INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF CANALES HUAPAYA ET AL. V. PERU

JUDGMENT OF JUNE 24, 2015

(Preliminary Objections, Merits, Reparations and Costs)

In the case of *Canales Huapaya et al.,*

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

Humberto Antonio Sierra Porto, President
Roberto F. Caldas, Vice President
Manuel E. Ventura Robles, Judge
Alberto Pérez Pérez, Judge
Eduardo Vio Grossi, Judge
Eduardo Ferrer Mac-Gregor Poisot, Judge;

also present,

Pablo Saavedra Alessandri, Registrar
Emilia Segares Rodríguez, Deputy Registrar,

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

[*] Pursuant to Article 19(1) of the Rules of Procedure of the Inter-American Court applicable to this case, Judge Diego García-Sayán, a Peruvian national, did not participate in the deliberation of this judgment.

TABLE OF CONTENTS

I
INTRODUCTION OF THE CASE AND CAUSE OF THE ACTION

1. *The case submitted to the Court.* On December 5, 2013, in accordance with Articles 51 and 61 of the American Convention and Article 35 of the Rules of Procedure of the Court, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted to the Court the case of *Carlos Alberto Canales Huapaya and others against the Republic of Peru* (hereinafter "the State" or "Peru"). According to the Commission, the case concerns the alleged violation of the right to judicial guarantees and judicial protection to the detriment of Carlos Alberto Canales Huapaya, José Castro Ballena and María Gracia Barriga Oré, "as a consequence of the lack of an adequate and effective judicial response to their dismissal as permanent officials of the Congress" of Peru. According to the Commission, the facts of the instant case share the essential features of the case of the *Dismissed Congressional Employees v. Peru,*[1] in which the Court determined that the workers' dismissal occurred in the context of a regulatory framework that prevented the alleged victims from having clarity about the approach they should use to challenge their dismissals. The Commission also indicated that the facts of the case "reflect a context of legal uncertainty and consequent judicial defenselessness in the face of possible arbitrary acts by the public authorities in the context of the collective dismissals that took place at the time."

2. *Procedure before the Commission.* The following proceedings took place before the Inter-American Commission:

a) *Petition.* On April 5, 1999, the Inter-American Commission received the initial petition of José Castro Ballena and María Gracia Barriga Oré and on September 20, 1999, it received the initial petition of Carlos Alberto Canales Huapaya.

b) *Admissibility Report.* On November 1, 2010, the Commission adopted Admissibility Report No. 150/10 (hereinafter "Admissibility Report").[2]

c) *Report on the Merits.* On November 13, 2012, the Commission issued Merits Report No. 126/12, pursuant to Article 50 of the American Convention (hereinafter "Merits Report").

i) *Conclusions.* The Commission concluded that Peru was responsible for the violation of the rights contained in Articles 8(1) and 25(1) of the American Convention, in relation to Articles 1(1) and 2 of thereof.

ii) *Recommendations.*-The Inter-American Commission recommended that the State:

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[1] *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) Preliminary objections, merits, reparations and costs.* Judgment of November 24, 2006. Series C No. 158.

[2] The Commission declared admissible the petitions concerning the possible violation of rights established in Articles 8(1) and 25(1) of the American Convention, in relation to the obligations established in Articles 1(1) and 2 thereof, in favor of María Gracia Barriga Oré, José Castro Ballena and Carlos Alberto Canales Huapaya. The Commission declared inadmissible the alleged violation of the right recognized in Article 24 of the Convention, by virtue of Article 47(b) of the same instrument. Likewise, it declared inadmissible the claims made in favor of Luz Angélica Soria Cañas and Dusnara Amelia Campos Ramírez, who were also included in the petition submitted by Mr. Castro and Ms. Barriga.

> Adequately repair the tangible and intangible damage caused as a result of the human rights violations stated in the present report, in accordance with what was decided by the Inter-American Court of Human Rights in its judgment of November 24, 2006, in the Case of the Dismissed Congressional Employees and by the Special Committee established by the Peruvian State for the purpose of enforcing said judgment.

d) *Notification to the State.* On December 5, 2012, the Merits Report was notified to the State, which was granted two months to report on its compliance with the recommendations.

3. *Submission to the Court.* On December 5, 2013, the Commission submitted to the jurisdiction of the Court all the facts and human rights violations described in the Merits Report, "given the need to obtain justice." The Inter-American Commission appointed Commissioner José de Jesús Orozco Henríquez and Executive Secretary Emilio Álvarez Icaza as its delegates, and Silvia Serrano Guzmán and Daniel Cerqueira, lawyers of the Executive Secretariat, as legal advisers.

4. *Request of the Inter-American Commission.* Based on the foregoing, the Commission requested that the Court declare the State responsible for the violation of Articles 8(1) and 25(1) of the American Convention, in relation to Articles 1(1) and 2 thereof, to the detriment of Carlos Alberto Canales Huapaya, José Castro Ballena and María Gracia Barriga Oré.

II
PROCEEDINGS BEFORE THE COURT

5. *Appointment of two common interveners to represent the alleged victims.* The three alleged victims did not reach agreement on the designation of a common intervener. Therefore, the Court authorized the appointment of more than one common intervener, pursuant to Article 25(2) of its Rules of Procedure. For the purposes of notification of the case, two common interveners were appointed: on the one hand, Mr. Castro, represented by the *Asociación Promotora para la Educación en el Perú* (APE PERU) (Association for the Promotion of Education in Peru); and, on the other, Mr. Canales and Mrs. Barriga, who stated that they would act jointly before the Court.

6. *Notification to the State and to the representatives.* The submission of the case by the Commission was notified to the State and to the alleged victims on January 8, 2014.

7. *Briefs of pleadings, motions and evidence.* On March 14, 2014, the alleged victims submitted their respective briefs of pleadings, motions and evidence (hereinafter "pleadings and motions briefs"), pursuant to Articles 25 and 40 of the Rules of the Court. In their brief, Mr. Canales and Ms. Barriga requested the assistance of an inter-American defender. In response, the Inter-American Association of Public Defenders (hereinafter "AIDEF") appointed Santiago García Berro (Argentina) and Antonio José Maffezoli (Brazil) as the inter-American Defenders of the said alleged victims (hereinafter "Inter-American Defenders"). At the time of their appointment, the Inter-American Defenders were informed that the deadline for the submission of the pleadings and motions brief in this case had already expired, and that they would have to accept the opportunities for procedural intervention provided for in the Rules of Procedure after the submission of the pleadings and motions brief.

8. *Answering brief.* On July 9, 2014, the State submitted to the Court its brief containing preliminary objections, its answer to the submission of the case and its observations on the

pleadings and motions brief (hereinafter "answering brief").[3] The State filed three preliminary objections and rejected the alleged violations.

9. *Observations on the preliminary objections.* In briefs submitted on August 15, 20 and 21, 2014, the Inter-American Defenders, Mr. José Castro Ballena and the Commission presented their respective observations on the preliminary objections filed by the State and requested that these be rejected.

10. *Public hearing.* In an order dated September 17, 2014,[4] the President of the Court called the parties to a public hearing to hear their final oral arguments and observations on the preliminary objections and possible merits, reparations and costs, as well as to receive the statement of an alleged victim proposed by the Inter-American Defenders, an expert witness proposed by Mr. Castro Ballena and a witness proposed by the State.[5] The President also requested the statements rendered by affidavit of two alleged victims proposed by the common interveners and an expert witness proposed by the Inter-American Commission. The public hearing[6] was held on October 17, 2014, during the Court's 105th regular session, which took place at the seat of the Court.

11. *Final written arguments and observations.* On November 17 and 18, the common interveners, the State and the Commission presented their final written arguments and observations. On that occasion, the State and the common interveners submitted a number of documents together with their briefs and answered various questions posed by the Court as requests for arguments and helpful evidence. The State and the common interveners submitted observations on the documentation and on the answers to the questions asked by the judges on December 3 and 10, 2014, respectively.

12. *Supervening evidence and helpful evidence.* On November 26, 2014, the State presented supervening evidence and the parties were granted a period of time to comment on the admissibility of said evidence. Likewise, on January 12, 2014, the President of the Court requested that the State and the common interveners provide certain helpful information, explanations and documentation as helpful evidence, which was submitted on January 21 and February 2, 2015. The parties submitted their observations to said information, explanations and documentation on February 10 and 11, 2015. Additional documentation was requested from the common interveners on February 11, 2015, which was submitted on February 17, 2015.

13. *Deliberation of the present case.* The Court began deliberation of this judgment on June 22, 2015.

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[3] The State appointed Luis Alberto Huerta Guerrero, Specialized Public Prosecutor for Supranational Affairs, as its agent, and Margarita Yalle Jorges and Iván Bazán Chacón as alternate agents.

[4] *Cf. Case of Canales Huapaya et al. v. Peru. Order of the President of the Court.* September 17, 2014. Available at: http://www.corteidh.or.cr/docs/asuntos/Canaleshuapaya_17_09_14.pdf

[5] The State withdrew this testimony on October 15, 2014.

[6] The following persons appeared at the public hearing: a) for the Inter-American Commission: Silvia Serrano Guzmán, lawyer of the Commission's Executive Secretariat; b) the common interveners: José Castro Ballena, alleged victim, Luis Alberto Molero Coca, litigation attorney, and Santiago García Berro, Inter-American Defender, and c) for the State of Peru: Iván Arturo Bazán Chacón, coordinator of the Office of the Specialized Public Prosecutor for Supranational Affairs, alternate agent, and Doris Margarita Yalle Jorges, lawyer of the Office of the Specialized Public Prosecutor for Supranational Affairs, alternate agent.

III
JURISDICTION

14. The Court has jurisdiction to hear this case in the terms of Article 62(3) of the Convention, given that Peru has been a State Party to the American Convention since July 28, 1978, and recognized the contentious jurisdiction of the Court on January 21, 1981.

IV
PRELIMINARY OBJECTIONS

15. The State filed two preliminary objections in relation to the pleadings and motions brief filed by Mr. Canales and Ms. Barriga and a preliminary objection in relation to the brief filed by Mr. Castro. Two of these preliminary objections refer to the alleged inclusion of new facts in the pleadings and motions briefs of the alleged victims and the third concerns the inclusion, by Mr. Canales and Ms. Barriga, of an alleged victim not mentioned in the Merits Report.

16. The Court will consider as preliminary objections only those arguments that have or could have exclusively such a nature in view of their content and purpose, in other words, those which, if favorably resolved would prevent the continuation of the proceeding or a ruling on the merits.[7] The Court has reiterated that a preliminary objection questions the Court's jurisdiction to hear a specific case or any of its aspects based on the person, the matter, the time or the place.[8] Therefore, regardless of whether the State defines an argument as a "preliminary objection," if, when analyzing these arguments it becomes necessary to previously consider the merits of a case, they would lose their preliminary nature and could not be analyzed as a preliminary objection.[9]

17. Based on the above criteria, the Court considers that the alleged preliminary objections related to supposed "new facts" submitted by the representatives in their pleadings and motions briefs and the inclusion of Mr. Canales' son as a presumed beneficiary of reparations, are not related to a question of admissibility or competence of the Court that must be resolved via a preliminary objection, as requested by the State.[10] Therefore, these aspects will be analyzed in the following chapter on prior considerations[11] referring more specifically to the factual framework of the case.

V
PRIOR CONSIDERATIONS

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[7] *Cf. Case of Cepeda Vargas v. Colombia. Preliminary objections, merits, reparations and costs.* Judgment of May 26, 2010. Series C No. 213, para. 35 *and Case of Cruz Sánchez et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of April 17, 2015. Series C No. 292, para. 30.

[8] *Cf. Case of Las Palmeras v. Colombia. Preliminary objections.* Judgment of February 4, 2000. Series C No. 67, para. 34, and *Case of Cruz Sánchez et al. v. Peru,* para. 30.

[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 Cruz Sánchez et al. v. Peru,* para. 30.

[10] In similar vein, see *Case of Tarazona Arrieta et al. v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of October 15, 2014. Series C No. 286, paras. 17 and 19.

[11] *Cf. Case of Mendoza et al. v. Argentina. Preliminary objections, merits and reparations*. Judgment of May 14, 2013 Series C No. 260, para. 25, and *Case of the Human Rights Defender et al. v. Guatemala. Preliminary objections, merits, reparations and costs.* Judgment of August 28, 2014. Series C No. 283, para. 15.

A. The factual framework of the case

A.1. Arguments of the Commission and the parties

18. The ***State*** argued that Mr. Castro and Ms. Barriga included new facts related to a motion for amparo filed by Eduardo Salcedo Peñarrieta "requesting the inapplicability of Resolution N° 453-RE-92", which had been declared admissible and would demonstrate, according to the alleged victims, that there was no equal treatment. The State also filed a "preliminary objection" regarding the alleged inclusion of new facts by Mr. Castro related to requests for information submitted by Mr. Castro in April 2013 and January 2014 regarding the salary scale and other benefits received as Head of the Property Management Unit. The State argued that the facts included by Mr. Castro and Mrs. Barriga regarding Mr. Eduardo Salcedo Peñarrieta's amparo action and the inclusion of new facts by Mr. Castro related to requests for information filed in April 2013 and January 2014, constitute facts that were not included by the Inter-American Commission in the Merits Report, so that the Court would be "unable to assess and rule on such facts".

19. The ***Commission*** considered that the matter raised by Mr. Canales and Ms. Barriga could reasonably be considered as an example of the climate of uncertainty mentioned in said Report, and therefore, linked to the factual framework of the case. As for the alleged new facts presented by Mr. Castro, the Commission recalled that in the proceedings before the Court it is possible to present supervening facts, and that "the first opportunity that the representatives had to provide the Court with updates of the facts was precisely in their pleadings and motions brief."

20. The ***Inter-American Defenders*** indicated that during the processing of the case before the Commission, Mr. Canales presented a claim in relation to his request for "equal treatment before the law by the State […] with respect to other persons in situations substantially similar to his."

21. Mr. ***José Castro Ballena*** alleged that he requested information from the State in order to prepare his pleadings and motions brief and exercise his right to a defense, and that the State's "omissive conduct [by not providing the requested information] not only contravened domestic law [,] but also prevented [him] from proving the magnitude of the damage [caused] at that time." He added that the sole purpose of attaching copies of the petitions and of the habeas data was to illustrate to the Court the alleged "reluctant conduct" of the State, and not as a new fact unrelated to the proceeding.

A.2. Considerations of the Court

22. The Court recalls that it is ultimately for the Court to decide in each case whether such claims are in order, thereby safeguarding procedural balance among the parties.[12] The facts presented by Mr. Canales and Ms. Barriga that are not specifically determined in the Merits Report relate to possible arbitrary unequal treatment with respect to another worker dismissed at the same time in the Ministry of Foreign Relations. In this regard, the Court considers that, in the specific circumstances of this case, where reference is made to a context of impediments and uncertainty about the procedural remedy available to the alleged victims to present their judicial claims, it is possible to consider these facts associated with alleged arbitrary unequal treatment as complementary facts to the structural situation of obstacles to access justice described by the Inter-American Commission in the factual framework of its Merits Report.

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[12] *Cf. Case of the Mapiripán Massacre v. Colombia. Merits, reparations and costs*. Judgment of September 15, 2005. Series C No. 134, para. 58, and *Case of the Human Rights Defender et al. v. Guatemala,* para. 28.

23. On the other hand, regarding the Mr. Castro's requests for information, the Court notes that these facts are not included in the Merits Report. However, they are related to the calculation of the pecuniary reparations in the present case, an aspect on which the Court has made several requests for helpful information and arguments (*supra* para. 12). Consequently, if pertinent, the Court will take into account Mr. Castro's comments regarding his requests for information in the chapter of reparations.

B. Determination of the alleged victims in the instant case

B.1. Arguments of the Commission and the parties

24. The ***State*** pointed out that the Inter-American Commission indicated that the alleged victims of this case were Mr. Canales, Mr. Castro and Ms. Barriga. However, it noted that in the pleadings and motions brief presented by Mr. Canales, his son, Carlos César Canales Trujillo, was included as an additional alleged victim. According to the State, "the inclusion of this family member should not be accepted," since it was not made at the appropriate procedural opportunity, which would have been in the proceeding before the Commission. Thus, it indicated that the exception contemplated in the Court's Rules of Procedure does not apply in this case, since it is not a case of massive or systematic violations that would have prevented the Commission from identifying some of the alleged victims.

25. Likewise, the State pointed out that "the Commission and the Inter-American Defenders have not demonstrated that [Carlos César Canales Trujillo, son of Mr. Canales Huapaya] has been the victim of any violation of a right enshrined in the Convention [,] and therefore Mr. César Canales Trujillo could not benefit from any type of reparation because he does not have the status of victim." The State also emphasized that in his sworn statement, Mr. Canales Huapaya mentioned that "it was not [his] intention that [his] son [should] be declared a victim." Therefore, the State "reject[ed] any claim implying an increase in the alleged victims […], especially as during the proceedings before the C[omission] Mr. Canales Huapaya did not indicate the alleged harm caused to his son César Canales Trujillo."

26. The ***Commission*** recalled that the rule established in Article 35(1) of the Court's Rules of Procedure is not absolute, but rather contemplates the existence of special situations in which it is not possible to identify all the alleged victims. Therefore, it considered that "it is up to the […] Court to assess whether the representatives provided an explanation for the inclusion of Carlos César Canales Trujillo as an alleged victim and whether this explanation is reasonable."

27. The ***Inter-American Defenders*** pointed out that "regardless of the fact that, in general, the victims should be indicated in the Merits Report, in reality the facts of cases have repercussions on other persons in addition to the alleged victims specified by the [Commission, who] should also be considered [...] as beneficiaries of reparations, especially when [...] it is a direct relative such as his son."

28. The Inter-American Defenders also noted that in this case "there are […] different circumstances with respect to other cases heard by [the Court] where certain persons were not identified as victims during the proceedings before the Commission." They also emphasized that Mr. Canales Huapaya's petition constitutes "a just claim" for reparation in favor of his son, because of the situation he experienced due to his father's dismissal and the "consequent legal process" that his father undertook into order to challenge said dismissal.

29. Mr. ***Castro*** did not submit any observations with regard to this argument of the State.

B.2 Considerations of the Court

30. With regard to the inclusion of Mr. Canales Huapaya's son as an alleged beneficiary of reparations, the Court recalls that the alleged victims must be indicated in the Merits Report of the Commission, pursuant to Article 50 of the Convention.[13] Article 35(1) of the Court's Rules of Procedure states that the case shall be submitted to the Court through the presentation of said Report, which must contain "the identification of the alleged victims." In accordance with this provision, it is the Commission and not this Court that must identify precisely and at the proper procedural opportunity the alleged victims in a case before the Court.[14] Legal certainty requires, as a general rule, that all the alleged victims be duly identified in the Merits Report, and it is not possible to add new alleged victims after the report has been issued, except in the exceptional circumstance contemplated in Article 35(2) of the Court's Rules of Procedure.[15] This Court notes that the instant case does not involve any of the assumptions indicated in said Article 35(2) that could justify the identification of alleged victims after the Merits Report.

31. Accordingly, this Court emphasizes that the representatives must indicate all the alleged victims and beneficiaries of reparations during the proceeding before the Commission and avoid doing so after the issuance of the Merits Report, pursuant to Article 50 of the Convention,[16] as occurred in the present case. This is because the Commission, at the time of issuing the aforementioned report, must have all the elements necessary to determine the factual and legal issues of the case, including those who should be considered victims,[17] which did not occur in this case.

32. Therefore, in application of Article 35(1) of its Rules of Procedure and of its constant case law, the Court will only consider Ms. Barriga, Mr. Canales and Mr. Castro as alleged victims and possible beneficiaries of the corresponding reparations, since they were the only persons identified as such in the Commission's Merits Report. Consequently, the Court will refrain from making any statement in relation to Carlos César Canales Trujillo, son of Mr. Canales.

C. Regarding the possibility of claiming rights that were declared inadmissible in the Admissibility Report issued by the Inter-American Commission

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[13] This has been the consistent case law of this Court since the *Case of García Prieto et al. v. El Salvador. Preliminary objections, merits, reparations and costs*. Judgment of November 20, 2007. Series C No. 168, paras. 65 to 68, and the *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*. *Preliminary objections, merits, reparations and costs.* Judgment of November 21, 2007. Series C No. 170, paras. 224 to 225. These judgments were adopted by the Court during the same session. In application of the Court's new Rules of Procedure, this criterion has been ratified since the *Case of the Barrios Family v. Venezuela. Merits, reparations and costs*. Judgment of November 24, 2011. Series C No. 237, footnote 214, and Case *of Suárez Peralta v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of May 21, 2013. Series C No. 261, para. 27.

[14] *Cf. Case of the Ituango Massacres v. Colombia. Preliminary objection, merits, reparations and costs*. Judgment of July 1, 2006. Series C No. 148, para. 98, and *Case of Suárez Peralta v. Ecuador,* para. 27.

[15] *Mutatis mutandi,* under the previous Rules of Procedure of the Court, *Case of Radilla Pacheco v. Mexico. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2009. Series C No. 209, para. 110, and *Case of Fleury et al. v. Haiti. Merits and reparations.* Judgment of November 23, 2011. Series C No. 236, para. 21.

[16] *Cf. Case of García and Family Members v. Guatemala. Merits, reparations and costs.* Judgment of November 29, 2012. Series C No. 258, para. 35.

[17] *Cf. Case of García and Family Members v. Guatemala,* para. 35.

C.1. Arguments of the Commission and the parties

33. The ***State*** argued that in its report the Commission did not mention an alleged violation of the right to equality, nor did it cite the case of Mr. Salcedo Peñarrieta. The State also asked the Court not to accept the allegations of the alleged victims, "since there are no solid arguments to extend or expand the effects to a possible violation of the right to equality."

34. The ***Inter-American Defenders*** pointed out that the "preliminary objection" raised by the State "implies determining whether, in light of the factual background that emerges from the presentations made by the alleged victims during the substantiation of the case before the [Commission], a violation of Article 24 of the [American Convention] was established;" if so, based on the principle *iura novit curia* "it would not be admissible to argue a possible violation of the State's right to a defense." In this regard, they indicated that in the processing of the case before the Commission, a claim was presented by Mr. Canales Huapaya in relation to his request for "equal treatment before the law by the State […] with respect to other persons who were in situations substantially similar to his." Therefore, they argued that "the references […] to the violation of the right to equality before the law based on the existence of different judicial rulings for similar situations, in no way constituted a procedural surprise for the State." They also argued that the case law on which the alleged victims based their claim regarding the violation of this right, "being the internal jurisprudence of the State [,] cannot be considered as unknown."

C.2. Considerations of the Court

35. The Court emphasizes that in the Admissibility Report, the Inter-American Commission declared inadmissible the alleged violation of Article 24 of the Convention. Therefore, the Court considers it pertinent to decide, beforehand, whether it is appropriate to analyze the violation of said article in the merits of the instant case. In its Merits Report, the Commission stated that:

> As for the alleged violation of the right enshrined in Article 24 of the American Convention, the IACHR considers that the present petitions do not contain elements that indicate the potential violation of said provision.

36. For this reason, in the operative paragraphs of the Admissibility Report the Commission decided:

> To declare inadmissible the alleged violation of the right enshrined in Article 24 of the Convention, in relation to these petitions [...], by virtue of Article 47(b) of the same instrument.

37. The Commission did not explain why the petitions did not contain elements indicating a potential violation of the right to equality. In its observations on the preliminary objections, the Commission argued that these problems of unequal treatment could be related to the general context of uncertainty regarding the course of action to be followed by the dismissed workers.

38. The Court recalls its constant case law according to which the possibility of changing or varying the legal classification of the facts of a specific case is permitted in the context of a proceeding in the inter-American system and that the alleged victims and their representatives may invoke the violation of other rights other than those included in the Merits Report, as long as they abide by the facts contained in said document, since the alleged victims are the holders of all the rights enshrined in the Convention.[18]

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[18] *Cf. Case of Five Pensioners v. Peru. Merits, reparations and costs*. Judgment of February 28, 2003. Series C No. 98, para. 155, and *Case of Norín Catrimán et al. (Leaders, Member and Activist of the Mapuche Indigenous People) v. Chile. Merits, reparations and costs*. Judgment of May 29, 2014. Series C No. 279, para. 38.

39. The Court must analyze whether in the Commission's Admissibility Report the facts that underpin the arguments on the alleged violation of the right to equality before the law were inadmissible, or whether, on the contrary, the Commission in its Admissibility Report made an assessment based exclusively on the legal characterization of certain facts. This is because the Court has already determined in previous cases that it is not possible to consider the alleged violation of rights based on facts that have been declared inadmissible by the Commission in its Admissibility Report.[19] The situation is different when the inadmissibility focuses on the legal characterization or classification that may initially be given to certain facts, since the Court has already established that the State must always know the facts in advance. However, the legal assessment of these facts may change throughout the process,[20] as indicated the aforementioned possibility of claiming rights not raised by the Commission or the Court's use of the *iura novit curia* principle.[21]

In view of the foregoing, the Court finds that the Admissibility Report declared inadmissible Article 24 of the Convention, since the Commission considered that the petitions contained no elements to indicate a potential violation of that article. The Court finds that the foregoing analysis is limited to a *prima facie* legal assessment made by the Commission, but not on the admissibility of the facts, which is why it concludes that it is possible for the Court to evaluate in subsequent chapters (*infra* para. 128) the allegations of the representatives regarding the alleged violation of Article 24 of the American Convention. Consequently, the Court will refer to the right to equality at the merits stage.

VI
EVIDENCE

A. Documentary, testimonial and expert evidence

40. The Court received various documents submitted as evidence by the Commission and the parties, attached to their main briefs. The Court also received from the parties the documents requested by this Court as helpful evidence, pursuant to Article 58 of the Rules of Procedure. In addition, it received the statements rendered by affidavit by the alleged victims Castro and Canales, proposed by the common interveners, and the expert witness

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[19] *Cf. Case of Díaz Peña v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of June 26, 2012. Series C No. 244, para. 44.

[20] *Cf. Case of Furlan and Family v. Argentina. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2012. Series C No. 246, para. 55.

[21] This is reflected in the case law practice established in the *Case of Albán Cornejo et al. v. Ecuador*, in which the Court analyzed the violation of Articles 4 (right to life) and 5 (right to personal integrity) even though these articles had been declared inadmissible in the Admissibility Report issued by the Inter-American Commission. Furthermore, in the Case of *Apitz Barbera et al. v. Venezuela*, the Court considered that although the complaint was declared inadmissible by the Inter-American Commission with respect to the alleged violation of Article 24, it was possible to analyze the alleged violation of this right, since the decisions of inadmissibility made by the Commission based on Article 47 (b) and (c) of the Convention are *prima facie* legal assessments, which do not limit the Court's jurisdiction to rule on a point of law that has been analyzed by the Commission only in a preliminary manner. Likewise, the Court has indicated that the alleged victim, his next of kin or his representatives may invoke rights other than those included in the Commission's application, based on the facts presented by the Commission. *Cf. Case of the Gómez Paquiyauri Brothers v. Peru*. *Merits, reparations and costs*. Judgment of July 8, 2004. Series C No. 110, para. 179; *Case of the "Juvenile Reeducation Institute v. Paraguay. Preliminary objections, merits, reparations and costs*, Judgment of September 2, 2004, Series C No. 112, para. 125; *Case of De La Cruz Flores v. Peru. Merits, reparations and costs.* Judgment of November 18, 2004. Series C No. 115, para. 122, and *Case of Yatama v. Nicaragua. Preliminary objections, merits, reparations and costs*. Judgment of June 23, 2005. Series C No. 127**,** para. 183.

Carlos Alza proposed by the Inter-American Commission. As for the evidence provided at the public hearing, the Court heard the statements of the alleged victim Ms. Barriga and the expert witness Lourdes Flores Nano.

