this instrument as a provision that protects freedom of association for labor purposes (*stricto sensu*), based on the provisions established in Article 45(c) of the OAS Charter.

50. Thus, the progress made in the case of *Lagos del Campo* in the area of the right to work (job security and freedom of association) and in the area of the protection and guarantee of the

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conditions required to achieve a decent life, an obligation that was underlined by the commitment reflected in Article 26 of the American Convention to take appropriate steps for complete realization of social rights. Nevertheless, by omission in its public health policies, the State diminished the enjoyment of basic public health, nutritional and housing conditions by the members of the Yakye Axa Community [...]" *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of June 17, 2005. Series C No. 125, para. 157.

<sup>74</sup> 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. 253; *Case of the Yean and Bosico Girls v. Dominican Republic.* Judgment of September 8, 2005. Series C No. 130, para. 115.B (in this case the representatives argued that the right to education was a right protected by Article 26 of the American Convention in the context of the violation of Article 19 of the American Convention); *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, para. 134; *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller") v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of July 1, 2009. Series C No. 198, para. 4; *Case of the Kichwa Indigenous Community of Sarayaku v. Ecuador. Merits and reparations.* Judgment of June 27, 2012. Series C No. 245, para. 137 to 139 and *Case of Gonzales Luy et al. v. Ecuador, supra*, para. 159.

<sup>75</sup> In this regard, it is important to point out that this tendency has been put in practice within the United Nations with the entry into force (in 2013) of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR), adopted in 2008. With the entry into force of the OP-ICESCR, the Committee on Economic, Social and Cultural Rights has been able to hear individual communications based on which it has declared violations of the provisions of the ICESCR. In this regard, see: CESCR, *Case of I.D.G v. Spain*, E/C.12/55/D/2/2014, June 17, 2015 and *Case of López Rodríguez v. Spain*, E/C.12/57/D/1/2013, March 4, 2016.

<sup>76</sup> It is especially significant that the direct justiciability of the ESCER occurs on the centenary of the 1917 Constitution of Querétaro, the first constitution to establish social rights, and particularly labor rights. Social constitutionalism originates from the original text of the current Constitution of the United Mexican States, promulgated on Monday, February 5, 1917, in the city of Querétaro, entered into force on May 1, that same year. In addition to establishing the right to education (Art. 3) and the right to land (Art. 27), it established specific labor rights (Art. 123). Indeed, Chapter Six, entitled "Work and Social Security" establishes, in the 30 paragraphs of Article 123, labor rights for manual workers, day laborers, employees, domestic employees, and artisans: maximum duration of the working day; prohibition to hire children under 12 years of age; prohibition for women and children under 16 years of age to perform unhealthy or hazardous work or any work after 10 p.m.; the right to a rest period; rights for women who are pregnant or breast-feeding; the right to a remunerative minimum wage and the prohibition to embargo, compensate or deduct from this; the right of the worker to participate in the company's profits; the right to the payment of overtime; the obligation of agricultural, industrial or mining employers to provide workers with rent-restricted comfortable and hygienic accommodation and to establish other necessary services in the community (schools, clinics, etc.); the obligation of the State to encourage individual savings (by saving banks and insurance schemes, etc.); the right to compensation for work accidents and professional ailments; the right of the workers to associate, to strike, and the right of workers to re-instatement or compensation for unjustified dismissal.

ESCER directly and by a comprehensive and collective analysis of the rights (economic, social, cultural and environmental, civil and political), has allowed the Court to take a historic step forward to a new era of inter-American case law. In this regard, the inter-American region is proceeding in the direction agreed by different countries of the United Nation in the 2030 Sustainable Development Agenda<sup>77</sup> (see *supra*, para. 4, *in fine*, of this opinion).<sup>78</sup> It should not be ignored, as the Economic Commission for Latin America and the Caribbean (ECLAC) has indicated, that currently, in our region, social inequality is an obstacle to sustainable development. And, in this regard – according to ECLAC – “equality of rights is [...] the basic axis of equality,” understood as the “full realization” of economic, social cultural and environmental rights.<sup>79</sup>

51. This case reveals how the violation of a right classified as a social right does not necessarily lead to the need to evaluate progressivity or non-retrogressivity, or aspects related to the availability of resources, or legislation, general regulatory frameworks or public policies. Considering that social rights are reduced to this type of analysis is to perpetuate false myths that the ESCER depend merely on the passage of time to be guaranteed. This belief does not take into account the existence of State obligations to respect and to ensure rights that are applicable to all human rights, without distinction. The intention is not to judicialize social public policies, but rather to achieve the effective protection of human rights in a specific case.

52. As of this time, the Inter-American Court can address the different issues that are submitted to it not by connectivity or indirectly, subsuming the content of the ESCER in the civil and political rights; but with a broader social perspective of the violations alleged in future cases. I note that this matter is especially important in the Latin American region which has high rates of inequity, inequality, poverty and social exclusion. I am convinced that this new vision of inter-American social rights will permit a more detailed and comprehensive analysis of the rights and obligations involved in a case, permitting the development of legal criteria and standards that address matters of significant impact for the realization of human rights in the region in a more appropriate and opportune manner.

Eduardo Ferrer Mac-Gregor Poisot  
Judge

Pablo Saavedra Alessandri  
Secretary

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<sup>77</sup> On September 25, 2015, world leaders adopted a series of global goals to end poverty, protect the planet and improve the prospects of everyone as part of a new Sustainable Development Agenda. Each goal has specific targets that must be achieved in the next 15 years. Among the most important goals are: No poverty (Goal No. 1), Zero hunger (Goal No. 2), Good health and well-being (Goal No.3), Quality education (Goal No. 4), Clean water and sanitation (Goal No. 6), Decent work and economic growth (Goal No. 8), Reduced inequalities (Goal No. 10), and Climate action, Life below water and Life on land (Goals No. 13, 14 and 15). These Goals clearly related to the economic, social, cultural and environmental rights.

<sup>78</sup> See footnote 216 of the judgment.

<sup>79</sup> See *Social Panorama of Latin America 2016*, Economic Commission for Latin America and the Caribbean, United Nations, 2017, p. 11. In addition, ECLAC indicates that “inequality means that not all individuals can fully exercise their civil, political, economic, social and environmental rights and, consequently, that the principle of universality is violated.” Meanwhile, paragraph five of the Preamble of the American Convention stipulates that: “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.”

**PARTIALLY DISSENTING OPINION OF JUDGE EDUARDO VIO GROSSI,  
INTER-AMERICAN COURT OF HUMAN RIGHTS  
CASE OF LAGOS DEL CAMPO v. PERU,  
JUDGMENT OF AUGUST 31, 2017,  
(Preliminary objections, merits, reparations and costs)**

**INTRODUCTION**

This partially dissenting opinion is issued<sup>1</sup> with regard to the above-mentioned judgment,<sup>2</sup> because the author disagrees with the reference it makes to Article 26<sup>3</sup> of the American Convention on Human Rights<sup>4</sup> as grounds for the fifth<sup>5</sup> and sixth operative paragraphs,<sup>6</sup> in which it declares that “[t]he State is responsible for the violation of the right to job security” and “the right to freedom of association.”

**a. Preliminary observations**

This opinion is evidently provided with full and absolute respect for the decision taken in this case by the Inter-American Court of Human Rights,<sup>7</sup> which must therefore be complied with. Consequently, this text should in no way be interpreted as detracting from the legitimacy of the decision taken in this case. However, this opinion is issued not only in the exercise of a right, but also to meet an obligation, which is to contribute to a better understanding of the function assigned to the Court.

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<sup>1</sup> Art. 66(2) of the Convention: “If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment.”

Art. 24(3) of the Statutes of the Court: “The decisions, judgments and opinions of the Court shall be delivered in public session, and the parties shall be given written notification thereof. In addition, the decisions, judgments and opinions shall be published, along with judges’ individual votes and opinions and with such other data or background information that the Court may deem appropriate.”

Art. 65(2) of the Court’s Rules of Procedure: “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 President 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.”

Hereafter, each time that a provision is cited without indicating to which legal instrument it corresponds, it shall be understood that it is from the American Convention on Human Rights.

<sup>2</sup> Hereinafter, *la* Judgment.

<sup>3</sup> “Progressive Development. The 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, subject to available resources, by legislation or other appropriate means, the full realization of the rights derived from 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.”

Hereinafter, the Organization of American States will be referred to as the OAS.

<sup>4</sup> Hereinafter, the Convention.

<sup>5</sup> “The State is responsible for the violation of the right to job security, recognized in Article 26 of the American Convention, in relation to Articles 1(1), 13, 8 and 16 of this instrument, to the detriment of del Campo, pursuant to paragraphs 133 to 154 and 166 of this judgment.”

<sup>6</sup> “The State is responsible for the violation of the right to freedom of association, recognized in Articles 16 and 26 of the American Convention, in relation to Articles 1(1), 13 and 8 of this instrument, to the detriment of del Campo, pursuant to paragraphs 155 to 163 of this judgment.”

<sup>7</sup> Hereinafter, the Court.

From that perspective, it should be pointed out that this opinion, such as others issued by the judges in this and other cases, is a clear demonstration of the dialogue and the diversity of opinions that exist in the Court, as well as the deference shown to its members, all of which evidently enhances the delicate and transcendental task with which they are entrusted.

Furthermore, it should be noted that this text is based on the conviction that the work of the Court is to interpret and to apply the Convention;<sup>8</sup> that is, to indicate the meaning and scope of its provisions, which may be applied in different ways since, to some extent, they are perceived to be obscure or debatable. In this regard, it is not for the Court to amend the Convention, but merely to indicate what it really establishes and not what the Court would like it to establish. Thus, the Court's function is to clarify the intention that the States Parties to the Convention had when signing it and, eventually, how it should be understood in relation to new situations. And, it is in order to determine that intention that it should abide by the rules for the interpretation of treaties contained in the Vienna Convention on the Law of Treaties and, in particular, those established in its Article 31,<sup>9</sup> understanding that the four elements set out in it should be applied simultaneously and harmoniously.

