

INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF MUELLE FLORES V. PERU

JUDGMENT OF MARCH 6, 2019

(Preliminary objections, merits, reparations and costs)

In the case of *Muelle Flores*,

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

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

also present,

Pablo Saavedra Alessandri, Secretary,

Pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”) and with 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:

* Judge Ricardo Pérez Manrique did not take part in the deliberation and signing of this Judgment given that he became a member of the Court on January 1, 2019, when this case was at the judgment stage.

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I

INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. *The case submitted to the Court.* – On July 13, 2017, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission” or “the Commission”) submitted to the jurisdiction of the Court the case of *Muelle Flores* against the Republic of Peru (hereinafter “the State” or “Peru”). According to the Commission, the case concerns the alleged violation of the right to effective judicial protection as a consequence of the State’s failure to comply, during 24 years, with a judgment issued in favor of Mr. Muelle Flores, in the context of an application for *amparo*, which ordered his reinstatement in a pension scheme implemented under Decree Law N° 20530. The Commission determined that the State of Peru was internationally responsible, in the first place, because its own authorities failed to execute a judicial ruling favorable to Mr. Muelle and, secondly, owing to the ineffectiveness of the judicial mechanisms subsequently activated to achieve that compliance. The Commission also declared that the facts of the instant case constituted a violation of the guarantee of reasonable time and the right to property, given that the equalized pension to which Mr. Muelle Flores was entitled under the said Decree became part of his property, in accordance with the favorable judicial decision, and yet he was unable to enjoy that right.

2. *Proceedings before the Commission.* – The proceedings before the Commission were as follows:

- a) *Petition.* On April 8, 1998, the Commission received a petition submitted by the presumed victim, Oscar Muelle Flores, in which he alleged that the State was responsible for non-compliance with two *amparo* judgments that recognized his pension rights as a former employee of the State-owned mining Company Tintaya, together with his inclusion under the pension and benefits system stipulated in Decree Law No. 20530, and the renewable payment of his retirement pension. The petitioner also alleged that the State of Peru had not complied with its obligation to execute the judgments of the Supreme Court of Justice and the Constitutional Court, in violation of the rights established in Articles 24 and 25 of the American Convention.
- b) *Admissibility Report.* On July 16, 2010, the Commission issued Admissibility Report No.106/10 (hereinafter the “Admissibility Report”), in which it concluded that Petition No. 147-98 was admissible in relation to Articles 8(1), 21 and 25(2)(c) of the American Convention. However, it declared the petition inadmissible with regard to Article 24 thereof.
- c) *Report on the Merits.* On January 27, 2017, the Commission approved the Report on the Merits No. 3/17 (hereinafter “Merits Report” or “Report No. 3/17”), pursuant to Article 50 of the American Convention, in which it concluded that the State of Peru was responsible for the violation of the rights to judicial guarantees, property and judicial protection, recognized in Articles 8(1), 21, 25(1) and 25(2)(c) of the American Convention, in relation to the obligations contained in Article 1(1) thereof, to the detriment of Oscar Muelle Flores. The Commission likewise concluded that the State failed to meet its obligations under Article 2 of the Convention and made several recommendations to the State.¹

¹ The Commission made a series of recommendations to the State, namely: “i) Comply as soon as possible with the judgments of the Supreme Court of Justice of February 2, 1993, and the Constitutional Court of December 10, 1999. This means that the Peruvian State must immediately take the steps needed to pay Mr. Muelle Flores his pension, on the terms recognized by the courts, that is to say, those of the Decree Law 20530 pension scheme. This includes paying him the pensions he did not receive from the date of his retirement through to the date on which payment is effected. Bearing in mind the standards set forth in this report on the obligations of the State in connection with the privatization of State-owned enterprises, Peru may not cite privatization as an excuse for not complying with this recommendation; ii) Make full reparation for the violations declared in this report, including due compensation for material (property) and immaterial damages, and iii) Adopt legislative and other measures needed to avoid the repetition of the violations declared in this report. In that regard, the State must take such steps as are needed to: a) Ensure that State-owned enterprises comply with the judicial rulings

d) *Notification to the State.* On February 13, 2017, the Commission notified the Merits Report to the State, granting it two months to report on its compliance with the recommendations. The State requested an initial extension of 60 days, which was granted by the Commission. However, in the absence of substantive information on its progress in complying with the recommendations of the Merits Report, the Commission decided not to grant the State a second extension as requested and, therefore, to submit the case to the jurisdiction of the Court.

3. *Submission to the Court.* On July 13, 2017, the Commission submitted the case to the Inter-American Court, given the need to obtain justice for the victim.

4. *Requests of the Inter-American Commission.* Based on the foregoing, the Commission asked the Court to declare the State's international responsibility for the same violations indicated in its Merits Report (*supra* para. 1), to the detriment of Mr. Oscar Muelle Flores. In addition, it asked the Court to order the State to implement certain measures of reparation, which are specified and analyzed in Chapter VIII of this Judgment.

II PROCEEDINGS BEFORE THE COURT

5. *Designation of Inter-American Public Defenders.* On September 8, 2017, Mr. Oscar Muelle requested that the Court appoint an Inter-American Public Defender. Following the relevant communications with the Inter-American Association of Public Defenders (hereinafter "AIDEF"),² on September 20, 2017, the Association's General Coordinator informed the Court that Renée Mariño Álvarez (Uruguay) and Isabel Penido de Campos Machado (Brazil) had been designated as Inter-American Public Defenders to act as legal representatives (hereinafter, "the representatives")³ of the alleged victim in this case.

6. *Notification to the State and to the representatives.* The Court notified the Commission's submission of the case to the State of Peru on October 9, 2017 and to the Inter-American Public Defenders of the alleged victim on October 17, 2017.

7. *Brief of pleadings, motions and evidence.* On December 10, 2017, the representatives filed their brief of pleadings, motions and evidence before the Court (hereinafter "pleadings and motions brief"). Overall, the representatives agreed with the allegations presented by the Commission. In addition to the violations alleged by the Commission, they presented further arguments regarding the alleged violation of the rights to judicial guarantees and judicial protection recognized in Articles 8(1) and 25(1) of the Convention, in relation to Articles 1(1) and 2 thereof, as well as the alleged violation of economic, social and cultural rights (Article 26), specifically pension rights, in relation to Article 1(1) of the Convention.

recognizing former workers' pension rights; b) Ensure that proper safeguards are in place in privatization processes so that these actions do not impede compliance with judicial rulings in favor of retirees; c) Ensure that judgment execution processes meet the conventional standards of straightforwardness and promptness, and d) Ensure that the judicial authorities hearing such processes are legally empowered to apply, and do so in practice, the coercive mechanisms needed to guarantee compliance with judicial rulings."

² In a communication dated September 11, 2017, pursuant to Article 2 of the Agreement of Understanding between the AIDEF and the Court, and following the instructions of the President of the Court, the General Coordinator of AIDEF was asked to appoint, within 10 days, the defender who would act as legal representative in this case and to provide details of an address for the notification of pertinent communications.

³ The AIDEF designated Mrs. Alicia Margarita Contero Bastidas (Ecuador) as alternate Inter-American Public Defender.

8. *Answering brief.* On April 2, 2018, the State⁴ submitted to the Court its answer to the brief submitting the case and to the observations made to the brief of pleadings, motions and evidence (hereinafter “answering brief”). In its answering brief, the State referred to a series of “procedural matters,” including “the failure to exhaust domestic remedies” and “observations regarding the inappropriate inclusion of Article 26” by the representatives, and claimed that the State was not responsible for the alleged violation of the rights mentioned by the Commission and the representatives.
9. *Observations to the preliminary objections.* On June 4 and 5, 2018, the Commission and the representatives, respectively, forwarded their observations to the preliminary objections filed by the State. The representatives also referred to other aspects of the State’s answering brief, which were not requested. Therefore, the Court will not consider those aspects, since they were not submitted at the proper procedural moment, with the exception of the arguments related to the preliminary objections.
10. *Final written proceeding.* After assessing the main briefs submitted by the Commission and the parties, and in light of the provisions of Articles 15, 45 and 50(1) of the Court’s Rules of Procedure, the President, in consultation with the plenary of the Court, decided that it was not necessary to call a public hearing in the present case for reasons of procedural economy. This decision was communicated in an Order of the President of the Court on July 27, 2018.⁵
11. *Final written arguments and observations.* On September 27, 2018, the representatives and the State forwarded their respective final written arguments, and the Commission presented its final written observations. Together with their brief of final arguments, the representatives presented various annexes (*infra* para. 39).
12. *Request for provisional measures.* On September 27, 2018, the representatives asked the Court to adopt provisional measures, pursuant to Article 63(2) of the Convention, citing the extreme gravity and urgency of Mr. Muelle Flores’ situation and the need to avoid irreparable harm to him. On November 23, 2018, the Plenary of the Court decided to postpone a decision on that request.
13. *Observations to the Annexes of the representatives.* On October 12, 2018, the State forwarded its observations to the annexes submitted by the representatives.
14. *Helpful evidence.* On November 16 and December 3, 2018, the President of the Court asked the State to provide helpful evidence. Peru presented the requested documentation on November 30, and December 11, 2018, respectively. Also, in a brief dated December 20, 2018, the State announced its decision to restore *ex officio*, and on a provisional basis, the pension of Mr. Muelle Flores, together with his access to medical care through the social health insurance system, and informed the Court of its decision to make an advance payment of the amounts owed in pension

⁴ In a communication of November 9, 2017, the State confirmed the appointment of Supranational Assistant Public Prosecutor, Iván Arturo Bazán Chacón, as agent, and Doris Margarita Yalle Jorges and Silvana Lucía Gómez Salazar as alternate agents. In communications dated February 19 and 21, 2018, the State confirmed the appointment of the lawyer Sofía Janett Donaires Vega as principal agent and the lawyer Sergio Manuel Tamayo Yañez as alternate agent in the case of Oscar Muelle Flores.

⁵ In that Order, the President of the Court also required the submission of the following testimonies, by affidavit: the presumed victim Oscar Muelle Flores; the witnesses offered by the representatives Vibeke Ann Muelle Jensen and Jesús Aníbal Delgado Flores; the expert witness proposed by the Commission, Christian Courtis, the expert witness offered by the representatives, María Virginia Brás Gomes, and the expert witness offered by the State, César González Hunt. Likewise, the President ordered that financial assistance be provided through the Victims’ Legal Assistance Fund of the Court. The statements requested by affidavit were received on August 27, 28 and 30, 2018. The statement of Mr. Muelle Flores was not forwarded as it was not possible to obtain it owing to his state of health. Likewise, the representatives withdrew the expert opinion of María Virginia Brás Gomes. *Cf. Case of Muelle Flores v. Peru.* Order of the President of the Court of July 27, 2018, paragraph 8. Available at: http://www.corteidh.or.cr/docs/asuntos/muelle_27_07_18.pdf

allowances to Mr. Muelle Flores.

15. *Observations of the representatives and the Commission.* The President granted the representatives and the Commission a period of time to present any observations deemed pertinent to the helpful evidence forwarded by the State and to the report of December 20, 2018. On December 5 and 17, 2018, as well as on January 7, 2019, the Commission indicated that it had no observations to make. After requesting an extension on December 18, 2018, the representatives presented their observations to the helpful evidence provided by the State and on the report of December 20, 2018.

16. *Disbursements in application of the Victims' Assistance Fund.* On November 14, 2018, the Secretariat, following the instructions of the President of the Court, forwarded information to the State regarding the disbursements made in application of the Victims' Legal Assistance Fund of the Inter-American Court (hereinafter the "Assistance Fund of the Court" or the "Fund") in the present case and, pursuant to Article 5 of the Rules for the Operation of said Fund, granted it a period to present any observations deemed pertinent. On November 28, 2018 the State indicated that it had no observations to make regarding the cited report.

17. *Deliberation of the instant case.* The Court began its deliberation of this Judgment on February 5, 2019.

III JURISDICTION

18. The Court is competent to hear this case, pursuant to Article 62(3) of the American Convention, given that Peru ratified the American Convention on July 28, 1978, and accepted the contentious jurisdiction of the Court on January 21, 1981.

IV PRELIMINARY OBJECTIONS

19. In its answering brief, the State filed a preliminary objection regarding the alleged failure to exhaust domestic remedies." Also, under the heading of "procedural matters" it presented "observations regarding the unwarranted inclusion of Article 26 by the [representatives]," and expressed its disagreement with the Court's interpretation of Article 26 of the Convention, as well as its competence to analyze this matter.

20. The Court recalls that a preliminary objection is an act that contests the admissibility of an application or the jurisdiction of the Court to hear a specific case or any of its aspects, based on the person, the issue, the time or the place, provided that those assertions are of a preliminary nature.⁶ If these assertions cannot be considered without prior analysis of the merits of a case, they cannot be analyzed through the mechanism of a preliminary objection.⁷ Accordingly, irrespective of whether an assertion is defined as a "preliminary objection," its content and purpose must have the essential juridical characteristics that ensure that it is of a preliminary nature, that is, it must object to the admissibility of the application or the Court's jurisdiction to hear the case or any of its aspects, and it must therefore be settled as such.⁸

⁶ Cf. *Case of Las Palmeras v. Colombia. Preliminary objections.* Judgment of February 4, 2000. Series C No. 67, para. 34, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico.* Preliminary objections, merits, reparations and costs. Judgment of November 28, 2018. Series C. No.374, para.21.

⁷ Cf. *Case of Castañeda Gutman v. United Mexican States.* Preliminary objections, merits, reparations and costs. Judgment of August 6, 2008, para. 39, and *Case of Herzog et al. v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of March 15, 2018. Series C No. 353, para. 97.

⁸ Cf. *Castañeda Gutman v. United Mexican States, supra*, para. 39, and *Case of Lagos del Campo v. Peru. Preliminary objections,*

21. Based on the foregoing, and having regard to the diverse nature of the arguments formulated by the State, aimed, on the one hand, at demonstrating that the domestic remedies have not been exhausted and on the other, at arguing that the Court does not have jurisdiction to examine the direct justiciability of the right to social security based on the interpretation of Article 26 of the Convention,⁹ this Court understands that these assertions have the nature of a preliminary objection.

A. Objection regarding the alleged failure to exhaust domestic remedies

A.1 Arguments of the State and observations of the Commission and the representatives

22. The State filed an objection regarding the alleged failure to exhaust domestic remedies based on Article 46(1)(a) of the Convention. It held that when the petition was lodged, the domestic remedies had not been exhausted, since the second *amparo* proceeding was still in progress, and was decided by the Constitutional Court on November 10, 1999. In addition, it indicated that the dispute in this case concerned the process of execution of the *amparo* judgment of February 2, 1993, which had not concluded at the time of submitting the petition; therefore, the alleged failure to exhaust domestic remedies must be analyzed in relation to the judicial execution proceeding. The State asserted that in the instant case there was no unwarranted delay, given that the petition was presented only two years and four months after the execution process had begun on December 18, 1995. It emphasized that this process was archived in 1999, given the lack of procedural activity by the parties, and that the actions only resumed in 2008, the date from which the time should be counted. Thus, it concluded that the domestic remedies had not been exhausted at the time when the petition was filed and that no objection was filed under the provisions in Article 46(2) of the Convention.

23. The Commission indicated that the preliminary objection was inadmissible because it was time-barred, since it was not filed during the admissibility stage. It held that the State presented a brief during that stage, dated March 1, 2010, containing a description of the domestic proceedings, but it did not allege non-compliance with the requirement to exhaust domestic remedies. In addition, the Commission argued that, unlike the view held by the State and in line with the Court's consistent case law, the analysis of exhaustion of domestic remedies or the application of any of the exceptions in this regard, should have taken place at the time when the case was declared admissible, and not during the presentation of the petition. The Commission argued that in the instant case, when the Admissibility Report was adopted on July 16, 2010, there had already been an unwarranted delay of more than 17 years in the process of compliance with the *amparo* judgment, and therefore the objection contemplated in Article 46(2)(c) of the Convention was applicable.

24. The representatives agreed with the Commission that the preliminary objection was time-barred, arguing that the State had tacitly waived the objection by not invoking it, clearly and precisely, at the first appropriate procedural opportunity, that is, during the admissibility stage before the Commission. They asserted that "in its communication of February 26, 2010 (prior to the Admissibility Report)" the State merely submitted reports and documents on the facts related to the case, omitting to invoke any objection. Furthermore, in agreement with the Commission, the representatives held that the analysis of failure to exhaust domestic remedies and the configuration of its objections should have been carried out bearing in mind the adoption of the Admissibility Report. In this regard they stated that at the time of issuing that Report, the domestic remedies had

merits, reparations and costs. Judgment of August 31, 2017. Series C No. 340, para. 17.

⁹ It is important to emphasize that in the case of *Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru*, the Court analyzed arguments of this nature through a preliminary objection *ratione materiae*. Cf. *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2009. Series C No. 198, paras. 12 to 19.

already been exhausted, given that by then two rulings had been adopted as *res judicata* in favor of Mr. Muelle Flores. Furthermore, they alleged that at the time when the Admissibility Report was adopted there had also been an unreasonable delay in the execution of the judicial decisions, which constituted an exception to this rule under Article 46(2) (c) of the American Convention.”

A.2 Considerations of the Court

25. According to Article 46(1)(a) of the American Convention, for a petition or communication lodged before the Inter-American Commission to be admissible under Articles 44 or 45 of the Convention, it is necessary that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law.¹⁰ The Court recalls that this rule was conceived in the interests of the State to allow it to resolve a dispute in the domestic sphere before being faced with international proceedings.¹¹ This means that not only must these remedies exist formally, but they must also be adequate and effective, as a result of the exceptions established in Article 46(2) of the Convention.¹²

26. Similarly, this Court has consistently held that an objection to the exercise of the Court’s jurisdiction based on the supposed failure to exhaust domestic remedies must be presented at the appropriate procedural opportunity, that is, during the admissibility proceeding before the Commission,¹³ after which the principle of procedural preclusion operates.¹⁴ In alleging a failure to exhaust domestic remedies, the State must specify which remedies have not yet been exhausted, and demonstrate that these were available, adequate, appropriate and effective.¹⁵ In this regard, the Court reiterates that it is not the task of this Court, or of the Commission, to identify *ex officio* the domestic remedies that remain to be exhausted, since it is not incumbent on the international bodies to rectify the lack of precision of the State’s arguments.¹⁶ It follows that, when the State claims the existence of a domestic remedy that has not been exhausted, this must not only be indicated opportunely, but also precisely, identifying the remedy in question and also how, in the specific case, it would be adequate and effective to protect the persons in the situation denounced.¹⁷

27. Regarding a preliminary objection of this nature, the Court recalls that it is first necessary to determine whether the objection was presented at the appropriate procedural opportunity. The Court notes that the only brief submitted by the State during the admissibility stage before the Commission was Report No. 48-2010-JUS/PPES of March 1, 2010, which contained a description of the domestic

¹⁰ Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary objections*. Judgment of June 26, 1987. Series C No. 1, para. 85, and *Case of Amrhein et al. v. Costa Rica*. Preliminary objections, merits, reparations and costs. Judgment of April 25, 2018. Series C No.354, para. 39.

¹¹ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*. Judgment of July 29, 1988. Series C No. 4, para. 61, and *Case of Favela Nova Brasília v. Brazil*. Preliminary objections, merits, reparations and costs. Judgment of February 16, 2017. Series C No. 33, para. 86.

¹² Cf. *Case of Velásquez Rodríguez v. Honduras. Merits, supra*, para. 63; *Case of Favela Nova Brasília v. Brazil, supra*, para. 86, and *Duque v. Colombia*. Preliminary objections, merits, reparations and costs. Judgment of February 26, 2016. Series C No.310, *supra*, para. 35.

¹³ Cf. *Case of Velásquez Rodríguez v. Honduras*. Preliminary objections, *supra*, para. 88, and *Case of Duque v. Colombia, supra*, para. 23.

¹⁴ 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. 28, and *Case of V.R.P., V.P.C. et al. v. Nicaragua*. Preliminary objections, merits, reparations and costs. Judgment of March 8, 2018. Series C No. 350, para. 22.

¹⁵ Cf. *Case of Velásquez Rodríguez v. Honduras*. Preliminary objections, *supra*, paras. 88 and 91, and *Case of Duque v. Colombia, supra*, para. 23.

¹⁶ Cf. *Case of Reverón Trujillo v. Venezuela*. Preliminary objection, merits, reparations and costs. Judgment of June 30, 2009. Series C No. 197, para. 23, and *Case of Amrhein et al. v Costa Rica, supra*, para.39.

¹⁷ Cf. *Case of Expelled Dominicans and Haitians v. Dominican Republic*. Preliminary objections, merits, reparations and costs. Judgment of August 28, 2014. Series C No. 282, para. 30, and *Case of Dismissed Employees of PetroPerú et al. v. Peru*. Preliminary objections, merits, reparations and costs. Judgment of November 23, 2017. Series C. No. 344, para.27.

proceedings conducted in relation to the facts denounced by Mr. Oscar Muelle Flores.¹⁸ In that brief, the State did not invoke Article 46(1) of the Convention at any time, nor did it argue that domestic remedies had not been exhausted, or that the petition was inadmissible, and merely described the status of the proceeding.¹⁹ In this sense, the Court has indicated that “a mere recount of the procedural actions undertaken is not sufficient to file a preliminary objection, given that, in the absence of a clear and timely argument by the State, it appears that the latter did not allege the failure to exhaust domestic remedies during the admissibility stage before the Commission.”²⁰ This Court also understands that a “clear manifestation” is deduced from general expressions such as “existing domestic remedies ha[d] not been exhausted;”²¹ however, in this case it was not even expressed in those terms. Therefore, the Court considers that the State has not presented the aforementioned defense in a timely manner.

28. Based on the foregoing, the Court concludes that the State’s objection concerning the alleged failure to exhaust domestic remedies is time-barred. Therefore, the Court dismisses the preliminary objection filed by the State. As a result, the Court does not consider it necessary to rule on the arguments concerning the procedural moment at which failure to exhaust domestic remedies must be analyzed or the exception of unwarranted delay.

B. Objection regarding the Court’s alleged lack of jurisdiction *ratione materiae* and the direct justiciability of Article 26 of the Convention

B.1 Arguments of the State and observations of the Commission and the representatives

29. The State pointed out that the representatives were not claiming the justiciability of the rights in the Convention, but rather of the economic, social, cultural and environmental rights (hereinafter “ESCER”), specifically the right to social security. The State argued that Article 19(6) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, “Protocol of San Salvador” (hereinafter “Protocol of San Salvador”), clearly delimited the jurisdiction of the Commission and of the Court in relation to the issue at hand, establishing that these bodies could only examine the protection of trade union rights and the right to education, through the mechanism of individual petitions before the inter-American system, but not the right to social security. It considered that it was not acceptable to undermine the content of the provisions of Article 19(6) of the San Salvador Protocol, which was a binding standard for the organs of the system, and that the *pro personae* principle would only be applicable within the framework of the competences established in the inter-American order.

30. The State highlighted the positions of some Judges of the Court who opposed the direct justiciability of ESCER, stating that it shared this view in all its aspects. In this regard, it emphasized that the rights included in the Convention’s protection system were those established up to Article 25 and, although other rights and freedoms could exist, these should be included in the protection system through the mechanisms envisaged in Articles 31, 76 and 77 of the Convention. It further stressed that adding rights was not within the jurisdiction of the Court, but of the States. It held that

¹⁸ Cf. Report No. 48-2010-JUS/PPES of the State of Peru of February 25, 2010, received by the Inter-American Commission on March 1, 2010 (evidence file, folios 39.8 to 39.9).

¹⁹ The fact that the State did not allege failure to exhaust domestic remedies was taken up by the Commission in Admissibility Report No. 106/10. Cf. Admissibility Report No. 106/10, Petition 147-98, Oscar Muelle Flores, Peru, July 16, 2010, para. 327 (evidence file, folio 225).

²⁰ Case of Tenorio Roca et al. v. Peru. Preliminary objections, merits, reparations and costs. Judgment of June 22, 2016. Series C No. 314, para. 24.

²¹ Cf. Case of Díaz Peña v. Venezuela. Preliminary objection, merits, reparations and costs. Judgment of June 26, 2012. Series C No. 244, paras. 118 and 122, and Case of Tenorio Roca et al. v. Peru, supra, para. 23.

ESCER should not be directly justiciable through the application of Article 26 of the Convention, since the said article did not list a catalogue of rights, or recognize or enshrine ESCER, but merely established the States' commitment to progressively achieve the full realization of the rights that could be derived from the Charter of the Organization of American States (hereinafter "OAS Charter"), subject to available resources. In this regard, the only obligation derived from Article 26 that could be directly supervised was compliance with the obligation of progressive development and the duty of non-retrogression. Thus, it could not be argued that a case concerning the alleged violation of some of the rights referred to could be submitted to the Court. The aforementioned lack of jurisdiction was confirmed by the Protocol of San Salvador, in which the States decided to allow justiciability only in two cases, which constituted a subsequent agreement and practice among the States parties. Accordingly, the State took the view that that the Court could not assume competence for the alleged violation of a right or freedom "not included either in the Convention or in the Protocol of San Salvador" and that the principle of progressive interpretation of international instruments could not be invoked in order to add rights to the protection system, since that principle was applied to attribute to an existing right, already included in said regime, a different and generally broader meaning than that originally given.

31. The *Commission* argued that this case was submitted to the Court prior to the case law advances related to Article 26 of the American Convention. Therefore, it considered that the analysis of the right to social security in the context of Article 26, in addition to the rights already claimed, "would indeed contribute to its insertion in the evolution of the inter-American system and to a broader understanding of the scope of international responsibility."

32. The *representatives* argued that Article 26 of the Convention should be justiciable under Article 62(3), which establishes the Court's jurisdiction to hear any case submitted to it related to the interpretation and application of the provisions of the Convention, and that the aforementioned provision formed part of the treaty. Similarly, they indicated that the violation of the Protocol of San Salvador had not been claimed, but that it had been mentioned by way of illustration, since it formed part of the inter-American *corpus juris* that could be used as a parameter for the interpretation of the Convention. Finally, they concluded that "the right to social security was a human right protected by international law and implicitly contained in Article 26 of the Convention."

B.2 Considerations of the Court

33. In accordance with the reasons outlined previously, regarding the analysis of the State's arguments concerning its preliminary objection on the Court's lack of jurisdiction *ratione materiae* (*supra* paras. 20 and 30), it is for the Court to determine whether it is competent to analyze, directly, the right to social security based on the interpretation of Article 26 the Convention.

34. The Court emphasizes that in the case of *Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru*, it was called upon to settle a preliminary objection regarding the right to social security based on an interpretation of Article 26 of the Convention. In that decision, the Court concluded, in general terms that, pursuant to Article 62(1) of the Convention, it would be competent to decide whether the State had violated or failed to comply with any of the rights of the Convention, including Article 26 thereof. However, the Court did not offer an interpretation as to whether the right to social security was derived from the OAS Charter nor did it consider the San Salvador Protocol with respect to Peru, which is a State party thereto.²²

²² In this case the Court did not declare a violation of Article 26 of the Convention nor did it analyze the State's obligation to ensure progressive development and the duty of non-retrogression, which was the focus of the Court's analysis of Article 26.

35. In the case of *Lagos del Campo v. Peru*, the Court for the first time established and consolidated a specific and autonomous violation of Article 26 of the American Convention,²³ set forth in Chapter III, and entitled Economic, Social and Cultural Rights. Thus, the Court defined more clearly²⁴ its jurisdiction to hear and settle disputes related to Article 26 of the American Convention, as an integral part of the rights contained therein, in respect of which Article 1(1) establishes the States' general obligations to respect and guarantee rights.²⁵ Based on that judgment, the Court established its jurisdiction to examine autonomous violations of Article 26 of the Convention, considering that the rights derived from this article may be directly justiciable through the mechanism of individual petitions before the inter-American system. This jurisprudential stance has been ratified in various subsequent decisions adopted by this Court.²⁶ In this sense, this Court has already established its jurisdiction to examine the merits of alleged violations of economic, social, cultural and environmental rights derived from Article 26 of the Convention.

36. In the particular case of *Cuscul Pivaral et al. v. Guatemala*, given the importance of this question for the legal certainty of the inter-American system, the Court considered the scope of its jurisdiction in relation to Article 26 of the American Convention based on a literal, systematic, teleological and evolutive interpretation thereof. Drawing on those interpretative methods, on an analysis of the preparatory works of the Convention and on the juridical nature of the Protocol of San Salvador, the Court concluded that "Article 26 of the Convention protects the rights derived from the economic, social, educational, scientific and cultural standards set forth in the OAS Charter. The scope of such rights should be understood in relation to the other articles of the American Convention and they are therefore subject to the general obligations contained in Articles 1(1) and 2 of the Convention and may be supervised by this Court in the terms of Articles 62 and 63 of this instrument. This conclusion is based not only on formal issues, but results from the interdependence and indivisibility of civil and political rights and economic, social, cultural and environmental rights, as well as their compatibility with the object and purpose of the Convention, which is the protection of the fundamental rights of human beings. In each specific case requiring an analysis of ESCER, it will be necessary to determine if a human right protected by Article 26 of the American Convention is explicitly or implicitly derived from the OAS Charter, as well as the scope of that protection."²⁷

37. The Court refers to the criteria adopted in the aforementioned cases and reiterates its constant case law regarding its jurisdiction to examine the alleged violation of the right to social security contained in Article 26 of the Convention. Based on the foregoing, the Court dismisses the preliminary

²³ Cf. *Case of Lagos del Campo v. Peru*, *supra*, paras. 142 and 145.

²⁴ Cf. *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru*, *supra*, paras. 16, 17 and 100, and *Case of Lagos del Campo v. Peru*, *supra*, para. 154.

²⁵ Cf. *Case of Lagos del Campo v. Peru*, *supra*, paras. 142 and 154. The paragraph stated that "[i]n [this] sense, the Court [held] that the broad terms in which the American Convention is drafted indicate that the Court exercises full jurisdiction over all its articles and provisions. Also, it is pertinent to note that although Article 26 is found in Chapter III of the Convention, (entitled 'Economic, Social and Cultural Rights'), it also appears in Part I of that instrument, entitled 'State Obligations and Rights Protected' and, therefore, is subject to the general obligations contained in Articles 1(1) and 2 indicated in Chapter I (entitled 'General Obligations'), and in Articles 3 to 25 contained in Chapter II (entitled 'Civil and Political Rights')". Cf. *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru*, *supra*, para. 100, and UN, Committee on Economic, Social and Cultural Rights, *General Comment N° 13: The right to education (Article 13 of the Covenant)*, U.N. Doc. E/C.12/1999/10, December 8, 1999, para. 50.

²⁶ Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of August 23, 2018. Series C No. 359, paras. 75 to 97; Environment and human rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and personal integrity- interpretation and scope of Articles 4(1) and 5(1), in relation to Articles 1(1) and 2 of the American Convention on Human Rights). *Advisory Opinion OC-23/17* of November 15, 2017. Series A No. 23, para. 57; *Case of Dismissed Employees of PetroPerú et al. v. Peru*, *supra*, para. 192; *Case of San Miguel Sosa and other v. Venezuela. Merits, reparations and costs*. Judgment of 8 February 2018. Series C No. 348, para. 220; *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, para. 100, and *Case of Lagos del Campo v. Peru*, *supra*, paras. 142 and 145.

²⁷ Cf. *Case of Cuscul Pivaral et al. v. Guatemala*, *supra*, paras. 75 to 97.

objection filed by the State, and will therefore rule on the merits of the matter in the corresponding section.

V EVIDENCE

A. Admission of the documentary evidence

38. The Court received various documents presented as evidence by the Commission, the representatives and the State, attached to their main briefs and as helpful evidence (*supra* paras. 6, 7, 8 and 14). In this case, as in others,²⁸ the Court admits those documents forwarded by the Commission and the parties at the appropriate procedural opportunity (Article 57 of the Rules of Procedure),²⁹ together with those submitted by the State at the request of the Court as helpful evidence, pursuant to Article 58(b), which were not contested or opposed³⁰ and the authenticity of which was not challenged. Nevertheless, it will offer some pertinent considerations.

39. Together with their final written arguments, the representatives forwarded three documents and two videos related to the physical and mental health of Mr. Muelle Flores as well as some of the expenses incurred. The Court notes that the State presented observations and objected to some of the annexes forwarded by the representatives. However, this Court will refer only to the arguments presented by the State regarding the admissibility of the documentary evidence. In this regard, the State held that Annex I, concerning the certificate issued by the Air Force Hospital, “[was] blurred and illegible” and lacked the formality of the “signature of the head of section of the F.A.P Central Hospital.” The Court finds that the document is legible and that it is signed by the attending physician, which it considers sufficient for its admission. Moreover, the document was issued after the representatives’ pleadings and motions brief, in relation to a supervening fact. Consequently, the Court admits this document, pursuant to Article 57(2) of its Rules of Procedure.

40. The State also argued that the representatives’ transcription of the text of the medical certificate provided by the surgeon who performed the surgical intervention on Mr. Oscar Muelle Flores’ femoral hip fracture, “[was] not of a formal nature, since it ha[d] not been transcribed and signed by the attending physician; therefore, it was not an appropriate document.” In this regard, the Court decides to admit the transcription of the representatives since it considers that its aim is to clarify, in a reliable manner, the content of the official medical certificate enclosed in the evidence forwarded by them, which includes the corresponding formalities.

B. Admission of the testimonial and expert evidence

41. The Court deems it pertinent to admit the testimony and expert opinions provided by affidavit, only insofar as they are in keeping with the purpose defined by the President in the Order requiring

²⁸ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits, supra*, para. 140, and *Case of V.R.P., V.P.C. et al. v. Nicaragua, supra*, para. 59.

²⁹ In general, documentary evidence may be presented in accordance with Article 57(2) of the Rules of Procedure, together with the briefs submitting the case, the pleadings and motions brief or the answer brief, as applicable. Evidence forwarded outside those procedural opportunities is not admissible, except in the circumstances established in Article 57(2) of the Rules of Procedure (namely, force majeure, serious impediment) or if it involves a supervening fact, i.e. an event that occurred after the procedural moments indicated. Cf. *Case of Barrios Family v. Venezuela. Merits, reparations and costs*. Judgment of November 24, 2011. Series C No. 237, paras. 17 and 18, and *Case of Colindres Schonenberg v. El Salvador. Merits, reparations and costs*. Judgment of February 4, 2019. Series C No. 373, para. 14.

³⁰ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits, supra*, para. 140, and *Case of Omeara Carrascal et al. v. Colombia. Merits, reparations and costs*. Judgment of November 21, 2018. Series C No. 368, para.64.

them (*supra* para. 10) and with the purpose of the instant case.³¹

42. The State presented various observations and asked the Court to assess these, in particular, those regarding the transfer of the expert opinions to the present case, as well as in relation to the testimonies rendered by affidavit by Vibeke Ann Muelle and Jesús Aníbal Flores. First, the Court will refer to the President's Order of July 27, 2018 (*supra* para. 10), in relation to the admissibility of the corresponding statements and the relevance of transferring the expert opinions. The Court also considers that the State's observations call into question the evidentiary weight of the statements, which does not pose a problem in terms of their admissibility.³² This Court will assess the State's observations regarding the evidentiary value of the statements and expert opinions admitted, as applicable, together with the entire body of evidence in the present case.

VI FACTS

C. Background

43. Oscar Muelle Flores is a civil engineer³³ who worked for a mining company, the *Empresa Minera Especial Tintaya S.A.* (hereinafter "Tintaya S.A." or "Tintaya company"), from June 1, 1981, until September 30, 1990.³⁴ Tintaya S.A. was a State-owned enterprise until it was privatized in November 1994 (*infra* para. 57). During that time, Mr. Muelle held various different positions within the company, the last one being the position of Assistant General Manager until his retirement.³⁵

44. On May 15, 1990, the State-owned company issued Resolution No. AD-0884/90-R, according to which Mr. Muelle Flores was included in the pension scheme under Decree Law No. 20530 "Rules Governing Pensions and Benefits for Civil Servants in the Service of the State,"³⁶ which acknowledged that Mr. Muelle had provided services to the State for 35 years, 10 months and 27 days.³⁷

45. The decision to include Mr. Muelle Flores in the aforementioned pension scheme was based on Board of Directors Decisions No. 155/88 of December 22, 1988 and No. 029/90 of February 8, 1990³⁸, which authorized the government to include company employees in that pension scheme and established the corresponding regulations for that purpose.³⁹

³¹ The Court received the statements rendered by affidavit from the witnesses offered by the representatives, namely, Vibeke Ann Muelle Jensen and Jesús Aníbal Delgado Flores, together with the expert opinions of Christian Courtis and César González Hunt, offered by the Commission and the State, respectively. The purpose of these statements are established in the Order of the President of July 27, 2018 (*supra* para. 10). Available at: http://www.corteidh.or.cr/docs/asuntos/muelle_27_07_18.pdf

³² Cf. Case of Díaz Peña v. Venezuela, *supra*, 33, and Case of Omeara Carrascal et al. v. Colombia, *supra*, para. 69.

³³ Cf. Curriculum vitae of Oscar Muelle Flores (evidence file, folios 1482 to 1483 and 1486 to 1487).

³⁴ Cf. Judgment of the Supreme Court of Justice of February 2, 1993 (evidence file, folio 13), and Brief No. 2 of the law firm Laos, Aguilar, Celi & Vinatea Abogados, of September 24, 1996 (evidence file, folio 4).

³⁵ Cf. Brief of the Pension Standardization Office (ONP) presented before the Administrative Chamber of the Superior Court of Lima of September 24, 1996 (evidence file, folio 4).

³⁶ Cf. Judgment of the Supreme Court of Justice of February 2, 1993 (evidence file, folio 13), and Brief No. 2 of the law firm Laos, Aguilar, Celi & Vinatea Abogados, of September 24, 1996 (evidence file, folio 4).

³⁷ Cf. Judgment of the Constitutional Court of December 10, 1999 (evidence file, folio 28) and Brief No. 2 of the law firm Laos, Aguilar, Celi & Vinatea Abogados, of September 24, 1996 (evidence file, folio 4).

³⁸ Cf. Opinion No. 735-97 issued by the Senior Prosecutor for Administrative Matters before the Constitutional and Social Chamber of the Supreme Court on August 22, 1997 (evidence file, folio 10 to 11).

³⁹ Cf. Application for *amparo* filed by Oscar Muelle Flores before the Fifth Civil Court of Lima on April 18, 1991 (evidence file, folio 16), and Resolution No. 6 issued by the Fifth Civil Court of Lima on July 19, 1991 (evidence file, folio 22).

46. The Decree Law No. 20530 pension scheme regulated "State pensions and benefits for civil services rendered by workers of the national public sector" who were not included in the National Pensions System established by Decree Law N°19990⁴⁰ of 1973. Under that scheme, created to "compensate state workers who could not join the National Pensions System,"⁴¹ workers acquired the right to a pension upon completing 15 years of service to the State, in the case of men, and 12.5 years in the case of women.⁴² The pension was calculated "on the basis of the last twelve (12) salaries earned and at a ratio of 1/30 per year of service for men and 1/25 per year of service for women."⁴³

47. With the promulgation of the Constitution of 1979, after the issue of Decree Law No. 20530, the Eighth General and Transitory Provision established the right of retired workers included in this pension scheme, and with more than 20 years of service to the State, to have their pensions progressively adjusted or equalized with the wages of active public officials and/or public servants.⁴⁴ For this reason, Decree Law No. 20530 was known as the "*Cédula viva*" system or the "renewable pension," due to the "mirror effect" that automatically equalized the pensions for dismissed or retired workers with the wages of active workers (active public servants), using as reference the last position held by the pensioner.⁴⁵ In this sense, the pension received by the beneficiary was equal to that of the active worker, and therefore the readjustment was in line with increases in the latter's wages (*infra* para. 48).

48. The benefit of pension equalization was a privilege extended by the Constitution to persons subject to Decree Law No. 20530, as it was not originally included in the text of said Decree. This benefit was implemented through Law No. 23495 of November 1982 and its Regulations, and through Supreme Decree No. 015-83-PCM of March 1983. Article 5 of that Law established that: "any post-equalization increase awarded to active public servants in the same or a similar position to the last position held by the dismissed or retired worker shall give rise to the same pension increase to which the active public servant is entitled."⁴⁶

49. On September 30, 1990 Mr. Muelle Flores retired from Tintaya S.A., a State-owned company governed by private law. Mr. Muelle Flores received his pension in accordance with Decree Law No. 20530, from October 1, 1990 until January 1991. On February 27, 1991, he received Communication No. GA/0130/91 from the company's administrative manager, unilaterally informing him that, on the advice of an external legal adviser, the pension scheme under Decree Law 20530 was being suspended.⁴⁷ Mr. Muelle Flores was informed that the Decree was no longer applicable to company

⁴⁰ Cf. Article 1 of Decree Law No. 20530 that established the Pensions and Benefits Regime for Civil Services Rendered to the State not included in Decree Law No. 19990, promulgated on February 27, 1974. Cf. Affidavit rendered by César José Gonzáles Hunt on August 24, 2018 (evidence file, folio 1849).

⁴¹ Affidavit rendered by César José Gonzáles Hunt on August 24, 2018 (evidence file, folio 1849).

⁴² Cf. Article 4 of Decree Law No. 20530, *supra*.

⁴³ Affidavit rendered by César José Gonzáles Hunt on August 24, 2018 (evidence file, folio 1849).

⁴⁴ The Eighth Transitory Provision of the 1979 Peruvian Constitution established that: "The pensions of dismissed and retired public administration workers with more than 20 years of service who are not subject to the Peruvian Social Security Service regime, or any other special regimes, are progressively equalized with the wages of active public servants in the respective categories, for a period of 10 fiscal years, starting from January 1, 1980, and must be included in the National Budget under the appropriate headings."

⁴⁵ Cf. Affidavit rendered by César José Gonzáles Hunt of August 24, 2018 (evidence file, folio 1850).

⁴⁶ Article 5 of Law No. 23495, "Progressive Equalization of Pensions of Discharged and Retired Workers of the Public Administration not subject to the Social Security System or to other special regimes," adopted on November 19, 1982.

⁴⁷ Cf. Judgment of the Fifth Civil Court of Lima on July 19, 1991 (evidence file, folios 23 to 24), and Judgment of the

personnel given that, although it was a State-owned Company, it was governed by private law and operated under the private sector labor regime, so that its workers could not be considered as public servants but rather as private workers.⁴⁸ He was also informed that his inclusion in that system contravened Article 14 of the Decree Law, which precluded the accumulation of public service under different types of labor regimes (public and private).⁴⁹

50. In order to reverse the suspension of his pension payments, Mr. Muelle Flores filed and participated in a number of legal actions seeking to be reinstated in the pension regime of Decree Law No. 20530, including: two applications for *amparo*; a contentious administrative proceeding, and a judgment execution proceeding,⁵⁰ which are described in the following sections.

51. From the date on which payment of his pension was suspended until the present, Mr. Muelle Flores has not been paid his full pension, notwithstanding certain partial payments made from 1999 until 2001 (*infra* paras. 79, 80 and 216).

52. Oscar Muelle Flores is currently 82 years of age⁵¹ and suffers from a severe hearing disability (hypoacusis) as a result of the total loss of hearing in one of his ears 15 years ago and a decrease in hearing in the other ear.⁵² Also, in May 2018, Mr. Muelle Flores was diagnosed with "senile dementia (Alzheimer's type)" and, in July 2018, suffered a femoral fracture and underwent a hip replacement operation.⁵³

D. First amparo proceeding

53. On April 18, 1991, Mr. Muelle Flores filed an application for *amparo* for the violation of several rights recognized in the Constitution of Peru, including the right to social security, and asked to be reinstated in the pension scheme under Decree Law No. 20530, as well as the payment of the amounts owed to him with interest, which were unpaid following the suspension.⁵⁴

54. On July 19, 1991, the Fifth Civil Court of Lima declared the application well-founded and ruled

Supreme Court of Justice on February 2, 1993 (evidence file, folio 13).

⁴⁸ Cf. Brief of the *Empresa Minera Especial Tintaya S.A.* to the Fifth Civil Court of Lima of May 3, 1991 (evidence file, folios 588 to 589).

⁴⁹ Cf. Communication from the State of December 18, 2012 (evidence file, folio 109) and communication from the *Empresa Minera Especial Tintaya S.A.* to the Fifth Civil Court of Lima of May 3, 1991 (evidence file folios 588 to 589).

⁵⁰ Likewise, Mr. Muelle Flores filed a criminal complaint before the Office of the Provincial Criminal Prosecutor of Lima against certain public servants for the crimes of violation of the freedom to work and abuse of authority, in a brief dated December 30, 1993, alleging their failure to pay his pension, as ordered by the *amparo* rulings. On June 30, 1997, the Second Criminal Chamber declared that said action had expired, and ordered the case to be archived. Cf. Complaint filed by Oscar Muelle on December 30, 1993 (evidence file, folios 353 to 358), and Judgment of the Second Criminal Chamber of June 30, 1997 (evidence file, folios 351 to 352).

⁵¹ Cf. Aide-mémoire stating that Oscar Rubén Muelle Flores was born on March 25, 1936, and affidavit rendered by Oscar Muelle Flores on October 25, 2017 (evidence file, folios 1520 and 1612).

⁵² Cf. Medical Diagnostic Report issued by "Hearing: the latest-generation hearing aids" (evidence file, folios 1499 to 1519).

⁵³ Cf. Discharge report from the Central Air Force Hospital of Peru (FAP) and medical certificates (evidence file, folios 1878 to 1890). In sworn statements before the Court, both Mr. Muelle's daughter, Vibeke Ann Muelle, and his half-brother, Jesús Aníbal Delgado Flores, referred to Mr. Muelle Flores' health condition. His daughter said that her father suffered from senile dementia, and his brother stressed that Mr. Muelle Flores suffered nervous depression and hearing loss due to stress. Cf. Affidavit rendered by Vibeke Ann Muelle Jensen on August 22, 2018 (evidence file, folio 1840), and affidavit rendered by Jesús Aníbal Delgado Flores on August 22, 2018 (evidence file, folios 1841 to 1842).

⁵⁴ Cf. Application for *amparo* filed by Oscar Muelle Flores before the Fifth Civil Court of Lima of April 18, 1991 (evidence file, folios 16 to 20).

in favor of Mr. Muelle Flores, revoking the suspension of his pension under the Decree Law No. 20530 scheme. Regarding Mr. Muelle Flores' inclusion in that pension system, the court concluded that this was carried out by the company that employed him; in other words, "his inclusion established a substantive legal relationship between employee and employer, that is to say, one that gave rise to material rights and obligations that both parties must comply with." Therefore, the company could not suspend those rights unilaterally; rather, any amendment or termination of said rights had to be obtained through an agreement between the parties or via a decision of a competent court. Thus, the court concluded that the company's unilateral suspension of the pension scheme was an unlawful and arbitrary act that violated the right to social security, equality and the right to work.⁵⁵

55. Although the company appealed the court's decision, on May 29, 1992, the Second Civil Chamber of the Superior Court of Lima confirmed the lower court's ruling, considering that the suspension of the Decree Law No. 20530 pension scheme had been carried out through an internal company communication, in an action that "ha[d] characteristics that injure and violate the law [.,]."⁵⁶

56. On February 2, 1993, the Supreme Court of Justice upheld the Superior Court's ruling and declared that "in the absence of nullity" in the judgment delivered by the Second Civil Chamber, the *amparo* action was well-founded and ruled that General Management Communication No. GA/0131/91 of February 27, 1991, "providing for the suspension ordered by the defendant, of the complainant's inclusion in the pension and benefits scheme envisaged in Decree-Law 20530 and of payment of his pension, is inapplicable to the complainant, wherefore his rights shall be restored to their status prior to the violation of the Constitution." The ruling established that, "given that this is a matter of rights recognized in favor of the employee which the company itself later unilaterally ceased to recognize, the *amparo* suit for restoration [...] is in order."⁵⁷

E. Privatization of the State-owned Empresa Minera Especial Tintaya S.A.

57. The *Empresa Especial Minera Tintaya S.A.* was privatized in 1994, in the context of Law Decree No. 674, entitled "Law for the Promotion of Private Investment of State Companies" and its Regulations, approved by Supreme Decree N°070-93-PCM. Article 1 of this Law Decree declared of national interest the promotion of private investment in companies that formed part of the State's business activities.⁵⁸

58. On November 29, 1994, a share purchase agreement contract was signed between the *Compañía Minera de Peru S.A.* and the consortium made up of Magma Copper Company and Global Magma Ltd. (called Magma Copper Corporation). This consortium acquired the ownership and total and absolute control, without restriction, of 98.43% of the social capital of Tintaya, while the workers acquired the remaining 1.57%.⁵⁹

59. The share purchase agreement contract between the parties stipulated in clause VI, subparagraph 7, entitled "statements and guarantees of the vendor," that the vendor was unaware of "the existence of other liabilities or assets, or contingencies, derived from tax, labor, legal or any

⁵⁵ Cf. Judgment of the Fifth Civil Court of Lima of July 19, 1991 (evidence file, folios 22 to 24).

⁵⁶ Cf. Judgment of the Second Civil Chamber of the Superior Court of Lima of May 29, 1992 (evidence file, folios 592-593).

⁵⁷ Cf. Judgment of the Supreme Court of Justice of February 2, 1993 (evidence file, folio 13).

⁵⁸ Cf. Resolution N. 08 of the Second Civil Chamber of the Superior Court of Lima of October 10, 2013 (evidence file, folio 1725) and Affidavit rendered by César José Gonzáles Hunt on August 24, 2018 (evidence file, folio 1848).