B. Admission of the evidence

41. This Court admits the documents submitted by the parties and the Commission at the proper procedural opportunity, whose admissibility was not challenged or disputed,[22] as well as those requested as helpful evidence, based on the provisions of Article 58 of the Court's Rules of Procedure. Regarding certain documents indicated by means of electronic links, the Court has established that, if a party or the Commission provides at least the direct electronic link of the document it cites as evidence and it is possible to access it, neither the legal certainty nor the procedural balance is affected because it is immediately accessible by the Court and by the other parties[23] and can be located up to the time of the issuance of the judgment. In this case, there were no objections or observations from the parties or the Commission on the admissibility of such documents.

B.1. Documentation submitted extemporaneously

42. On May 6, 2014, **Mr. Canales and Ms. Barriga** submitted "evidentiary documents," affidavits and the offer of expert evidence.[24] In this regard, on May 29, 2014, the Secretariat, following the President's instructions, informed Mr. Canales and Ms. Barriga that said evidence and the proposed expert statement were inadmissible because they were time-barred.

43. The ***State*** challenged the admissibility of an annex submitted by the Inter-American Defenders in their final written arguments, entitled "Agreement No. 006-2006-2007/MESA-CR." This annex was submitted by the Inter-American Defenders as a complement to the documentary evidence provided by Mr. Canales Huapaya and Ms. Barriga at the time of submitting their pleadings and motions brief. The State argued that in the closing arguments no additional information or new concepts could be added to a document that had already been submitted as evidence in a previous procedural stage.

44. On this point, the Court considers that since the document submitted by the Inter-American Defenders is related to various requests made by the Court with respect to helpful arguments and evidence on the reparations to be determined in the instant case, the allegation of untimeliness in the presentation of the evidence is unacceptable.

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[22] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4, para. 140, and *Case of the Expelled Dominicans and Haitians v. Dominican Republic. Preliminary objections, merits, reparations and costs.* Judgment of August 28, 2014. Series C No. 282, para. 113.

[23] *Cf. Case of Escué Zapata v. Colombia. Merits, reparations and costs*. Judgment of July 4, 2007. Series C No. 165, para. 26, and *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia,* para. 58.

[24] Mr. Canales and Ms. Barriga proposed the statement of Mr. Carlos Blancas Bustamante, a former Labor Minister and labor expert, who chaired the Special Committee for the Execution of the Judgment in the Case of the *"Dismissed Congressional Employees"* and "whose participation would clarify to the Court the progress made in implementing the decisions indicated in the final report issued by said Special Committee on December 14, 2010, together with, according to his experience, the best and most effective reparation measures to be adopted in this case."

B.2. Dispute regarding the documentation submitted extemporaneously by the State concerning the exhaustion of the contentious administrative jurisdiction by Mr. Castro and Ms. Barriga

45. During the public hearing, the ***State*** presented two files related to the contentious administrative actions lodged by Mr. Castro and Ms. Barriga (*infra* paras. 71 to 75). This documentary evidence had not been presented previously, either before the Inter-American Commission or in the answering brief submitted by the State in the proceedings before the Court. In this regard, the State alleged that "in the days prior to the [public] hearing it ha[d] located the documentation of the contentious administrative proceeding" brought by Mr. Castro and Ms. Barriga, which had "come as a surprise" and that for this reason it "offer[ed] it as evidence since, not knowing that said proceeding existed, it did not provide it (the documentation) during the proceedings before the Commission." The State alleged that "it faced serious impediment for not providing it in the preliminary phase before the Commission, which is not mentioned in the Merits Report, apparently because this situation was not communicated" by Mr. Castro and Mrs. Barriga. Likewise, the State acknowledged that the Commission understood that the objection of failure to exhaust domestic remedies had been tacitly withdrawn since the State did not argue that Mr. Castro and Ms. Barriga had not filed and exhausted the remedies of the under domestic jurisdiction. The State added that it "[did] not know the reasons for the silence" of Mr. Castro and Ms. Barriga. In particular, with respect to Ms. Barriga, it indicated that when she testified at the public hearing, "when asked if she had filed any contentious-administrative action, she stated that she had not." With respect to Mr. Castro, the State indicated that in his statement before the Court by affidavit, when asked by the State which legal actions he had filed, Mr. Castro only mentioned the amparo action "but said nothing about having filed a contentious-administrative lawsuit." Therefore, "before the Commission and now before the Court, Mr. Castro Ballena did not provide all the relevant information required to clarify the facts."

46. With respect to the contentious-administrative files presented by the State at the hearing, the ***Inter-American Defenders*** argued that "these documents should not be assessed because they were submitted belatedly, outside the appropriate procedural stage." They added that if said documentation were to be admitted as evidence "its existence does not change" the judgment in the Case of *Aguado Alfaro et al.*, which concluded that "in view of the different treatment given, the State was not correct that this route was the appropriate and suitable way to present the claims of the dismissed workers." They added that Ms. Barriga "is a laywoman, a specialist in accounting, who does not have the technical legal knowledge to remember all the acts, lawsuits and appeals that she had to file throughout 22 years of struggle for justice."

47. Mr. ***Castro*** alleged that "the representative of the State wants to surprise" the Court by "arguing that this is a document that was found shortly before the hearing," when the State "knew perfectly well that several workers, who had no legal guidance or clarity about the judicial remedy that should be used to challenge the arbitrary dismissals, resorted to both remedies." In this regard, Mr. Castro indicated that "so much so, that in the final arguments" of the representatives in the Aguado Alfaro Case, they cited the Prosecutor's Opinion No. 1304-94 of the Constitutional and Social Chamber of the Supreme Court, referring to the contentious administrative action filed by Mrs. Barriga, "which recognized the existence of an administrative proceeding that should be exhausted for the purpose of processing these cases before the Judiciary." He then pointed out that since July 2006, the date of the final arguments of the 257 dismissed congressional employees, the State "knew perfectly well that it had resorted (in an act of disregard and lack of judicial protection) to the two mechanisms." Given that the State knew of these facts, it should have presented the contentious administrative file at the proper procedural opportunity, before the

Commission or in its response to the Court. Furthermore, Mr. Castro indicated that with this posture the State engaged in conduct contrary to the principle of *estoppel*. Finally, Mr. Castro pointed out that the violations of his rights occurred within the context of the processing of his amparo proceeding. In view of the foregoing, he requested that the evidence presented by the State be dismissed because it was time-barred "and unrelated to this proceeding."

48. During the public hearing the ***Commission*** alleged that "the facts that the State intends to prove with the documents presented at the hearing occurred prior to the State's response"; thus, the State had the opportunity to present them and "[has] not argued reasons of *force majeure* for which it was not possible to provide this evidence at the proper procedural moment."

49. In relation to this dispute regarding the admissibility of the file that proves the exhaustion of the contentious administrative jurisdiction by Mr. Castro and Ms. Barriga, the Court considers that this evidence is relevant to assess the arguments presented by the State in relation to the alleged violation of Articles 8 and 25. Therefore, the Court admits this evidence, considering it useful, in accordance with Article 47(2) of its Rules of Procedure.

B.3. Observations submitted by the State regarding certain statements made by the alleged victims and expert witnesses

50. The ***State*** made several observations on the statements rendered by the three alleged victims and by the expert witnesses Lourdes Flores and Carlos Alza. With respect to Mrs. Barriga Oré, it alleged that in her statement at the public hearing, she did not refer to aspects that the State considered relevant for the resolution of the present dispute, and noted that some of the information provided in her statement was contradictory as arguments to allege certain claims against her. With regard to Mr. Canales Huapaya, the State indicated that he made reference to various personal situations that were not mentioned in his pleadings and motions brief, and that his statement "does not reasonably support the possible episodes of depression" that the alleged victim described in his statement. In addition, the State alleged that Mr. José Castro Ballena omitted to indicate, in response to a question posed by the State, that he filed a contentious administrative action. On the other hand, in relation to Ms. Lourdes Flores Nano, it pointed out that the expert's statements were "generic assertions", and that the amparo and contentious administrative proceedings that form part of the factual framework of the case "are not strictly from the period indicated by the expert witness" and that some details "do not correspond to the real facts." Finally, regarding the statement of the expert witness Carlos Alza, the State pointed out that he did not specify the documents on which he based his expert opinion, "which diminishes its technical content, and must therefore be carefully assessed by the Court when examining the evidence offered."

51. With respect to the State's observations, the Court considers that these have a bearing on the evidentiary weight and scope of the statements rendered, but do not affect their admissibility.[25] Accordingly, the Court will take these observations into account when assessing the evidence on the merits of this case.[26]

B.4. Press reports

52. The common interveners also submitted press reports. This Court has considered that newspaper articles may be assessed when they contain public and well-known facts or

[25] *Case of the Human Rights Defender et al. v. Guatemala*. Preliminary objections, merits, reparations and costs. Judgment of August 28, 2014. Series C No. 283, para. 69

[26] *Case of Rodríguez Vera et al. (The Disappeared of the Palace of Justice) v. Colombia*. Preliminary objections, merits, reparations and costs. Judgment of November 14, 2014. Series C No. 287, para. 72

statements of State officials or when they corroborate aspects related to the case.[27] Thus, the Court decides to admit documents of this nature that are complete or that, at the very least, allow their source and date of publication to be verified, and will evaluate them taking into account the entire body of evidence and the rules of sound judicial discretion.[28]

C. Assessment of the evidence

53. Based on Articles 46, 47, 48, 50, 51, 52, 57 and 58 of the Rules of Procedure, as well as on its case law concerning evidence and its assessment, the Court will now examine and assess the documentary evidence submitted by the parties and the Commission, the statements and opinions provided by affidavit and during the public hearing, as well as the helpful evidence requested by this Court in order to establish the facts of the case and rule on the merits. To this end, it will abide by the principles of sound judicial discretion, within the corresponding legal framework, taking into account the entire body of evidence and the arguments in this case.[29]

54. Also, in accordance with this Court's case law, the statements made by the alleged victims cannot be assessed in isolation, but rather within the entire body of evidence in the proceedings, insofar as they can provide further information on the alleged violations and their consequences.[30]

VII
FACTS

55. In this chapter, the Court will examine: a) the context in which the facts of this case took place; b) the dismissal of the alleged victims from their positions as career officials of the Congress of the Republic; c) the amparo action filed by the alleged victims; d) the contentious-administrative actions filed by Mr. Castro Ballena and Ms. Barriga Oré; and e) the regulatory framework as of 2001 for the purpose of reviewing and repairing the unlawful dismissals carried out in 1992.

A. Context in which the Congressional employees were dismissed at the end of 1992

56. The Court emphasizes that the instant case is related to the dismissal of 1,117 workers of the Congress of the Republic in December 1992, following the rupture of the democratic-constitutional order on April 5, 1992, which was described in detail in the judgment issued by the Court on November 24, 2006, in the *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru*. In that judgment, the Court established a series of facts that preceded the dismissal of the congressional employees, together with the adoption of laws and administrative decisions aimed at redressing the irregular dismissals implemented during the reorganization processes carried out in public institutions throughout the 1990s. Notwithstanding the dispute between the parties regarding the alleged differences between

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[27] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits,* para. 146, and *Case of Liakat Ali Alibux v. Suriname*, para. 27.

[28] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits,* para. 146, and *Case of Liakat Ali Alibux v. Suriname*, para. 27.

[29] *Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Merits*. Judgment of March 8, 1998. Series C No. 37 para. 76, and *Case of the Landaeta Mejías Brothers et al. v. Venezuela,* para. 31.

[30] *Cf. Case of Loayza Tamayo v. Peru. Merits*. Judgment of September 17, 1997. Series C No. 22, para. 43, and *Landaeta Mejías Brothers et al. v. Venezuela,* para. 39.

that case and the case *sub judice* (*infra* paras. 101-102), the Court considers the following facts to be proven in light of its previous decisions in the case of the *Dismissed Congressional Employees:*

Historical context of Peru at the time of the facts

89.1 On July 28, 1990, Alberto Fujimori assumed the Presidency of Peru under the 1979 Constitution, with a five-year mandate.

89.2 On April 5, 1992, President Fujimori broadcast the "Manifesto to the Nation" in which he stated, *inter alia*, that he considered that he had "the responsibility to assume an exceptional approach to try and accelerate the process of […] national reconstruction and ha[d] therefore, […] decide[d] […] to temporarily dissolve the Congress of the Republic [, …] to modernize the public administration, [and] to reorganize the Judiciary completely." The following day, based on this manifesto, Mr. Fujimori established transitorily the so-called "Emergency and National Reconstruction Government" by Decree Law No. 25418, 12 which stipulated:

[…] Article 2. The institutional reform of the country is a fundamental goal of the Emergency and National Reconstruction Government, in order to achieve an authentic democracy. […] This reform seeks the following goals*:*

1) To propose the modification of the Constitution so that the new instrument will be an effective mechanism for development.

2) 2) To improve the moral fabric of the administration of justice and related institutions; and the national control system, decreeing the comprehensive reorganization of the Judiciary, the Constitutional Court, the National Council of the Judiciary, the Attorney General's Office (*Ministerio Público*) and the Comptroller General's Office.

3) 3) To modernize the public administration, reforming the central Government structure, public enterprise and the decentralized public agencies, so that they become elements that promote productive activities. […]

Article 4. To dissolve the Congress of the Republic until a new basic structure for the Legislature is adopted, as a result of the modification of the Constitution referred to in Article 2 of this Decree Law.

Article 5. The President of the Republic, with the affirmative vote of an absolute majority of the members of the Council of Ministers, shall exercise the functions corresponding to the Legislature, through Decree Laws. […]

Article 8. The articles of the Constitution and legal provisions that are contrary to this Decree Law are suspended.

89(3) As a result of various factors and in the context of the application of Resolution 1080 adopted by the OAS General Assembly on June 5, 1991, the instability led to the call for elections and the formation of the so-called "Democratic Constituent Congress" (CCD), which was supposed to draw up a new Constitution, among other matters. One of the first actions of this Congress was to issue the so-called "constitutional laws." The first of these, adopted on January 6, 1993, and published three days later, declared that the 1979 Constitution was in force, except in the case of the decree laws issued by the Government, and stated that they were in force until they were revised, modified or derogated by Congress itself.

89(4) At the time the facts of the instant case occurred, when the alleged victims filed the administrative and judicial remedies, several decree laws included a provision that prevented an action for amparo being filed to contest their effects; this denaturalized the amparo procedure, because situations outside jurisdictional control were established.

89(5) On October 31, 1993, a new Peruvian Constitution was adopted, promulgated by the so-called Democratic Constituent Congress on December 29, of that year.

89(6) Alberto Fujimori was re-elected President of Peru in 1995 and assumed the Presidency again in July 2000. In November 2000 he renounced the Presidency of his country from Japan; consequently, Congress appointed Valentín Paniagua Corazao, who was then President of Congress, as President of the transition Government, so that he could call elections.

The dismissal of Congressional employees

89(7) On April 16, 1992, the "Emergency and National Reconstruction Government" issued Decree Law No. 25438 establishing the Commission to Administer the Property of the Congress of the Republic (hereinafter "Administrative Commission"), mandated "to adopt the administrative measures and prepare the personnel actions that [were] necessary."

89(8) On May 6, 1992, Decree Law No. 25477 stipulated that the Administrative Commission should "initiate an administrative streamlining process, to be concluded within 45 days of the publication of [the said] decree."[31]

89(9) Decree Law No. 25640 of July 21, 1992, authorized the implementation of the process to streamline the personnel of the Congress of the Republic. This Decree […] established, *inter alia*:

Article 2 […] Congressional employees subject to the labor regime of Legislative Decree No. 276 and its Regulation may request their termination by renouncing the administrative career, and claiming the payments that this law establishes.

Article 3 The personnel who terminate their employment pursuant to the preceding article shall receive: (a) a financial incentive, [and] (b) an additional incentive [for personnel subject to the pension regime of Decree Law No. 20530].

Article 4 […] the personnel who have not requested voluntary termination and who are declared to be surplus shall be placed at the disposal of the National Public Administration Institute (INAP), to be relocated among the public entities that need personnel. Once forty-five (45) calendar days have elapsed following their being placed at the disposal of INAP, the personnel who have not been relocated shall be terminated from the administrative career and shall only receive compensation for the time they have served and other benefits that correspond to them according to the law.

[…] Article 7 The personnel who terminate their employment claiming the benefit of the incentives established in this Decree Law, may not return to work in the Public Administration, Public Institutions or State Enterprises, through any way or type of employment or legal regime, for five years from the date of their termination. […]

Article 9 The action for amparo to contest the application of this Decree Law directly or indirectly shall be inadmissible.

Article 10 Any provisions that are opposed to this Decree Law shall be annulled or suspended, as applicable.

89(10) Decree Law No. 25759 of October 1, 1992, stipulated that "the streamlining process" would conclude on November 6 of that year, and the Administrative Commission was mandated to conduct the "Personnel Evaluation and Selection Procedure" by means of examinations to classify the personnel. It also stipulated that the employees who passed the examination would occupy, "the posts established in the new Congress Personnel Allocation Table strictly in order of merit"; and that those who did not find a vacancy for the position they were applying for or who did not take the examination would be "terminated owing to the reorganization and [would] only have the right to receive their legally-established social benefits." This Decree Law derogated Article 4 of Decree Law No. 25640". This Decree Law repealed Article 4 of Decree Law No. 25640 […].

89(11) Resolution No. 1239-A-92-CACL of October 13, 1992, issued by the acting President of the Administrative Commission, adopted the "new Congress Personnel Allocation Table"; the requirements for taking the selection examinations for the posts established on this table; the bases for the selection examinations, and the regulations for the congressional personnel evaluation and selection procedure. It also stipulated that the "Administrative Commission […] [would] not accept complaints concerning the results of the examination," and that this Commission would "issue resolutions declaring the termination of those employees who had not found a vacancy or who had not registered for the competitive examination."

89(12) The evaluation process was conducted by the Administrative Commission first, on October 18, 1992, for the employees who had not availed themselves of the voluntary termination procedure and the financial incentives. However, it was reported "that the test [for the selection

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[31] [...] This Commission was presided by retired Peruvian Army Brigadier General Wilfredo Mori Orzo. On October 22, 1992, General (r) Wilfredo Mori Orzo requested leave, which was granted the same day for 60 days. Supreme Resolution 532-92-PCM, issued on November 5, 1992, and published the following day, established that General (r) Mori Orzo would be replaced by Colonel (r) Carlos Novoa Tello as of that date, "during the absence of the incumbent." On November 6, 1992, Colonel Novoa Tello, acting as President of the Administrative Commission, issued Resolution No. 1303-92-CACL, which was published on November 9, 1992. This Resolution adopted the merits classification for the evaluation and selection procedure for the personnel of the Congress of the Republic [...].

> examination had been] sold to some employees two days before the date of the examination […] and, on the day itself, it [had been] detected that some employees arrived for the examination with the document completed." Consequently, this evaluation procedure was annulled and it was established that the examination would be held on October 24 and 25, 1992.
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> 89(13) On November 6, 1992, the acting President of the Administrative Commission issued two resolutions under which 1,110 congressional officials and employees were dismissed […]:
>
> a) Resolution No. 1303-A-92-CACL, published on December 31, 1992, by which the employees who "decided not to register for the competitive examination and/or those who, having registered, did not complete the corresponding examination," were dismissed "owing to reorganization," and
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> b) Resolution No. 1303-B-92-CACL, published on December 31, 1992, by which the employees "who did not find a vacancy on the personnel allocation table of the Congress of the Republic" were dismissed "owing to reorganization and streamlining."
>
> 89(14) On December 31, 1992, most of the employees who were dismissed by Resolutions Nos. 1303-A-92-CACL and 1303-B-CACL received checks of the *Banco de la Nación* corresponding to the "payment of social benefits for 1992" […].

B. Dismissal of the alleged victims from their positions as career officials of the Congress

57. On January 1, 1985, Carlos Alberto Canales Huapaya was hired as a driver of the vehicle operations unit of the Senate of the Republic. On June 1, 1985, he was appointed to the position of Driver I (Grade III - 5) of the same unit of the aforementioned legislative institution. From January 2, 1991, he held the position of Chief of the Security Unit of the Senate,[32] until his dismissal. Years after his dismissal in 1992, he worked in the Provincial Municipality of Callao as Deputy Administrative Director Level F1 of the General Directorate of Social and Cultural Services from June 15, 1999 to June 30, 2001.[33] He is currently 60 years old.[34]

58. Mr. José Castro Ballena is an economist and joined the Senate of the Republic on March 2, 1989, in the position of "Administrative Assistant APE."[35] On January 1, 1990, he was hired as an administrative assistant in the General Personnel Office of the Congress of the Republic. At the time of his dismissal he served as head of the Property Management Unit (F-1).[36] Years after his dismissal in 1992, between August 1, 2000 and July 26, 2001, he was hired in a position of trust as a Technician Level ST-4, assigned to the office of a congresswoman. Likewise, from March 1, 2002 to April 30, 2002, he was again hired as "trusted personnel" at the same technical level and with the same congresswoman.[37] In July 2015, Mr. Castro will be 60 years old.[38]

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[32] *Cf.* Technical Administrative Report No. 323-2009-CFRCP-AAP-DRH/CR of August 5, 2009 evidence file, folio 10.

[33] Decision of the Mayor's Office No. 000231 of July 3, 2001 of the Provincial Municipality of Callao, merits file, folio 1481.

[34] Statement rendered by affidavit of Mr. Canales Huapaya of October 9, 2014, merits file, folio 384.

[35] Certification issued on July 27, 1990 by Senator Alfredo Santa María Calerón (evidence file, folio 2550) and Official letter No. 545-90-OM issued on June 28, 1990 by the Chief of Staff of the Senate (evidence file, folio 2551).

[36] *Cf.* Technical Administrative Report No. 0602-2011-GFRCP-AAP-DRH/CR of April 26, 2011 (evidence file, folio 12) and Resolution No. 385-91-S issued on May 9, 1991 by the Presidency of the Senate (evidence file, folios 2554 and 2555).

[37] *Cf.* Technical Administrative Report No. 085-2008-ARCP-DAP-DRH/CR of March 13, 2008 (evidence file, folio 2628). Mr. Castro Ballena worked as a trusted official in the National Food Assistance Program (PRONAA) from August 2, 2001 to January 3, 2002 and in the Office of Cooperation Popular COOPOP from January 8 to February 12, 2002 (merits file, folio 1458).

[38] Mr. Castro Ballena's passport states that he was born on July 26, 1955. *Cf. Merits file*, folio 734.

59. On May 1, 1989, María Gracia Barriga Oré began working as an "STA Technician" in the Chamber of Deputies. After her dismissal in 1992, she was rehired on August 1, 1995, for an indefinite term as ST Technician Level 5, assigned to the Treasury Department of the Peruvian Congress. Her second contract was carried out under the private labor regime, in accordance with Legislative Decree No. 728.[39] She is currently 62 years old.[40]

60. As mentioned previously, on December 31, 1992, Resolutions 1303-A-92-CACL and 1303-B-92-CACL, dated November 6 of the same year, were published in the Official Gazette *El Peruano*, establishing the dismissal of 1,117 officials. The alleged victims in the present case did not avail themselves of the procedure of voluntary resignations and financial incentives provided for in Article 2 of Decree Law No. 25640, but instead submitted to the "personnel evaluation and selection process" regulated by Decree Law No. 25759. The alleged victims were dismissed from their positions by means of Resolution No. 1303-B-92-CACL, which established as grounds for termination the "reorganization and streamlining of workers who did not obtain a vacancy in the Personnel Allocation Table of the Congress of the Republic."

61. At the time of their dismissal, the alleged victims were working under the regime provided for in Legislative Decree No. 276 (Law on the Bases of the Administrative Career and Remuneration of the Public Sector), which was issued in 1984. This decree establishes the following:

> Article 4. The administrative career is permanent and is governed by the principles of:
> a) Equality of opportunities;
> b) Stability;
> c) Guarantee of the acquired level; and
> d) Fair and equitable remuneration, regulated by a single standardized system [...]
>
> Article 24- Career public servants have the following rights:
> (a) To pursue a public career on the basis of merit, without political, religious, economic, racial or sexual discrimination, or any other kind of discrimination;
> b) To enjoy stability. No public servant may be dismissed or removed except on grounds provided for by law and in accordance with the established procedure [...].
>
> Article 35. Article 35- The following are justified causes for dismissal of a public servant:
> a) Age limit of seventy years;
> b) Loss of Nationality;
> c) Permanent physical or mental incapacity; and
> d) Proven inefficiency or ineptitude in the performance of the position[41].

62. The alleged victims filed several amparo actions against Resolution No. 1303-B-92-CACL, obtaining an unfavorable ruling from the Peruvian courts, as explained below.

C. Amparo actions filed by the alleged victims

C.1. Carlos Alberto Canales Huapaya

63. On February 24, 1993, Mr. Canales filed an amparo action against the Democratic Constituent Congress, requesting that his right to work, jurisdiction and due process and

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[39] *Cf.* Technical Administrative Report No. 085-2008-ARCP-DAP-DRH/CR of March 13, 2008 (evidence file, folio 14).

[40] Statement of Ms. Barriga Oré at the public hearing in this case.

[41] *Cf.* Legislative Decree No. 276 of March 6, 1984 (evidence file, folios 16 to 29).

the right to petition be guaranteed. He alleged that Resolution Nº 1239-A-92-CACL, approving the Regulations of the Personnel Allocation Table and the Rules and Regulations of the Congressional Personnel Evaluation and Selection Procedure, was null and void because it was contrary to Legislative Decree No. 276, and "undermined his administrative career" and because said resolution and Resolution Nº 1303-B-92 would be applied retroactively.[42]

64. On May 5, 1993, the Thirtieth Civil Court of Lima declined to hear the action, considering that the claim was equivalent to that of a popular action.[43] On September 21, 1993, the Fourth Civil Chamber of the Superior Court of Justice of Lima declared the decision null and void and ordered the case to be returned to the court of origin (Thirtieth Civil Court of Lima) so that it could continue with the proceeding.[44] On January 25, 1995, the Thirtieth Civil Court of Lima declared the lawsuit inadmissible, considering that it was filed outside the 30-day term established in the Law of Administrative Simplification and that the plaintiff had not exhausted the previous administrative process.[45]

65. Mr. Canales Huapaya filed an appeal against this decision on February 9, 1995.[46] On July 5, 1995, the head of the Fourth Superior Civil Prosecutor's Office issued an opinion stating that the judgment of January 25, 1995, of the Thirtieth Civil Court of Lima should be revoked and that the amparo action should be declared admissible.[47]

66. On August 7, 1995, the Fourth Civil Chamber of the Superior Court of Justice of Lima declared the appeal well-founded and concluded that Resolution No. 1303-B-92-CACL was inapplicable.[48] In response, the Public Prosecutor's Office for Judicial Affairs of the Legislative Branch and Office of the President of the Council of Ministers filed an appeal for annulment of this decision,[49] and on March 12, 1996, the Chief Prosecutor for Contentious Administrative Matters expressed the opinion that the appealed judgment should be declared null and void, since the amparo action had been filed outside the deadline provided for in Law No. 23506.[50] On June 28, 1996, the Constitutional and Social Law Chamber of the Supreme Court of Justice annulled the judgment of the Fourth Civil Chamber of the Superior

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[42] *Cf.* Amparo action filed by Carlos Alberto Canales Huapaya on February 24, 1993. Mr. Canales indicated that Resolution Nº 1303-B-92 had been published on December 31, 1992, the date on which the Democratic Constituent Congress, was in operation, in addition to the fact that the Administrative Commission of the Congress had been annulled by Decree Law No. 26158 of December 30, 1992. He indicated that Resolution No. 1303-A-92 and Resolution No. 1303-B-92, upon being published on December 31, 1992, usurp the functions of the Democratic Constituent Congress, since it was officially installed on December 30, 1992. (evidence file, folios 31 to 35).

[43] *Cf.* Decision of April 30, 1993 of the Thirtieth Civil Court of Lima, file No. 3055-93 (evidence file, folio 37).

[44] *Cf.* Ruling of the Fourth Civil Chamber of the Superior Court of Justice of Lima of September 21, 1993, file No. 1539-93 (evidence file, folio 39).

[45] *Cf.* Judgment of the Thirtieth Civil Court of Lima of January 25, 1995, file No. 3055-93 (evidence file, folios 41 to 44).

[46] *Cf.* Appeal filed by Carlos Alberto Canales Huapaya on February 9, 1995 (evidence file, folios 46 to 51).