It is worth adding, in this regard, that the Court's mandate is to impart justice using the law.<sup>10</sup> It is not incumbent on the Court to promote human rights, which is the function that the Convention assigns to the Inter-American Commission on Human Rights.<sup>11</sup> Consequently, as a judicial organ, the Court does not have the authority to rule outside or disregarding the legal provisions established, for the purposes of the Court, in the Convention.

This dissent is manifested, therefore, with the hope that, in future, it will be adopted either by the Court's case law or by a new provision of international law. Regarding the former, because the Court's judgment is only binding for the State that is a party to the case in which it is delivered,<sup>12</sup> and thus, the Court's case law, as an ancillary source of international law and,

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<sup>8</sup> Art. 62(3): "The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement."

<sup>9</sup> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

<sup>10</sup> Footnote 8.

<sup>11</sup> Hereinafter the Commission.

Art. 41: "The main function of the Commission shall be to promote respect for and defense of human rights. In the exercise of its mandate, it shall have the following functions and powers:

- a) to develop an awareness of human rights among the peoples of America;
- b) to make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights;
- c) to prepare such studies or reports as it considers advisable in the performance of its duties;
- d) to request the governments of the member states to supply it with information on the measures adopted by them in matters of human rights;
- e) to respond, through the General Secretariat of the Organization of American States, to inquiries made by the member states on matters related to human rights and, within the limits of its possibilities, to provide those states with the advisory services they request;
- f) to take action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51 of this Convention; and
- g) to submit an annual report to the General Assembly of the Organization of American States.

<sup>12</sup> Art.68(1): "The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties."

Art. 46(1) of the European Convention on Human Rights: " The High Contracting Parties undertake to abide by the final

consequently, a means of “determining the rules of law” established by an autonomous source of international law – in other words, treaty, custom, general principle of law or unilateral legal act,<sup>13</sup> may, in future change when judgment is handed down in another case. And, regarding the latter, because the function of developing international standards is a matter for the States and, in the case of the Convention, its States Parties, by amendments to the Convention.<sup>14</sup>

Therefore, I wish to put on record that, the considerations set forth in this opinion do not seek, under any circumstance, to weaken or restrict the effectiveness of human rights, but rather, precisely the contrary. Indeed, the following considerations respond to the certainty that real respect for human rights is achieved if the States Parties to the Convention are required to comply with what they freely and sovereignly accepted. In this regard, legal certainty plays a fundamental role and, consequently, cannot be understood as a limitation or restriction to the development of human rights, but rather as the instrument that can best ensure real respect for them or their prompt re-establishment, if they have been violated.

What underlies this text is, therefore, the fact that law is the means to achieve justice, and justice to achieve peace and, consequently, given that international human rights law forms part of general international law, the interpretation and application of the former should be carried out in harmony with the provisions of the latter.<sup>15</sup>

In addition, it is relevant to indicate that this text also responds to the circumstance that the Court, as a judicial organ, enjoys the broadest autonomy in its task, since there is no higher authority that can control its conduct, a characteristic that means that it is essential for the Court to be extremely rigorous in the exercise of its jurisdiction, in order not to distort this and, consequently, weaken the inter-American system for the protection of human rights. In this regard, the following opinion seeks to ensure the broadest possible recognition of the Court by all those who appear before it and, thus, to strengthen its capacity as a judicial organ and, consequently, as the most proficient entity of hemispheric scope that has been created to

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judgment of the Court in any case to which they are parties.”

Art. 46. and 3 of the Statute of the African Court of Justice and Human Rights: “Binding Force and Execution of Judgments. 1. The decision of the Court shall be binding on the parties. ... 3. The parties shall comply with the judgment made by the Court in any dispute to which they are parties within the time stipulated by the Court and shall guarantee its execution.”

Art. 59 of the Statute of the International Court of Justice: “The decision of the Court has no binding force except between the parties and in respect of that particular case.”

<sup>13</sup> Art. 38 of the Statute of the International Court of Justice: “1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

(b) international custom, as evidence of a general practice accepted as law;

(c) the general principles of law recognized by civilized nations;

(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo* if the parties agree thereto.”

<sup>14</sup> Art. 31: “Recognition of Other Rights. Other rights and freedoms recognized in accordance with the procedures established in Articles 76 and 77 may be included in the system of protection of this Convention.”

Art. 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.”

Art. 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.”

<sup>15</sup> Art. 31.3.c) of the Vienna Convention on the Law of Treaties: ““General rule of interpretation.... There shall be taken into account, together with the context: ... (c) any relevant rules of international law applicable in the relations between the parties.”

safeguard human rights. Thus, it is necessary to persist in improving and consolidating it, without subjecting it to risks that could affect this effort adversely.

## **b. The dissent**

The partial dissent indicated in this opinion refers, as indicated, to the violation of two rights, the right to job security and the right to freedom of association.

### **1. Right to job security**

Regarding the right to job security, it must be indicated that my dissent in this matter does not refer to the existence of this right, or to that of the other economic, social and cultural rights. There is no doubt about this, because it is evident that they are embodied in the international law applicable in the States of the Americas and, particularly with regard to the right to work, in the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Protocol of San Salvador.

Rather, this opinion relates to the fact that, in the instant case, it was not a matter of determining the existence of the right to job security as the judgment does,<sup>16</sup> but whether its possible violation by the State could be submitted to the consideration and decision of the Court. The disputed issue related, therefore, to whether the right to job security could be heard by the Court; in other words, whether the Court had competence, under the provisions of Article 26 of the Convention, to rule on the possible violation of this right.

The thesis supported by this text is based on the fact that the Court lacks this competence; that is, it asserts, contrary to the judgment, that the right to job security cannot be tried internationally before the Court. And this, based on reasons that will be set forth below, grouped around the provisions of the Convention; the provisions of its Article 26 in particular and, finally, some other considerations with regard to the judgment.

### **2. Right to freedom of association**

Regarding the right to freedom of association, it is sufficient to indicate that the mention made in the judgment to Article 26 of the Convention in this regard seems unnecessary because, on the one hand, the said right is expressly established in Article 16(1) of the Convention<sup>17</sup> and, on the other, its meaning and scope is repeated abundantly in the judgment.<sup>18</sup> Accordingly, it can be deduced that this right can be judicialized before the Court on those grounds and not on the basis of the provisions of the said Article 26, which, incidentally, is alluded to very tangentially or marginally in the judgment in relation to freedom of association, on a level with the Inter-American Democratic Charter<sup>19</sup> and the ILO Convention on Workers' Representatives.<sup>20</sup> In other words, it is addressed more appropriately as a means of interpreting its provisions, together with the context of the wording of the Convention,<sup>21</sup> as regards the existence of the right to freedom of association, but not to substantiate the Court's competence to rule in that regard.

<sup>16</sup> Paras. Nos. 141 to 150. Hereafter, each time a paragraph is cited, it will be indicated as "para." or "paras" if plural, and it shall be understood to correspond to the judgment.

<sup>17</sup> "Freedom of Association. Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes."

<sup>18</sup> Paras 155 to 160.

<sup>19</sup> Para. 158.

<sup>20</sup> Para. 159.

<sup>21</sup> Art. 31.3.c) of the Vienna Convention on the Law of Treaties: "General rule of interpretation.... There shall be taken into account, together with the context: ... (c) any relevant rules of international law applicable in the relations between the parties."



### c. Scope of this text

Therefore, the views expressed in this opinion are restricted to the right to job security, even though they could also be considered appropriate as regards the relationship made by the judgment between Article 26 of the Convention and the right to freedom of association.

## I. THE PROVISIONS OF THE CONVENTION

Regarding my discrepancy with the judgment, I will set forth five considerations. One, with regard to the rights "*recognized*" in the Convention. Another, regarding the existence of other rights. The third, on the protection system embodied in the Convention. The fourth, on the extension of this to other rights. And, lastly, on the Protocol of San Salvador.

### A. Rights "*recognized*" in the Convention.

Article 1(1) of the Convention establishes that the States Parties undertake to respect and to ensure the enjoyment and exercise of the rights "*recognized herein.*"<sup>22</sup> Meanwhile, Article 29(a) of the Convention, on the *pro personae* principle includes the same wording.<sup>23</sup>

It should be indicated also that, in other provisions, the Convention refers to "*the rights set forth,*"<sup>24</sup> "*guaranteed,*"<sup>25</sup> "*protected,*"<sup>26</sup> [Translator's note: "*consagrado*" in Spanish] or "*protected*"<sup>27</sup> ["*protegido*"] therein; so that, logically, it should be understood that these are rights that have been "*recognized*" in this treaty.<sup>28</sup>

That said, the rights "*recognized*" in the Convention are the "Civil and Political Rights" (Chapter II); that is, the right to recognition of juridical personality (Art. 3), right to life, (Art. 4), right to personal integrity (Art. 5), freedom from slavery (Art. 6), right to personal liberty (Art. 7), right to a fair trial (Art. 8), freedom from *ex-post facto* laws (Art. 9), right to compensation (Art. 10), right to privacy (Art. 11), freedom of conscience and religion (Art. 12), freedom of thought and expression (Art. 13), right of reply (Art. 14), right of assembly (Art. 15), freedom of association (Art. 16), rights of the family (Art. 17), right to a name (Art. 18), rights of the child (Art. 19), right to nationality (Art. 20), right to property (Art. 21), freedom of movement and residence

<sup>22</sup> "The States Parties to this Convention 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 for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

<sup>23</sup> "Restrictions Regarding Interpretation. No 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."

<sup>24</sup> Art. 45(1): "Any State Party may, when it deposits its instrument of ratification of or adherence to this Convention, or at any later time, declare that it recognizes the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention."

<sup>25</sup> Art. 47(b) "The Commission shall consider inadmissible any petition or communication submitted under Articles 44 or 45 if: ... the petition or communication does not state facts that tend to establish a violation of the rights guaranteed by this Convention."

<sup>26</sup> Art.48(1): "When the Commission receives a petition or communication alleging violation of any of the rights protected by this Convention, it shall proceed as follows: ..."