⁵⁹ Cf. Resolution N.08 of the Second Civil Chamber of the Superior Court of Lima of October 10, 2013 (evidence file, folio 1725), and Affidavit rendered by César José Gonzáles Hunt on August 24, 2018 (evidence file, folio 1848).

other type of liabilities different to those recorded.”⁶⁰ The same clause established that “if any unregistered liabilities or contingencies, derived from facts prior to the contract closing date [November 29, 1994] should arise, these [would] be assumed by the [s]eller [,] insofar as they [were] effectively generated during its administration, together with any claims arising within two years of the closing date, except for tax contingencies [...]”⁶¹

60. Clause VI, subparagraph 11 indicated that Annex “D” of said contract contained “the complete list of financial obligations and payments for retirement, pensions and other employee benefits [...] [and that] there [were] no additional obligations toward workers other than those indicated.”⁶² Annex D, subparagraph 1 “retirement payments,” and 2 “pensions,” expressly stated that the Tintaya S.A. mining company did not have retirees or pensioners on the company accounts, but that a lawsuit had been filed against two officials.⁶³

61. After the privatization process, ownership of the company was transferred on several occasions and its business name was changed. In 1996, the assets and liabilities of Magma Copper Corporation were taken over by the Minera BHP Tintaya S.A. - BHP Billinton. In 2001, BHP Billinton Tintaya S.A. was created as a result of a merger. BHP then acquired the Swiss mining company, Xstrata Copper, which was renamed Xstrata Tintaya S.A.⁶⁴ Currently, the company is called Antapaccay, S.A.⁶⁵

F. Second amparo proceeding

62. On February 17, 1993, the company issued Board of Directors Decision No. 023/93, suspending Decisions Nos. 155 and 029/90, which had established the company’s power to include workers in the pension scheme envisaged in Decree Law No. 20530. This new Decision by the company ordered the suspension of retirement pension payments to its former employees,⁶⁶ among them Mr. Muelle Flores. The decision was communicated to him on May 17, 1993.⁶⁷

63. In response, Mr. Muelle Flores filed a second application for *amparo*, in an effort to block the application of Board of Directors Decision No. 023/93. He also requested the restoration of his right to continue receiving his pension in accordance with Decree Law No. 20530 and Law No. 25273, as well as an amount as compensation for the damage caused.⁶⁸

⁶⁰ Resolution No. 08 of the Second Civil Chamber of the Superior Court of Lima of October 10, 2013 (evidence file, folio 1726), and Affidavit rendered by César José Gonzáles Hunt on August 24, 2018 (evidence file, folio 1848).

⁶¹ Resolution No. 08 of the Second Civil Chamber of the Superior Court of Lima of October 10, 2013 (evidence file, folio 1726), and Affidavit rendered by César José Gonzáles Hunt on August 24, 2018 (evidence file, folio 1848).

⁶² Cf. Resolution No.08 of the Second Civil Chamber of the Superior Court of Lima of October 10, 2013 (evidence file, folio 1726), and Affidavit rendered by César José Gonzáles Hunt on August 24, 2018 (evidence file, folio 1848).

⁶³ Numeral two stated that litigation existed with two officials, without identifying them or specifying the type of litigation. Cf. Resolution No. 08 of the Second Civil Chamber of the Superior Court of Lima of October 10, 2013 (evidence file, folios 1726 to 1727), and Affidavit rendered by César José Gonzáles Hunt on August 24, 2018 (evidence file, folios 1848 to 1849).

⁶⁴ Cf. Notice of appearance of Xstrata Tintaya S.A. of April 13, 2009, presented before the Thirty-eighth Civil Court of Lima (evidence file, folio 63 to 64).

⁶⁵ After privatization, ownership of Tintaya S.A. was transferred on several occasions and its business name was changed. Therefore, for the purposes of this Judgment, the Court will use the business name employed during its interventions in the domestic judicial proceedings.

⁶⁶ Cf. Judgment of the Constitutional Court of October 10, 1999 (evidence file, folio 26).

⁶⁷ Cf. Judgment of the Constitutional Court of December 10, 1999 (evidence file, folio 28).

⁶⁸ Cf. Judgment of the Constitutional Court of December 10, 1999 (evidence file, folio 26).

64. On February 23, 1995, the Seventeenth Civil Court of Lima declared his application for *amparo* inadmissible, concluding that Board of Directors Decision No. 023/93 did not violate or threaten any constitutional right, since it did not amend or terminate his right to be included in the pension and benefits scheme of Decree Law 20530. The court declared that his right was “fully guaranteed, safeguarded and protected by the final judgment” adopted in his favor in the constitutional proceeding before the Fifth Specialized Court. It added that this decision was being executed and that its full implementation must be verified before that court.⁶⁹

65. On July 14, 1995, the First Civil Chamber of the Superior Court of Lima confirmed the judgment of the lower court, considering that the Supreme Court decision of February 2, 1993, had the status of *res judicata* in favor of Mr. Muelle Flores, and therefore it could and should oppose any attempt to mount an assault on his rights. In this sense, it concluded that no further action could be brought against an act that expresses “clear and unlawful resistance to the decision of the jurisdictional authority.”⁷⁰

66. On August 26, 1997, the Constitutional and Social Law Chamber of the Supreme Court ruled on Mr. Muelle Flores’ appeal for a reversal of judgment and declared his appeal inadmissible.⁷¹ In light of the ruling, Mr. Muelle Flores filed an extraordinary appeal with the Constitutional Court.

67. On December 10, 1999, the Constitutional Court revoked the decision issued by the Supreme Court of Justice and declared the second *amparo* suit well-founded. The Constitutional Court considered that the pension rights acquired by the plaintiff under Decree Law No. 20530 could not be disregarded by the defendant (company) unilaterally and extemporaneously, that is, outside the six-month term allotted to the management to declare the annulment of administrative decisions, thereby disregarding labor rights and principles of constitutional rank. The Judgment emphasized that the only way to determine the nullity of resolutions constituting *res judicata*, which were immutable, was through regular proceedings before a competent court.⁷²

68. The Constitutional Court declared that Board of Directors Decision No. 023/93 of February 17, 1993, was inapplicable to the petitioner and ordered the company to comply with the continued payment of the adjustable retirement pension that Mr. Muelle Flores had been receiving. It also declared that the request for compensation was inadmissible.⁷³

G. Contentious-administrative proceeding

69. The State-owned company Tintaya S.A. filed suit in the administrative courts requesting that that Mr. Muelle Flores’ reincorporation into the Decree Law No. 20530 pension scheme be declared inadmissible.⁷⁴ On January 21, 1994, the complaint was declared well-founded. This ruling was appealed and the case was forwarded to the Administrative Chamber of the Superior Court of Lima.

70. Under the First Supplementary Provision of Decree Law No. 817,⁷⁵ the Administrative Chamber

⁶⁹ Cf. Judgment of the Constitutional Court of December 10, 1999 (evidence file, folio 27).

⁷⁰ Cf. Judgment of the Constitutional Court of December 10, 1999 (evidence file, folio 27).

⁷¹ Cf. Judgment of the Constitutional Court of December 10, 1999 (evidence file, folio 27).

⁷² Cf. Judgment of the Constitutional Court of December 10, 1999 (evidence file, folio 29).

⁷³ Cf. Judgment of the Constitutional Court of December 10, 1999 (evidence file, folio 29).

⁷⁴ Cf. Judgment of the Chamber of Constitutional and Social Law of the Supreme Court of Justice of October 29, 1997 (evidence file folio 387).

⁷⁵ Cf. First Supplementary Provision of Legislative Decree No. 817, published on April 23, 1996, in the Official Gazette *El*

issued a resolution on July 30, 1996, summoning the Pension Standardization Office (hereinafter "ONP") to the proceeding,⁷⁶ since according to that law the ONP was the entity responsible for defending the State's interests in all judicial proceedings concerning pension rights.

71. The ONP attended the hearing on August 15, 1996,⁷⁷ and presented a brief containing a disclaimer, which stated that Mr. Muelle Flores' reincorporation into the pension system of Decree Law No. 20530 was inadmissible, because he did not comply with various legal requirements.⁷⁸

72. On September 2, 1996, the Contentious-Administrative Chamber (*Sala Contencioso Administrativo*) of the Superior Court of Lima confirmed the judgment of the lower court.⁷⁹

73. Mr. Muelle Flores then filed an appeal for the annulment of the decision of the Contentious-Administrative Chamber. The appeal was decided by the Supreme Court on October 29, 1997, which annulled the decision, considering the complaint by Tintaya S.A. without merit. In its decision, the Supreme Court agreed with the reasons given in the opinion of the Prosecutor General's Office,⁸⁰ and declared that Mr. Muelle Flores' reincorporation into the pension system of Decree Law No. 20530 was lawful.

74. The Supreme Court judgment and the prosecutor's opinion pointed out that Mr. Muelle Flores' reinstatement in the State pension regime complied with the requirements of Decree Law No. 20530. Both stated that although Article 14(b) precluded the accumulation of periods of public service under differing labor regimes, it was also true that the Fifth Transitory Provision of that law, together with Law No. 25273 of July 6, 1990, established exceptions to Article 14(b) of that Decree, which were applicable to Mr. Muelle Flores' case based on the principle of benign retroactivity of laws. Therefore, the repeal of Law No. 25273 in no way impaired Mr. Muelle's acquired right.⁸¹

75. Mr. Muelle Flores forwarded several notarized letters to the ONP in order to obtain compliance with the judgment of October 29, 1997, in the administrative action filed by the company Tintaya S.A.⁸² On November 27, 1998, the ONP sent a communication to that company, which had already

Peruano. Some articles of this law were declared unconstitutional by the Constitutional Court in the Judgment of April 23, 1997, Case File No. 008-96-I/TC. See also, Affidavit rendered by César José Gonzáles Hunt on August 24, 2018 (evidence file, folio 1853 to 1855).

⁷⁶ Cf. Resolution of the Administrative Chamber of the Superior Court of Lima of July 30, 1996 (evidence file, folio 417).

⁷⁷ Cf. Notification of the resolution issued by the Administrative Chamber of the Superior Court of Lima of August 15, 1996 (evidence file, folio 418).

⁷⁸ Cf. Brief of the Pension Standardization Office (ONP) presented before the Administrative Chamber of the Superior Court of Lima on September 24, 1996 (evidence file, folio 4).

⁷⁹ Cf. Opinion issued by the Office of the Public Prosecutor for Administrative Matters of the Attorney General's Office before the Constitutional and Social Chamber of the Supreme Court of Justice on August 22, 1997 (evidence file, folio 10) and Judgment of the Constitutional and Social Chamber of the Supreme Court of Justice of October 29, 1997 (evidence file, folio 387).

⁸⁰ Cf. Opinion issued by the Office of the Public Prosecutor for Administrative Matters of the Attorney General's Office before the Constitutional and Social Chamber of the Supreme Court on August 22, 1997 (evidence file, folios 10 to 11).

⁸¹ Cf. Opinion issued by the Office of the Public Prosecutor for Administrative Matters of the Attorney General's Office before the Constitutional and Social Chamber of the Supreme Court of Justice on August 22, 1997 (evidence file, folios 10 to 11) and Judgment of the Constitutional and Social Chamber of the Supreme Court of October 29, 1997 (evidence file, folio 387).

⁸² Cf. Notarized letter of October 30, 1998, forwarded by Oscar Muelle Flores to the Pension Standardization Office (evidence file, folios 344 to 346), and letters issued by the Pension Standardization Office of November 27 and December 7, 1998, with reference to the notarized letters of October 30, November 4 and 17, 1998 forwarded by Oscar Muelle Flores to the ONP (evidence file, folios 259 to 260).

been privatized (*supra* para. 57), emphasizing that every individual and authority had an obligation to comply with judicial rulings. The communication concluded that, pursuant to Article 4 of Legislative Decree No. 817, "each entity continues to be responsible for paying the pensions that correspond to it, according to law, with the exception of those entities that, via a Supreme Decree, have transferred their funds and obligations to the ONP, which is not the case of this company."⁸³ On that same date, the ONP informed Mr. Muelle Flores that it had sent a document to Tintaya S.A. indicating that it must comply with the order of the judicial authority.⁸⁴

H. Proceeding for the execution of the amparo judgment of February 2, 1993

76. On December 18, 1995, the Fifth Specialized Civil Court of Lima issued a resolution stating that the judgment of February 2, 1993, was a final decision which, by its nature, implied powers of coercion and enforcement and stated that the company had been creating obstacles to the execution of the judgment. The resolution stressed that "Magma Copper Corporation-Tintaya had not challenged the plaintiff's arguments concerning the merger of the original defendant company and, having assumed the *universitas juris* of the patrimony of *Empresa Minera Especial Tintaya* [S.A], [...] this also included its liabilities," and ordered the company to comply with the judgment within three days.⁸⁵

77. On April 7, 1997, the Fifth Civil Court issued a new resolution stating, "Let the Special Mining Corporation Tintaya S.A. (now BHP Tintaya, S.A) be hereby required for the last time to fully comply within three days with the order handed down by the Supreme Court on February 2, 1993, on pain of issuance of certified copies for filing criminal suit."⁸⁶

78. On October 20, 1999, the First Corporate Transitory Chamber Specialized in Public Law ordered the case to be archived because the matter had been paralyzed for more than four months.⁸⁷

79. On September 19, 2000, the Pension Standardization Office received a communication from Mr. Muelle Flores dated August 24, 2000, in which he reported that as of 1999, BHP Tintaya S.A. had begun paying him a monthly sum of S/800 new soles. He also reported that the company had not "performed the balanced-out and retroactive calculation of the pension" to which he was legally entitled.⁸⁸

80. There is no dispute between the parties regarding the fact that, from March 1999 to June 2001, BHP Tintaya S.A. made payments of S/800 new soles monthly to Mr. Muelle Flores for the pensions corresponding to the months between February 1991 and June 2001,⁸⁹ except for the months

⁸³ Letter issued by the Pension Standardization Office on November 27, 1998 (evidence file, folios 261 to 262).

⁸⁴ Cf. Letters issued by the Pension Standardization Office on November 27 and December 7, 1998 (evidence file, folios 259 to 260).

⁸⁵ Cf. Resolution of the Fifth Civil Court of Lima of December 18, 1995 (evidence file, folio 31).

⁸⁶ Cf. Resolution of the Fifth Civil Court of Lima of April 7, 1997 (evidence file, folio 34).

⁸⁷ Cf. Resolution of the First Transitory Corporate Court Specializing in Public Law of October 20, 1999 (evidence file, folio 1719).

⁸⁸ Cf. Communication of August 24, 2000, sent by Oscar Muelle Flores to the Pension Standardization Office, September 19, 2000 (evidence file, folio 36).

⁸⁹ Based on the evidence provided by the parties, the following payments were made to Mr. Muelle Flores: a) March 19, 1999, for the sum of 59,200 soles, for pensions corresponding to the months from February 1993 to March 1999; b) June 26, 1999, for the sum of 19,200 soles for pensions corresponding to the months from February 1991 to October 1992, and from April to June, 1999; c) September 21, 1999, for the sum of 2,400 soles for pensions corresponding to the months from July to September, 1999; d) December 3, 1999, for the sum of 2,400 soles for pensions corresponding to the months from October

November 1992 to January 1993, payment of which has not been accredited before this Court. According to a document dated March 19, 1999, BHP Tintaya S.A. stated that the amount paid constituted "a provisional payment, in compliance with the Supreme Court judgment of February 2, 1993 [...]. The final amount of the pension [would] be determined by the Actuarial Calculation Office of the ONP. The company [would] transfer to the [ONP] the corresponding funds for the pension payments from April of this year."⁹⁰ Based on the evidence provided by the parties, this did not occur. The total amount paid to Mr. Muelle Flores for provisional payment of the pensions owed is S/97,600.00 soles.

81. On October 26, 2000, the ONP replied that "it [was] only competent to decide on claims for the payment of pensions of those institutions whose administration and pension payments [had] been transferred to it [...] by express legal provisions, a situation that had not occurred in the case of [Mr. Muelle's] institution [referring to the company]", and advised him to file his claim with the company paying his pension.⁹¹

82. In November 2004, the ONP sent a new communication to Mr. Muelle Flores in response to his notarized letter,⁹² stating that his name "[did] not appear in [its] document processing system of Decree Law N° 20530, [...] [and that] [through a resolution of January 2004] the Pension Standardization Office -ONP, ha[d] been delegated the task of recognition, declaration, qualification and payment of pensions of those entities privatized, liquidated, deactivated and/or dissolved under Decree Law N° 20530 that [had] their own respective financial resources, and that BHP Tintaya S.A. company [did] not appear to be included among those under the responsibility of the ONP."⁹³

83. Mr. Muelle Flores sent a notarized letter to the Ministry of Economy and Finance (hereinafter the "MEF"), requesting information as to whether Law No. 28115 - establishing that the MEF was the State entity responsible for paying the pensions of workers following the privatization of state companies (*infra* para. 102) - was applicable to him. Mr. Muelle Flores also requested information as to whether after the privatization of *Empresa Minera Especial Tintaya S.A.*, the mandates issued in the Supreme Court judgments of February 2, 1993, and October 29, 1997, as well as the Constitutional Court judgment of December 10, 1999, were assumed as an obligation by said Ministry. In response, Mr. Muelle Flores was informed that "the Ministry of Economy and Finance ha[d] not assumed the obligations in relation to [his] pension [...] given that a judgment by the Constitutional Court expressly required the *Empresa Minera Especial Tintaya S.A.* to continue paying his pension, and therefore Law No. 28115 [was] not applicable to his specific case."⁹⁴

to December, 1999; e) February 18, 2000, for the sum of 2,400 soles for pensions corresponding to the months from January to March, 2000; f) May 11, 2000, for the sum of 2,400 soles for pensions corresponding to the months from April to June of 2000; g) September 22, 2000, for the sum of 4,800 soles for pensions corresponding to the months from July to December 2000, and h) 4,800 soles for pensions corresponding to the months from January to June to December, 2001. Regarding this last payment, although the Court does not have the corresponding receipt, Mr. Muelle Flores admitted having received it for the period mentioned. *Cf.* Receipt of payment and delivery certificate signed by the legal representative of BHP Tintaya and Oscar Muelle Flores on March 19, 1999; receipts of payment dated June 26, September 21 and December 3, 1999, February 18, May 11 and September 22, 2000 (evidence file, folios 1673 to 1688). See also, Appeal filed by Oscar Muelle on May 17, 2010, (evidence file, folios 74 and 75).

⁹⁰ *Cf.* Delivery certificate signed by the legal representative of BHP Tintaya and Oscar Muelle Flores on March 19, 1999 (evidence file, folio 1675).

⁹¹ *Cf.* Communication of the Pension Standardization Office of October 26, 2000 (evidence file, folio 38).

⁹² *Cf.* Notarized letter of July 5, 2004 sent by Oscar Muelle Flores to the Pension Standardization Office on August 23, 2004 (evidence file, folios 251 to 256).

⁹³ *Cf.* Letter issued by the Pension Standardization Office November 2004 (evidence file, folio 250).

⁹⁴ *Cf.* Letter issued by the Ministry of Economy and Finance on November 3, 2004 and Report No. 466-2004-EF/65.16 of October 27, 2004 (evidence file, folios 246 to 249).

84. During the proceeding before the Commission, Mr. Muelle explained that he suddenly lost his hearing in 1999 and that he went “to the most renowned medical specialists” who could do nothing to help his hearing problem but “recommended that [he] be examined at a center or institution in the more advanced countries in these matters [and] that is how [he obtained] an appointment in March 2001 at the Audiology Research Institute of the University of Miami.”⁹⁵ As a result, Mr. Muelle Flores remained abroad for seven years, approximately.⁹⁶ The aforementioned partial payments were suspended from July 2001, after the presumed victim traveled to the United States.

85. After his return to Peru, Mr. Muelle Flores requested that his case be reopened⁹⁷ and, on August 5, 2008, the Forty-third Civil Court of the Superior Court of Lima took on the reopened case.

86. On April 6, 2009, the Thirty-Eighth Civil Court of Lima, which had assumed jurisdiction for executing the judgment of February 1993, issued two resolutions on January 5 and March 23, 2009, respectively, ordering the company to comply with the aforementioned judgment within three days.⁹⁸

87. On April 13, 2009 the company Xstrata Tintaya S.A. (formerly BHP Billiton Tintaya S.A.) attended the proceeding before the Thirty-Eighth Civil Court of Lima and emphasized that the *Empresa Especial Tintaya S.A.* was privatized in 1994 and, over time, was purchased by various different corporations, its current owner being Xstrata Tintaya S.A.⁹⁹

88. Xstrata Tintaya S.A. indicated that “the Decree Law N° 20530 scheme [was] a system that regula[ted] State pensions and benefits for workers who provided civil services to the national public sector [...]” The company emphasized that “the Decree Law N° 20530 system establish[ed] a pension obligation between the State (entity and/or company) and its former employees, provided that they met the requirements stipulated in that Decree. Over time, the authority to recognize the right to a pension and benefits under that system was attributed, initially, to the State institution where the pensioner worked, and subsequently to the Pension Standardization Office, to finally return to the initial system whereby each entity was responsible for recognizing and paying its own workers’ pension benefits. It was also established that for companies that had been privatized (in which the State had no stake), dissolved or liquidated, the competent entity “[would be] the Ministry of Economy and Finance [referring to laws No. 27719 and 28115] (*infra* para. 138).” In that regard, Xstrata Tintaya S.A. concluded that the competent entity was the MEF, which was asked to attend the enforcement proceeding.¹⁰⁰

89. On April 26, 2010, the Thirty-Eighth Civil Court of Lima issued a new resolution in which it stated that, despite reiterated instructions to the defendant company to comply with the Supreme Court judgment, the plaintiff’s claim was no longer viable given that the State company had been privatized after the judgement was issued, and therefore it was not obligated to make the payments

⁹⁵ Cf. Communication of Oscar Muelle Flores of May 29, 2010 received by the Inter-American Commission on July 8, 2010 (evidence file, folios 237 to 238).

⁹⁶ Cf. Communication of Oscar Muelle Flores of May 29, 2010 received by the Inter-American Commission on July 8, 2010 (evidence file, folios 237 to 238).

⁹⁷ Cf. Resolution issued by the Thirty-eighth Civil Court of Lima of April 26, 2010 (evidence file, folio 68).

⁹⁸ Cf. Report No.48-2010-JUS/PPES from the State of Peru of February 25, 2010, received by the Inter-American Commission on March 1, 2010 (evidence file, folios 39.8 to 39.9).

⁹⁹ Cf. Notice of appearance of the firm Xstrata Tintaya S.A. of April 13, 2009, presented before the Thirty-eighth Civil Court of Lima (evidence file, folios 62 to 64).

¹⁰⁰ Cf. Notice of appearance of the firm Xstrata Tintaya S.A. of April 13, 2009, presented before the Thirty-eighth Civil Court of Lima (evidence file, folios 62 to 64).

ordered by the Supreme Court ruling.¹⁰¹ The decision established that Xstrata Tintaya S.A. was a private company, whose obligation to pay the pension rights claimed had not been demonstrated.¹⁰²

90. On May 17, 2010, the same date on which he was notified, Mr. Muelle Flores filed an appeal against the aforesaid resolution;¹⁰³ his appeal was then forwarded to the Civil Chamber.¹⁰⁴ In his brief, Mr. Muelle acknowledged receipt of pension payments corresponding to the period from February 1991 to December 2000, as well as those for the months of January to June, 2001¹⁰⁵ (*supra* para. 80).

91. On April 13, 2011, the Second Civil Chamber of the Superior Court of Lima annulled the resolution of the Thirty-eighth Civil Court of Lima of April 26, 2010, and ordered the restoration of the procedural act affected. The Second Civil Chamber considered that the Thirty-eighth Civil Court had assumed as completely true the statements made by Xstrata Tintaya S.A., without first determining whether the “Magma Copper” company had or had not taken over the assets and liabilities of the initial defendant party (*Empresa Minera Especial Tintaya S.A.*). The Chamber concluded that if indeed it had assumed all those assets and liabilities, then that private company would also be required to pay Mr. Muelle Flores’ pension. The Chamber also emphasized that the Thirty-Eighth Civil Court had issued its resolution without specifying the facts and the corresponding legal provisions supporting its decision, in violation of the right to due substantiation of judicial resolutions.¹⁰⁶

92. On May 17, 2012, the Thirty-third Civil Court of Lima issued a resolution requiring Xstrata Tintaya S.A. to comply with the order issued by the Supreme Court in its judgment of February 2, 1993.¹⁰⁷ The company filed an appeal against said resolution.¹⁰⁸ On October 30, 2012, the Thirty-third Civil Court of Lima decided that “[...] it [was] reasonable to order the temporary suspension of the [execution] process, pending a [decision] on the appeal filed by the [defendant] company.”¹⁰⁹ On November 20, 2012, Mr. Muelle Flores appealed against this last decision to suspend the execution process, arguing that it impaired the *res judicata* status of the previous judgments granting him his pension rights, so that there could be no change or delay in their enforcement.¹¹⁰

93. On October 10, 2013, the Second Civil Chamber of the Superior Court of Justice issued a decision annulling the resolution of May 17, 2012 of the Thirty-third Civil Court of Lima. The Chamber examined the purchase-sale contract of Tintaya S.A., of November 29, 1994, and concluded that when the State-owned company was privatized, the private purchaser Magma Copper Corporation and Global Magma Ltd., did not take over the liabilities of the State-owned company, or the obligation

¹⁰¹ Cf. Resolution of the Thirty-eighth Civil Court of Lima of April 26, 2010 (evidence file, folio 68).

¹⁰² Cf. Resolution of the Thirty-eighth Civil Court of Lima of April 26, 2010 (evidence file, folio 68).

¹⁰³ Cf. Appeal filed by Oscar Muelle on May 17, 2010 (evidence files, folio 70).

¹⁰⁴ Cf. Resolution of the Thirty-Eighth Civil Court of Lima of May 19, 2010 (evidence file, folio 83).

¹⁰⁵ Cf. Appeal filed by Oscar Muelle on May 17, 2010 (evidence file, folios 74 and 75).

¹⁰⁶ Cf. Resolution of the Second Civil Chamber of the Superior Court of Lima of April 13, 2011 (evidence file, folio 98).

¹⁰⁷ Cf. Resolution No. 08 of the Second Civil Chamber of the Superior Court of Lima of October 10, 2013 (evidence file, folio 1721).

¹⁰⁸ Cf. Resolution No. 08 of the Second Civil Chamber of the Superior Court of Lima of October 10, 2013 (evidence file, folio 1721).

¹⁰⁹ Resolution of the Thirty-Third Civil Court of Lima of October 30, 2012 (evidence file, folio 114).

¹¹⁰ Cf. Appeal filed by Oscar Muelle on November 20, 2012 (evidence file, folio 116).

to pay pensions. It stressed that the pension rules of Decree Law No. 20530 regulated State pensions and benefits financed with State resources, and consequently the private company could not administer pension funds; moreover, it emphasized that it did not take on that obligation and that in accordance with the cited Decree, the plaintiff's legal relationship was with the State.¹¹¹ In addition, the Second Chamber considered that, in the case of privatized companies, the rules introduced in 2002 stipulated which public entities would be responsible for awarding and paying pensions under the system in question.¹¹² The Chamber ordered that a new resolution be issued, "taking these considerations into account."¹¹³ Thus, the resolution of October 30, 2012, ordering the suspension of the [execution] proceeding pending a decision on the appeal, was rendered ineffective.¹¹⁴

94. On September 5, 2014, the Thirty-third Civil Court adopted a resolution requiring that the MEF provide information on the assets and liabilities assumed by the former State company Tintaya S.A. This information was required in an official letter dated September 9, 2014.¹¹⁵

95. On June 11, 2015, the Thirty-third Civil Court issued a resolution declaring without merit the annulment of the resolution of September 5, 2014, and considered that the company Xstrata Tintaya S.A. should assume the obligation to pay Mr. Muelle Flores' pension. The Thirty-third Civil Court emphasized that the judgment of February 2, 1993, was issued prior to the privatization of Tintaya S.A. and based its annulment decision on the following arguments: a) the MEF and the ONP concluded that they did not have the obligation to pay Mr. Muelle Flores' pension, since the judgment of the Constitutional Court had expressly stated that Tintaya S.A. had the obligation to pay it (*supra* paras. 67 and 68); b) "it [had] been accredited that Magma Copper Corporation Tintaya assumed the legal universality of the company's assets [the State company Tintaya S.A.]"; c) the company BHP Billiton Tintaya S.A. made pension payments, and d) "it [was] obvious that Xstrata Tintaya S.A. ha[d] also taken on the assets and liabilities of the previous companies."¹¹⁶ This decision was appealed by Xstrata Tintaya S.A.

96. On October 26, 2015, the Thirty-third Civil Court instructed the private investment promotion agency (*Proinversión*) to report, urgently, on the assets and liabilities assumed by the former State-owned company Tintaya S.A.¹¹⁷ Given that this agency did not provide the information requested, Mr. Muelle Flores presented a brief on June 7, 2016, requesting that *Proinversión* be ordered to comply with that request, under penalty of a fine.¹¹⁸

¹¹¹ Cf. Resolution No. 08 of the Second Civil Chamber of the Superior Court of Lima of October 10, 2013 (evidence file, folios 1725 to 1729).

¹¹² Cf. Resolution No. 08 of the Second Civil Chamber of the Superior Court of Lima of October 10, 2013 (evidence file, folio 1728).

¹¹³ Cf. Resolution No. 08 of the Second Civil Chamber of the Superior Court of Lima of October 10, 2013 (evidence file, folio 1730).

¹¹⁴ Cf. Resolution No. 08 of the Second Civil Chamber of the Superior Court of Lima of October 10, 2013 (evidence file, folios 1737 to 1738).

¹¹⁵ Cf. Resolution No. 104 of the Thirty-Third Civil Court of Lima of September 5, 2014 and Official Letter issued by the Thirty-Third Civil Court of Lima on September 9, 2014 (evidence file, folios 1740 to 1741).

¹¹⁶ Cf. Resolution No. 106 of the Thirty-Third Civil Court of Lima of June 11, 2015 (evidence file, folios 1743-1746).

¹¹⁷ Cf. Resolution No. 109 of the Thirty-Third Civil Court of Lima of October 26, 2015 (evidence file, folio 1748). This Court requested information from *Proinversión* after the MEF indicated, on July 21, 2015, that the State entity that should provide a response on the assets and liabilities assumed by the former State-owned company Tintaya S.A. would be the National Fund for State Business Activity (FONAFE). In turn, on July 17, 2015, FONAFE indicated that the entity that should respond to that request was PROINVERSIÓN. Cf. Brief of Mr. Muelle of May 3, 2017 (evidence file, folios 1754 to 1755).

¹¹⁸ Cf. Brief of Mr. Muelle of June 7, 2016 (evidence file, folios 1750-1751).

97. In a brief dated May 3, 2017, Mr. Muelle Flores stated that on July 7, 2016, *Proinversión* provided the requested information to the Court. It emphasized that Annex F "List of Legal Actions" of the Final Report CEPRI Tintaya, included a letter sent to the former State-owned company specifying the existing legal proceedings against it, as well as the contingent liability of each one. Therefore, in the brief filed on behalf of Mr. Muelle Flores it was argued that "having been proven that a contingent liability exist[ed] in favor of the plaintiff and that the Company XSTRATA TINTAYA S.A. EX BHP BILLINTON TINTAYA S.A. had taken over the assets and liabilities of the previous companies, the logical and obvious correlative is that said company must comply with the payment of the plaintiff's retirement pension," and requested that "PREFERENTIAL TREATMENT" be given to the execution of the judicial proceeding, since the plaintiff was 81 years of age at the time.¹¹⁹

98. On February 14, 2017, based on the appeal filed by Xstrata Tintaya, the Second Civil Chamber declared invalid the resolution of June 11, 2015, considering that "there [were] no grounds for annulment because it was not issued pursuant to the merits of the actions." The Chamber ordered the court *a quo* to continue the case and to renew the procedural act affected, issuing a new resolution according to law.¹²⁰ This decision indicated that the judge established that Xstrata Tintaya S.A. was responsible for paying the pension, despite the fact that at the time when the decision on the appeal was issued, the information requested from MEF on September 9, 2014, was not yet available. Thus it was considered incongruous that a ruling had been issued on the dispute, without having the information necessary to take a decision.¹²¹

99. The Thirty-third Civil Court scheduled an oral report for March 27, 2018, which was attended by the defense counsel of Mr. Muelle Flores, but not by the counsel of the private company. The Court informed the parties that the case files were available and the matter could proceed.¹²² This is the last procedural act that is recorded in the body of evidence before this Court.

100. To date, the execution process, initiated in 1993, is still ongoing.

I. Regulations on pensions and privatizations from 2002

101. On May 12, 2002,¹²³ Law No. 27719 was published; Article 7 of that law established that

¹¹⁹ Cf. Brief of Mr. Muelle Flores of May 3, 2017 (evidence file, folios 1754 to 1758).

¹²⁰ Cf. Resolution of the Second Civil Chamber of the Superior Court of Lima of February 14, 2017 (evidence file, folios 1760 to 1762).

¹²¹ Cf. Resolution of the Second Civil Chamber of the Superior Court of Lima of February 14, 2017 (evidence file, folio 1761).

¹²² Cf. Oral report of the Thirty-Third Civil Court of Lima of March 27, 2018 (evidence file, folio 1770).

¹²³ According to the State, on September 29, 1994, Supreme Decree No. 125-94-EF was published in the Official Gazette, *El Peruano*; Article 1 of that Decree establishes the following: "Article 1.- The Ministry of Economy and Finance is authorized to assume the balance resulting from the offsetting of financial assets – consisting of available cash and accounts receivable- and liabilities held by *Empresa Minera Especial Tintaya S.A.* on the date of entry into force of this legal provision, through the organizations and companies listed in the paragraph following this Article. If said exercise should result in a debit balance, that is, if the liabilities are greater than the assets, it shall be capitalized, the *Empresa Minera Especial Tintaya S.A.* being required to issue the corresponding shares in the name of *Empresa Minera del Peru S.A. -MINERD PERU-*. If the balance is positive, i.e. the assets are greater than the liabilities, this will be applied in favor of the Ministry of Economy and Finance, which will assume responsibility for administering payments; the *Empresa Minera Especial Tintaya S.A.* must implement the corresponding capital reduction.

The organizations and companies authorized to offset an entity's assets and liabilities are the following: the Public Treasury, the National Superintendency of Tax Administration - SUNAT-, *Empresa Minera de Comercialización* (MINPECO S.A.) in liquidation, the Mining Bank of Peru in liquidation, the Geological, Mining and Metallurgical Institute -(INGEMMET), the Inka Regional Government, the National Fund for Financing State Enterprises (FONAFE) and the Peruvian Social Security Institute (IPSS)."

"pensioners whose institution of origin has been privatized or dissolved, shall receive their pensions from the Ministry of Economy and Finance."¹²⁴

102. The previous rule was expanded on December 6, 2003, through Law No. 28115. Article 1 of this law established that "[t]he recognition, declaration, qualification and payment of pensions originating from an entity that has been privatized, liquidated, deactivated and/or dissolved, shall be under the responsibility of the Ministry of Economy and Finance, which is authorized to delegate those functions to the Pension Standardization Office."¹²⁵

103. On November 17, 2004, Law No. 28389 was promulgated,¹²⁶ Article 3 of which modified the First Final and Transitory Provision of the Constitution of 1993, finally declaring closed the pension scheme of Decree Law No. 20530. The reform prohibited the inclusion or re-inclusion of new workers and required those who had not yet met the requirements to choose between the National Pensions System or a Private System. That same article was applicable immediately to workers and pensioners under the State pension schemes and prohibited the equalization of pensions.¹²⁷

104. On December 30, 2004, Law No. 28449 was issued, establishing the new rules of the pension scheme governed by Decree Law No. 20530, Article 4 of which expressly prohibited the equalization of pensions with the wages and benefits received by active public servants.¹²⁸ Article 10 reiterated that the Ministry of the Economy and Finance would be the government entity responsible for administering the pension scheme of Decree Law No. 20530.¹²⁹ This pension reform was declared constitutional by the Constitutional Court in 2005.

VII MERITS

¹²⁴ Article 7 of Law No. 27719, "Law of recognition, declaration and qualification of pension benefits legally obtained under Decree Law N° 20530 and its supplementary rules and amendments", published in the Official Gazette *El Peruano* on May 12, 2012 (evidence file, folio 1691).

¹²⁵ Article 1 of Law No. 28115, "Law that expands and specifies the scope of Law N°27719 "Law on the recognition, declaration and qualification of pension benefits legally obtained under Decree Law N°20530 and its supplementary rules and amendments", published in the Official Gazette *El Peruano* on December 6, 2003 (evidence file, folio 1694).

¹²⁶ Cf. Article 3 of Law No. 28389, "Law to reform Articles 11, 103 and the First Final and Transitory Provision of the Constitution of Peru" published in the Official Gazette *El Peruano*, on November 17, 2004 (evidence file, folio 1696).

¹²⁷ Cf. Article 3 of Law N° 28389, "Law to Reform Articles 11, 103 and First Final and Transitory Provision of the Constitution of Peru" published in the Official Gazette *El Peruano*, on November 17, 2004 (evidence file, folio 1696). This Article states: "[t]he pension scheme of Decree Law No 20530 is hereby declared permanently closed." The changes brought about through this Constitutional Reform included: 1. No admission or re-admission of new workers to the Decree Law No 20530 pension scheme. 2. Workers affiliated to that system who did not meet the requirements to obtain their pension must opt for the National Pensions System or the system of the Private Pension Fund Administrators.

Also, for reasons of social interest, immediate application of the new pension rules to employees and pensioners of the State pension regimes. Discontinuation of pension equalization with wages, and the reduction of the amount of pensions lower than one Taxation Unit. Gradual imposition of caps on pensions that exceed one Taxation Unit.

Budgetary savings obtained from the application of new pension rules to be used to increase the lowest pensions, according to law. Any modifications made to the existing pension schemes, and to new pension regimes that may be established in future, must be governed by criteria of financial sustainability and non-adjustment [...]."

¹²⁸ Cf. Article 4 of Law No. 28449 entitled "Law to establish the new rules of the pensions system of Decree Law N° 20530", published in the Official Gazette *El Peruano*, on December 30, 2004 (evidence file, folio 1700).

¹²⁹ Cf. Article 10 of Law 28449 entitled "Law establishing the new rules of the pension scheme of Decree Law N° 20530", published in the Official Gazette *El Peruano*, on December 30, 2004 (evidence file, folio 1698). Said Article establishes that: "[t]he Ministry of Economy and Finance is the national government entity that administers the pensions of Decree Law No 20530. Any reference to the entities responsible for functions related to the regime regulated by this Law shall be referred to the Ministry of Economy and Finance, except in relation to the payment of pensions, unless this task is delegated to it by Supreme Decree, with the approval of the Council of Ministers."

105. In this chapter, the Court will examine the merits of the case. The Court will analyze the alleged international responsibility of the State based on its obligations under the American Convention in the case of a pensioner who retired under the Decree Law No. 20530 system, and who stopped receiving his pension as of February 1991 from a State-owned company that was subsequently privatized, despite having several judicial rulings issued in his favor, which ordered the restoration of his pension payments. According to the arguments presented, the international responsibility of Peru arises from its failure to comply with domestic judgments and its failure to execute these to date, as well as for the violation of the right to social security derived from Article 26 of the Convention and the right to property.

106. Thus, in order to examine the arguments presented, the Court will first analyze all those related to effective judicial protection, non-compliance with domestic rulings and failure to execute such rulings, in circumstances wherein the State entity that was initially responsible for pension payments was subsequently privatized. The Court will then consider the issue of reasonable time in the process of executing the judgments, the alleged violation of the right to social security, pursuant to Article 26, and will finally consider the arguments regarding the violation of Mr. Oscar Muelle Flores' right to property.

VII

RIGHTS TO JUDICIAL GUARANTEES¹³⁰, JUDICIAL PROTECTION¹³¹, SOCIAL SECURITY¹³², PERSONAL INTEGRITY¹³³, DIGNITY¹³⁴, PROPERTY¹³⁵, AND THE OBLIGATION TO ADOPT DOMESTIC LEGAL EFFECTS,¹³⁶ IN RELATION TO THE OBLIGATIONS TO RESPECT AND GUARANTEE RIGHTS (ARTICLES 8(1), 25(1), 25(2)(C), 26, 5, 11(1), 21, 1(1) AND 2 OF THE AMERICAN CONVENTION)

¹³⁰ Article 8(1) of the Convention establishes that "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."

¹³¹ Article 25 of the Convention establishes 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.

¹³² Article 26 of the Convention establishes the following: "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, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires, subject to available resources, by legislation or other appropriate means."

¹³³ Article 5(1) establishes that: "Every person has the right to have his physical, mental, and moral integrity respected."

¹³⁴ Article 11(1) establishes that: "Everyone has the right to have his honor respected and his dignity recognized."

¹³⁵ Article 21 of the Convention establishes that "1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. 3. Usury and any other form of exploitation of man by man shall be prohibited by law."

¹³⁶ Article 2 of the Convention establishes that: "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."

107. The Court emphasizes that in the cases of "*Five Pensioners*" v. *Peru and Acevedo Buendía et al.* ("*Discharged and Retired Employees of the Comptroller's Office*") v. *Peru*, also related to pension matters, the Court had already established that the failure by the State to comply with judicial decisions ordering the payment of pensions, as well as failure to execute these, violates the right to judicial protection (Articles 25(1) and 25(2)(c) and the right to property (Article 21). Therefore, it is the task of this Court to analyze whether, based on the facts of this specific case and the arguments of the parties and the Commission, Peru violated those rights. However, the case at hand has some particular features that differentiate it from those decided previously by this Court, since the execution of the judicial rulings issued in the *amparo* proceedings was further complicated by the privatization of the State-owned company that was originally responsible for paying Mr. Muelle Flores' pension. The Court will also consider whether there was an autonomous violation of the right to social security (right to a pension), as alleged by the representatives, based on the interpretation of Article 26 the Convention.

108. Thus, the dispute in this case concerns the presumed failure to comply with the *amparo* judgments that recognized Mr. Muelle Flores' right to receive a pension under the pension scheme of Decree Law No. 20530, together with the alleged failure to adopt coercive measures to ensure its implementation, and the impact that this had on the victim's right to social security and right to property. Therefore, the Court deems it important to emphasize that it is not appropriate to determine the responsibility of the privatized company in relation to the pensioner, but rather the State's failure to comply with *res judicata* decisions issued in favor of Mr. Muelle Flores at the domestic level, for its failure to execute those decisions within a reasonable time, and the effect on pension rights caused by the privatization of the State company Tintaya S.A., as well as the alleged consequences of all these matters on his right to property. Accordingly, in this section the Court will analyze: a) the right to effective judicial protection in the execution of judgments and privatization of companies; b) reasonable time; c) the right to social security, and d) the right to property.

A. Right to effective judicial protection in the execution of judgments and privatization of companies

A.1 Arguments of the parties and of the Commission

109. The **Commission** alleged that two *amparo* judgments delivered in 1993 and 1999 ordered that Mr. Muelle Flores be reinstated in the pension scheme governed by Decree Law No. 20530, and that his pension be paid. Also, in the lawsuit filed by the company, the court ruled that Mr. Muelle Flores' inclusion in that system was lawful. Despite this, the Commission indicated that those judicial decisions were not executed and that "none of the judicial authorities hearing the execution of judgment proceedings established any coercive mechanism to ensure that Mr. Muelle's recognized right would actually be exercised," beyond the orders to execute the measure, adopted on four occasions, which were also not implemented.

110. The Commission further alleged that the public company initially failed to comply with the judgment of February 2, 1993, which was favorable to Mr. Muelle Flores, prior to privatization. One of the arguments adduced by the company for not complying with that judgment was that the company had been privatized after the ruling had been issued, this being one of the obstacles that impeded - and continues to impede - effective compliance with the judgment and its execution. The Commission stressed that "the right to effective judicial protection imposed an obligation on the State to ensure that the privatization of the State company did not undermine Mr. Muelle Flores' right to his pension on the terms recognized judicially," and stressed that States must apply safeguards to ensure that the privatization of State companies does not undermine the rights of workers, something that did not occur in this case. It emphasized that although the State had mentioned a "supposed regulation on the matter," this was issued after the privatization process. It added that the inefficacy demonstrated by the Judiciary to date to ensure implementation of its rulings in the context of that

privatization, highlights the fact that this regulation did not satisfy the purposes for which it was created.

111. The Commission stressed that, nearly 24 years after the first judicial ruling was issued in Mr. Muelle's favor, the State continues to violate his right to effective judicial protection, given that the execution process, by not fulfilling its essential purpose, turned out to be ineffective. It considered that although the State referred to some payments made in the 1990s and until 2000, these were partial; moreover, the State had not demonstrated that these payments complied with the equalization and calculation process ordered in the judgment favorable to Mr. Muelle Flores.

112. The Commission concluded that the State was responsible for failing to establish an adequate regulatory framework; for the State entity's initial failure to comply with the judgment favorable to Mr. Muelle Flores; for the inefficacy of the Judiciary to ensure such compliance; for creating obstacles by means of a privatization process that did not provide minimal safeguards; and for the Judiciary's subsequent inefficacy in settling the dispute regarding who was responsible for making the pension payments. Accordingly, it concluded that the Peruvian State was responsible for the violation of the rights recognized in Articles 25(1) and 25(2) (c) of the American Convention in relation to the obligations established in Article 1(1) thereof, to the detriment of Mr. Muelle Flores. Finally, it pointed out that the State did not adopt the general measures necessary to remedy Mr. Muelle Flores' situation, and therefore, it was also responsible for the violation of Article 2 of the American Convention.

113. The **representatives** pointed out that Mr. Muelle's pension payments were suspended through a unilateral, arbitrary and untimely decision taken by the State-owned company, without any prior administrative procedure, breaching the victim's acquired rights and his right to due process. Accordingly, they concluded that the State violated Article 8(1) and 25(1) of the American Convention. The representatives also argued that the State had manifestly failed in its obligation to provide an effective judicial remedy, given that although the judgments in favor of Mr. Muelle Flores had the authority of *res judicata*, the State did not act or fulfill its obligation to employ all necessary means to ensure their implementation.

114. Furthermore, they argued that the State not only failed to comply with the domestic judgments, but also failed to provide a judicial remedy to ensure the execution of those decisions.

115. The representatives pointed out that, after the privatization of the company, it was not made clear who would be responsible for paying Mr. Muelle's pension. This matter was not settled during the execution process, since both the privatized company and the OEP (hereinafter "State Pension Body") excused themselves from the duty to implement the judgment, since in their view, neither one was responsible for paying the pension.

116. The representatives argued that the State's non-compliance still continues today, given that the presumed victim has not received his equalized retirement pension since February of 1991, nor has he been granted the corresponding health coverage. They considered that the partial pension payments made from 1999 to 2001 did not correspond to the equalized amount that he should have received, pursuant to the judgments issued by the domestic courts, and that despite this, the ONP refused to calculate the payment due, even though it was required to do so, based on the legislation at that time. Accordingly, the representatives concluded that the State of Peru was responsible for the violation of the rights established in Articles 25(1) and 25(2) (c) of the American Convention in relation to the obligations established in Article 1(1) thereof, to the detriment of Mr. Muelle Flores.

117. The representatives also concluded that the Peruvian State was responsible for the violation of Article 2 of the Convention for failing to adopt, for a long period of time, the set of measures needed to ensure full compliance with the judgments of its judicial bodies.

118. The **State** pointed out that, “although no specific coercive measures were adopted in this case” to ensure compliance with the ruling during the execution process “the judicial body *did* require the company to comply with the judicial ruling.” Likewise, the State indicated that there were regulations in effect governing coercive measures for jurisdictional organs, and emphasized that the execution of judgments and judicial rulings formed part of the fundamental right to effective judicial protection, enshrined in the Peruvian Constitution. To this end, the State indicated that the Organic Law of the Judiciary, the Code of Constitutional Procedure and the Code of Civil Procedure, established the obligation of “every individual and authority” to abide by and comply with judicial decisions, “under civil, criminal or administrative responsibility,” without delay in their execution. It also emphasized that Administrative Resolution N° 149-2012-P-PJ of April 10, 2012, an Official Circular of March 2005 and Administrative Resolution N° 128-2008-CE-PJ of May 9, 2008, issued by the Executive Council of the Judiciary, ordered that “all the country’s jurisdictional organs adopt appropriate measures to execute, within a reasonable time, the monetary judgments issued against State entities.”

119. The State argued that the Second Civil Chamber of the Superior Court had ruled that the company was not obliged to pay Mr. Muelle Flores’ pensions, and had therefore decided that the lower court should rule again on this matter. In this regard, the State considered that since 2002, “the payment of pensions originating from a privatized entity [has been] the responsibility of the [MEF]”, and given that the private company was not obligated to pay [the pension], the coercive measures and demands for payment should have been directed to the MEF. Instead, during the domestic proceedings, Mr. Muelle Flores, despite being aware of this situation, always maintained his position of acting against the private company, omitting to request that a summons be issued to the MEF, which was not summoned at any time. The State further argued that, under the *amparo* laws in effect at the time, “the process of enforcing judicial decisions was carried out at the request of the party,” who “claimed interest and legitimacy to act;” therefore, Mr. Muelle Flores, being the right holder, should have requested the formal summons of the MEF but did not do so, which “has not helped to clarify the legal problem, [but on the contrary] has, in some way, led to confusion in the judicial authority.” However, the State stressed that it was not trying to “elude [its] obligations regarding Mr. Oscar Muelle Flores’ pension” and expressed its willingness to comply with the Court’s order. It indicated that its legal counsel would try to explain the complexities of the case to the Court, which in some way have affected the alleged failure to execute the judgment, given that, as a result of the judicial debate that is still under way, it has not been determined who should execute the decision in favor of Mr. Muelle Flores.