[47] *Cf.* Opinion No. 202-95 of the Fourth Superior Civil Prosecutor's Office issued on July 5, 1995 (evidence file, folios 53 to 58).

[48] *Cf.* Judgment of the Fifth Civil Chamber of the Superior Court of Justice of Lima of August 7, 1995, file No. 669-93 (evidence file, folios 60 to 63).

[49] *Cf.* Appeal for annulment filed by the Public Prosecutor's Office for Judicial Affairs of the Legislative Branch and Office of the President of the Council of Ministers, August 28, 1995. (evidence file, folios 65 to 69).

[50] *Cf.* Opinion No. 541-96-MP-FSCA of March 12, 1996, issued by the Chief Prosecutor for Contentious Administrative Matters, file No. 1934-95 (evidence file, folio 71).

Court of Justice of Lima and declared the amparo action inadmissible, accepting the arguments expressed in the aforementioned opinion of the Chief Prosecutor. The Supreme Court of Justice stated:

> CONSIDERED: in conformity with the opinion of [the Prosecutor] whose arguments are transcribed, Declared **NULL AND VOID** in the judgment of hearing three hundred and three, dated August 7, 1995, which, revoking the appealed judgment of page two hundred and forty, dated January 25 of the same year, declared the action of amparo filed by Mr. Carlos Alberto Canales Huapaya against the Democratic Constituent Congress and another to be founded; reversing the hearing, they confirmed the appealed decision declaring the above mentioned action of protection **UNFOUNDED**; **ORDERED** that once the present resolution is executed, it be published in the Official Gazette "El Peruano" within the term established in Article 42 of Law twenty-three thousand five hundred and six; and returned them.[51]

67. Mr. Canales Huapaya filed a special appeal against the Supreme Court's decision before the Constitutional Court, which issued a final judgment on August 6, 1998, confirming the decision of the Supreme Court of Justice with the following arguments:

> 1. That this amparo action is filed against the Democratic Constituent Congress, requesting that its President, Mr. Jaime Yoshiyama Tanaka, be notified, when the Democratic Constituent Congress had no intervention whatsoever in the facts.
>
> 2. That the President of the Administrative Commission of the Property of the Congress of the Republic, Mr. Carlos Novoa Tello, in his capacity as person in charge, who signs and authorizes Resolutions No. 1303-A-92-CACL and 1303-B-92-CACL dated November 6, 1992, has not been sued, thus violating the principle of the right of defense, of which this person could have made use.
>
> 3. That the decree laws that have authorized the Administrative Commission of the Property of the Republic of Congress to implement a process of streamlining of personnel of the Congress of the Republic, such as Decrees Laws No. 25438, 25640, 25477 and 25759, remain in full force and effect, as established by the Constitutional Law of January 9, 1993, since they have not been revised, modified or repealed by the Democratic Constituent Congress.
>
> 4. That the plaintiff requests the annulment of the resolutions, where both he and other persons, of which he is not representative, appear, and not the inapplicability insofar as it refers only to his person, as he does in his request to challenge resolutions No. 1303-A-92-CACL and 1303-B-92-CACL dated January 12, 1993, which he presented to the President of the Democratic Constituent Congress, a simple copy of which appears on pages seven to nine.
>
> 5. That, as already expressed by this Constitutional Court, it should not be overlooked that in the current circumstances, under the Constitution of 1993, the organic structure of the Congress, and therefore its Personnel Allocation Table, has changed substantially, in relation to the one it had with the previous Constitution. Specifically, in the present case the plaintiff was Head of the Security Unit of the Senate, a parliamentary body that no longer exists; it is not possible to try to reestablish situations which, by their very nature have become irreparable, by means of amparo, and in such circumstances Article 6(1) of Law No. 23506 is applicable.
>
> On these grounds, the Constitutional Court, in use of the powers conferred upon it by the Constitution of the State and its Organic Law:
>
> RULES: CONFIRMING the decision issued by the Constitutional and Social Law Chamber of the Supreme Court of Justice of the Republic, on page forty-one of the Book of Annulment, dated June 28, [1996], which declared the annulment of the appealed decision of August 7, [1995], and ruled the amparo action filed INADMISSIBLE. [...][52].

C.2 José Castro Ballena and María Gracia Barriga Oré

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[51] *Cf.* Judgment of the Chamber of Constitutional and Social Law of the Supreme Court of Justice of June 28, 1996, file No. 1934-95, single paragraph (evidence file, folio 73).

[52] *Cf.* Judgment of the Constitutional Court of August 6, 1998, file No. 705-96-AA/TC (evidence file, folios 75 to 78).

68. On March 17, 1993, they filed an amparo action against the President of the Administrative Commission of the Property of the Legislative Chambers, in order to declare the inapplicability of Resolution No. 1303-B-92-CACL. They alleged that once the deadline of November 6, 1992 to carry out a personnel evaluation and selection process had expired, the Administrative Commission did not comply with the task of selecting the personnel, since on November 9, 1992, the merit table of the evaluation process was published in the Official Gazette *El Peruano*. From this, it could be inferred that the President of the Administrative Commission would have committed the crime of Usurpation of Functions, since his term of office was only until November 6, 1992.[53]

69. On September 30, 1993, the Twenty-third Civil Court of Lima ruled the claim well founded and declared Resolution No. 1303-B-92-CACL inapplicable.[54] After an appeal was filed, the Fifth Civil Chamber of the Superior Court of Justice of Lima issued a decision on November 30, 1994, confirming the decision of the Twenty-third Civil Court.[55]

70. On January 22, 1996, the Specialized Public Law Chamber of the Superior Court of Justice of Lima confirmed the resolution *ad quo.*[56] On August 5, 1997, the Constitutional and Social Law Chamber of the Supreme Court of Justice declared the said resolution null and void, concluding that the amparo action was inadmissible.[57] The victims filed a special appeal against this decision before the Constitutional Court, which issued a final judgment on September 25, 1998, declaring the amparo action unfounded. The Constitutional Court stated the following in this regard:

> 1. That, through the present proceeding, the plaintiffs seek a declaration of the inapplicability of Resolution Nº 1303-B-92-CACL by virtue of which they were dismissed from the Congress of the Republic on the grounds of reorganization and streamlining.
>
> 2. That, as can be seen from the resolution challenged in these proceedings, on page one, this was issued within the term stipulated in Article 1 of Law Nº 25759, that is to say, on November 6, 1992, the date as of which it was decided to dismiss the plaintiffs involved in this amparo action.
>
> 3. That, it cannot be alleged that retired Army Colonel Carlos Novoa Tello has committed the crime of Usurpation of Functions by issuing the challenged resolution on November 6, 1992, since according to Supreme Resolution Nº 532-92-PCM he held the position of President of the Administrative Commission of the Property of the Congress of the Republic in representation of the President of the Council of Ministers since October 22, 1992, for a term of sixty days from that date.
>
> 4. In this sense the dismissal of the plaintiffs was due to strict compliance with Law Nº 25759 for not having passed the personnel selection examination.

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[53] They also pointed out that on December 29 of the same year, the new President of the Democratic Constituent Congress was sworn in, a position that was ratified on December 30, 1992, for which reason the functions of the President of the Administrative Commission of the Legislative Chambers ceased as of that date. However, in spite of this, on December 31, 1992, he published the challenged resolution, for which reason the defendant again committed the crime of Usurpation of Functions. They added that, according to Article 42 of Decree Law Nº 26111 that modifies Supreme Decree Nº 006-SC-67, administrative acts take effect from the day following their notification or publication.

[54] *Cf.* Ruling of the Twenty-third Civil Court of Lima, September 30, 1993, file No. 2293-93 (evidence file, folios 80 to 83).

[55] *Cf.* Resolution of November 30, 1994, of the Specialized Public Law Chamber of the Superior Court of Justice of Lima, file No. 204-94 (evidence file, folios 85 to 87).

[56] *Cf.* Writ of execution of January 22, 1997 of the Specialized Public Law Chamber of the Superior Court of Justice of Lima, file No. 724-96 (evidence file, folios 89 to 90).

[57] *Cf.* Resolution of the Constitutional Court of September 25, 1998, file Nº 434-98-AA/TC, section entitled Background (evidence file, folios 92 and 93).

> 5. For these reasons, the Constitutional Court, in use of the powers conferred upon it by the Constitution of the State and its Organic Law,
>
> RULES: REVOKING the judgment issued by the Constitutional and Social Law Chamber of the Supreme Court of the Republic, on page 38 of the annulment case file, DATED August 5, 1997, which decides on the Annulment and in the ruling at the hearing declares the claim inadmissible; and *reforming* it declares it UNFOUNDED. It orders the notification of the parties, its publication in the Official Gazette *El Peruano* and the return of court records.[58]

D. Contentious administrative actions filed by Mr. Castro Ballena and Ms. Barriga Oré

71. In October 1993, Mr. Castro[59] and Ms. Barriga[60] filed separate petitions before the First Specialized Labor Court of Lima, requesting the annulment of Resolution No. 1303-B-92-CACL of December 31, 1992, of all personnel actions taken by the former Administrative Commission of the Property of Congress, and reinstatement in the then Democratic Constituent Congress. Because of its relevance to various arguments presented by the parties on the scope of domestic remedies in this case and the alleged violation of the right to equality (*infra* paras. 127 and 128), the Court will also describe the proven facts regarding the use of the contentious-administrative jurisdiction by Mr. Raúl Cabrera Mullos and Mrs. Rosario Quintero Coritoma and Ms. Rosario Quintero Coritoma.

72. In the case of Mr. Castro, on November 23, 1993 the Labor Chamber declared the claim inadmissible because it had been filed outside the three-month term established by the law in force at the time for filing that type of claim. In other words, the deadline for filing the claim had expired.[61] The Labor Chamber issued a similar decision on December 17, 1993, with respect to Mrs. Barriga, adding that the plaintiff did not file the appeals allowed by law (Article 102 of Decree Law N° 26111), and that, consequently, she accepted the resolution she claimed as null and void. Likewise, in relation to Ms. Barriga, the Labor Chamber indicated that Resolution 159-93-CD/CCD does not contradict or distort the content of Resolution N° 1303-B-92-CACL, since it deals with the payment of workers' compensation and other social benefits for employees dismissed owing to the reorganization and streamlining process between November 7 and December 31, 1992.

73. On February 24, 1994, Mr. Castro Ballena filed an appeal against this resolution and argued that the action was not time-barred according to the provisions of the Constitution of 1979 and those of the Code of Civil Procedure. On February 25, 1994, Ms. Barriga also appealed and argued that in January 1993 she filed an administrative complaint before the Presidency of the Democratic Constituent Congress (CCD), which was ruled inadmissible. Ms. Barriga added that that it was from that ruling that the three-month period should be counted. She pointed out that the Resolution of the CCD that recognized the payment to the dismissed workers for the months of November and December 1992 left the dismissal without effect, since the State could not remunerate those who did not provide services to

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58 *Cf.* Ruling of the Constitutional Court of September 25, 1998, file Nº 434-98-AA/TC (evidence file, folios 92 and 93).

59 *Cf.* File No. 568-93-ACA / contentious administrative action before the First Labor Chamber of the Superior Court of Justice of Lima (evidence file, folios 4130 to 4143).

60 *Cf.* File No. 703-93-ACA / contentious administrative action before the First Labor Chamber of the Superior Court of Justice of Lima (evidence file, folios 4116 to 4128).

61 The expiration period was established in Supreme Decree No. 037-90-TR, pursuant to Article 541, paragraph 3 of the Code of Civil Procedure. Cf. Decision issued on December 17, 1993 by the First Labor Chamber of the Superior Court of Justice of Lima (evidence file, folio 4122).

it. She also argued that the Judicial Branch should have corrected these processes, as prescribed by the labor laws.

74. On September 2, 1994, the Chief Prosecutor for Contentious Administrative Matters intervened in the proceeding with respect to Mr. Castro and requested that the appealed decision be confirmed and the claim be declared inadmissible. The Chief Prosecutor reasoned that Mr. Castro had challenged the competitive procedure convened by the Administrative Commission of the Legislative Chambers through Decree Law No. 25477, of May 6, 1992. In spite of considering that this competition was prejudicial to his rights, he nevertheless participated in it, and then also challenged Resolution No. 1303-B-92-CACL, which was published on December 31, 1992. The Chief Prosecutor considered that if Mr. Castro Ballena felt that his rights had been violated by Decree Law N° 25477, his challenge to the procedure was already extemporaneous, i.e., his right to claim against said procedure had expired. On the other hand, the Prosecutor indicated that Resolution N° 1303-B-92-CACL had been approved, according to Article 102 of Decree Law N° 26111, which modified Supreme Decree No. 006-67-SC on General Rules of Administrative Procedures. Likewise, the payment of social benefits was also left without effect, as provided for in Article 2 of Resolution No. 1303-B-92-CACL. Finally, the prosecutor's opinion indicated that the reinstatement was invalid, since the person had been dismissed due to the reorganization and streamlining of congressional officials, pursuant to Decree Law N° 25438. Moreover, the same opinion concluded that reinstatement in the job was not claimable through a contentious administrative action. The Chief Prosecutor also intervened in Ms. Barriga's proceeding and on October 19, 1994, she expressed her opinion in favor of confirming the appealed resolution as the request was inadmissible since Mrs. Barriga Oré had not exhausted the previous administrative process according to Article 100 of D.S. No. 006-67-SC, modified by D.L. No. 26111. The Chief Prosecutor added that the claim was filed extemporaneously.

75. On October 12, 1994, the Constitutional and Social Chamber of the Supreme Court of Justice confirmed the appealed judgment and declared the claim filed by Mr. Castro inadmissible. The Supreme Court based its decision on the arguments set forth in the Chief Prosecutor's opinion, to which it adhered. It also indicated that the plaintiff did not prove that he had filed an appeal challenging the resolution in dispute. Similarly, on January 30, 1995 (Exp. N° 991-94), the Constitutional and Social Chamber of the Supreme Court of Justice confirmed the appealed judgment and declared Ms. Barriga's request inadmissible, endorsing the arguments presented in the Chief Prosecutor's opinion. It added that the statute of limitations had expired since Mrs. Barriga filed the lawsuit on December 16, 1993, and the resolution in question was published on December 31, 1992.

E. Regulatory framework from 2001 for the purpose of reviewing and repairing the unlawful dismissals implemented in 1992

76. The Court notes that on this point the judgment in the *Case of the Dismissed Congressional Employees* established the following proven facts:

> *Facts subsequent to the administrative and judicial measures*
>
> 89(31) […]following the installation of the transition government in 2000 […], laws and administrative provisions were issued ordering a review of the collective dismissals in order to provide the employees dismissed from the public sector with the possibility of claiming their rights […].[62]

[62] Law 27452 created a Special Committee for the purpose of reviewing the collective dismissals carried out in State enterprises subject to processes of promotion of private investment (evidence file, annex 12 to the answer of the State).

89(32) In this context, Law No. 27487 was issued on June 21, 2001, which established the following:

Article 1. Article 1. Decree Law No. 26093 […,] Act No. 25536 […] and any other specific norms that authorize collective dismissals under reorganization processes are annulled. […]

Article 3. Within 15 calendar days from the date on which this law comes into force, public institutions and agencies […] shall establish Special Committees composed of representatives of the institution or agency and of the employees, responsible for reviewing the collective dismissals of employees under the personnel evaluation procedure conducted under Decree Law No. 26093 or in reorganization processes authorized by a specific law.

Within 45 calendar days of their installation, the Special Committees shall prepare a report containing the list of the employees who were dismissed irregularly, if there are any, and also the recommendations and suggestions to be implemented by the head of the sector or local government. […]

89(33) Supreme Decrees 021 and 022-2001-TR established the "terms of reference for the composition and operation of the Special Committees responsible for reviewing the collective dismissals in the public sector." Among them, the Special Committee responsible for reviewing the collective dismissals of congressional personnel under Law No. 27487 was established […], which, in its report of December 20, 2001, concluded *inter alia*, that:

[…] The 1992 and 1993 processes of administrative reorganization and streamlining were implemented in compliance with specific norms.

Irregularities have been determined in the evaluation and selection of personnel in 1992 [… during which] the minimum number of points indicated in the Rules for the Competitive Examination was not respected [… and,] in many cases, the classification obtained by the candidates in the qualifying examination was not respected.

[…] The former employees who collected their social benefits and those who also availed themselves of incentives for voluntary termination accepted their dismissal, according to repeated acts of a labor-related nature.

[…] Pursuant to the [Peruvian] laws in force, the Special Committee has refrained from examining any claim that is before a judicial body, in either the domestic or the supranational sphere.

Specifically, with regard to the dismissed employees involved in the proceedings before the Inter-American Commission, the Special Committee stated that:

> Since this matter was being decided by a supranational body, under the laws in force, it was unable to rule on it; particularly since a group of the said former employees have formally requested that the international organ rule on the merits; hence, it refrained from issuing an opinion in this regard. [Moreover, it should not be overlooked that the 257 former employees were the only ones who exhausted the judicial proceedings.

In other words, the 257 alleged victims in this case [*Dismissed Congressional Employees*] were not included in the hypotheses for the application of these supreme decrees.

89(34) Law No. 27586 of November 22, 2001, published on December 12, 2001, established that the latest date for the Special Committees […] to conclude their final reports was December 20, 2001. The Law also created a Multisectoral Commission composed of the Ministers of Economy and Finance, Labor and Social Promotion, the Presidency, Health, and Education, as well as by four representatives of the provincial municipalities and by the Ombudsman, or their respective representatives. This Multisectoral Commission would be:

[…] responsible for evaluating the viability of the suggestions and recommendations of the Special Committees of the entities included within the framework of Law No. 27487, and also for establishing measures to be implemented by the heads of the entities and for the adoption of supreme decrees or the elaboration of draft laws, taking into consideration criteria relating to administrative efficiency, job promotion, and reincorporation in the affected sectors; if necessary, it would be able to propose reinstatement, and also the possibility of a special early pension regime. […]

The said Multisectoral Commission may also review the reasons for the dismissals and determine the cases in which the payment of earned or pending remuneration or social benefits is owed, provided that these aspects have not been the object of legal action.

> 89(35) On March 26, 2002, the Multisectoral Commission issued its final report, concluding, *inter alia*, that "the norms that regulated the collective dismissals should not be questioned […], merely the procedures by which they were implemented." It also agreed "that any recommendation on reincorporation or reinstatement should be understood as a new labor relationship, which could be a new contract or a new appointment, provided that there are vacant budgeted posts in the entities or that such posts are opened up; that the employees comply with the requirements for these posts; that there is legal competence to hire, and that there is a legal norm authorizing appointments." Based on the Special Committee's recommendations, it considered that there had been 760 cases of irregular dismissals under the 1992 evaluation and selection procedure […], with regard to the employees dismissed from the Congress of the Republic. […][63] (Underlining added).

77. On July 29, 2002, Law 27803 was promulgated, which granted workers declared to have been arbitrarily dismissed the option of one of the following benefits: reinstatement or reassignment to another position, early retirement, financial compensation and job training.[64] In its fourth transitory provision, this law stated that "the irregular dismissal of those former employees who had legal proceedings in process are included in this law, provided they […] withdraw their claim before the jurisdictional body." For the purpose of executing the aforementioned benefits, the same law created a National Registry of Irregularly Dismissed Workers. As of July 2012, the Ministry of Labor had published four lists of irregularly dismissed employees.[65]

78. Law 27803 established that the State would assume the payment of pension contributions "for the period of time during which the worker was dismissed" and that "in no case does this imply the recovery of unpaid salaries during the same period."[66] In 2004,[67] a paragraph was added to Article 13, establishing that "the payment of [pension] contributions by the State shall in no case be for a period longer than 12 years."

79. Carlos Alberto Canales Huapaya, José Castro Ballena and María Gracia Barriga Oré did not avail themselves of the benefits of Law 27803.[68] In this regard, Mr. Castro argued that this law was conditional, coercive and exclusionary, since inclusion in that program was contingent upon withdrawing any type of judicial claim against the State, both in the domestic and supranational jurisdictions. He also pointed out that said law did not fully compensate for the material and moral damage arising from the dismissals. He added that there was no rule that clearly established the parameters to be used to assess the applications, resulting in a discretionary approach, lack of certainty and lack of transparency. He indicated that there was further uncertainty because daily reports were published alleging a series of irregularities by the Multisectoral Commission in charge of the collective dismissals. On this point, he submitted various newspaper articles mentioning the alleged lack of transparency in the preparation of the lists of irregularly dismissed workers.[69] He also stated that he wanted to "avoid a double processing of the same case which could

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63 *Case Dismissed Congressional Employees (Aguado Alfaro et al.).* Judgment of November 24, 2006. Series C No. 158, para. 89. The citations and references were taken from the original text.

64 *Cf.* Law 27803 of July 29, 2002, Article 3 (evidence file, folio 4).

65 The Commission informed of these listings through the following email address www.mintra.gob.pe/mostrarContenido.php?id=196&tip=195 (merits file, folio 18).

66 Law 27803 of July 29, 2002, Article 13.

67 Through Law 28299, published on July 22, 2004.

68 *Cf.* Official letter Nº 1078-2008-MTPE/2-CCC of July 30, 2008, paragraph a), in which the Adviser on Collective Dismissals of the Ministry of Labor and Promotion of Employment states that "[…]José Castro Ballena and María Gracia Barriga Ore are not included in the National Register of Employees Dismissed Irregularly [...]" (evidence file, folio 8).

69 File containing annexes to the pleadings and motions brief of Mr. Castro Ballena, folios 2667 and ff.

hinder his petition in the supranational jurisdiction." For her part, Ms. Barriga stated that one of the aspects of the Law that she rejected was the fact that it only recognized up to 12 years of pension contributions.[70]

80. Without prejudice to the more detailed analysis that will be made of the State's allegations regarding the differences between the instant case and that of the *Dismissed Congressional Employees* (*infra* paras. 101 and 102), the Court considers that in the present case, the considerations contained in that judgment are applicable, in that the Special Committee created for the purpose of reviewing the dismissal of the 1,117 workers of the Congress abstained from hearing applications from those who had claims pending before the Inter-American Commission. In this regard, the Court stated that the 257 victims of the Case of the *Dismissed Congressional Employees* did not fall within the scope of the laws enacted as of June 2001, for the purpose of providing reparations to the workers irregularly dismissed in the 1990s. This is because they had complaints pending before the Inter-American Commission, as do the alleged victims in this case.

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VIII
JUDICIAL GUARANTEES AND JUDICIAL PROTECTION

A. Arguments of the Commission and the parties

81. The ***Commission*** considered that this case is similar to the case of the *Dismissed Congressional Employees*, in which the Court did not make "a differentiated analysis for each group of victims, […] because the denial of justice occurred […] in a general context of ineffectiveness of the judicial institutions, absence of guarantees of independence and impartiality, and a lack of clarity about the remedy to be used to challenge the collective dismissals," a context that applies to the instant case. In addition, it argued that the regulation of dismissals in the emergency government was accompanied by serious restrictions on the possibility of challenging them, since it was indicated that administrative challenges to the results of the merit examinations were not admissible, nor was it possible to file an amparo action to directly or indirectly challenge the application of the decree authorizing the execution of the dismissals. The Commission also observed that the amparo petitions filed by the alleged victims "were heard by the Constitutional Court while it was composed of four judges, because the Congress had dismissed [the] other three." It considered that this affected the right to a proper administration of justice in Peru, owing to the "interference of other State agencies in the Judiciary" at the time of the facts.

82. Mr. ***Canales and Ms. Barriga*** pointed out that the amparo action they filed was declared inadmissible by the Constitutional Court, which at that time was composed of four judges, who indicated that this was not the correct procedural approach, despite the fact that in another similar case this action had been declared admissible. The alleged victims stated that they resorted to the amparo action because it was a quick and simple means that was frequently used during "the period of mass layoffs," and that they filed it within the legal

[70] During the public hearing, Ms. Barriga stated that "we did not take advantage of these benefits because we had already initiated a lawsuit; we were almost a decade into this lawsuit, and our case was already before the Inter-American Commission on Human Rights." She added that the Commission that reviewed the collective dismissals wanted them to "renounce any legal process that we had initiated" and "in part it only recognized 12 years for our retirement, which is not fair, and is something that the Constitution does not say." She added, "we decided to continue with our process to ensure compliance with the Constitution [... which] states that a worker's labor rights must not be violated."

deadline, "but the Judiciary used a false argument to prevent the action from being declared admissible."

83. The ***Inter-American Defenders*** also argued that the facts of the instant case share the essential features of the case of the *Dismissed Congressional Employees,* where it was "observed that a regulatory framework was in force that prevented the victims from clearly understanding the approach they should take in order to challenge their dismissal as career officials of the Congress." In this regard, they indicated that "failure in an evaluation process did not constitute one of the grounds for the dismissal of public employees", and that the only grounds for dismissal would be an act of serious misconduct established in disciplinary proceedings, and not the personnel reorganization process "for which they were dismissed." They also pointed out that "the historical context and the legislation in force [at] the time of the dismissals prevented them from exercising their constitutionally acquired rights in an effective and useful manner," and emphasized that "the Administrative Commission of the Property of the Congress of the Republic [...] regulated the process of evaluation and selection of personnel" and stipulated that it would not accept complaints about the results of the examination on which the future employment relationship depended. They indicated that Decree Law No. 25640, which authorized the implementation of the staff reorganization process in the Congress, expressly prohibited the filing of an amparo action against its effects. As for the argument presented by the State regarding the contentious-administrative action as an adequate and suitable remedy, they reiterated the arguments made in the case of the *Dismissed Congressional Employees*, where the Court pointed out that the viability or suitability of the contentious-administrative jurisdiction for the alleged victims to challenge their dismissal was not clear. They also argued that the amparo action filed by Mr. Canales Huapaya was filed within the specified time limit since, as the Constitutional and Social Law Chamber pointed out, "the resolutions in question were effective as of the date of publication [,] that is, December 31, 1992."

84. The Inter-American Defenders emphasized that, since the dissolution of the Congress, "the executive function assumed the powers of the legislative body, without having been democratically elected [, so that] Decree Law N°25.640 could not even be recognized as a law […] and therefore its application violated the principle of legality." Finally, they argued that due to the situation in Peru at the time of the events, "[t]o expect […] simple citizens, in the context indicated, to freely and successfully claim, by filing challenges, that the courts to which they submitted their claims were not impartial, was an excessive and illusory demand."

85. Mr. ***Castro*** indicated that the restriction on submitting for review and oversight the administrative acts that led to his dismissal violated his right to a simple, prompt and effective remedy, since these norms "endorsed and legalized any arbitrary act committed by the Administrative Commission of Congress, without the right to appeal, placing [him] in a situation of defenselessness," and violated his right to the minimum judicial guarantees of due process. He pointed out that when he filed the amparo action, "because [he] was not afforded due process", he spent seven years in litigation against the State, and "despite obtaining three favorable rulings and a favorable report from the Attorney General's Office," the Constitutional and Social Law Chamber of the Supreme Court of Justice of Lima declared his claim inadmissible, disregarding its own jurisprudence which "in previous similar cases […] ordered the reinstatement of the workers illegally dismissed with the same Resolution 1303-B-92-CACL."

86. Mr. Castro alleged that the change of jurisprudence was based on the fact that in the other cases there was a different composition of the Chamber, whose regular judges "were removed after the issuance of these first judgments[,] leaving it restructured [...] by the new judges who were [...] questioned and prosecuted for crimes of corruption" and who declared

the action inadmissible. Therefore, he stated that he did not have access to "independent and impartial judges", since the rulings issued by "the judges of the Judicial Branch were aimed at fulfilling the interests of the Fujimori regime," violating his right to be heard with due judicial guarantees and within a reasonable time by a competent, independent and impartial authority, and that the Constitutional Court failed in its role as "guarantor of the Constitution and protector of fundamental rights." Regarding the processing of the appeal before the Constitutional Court, he indicated that said Court did not consider or review the merits of his claim, and "dismissed it without any justification."