<sup>27</sup> Art. 63(1): "If 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. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

<sup>28</sup> Hereafter, each time the rights "*recognized*" in the Convention are referred to, it shall be understood that this also includes those that are "*established,*" "*guaranteed,*" "*embodied*" or "*protected.*"

(Art. 22), right to participate in government (Art. 23), right to equal protection (Art. 24) and right to judicial protection (Art. 25).

In accordance with these provisions, the rights that are the purpose of the Convention and that, consequently, its States Parties “undertake to respect [...] and to ensure to all persons subject to their jurisdiction the[ir] free and full exercise,” and to interpret pursuant to the *pro personae* principle, are, therefore, only those mentioned, and do not include the right to work or the right to job security.

## **B. The existence of other human rights**

Nevertheless, this does not mean that there are no other human rights. To the contrary, the Convention itself alludes to other rights and to different types of categories of human rights that have sources other than international law.<sup>29</sup> Thus, in addition to those “recognized” in the Convention, it also mentions “economic, social and cultural rights”;<sup>30</sup> those “derived” from the provisions of the Charter of the Organization of American States;<sup>31</sup> those “recognized” by the laws of the States or in other convention,<sup>32</sup> and those “inherent in the human personality or derived from representative democracy as a form of government.”<sup>33</sup>

It is clear, therefore, and as the judgment itself affirms when citing Article 26 of the Convention to declare the violation of the right to job security, that this is part of the group of “economic, social and cultural rights.”<sup>34</sup> This also reveals that, since these rights derive from provisions of the OAS Charter, the said right does not form part of the rights “recognized” in the Convention.

## **C. The Convention’s protection system**

Considering the foregoing, it is now necessary to refer to the protection system established in Part II of the Convention entitled “Means of Protection” and this consists of two organs: namely, the Commission and the Court.<sup>35</sup> Regarding the Court, the harmonious interpretation of Articles 1, 29(a), 33, 45(1), 47(b), 48(1), 62(3), and 63(1), leads to the conclusion that the rights that can be invoked before the Court for it to rule on their alleged violation are those “recognized,” “set forth,” “guaranteed” or “protected,” in the Convention; that is, the “Civil and Political Rights.” Thus, the “economic, social and cultural rights” derived from the Charter of the

<sup>29</sup> It should be pointed out that the Convention also mentioned “principles,” referring to “a system of personal liberty and social justice based on respect for the essential rights of man,” because these “are not derived from one’s being a national of a certain state, but are based upon attributes of the human personality,” and that they “have been set forth in the Charter of the Organization of American States, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights and [...] have been reaffirmed and refined in other international instruments, worldwide as well as regional in scope.” Paras.1, 2 and 3 of the Preamble.

<sup>30</sup> Paragraph 4 of the Preamble: “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.”

<sup>31</sup> Art.2, *cit.* in Footnote 3.

<sup>32</sup> Art. 29(b): “Restrictions Regarding Interpretation. No provision of this Convention shall be interpreted as... restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party.

<sup>33</sup> Art. 29(c): “Restrictions Regarding Interpretation. No provision of this Convention shall be interpreted as... precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government [...]”

<sup>34</sup> Paras. 142 and 154.

<sup>35</sup> Art. 33: “The following organs shall have competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to this Convention:

- a. the Inter-American Commission on Human Rights, referred to as “The Commission;” and
- b. the Inter-American Court of Human Rights, referred to as “The Court.”

Organization of American States, those “*recognized*” by State laws or other conventions and others “*inherent to the human being or derived from representative democratic government*” should be excluded from this judicialization. Evidently, those rights cannot be judicialized before the Court because their source is a treaty or source of international law other than the Convention. Since they are not part of the category of rights “*recognized*” in the Convention, the right to work and the right to job security cannot be judicialized before the Court, with the exception, as regards the former, but only in relation to the specific matters established in the Protocol of San Salvador.

#### **D. Extension of the protection system to other rights**

However, the fact that a right is not “*recognized*” in the Convention does not prevent it from being included among the rights that may be invoked before the Court. To this end, it would be necessary to adopt a protocol that established this.<sup>36</sup>

Indeed, Article 31 of the Convention, in connection with Articles 76(1) and 77(1)<sup>37</sup> of this instrument, expressly establishes that “*other rights and freedoms may be included in the system of protection of this Convention*” based on the normative function with regard to the Convention which is exercised by its States Parties. Accordingly, that area is implicitly prohibited to the Court, which therefore cannot include the right to job security among the rights that may be judicialized before it. If it does so, it is evidently exceeding its powers. Indeed, and contrary to what may be deduced from the judgment,<sup>38</sup> the authority to determine its own competence, pursuant to the principle of “*kompetenz-kompetenz*,” does not authorize the Court to violate the principle of public law that it is only possible to do what the law permits or stipulates.

#### **E. The Protocol of San Salvador**

As already noted, the judicialization, even though partial, of the right to work occurred, precisely, with the 1988 “*Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Protocol of San Salvador*,” which was adopted under the provisions of Articles 76(1) and 77(1) of the Convention; that is, “for the purpose of gradually incorporating other rights and freedoms into the protective system thereof,” as expressly indicated in its Preamble.<sup>39</sup>

This Protocol “*recognizes*”<sup>40</sup> the right to work (Art. 6), the right to just, equitable, and satisfactory conditions of work (Art. 7), trade union rights (Art. 8), the right to social security (Art. 9), the right to health (Art. 10), the right to a healthy environment (Art. 11), the right to food (Art. 12), the right to education (Art. 13), the right to the benefits of culture (Art. 14), the

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<sup>36</sup> The possibility also exists that protocols are signed that do not involve the incorporation of rights into the protection system. Thus, for example, the 1990 Protocol to the American Convention on Human Rights to Abolish the Death Penalty, was adopted because, according to its sixth preambular paragraph “*an international agreement must be arrived at that will entail a progressive development of the American Convention on Human Rights.*”

<sup>37</sup> Footnote 14.

<sup>38</sup> Para. 142.

<sup>39</sup> Preambular paragraph 7: “Considering that the American Convention on Human Rights provides that draft additional protocols to that Convention may be submitted for consideration to the States Parties, meeting together on the occasion of the General Assembly of the Organization of American States, for the purpose of gradually incorporating other rights and freedoms into the protective system thereof, Have agreed upon the following Additional Protocol to the American Convention on Human Rights “Protocol of San Salvador.”

<sup>40</sup> Art. 1 of the Protocol of San Salvador: “Obligation to Adopt Measures. The States Parties to this Additional Protocol to the American Convention on Human Rights undertake to adopt the necessary measures, both domestically and through international cooperation, especially economic and technical, to the extent allowed by their available resources, and taking into account their degree of development, for the purpose of achieving progressively and pursuant to their internal legislations, the full observance of the rights recognized in this Protocol.”

right to the formation and the protection of families (Art. 15), the rights of children (Art. 16), the protection of the elderly (Art. 17) and the protection of the handicapped (Art. 18).

Nevertheless, this Protocol established that the violation of only some of those rights may be submitted to the Court<sup>41</sup> and these relate to the right to organize trade unions and join them<sup>42</sup> and the right to education.<sup>43</sup> Regarding the right to work, although it has been recognized and even judicialized, this has only been done partially; that is, as regards the right to organize trade unions and to join them. Nothing else. The other issues involved, including the possible violation of the right to job security, which is not mentioned in the said Protocol, are consequently excluded from being submitted to the Court's consideration and decision. If there was a possibility that violations of the right to work and the right to job security could be submitted to, examined and decided by the Court under Article 26 of the Convention, the provisions of the Protocol of San Salvador would be pointless.

## II. THE INTERPRETATION OF ARTICLE 26

Based on the foregoing and considering that the judgment finds its decision in the fifth operative paragraph<sup>44</sup> on Article 26 of the Convention,<sup>45</sup> it is necessary to interpret this article, refer to the preparatory work, analyze the rights referred to, and derive the consequences of the decision taken in this regard in the judgment.

### A. The article

As indicated,<sup>46</sup> the said article establishes:

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<sup>41</sup> Art. 19(6) of this Protocol: "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.

<sup>42</sup> Art. 8(a) of this Protocol: "The States Parties shall ensure: (a) The right of workers to organize labor unions and to join the union of their choice for the purpose of protecting and promoting their interests. As an extension of that right, the States Parties shall permit labor unions to establish national federations or confederations, or to affiliate with those that already exist, as well as to form international labor union organizations and to affiliate with that of their choice. The States Parties shall also permit labor unions, federations and confederations to function freely."

<sup>43</sup> Art.13 of this Protocol: "Right to Education. 1. 1. Everyone has the right to education. 2. The States Parties to this Protocol agree that education should be directed towards the full development of the human personality and human dignity and should strengthen respect for human rights, ideological pluralism, fundamental freedoms, justice and peace. They further agree that education ought to enable everyone to participate effectively in a democratic and pluralistic society and achieve a decent existence and should foster understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups and promote activities for the maintenance of peace. 3. The States Parties to this Protocol recognize that in order to achieve the full exercise of the right to education: a. Primary education should be compulsory and accessible to all without cost; b. Secondary education in its different forms, including technical and vocational secondary education, should be made generally available and accessible to all by every appropriate means, and in particular, by the progressive introduction of free education; c. Higher education should be made equally accessible to all, on the basis of individual capacity, by every appropriate means, and in particular, by the progressive introduction of free education; d. Basic education should be encouraged or intensified as far as possible for those persons who have not received or completed the whole cycle of primary instruction; e. Programs of special education should be established for the handicapped, so as to provide special instruction and training to persons with physical disabilities or mental deficiencies. 4. In conformity with the domestic legislation of the States Parties, parents should have the right to select the type of education to be given to their children, provided that it conforms to the principles set forth above. 5. Nothing in this Protocol shall be interpreted as a restriction of the freedom of individuals and entities to establish and direct educational institutions in accordance with the domestic legislation of the States Parties."

<sup>44</sup> Footnote 5.

<sup>45</sup> Footnote 3.

<sup>46</sup> Idem.

"Progressive Development. The 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 and subject to available resources, the full realization of the rights derived from 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."