120. The State further argued that the private company had made partial payments to Mr. Muelle after the Supreme Court ruling of February 2, 1993. Those amounts corresponded to the pension payments that he should have received since 1991, that is, he received the payments corresponding to the period from 1991 to 2001; thus, it could not be categorically stated that the remedy was ineffective.

121. As to the measures adopted by virtue of the privatization process, the State affirmed that contrary to what was alleged by the Court, it did indeed adopt measures to protect the pension rights of former employees of privatized companies enrolled in the pension scheme of Decree Law No. 20530. In that regard, it indicated that from 2002, by means of different regulations (Laws No.27719, No.28115 and No.28449), it was determined that, in the case of privatized State companies, the entity that should take responsibility for paying the pensions of persons affiliated to the Decree Law No. 20530 pension scheme was the Ministry of Economy and Finance. Therefore, the State considered that “based on those laws it was clear which entity was to take over the pension payments.” The State acknowledged that although those safeguards “[were] not applied in this specific case, this constitutes a measure of reparation to prevent the repetition of similar situations in the future.”

122. Finally, the State argued that it did not violate Article 2 of the American Convention, given that it had precise and specific laws regarding coercive measures to execute judicial decisions in relation to pension safeguards for its former workers in the event of privatization.

A.2 Considerations of the Court

123. Regarding the right to judicial protection, under the terms of Article 25 of the Convention, it is possible to identify two specific responsibilities of the State. The first one is that the States have the obligation to embody in their legislation and ensure the application of effective remedies before the competent authorities, which protect all persons subject to their jurisdiction from acts that violate their fundamental rights or which lead to the determination of the latter's rights and obligations.¹³⁷ The second one requires the States to guarantee effective mechanisms to execute the decisions or judgments delivered by the competent authorities, so that the rights declared or recognized are effectively protected.¹³⁸ This is because a judgment that is *res judicata* grants certainty as to the right or dispute under discussion in the particular case and, therefore, its binding force is one of the effects thereof.¹³⁹ The contrary would imply the denial of this right.¹⁴⁰

124. In this regard, Article 25(2)(c) of the Convention requires States to "ensure that the competent authorities shall enforce such remedies when granted."

125. The Court has indicated that the State's responsibility does not end when the competent authorities issue a decision or judgment, but that it also requires the State to guarantee effective means and mechanisms to execute final decisions, so that the rights declared are effectively protected.¹⁴¹ Likewise, this Court has established that the full effectiveness of judgments depends on their execution. The process should lead to the materialization of the protection of the right recognized in the judicial ruling.¹⁴²

126. The Court considers that the implementation of judgments should be governed by those specific standards that enable the realization of the principles of, *inter alia*, judicial protection, due process, legal certainty, judicial independence and the rule of law. The Court has also indicated that in order to achieve the full effectiveness of a judgment, its implementation should be complete, perfect, and comprehensive and without delay.¹⁴³

¹³⁷ Cf. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*. Judgment of November 19, 1999. Series C No. 63, para. 237, and *Case of Favela Nova Brasília v. Brazil, supra*, para. 234.

¹³⁸ Cf. *Case of Baena Ricardo et al. v. Panama. Jurisdiction*. Judgment of November 28, 2003. Series C No. 104, para. 79, and *Case of Favela Nova Brasília v. Brazil, supra*, para. 234.

¹³⁹ Cf. *Case of Acevedo Jaramillo et al. v. Peru, supra*, para. 167, and *Case of the Garifuna Community of Punta Piedra and its Members v. Honduras. Preliminary objections, merits, reparations and costs*. Judgment of October 8, 2015. Series C No. 304, para. 248.

¹⁴⁰ Cf. *Case of Cantos v. Argentina. Merits, reparations and costs*. Judgment of November 28, 2002. Series C No. 97, para. 54, and *Case of the Garifuna Community of Punta Piedra and its Members v. Honduras, supra*, para. 244.

¹⁴¹ Cf. *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8, American Convention on Human Rights)*. Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 24; *Case of Acevedo Jaramillo et al. v. Peru, supra*, para. 220, and *Case of Cuscul Pivaral et al. v. Guatemala, supra*, para. 169.

¹⁴² Cf. *Case of Baena Ricardo et al. v. Panama. Jurisdiction, supra*, para. 73, and *Case of Colindres Schonenberg v. El Salvador, supra*, para. 101.

¹⁴³ Cf. *Case of Mejía Idrovo v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of July 5, 2011. Series C No. 228, para. 105, and *Case of the Garifuna Community of Punta Piedra and its Members v. Honduras, supra*, para. 244.

127. Likewise, the principle of effective judicial protection requires that the implementation procedures be accessible to the parties, without hindrance or undue delay in order to quickly, simply, and comprehensively accomplish their purpose.¹⁴⁴ Additionally, the provisions governing the independence of the judicial order must be made in an appropriate way so as to ensure the timely execution¹⁴⁵ of judgments and guarantee the binding and obligatory nature of the decisions of last resort.¹⁴⁶ The Court considers that in a system based on the principle of the rule of law, all public authorities, within the framework of their jurisdiction, must take heed of judicial decisions and promote their execution, without hindering the purpose and scope of the decision or unduly delaying its implementation.¹⁴⁷

128. This Court also emphasizes that Article 25(2)(c) of the Convention establishes the obligation to ensure that competent authorities “shall enforce such remedies when granted.” This includes guaranteeing effective mechanisms for the enforcement of judicial decisions or final judgments issued both against State and private entities. It is also essential to adopt appropriate and effective coercive mechanisms to ensure, where necessary, that the authorities who issue decisions or judgments execute these, thereby ensuring the protection of the right recognized in a final ruling.

129. In the instant case, there is no dispute regarding Mr. Muelle Flores’ right to his pension and its equalization according to domestic laws, or as to whether the decision to withdraw him from the Decree Law No. 20530 pension scheme was consistent with the Convention or violated due process, since his right to a pension and his reinstatement in that system were ordered in the *amparo* judgments of the domestic courts and in the administrative proceeding (*supra* para. 73). Therefore, this Court will not refer to the violation of Article 8(1) as requested by the representatives in that regard (*supra* para. 113). The Court will proceed to divide its analysis in this section as follows: i) failure to comply with the final judgments delivered in the domestic courts; ii) the creation of obstacles to the enforcement of domestic judgments via privatization, and iii) the lack of effectiveness of the judgement execution process: absence of coercive mechanisms and measures to reverse the effects of privatization.

i) Failure to comply with the final judgments delivered in the domestic courts

130. Mr. Muelle worked at a State-owned mining company until his retirement on September 30, 1990. In May of 1990, prior to his retirement, the State company enrolled him in the pension scheme governed by Decree Law No. 20530, as a result of which he received his equalized pension (*supra* para. 44) from October 1, 1990, until January 1991. However, in February of that same year, the company unilaterally suspended the application of that pension system (*supra* para. 49). In response,

¹⁴⁴ Cf. *Case of Mejía Idrovo v. Ecuador*, para. 105, citing ECHR, *Case of Matheus v. France*, (No. 62740/01), Judgment of March 31, 2005, para. 58. According to the principles proposed by the Consultative Council of European Judges (CCJE), an advisory body of the Committee of Ministers of the Council of Europe on matters concerning the independence, impartiality and professional competence of judges, “the enforcement of judicial decisions should be fair, swift, effective and proportionate.” (Cf. Opinion No. 13 (2010), *On the role of judges in the enforcement of judicial decisions*. Available at: [https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CCJE\(2010\)2&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CCJE(2010)2&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864)).

¹⁴⁵ Cf. *Case of Mejía Idrovo v. Ecuador*, *supra*, para. 106. Cf. Advisory Opinion No. 13 (2010) *On the role of judges in the enforcement of judicial decisions*, Conclusions, F), *supra* note 84. See also *Case of Matheus v. France*, *supra* note 84, paras. 58 and subseq; and *Cabourdin versus France*, n° 60796/00, Judgment of April 11, 2006, paras. 28-30.

¹⁴⁶ This means that compliance with such decisions is mandatory, and that if they are not obeyed voluntarily, they may be enforced coercively. Cf. *Case of Mejía Idrovo v. Ecuador*, *supra*, para. 106.

¹⁴⁷ The European Court has established in the *Case of Immobiliare Saffi v. Italy*: “While it may be accepted that Contracting States may [...] intervene in proceedings for the enforcement of a judicial decision, the consequence of such intervention should not be that execution is prevented, invalidated or unduly delayed or, still less, that the substance of the decision is undermined.” (Translation of the Secretariat of the Court). Cf. ECHR, *Case of Immobiliare Saffi v. Italy*, n° 22774/93, Judgment of 28.07.1999, para. 74. Cf. *Case of Mejía Idrovo v. Ecuador*, *supra*, para. 106.

Mr. Muelle Flores filed an application for *amparo* before the Supreme Court, which decided in his favor on February 2, 1993, and ordered the State-owned company to pay Mr. Muelle the corresponding pension and reinstate him in the aforementioned scheme.

131. From the evidence in the file, the Court finds that, despite that judgment, the *Empresa Especial Minera Tintaya S.A.*, which was a State-owned company at the time, did not comply with the Supreme Court ruling; on the contrary, a few days after the decision was adopted, the company issued a new Board of Directors Decision ordering the suspension of Mr. Muelle Flores' pension payments once again. In response, Mr. Muelle Flores filed a second application for *amparo*, which was eventually declared to have merit in 1999, and which ordered the non-application of the 1991 Board Decision and the payment of his pension. During the second *amparo* proceeding, one of the intervening judicial authorities concluded that the violation of Mr. Muelle's right to a pension constituted "a clear and unlawful resistance to the decision of the judicial authority." However, this decision, too, was not complied with or executed by the State. The Court notes that in addition to the two judgments that protected Mr. Muelle Flores' right to an equalized pension, the State-owned company filed a contentious-administrative action prior to its privatization, asking the court to declare unlawful his inclusion in the Decree Law No. 20530 pension scheme. This also resulted in a decision favorable to Mr. Muelle in 1997, with the court concluding that his inclusion in that pension scheme complied with existing legal requirements. In this regard, the Court observes that, after the first judgment was delivered in 1993, the State did not take any steps to comply, in a prompt and effective manner, with the measures ordered by the judicial authorities to guarantee Mr. Muelle Flores' legally recognized right to a pension.

ii) Creation of obstacles to the enforcement of domestic judgments via privatization

132. After the Supreme Court judgment of 1993, Tintaya S.A. was privatized on November 29, 1994, and from that date ceased to be a State-owned company. The Court observes that since that time, the company has changed its business name and has been acquired by different owners, but has not reverted to being a State-owned public company.

133. The Court notes that prior to the company's privatization in November 1994, a final judicial ruling had already been issued against the State-owned firm. In other words, the State was aware of the existing legal obligations and, despite this, not only failed to comply, but its Board of Directors even adopted a subsequent decision to suspend Mr. Muelle Flores from the pension scheme under Decree Law No. 20530. Furthermore, the State took the decision to privatize the public company, without adopting measures of due diligence to ensure that the transfer of ownership would not affect compliance with the obligation to pay Mr. Muelle Flores' pension.

134. In particular, the Court notes that the State did not establish, clearly and explicitly, who would be responsible for the administration and payment of Mr. Muelle Flores' pension, given that, under the existing legal system, the obligated public company would become a private company. This lack of clear regulation regarding which entity would be responsible for paying Mr. Muelle Flores' pension created a situation of uncertainty regarding its payment which, in turn, created an obstacle to compliance and execution of the judgment. The State had a legal obligation to comply, which should have been maintained after privatization or, at least, it should have established which entity (public or private) would be required to comply with the ruling. It is important to recall that, based on the obligations derived from Article 1(1) of the Convention, the State not only has the obligation to respect rights, but also to ensure that rights are respected. Therefore, even on the assumption that a private entity would be responsible for paying Mr. Muelle's pension, the State had the obligation to ensure that his pension was paid.¹⁴⁸

¹⁴⁸ The Court has also established that the State's liability may also result from acts committed by private individuals

135. In addition, according to the facts of the case, the sale contract between Tintaya S.A. and Magma Copper Corporation expressly stated that Tintaya S.A. had no retirees or pensioners on the company's account, although it did refer to litigation involving two company officials. The contract also stipulated that, "if any unregistered liabilities or contingencies should arise, derived from facts prior to the closing date [November 29, 1994], these "[would] be assumed by the vendor [...]" (*supra* paras. 59). The State never assumed these liabilities but, on the contrary, used the uncertainty it had created to disregard a legitimately acquired and judicially confirmed right to a pension, arguing that the judicial rulings and proceedings were aimed at ensuring that the private company complied with the pension payments. Even at the time of the sale, when the contentious-administrative process initiated by Tintaya S.A. to declare the victim's incorporation into the Decree Law No. 205030 system unlawful was under way, the State had already been legally vanquished in the *amparo* ruling of 1993. Nor were the pension payments made after the contentious-administrative process concluded in favor of Mr. Muelle Flores, or after the decision of the Constitutional Court in 1999, which also ordered the payment of his pension.

136. At the same time, the State alleged that the judicial authority's confusion in enforcing the domestic judgment was partly due to the fact that Mr. Muelle Flores "always insisted that the private company was the one obligated to pay his pension" and that, despite knowing that the MEF was responsible for the payments from 2002 (*infra* para. 138), he maintained his position of acting against the private company, omitting to request the summons of the MEF, as a result of which he was unable to "assert his rights" during the *amparo* proceeding or during the execution of the judgment process. The Court considers that the State not only failed to comply with the rulings of the Judiciary, but also failed to clarify its own obligations in order to protect the rights of the victim in the context of the privatization process undertaken by its own decision. The Court finds this last point noteworthy, given that, based on the legislation in force in 1996 and 2004, forwarded by the State, both the ONP, and subsequently the MEF,¹⁴⁹ respectively, were the institutions responsible for the procedural representation of the State in judicial proceedings related to the Decree Law No. 20530 system of privatized entities.¹⁵⁰ In this regard, the Court understands that the MEF should have attended the proceeding *ex officio* at the appropriate opportunity, pursuant to the existing legislation, as it effectively did following the resolution of July 30, 1996, in which the Administrative Chamber requested the attendance of the ONP at said proceeding (*supra* para. 70). Furthermore, the Court finds that it was the State itself, through its public institutions, which provided information to the victim that led him to consider that the private company was responsible for paying his pension. Indeed, both the ONP and the MEF received Mr. Muelle Flores' notarized letters requesting information concerning the entity responsible for paying his pension, and both of these State institutions claimed that this responsibility did not fall on them, but on the company "that paid his pension" or the "*Empresa Minera Especial Tintaya S.A.*", which no longer existed as such at that time.

which, in principle, are not attributable to the State. The effects of the duties *erga omnes* of the States to respect and guarantee protection norms and to ensure the effectiveness of rights go beyond the relationship between their agents and the individuals under their jurisdiction, since they are embodied in the positive duty of the State to adopt such measures as may be necessary to ensure the effective protection of human rights in relationships between individuals. The assumptions of the State's liability for the violation of rights enshrined in the Convention may include both the acts and the failure to act attributable to State bodies or officials, as well as the failure of the State to prevent third parties from impairing the juridical rights protected by human rights. Cf. *Mutatis mutandis, Ximenes Lopes v. Brazil*. Judgment of July 4, 2006. Series C No. 149, paras. 85 and 86.

¹⁴⁹ Cf. Article 1 of Law No. 28115 entitled "Law that expands and specifies the scope of Law N°27719 "Law of recognition, declaration and qualification of pension rights legally acquired under Decree Law N°20530 with its amendments and supplementary regulations", published in the Official Gazette *El Peruano* on December 6, 2003 (evidence file, folio 1694).

¹⁵⁰ As of 1996, and pursuant to Legislative Decree No. 817, the Pension Standardization Office (ONP) was the State body responsible for defending the State's interests in all judicial proceedings related to the application of pension rights (*supra* para. 70).

Indeed, the MEF informed Mr. Muelle Flores that it was not responsible for his pension payments, despite the regulation adopted establishing that this Ministry would be responsible for administering and paying the pensions of Decree Law No. 20530 retirees of privatized companies, based on the fact that the order issued by the Constitutional Court was against a company that was now private.

137. By virtue of its obligations, the Court considers that the State should not only have complied with the pension payments ordered by the courts immediately, and with special due diligence and promptness, this being a benefit of an "alimentary and income-substituting nature"¹⁵¹ (*infra* para. 162), but it should also have established clearly and precisely which entity would be responsible for complying with the judicial ruling issued prior to the privatization process, clarifying the matter *ex officio* and redirecting the procedure to the State entity that would be responsible for making the corresponding payments. This did not occur in the instant case; on the contrary, that responsibility was transferred to the victim.

138. The State also indicated that from May 2002, with the enactment of Law No. 27719 and subsequent laws that expanded and/or modified it (Laws No. 28115 and No. 28449), "the payment of pensions originating from an entity that has been privatized [would be] under the responsibility of the Ministry of Economy and Finance"¹⁵² (*supra* paras. 101). In this regard, the State considered that it had indeed adopted measures to protect the pension rights of former employees of privatized companies. Nevertheless, it recognized that these measures had not been applied in this specific case. Although the Court considers positive the regulatory changes adopted in 2002, it notes that these occurred nearly eight years after the privatization, and not prior to that process. Similarly, despite the regulatory changes, the MEF did not assume the payment of Mr. Muelle Flores' pension but, on the contrary, stated that it was not obliged to do so, since the ruling of the Constitutional Court judgment of 1999 had been directed against a private company. Therefore, the Court considers that the adoption of the regulations cited did not result in the payment of the corresponding pension.

139. In view of the foregoing, the Court considers that the State's failure to adopt regulatory or other types of safeguards to prevent a violation of Mr. Muelle Flores' rights as a consequence of the privatization process, created an obstacle that prevented the victim from obtaining his legally recognized pension and hindered the execution of the *amparo* judgments. This resulted in Mr. Muelle Flores being unable to enjoy, even to this day, the pension to which he had contributed and to which he had acquired full rights. Therefore, the State is responsible for the violation of Article 2 of the Convention for the failure to adopt measures, at least until 2002.

iii) Lack of effectiveness of the execution of judgment proceedings: lack of coercive mechanisms and measures to reverse the effects of privatization

140. As this Court has already established, compliance with and enforcement of judgments are both components of the right of access to justice and to effective judicial protection. Likewise, the effectiveness of judgments depends on their execution, given that the right to judicial protection would be illusory if the State's domestic legal system were to allow a final and binding judicial decision to remain inoperative to the detriment of one of the parties.¹⁵³ The Court considers that as part of the duty to ensure effective means and mechanisms to execute final decisions, the States "must establish monitoring and enforcement of compliance mechanisms that are available and accessible in practice [...] [such as different types of coercive measures, including,] sanctions against those who hinder

¹⁵¹ Cf. Affidavit rendered by Christian Courtis on August 30, 2018 (evidence file, affidavits, folio 1821).

¹⁵² Cf. Answering brief of the State to the IACHR Merits Report N° 3/17 and observations to the pleadings and motions brief of the representatives of the alleged victim (merits file, folio 310).

¹⁵³ Cf. Case of Acevedo Jaramillo et al. v. Peru, *supra*, para. 219.

the effective exercise of rights [...]."¹⁵⁴ This would contribute to ensure that the right protected by the decision is implemented.

141. In this regard, the State of Peru argued that its domestic legislation includes various laws that regulate coercive measures to ensure that the judicial authorities execute judgments and judicial decisions. The State pointed out that Article 139, subparagraph 2 of the Peruvian Constitution establishes that "No authority shall [...] invalidate orders under *res judicata* [...] or delay their execution." Likewise, it stressed that the Organic Law of the Judiciary,¹⁵⁵ the Code of Constitutional Procedure,¹⁵⁶ the Code of Civil Procedure,¹⁵⁷ the case law of the Constitutional Court¹⁵⁸ and administrative resolutions, establish coercive mechanisms, ranging from the imposition of fines to arrest for up to 24 hours, as well as criteria for the execution of judicial decisions.¹⁵⁹ Regarding the latter, the State reported that Law No. 30137, published in December 2013, establishes criteria for the prioritization of payments arising from judicial decisions, one of these being related to the payment of pensions.¹⁶⁰

¹⁵⁴ Cf. Report of the United Nations Secretary General on *The question of the effective exercise, in all countries, of economic, social and cultural rights*, Mr. Ban Ki-moon. Doc. A/HRC/25/31, December 19, 2013, para. 35.

¹⁵⁵ Cf. Article 4 of the Organic Law of the Judiciary (LOPJ) establishes that: "[e]very individual and authority is required to comply with and enforce judicial or administrative decisions issued by a competent judicial authority, in its own terms, without assessing its content or its merits, restricting its effects or interpreting its scope, under civil, criminal or administrative responsibility determined by law. No authority, [...] may revoke judicial resolutions with the authority of *res judicata*, modify their content, or delay their execution [...]."

¹⁵⁶ The Peruvian Code of Constitutional Procedure, in Article 22, on the execution of judgments, states:
A judgment ordering the realization of a benefit of giving, doing or not doing is immediately actionable. For enforcement purposes, and in accordance with the specific content of the ruling and the magnitude of the constitutional offense, the Judge may order fixed or accumulative fines and even order the dismissal of the person responsible.
Any of these coercive measures should be included in the judgment as admonition; however, these may be modified *ex officio* or at the request of a party during the execution phase.
The amount of the fines is determined at the Judge's discretion, based on the Procedural Reference Unit and having regard also to the financial capacity of the defendant.
Payment shall be made effective with assistance from the police, a financial institution or the assistance of whomsoever the Judge deems pertinent.
The Judge may decide that the accumulated fines of up to 100% for each calendar day, until the judicial order has been obeyed.
The amount collected from fines shall constitute the income of the Judiciary, unless the party complies with judicial order within three days of receiving the fine.
In this last case, the amount collected shall be returned in its entirety to its owner."

¹⁵⁷ Article 53 of the Civil Procedure Code establishes the following: "Article 53. - Coercive powers of the Judge. Pursuant to the objectives of Article 52, the Judge may:

1. Impose a compulsory and progressive fine to ensure that the party or the individual concerned complies with its mandates according to the content of his ruling.

The fine is established at the discretion of the Judge within the limits set forth in this Code; the fine may be modified or revoked if he considers that the disobedience has been or is justified.

2. Order the detention, for up to 24 hours, of any person who resists his mandate without justification, causing injury to a party or to the [... Judiciary].

Considering the importance and urgency of his mandate, the Judge will determine the successive, individual or joint application of the sanctions established in this Article.

Sanctions shall be applied without detriment to compliance with the mandate."

¹⁵⁸ The Constitutional Court of Peru has indicated that the right to the effectiveness of the judgment: "[d]emands a particular type of action. And, if the right to the execution of judicial resolutions guarantees that the decisions issued in a judgment or judicial ruling are executed, it is clear that those who issue them or those who are responsible for executing them, have the obligation to adopt, according to the applicable laws and procedures –and regardless of whether or not the resolution is to be executed by a public entity –necessary and timely measures for its strict enforcement." Cf. Judgment of ITC in Exp. No. 015-2001-AI/TC, Exp. No. 016-2001-AI/TC, and Exp. No. 004-2002-AI/TC (Dossiers), Legal basis 12.

¹⁵⁹ Cf. Administrative Resolution N° 149-2012-P-PJ "Circular on guidelines for judgment execution proceedings and monetary payments issued against the State," issued by the Supreme Court of Justice on April 10, 2012; Administrative Resolution N° 128-2008-CE-PJ and Circular issued by the Executive Council of the Judiciary, on May 9, 2008 and March 2005, establishing criteria for "all the country's judicial bodies to adopt appropriate measures for the execution, within a reasonable time, of condemnatory judgments issued against State entities" (evidence file, folios 1702 to 1708).

¹⁶⁰ Cf. Law No. 30137, "Law establishing criteria for the prioritization of payments related to judicial rulings", published in

142. The Court indeed confirms the existence of such laws and of a range of coercive mechanisms for executing judicial decisions. However, it also notes that many of those rules were adopted many years after the first *amparo* judgment of February 2, 1993, though it emphasizes that several were in force during and after that date. Likewise, from the body of evidence contained in the file, the Court finds that the State, through its enforcement courts, did not employ any of the mechanisms available to compel the State authorities to execute the payment of Mr. Muelle Flores' pension in order to realize his right. While it is true that the judicial authorities required the private company to comply with the judicial ruling (*supra* para. 83), on the uncertain understanding that the private company was the entity obligated to comply with the payment, the Court finds no evidence that effective coercive measures were adopted against the company. Despite the fact that from the time of the privatization until the present, the judicial authorities could not settle the debate as to who had the obligation to pay the pension, it is important to emphasize that, although that responsibility fell on the private company, the State retained its obligation to execute judgments issued against private entities, pursuant to Article 25(2)(c).

143. Furthermore, by not specifying who would be responsible for paying Mr. Muelle Flores' pension, the State created obstacles to compliance with the judgments that were not resolved by the Judiciary during the execution process. The negative effects of the privatization on Mr. Muelle Flores' right to a pension were not reversed in court, since the judges did not conduct a detailed analysis of the victim's situation and did not take steps to effectively decide who was responsible for the payments. The Court notes that several resolutions determined that the private company was responsible for the payments; however, these decisions were subsequently reversed, with the courts concluding to the contrary, but without having proved whether or not the private company had indeed assumed the liabilities of Tintaya S.A. This conduct by the judges responsible for enforcement contributed to the delay in the proceedings and aggravated the non-compliance with the domestic rulings.

144. From the information available to the Court, it was not until 2013 that the Second Civil Chamber assessed the 1994 sale contract and determined that the private purchaser had not assumed the liabilities of Tintaya S.A. Despite this, and despite the regulatory changes that gave the MEF responsibility for the payments in cases such as this, and the fact that the pensions system under Decree Law No. 20530 is a system administered by the State, that decision was overturned in subsequent resolutions. However to date, the execution of judgment process has still not concluded – that is, 25 years after the first *amparo* judgment issued by the Supreme Court. The Court also notes that it was not until 2014 and 2015 that the Thirty-third Civil Court of Lima requested information from the MEF and other State bodies in order to clarify which assets and liabilities the private company had assumed, in other words, more than 20 years after privatization. Accordingly, the Court considers that the State failed to adopt effective measures to ascertain which government authority should comply with the judicial rulings or if, on the contrary, that responsibility fell on the private company, in order to reverse the negative effects of the privatization caused by the State itself.

145. In this regard, the Court notes that the State not only failed to comply with the domestic rulings, but also that the judicial authorities did not ensure compliance with either of the two *amparo* judgments during the execution process. Moreover, the State did not adopt the safeguards necessary to clearly establish which entity would be responsible for paying Mr. Muelle Flores' pension, a problem that was not resolved by the judicial authorities, either before or after privatization, and it also failed to adopt coercive mechanisms to ensure compliance with the rulings. The failure to execute the judgments, which continues to this day, and the Judiciary's inefficacy in addressing the obstacles

the Official Gazette *El Peruano*, on December 27, 2013 (evidence file, folios 1710 to 1711).

that arose in the compliance process stemming from the privatization, violated Mr. Muelle Flores' right to effective judicial protection and prevented the realization of his right to a pension.

146. In relation to the partial payments disbursed to Mr. Muelle Flores, the Court observes that these were made by the private company (*supra* para. 80) and not by the State of Peru. Furthermore, the Court notes that the payments were made without taking into account the equalization of Mr. Muelle Flores' pension, in accordance with the regulations in force at the time. Nevertheless, the Court will take into consideration the amounts paid when it orders the measures of reparation in this case (*infra* para. 254).

147. In addition to the foregoing, the Court considers it important to emphasize the point made by the expert witness Christian Courtis, as follows:

"Effective compliance with judicial rulings acquires even greater importance when the type of benefit is of an alimentary and income-substituting nature, since the right to a life with dignity or a decent standard of living depends on it, along with the rights that are interdependent [...]. In addition to this, there is a special need to protect older persons and persons with disabilities, whose possibilities of obtaining an alternative source of income in the labor market are drastically reduced."¹⁶¹

148. Accordingly, the Court considers that, in the instant case, the State should have acted with special diligence and promptness to ensure compliance with the domestic judgments, as well as the implementation of the pension payments. This, in consideration of the nature of the benefit at stake and "the need for promptness, procedural simplification and effectiveness"¹⁶² in cases where the claim before the courts concerns social security, especially that of an older person. In the instant case, the State did not take into account the content of the claim; on the contrary it has failed to execute the judgments delivered 25 and 19 years ago.

A.3 Conclusion

149. Based on the foregoing, this Court concludes that the State is responsible for failing to comply with the judgments issued in favor of Mr. Muelle Flores, by creating obstacles stemming from the privatization process; for the inefficacy of the Judiciary in ensuring such compliance and reversing the negative effects of privatization; and for its failure to implement measures to remedy that situation for a prolonged period of time. Consequently, the State violated the right to effective judicial protection recognized in Articles 25(1) and 25(2)(c) of the American Convention, in relation to Article 1(1) thereof, and of Article 2 of the American Convention, to the detriment of Mr. Oscar Muelle Flores.

B. Reasonable time

B.1 Arguments of the parties and of the Commission

150. The **Commission** argued that the issue of reasonable time could also be applied to the execution of a final judicial decision. Regarding the complexity of the case, the Commission stressed that the matter was not complex given that a final judicial decision had already been handed down that was to be executed. In relation to the involvement of the interested party, it held that Mr. Muelle Flores had actively followed up on the case and promoted the execution of the judgment, complaining

¹⁶¹ Cf. Affidavit rendered by Christian Courtis on August 30, 2018 (evidence file, folio 1829).

¹⁶² Cf. Affidavit rendered by Christian Courtis on August 30, 2018 (evidence file, folio 1833). As this expert witness emphasized, Article 31 of the Inter-American Convention on Protecting the Human Rights of Older Persons, concerning the right of access to justice, establishes that: "State Parties shall ensure due diligence and preferential treatment for older persons in processing, settlement of, and enforcement of decisions in administrative and legal proceedings."

on several occasions about the delays in this process. With respect to the conduct of the judicial authorities, it emphasized that the rulings issued during the execution of judgment stage were ineffective in achieving compliance with the judgments issued, and considered that there had been unwarranted delays by the State in resolving several appeals filed by both parties, as well as long periods of inactivity during the execution phase. As to the fourth element, the Commission noted that another factor in determining what constitutes an unreasonable time was the adverse effect of the lengthy proceedings on Mr. Muelle Flores' legal situation. The Commission stressed that the victim was more than 80 years of age and in a precarious financial and health situation, given that more than 27 years had elapsed without being able to enjoy his pension under the legally recognized terms. Accordingly, it concluded that the State was responsible for the violation of the right to a reasonable time established in Article 8(1) in relation to Article 1(1) of the American Convention, to the detriment of Mr. Muelle Flores.

151. The **representatives** agreed in all respects with the Commission's arguments. They added that the State's argument that "the execution of the plaintiff's claim [was] no longer viable [...] given that the respondent company was a private company," was not worthy of consideration, since both the ONP and the MEF were aware of the execution process. They also held that, bearing in mind the provisions of Article 22 of Peru's Code of Constitutional Procedure, which states that "a judgment that orders the implementation of a benefit that implies giving, doing or not doing is immediately actionable [...]", the long period that has elapsed without completing the execution process was clearly unreasonable. The representatives argued that because neither the Supreme Court judgment of February 1993 was not executed for more than 24 years, nor the 1999 judgment, the State had exceeded what could be considered a reasonable time to effectively execute those judgments. Consequently, they concluded that the State was responsible for the violation of Article 8(1) of the American Convention, to the detriment of Mr. Muelle Flores.

152. The **State** argued that the Commission only assessed reasonable time in relation to the judgment of February 2, 1993, and not in relation to the judgment of the Constitutional Court on December 10, 1999. It therefore understood that, according to the Commission, there had been no violation of reasonable time regarding the second *amparo* proceeding. It also considered that the reasonable time must be counted from 2008, when the execution process was re-opened, and until the present. As to the complexity of the case, the State indicated that although a final judicial ruling existed, it was necessary to consider the regulatory changes introduced from 2002 to 2004, whereby "the execution of the judgment was no longer viable" because the respondent State-owned company that was originally obligated to pay the pension, was privatized and underwent changes of ownership and business name on several occasions. The State recalled that after the privatization, two jurisdictional bodies considered that the respondent company was not obliged to pay the pension, while Mr. Muelle Flores and another judicial body believed the opposite. In other words, the case was clearly a complex one and could not be reduced to the simple execution of a final judgment; on the contrary, the obligations assumed by the company when it was privatized had still not been determined, nor had the State entities that would eventually be required to do so. All this produced a state of "uncertainty" that demonstrated the complexity of the case. As to the procedural activity of the interested party, the State noted that the execution process was archived in 1999 and was reopened in 2008, at the request of Mr. Muelle, and therefore there was a long period of inactivity on the part of the interested party. Moreover, the State considered that Mr. Muelle Flores did not request the procedural intervention of the MEF or of another State entity, which could have settled the matter in a shorter time. It also indicated that there was insufficient activity on the part of Mr. Muelle, who only submitted two briefs in the last two years.

153. Regarding the conduct of the judicial authorities, the State argued that the judicial rulings issued had not been "completely ineffective," given that Mr. Muelle Flores had received his pension between 1991 and 2001. It noted that the judicial bodies promoted the process, issuing resolutions that ordered the execution of the Supreme Court judgment and requesting information from the

MEF; therefore the claim of unwarranted delays “is not true.” Likewise, the State considered that there were no “unjustified delays” given that, when the appeals were filed, these were settled by the Superior Court within reasonable times (in less than 11 and 12 months). Finally, regarding the situation of the presumed victim, it indicated that the precarious financial and health situation alleged by Mr. Muelle Flores had not been proven. Consequently, it asked the Court to declare that the State had not violated Article 8(1) of the American Convention.

B.2 Considerations of the Court

154. In its constant case law, the Court has considered that a prolonged delay in the proceedings can constitute, of itself, a violation of judicial guarantees.¹⁶³ This is also applicable to proceedings for the execution of final judgments. The Court has indicated that “execution of a judgment given by any court must therefore be regarded as an integral part of the “trial.”¹⁶⁴ In other words, any unjustified delay in the execution of a judgment may imply the violation of the “right to a court” in a reasonable time.¹⁶⁵ The Court considers that, “since compliance should be considered an integral part of the proceedings, this right must be understood in conjunction with the requirement for a “prompt decision” when the duration of a trial or proceeding is examined.”¹⁶⁶

155. The Court has established that in assessing reasonable time it is necessary to analyze, in each specific case, the entire duration of the process, which may also include the execution of the final judgment. Accordingly, the Court has considered four elements to determine whether this process complied with the guarantee of reasonable time, namely: i) the complexity of the matter, ii) the procedural activity of the interested party, iii) the conduct of the judicial authorities, and iv) the legal effects on the situation of the individual involved in the proceeding. The Court recalls that it is for the State to justify, based on the criteria indicated, the reasons why it has taken so long to conduct a proceeding. Otherwise, the Court has broad powers to make its own analysis of this matter.¹⁶⁷

156. The analysis contained in this section will focus on an assessment of the time elapsed since the adoption of the first *amparo* judgment of the Supreme Court on February 2, 1993, until the present, and since the adoption of the second *amparo* judgment of the Constitutional Court of December 10, 1999, until the present date.

157. With regard to reasonable time in relation to the execution of judgment stage, the Court emphasizes that this period should be shorter owing to the existence of a final decision in relation to the specific matter. It is inadmissible that a proceeding on execution of judgment should temporarily alter a decision issued in a final judgment or in any way undermine it or render it ineffective, excessively or indefinitely prolonging a dispute that has already been settled. This acquires greater relevance in a proceeding on execution of judgment, in which the right to social security has been recognized in the domestic sphere and the victim is an older person with a hearing disability, owing to the nutritional nature of the benefit claimed. In such cases, the judicial guarantee of reasonable time established in Article 8(1) of the American Convention must be analyzed in conjunction with the

¹⁶³ Cf. *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago. Merits, reparations and costs.* Judgment of June 21, 2002. Series C No. 94, para. 145, and *Case of Acosta et al. v. Nicaragua, supra*, para. 177.

¹⁶⁴ Cf. *ECHR, Case of Hornsby v. Greece*, Judgment of March 19, 1997, para. 40; *Case of Popov v. Moldova*, Judgment of January 18, 2005, no. 74153/01, para. 40; *Case of Assanidze v. Georgia*. Judgment of April 8, 2004, no. 71503/01, para. 182; *Case of Jasiúniene v. Lithuania*, Judgment of March 6, 2003, no. 41510/98, para. 27, and *Case of Burdov v. Russia*, Judgment of May 7, 2002, no. 59498/00, para. 34.

¹⁶⁵ Cf. *ECHR, Case of Hornsby v. Greece*. Judgment of March 19, 1997, para. 40.

¹⁶⁶ Cf. Report of the United Nations Secretary General on *the effective exercise, in all countries, of economic, social and cultural rights*, Mr. Ban Ki-moon, a Doc. A/HRC/25/31, December 19, 2013, para. 35.

¹⁶⁷ Cf. *Case of Anzualdo Castro v. Peru*. Preliminary objection, merits, reparations and costs. Judgment of September 22, 2009. Series C No. 202, para. 156, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico, supra*, para. 306.

State's duty to act with particular promptness in the execution of domestic decisions (*supra* para. 129).

158. The Court confirms that the first application for *amparo* concluded with the judgment issued by the Supreme Court of Justice on February 2, 1993, and the second *amparo* action concluded with the judgment delivered by the Constitutional Court on December 10, 1999. However, these judgements have not been implemented since their adoption 26 and 19 years ago, respectively. In view of the foregoing, and based on the criteria established in its case law, the Court will now determine whether the time elapsed is reasonable.

159. To determine the *complexity of a matter*, this Court has considered several criteria such as the complexity of the evidence, the multiplicity of procedural subjects or the number of victims, the time elapsed since the violation, and the context in which the violation occurred.¹⁶⁸ The Court notes that in the instant case there is only one victim, and that a final judicial decision already existed which should have been complied with or executed. The State's argument that the complexity of the case was due to the uncertainty regarding the entity responsible for the pension payments has no merit, since the State itself created the uncertainty by not clearly establishing, prior to the privatization, how the victim's legally recognized pension rights would be protected. Likewise, such complexity cannot be based on the inefficacy and passivity of the Judiciary itself to determine who would be responsible for paying the pension. Therefore, the Court finds that there are no elements of complexity in this case.

160. In relation to the *procedural activity of the interested party*, the Court notes that Mr. Oscar Muelle Flores actively promoted the proceedings throughout the execution process. He participated in a series of actions to reverse the suspension of his pension payments (including the contentious-administrative complaint filed by the State company), submitted several briefs seeking the enforcement of the judgments, and sent requests for payment and notarized letters, both to the ONP, and the MEF and *Proinversión*, in support of the restoration of his right (*supra* paras. 75). Furthermore, on several occasions, the interested party questioned the delay in the process and asked that his case be expedited (*supra* para. 92).

161. Regarding the *conduct of the judicial authorities*, the Court considers that to ensure the full effectiveness of the judgment, the judicial authorities must act promptly and without delay,¹⁶⁹ because the principle of effective judicial protection requires that the implementation procedures be carried out without hindrance or undue delay, in order to quickly, simply and comprehensively satisfy their purpose.¹⁷⁰ In the instant case, the Court observes that despite the existence two final judicial rulings, the judicial authorities failed to take the necessary steps to ensure compliance with those decisions, thereby highlighting their inefficacy in resolving the vicissitudes arising in the execution process. This is reflected in the delays in deciding on the legal claims filed by the victim and in the fact that on several occasions the judicial authorities had to order compliance with the judgments, and that despite this, even after a long period had elapsed, none of the judicial authorities involved in the process to execute the judgment activated any coercive mechanism to ensure the realization of Mr. Muelle Flores' legally recognized right. Furthermore, although Mr. Muelle Flores had to travel abroad for health reasons, from the evidence it is clear that even during his absence from the country

¹⁶⁸ Cf. Case of Genie Lacayo v. Nicaragua, *supra*, para. 78, and Case of Women Victims of Sexual Torture in Atenco v. Mexico, *supra*, para. 308.

¹⁶⁹ Cf. Case of Mejía Idrovo v. Ecuador, *supra*, para. 105, and *Case of the Garifuna Community of Punta Piedra and its Members v. Honduras*, *supra*, para. 244.

¹⁷⁰ Cf. Case of Mejía Idrovo v. Ecuador, *supra*, para. 106, and Case of Ramírez Escobar et al. v. Guatemala. Merits, reparations and costs. Judgment of March 9, 2018. Series C No. 351, para. 250. Cf. Opinion No. 13 (2010) On the role of judges in the enforcement of judicial decisions, cit., Conclusions, H), *supra*.

he submitted requests to the authorities regarding payment of his pension (*supra*, para. 82). In any case, the Court considers that the procedural momentum to achieve compliance with a human right (social security) pursuant to a judicial order, which is also recognized in the Peruvian Constitution, cannot rely entirely on the victim, since the State is obligated to guarantee that right. Thus, there was an excessive prolongation of the execution process and periods of inactivity by the authorities.

162. As to the *effects on the legal situation of the person involved in the proceedings*, this Court has established that if the passage of time has a significant impact on an individual's legal situation, the proceedings must move forward with greater diligence so that the case is decided promptly.¹⁷¹ Given that this case concerns the right of an older person with a hearing impairment to social security, a benefit associated with income substitution and nutrition, the Court considers that exceptional due diligence was required.

163. In the instant case, the Court deems it pertinent to recall that the applications for *amparo* filed by the alleged victim involved various aspects of his right to social security, and the correlative access to health care services, based on monthly deductions from his pension, which entitled him to social health insurance with EsSalud.¹⁷² This aspect is of the utmost importance, given that the victim is 82 years old, which places him in an even greater situation of vulnerability and implies a reinforced obligation to respect and guarantee his rights. In fact, Mr. Muelle Flores stopped receiving his pension from 1991 (although he did receive some partial payments) pursuant to the laws in force at the time. In other words, despite having acquired the right to a pension in September 1990, which would have provided him with sufficient means to live with dignity and to cover his health care expenses, Mr. Muelle Flores was unable to enjoy this right, but instead had to seek financial help from his family¹⁷³ and take certain occasional jobs for as long as his health allowed, in order to survive.

164. In addition, the victim has suffered various ailments, which have worsened over time, such as the development of severe hypoacusia with total loss of hearing in one ear and a significant decrease in hearing in the other, Alzheimer's syndrome and a fractured femur (*supra* para. 52), given that he was unable to access the public health system as a direct consequence of the failure to execute the judicial decisions in his favor.

165. In this regard, it is important to emphasize that since the judgments were handed down in 1993 and 1999, more than 26 and 19 years have elapsed, respectively. For a person of advanced age who lacks financial resources, this state of affairs has had an impact on his legal situation. Bearing in mind the foregoing, the Court considers that it has been sufficiently proven that the undue prolongation of the judgment execution process in this case has had a significant and direct impact on Mr. Muelle Flores' legal situation, given that the delay in complying with the judicial decisions affected the course of his life after his retirement.

166. Having analyzed the four elements to determine the issue of reasonable time in this case, the Court finds that the judicial authorities exceeded a reasonable time in the process to execute the judgments, in violation of the right to judicial guarantees established in Article 8(1) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Oscar Muelle Flores.

¹⁷¹ Cf. Case of Valle Jaramillo et al. v. Colombia. Merits, reparations and costs. Judgment of November 27, 2008. Series C No. 192, para.155, and Case of Women Victims of Sexual Torture in Atenco v. Mexico, *supra*, para.308.

¹⁷² Cf. Brief of the State containing helpful evidence, December 11, 2018 (evidence file, folio 1833).

¹⁷³ Cf. Affidavit rendered by Vibeke Ann Muelle Jensen on August 22, 2018 (evidence file, folio 1840), and affidavit rendered by Jesús Aníbal Delgado Flores on August 22, 2018 (evidence file, folios 1841 to 1842).

C. Right to social security

C.1 Arguments of the parties and of the Commission

167. The **representatives** pointed out that the central issue in this case was the deprivation of access to and enjoyment of the right to social security, and that the State committed an autonomous violation of that right, derived from Article 26 of the American Convention. They argued that the State failed to guarantee the right to social security given the “26 years of daily denial and arbitrary conduct perpetrated initially by a State-owned mining company, followed by the absence of State protection during the privatization process, and the failure to execute domestic judicial rulings that recognized the violation.

168. The representatives considered that the arbitrary suspension of the pension payments, combined with the privatization of the Tintaya company and the failure to adopt measures of due diligence and safeguards to guarantee Mr. Muelle Flores’ right to a pension upon retirement, resulted in the violation of his right to social security. Likewise, they argued that the absence of clear and transparent rules concerning the entity that would be responsible for complying with the judgments, resulted in their non-execution. This failure to comply with the judgments deprived the victim of the right to lead a life with dignity, enjoy a healthy old age and cover his most basic necessities, such as food, housing and health care, in order to improve his quality of life and that of his family. The representatives indicated that, as a consequence of the suspension of his pension, Mr. Muelle Flores was unable to contribute to the social health insurance system, and therefore did not benefit from medical insurance and medical care on the same terms as other pensioners under Decree Law No. 20530. As a result, he incurred financial expenses in treating his health problems. The representatives also stated that, “it should not be forgotten that full respect for the guarantees of due legal process and judicial protection ultimately constitute the main support for the realization of and compliance with economic, social and cultural rights.” Finally, the representatives emphasized that the instant case “is of the utmost importance and interest since it seeks to ensure the effective protection of the rights of older persons, whose situation is characterized by a high level of social and economic vulnerability.”

169. Neither the **Commission** nor the **State** presented arguments regarding the alleged violation of Article 26 of the Convention.

C.2 Considerations of the Court

170. The Court advises that in the instant case, the legal problem presented by the representatives is related to the scope of the right to social security, understood as an autonomous right derived from Article 26 of the American Convention. Thus, the arguments of the representatives follow the same approach adopted by this Court since the case of *Lagos del Campo v. Peru*,¹⁷⁴ which has been continued in subsequent decisions.¹⁷⁵ In this regard, the Court recalls that in the case of *Poblete Vilches et al. v. Chile* it stated the following:

Thus, it may be clearly interpreted that the American Convention embodied in its catalogue of protected rights the economic, social, cultural and environmental rights (ESCER) derived from the standards set forth in the Charter of the Organization of American States (OAS), and from

¹⁷⁴ Cf. *Case of Lagos del Campo v. Peru*, *supra*, paras. 141–150 and 154.

¹⁷⁵ Cf. Environment and human rights (the State’s obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity- interpretation and scope of Articles 4(1) and 5(1), in relation to Articles 1(1) and 2 of the American Convention on Human Rights). *Advisory Opinion OC-23/17* of November 15, 2017. Series A No. 23, para. 57; *Case of Dismissed Employees of PetroPerú et al. v. Peru*, *supra*, para. 192; *Case of San Miguel Sosa et al. v. Venezuela*, *supra*, para. 220; *Case of Poblete Vilches et al. v. Chile*, *supra*, para. 100, and *Case of Cuscul et al. v. Guatemala*, *supra*, para. 73.

the rules of interpretation established in Article 29 of the Convention; in particular, it prohibits any restriction or exclusion of the rights established in the American Declaration and even those recognized in the domestic sphere. Likewise, in line with a systematic, teleological and evolutive interpretation, the Court has referred to the national and international *corpus iuris* in this matter to give specific content to the scope of the rights protected by the Convention, in order to determine the scope of the specific obligations related to each right.¹⁷⁶

171. In this section, the Court will rule, for the first time, on the right to social security, specifically the autonomous right to a pension, as an integral part of ESCER and to that end will proceed as follows: a) the right to social security as an autonomous and justiciable right; b) the content of the right to social security, and c) effects on the right to social security in the instant case.

i) The right to social security as an autonomous and justiciable right

172. To identify those rights that can be derived interpretatively from Article 26, it is necessary to consider that this refers directly to the economic, social, educational, scientific and cultural standards set forth in the OAS Charter. From a reading of the latter instrument, the Court notes that it recognizes social security in Article 3(j)¹⁷⁷ stating that "Social justice and social security are the bases of lasting peace." Likewise, Article 45(b)¹⁷⁸ of the OAS Charter establishes that "b) Work is a right and a social duty, it gives dignity to the one who performs it, and it should be performed under conditions, including a system of fair wages, that ensure life, health and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working." Meanwhile, Article 45 of the Charter¹⁷⁹ establishes that "man can only achieve the full realization of his aspirations within a just social order." Therefore, the Member States agree to dedicate every effort to the application of certain principles and mechanisms, including, "(h) the development of an efficient social security policy." In Article 46 of the Charter the States recognize that "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."

173. Thus, the Court considers that the right to social security is referred to with a sufficient degree of specificity in the OAS Charter to establish its existence and implicit recognition. In particular, from the different references, the Court notes that the purpose of the right to social security is to ensure life, health and a decent standard of living to everyone in their old age, or in the case of events that deprive them of the possibility of working; that is, in relation to future events that could affect their quality of life. Accordingly, the Court considers that the right to social security is a right protected by Article 26 of the American Convention.