87. He also pointed out that the alleged lack of independence and impartiality of the judges assigned to the Constitutional and Social Law Chamber and the Constitutional Court "was specifically related to the political power of the then President Alberto Fujimori [,] which caused them to issue manifestly and intentionally illegal resolutions favoring the *de facto* regime." Finally, he alleged that "since the Judiciary and the Constitutional Court were not independent [...] neither were the judges personally independent [,] and therefore their impartiality could not be ensured and they were unable to carry out their functions with autonomy and independence, guarantee due process and issue a duly reasoned judgment."

88. The ***State*** pointed out that "it was clear that by knowing the list of persons who had passed [the personnel evaluation and selection process, it was possible] to know who had also been automatically dismissed because they had not passed the examination." It argued that according to Decree Law 25640, an amparo action aimed at directly or indirectly challenging the scope of said Decree Law, which authorized the Administrative Commission of Congress to carry out a staff reorganization process, was not admissible. Therefore, in order to challenge Resolution 1303-B-92-CACL, the provisions of Supreme Decree 037-90-TR should be taken into account, "which determined that the Labor Chambers and Labor Communities of Lima [were] competent to hear contentious-administrative lawsuits filed against resolutions of the public administration on labor matters." In this regard, the State indicated that the alleged victims' claim was of a purely labor-related nature and was therefore within the jurisdiction of the labor courts, and that the appropriate remedy was an administrative contentious action. With regard to the alleged victim Carlos Alberto Canales Huapaya, the State indicated that by the time he filed his amparo action, the deadline established in Law 23506 had expired. The State argued that, although Resolution 1303-B-92-CACL was published on December 31, 1992, "its contents were made known to the plaintiff by means of transcription […] 982-92-CACL-OGA-OPER, dated November 6, 1992; that since the challenged resolution was an administrative act, it should have taken effect from the day after its notification [, therefore] the alleged violation of rights would have occurred on November 7, 1992." Thus, the deadline would have expired on February 4, 1993, and thus the amparo action filed on February 25, 1993 "was time-barred."

89. The State pointed out that "[a]lthough the petitioners did initiate an administrative claim, the latter was legally inadmissible, since Resolution No. 1239-A-92-CACL [...] had explicitly stated in Article 27 that '[t]he Administrative Commission of the Property of the Congress of the Republic, will not accept claims regarding the results of the examination,' which [meant] that these were non-appealable acts, at least in strictly administrative proceedings. Consequently, since there was no [...] prior remedy to resort to, Article 28 paragraph 3 of Law No. 23506, which regulated the amparo proceeding [...] was fully applicable, and therefore, correlatively, the term to calculate the expiration of the present action [...] began sixty working days after the violation occurred, which meant that at the time the claim was filed, the deadline had long expired."

90. The State further argued that "the fact of having a judgment that was not favorable to the alleged victims does not mean that the right to due process or judicial protection was

violated." It pointed out that the alleged victims had recourse to the pertinent amparo and contentious administrative mechanisms, and filed the remedies provided by law, and that "the fact that the Transitional Constitutional and Social Law Chamber of the Supreme Court of Justice of the Republic has not ruled favorably does not imply *per se* a violation of their human rights." It also pointed out that in the two amparo proceedings filed by the alleged victims, their judicial guarantees and judicial protection were respected, since their "claims [were processed] and resolved in accordance with due process [,] there was a full hearing, the parties defended themselves, [and] grounds were provided for the rulings issued." It also emphasized that "[n]o ruling applied the rule that nominally prohibited the filing of the amparo action."

91. With regard to domestic remedies, the State asked the Court to take into consideration the fact that effective domestic remedies existed to safeguard the rights of the alleged victims. It added that "if the contentious administrative proceedings […] had […] been used in a timely manner, the petitioners would have been able to defend themselves against the alleged violations of their rights." Furthermore, it argued that "the contentious administrative claims presented by the petitioners […] were declared inadmissible due to [the] lack of diligence [on the part of their attorneys,] since they filed their claims after the legal deadline."

92. With respect to the amparo proceedings, the State pointed out that "the amparo actions filed by the alleged victims did not last seven […] years as stated by María Gracia Barriga Oré in her statement […] at the public hearing," since the proceedings filed by Mr. Canales Huapaya on February 24, 1993, ended with the judgment of the Constitutional Court on August 6, 1998, and the action filed by Ms. Barriga Oré and Mr. Castro Ballena on March 17, 1993, was resolved by the Constitutional Court on September 25, 1998.

93. On the other hand, the State indicated that all the decisions issued by the Judiciary and the Constitutional Court "contain[ed] arguments on the reasons why, according to the assessment of each judge or court, the claims of the three petitioners were accepted or rejected," and in the cases in which they considered the judicial decisions adverse to their claims, they challenged them, "in compliance with the provisions of Article 8(2)(h) of the Convention." The State added that the alleged victims and the Commission did not specifically state whether, during the proceedings, the petitioners challenged the members of the courts for their lack of competence, independence or impartiality, and that the lack of impartiality of a judge cannot be alleged in the abstract. It also pointed out that the difference in criteria between the different chambers or courts "does not constitute a violation of judicial guarantees and judicial protection." As for the allegation of lack of impartiality and judicial independence, the State emphasized that "the generic allegation of lack of independence and impartiality has occurred in the seat of the Inter-American Court without this situation having been raised [...] at the appropriate procedural stage, and that the Office of the Ombudsman of Peru did not conclude that the Constitutional and Social Chamber of the Supreme Court lacked independence or was biased.

94. The State argued that, in order for their dismissal to be classified as irregular, the dismissed employees were required to have filed their petition or claim by July 23, 2001. In addition, workers had the possibility of applying to the Special Benefits Program. However, if they had any legal action in progress, they had to waive it, since it was not possible to obtain benefits through two different actions.

95. Furthermore, the State argued that in this case, the considerations established by the Court in the case of the *Dismissed Congressional Employees* could not be applied. It indicated that in the latter case the workers "filed or joined in the same amparo action, which was resolved with effects for all the litigants," while in the instant case, Mr. Canales Huapaya "sued

on his own behalf and the final jurisdictional decision that finally declared his claim before the Constitutional Court inadmissible, is different from that of Mr. Castro and Ms. Barriga, who filed another motion for amparo in their own right, which was declared unfounded by the Constitutional Court." The State alleged that in the case of the *Dismissed Congressional Employees*, out of the 257 affected, only two filed a contentious-administrative action, while in the present case two of the three alleged victims attempted that remedy. It also indicated that "unlike the case of the *Dismissed Congressional Employees* [,] the Constitutional Court did not intervene in the contentious-administrative proceedings […]." Thus, the conclusion reached by the Inter-American Court in the 2006 judgment regarding the failure of the Constitutional Court to apply the broad control of constitutionality of laws, and its impediment to rule on actions of unconstitutionality because it was reduced to three of its members, "does not extend to the courts of the Judicial Branch that heard and resolved the contentious-administrative proceeding filed by Mr. Castro Ballena, since they were regularly constituted and acted in accordance with due process." Nor is there any record that Mr. Castro Ballena has alleged the partiality of its judges. In sum, the State emphasized that "the claims, in administrative and judicial proceedings differ in terms of the plaintiffs, the arguments put forward, and the claims asserted, as well as in the assessment made in relation to the different jurisdictional rulings."

B. Considerations of the Court

96. In order to settle the dispute between the parties, the Court will begin by: 1) considering the scope of Articles 8 and 25 of the American Convention, and then 2) determining whether there are sufficient similarities between the present case and the case of the *Dismissed Congressional Employees* to justify arriving at similar conclusions, which will help resolve the dispute regarding the alleged violation of access to justice.

B.1. Access to justice and Articles 8 and 25 of the American Convention

97. The Court has indicated that, in light of Article 8(1) of the Convention, every person has the right to be heard by an impartial and competent body, with due process of law, including the opportunity to present arguments and offer evidence. The Court has stated in that this conventional provision "means that the State must guarantee that the decision produced by the proceedings satisfies the purpose for which it was conceived. The latter does not mean that it must always be accepted, but rather that its capacity to produce the result for which it was conceived must be guaranteed." [71]

98. In relation to Article 25(1) of the Convention, this Court has stated that this norm

> includes an obligation for States Party to guarantee all persons under its jurisdiction access to an effective judicial remedy against acts that violate their fundamental rights. This effectiveness supposes that in addition to the formal existence of the remedies, they get results or responses to the violations of the rights contemplated in the Convention, in the Constitution or in laws. In this sense, remedies that because of the country's general conditions, or even because of specific conditions related to the case in question are illusory, cannot be considered effective. This can be the case, for example, when their uselessness has been demonstrated in practice, due to a lack of means for executing rulings, or due to any other situation giving rise to a context of denial of justice. Thus, the proceeding must tend toward the materialization of the protection of the right

[71] *Cf. Case of Barbani Duarte et al. v. Uruguay. Merits, reparations and costs.* Judgment of October 13, 2011. Series C No. 234, para. 122, and *Case of the Kuna Indigenous People* of *Madungandí and Emberá of Bayano and their Members v. Panama. Preliminary objections, merits, reparations and costs.* Judgment of October 14, 2014. Series C No. 284, para. 178.

> recognized in the judicial ruling through the suitable application of that ruling.[72]

99. The Court has indicated that, for a remedy to be effective, it is not enough for it to be established by the Constitution or by law, or be formally admissible; rather, it must be truly appropriate to establish whether there has been a human rights violation and to provide the necessary redress.[73] As for the requirements for admissibility of a judicial claim, this Court has indicated that:

> [t]o ensure legal certainty, for the proper and functional administration of justice and the effective protection of human rights, the States may and should establish admissibility principles and criteria for domestic remedies of a judicial or any other nature. Thus, although these domestic remedies must be available to the interested parties and result in an effective and justified decision on the matter raised, as well as potentially providing adequate reparation, it cannot be considered that always and in every case the domestic organs and courts must decide on the merits of the matter filed before them, without verifying the procedural criteria relating to the admissibility and legitimacy of the specific remedy filed.[74]

100. As has already been established, the alleged victims in this case filed amparo actions seeking the annulment of Resolution 1303-B-92-CACL, which had removed them from their positions as permanent officials of Congress. With regard to Mr. Canales, on August 6, 1998, the Constitutional Court declared his claim inadmissible, *inter alia*, on the grounds that his claim could not be addressed through a motion for amparo. As for Mr. Castro and Ms. Barriga, on September 25, 1998, the Constitutional Court declared their action unfounded, considering that the dismissal provided for in Resolution Nº 1303-B-92-CACL was in strict compliance with Law Nº 25759, and did not violate any constitutional precept. The following is an analysis of whether the responses of the domestic judicial authorities could be associated with a violation of access to justice in the present case.

B.2. Application to the present case of the considerations issued by the Court in the case of the Dismissed Congressional Employees

101. The Court finds it pertinent to examine the State's argument that there are certain differences between the present case and that of the *Dismissed Congressional Employees,* which prevent the Court from reaching similar legal conclusions and from declaring that no rights have been violated in the present dispute. In particular, the State alleges that the amparo actions filed by the alleged victims were heard by several courts, that disagreement with the outcome cannot be the basis for a violation of the Convention, and that the prohibition of filing amparo actions established in Article 9 of Decree Law 25640 did not constitute an impediment for the Constitutional Court to hear the claims filed.

102. Furthermore, the State put forward a series of arguments through which it sought to differentiate the present case from that of the *Dismissed Congressional Employees.* Among the alleged differences raised by the State at the hearing are the following: i) that in the case of the *Dismissed Congressional Employees* only some individuals filed administrative claims, while in the present case all three alleged victims did so; ii) that in the case of the *Dismissed Congressional Employees,* all 257 victims joined the amparo action, while in the

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[72] *Cf. Case of Abrill Alosilla et al. v. Peru. Merits, reparations and costs*. Judgment of March 4, 2011. Series C No. 223, para. 75. The citations present in the original text were omitted. Similarly, *Case Argüelles et al. v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of November 20, 2014. Series C No. 288, para. 145.

[73] *Cf. Mutatis mutandi, Case of Vélez Loor v. Panama. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2010. Series C No. 218, para. 129, and *Case of Rochac Hernández et al. v. El Salvador. Merits, reparations and costs.* Judgment of October 14, 2014. Series C No. 285, para. 162.

[74] *Cf. Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 24, 2006. Series C No. 158, para. 126.

instant case there are two amparo proceedings, one filed by Mr. Canales Huapaya, and the other filed jointly by Mr. Castro Ballena and Ms. Barriga Oré; and iii) that in the case of the *Dismissed Congressional Employees* the amparo action was filed extemporaneously and that this determined its inadmissibility, while in the instant case the amparo actions were admitted and decided.

103. The Court considers that these differences noted by the State do not constitute sufficient reasons to deviate from the conclusions established in the analogous case under discussion. Indeed, in the judgment in the case of the *Dismissed Congressional Employees,* the Court noted that, in addition to the amparo, some persons resorted to administrative remedies and others resorted to administrative litigation, without carrying out a differentiated analysis for each group of victims, without carrying out a differentiated analysis for each group of victims, precisely because the denial of justice took place in a generalized context of inefficiency of the judicial institutions, absence of guarantees of independence and impartiality, and lack of clarity as to the remedy to be used to challenge collective dismissals. The Court finds that Mr. Canales Huapaya, Mr. Castro Ballena and Ms. Barriga Oré, as well as the 257 victims of the case of *Aguado Alfaro et al.*:

a. Form part of the universe of more than 1,000 workers of the Peruvian Congress dismissed in December 1992.

b. Their dismissals were ordered in application of Decree Law 25640 for not having passed, or not having taken, the qualifying examinations required by Decree Law 25759.

c. They filed appeals before the Judicial Branch, despite the fact that Article 9 of Decree Law 25640 indicated their inadmissibility.

d. Despite having obtained favorable rulings within the framework of said amparo proceedings, the Public Prosecutor of the Legislative Branch filed appeals against such rulings, until the Constitutional Court finally decided that the amparo action was inadmissible.

e. At the time the inter-American system was invoked, the State had not provided any compensatory response to the collective dismissals implemented in 1992 and 1993.

f. Their cases did not fall within the scope of the laws enacted as of June 2001, for the purpose of providing reparation to workers irregularly dismissed in the 1990s, due to the fact that the alleged victims decided not to withdraw the claims they had pending before the Inter-American Commission.

g. Their cases could not be analyzed by the Special Committee created for the purpose of reviewing the dismissal of the 1,117 workers of the Congress of the Republic, since this Committee refrained from hearing requests from those whose claims were pending before the Inter-American Commission.

104. These facts lead the Court to conclude that the three alleged victims in the instant case were essentially in the same situation as the 257 victims in the case of the *Dismissed Congressional Employees.* Consequently, the Court finds that the considerations regarding the validity of a regulatory framework that prevented 257 dismissed workers from having clarity as to the appropriate remedy they should pursue in order to challenge their dismissal as career officials of Congress are applicable to Mr. Canales Huapaya, Mr. Castro Ballena and Mrs. Barriga Oré:

117. In relation to the norms applied to those who were dismissed, it has been established that article 9 of Decree Law No. 25640 expressly prohibited the possibility of filing an action for *amparo* against its effects […]. As the expert witness Abad Yupanqui has stated, at the time of the facts "in each of the decree laws where it was considered necessary, the Government began to include a provision that prevented the use of the *amparo* procedure […]."

> 118. Regarding the provisions called into question by the Commission and by the common interveners in these proceedings, the State declared that:
>
> During the period of the process to streamline the personnel of the National Congress of the Peruvian Republic, legal and administrative provisions were in force, which are at issue in these proceedings, which violated the rights embodied in Articles 1(1) and 2 of the American Convention.
>
> Article 9 of the Decree Law No. 25640, which has been called into question in these proceedings, violated the provisions of Articles 8(1) and 25(1) of the American Convention.
>
> […] It could be understood that the mere issuance of article 9 [of the said] Decree […] and article 27 of Resolution 1239-A-92CACL were incompatible with the Convention.
>
> 119. The Court finds it evident that the alleged victims were affected by the provisions under consideration in the international proceedings. The prohibition to contest the effects of Decree Law No. 25640, contained in said article 9, constituted a norm of immediate application, since the people it affected were prevented *ab initio* from contesting any effect they deemed prejudicial to their interests. The Court finds that, in a democratic society, a norm containing a prohibition to contest the possible effects of its application or interpretation cannot be considered a valid limitation of the right of those affected by the decree to a genuine and effective access to justice, which cannot be arbitrarily restricted, reduced or annulled in light of Articles 8 and 25 of the Convention, in relation to Articles 1(1) and 2 thereof.
>
> 120. In the context described above, article 9 of Decree Law No. 26540 and article 27 of Resolution 1239-A-CACL of the Administrative Commission helped to promote a climate of absence of judicial protection and legal certainty which, to a great extent, prevented or hindered the persons affected from determining with reasonable clarity the appropriate proceeding to which they could or should resort to reclaim the rights they considered violated.[75]

105. The Court emphasizes that the norms referred to in the above-cited excerpts of the judgment in the *Case of the Dismissed Congressional Employees* were in force during the dismissal of the alleged victims in this case, and during the decisions adopted in the legal actions filed by them. In ruling on the consequences of said norms on the right of access to justice for the 257 victims of the *Case of the Dismissed Congressional Employees*, the Court emphasized the following:

> 129. In conclusion, the Court observes that this case took place within the framework of practical and normative impediments to a real access to justice and a general situation of absence of guarantees and ineffectiveness of the judicial institutions to deal with facts such as those of the instant case. In this context and, in particular, the climate of legal uncertainty promoted by the norms that restricted complaints against the evaluation procedure and the eventual dismissal of the alleged victims, it is clear that the latter had no certainty about the proceeding they should or could use to claim the rights they considered violated, whether this was administrative, under administrative-law, or by an action for amparo.
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> 130. In this regard, in *Akdivar v. Turkey*, the European Court of Human Rights found, *inter alia*, that the existence of domestic remedies must be sufficiently guaranteed, not only in theory, but also in practice; to the contrary, they would not comply with the required accessibility and effectiveness. It also considered that the existence of formal remedies under the legal system of the State in question should be taken into account, and also the general political and legal context in which they operate as well as the personal circumstances of the petitioners or plaintiffs.

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[75] *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 24, 2006. Series C No. 158, paras. 117 to 120. The citations and references were taken from the original text.

> 131. In this case, the existing domestic remedies were not effective, either individually or as a whole, to provide the alleged victims dismissed from the Peruvian Congress with an adequate and effective guarantee of the right of access to justice in the terms of the American Convention.
>
> 132. Based on the above, the Court concludes that the State violated Articles 8(1) and 25 of the American Convention, in relation to Articles 1(1) and 2 thereof, to the detriment of the 257 individuals listed in the Appendix to this judgment.[76]

106. It has been established that Ms. Barriga Oré, Mr. Canales Huapaya and Mr. Castro Ballena attempted to challenge their dismissal from their jobs through amparo actions, which were heard and resolved within the same time frame as the actions filed by the 257 victims in the *Case of the Dismissed Congressional Employees*. In this sense, the three alleged victims in the instant case faced the same obstacles in obtaining access to justice identified by the Court in its previously cited legal conclusions. In both cases the alleged victims lodged their claims before the competent administrative and judicial authorities, despite the fact that decrees issued by the Emergency Government of National Reconstruction and resolutions of the Administrative Commission prohibited the filing of administrative claims and amparo actions aimed at contesting the rejection of congressional workers in the merit examination regulated by Resolution No. 1239-A-92-CACL of October 13, 1992.

107. The Court also notes that the amparo actions filed by the alleged victims in this case were heard by the Constitutional Court while it was composed of four judges, because the Congress had dismissed the other three members of the highest authority in Peru's constitutional jurisdiction. In ruling on the effects of this interference in the composition of the Constitutional Court on the victims of the *Case of the Dismissed Congressional Employees*, and on other contextual elements, the Court stated the following:

> 108. […] this case is situated in a historical context during which numerous irregular dismissals took place in the public sector. This was acknowledged by the State in 2001 when it enacted "laws and administrative provisions ordering a review of the collective dismissals in order to provide those employees who had been dismissed irregularly with the possibility of claiming their rights" […]. Among these measures, one of the most important was Act No. 27487 of June 21, 2001, which ordered the establishment of Special Committees to review the collective dismissals carried out within the framework of personnel evaluation procedures. One of these was the Special Committee responsible for reviewing the collective dismissals of the congressional personnel […], even though it did not include the alleged victims in this case in its conclusions […]. In addition, a "Multisectoral Commission" was established, responsible, *inter alia*, for assessing the viability of the suggestions and recommendations contained in the final reports of the Special Committees, and Law No. 27586 was promulgated to implement its recommendations […]. Indeed, Peru asked the Court, should it declare that there had been a violation of the Convention, to accept the State's "commitment […]to establish a Multisectoral Commission to review […] the respective dismissals and grant benefits […] to the employees considered [alleged] victims in the Inter-American Commission's application, following the guidelines established in the legal norms ordering the review of the collective dismissals" […].These actions show that the State has acknowledged this context and has expressed its willingness to establish the possibility for those affected by this situation to claim or repair certain prejudicial consequences thereof, to some extent.
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> [...] On May 28, 1997, the Congress in plenary session, dismissed the following Constitutional Court justices: Manuel Aguirre Roca, Guillermo Rey Terry and Delia Revoredo Marsano. On November 17, 2000, Congress annulled the dismissal resolutions and reinstated them in their posts. In another case, this Court has verified that, while this destitution lasted, the Constitutional Court "was dismantled and disqualified from exercising its jurisdiction appropriately, particularly with regard to controlling constitutionality […] and the consequent examination of whether the State's conduct was in harmony with the Constitution."
>
> 109. It has also been demonstrated […] that the independence and impartiality of the Constitutional Court, as a democratic institution guaranteeing the rule of law, was undermined by the removal of some of its justices, which "violated *erga omnes* the possibility of exercising the control of constitutionality and the consequent examination of the adaptation of the State's conduct to the Constitution." The above

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[76] *Case Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 24, 2006. Series C No. 158, paras. 129 to 132. The citations and references are taken from the original text.

> resulted in a general situation of absence of guarantees and the ineffectiveness of the courts to deal with facts such as those of the instant case, as well as the consequent lack of confidence in these institutions at the time.
>
> 110. Furthermore, the Court observes that the facts of the instant case occurred within the framework of the so-called "streamlining of the personnel of the Congress of the Republic," which was justified by the so-called Emergency and National Reconstruction Government, *inter alia*, as a reorganization or restructuring of the State legislature. The Court considers that States evidently have discretionary powers to reorganize their institutions and, possibly, to remove personnel based on the needs of the public service and the administration of public interests in a democratic society; however, these powers cannot be exercised without full respect for the guarantees of due process and judicial protection, because, otherwise, those affected could be subjected to arbitrary acts. Despite the foregoing, the Court has indicated that it will examine the dispute in this case in light of the State's obligations arising from Articles 8 and 25 of the American Convention, in relation to Articles 1(1) and 2 thereof […]. Consequently, the Court will not examine the scope of this "streamlining process" as such, but whether, in the historical context mentioned above and according to the norms under which they were dismissed, the alleged victims could determine with legal certainty the proceeding to which they could and should resort to claim the rights they considered had been violated and whether they were guaranteed real and effective access to justice.[77]

108. The arguments transcribed above are relevant because, in the opinion of this Court, the facts of the instant case are framed within the aforementioned regulatory and practical impediments to ensure real access to justice, as well as the various problems of lack of certainty and clarity regarding the remedy to which the alleged victims could resort to challenge the collective dismissals. In this sense, the Court observes a consistency in the substantive factual and legal aspects of the present case with those of the case decided by the Court in its judgment of November 24, 2006.

109. Consequently, the Peruvian State is responsible for the violation of the rights protected in Articles 8(1) and 25(1) of the American Convention, in relation to the obligations set forth in Articles 1(1) and 2 of the same instrument, to the detriment of Carlos Alberto Canales Huapaya, José Castro Ballena and María Gracia Barriga Oré.

IX
RIGHT TO PROPERTY

A. Arguments of the parties and the Commission

110. The ***Commission*** pointed out that it is up to the Court "to determine whether the pecuniary damage resulting from the State's arbitrary conduct in circumstances such as those of the instant case, constitutes an autonomous violation of the right to property, and that the Commission understood that such an analysis was not necessary" in this case. It noted that the purpose of the instant case is not to determine the arbitrariness or otherwise of the dismissals, but rather to assess the effectiveness of the remedy filed by the alleged victims. Therefore, it "did not review the merits of the judicial decisions, but rather the climate of legal uncertainty prevailing at the time, along with the lack of independence and impartiality that [...] made the prospect of the effectiveness of such remedies null and void." However, it considered that the determination of the arbitrariness or not of the dismissals is relevant to establish whether there was a pecuniary damage that must be repaired, which in the opinion of the Commission, according to the conclusions of the Special Committee, was indeed the case. It also indicated that the establishment of the Special Committee in the case of the *Dismissed Congressional Employees* had the purpose of restoring the right of access to justice,

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[77] *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 24, 2006. Series C No. 158, paras. 108 to 110. The internal citations and references are taken from the original text.

which implied reaching a decision as to whether the dismissals were arbitrary and, if so, to establish the consequences of such decision.

111. The ***State*** argued that the dispute brought before the Court "does not refer to the possible arbitrariness of the dismissal of the [alleged] victims, but rather to the denial of justice alleged by the petitioners in relation to their access to and effectiveness of domestic legal remedies." Thus, it is not for the Court to rule on the possible irregularities in the dismissal of the alleged victims. The State also argued that "[i]f at this stage of the proceedings it were accepted that there had been a violation [of the right to property], this would not allow the State to defend itself at the appropriate procedural moment, which would leave it defenseless." In this regard, it emphasized that in this case "there have been no allegations of violations of the right to property in the original and subsequent communications of the petitioners, as well as in the Admissibility and Merits Reports of the Commission [, nor] was it the subject of debate in the case [of the Dismissed Congressional Employees. For this reason, not having been proposed […] from the outset, it could not be modified in the last phase of the proceedings, since it would leave the State defenseless."

112. The ***Inter-American Defenders*** argued that "the violation of the [alleged victims'] right to property is evident" since the right to job security provided for in the Constitution and, consequently, their right to receive wages for their work, were part of the rights acquired by Mr. Canales Huapaya and Ms. Barriga Oré, and "were part of their right to property legitimately obtained and […] curtailed by the illegal actions of the State." Furthermore, they pointed out that "the infringement of their right to property [...] lasted throughout the time in which, in addition to the commission of the violation indicated, they were deprived of a quick and simple remedy through which they could make effective claims for their rights in domestic courts, forcing them to pursue their claims in international courts." The Inter-American Defenders emphasized that the remuneration owed to their clients "exceeds one million new soles (US$ 283,286.12[)] for Ms. Barriga [Oré] and four million new soles (US$ 1,133,144.48) for Mr. Canales Huapaya."

113. Mr. ***Castro*** argued that "as a result of the [alleged] violation of [his] rights [to judicial guarantees and judicial protection,] there is indeed a related violation of [his] right to property." In this regard, he alleged that his "untimely and unjustified dismissal resulted in the loss of a permanent salary and therefore had a direct impact [...] on [his] personal and family assets," since he had to assume the maintenance of his family as well as the expenses of the judicial proceedings. He also alleged that in order to cover the high legal costs of the judicial proceedings for eight years, and subsequently those of the international proceedings, he was obliged to sell his belongings and personal effects that were part of his home, and had to move from his house to live with relatives "because [he] did not have money to rent an apartment to live in." He pointed out that had to assume financial responsibilities and, since he did not have a job, he had to pay for these with the money from the sale of his property.

B. Considerations of the Court

114. The Court observes that the purpose of this judgment has not been to determine the alleged arbitrary nature of the dismissals of the alleged victims. The Court has declared the violation of Articles 8(1) and 25 of the Convention, relating to judicial guarantees and judicial protection, due to the existence of regulatory and practical impediments to effective access to justice (*supra* para. 109). Consequently, the Court considers that it is not appropriate to rule on the alleged violation of the right to property.