In this regard, attention should be drawn to the fact that:

a) First, this provision establishes a State obligation of action, and not of result, which is "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" mentioned. Thus, it does not "recognize" rights; rather it establishes the obligation of the States to achieve certain rights progressively, precisely because they are not fully effective.

b) Second, this provision refers to "rights derived from the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States"; in other words, rights that emanate from or can be inferred from the provisions of the latter and not that it establishes or recognizes.

c) Third, the said provision makes compliance with this obligation of action "subject to available resources," which reinforces the idea that this is not an obligation of result.

d) And, lastly, the said Article 26 indicates the means to comply with the obligation of action that it establishes: namely "by legislation or other appropriate means." Thus – and as its title indicates – the article refers to the "Progressive Development" of the said rights which, although it concurs with the obligation established in Article 2 of the Convention,<sup>47</sup> evidently does not constitute, in any way, grounds for asserting that it is possible to submit a case to the Court that involves the presumed violation of any of the rights to which the article refers.

Consequently, it is plain that the said rights are different from those regulated by the Convention in its Articles 3 to 25 cited above – that is the "civil and political rights" – and are therefore subject to a different protection regime.

## **B. Preparatory work<sup>48</sup>**

It should be noted that during the Specialized Inter-American Conference on Human Rights at which the final text of the Convention was adopted, "[f]ollowing some discussions in which some of the previous positions were reiterated without reaching a consensus and, in none of which, it was proposed to include the economic, social and cultural rights in the protection regime established for the civil and political rights, a chapter was drafted with two articles."<sup>49</sup> As

<sup>47</sup> "Domestic Legal Effects. Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."

<sup>48</sup> Art. 32 of the Vienna Convention on the Law of Treaties: "Supplementary means of interpretation. Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable."

<sup>49</sup> Concurring opinion of Judge Alberto Pérez Pérez, *Case of Gonzales Lluy et al. v. Ecuador*, Judgment of September 1, 2015 (Preliminary objections, merits, reparations and costs).

a result of the respective vote, the first was included in the final text of the Convention, as Article 26. The second, which would have been Article 27, established: "*Control of Compliance with Obligations. The States Parties shall forward the Inter-American Commission on Human Rights a copy of the reports that, in their respective areas, the Executive Committees of the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture submit each year so that the Commission may verify compliance with the preceding obligations, that are essential for the exercise of the other rights established in this Convention.*"

It should be noted that the proposal for the said Article 27 distinguished between "*the preceding obligations,*" obviously in Article 26, and "*the other rights established in this Convention.*" It should also be recalled that the said article was, however, eliminated; from which it can be concluded that, at no time, were the economic, social and cultural rights that "derive" from the provisions of the OAS Charter, including the right to job security, included under the protection regime for the civil and political rights "*recognized*" in the Convention.

### **C. The rights derived from the economic, social, educational, scientific and cultural provisions contained in the OAS Charter**

The judgment cited Articles 45(b) and (c),<sup>50</sup> 46<sup>51</sup> and 34(g)<sup>52</sup> of the OAS Charter to rule on the right to work and, more specifically, on the right to job security. However, these provisions establish either "*principles and mechanisms*" to "*achieve the full realization of [man's] aspirations within a just social order, along with economic development and true peace,*" or a "*goal*" "*to facilitate the process of Latin American regional integration,*" or "*basic goals*" to achieve "*basic objectives of integral development*"; and, in all these hypotheses, they established an obligation of conduct that is expressed in devoting the "*utmost efforts*" to achieve the said goals.

In other words, strictly speaking, these provisions do not establish rights, but rather the obligation of the respective State to devote its "*utmost efforts*" to achieve the goal of economic development and peace, Latin American integration or comprehensive development, as appropriate. Consequently, and also based on the general wording used in the OAS Charter to refer to the matters addressed in the said provisions, it can be concluded that they are considered to be "*goals*" or "*objectives*" to achieve or as "*principles and mechanisms*" to be followed, rather than rights that the individual can judicialize internationally.

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<sup>50</sup> "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;

<sup>51</sup> "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."

<sup>52</sup> "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."

Furthermore, it should be pointed out that the provisions of the OAS Charter cited in the judgment are placed in Chapter VII of this international legal instrument, which is entitled "*Integral Development*," and that the first article in this chapter, Article 30,<sup>53</sup> considers this development as an objective to achieve through compliance with the provisions that follow. It should also be noted that the other articles in this chapter reaffirm the concept that these are "*goals*" that the States undertake to achieve and not rights that may be judicialized internationally.

In other words, it is plain that, applying the rule of harmonious interpretation established in Article 31 of the Vienna Convention on the Law of Treaties,<sup>54</sup> it is not possible to infer that it was agreed that the standards established in the said Chapter VII established rights for the individual; rather they are State obligations when elaborating and applying their corresponding public policies for the benefit of those who are subject to their respective jurisdictions. Thus, the object and purpose of such standards is not related to human rights, but to the integral development of the nations.

#### **D. Consequences**

Regarding the interpretation made in the judgment that the rights referred to in Article 26 of the Convention would also be "*enforceable in all cases before the competent authorities*,"<sup>55</sup> this begs the question of why the said rights were not directly included in the articles of the Convention, as the *Civil and Political Rights* expressly were and, to the contrary, it was chosen to make a general statement in the said article, situated in a special chapter, Chapter III of Part I, entitled *Economic, Social and Cultural Rights*. Thus, the issue is to determine the reason for the existence of the said provision and, consequently, for the regulation of the latter rights. The answer would seem evident; namely, that the *economic, social and cultural rights* are not subject to the same protection regime as the *civil and political rights*, described in Chapter II. Thus, although it is true that there is a close connection between both types of rights, it is also true that the Convention gives them a differentiated treatment, which is indicated precisely in Article 26.

Furthermore, if we accept what the judgment indicates in relation to the said Article 26, this would make the provisions of Articles 31, 76(1) and 77(1)<sup>56</sup> of the Convention unnecessary and useless; in other words, the signature of additional protocols in order to recognize rights other than those already in the Convention and to include them in the protection regime that it establishes, because it would be sufficient to apply the first of the said articles to achieve this. In this regard, even, as already indicated, the "*Protocol of San Salvador*" and, especially, its articles on the right to organize and join trade unions, and the right to education,<sup>57</sup> would not be necessary to claim the violation of those rights before the Court, because the said Article 26 alone would be sufficient.

In other words, based on the principle that "*Ubi eadem est ratio, eadem est o debet esse juris dispositivo*" [for the same reason, the same legal provision], if the criteria adopted in the

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<sup>53</sup> "The Member States, inspired by the principles of inter-American solidarity and cooperation, pledge themselves to a united effort to ensure international social justice in their relations and integral development for their peoples, as conditions essential to peace and security. Integral development encompasses the economic, social, educational, cultural, scientific, and technological fields through which the goals that each country sets for accomplishing it should be achieved."

<sup>54</sup> Footnote 9.

<sup>55</sup> Para. 141.

<sup>56</sup> Footnote 14.

<sup>57</sup> Footnote 42.

judgment is followed and taken to its extreme, there would seem to be no reason why the presumed violations of all the human rights that the provisions of Chapter VII of the OAS Charter would imply could not also be invoked before the Court.<sup>58</sup>

<sup>58</sup> Thus, for example, according to this criteria and restricting the reference only to the articles of the OAS Charter cited in the judgments – that is Articles 34, 45 and 46 – the rights that “derive” from the “basic goals” “principles and mechanisms” or “goal,” as applicable, could be judicialized before the Court, and they establish:

Art. 34: “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:

- a) Substantial and self-sustained increase of per capita national product;
- b) Equitable distribution of national income;
- c) Adequate and equitable systems of taxation;
- d) Modernization of rural life and reforms leading to equitable and efficient land-tenure systems, increased agricultural productivity, expanded use of land, diversification of production and improved processing and marketing systems for agricultural products; and the strengthening and expansion of the means to attain these ends;
- e) Accelerated and diversified industrialization, especially of capital and intermediate goods.
- f) Stability of domestic price levels, compatible with sustained economic development and the attainment of social justice;
- g) Fair wages, employment opportunities, and acceptable working conditions for all;
- h) Rapid eradication of illiteracy and expansion of educational opportunities for all;
- i) Protection of man's potential through the extension and application of modern medical science;
- j) Proper nutrition, especially through the acceleration of national efforts to increase the production and availability of food;
- k) Adequate housing for all sectors of the population;
- l) Urban conditions that offer the opportunity for a healthful, productive, and full life;
- m) Promotion of private initiative and investment in harmony with action in the public sector; and
- n) Expansion and diversification of exports.”

Art.45: “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:

- a) All human beings, without distinction as to race, sex, nationality, creed, or social condition, have a right to material well-being and to their spiritual development, under circumstances of liberty, dignity, equality of opportunity, and economic security;
- 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;
- d) Fair and efficient systems and procedures for consultation and collaboration among the sectors of production, with due regard for safeguarding the interests of the entire society;
- e) The operation of systems of public administration, banking and credit, enterprise, and distribution and sales, in such a way, in harmony with the private sector, as to meet the requirements and interests of the community;
- f) The incorporation and increasing participation of the marginal sectors of the population, in both rural and urban areas, in the economic, social, civic, cultural, and political life of the nation, in order to achieve the full integration of the national community, acceleration of the process of social mobility, and the consolidation of the democratic system. The encouragement of all efforts of popular promotion and cooperation that have as their purpose the development and progress of the community;
- g) Recognition of the importance of the contribution of organizations such as labor unions, cooperatives, and cultural, professional, business, neighborhood, and community associations to the life of the society and to the development process;
- h) Development of an efficient social security policy; and
- i) Adequate provision for all persons to have due legal aid in order to secure their rights.”

Art.46: “The Member States recognize that, in order to facilitate the process of Latin American regional integration, it is



Nevertheless, if this extreme conclusion was reached, all the States Parties to the Convention that have accepted the Court's jurisdiction could eventually be taken before the Court because they were underdeveloped or developing countries – in other words, because they had not fully achieved integral development or any of its facets, which is plainly very far from what the States Parties were intending when they signed the Convention or, at least, from the logic implicit in this instrument, especially owing to the way in which the said Chapter VII was drafted.