174. It is for this Court, then, to determine the scope of the right to social security, in particular the right to a pension in the context of this case (*supra* para. 171), in light of the *international corpus iuris* on the matter. The Court recalls that the obligations contained in Articles 1(1) and 2 of the

¹⁷⁶ Cf. *Case of Poblete Vilches et al. v. Chile*, *supra*, para. 103, and *Case of Cuscul Pivaral et al. v. Guatemala*, *supra*, para. 73.

¹⁷⁷ Article 3(j) of the OAS Charter indicates that "[s]ocial justice and social security are the bases of lasting peace."

¹⁷⁸ Article 45 of the OAS Charter establishes that "[t]he 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) [w]ork 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."

¹⁷⁹ Article 45(h) of the OAS Charter refers to: "[d]evelopment of an efficient social security policy."

American Convention constitute, ultimately, the basis for determining a State's international responsibility for violations of the rights recognized in the Convention,¹⁸⁰ including those recognized under Article 26. However, the American Convention itself explicitly refers to the general rules of international law for its interpretation and application, specifically through Article 29, which establishes the *pro personae principle*.¹⁸¹ Thus, as has been the consistent practice of this Court,¹⁸² when determining the compatibility of a State's acts and omissions, or of its norms, with the American Convention or other treaties over which it has jurisdiction, it is able to interpret the corresponding obligations and rights in light of other pertinent treaties and norms.

175. Accordingly, the Court will use the sources, principles and criteria of the international *corpus iuris* as special rules that are applicable in determining the content of the right to social security. The Court advises that these norms will be used to supplement the provisions of the American Convention, and affirms that is not assuming a jurisdiction over some treaties that it does not have, nor is it granting Convention status to norms contained in other national or international instruments related to ESCER.¹⁸³ On the contrary, the Court will make an interpretation pursuant to the standards established in Article 29, and its own case law, in order to update the meaning of the rights derived from the OAS Charter that are recognized by Article 26 of the Convention. The determination of the right to social security will place special emphasis on the American Declaration, given that this Court has established 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.¹⁸⁴

176. Similarly, this Court has indicated on other occasions that human rights treaties are living instruments, the interpretation of which must accompany the evolution of the times and current living conditions. An evolving interpretation is consistent with the general rules of interpretation established in Article 29 of the American Convention, as well as in the Vienna Convention.¹⁸⁵ In

¹⁸⁰ Cf. Case of the "Mapiripán Massacre" v. Colombia. Judgment of September 15, 2005. Series C No. 134, para. 107, and Case of Cuscul Pivaral et al. v. Guatemala, supra, para. 100.

¹⁸¹ Cf. Case of the Pacheco Tineo Family v. Bolivia. Preliminary objections, merits, reparations and costs. Judgment of November 25, 2013. Series C No. 272, para. 143, and Case of Cuscul Pivaral et al. v. Guatemala, supra, para. 100.

¹⁸² Cf. Case of Poblete Vilches et al. v. Chile, supra, para. 103; Case of Lagos del Campo v. Peru, supra, para. 145; Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs. Judgment of November 30, 2016. Series C No. 329, para. 168; Case of the Pacheco Tineo Family v. Bolivia, para. 129; 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 Gelman v. Uruguay. Merits and reparations. Judgment of February 24, 2011. Series C No. 221, para. 78 and 121, and Case of Cuscul Pivaral et al. v. Guatemala, supra, para. 100.

¹⁸³ Cf. Case of the Pacheco Tineo Family v. Bolivia, supra, para. 143 and Case of Cuscul Pivaral et al. v. Guatemala, supra, para. 101.

¹⁸⁴ Cf. Interpretation of the American Declaration on 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, and Case of Cuscul Pivaral et al. v. Guatemala, supra, para. 101.

¹⁸⁵ Cf. The Right to Information on Consular Assistance within the Framework of the Guarantees of the Due Process of Law. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 114, and *The institution of asylum, and its recognition as a human right under the Inter-American System of Protection (interpretation and scope of Articles 5, 22(7) and 22(8) in relation to Article 1(1) of the American Convention on Human Rights)*. Advisory Opinion OC-25/18 of May 30, 2018. Series A No. 25, para. 137.

addition, Article 31, paragraph 3 of the Vienna Convention authorizes relevant agreements regarding the interpretation of a treaty or the application of its provisions or relevant rules of international law that States have expressed on treaty matters, which are some of the methods related to an evolving vision of the Treaty. Thus, in order to determine the scope of the right to social security, particularly the right to a pension in the context of a contributory State pension system, implicit in the economic, social, educational, scientific and cultural standards set forth in the OAS Charter, the Court will refer to the relevant instruments of the *international corpus iuris*.

177. This Court will now examine the scope and content of this right for the purposes of this case.

ii) The content of the right to social security

178. As noted previously, Article 45(b) of the OAS Charter expressly states that work should be performed under conditions 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.

179. Likewise, Article XVI¹⁸⁶ of the American Declaration specifies the right to social security, stating that "every person has the right to social security which will protect him from the consequences of unemployment, old age, and any disabilities arising from causes beyond his control that make it physically or mentally impossible for him to earn a living."

180. Similarly, Article 9 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights or "Protocol of San Salvador" (hereinafter "Protocol of San Salvador"),¹⁸⁷ establishes that "1) Everyone shall have the right to social security protecting him from the consequences of old age and of disability which prevents him, physically or mentally, from securing the means for a dignified and decent existence. In the event of the death of a beneficiary, social security benefits shall be applied to his dependents. 2) In the case of persons who are employed, the right to social security shall cover at least medical care and an allowance or retirement benefit in the case of work accidents or occupational disease and, in the case of women, paid maternity leave before and after childbirth."

181. In the universal sphere, Article 22 of the Universal Declaration of Human Rights¹⁸⁸ establishes that "[e]veryone, as a member of society, has the right to social security and is entitled to the realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality." Similarly, Article 25 provides that "everyone has the right to an adequate standard of living [...] and to security in the event of

¹⁸⁶ Approved at the Ninth Pan American Conference held in Bogotá, Colombia, 1948.

¹⁸⁷ Adopted in San Salvador, El Salvador, on November 17, 1988, confirmed at the Eighteenth Regular Session of the General Assembly. It entered into force on November 16, 1999. Peru signed it on November 17, 1988 and ratified it on May 17, 1995. Article 9 establishes that: "1) Everyone shall have the right to social security protecting him from the consequences of old age and of disability which prevents him, physically or mentally, from securing the means for a dignified and decent existence. In the event of the death of a beneficiary, social security benefits shall be applied to his dependents. 2) In the case of persons who are employed, the right to social security shall cover at least medical care and an allowance or retirement benefit in the case of work accidents or occupational disease and, in the case of women, paid maternity leave before and after childbirth."

¹⁸⁸ Adopted and proclaimed by the Resolution of General Assembly 217 A (iii) of December 10, 1948, in Paris. Article 25 establishes that: "(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. (2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection."

unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.” For its part, Article 9 of the International Covenant on Economic, Social and Cultural Rights¹⁸⁹ (ICESCR) also recognizes “the right of everyone to social security, including social insurance.”

182. Furthermore, the right to social security is established in Articles 10 and 11 of the 1993 Constitution of Peru.¹⁹⁰

183. That said, from Article 45 of the OAS Charter, interpreted in light of the American Declaration and of other instruments mentioned, may be derived certain constituent elements of the right to social security. For example, this is a right that seeks to protect the individual from future contingencies that, should they occur, would have harmful consequences for that person; therefore, measures must be taken to protect them.¹⁹¹ In this particular case, the right to social security aims to protect an individual from situations that will arise when they reach a certain age and are physically or mentally unable to obtain the necessary means of subsistence for an adequate standard of living, which may, in turn, deprive them of their ability to fully exercise all their other rights. This aspect also concerns one of the constituent elements of the right, because social security must be implemented in a way that guarantees conditions that ensure life, health and a decent economic status.

184. Although the right to social security is widely recognized in the international *corpus iuris*,¹⁹² both the International Labour Organization (hereinafter “ILO”), and the United Nations Committee on Economic, Social and Cultural Rights (hereinafter the “CESCR”), following the principal instruments adopted by the former,¹⁹³ have developed the content of the right to social security with greater clarity, which will allow the Court to interpret the content of the right and obligations of the Peruvian State pursuant to the facts of this case.

185. In general terms, the ILO has defined the right to social security as “the protection that a society provides to individuals and households to ensure access to health care and to guarantee income security, particularly in cases of old age, unemployment, sickness, invalidity, work injury, maternity or loss of a breadwinner.”¹⁹⁴ In the specific case of a retirement pension based

¹⁸⁹ Adopted and opened for signature, ratification and accession by the General Assembly in Resolution 2200 A (XXI), of December 16, 1966. Entry into force: January 3, 1976. Ratified by Peru on April 28, 1978. In relation to Social Security, Article 10 establishes that: “The States Parties to the present Covenant recognize that: 2) Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.”

¹⁹⁰ Article 10 establishes: “Right to Social Security. Article 10. - The State recognizes the universal and progressive right of every person to social security, for his protection from the contingencies specified by law and for the improvement of his quality of life. Article 11 establishes: “Free access to health benefits and pensions. Article 11.-The State guarantees free access to health benefits and pensions, through public, private or mixed entities. It also oversees their effective operation. The law establishes the National Government entity that administers the State pension regimes.”

¹⁹¹ Cf. Working Group to Examine the National Reports envisioned in the Protocol of San Salvador “Progress indicators for measuring rights under the Protocol of San Salvador,” OEA/Ser.L/XXV.2.1; GT/PSS/doc.2/11 rev.2, of December 16, 2011, para. 62. This document was based on the guidelines and criteria presented by the Inter-American Commission on Human Rights.

¹⁹² Article 11 of the United Nations Declaration on Social Progress and Development; Articles 11 and 13 of the United Nations Convention on the Elimination of All Forms of Discrimination against Women; Article 26(1) of the Convention on the Rights of the Child; Article 5 (e)(1), iv) of the International Convention on the Elimination of All Forms of Racial Discrimination; Articles 27 and 54 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; Articles 12,13,14 of the European Social Charter. Includes articles of Conventions 102 and 128 [International Labour Organization](#) (Peru is not a party to the latter), and Recommendations 67, 167 and 202.

¹⁹³ Cf. Convention C 102 [International Labour Organization](#), Convention C128 [International Labour Organization](#), Recommendation 67, 167 and 202 [International Labour Organization](#).

¹⁹⁴ ILO, “*Social Security Facts*”, publication of the International Labour Office, Geneva, Switzerland, June 6, 2003,

on a contributory system, this is a component of social security that aims to cover subsistence needs of those who can no longer work, when the contingency of survival beyond a prescribed age is met. In such cases, the old age pension is a form of deferred salary for a worker, an acquired right after the accumulation of contributions and time worked.

186. In General Comment No. 19 on “the right to social security” the CESCR has established that this right encompasses the right to access and maintain benefits, whether in cash or in kind, without discrimination, in order to secure protection, *inter alia* (*infra* para. 187) from a lack of work-related income owing to old age.¹⁹⁵

187. Similarly, General Comment No. 19 of the CESCR has established the regulatory content of the right to social security,¹⁹⁶ emphasizing that it includes the right not to be subject to arbitrary and unreasonable restrictions of existing social security coverage, whether obtained publicly or privately, as well as the right to equal enjoyment of adequate protection from social risks and contingencies. As fundamental elements of this right it established the following:

a) Availability: The right to social security requires, for its implementation, that a system, whether composed of a single scheme or variety of schemes, is available and in place to ensure that benefits are provided for the relevant social risks and contingencies. The system should be established under domestic law, and public authorities must take responsibility for the effective administration or supervision of the system. The schemes should also be sustainable, including those concerning provision of pensions, in order to ensure that the right can be realized for present and future generations.

b) Social risks and contingencies: The social security system should provide for the coverage of the following nine principal branches of social security, namely: i) health care; ii) sickness; iii) old age; iv) unemployment; v) employment injury; vi) family and child support; vii) maternity; viii) disability, and ix) survivors and orphans. In relation to health care, States Parties have the obligation to guarantee that health systems are established to provide adequate access to health services for all;¹⁹⁷ such services must be affordable.¹⁹⁸ Regarding old age, States Parties should take appropriate measures to establish social security schemes that provide benefits to older persons, starting at a

available at: https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_067592.pdf Also, the ILO’s Committee of Experts concluded that the case law of various Constitutional Courts in Latin America establish the right to social security through seven fundamental concepts: “[1] the right to social security is a fundamental right; [2] the right to social security has the dual purpose to protect individuals and improve their quality of life; [3] the right to social security permits the recognition of social security as an institutional guarantee; [4] the concept of social security refers to all means of institutional protection against the risks that threaten the ability and opportunity of people and their families to generate sufficient income to have a decent human existence; [5] social security has as its own responsibility the integral coverage of the negative consequences produced by social contingencies; [6] national social security institutions have the duty to calculate benefits correctly and to grant benefits in full, respecting the principle of legitimate expectations of a beneficiary, and [7] on the basis of the urgency of each case and social solidarity, individuals who are not covered by the social security system may be entitled to social security benefits.” Cf. International Labour Conference, 100th Session, 2011, *General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization*, Report of the Committee of Experts on the Application of Conventions and Recommendations (Articles 19, 22 and 35 of the Constitution), Report III (Part 1B), p. 131, para. 281.

¹⁹⁵ Cf. UN, Committee on Economic, Social and Cultural Rights, *General Comment No. 19. The right to social security (Article 9)*, February 4, 2008, para. 2.

¹⁹⁶ Cf. UN, Committee on Economic, Social and Cultural Rights, *General Comment No. 19. The right to social security (Article 9)*, February 4, 2008, paras. 9 to 28.

¹⁹⁷ *General Comment No. 14 (2000). The right to the highest attainable standard of health (Art. 12)*. Coverage must include any condition of morbidity, regardless of its causes, pregnancy and childbirth and its consequences, general medical care and hospitalization.

¹⁹⁸ See paragraph 4 *supra* and paragraphs 23 to 27 *infra*.

specific age, to be prescribed by national law.¹⁹⁹

c) *Adequacy*:²⁰⁰ Benefits, whether in cash or in kind, must be adequate in amount and duration in order that everyone may realize his or her rights to family protection and assistance, an adequate standard of living and adequate access to health care. States Parties must also pay full respect to the principle of human dignity and the principle of non-discrimination, so as to avoid any adverse effect on the levels of benefits and the form in which they are provided. The methods applied should ensure the adequacy of benefits. The adequacy criteria should be monitored regularly to ensure that beneficiaries are able to afford the goods and services they require to realize their Covenant rights. When a person makes contributions to a social security scheme that provides benefits to cover lack of income, there should be a reasonable relationship between earnings, paid contributions, and the amount of the relevant benefit.²⁰¹

d) *Accessibility*: which includes: i) Coverage: all persons should be covered by the social security system, without discrimination. In order to ensure universal coverage, non-contributory schemes will be necessary; ii) Eligibility: the qualifying conditions for benefits must be reasonable, proportionate and transparent; iii) Affordability: if a social security scheme requires contributions, those contributions should be stipulated in advance. The direct and indirect costs associated with making contributions must be affordable for all and must not compromise the realization of other rights; iv) Participation and information: beneficiaries of social security schemes must be able to participate in

¹⁹⁹ See General Comment Nº 6 (1995) on the Economic, Social and Cultural Rights of Older Persons.

²⁰⁰ Cf. ILO, *Recommendation No. 67, Income Security Recommendation*, of May 12, 1944, adopted in Philadelphia, 26th Session CIT meeting, Guiding Principle 1, which establishes that: "1. Income security schemes should relieve want and prevent destitution by restoring, up to a reasonable level, income which is lost by reason of inability to work (including old age) or to obtain remunerative work or by reason of the death of a breadwinner." Also see *Recommendation No. 202, Social Protection Floors Recommendation*, of June 14, 2012, adopted in Geneva, ILC 101st Session. Article 3, subparagraphs b) and c) establish that: "3. Recognizing the overall and primary responsibility of the State in giving effect to this Recommendation, Members should apply the following principles: b) entitlement to benefits prescribed by national law, and c) adequacy and predictability of benefits." Article 4 establishes that: "4. Members should, in accordance with national circumstances, establish as quickly as possible and maintain their social protection floors comprising basic social security guarantees. The guarantees should ensure at a minimum that, over the life cycle, all in need have access to essential health care and to basic income security which together secure effective access to goods and services defined as necessary at the national level." Article 5, subparagraphs a) and d) establish that: "5. The social protection floors referred to in Paragraph 4 should comprise at least the following basic social security guarantees: a) access to a nationally defined set of goods and services, constituting essential health care, including maternity care, that meets the criteria of availability, accessibility, acceptability and quality, and d) basic income security, at least at a nationally defined minimum level, for older persons." Also, Article 8, subparagraphs b) and c) establish that: "8. When defining the basic social security guarantees, Members should give due consideration to the following: b) basic income security should allow for life in dignity. Nationally defined minimum levels of income may correspond to the monetary value of a set of necessary goods and services, national poverty lines, income thresholds for social assistance or other comparable thresholds established by national law or practice, and may take into account regional differences, and c) the levels of basic social security guarantees should be regularly reviewed through a transparent procedure that is established by national laws, regulations or practice, as appropriate."

²⁰¹ The Court also considers that an adequate level of benefits should provide a person with a decent standard of living that not only seeks to satisfy their purely biological needs, but also to ensure dignified living conditions. It is important to emphasize that, as a general rule, the retirement pensions of older adults constitute the only source of income for the pensioner and his family; therefore, an amount equivalent to an adequate level of income is of special importance for older persons. Colombia's Constitutional Court has indicated that: "(...) in different judgments - some of which have involved a large number of individuals - the Court, following well-settled case law, has indicated that the right to social security may be considered a basic right when failure to pay pension allowances violates or threatens to violate fundamental rights, such as the rights to life or health. This occurs in cases in which the failure to pay a pension endangers the minimum subsistence of retired persons, a very common situation among those who have reached old age, since they are no longer able to participate in the labor market and generally rely exclusively on their allowance for their subsistence." Likewise, the Constitutional Court established that "To determine the effects on the right to minimum subsistence [that must be covered with the pensions of retirees] this body has defined it as 'the portion of income the purpose of which is to cover basic needs such as food, health care, education, recreation, public utility services, etc.' Therefore, our case law has considered that the concept of minimum subsistence includes not only a quantitative component of simple subsistence, but also a quantitative element related to respect for human dignity as a founding principle of the constitutional order". Cf. Judgment T 236/2016 of May 13, 2016. Action of protection, paras. 4.1 and 4.4.

the administration of the social security system.²⁰² The system should be established under national law and ensure the right of individuals and organizations to seek, receive and impart information on all social security entitlements in a clear and transparent manner, and v) Physical access: benefits should be provided in a timely manner and beneficiaries should have physical access to the social security services in order to access benefits and information, and make contributions where relevant [...].

e) *Relationship with other rights*: The right to social security plays an important role in supporting the realization of many economic, social and cultural rights.

188. Furthermore, General Comment No. 19 has established that the right of access to justice forms part of the right to social security. Thus, any individuals or groups who have experienced violations of their right to social security should have access to effective judicial or other appropriate remedies, at both national and international levels, including adequate reparations.²⁰³

189. States also have the obligation to facilitate the realization of the right to social security by adopting positive measures to assist individuals and communities to enjoy this right.²⁰⁴ Not only must the States facilitate said exercise, but they must also ensure that "before any action is carried out by the State party, or by any other third party, that interferes with the right of an individual to social security the relevant authorities must ensure that such actions are performed in a manner warranted by law, compatible with the Covenant, and include: (a) an opportunity for genuine consultation with those affected; (b) timely and full disclosure of information on the proposed measures; (c) reasonable notice of the proposed actions; (d) legal recourse and remedies for those affected; and (e) legal assistance for obtaining legal remedies[...]."²⁰⁵

190. That said, the Court considers that the nature and scope of the obligations derived from the protection of social security include aspects that are immediately enforceable, as well as aspects of a progressive nature.²⁰⁶ Regarding the former (obligations of an immediate nature), the Court recalls that States must take effective measures to ensure access, without discrimination, to the benefits recognized by the right to social security and equal rights for men and women, among other matters.²⁰⁷ Regarding the latter (obligations of a progressive nature), this means that the States

²⁰² Articles 71 and 72 of the ILO Social Security (Minimum Standards) Convention N° 102 (1952) contains similar requirements. Peru ratified that Convention on August 23, 1961.

²⁰³ Cf. UN, Committee on Economic, Social and Cultural Rights, *General Comment No. 19. The right to social security (Article 9)*, February 4, 2008, para. 77. See also ILO, Convention No. 102, Social Security (Minimum Standards) Convention, June 28, 1952, adopted in Geneva, ILC 35th Session, Article 70, subparagraph 1, which establishes that: "1. Every claimant shall have a right of appeal in case of refusal of the benefit or complaint as to its quality or quantity." See also, ILO, *Recommendation No. 202, Social Protection Floors Recommendation*, of June 14, 2012, adopted in Geneva, ILC 101st Session. Article 7 establishes that: "7. Basic social security guarantees should be established by law. National laws and regulations should specify the range, qualifying conditions and levels of the benefits giving effect to these guarantees. Impartial, transparent, effective, simple, rapid, accessible and inexpensive complaint and appeal procedures should also be specified. Access to complaint and appeal procedures should be free of charge to the applicant. Systems should be in place that enhance compliance with national legal frameworks."

²⁰⁴ Paragraph 48 of General Comment No. 19 establishes that: "[t]he obligation to facilitate requires States parties to take positive measures to assist individuals and communities to enjoy the right to social security. The obligation includes, inter alia, according sufficient recognition of this right within the national political and legal systems, preferably by way of legislative implementation; adopting a national social security strategy and plan of action to realize this right; and ensuring that the social security system will be adequate, accessible for everyone and will cover social risks and contingencies."

²⁰⁵ Cf. UN, Committee on Economic, Social and Cultural Rights, *General Comment No. 19. The right to social security (Article 9)*, February 4, 2008, para. 78.

²⁰⁶ Cf. *Mutatis mutandis*, Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs. Judgment of March 8, 2018. Series C No. 349, para. 104 and Case of Cuscul Pivaral et al. v. Guatemala, supra, para. 98.

²⁰⁷ Cf. UN, Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, December 14, 1990, U.N. Doc. E/1991/23, para. 3, and Committee on

Parties have the specific and constant obligation to advance as rapidly and efficiently as possible towards the full realization of this right,²⁰⁸ subject to available resources, by legislation or other appropriate means.²⁰⁹ There is also an obligation of *non-retrogression* regarding the realization of the rights attained.²¹⁰ Consequently, the obligations to respect and guarantee rights established in the Convention, as well as domestic legal effects (Articles 1(1) and 2 of the American Convention), are essential to achieve their effectiveness.

191. However, the Court notes that the instant case does not concern the obligations of progressive development derived from Article 26 of the American Convention, but rather the failure to implement the right to a pension as an integral part of Mr. Muelle Flores' right to social security, owing to the failure to execute and comply with the judgments handed down in his favor in the domestic courts, in the context of the privatization of the State company, following his retirement. Mr. Muelle Flores acquired his right to a pension under a State-administered contributory system; that is, he acquired the right to receive a pension after having paid his contributions for several years. The legality of his enrolment in this system was confirmed at the domestic level (*supra* para. 74).

192. Accordingly, based on the criteria and constituent elements of the right to social security, and taking into account the facts and specificities of this case, the State's obligations in relation to the right to a pension are as follows: a) the right to access a pension after reaching the legal age for that purpose and the requirements established by national law, for which there must be a functioning social security system that guarantees benefits. This system should be administered or supervised and audited by the State (in the case of a privately administered system); b) guarantee that the benefits are adequate in amount and duration, to provide the pensioner with a decent standard of living and adequate access to health care, without discrimination; c) ensure the accessibility of the pension, that is, reasonable, proportionate and transparent conditions of access. Also, the cost of the contributions must be affordable and the beneficiaries must receive clear and transparent information, especially if any measure is adopted that could affect their right, such as the

Economic, Social and Cultural Rights, *General Comment No. 19, The right to social security (Article 9)*, February 4, 2008, para. 40.

²⁰⁸ Cf. UN, Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, December 14, 1990, U.N. Doc. E/1991/23, para. 9, and Committee on Economic, Social and Cultural Rights, *General Comment No. 19, The right to social security (Article 9)*, February 4, 2008, paras. 40 and 41.

²⁰⁹ Article 26 of the Convention establishes: "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, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires, subject to available resources, by legislation or other appropriate means."

²¹⁰ Cf. Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru, *supra*, paras. 102, 103, and Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs. Judgment of March 8, 2018. Series C No. 349, para. 104. See also: "Working Group to Examine the National Reports envisioned in the Protocol of San Salvador". Initially, the Working Group prepared the document "Progress indicators for measuring rights under the Protocol of San Salvador," OEA/Ser.L/XXV.2.1; GT/PSS/doc.2/11 rev.2, of December 16, 2011, based on the guidelines and criteria presented by the Inter-American Commission on Human Rights. Following consultations with the States and civil society, these were adopted by the Forty-second General Assembly held in Cochabamba, Bolivia in June 2012 (AG/RES. 2713 (XLII-O/12)). On that occasion, the rights to social security, health and education were addressed. Subsequently, a second group of rights was addressed and the Working Group issued the "Progress indicators for measuring rights contemplated in the Protocol of San Salvador – second group of rights," OEA/Ser.L/XXV.2.1 GT/PSS/doc.9/13, adopted by the OAS General Assembly in Resolution AG/RES. 2823 (XLIV-O/14), at the second plenary session on June 4, 2014. Finally, in 2015, the Working Group combined the two groups of rights and published the document "Progress indicators for measuring rights contemplated in the Protocol of San Salvador," OEA/Ser.D/XXVI.11 (2015). On that occasion, they addressed the right to work and trade union rights, the right to adequate food, a healthy environment, and the benefits of culture. Cf. UN, Committee on Economic, Social and Cultural Rights, *General Comment No. 19. The right to social security (Art. 9 of the Covenant)*, February 4, 2008, para. 42.

privatization of a company; d) retirement pension benefits must be guaranteed and paid in a timely manner and without delays, bearing in mind the importance of this principle for older persons, and e) effective grievance mechanisms must be available in the event of a violation of the right to social security, in order to guarantee access to justice and effective judicial protection; this includes the realization of that right through the effective implementation of favorable rulings issued at the domestic level.

193. Based on the criteria established in the preceding paragraphs and the Court's conclusions regarding the right to judicial protection (*supra* paras.149), and considering, in particular, that the State company from which Mr. Muelle Flores retired was privatized, the Court will now analyze the effects on the right to social security in this specific case.

iii) Effects on the right to social security in the instant case

194. In the instant case, Decree Law No. 20530 regulated a pension scheme in Peru based on the contributions of workers enrolled in that system. The application of this system to Mr. Muelle Flores was suspended in 1991. However, two *amparo* judgments and a ruling in a contentious-administrative proceeding declared that the unilateral suspension of Mr. Muelle Flores' pension payments by the public company was arbitrary, recognized his right to a pension, and ordered its restoration. Despite this, his right to a pension did not materialize owing to the failure to comply with and execute those decisions. It is important to emphasize that access to justice not only forms part of the content of the right to social security, but that respect for judicial guarantees and judicial protection are also essential to ensure the protection and the effectiveness of the economic, social and cultural rights.

195. The mere recognition of a pension does not mean that this right has been satisfied or realized. For this to occur, it is indispensable, in the interest of effectively realizing that right, to execute the domestic rulings issued in favor of Mr. Muelle Flores and pay the amounts owed for unpaid pensions and continue to pay those to which he will be entitled in the future.

196. In this case, it is important to highlight the State's obligations in relation to Article 26 of the Convention, in the context of a privatization process. The privatization of Tintaya S.A. was part of an effort to promote private investment in companies that form part of the State's business activities (*supra* para. 57) and, although this is not prohibited under the Covenant,²¹¹ it can have various effects on the rights of its workers or retirees, as in the case of Mr. Muelle Flores. As the expert witness Christian Courtis has indicated, "privatization does not relieve the State of its human rights obligations, and it must observe due diligence to ensure that the transfer of a public company to the private sector does not affect the rights of those linked to that company, such as workers entitled to the right to social security and users. As the CESCR has stated, "the obligations to protect the right to work include, *inter alia*, the duties of the States parties to [...] ensure that privatization measures do not undermine workers' rights."²¹² The same principle is applicable to the right to social security and to other social rights."²¹³

197. Regarding this last point, although the CESCR has indicated the importance of adopting measures to ensure that privatization does not undermine the rights of workers, as part of the State's "obligations to protect," the Court considers that within the framework of the general obligations to

²¹¹ Cf. *Mutatis mutandis*, UN, Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 24* (2017), para. 21.

²¹² U.N. CESCR, *General Comment No. 18* (2005), para. 25.

²¹³ Cf. Affidavit rendered by Christian Courtis on August 30, 2018 (evidence file, folio 1823).

respect and guarantee rights and to adopt domestic legal effects, as established in the Convention, the States also have an obligation to adopt measures to ensure that privatization processes do not have detrimental effects on the rights of its pensioners. This, in consideration of the essential nature and special importance that the old age pension has in the life of a retired person, as it may constitute the only income they receive in their old age as a substitute for a salary and to provide for their basic subsistence needs. The pension, and social security in general, provide a means of protection to enjoy a life with dignity. Old-age pensions are granted to older persons who, in some cases, such as Mr. Muelle Flores, find themselves in a situation of vulnerability.²¹⁴ Indeed, in General Comment No. 6 on older persons, the CESCR has indicated that it is “[...] of the view that States Parties to the Covenant are obligated to pay particular attention to promoting and protecting the economic, social and cultural rights of older persons.”²¹⁵

198. Mr. Muelle Flores stopped receiving his pension in 1991 and, by the end of the 1990s, began to lose his hearing in one ear, which resulted in a disability (*supra* para. 84). This situation has gradually deteriorated over the years, and Mr. Muelle Flores is now 82 years of age and relies on his family for financial assistance to survive, despite having paid the contributions required under Peruvian law to enjoy a pension, after 35 years of service to the State (*supra* para. 44). Owing to the lack of compliance and execution of the domestic judgments, Mr. Muelle Flores’ right to a pension has not been guaranteed in a timely manner; on the contrary, to date those judgments have not been executed, since the corresponding process remains open. Therefore, the existing mechanisms have not achieved the realization of that right.

199. Also, as indicated previously (*supra* para.187), one of the constituent elements of this right is accessibility which, in turn, includes the components of participation and information. Thus, Mr. Muelle had the right to receive timely, clear, transparent and complete information on the effects that the privatization might have on the payment of his pension, something that did not occur in this case. Although the company, when it was State-owned, had the obligation to pay Mr. Muelle Flores’ pension, it was evident that, after privatization, this right could have been affected owing to the transfer of a public company to private ownership. One of the clearest negative effects of the privatization process was the failure to determine which entity would be responsible for the administration and payment of the pensions of retired workers. Indeed, once the decision had been taken to privatize the company, the State had the duty to clearly establish the consequences of the privatization on the pensions it had granted, explicitly determining who would have responsibility for paying Mr. Muelle Flores’ legally recognized pension and providing him with relevant, adequate and timely information.

200. From the evidence provided to this Court, the State did not, at any time, provide timely and comprehensive information to Mr. Muelle Flores on the manner in which his right to a pension would be made effective after privatization, especially in light of the existing judicial ruling. In particular, the Court notes that the State did not explicitly and clearly establish which entity would be in charge of the administration and payment of Mr. Muelle Flores’ pension, since the public company, which should have been responsible for the payment until that moment, was to become a private company. This lack of clear regulation and information regarding who would be responsible for paying Mr. Muelle Flores’ pension created a situation of uncertainty over its payment which, instead of facilitating his enjoyment of that right, made it exceedingly difficult. The change in the company’s legal status

²¹⁴ The inter-American system adopted the Inter-American Convention on Protecting the Human Rights of Older Persons on June 15, 2015, an instrument specifically for the protection of older persons, precisely due to the situation of vulnerability that they could face. This instrument has been in force since January 11, 2017. Article 2 of that instrument establishes that “For the purposes of this Convention the following definitions shall apply: “Older person”: A person aged 60 or older, except where domestic legislation has determined a minimum age that is lesser or greater, provided that it is not over 65 years. This concept includes, among others, elderly persons. The State of Peru has not ratified this agreement.

²¹⁵ UN, CESCR, *General Comment No. 6*, (1995), para. 13.

was the result of a decision taken by the State, and therefore it was up to the State itself to communicate, in an adequate and timely manner, the effects of that decision on the victim's acquired rights, which had also been judicially recognized.

201. Furthermore, the Court notes that, at the time of the facts, the State did not have clear regulations that clearly established how the pension rights of its retired workers would be protected after privatization, in accordance with its obligation to adopt the measures necessary to realize the right to social security. Although the sale contract between Tintaya S.A. and Magma Copper Corporation mentioned the number of retirees and pensioners that the State company had, and referred to responsibility for unregistered liabilities or contingencies (*supra* para. 59), this information was never clearly explained to Mr. Muelle Flores, in order to establish how his pension would continue to be guaranteed, based on the domestic judicial rulings.

202. The Court considers that the State failed to fulfill its obligations, namely, the obligation to adopt safeguards to prevent the negative effects of the privatization process resulting from a decision taken by the State itself; the obligation to inform Mr. Muelle Flores of the manner in which his legally recognized pension would be guaranteed; the obligation to clearly establish which entity would be responsible for paying his pension; and the obligation to comply with and execute domestic judicial decisions. These are all obligations of an immediate nature, which have nothing to do with the progressive development of the right.

203. At the same time, the Court observes that, according to Peruvian law, pensioners who retired under Decree Law No. 20530 had the right to obtain health insurance with EsSalud, the health care provider within Peru's social security system. The pensioner had a right to this insurance since the entity responsible for paying his pension was required to retain 4% of his pension to pay his health insurance contributions. This deduction was mandatory, that is, the health insurance to which Mr. Muelle Flores was entitled, like any other pensioner under that pension scheme, was provided to him based on his contributions to that system. In the instant case, because the State stopped paying Mr. Muelle Flores the pension to which he had an acquired right – a right subsequently recognized by the courts – the contributions required to access the health insurance to which he was entitled were not made and, therefore, the victim did not receive the health coverage to which he was also entitled under Peruvian law and which, in turn, forms part of the right to social security. As result of this situation, Mr. Muelle Flores had to cover the cost of treatment for his health problems and the surgical intervention he required (*supra*, para. 84) with his own money, instead of being covered by the social health insurance to which he was entitled, in violation of his right to social security.

204. Furthermore, the Court considers that in a context in which a legally recognized pension is not paid, the rights to social security, personal integrity and human dignity are also affected, since they are interrelated, and that sometimes the violation of one right directly affects another, a situation that is accentuated in the case of older persons. Although neither the Commission nor the representatives have expressly alleged the violation of Articles 5(1) and 11(1) of the Convention in the instant case, that does not prevent this Court from applying those precepts by virtue of a general principle of law, *iura novit curia*, on which international jurisprudence has repeatedly relied and under which a court has the power and the duty to apply the juridical provisions relevant to a proceeding, even when the parties do not expressly invoke them.²¹⁶

205. Indeed, the lack of financial resources resulting from the failure to pay pension allowances directly undermines the dignity of an older person, since at this stage of life the pension constitutes their main source of income to cover the basic and essential necessities of a human being.

²¹⁶ Cf. Case of Velásquez Rodríguez v. Honduras. Merits, *supra*, para. 163, and Case of Vereda La Esperanza v. Colombia. Preliminary objection, merits, reparations and costs. Judgment of August 31, 2017. Series C No. 341, para.239.

206. For older persons, the impairment of their right to social security through the failure to pay pension allowances also causes anguish, insecurity and uncertainty regarding their future, given the possible lack of financial resources for their subsistence, since deprivation of income intrinsically affects the progress and development of their quality of life and their personal integrity.

207. The failure to implement the right to social security for more than 27 years seriously prejudiced the quality of life and health care coverage of Mr. Muelle, a person in a situation requiring special protection because he was an older person with a disability. The violation resulting from the failure to pay his pension exceeded a reasonable time and, as this was the victim's only income, the prolonged absence of the payments inevitably resulted in financial hardship that affected his ability to pay for his basic necessities and, consequently, affected his mental and moral integrity, as well as his dignity.

C.3 Conclusion

208. Based on the foregoing considerations, the Court concludes that the State is responsible for the violation of Article 26 of the American Convention, in relation to Articles 5, 8(1), 11(1), 25(1), 25(2)(c) and 1(1) thereof, as well as Article 2 of the American Convention, to the detriment of Mr. Oscar Muelle Flores.

D. Right to property

D.1 Arguments of the parties and of the Commission

209. The **Commission** indicated that Mr. Muelle Flores: i) was lawfully included in the Decree Law No. 20530 pension scheme, as ratified by the courts in two *amparo* judgments and in the ruling on the lawsuit filed by the company itself; ii) he was prevented from continuing to receive the benefits to which he was entitled under that system; iii) he filed judicial appeals seeking his reinstatement in that pension scheme; iv) he obtained final court judgments supporting his claim; and v) to date, these rulings have not been executed. Thus, the Commission argued that all these factors had impaired Mr. Muelle Flores' patrimony and, consequently, the State of Peru, violated the right to property established in Article 21 of the Convention.

210. The **representatives** argued that the right to property encompasses not only material possessions in the strict sense, but also the protection of acquired rights that form part of a person's patrimony. They affirmed that Mr. Muelle Flores had not received any pension payments since 1991, despite the fact that his right was judicially recognized in a final judgment in 1993. They argued that the failure to comply with both domestic rulings had resulted in a violation of the right to property, which had "property implications" (*patrimonial effects*) derived from his right to an equalized pension, an acquired right under Peru's domestic law, pursuant to Decree Law No. 20530. Therefore, the representatives concluded that the State violated Article 21 of the American Convention.

211. The **State** considered that the cases of *Five Pensioners v. Peru* and *Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru* were not relevant to the instant case, since those cases involved pensioners of public institutions, whereas the instant case concerns a pensioner of a public company that was subsequently privatized. It also affirmed that in the case *Acevedo Buendía et al. v. Peru* it was demonstrated in the domestic courts that the State had an obligation to pay the victims the amounts corresponding to the equalized pension, and only had to determine the amount owed, while in the case of Mr. Muelle Flores, it had not been proven that the State of Peru was obligated to pay the pension, since the State company that was initially obligated to do so was privatized, and the legislation on this matter had changed, thereby creating uncertainty regarding the entity responsible for the payment. Furthermore, it argued that the plaintiff

could not allege an absolute lack of compliance, since partial pension payments were made between 1999 and 2001. Therefore, the State concluded that it was not responsible for the violation of Article 21 of the Convention.

D.2 Considerations of the Court

212. In its case law, the Court has developed²¹⁷ a broad concept of property that encompasses, *inter alia*, the use and enjoyment of possessions, defined in the case of *Ivcher Bronstein v. Peru* as “those material objects that may be appropriated, or intangible objects, as well as any right that may form part of a person’s patrimony.”²¹⁸ The Court has also considered that “this concept includes all movable and immovable property, corporal and incorporeal elements, and any other intangible object of any value.”²¹⁹

213. In the cases of the *Five Pensioners v. Peru* and *Acevedo Buendía et al. v. Peru*, the Court declared a violation of the right to property owing to the patrimonial effects caused by the failure to comply with judgments that sought to protect the right to a pension, which had been acquired by the victims, in accordance with domestic laws. In the case of *Five Pensioners*,²²⁰ the Court considered that, from the time that a pensioner pays his contributions to the pension fund, ceases to work for the institution in question, and opts for the retirement regime established by law, he acquires the right to have his pension governed by the terms and conditions established by said law. In the case of *Acevedo Buendía et al. v. Peru*,²²¹ the Court declared that the right to a pension acquired by a pensioner produces “patrimonial effects,” which are protected under Article 21 of the Convention.

214. The Court also emphasizes and concurs with the points made by Christian Courtis in his expert opinion, that “[t]he benefits derived from social security, including the right to an old-age pension, form part of the right to property and both must be protected against arbitrary interference by the State. The right to property may even cover the legitimate expectations of the beneficiary, particularly when he has paid contributions through a contributory system. With even greater reason, it should cover the rights acquired once the conditions are met to obtain a benefit such as the old-age pension, particularly when that right has been recognized in a judicial ruling. Furthermore, among the wide range of interests protected by the right to property, social security benefits acquire particular significance in terms of their nature as an alimentary and income-substituting benefit.”²²²

215. In the instant case, the Court observes that, based on Decree Law No. 20530, Mr. Muelle Flores had acquired the right to an equalized pension upon retirement, on September 30, 1990, from his position as Assistant General Manager of the State-owned company Tintaya S.A. (*supra* para. 43). Likewise, his inclusion in that pension scheme was declared lawful following an administrative

²¹⁷ Cf. Case of “Five Pensioners” v. Peru. Merits, reparations and costs. Judgment of February 28, 2003. Series C No. 98, para. 173. Cf. Case of Acevedo Jaramillo et al. v. Peru, *supra*, para. 294. Cf. Case of Abrill Alosilla et al. v. Peru, *supra*, para. 82.

²¹⁸ Cf. Case of Ivcher Bronstein v. Peru. Reparations and costs. Judgment of February 6, 2001. Series C No. 74, paras. 120-122. Cf. Case of Salvador Chiriboga v. Ecuador. Preliminary objection and Merits. Judgment of May 6, 2008. Series C No. 179, para. 55. Cf. Case of Acevedo Buendía et al. (“Discharged and Retired Employees of the Comptroller’s Office”) v. Peru. Preliminary objection, merits, reparations and costs. Judgment of July 1, 2009. Series C No.198, para. 84. Cf. Case of Abrill Alosilla et al. v. Peru, *supra*, para. 82.

²¹⁹ Cf. Case of Ivcher Bronstein v. Peru, *supra*, para. 122.

²²⁰ Cf. Case of “Five Pensioners” v. Peru, *supra*, para. 103.

²²¹ Cf. Case of Acevedo Buendía et al. (“Discharged and Retired Employees of the Comptroller’s Office”) v. Peru, *supra*, para. 85.

²²² Cf. Affidavit rendered by Christian Courtis on August 30, 2018 (evidence file, folio 1833).

proceeding, which established that Mr. Muelle Flores met the necessary requirements to acquire the right to an equalized pension. In addition, two *amparo* judgments were issued that ordered the payment of his pension, which were not implemented.

216. Mr. Oscar Muelle Flores retired on September 30, 1990, and received his pension, in full, only from October 1990 until January 1991, since these payments were suspended from February 1991. Although the private company- not the Peruvian State- made payments from 1999 to 2001, these covered the pension, but only partially, as expressly indicated in the pay slips issued by the company (*supra* para. 80). In this sense, the amounts paid to the victim as pension allowances from February 1991 until June 2001 consisted of partial payments, since the amount paid did not correspond to the equalized amount to which he was entitled under the pension scheme of Decree Law No. 20530, at least until the constitutional reform of November 2004 (*supra* para. 103). Furthermore, the Court confirms that from July 2001, Mr. Muelle Flores did not receive any pension payments; in other words, the victim has not been able to realize his right to a pension for more than 27 years.

217. The Court considers that the victim's right to an equalized pension, under a system that was in force in Peru until 2004, as well as his right to a pension under the constitutional reforms implemented on that date, affected the patrimony of Mr. Muelle Flores. In fact, he acquired the right to receive a pension after he stopped providing services to the institution for which he had worked, having met the requirements for that purpose and having paid the corresponding contributions, in accordance with Peru's domestic laws. In this sense, his patrimony was directly affected by the State's decision to suspend the payments, as well as by its non-compliance and failure to execute the judgments. Consequently, the victim was unable to fully enjoy his right to property given the patrimonial effects on his legally recognized pension, this being understood as the amounts he did not receive. Similarly, given that the State has still not implemented the domestic judgments that ordered the payment of Mr. Muelle Flores' pension, the effects on his patrimony continue. The foregoing situation is a direct consequence of the failure to comply with the judgments of the Supreme Court and the Constitutional Court.²²³

218. For all the aforementioned reasons, and bearing in mind that the lack of judicial protection affected the victim's right to a pension that formed part of his patrimony, the Court declares that the State violated the right to property recognized in Article 21(1) and 21(2), in relation to Articles 25(1), 25(2) (c), 26 and 1(1) of the American Convention, to the detriment of Mr. Muelle Flores.

E. Conclusions

219. Based on the foregoing considerations, the Court concludes that the State of Peru is responsible for the violation of the rights to judicial guarantees, judicial protection, social security, personal integrity, dignity, and property, recognized in Articles 8(1), 25(1), 25(2) (c), 26, 5, 11(1), 21(1), and 21(2) of the American Convention, respectively, in relation to Article 1(1) thereof, to the detriment of Oscar Muelle Flores. Furthermore, the State is responsible for the violation of its obligation to adopt domestic legal effects, established in Article 2 of the American Convention, to the detriment of Oscar Muelle Flores.

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

220. Based on the provisions of Article 63 (1) of the American Convention,²²⁴ the Court has indicated

²²³ Cf. Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") *supra*, para. 89.

²²⁴ Article 63(1) of the American Convention establishes that "[if] the Court finds that there has been a violation of a right

that any violation of an international obligation that has produced harm entails the obligation to make adequate reparation and that this provision reflects a customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility.²²⁵

221. The reparation of the harm caused by the violation of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists of the re-establishment of the situation prior to the commission of the violation. If this is not feasible, the Court will determine measures to guarantee the rights that have been violated and to redress the consequences of those violations.²²⁶ Accordingly, the Court has considered the need to grant different measures of reparation in order to fully redress the harm caused; thus, in addition to pecuniary compensation, the Court will order measures of restitution, rehabilitation and satisfaction, and guarantees of non-repetition, which have special relevance owing to the nature of the damage caused.²²⁷

222. The Court has established that reparations must have a causal nexus with the facts of the case, the violations declared, the damage proven and the measures requested to repair the resulting harm. Therefore, the Court must observe such concurrence in order to adjudge and declare according to law.²²⁸

223. Considering the violations of the American Convention declared in the foregoing chapters, and in light of the criteria established in its case law regarding the nature and scope of the obligation to make reparation,²²⁹ the Court will analyze the claims presented by the Commission and the representatives, as well as the arguments of the State, with a view to ordering measures aimed at making reparation for those violations.

A. Injured Party

224. Under the terms of Article 63(1) of the Convention, the Court considers as injured party anyone who has been declared a victim of the violation of any right recognized therein. Therefore, this Court considers as "Injured Party" Mr. Oscar Rubén Muelle Flores who, as victim of the violations declared in this Judgment will be considered as the beneficiary of the reparations ordered by the Court.

B. Restoration of Mr. Muelle Flores' pension: compliance with the final judgments of the domestic courts

B.1. Arguments of the Commission and of the parties

225. The **Commission** asked the Court to order the State to comply, as soon as possible, with the judgments of the Supreme Court of Justice, of February 2, 1993, and of the Constitutional Court, of December 10, 1999, and to immediately take the necessary steps to pay Mr. Muelle Flores' pension under the terms recognized by the courts, that is to say, those of Decree Law N° 20530.

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."

²²⁵ Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs*. Judgment of July 21, 1989. Series C No. 7, para. 25, and *Case of Villaseñor Velarde et al. v. Guatemala*. Merits, reparations and costs. Series C No. 374, para. 147.

²²⁶ Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs, supra*, paras. 25 and 26, and *Case of Órdenes Guerra Et al. v. Chile*. Merits, reparations and costs. Series C No. 372, para. 78.

²²⁷ Cf. *Case of Cantoral Benavides v. Peru. Reparations and costs*. Judgment of December 3, 2001. Series C No. 88, paras. 79 to 81, and *Case of Órdenes Guerra et al. v. Chile, supra*, para. 105.

²²⁸ Cf. *Case of Ticona Estrada v. Bolivia. Merits, reparations and costs*. Judgment of November 27, 2008. Series C No. 191, para. 110, and *Case of Órdenes Guerra et al. v. Chile, supra*, para. 115.

²²⁹ Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs, supra*, paras. 25 to 27, and *Case of Villaseñor Velarde et al. v. Guatemala, supra*, para. 148.

226. The **representatives** asked the Court to order the State to implement, immediately, the equalized pension in favor of Mr. Muelle Flores, on the terms established in the judgments of the Supreme Court of Justice and the Constitutional Court. They also requested that the State adopt some basic secondary obligations, namely: i) ensure that the pension payments respect the victim's acquired right to equalization, and that the amount paid is equivalent to the current remuneration of a public servant in a position of the same rank as that held by Mr. Muelle Flores when he retired; ii) guarantee Mr. Muelle Flores "immediate access to the health system" and to all social security benefits available to pensioners protected under the Decree Law No. 20.530 pension scheme, and, iii) reestablish the payment of a provisional pension of S/800 soles monthly, immediately and provisionally, until the total value of the equalized pension has been calculated.