X
RIGHT TO EQUALITY BEFORE THE LAW

A. Arguments of the parties and the Commission regarding the alleged violation of the right to equality before the law with respect to the decision in favor of the dismissed worker Salcedo Peñarrieta

115. The ***Commission*** indicated that during the processing of the case before it, it did not find sufficient evidence to analyze a possible violation of the right to equality before the law. In this regard, it argued that "the existence of a climate of uncertainty regarding access to justice, although it may favor situations of arbitrary difference of treatment, [in order to declare] an autonomous violation of Article 24 of the Convention, additional factual elements are required regarding the effective occurrence of such difference of treatment in the aforementioned context."

116. Regarding the amparo action, Mr. ***Canales Huapaya and Ms. Barriga Oré*** alleged that "the Supreme Court [decided] two cases that had the triple identity of cause, matter and person [...] in a completely different manner to the detriment of the plaintiffs [,] demonstrating that there was no equal treatment for Peruvians." They also referred to the case of Mr. Eduardo Salcedo Peñarrieta, who resorted to amparo proceedings for "having been dismissed outside the term established for that purpose and yet the Constitutional Court [...] declared his action admissible", while their action was declared inadmissible "based on Decree Laws that violate the American Convention, specifically article 9 of Decree Law 25640."

117. The ***Inter-American Defenders*** argued that the alleged violation of the right to equality before the law "is evident since the State itself, when responding to the Merits Report […] admits that [it created] a Multisectoral Commission to review the reasons for the dismissals and determine the cases in which the payment of remunerations or benefits was owed […] 'as long as such aspects had not been the subject of a judicial claim', which [...] violates the aforementioned right to equality before the law among persons in the same situation and unduly restricts the free and free exercise of the right of access to justice." They alleged that the right to equality was violated from the beginning of the claims at the domestic level, where in similar cases the Constitutional Court ruled the opposite way. In this regard, they pointed out that the "fact of being faced with such contradictory decisions arising from identical situations and differentiated only by the name of the plaintiffs, not only undermines the legal certainty that should support judicial decisions, but also demonstrates an inclination of Justice to judge differently depending on the plaintiffs." Regarding the case of Mr. Salcedo Peñarrieta, they indicated that regardless of the fact that the workplaces of Mr. Salcedo Peñarrieta and the alleged victims in this case were different, the situation that led to the termination of their employment was the same, as were the rights that protected them. On the other hand, they stated that this right was also violated due to the "unequal treatment received by the workers dismissed by the State […] in relation to [the] possibility of availing themselves of the benefits provided for in Law 27.803, such as […] the provisions of the Special Committees [...] and the Multisectoral Commission [, since all] had established that they would refrain from hearing any claim that was pending before the courts" at the national or international level.

118. The ***State*** argued that "it cannot be claimed that the facts that occurred imply a possible violation of the right to equality [...] merely because the Constitutional Court declared a petition for amparo filed by [Mr.] Salcedo Peñarrieta to be admissible. Furthermore, it pointed out that the case of Mr. Salcedo Peñarrieta "bears no relation to the factual framework of the present case, since it does not concern the situation of an official subject to a staff evaluation

competition but that of a voluntary retirement incentive plan for staff members of the Diplomatic Service due to a process of reorganization." The State also pointed out that the Constitutional Court that examined the case of Mr. Salcedo Peñarrieta was made up of the same judges "that the alleged victims have challenged in the current proceedings […] and which is now presented to exemplify or clarify their situation. The State considered that if the alleged violation of Article 24 of the Convention were accepted, it would not be allowed to defend itself at the proper procedural moment.

B. Arguments of the parties regarding the violation of the right to equality before the law with respect to judicial decisions in favor of the dismissed workers Cabrera Mullos and Quintero Coritoma

119. The ***Inter-American Defenders*** emphasized that in the cases of Mr. Cabrera Mullos and Mr. Quintero Coritoma, the Constitutional and Social Law Chamber "affirmed, among other things, that the resolutions in question were effective as of the date of their publication [...], which demonstrates that the amparo action of [Mr.] Canales Huapaya [...] was filed in a timely manner." Mr. Canales Huapaya and Ms. Barriga Oré alleged that the decision in the Cabrera Mullos case was identical to the rulings by the Fourth Superior Chamber in the amparo actions of Mr. Canales Huapaya, Mr. Castro Ballena and others. Furthermore, they pointed out that "only the administrative actions of Ra[ú]l Cabrera Mullos and Rosario Quintero Coritoma defeated Congress in 1996, and four other actions [...] regarding the same principles were declared unfounded."

120. Mr. ***Castro Ballena*** alleged that in the earlier cases of Quintero Coritoma and Cabrera Mullos, analogous to the present case, "the Constitutional and Social Law Chamber [...] had ordered the reinstatement of these workers who were unlawfully dismissed by means of the same resolution in which [he was] involved," whereas his claim was declared inadmissible; and that the change was based on the fact that at the time the judgment was issued, the Chamber had a different composition of judges, who were transferred after those cases. He indicated that as a result of the alleged violation of his rights to judicial guarantees and judicial protection, a related violation of the right to equality contained in Article 24 of the American Convention occurred. He argued that the decision of the Constitutional and Social Law Chamber of the Supreme Court to declare the amparo action inadmissible ignored the jurisprudence of said Chamber, particularly in the Quintero Coritoma and Cabrera Mullos cases, in which it "annulled Resolution 1303-B-92-CACL ordering the reinstatement of these persons." Mr. Castro Ballena stated that after the issuance of these judgments, the regular judges "were strangely transferred to other chambers, leaving the Constitutional and Social Law Chamber [...] restructured by other [provisional] judges [,] who declared [his] claim inadmissible. Of the six provisional judges who reviewed his case, he pointed out that three of them were convicted and one is being prosecuted "for [alleged] corruption offenses." In addition, he considered that the Constitutional Court violated his right to equality before the law by declaring unfounded his special appeal against the decision of the Constitutional and Social Law Chamber with only four of the seven judges, and arguing that the dismissal was valid "because it was carried out in compliance with the provisions of Article 1 of Law No. 25759", despite the fact that the Special Committee determined that the dismissals based on this decree law were irregular and illegitimate."

121. Mr. Castro Ballena also pointed out that, although the Inter-American Commission did not declare that his rights to property and equality before the law had been violated, the possibility of varying the legal classification of the facts of a case "is permitted within the framework of a proceeding in the Inter-American System," and that the principle of *iura novit curia* "allows for the examination of possible violations of conventional norms that have not

been alleged in the briefs submitted by the parties, provided that the parties have had the opportunity to express their respective positions in relation to the facts on which they are based."

122. The ***State*** argued that the case of Mr. Raúl Cabrera Mullos is not the same as that of the alleged victims Barriga and Castro, "since Mr. Cabrera Mullos filed his claim within the term established by law [, whereas] Ms. Barriga Oré and Mr. Castro Ballena filed administrative actions outside the term established by law." In addition, it indicated that the alleged victims requested the annulment of Resolution 1303-3-B-92-CACL, whereas Mr. Cabrera Mullos requested the annulment of Resolution 1303-A-92-CACL, these being "totally different situations." Regarding the case of Ms. Quintero Coritoma, the State pointed out that "she formally requested to be admitted to the merits-based evaluation process [, obtaining] a higher score than [another] employee [...] who had obtained a vacancy in the Directorate [to which Mrs. Quintero applied], for which reason her exclusion lacked justification, being a different situation from that of the alleged victims." The State indicated that if Mr. Castro Ballena and Ms. Barriga Oré "had filed their contentious administrative actions within the time limit stipulated by law, perhaps they could have obtained a favorable ruling, as Mr. Raúl Cabrera Mullos and Mrs. Rosario Quintero Coritoma did."

123. The State also emphasized that the cases of Mr. Cabrera Mullos and Mr. Quintero Coritoma demonstrate that the contentious administrative proceeding was a procedural mechanism through which the alleged victims could have defended their rights, since these individuals challenged resolutions 1303-92-CACL, 1303-A-92-CACL and 1303-B-92-CACL and their claims "were declared well-founded." Therefore, it asked the Court "to bear in mind that there were two administrative litigation processes through which the plaintiffs could have protected their interests against the resolutions issued in the context of the staff reorganization process in the Congress, and that these procedures were not only recognized by law but were also effective."

C. Considerations of the Court

124. The victims have alleged the existence of arbitrary and unequal treatment in relation to the judicial responses received by other dismissed workers. The Court will now analyze the arguments in relation to Mr. Eduardo Salcedo Peñarrieta, and will then assess the arguments in relation to Raúl Cabrera Mullos and Rosario Quintero Coritoma.

125. Mr. Canales Huapaya and Ms. Barriga Oré claim that they were treated in a manner unequal to Mr. Eduardo Salcedo Peñarrieta, who worked as an official at the Ministry of Foreign Relations, specifically in the Diplomatic Service, and was dismissed at the same time as the victims. On February 14, 1995, Mr. Salcedo filed an amparo action requesting the non-applicability of Resolution No. 453-RE-92 published on December 29, 1992 in the Official Gazette *El Peruano*, whereby he was dismissed by application of Decree Law Nº 25889. He was not subject to a personnel evaluation exam but to an incentive plan for voluntary retirement of Diplomatic Service officials due to the implementation of a reorganization process.[78]

126. On September 1, 1997, the Constitutional Court composed of the same judges that decided the amparo actions filed by Mr. Canales Huapaya and Ms. Barriga Oré, determined that the fact that the administrative appeal filed by Mr. Salcedo Peñarrieta had never been

[78] *Cf.* Decree Law No. 25889 "Diplomatic Service of the Republic declared in state of reorganization", published in the Official Gazette *El Peruano* on November 17, 1992 (evidence file, folio 4002).

resolved should be considered in his favor and therefore prevented the amparo action from being understood as having been filed extemporaneously. Consequently, the Constitutional Court decided that the expiration period established in Article 37 of Law 23506 could not be calculated. It also pointed out that at the time of the plaintiff's dismissal, the term granted by Decree Law 25889 to declare him dismissed had already expired and that the Supreme Resolution N° 453/RE-92 in question had violated the procedures and rights recognized by the 1979 Constitution of Peru in force at that time, violating the right to job stability also recognized in lower hierarchical norms referring to the applicable legislation for public sector workers. The Constitutional Court considered that the rights of defense and due process had been breached, since it had not been possible to establish a duly proven just cause that merited the plaintiff's dismissal, and consequently said dismissal had lacked justification and reasonableness, thereby violating the constitutional rights invoked that should be taken into account.[79]

127. Mr. Castro Ballena claims that he was subject to arbitrary and unequal treatment with respect to other dismissed workers who filed administrative litigation actions, particularly Mr. Raúl Cabrera Mullos[80] and Ms. Rosario Quintero Coritoma.[81] Mr. Cabrera Mullos filed his lawsuit within the term established by law seeking to have Resolution No. 1303-A-92-CACL declared null and void. The claim was declared admissible on the grounds that the publication of the challenged resolution (which provided for the plaintiff's dismissal) was not made within the term specified in Decree Law No. 25759.[82] For her part, Ms. Quintero Coritoma formally requested to be included in the merit-based evaluation process, applying for the position of Editorial Technician for the Organizational Unit, Directorate of the *Diario de los Debates y Publicaciones*. The judgment in favor of Mrs. Rosario Quintero stated that she had a higher score than another worker who had obtained a vacancy in the Directorate of the *Diario de los Debates y Publicaciones*, and that, by mistake, she was placed in another area, so that her dismissal lacked justification. Consequently, her contentious-administrative action was declared well-founded and the resolutions challenged were left "without legal effect for the plaintiff." In addition, the ruling ordered that "she be assigned to a vacancy in the Personnel Allocation Table of the Congress of the Republic and that she be paid the salary to which she was entitled as of the date of her dismissal."[83]

128. In view of the foregoing, this Court finds that Mr. Salcedo Peñarrieta, who was dismissed from his job in the Ministry of Foreign Affairs, was not an official subject to a personnel evaluation process but rather to an incentives plan for the voluntary retirement of Diplomatic Service officials due to the reorganization process. For his part, Mr. Cabrera Mullos filed his administrative contentious claims based on different grounds to those alleged by Mr. Castro and Ms. Barriga. With regard to Ms. Quintero Coritoma, she formally requested to be admitted to the merit-based evaluation process in order to apply for a position and,

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[79] *Cf.* Judgment of the Constitutional Court of September 1, 1997, Case "Eduardo Salcedo Peñarrieta (evidence file, folio 2401).

[80] *Cf.* Contentious administrative action filed by Mr. Raúl Cabrera Mullos. File No. 709-93-ACA (evidence file, folios 4107 to 4109).

[81] *Cf.* Contentious administrative action filed by Ms. Rosario Quintero Coritoma. File No. 1795-93-ACA (evidence file, folios 4111 to 4114).

[82] *Cf.* Decision issued on November 23, 1995 by the Superior Court of Justice of Lima. File No. 709-93-ACA (evidence file, folios 2789 and 2790).

[83] *Cf.* Judgment of the Second Civil Chamber of the Superior Court of Justice of Lima in the administrative contentious action filed by Mrs. Rosario Quintero Coritoma with the Public Prosecutor's Office in charge of the affairs of the Legislative Power on Annulment of Administrative Resolutions of December 22, 1995 (evidence file, folios 4111 to 4114).

by mistake, was assigned to another area, which placed her in a different situation than that of the alleged victims. Consequently, this Court considers that the cases of Eduardo Salcedo Peñarrieta, Raúl Cabrera Mullos and Rosario Quintero Coritoma are not cases in which the factual circumstances, judicial proceedings and arguments before the domestic courts are the same as those of the victims in the instant case and, therefore, there is no evidence to conclude that there has been a violation of the right to equality before the law.

XI
REPARATIONS
(Application of Article 63(1) of the American Convention)

129. Based on the provisions of Article 63(1) of the American Convention,[84] the Court has indicated that any violation of an international obligation that has produced harm entails the obligation to make adequate reparation,[85] and that this provision reflects a customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility.[86]

130. The reparation of the harm caused by the breach of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists of reestablishing the situation prior to the violation. If this is not feasible, as occurs in the majority of cases of human rights violations, the Court may order measures to protect the rights that have been violated and repair the harm caused by those violations.[87] Accordingly, the Court has considered the need to provide different types of reparation in order to fully redress the damage caused; consequently, in addition to pecuniary compensation, other measures such as those of satisfaction, restitution, rehabilitation, and guarantees of non-repetition, have special relevance owing to the severity of the harm caused.[88]

131. This Court has also 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 redress the respective harm. Therefore, the Court must analyze the concurrence of these factors in order to rule appropriately and according to the law.[89]

132. In consideration of the violations declared in the preceding chapters, the Court will now examine the claims presented by the Commission and the representatives of the victims, together with the arguments of the State, in light of the criteria established in its case law

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[84] Article 63(1) of the American Convention establishes that: "If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

[85] *Cf. Case of Velásquez Rodríguez v. Hondura*s. *Reparations and costs*. Judgment of July 21, 1989. Series C No. 7, para. 25, and *Case of Cruz Sánchez et al. v. Peru,* para. 451.

[86] *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, para. 25, and *Case of Cruz Sánchez et al. v. Peru,* para. 451.

[87] *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs,* para. 26, and *Case of Cruz Sánchez et al. v. Peru***,** para. 452.

[88] *Cf. Case of the Dos Erres Massacre v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of November 24, 2009. Series C No. 211, para. 226, and *Case of Cruz Sánchez et al. v. Peru***,** para. 452.

[89] *Cf. Case of Ticona Estrada et al. v. Bolivia. Merits, reparations and costs*. Judgment of November 27, 2008. Series C No. 191, para. 110, and *Case of Cruz Sánchez et al. v. Peru,* para. 453.

concerning the nature and scope of the obligation to make reparation,[90] for the purpose of ordering measures to redress the harm caused to the victims.

A. Injured party

133. Pursuant to Article 63(1) of the Convention, this Court considers that anyone who has been declared a victim of the violation of any right recognized therein is an injured party.[91] Therefore, this Court considers as "injured party" María Gracia Barriga Oré, Carlos Alberto Canales Huapaya and José Castro Ballena, who as victims of the violations declared in this judgment shall be the beneficiaries of the reparations ordered by the Court.

B. Prior considerations related to reparations

B.1) Arguments of the parties and the Commission

134. The ***Commission*** recommended that the Peruvian State provide adequate reparation for the pecuniary and non-pecuniary damage caused by the human rights violations declared in its Merits Report, in accordance with the provisions of the *Case of the Dismissed Congressional Employees* and the Special Committee created by the Peruvian State for the purpose of ensuring compliance with that judgment. At the same time, it acknowledged the efforts made by the State since 2001 to provide "some type of response to the collective dismissals through the creation of special committees." However, it pointed out that, in spite of having a large number of cases pending in which the adequacy or otherwise of such initiatives is being debated, in the present case such a determination would not be necessary, since the victims "were explicitly excluded from accessing such mechanisms" of reparation, as they had to desist from any action against the State in order to have access to them. It also indicated that at the time when the decrees creating the special committees were issued, the alleged victims had already filed their petitions before the Commission, and therefore they requested that the Inter-American Court directly establish the corresponding reparations. Finally, the Commission "consider[ed] it pertinent for the Court to explore the possibility that the conclusions of the Special Committee be applied to the present case, inasmuch as it involves determining the irregularity of the dismissals carried out in the same context and circumstances as the 257 victims in the *Case of Aguado Alfaro et al.*"

135. The ***Inter-American Defenders*** argued that although the measures of reparation established by the Special Committee in the *Case of the Dismissed Congressional Employees* "are perfectly adequate in terms of comprehensive restitution, problems have arisen in the implementation of those measures," since several victims have not yet received compensation. They also pointed out that several public servants have had to approach the Judiciary to discuss the scope and legal aspects of the Inter-American Court's judgment and the records of the Special Committee.

136. In his final arguments, Mr. ***Castro Ballena*** requested that the State be ordered to establish a committee or working group made up of only three persons in order to implement the reparations, to be formed the day after the notification of the judgment and with a term of three months to issue its final report.

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[90] *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, paras. 25 to 27, and *Case of Cruz Sánchez et al. v. Peru,* para. 454.

[91] *Cf. Case of the La Rochela Massacre v. Colombia. Merits, reparations and costs.* Judgment of May 11, 2007. Series C No. 163, para. 233, and *Case of Cruz Sánchez et al. v. Peru,* para. 455.

137. With regard to Carlos Alberto Canales Huapaya and José Castro Ballena, the ***State*** alleged that the respective consultations have been carried out with the Senior Management of the Congress of the Republic, in order to take a decision regarding the recommendations of the Inter-American Commission and that to date the issue has been included in the agenda of the Board of Directors of the Congress. It also pointed out that the Special Committee responsible for executing the judgment of the Inter-American Court in the *Aguado Alfaro et al. case* was limited to that single case and that said committee is no longer active and "did not have the authority to resolve other cases." Furthermore, regarding the reinstatement of employees, it reported that the administration of the Congress, when implementing the ruling in the *Case of the Dismissed Congressional Employees,* which is being processed before a Specialized Civil Court, has complied with the reinstatement of 190 former employees.

B.2) Considerations of the Court

138. In the *Case of the Dismissed Congressional Employees* the Court decided that "in view of the violations of the American Convention declared by the Court," the appropriate reparation was:

> that the State should guarantee the injured parties the enjoyment of their violated rights and freedoms through effective access to a simple, prompt and effective recourse. To this end, it should establish, as soon as possible, an independent and impartial body with powers to decide, in a binding and final manner, whether or not said persons were dismissed in a justified and regular manner from the Congress of the Republic, and to establish the respective legal consequences, including, if applicable, the relevant compensation based on the specific circumstances of each individual.

139. According to the information received in the process of monitoring compliance with the aforementioned judgment, a "Special Committee for the execution of the judgment in the Case of the Dismissed Congressional Employees" was established, which issued its final report on December 14, 2010. The report established the irregular and unjustified nature of the dismissal of the 257 victims[92] and ordered i) their reinstatement or reassignment;[93] ii)

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[92] The Special Committee declared that the 257 victims included in the judgment of the Inter-American Court "were dismissed irregularly and without justification by the Congress of the Republic" and that the rights that were violated by this irregular dismissal were: a) their right to dignity and decorum; b) their right to due process and to the jurisdictional protection thereof; c) their right to work and to retain their jobs without being deprived of these except for a just cause established by law and with the guarantees of due process; d) the corresponding salary compensation for the positions for which they had been hired and of which they were deprived for a reason beyond their control, as well as the fruits that such salaries should have produced; and e) their right to social security and respective recognition of their years of service and the corresponding contributions to the National Pension System (SNP) or to the Private Pension Fund Management System (SPP) during the time they were irregularly deprived of their jobs, as the case may be, for the purposes of their subsequent retirement and to ensure their affiliation with the social security health system and that of their families. The Commission also noted that, with respect to the content of the reparation for wrongful dismissal, for the victims, the loss of their jobs represented i) the loss of their regular salaries, complementary allowances and bonuses for national holidays and Christmas, including, of course, the readjustment of said salaries over time; ii) the loss of their time of service and the receipt, if applicable, of the allowance provided for in Article 54 a) of Legislative Decree No. 276; iii) compensation for length of service; and iv) the loss of their status as members of the Social Security Health System and the National Pension System or the Private Pension System, given the discontinuation of the contributions of the employee and the employer to such social security systems.

[93] The Special Committee ordered that the victims be "reinstated in their jobs, and that they be assigned functions equal or analogous to those they performed at the time of their dismissal, taking into account their professional or technical qualifications and without reducing their acquired rank or level. In the event that it is not materially possible to reinstate them in the Congress because the positions that the victims occupied in the Personnel Allocation Table have been eliminated, Congress may comply with the replacement mandate by reassigning victims who do not have a position in Congress to other public entities in which they can work in accordance with their capacities, provided that there are available positions in these entities. Victims who, by judicial decision or any other type of decision, are currently working for the Congress or for another State entity must be placed by the latter in a position of the same category as the one they held at the time of their dismissal, unless they voluntarily decide to remain in the position they currently occupy because they have more favorable conditions. Those victims who were

the payment of their accrued or unpaid wages;[94] iii) the recognition, in order to obtain a retirement pension, of the years of contributions to the pension system to which they were affiliated at the time of their dismissal;[95] iv) the payment of the necessary contributions for the worker and his family to recover their right to health care and other benefits under the Social Security Health Care Program, and v) the recognition as 'time worked' of the period when they did not work due to their irregular dismissal and reserve the amount corresponding to that period as compensation for length of service.[96]

140. In compliance with the decisions of the Special Committee, the Human Resources Department of the Congress, by means of individual administrative resolutions determined the following: (i) the computable period to be recognized to each of the 257 beneficiaries; (ii) the amount of the compensation capital for loss of earnings (accrued unpaid wages); (iii) deduction of amounts corresponding to contributions to the social security system to which the beneficiary was affiliated, and (iv) liquidation of interest.

141. Although these decisions of the Special Committee were issued in 2010, their implementation is still ongoing. In fact, this committee is no longer in operation. The final act of said committee has been subject to judicialization, as expressly stipulated in the sixth article of said document which indicated that its execution would be carried out in accordance with the procedure referred to in Law No. 27775, "which regulates the procedure for the execution of judgments delivered by supranational courts." Article 2 of this law establishes

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requesting their reinstatement in accordance with the provisions of Law No. 27803 had to choose to follow such procedure or to take advantage of the provisions of this resolution."

[94] The Special Committee ordered that "the victims be paid the remunerations earned or not received from the moment of their dismissal until their effective reinstatement in their jobs, or in the positions they hold, as the case may be, in public entities other than the Congress of the Republic. Said remunerations shall be calculated based on the total monthly remuneration received by the victim at the time of the irregular dismissal, according to their position on the Congressional Salary Scale, including bonuses, allowances or any other type of additional or complementary remuneration that would have corresponded to them if they had remained in their jobs. Likewise, the salary readjustments that were applied to those who held positions or jobs, or their equivalents, after their irregular dismissal and up to the present, plus the respective legal interest applicable to the labor debts, shall be added. In the case of victims who have returned to the service of the Congress or of a public entity, under any service provision modality, the remunerations accrued shall be calculated up to the date of their reinstatement. In the case of victims who, after re-entering the service, were dismissed again, the remunerations received during that period shall be deducted."

[95] The Special Committee decided to "[r]ecognize the victims for the purposes of their right to obtain a retirement pension for the years of contributions made to the pension system to which they were affiliated at the time of their dismissal. To this end, they must make such contributions within 24 months following the notification of this resolution, with the deduction of said amount from the amount of the remunerations earned, since said contribution is attributed to the worker."

[96] The Special Committee also provided for subsidiary measures in those cases where reinstatement was not possible, stating that "[t]he victims, individually, may opt, within 15 calendar days of notification of [the] resolution, for the payment of compensation instead of reinstatement. The indemnity shall be equivalent to one and a half ordinary monthly salaries for each full year of service with a maximum of twelve salaries. In order to establish the computable years of service, the years of service recognized to the victims in paragraph 4 of the second article of the [...] resolution shall be included, if necessary. The amount of the ordinary monthly salary is the same as that determined for the payment of the accrued remunerations, in accordance with paragraph 2 of article two of [t]he resolution. The option for the compensation in lieu of reinstatement does not exclude the receipt of the benefits listed in paragraphs 2, 3 and 4 of the second article of [t]he resolution, which shall be paid together with the compensation, except in the case of social security contributions, which shall be paid to the corresponding entity. [...] The Congress may exempt itself from the obligation to reinstate the victim in the event that he/she has reached the age of 65 and is entitled to an ordinary pension in the pension system to which he/she is affiliated, including, in order to generate this right or determine the amount of the pension, the contributions for the years of service recognized in accordance with numeral 3 of Article 2 of [t]he resolution. For such purpose, the Congress shall immediately pay the full amount of the contributions to the corresponding retirement system, even if in the absence of such contributions the worker is already entitled to a pension. In the event that Congress does not pay such contributions within a maximum period of sixty calendar days, it shall reinstate the victim in his or her job."

that the judgment issued by the international Court shall be transcribed by the Ministry of Foreign Affairs to the President of the Supreme Court, who shall forward it to the chamber in which the domestic jurisdiction was exhausted, ordering its execution by the specialized or mixed jurisdiction judge who heard the previous proceeding. In the absence of a prior domestic proceeding, he will order the competent specialized or mixed jurisdiction judge to hear the execution of the decision. This explains why disputes are still being raised before the specialized judges regarding the scope of the decision of the Special Committee.[97]

142. That said, taking into account that 23 years have passed since the events occurred, and nine years since the judgment in the *Case Dismissed Congressional Employees* was issued, and that disputes related to its implementation are still ongoing, the Court deems it appropriate to make a final decision on the reparations due in the instant case, without referring to the domestic jurisdiction regarding the creation of a Commission, Working Group or similar mechanism. To this effect, the Court will take into consideration the information available in the case file.

143. Notwithstanding the foregoing, none of the considerations made in the present judgment regarding reparations should be understood as a prejudgment regarding the scope of the implementation of the *Case of the Dismissed Congressional Employees*. Indeed, while that case was called upon to resolve the situation of 257 victims, the present case only focuses on three victims, which may justify some differences in the corresponding analysis. For this reason, any difference in criteria with respect to the decisions adopted by the Special Committee cannot be understood as a disqualification of the criteria adopted by said body.

C. Measures of restitution and satisfaction

C.1) Measures of restitution

C.1.a) Reinstatement of the victims in their jobs

144. Mr. ***Castro Ballena*** requested his reinstatement in the same position or in a position similar to the one he held at the time of his dismissal.

145. In his pleadings and motions brief, Mr. ***Canales*** requested his reinstatement in his job as Chief Officer of the Security Unit, with salary level 1. However, he pointed out that due to health reasons, he can only perform 30% of his usual activities on medical advice, adding that if the Congress agrees to reinstate him in the pension system of Law 20530, he would "request that [his] position, in another occupational group, be occupied by [his] eldest son."

146. Ms. ***Barriga***, who at the time of the facts held a position in the Technical Occupational Group in the Payroll Department with STA salary level, requested the reinstatement of her salary level in the occupational group she held at the time of her dismissal, or its equivalent or homologation.