Lastly, as a supplementary comment to the thesis upheld in this opinion, it should be recalled that, in other judgments of the Court, a similar result to the one sought in this case was achieved applying only the provisions of the Convention concerning rights that it recognizes, such as those that protect the right to personal integrity, to property or to judicial guarantees and judicial protection, without needing to resort to the said Article 26.<sup>59</sup>

### III. OTHER ARGUMENTS INCLUDED IN THE JUDGMENT

To reinforce the thesis set out in this text, it would appear useful to refer, although in a supplementary manner, to certain assertions in the judgment, and I will now do this.

1. The assertion concerning "*the interdependence and indivisibility of civil and political rights and economic, social and cultural rights,*" so that "*they should all be understood integrally as human rights, without any specific hierarchy, and be enforceable in all cases before the competent authorities,*"<sup>60</sup> does not mean that the violation of both types of rights can be invoked before the Court. I could agree with what is indicated in the judgment to the extent that it is understood that, although the enjoyment of all human rights, including the economic, social and cultural rights should be respected and that, consequently, they are all enforceable before the competent authorities, this does not signify that the latter, always and in every circumstance, can be claimed before the domestic courts and, eventually, before the Court. Indeed, and as indicated, I am not disputing that the presumed violations of any human right can and even should be claimed before the competent domestic courts.<sup>61</sup> However, what this

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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."

The same would result from other provisions of Chapter VII of the OAS Charter (Articles 30 to 52), all of which concern "*integral development*"; thus, as could be deduced from the judgment, rights could also be derived from these provisions, the violation of which could be argued before the Court.

<sup>59</sup> The most recent example, *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*. Judgment of November 30, 2016. Series C No. 329, paras. 154, 155 and ff.

<sup>60</sup> Para. 141.

<sup>61</sup> Preamble, second para: "Recognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states."

Art. 46: "1. Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:

- a) that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law;
- b) that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment;
- c) that the subject of the petition or communication is not pending in another international proceeding for settlement; and
- d) that, in the case of Article 44, the petition contains the name, nationality, profession, domicile, and signature of the person or persons or of the legal representative of the entity lodging the petition.

2. The provisions of paragraphs 1.a and 1.b of this article shall not be applicable when:

opinion asserts is that only some of the violations of the economic, social and cultural rights, specifically those established in the Protocol of San Salvador, can be submitted to the consideration and decision of the Court.

2. Similarly, the statement that "Article 26 [...] it is subject to the general obligations contained in Articles 1(1) and 2 in Chapter I (entitled "General Obligations"), as also are Articles 3 to 25 that appear in Chapter II (entitled "Civil and Political Rights"),<sup>62</sup> does not mean that the rights derived from the OAS Charter may be judicialized before the Court. It merely signifies, as stated previously, that all human rights, including the economic, social and cultural rights to which Chapter III of the Convention alludes, should be respected and ensured, because this is required by the said Articles 1 and 2.

3. Furthermore, the allusion to Articles "6 of the International Covenant on Economic, Social and Cultural Rights," "23 of the Universal Declaration of Human Rights," "7 and 8 of the Social Charter of the Americas," "6 and 7 of the Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights," "11 of the Convention on the Elimination of All Forms of Discrimination against Women," "32.1 of the Convention on the Rights of the Child," "1 of the European Social Charter" and "15 of the African Charter on Human and Peoples' Rights,"<sup>63</sup> does not provide grounds to affirm that the violation of the right to work and more specifically, of the right to job security, can be examined and decided by the Court pursuant to Article 26 of the Convention.

4. The same is true in the case of the references to the Committee on Economic, Social and Cultural Rights, in its General Comment No. 18 on the right to work,<sup>64</sup> and to Convention 158 of the International Labour Organization on termination of employment (1982).<sup>65</sup> The said provisions do not refer to this and it is not in their remit, either because they are treaties that have no relationship to the possibility of judicializing the economic, social and cultural rights, or because they are resolutions of international organizations that are not binding for the States; that is, they are merely resolutions that either reflect political aspirations that they be incorporated into law, which may be very legitimate, or they do not interpret a treaty of any kind.

5. The statement that "*the American Declaration constitutes, as applicable and in relation to the OAS Charter, a source of international obligations*"<sup>66</sup> and the reference to the provisions of Article 29(d) of the Convention,<sup>67</sup> do not contradict the indisputable fact in international law that the American Declaration is a declarative legal decision of an international organization or institution and, consequently, even though it is not established among the sources of

a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;

b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or

c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

Art. 61: 1. Only the States Parties and the Commission shall have the right to submit a case to the Court.

2. In order for the Court to hear a case, it is necessary that the procedures set forth in Articles 48 and 50 shall have been completed."

<sup>62</sup> Para. 142.

<sup>63</sup> Para. 145.

<sup>64</sup> Para. 147.

<sup>65</sup> Para. 148.

<sup>66</sup> Para. 144.

<sup>67</sup> "No provision of this Convention shall be interpreted as: [...] (d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have."

international law stipulated in Article 38 of the Statute of the International Court of Justice<sup>68</sup> – the only provision that does this – it is a subsidiary means of international law; that is, it serves “*for the determination of rules of law*” established by an autonomous source of international law. Thus, the said Declaration is a “*source of international obligations*” to the extent that it interprets rights or obligations established in any autonomous source of international law.

6. The basic reason for the reference to all the documents cited above<sup>69</sup> seems to have been to support the interpretation as regards the existence of the right to work and the right to job security, which, we repeat, is not contradicted or opposed in this opinion. However, this does not mean that the said texts establish that the violation of those rights can be submitted to the consideration and decision of the Court pursuant to the oft cited Article 26.

7. The phrase that “*the Court exercises full jurisdiction over all its articles and provisions*”;<sup>70</sup> similarly, no matter that Article 26 of the Convention includes rights whose violation can be submitted to the consideration of the Court for a decision, it also indicates that the Court should rule applying and interpreting the provisions of the Convention,<sup>71</sup> which it should do – as stated previously – respecting the public law principle that only what the law allows or prescribes is admissible.

8. Regarding the phrase that “*the Court has the authority to decide any dispute concerning its jurisdiction*,”<sup>72</sup> it should be recalled that the instant case did not refer to the presumed violation of labor rights in light of the Convention. It was only the petitioner who did this, and only before the Commission;<sup>73</sup> moreover, without invoking the application of Article 26. Thus, strictly speaking there was no dispute in this regard.

9. The mention of “*important case law on this matter, in light of different articles of the Convention*”<sup>74</sup> should also be understood as the use of the Court’s own case law as a supplementary source of international law and not as the creation, *per se*, of international obligations or rights.

10. Lastly, the statement that “*the right to work is explicitly recognized in different domestic laws of the States in the region*”<sup>75</sup> only supposes that there is no doubt that in the domestic sphere or at the national level, the presumed violation of the right to work can and should be invoked before the competent domestic courts, and not that there is a right to claim the violation of that right before the Inter-American Court pursuant to Article 26 of the Convention.

## CONCLUSION

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<sup>68</sup> “1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo* if the parties agree thereto.”

<sup>69</sup> Paras. 143 to 149.

<sup>70</sup> Para. 142.

<sup>71</sup> Art. 62(3) *cit.*

<sup>72</sup> Para. 142.

<sup>73</sup> Paras. 133 to 137.

<sup>74</sup> Para. 154.

<sup>75</sup> Para. 145.

In sum, I disagree with the decision in the judgment because, since the Convention makes a clear distinction between political and civil rights and economic, social and cultural rights, the right to work, including the right to job security, as part of the latter rights is not a right "recognized" in the Convention and, consequently, is not safeguarded by the system of protection that is established therein only for the political and civil rights. For the economic, social and cultural rights to be judicialized before the Court, the signature of an additional protocol would be necessary, and this has not happened, except partially with the Protocol of San Salvador, but for matters other than those in the instant case.

I also dissent because Article 26 of the Convention establishes obligations of conduct for the States, and not a recognition of human rights. Moreover, this provision cites the OAS Charter, which, in turn, does not recognize human rights, but rather stipulates "*goals*" or "*principles and mechanisms*" that the States undertake to achieve or to implement, as applicable. In addition, I do not share the decisions taken because permitting the provisions of the said Article 26 to be judicialized before the Court not only renders meaningless the provisions of Articles 31, 76(1) and 77(1) of the Convention and of the Protocol of San Salvador, but would also allow this for all the rights derived from the OAS Charter, an eventuality that is evidently totally alien to what was intended.

Based on the foregoing, I reiterate that I am not denying the existence of the right to job security which, incidentally, does not appear as such in the OAS Charter from the provisions of which it would derive according to Article 26 of the Convention. I merely indicate that its eventual violation cannot be submitted to the consideration and decision of the Court.

Furthermore, this opinion should not be understood to signify that I would not be in favor of the eventual judicialization of the economic, social and cultural rights. I merely consider that, if this occurs, it should be accomplished by the entity responsible for setting international legal standards; namely, the States, through treaties, international custom, general principles of law, or unilateral legal acts. It does not appear desirable that the organ responsible for the inter-American judicial function should assume the role of setting international standards, particularly when the States Parties to the Convention are democratic and, in this regard, governed by the Inter-American Democratic Charter that establishes the separation of powers and civic participation in public affairs,<sup>76</sup> which should also be reflected in matters relating to the role of setting international legal standards, particularly those standards that concern them most directly.

Finally, this opinion records my discrepancy with the fact that the judgment develops and expresses, for the first time, "*a specific condemnation for the violation of Article 26 of the American Convention on Human Rights, established in Chapter III of this treaty, entitled Economic, Social and Cultural Rights.*"<sup>77</sup>

And this is so, also, based not only on the negative consequences that this decision could have, but also because it appears that it does not take into consideration the circumstance that the

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<sup>76</sup> Adopted at the twenty-eighth OAS General Assembly on September 11, 2001, Lima, Peru.

"Art. 3: Essential elements of representative democracy include, *inter alia*, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government.

Art. 6: It is the right and responsibility of all citizens to participate in decisions relating to their own development. This is also a necessary condition for the full and effective exercise of democracy. Promoting and fostering diverse forms of participation strengthens democracy."