227. In their brief of January 9, 2019, and in relation to the measures adopted by the State and described *infra*, the representatives considered that the payment of the provisional pension to Mr. Muelle Flores constituted a major step forward in settling the case and in guaranteeing his rights. However, they emphasized that this was a provisional measure and disputed the amount calculated by the State (S/1,337.61 new soles), considering that it did not correspond to the amount of an equalized pension, which should take as reference the salary of an employee of the same hierarchical rank (as that held by the victim). They argued that they had encountered evidentiary obstacles in determining the current or updated value of the equalized pension; however, as a point of reference, based on the current salaries of public servants holding strategic and/or management positions, as cited in the State's Transparency Portal, the current salaries ranged from S/13,000 to S/22,600 new soles. They emphasized that some functions which required a lower level of education, such as drivers and others, received higher wages than those offered by the Peruvian State. The representatives requested that the amount due be determined based on the criterion of equity, and on the amounts currently received by those in public sector management positions, with a value of no less than S/15,600 new soles.

228. The **State** argued that the Judiciary was currently engaged in efforts to conclude the execution process of the first *amparo* ruling, and noted that the Commission had not claimed any delay in the execution of the second *amparo* judgment. In addition, the State emphasized that, in the event of being ordered to pay the equalized pension, it would be necessary to deduct from the total sum ordered the amounts corresponding to the payments made between 1999 and 2001, reiterating that these were duly accredited in the respective documentation. It stressed that if the Court should find the State responsible, it would not object to adopting the measures contemplated in the domestic regulations for executing the payment of the amounts owed, with the corresponding interest, together with the "health insurance" requested.

229. Likewise, in its brief of December 20, 2018, the State reported that through Executive Resolution No. 635-2018-EF/43.02 of the MEF, and in the context of the request for provisional measures presented by the representatives (*supra* para. 12), it had decided to re-establish *ex officio*, and provisionally, the pension of Mr. Muelle Flores for the sum of S/800 new soles monthly, with the deductions required by law, as of January 1, 2018, and until the Court issues the corresponding Judgment. The State indicated that after that, the ONP would determine the ranking, salary level and amount that the victim should receive, which it estimated would total S/1,337.61 new soles, as established by the MEF. The State also reported that it had re-established medical care for Mr. Muelle Flores through the social health insurance system, EsSalud, and therefore he should register in order to have immediate access to those services. In view of the actions taken, the State asked the Court to deduct the amounts allocated from any compensation that it might eventually order.

B.2. Considerations of the Court

230. As this Court has already established, the reparation of the harm caused by the violation of an

international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists of the restoration of the previous situation. In this regard, although the Court positively assesses the State's willingness to fulfill its pension obligations with respect to Mr. Muelle Flores, it notes that more than 25 years have elapsed since the final judgment of February 2, 1993, and 19 years since the Judgment of December 10, 1999, were issued, and yet still these rulings have not been complied with or executed. Accordingly, this Court declares that the State of Peru is responsible for the violation of Articles 8(1), 25(1) and 25(2)(c) of the Convention, as well as of Articles 26, 5(1), 11(1), 21(1) and 21(2) thereof, to the detriment of Oscar Muelle Flores.

231. Nevertheless, the Court considers very positive the decision of the State to re-establish, provisionally, Mr. Muelle Flores' pension, and to restore his access to the medical care provided by Peru's social security system. This decision was adopted *ex officio* by the State, in order to guarantee the victim access to a better quality of life, which denotes a positive attitude on the part of the Peruvian State, in compliance with its international obligations under the American Convention.

232. Given that the State indicated that the measures adopted are provisional until this Court delivers the corresponding Judgment, and until it has been notified thereof, it must comply with the judgments delivered in favor of the victim and ensure the effective payment of Mr. Oscar Muelle Flores' pension under the terms of Decree Law No. 20530 and pursuant to current regulations on this matter,²³⁰ within six months of notification of this Judgment. Accordingly, the judicial authorities must implement any measures deemed necessary in the event of non-compliance by the entity responsible for paying Mr. Muelle Flores' pension. The Court emphasizes that, according to the information provided by the State in the contentious-administrative proceeding, the entity responsible for the administration and payment of pensions under Decree Law No. 20530 is the Ministry of Economy and Finance. The amounts due for the pensions owed to Mr. Muelle Flores from February 1991, the date on which his pension payments were suspended, and until the notification of this Judgment, will be analyzed in the section on pecuniary damage.

233. The Court also notes that Mr. Oscar Muelle Flores is of an advanced age and suffers from several physical ailments resulting from the deterioration of his health, including Alzheimer's disease (*supra* para. 52) and has had to rely on his family for financial support to be able to survive and pay for his health treatment. Although the State re-established a provisional pension of S/800 in favor of the victim, the Court orders, in equity, that after notification of this Judgment, and until such time as compliance is achieved with the final domestic judgments, and the amount of the Mr. Muelle Flores' pension has been calculated, taking into consideration the criteria of adequate level established by this Court (*supra* para. 187), together with the amounts claimed by the representatives, the State must grant a provisional pension of no less than two minimum salaries in Peru to cover the victim's basic needs for a decent life. Also, the Court orders in equity that, although the State must calculate the amount of pension due to Mr. Muelle Flores, said amount must not be less than two minimum salaries in Peru.

234. The Court further notes that, with the cessation of the pension payments and the suspension of the aforementioned pension scheme, Mr. Muelle Flores found it impossible to contribute to the corresponding social health insurance system, so that he could have access to the public health system on the same terms as the beneficiaries of Decree Law No. 20530. The health scheme to which he was entitled was the one provided by the social health insurance system, EsSalud, through a contributory system that offers a full coverage plan.²³¹

235. In fact, Article 3 of Law N° 26790 "Law for the Modernization of Social Health Insurance" of

²³⁰ Including Law N° 28449, Law on the New Rules of the Decree Law N° 20530 Pension Regime (*supra* para. 104).

²³¹ Cf. Brief of the State containing helpful evidence of December 11, 2018 (merits file, folio 1001).

May 17, 1997, pursuant to Article 30, subparagraph b) of its Regulations, approved by Supreme Decree No. 009-97-SA of September 9, 1997, establishes that “pensioners who receive a pension for dismissal, retirement, incapacity or survival, under any lawful regime to which they are subject, are insured as regular members under the contributory system of the social health insurance system.” Also, Article 6 of the regulations establishes that contributions for affiliation to the social health insurance system are paid monthly and that the contribution for pensioners is 4% of their pension, for which pensioners are responsible; the employer, the ONP or the Administrator of Pension Funds AFP, is responsible for the affiliation, retention, declaration and payment of the contribution in the month after the relevant pension is paid or made available, whether provisional or final. In turn, Article 35 of the Regulations establishes that pensioners have the right to coverage under EsSalud, without a waiting period, from the date on which they become pensioners, provided that they are recognized as such by the entity that pays their pension, and maintain that status if they have complied with the corresponding contributions.²³²

236. Consequently, taking into account the victim’s current state of vulnerability, and based on the information provided by the State to this Court on the re-establishment of his health care coverage through the EsSalud social insurance system, the State must maintain that coverage without interruption, as established in the relevant domestic legislation. The Court considers it pertinent to emphasize that said affiliation may not be limited with regard to any pre-existing conditions affecting Mr. Muelle Flores. The State must pay Mr. Muelle Flores’ social security contributions and may deduct the legal amount corresponding to the provisional payment ordered (*supra* para. 233).

C. Measures of satisfaction

a) Publication of the Judgment

237. The **representatives** asked the Court to order to the State to publish an “executive summary” of the Judgment in the Official Gazette, and in a major newspaper with wide national circulation, together with the full text of the Judgment on an official government website, in a manner accessible to the public from the homepage of the website. The **State** indicated that it would make the respective publications if the Court so required this in its Judgment.

238. The **Commission** did not submit any specific arguments on this point.

239. As it has done in other cases,²³³ the Court orders the State to 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 a legible and adequate font size; b) the official summary of this Judgment prepared by the Court, once, in a newspaper with wide national circulation in a legible and adequate font size, and c) this Judgment, in full, available for one year, on an official website of the State, in a manner easily accessible to the public from its homepage.

240. The State must immediately notify this Court once it proceeds to make each of the publications ordered, notwithstanding the one-year period allowed for the submission of its first report as ordered in operative paragraph twelve of the Judgment.

D. Other measures requested

241. The **Commission** asked the Court to order the State to adopt legislation or other measures necessary to prevent the repetition of the violations declared in its merits report. In this regard, it

²³² Cf. Brief of the State containing helpful evidence of December 11, 2018 (merits file, folio 1000).

²³³ Cf. *Case of Cantoral Benavides v. Peru*, *supra*, para. 79, and *Case of Alvarado Espinoza et al. v. Mexico. Merits, reparations and costs* Judgment of November 28, 2018. Series C No. 370, para. 313.

considered that the State should order the measures necessary to: i) ensure that State-owned companies comply with judicial rulings that recognize the pension rights of former employees; ii) ensure that proper safeguards are established in privatization processes so that this action does not impede compliance with judicial rulings in favor of retirees; iii) ensure that judgment execution proceedings comply with conventional standards of simplicity and promptness; and iv) ensure that the judicial authorities hearing such proceedings are legally empowered to apply, and do in practice apply, coercive mechanisms needed to guarantee compliance with judicial rulings.

242. The **representatives** agreed with the requests made by the Commission and, in addition, asked the Court to require the State to provide human rights training for its agents, by organizing courses for “judges, prosecutors, personnel of the Ombudsman’s Office, agents of the ONP or those responsible for pension issues within the public administration, and the Ministry of Economy and Finance.” They also asked the Court to order the State to design a publication or primer describing in a clear, concise and accessible manner the rights of older persons in relation to social security, as envisaged in the standards established in this case, and in the precedents of “*Five Pensioners*” and “*Acevedo Buendía*.” The representatives requested that this publication (in print and/or digital format) be made available to government departments responsible for pension matters and posted on the web site of the MEF and ONP. They also asked the Court to order the State to implement for a period of three years, from notification of this Judgment, a “general policy of comprehensive protection for older persons in line with accepted standards on this matter.” Finally, the representatives requested the implementation of a public act of apology by senior State authorities.

243. The **State** argued that the measure requested to ensure that State-owned companies comply with judicial rulings recognizing the pension rights of former workers, is not related to the instant case, since the company required to comply with the judicial ruling had ceased to belong to the State, having been privatized after the first *amparo* proceeding. Likewise, it indicated that, pursuant to Law N° 30137, the State must give priority to judgments ordering the payment of pension debts and emphasized the recent implementation of a mechanism to determine more precisely the judgments in which payments are pending, including “pension payments.”

244. As to the request to adopt legal or other measures required to ensure that State-owned companies comply with judicial rulings recognizing the pension rights of former employees, and regarding the adoption of safeguards to protect the rights of pensioners in the context of privatization processes, the Court observes that Peru’s legal system includes provisions enabling the judicial authorities to impose coercive measures to enforce compliance with judicial decisions in general, and that the laws introduced in 2002 establish that the MEF is the entity responsible for paying the pensions of former employees of privatized companies (*supra* paras. 141 and 142). That said, although that legislation was not applied to this specific case, the Court does not deem it necessary to order guarantees of non-repetition as requested. Nor does it consider it pertinent to order a public act of acknowledgement of international responsibility, training courses, or other guarantees of non-repetition requested by the representatives.

E. Compensation

245. The **Commission** asked the Court to order the State to provide comprehensive reparation for the human rights violations declared in its merits report, both in the material and the moral aspects.

D.1 Pecuniary damage

246. In its case law the Court has developed the concept of pecuniary damage and has established that this encompasses the loss of or detriment to the victims’ income, the expenses incurred as a result of the facts, and the monetary consequences that have a causal nexus with the facts of the

case.²³⁴

a) *Consequential damages*

247. The **representatives** argued that the State should pay compensation for the expenses incurred in the course of the domestic judicial proceedings during nearly 27 years, as well as the lawyers' fees. They also requested reimbursement of Mr. Muelle Flores' medical expenses, including those already incurred and "future" expenses, as a consequence of having developed "severe hypoacusia with loss total of hearing in one ear and significant decrease in hearing in the other,"²³⁵ and the aggravation of his general health owing to Alzheimer's disease and the femoral fracture. The representatives stressed that those expenses resulted from the fact that Mr. Muelle Flores could not access social health insurance on the same terms as other pensioners, because his pension had not been paid. Therefore, they requested the payment, in equity, of a sum no less than US\$52,000.00 (fifty two thousand US dollars) "based on an estimated value of US \$2,000.00 (two thousand US dollars) per year."

248. The **State** opposed the request of the representatives and held that the expenses arising from the domestic judicial proceedings could not be considered pecuniary damage, and should have been requested as costs and expenses. It asked the Court to reject this demand "because it was not consistent with the nature of the measure requested." Likewise, it indicated that the representatives did not attach documentation accrediting the costs incurred in the domestic judicial proceedings, or the costs of treating the hearing disability of the presumed victim, both invoked as consequential damages. In addition, it emphasized that no causal link existed between the State's responsibility and the effects on Mr. Muelle Flores' health; it argued that, according to the pleadings and motions brief, the origin of his ailment preceded the facts that prompted this case, and that it had not been claimed that Mr. Muelle Flores currently did not have access to medical treatment or medicines. Consequently, it concluded that "the necessary conditions were not met to be validly grant[ed] pecuniary compensation for consequential damages," and asked the Court to dismiss that claim.

249. The Court will consider, under the heading of consequential damages, the expenses incurred by Mr. Muelle Flores that are not related to the processing of the case, both at the domestic level and before the Commission, which will be analyzed in the section on costs and expenses²³⁶ (*infra* paras. 270 to 273).

250. As to consequential damages, the Court notes that the representatives based the amount requested on various medical expenses incurred by Mr. Muelle Flores as a consequence of the physical ailments caused by the deterioration of his health (*supra* paras. 52 and 164). In this regard, the Court determined that the State was internationally responsible for failure to comply with and enforce the domestic rulings which, had these been implemented, would have enabled the victim to have access to health services and benefits on the same terms as other beneficiaries of the Decree Law N° 20530 pension system, as indicated by this Court (*supra* para. 149). Furthermore, the Court concluded that the failure to realize his right to social security prevented Mr. Muelle Flores from

²³⁴ Cf. *Case of Bámaca Velásquez v. Guatemala. Reparations and costs*. Judgment of February 22, 2002. Series C No. 91, para. 43, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico, supra*, para. 369.

²³⁵ In their final written arguments, the representatives made it clear that, in relation to the State's objection in this regard, the victim is not claiming reimbursement for medical treatment received in the United States between 2001 and 2008, as this did not generate any costs for Mr. Muelle because it was provided through the support of an NGO. Mr. Muelle Flores merely referred to that treatment in his petitions in order to justify his change of residence before the Court, and to emphasize the need for promptness in the inter-American proceeding given his disability. Cf. Brief of final arguments of the representatives (merits file, folio 704, footnote 169).

²³⁶ Cf. *Case of the Serrano Cruz Sisters v. El Salvador. Merits, reparations and costs*. Judgment of March 1, 2005. Series C No. 120, para. 152, and *Case of V.R.P., V.P.C.* et al. v. Nicaragua, supra*, para. 410.

accessing the social health insurance to which he was entitled as a pensioner. Although the State argued that Mr. Muelle Flores could have had access to Comprehensive Health Insurance (SIS),²³⁷ the State itself acknowledged that coverage under this insurance scheme was different to the one he was entitled to as a pensioner, and that EsSalud provided full insurance coverage. Furthermore, the Court notes that the SIS was created in 2002. The Court considers that the insurance to which Mr. Muelle Flores was entitled was that provided by social security through EsSalud. The victim was unable to benefit from this system owing to the failure to pay his pension, which meant that he had to pay for his health costs out of his own pocket.

251. The representatives presented receipts for certain medical expenses related to the victim's hearing disability, as well as for diagnostic and medical expenses²³⁸ for a hip fracture and for his Alzheimer's syndrome. They added that, given the time elapsed, it was impossible to attach previous receipts and to calculate the total amount disbursed by the victim for health expenses. Consequently, although the amount accounted for in the file before this Court refers to the most recent health expenses incurred by Mr. Muelle Flores, totaling S/8,626.41 new soles, or approximately US\$2,590.00 (two thousand five hundred and ninety United States dollars), the Court presumes that Mr. Muelle Flores incurred additional expenses derived from the human rights violations committed by the State in this case. Therefore, the Court considers it reasonable to order payment of US\$ 10,000.00 (ten thousand United States dollars), for consequential damages, which must be paid to Mr. Muelle Flores within six months of notification of this Judgment. The Court considers that the request for the inclusion of the victim's future expenses is covered under the measure of restitution of rights ordered.

b) Loss of income

252. The **Commission** asked the Court to order payment of the pensions owed to Mr. Muelle Flores from the moment of his retirement until the date on which said payment is made effective.

253. The **representatives** requested that Mr. Muelle Flores' pension be paid retroactively, with the appropriate monetary adjustments and the corresponding interest on arrears, from the date of its arbitrary suspension in February 1991, until the full amount of the pension owed is effectively paid, respecting equalization and applying the most favorable terms for the pensioner. In their brief of January 9, 2019, and in relation to the measures adopted by the State described *infra*, the representatives disputed the amount calculated by the State (S/1,337.61 new soles) as equalized remuneration, and pointed out that this amount did not correspond to the salary earned by a public servant of the rank of Mr. Muelle Flores. In addition - and only in the event that the amount of the equalized pension is determined to be S/1,337.61 new soles - they requested that this be paid from the time that Mr. Muelle stopped receiving his pension, that is, from February 1991, and that it contemplate the relevant monetary correction (adjustment for currency devaluation), plus the interest on arrears and other interest accrued since the unlawful suspension of his pension. Likewise, the representatives expressed their disagreement with the retroactive deduction of S/6,563.93 new soles, related to the 4% deduction for contributions to EsSalud, during the period from 1991 to 2018, when the victim did not have access to public health services.

254. The **State** indicated that a number of partial payments were made between 1999 and 2001 and that these should be taken into account when analyzing the financial reparations. In its brief of

²³⁷ The *Seguro Integral de Salud* (SIS) or Comprehensive Health Insurance, is Peru's universal public health care system, created to protect the health of Peruvians who do not have health insurance. It prioritizes vulnerable populations living in poverty and extreme poverty. Cf. Ministry of Health Law N° 27657, creation of the *Seguro Integral de Salud* (SIS) as a decentralized public institution under the Ministry of Health, and subsequently classified as a Public Executive Organization through Supreme Decree N° 034-2008-PCM (merits file, folio 1001).

²³⁸ Cf. Physical health vouchers (evidence file, folios 1877 to 1888).

helpful evidence, the State indicated that the Ministry of Economy and Finance, the institution responsible for paying Mr. Muelle Flores' pension, in its capacity as administrator of the Decree Law No. 20530 system, had reported that "according to Scale 11 of Supreme Decree No.051-91-PCM, enacted on February 1, 1991, as an Assistant General Manager (Mr. Muelle Flores) was classified as Category F-4." The MEF also reported that according to the expert witness of the Peruvian State, the sale contract signed for the privatization of Tintaya S.A. established that the company "[did] not have retirees," and explicitly stated that it did not have pension liabilities. Consequently, it did not have all the information on the pension payments being made to the pensioner until February 1991, only that his last payments amounted to S/800 soles. The State also indicated that, based on the expert opinion of Mr. González Hunt, it was not possible to equalize his pension with private sector workers, but rather with those of workers subject to the public sector system. For all those reasons, the State indicated that the MEF made a calculation based on the reported annual payments of employees of the same F-4 category who worked at the MEF and concluded that the permanent total earned (main salary, personal and family bonus, temporary remuneration for standardization purposes and bonus for lunch and transport) was approximately S/263.83 Soles (to February 1991). The MEF indicated that the equalized amount with progression up to the present date is S/1,337.61 soles.

255. The State emphasized the difference between the amount that the victim received up to February 1991 (S/800 soles) and the amount earned by MEF employees of the same salary category (S/263.83 soles, as public servants of the public sector labor regime). However, the State indicated that in order to avoid making minor readjustments to the amount that Mr. Muelle Flores was receiving, the MEF finally established that the amount to be paid would be S/800 from February 1991 and, when the Court eventually issues its Judgment, the equalized sum of S/1,337.61 soles.

256. Also, in its brief of December 20, 2018, the State reported that through Executive Resolution No. 635-2018-EF/43.02 of the MEF, and in the context of the request for provisional measures submitted by the representatives (*supra* para. 12), it had decided to "make an advance payment" of the amounts owed in unpaid pensions, for a total amount of S/. 175,898.00 soles (\$53,791 approx.), from which S/6,563.92 new soles would be deducted, corresponding to the 4% contribution to EsSalud social insurance so that Mr. Muelle Flores could have access to health services. By virtue of the actions taken, the State asked the Court to deduct those amounts from any compensation it might eventually order.

257. The **Court** held that Mr. Muelle Flores suffered a violation of his rights to social security, personal integrity, dignity, property, judicial guarantees and judicial protection, owing to the failure to execute the judgments that recognized his right to a pension, which was suspended from February 1991 and has not been restored to date (*supra* paras. 149 and 208). Accordingly, the Court considers that there is a causal nexus between the violations declared in this case and the pecuniary damage for loss of pension income.

258. In the instant case, the Court points out that the representatives did not request a specific amount for the pensions owed and did not offer evidence in this regard, due to the impossibility of calculating the equalized amount to which Mr. Muelle Flores would have been entitled. However, by way of reference, Mr. Muelle Flores pointed out that, after his retirement, the salary of an Assistant General Manager stood at S/3,000 soles, and the representatives indicated that pursuant to the Peruvian Transparency Portal, the current monthly salaries paid to those holding management positions in the Public Administration were no lower than S/15,600 new soles. Also, according to the information forwarded by the State, the amounts for pension allowances would be S/263.83 and S/1,337.61 if they were to be equalized. However, the Court notes that there is a substantial difference between the final calculations presented by the State and the reference information provided by Mr. Muelle Flores and by the representatives obtained from the Peruvian Transparency Portal. In order to determine the amounts owed to Mr. Muelle Flores for pending pension allowances,

the State was asked to provide helpful evidence and the parties were granted different opportunities to challenge the criteria used by the counterpart to make the calculation. However, the Court considers that this information is solely in the hands of the State, since it is very difficult for the representatives to provide criteria that would disprove it.

259. Therefore, taking into account: i) the arguments of the parties regarding the amounts that the victim did not receive in pension payments; ii) the significant difference between the amounts proposed by the State and those proposed by the victim and his representatives; iii) the partial payments made by the private company totaling S/97,600 soles; iv) the payments of S/800 soles for provisional pension allowances made by the State from January 1, 2018; v) an advance payment for accrued unpaid pensions of S/175,989.00 new soles; vi) that it was not possible to equalize Mr. Muelle Flores' pension with private sector workers, but rather with those of workers subject to the public sector regime;²³⁹ vii) that pensioners have a right to receive 12 pension payments annually, plus a bonus for educational level, a bonus for national holidays and a Christmas bonus (*aguinaldo*), and, viii) the complexity of the calculation, the Court orders the payment of US\$ 120,000.00 (one hundred and twenty thousand United States dollars) as compensation for the pension allowances that he ceased to receive from February 1, 1991 until notification of this Judgment. This amount includes the applicable interest and arrears. Likewise, the Court considers that it was not appropriate for the State to have charged the sum of S/6,563.92 new soles retroactively to Mr. Muelle Flores to cover health expenses during a period in which the victim did not receive such coverage. Therefore, the State must reimburse the said amount to the victim. The amounts ordered must be paid by the Ministry of Economy and Finance, or by any entity designated by the State, within six months of notification of this Judgment. These amounts must be paid directly to Mr. Muelle Flores, or through a duly accredited representative, in the event that he is unable to attend to the matter, owing to his health condition.

D.2 Non-pecuniary damage

260. The **representatives** referred to "the continuous anguish suffered," the "very long wait" and the "grave deterioration in the victim's living conditions," which they considered placed him in a "situation of particular social vulnerability," aggravated by his advanced age (82 years) and by his chronic hearing disability. Thus, they requested, in equity, the sum of no less than US\$ 20,000.00 (twenty thousand United States dollars), in accordance with the provisions established in the Case

²³⁹ Based on various internal regulations, and on the domestic case law of Peru, it is not feasible to equalize the pensions of public sector retirees with the remuneration of private sector workers. In this regard, the adjustment of pensions cannot be made with reference to active workers subject to the private sector labor regime, but rather with active workers subject to the public sector labor regime. Cf. Affidavit rendered by César José Gonzáles Hunt on August 24, 2018 (evidence file, folios 1856 to 1863). The expert witness emphasized that "paragraphs 15 and 16 of the Judgment of the Constitutional Court in File No. 189-2002-AA/TC (Case of Carlos Maldonado Duarte, dated June 18, 2003) established the following as a binding precedent: "15. The adjustment to which a pensioner who enjoys an equalized pension is entitled must be made with reference to an active official or employee of the Public Administration, of the level and rank held by the pensioner at the time of his retirement [...]; 16. The plaintiff's claim of a pension equalized with the salary received by an active worker of the private sector labor regime "[...] is inadmissible [...]." The expert witness emphasized that this principle has been ratified by the Constitutional Court, becoming a binding rule for the purposes of application and interpretation. Subsequently, Law No. 28047 (Law to Update the Percentage of Contributions paid to the Pension Fund of National Public Sector Workers and to Regulate the Equalization of Pensions governed by Decree Law No. 20530) published on July 31, 2003, established in Article 3 entitled "Determination of the amount of the pensions of discharged and retired workers subject to the system under Decree Law N° 20530" that:"[...]the equalization of pensions of discharged and retired workers subject to Decree Law N° 20530, of those entities that have, or have had, different labor regimes, shall be determined with reference to the wages earned by workers of the pensioner's institution of origin, under the Unified Remuneration System contemplated in Legislative Decree No. 276. For those purposes, non-pensionable benefits will not be taken into account. In no case will such pensions be adjusted taking as reference the payments of workers of such entities that are subject to the private sector labor regime. Furthermore, no person shall be entitled to receive an equalized pension higher than the amount of the salary received by an active worker of the same position and rank."

According to the expert witness, "The article in question was framed within the current case law of the Constitutional Court set forth in paragraphs 15 and 16 (cited previously) of the *amparo* judgment in the case of Carlos Maldonado Duarte."

of *Lagos del Campo v. Peru*, by virtue of the aggravating circumstances mentioned.

261. The **State** argued that “the grave deterioration in the victim’s living conditions has not been explained in detail and precisely.” It added that this fact has not been demonstrated, and cannot be presumed. It also objected to the granting of pecuniary compensation for damage to the life project, considering this a category “in disuse,” and requesting that the Court reject it.

262. In its case law, the **Court** has established that non-pecuniary damage “may include both the suffering and distress caused to victims and the impairment of values that are highly significant to them, as well as suffering of a non-pecuniary nature that affects their living conditions.” Since it is not possible to assign a precise monetary value to non-pecuniary damage, for the purposes of making integral reparation to the victims, they may only obtain compensation through the payment of a sum of money or through the delivery of goods and services that can be assessed monetarily, as prudently determined by the Court, applying judicial discretion and the principle of equity.²⁴⁰

263. Thus, it is for the Court determine whether, in the instant case, the failure to comply with the judgments of the Supreme Court of Justice and the Constitutional Court, which resulted in the impairment of the victim’s rights to social security and property, owing to a lack of effective judicial protection, produced non-pecuniary damage to the detriment of the victim.

264. The Court notes that Mr. Muelle Flores was unable to submit his sworn statement due to his current health situation, since was diagnosed with “Alzheimer-type senile dementia.” In this regard, the Court has verified the deterioration of the victim’s physical condition through two videos provided as supervening evidence by the representatives.

265. However, his daughter Vibeke Ann Muelle Jensen declared that her father had expressed “his concern” because of what “he was owed;” the “extreme need” he suffered, as well as “the problems derived from not having health care.” She also stressed the anguish he suffered because of “the [judicial] proceedings [he] had to go through to be able to” obtain his pension. Finally she described the consequences of his “limited ability to cover his health needs and [...] not enjoying a situation of wellbeing consistent with the professional status he had throughout his life.”²⁴¹ For his part, Jesús Aníbal Delgado Flores, the victim’s brother, indicated that Mr. Muelle Flores had suffered “a tremendous nervous depression” and that he had to “support him financially and at home [since] he has lost his hearing due to stress.”²⁴²

266. From these statements, it is clear that the victim was unable to enjoy the financial security afforded by having the full pension to which he was entitled, based on his contributions for more than 27 years, and having to survive on the good will of his family, as a result of the failure to execute the judgments in his favor for more than 25 years. Consequently, the Court considers that the victim experienced frustration, anguish and suffering, together with the progressive deterioration and aggravation of his state of health.

267. Although this Court has established in its constant case law that a judgment declaring a violation of rights constitutes *per se* a form of reparation,²⁴³ and reiterates this point once again in the instant case, it considers that the uncertainty, anguish and suffering inflicted on Mr. Muelle Flores

²⁴⁰ Cf. 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 Women Victims of Sexual Torture in Atenco v. Mexico, *supra*, para.375.

²⁴¹ Cf. Sworn statement by Vibeke Ann Muelle Jensen. (evidence file, folios 1840 and 1841).

²⁴² Cf. Sworn statement of Jesús Aníbal Delgado Flores. (evidence file, folios 1841 and 1842)

²⁴³ Cf. *Case of Neira Alegría et al. v. Peru. Reparations and costs.* Judgment of September 19, 1996. Series C No. 29, para. 56; *Case of Kawas Fernández, supra* note 13, para. 184, and *Case of Perozo et al., supra* note 13, para. 413.

by the failure to execute the judicial rulings issued in his favor determines the existence of non-pecuniary damage that can be repaired through compensation, in accordance with equity.²⁴⁴ Therefore, the Court sets in equity the sum of US\$ 7,000.00 (seven thousand United States dollars), as compensation for non-pecuniary damage, in favor of Mr. Oscar Muelle Flores. The State must pay this amount within six months of notification of this Judgment.

F. Costs and expenses

268. The **representatives** asked the Court to order the State to pay the costs and expenses incurred in bringing the case before the domestic courts and before the inter-American system. In particular, they asked the Court to order the reimbursement of expenses incurred by the victim in the course of the domestic judicial proceedings, the lawyers' fees for litigation, and the costs of sending documents to the Commission. They explained that, given the long period of time that had elapsed, it was not possible to specify the exact amount of those expenses since the receipts had been mislaid. Nevertheless, they requested that, in light of the Court's rulings on other occasions, the expenses incurred be recognized, in equity.

269. The **State** pointed out that the expenses requested in relation to the domestic proceedings were filed as consequential damages by the representatives, when they should have been requested under the heading of costs and expenses. It also indicated that the representatives did not provide documentation to accredit such expenses.

270. The **Commission** did not comment on the costs and expenses.

271. The Court reiterates that, pursuant to its case law, costs and expenses form part of the concept of reparation, because the actions taken by victims to obtain justice, in both the domestic and the international sphere, entail disbursements that should be compensated when the international responsibility of the State has been declared in a judgment against it.²⁴⁵ Regarding the reimbursement of expenses, it is for the Court to prudently assess their scope, and this includes the expenses generated during 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 may be based on the principle of equity, taking into account the expenses indicated by the parties, provided that their *quantum* is reasonable.²⁴⁶

272. The Court has indicated that "the claims of the victims or their representatives for costs and expenses, and the evidence that supports them, must be submitted to the Court at the first procedural opportunity granted to them, that is, in the pleadings and motions brief, without prejudice to such claims being subsequently updated, in keeping with the new costs and expenses incurred during the proceedings before this Court."²⁴⁷ In addition, the Court reiterates that it is not sufficient merely to forward probative documents; rather, the parties must include arguments that relate the

²⁴⁴ Cf. Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru, *supra*, para. 133 and Case of Usón Ramírez v. Venezuela. Preliminary objection, merits, reparations and costs. Judgment of November 20, 2009. Series C No. 207, para. 207.

²⁴⁵ Cf. Case of Garrido and Baigorria v. Argentina. Reparations and costs. Judgment of August 27, 1998. Series C No. 39, para. 79, and Case of Órdenes Guerra et al. v. Chile, *supra*, para. 139.

²⁴⁶ Cf. Case of Garrido and Baigorria v. Argentina, Reparations and costs *supra*, para. 82, and Case of Órdenes Guerra et al. v. Chile, *supra*, para. 95.

²⁴⁷ Cf. Case of Garrido and Baigorria v. Argentina. Reparations and costs, *supra*, paras. 79 and 82, and Case of Órdenes Guerra et al. v. Chile, *supra*, para. 139.

evidence to the fact it is meant to represent and, in the case of alleged financial disbursements, the items and their justification must be clearly established.²⁴⁸

273. Although the reimbursement of expenses arising from the domestic proceedings, as well as expenses for sending documents to the Commission, was requested under the heading of consequential damages, given their nature, these will be analyzed as costs and expenses (*supra*, para. 246). The Court notes that no receipts were provided for expenses derived from the quest for justice at the domestic level, or before the Inter-American Commission, or regarding the fees of the lawyers who represented Mr. Muelle Flores before those bodies. Nevertheless, the Court considers that it must be presumed that the victim incurred additional expenses arising from the different remedies he pursued, during 25 years, in order to obtain compliance with and execution of the judgments issued in his favor in the domestic courts, as well as his search for justice before the Inter-American Commission. The Court considers it important to point out that this amount does not include payment of the expenses incurred in the proceeding before this Court, which were covered by the Victims' Legal Assistance Fund (*infra* para. 276).

274. Consequently, the Court decides to order the payment of a reasonable sum of US\$ 10,000.00 (ten thousand United States dollars) for costs and expenses. This amount must be paid to Mr. Oscar Muelle Flores. In the monitoring compliance with judgment proceeding, the Court may order the State to reimburse the victim or his representatives for reasonable expenses duly proven in that procedural stage.²⁴⁹

G. Reimbursement of expenses to the Victims' Legal Assistance Fund

275. In the instant case, the President of the Court, in an Order of July 27, 2018,²⁵⁰ granted financial assistance from the Fund to cover the following expenses: i) travel, transfers and accommodation costs required to meet with the presumed victim in Lima in October 2017; ii) expenses incurred in obtaining the affidavits of the presumed victim, two witnesses and an expert witness, all proposed by the defense attorneys, as specified in the operative paragraphs of this Order, and iii) any other reasonable and necessary expenses that the representatives have incurred or may incur, and for which they must submit to the Court both the justification for such expenses and the relevant receipts.

276. The State had an opportunity to present its observations on the disbursements made in this case; however, in its brief of November 28, 2018, it stated that it had no observations to make in that regard.

277. Therefore, considering the violations declared in this Judgment and that the petitioners complied with the requirements for accessing the Fund, the Court orders the State to reimburse this Fund in the amount of US\$ 2,334.04 (two thousand, three hundred and thirty-four United States dollars and 04/100 cents). This amount must be reimbursed within six months of notification of this Judgment.

H. Method of compliance with the payments ordered

²⁴⁸ Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, *supra*, para. 277, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico*, *supra*, para. 379.

²⁴⁹ Cf. *Case of the Xákmok Kásek Indigenous Community v. Paraguay*. Merits, reparations and costs. Judgment of August 24, 2010. Series C No. 214, para. 331, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico*, *supra*, para. 379.

²⁵⁰ Cf. Order of the President of the Inter-American Court of Human Rights of July 27, 2018 (merits file, folios 496-502). Available at: http://www.corteidh.or.cr/docs/asuntos/muelle_27_07_18.pdf

278. The State must pay the amounts ordered in this Judgment as compensation for pecuniary and non-pecuniary damage and to reimburse costs and expenses, directly to Mr. Muelle Flores, or through a duly accredited representative, if he is unable to receive it owing to his health condition, within six months of notification of this Judgment, in the terms specified in the corresponding paragraph. (*Supra* para. 232).

279. In the event that the beneficiary has died or dies before the respective compensation has been received, payment shall be made directly to his heirs, in accordance with applicable domestic law.

280. The State must comply with its pecuniary obligations through payment in United States dollars or its equivalent in national currency, based on the relevant rate of exchange indicated by the New York Stock Exchange, United States of America, on the day prior to payment.

281. If, for reasons that can be attributed to the beneficiary of the compensation, or to his heirs, it is not possible to pay the amounts established within the term indicated, the State shall deposit said amount in an account or certificate of deposit in a solvent Peruvian financial institution, in United States dollars, and on the most favorable financial terms permitted by law and banking practice. If, after ten years, the amount assigned has not been claimed, the amounts shall be returned to the State with the accrued interest.

282. The amounts allocated in this Judgment as compensation and as reimbursement of costs and expenses must be delivered in full to the individuals and organizations indicated, as established in this Judgment, without any deductions derived from possible taxes or charges.

283. If the State should fall into arrears, including with the reimbursement of expenses to the Victims' Legal Assistance Fund, it must pay interest on the amount owed, corresponding to bank interest on arrears in the Republic of Peru.

IX OPERATIVE PARAGRAPHS

284. Therefore,

THE COURT

DECIDES,

Unanimously,

1. To reject the preliminary objection filed by the State regarding the alleged failure to exhaust domestic remedies in the terms of paragraphs 25 to 28 of this Judgment.

By four votes in favor and two against,

2. To reject the preliminary objection filed by the State regarding the alleged lack of jurisdiction *ratione materiae* and the direct justiciability of Article 26 of the Convention in the terms of paragraphs 33 to 37 of this Judgment.

Judges Eduardo Vio Grossi and Humberto Antonio Sierra Porto dissenting.

DECLARES,

Unanimously, that

3. The State is responsible for the violation of the right to the effective judicial protection established in Articles 25(1) and 25(2)(c) of the American Convention, in relation to Article 1(1) thereof, as well as Article 2 of the American Convention, to the detriment of Mr. Oscar Muelle Flores pursuant to the provisions of paragraphs 123 to 149 of this Judgment.

Unanimously, that

4. The State is responsible for the violation of reasonable time recognized in Article 8(1) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Oscar Muelle Flores, as established in paragraphs 154 to 166 of this Judgment.

By four votes in favor and two against, that

5. The State is responsible for the violation of the right to social security, pursuant to Article 26 of the American Convention, in relation to Articles 5, 8(1), 11(1), 25(1), 25(2)(c) and 1(1) thereof, as well as Article 2 of the American Convention, to the detriment of Mr. Oscar Muelle Flores, as established in paragraphs 170 to 208 of this Judgment.

Judges Eduardo Vio Grossi and Humberto Antonio Sierra Porto dissenting

By four votes in favor and two against, that

6. The State is responsible for the violation of the right to property recognized in Article 21(1) and 21(2), in relation to Articles 25(1), 25(2)(c), 26 and 1(1) of the American Convention, to the detriment of Oscar Muelle Flores, as established in paragraphs 212 to 218 of this Judgment.

Judges Eduardo Vio Grossi and Humberto Antonio Sierra Porto dissenting

AND DECIDES,

Unanimously, that:

7. This Judgment constitutes *per se* a form of reparation.

8. The State must execute the domestic judgments adopted in favor of the victim and ensure the effective payment of the pension of Mr. Oscar Muelle Flores, within a maximum period of six months from notification of this Judgment, and maintain his provisional pension payments and his access to social health insurance, as established in paragraphs 230 to 236 of this Judgment.

9. The State must publish, within six months of notification of this Judgment, the publications required in paragraph 239 of this Judgment, in the terms established therein.

10. The State must pay, within the time stipulated, the amounts ordered in paragraphs 251, 259, 267 and 274 of this Judgment for compensation and reimbursement of costs and expenses, in the terms established in those paragraphs and in paragraphs 278 to 283 of this Judgment.

11. The State must reimburse the Victims' Legal Assistance Fund of the Inter-American Court of Human Rights for the amounts disbursed during the processing of this case, in the terms established in paragraph 277 of this Judgment.

12. The State must submit to the Court a report, within one year of notification of this Judgment, on the measures adopted in compliance therewith.

13. The Court will monitor full compliance with this Judgment, in exercise of its attributions and in compliance with its duties in accordance with the American Convention on Human Rights, and will consider this case closed when the State has complied fully with its provisions.

Judge Eduardo Ferrer Mac-Gregor Poisot advised the Court of his Separate Opinion, and Judges Eduardo Vio Grossi and Humberto Sierra Porto advised the Court of their Partially Dissenting Opinions, which accompany this Judgment.

Done in Spanish at San José, Costa Rica, on March 6, 2019.

Inter-American Court of Human Rights. *Case of Muelle Flores v. Peru*. Preliminary objections, merits, reparations and costs. Judgment of March 6, 2019.

Eduardo Ferrer Mac-Gregor Poisot
President

Eduardo Vio Grossi

Humberto A. Sierra Porto

Elizabeth Odio Benito

Eugenio Raúl Zaffaroni

L. Patricio Pazmiño Freire

Pablo Saavedra Alessandri
Secretary

So ordered,

Eduardo Ferrer Mac-Gregor Poisot
President

Pablo Saavedra Alessandri
Secretary

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

CASE OF MUELLE FLORES V. PERU

**JUDGMENT OF MARCH 6, 2019
(Preliminary objections, merits, reparations and costs)**

INTRODUCTION:

*THE RIGHT TO SOCIAL SECURITY AS AN AUTONOMOUS AND JUSTICIABLE RIGHT
(ITS SPECIAL IMPACT ON THE OLDER PERSON)*

1. The judgment in the case of *Muelle Flores v. Peru* (hereinafter “the judgment” or “Muelle Flores”)¹ contributes to the inter-American line of case law on the economic, social, cultural and environmental rights (hereinafter “the ESCER” or “the social rights”). The judgment reaffirms the competence of the Inter-American Court of Human Rights (hereinafter “the Court” or “the Inter-American Court”) to analyze autonomous violations of Article 26 of the American Convention on Human Rights (hereinafter “the American Convention” or “the Pact of San José”).²

2. The case of *Muelle Flores* marks an important precedent for the inter-American system. For the first time, the Inter-American Court directly addresses the *right to social security* as an autonomous and justiciable right under Article 26 of the American Convention, declaring that this right has been violated and establishing relevant standards based on the fact that the *victim is an individual who is in a situation requiring special protection because he is an older person with a disability*.³

¹ Cf. Case of *Muelle Flores v. Peru*. Preliminary objections, merits, reparations and costs. Judgment of March 6, 2019. Series C No. 375.

² Cf. Case of *Acevedo Buendía et al. (“Discharged and Retired Employees of the Comptroller’s Office”) v. Peru*. Preliminary objection, merits, reparations and costs. Judgment of July 1, 2009. Series C No. 198, paras. 12 to 19; Case of *Lagos del Campo v. Peru*. Preliminary objections, merits, reparations and costs. Judgment of August 31, 2017. Series C No. 340, paras. 142 and 145; *Advisory Opinion OC-23/17 on The Environment and Human Rights (State obligations with regard to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1), in relation to Articles 1(1) and 2 of the American Convention on Human Rights)*. November 15, 2017, Series A No. 23, para. 57; Case of the Dismissed Employees of Petroperú et al. v. Peru. Preliminary objections, merits, reparations and costs. Judgment of November 23, 2017. Series C No. 344, para. 192; Case of *San Miguel Sosa et al. v. Venezuela*. Merits, reparations and costs. Judgment of February 8, 2018. Series C No. 348, para. 220; Case of *Poblete Vilches et al. v. Chile*. Merits, reparations and costs. Judgment of March 8, 2018. Series C No. 349, para. 100; Case of *Cuscul Pivaral et al. v. Guatemala*. Preliminary objection, merits, reparations and costs. Judgment of August 23, 2018. Series C No. 359, paras. 75 to 97; and Case of *Muelle Flores v. Peru*. Preliminary objections, merits, reparations and costs. Judgment of March 6, 2019. Series C No. 375, paras. 33 to 37.

³ “Oscar Muelle Flores is 82 years of age and suffers from a severe hearing disability as a result of the total loss of hearing in one of his ears 15 years ago and a decrease in hearing in the other ear. Also, in May 2018, Mr. Muelle Flores was diagnosed with “senile dementia (Alzheimer’s type)” and, in July 2018, suffered a femoral fracture and underwent a hip replacement operation.” Case of *Muelle Flores v. Peru*. Preliminary objections, merits, reparations and costs. Judgment of March 6, 2019. Series C No. 375, para. 52.

3. The judgment reiterates that Article 26 of the American Convention protects the rights implicit in the economic, social, educational, scientific and cultural standards set forth in the Charter of the Organization of American States (hereinafter "the OAS Charter"). In this case, the Inter-American Court identified various provisions of the OAS Charter⁴ from which it is possible to derive the right to social security. It considered that the right to social security is referred to with a sufficient degree of specificity in the OAS Charter to establish its existence and implicit recognition. In particular, from the different references it can be noted that the purpose of the right to social security is "to ensure life, health and a decent standard of living" to everyone in their old age, or in the case of events that deprive them of the possibility of working; that is, in relation to future events that could affect their quality of life. On this basis, the judgment concluded that the right to social security was a right protected by Article 26 of the American Convention.⁵

4. Having determined that the right to social security is protected under Article 26 of the Pact of San José, the Inter-American Court proceeded to delimit this right with greater precision giving special consideration to the American Declaration of the Rights and Duties of Man because "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."⁶

5. Thus, Article XVI ("Right to social security") of the American Declaration of the Rights and Duties of Man states clearly that "*Every person has the right to social security which will protect him from the consequences of unemployment, old age, and any disabilities arising from causes beyond his control that make it physically or mentally impossible for him to earn a living.*"⁷ To establish the content of the right and the corresponding obligations with greater precision, the Inter-American Court noted that the right to social security had been developed extensively in international law: in Article 9 of the Protocol of San Salvador, and in Articles 22 and 25 of the Universal Declaration of Human Rights, as well as within the mandate of the International Labour Organization (ILO) and by the Committee on Economic, Social and Cultural Rights (hereinafter "the CESCR") in application of Article 9 of the International

⁴ See Articles 3(j), 45(b) and (h), and 46 of the OAS Charter. Article 3(j) indicates that "[s]ocial justice and social security are bases of lasting peace." Article 45(b) establishes that: "(b) [w]ork 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." In addition, Article 45 establishes that "[t]he 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: (h) [d]evelopment of an efficient social security policy." Meanwhile, Article 46 recognizes that "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." Cf. *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of March 6, 2019. Series C No. 375, paras. 172 and 173.

⁵ Cf. *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of March 6, 2019. Series C No. 375, para. 173.

⁶ Cf. 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, and *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of August 23, 2018. Series C No. 359, para. 101.

⁷ Cf. *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of March 6, 2019. Series C No. 375, para. 179.

Covenant on Economic, Social and Cultural Rights (hereinafter “the ICESCR”).⁸ Lastly, the Inter-American Court determined that the right to social security was also established in Articles 10 and 11 of the 1993 Constitution of Peru.⁹

6. It is important to point out that, when using the sources, principles and criteria of the international *corpus iuris* as special norms that are applicable when determining the content of the right to social security in order to supplement the provisions of the American Convention, the Inter-American Court is not assuming a jurisdiction over some treaties that it does not have, nor is it granting Convention status to norms contained in other national and international instruments related to ESCER.¹⁰ On the contrary, the Court is making an interpretation pursuant to the standards established in Article 29 of the Pact of San José,¹¹ in order to update the meaning of the rights derived from the OAS Charter that are recognized by Article 26 of the American Convention.¹² The consistent practice of the Inter-American Court has been¹³ that, when determining the compatibility of a State’s acts and omissions or of its laws with the American Convention, it is able to interpret the corresponding obligations and rights in light of other pertinent treaties and norms.¹⁴

7. Following this jurisprudential line,¹⁵ the Inter-American Court considered that the nature and scope of the obligations derived from the protection of social security include aspects that are *immediately enforceable*, as well as aspects that are *of a progressive nature*. The judgment recalls that, regarding the former (the obligations that are immediately enforceable), the States must take effective measures to ensure access, without discrimination, to the benefits recognized by the right to social security and equal rights of men and women, among other matters.¹⁶ Regarding the latter (obligations of a progressive

⁸ Cf. Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs. Judgment of March 6, 2019. Series C No. 375, paras. 181, 183 and 184.

⁹ Cf. Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs. Judgment of March 6, 2019. Series C No. 375, para. 182.

¹⁰ Cf. Case of the Pacheco Tineo Family v. Bolivia, *supra*, para. 143, and Case of Cuscul Pivaral et al. v. Guatemala, *supra*, para. 101.

¹¹ Article 29 of the American Convention (which establishes the *pro personae* principle), explicitly refers to the general rules of international law for its interpretation and application. Cf. Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs. Judgment of March 6, 2019. Series C No. 375, para. 174; Case of the Pacheco Tineo family v. Bolivia. Preliminary objections, merits, reparations and costs. Judgment of November 25, 2013. Series C No. 272, para. 143, and Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs. Judgment of August 23, 2018. Series C No. 359, para. 100.

¹² Cf. Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs. Judgment of March 6, 2019. Series C No. 375, para. 175.

¹³ Cf. Case of Poblete Vilches et al. v. Chile, *supra*, para. 103; Case of Lagos del Campo v. Peru, *supra*, para. 145; Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs. Judgment of November 30, 2016. Series C No. 329, para. 168; Case of the Pacheco Tineo family v. Bolivia, para. 129; 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 Gelman v. Uruguay. Merits and reparations. Judgment of February 24, 2011. Series C No. 221, para. 78 and 121, and Case of Cuscul Pivaral et al. v. Guatemala, *supra*, para. 100.

¹⁴ Cf. Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs. Judgment of March 6, 2019. Series C No. 375, para. 174.

¹⁵ Cf. Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs. Judgment of March 8, 2018. Series C No. 349, para. 104, and Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs. Judgment of August 23, 2018. Series C No. 359, para. 98.