147. The ***Inter-American Defenders*** pointed out that at present, congressional employees work under the private labor regime, which has been in operation since March

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[97] *Cf.* Brief filed by Ronald Luciano Revelo Infante and others, on April 18, 2013, before the Twenty-fifth Civil Court of Lima, in the proceedings with the Peruvian State on Execution of Judgment (evidence file, folios 3355 to 3373), and brief filed by Ronald Luciano Revelo Infante and others, on September 26, 2013, before the Fifth Civil Chamber of the Superior Court of Justice of Lima, in the proceedings with the Peruvian State on the Amparo Action in the Execution of a Supranational Judgment, Appeals against Resolution Nº 400 of January 11, 2014 (evidence file, folios 3375 to 3392).

1993, so that the victims could only be reinstated under this system. They also alleged that according to the equivalence of positions between the system that applied at the time of the facts and the current one, Ms. Barriga Oré should be reinstated at the last level of the technical career, corresponding to level ST-9, while Mr. Canales Huapaya should occupy the position of civil servant at level F-10. They requested that the Court specify that the reinstatement of the victims "must occur retroactively to the same day of the legal dismissal and that the transposition of their positions and levels to the equivalent positions and levels of Legislative Decree No. 728 must occur on the date of enforcement of that decree [,] given that, since then, it is the only labor regime applicable to the employees of Congress." In addition, they requested that, in the event that it is alleged that there are no positions available in Congress, the victims be placed in equivalent positions in other public bodies, or be placed on stand-by, while awaiting the assignment of a position and receiving their salaries. Finally, given the interpretative difficulties that have arisen with the use of the term "reincorporation" instead of "reinstatement", they requested that the term "reinstate" be used to avoid confusion that might prevent the recognition of the period not worked as part of the victims' work seniority.

148. With respect to Mr. Canales Huapaya's request that his position be occupied by his eldest son, the ***State*** explained that Peruvian law does not allow for the possibility of transferring a person's job, or allowing it to be taken over by his son. In this regard, it explained that there is no legal basis for accepting the transfer of a job.

149. The Court considers that 23 years after the dismissals that occurred in the instant case, the reincorporation or reinstatement of the victims in their former positions or in other similar positions faces different levels of complexity and operability, in particular, due to the modification of the personnel structure in the Congress. Consequently, the Court considers that it will not order the reinstatement of the victims and, for this reason, this aspect will be taken into account when calculating the compensatory damages.

C.2) Measures of satisfaction

C.2.a) Publication of the Judgment

150. Mr. ***Canales*** and ***Ms. Barriga*** asked the Court to order the State to publish the judgment. The ***Inter-American Defenders*** requested that the judgment be published in a newspaper with wide national circulation.

151. Mr. ***Castro*** and the State did not comment on this request.

152. The Court orders, as it has done in other cases,[98] that the State 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; b) the official summary of this judgment prepared by the Court, once, in a newspaper with wide national circulation, and c) the present judgment in full, available for one year, on an official website.

C.2 (b) Public act of acknowledgement of international responsibility

[98] *Cf. Case of Cantoral Benavides v. Peru. Reparations and costs.* Judgment of December 3, 2001. Series C No. 88, para. 79, and *Case of Cruz Sánchez et al. v. Peru, supra*, para. 466.

153. Mr. ***Castro*** asked the Court to order the State to issue a "public apology recognizing its international responsibility" for the violations of his fundamental rights for more than twenty years, and for not having respected the principles of judicial guarantees and judicial protection.

154. Mr. ***Canales*** requested that the State organize a public act of apology in which he would be present. For her part, Ms. ***Barriga*** requested that Congress "publicly apologize, using the channels of the Congress."

155. Neither the ***State*** nor the ***Commission*** referred to this request.

156. The Court notes that in the context of the implementation of the *Case of the Dismissed Congressional Employees,* the President of the Congress offered "a public apology" during a ceremony held in 2011 on the occasion of the reinstatement of some of the dismissed workers.[99] This event was attended by some public authorities, representatives of the victims and a judge of the Inter-American Court who took part in the deliberation and judgment of this case. Taking into account the similarity between the latter case and the present one, and the fact that the statements made on that occasion were related to the general context of arbitrary dismissals that occurred at the time of the facts, as well as the specific characteristics of the instant case, the Court considers that it is not appropriate to order another public act of acknowledgment of responsibility.

D. Compensation

D.1) Arguments regarding pecuniary damage

157. The ***Commission*** requested adequate reparation for the pecuniary damage arising from the human rights violations, in accordance with what was established by the Inter-American Court in the *Case of the Dismissed Congressional Employees* and by the Special Committee created to ensure compliance with that judgment.

D.1.a) Payment of salaries not paid as a result of the dismissals

158. In relation to pecuniary damage, Mr. ***Castro*** asked the Court to order the State to acknowledge and pay compensation for his time of service from the date of his dismissal until the day before his effective reinstatement in the Congress. In this regard, he requested payment of the salaries that he ceased to receive, plus interest, bonuses and compensation for length of service from the day after his dismissal until the present, for the sum of US$ 1,375,783.00 (one million, three hundred seventy-five thousand seven hundred and eighty-three United States dollars). Mr. Castro's representatives presented a report prepared by the economist Walter Paul Noriega, regarding the "determination of loss of work income and compensation for length of service suffered by Mr. Castro Ballena due to his dismissal from

[99] The Inter-American Commission submitted a video of this event, which accompanied the submission brief and its annexes.

his job."[100] The report states that the "salary scales"[101] facilitate the calculation of Mr. Castro Ballena's "loss of income and compensation for length of service," month by month, from January 1993 to January 2014. They also show the "variations over time that reflect the salary increases granted."[102] According to the report, Mr. Castro Ballena ceased to receive a total of S/3,854,946.36 (three million eight hundred and fifty-four thousand nine hundred and forty-six new soles and thirty-six cents).

159. Mr. ***Canales*** requested payment of S/3,926,151.59 (three million nine hundred and twenty-six thousand one hundred and fifty-one new soles and fifty-nine cents) for lost wages, related legal interest, and compensation for length of service. In the final written arguments, it was indicated that this amount does not include the increase established from 2006, nor the food bonus that started at 500 new soles and is currently around 1,000 new soles. Mr. Canales presented an expert report prepared by Mr. Felix Diego Buendía Ramírez, which is based on: a) the minutes of the Special Committee for the execution of the judgment of the Inter-American Court of Human Rights in the Case of the Dismissed Congressional Employees, of December 14, 2010;[103] and b) the Expert Report "CDH-11-830f01- *Trabajadores Cesados del Congreso de la Republica del Peru (*Dismissed Congressional Employees of the Republic of Peru), which contains data on the workers' income from January 1, 1993 to May 30, 2006. In order to determine the amount "not received," the report calculates the income and benefits that "the dismissed official would have received had he or she continued working at the Congress of the Republic of Peru, according to the current salary scales for workers."[104] The report also mentions that "the

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100 The report is based on: a) "Report Nº 041-2005-AP-DAP-DRRHH/CR" prepared by the Payroll Department of the Congress of the Republic, which includes salary tables and documents that "show the changes in the Salary Scales from the years 1993 to 2001"; b) the personnel remuneration scale of Legislative Decree 728 of 2012 of the Congress of the Republic, and c) the resolution of May 9, 1991, which declared Mr. Castro Ballena the winner of the promotion to the position of Head of Unit (F-1) of the Property Management Unit of the General Administration Office of the Senate.

101 The report states that:

a) The position of Head of Unit (F-1) of the Property Management Unit is equivalent to the Department Heads Category Level D5 of the "Salary Scale (variation of increases from April 1, 1993)" and subsequent years. "Salary Scale as of June 1999," which consists of 14 levels.
b) The Department Heads Category Level D5 of the Salary Scale from April 1, 1993, corresponds to Salary Level 10 of the "Pay Scale from June 1999". This equivalence has been maintained to date.
c) The equivalence of the Department Heads Category Level D5 of the 1993 Salary Scale, with Salary Level 10 in the 1999 Salary Scale, is reasonable if it is considered that in both salary scales, the level assigned to the dismissed employee retains the fifth salary level, counting from the highest level to the lowest.

102 In addition, the report includes "remuneration items" such as the "bonuses for the months of July and December," which are equivalent to the amount of one salary in each of the months mentioned. Finally, the report adds "compensation for time of service," equivalent to one annual salary. The report states that "[t]o simplify and adequately reflect the amount of this benefit, the remuneration for the month of December of each year has been used."

103 The report indicates that this resolution determined that "[t]he victims shall receive the salaries earned or not received from the time of their dismissal until their effective reinstatement in their positions or in the jobs they hold, as the case may be, in public entities other than the Congress of the Republic. Said remunerations shall be calculated based on the total monthly salary received by the victim at the time of his or her irregular dismissal, according to his or her position on the Congressional Salary Scale, including bonuses, gratuities, allowances or any other type of additional or complementary remuneration that would have corresponded to them had they remained in their jobs. Likewise, the salary readjustments that were applied to those who occupied the positions or jobs, or their equivalents, after their irregular dismissal and up to the present time, plus the respective legal interests, shall be added."

104 The report takes into account "the occupational category of Carlos Alberto Canales Huapaya who, at the time of his dismissal, held the position of Head of Unit, level F-1, under the Labor Regime of Law No. 276 of the Administrative Career." The report also notes that "[t]he personnel of the Congress of the Republic of Peru is currently working under the TUO D.L. No. 728-Labor Productivity and Competitiveness Law." According to Mr. Buendía, Mr.

amounts determined for non-payment were calculated taking into account the reports issued by the Superintendence of Banking and Insurance, regarding legal labor interest." The report concludes that the "determination and updating of accrued salaries" amounts to the sum of S/3,626,774.02 (three million six hundred and twenty-six thousand, seven hundred and seventy-four new soles and two cents); and the "calculation and updating of compensation for unpaid time of service" up to January 31, 2014, totals S/299,377.57 (two hundred ninety-nine thousand three hundred and seventy-seven new soles and fifty-seven cents).

160. Ms. ***Barriga*** requested the accrual and recognition as time of service of the period during which she did not work because she was illegally dismissed, namely the period from December 31, 1992 to August 1, 1995. She requested payment of unpaid or outstanding wages, plus bank interest, for the sum of S/1.096.194,68 (one million and ninety-six thousand one hundred and ninety-four new soles and sixty-eight cents), and that the payment of the debt in favor of Mr. Carlos Alberto Canales Huapaya be prioritized, in accordance with the provisions of Decree 001-2014-JUS of February 15, 2014. Ms. Barriga presented a report prepared by the accountant Felix Diego Buendía Ramírez. In order to determine "loss of earnings," the calculation of income and benefits that "the dismissed worker would have received had she continued her labor relationship with the Congress" is made, according to "the current salary scales of the workers." The report states that said "salary scales" were based on: a) Expert Report CDH-11-830f01, based on information from January 1, 1993 to May 31, 2006; b) the "salary reports" issued by the Remuneration Office of the Congress from August 1, 1995 to January 31, 2014, and c) the table of the 2006 salary scale.[105] The expert report takes into consideration that Ms. Barriga was removed from her position from December 1992 to July 31, 1995, and was subsequently hired by the Congress from August 1, 1995, until the present date, at a level lower than Administrative Technical Officer "A". It also mentions that Mrs. Barriga stopped receiving her "salaries" and "compensation for length of service" from January 1993 until July 1995; subsequently, she did not receive the difference in the salaries paid from August 1995 until January 2014, compared to those she received prior to her dismissal, due to the lower level at which she was hired in July 1995. Finally the report concludes that Ms. Barriga Oré ceased to receive a total sum of S/1,096,194.68 (one million ninety-six thousand, one hundred ninety-four new soles and sixty-eight cents).

161. The ***Inter-American Defenders*** pointed out that in Peru, workers receive 16 salaries per year, which should be taken into account when calculating the amount of remuneration earned. Said salaries should be calculated with eventual salary readjustments or gratuities, bonuses or any other type of additional remuneration applicable to the position, and should be updated with the corresponding legal interest. Regarding the specific situation of Ms. Barriga Oré, the defenders alleged that she is entitled to full remuneration for the period between her dismissal and her return to the Congress on August 1, 1995, "in a lower-level position." They also requested that she be awarded the difference in salary between the

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Canales would be classified in the occupational category of "Department Head, as this is the initial level, as far as management is concerned."

[105] The expert report states that this document compares what Ms. Barriga should have received during the period between 2006 and 2014. The report takes into account "the occupational category of the Administrative Technical Officer "A" (STA) María Gracia Barriga Oré who on the date of dismissal held the position of Technical Officer "A", under the Labor Regime of Law No. 276, Law of the Administrative Career." The report also notes that "[a]t present, the personnel of the Peruvian Congress work under the regime of the TUO D.L. Nº 728-Law of Labor Productivity and Competitiveness." According to Mr. Buendía, Ms. Barriga would be classified as an "Administrative Technical Officer "A".

amount she receives in her new position and what she should have received in her original position.

162. All the ***common interveners*** requested that the calculation of the interest be made in accordance with Articles 1244, 1245 and 1246 of the Peruvian Civil Code.

163. The ***State*** held that the victims' claims are distorting the Inter-American system by using it for patrimonial purposes, which does not correspond to its object and purpose. It expressed concern that the claims are aimed at obtaining financial benefit, even though these matters have already been remedied in the domestic jurisdiction, ensuring a correct procedure for the recognition of benefits and the repeal of norms that at the time violated the American Convention. The State argued that a malicious intent on the part of the victims was evident. In addition, it pointed out that the Commission's report stated the duty to adequately repair the pecuniary and non-pecuniary damage for the human rights violations, in accordance with the *Case of the Dismissed Congressional Employees v. Peru.* In this regard, the State argued that in line with that judgment, the damage had to be determined at the domestic level. The State expressed its deepest disagreement with the high amount requested by the victims, taking into consideration that the Court, in accordance with its supervisory role in human rights matters, has the task of upholding justice and ruling on the failure of the Peruvian State to comply with its international obligations, while the victims' claims "seek to turn the Court into a financial body." Therefore, it asked the Court to reject the amounts requested by the alleged victims for pecuniary damage.

164. The State also considered that the Inter-American Court's considerations are applicable to the fact that the nature and amount of the reparations depend on the nature of the violations committed and the damage caused, both pecuniary and non-pecuniary, and should be related to the violations declared, and should not imply enrichment or impoverishment for the victim or his heirs. Regarding the reestablishment of the salary level, it indicated that workers under the labor regime of Legislative Decree 276 with the STA level that Ms. Barriga Oré held prior to her dismissal, received a monthly salary of S/1,251.89 (one thousand two hundred and fifty-one new soles and eighty-nine cents), whereas she is currently receiving the amount of S/5. 809.00 (five thousand eight hundred and nine new soles), in her position as a worker in the Technical Occupational Group of level ST7, and thus would currently have a significant economic improvement, given that her real income is more than nine times what she earned at the time of her dismissal. Finally, the State argued that in the context of the execution of the judgment in the *Case of the Dismissed Congressional Employees*, it agreed with the 257 victims to recognize as time of service the period during which they did not provide their services due to the irregular and unjustified dismissal.

165. The State pointed out that the Office of the Legal Counsel of the Congress has stated, as established in the minutes of December 14, 2010 of the Special Committee, that the payment of salaries not received during the period between the workers' dismissal and their reinstatement constitutes a full measure of reparation and consequently has a compensatory nature with respect to loss of earnings, understood as the income not received as a result of the irregular dismissal.

166. Notwithstanding the foregoing, the State alleged that during the proceedings before the Commission, it was reported that Mrs. María Gracia Barriga Oré maintains a current employment relationship with the Congress of the Republic, and that she currently holds the position of Accountant in the Payroll Department. Also, regarding the request for the reestablishment of her salary level, the State argued that in the labor regime of Legislative

Decree 728, the positions or jobs are different from those of the administrative career regime, regulated by Legislative Decree 276, so there would be no comparison and equivalence with the career positions.

167. Furthermore, the State presented information in response to the questions posed by the judges, regarding "the compensation owed to dismissed workers who might find themselves in similar positions to those of the three alleged victims."[106] The State also submitted information on "the differences that would exist between the amounts of compensation awarded to those who occupied managerial and intermediate positions and those who occupied the lowest positions in the congressional ladder of positions." Finally, the State submitted information on "whether the pecuniary compensation requested by the alleged victims is very different or similar to that received by the victims in the case of the *Dismissed Congressional Employees*."

168. The State submitted Report No. 854.2014-AAP-DRH/CR, which contains "a detailed table of the amounts granted to the beneficiaries of the judgment of the Inter-American Court, with their equivalent in United States dollars, with the same salary level as the victims Canales, Castro and Barriga." Based on the information shown in this table,[107] the State has asserted that: a) the compensation received by workers in posts similar to Ms. Barriga Oré, ranged from US$ 44,435.69 (forty-four thousand four hundred and thirty-five United States dollars and sixty-nine cents) to US$ 94,425.83 (ninety-four thousand four hundred and twenty-five United States dollars and eighty-three cents); b) the compensation received by workers in positions similar to Mr. Castro Ballena, ranged from US$ 63,882.15 (sixty-three thousand right hundred and eighty-two United States dollars and fifteen cents) to US$ 95,602.94 (ninety-five thousand six hundred and two United States dollars and ninety-four cents), and c) the compensation received by workers in positions to Mr. Canales Huapaya, ranged from US$ 34,680.64 (thirty-four thousand six hundred eighty United States dollars and sixty-four cents) to US$ 135,366.38 (one hundred and thirty-five thousand three hundred and sixty-six United States dollars and thirty-eight cents).[108]

169. The State also submitted Report No. 43-2015-GFBL-APP-DHR/CR prepared by the Operations Group of Benefits and Settlements of the Department of Human Resources of the Congress of the Republic. Said report took into account the "computable period," "labor reg.", "occupational level", "computable period", and "computable rem". Based on this, it was calculated that the estimated amount in United States dollars for Ms. Barriga Oré totals US$ 12,795.45 (twelve thousand seven hundred and ninety-five United States dollars and

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[106] The Court asked: "approximately how much did the dismissed workers who were subject to the collective dismissal review programs and those reviewed by the Working Group that is implementing the recommendations of the Special Committee receive individually as economic compensation? (Please provide approximate figures in dollars, trying to establish a minimum and a maximum disaggregated figure). In particular, the State is requested to determine an approximate amount in dollars of what was awarded as compensation to those dismissed workers who may be in positions similar to those of the three alleged victims in this case. It is also asked to specify in dollars what differences exist between the amount awarded as compensation to those who occupied managerial and intermediate positions and those who occupied the lowest positions in the Congressional hierarchy of positions." The Court also asked whether "the final amount of the material damage requested by the alleged victims through the reports issued by Paul Noriega and Felix Diego Buendía is very different or very similar to that received by the victims in the *Case of the Dismissed Congressional Employees* as compensation? Please specify as clearly as possible the differences and similarities."

[107] For the analysis, the table takes into account the "labor regulations," the "occupational level," the "computable period," the "amount of compensatory capital according to the resolution," and the "dollar exchange rate according to BCR on 13-11-2014 (S./2.93)".

[108] The State also submitted Report No. 554-2014-GFBL-AAP, which contains "a table with the equivalence in dollars, of the difference between the high, intermediate and low remuneration levels, registered in the Congressional pay scale of the Congress of the Republic."

forty-five cents), the amount for Mr. Canales Huapaya totals US$ 143,197.10 (one hundred and forty-three thousand one hundred and ninety-seven United States dollars and ten cents), and the amount for Mr. Castro Ballena totals US$ 106,826.86 (one hundred and six thousand eight hundred and twenty-six United States dollars and eighty-six cents).[109] In addition, according to the State, the calculation of the "legal labor interest" that would correspond to Mrs. Barriga Oré is US$ 2,051.24 (two thousand and fifty-one United States dollars and twenty-four cents), for Mr. Canales Huapaya it is US$ 97,343.04 (ninety-seven thousand three hundred and forty-three United States dollars and four cents), and for Mr. Castro Ballena it is US$ 72,618.76 (seventy-two thousand six hundred and eighteen United States dollars and seventy-six cents).

170. On another matter, when answering the question on the differences or similarities between the monetary amount requested by the alleged victims via the reports issued by Paul Noriega and Félix Diego Buendía and the amount received by the victims in the *Case of the Dismissed Congressional Employees*, the State alleged that there were major differences, taking as an example two cases of persons reinstated in Congress. It indicated that the person who was awarded the highest compensation payment (accrued salaries not received) was determined to have a total of 242 months as the computable period to be recognized, since there were no deductible periods in his case, given that he did not work during his dismissal from Congress. The amount of S/396,623.48 (three hundred and ninety-six thousand six hundred and twenty-three new soles and forty-eight cents) was established in his favor, which at the exchange rate in dollars is equivalent to US$ 135,829.95 (one hundred and thirty-five thousand eight hundred and twenty-nine United States dollars and ninety and five cents).[110] As for the person who was awarded the lowest compensation payment (accrued salaries not received) a total of seven months was determined as the computable period to be recognized, since in his case there were deductible periods, taking into account that he worked during his dismissal from the Congress. The amount of S/7,998.41 (seven thousand nine hundred ninety-eight new soles and forty-one cents) was determined in his favor, which at the exchange rate in dollars is equivalent to US$ 2,739.18 (two thousand seven hundred thirty-nine United States dollars and eighteen cents).[111]

171. The common interveners pointed out that these cases mentioned by the State in the context of the comparisons requested by the Court are not an appropriate reference for determining the amount corresponding to the alleged victims. They pointed out that the basic factors used for the calculation, the interest applied, as well as the computable periods were different, or that the persons whose calculation is being analyzed were not of the same hierarchical rank at work (they were employees while Mr. Castro and Mr. Canales were department heads and level 1 officials). However, the Court was not provided with information on the compensation that, according to the common interveners, the workers in the same position as the victims could have received.

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[109] The Report states that the information presented "has been prepared in accordance with information from the Technical Administrative Reports ITA Nº 46, 47 and 48" and "therefore, 14 months of the computable period have been deducted from the former employee Castro Ballena, for having worked in the Congress of the Republic".

[110] Approximately at the current exchange rate of S/2.92 New - Resolution No. 204-2013-DHR-DGA/CR, dated March 26, 2013, issued by the Human Resources Department.

[111] Approximately at the current exchange rate of S/2.92 New - Resolution No. 204-2013-DHR-DGA/CR, dated March 26, 2013, issued by the Human Resources Department.

D.1.b) Inclusion in the Pension System of Law 20530

172. Mr. ***Canales*** requested his inclusion in the pension system of Law 20530, "which he could not access due to the rupture of the constitutional order [...] and [his] subsequent irregular dismissal."

173. Ms. ***Barriga*** requested that the State pay the unpaid contributions to the National Pension System and/or the Private Pension System.

174. The ***Inter-American Defenders*** argued that the State must recognize the years of contributions made by the victims to the pension system to which they were affiliated at the time of their dismissal, and that such payments should be made within 24 months. They pointed out that the contributions cannot have any limitation, "and must be paid consecutively and retroactively for each month that the [victims] would have been working if they had not been dismissed." In addition, they pointed out that regardless of the fact that the State had reformed its pension system in 2004, Mr. Canales Huapaya was entitled to benefit from that system in 2000 - had he not been dismissed - and therefore that pension system should be applied to him.

175. The ***State*** pointed out that Law 20530 exclusively regulated the situation of public servants who began to provide services to the State before July 11, 1962, as a closed regime for those workers and one that no other person can join. In this regard, it explained that the enactment of Laws 28389 and 28449 eliminated the pension system derived from Decree Law 20530, whose main characteristic was the leveling of pensions according to the salary received by the active worker. It added that this request is outside the Court's jurisdiction.

D.1.c) Payment of contributions to ESSALUD for Mr. Canales and Ms. Barriga

176. Mr. ***Canales*** asked the State to pay his contributions to ESSALUD from the date of his dismissal to the present, so that this institution could "refer [him] to the National Heart Institute and try to treat the systolic insufficiency that afflicts [him]."

177. Ms. ***Barriga*** requested that the State pay the unpaid contributions to ESSALUD, and that her right to receive medical care and health benefits be restored.

178. With respect to the contributions to ESSALUD, the ***Inter-American Defenders*** indicated that, given the cooperative nature of the health system, paying all the contributions that were not paid during the 22 years "will not benefit Mr. Canales Huapaya, nor will it compensate him for the expenses he incurred during all those years."

179. The ***State*** argued that Mr. Canales Huapaya's request for payment of his contributions to ESSALUD is not admissible because, according to the criteria of the Peruvian Constitutional Court, only the payment of compensation is allowed, and this cannot form part of the basis for calculating social benefits or deductions and contributions to the Treasury, which include contributions to ESSALUD. The State also reiterated the comments made by Mr. Canales Huapaya in his statement before a notary public, where he indicated that he underwent echocardiograms at ESSALUD every three months and therefore the State considered that even if he had this benefit because his wife is retired, "the fact that he is the holder of this benefit would not provide him with better care" since no distinction is made between the holders and the spouses. Likewise, it indicated that since 2006 the contributions to ESSALUD correspond to active workers.

D.2) Arguments related to non-pecuniary damage

180. The ***Commission*** requested that the non-pecuniary damage suffered by the victims in this case be adequately compensated, in accordance with the stipulations made by the Inter-American Court in the *Case of the Dismissed Congressional Employees* and the Special Committee created to comply with said judgment.

181. For non-pecuniary damage, Mr. ***Castro*** requested compensation for the suffering he endured together with his wife and children for more than twenty years, as well as the curtailment of his family life project. In this regard, he pointed out that his request is supported by the expert opinion provided, and therefore it is not an excessive claim. Finally, he alleged that he has experienced more than 20 years of "permanent suffering" due to the constant struggle for the redress of his rights. Mr. Castro did not request a specific amount for non-pecuniary damage and left it to the discretion of the Court to set the respective amount.

182. Mr. ***Canales*** requested payment of US$ 150,000.00 (one hundred and fifty thousand United States dollars) for his "transfer to a hospital in the United States of America for surgery."

183. Ms. ***Barriga*** requested that the Court set an amount for non-pecuniary damage in her favor for her unjustified or arbitrary dismissal.

184. The ***Inter-American Defenders*** pointed out that the amount requested by Mr. Canales Huapaya in his pleadings and motions brief "is very adequate as fair reparation for the moral damage suffered by him and […] by Ms. Barriga." In this regard, they indicated that any comparison with the amount established in the *Case of the Dismissed Congressional Employees* is inappropriate, since in the present case the illegality of the dismissals was already determined by the Special Committee. They also emphasized that, as stated by the expert witness Lourdes Flores Nano, the effort and disappointment of the victims in this case was greater, because although they initiated a lawsuit before their 257 colleagues, the latter obtained a final decision earlier. They emphasized that in this case there was not only a violation of judicial guarantees, but they were also removed from their jobs, so that they "had to find other means of support, often precarious [, and] sometimes less qualified and less well paid [work]," and their life plans were adversely affected. As a result of the facts, Mr. Canales Huapaya had to sell his belongings and move to a relative's house, he suffered from depression and because of this and the difficulties of underemployment, his systolic insufficiency worsened, and he currently has difficulty breathing and walking. For her part, Mrs. Barriga Oré "was able [...] to study for a professional career [until] she was 55 years old [,] given that her entire life project was put on hold for more than 25 years" at the time she was dismissed she had to leave the university "because she suddenly found herself unemployed." They also pointed out that her dismissal had a strong impact on a personal level, since she was the sole breadwinner for her grandmother and aunt, and had to work several jobs in order to balance the budget for the family's food and medical expenses. Finally, they argued that the amount of compensation could serve to demonstrate to the State the "importance of […] taking all the steps [necessary] to ensure that the judgments, jurisprudence and inter-American human rights standards are promptly and effectively complied with."

185. For its part, the ***State*** recalled that in the *Case of the Dismissed Congressional Employees*, the Court established the sum of US$ 15,000.00 (fifteen thousand United States dollars) for non-pecuniary damage, and therefore argued that Mr. Canales Huapaya's

request should be dismissed, because there would be inequality with respect to the other workers who were granted the aforementioned compensation. The State considered that the same argument was applicable to Mr. Castro Ballena. Regarding Ms. Barriga Oré, it asked the Court to consider a much lower amount, since she was reinstated in her job in 1995.