<sup>77</sup> Para. 154.

sphere of the domestic jurisdiction, or the jurisdiction that is exclusive to the State<sup>78</sup> - also known as the margin of discretion<sup>79</sup> - still exists, although to a lesser extent than in the past. And this shows that not everything is regulated by international law, and in the case of the Convention, it is expressed, *inter alia*, both in the provision that establishes that it is the State Party in the respective case that must comply with the corresponding judgment,<sup>80</sup> and in its Article 26, which leaves the prosecution of violations of the economic, social and cultural rights to the said sphere.

Eduardo Vio Grossi  
Judge

Pablo Saavedra Alessandri  
Secretary

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<sup>78</sup> "The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain." Permanent Court of International Justice, Advisory Opinion on Nationality Decrees issued in Tunisia and Morocco (French zone), Series B No. 4, p.24.

<sup>79</sup> Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, "Art.1: At the end of the preamble to the Convention, a new recital shall be added, which shall read as follows: "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention."

<sup>80</sup> Art. 68: "1. The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties.

2. That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state.

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

**JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS**

**CASE OF LAGOS DEL CAMPO v. PERU**

**JUDGMENT OF AUGUST 31, 2017**

***(Preliminary objections, merits, reparations and costs)***

With the usual respect for the decision of the Court, allow me to submit the following partially dissenting opinion in the above case, which will be presented in the following order:

**A. INTRODUCTION**

1. The intention of this partially dissenting opinion is to present, in detail, the reasons why I voted against the fifth operative paragraph of the judgment in the *Case of Lagos del Campo v. Peru*. My position with regard to making the so-called economic, social and cultural rights (ESCR) justiciable by a direct application of Article 26 of the American Convention on Human Rights (ACHR) is already known, in light of the fact that two years ago I submitted a concurring opinion on this matter in the *Case of González Lluy et al. v. Ecuador*. On that occasion, I indicated the legal arguments that substantiated my position in the hope that they would become part of the internal and external debate on the applicability of the said article of the Convention, but also in order to dissuade those who advocated for the step that the Inter-American Court has taken in this judgment.

2. This does not mean that, in general, I am contrary to the thesis that the ESCR are justiciable rights. To the contrary, during my time as a member of the Colombian Constitutional Court I had occasion to contribute to the development of case law on the nature of fundamental rights and, therefore, their enforceability by means of the action for the protection of the right to health, the right to decent housing, the right to potable water, and the right to social security, among others. However, I consider that there are substantial differences between, on the one hand, the Colombian Constitution and the American Convention and, on the other, between the role of a judge of a constitutional court and the role of a judge who is a member of an international human rights court.

3. In addition, my experience as a judge of a national court whose track record in the direct justiciability of the ESCR is widely known has left me with the clear perception of the difficulties faced by a judicial organ that assumes jurisdiction in this area. This is because, even though the protection of these rights does not always involve the adoption of public policies or decision-making in relation to scarce resources or merit goods, in numerous cases submitted to the consideration of a judicial authority, that is what is required and this inevitably leads to discussion on the role of judges under a social rule of law and the legitimate organ for the adoption of such decisions under a democratic system.

4. In this regard, I remain convinced that, within the framework of the inter-American system for the protection of human rights, the justiciability of the ESCR should not be implemented by the direct application of Article 26 of the ACHR, as in this case and I will indicate the grounds for my position below. Thus, in this opinion: (i) I will reiterate the general reasons why I do not agree with the justiciability of the ESCR based on Article 26 described in my previous concurring opinion, and I will add the concerns that this judgment has caused me

in this regard; (ii) I will indicated why, in my opinion, in this case in particular it was not pertinent to arrive at a declaration of the violation of Article 26 of the ACHR and not even to embark on that discussion, and (iii) I will indicate the flaws in the arguments in the judgment that make this a very sensitive precedent in the case law of the Inter-American Court.

## **B. MAIN ARGUMENTS AGAINST THE DIRECT JUSTICIABILITY OF THE ESCR BASED ON ARTICLE 26 OF THE AMERICAN CONVENTION**

5. Given that, in the said concurring opinion, I gave a wide-ranging explanation of each argument that substantiates my position, I consider that it is not pertinent to reproduce these extensively, and will therefore focus on the more relevant reflections and conclusions of that text.

6. However, and on a preliminary basis, I wish to repeat that my position on the Inter-American Court's jurisdiction should not be understood as denying the importance and the need to make the ESCR justiciable, because these are two distinct issues. Indeed, the abundant case law on the matter that I helped to develop while a justice of the Colombian Constitutional Court<sup>1</sup> proves that my position is in favor of ensuring those rights directly when the jurisdictional circumstances are appropriate. Thus, my discussion does not focus on whether the ESCR are human rights that should be respected and ensured by the State, but rather on the way in which this justiciability is achieved under the inter-American system in particular. That said, I will proceed to recall why the direct application of Article 26 of the American Convention is so conflictive.

### **a) Scope of Article 26 of the American Convention**

7. The scope of this article has been discussed profusely by academics<sup>2</sup> and within the Inter-American Court,<sup>3</sup> and efforts have been made to expand the debate to issues such as the benefit-related nature of the ESCR or their indivisibility, when the central question that should be asked to understand the scope of these rights is: does Article 26 of the ACHR contain subjective rights?

8. In this regard, I have indicated on previous occasions<sup>4</sup> that Article 26<sup>5</sup> of the ACHR does not establish a list of rights; rather the obligation entailed by this article, which the Court is able to monitor directly, is compliance with the obligation of progressive development – and the consequent obligation of non-retrogressivity – of the rights that may be derived from the Charter of the Organization of American States (hereinafter “the Charter”).

<sup>1</sup> In this regard, see the jurisprudence of the Constitutional Court of Colombia on the transmutation of the ESCR. For example, T-1079 of 2007. Available at: <http://www.corteconstitucional.gov.co/relatoria/2007/T-1079-07.htm>.

<sup>2</sup> In this regard, see for example: Oswaldo Ruiz Chiriboga, *The American Convention and the Protocol of San Salvador: Two Intertwined Treaties Non-enforceability of Economic, Social and Cultural Rights in the Inter-American System*, Netherlands Quarterly of Human Rights, Vol. 31/2 (2013); Abramovich, V. and Rossi, J., 'La Tutela de los Derechos Económicos, Sociales y Culturales en el Artículo 26 de la Convención Americana sobre Derechos Humanos,' Estudios Socio-Jurídicos, Vol. 9, 2007; Oscar Parra Vera, *Justiciabilidad de los derechos económicos, sociales y culturales ante el sistema interamericano*, Comisión Nacional de los Derechos Humanos, Mexico, 2011.

<sup>3</sup> See dissenting opinion of Judge Ferrar McGregor in the *Case of González Lluy et al. v. Ecuador* or opinion of Judges Caldas and Ferrer McGregor in the *Case of Canales Huapaya et al. v. Peru*.

<sup>4</sup> In this regard, concurring opinion *Case of González Lluy et al. v. Ecuador*, paras. 7 to 11.

<sup>5</sup> Chapter III. Economic, Social and Cultural Rights. Article 26. Progressive Development: The 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, subject to available resources, by legislation or other appropriate means, the full realization of the rights derived from 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 (underlining added).

9. This is because the said article refers directly back to the Charter of the Organization of American States. However, from reading the Charter it may be concluded that neither does this text contain a list of clear and precise subjective rights; rather, to the contrary, it contains a list of goals and expectations that the States of the region pursue, which makes it difficult to understand which are the rights that the said Article 26 mentions. In particular, there are few express references to the ESCR and, it is necessary to make a fairly extensive interpretive effort in order to affirm that they are really established in the Charter.

10. Even if it would have been desirable that Article 26 used a less problematic legislative technique, the reality is that it cites the OAS Charter and not the American Declaration, which could have led to a different interpretation, because the Declaration does refer more clearly to the ESCR.<sup>6</sup> Unfortunately, this is not the case.<sup>7</sup> Thus, the use of the American Declaration in this judgment is “a shortcut,” which is only substantiated by a reference to a 1989 Advisory Opinion.

11. That said, the right to work is one of those rights that could be derived from the Charter, above and beyond the simple reference to the name,<sup>8</sup> because that instrument mentions it expressly. However, the right to work is one thing and job security is quite another, and this reveals the dilemma that arises when the list of rights and their scope are not well defined. In addition, it should not be forgotten that the general obligation of Article 26 of the ACHR permits the Court to monitor compliance with the obligation of progressive development and its consequent obligation of non-retrogressivity, an analysis that was not made in this judgment.

12. In addition, I insist in clarifying that the referral is to the Charter and not to other declarations, treaties or documents of soft law,<sup>9</sup> because mentioning them does not rectify or change what is expressly indicated in Article 26 of the ACHR, In other words, referring to “a vast *corpus iuris*,”<sup>10</sup> mentioning treaties of the universal system and regional systems other than the inter-American system, does not change the fact that the referral in Article 26 is to the Charter and to no other instrument, treaty or document of international law.

13. If trying to construct a list of ESCR based on the Charter is a complex interpretive task, using every existing human rights treaties to give content to Article 26 of the ACHR can only create a dynamic of “*vis expansiva*” [“expansive force”] of the international responsibility of the States. In other words, since there is no definitive list of the ESCR the violation of which generates State responsibility, the States are unable to prevent or redress such violations in the

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<sup>6</sup> For example Article XI establishes that: “Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.”

<sup>7</sup> In this regard, “on the path that should be followed to determine whether a right is implicit in the Charter it is necessary, in our opinion, to avoid the shortcut of directly citing the American Declaration as an instrument that informs the content of the human rights established in the Charter. [And this is taking into account that] Article 26 refers to rights derived from the economic, social, education, scientific and cultural standards set forth in the Charter and does not refer back to the Declaration.” Abramovich, V. and Rossi, J., ‘*La Tutela de los Derechos Económicos, Sociales y Culturales en el Artículo 26 de la Convención Americana sobre Derechos Humanos*,’ *Estudios Socio-Jurídicos*, Vol. 9, 2007, p. 47.

<sup>8</sup> For example, Article 45(b) of the Charter establishes that: “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.”