¹⁶ Cf. UN, Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant)*, December 14, 1990, UN Doc. E/1991/23, para. 3, and Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The right to social security (Art. 9 of the Covenant)*, February 4, 2008, para. 40.

nature), progressive development means that the States Parties have the specific and constant obligation to advance as rapidly and efficiently as possible towards the full realization of this right,¹⁷ subject to available resources, by legislation or other appropriate means.¹⁸ In addition, there is an obligation of non-retrogression *vis-a-vis* the rights achieved.¹⁹ Consequently, the obligations of respect and guarantee established in the Convention, as well as the domestic legal effects (Articles 1(1) and 2 of the American Convention), are essential to achieve its effectiveness.

8. As the judgment indicates, in each case examined, it is necessary to determine which type of obligations are involved in relation to the right to social security.²⁰ The Inter-American Court noted that this case did not relate to the obligations of progressive development derived from Article 26 of the American Convention, but rather to *the failure to implement the right to a pension as an integral part of the right to social security of Mr. Muelle Flores* owing to the failure to execute and comply with the judgments handed down in his favor in the domestic sphere in the context of the privatization of the State company following his retirement.²¹

9. In addition, the judgment addresses relevant aspects of the issue of *older persons* as a group in a situation of special vulnerability in relation to the enjoyment of the social rights,²² as well as the particular impact – material and emotional – on older persons of the failure to execute domestic judgments that protect the right to social security.²³ The judgment

¹⁷ Cf. UN, Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, December 14, 1990, UN Doc. E/1991/23, para. 9, and Committee on Economic, Social and Cultural Rights, *General Comment No. 19, The right to social security (Article 9)*, February 4, 2008, paras. 40 and 41.

¹⁸ Article 26 of the Convention establishes: "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 implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires."

¹⁹ Cf. Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru. *Preliminary objection, merits, reparations and costs*. Judgment of July 1, 2009. Series C No. 198, paras. 102 and 103; and Case of Poblete Vilches et al. v. Chile. *Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, para. 104. See also: "Working Group to Examine the National Reports envisioned in the Protocol of San Salvador." Initially, the Working Group prepared the document "Progress indicators for measuring rights under the Protocol of San Salvador," OEA/Ser.L/XXV.2.1; GT/PSS/doc.2/11 rev.2, of December 16, 2011, based on the guidelines and criteria presented by the Inter-American Commission on Human Rights. Following consultations with the States and civil society, these were adopted by the Forty-second General Assembly held in Cochabamba, Bolivia in June 2012 (AG/RES. 2713 (XLII-O/12)). On that occasion, the rights to social security, health and education were addressed. Subsequently, a second group of rights was addressed and the Working Group issued the "Progress indicators for measuring rights contemplated in the Protocol of San Salvador – second group of rights," OEA/Ser.L/XXV.2.1 GT/PSS/doc.9/13, adopted by the OAS General Assembly in Resolution AG/RES. 2823 (XLIV-O/14), at the second plenary session on June 4, 2014. Finally, in 2015, the Working Group combined the two groups of rights and published the document "Progress indicators for measuring rights contemplated in the Protocol of San Salvador," OEA/Ser.D/XXVI.11 (2015). On that occasions, they addressed the right to work and trade union rights, the right to adequate food, a healthy environment, and the benefits of culture. Cf. UN, Committee on Economic, Social and Cultural Rights, *General Comment No. 19, The right to social security (Art. 9 of the Covenant)*, February 4, 2008, para. 42.

²⁰ Cf. Case of Muelle Flores v. Peru. *Preliminary objections, merits, reparations and costs*. Judgment of March 6, 2019. Series C No. 375, paras. 190, 191 and 202.

²¹ Mr. Muelle Flores acquired his right to a pension under a State-administered contribution regime; in other words, he acquired the right to receive a pension having made contributions for several years. The legitimacy of his incorporation into this regime was confirmed by the domestic courts.

²² Cf. Case of Muelle Flores v. Peru. *Preliminary objections, merits, reparations and costs*. Judgment of March 6, 2019. Series C No. 375, para. 207.

²³ Cf. Case of Muelle Flores v. Peru. *Preliminary objections, merits, reparations and costs*. Judgment of March 6,

emphasizes that “in a context in which a legally recognized pension is not paid, the rights to [Art. 26 of the American Convention], personal integrity [Art. 5(1) of the American Convention] and human dignity [Art. 11(1) of the American Convention] are interrelated and, at times, the violation of one directly affects the other, a situation that is accentuated in the case of *older persons*.”²⁴

10. In this regard, in its judgment the Inter-American Court concluded that “[t]he failure to implement the right to social security for more than 27 years seriously prejudiced the quality of life and the health care coverage of Mr. Muelle, a person in a situation requiring special protection because he was an older person with a disability. The violation caused by the failure to pay the pension exceeded a reasonable time because, since this was the victim’s only income, the prolonged absence of the payment inevitably resulted in financial hardship that affected his ability to pay for his basic necessities and, consequently, affected his mental and moral integrity, as well as his dignity.”²⁵

11. Based on this brief introduction, I am issuing this opinion to examine in more detail some aspects of this judgment that are relevant for the future of the inter-American system: I. The right to social security as an autonomous right and its importance for international law (*paras. 12-35*). II. The failure to execute judgments on the social rights and the impact on older persons (*paras. 36-57*), and III. The importance of the *Case of Muelle Flores* for inter-American case law: the obligation of “exceptional due diligence” (*paras. 58-68*).

I. THE RIGHT TO SOCIAL SECURITY AS AN AUTONOMOUS RIGHT AND ITS IMPORTANCE FOR INTERNATIONAL LAW

a) Universal system

12. The right to social security was established in the universal system of human rights, by Article 22 of the Universal Declaration of Human Rights.²⁶ However, this right was defined more specifically in 1966 in the International Covenant on Economic, Social and Cultural Rights. Article 9 of that treaty stipulated that “The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.” In particular, the content of this right was developed by the CESCR, in General Comment No. 19 on the right to social security.²⁷

13. In this regard it is important to stress the standards that have been incorporated into inter-American case law with regard to social security and which are consistent with the content developed by the CESCR. First, the right to social security can be conceptualized as

2019. Series C No. 375, paras. 204 to 206.

²⁴ Cf. *Case of Muelle Flores v. Peru*. Preliminary objections, merits, reparations and costs. Judgment of March 6, 2019. Series C No. 375, para. 204.

²⁵ Cf. *Case of Muelle Flores v. Peru*. Preliminary objections, merits, reparations and costs. Judgment of March 6, 2019. Series C No. 375, para. 207.

²⁶ Adopted and proclaimed by Assembly General Resolution 217 A (III) on December 10, 1948, in Paris. Article 25 establishes that: “(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. (2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.”

²⁷ The Inter-American Court has reflected the content developed by the CESCR in General Comment No. 19 in the instant case.

the right “[t]o access and maintain benefits whether in cash or in kind, without discrimination, in order to secure protection, *inter alia*, from [...] a lack of work-related income.”²⁸

14. The CESCR has also indicated “a number of essential factors” that apply in any situation or circumstance, namely: (i) availability; (ii) social risks and contingencies: (a) health care, (b) sickness, (c) old age, (d) unemployment, (e) unemployment injury, (f) family and child support, (g) maternity, (h) disability, and (i) survivors and orphans; (iii) adequacy; (iv) accessibility: (a) coverage, (b) eligibility, (c) affordability, (d) participation and information, and (e) physical access.²⁹

15. It is worth pointing out that the CESCR has declared the violation of the right to social security in its system of individual communications. In 2017, the CESCR ruled on this issue in *Trujillo Calero v. Ecuador*, based on General Comments No. 6 (older persons) and No. 19 (social security); according to the CESCR, “the right to social security is of central importance in guaranteeing human dignity.”³⁰ It has also considered that Article 9 of the Covenant “implicitly recognizes the right to old-age benefits.”³¹

b) African system of human rights

16. Under the African system, the right to social security is not included in the 1991 African Charter of Human and Peoples’ Rights. Moreover, although the African Charter explicitly includes social rights, *a number of social rights are missing*. Thus, the Banjul Charter does not expressly refer to adequate living standards (including the right to food, clothing and housing), the right to social security, or the benefits of scientific advances. These “missing” rights in the Banjul Charter relate to the socio-economic necessities of the African peoples who are predominantly rural and impoverished and who have limited access to safe drinking water, adequate housing, food, etc.³² The adoption, in 2016, of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Older Persons in Africa³³ was an important step forward, and its Article 7 (Social Protection) establishes that the “States Parties shall: 1. Develop policies and legislation that ensure that older persons who retire from their employment are provided with adequate pensions and other forms of social security.”

c) European system of human rights

17. The European Court of Human Rights (hereinafter “the European Court”) has understood that the benefits of the social security system may be considered a possession to

²⁸ Cf. UN, Committee on Economic, Social and Cultural Rights, General Comment No. 19, The right to social security (Article 9), Adopted on November 23, 2007, para. 2 and Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs. Judgment of March 6, 2019. Series C No. 375, para. 186

²⁹ Cf. Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs. Judgment of March 6, 2019. Series C No. 375, paras. 178 to 193.

³⁰ *Trujillo Calero v. Ecuador*, Communication 10/2015, E/C.12/63/D/10/2015, March 26, 2018, para. 11.1. Similarly, see: UN, Committee on Economic, Social and Cultural Rights, General Comment No. 19, *The right to social security (Article 9)*, February 4, 2008, paras. 1 to 3; and *López Rodríguez v. Spain*, Communication 1/2013, E/C.12/57/D/1/2013, April 20, 2016, paras. 10.1 and 10.2.

³¹ Cf. UN, Committee on Economic, Social and Cultural Rights, General Comment No. 6 (1995) *The Economic, Social and Cultural Rights of Older Persons* para. 10, and Cf. UN, Committee on Economic, Social and Cultural Rights, General Comment No. 19, *The right to social security (Article 9)*, February 4, 2008, para. 10.

³² Cf. Alemahu Yeshanew, Sisay, *The Justiciability of Economics, Social and Cultural Rights in the African Regional Human Rights System*, Intersentia, Cambridge, 2013, p. 241.

³³ Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Older Persons in Africa, adopted on July 31, 2016, in Addis Ababa, Ethiopia.

which the individual has a right, insofar as it is recognized by domestic law and precisely owing to his or her contribution to the social security system; a contribution that would give rise to a reasonable expectation of access to the corresponding social security benefits.³⁴ This right has been derived from the right to protection of property established in Article 1 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms³⁵ based on the concept of “possessions.”³⁶

18. The European Court has underlined the special diligence required in the processing of cases in which the matter in question is urgent, identifying, for example, those cases of a work-related nature and concerning pensions. Specifically, in the case of pensions, the European Court has said that special diligence is required in work-related disputes including disputes on pensions.³⁷

19. Meanwhile, the European Committee of Social Rights³⁸ is the organ responsible for monitoring compliance with the European Social Charter, Article 12 of which explicitly includes the right to social security.³⁹ In this way, the European Committee of Social Rights has understood that the right to social security is a fundamental right and that the social security system must cover the traditional social risks providing adequate benefits in respect of medical care, sickness, unemployment, old age, employment injury, family, maternity, etc. It has also specified that the benefits provided within the different branches of social security should be adequate and, in particular, income-substituting benefits should not be so low as to result in

³⁴ Cf. Santolaya Machetti, Pablo and Díaz Ricci, Sergio M., “Los Derechos Económicos, Sociales y Culturales y la protección de grupos vulnerables”, in Canosa Usera, Raúl, Fernández Sánchez, Pablo Antonio, García Roca, Javier and Santolaya Machetti, Pablo (Coords.), *El Diálogo entre los Sistemas Europeo y Americano de Derechos Humanos*, Lima, ECB Ediciones S. A. C., 2015, p. 303.

³⁵ “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. [...]”

³⁶ Cf. *Case of Stec and Others v. The United Kingdom*, Application No. 65731/01 65900/01, Judgment of April 12, 2006; *Case of Wessels-Bergervoet v. The Netherlands*, Application No. 34462/97, Judgment of November 12, 2002, and *Case of Andrejeva v. Latvia*, Application No. 55707/00, Judgment of February 18, 2009.

³⁷ Cf. Affidavit rendered by Christian Courtis on August 30, 2018, citing case law of the European Court of Human Rights, namely: cases of *Konig v. Germany*, June 28, 1978, para. 111; *Buchholz v. Germany*, May 6, 1981, para. 52; *Obermeier v. Austria*, June 28, 1990, para. 72; *Vacatura v. Italy*, May 24, 1991, para. 17; *Borgese v. Italy*, January 24, 1992, para. 18; *Ruotolo v. Italy*, February 27, 1992, para. 17; *Doustaly v. France*, April 23, 1998, para. 48; *Thlimmenos v. Greece*, April 6, 2000, paras. 60 and 62; *Frydlender v. France*, June 27, 2000, para. 45; *Garcia v. France*, September 26, 2000, para. 14; *Julien v. France*, April 8, 2003, para. 31, and *Sartory v. France*, September 24, 2009, para. 34.

³⁸ ECSR, Cf. *Finnish Society of Social Rights v. Finland*, Decision on the Merits, Complaint No. 88/2012, Decision of September 9, 2014, paras. 57 and 59 and *Unione Italiana del Lavoro U.I.L. Scuola-Sicilia v. Italy*, Complaint No. 13/2014, Decision on the merits, Decision of January 24, 2014, para. 52.

³⁹ “With a view to ensuring the effective exercise of the right to social security, the Contracting Parties undertake: (1) to establish or maintain a system of social security; (2) to maintain the social security system at a satisfactory level at least equal to that required for ratification of International Labour Convention (No. 102) Concerning Minimum Standards of Social Security; (3) to endeavor to raise progressively the system of social security to a higher level; (4) to take steps, through the conclusion of appropriate bilateral and multilateral agreements, or by other means, and subject to the conditions laid down in such agreements, in order to ensure: (a) equal treatment with their own nationals of the nationals of other Contracting Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Contracting Parties; (b) the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Contracting Parties.”

the beneficiaries falling into poverty.⁴⁰ It should be noted that, contrary, to the ICESCR, for example, the European Social Charter disaggregates the content of the right to social security into other provisions such as “The right of employed women to protection” (Art. 8)⁴¹ or “The right to social and medical assistance” (Art. 13).⁴² In this regard, the Council of Europe’s *Recommendation on the promotion of human rights of older persons*, adopted in 2014, is also relevant.⁴³

d) *Inter-American system of human rights: the Inter-American Court’s interpretation of Article 26 and the right to social security as an autonomous right*

1. The right to social security prior to the *Case of Lagos del Campo v. Peru*

20. In relation to the *right to social security*, the Inter-American Court had referred in its case law to the pension regime. In this regard, the Court had protected this right, mainly by way of the right to property — as an “acquired right” — (Article 21 of the American Convention), the right to judicial protection (Article 25 of the Convention) or based on the right to equal protection before the law, and non-discrimination (Articles 24 and 1(1) of the Convention).

21. In the *Case of the “Five Pensioners” v. Peru* (2003), the Inter-American Court considered that there could be no doubt that the victims in that case had the right to a retirement pension when they ceased to work.⁴⁴ However, the Court did not analyze the true nature of the right – as part of social security — rather, it analyzed the pension regime in light of the right to property. To this end, it determined, first, that pensions may be considered an

⁴⁰ ECSR, Cf. *Finnish Society of Social Rights v. Finland*, Decision on the Merits, Complaint No. 88/2012, Decision of September 9, 2014, paras. 57 and 59 and *Unione Italiana del Lavoro U.I.L. Scuola-Sicilia v. Italy*, Complaint No. 13/2014, Decision on the merits, Decision of January 24, 201, para. 52

⁴¹ “With a view to ensuring the effective exercise of the right of employed women to protection, the Contracting Parties undertake: (1) to provide either by paid leave, by adequate social security benefits or by benefits from public funds for women to take leave before and after childbirth up to a total of at least 12 weeks; (2) to consider it as unlawful for an employer to give a woman notice of dismissal during her absence on maternity leave or to give her notice of dismissal at such a time that the notice would expire during such absence; (3) to provide that mothers who are nursing their infants shall be entitled to sufficient time off for this purpose: (a) to regulate the employment of women workers on night work in industrial employment; (b) to prohibit the employment of women workers in underground mining, and, as appropriate, in all other work which is unsuitable for them by reason of its dangerous, unhealthy, or arduous nature.”

⁴² “With a view to ensuring the effective exercise of the right to social and medical assistance, the Contracting Parties undertake: (1) to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition; (2) to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights; (3) to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want; (4) to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other Contracting Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11th December 1953.”

⁴³ Recommendation CM/Rec (2014) of the Committee of Ministers to member States on the promotion of human rights of older persons. Adopted by the Committee of Ministers on February 19, 2014, at the 1192nd meeting of the Ministers’ Deputies. According to the first point of the appendix: “1. The purpose of the present recommendation is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all older persons, and to promote respect for their inherent dignity.

⁴⁴ Case of the “Five Pensioners” v. Peru. Merits, reparations and costs. Judgment of February 28, 2003. Series C No. 98, para. 94.

acquired right and, second, the parameters that should be taken into consideration to quantify the right to a pension.⁴⁵

22. Regarding the first point, the Inter-American Court considered that an acquired right is "a right that has been incorporated into the patrimony of a person," such as a pension; "in other words, that pensioners acquire a right to property related to the patrimonial effects of the right to a pension, [...] as established in Article 21 of the American Convention."⁴⁶ On the second point, namely, the way in which an equalized pension should be calculated, the Inter-American Court considered that "although the right to an equalized pension is an acquired right in accordance with Article 21 of the Convention, States may restrict the enjoyment of the right to property for reasons of public utility or social interest. In the case of the patrimonial effects of pensions (the pension amount), States may reduce these only by the appropriate legal procedure and for the said reasons." Thus, the Inter-American Court indicated that Article 5 of the Protocol of San Salvador only "allows States to establish restrictions and limitations to the enjoyment and exercise of economic, social and cultural rights 'by means of laws promulgated in order to preserve the general welfare in a democratic society only to the extent that they are not incompatible with the purpose and reason underlying those rights.'"⁴⁷

23. In addition to the violation of Article 21, in that case the Inter-American Court also found that there had been a violation of Article 25 of the American Convention because, in the domestic sphere, the judgments that granted protection to the victims' pensions had not been executed.⁴⁸

24. In 2009, in the *Case of Acevedo Buendía et al. (Discharged and Retired Employees of the Comptroller's Office) v. Peru* relating to the failure to pay pensions (from April 1993 to October 2002), following the precedent in the *Case of the "Five Pensioners,"* the Court considered that there had been a violation of Articles 25⁴⁹ and 21⁵⁰ of the American

⁴⁵ Case of the "Five Pensioners" v. Peru. Merits, reparations and costs. Judgment of February 28, 2003. Series C No. 98, para. 95.

⁴⁶ *Case of the "Five Pensioners" v. Peru. Merits, reparations and costs.* Judgment of February 28, 2003. Series C No. 98, paras. 102 and 103.

⁴⁷ *Case of the "Five Pensioners" v. Peru. Merits, reparations and costs.* Judgment of February 28, 2003. Series C No. 98, para. 116. In other words, the Inter-American Court determined that, in order to restrict the right to an equalized pension it was necessary to: (a) execute an administrative procedure with full respect for the appropriate guarantees, and (b) in any event, given precedence to the decisions of the courts of justice over the administrative decisions. In the case of all five victims, the Inter-American Court considered that neither of these two conditions had been met. *Case of the "Five Pensioners" v. Peru. Merits, reparations and costs.* Judgment of February 28, 2003. Series C No. 98, paras. 117 and 118.

⁴⁸ *Case of the "Five Pensioners" v. Peru. Merits, reparations and costs.* Judgment of February 28, 2003. Series C No. 98, paras. 138 and 141.

⁴⁹ Regarding the violation of Article 25 of the Pact of San José, the Court indicated that "72. In this sense, under the terms of Article 25 of the Convention, it is possible to identify two specific responsibilities of the State. The first is that the States have the responsibility to enact and ensure due application of effective remedies before the competent authorities that protect all persons subject to their jurisdiction from acts that violate their fundamental rights or that lead to the determination of the rights and obligations of the latter. The second is that States must guarantee effective mechanisms to execute the respective decisions and final judgments delivered by these competent authorities so that rights that are declared or recognized are protected effectively. And this is because a judgment that is *res judicata* grants certainty regarding the right or dispute in question in the specific case and, therefore, one of its effects is its binding nature. The contrary would imply the denial of the right involved." *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2009. Series C No. 198, para. 72.

⁵⁰ With regard to the violation of Article 21 of the Pact of San José, the Court stipulated that: "85. In a case similar to this one, the Court declared a violation of the right to property based on the patrimonial damage caused by the State's failure to comply with judgments that were intended to protect the right to a pension – a right that the

Convention.

25. The Court observed that, a total of 11 and 8 years, respectively, had passed since the delivery of the first and last judgment of the Constitutional Court – and almost 15 years since the judgment of the First Civil Chamber of the Superior Court of Lima – without these judgments being executed. As a result of the ineffectiveness of these remedies, the right to judicial protection of the presumed victims was, at least partially, illusory, which signified the denial of the right concerned. In conclusion, the Inter-American Court considered that the prolonged and unjustified failure to comply with the domestic judicial decisions resulted in the violation of the right to property recognized in Article 21 of the American Convention, and that this would not have occurred if the said judgments had been executed fully and promptly.⁵¹

26. Lastly, in 2015, in the *Case of Duque v. Colombia*, it was alleged that the victim was excluded from the possibility of obtaining a survivor's pension following the death of his partner; this exclusion resulted from the fact that they were a same-sex couple. Although the fundamental issue in this case was the pension, the Court also declared the violation of the right to equality before the law and to non-discrimination – as established in Articles 1(1) and 24 of the American Convention. In this case, the Court concluded that the State had failed to present an objective and reasonable justification for the existence of a restriction in access to a survivor's pension based on sexual orientation. Consequently, the Inter-American Court found that the differentiation established in domestic law based on sexual orientation for access to a survivor's pension was discriminatory and violated the provisions of Article 24 of the American Convention.⁵²

27. Accordingly, the Inter-American Court noted that when a domestic law was in force that did not permit the payment of pensions to the survivor of a same-sex couple, there was a difference in treatment that violated the right to equality and non-discrimination, so that it constituted an internationally wrongful act. Added to this, the internationally wrongful act affected Mr. Duque because this domestic law was applied in his case.⁵³

2. The right to social security following the *Case of Lagos del Campo: the Case of Muelle Flores et al. v. Peru*

28. The *Case of Lagos del Campo v. Peru* marked a turning point in the case law of the Inter-American Court as regards the direct justiciability of the economic, social, cultural and environmental rights before the organs of protection of the inter-American system, by

victims in that case had acquired under domestic law. In its judgment, the Court found that, from the moment a pensioner pays his contributions to a pension fund and ceases to work for the institution concerned in order to benefit from the retirement regime established by law, he acquires the right that his pension will be governed by the terms and conditions established in that law. Furthermore, the Court declared that the right to a pension acquired by the individual produces "patrimonial effects," and these are protected under Article 21 of the Convention. Consequently, in that case, the Court found that, by arbitrarily changing the amount of the pensions that the presumed victims had been receiving and by failing to comply with the judicial decisions handed down in relation to their applications for protective measures, the State violated the right to property recognized in Article 21 of the Convention." *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2009. Series C No. 198, para. 85.

⁵¹ Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru. Preliminary objection, merits, reparations and costs. Judgment of July 1, 2009. Series C No. 198, para. 90.

⁵² Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs. Judgment of February 26, 2016. Series C No. 310, para. 124.

⁵³ Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs. Judgment of February 26, 2016. Series C No. 310, para. 125.

declaring, for the first time, a violation of Article 26 of the American Convention.⁵⁴ In that case, the Inter-American Court declared that Peru was responsible for violating the right to job security of Alfredo Lagos del Campo because, following his arbitrary dismissal from the company in which he worked, the State failed to take adequate measures to protect his right.⁵⁵ This decision launched a new era in the direct and autonomous protection of the ESCER before the Inter-American Court.

29. As has been its practice in the case of the right to work⁵⁶ or the right to health,⁵⁷ in the *Muelle Flores* case, the Inter-American Court has considered that the right to social security may be derived fully from the referral made in Article 26 of the American Convention to the economic, social, educational, scientific and cultural standards set forth in the OAS Charter. In this regard, the Inter-American Court analyzed a series of provisions of the OAS Charter in order to determine that the right to social security is a human right that is justiciable under Article 26, to then establish its content and the corresponding State obligations with greater precision based on the American Declaration of the Rights and Duties of Man, the international *corpus iuris* and domestic constitutional provisions.⁵⁸

30. Even though the Inter-American Court had ruled on social security (pensions), in the cases of the *Five Pensioners* and *Acevedo Buendía*, there are evident differences between those judgments and the case of *Muelle Flores*. For example, in its first approach *from the perspective of the older person*, the Inter-American Court established that social security “is a right that seeks to protect the individual from future contingencies that, should they occur, would have harmful consequences for that person; therefore, measures must be taken to protect them. The right to social security seeks to protect the individual from situations that will occur when they reach a certain age and are physically or mentally unable to obtain the necessary means of subsistence for an adequate living standard, which may, in turn, deprive them of their ability to fully exercise all their other rights. This aspect also relates to one of the constituent elements of the right, because social security must be implemented in a way that guarantees conditions that ensure life, health and a decent economic status.”⁵⁹

31. Another differentiating aspect relates to the fact that the Inter-American Court can now examine in greater detail the obligations that a specific right entails. The Court determined that, pursuant to the general obligations of respect and guarantee contained in Articles 1(1) and 2 of the Pact of San José, both the obligations of an immediate nature (such as non-discrimination), and also those that require time to implement them (such as the obligations of a progressive nature – and consequently that of non-retrogression) are applicable to social security. Evidently, in each case examined the Court must determine the type of obligations

⁵⁴ *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 340, para. 154 and fifth operative paragraph.

⁵⁵ *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 340, para. 151.

⁵⁶ *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 340, paras. 142 and 145; *Case of the Dismissed Employees of Petroperú et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2017. Series C No. 344, para. 192; and *Case of San Miguel Sosa et al. v. Venezuela. Merits, reparations and costs.* Judgment of February 8, 2018. Series C No. 348, para. 220.

⁵⁷ *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349, para. 100; and *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, paras. 75 to 97.

⁵⁸ See *supra*, paras. 3 to 5 of this opinion.

⁵⁹ Cf. *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375, para. 183.

that are involved in relation to the right to social security, and whether these are the obligation to respect this right, the obligation to ensure the right (as in the case of its progressive development), or a combination of the two. This determination is essential because it reveals that not every case involving a social right necessarily signifies only a violation of the “obligation to ensure its progressive development.”⁶⁰

32. A third relevant aspect of the *Muelle Flores* case is that it gives us a comprehensive view of each of the violations that have occurred in each case. Even though the Court has done a commendable job with regard to the issue of pensions by incorporating violations within the content of the right to property (Article 21), as in the cases of the *Five Pensioners* and *Acevedo Buendía*, it is clear that the said right does not encompass the broader content of the right to social security;⁶¹ although the right to social security does include monetary or financial aspects (pensions), it also encompasses benefits relating to certain services that beneficiaries can access – for example, preventive or emergency medical services – that are clearly unrelated to the sphere of the protection of private property.⁶² Consequently, in its judgment, the Court relates the right to social security to the right to property – without subsuming it within the latter.⁶³

33. Each and every one of the aspects I have emphasized provides a specific argument regarding the reasons why the social rights – such as the right to social security – may validly be autonomously justiciable.⁶⁴ To this should be added, as previously indicated by the Inter-American Court, that “a literal, systematic and teleological interpretation leads to the conclusion that Article 26 of the Convention protects the rights derived from the economic, social, educational, scientific and cultural standards set forth in the OAS Charter. The scope of such rights should be understood in relation to the other articles of the American Convention and they are therefore subject to the general obligations contained in Article 1(1) and 2 of the Convention and may be supervised by the Court in the terms of Articles 62 and 63 of this instrument. This conclusion is based not only on formal issues, but results from the interdependence and indivisibility of civil and political rights and economic, social, cultural and environmental rights, as well as their compatibility with the object and purpose of the Convention, which is the protection of the fundamental rights of the human being.[...]”⁶⁵

34. This important exercise performed by the Court in interpreting the rights and also the scope of the social rights is not unrelated to its case law because, traditionally, the Court has

⁶⁰ Cf. *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of March 6, 2019. Series C No. 375, paras. 190, 191 and 202.

⁶¹ For example, in the *Case of Vereda La Esperanza v. Colombia*, the Inter-American Court used a similar approach in relation to Article 21 of the American Convention with regard to the possibility of differentiating the right to property and the right to housing. It indicated that: “Consequently, this Court finds it necessary to make some additional clarifications regarding the inviolability of the home and privacy from the perspective of Article 11(2) of the Convention and with regard to the right to housing, the latter taking into account that, even though every home can be protected by the right to property, not all property is necessarily a home [...]” Cf. *Case of Vereda La Esperanza v. Colombia. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2017. Series C No. 341, para. 241. It should be pointed out that the Inter-American Court did not declare that the right to housing had been violated autonomously in that judgment.

⁶² Cf. UN, Committee on Economic, Social and Cultural Rights, General Comment No. 19, *The right to social security (Article 9)*, February 4, 2008, para. 2

⁶³ Cf. *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of March 6, 2019. Series C No. 375, para. 218.

⁶⁴ Cf. *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of March 6, 2019. Series C No. 375, fifth and sixth operative paragraphs and paras. 171 to 209 and 213 to 219.

⁶⁵ *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of August 23, 2018. Series C No. 359, para. 97.

provided content to the provisions of the Pact of San José in order to update the content of the articles based on the new realities that have been submitted to its jurisdictional function.⁶⁶

35. It is important to stress that the Inter-American Court, as any organ with jurisdictional functions, has the inherent authority to determine the scope of its own competence (*compétence de la compétence*). When making this determination, the Court must take into account that the instruments accepting the optional clause concerning the binding jurisdiction (Article 62(1) of the Convention) presume that the States that deposit this instrument accept the right of the Court to decide any dispute concerning its jurisdiction. Furthermore, the Court has indicated previously that the broad terms in which the American Convention was drafted indicate that the Inter-American Court exercises full jurisdiction over all its articles and provisions.⁶⁷

II. THE FAILURE TO EXECUTE JUDGMENTS ON THE SOCIAL RIGHTS AND THE IMPACT ON OLDER PERSONS

a) The right of access to justice broadly construed

36. The Inter-American Court has established that “the fact that a judgment is at the stage of execution does not exclude a possible violation of the right to an effective remedy,” insofar as “the process should lead to the materialization of the protection of the right recognized in the judicial ruling by the proper application of this ruling.”⁶⁸

37. The Inter-American Court has indicated that the responsibility of the State does not end when the competent authorities issue a decision or a judgment, but also requires the State to ensure the means to execute the final decisions in order to provide effective protection to the declared rights.⁶⁹ The Court has also established that the effectiveness of judgments depends on their execution. The process should lead to the materialization of the protection of the right recognized in the judicial ruling by the proper application of that ruling.⁷⁰

38. Article 25(2)(c) of the American Convention establishes the undertaking of the States “to ensure that the competent authorities shall enforce such remedies when granted” and this protects the individual against acts that violate his or her fundamental rights. Accordingly, the effectiveness of judgments and judicial orders “depends on their execution [...] because a

⁶⁶ For example, the Court has recently interpreted the scope of Article 6 of the American Convention. See, *Case of Hacienda Brasil Verde Workers v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of October 20, 2016. Series C No. 318. Cases related to the right to the truth can also be noted: *Case of the Campesino Community of Santa Bárbara v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2015. Series C No. 299, and the *Case of Munárriz Escobar et al. v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of August 20, 2018. Series C No. 355.

⁶⁷ Cf. *Case of Acevedo Buendía et al. (“Discharged and Retired Employees of the Comptroller’s Office”) v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of July 1, 2009. Series C No. 198, paras. 16 and 17.

⁶⁸ Cf. *Case of Baena Ricardo et al. v. Panamá. Jurisdiction*. Judgment of November 28, 2003. Series C No. 104, para. 73, and *Case of Fornerón and daughter v. Argentina. Merits, reparations and costs*. Judgment of April 27, 2012. Series C No. 242, para. 107

⁶⁹ Cf. *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights)*. Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 24, and *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of August 23, 2018. Series C No. 359, para. 169.

⁷⁰ Cf. *Case of Baena Ricardo et al. v. Panama. Jurisdiction*. Judgment of November 28, 2003. Series C No. 104, para. 73 and *Case of Liakat Ali Alibux v. Suriname*. Preliminary objections, merits, reparations and costs. Judgment of January 30, 2014. Series C No. 276, para. 33.

judgment that is *res judicata* accords certainty with regard to the right or dispute examined in the specific case and, consequently, one of its effects is its binding nature or the necessity of complying with it. The contrary would involve the very denial of the right involved." Consequently, "the execution of judgments must be considered an integral part of the right of access to the remedy, which also includes full compliance with the respective decision."⁷¹

39. The right of access to justice in its broad sense is fundamental for the social rights and is essential for effective judicial protection. In many cases, the problems do not arise from the fact that a right is not protected in the domestic sphere, but rather from the failure to execute the domestic judgments that have recognized and granted that right.

40. For example, the CESCR has determined that, in practice, the victims of violations of the rights recognized in the ICESCR "have difficulty in accessing effective judicial remedies." The Committee mentioned this explicitly in its most recent Concluding Observations on the periodic reports of eight countries that have accepted the contentious jurisdiction of the Inter-American Court;⁷² moreover, this concern may be noted implicitly in a further two cases.⁷³ A similar situation can be seen in at least six OAS Member States that have not accepted the jurisdiction of the Inter-American Court.⁷⁴

41. Recently, the CESCR has also indicated its concern at the lack of effective enforcement of the judgments handed down in proceedings in which violations of economic, social and cultural rights have been found.⁷⁵

42. In these circumstances, in its General Comment No. 9 on the domestic application of the Covenant, the CESCR established that "the means of implementation chosen must be

⁷¹ *Case of Acevedo Jaramillo et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of February 7, 2006. Series C No. 144, para. 220 and *Case of Furlan and family v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2012. Series C No. 246, para. 209.

⁷² Cf. CESCR, Concluding observations on the combined fifth and sixth periodic reports of Mexico, April 17 2018, UN Doc. E/C.12/MEX/CO/5-6, para. 5; CESCR, Concluding observations on the fifth periodic report of Uruguay, July 20, 2017, UN Doc. E/C.12/URY/CO/5, para. 7; CESCR, Concluding observations on the fifth periodic report of Costa Rica, October 21, 2016, UN Doc. E/C.12/CRI/CO/5, paras. 6 and 7; CESCR, Concluding observations on the fourth periodic report of the Dominican Republic, October 21, 2016, UN Doc. E/C.12/DOM/CO/4, para. 5; CESCR, Concluding observations on the second periodic report of Honduras, July 11, 2016, UN Doc. E/C.12/HND/CO/2, para. 5; CESCR, Concluding observations on the fourth periodic report of Chile, July 7, 2015, UN Doc. E/C.12/CHL/CO/4, para. 7; CESCR, Concluding observations on the fourth periodic report of Paraguay, March 20, 2015, UN Doc. E/C.12/PRY/CO/4, para. 7, and CESCR, Consideration of reports by States Parties under Articles 16 and 17 of the Covenant. Concluding observations of the Committee on Economic, Social and Cultural Rights, Panama, September 24, 2001, E/C.12/1/Add.64, paras. 9 and 25.

⁷³ Cf. CESCR, Concluding observations on the sixth periodic report of Colombia, October 19, 2017, E/C.12/COL/CO/6, para. 13 (c), 45 and 46 (c); CESCR, Concluding observations on the third periodic report of Guatemala, December 9, 2014, E/C.12/GTM/CO/3, para. 6.

⁷⁴ Cf. CESCR, Concluding observations on the sixth periodic report of Canada, March 23, 2016, UN Doc. E/C.12/CAN/CO/6, para. 5; CESCR, Concluding observations on the combined second to fourth periodic reports of Guyana, October 28, 2015, UN Doc. E/C.12/GUY/CO/2-4, para. 8; CESCR, Concluding observations on the third periodic report of the Bolivarian Republic of Venezuela, July 7, 2015, UN Doc. E/C.12/VEN/CO/3, para. 7; CESCR, Concluding observations on the combined third and fourth periodic reports of Jamaica, June 10, 2013, UN Doc. E/C.12/JAM/CO/3-4, para. 6; CESCR, Consideration of reports by States Parties under Articles 16 and 17 of the Covenant. Concluding observations of the Committee on Economic, Social and Cultural Rights, Trinidad and Tobago, June 5, 2002, E/C.12/1/Add.80, para. 9; CESCR, Consideration of reports by States Parties under Articles 16 and 17 of the Covenant. Concluding observations of the Committee on Economic, Social and Cultural Rights, San Vicente and the Grenadines, December 2, 1997, E/C.12/1/Add.21, para. 13.

⁷⁵ Cf. CESCR, Concluding observations on the combined fifth and sixth periodic reports of Mexico, op. cit., para. 5 and 6; CESCR, Concluding observations on the sixth periodic report of Colombia, op. cit., para. 18(c).

adequate to ensure fulfilment of the obligations under the Covenant;⁷⁶ and these include ensuring the right to social security through the creation of internal – coercive – mechanisms that ensure execution of a judgment that grants and recognizes the right.⁷⁷

43. Although the instant case addresses the right to social security, it should be emphasized that “these mechanisms” aimed at ensuring execution of a judicial decision apply to all human rights, whether economic, social, cultural and environmental or civil and political.

b) The protection of older persons in international law and their importance as a group in a vulnerable situation

44. In 1995, the CESCR indicated that “unlike the case of other population groups such as women and children, no comprehensive international convention yet exists in relation to the rights of older persons and no binding supervisory arrangements attach to the various sets of United Nations principles in this area.”⁷⁸

45. Today the situation described by the CESCR in 1995 has changed considerably. Within the United Nations,⁷⁹ in May 2014, the Human Rights Council appointed Rosa Kornfeld-Matte as the first Independent Expert on the enjoyment of all human rights by older persons.⁸⁰ Nevertheless, the greatest progress has been made in the inter-American and the African systems of human rights as they have developed specific instruments that establish concrete rights for older persons.

46. In the case of the African Charter of Human and Peoples’ Rights, Article 18(4) grants special protection to older persons.⁸¹ And, on January 31, 2016, the Protocol to the African Charter of Human and Peoples’ Rights on the Rights of Older Persons in Africa.⁸²

47. In the case of the inter-American system of human rights, the Inter-American Convention on Protecting the Human Rights of Older Persons was adopted on June 15, 2015,

⁷⁶ Mutatis mutandis, CESCR, General Comment No. 9, “The domestic application of the Covenant, 1998, para. 7.

⁷⁷ Cf. Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs. Judgment of March 6, 2019. Series C No. 375, para. 128.

⁷⁸ Cf. CESCR, General Comment No. 6, The Economic, Social and Cultural Rights of Older Persons, 1995, para. 13.

⁷⁹ The first time that the issue of the older person was highlighted on the international agenda was in the 1982 Vienna International Plan of Action on Ageing. Subsequently, in 1991, the United Nations proclaimed the “United Nations Principles for Older Persons” which established the guiding principles of independence, participation, care, self-fulfillment and dignity. In 1992, the United Nations General Assembly issued the Proclamation on Ageing in which it urged support for initiatives so that “[o]lder persons are viewed as contributors to their societies and not as a burden.” Lastly, the most significant step forward was taken in 2002 with the Madrid International Plan of Action on Ageing and the Political Declaration. In this Declaration the State committed themselves “to the task of effectively incorporating ageing within social and economic strategies, policies and action while recognizing that specific policies will vary according to conditions within each country.” In addition, other bodies of the universal system in general comments, general recommendations and reports of Special Rapporteurs have addressed the situation of the rights of older persons.

⁸⁰ This mandate has given visibility to thematic reports on older persons with regard to their autonomy and care.

⁸¹ “[...] 4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.”

⁸² The Protocol was adopted on July 31, 2016, in Addis Ababa, Ethiopia.

and has been in force since January 11, 2017.⁸³ It is particularly relevant that Article 31 (Access to Justice) of this international instrument states that “State Parties shall ensure due diligence and preferential treatment for older persons in the processing, settlement of, and enforcement of decisions in administrative and legal proceedings.”

48. Although the European system of human rights does not have a specific legal instrument that protects older persons in a differentiated manner, Article 23 of the revised version of the European Social Charter (1996), establishes “[t]he right of elderly persons to social protection.”⁸⁴

49. Despite the foregoing, the most significant progress made with regard to protecting the rights of the older person has been in the case law of the European Court of Human Rights based on the provisions of the European Convention on Human Rights, and in the case law of the Inter-American Court applying the provisions of the American Convention.

50. In the case of the European Court of Human Rights, that Court has had the occasion to rule in cases involving older persons on issues relating to the disappearance from a nursing home for the elderly of a resident suffering from Alzheimer’s disease;⁸⁵ on the need for prompt proceedings due to the age of the applicants;⁸⁶ on the closure of care homes for older persons;⁸⁷ and on the protection of the property of older persons.⁸⁸

c) *The Inter-American Court’s case law on older persons*

51. We can identify two stages in the Inter-American Court’s case law in relation to older persons: (a) the first in which, timidly and tangentially, it addressed the specific situation of an older person, and (b) the second, in which the Court addressed the case from a perspective of “age” as a factor that had a differentiated impact on older persons and their rights.

52. Regarding the first stage, in 2005, in the *Case of the Yakye Axa Indigenous Community v. Paraguay*, the Inter-American Court noted that some members of the community were “elderly” and considered that “[a]s regards the special consideration required by the elderly, it is important for the State to take measures to ensure their continuing functionality and autonomy, guaranteeing their right to adequate food, and their access to clean water and

⁸³ To date, this Convention has been signed, ratified or acceded to by the following countries: Argentina, Bolivia, Chile, Costa Rica, Ecuador, El Salvador and Uruguay.

⁸⁴ “With a view to ensuring the effective exercise of the right of elderly persons to social protection, the Parties undertake to adopt or encourage, either directly or in co-operation with public or private organizations, appropriate measures designed in particular: - to enable elderly persons to remain full members of society for as long as possible, by means of: (a) adequate resources enabling them to lead a decent life and play an active part in public, social and cultural life; (b) provision of information about services and facilities available for elderly persons and their opportunities to make use of them; - to enable elderly persons to choose their life-style freely and to lead independent lives in their familiar surroundings for as long as they wish and are able, by means of: (a) the provision of housing suited to their needs and their state of health or of adequate support for adapting their housing; (b) the health care and services necessitated by their state; - to guarantee elderly persons living in institutions appropriate support, while respecting their privacy, and participation in decisions concerning living conditions in the institution.”

⁸⁵ *Case of Dodov v. Bulgaria*. Judgment of January 17, 2008.

⁸⁶ Cf. *Case of Jablonská v. Poland* (No.60225/00), Judgment of March 9, 2004. Final, June 9, 2004; *Case of Codarcea v. Romania* (No. 31675/04), Judgment of June 2, 2009. Final, September 2, 2009; *Case of Styranowski v. Poland* (No. 28616/95), Judgment of October 30, 1998; and *Case of Krzak v. Poland* (No. 51515/99), Judgment of April 6, 2004. Final, July 7, 2004.

⁸⁷ *Case of Watts v. The United Kingdom*, May 4, 2010.

⁸⁸ *Case of Klaus and Iouri Kiladze v. Georgia* of February 2, 2010, and *Cases of Da Conceição Mateus v. Portugal and Santos Januário v. Portugal* of October 8, 2013.

health care. Specifically, the State must provide care for the elderly with chronic diseases and those who are terminally ill, sparing them unnecessary suffering.”⁸⁹ Subsequently, in 2013, in the *Case of García Lucero v. Chile* in which “[the victim] is in a particularly vulnerable situation,” the Court observed “that it ha[d] been proved that Mr. García Lucero [was] 79 years old.”⁹⁰

53. During the second stage, we find that the leading case with regard to older persons is the *Case of Poblete Vilches et al. v. Chile*, which was decided by the Inter-American Court in 2018.⁹¹ This case provided the Court with its first opportunity to address in a detailed manner the special situation of vulnerability and discrimination experienced by older persons. In addition, in the judgment “age” was considered a vulnerable category that – although not expressly mentioned in Article 1 of the Pact of San José – could be interpreted in the same way as other implicit categories within the category of “or any other social condition.” Therefore, in the case of older persons, the prohibition of discrimination based on age is protected by the American Convention.

54. This ruling added that “the Court has indicated that age is also a category protected by that provision” as it interpreted in Advisory Opinion No. 18 on the Juridical Condition and Rights of Undocumented Migrants.⁹² Consequently, the prohibition of discrimination in the case of older persons entails, among other matters, the application of inclusive policies for the whole population and ensuring ease of access to public services.⁹³

55. It should be emphasized that the *Case of Poblete Vilches*⁹⁴ was the first precedent in which the Court declared a violation of the right to health as an autonomous right. In this case, it addressed the violation of rights from the perspective of their impact on a person’s age and the particular circumstances of the case in relation to substitute informed consent and how urgent medical services should be understood when the right to health of an older person is involved.⁹⁵

56. Finally, it is important to emphasize some measures of reparations that, if the special situation of vulnerability had not been addressed, would have been developed using other parameters. Thus, the judgment ordered: (i) reinforcement of the National Institute of Geriatrics and its impact on the hospital network; (ii) design of a publication or leaflet containing the rights of older persons in the area of health care, and (iii) adoption of the

⁸⁹ *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of June 17, 2005. Series C No. 125, para. 175

⁹⁰ *Case of García Lucero et al. v. Chile.* Preliminary objections, merits and reparations. Judgment of August 28, 2013. Series C No. 267, para. 231.

⁹¹ Cf. *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349.

⁹² Juridical Condition and Rights of Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 101.

⁹³ Cf. *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349, para. 122.

⁹⁴ For an assessment of this case and its importance, see the interesting opinions contained in the compendium: Morales Antoniazzi, Mariela, and Clérico, Laura (coords.), *Interamericanización del derecho a la salud. Perspectivas a la luz del Caso Poblete de la Corte IDH*, Instituto de Estudios Constitucionales del Estado de Querétaro, Querétaro, 2019.

⁹⁵ Cf. *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349, para. 142.

necessary measures to develop a general policy of comprehensive protection for older persons.⁹⁶

57. The second case in which the Inter-American Court has referred to the situation of older persons directly and specifically is precisely the *case of Muelle Flores*, in which in addition to addressing the violations of a social right, the Court introduces some important standards with regard to older persons from a perspective of the failure to execute judgments.

III. THE IMPORTANCE OF THE *CASE OF MUELLE FLORES* FOR INTER-AMERICAN CASE LAW: THE OBLIGATION OF "EXCEPTIONAL DUE DILIGENCE"

58. The rights that have been addressed in the preceding sections — the right to social security, the right to property and the right to an effective judicial remedy — have a special impact in this specific case. The judgment indicates that "[r]egarding a reasonable time at the stage of execution of judgment, the Court emphasizes that this time should be shorter owing to the existence of a final decision on the specific matter. It is inadmissible that a proceeding on execution of judgment should temporarily alter a decision issued in a final judgment or in any other way undermine it or render it ineffective, excessively or indefinitely prolonging a dispute that has already been settled. This acquires greater relevance in a proceeding on execution of judgment in which the right to social security has been recognized in the domestic sphere [...]."⁹⁷

59. In such cases, the rights involved in the domestic judgments that recognize human rights — such as the right to social security — must be analyzed from the perspective of the special promptness of the reasonable time established in Article 8(1) of the American Convention for the execution of the judgment. As established in the case law of the Inter-American Court, this is especially important in relation to *the effects caused on the legal situation of the person involved in the proceedings*. The Court has established that, if the passage of time has a relevant impact on an individual's legal situation, the proceedings must move forward with greater diligence so that the case is decided promptly.⁹⁸ Although, in its judgment, the Inter-American Court refers to this obligation as "advancing with greater diligence" or "greater promptness," this obligation has also been identified as "*exceptional due diligence*."

60. Regarding the reasonableness of the time in cases involving violations of the rights of a person who is in a vulnerable situation, the European Court of Human Rights has indicated that the authorities should act with *exceptional diligence*.⁹⁹ Thus, the judicial authorities should act with exceptional diligence in proceedings that involve individuals who, owing to their specific conditions, require immediate attention; for example, people living with HIV/AIDS

⁹⁶ Cf. *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, fifteenth and sixteenth operative paragraphs.

⁹⁷ Cf. *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of March 6, 2019. Series C No. 375, para. 157.

⁹⁸ Cf. *Case of Valle Jaramillo et al. v. Colombia. Merits, reparations and costs*. Judgment of November 27, 2008. Series C No. 192, para. 155 and *Case of Pacheco León et al. v. Honduras. Merits, reparations and costs*. Judgment of November 15, 2017. Series C No. 342, para. 120.

⁹⁹ *Case of Furlan and family v. Argentina. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2012. Series C No. 246, para. 195; and ECHR, *Case of H. v. The United Kingdom*, No. 9580/81, Judgment of July 8, 1987, para. 85.

because what is at stake is crucially important (their health).¹⁰⁰ The European Court has also considered that the advanced age of the applicants calls for the authorities to exercise special diligence in the settlement of their proceedings.¹⁰¹

61. Meanwhile, the Inter-American Court has considered that in cases of individuals in a vulnerable situation, such as a person with a disability, it is essential to take the pertinent measures; for example, the relevant authorities must give priority to hearing and deciding cases to avoid processing delays and to ensure prompt rulings and their execution.¹⁰² The Court has also considered that this obligation should be applied in criminal proceedings involving minors living with HIV/AIDS¹⁰³ to set in motion the procedure for payment of damages.¹⁰⁴

62. That said, the *Muelle Flores* case reveals that the age of an older person is an important element to consider in this type of case because social security is a right that is associated with income substitution and nutrition and has a major impact on the way in which older persons will live the rest of their lives, especially if we consider that they have a legitimate expectation of receiving a pension when their working life ends.