D.3) Considerations of the Court

186. The Court will now determine the scope of the pecuniary reparations in this case taking into account the arguments and information submitted by the Commission and the parties, some specifics of the situation of the alleged victims, and the information that was submitted to the Court in response to the helpful evidence requested (*supra* para. 12).[112] The Court will initially refer to the benefits that would apply in relation to pensions and health, and will then calculate the compensatory damages, which will include, in a single amount in equity, the pecuniary and non-pecuniary damage.

i) Contributions to the pension system

187. In relation to this matter, the State clarified various points of domestic law that are important elements in assessing the request made by the victims. Indeed, the Second Transitory Constitutional and Social Law Chamber of the Supreme Court of Justice issued a ruling on August 28, 2013[113] on the payment of contributions and compensation in connection with these dismissals. In this decision, the provisions of Law No. 27803, Article 13(2) (added by Article 1 of Law No. 28229) were addressed again, in the sense that the maximum limit applicable for the payment of pension contributions was set at twelve years, and it was determined that it would not include the payment of contributions for periods in which the former employee had been working directly for the State.[114] In order to

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[112] Among other questions, the Court asked: i) in the State's opinion, what would be the specific and concrete problems that the report rendered by Mr. Paul Noriega would have with respect to the compensation that corresponds to Mr. Castro Ballena? Does the State consider that this expert opinion is accurate in the way it adopts the criteria used by the Committee established for the execution of the judgment in the Case of the *Dismissed Employees*? In the State's opinion, what would be the specific and concrete problems that the reports rendered by Mr. Felix Diego Buendía have with respect to the indemnities that would correspond to Mr. Canales and Mrs. Barriga? Does the State consider that said reports are accurate in the way they adopt the criteria used by the Commission formed in the framework of the implementation of the *Case of Dismissed Congressional Employees*? If the State considers that these reports are erroneous, and in the event that some type of violation of rights is declared in the present case, how would the State calculate the amount of the pecuniary damage in this case?. ii) In some of the settlement tables, what does the section entitled "computable period" refer to in the tables entitled "equivalent in dollars of the capital compensation amount of a worker" with STA, SPE and F-1 level and in the table entitled "equivalent amount in dollars of the difference between the levels registered in the Congressional salary scale as of December 1992"? In particular, it should be specified whether this computable period is similar to the computable period that would apply to the alleged victims in this case, Ms. Barriga Oré and Messrs. Canales Huapaya and Castro Ballena. If the computable period is different, the State and the parties are requested to make the calculation applicable to the alleged victims in this case, with the respective equivalent in dollars. iii) With respect to the report issued by the Head of the Operational Group on Benefits and Settlements regarding the calculation of the pecuniary damage for the alleged victims, it is requested that in relation to Messrs. Canales and Castro Ballena, a calculation be made up to January 2015. iv) It is requested that in the estimate provided by the State, the respective calculation be made as of March 21, 1997, according to the provisions of Legislative Decree 728, the private labor regime, which would constitute - according to the representatives- the regime applicable to the alleged victims after that date.

[113] Cassation No. 3211-2011 on payment of contributions and compensation (Special Process). Second Constitutional and Social Transitory Chamber of Constitutional and Social Law of the Supreme Court of Justice, August 28, 2013, evidence file, annex 27 to the State's answering brief.

[114] Article 13 of Law 27803, which implements the recommendations derived from the committees created by the Laws 27452 and 27586, in charge of reviewing the collective dismissals carried out in the State enterprises subject to processes to promote private investment and in public sector entities and regional governments, states: "Article 13.- Payment of pension contributions: The options referred to in Articles 10 and 11 of this Law also require the State to assume the payment of pension contributions to the National Pension System or to the Private Pension

standardize the interpretation of this rule by the lower courts, the Supreme Court established the interpretation regarding the maximum period of pension contributions. It was then stated that the period of pension contributions for workers who opted for reinstatement or relocation "in no case may exceed twelve years, excluding those periods during which the worker had been working directly for the State."

188. In addition, the Court observes that the pension system to which Mr. Canales is requesting his reinstatement (Decree Law 25030) is closed, taking into account that Law No. 28389 of 2004, which amended the Peruvian Constitution, established that new affiliations or re-admissions to said pension system, whose main characteristic was the equalization of pensions according to the salary received by the active worker, would not be permitted.[115] The new regime established maximum pension ceilings, under the category of Tax Units, so that no pensioner may receive more than two such units. Likewise, mechanisms were established to adjust pensions periodically. This constitutional reform was not contested by the Constitutional Court or by the Inter-American Commission on Human Rights when assessing several claims filed against said reform.[116]

189. The Court notes that the Inter-American Defenders argue that pension contributions should not be limited in any way, such as being calculated only up to 12 years. Furthermore, the Inter-American Defenders argue that if Mr. Canales had not been illegally dismissed, he would have been entitled, in 2000, to the pension system prior to the constitutional reform. Accordingly, they requested that he be allowed to return to the *status quo* prior to the violation in accordance with the principle of *restitutio in integrum*.

System, for the period during which the worker was dismissed. In no case does it imply the recovery of remunerations not received during the same period."

Subsequently, Law 28299 of July 22, 2004, amended Law 27803, stating in Article 1: Inclusion of paragraphs in Articles 5, 10, 11, 13 and 18 of Law 27803. Paragraphs are added to Articles 5, 10, 11, 13 and 18 of Law 27803 […] Article 13.- Payment of pension contributions […] Said payment of contributions by the State shall in no case be for a period longer than 12 years and shall not include the payment of contributions for periods in which the former employee had been working directly for the State.

115 Law No. 28389 "Law for the Reform of 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, Annex 35 to the State's answering brief) established: "The pension system of Decree Law No. 20530 is hereby declared definitively closed. Consequently, as of the effective date of this Constitutional Reform:

1. New memberships or readmissions to the pension regime of Decree Law N. 20530 are not permitted.

2. Workers who, being members of such a regime, have not complied with the requirements to obtain the corresponding pension, must choose between the National Pension System or the Private Pension Fund Management System.

For reasons of social interest, the new pension rules established by law shall apply immediately to workers and pensioners of the State pension regimes, as the case may be. They may not provide for the equalization of pensions with remunerations, nor the reduction of the amount of pensions that are lower than one Tax Unit."

116 Judgment of the Constitutional Court of Peru of June 3, 2005 (evidence file, Annex 38 to the State's response) and Report No. 38 of 2009 issued by the Commission Inter-American Commission on Human Rights (evidence file, Annex 37 to the State's answering brief). The Constitutional Court of Peru issued a ruling declaring the constitutionality of the reform proposed by Laws 28389 and 28449 and, consequently, declared the definitive closure of the pension regime of Decree Law No. 20530, the introduction of pension ceilings and the elimination of pension equalization, established in the Constitutional Reform Law, to be compatible with the Constitution. Among its arguments, it considered that the progressiveness and universality of social security was not affected, nor was the increase in the quality of life and the validity of the rights to equality and property of pensioners impaired. For its part, the Inter-American Commission considered reasonable the argument that "these measures [could] generate considerable savings and, therefore, [were] suitable for achieving the intended purpose, which was to ensure the financial stability of the State and eliminate inequity in the social security system by increasing the lowest pensions, among other aspects."

190. The Court considers that insufficient arguments have been presented to order Mr. Canales' reinstatement in a pension system that has been closed in Peru and in respect of which a constitutional reform has been implemented. On the other hand, the Court considers that the victims should receive a sum for the contributions that did not enter their pension fund as a consequence of the arbitrary dismissal of which they were victims. The Court will include this aspect in the amount to be established in equity as compensation in this case.

ii) Payment of health contributions

191. The Court notes that in his testimony,[117] Mr. Canales stated that he had been receiving treatment from the State's ESSALUD system as a beneficiary of his wife, who is retired. Thus, Mr. Canales has been receiving health care without such care having been contingent on payments that he would have had to make. On the other hand, according to the information provided by the State and not disputed by the other parties, Law No. 28791 of July 21, 2006 establishes that ESSALUD contributions correspond to active workers. In this respect, the ESSALUD contribution rate is equivalent to 9% of the worker's remuneration or income, that is, the contribution of an active worker. Such contributions are mandatory for the employer who must declare and pay them in full to ESSALUD on a monthly basis, with no deductions being made from the employee's pay.

192. In view of the foregoing elements and the lack of evidence regarding the expenses incurred for the health care of Mr. Canales that have a clear causal relationship with the violations declared in this judgment, the Court will refrain from ordering pecuniary compensation for this item. In relation to Ms. Barriga, her request was not reiterated in the final written arguments of the Inter-American Defenders, nor was sufficient information provided to assess her request, for which reason the Court will not order pecuniary reparation in her favor with respect to health contributions.

iii) Compensation

193. In the instant case, the Court emphasizes that there is a striking difference between the final result of the calculations provided by the representatives of the victims and those of the State regarding the amount of compensation for pecuniary damage. In order to determine why there is such large difference between the calculations submitted by the representatives and by the State, the Secretariat of the Court, through various notes, gave each party several opportunities to refute the criteria used by the opposing party to make the calculation. On this point, the Court considers that the answers submitted by the parties were not sufficiently clear to reach a full consensus as to which calculation should prevail.

194. Consequently, taking into account i) the allegations of the parties with respect to the compensation; ii) the significant difference between the amounts proposed by the State and by the victims, and iii) the complexity of the calculation, the Court orders, in equity, the sum of US$ 350,000 (three hundred and fifty thousand United States dollars) as compensation for each of Mr. Canales and Mr. Castro, and US$ 90,000 (ninety thousand United States dollars) as compensatory damages in favor of Mrs. Barriga. This includes pecuniary damage, non-pecuniary damage, the amount indicated in paragraph 190 and the applicable interest. These amounts shall be paid within one year from notification of this judgment.

E. Costs and expenses

[117] Statement of Mr. Canales Huapaya rendered by affidavit in the proceeding before the Court.

195. Mr. ***Castro*** requested that the State be ordered to pay US$ 70,000.00 (seventy thousand United States dollars) for costs and expenses in the domestic and international courts. He pointed out that this petition was supported by copies of the professional services contracts. However, he explained that "due to the constant changes of housing as a result of [his] financial instability" he lost the receipts proving the payments made to the attorneys.

196. In their pleadings and motions brief, Mr. ***Canales*** **and Ms.** ***Barriga*** did not request payment for expenses incurred during the proceedings.

197. The ***Inter-American Defenders*** requested payment of costs and expenses incurred by the victims and their defense counsel for the processing of the case, including travel expenses incurred by the Inter-American Defenders in their trip to Lima, Peru and the travel costs of the victims and the inter-American defender, Santiago García Berro, to Costa Rica to participate in the public hearing in this case.

198. The State argued that Mr. Castro Ballena's claim was "unacceptable" because he had not substantiated his request, nor had he provided proof of the expenses incurred.

199. This Court notes that Mr. Castro Ballena attached the contracts in which the fees of his attorneys Christian Bruno Águila Grados and the *Asociación Promotora para la Educación en el Perú* (APE Perú) were agreed upon.[118] In the contracts with attorney Águila Grados, it was agreed to pay professional fees in the amount of S/500.00 (five hundred new soles) per month for each month of professional advice during the proceedings before the Inter-American Commission. As of January 1, 2006, the professional fees amounted to S/600.00 (six hundred new soles) per month. In another contract issued on January 1, 2008, fees were agreed for S/900.00 (nine hundred new soles) per month. Regarding the proceedings before the Inter-American Court, Mr. Castro Ballena agreed to pay professional fees to APE Peru in the amount of US$ 15,000.00 (fifteen thousand United States dollars) for all the proceedings before this Court.

200. The Court reiterates that, in accordance with its case law, costs and expenses form part of the concept of reparation, since the efforts made by the victims in order to obtain justice, both at the national and international levels, imply expenditures that must be compensated when the State's international responsibility is declared through a condemnatory judgment. As for the reimbursement of expenses, it is for the Court to prudently assess their scope, which includes the expenses incurred before the authorities of the domestic jurisdiction, as well as those incurred in the course of the proceedings before the inter-American system, taking into account the circumstances of the specific case and the nature of the international jurisdiction of protection of human rights. This assessment may be based on the principle of equity and taking into account the expenses indicated by the parties, provided that their *quantum* is reasonable.[119] As the Court has stated on previous occasions, it is not sufficient to merely forward evidentiary documents; rather, the parties are required to include arguments that relate the evidence to the facts that they

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[118] *Cf.* Contract for provision of legal counseling services dated January 2, 2001, between Christian Bruno Águila Grados, attorney, and José Castro Ballena (evidence file, folios 2542 to 2544), and contract for professional services of January 3, 2014, between the *Asociación Promotora para la Educación en el Perú (APE Peru)* and Mr. Castro Ballena (evidence file, folios 2547 and 2548).

[119] *Cf. Case of Garrido and Baigorria v. Argentina. Reparations and costs*. Judgment of August 27, 1998. Series C No. 39, para. 82, and *Case of Cruz Sánchez et al. v. Peru, supra*, para. 488.

represent and, in the case of alleged financial disbursements, clearly specify the items and their justification.[120]

201. In this case the Court observes that Mr. Castro Ballena did not submit receipts that prove the payments for legal advice related to the contracts attached to his pleadings and motions brief. Likewise, the Court finds that the appraisal of fees in relation to each month of processing the case before the inter-American system is unreasonable in light of the circumstances of this specific case. Furthermore, Mr. Castro Ballena and one of his representatives were beneficiaries of support from the Legal Assistance Fund for their appearance at the public hearing in this case. Nevertheless, the Court assumes that the victims incurred expenses associated with their litigation before the inter-American system. In the case of Mr. Canales and Ms. Barriga, this estimate is made up until the time when two Inter-American Defenders were appointed to represent them. Likewise, it is reasonable to assume that during the years of processing of this case before the Commission, the victims and their representative made financial disbursements. In view of the foregoing and in the absence of proof of these expenses, the Court determines, in equity, that the State must pay the total sum of US$ 5,000.00 (five thousand United States dollars) to each of the victims for the work carried out in the litigation of the case at the national and international levels. This must be paid by the State to each of the victims within six months from the notification of this judgment. The Court considers that, in the proceedings to monitor compliance with this judgment, it may order the State to reimburse the victims or their representatives for reasonable expenses incurred during this procedural stage.

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

202. In an order of August 29, 2014, the President of the Court declared admissible the application made to the Victims' Legal Assistance Fund of the Inter-American Court of Human Rights to cover expenses incurred by the Inter-American Defenders in representing the alleged victims. The President also admitted Mr. Castro Ballena's request to have recourse to the Victims' Legal Assistance Fund. [121]

203. The common interveners also submitted applications for support from the Victims' Legal Assistance Fund to cover certain expenses. In an order of August 29, 2014, the President of the Court admitted the alleged victims' request to have access to the Fund, and granted financial assistance to cover expenses incurred in their representation by the Inter-American Defenders, including the presentation of a maximum of two statements by Mr. Castro Ballena's representative, and for his appearance and that of one of his representatives at the public hearing.

204. On March 13, 2015, a report on expenditures was sent to the State pursuant to Article 5 of the Rules for the Operation of the Fund. The State had an opportunity to submit its observations on the expenditures made in the instant case, which amounted to US$ 15,655.09 (fifteen thousand six hundred and fifty-five United States dollars and nine cents). Peru argued that "there is no evidence of invoices or receipts proving the payment of accommodation and food expenses in the city of San Jose" for seven of the beneficiaries of the Fund.

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[120] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of November 21, 2007. Series C No. 170, para. 275, and *Case of Cruz Sánchez et al. v. Peru, supra*, para. 489.

[121] *Cf. Case of Canales Huapaya et al. v. Peru. Order of the President of the Court.* Victims' Legal Assistance Fund. August 29, 2014. Available at: http://www.corteidh.or.cr/docs/asuntos/huapaya_fv_14.pdf

205. In application of Article 5 of the Rules for the Operation of the Fund, it is incumbent upon the Court to consider whether it is appropriate to order the respondent State to reimburse the Victims' Legal Assistance Fund for the expenses incurred. In view of the violations declared in this judgment, and taking into account the observations of the State, the Court orders the State to reimburse the Fund in the amount of USD$ 15,655.09 (fifteen thousand six hundred and fifty-five United States dollars and nine cents) for the expenses incurred. This amount shall be reimbursed to the Inter-American Court within ninety days from the date of notification of this judgment.

G. Method of compliance with the payments ordered

206. The State shall pay compensation for pecuniary and non-pecuniary damage, and for reimbursement of costs and expenses established in this judgment, directly to the persons indicated herein, within one year of notification of this judgment, in accordance with the following paragraphs.

207. If the beneficiaries should die before they receive the respective compensation, this shall be delivered directly to their heirs, in accordance with the applicable domestic laws.

208. The State shall comply with its monetary obligations by payment in United States dollars, or the equivalent in Peruvian currency, using for the respective calculation the exchange rate in force on the New York Stock Exchange, United States of America, on the day prior to payment.

209. If, for reasons that can be attributed to the beneficiaries of the compensation or their heirs, it is not possible to pay the amounts established within the time frame indicated, the State shall deposit said amounts in their favor, 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 banking law and practice. If the corresponding compensation is not claimed within ten years, the amounts shall be returned to the State with the accrued interest.

210. The amounts established in this judgment as compensation shall be delivered in full to the persons indicated in this judgment, without any deductions arising from possible charges or taxes.

211. If the State should fall into arrears, it shall pay interest on the amount owed corresponding to banking interest on arrears in the Republic of Peru.

XII
OPERATIVE PARAGRAPHS

THEREFORE,

THE COURT

DECIDES:

Unanimously,

1. To dismiss the preliminary objections filed by the State regarding the alleged inclusion of new facts and the inclusion as an alleged victim of Carlos César Canales Trujillo, son of Carlos Alberto Canales Huapaya, pursuant to paragraphs 23 and 32 of this judgment.

DECLARES:

Unanimously, that:

2. The State is responsible for the violation of the rights protected in Articles 8(1) and 25(1) of the American Convention, in relation to the obligations set forth in Articles 1(1) and 2 of the same instrument, to the detriment of the victims Carlos Alberto Canales Huapaya, José Castro Ballena and María Gracia Barriga Oré, pursuant to paragraphs 96 to 109 of this judgment.

3. It is not appropriate to rule on the alleged violation of the right to property, in the terms of the paragraph 114 of this judgment.

4. The State is not responsible for the alleged violation of the right to equality before the law, pursuant to paragraphs 124 to 128 of this judgment.

AND ESTABLISHES

Unanimously, that:

5. This judgment constitutes *per se* a form of reparation.

6. The State shall publish the official summary of this judgment, once, in the Official Gazette and in a newspaper with wide national circulation, within six months of notification of this judgment. In addition, within the same period, the State shall publish the present judgment in full, on an official website of the State for one year, pursuant to paragraph 152 of this judgment.

7. The State shall pay the amounts established in paragraph 194 of this judgment as compensation and to reimburse costs and expenses, as established in paragraph 201, and to reimburse the Victims' Legal Assistance Fund in the amount established in paragraph 205, in the terms of the aforementioned paragraphs and of paragraphs 206 to 211.

8. The State shall, within one year of notification of this judgment, provide the Court with a report on the measures adopted to comply with it.

9. The Court will monitor full compliance with this judgment, in exercise of its authority and in fulfilment of its obligations under the American Convention on Human Rights, and will close this case once the State has complied fully with the measures ordered herein.

Judges Roberto F. Caldas, Alberto Pérez Pérez and Eduardo Ferrer Mac-Gregor Poisot advised the Court of their concurring opinions, which accompany this judgment.

DONE at San José, Costa Rica, on June 24, 2015, in the Spanish language.

IACtHR. *Case of Canales Huapaya et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of June 24, 2015

Humberto Antonio Sierra Porto
President

Roberto F. Caldas

Manuel E. Ventura Robles

Alberto Pérez Pérez

Eduardo Vio Grossi

Eduardo Ferrer Mac-Gregor Poisot

Pablo Saavedra Alessandri
Registrar

So ordered,

Humberto Antonio Sierra Porto
President

Pablo Saavedra Alessandri
Registrar

JOINT CONCURRING OPINION OF JUDGES

ROBERTO F. CALDAS AND EDUARDO FERRER MAC-GREGOR POISOT[1]

CASE OF CANALES HUAPAYA ET AL. V. PERU

JUDGMENT OF JUNE 24, 2015

(Preliminary objections, Merits, Reparations and Costs)

INTRODUCTION

1. We issue this concurring opinion to substantiate the reasons why we disagree with the decision not to include an analysis of the violation of the right to work, in the context of Article 26 of the American Convention on Human Rights, in the judgment delivered by the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court") on June 24, 2015, in the *Case of Canales Huapaya et al. v. Peru* (hereinafter "the judgment").

2. In the instant case, the Court essentially follows the judgment delivered in the case of the *Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru*, on November 24, 2006, in which it declared the international responsibility of the Peruvian State for the violation of the rights to judicial guarantees and judicial protection enshrined in Articles 8(1) and 25 of the American Convention, in relation to the general obligation to respect and guarantee rights and the duty to adopt provisions of domestic law established in Articles 1(1) and 2 thereof. However, we the undersigned consider that another precedent issued three years after that judgment should have been considered: the *Case Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru.* In this judgment, issued on July 1, 2009, the plenary of the Court explicitly stated that Article 26 of the American Convention, which embodies economic, social and cultural rights, was associated with various scenarios of justiciability and that "it is subject to the general obligations contained in Articles 1(1) and 2 of the Convention."

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[1] This Joint Opinion is based on the structure of the arguments regarding the direct justiciability of the right to health developed in the Concurring Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot to the Judgment of the Inter-American Court of Human Rights in the *Case of Suárez Peralta v. Ecuador*, of May 21, 2013. The Vice President of the Inter-American Court, Judge Roberto F. Caldas, considered that the arguments presented by Judge Ferrer Mac-Gregor on that occasion were persuasive for him to promote the evolution of the Court's jurisprudence on this issue and therefore adheres to this position, which is complemented with additional arguments in some segments of this Opinion.

3. Although neither the Commission nor the common intervenors alleged the violation of Article 26 of the American Convention in this case, the violation of the right to work could have been analyzed by the Court within the framework of the *iura novit curia* principle, which is solidly supported by international jurisprudence and allows the Court to study possible violations of conventional norms that have not been alleged in the briefs submitted by the parties, provided that they have had the opportunity to express their respective positions in relation to the supporting facts. In this regard, the Court has used this principle, since its first judgment and on several occasions thereafter,[2] to declare the violation of rights that had not been directly alleged by the parties, but which were derived from the analysis of the facts under dispute - as long as the factual framework of the case is respected - since this principle authorizes the Court to characterize the disputed situation or legal relationship in a different way than the parties did.[3]

4. The Court's jurisprudence has advanced in terms of its indirect protection of economic, social and cultural rights and in connection with other civil and political rights.[4] Nevertheless, in the present case, the Court could have offered arguments that would allow for further development of its case law regarding the direct justiciability of economic, social and cultural rights through a greater clarification of State obligations with respect to such rights in light of the American Convention. This would contribute to a greater recognition and normative effectiveness of such rights. We emphasize that, as various statements have made clear, the application, promotion and protection of economic, social and cultural rights require the same attention and urgent consideration as civil and political rights.[5]

5. In the following paragraphs of this opinion we will refer initially to i) the scope of Article 26 of the American Convention; ii) the interdependence and indivisibility between civil and political rights and economic, social and cultural rights; iii) the systematic interpretation of the American Convention and the Protocol of San Salvador; iv) the right to work as an autonomous right in comparative law and the recognition of its direct justiciability by the High Courts of the region; and v) the scope of the right to work as relevant to the present case.

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[2] By way of example in the following cases, *inter alia*, the Court declared the violation of rights not invoked by the parties, in application of the *iura novit curia* principle: i) in the case of *Velásquez Rodríguez v. Honduras* it declared violation of Article 1(1) of the Convention; ii) in the case of *Usón Ramírez v. Venezuela* it declared the violation of Article 9 of the American Convention; iii) in the case of *Bayarri v. Argentina* it declared the violation of Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture; iv) in the case of *Heliodoro Portugal v. Panama* it declared the violation of Article I of the Convention on Enforced Disappearance, in relation to Article II of said instrument; v) in the case of *Kimel v. Argentina* it declared the violation of Article 9 of the American Convention; vi) in the case of *Bueno Alves* it declared the violation of Article 5(1) of the American Convention to the detriment of the relatives of Mr. Bueno Alves; vii) in the case of the *Ituango Massacres v. Colombia* it declared the violation of Article 11(2) of the Convention, and viii) in the case of the *Sawhoyamaxa Indigenous Community v. Paraguay* it declared the violation of Article 3 of the American Convention.

[3] *Cf. Case of Bueno Alves v. Argentina. Merits, reparations and costs.* Judgment of May 11, 2007. Series C No. 164, para. 70.

[4] In a very few cases, the Court has analyzed the scope of Article 26 of the American Convention, generally limiting itself to interpreting certain regulatory aspects of that conventional provision: *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office"), supra*, paras. 99 to 103; *Case of the Girls Yean and Bosico v. Dominican Republic.* Judgment of September 8, 2005. Series C No. 130, para. 158, and *Case of Five Pensioners v. Peru. Merits, reparations and costs.* Judgment of February 28, 2003, Series C No. 98, paras. 147 and 148; *Case of the Yakye Axa Indigenous Community*, *supra*, para. 163 (in the latter case, the State acknowledged its responsibility for the violation of Article 26, but the Court only included this article in its narrative on the violation of the right to life).

[5] *Cf.* United Nations General Assembly resolution 32/130 of September 16, 1977, paragraph 1(a); Declaration on the Right to Development, General Assembly resolution 41/128 of December 4, 1986, para. 10 of the preamble and art. 6; Limburg Principles of 1986, especially No. 3, and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights of 1997, in particular No. 3.

I. SCOPE OF ARTICLE 26 OF THE AMERICAN CONVENTION

6. Article 26 of the American Convention is the only provision of this treaty that refers to "the rights derived from the economic, social and educational, scientific and cultural standards contained in the Charter of the Organization of American States, as amended by the Buenos Aires Protocol." Furthermore, as noted by the Court in the case of *Acevedo Buendía et al. v. Peru,*[6] Article 26 is included in Part I (Duties of the States and Rights Protected) of the American Convention and, therefore, the economic, social and cultural rights referred to in Article 26 are subject to the general obligations contained in Articles 1(1) and 2 of the American Convention, as are the civil and political rights established in Articles 3 to 25.

7. Article 26 of the Pact of San José provides for the "full realization" of economic, social and cultural rights, without the elements of "progressivity" and "available resources" referred to in this provision being able to be configured as regulatory conditions for the justiciability of these rights. To some extent, they constitute aspects of their implementation in accordance with the particular characteristics of each State. In fact, as noted in the case of *Acevedo Buendía*, cases may arise in which judicial review focuses on alleged regressive measures or improper management of available resources (i.e. judicial review of progressive development).

8. With respect to the rights protected by Article 26 of the American Convention, we note that the terms of the provision indicate that they are those derived from the economic, social, educational, scientific and cultural standards contained in the OAS Charter. These rights can be determined by reference to the American Declaration or other human rights treaties in force in the respective State, as well as their interpretation by international oversight bodies.

9. On the possible integration of the OAS Charter with the American Declaration of the Rights and Duties of Man, it is pertinent to consider Advisory Opinion OC-10/89 "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," of July 14, 1989, especially paragraphs 43 and 45:

> 43. Hence it may be said that by means of an authoritative interpretation, 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.
>
> […]
>
> 45. For the member states of the Organization, the Declaration is the text that defines the human rights referred to in the Charter. Moreover, Articles 1(2)(b) and 20 of the Commission's Statute define the competence of that body with respect to the human rights enunciated in the Declaration, with the result that to this extent the American Declaration is for these States a source of international obligations related to the Charter of the Organization.

10. Likewise, Articles 26 and 29 of the Pact of San José must be linked to the *pro persona* principle. Indeed, according to Article 29 of the American Convention, no provision of said treaty may be interpreted as limiting the enjoyment and exercise of any right or freedom that may be recognized under the laws of any of the States Parties, or under any other convention to which one of the said States is a party, or as excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same

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[6] *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office"), supra*, paras. 16, 17 and 100.

nature may have (such as the Universal Declaration of the Rights of Man) which, like the American Declaration, provides for social rights without distinction from civil and political rights.