<sup>9</sup> The discussion on which sources of international law can be used by the Inter-American Court to establish the scope of obligations and rights required of the States is not the main issue of this opinion, but I wish to express my concern owing to the use of documents such as the Agenda 2030 of the United Nations General Assembly (Millennium Goals) as a binding source for the inter-American system.

<sup>10</sup> Judgment *Lagos del Campo v. Peru*, para. 145.



domestic sphere because, simply put, the Inter-American Court may amend the list of rights depending on the case.

14. In this regard, the judgment examined causes concern because it inaugurates an operating logic for inter-American justice that affects not only the system of competencies of the Commission and the Court, but also begins to amend and add a list of new rights protected by the American Convention.

### **b) The Protocol of San Salvador**

15. As indicated previously,<sup>11</sup> it is not possible to address the debate on the Inter-American Court's jurisdiction in the area of ESCR without taking into account the Protocol of San Salvador. The Protocol's relevance stems from the fact that it is through this treaty that the States of the region took the decision to define which ESCR they are obliged to comply with. Also, they established clearly and precisely the content of the said rights.

16. Despite this, the States took the sovereign decision to restrict which ESCR established in the Protocol could be monitored by the mechanism of individual petitions when establishing in Article 19(6) that:

6. 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 (underlining added).

17. Thus, by this provision, the States decided to limit the competence of the Commission and of the Court to examine contentious cases unless they related to trade union rights and to the right to education.

18. That said, this limitation of competence should not be understood as contradicting the provisions of Article 26 of the American Convention, if it is taken into account that the said article expresses the subsequent and more specific intention of the States regarding the Inter-American Court's competence in relation to the ESCR. Furthermore, the American Convention should not be read in isolation without taking its Protocol into account, because these are complementary treaties that should be read and interpreted jointly. In this regard, the different proposals for the reform of the inter-American human rights system that sought to include the justiciability of the ESCR reveal that this involved an understanding of the Convention that was contrary to the intention of the States; to their explicit intention not to make the ESCR justiciables, with the exception of those expressly indicated in Article 19(6) of the Protocol.

19. Furthermore, it is relevant to point out that the State obligations arising from the Protocol are independent of the fact that the Court has jurisdiction to declare violations in the context of its contentious function. The State established other mechanisms for simply monitoring compliance with those rights, such as those established in the other paragraphs of Article 19 of the Protocol, such as the possibility of formulating observations and recommendations concerning the status of the ESCR in the Annual Report of the Inter-American Commission.

20. Bearing in mind the foregoing, I consider it inconceivable that a judgment declaring the violation of an ESCR under the inter-American system makes no reference whatsoever to the Protocol and its scope. Below, I will show how this represents an important shortcoming in the

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<sup>11</sup> In this regard, concurring opinion *Case of González Lluy et al. v. Ecuador*, paras. 12 to 19.

arguments but, above and beyond the legal technique that is required of a court of the importance of the Inter-American Court, the failure to refer to the Protocol reveals the express intention not to want to address the problems of jurisdiction and justiciability that arise. In other words, it would appear that, by making no reference to the Protocol, it is sought to disavow its existence as a supplementary treaty to the American Convention, the intention of the States that it expresses, and the debates that have arisen based on its provisions. Despite that intention, it is clear that the validity and obligatory nature of a norm cannot depend on whether it is mentioned in any specific judgment. In other words, even if the intention is to omit it, this does not in the least affect its existence or binding nature.

### **c) Evolutive interpretation and *pro persona* principle**

21. The idea of overcoming the problems of the justiciability of the ESCR based on an evolutive and supposedly "*pro persona*" interpretation of Article 26 of the ACHR has been a constant for those who support this thesis. However, this claim entails a basic problem, because it fails to take into account that, to interpret a treaty correctly, it is necessary to have recourse to other methods of interpretation that exist in international law, because the evolutive method is not the only one that should be taken into consideration.

22. Regarding methods of interpretation that should be taken in account, Articles 31 and 32 of the Vienna Convention on the Law of Treaties establish the main methods. The Inter-American Court has incorporated these into its case law,<sup>12</sup> thus, in addition to the evolutive method, it has used other interpretation criteria such as literal interpretation, systematic interpretation, and teleological interpretation.

23. In this regard, it should be pointed out that, to interpret a norm, it is not sufficient to use just one of the different methods of interpretation that exist, because these methods are complementary and all of equal rank. Indeed, in the aforementioned concurring opinion, I analyzed<sup>13</sup> Article 26 of the ACHR based on all the methods of interpretation, and this revealed that it does not permit a direct justiciability of the ESCR, because the jurisdiction of the Inter-American Court in this regard is regulated by Article 19(6) of the Protocol.

24. Consequently, this point is also fairly controversial in the instant judgment because it merely uses one method of interpretation, disregarding one of the most basic rules of public international law, which is the Vienna Convention on the Law of Treaties. In addition, it does not explain or argue why it seeks to make an interpretation of the treaty using a single methodology. Moreover, this is unusual for the Inter-American Court which, on different occasions, has made interpretations based on all the methods established.

25. Lastly, I stress that this case does not include an interpretation that provides the most protection for the norm that permits the application of the *pro persona* principle. This is because the *pro persona* principle should be applied when the Court is faced with two possible interpretations that are both valid and correct. Specifically what I have demonstrated is that the direct justiciability of the ESCR using Article 26 of the Convention is not a valid interpretation because the intention is to derive a normative principle that does not correspond to the norm.<sup>14</sup> In other words, the *pro persona* principle cannot be used to validate an interpretive option that does not emanate from the norm and that, to the contrary, entails its modification.

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<sup>12</sup> A good example of the correct use of the methods of treaty interpretation can be found in Advisory Opinion No. 21 on the *Entitlement of Legal Entities to Hold Rights under the Inter-American Human Rights System*.

<sup>13</sup> In this regard, concurring opinion, *Case of González Lluy et al. v. Ecuador*, paras. 23 to 28.

<sup>14</sup> Similarly, see: *Case of González et al. ("Cotton Field") v. Mexico. Preliminary objections, merits, reparations and costs*. Judgment of November 16, 2009. Series C No. 205, para. 78.

### C. LACK OF PERTINENCE OF THE SPECIFIC CASE

26. Having described my general arguments in this matter, I will now present the reasons why I considered that this case, in particular, possessed various complex features that meant that it did not allow this debate to be undertaken and, in particular, to arrive at the conclusion reached by the majority of the Inter-American Court.

27. First, I consider it extremely rash to use the *iura novit curia* principle in this case. As is well known, the Inter-American Court has used this principle since its very first judgments,<sup>15</sup> and has defined it as “the authority and even the duty [of the judge] to apply the pertinent legal provisions in a case, even when the parties do not expressly invoke them.”<sup>16</sup> Thus, this principle means, as its name indicates, that the inter-America judge can apply a norm that has not been alleged by the Commission or the parties, because it is better positioned to determine which right is applicable to the case. In other words, the inter-American system is not justice based on the content of the petition (*justicia rogada*), in the sense that the litigation is not undertaken based on the norms alleged by the Commission or the parties.

28. Therefore, I consider that, even though this is an acknowledged faculty of inter-American judges, it cannot be used under any circumstance and without having recourse to certain criteria of reasonableness and pertinence. Indeed, I consider that the said principle may be used when a human rights violation is evident or when the representatives or the Commission have committed a serious omission or error, so that the Court rectifies a possible injustice, but this principle should not be used to surprise a State with a violation that it had no way of anticipating and that it was unable to contest, not even at the time of the facts.

29. In this case, the judgment indicates that, during the first stage of the process before the Inter-American Commission, the petitioner argued the presumed violation of the right to work.<sup>17</sup> This was taken as grounds to conclude that the State had been aware of the facts from the start<sup>18</sup> and that “the parties [...] had abundant possibilities of referring to the scope of the rights involved in the facts analyzed.”<sup>19</sup>

30. It may be considered that the Court reached its conclusion in a perfunctory and over hasty manner, because indicating that the State had abundant possibility to defend itself based on the violation of Article 26 of the American Convention, does not take into account the strenuous debate on this article that has taken place within the Inter-American Court. Indeed, by declaring the violation of Article 26 of the ACHR in this case, the Court was not simply considering whether or not the dismissal of Mr. Lagos was justified; rather, behind this, there have been long discussions on the scope of an article, which have not always been calm and which the States have been emphatic in rejecting. Thus, it is not sufficient to say that a mention in the allegations presented prior to the Commission’s Admissibility Report could allow the State of Peru to anticipate that it was possible that the Inter-American Court would declare the violation of this right in a case that was submitted as a presumed violation of Articles 8 and 13 of the ACHR.

<sup>15</sup> *Case of Velásquez Rodríguez v. Honduras*, Judgment of July 29, 1988 (Merits), Series C No. 4, paras. 163 to 166.

<sup>16</sup> *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, Judgment of June 21, 2002 (Merits, reparations and costs), para. 107.

<sup>17</sup> Judgment *Lagos del Campo v. Peru*, paras. 133 to 139.

<sup>18</sup> It should be stressed that the judgment indicates that the Peruvian State was aware of the facts, but when this is mentioned in footnote No. 183, it includes a citation that refers to an argument on a right to work and not to a specific fact.

<sup>19</sup> Judgment *Lagos del Campo v. Peru*, para. 137.

31. In this regard, I consider that in light of the complexities of the debate on Article 26 of the ACHR and the implications that this can have not only on this case in particular, but also as a future precedent for the Inter-American Court, the least that could be asked is that an open and public debate should be allowed on the possible interpretations and scope being discussed. Indeed, if this conclusion had been reached in a case such as *Gonzalez Lluy v. Ecuador*, in which the debate took place between the representatives and the State during the public hearing and in the main briefs, I would not have found the declaration so lacking in pertinence (from a procedural standpoint), because the State had the opportunity to present its position on the issue. However, arriving at the conclusion reached in this judgment without the due debate between the parties could be seen by the States as an over-hasty and arbitrary decision of the Court, which endangers its legitimacy.