63. This has particular relevance if we consider that Article 31 (Access to Justice) of the Inter-American Convention on Protecting the Human Rights of Older Persons establishes that "State Parties shall ensure due diligence and preferential treatment for older persons in the processing, settlement of, and enforcement of decisions in administrative and legal proceedings."

64. In this specific case, the Inter-American Court noted that the failure to execute the judgments had an impact not only on the enjoyment of the right to social security but also triggered a series of consequences of both a physical and an emotional nature. Specifically, it should be emphasized that, since he was unable to enjoy the right to social security, Mr. Muelle Flores developed a hearing disability. Although it is true that upon reaching an advanced age a person's bodily functions may diminish, if a lack of access to a system of preventive health care services is added to this, it is logical that upon reaching a certain age

¹⁰⁰ ECHR, *Case of H. v. The United Kingdom*, (No. 9580/81), Judgment of July 8, 1987, para. 85; *Case of X. v. France*, (No. 18020/91), Judgment of March 31, 1992, para. 47. Similarly, *Case of A. and Others v. Denmark*, (No. 20826/92), Judgment of February 8, 1996, para. 78.

¹⁰¹ ECHR, *Case of Jablonská v. Poland* (No.60225/00), Judgment of March 9, 2004. Final, June 9, 2004, para. 43; *Case of Codarcea v. Romania* (No. 31675/04), Judgment of June 2, 2009. Final, September 2, 2009, para. 89; *Case of Styranowski v. Poland* (No. 28616/95), Judgment of October 30, 1998, para. 57, and *Case of Krzak v. Poland* (No. 51515/99), Judgment of April 6, 2004. Final, July 7, 2004, para. 42.

¹⁰² *Case of Furlan and family v. Argentina*. Preliminary objections, merits, reparations and costs. Judgment of August 31, 2012. Series C No. 246, para. 196.

¹⁰³ In the case of *Gonzales Lluy*, the Court stipulated that: "315. Taking into consideration: (i) that, in this case, Talía's integrity was at stake; (ii) the consequent urgency derived from her situation as a child with HIV, and (iii) the crucial importance of concluding the proceedings so that Talía and her family could have access to reparation for damages, the Court concludes that there was a special obligation to act with due diligence, and that the State did not comply with this obligation." *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2015. Series C No. 298, para. 315.

¹⁰⁴ *Cf. Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2015. Series C No. 298, paras. 309 to 312. Similarly, even though in relation to the measures of reparation in the *Case of Cuscul Pivaral et al. v. Guatemala*, a case related to a violation of the right to health owing to the lack of medical care for people with HIV/AIDS, the Inter-American Court ordered that it was necessary "to act with special promptness to comply with" the medical and psychological/psychiatric treatment of the direct victims who were alive, "because the preservation of the health, personal integrity and life of the victims in th[e] case depend on compliance with them." *Cf. Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of August 23, 2018. Series C No. 359, paras. 210 and 213.

certain limitations are developed. It is essential to stress that an older person will not necessarily have a disability because they reach a specific stage of their life; however, social security plays a fundamental role – owing to the wide range of services that it includes – for a certain group of individuals, such as older persons.

65. Another kind of negative result of excessive delay in the execution of judgments recognizing the right to social security concerns the feelings of anguish. Although this was not alleged by either the Inter-American Commission or the victim’s representatives, the Inter-American Court determined that this type of effect goes beyond the purely material aspect. For this reason, the Inter-American Court included the right to personal integrity (Art. 5 of the American Convention) and the right to dignity (a right derived from a broad interpretation of Article 11 of the Pact of San José) using the *iura novit curia* principle.

66. Thus, as the judgment concludes, “[t]he failure to implement the right to social security for more than 27 years seriously prejudiced the quality of life and the health care coverage of Mr. Muelle, an individual in a situation requiring special protection because he was an older person with a disability. The violation resulting from the failure to pay his pension exceeded a reasonable time and, as this was the victim’s only income, the prolonged absence of the payments inevitably resulted in financial hardship that affected his ability to pay for his basic necessities and, consequently, affected his mental and moral integrity, as well as his dignity.”¹⁰⁵

67. The *Muelle Flores* case reveals that the confluence of different factors of vulnerability – that have traditionally been identified by the Inter-American Court in cases of discrimination against women¹⁰⁶— may also apply in situations that do not involve sex/gender. In the instant case, “age” and “a hearing disability” represent *multiple forms of vulnerability* in the life of Mr. Muelle Flores and had important consequences, taking into account the failure to execute the domestic judgments that had recognized the right to social security.

68. All these elements that permeate the judgment of the Inter-American Court have special relevance for a social group that, for many years, was not protected by the main international human rights instruments. Furthermore, it is no coincidence that the precedents concerning older persons correspond to rights of a social nature because, in many cases it is this vulnerable group – frequently characterized by poverty, marginalization and exclusion – who are denied their basic rights. Hence, “it is necessary to advance along the path of equality and build welfare States for the entire population, in which social protection is an effective right.”¹⁰⁷

Eduardo Ferrer Mac-Gregor Poisot
Judge

¹⁰⁵ Cf. Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs. Judgment of March 6, 2019. Series C No. 375, para. 207

¹⁰⁶ Among others: Case of *Gonzales Lluy et al. v. Ecuador*. Preliminary objections, merits, reparations and costs. Judgment of September 1, 2015. Series C No. 298; and Case of *Cuscul Pivaral et al. v. Guatemala*. Preliminary objection, merits, reparations and costs. Judgment of August 23, 2018. Series C No. 359.

¹⁰⁷ Economic Commission for Latin America and the Caribbean (ECLAC), *Social Panorama of Latin America, 2018 LC/PUB.2019/3-P*, Santiago, 2019, p. 14.

Pablo Saavedra Alessandri
Secretary

**PARTIALLY DISSENTING OPINION OF JUDGE EDUARDO VIO GROSSI,
INTER-AMERICAN COURT OF HUMAN RIGHTS,
CASE OF MUELLE FLORES V. PERU,
JUDGMENT OF MARCH 6, 2019,
(Preliminary objections, Merits, Reparations and Costs).**

1. I issue this partially dissenting opinion in relation to the Judgment in the above-mentioned case¹ because I disagree with the decisions set forth in Operative Paragraphs N° 2², 5³ and 6⁴, which, based on the provisions, among other norms⁵, of Article 26⁶ of the American Convention on Human Rights⁷, dismiss the preliminary objection filed by the Republic of Peru⁸ regarding the lack of jurisdiction of the Inter-American Court of Human Rights⁹ and declare that the State is responsible for the violation of the right to social security and the right to property.

2. Certainly, given the importance of this matter and having regard to the reasons set forth in this opinion, I reiterate and supplement the comments I have made on other occasions.¹⁰ Thus, after mentioning some prior considerations related to this opinion, I will address the reasons that explain

¹ Hereinafter, the Judgment.

² “Dismiss the preliminary objection filed by the State regarding the alleged lack of competence *ratione materiae* and the direct justiciability of Article 26 of the Convention in the terms of paragraphs 33 to 37 of this Judgment.”

³ “The State is responsible for the violation of the right to social security, pursuant to Article 26 of the American Convention, in relation to Articles 5, 8(1), 11(1), 25(1), 25(2)(c) and 1(1) thereof, as well as Article 2 of the Convention, to the detriment of Mr. Oscar Muelle Flores, pursuant to paragraphs 170 to 208 of this Judgement.”

⁴ “The State is responsible for the violation of the right to private property recognized in Article 21(1) and 21(2), in relation to Articles 25(1), 25(2)(c), 26 and 1(1) of the American Convention, to the detriment of Oscar Muelle Flores, pursuant to paragraphs 212 to 218 of this Judgment.”

⁵ Hereinafter, whenever a provision is cited without specifying the corresponding legal instrument, it shall be understood as being from the American Convention on Human Rights.

⁶ “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 implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.”

⁷ Hereinafter, the Convention.

⁸ Hereinafter, the State.

⁹ Hereinafter, the Court.

¹⁰ Cf. *Case of The Dismissed Employees of Petroperú, v. Peru*, Judgment of November 23, 2017, Separate Opinion of Judge Eduardo Vio Grossi and *Case of Lagos del Campo v. Peru*, Judgment of August 31, 2017, Partially Dissenting Opinion of Judge Eduardo Vio Grossi.

my position with reference to treaty interpretation methods, the interpretation of Article 26 and, finally, other arguments outlined in the Judgment.

I. PRIOR CONSIDERATIONS

3. The prior considerations concerning the matter at hand are related to the role of the separate opinion, the function of the Court and the present dissenting opinion.

A. Regarding the role of the separate opinion

4. This partially dissenting opinion¹¹ is formulated, as are my previous opinions, with full and absolute respect for the decision issued by the Court in this case, which must therefore be complied with. Thus, this opinion cannot be interpreted, in any way or under any circumstance, as undermining the legitimacy of the decision adopted in the instant case.

5. It is also appropriate to clearly state that the view expressed in this opinion does not seek to weaken or restrict, in any way, the effective exercise of human rights; in fact, it seeks precisely the opposite. Indeed, what I state here responds to an inner certainty that effective respect for human rights can only be achieved if the States Parties to the Convention are required to do what they actually agreed to, in a free and sovereign manner. In this regard, legal certainty has a fundamental role and, therefore, cannot be considered as a limitation or restriction to the development of human rights. Rather, it should be considered as the instrument that can best ensure that these rights are fully respected; or, if such rights have been breached, that they are promptly restored by the respective State. It is not merely a question, then, of issuing solid and well-founded judgments aimed at developing human rights; rather, when these have been breached, the aim is to restore their effective exercise as soon as possible by the State concerned.¹²

6. Furthermore, the issuance of separate opinions not only constitutes the exercise of a right, but is fundamentally the fulfilment of a duty to contribute to a better understanding of the judgment to which it refers.

¹¹ Article 66 (2): *"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."*

Article 24(3) of the Statute of the Inter-American Court of Human Rights: *"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."*

Article 65(2) of the Rules of Procedure of the Court: *"Any Judge who has taken part in the consideration of a case is entitled to append a separate reasoned opinion to the judgment, concurring or dissenting. These opinions shall be submitted within a time limit to be fixed by the Presidency, so that the other Judges make take cognizance thereof before notice of the judgment is served. Said opinions shall only refer to the issues covered in the judgment."*

¹² Article 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."*

7. It is for this last reason that the institution of the separate opinion is also contemplated in the rules of other international courts and is a document that must be published together with the respective judgment.¹³

8. Accordingly, I must emphasize that this opinion, along with others issued by the judges in this and in other proceedings, is a clear demonstration of the dialogue and diversity of views that exist in this Court, as well as of the deferential consideration accorded to one another by its members. This undoubtedly enriches the delicate and transcendent work that has been entrusted to the Court.

9. I offer this opinion, then, harboring the illusion that in the future its content will be accepted, either by the Court's own case law, or by a new rule of international law. In the first case, given that the Court's ruling is binding only for the State Party involved in the case under examination,¹⁴ the Court, as an auxiliary source of international law, and therefore responsible for "*determining the rules of law*" established by an autonomous source of international law, that is, by a treaty, a custom, a general principle of law or a unilateral legal act,¹⁵ may in future adopt variations when ruling on another case. With respect to the second situation, by virtue of the fact that the States have an international regulatory function and, in the case of the Convention, the States Parties, this would occur through amendments to the latter.¹⁶

¹³ European Court of Human Rights. Article 74(2) of the Rules of Procedure: "Any judge who has taken part in the consideration of the case shall be entitled to annex to the judgment either a separate opinion, concurring with or dissenting from that judgment, or a bare statement of dissent."

Statute of the African Court of Justice and Human Rights. Article 44: "*Dissenting Opinion –If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate or dissenting opinion.*"
International Court of Justice. Article 57 of its Statute: "*If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.*"

International Criminal Court. Article 74(5) of the Statute: "*The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court.*"

Tribunal of the Law of the Sea. Article 30(3) of the Statute: "*If the judgment does not represent in whole or in part the unanimous opinion of the members of the Tribunal, any member shall be entitled to deliver a separate opinion.*"

¹⁴ Article 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.*"

Article 46(1) and (3) of the European Convention on Human Rights: "*The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.*"

Statute of the African Court of Justice and Human Rights Article 46: "*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 delivered by the Court in any dispute to which they are parties and shall guarantee its execution within the time stipulated by the Court.*"

Article 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.*"

¹⁵ Article 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 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 et bono, if the parties agree thereto."

¹⁶ Article 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.*"

Article 76(1): "*Proposals to amend this Convention may be submitted to the General Assembly for the action it deems appropriate by any State Party directly, and by the Commission or the Court through the Secretary General.*"

Article 77(1): "*In accordance with Article 31, any State Party and the Commission may submit proposed protocols to this*

B. Regarding the function of the Court.

10. The first point to make in this regard is that the Court must fulfill its mission within the institutional legal framework of the Convention.¹⁷ This is important, since the latter is an instrument of public international law and therefore, within its framework, the Court must exercise its contentious jurisdiction and issue rulings,¹⁸ or, by reason of its advisory or non-contentious jurisdiction, issue its opinions.¹⁹ Although it may seem an obvious statement, the Court is, therefore, prohibited from basing its mandate on the domestic laws of the States, which in turn are governed by conventional and customary rules that prohibit them from invoking provisions of their domestic laws to avoid complying with an international obligation²⁰ and ²¹. This applies, except in cases where various domestic legal systems converge to express either an international custom, that is, they reflect a common, consistent and concordant practice, followed with the conviction of acting according to law, or a general principle of law that is common to all, is recognized as such and is applicable in situations governed by international law. Under such hypotheses, the Court's ruling is not, or would not be, issued in line with the domestic laws of the States, but would abide by the custom or general principle of law, based on sources of public international law.²² The use of comparative law helps in that regard.

11. However, the foregoing certainly does not imply that the Court should not or cannot analyze the provisions of the domestic laws of the State in question, in order to determine whether any act attributable to that State entails international responsibility.²³ In such eventuality, the respective

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."

¹⁷ Article 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."

Article 65: *"To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations."*

¹⁸ Footnote 12.

¹⁹ Article 64(1): *"The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court.*

(2) The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments."

²⁰ Article 27 of the Vienna Convention on the Law of Treaties: *"Internal law and observance of treaties. A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46."*

²¹ Hereinafter, the Vienna Convention.

²² Footnote 15.

²³ Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its fifty-third session (A/56/10) and annexed by the GA in Resolution 56/83, of December 12, 2001. Article 1: *"Responsibility of a State for its internationally wrongful acts. Every internationally wrongful act of a State entails the international responsibility of that State."*

Article 2: *"Elements of an internationally wrongful act of a State. There is an internationally wrongful act of a State when conduct consisting of an action or omission:*

domestic law is not, for the purposes of the Court's respective ruling, more than a "fact" and more specifically and generally, an "act." Therefore, in interpreting an international legal norm it is important to distinguish between this situation and the one addressed in the preceding paragraph.

12. The above is also related to the fact that the Court's imperative to rule according to public international law means that it must consider the law as it is established, and not as it wishes it to be. Among other peculiarities of that branch of law that essentially governs inter-state relations and which, as regards the Convention, is reflected in the fact that only the States Parties - those that signed and ratified it -²⁴ are obligated to respect and guarantee the rights recognized therein,²⁵ it is important to bear in mind that only those who have recognized the contentious jurisdiction of the Court and of the Inter-American Commission for Human Rights²⁶ can submit a case to these organs.²⁷ It should also be recalled that the Commission represents all the States,²⁸ that the States Parties to the Convention that appear before the Court undertake to abide by its decisions²⁹ and that, in the event of non-compliance, the Court must notify the General Assembly of the Organization of American States³⁰ and ³¹. Certainly, this is not an obstacle for the Convention to provide for the rights

a) *Is attributable to the State under international law; and*
 b) *Constitutes a breach of an international obligation of the State."*

Article 3: *"Characterization of an act of a State as internationally wrongful. The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law."*

Article 4: *"Conduct of the organs of a State.1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.*

2. *An organ includes any person or entity which has that status in accordance with the internal law of the State."*

²⁴ Preamble to the Convention, first phrase: *"The American states signatory to the present Convention,"*

²⁵ Article 1(1): *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."*

2. *For the purposes of this Convention, "person" means every human being.*

²⁶ Hereinafter, the Commission.

²⁷ Article 61(1): *"Only the States Parties and the Commission shall have the right to submit a case to the Court."*

²⁸ Article 35: *"The Commission shall represent all the member countries of the Organization of American States."*

²⁹ Article 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."*

³⁰ Article 65: *"To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations."*

³¹ Hereinafter, the OAS.

of individuals, or for them to be its beneficiaries and even have recourse to the Court in defense of their rights.³² Nevertheless, the Convention continues to be a treaty.³³

13. Similarly, the view outlined in this opinion concerns one of the peculiarities of public international law that still exists - though to a lesser extent than in the past, but probably to a greater extent that one would wish - namely, the sphere of the internal, domestic, or exclusive jurisdiction of the States.³⁴ This is also known as a margin of appreciation,³⁵ or more simply as sovereignty, which demonstrates or implies that not everything is regulated by public international law. However, this situation does not constitute a defect or an imperfection in the international legal order, but responds to the type of society that it regulates or seeks to regulate. For this reason, in order to understand public international law it is essential to consider, albeit in general terms, the type of society that it seeks to govern. Such a society is characterized by States that basically recognize each other as sovereign and that consequently do not have executive, legislative and judicial branches that are centralized and hierarchical; States that cannot be judged without their consent, where there is no monopoly on the use of force, where the power structure is *de facto* and, therefore, changes only according to political factors and there is no hierarchy among the norms, only, at the most, a preference in their application.

14. It is in that context, then, that the inter-American System of Human Rights³⁶ is inserted and must be understood. Within that system the main function of the Commission is "*to promote respect for and defense of human rights,*"³⁷ while the Court, in relation to its contentious jurisdiction, is

³² Article 40 of the Court's Rules of Procedure: "*Brief containing Pleadings, Motions, and Evidence. 1. Upon notice of the presentation of the case to the alleged victim or his or her representatives, these shall have a non-renewable term of two months as of receipt of that brief and its annexes to autonomously submit to the Court the brief containing pleadings, motions, and evidence.*

2. The brief containing pleadings, motions, and evidence shall contain:

a. a description of the facts within the factual framework established in the presentation of the case by the Commission;
b. the evidence offered, properly organized, with an indication of the alleged facts and arguments that it relates to;
c. the identities of declarants and the object of their statements. Expert witnesses must also submit their curricula vitae and contact information;
d. all claims, including those relating to reparations and costs."

³³ Article 2 a) of the Vienna Convention: "*Use of terms. 1. For the purposes of the present Convention: "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.*"

³⁴ "*The question of 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 the reserved domain.*" Permanent Court of International Justice, Advisory Opinion on Nationality Decrees Issued in Tunis and Morocco, Series B N° 4 Page 24.

³⁵ **Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms**, Article 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."*

³⁶ Footnote 17.

³⁷ Article 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;

responsible for "*the interpretation and application*" of the Convention.³⁸ In relation to the Court's non-contentious or advisory jurisdiction, a member State may consult it regarding the "*interpretation*" of the Convention or of "*other treaties concerning the protection of human rights;*" or, the Court may provide that State with "*opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments.*"³⁹ For its part, the OAS General Assembly is entrusted with the task of adopting the measures deemed necessary to ensure compliance with the rulings.⁴⁰ The efficacy of the Inter-American System of Human Rights depends on ensuring that each of these organs duly fulfills its role.

15. Thus, in accordance with that system, the Commission may, among other actions, make recommendations to the States Parties to the Convention, respond to their consultations, advise them and represent all member States in proceedings before the Court. To this end, it must necessarily take sides, take a stance, commit to a faction and be partial to a position, namely, that of promoting and defending human rights. That is its role.

16. By contrast, under the aforementioned system, the Court's task is to impart justice on matters of human rights, and to do so it must be "*the final interpreter of the Convention.*"⁴¹ Accordingly, to fulfill that role, it must strictly protect the independence and impartiality that characterizes it,⁴² especially in contentious cases that are submitted to it. Therefore, its judges must not advance or put forward an opinion that could undermine that privileged position or transform it into a promotor and defender of human rights, thereby invading the jurisdiction of the Commission.

17. Hence, it is appropriate to recall that this document responds to the circumstance that the Court, as a jurisdictional body, enjoys the broadest autonomy,⁴³ since there is no higher body that can oversee its conduct. This characteristic requires it to be very rigorous in the exercise of its jurisdiction, so that it does not distort its nature and, consequently, weaken the inter-American system for the protection of human rights. For this reason, the views expressed below seek to ensure

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."

³⁸ Footnote 12.

³⁹ Footnote, 19.

⁴⁰ Footnote 17.

⁴¹ *Cf. Case of Colindres Schonenberg v. El Salvador.* Judgment of February 4, 2019 (Merits, reparations and costs), para. 129.

⁴² Article 11(1) of the Court's Statute: "*Upon assuming office, each judge shall take the following oath or make the following solemn declaration: "I swear" - or "I solemnly declare" - "that I shall exercise my functions as a judge honorably, independently and impartially and that I shall keep secret all deliberations."*

⁴³ Article 1 of the Statute states: "*The Inter-American Court of Human Rights is an autonomous judicial institution whose purpose is the application and interpretation of the American Convention on Human Rights. The Court exercises its functions in accordance with the provisions of the aforementioned Convention and the present Statute.*"

the broadest possible recognition of the Court on the part of all those who appear before it, as the most consolidated entity with continental scope that has been developed to safeguard human rights. Therefore, it is vital to continue with its consolidation and improvement, without subjecting it to risks that could negatively affect that effort.

18. However, the Court must act with such prudence bearing in mind that the *raison d'être* of the Convention⁴⁴ is to ensure respect for human rights⁴⁵ and, in particular, that the inter-American jurisdiction reinforces and complements the protection provided by the domestic laws of the American States.⁴⁶ Thus, any decision adopted by the Court in exercise of its contentious jurisdiction must result in the most effective respect for human rights by the States, or in the prompt restoration of their effective exercise where these have been violated;⁴⁷ and, any advisory opinion issued in exercise of its non-contentious or advisory role must effectively contribute, not obligate, those States or organs that request such counsel, to act according to the provisions of the Convention, so that they do not commit any international wrongful acts.⁴⁸ The Court's task would be similar, then, to what occurs within the domestic sphere, for example with family, labor or environmental courts, which must protect the rights of children, workers or the inhabitants of protected areas, respectively, while acting with absolute impartiality in that regard. The Court must therefore reconcile the special interest that should prevail with the impartiality with which this must be put into practice.

19. That said, in accomplishing this task, the Court must specify the meaning and scope of its provisions which, because they are sometimes perceived as obscure or vague, present various options in terms of their application. In this order of ideas, it is appropriate to bear in mind that the interpretation of a treaty seeks to clarify any obscure or ambiguous aspects that it may contain, from which we may conclude that, if the provisions contained therein make sense, that will be the end of the matter.⁴⁹ Therefore, the challenge of interpretation lies in ascertaining the will expressed by the

⁴⁴ Preamble to the Convention: "*Reaffirming their intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man; 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; Considering that these principles 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; 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.*"

⁴⁵ Footnote 12.

⁴⁶ Footnote 44.

⁴⁷ Footnote 12.

⁴⁸ Footnote 19.

⁴⁹ "*The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavor to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, and that is an end of the*

matter." *International Court of Justice. "Advisory Opinion on the Competence of the General Assembly for the Admission of a State in the United Nations."* 1950. p. 8.

States Parties to the Convention when they signed it and, ultimately, how that conventional expression should be understood when faced with new situations. In this order of ideas, it is important to recall that judgments and advisory opinions must, on the one hand, indicate only what is actually stipulated in the Convention including, of course, the *pro personae* principle,⁵⁰ and not what one might wish to find stipulated, and on the other hand, they must avoid modifying them.

20. Thus, for the foregoing reasons the Court's judgments and advisory opinions must refer, as they claim to do⁵¹ and ⁵², to the provisions concerning the interpretation of treaties established in the Vienna Convention.⁵³

21. These provisions include three approaches to interpretation. One is the textual or literal method that focuses on analyzing the text of the treaty, the vocabulary used and the ordinary meaning of its terms. Another is the subjective method, which tries to ascertain the will of the parties to the treaty and, to that end, also analyzes the preparatory work and subsequent conduct of the parties. The third approach is the functional or teleological method, which aims to determine the purpose or function of the treaty in order to fulfill its object and purpose.

22. These three methods incorporate four rules, namely, good faith, the terms, their context and the object and purpose pursued, which must be applied simultaneously and harmoniously, without omitting any of these elements, or favoring one over another.

⁵⁰ Article 29: "*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; 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.*"

⁵¹ Paragraph 36 of the Judgment.

⁵² Hereinafter, whenever reference is made to "*para.*" or "*paras.*" it shall be understood to mean the relevant paragraph or paragraphs, of the Judgment.

⁵³ Article 31. "*General rule of interpretation. I. 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."*

23. In synthesis, the Court's mission of imparting justice on matters of human rights is accomplished by means of the law and not by promoting human rights, at least not exclusively and directly, although that is ultimately and precisely one of its effects. Consequently, as a jurisdictional body, the Court does not have the power to adjudicate outside of, or disregarding the provisions of law, as stated in the Convention. By acting in accordance with what is envisaged in the Convention, the Court, which is comprised of individuals who can make mistakes, ensures that the margin of error is as small as possible and guarantees the impartiality of its judges, thereby conferring the necessary and appropriate legal certainty upon its decisions.

24. The idea underlying the points expressed in these lines is that the law is the means to achieving justice and peace and that because International Human Rights Law forms part of Public International Law, the interpretation and application of the former must be undertaken in conformity with the latter.⁵⁴

C. Regarding this dissenting opinion

25. The case at hand refers, primarily or substantively, to the "*violation of the right to effective judicial protection*" for non-compliance with a judicial ruling that ordered that the victim be reinstated in a pension system implemented by the State.⁵⁵ Consequently, the dispute concerned the violation of that right.

26. However, in its Judgment the Court decided, among other things, that the State violated Article 26 of the Convention given that it did not respect the victim's right to social security and, consequently, also violated his right to property, thereby adding new elements to the dispute. It should be recalled that upon submitting the case to the Court, the Commission did not allege the violation of Article 26 in relation to the right to social security; however, the petitioners did so.⁵⁶

27. In that order of ideas, it is of the utmost importance to point out that this opinion does not concern the existence of the right to social security, and less still, that of the right to property, or to the other economic, social and cultural rights. It merely addresses the question of whether such rights could be justiciable before the Court.

28. Regarding the right to property, it is sufficient to note that the basis for its justiciability before the Court lies not in the OAS Charter but in the Convention itself;⁵⁷ therefore, it is not necessary to invoke Article 26 to justify that point.

⁵⁴ Footnote 53.

⁵⁵ Paragraph 1. "*According to the Commission, the case concerns the alleged violation of the right to effective judicial protection as a consequence of the State's non-compliance, during 24 years, with a judgment issued in favor of Mr. Muelle Flores, in the context of an application for amparo, which ordered his reinstatement in a pension scheme implemented under Decree Law N° 20530. The Commission determined that the State of Peru was internationally responsible, first of all, because its own authorities failed to execute a judicial ruling favorable to Mr. Muelle and, secondly, owing to the ineffectiveness of the judicial mechanisms subsequently activated to achieve that compliance. The Commission also declared that the facts of the instant case constituted a violation of the guarantee of reasonable time and the right to property, given that the equalized pension to which Mr. Muelle Flores was entitled under the said Decree became part of his property, in accordance with the favorable judicial decision, and yet he was unable to enjoy that right.*"

⁵⁶ Para.7.

⁵⁷ Article 21:" *Right to private property.1. Everyone has the right to the use and enjoyment of his property. The law*

29. As to the right to social security, in this opinion I argue that the Court, contrary to what is indicated in the Judgment, lacks competence to examine its violation; in other words, that right is not subject to being internationally justiciable by the Court. Consequently, this matter is the subject of the present opinion.

II. INTERPRETATION OF ARTICLE 26

30. That said, prior to stating the reasons why I disagree with this Judgment, and to ensure that these reasons can be properly understood, it is important to offer an interpretation of the aforementioned Article 26,⁵⁸ according to the treaty interpretation methods established in the Vienna Convention.

A. Textual or literal method.

31. In interpreting the article in question, we may conclude that:

- a) it contemplates an obligation to act, not to produce a result, on the part of the States Parties to the Convention, and specifically, *"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 therein;*
- b) indeed, as indicated in the title of the article, namely, *"Progressive Development"*, this obligation involves the gradual development of the rights alluded to, precisely because they have not been fully realized;
- c) this provision refers to *"rights derived⁵⁹ from the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States,"* that is, rights that are implicit in or may be inferred⁶⁰ from the latter's provisions. However, these rights are not enshrined or contemplated; instead their definition is left for interpretation;
- d) therefore, those rights are not *"recognized"* by the Convention;⁶¹

may subordinate such use and enjoyment to the interest of society.

2. *No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.*

3. *Usury and any other form of exploitation of man by man shall be prohibited by law."*

⁵⁸ Footnote 6.

⁵⁹ *"Derive: Obtain something from a source. Originate from something.* Diccionario de la Lengua Española, Real Academia Española, 2018

⁶⁰ *"Infer: To deduce something or reach a conclusion", Idem.*

⁶¹ Footnote 25.

- e) the article in question makes compliance with the obligation to act conditional, i.e. “*subject to available resources*” and precisely for this reason indicates the means to accomplish this, namely, “*by legislation or other appropriate means;*” and
- f) under the provisions contemplated in that article, the States Parties to the Convention are required, not to respect human rights or guarantee respect for these,⁶² but rather to adopt “*measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively [...]the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter*” of the OAS.

32. Consequently, it is reasonable to affirm that, according to its literal meaning, Article 26 of the Convention, on the one hand, does not offer various possibilities for its application, i.e. doubts as to its meaning and scope and, on the other, does not establish any human right and, even less, one that it can be enforced by the Court. Instead, it refers to obligations to act, not to produce results, assumed by the States Parties to the Convention.

B. Subjective method

33. In attempting to elucidate the will of the States Parties to the Convention regarding the provision under discussion, it is necessary to refer to the context of the terms, as envisaged in the Vienna Convention. To do so, we must refer to the system enshrined in the Convention, in which Article 26 is inserted:

- a) that system is comprised of the obligations and rights provided for,⁶³ the organs responsible for ensuring respect for and compliance with these, respectively⁶⁴ and provisions concerning the Convention;⁶⁵

⁶² Footnote 6.

⁶³ “*Part I, “State Obligations and Rights Protected.”*”

⁶⁴ “*Part II, “Means of Protection.”*”

⁶⁵ “*Part III, “General and Transitory Provisions.”*”

- b) in relation to the obligations, there are two, namely, the "*Obligation to Respect Rights*"⁶⁶ and the "*Duty to Adopt Domestic Legal Effects*;"⁶⁷ in relation to rights, there are "*Civil and Political Rights*"⁶⁸ and "*Economic, Social and Cultural Rights*;"⁶⁹
- c) with regard to the organs of this system, namely the Commission, the Court⁷⁰ and the OAS General Assembly,⁷¹ the first is tasked with promoting and defending human rights⁷², the second with the interpretation and application of the Convention⁷³ and the third with the adoption of necessary measures to enforce the corresponding ruling;⁷⁴
- d) based on a harmonious interpretation of the corresponding rules regarding the Court's jurisdiction to impart justice in the cases submitted to it, we may infer that the Convention distinguishes between two types of rights: the rights that are "recognized,"⁷⁵ and ⁷⁶, "established,"⁷⁷ guaranteed,"⁷⁸ "enshrined"⁷⁹ or "protected"⁸⁰ by or in the Convention, and others that are

⁶⁶ *Supra*, Footnote 25.

⁶⁷ 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.*"

⁶⁸ Part I, Chapter II, Articles 3 to 25. Right to Juridical Personality (Article 3), Right to Life (Article 4), Right to Humane Treatment (Personal Integrity) (Article 5), Freedom from Slavery (Article 6), Right to Personal Liberty (Article 7), Right to a Fair Trial (Judicial Guarantees) (Article 8), Freedom from Ex Post Facto Laws (Article 9), Right to Compensation (Article 10), Right to privacy (protection of honor and dignity) (Article 11), Freedom of Conscience and Religion (Article 12), Freedom of Thought and Expression (Article 13), Right of Reply (Article 14), Right of Assembly (Article 15), Freedom of Association (Article 16), Rights of the Family (Article 17), Right to a Name (Article 18), Rights of the Child (Article 19), Right to Nationality (Article 20), Right to Property (Article 21), Freedom of Movement and Residence (Article 22), Political Rights (Right to Participate in Government) (Article 23), Right to Equal Protection before the Law (Article 24) and Right to Judicial Protection (Article 25).

⁶⁹ Footnote 6.

⁷⁰ Footnote 17.

⁷¹ Footnote 30.

⁷² Footnote 37.

⁷³ Footnote 12.

⁷⁴ Footnote 30.

⁷⁵ Footnote 47.

⁷⁶ Article 48(1)(f): "1. *When the Commission receives a petition or communication alleging the violation of any of the rights protected by this Convention, it shall proceed as follows:...* [it] shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention."

⁷⁷ Article 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."

⁷⁸ Article 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;"

⁷⁹ Article 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: ..."

⁸⁰ Footnote 12.

“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;”⁸¹

- e) in relation to the first, *“the jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of th[e] Convention that are submitted to it;”*⁸²
- f) consequently, when such a case is submitted to the Court, those States that have recognized its contentious jurisdiction can only be required to ensure due respect for the civil and political rights that it *“recognizes”* and *“guarantees;”*⁸³
- g) also, the States may be eventually required 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;”*⁸⁴
- h) by contrast, in relation to the rights *“derived from the economic, social, educational, scientific and cultural standards set forth in the Charter of the Organization of the American States, as amended by the Protocol of Buenos Aires,”* only States Parties to the Convention could be required to adopt *“by legislation or other appropriate means,” “measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively [...]the full realization of the rights,”* and this is *“subject to available resources;”*
- i) as to the supplementary means of interpretation, these confirm that the States Parties to the Convention did not wish to include economic, social and cultural rights within the established system of protection;
- j) indeed, during the Specialized Inter-American Conference on Human Rights, during which the final text of the Convention was adopted, Colombia proposed the definition of the economic, social and cultural rights to be protected by the mechanism provided therein, while Mexico argued that none of those rights should be included. Consequently, *“(f)ollowing discussions during which some of the preceding positions were repeated without reaching a consensus, and during which it was never proposed to include economic, social and cultural rights in the system of protection contemplated for civil and political rights, a chapter was drafted with two articles.”*⁸⁵ The first of these articles, proposed by Brazil as a formula for conciliation, was included by virtue of the corresponding vote, in the final text of the Convention, as Article 26.

⁸¹ Footnote 6.

⁸² Footnote 12.

⁸³ Footnote 25.

⁸⁴ Footnote 67.

⁸⁵ Concurring Opinion of Judge Alberto Pérez, *Case of Gonzales Lluy et al. v. Ecuador*, Judgment of September 1, 2015, (Preliminary objections, merits, reparations and costs).

- k) for its part, the second article, No. 27, stated the following: "*Monitoring Compliance with the Obligations. The States Parties shall transmit to the Inter-American Commission of Human Rights a copy of each of the reports and studies that they submit annually to the Executive Committees of the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture, in their respective fields, so that the Commission can verify their compliance with the obligations determined previously, which are the essential basis for the exercise of other rights enshrined in this Convention;*"
- l) the proposal regarding the aforementioned Article 27 referred to "*reports and studies*" that would enable the Commission to verify whether States were complying with their obligations and distinguished between "*obligations determined previously*", obviously in Article 26, and "*other rights enshrined in this Convention*"; and
- m) we may conclude, therefore, that at no time were the economic, social and cultural rights "*derived*" from the standards set forth in the OAS Charter - among them the right to social security - included in the protection system along with the civil and political rights "*recognized*" in the Convention.

34. In synthesis, there is no doubt whatsoever that Article 26 was adopted in good faith, so that it would actually have the '*effet utile*' of being applied in a manner different from that envisaged in the previous provisions contained in Chapter II of Part I of the Convention. The element that distinguishes it is, precisely, that the rights to which it refers are not "*enshrined*" in the Convention, but are "*derived*" from the standards set forth in the OAS Charter, and also that they are not justiciable before the Court.

C. Functional or teleological method

35. In attempting to specify the object and purpose of the conventional provision in question, it seems obvious that:

- a) the purpose of the States Parties to the Convention is "to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of Man;"⁸⁶
- b) in general, as I have reiterated to the Court on several occasions, "*the object and purpose of the Convention is to protect the fundamental rights of human beings;*"⁸⁷
- c) however, its more specific object and purpose, explicitly stated therein, is to determine "*the structure, competence and procedure of the organs responsible for these matters;*"⁸⁸ and
- d) within that structural framework, it is clear that the specific object and purpose of Article 26 of the Convention is that the States Parties "*adopt measures, both internally and through*

⁸⁶ Footnote 44.

⁸⁷ Para. 36.

⁸⁸ Footnote 44.

international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, 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, subject to available resources, by legislation or other appropriate means."

36. Finally, the application of the functional or teleological method of treaty interpretation in relation to Article 26 of the Convention leads to the same conclusion reached by using the other methods of treaty interpretation, namely, that this provision is not intended to establish a human right, but only to enshrine the obligation of the States Parties to adopt measures to fully realize the economic, social and cultural rights "derived" from the OAS Charter.

III. DISAGREEMENT WITH THE JUDGMENT.

37. Based on the foregoing analysis, which highlights the difference between the interpretation of Article 26 made in the Judgment, and the one expressed in this opinion, it nevertheless seems appropriate or useful to explain this divergence in greater detail. To that end, I will begin by pointing out that, for the purposes of interpreting Article 26 of the Convention, I will refer to the content of the judgments issued in the cases of "*Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru*,"⁸⁹ "*Lagos del Campo v. Peru*"⁹⁰ and most especially, "*Cuscúl Pivaral et al. v. Guatemala*."⁹¹ Considering that, in the first two judgments separate opinions were issued⁹² which were ratified, and that the Judgment in the instant case makes particular mention of the last of these rulings⁹³ (i.e. *Cuscúl Pivaral et al. v. Guatemala*) in which the undersigned did not participate,⁹⁴ in order to fully understand the disagreement I express in this opinion it is imperative to refer to it.⁹⁵

38. That said, as a prior consideration, it should be noted that in other judgments the Court achieved a result analogous to the one sought in this case by applying only those provisions of the Convention that refer to the rights recognized therein, logically within their limits, such as those that protect the right to personal integrity, property, judicial guarantees and judicial protection, without the need to refer to the aforementioned Article 26.

39. Also, as a second preliminary consideration, it is noteworthy that the Judgment in the instant case indicates that in the Ruling (issued in the case of *Cuscúl Pivaral et al.*) the Court undertook a "*literal, systematic, teleological and evolutive interpretation regarding the scope of (the Court's)*

⁸⁹ Para. 34.

⁹⁰ Para. 146.

⁹¹ Para.143.

⁹² Footnote 10.

⁹³ Para. 36.

⁹⁴ Footnote 1 of the Judgment [Case of *Cuscúl Pivaral*].

⁹⁵ Hereinafter, the Ruling [Case of *Cuscúl Pivaral*]

jurisdiction in relation to Article 26 of the Convention,⁹⁶ something that did not really occur. Nevertheless, the Judgment itself does have recourse to an evolutive interpretation of the matter; it does so by recalling that this is contemplated in Article 31 of the Vienna Convention,⁹⁷ and proceeds to apply that provision to determine the scope and content of the right to social security. The latter is clearly not the purpose of this partially dissenting opinion, which is restricted to the question of the judicialization of that right before the Court.

40. However, (in the case of *Cuscúl Pivaral et al.*) the Ruling actually adheres to the system comprised of the literal interpretation, internal context– systematic interpretation, the teleological interpretation and supplementary interpretation methods, an order that I will follow in this analysis.

A. Literal interpretation

41. Although the Ruling indicates that it applies the literal or textual method of treaty interpretation, this does not really appear to be the case.

42. Indeed, the literal interpretation invoked in the Ruling⁹⁸ is confused with the teleological method of interpretation or, at least, the latter prevails over the former, insofar as it argues that *“the Court considers that the ordinary meaning that should be given to the rule established in Article 26 of the Convention is that the States undertook to realize “rights” derived from the economic, social, educational, scientific and cultural rights set forth in the Charter”* of the OAS. Thus, *“(t)he text of the provision should be interpreted in such a way that its terms acquire meaning and a specific significance, which, in the case of Article 26, means understanding that the States agreed to adopt measures in order to fully realize the “rights” recognized in the OAS Charter.”*⁹⁹ In other words, what the Court considers, or could be considered, as the object and purpose of the rule, prevails over its terms.

43. Indeed, what the States Parties to the Convention actually undertake to do, according to Article 26, is *“to adopt measures”* with the aim of *“achieving progressively the full realization of the rights derived from”* the OAS Charter. Thus, they are not obligated to realize such rights but to adopt measures to achieve this objective. The Ruling explicitly recognizes that the rights referred to in Article 26 are, on the one hand, not truly *“realized”*, in other words, *“real or true,”*¹⁰⁰ for which reason *“the States undertake to adopt measures [...] with a view to achieving [...] (their) full realization”* and, on the other hand, that they are not *“recognized”* by the American Convention, but derived from *“the Charter”* of the OAS, completely departing from the literal meaning of that norm, inasmuch as it disregards what it has established.

⁹⁶ Para. 36.

⁹⁷ Footnote 53.

⁹⁸ Para. 78 of the Ruling [Case of Cuscúl Pivaral].

⁹⁹ Para. 78 of the Ruling [Case of Cuscúl Pivaral]

¹⁰⁰ *Diccionario de la Lengua Española, Real Academia Española, 2018.*

44. It is also useful to recall that the literal interpretation method does not imply attributing the ordinary meaning to a "*provision*," as the Ruling does,¹⁰¹ but rather to "*terms*,"¹⁰² or "*words*,"¹⁰³ something that is confirmed if we bear in mind the provision of the Vienna Convention that states, "*a special meaning shall be given to a term if it is established that the parties so intended.*"¹⁰⁴

45. To all the aforementioned points, we should add that the Ruling does not ponder the fact that the Convention utilizes, as mentioned previously,¹⁰⁵ the terms "*recognized*," "*rights established*," "*guaranteed*," "*enshrined*" or "*protected*" by or in the Convention, and that it also alludes to other rights, namely, "*economic, social and cultural rights*," that are "*derived*" from the standards of the OAS Charter; those "*recognized*" by the laws of the States or other conventions and those "*inherent to the human being or that derive from a democratic representative form of government.*"¹⁰⁶

46. In other words, it is important to note that the Ruling not only does not consider all the terms transcribed in the "*ordinary meaning to be given to [them]*," but also omits to refer to them. In other words, it rules as though they were not used by the Convention.

47. In view of the foregoing, we can argue that on this particular matter, and despite affirming to the contrary, the Ruling does not follow the literal or textual approach or, therefore, the rule of treaty interpretation concerning the terms; instead, it ultimately gives precedence to the functional or teleological method over the literal or textual method of treaty interpretation and, of course, this leads to an erroneous interpretation of Article 26 of the Convention.

B. Internal context – systematic interpretation

48. In relation to the so-called "*Internal context -systematic interpretation*" in the Ruling (in the case of *Cuscúl Pivaral et al.*), this really appears to refer to the subjective method of treaty interpretation, contemplated in Article 31(2) of the Vienna Convention.

49. In fact, the Ruling states that "*the general obligations "to respect" and "to guarantee" rights, together with the obligation relating to "domestic legal effects" of Article 2 of the Convention, apply to all rights, whether civil and political, or economic, social, cultural and environmental*"¹⁰⁷ and consequently, "*since States have an obligation to respect and guarantee the rights indicated in Article 26, in the terms of Article 1(1) of the Convention, the Court is competent to assess whether there*

¹⁰¹ Para. 79 of the Ruling. [Case of Cuscúl Pivaral]

¹⁰² Footnote 53.

¹⁰³ *Diccionario de la Lengua Española*, 2018.

¹⁰⁴ Footnote 53.

¹⁰⁵ Para. 33, d).

¹⁰⁶ *Idem*.

¹⁰⁷ Para. 83 of the Ruling. [Case of Cuscúl Pivaral]

has been a violation of a right derived from Article 26 in the terms of Articles 62 and 63 of the Convention."¹⁰⁸

50. Likewise, the Ruling adds that this *"results not only from formal matters, but also from the reciprocal indivisibility and interdependence of the civil and political rights and the economic, social, cultural and environmental rights"*¹⁰⁹ and that *"the interdependence and indivisibility of the rights recognized by the American Convention denies any separation, categorization or hierarchy between rights for the purposes of their respect, protection and guarantee."*¹¹⁰

51. In maintaining that position, the Ruling omits to mention that Article 1(1) of the Convention requires the State Parties to respect and guarantee the free exercise of the rights *"recognized therein"* and that Article 29 (a) of the same instrument, related to the *"pro personae"* principle, employs the same formula.¹¹¹ Nor does it refer to other provisions of the Convention that mention *"the rights established," "guaranteed", "enshrined" or "protected,"*¹¹² which, logically, should be understood to mean the rights that have been *"recognized."*¹¹³

52. Furthermore, the Ruling does not take full account of the agreements and instruments related to the Convention, or concerning its interpretation, or the relevant practice of its States Parties. On this point, it merely evokes in a generic manner the link between civil and political rights and economic, social and cultural rights,¹¹⁴ but without providing details of agreements subsequent to the signing of the Convention that reflect the interpretation made by its States Parties. Instead, the Ruling only mentions the Protocol of San Salvador, downplaying its importance by not considering the fact that it establishes that the Court can only examine two very specific situations contemplated therein, ultimately calling into question its purpose and the need for it.¹¹⁵

53. Moreover, the Ruling appears to confuse the nature of subsequent agreements that the States Parties to the Convention reach or have reached. Indeed, it states that *"the Court recalls that Article 76 of the American Convention establishes a specific procedure for amendments, which require the ratification of two-thirds of the States Parties to the Convention"* and that, *"it would be contradictory to consider that the adoption of the Additional Protocol, which did not require such a high margin of ratification as an amendment to the American Convention, could modify the content and scope of the latter's effects."*¹¹⁶ Thus, in relation to the amendment and modification of treaties, pursuant to

¹⁰⁸ Para. 84 of the Ruling. [Case of Cuscúl Pivaral]

¹⁰⁹ Para. 85 of the Ruling. [Case of Cuscúl Pivaral]

¹¹⁰ Para.86 of the Ruling. [Case of Cuscúl Pivaral]

¹¹¹ Footnote 50.

¹¹² Para. 33, d).

¹¹³ Hereinafter, whenever reference is made to the rights *"recognized"* in the Convention, it should also be understood to include those *"established", "guaranteed", "enshrined" or "protected"* therein.

¹¹⁴ Para. 85 of the Ruling[Case of Cuscúl Pivaral]

¹¹⁵ Paras. 88 and 89 of the Ruling [Case of Cuscúl Pivaral]

¹¹⁶ Para. 89 of the Ruling [Case of Cuscúl Pivaral]

the Vienna Convention, the Ruling does not appear to consider the principle that the will of the Parties must prevail and that any change made to such treaties by all of the States Parties is termed an amendment, whereas one made by agreement only among certain of the parties, is termed a modification.¹¹⁷ Nor does it appear to take into account that the Convention, in turn, also makes a distinction on the matter, between proposed amendments, pursuant to Article 76,¹¹⁸ and drafts of additional Protocols to the Convention, in order to progressively include in its protection system other rights and freedoms regulated by Article 77.¹¹⁹ Therefore, the said Protocols do not constitute a change to the Convention as such, but rather aim to add other rights not contemplated therein to the protection system that it envisages.

54. With reference to the provision of the Vienna Convention according to which “*any relevant rules of international law applicable in the relations between the parties,*” I should also mention that the Ruling also alludes, in a very generic manner, solely to the American Declaration of the Rights and Duties of Man.¹²⁰ However, it does not point out that since the latter pre-dates the Convention, it is a resolution that was originally declarative or interpretative of a general principle of law and therefore, pursuant to Article 29(d) thereof,¹²¹ must be considered for interpretative purposes of the Convention, but not that it interprets it.

55. Moreover, the Ruling does not comment on the protection system contemplated in the Convention, as part of the context. As mentioned previously¹²² this system is described in Part II of

¹¹⁷ Article 39: “*General rule regarding the amendment of treaties. A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except insofar as the treaty may otherwise provide.*”

Article 40: “*Amendment of multilateral treaties. 1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.*

2. *Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in:*

a) *the decision as to the action to be taken in regard to such proposal;*

b) *the negotiation and conclusion of any agreement for the amendment of the treaty.*

3. *Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.*

4. *The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4 (b), applies in relation to such State.*

5. *Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:*

a) *be considered as a party to the treaty as amended; and*

b) *be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.”*

Article 41: “*1. Agreements to modify multilateral treaties between certain of the parties only. 1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:*

a) *the possibility of such a modification is provided for by the treaty; or*

b) *the modification in question is not prohibited by the treaty and:*

i) *does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;*

ii) *does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.*

2. *Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.”*

¹¹⁸ Footnote 16

¹¹⁹ *Idem.*

¹²⁰ Paras. 82 and 85 of the Ruling [Case of Cuscúl Pivaral].