32. Due respect for and compliance with the Court's decisions is essential to ensure that the judgments convicting the States for disregarding human rights become not only a mechanism of reparation for the victims, but also serve as a positive catalyst of structural changes in society and in the State apparatus. Judicial rulings by an international court on the adequate use and distribution of economic resources, which are scarce by definition, signify a particularly profound intervention in internal affairs and, therefore, require a legitimacy that can only be derived from an explicit manifestation.

33. When declaring a violation of Article 26, judgments could, and at times should, establish reparations that would have a more pronounced impact in the area of public policies than those that have been handed down by the Court to date. Consequently, it will be necessary that, in contexts of instability and restricted budgets, characteristic of most of the States of our region, inventories of economic availability are established that allow priorities for the investment of scarce resources to be reoriented. In this regard, the way in which the jurisdiction of the Inter-American Court is substantiated and legitimized is not irrelevant.

#### **D. FLAWS IN THE ARGUMENTS OF THE JUDGMENT**

34. In addition to the reasons set forth above, I consider it necessary to demonstrate the flaws in the judgment's arguments, because they reveal that the decision concerning the violation of Article 26 was not subject to the exhaustive analysis required. To this end, I will refer to three main problems, which are: (i) failure to provide explicit grounds to justify the change in case law; (ii) use of a single interpretation method to reach the decision, and (iii) confusion between the existence of the right and the Inter-American Court's jurisdiction.

##### **a) Failure to provide explicit grounds to justify the change in case law**

35. First, I should indicate that the judgment completely fails to explain why it made a change in precedent, because it proceeded as if it were reiterating case law, which is absolutely false. This resulted in two different flaws in the arguments. The first is the omission of arguments that reveal the reasons why the Inter-American Court decided to make a change in precedent. The second is giving a specific judicial ruling the value of precedent, in order to conceal that, in reality, a new judicial position has been adopted.

36. Regarding the first point, it is evident that courts must be consistent with their previous decisions. This is a basic requirement, not only from the perspective of the theory of legal arguments, but it is also an essential element to ensure legal certainty and the effective application of the principle of equality between the recipients of their decisions. Sudden and unjustified changes in case law are arbitrary and undermine the legitimacy of judicial organs.

37. This means that, in this judgment, it was crucial to recognize that a change in case law was being made that moved away from the position adopted by the Inter-American Court in previous decisions in this regard, and also to explain with much more substantial grounds the reasons why it found it necessary to make this change. The values in play are legal certainty and the right to equality; therefore, the States and everyone subject to the jurisdiction of the American Convention need to understand the compelling reasons that the Court had to change its precedent. And this is especially relevant, if we consider that this is not just a simple change in case law because, basically, what this judgment does is modify the American Convention and, thereby, fundamentally transforms the system of inter-American justice.

38. In relation to the second point, the judgment not only fails to recognize that it was making a change in case law, but also seeks to make the reader believe that what it is doing is a repetition of its case law. In this regard, starting in paragraph 141 of the judgment, the Court begins to affirm that it is reiterating its case law in cases such as *Acevedo Buendía*, which, as is well-known, is not a case in which the Court reached the conclusion that Article 26 of the ACHR had been violated.

39. Regarding the case of *Acevedo Buendía et al. v. Peru*, I repeat that, in my opinion, the scope that the Court has tried to give to this judgment is excessive. First, in that judgment, the Court did not declare the violation of Article 26 and the analysis made was precisely with regard to the obligation of progressive development, and not the direct enforceability of any right in particular. Second, that judgment did not define or clarify which ESCR it was protecting, or its scope or minimum content. Third, even if the Court wished to derive some type of direct justiciability from the assertion that the obligations to respect and to ensure rights are applicable to Article 26 of the Convention, it should be stressed that such assertions were an *obiter dictum* of that judgment, because they had no direct relationship to the final decision which was not to declare a violation of Article 26.<sup>20</sup> In addition, this element of the judgment has not been reiterated in the Court's subsequent case law up until this case, so that it could not be considered a reiterated precedent.

#### **b) Use of a single method of interpretation to reach the decision**

40. That said, the second flaw in the arguments centers upon the use of a single interpretation method to interpret the treaty. As mentioned previously in this opinion, the exclusive use of "evolutive interpretation" disregards the fact that to make an interpretation that is in keeping with the treaty and that is not arbitrary, all the methods of interpretation described in Articles 31 and 32 of the Vienna Convention should be applied simultaneously. Thus, this simple omission, that moves away from the type of analysis that the Inter-American Court usually makes when it is faced with the need to interpret the American Convention is, in itself, an inexcusable error.

41. In addition, and with regard to the definition of evolutive interpretation, the Inter-American Court has indicated on various occasions<sup>21</sup> that human rights treaties are living

<sup>20</sup> Indeed, the reason why the judgment decides that there is no violation is that, "considering that the analysis is not centered on some measure adopted by the State that hindered the progressive realization of the right to a pension, but on the State's non-compliance with the payment ordered by the domestic courts, the Court deems that the violated rights are those protected in Articles 25 and 21 of the Convention and does not find grounds to also declare non-compliance with Article 26 of this instrument." *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller") v. Peru*, para. 106.

<sup>21</sup> Cf. Advisory Opinion OC-16/99, para. 114; *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*. Judgment of February 24, 2012. Series C No. 239, para. 83; *Case of Artavia Murillo et al. (In vitro fertilization) v. Costa Rica*, para. 245, and Advisory Opinion OC-21/14, para. 55. Similarly, the Preamble of the American Declaration of the Rights and Duties of Man indicates that: "[t]he international protection of the rights of man should be the principal guide of an evolving American law."

instruments the interpretation of which must evolve with the passage of time and contemporary conditions. It has also asserted that this evolutive interpretation is consequent with the general rules of interpretation established in Article 29 of the American Convention, and in the Vienna Convention on the Law of Treaties.<sup>22</sup> In this regard, “evolutive interpretation” may be understood as the determination and construction of the meaning of the norms derived from treaty-based precepts that, originally, were not in the intention of the countries that took part in drafting them, but which, today, owing to changes in the social and political reality, have become very relevant. The original text of treaties was not drafted taking into account facts and circumstances that, nowadays, fall within treaty-based circumstances.

42. Accordingly, this method of interpretation plays an important role, which is to update the treaty-based standards to the needs of the new times. Despite this, another of the flaws in the judgment lies in the use of “evolutive interpretation” to camouflage a “treaty modification.” This type of modification involves a substantial change in the text of the American Convention, by “interpretations” that are contrary to the wording of the Convention’s text. Thus, with the pretext of interpreting the Convention, a situation is created that is contrary to the text or to an interpretation in keeping with this instrument. Treaty modification obeys the same logic as the mechanism that constitutional doctrine calls constitutional mutation.<sup>23</sup>

43. In this regard, it has already been established that when all interpretation methods are used, the conclusion is reached that an extensive interpretation of Article 26 of the American Convention cannot derogate what the States sovereignly decided when they signed and ratified the Protocol of San Salvador. Thus, I can affirm without fear of contradiction that, in this judgment, the Court did not make an evolutive interpretation, because evolution cannot lead the Court to contravene the Convention. It is one thing to decide innovative matters that were not anticipated by the creators of the norm, and quite another to change the norm.

### **c) Confusion between the existence of the right and the Inter-American Court’s jurisdiction**

44. Third, the judgment does not address the problem of jurisdiction, because it focuses its arguments on proving the existence of the right to work or to job security, but makes no mention of Article 19 of the Protocol of San Salvador. The only mention of jurisdiction is made at the end of the analysis of the arguments in paragraph 154 of the judgment in which, once again, the Court tries to say that the discussion concerning the its jurisdiction had already been settled in the case of *Acevedo Buendía* when, as explained above, this assertion is not true.

45. In my opinion, this confusion is based on the clear desire to rectify, at any cost, what “some” consider an error in the Protocol of San Salvador when it limits the justiciability of the ESCR established therein. In this understanding, I consider that it is necessary to make a distinction between the advantages derived from the justiciability of the ESCR and the legal determination of the Court’s jurisdiction in this area.

46. As I have stated on other occasions, the Inter-American Court has already taken indirect decisions with regard to ESCR, generally by using connectivity, which is a less polemic methodology and, above all, more respectful of the intention of the States expressed in the American Convention and in its Protocol. It should not be overlooked that any action above and beyond the American Convention will be arbitrary even when it is based on good intentions.

<sup>22</sup> Cf. Advisory Opinion OC-16/99, para. 114, and Advisory Opinion OC-21/14, para. 55.

<sup>23</sup> In this regard, constitutional mutation refers to “the transformation or modification of a constitutional principle or precept.” Humberto Sierra Porto, *La reforma de la Constitución*, Bogotá, Instituto de Estudios Constitucionales Carlos Restrepo Piedrahita, 1998, p. 33.

## **E. GENERAL CONCLUSION**

47. In general, I consider that a judgment that declares the international responsibility of a State cannot include flaws in its arguments of the magnitude described above. If the Court wishes to hold the domestic courts to such a high standard as that established in this judgment with regard to providing the reasons for their decisions, the minimum that can be required is that it use the same yardstick for its own decision because, to the contrary, it runs the risk of adversely affecting the legitimacy of the Inter-American Court vis-à-vis our colleagues in the jurisdictional task.

48. In point of fact, the legitimacy of the Inter-American Court derives from the rigor of its arguments and legal constructs, as well as from the justice achieved through its decisions. Consequently, the intention of trying to get it right is not enough – is insufficient – because what this may generate is an important factor for the delegitimization of the Court. Indeed, ultimately, decisions such as this one create a vision, a project of integration and transformations arising autonomously from the organs of the inter-American human rights system, moving away from the main function of the Inter-American Court, which is to administer justice, ensuring the protection of human rights while strictly respecting its jurisdiction. Indeed, it is not possible to create transformational law that runs counter to the law in force.

49. Finally, I hope that this opinion makes a contribution to understanding the magnitude of the decision that the majority of the Inter-American Court adopted in this case, and reveals the main problems arising from the judgment. Only sincere criticism and open and public debate can help mitigate, up to a certain point, the risks to legitimacy and legal certainty that may arise from this judgment.

Humberto A. Sierra Porto  
Judge

Pablo Saavedra Alessandri  
Secretary