¹²¹ Footnote 50.

¹²² Para. 17

the Convention, entitled "*Means of Protection.*" On this point it should be noted that the Ruling does not explain or give any reason— or, at least sufficient reason - why Article 26 was included separately and as the sole article of Chapter III of the Convention, entitled "*Economic, Social and Cultural Rights,*" or why it was not included in Chapter II of Part I of the Convention, entitled "*State Obligations and Rights Protected.*" Moreover, it does not explain why that Chapter was not given the simple title of "*Rights.*"

56. In sum, the Ruling does not provide a reasonable explanation to help us understand the difference between the two chapters of Part I of the Convention. It does not provide any reason to justify the difference between the conventional regulation of civil and political rights and the economic, social and cultural rights. Obviously and logically, the basis for this cannot be other than the fact that Article 26 does not establish a human right and that, consequently, under its aegis, persons do not have the right to make a claim before the Court for the violation of a human right.

57. Finally, in relation to the systematic interpretation, it seems appropriate to emphasize that the Ruling is based solely on the Court's own case law,¹²³ that is to say, on its own view. The Court even has recourse to the institution of "*la compétence de la compétence*" in order to affirm that it "*has the inherent authority to determine the scope of its own competence.*"¹²⁴ Clearly, this argument is insufficient to support its position.

58. In synthesis, we must conclude that the Ruling does not, strictly speaking, make a systematic or subjective interpretation, as envisaged in the Vienna Convention. In other words, it does not carry out a harmonious interpretation between the different provisions of the Convention. Consequently, as in the case of the incorrect application of the literal method of interpretation, this leads to an inaccurate conclusion.

C. Teleological or functional interpretation

59. As to the teleological method of interpretation of the Convention, while it is true that the Ruling refers to the Preamble of the Convention, it is also true that only one of the latter's paragraphs states the object and purpose thereof, since the others contain considerations concerning the reasons for signing that instrument.¹²⁵ In terms of the latter paragraph, the object and purpose of the Convention is "*the incorporation into the Charter of the Organization itself of broader standards with respect to the economic, social and educational rights*" and that "*an inter-American convention on human rights should determine the structure, competence and procedure of the organs responsible for these matters.*"

60. Therefore, it being true that "*the Court has asserted that the object and purpose of the Convention is the protection of the fundamental rights of the human being,*"¹²⁶ a purpose shared by

¹²³ Paras. 83 to 86 of the Ruling [Case of Cuscúl Pivaral]

¹²⁴ Para. 86 of the Ruling [Case of Cuscúl Pivaral]

¹²⁵ Footnote 44

¹²⁶ Paras. 92 and 97 of the Ruling [Case of Cuscúl Pivaral]

all human rights norms, in the strict sense the purpose of the Convention is to establish the obligations and rights protected (Part I) and the means of protection provided for that purpose (Part II), in addition to the pertinent general and transitory provisions to the Convention itself (Part III).

61. We must also bear in mind that each provision of the Convention has its own specific object and purpose, which is consistent with it. Thus, the object and purpose of Article 26 of the Convention is *not*, as we have already said, to establish a human right, but fundamentally to establish an obligation of the States to ensure the progressive development of the law regarding economic social and cultural rights.

62. And it is in this aspect that the Ruling errs by applying the teleological or functional method of interpretation. Thus, it points out that the interpretation resulting from that method "*would be similar to the conclusion reached by means of the literal and systematic interpretation, in the sense that Article 26 recognizes the existence of "rights" that must be ensured by the State to all persons subject to their jurisdiction in the terms established by the American Convention.*" However, it is quite clear that the provision in question does not "*recognize*" rights but merely states that they are "*derived*" from the OAS Charter without, however, indicating or specifying those rights.

63. Consequently, the Ruling not only makes the teleological or functional method of interpretation prevail over other methods, but also accords the object and purpose that inspires the entire inter-American system of human rights, namely, "*the protection of the fundamental rights of human beings,*" the attribute of justifying any interpretation of the Convention, disregarding the good faith in which it was signed, the terms employed and their context and even the specific object and purpose of the provision being interpreted.

64. Therefore, we may conclude that the Ruling does not apply the functional or teleological method of interpretation of the Convention or, at least, in the appropriate terms, which obviously has a negative effect on the conclusion reached.

D. Supplementary methods of interpretation

65. Finally, regarding supplementary methods of interpretation, it should be emphasized, first of all, that the Ruling does not consider these as part of the subjective method of treaty interpretation, as contemplated in Article 32 of the Vienna Convention, but rather as a separate method or rule of interpretation.

66. In second place, it should be emphasized that, as mentioned previously, the Ruling does not clearly and expressly reflect what happened at the Inter-American Specialized Conference on Human Rights, which adopted the final text of the Convention.¹²⁷

67. We may conclude, therefore, that the preparatory work of the Convention never included the economic, social and cultural rights "*derived*" from the standards of the OAS Charter- among them the right to social security - within its protection system, which only relates to the civil and political rights "*recognized*" in the Convention.

¹²⁷ Para. 32, i) to m).

IV. ADDITIONAL CONSIDERATIONS

68. In addition to the foregoing, there are other affirmations, either in the Judgment (case of *Muelle Flores*) or in the Ruling (*Cuscúl Pivara*), which I do not share and regarding which I consider it appropriate to highlight the reasons for my disagreement.

69. The affirmation in the Ruling,¹²⁸ and reiterated in the Judgment, that the conclusion reached “*is based not only on formal issues, but results from the interdependence and indivisibility of civil and political rights and economic, social, cultural and environmental rights, as well as their compatibility with the object and purpose of the Convention,*”¹²⁹ does not necessarily imply that the violation of both types of rights can be invoked before the Court. The position expressed in the Judgment could be shared on the understanding that although the enjoyment of all human rights, including economic, social and cultural rights, must be respected, and that consequently all may be enforceable by the competent authorities, this does not necessarily or exclusively mean that the latter are, always, in every circumstance and in relation to all human rights, to be brought before an international tribunal and, eventually, before the Court, especially when we consider that the inter-American jurisdiction reinforces or complements that established in the domestic laws of the State concerned.¹³⁰ Indeed, here we are not disputing the fact that alleged violations of any human right can and should be claimed before the competent domestic courts;¹³¹ my argument is that only some violations of the economic, social and cultural rights may be submitted to the Court for consideration and a ruling, which does not include the right to social security.

70. The second reason for my dissent, on which I consider it necessary to insist, is that in order to claim the right to social security before the Court, it would be indispensable for this to be permitted by a new conventional rule. In fact, Articles 31, 76(1) and 77(1) of the Convention,¹³² expressly

¹²⁸ Para. 85 of the Ruling [Case of *Cuscúl Pivara*]

¹²⁹ Para. 36 of the Judgment.

¹³⁰ Footnote 44.

¹³¹ Article 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:

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.”

Article 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.”

¹³² Footnote 16.

establish that the States Parties are responsible for the regulatory function in relation to the Convention, and specifically for the purpose of “*progressively including other rights in its system of protection.*” Accordingly, this area is implicitly barred to the Court, which therefore cannot include that right among those that can be submitted to it for adjudication.

71. Indeed, to the contrary of what appears to be stated in the Judgment,¹³³ the authority to determine its own competence, under the principle of *compétence de la compétence*, or “*kompetenz-kompetenz*,” does not authorize it to violate the principle of public law whereby authorities may only act within the law. Obviously, the fact that a right is not “*recognized*” in the Convention does not preclude its future inclusion among the rights that could be invoked before the Court, or preclude the development of an existing right.¹³⁴

72. Furthermore, if we accept the position expressed in the Judgment regarding Article 26, the provisions of Articles 31, 76(1) and 77(1) of the Convention would be rendered somewhat unnecessary and useless; that is to say, there would be no need to sign additional protocols in order to recognize other rights different to those established in the Convention and include them within its protection system, since to that end it would be sufficient to apply Article 26.

73. In other words, based on the principle that “*for the same reason, the same legal provision,*” if the criterion adopted in the Judgment were to be followed and taken to its extreme, it would not be apparent why alleged human rights violations contained in the provisions found throughout Chapter VII of the OAS Charter could not also be invoked before the Court,¹³⁵ which would obviously

¹³³ Para. 142.

¹³⁴ The possibility exists that Protocols could be signed that do not imply the inclusion of rights within the protection system. For example, the *Protocol to the American Convention on Human Rights to Abolish the Death Penalty*, of 1990, was adopted in consideration that, under paragraph 6 of its Preamble, “*an international agreement must be arrived at that will entail a progressive development of the American Convention on Human Rights.*”

¹³⁵ Article 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 human 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.*”

Article 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;*

lead to legal uncertainty, given the very broad and vague manner in which they are envisioned, which could not be otherwise since it concerns “*basic objectives*” or “*goals*.”

74. But, in addition, if we accept that the rights “*derived*” from the OAS Charter could be judicialized before the Court, this would mean that all States Parties to the Convention that have accepted its jurisdiction could eventually be brought before the Court simply for being underdeveloped or developing countries, in other words, for not fully achieving integral development or some of its facets. Clearly, this seems far removed from the logic of the Convention, especially considering the way in which Chapter VII is drafted. Moreover, this would not only lead to a manifestly absurd outcome but would undoubtedly undermine effective respect for human rights or their prompt restoration in the event of having been violated.

75. In relation to this point, it is useful to refer to what the Judgment cites as the source of the right to social security, as an autonomous right derived from the economic, social, educational, scientific and cultural standards set forth in the OAS Charter, and, therefore justiciable before the

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- 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.”*

Article 46:” *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.”*

Court. In this regard the Court indicates as sources¹³⁶ Articles (3)(j)¹³⁷, 45(b)¹³⁸, 45(h)¹³⁹ and 46¹⁴⁰ of the OAS Charter.

76. As may easily be deduced from such provisions, strictly speaking these do not establish the right to social security, but rather the obligation of the respective State to make the “*greatest efforts*” to “*apply*” the aforementioned “*principles* and “*mechanisms.*” Thus, the right to social security “*would be derived*” from the latter, and therefore would not be “*recognized*” by or “*enshrined*” in the OAS Charter, and even less so in the Convention.

77. It should also be emphasized that the standards set forth in the OAS Charter cited in the Judgment are included in Chapter VII of that international legal instrument, entitled “*Integral Development,*” and that its first article, Article 30,¹⁴¹ considers such development as an objective to be achieved through compliance with the rules that follow. Likewise, it should be pointed out that the other provisions of this Chapter reaffirm the notion that these are “*intentions*” that the States undertake to achieve, and not rights subject to international adjudication.

78. Therefore, having regard to the foregoing, it is not possible to conclude, from the provisions contained in Article 26 of the Convention and in the OAS Charter, that the right to social security would be internationally justiciable before the Court.

CONCLUSION

79. As may be inferred from all the foregoing arguments concerning the interpretation of Article 26 made in the Ruling, such interpretation ostensibly departs from one that would result from the proper application of the rules of treaty interpretation established in the Vienna Convention and, therefore, leads to a result that was never desired or envisaged in the Convention.

¹³⁶ Para. 172.

¹³⁷ “*The American States reaffirm the following principles: (j) Social justice and social security are bases of lasting peace.*”

¹³⁸ “*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.*”

¹³⁹ “*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: h) [d] evelopment of an efficient social security policy.*”

¹⁴⁰ “*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.*”

¹⁴¹ “*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.*”

80. Thus, I disagree with the decision reached in the Judgment considering that the Convention makes a clear distinction between political and civil rights and economic, social and cultural rights. The right to social security is not a "*recognized*" right in the Convention and therefore is not under the protection system envisaged therein, which applies only to the first category of rights mentioned. In order to judicialize economic, social and cultural rights before the Court, it would be necessary to sign an additional Protocol, something that has not occurred in relation to the right to social security.

81. My dissent is also based on the fact that the content of Article 26 of the Convention refers to the States' obligations of conduct, not the recognition of human rights. Moreover, this provision refers to the OAS Charter which, in turn, stipulates "*goals*" or "*objectives*" or "*principles and mechanisms*" that the States undertake to achieve or to implement, as appropriate.

82. In addition, I do not share the view expressed in the decision, given that, by allowing the provisions of Article 26 to be prosecuted before the Court, this would not only render Articles 31, 76(1) and 77(1) of the Convention largely meaningless, but would also allow all the rights "*derived*" from the OAS Charter to be so. This possibility is clearly far removed from what was agreed and, if that path were to be followed, it would undoubtedly lead to unsuspected consequences, not entirely beneficial for the effective respect of human rights.

83. Accordingly, I reiterate once again that I do not deny the existence of the right to social security which, in any case, does not figure in those terms in the standards contained in the OAS Charter, from which it is derived, pursuant to Article 26 of the Convention. I merely argue that its possible violation cannot be submitted to the Court for examination and a ruling.

84. Furthermore, this opinion should not be taken to mean that I would not eventually favor the international adjudication of economic, social and cultural rights before the Court. On this point, I believe that if we proceed with this course of action, it must be done by those responsible for international regulatory functions, that is, by the States through treaties, international custom and general principles of law or by unilateral legal acts. It does not seem appropriate that the body responsible for the inter-American judicial function should assume the international regulatory function, especially when the States Parties to the Convention are democratic and governed by the Inter-American Democratic Charter that envisages the separation of powers and citizens' participation in public affairs.¹⁴² It seems fitting that this should also be reflected in matters concerning the international regulatory function, particularly of those norms that concern citizens more directly.

¹⁴² Adopted at the 28th Special Session of the OAS General Assembly, September 11, 2001, Lima, Peru.

Article 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.*"

Article 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.*"

Eduardo Vio Grossi
Judge

Pablo Saavedra Alessandri
Secretary

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

CASE OF MUELLE FLORES V. PERU

**JUDGMENT OF MARCH 6, 2019
(Preliminary objection, Merits, Reparations and Costs)**

1. Reiterating my respect for the decisions of the Inter-American Court of Human Rights (hereinafter “the Inter-American Court” or “the Court”), I offer this partially dissenting opinion. My opinion focuses on the in-depth analysis undertaken by the Court regarding the international responsibility of the State (hereinafter “the State”, “Republic of Peru” or “Peru”) for the violation of the right to social security and the principle of progressivity. Specifically, I will explain my disagreement with the position adopted by the Court in relation to Operative Paragraphs 1, 5 and 6, in which it was determined that those rights were violated in the instant case. In that regard, I point out that my thoughts reflect what I have already expressed in my partially dissenting opinions issued in the cases *Lagos of the Campo v. Peru*¹, the *Dismissed Employees of PetroPeru et al. v. Peru*², and *San Miguel Sosa et al v. Venezuela*³; as well as in my concurring opinions in the cases of *Gonzales Lluy et al. v. Ecuador*⁴, *Poblete Vilches et al. v. Chile*⁵ and *Cuscul Pivaral et al. v. Guatemala*.⁶ This analysis will be carried out in the following order: A. Objection to the alleged lack of jurisdiction *ratione materiae*, and B. Direct justiciability of Article 26 of the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”).

I. OBJECTION REGARDING THE ALLEGED LACK OF JURISDICTION *RATIONE MATERIAE*

2. In the instant case, the *State* pointed out that the representatives did not seek to claim the justiciability of the Convention rights, but rather of the economic, social, cultural and environmental rights (hereinafter “ESCER”), specifically the right to social security. The State argued that Article 19(6) of the Additional Protocol to the American Convention on Human Rights in the Area of

¹ Cf. *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2017. Series C No. 340. Partially dissenting opinion of Judge Antonio Humberto Sierra Porto.

² Cf. *Case of Case of Dismissed Employees of PetroPeru et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2017. Series C No. 344. Partially dissenting opinion of Judge Antonio Humberto Sierra Porto.

³ Cf. *Case of San Miguel Sosa et al. v. Venezuela. Merits, reparations and costs*. Judgment of February 8, 2018. Series C No. 348. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

⁴ Cf. *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2015. Series C No. 298. Concurring Opinion of Judge Humberto Antonio Sierra Porto.

⁵ Cf. *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349. Concurring Opinion of Judge Humberto Antonio Sierra Porto.

⁶ Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of August 23, 2018. Series C No. 359. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

Economic, Social and Cultural Rights, "Protocol of San Salvador" (hereinafter "Protocol of San Salvador"), clearly defined the jurisdiction of the Commission and of the Court in relation to the subject-matter, establishing that, under the mechanism of individual petitions before the inter-American system, only the protection of trade union rights and the right to education could be subject to analysis, but not the right to social security. The State considered that it was not acceptable to weaken the content of the provisions of Article 19(6) of the San Salvador Protocol, which was a binding standard for the organs of the system, and that the *pro personae principle* would only be applicable within the jurisdictional framework established by the inter-American order.

3. Furthermore, the State noted the position taken by some Judges of the Court in opposing the direct justiciability of ESCER, and expressed its agreement with that view in all respects. In this regard, it emphasized that the rights included in the protection system of the Convention were those established up to Article 25, and that although other rights and freedoms could exist, these should be included in that protection system via the mechanisms contemplated in Articles 31, 76 and 77 of the Convention. It also stressed that the Court did not have jurisdiction to add rights, only the States. It held that ESCER should not be justiciable through the direct application of Article 26 of the Convention, since that article did not enumerate a catalogue of rights, or recognize or enshrine ESCER; rather, it established the commitment of the States Parties to progressively achieve the full realization of rights that could be derived from the Charter of the Organization of American States, subject to available resources. In this sense, it argued that the obligation implicit in Article 26 that could be directly supervised by the Court was compliance with the obligation of progressive development and the duty of non-retrogression; therefore, it could not be claimed that a case concerning the alleged violation of some of the rights established in Article 26 could be submitted to this Court. It reiterated that this lack of jurisdiction was confirmed through the Protocol of San Salvador, in which the States determined that justiciability applied only in two cases, which constituted a subsequent agreement and practice among the States Parties. In addition, the State subscribed to the view that the Court could not assume jurisdiction in relation to the alleged violation of a right or freedom "not included in the Convention or in the Protocol of San Salvador" and that it was not possible to invoke the principle of progressive interpretation of international instruments in order to add rights to the protection system of the Convention, since this was being applied to attribute to an existing right that was already included in that system, a different and generally broader meaning than that originally given.

4. For its part, the *Commission* argued that the instant case was submitted to the Court prior to the case law advances related to Article 26 of the American Convention. Therefore, it considered that the analysis of the right to social security in the context of Article 26, in addition to the rights already invoked, "would contribute to insert it precisely in that inter-American evolution and towards a more comprehensive understanding of the scope of the international responsibility."

5. The *representatives* argued that Article 26 of the Convention should be justiciable based on Article 62(3) of the Convention, which establishes the Court's jurisdiction to hear all cases concerning the interpretation and application of the provisions of the Convention that are submitted to it, and that the aforementioned provision was part of the treaty. Likewise, they indicated that the violation of the Protocol of San Salvador had not been invoked, but that its mention was by way of illustration, since it formed part of the inter-American *corpus juris* that could be used as a parameter for interpreting the Convention. Finally, they concluded that "the right to social security is a human right protected by international law and implicit in Article 26 of the Convention."

6. In this regard, it should be recalled that preliminary objections are objections to the admissibility of an application or the jurisdiction of the Court to hear a specific case or any of its aspects, owing to the person, the issue, the time or the place, provided that those assertions are

of a preliminary nature.⁷ If these assertions cannot be considered without prior analysis of the merits of a case, they cannot be analyzed through a preliminary objection.⁸ Accordingly, irrespective of whether an assertion is made by the State in its briefs, if, upon analyzing the argument, it is determined that it constitutes a preliminary objection, that is, it must object to the admissibility of the application or the Court's competence to hear the case or any of its aspects, it must therefore be settled as such.⁹

7. Accordingly, and having regard to the diverse nature of the arguments presented by the State with the aim of arguing that the Court does not have jurisdiction to examine the direct justiciability of the right to social security based on the interpretation of Article 26 of the Convention, I consider that the Court should have decided to treat this matter as a preliminary objection. It is important to note that in the case of *Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru*, the Court had already analyzed arguments of this nature through a preliminary objection related to *ratione materiae*.¹⁰

8. In the instant case, no violation of the Protocol of San Salvador has been alleged; rather, the representatives' petition focuses on the application of Article 26 of the Convention in relation to the right to social security. In this regard, it was up to the Court to determine whether it was competent to analyze, directly, the alleged violation of the right to social security pursuant to Article 26 of the Convention.

9. In the cases of *"Five Pensioners" v. Peru* and *Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru*, this Court settled claims related to the violation of Article 26 of the Convention. Although no violation of that article was declared in either of those cases, and the Court did not conduct an extensive analysis of the State's obligation of progressive development and the duty of non-retrogression, the Court's considerations focused on that obligation, concluding that "retrogression is actionable when economic, social and cultural rights are involved."¹¹ The Court did not undertake a study regarding the violation of an economic, social, cultural or environmental right in its individual dimension, that is, applicable to a specific case; rather, its assessment was based on the collective dimension of the right.¹² Indeed, in the case of the *"Five Pensioners,"* the Court established that "economic, social and cultural rights have both an individual and a collective dimension."¹³ In this sense, it is understood that the collective dimension of ESCER is derived from Article 26 of the Convention, through the obligation of progressive development. Thus, for the sake of greater clarity in presenting my arguments, I will refer to the individual dimension of ESCER when alluding to the direct justiciability of a particular right of this nature, applicable to a specific case - for example the victim's right to a pension - and I will refer to the progressive dimension of ESCAR when alluding to the State's obligation to progressive development and non-retrogression.

⁷ Cf. *Case of Las Palmeras v. Colombia. Preliminary objections*. Judgment of February 4, 2000. Series C No. 67, para. 34, and *Case of Herzog et al. v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of March 15, 2018. Series C No. 353, para. 97.

⁸ Cf. *Case of Castañeda Gutman v. Mexico*, para. 39, and *Case of Herzog et al. v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of March 15, 2018. Series C No. 353, para. 97.

⁹ 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 Lagos del Campo v. Peru. Preliminary objections, Merits, reparations and costs*. Judgment of August 31, 2017. Series C No. 340, para. 17.

¹⁰ Cf. *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of July 1, 2009. Series C No. 198, paras. 12 to 19.

¹¹ Cf. *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of July 1, 2009. Series C No. 198, paras.103.

¹² Cf. *Case of "Five Pensioners" v. Peru. Merits, reparations and costs*, para. 147.

¹³ Cf. *Case of "Five Pensioners" v. Peru. Merits, reparations and costs*, para. 147.

10. Since the Judgment issued in the case of *Lagos del Campo v. Peru*, this Court has adopted an important jurisprudential stance in interpreting the direct justiciability of Article 26 of the Convention in its individual dimension and establishing, for the first time, a conviction in a specific case, for the violation of that article (job stability), due to the dismissal of Mr. Lagos del Campo, a workers' representative, as a result of his comments made during an interview, published in a magazine, against the company for which he worked. This jurisprudential stance has been reiterated in subsequent judgments by this Court, where the majority of its Members considered that the direct justiciability of certain economic social and cultural rights (the right to work and the right to health) in their individual dimension, was possible under Article 26 of the Convention.

11. However, I consider it appropriate to depart from the case law criterion adopted until now, because I believe that the previous interpretation expands the Court's jurisdiction, disregarding the will of the States, which is expressed not only in the manner in which Article 26 of the American Convention was drafted, but also in the jurisdiction established in Article 19(6) of the Protocol of San Salvador. The latter clearly stipulated the economic, social, cultural and environmental rights that could be examined under the inter-American protection system.

12. This analysis does not deny the interdependence and indivisibility of civil, political, economic, social, cultural and environmental rights, nor does it disregard the obligations derived from the Protocol of San Salvador, for those countries that ratified it. And it does not imply that the Court considers that ESCER, in their individual dimension, should not be protected or be directly justiciable through other channels, such as the domestic courts, for example, or even before the Inter-American Court, provided that their justiciability is accomplished in connection with rights recognized in the Convention, as the Court has done on several previous occasions. The purpose of this partially dissenting opinion is to analyze the jurisdiction of the American Convention in relation to these issues and the manner in which justiciability is achieved in the inter-American system, which is different from the manner in which it operates in the domestic systems of each State.

13. A correct interpretation of Article 26 of the Convention and its relationship with Articles 1(1), 2, 62 and 63 of the American Convention should be aimed at determining the competence of the Court in relation to that article and the scope of the State's obligations derived therefrom. For this, we must refer to the Vienna Convention on the Law of Treaties (hereinafter "Vienna Convention"), which establishes the general and customary rules of interpretation of international treaties, and requires the simultaneous and joint application of good faith, the ordinary meaning and context of the terms used in the treaty in question, as well as the object and purpose of the treaty. Thus, in line with its constant case law, the Court must utilize the methods stipulated in Articles 31 and 32 of the Vienna Convention to make such interpretation¹⁴ (literal, systematic and teleological

¹⁴ Cf. Gender identity, and equality and non-discrimination with regard to same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1 of the American Convention on Human Rights). Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, para. 55; Environment and human rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity - interpretation and scope of Articles 4(1) and 5(1), in relation to Articles 1(1) and 2 of the American Convention on Human Rights). Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23, para. 40; Case of the Workers of Hacienda Brazil Verde v. Brazil. Preliminary objections, Merits, reparations and costs. Judgment of October 20, 2016. Series C No. 318, para. 246; Case of Artavia Murillo et al. ("In-vitro fertilization ") v. Costa Rica. Preliminary objections, Merits, reparations and costs. Judgment of November 28, 2012. Series C No. 257, para. 173, and Case of González et al. ("Cotton Field") v. Mexico. Preliminary objection, merits, reparations and costs. Judgment of November 16, 2009. Series C No. 205, para. 32.

interpretation). Furthermore, the interpretation standards derived from Article 29 of the American Convention should be used, where pertinent.¹⁵

II. DIRECT JUSTICIABILITY OF ARTICLE 26 OF THE AMERICAN CONVENTION ON HUMAN RIGHTS

B.1 Literal Interpretation

14. Article 26 of the American Convention establishes the following:

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, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, subject to available resources, by legislation or other appropriate means.

15. In making a literal interpretation of Article 26, that is, an interpretation in good faith, based on the ordinary meaning of the terms and derived from the literal meaning of some expressions or words in the Convention and in other treaties, we must understand that this article establishes an obligation to act, in other words, an obligation of conduct, not of result. The scope of that obligation is to "adopt measures" in order to achieve "progressively the full realization of the rights derived from the economic, social, educational, scientific and cultural standards, set forth in the [OAS] Charter," that is, of the rights that are derived from, or can be inferred from, the provisions of the latter instrument, and only of that instrument. Moreover, the obligation to act, established in Article 26 is conditional – it is "subject to available resources," which reinforces the idea that it is not an obligation to produce a result. Although this implies that the progressive development of those rights cannot be achieved within a short period of time, since this "requires a necessarily flexible device reflecting the realities of the world and the difficulties involved for each country in ensuring their realization,"¹⁶ it cannot imply inaction on the part of the State, in light of the undertaking to "adopt measures" "by legislation or other appropriate means."

¹⁵ Article 29 of the Convention establishes: "Standards of 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; 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; and, 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."

¹⁶ Cf. *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2009. Series C No. 198, para. 102, and *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, para. 80. See also, Committee on Economic, Social and Cultural Rights, General Comment No. 3: The nature of States Parties' obligations (Article 2, paragraph 1 of the Covenant), December 14, 1990, U.N. Doc. E/1991/23, para. 9.

16. Progressive realization means that the States parties have the specific and constant obligation to advance as rapidly and efficiently as possible towards the full realization of ESCER.¹⁷ This should not be interpreted to mean that, during their implementation, those obligations are divested of their specific content, or that the States can indefinitely postpone the adoption of measures to realize the rights in question - particularly after nearly forty years since the Inter-American Convention entered into force. Therefore, it is necessary to ensure the duty of *non-retrogression* regarding the rights achieved.

17. In other words, in relation to the scope of Article 26, the Court has indicated that the main obligation derived from this article is to adopt measures to achieve the progressive development of economic, social and cultural rights.¹⁸ This entails "a duty - albeit conditioned- of non-retrogression, which should not always be understood as a prohibition to adopt measures that restrict the exercise of a right."¹⁹

18. Article 26 does not "recognize" rights, nor does it establish a specific catalogue of rights; instead, it establishes the obligation of the States to progressively develop certain rights, precisely because these have not been fully realized. In order to identify those rights that must be developed progressively, Article 26 makes direct reference to the Charter of the Organization of American States (hereinafter "Charter" or "OAS Charter"). However, from a reading of the Charter, we may conclude that it, too, does not contain a clear and precise catalogue of subjective rights; therefore, it is necessary to undertake interpretative work to conclude that a right is derived from the Charter. It is important to stress that, if it is determined that a right is derived from the Charter, it must be interpreted in conjunction with the provisions of Article 26 of the Convention and within the established limits; in other words, the right in question could be directly justiciable, provided that an analysis of progressivity is carried out.

19. From a literal reading of Article 26, there are no valid arguments to affirm that it is possible to submit to the Court a case concerning the alleged violation of a specific right in its individual dimension, based on the reference in question, since the scope of the protection afforded by Article 26 differs from that of the civil and political rights enshrined in Articles 3 to 25. Indeed, the terms used in drafting those articles, such as "every person", "no one shall be," "every citizen," as well as the clearer development of the content of each right, denotes the clear intention of the States to protect these through the inter-American system in specific cases in which their violation is

¹⁷ Cf. U.N. Committee on Rights Economic, Social and Cultural, General Comment No. 14: The right to the highest attainable standard of health, E/C.12/2000/4, August 11, 2000, para. 31, and *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349, para. 104.

¹⁸ Cf. *Case of "Five Pensioners" v Peru. Merits, reparations and costs.* Judgment of February 28, 2003. Series C No. 98, para. 147.

¹⁹ *In this regard, the Court has endorsed the view expressed by the CESCR in the sense that "any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the [International] Covenant [on Economic, Social and Cultural Rights] and in the context of the full use of the maximum available resources [to the State]." Cf. Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru. Preliminary objection, merits, reparations and costs. Judgment of July 1, 2009. Series C No. 198, para. 103; Committee on Economic, Social and Cultural Rights, General Comment No. 3: The nature of States Parties' obligations (Article 2, paragraph 1 of the Covenant), December 14, 1990, U.N. Doc. E/1991/23.*

Similarly, the Inter-American Commission has considered that in order to determine whether a retrogressive measure is compatible with the American Convention, it is necessary to "determine if it is justified by strong reasons." Cf. Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru. Preliminary objection, merits, reparations and costs. Judgment of July 1, 2009. Series C No. 198, para. 103, and Reports on Admissibility and Merits No. 38/09, Case 12.670, National Association of Ex-Employees of the Peruvian Social Security Institute et al. v. Peru, issued by the Inter-American Commission of Human Rights, on March 27, 2009, paras.140 to 147.

alleged, but not in relation to their progressive development or non-retrogression, unlike what is stipulated in Article 26. The obligation established in this article implies that the Court can directly supervise compliance with the obligation of progressive development and the consequent duty of non-retrogression of the rights that could be derived from the Charter. Accordingly, it is important to note that this facet of the principle of progressive development is justiciable when economic, social, cultural and environmental rights are involved. An interpretation to the contrary would imply expanding the scope of the protection afforded by Article 26, which is not the task of this Court, but of the States. In doing so, the Court would be overstepping the limits of its jurisdiction.

B.2 Internal context-systematic interpretation

20. The Court has held that norms should be interpreted as part of a whole, whose meaning and scope must be defined on the basis of the legal system to which they belong.²⁰ In this regard, the Court has considered that in interpreting a treaty it is not only necessary to take into account all its provisions, but also any agreement or instruments formally related thereto (Article 31, subparagraph 2 of the Vienna Convention), as well as the system within which it is inserted (Article 31, subparagraph 3), that is, the Inter-American System for the Protection of Human Rights.²¹

21. As to the rest of the provisions of the Convention, the Court has indicated that Article 26 is embodied in Chapter III of the Convention, entitled "Economic, Social and Cultural Rights", but is also included in Part I of that instrument, entitled "State Obligations and Rights Protected;" therefore, it is subject to the general obligations contained in Articles 1(1) and 2 of Chapter I (entitled "General Obligations"), as well as Articles 3 to 25 included in Chapter II (entitled "Civil and Political Rights"). Accordingly, the Court has considered that the general obligations of "respect" and "guarantee," together with the obligation to "adopt" in Article 2 of the Convention, applies to all rights, whether civil, political, economic, social, cultural or environmental.²²

22. This does not imply an interpretation of the direct enforceability of a particular right, in its individual dimension, nor does it grant the Court competence for its judicialization. What the preceding paragraph establishes is simply that the provisions of Articles 1(1) and 2 of the Convention also apply to the obligation of progressive development of rights; that is, to the progressive aspect of the rights that could be derived from the OAS Charter, which implies the adoption of measures, either legislative or other types of measures, to achieve the progressive development of ESCER. The manner in which the violation of these rights operates in conjunction with the obligations to guarantee and respect, must be analyzed by this Court in each specific case.

23. Furthermore, a systematic interpretation of Article 26 of the Convention cannot ignore the Protocol of San Salvador adopted on November 17, 1988, and in force since November 16, 1999.²³ With regard to the nature of protocols, it should be recalled that in international public law these

²⁰ Cf. *Case of González et al ("Cotton Field") v. Mexico. Preliminary objection, merits, reparations and costs*. Judgment of November 16, 2009. Series C No. 205, para. 43, and *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of August 23, 2018. Series C No. 359, para. 82.

²¹ Cf. *The Right to Information on Consular Assistance in the framework of the Guarantees of Due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 113, and *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of August 23, 2018. Series C No. 359, para. 82.

²² Cf. *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") V. Peru. Preliminary objection, merits, reparations and costs*. Judgment of July 1, 2009. Series C No 198, para. 100, and *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of August 23, 2018. Series C No. 359, para. 83.

²³ To date, 16 States have ratified the Protocol of San Salvador, namely: Argentina, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, El Salvador, Guatemala, Surinam and Uruguay.

are separate but supplementary agreements to a treaty that add, clarify, amend or supplement the procedural or substantial content thereof. The existence of a protocol is directly linked to the existence of the treaty; in other words, without a foundation treaty there can be no protocol.²⁴ In this sense, the American Convention should not be interpreted in isolation, without taking into account its Protocol, given that these are complementary instruments that should be read and interpreted jointly.

24. That said, based on Article 77(1) of the Convention, the States Parties adopted the Protocol of San Salvador with a view to "gradually including other rights and freedoms within its system of protection," this being understood as other rights and freedoms *not* established in the Convention. In other words, the Protocol was adopted in order to establish, in a clear and precise manner, a catalogue of economic, social, cultural and environmental rights that were not expressly recognized in the American Convention, although some of these could be derived from the Charter, as mentioned previously *supra*. However, although the Protocol establishes a clearer catalogue of ESCER, this does not mean that this Court has jurisdiction to examine violations of any of its articles. On the contrary, Article 19(6) of the Protocol clearly stipulates that the only rights that can be subject to supervision through the mechanism of individual petitions are "the rights established in paragraph a) of Article 8 and in Article 13." Thus, it is through the Protocol of San Salvador that the States of the region have, for the first time, defined those ESCER that may be directly justiciable, in their individual dimension, in specific cases.

25. Although the Court's jurisdiction in relation to Article 26 refers solely to direct supervision of compliance with the obligation of progressive development and its correlative duty of non-retrogression of rights that could be derived from the Charter, the Protocol of San Salvador supplements the substance, and especially the procedural content, of the Convention. It does so by granting, for the first time, jurisdiction to the Commission and to the Court to hear contentious cases involving the violation of certain trade union rights and the right to education, in specific cases concerning the individual dimension. Such jurisdiction is not established in the Convention. In other words, the Protocol not only incorporates ESCER more specifically, but also expands the sphere of their protection, particularly for the States parties. Thus, Article 19(6) of the Protocol should not be seen as contradictory to the provisions of Article 26 of the American Convention, but rather as complementary, given that, as mentioned previously, the latter does not grant the Court jurisdiction to analyze violations of economic, social, cultural and environmental rights in their individual dimension, but only in the context of the obligation of progressive development. Thus, the Protocol does not modify the American Convention in the sense of weakening its jurisdiction in relation to Article 26 with regard to the individual dimension of ESCER, because this was never granted in the Convention. Rather, the Protocol grants jurisdiction for the first time in relation to the two articles previously cited.

26. That said, it is important to point out that the rights recognized by the Protocol and the obligations of the States Parties derived therefrom, are separate to the fact that the Court has jurisdiction to declare violations within the context of its contentious role. Simply put, in order to monitor compliance with these rights the States devised other mechanisms, such as those established in the other subparagraphs of Article 19 of the Protocol.

27. Based on the foregoing, I consider that the Court can hear contentious cases in which a violation is alleged of the obligation of progressive development of rights that could be derived from the Charter, by virtue of Article 26 of the Convention, as well as those cases in which a violation of Articles 8(a) and 13 of the Protocol is alleged.

²⁴ See, Definitions of basic terms in the United Nations Treaty Collection. Consulted at: <http://www.un.org/es/treaty/untc.shtml#protocols>.

B.3 Teleological Interpretation

28. It is useful to recall that a teleological interpretation seeks to analyze the purpose of a particular norm. To this end, it is pertinent to examine the object and purpose of the treaty itself and, if applicable, to analyze the purpose of the regional protection system.²⁵ As the Court has indicated, the object and purpose of the American Convention is “the protection of the fundamental rights of human beings.” Likewise, the American Convention expressly contemplates certain interpretation guidelines set forth in Article 29,²⁶ including the *pro personae* principle.

29. However, with regard to an interpretation based on the object and purpose of the American Convention, and the *pro personae* principle, it is important to emphasize that in its interpretative work, the Court should not consider this approach in isolation, but in conjunction with the other methods of interpretation. Thus, although the object and purpose of the American Convention is “the protection of the fundamental rights of human beings,” that object is to be understood as being within the limits set by the treaty itself and in accordance with the guarantees recognized therein.²⁷

30. The *pro personae* principle, in turn, implies that in interpreting a treaty provision, precedence should be given to applying the rule that gives the greatest protection to the rights of the individual and/or interpreting those rights in a broad manner that favors him or her. However, the application of this principle cannot displace the use of other interpretation methods, nor can it disregard their results, since all of these must be understood as a whole. Otherwise, the unrestricted application of the *pro personae* principle would lead to the invalidation of the interpreter's actions.²⁸

31. From the aforementioned interpretation methods it is clear that the Convention does not grant the organs of the inter-American system the jurisdiction to directly protect ESCER in their individual dimension; thus, neither the object and purpose of the Convention nor the *pro personae principle* may be used to arrive at a different result. These cannot be used to validate an interpretative option that is not apparent from the rule itself and that, on the contrary, implies a modification thereof. In this case we are not contemplating a more protective or guarantee-oriented interpretation of the rule that allows for the application of the *pro personae* principle, since this must be applied when the Court is confronted with two possible valid and true interpretations of a conventional precept. Indeed, the direct justiciability of ESCER as individual rights, based on Article 26 of the Convention, is not a valid interpretation, given that, what is being attempted is to infer

²⁵ Cf. *Case of González et al. (“Cotton Field”) v. Mexico. Preliminary objection, merits, reparations and costs*. Judgment of November 16, 2009. Series C No. 205, para. 59, and *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of August 23, 2018. Series C No. 359, para. 90.

²⁶ Article 29 of the American Convention establishes the following: “Standards of 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; 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; and, 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.”

²⁷ Cf. *The Institution of Asylum and its Recognition as a Human Right in the Inter-American System of Protection (Interpretation and Scope of Articles 5, 22(7) and 22(8), in relation to Article 1(1) of the American Convention on Human Rights)*. Advisory Opinion OC-25/18 of May 30, 2018. Series A No. 25, para. 148.

²⁸ Cf. *The Institution of Asylum and its Recognition as a Human Right in the Inter-American System of Protection (Interpretation and Scope of Articles 5, 22(7) and 22(8), in relation to Article 1(1) of the American Convention on Human Rights)*. Advisory Opinion OC-25/18 of May 30, 2018. Series A No. 25, para. 149.

an interpretive principle that does not correspond to the provision interpreted.²⁹ Therefore, the Inter-American Court cannot assume jurisdiction for the alleged violation of a right or freedom not included in the protection system of the American Convention or in the Protocol of San Salvador.

32. With regard to the evolutive interpretation, the Court has reiterated that human rights treaties are living instruments, whose interpretation must go hand in hand with evolving times and current living conditions. Thus, an evolutive interpretation is consistent with the general rules of interpretation established in Article 29 of the American Convention, as well as those established in the Vienna Convention on the Law of Treaties.³⁰

33. However, this method of interpretation cannot be invoked to add rights to the protection system of the Convention or to grant the Court jurisdiction where it does not have it. The appropriate sphere for its application is in the evolutive interpretation of an existing right or freedom, or of a State obligation, already included in the protection system of the Convention or in the Protocol, but in a different and generally broader sense than originally envisaged by its authors, as the Court has done on different occasions, especially when defining or expanding the content of the rights recognized in the Convention, with recourse to the international *corpus iuris*. An example of this is the inclusion of "gender orientation" in the reference to "any other social condition" as one of the grounds for discrimination prohibited by Article 1(1) of the Convention.³¹

34. At the same time, the Court recalls that, under Article 32 of the Vienna Convention, supplementary means of interpretation, especially the preparatory work of the treaty, may be used to confirm the meaning resulting from the application of the methods mentioned in Article 31. This implies that they are used in a subsidiary manner.³² I note that the characterization of the debate on the inclusion and scope of Article 26 since the judgment in the case *Acevedo Buendía et al. v. Peru* and up to the case of *Cuscul Pivaral et al. v. Guatemala*,³³ is not correct. The references made to the preparatory works in those judgments, suggesting that these demonstrated the States' probable intention to allow the direct justiciability of ESCER through Article 26 of the Convention, is biased, since they only mentioned fragments of the observations made by four States out of a

²⁹ Similarly, see: *Case of González et al. ("Cotton Field") v. Mexico*. Preliminary objection, merits, reparations and costs. Judgment of November 16, 2009. Series C No. 205, para. 78.

³⁰ Cf. Advisory Opinion OC-16/99, *supra*, para. 114, and Advisory Opinion OC-24/17, *supra*, para. 58. Cuscul, para. 102.

³¹ *Case of Atala Riffo and Daughters v. Chile*. Merits, reparations and costs. Judgment of February 24, 2012. Series C No. 239, para. 91.

³² Cf. *Case of Cuscul Pivaral et al. v. Guatemala*. Preliminary objection, merits, reparations and costs. Judgment of August 23, 2018. Series C No. 359, para. 94.

³³ In such cases: "[t]he Court recalls that the content of Article 26 of the Convention was the subject of intense debate in the preparatory works, arising from the interest of the States Parties to assign a "direct reference" to economic, social and cultural "rights;" "a provision establishing certain legal mandates [...] for its compliance and application" [Chile]; as well as "the [respective] mechanisms [for its] promotion and protection" [Chile]; since the Preliminary Draft of the treaty prepared by the Inter-American Commission made reference to such mechanisms in two Articles which, according to some States, only "contemplated, in a merely declarative text, the conclusions reached at the Buenos Aires Conference" [Uruguay]. The review of said preparatory works of the Convention also proves that the main observations, upon which the approval of the Convention was based, placed a special emphasis on "granting the economic, social and cultural rights the maximum protection compatible with the specific conditions in most of the American States." [Brazil]. Accordingly, as part of the debate during the preparatory works, it was also proposed that "[the] exercise [of those rights] be made possible through the action of the courts" [Guatemala]". Cf. *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru*. Preliminary objection, merits, reparations and costs. Judgment of July 1, 2009. Series C No. 198, para. 99; *Case of Poblete Vilches et al. v. Chile*. Merits, reparations and costs. Judgment of March 8, 2018. Series C No. 349, para. 101, and *Case of Cuscul Pivaral et al. v. Guatemala*. Preliminary objection, merits, reparations and costs. Judgment of August 23, 2018. Series C No. 359, para. 95.

total of 23 participating States, which hardly reflects a majority position in this regard. No mention was made of the countries that opposed the enforceability of ESCER or the fact that the majority of these countries did not express a clear position.

35. Based on a study of the preparatory works, there is no clear indication of the States' intention to include economic, social, cultural and environmental rights in the protection system contemplated by the Convention. For example, opinions were proffered pointing out that the content of the article did not appear to be typical of a convention, "but that perhaps it [was] not politically convenient to oppose the inclusion of that text."³⁴ The Dominican Republic, in its intervention regarding Article 25(1) of the draft Convention, stressed that it was preferable to eliminate paragraph 1 proposing that the States dedicate their efforts to guarantee, in their domestic laws, the other rights enshrined in the American Declaration.³⁵ Likewise, Chile emphasized that any direct mention of the ESCER had been eliminated;³⁶ Mexico pointed out that "unlike all the other rights alluded to in the draft –which are rights enjoyed by a person as an individual or as a member of a particular social group – it is difficult at a given moment to precisely establish which person or persons would be directly affected in the event of a violation of the rights contained in Article 25."³⁷ The observations of Guatemala³⁸ and Brazil³⁹ were aimed at proposing articles in the context of the obligation of progressive development, or proposing that the States submit reports to the Commission on the measures adopted and the progress made in ensuring respect for ESCAR. In particular, Brazil emphasized that "economic, social and cultural rights are contemplated in very different degrees and forms by the legislation of the different American States and, although governments may wish to recognize them all, their enforcement depends substantially on the availability of material resources that enable their implementation."

36. I would also point out that, based on the positions adopted by the States, the only consensus reached was to include the obligation of progressive development of rights, pursuant to Article 26 of the Convention; however, there was no proposal to include ESCER in the same system of protection contemplated for other civil and political rights, at least not from an individual standpoint. Accordingly, the interpretation made using the methods cited is confirmed in the preparatory works of the American Convention.

37. Despite my comments in this section, I am not unaware of the importance of the justiciability of ESCER and their protection through the inter-American system. However, to accomplish this we can turn to less problematic approaches in terms of interpretation, which are consistent with the jurisdiction granted to the Court by the States and with the stipulations of international law. Thus, as this Court has done on several occasions prior to its current jurisprudential stance, it can still protect ESCER in conjunction with other rights recognized in the Convention, in other words, through an indirect mechanism of protection.

³⁴ Cf. Uruguay. Records of the Inter-American Specialized Conference on Human Rights, November 7-22, 1969, OEA/Ser.K/XVI/1.2, p. 37.

³⁵ Cf. Dominican Republic. Records of the Inter-American Specialized Conference on Human Rights, November 7-22, 1969, OEA/Ser.K/XVI/1.2, pp. 69 and 70.

³⁶ Cf. Chile. Records of the Inter-American Specialized Conference on Human Rights, November 7-22, 1969, OEA/Ser.K/XVI/1.2, pp. 42 and 43.

³⁷ Cf. Mexico. Records of the Inter-American Specialized Conference on Human Rights, November 7-22, 1969, OEA/Ser.K/XVI/1.2, p. 101.

³⁸ Cf. Guatemala. Records of the Inter-American Specialized Conference on Human Rights, November 7-22, 1969, OEA/Ser.K/XVI/1.2, pp. 115 and 116.

³⁹ Cf. Brazil. Records of the Inter-American Specialized Conference on Human Rights, November 7-22, 1969, OEA/Ser.K/XVI/1.2, pp. 124 and 125.

38. Article 26 of the American Convention establishes the obligation of progressive development and the consequent duty of non-retrogression of rights that may be derived from the OAS Charter; therefore, the Court may directly supervise compliance with those obligations. However, this is not the case with the economic, social, cultural and environmental rights in their individual dimension, since the Court is not competent to do so, based on the methods of interpretation previously applied. In this sense, I consider that this Court does not have jurisdiction to examine the alleged violation of the right to social security that would be contained in that article.

39. Given that the dispute in this case concerns the alleged responsibility of the State for the failure to execute domestic judgments issued in favor of Mr. Muelle Flores, ordering the payment of a pension to which he was entitled, this Court should have considered that it is not competent to analyze the right to social security based on an interpretation of Article 26 of the American Convention. Thus, the Court should have admitted the preliminary objection filed by the State, and therefore it was not appropriate to continue with the in-depth analysis of the right to social security.

40. For all the foregoing reasons, I consider that this Court could not assume jurisdiction for the presumed violation of a right or freedom not included in the protection system of the American Convention or in the Protocol of San Salvador; therefore, it is unnecessary to issue a statement on the right to social security.

41. Finally, I wish to emphasize that, for practical purposes, it became irrelevant in this specific case to declare the violation of Article 26 of the Convention to the detriment of the victim, given that the discussion in this case focused on the failure to execute domestic judicial rulings that had already declared Mr. Muelle Flores' right to a pension. In that sense it was sufficient for this Court to declare, as indeed it did, the violation of Articles 8(1), 25(1) and 25(2)(c) of the Convention, as well as Article 21(1) and 21(2) thereof, to the detriment of Oscar Muelle Flores, to reach the same legal consequences derived from an incorrect interpretation by this Court regarding its jurisdiction and the analysis of the right to social security based on Article 26 of the American Convention.

Humberto Antonio Sierra Porto
Judge

Pablo Saavedra Alessandri
Secretary