11. Applying these criteria in accordance with the *pro persona* principle, the interpretation of Article 26 should not only *not* limit the enjoyment and exercise of the rights provided for in the laws of the States Parties - including their national constitutions - or the rights provided for in other conventions, but those laws and conventions should also be used to ensure the *highest level of protection*. Thus, in order to know what rights are derived from the economic, social, educational, scientific and cultural norms contained in the OAS Charter (in terms of Article 26 of the American Convention), in addition to its text, one could refer to national laws and other international instruments, including the American Declaration (*infra* paras. 31 et seq.)[7].

II. THE INTERDEPENDENCE AND INDIVISIBILITY OF CIVIL AND POLITICAL RIGHTS AND ECONOMIC, SOCIAL AND CULTURAL RIGHTS

12. At the same time, the possibility for the Court to rule on the right to work derives from the "interdependence and indivisibility" existing between civil and political rights with respect to economic, social and cultural rights.[8] Indeed, previously, in the cases of *Acevedo Buendía v. Peru and Suárez Peralta v. Ecuador*, it was stated that:[9]

> 101. […] the Court deems it appropriate to recall the interpendence that exists between civil and political rights and economic, social and cultural rights, since they should be fully understood as human rights, without any rank and enforceable in all the cases before the competent authorities.

13. In addition to establishing "interdependence" among human rights, the Court has endorsed the statement of the European Court of Human Rights on interpretative extensions to the protection of social and economic rights. In the case of *Acevedo Buendía et al. v. Peru*, it stated:[10]

> In this respect, it is appropriate to mention the case law of the European Court on Human Rights that, in the case of Airey, pointed out that:
>
> > The Court is aware that the further realization of social and economic rights is largely dependent on the situation - notably financial - reigning in the State in question. On the other hand, the [European] Convention must be interpreted in the light of present-day conditions and it is designed to safeguard the individual in a real and practical way as regards those areas with which it deals […]. Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights

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[7] On some occasions, the Court itself has used national laws and various international instruments to give greater content and context to civil rights through the interpretation of Article 29(b) of the American Convention. For example, Article 44 of the Constitution of Colombia (fundamental rights of children) was used, together with various international instruments and the American Convention, in the *Case of the Mapiripán Massacre v. Colombia*.

[8] Paragraph 5 of the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on June 25, 1993, stated that: "All human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis."

[9] *Case Suárez Peralta v. Ecuador*, para. 131 and *Case Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office"), supra*, para. 101.

[10] *Idem.* See also, United Nations, Economic and Social Council, Committee on Economic, Social and Cultural Rights. General Comment No. 9, E/C.12/1998/24, December 3, 1998, para. 10, and ECHR. *Sidabras and Dziautas v. Lithuania*. Nos. 55480/00 and 59330/0. Section two. Judgment of July 27, 2004, para. 47.

> should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.[11]

14. In this order of ideas, the interdependence of civil and political rights in relation to economic, social and cultural rights, addressed in the case of *Acevedo Buendía et al. v. Peru*, examined the interpretative scope of Article 26 of the American Convention, with respect to a right (social security) not expressly recognized as justiciable in Article 19(6) of the Protocol of San Salvador. The following is a more detailed analysis of this relationship between the Convention and the said Protocol.

III. SYSTEMATIC INTERPRETATION OF THE AMERICAN CONVENTION AND THE PROTOCOL OF SAN SALVADOR

15. We will now analyze how it can be understood that the Protocol of San Salvador does not constitute an obstacle to interpreting Article 26 as a scenario for arguing the direct justiciability of economic, social and cultural rights. We will also analyze the way in which the Protocol of San Salvador can provide a reference point for determining the content of the rights that should be derived from Article 26 of the Convention.

16. In this regard, it should be noted that in the case of *Acevedo Buendía et al. v. Peru*, the Court established an initial position on this matter, when it rejected a preliminary objection of lack of jurisdiction *ratione materiae* with respect to the right to social security, which had been formulated in these terms:[12]

> […] the State alleged that the right to social security falls outside of the Court's competence *ratione materiae* since such right is not enshrined in the American Convention and it is not even one of the two rights (right to organize trade unions and right to education) that would be actionable before the Inter-American system, in accordance with the provisions of Article 19(6) of the Protocol of San Salvador.

17. The Court, without mentioning the Protocol of San Salvador to determine whether it had jurisdiction over it, considering that it was not necessary since no direct violation of said international instrument was alleged, dismissed the State's preliminary objection in said case by considering, on the one hand, that like any other organ with jurisdictional functions, the Inter-American Court has the power inherent to its attributions to determine the scope of its own jurisdiction (*compétence de la compétence*); and, on the other hand, that "the Court must take into account that the instruments of recognition of the optional clause of compulsory jurisdiction (Article 62(1) of the Convention) presuppose the acceptance, by the by the States that have recognized the Court's authority, of its right to settle *any dispute relating to its jurisdiction*.[13] Moreover, the Court has previously noted that the broad terms in which the Convention is drafted indicate that the Court exercises "*full jurisdiction over all its articles and provisions.*"[14] In dismissing this preliminary objection and considering the

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[11] ECHR. *Airey v. Ireland*. No. 6289/73. Judgment of October 9, 1979, para. 26.

[12] *Case of Acevedo Buendía et al. v. Peru ("Discharged and Retired Employees of the Comptroller's Office"), supra*, para. 12.

[13] *Cf. Case of Ivcher Bronstein v. Peru*. *Jurisdiction.* Judgment of September 24, 1999. Series C No. 54, paras. 32 and 34; *Case of Heliodoro Portugal v. Panama. Preliminary objections, Merits, reparations and costs*. Judgment of August 12, 2008. Series C No. 186, para. 23, and *Case of García Prieto. Preliminary objection, Merits, reparations and costs*. Judgment of November 20, 2007. Series C No. 168, para. 38.

[14] *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary objections*. Judgment of June 26, 1987. Series C No. 1, para. 29, and *Case of the 19 Merchants v. Colombia. Preliminary objection*. Judgment of June 12, 2002. Series C No. 93, para. 27.

merits of the case, the Court considered its competence to hear and determine (including the power to declare a violation of) Article 26 of the Pact of San José.

18. With respect to the apparent interpretative conflict regarding the scope to be given to Article 26 of the Pact of San José in relation to Article 19(6) of the Protocol of San Salvador, which limits the justiciability of economic, social and cultural rights to only certain rights, it is incumbent upon the Court to update the regulatory meaning of Article 26 of the Convention. On this point, the Court emphasizes that the Protocol of San Salvador does not establish any provision intended to limit the scope of the American Convention. In interpreting the Convention and the Protocol of San Salvador, a systematic interpretation of both treaties must be made, taking into account their purpose.

19. On this matter, the Vienna Convention requires a good faith interpretation of the terms of Article 26 of the American Convention. This good faith interpretation implies the recognition that the American Convention makes no distinction when stating that its jurisdiction covers all the rights established between Articles 3 and 26 of the Convention. Furthermore, Article 4 of the Protocol of San Salvador establishes that no right recognized or in force in a State may be restricted or infringed by virtue of international instruments, with the excuse that the aforementioned Protocol does not recognize it or recognizes it to a lesser degree. Finally, the Vienna Convention states that an interpretation should not lead to a manifestly absurd or irrational result. In this sense, the notion that the Protocol of San Salvador limits the scope of the Convention would result in the unreasonable conclusion that the American Convention could have certain effects among the States Parties to the Protocol of San Salvador and, at the same time, have a different effect for States that are not parties to said Protocol,[15] limiting the justiciability of economic, social and cultural rights only to States Parties to the Protocol.

20. As can be appreciated, what matters is not the subjective intention of the delegates of the States at the time of the San José Conference or during the discussion of the Protocol of San Salvador (*mens legislatoris*), but the intention objectified in the text of the American Convention (*mens legis*), taking into account that the duty of the interpreter is to update the regulatory meaning of the international instrument. Moreover, using a historical interpretation, based on the hypothetical intention that the delegates who adopted the Protocol of San Salvador would have had with respect to the American Convention, one cannot disregard the explicit content of that Convention. On the contrary, as the Court pointed out in the case of *Acevedo Buendía v. Peru*, when the Convention was signed, there was a strong tendency to recognize obligations in relation to economic, social and cultural rights:

> the Court recalls that the content of Article 26 of the Convention was the subject of an intense debate in the preparatory works of the Convention, as a result of the States Parties' interest in assigning a "direct reference" to economic, social and cultural "rights;" "a provision establishing a certain legal obligation […] in its compliance and application;"[16] as well as "the [respective] mechanisms [for its] promotion and protection,"[17] 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,

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[15] Only 15 States have ratified the Protocol of San Salvador. Source: http://www.cidh.oas.org/Basicos/basicos4.htm.

[16] *Case of Acevedo Buendía et al. v. Peru*, citing: Specialized Inter-American Conference on Human Rights (San José, Costa Rica, November 7-22, 1969). Minutes and Documents. Observations of the Government of Chile to the Draft of the Inter-American Convention on Human Rights, pp. 42-43.

[17] *Case of Acevedo Buendía et al. v. Peru*, citing: Specialized Inter-American Conference on Human Rights, Intervention of the Delegate of the Government of Chile in the debate on the Draft of the Inter-American Convention on Human Rights, during the Fourteenth Session of the "I" Commission, p. 268.

> the conclusions reached at the Buenos Aires Conference."[18] The review of the preparatory works of the Convention also proves that the main observations upon which the approval of the Convention was based, placed special emphasis on "granting the economic, social and cultural rights the maximum protection compatible with the peculiar conditions to most of the American States."[19] Thus, as part of the debate in the preparatory works, it was also proposed "to materialize the exercise of [said rights] by means of the activity of the courts."[20]

21. That said, we note that no provision of the Protocol of San Salvador makes any reference to the scope of the general obligations referred to in Articles 1(1) and 2 of the American Convention. If the Pact of San José is not being expressly modified, the corresponding interpretation must be the least restrictive with respect to its scope. In this regard, it is important to emphasize that the American Convention itself provides a specific procedure for its amendment.[21] Thus, if the Protocol of San Salvador intended to repeal or modify the scope of Article 26, this should have been expressly and unequivocally established. The clear wording of Article 19(6) of the Protocol does not allow any inference to be drawn regarding the literal relationship of Article 26 with Articles 1(1) and 2 of the American Convention.

22. We believe that in the face of the doubts that may arise in this matter - given the coexistence of various possible interpretations of the relationship between the American Convention and the Protocol of San Salvador - the principle of the most favorable interpretation should be applied not only in relation to substantive aspects of the Convention but also to procedural aspects related to the attribution of jurisdiction, provided that there is a specific and genuine conflict of interpretation. If the Protocol of San Salvador had expressly stated that Article 26 was to be understood as no longer in force, the interpreter would not be able to reach a different conclusion. However, there is no reference in the Protocol to diminishing or limiting the scope of the American Convention.

23. On the contrary, we emphasize that one of the provisions of the Protocol states that this instrument should not be interpreted in a manner that disregards other rights in force in the States Parties, which includes the rights derived from Article 26 within the framework of the American Convention.[22] Likewise, in accordance with Article 29(b) of the American Convention, a restrictive interpretation of the rights cannot be made.[23]

24. It is therefore appropriate to apply a systematic, teleological, evolving and more favorable interpretation so as to promote the best protection of the human being and achieve the object and purpose of Article 26 of the American Convention with respect to the need to effectively guarantee economic, social and cultural rights. In an interpretative conflict, it is appropriate to give precedence to a systematic interpretation of the relevant norms and to

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[18] *Case of Acevedo Buendía et al. v. Peru*, citing: Specialized Inter-American Conference on Human Rights, Observations of the Government of Uruguay to the Draft of the Inter-American Convention on Human Rights, p. 37.

[19] *Case of Acevedo Buendía et al. v. Peru*, citing: Specialized Inter-American Conference on Human Rights, Observations and Amendments of the Government of Brazil to the Draft of the Inter-American Convention on Human Rights, p. 125.

[20] *Case of Acevedo Buendía et al. v. Peru*, citing: Specialized Inter-American Conference on Human Rights, Intervention of the Delegate of the Government of Guatemala to the Draft of the Inter-American Convention on Human Rights, during the Fourteenth Session of the "I" Commission, pp. 268-269.

[21] American 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."

[22] Protocol of San Salvador: "Article 4. *Inadmissibility of Restrictions*. A right which is recognized or in effect in a State by virtue of its internal legislation or international conventions may not be restricted or curtailed on the pretext that this Protocol does not recognize the right or recognizes it to a lesser degree."

[23] *Cf. Case of the "Mapiripán Massacre" v. Colombia, supra*, para. 188.

give priority to those arguments that ensure the greatest possible useful effect (*effet utile)* to the inter-American norms as a whole, as the Court has been doing with respect to civil and political rights.

25. In this regard, the Court has pointed out on other occasions[24] that human rights treaties are living instruments whose interpretation must accompany the evolution of the times and current living conditions. It has also held that this 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 on the Law of Treaties.[25] In carrying out an evolutive interpretation, the Court has placed special emphasis on comparative law, and for this reason has used national norms[26]or the jurisprudence of domestic courts[27] when analyzing specific disputes in contentious cases.

26. At the same time, it is possible to contrast other arguments on the systematic interpretation between the American Convention and the Protocol of San Salvador in light of the relationship between Articles 26, 31 and 77 of the Pact of San José. Some authors have pointed out that if social rights were already included in the American Convention, the States Parties would have preferred to amend the Convention to complement or expand the scope of those rights. According to this position, the ordinary meaning of the term "amendment" denotes the strengthening or revision of a text. By contrast, the notion of a "protocol," in light of Article 77 of the American Convention, would imply the inclusion of something that did not exist previously. Consequently, according to these positions, the literal meaning of the terms leads us to the conclusion that Article 26 of the American Convention cannot contain the rights included in the Protocol.[28]

27. We consider that a different interpretation of the relationship between "treaties" and their "protocols" in international human rights law is possible. Indeed, as can be seen in other Additional Protocols to human rights treaties, it is possible to find scenarios of complementary regulation to the subject matter developed in the respective treaty.[29]

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[24] *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. 114, and *Case of Atala Riffo and Daughters v. Chile*. *Merits, reparations and costs.* Judgment of February 24, 2012. Series C No. 239, para. 83.

[25] *Cf. The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law.* Advisory Opinion OC-16/99, *supra*, para. 114, and *Case of Atala Riffo and Daughters, supra*, para. 83.

[26] In the *Case of Kawas Fernández v. Honduras. Merits, reparations and costs.* Judgment of April 3, 2009. Series C No. 196, para. 148, the Court noted that: "a considerable number of States Parties to the American Convention have adopted constitutional provisions expressly recognizing the right to a healthy enviroment."

[27] In the *Case of Heliodoro Portugal v. Panama, supra*, and the *Case of Tiu Tojín v. Guatemala. Merits, reparations and costs.* Judgment of November 26, 2008. Series C No. 190, the Court took into account the judgments of the domestic courts of Bolivia, Colombia, Mexico, Panama, Peru, and Venezuela, which ruled that crimes of a continuing or permanent nature such as forced disappearance, are not subject to the statute of limitations. Also, in the *Case of Anzualdo Castro v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of September 22, 2009. Series C No. 202, the Court used the rulings of the constitutional courts of various American countries to support its definition of the concept of forced disappearance. Other examples are the *Case of Atala Riffo and Daughters, supra, and* the *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*. *Merits and reparations*. Judgment of June 27, 2012. Series C No. 245.

[28] Ruiz-Chiriboga, Oswaldo (2013). The American Convention and the Protocol of San Salvador: Two intertwined treaties non-enforceability of economic, social and cultural rights in the Inter-American System. *Netherlands Quarterly of Human Rights*. Vol. 31 (2). pp. 159-156.

[29] Among other examples, it is worth highlighting the relationship between Article 14 of the European Convention on Human Rights, which prohibits discrimination in the application of the rights recognized by the Convention, and Protocol No. 12 of 2000, which introduced a prohibition of discrimination in the application of any legally recognized right. This is an example where the respective protocol focuses on increasing or regulating more broadly the level of protection established previously in the Convention. Likewise, the protocol on the prohibition of

28. On this point it should be emphasized that Article 31 of the American Convention recognizes the possibility of including other rights in the Convention, either by means of amendments or additional protocols. The text of the Convention is clear in pointing out that the main difference between these two mechanisms is the procedure for their entry into force. Indeed, a more complex approval procedure is envisaged for the adoption of amendments, since these require the ratification of two-thirds of the States Parties, whereas the protocols enter into force with ratification by a smaller number of States. However, the interpretative panorama is broader with respect to the substantive differences between these mechanisms. The Convention does not limit the scope of the amendments to strengthening something that is already included in said instrument, so that they could be used to add new rights or make adjustments to the institutional designs provided for therein. It is true that, unlike the amendments, the article referring to protocols does establish that these could be used to "progressively include other rights and freedoms in the system of protection thereof." However, this does not imply that amendments cannot serve this purpose. Nor can it be inferred that protocols are only limited to establishing new rights; they may also complement aspects already provided for in the Convention. The central difference between the two mechanisms is the procedure for their approval. In addition, the protocol would not permit the curtailment of the rights provided for in the Convention, which would require an amendment, in the terms previously mentioned.

29. Similarly, the fact that a protocol is issued does not necessarily mean that the rights and obligations included therein are not recognized in the Convention, but rather that it may serve to develop more thoroughly some of the articles contained in that instrument. For example, in the inter-American system, Article 15 of the Protocol of San Salvador develops the right to the establishment and protection of the family, a right already recognized in Article 17 of the Convention. Article 16 of the Protocol of San Salvador develops the "right of the child," a right already recognized in Article 19 of the Convention. Another example is the Protocol to Abolish the Death Penalty, which does not create a new right because Article 4(3) of the American Convention already establishes that "the death penalty shall not be reestablished in States that have abolished it."

30. In sum, it is clear that the Court could not declare the violation of the right to work in the context of the Protocol of San Salvador because this is evident from the wording of Article 19(6) thereof. However, it is possible to understand the Protocol of San Salvador as one of the interpretative references on the scope of the right to work protected by Article 26 of the American Convention. The Additional Protocol, in light of the *corpus juris* of human rights, clarifies the content of the obligations to respect and guarantee this right. In other words, the Protocol of San Salvador offers *guidance* on the application of Article 26 in conjunction with the obligations established in Articles 1(1) and 2 of the Pact of San José.[30] This, within the

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imprisonment for debt (No. 12) can be understood as an extension of the areas of protection of personal liberty, the protocols on the abolition of the death penalty (Nos. 6 and 13) can be understood as a development of the right to life, the protocols on "procedural safeguards relating to the expulsion of aliens" (Article 1 of Protocol No. 7) and the "right not to be tried or punished twice" (Article 4 of Protocol No. 7) are clearly associated with the guarantees of due process previously provided for in the Convention. It is difficult to argue that these areas of regulation focus on rights that are totally autonomous from the rights initially established in the Convention. On the other hand, additional procedural protocols to both the European Convention and the International Covenant on Civil and Political Rights have regulated procedural aspects of how the possibility of submitting complaints to these bodies operates. This allows us to understand such regulations as extensions or developments of the design of access to international justice established preliminarily in the respective treaties.

[30] The possibility of using the Protocol of San Salvador to define the scope of protection of the right to work contained in Article 26 of the American Convention would not be unusual in the jurisprudence of the Court, nor is the use of other international sources or the OAS Progress Indicators for measuring the rights contemplated in the same Protocol, to specify different obligations of the State in this matter. Indeed, this exercise was carried out by the Court

framework of the constant practice of this Court of using different international instruments and sources beyond the Pact of San José to define the contents and even expand the scope of the rights established in the American Convention and to specify the obligations of the States, inasmuch as said international instruments and sources form part of a very comprehensive international *corpus juris* on the matter, also using the Protocol of San Salvador.

31. Taking into account the above, we consider that the Court had jurisdiction to examine the right to work on the basis of Article 26 (Progressive Development) of the Pact of San José, in relation to Articles 1(1) (Obligation to Respect Rights) and 2 (Duty to Adopt Provisions of Domestic Law), as well as Article 29 (Rules of Interpretation)[31] of the American Convention itself. Furthermore, considering:

a) Article 45(b) of the Charter of the Organization of American States, which states that:

"Work is a right and a social duty, it gives dignity to the one who performs it, and it should be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working."

b) Article XIV of the American Declaration of the Rights and Duties of Man, which states:

Article XIV: "*Every person has the right to work, under proper conditions*, and to follow his vocation freely, insofar as existing conditions of employment permit. Every person who works has the right to receive such remuneration as will, in proportion to his capacity and skill, assure him a standard of living suitable for himself and for his family."

c) Article 23 of the Universal Declaration of Human Rights:

"Article 23. *Everyone has the right to work*, to free choice of employment, to just and favorable conditions of work and to protection against unemployment. Everyone, without any discrimination, has the right to equal pay for equal work. Everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity, and

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in the following cases: *Juvenile Reeducation Institute v. Paraguay* (to define the scope of Article 19 of the Pact of San José); *Yakye Axa Community v. Paraguay* (interpretation of Article 4 of the American Convention in light of the international *corpus iuris* on the special protection required by members of indigenous communities); *Xákmok Kásek v. Paraguay*; *Kichwa Indigenous People of Sarayaku v. Ecuador* (interpretation of the right to prior, free and informed consultation of indigenous and tribal communities and peoples in the recognition of the rights to one's own culture or cultural identity, recognized in the ILO Convention 169); *Chitay Nech v. Guatemala* (right to cultural life of indigenous children in light of the interpretation of Article 30 of the Convention on the Rights of the Child and observations of its Committee); *the Dos Erres Massacre v. Guatemala* (right of every person to receive protection against arbitrary or illegal interference in his family as part of the right to the protection of the family and of the child); *Gelman v. Uruguay* (right to identity– which is not expressly contemplated in the American Convention-); *Massacres of El Mozote and nearby places v. El Salvador* (right to property in relation to Articles 13 and 14 of the Additional Protocol II to the Geneva Conventions of 1949 relating to the Protection of Victims of Non-International Armed Conflicts of June 8, 1977, *Santo Domingo Massacre v. Colombia* (Article 21 in light of Rule 7 of customary international humanitarian law, regarding the distinction between civilian objects and military objectives and Article 4(2)(g) of Protocol II, regarding the act of looting).

[31] American Convention: "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."

supplemented, if necessary, by other means of social protection. Everyone has the right to form and to join trade unions for the protection of his interests.

It should be emphasized that these two declarations have a special interpretative value pursuant to Article 29(d)[32] of the Pact of San José.

d) Other international instruments and sources that provide content, definition and scope in relation to the right to work —as the Court has done with respect to civil and political rights—[33] such as Articles 6 of the Additional Protocol to the American Convention on Economic, Social and Cultural Rights:

"Article 6. *Everyone has the right to work*, which includes the opportunity to secure the means for living a dignified and decent existence by performing a freely elected or accepted lawful activity. The States Parties undertake to adopt measures that will make the right to work fully effective, especially with regard to the achievement of full employment, vocational guidance, and the development of technical and vocational training projects, in particular those directed at the disabled. The States Parties also undertake to implement and strengthen programs that help to ensure suitable family care, so that women may enjoy a real opportunity to exercise the right to work."

e) Article 8 of the Social Charter of the Americas, adopted by the OAS General Assembly on June 4, 2012, in Cochabamba, Bolivia:

"Article 8. The promotion of decent work, the fight against unemployment and underemployment, as well as addressing the challenges of informal labor are essential elements for achieving economic development with equity.

Respect for workers' rights, equal employment opportunities, and improved working conditions are essential to attaining prosperity. Cooperation and social dialogue among government representatives, workers, employers, and other stakeholders promote good governance and a stable economy.

Observance of the International Labor Organization Declaration on Fundamental Principles and Rights at Work and its Follow-Up, adopted in 1998, helps to foster a quality workforce that drives economic and social progress and provides a basis for sustained and balanced growth and for social justice for the peoples of the Hemisphere."

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[32] It expressly states that the effect produced by the "American Declaration" and "other international acts of the same nature" cannot be limited.

[33] For example, in the *Case of the Mapiripán Massacre v. Colombia*. Judgment of September 15, 2005. Series C No. 134, para. 153, the Court established: "The content and scope of Article 19 of the American Convention must be specified, in cases such as the instant one, taking into account the pertinent provisions of the Convention on the Rights of the Child, especially Articles 6, 37, 38 and 39, and of Protocol II to the Geneva Conventions, as these instruments and the American Convention are part of a very comprehensive international corpus juris for the protection of children, which the States must respect."

Another example is the *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, reparations and costs*. Judgment of August 31, 2001, Series C No. 79, paras. 147 and 148. The latter states: "Through an evolutionary interpretation of international instruments for the protection of human rights, taking into account applicable norms of interpretation and pursuant to article 29(b) of the Convention - which precludes a restrictive interpretation of rights- it is the opinion of this Court that article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property, which is also recognized by the Constitution of Nicaragua."

In the *Case of Gelman v. Uruguay*. *Merits and reparations*. Judgment of February 24, 2011, Series C No.221, para. 121, the Court established that: "Maria Macarena Gelman, had the right to special measures of protection, which under Article 19 of the Convention corresponds to the family, society, and the State. Therefore, the rights recognized in Articles 3, 17, 18, and 20 of the Convention should be interpreted, in consideration of the *corpus juris* of the rights of the child and, in particular, in the specific circumstances of the present case, in harmony with other provisions that affect children, particularly Articles 7, 8, 9, 11, 16, and 18 of the Convention on the Rights of the Child."

f) Article 6 of the International Covenant on Economic, Social and Cultural Rights:

"Article 6. 1. The States Parties to the present Covenant recognize *the right to work*, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right. 2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual."

g) Article 11 of the Convention on the Elimination of All Forms of Discrimination Against Women:

"Article 11. 1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights […]."

h) Article 32(1) of the Convention on the Rights of the Child:

"Article 32 1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development. 2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular: (a) Provide for a minimum age or minimum ages for admission to employment; (b) Provide for appropriate regulation of the hours and conditions of employment; (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article."

i) Among other international instruments[34] and sources[35]- including national ones under Article 29(b)[36] of the American Convention,[37] as explained below.

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[34] For example, the Convention on the protection of migrant workers and their families: "Article 25(1) Migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration and: a) Other conditions of work, that is to say, overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of the employment relationship and any other conditions of work which, according to national law and practice, are covered by these terms; b) Other terms of employment, that is to say, minimum age of employment, restriction on work and any other matters which, according to national law and practice, are considered a term of employment."

[35] For instance, the recommendations and general comments of the different Committees. Especially relevant to the right to work is General Comment No.18 of the Committee on Economic, Social and Cultural Rights, which interprets Article 6 of the International Covenant on Economic, Social and Cultural Rights on "the Right to Work." U.N. Doc. E/C.12/GC/18 (2006), stating that: **"**The right to work is a fundamental right, recognized in several international legal instruments. […]The right to work is essential for realizing other human rights and forms an inseparable and inherent part of human dignity. Every individual has the right to be able to work, allowing him/her to live in dignity. The right to work contributes at the same time to the survival of the individual and to that of his/her family, and insofar as work is freely chosen or accepted, to his/her development and recognition within the community."

[36] American Convention: "Article 29 (b). No provision of this Convention shall be interpreted as: restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party."

[37] Most of the national constitutions of the countries that have signed the Pact of San José regulate the protection of the right to work explicitly, implicitly with other precepts or through the incorporation of international treaties. It should also be noted that the Court has used the provisions of national Constitutions to grant certain contents to civil rights, for example, "in application of Article 29 of the Convention, the provisions of Article 44 of the

IV. THE RIGHT TO WORK AS AN AUTONOMOUS RIGHT IN COMPARATIVE LAW AND THE RECOGNITION OF ITS DIRECT JUSTICIABILITY BY HIGH COURTS IN THE REGION

32. In order to delve deeper into the direct justiciability of the right to work, it is particularly useful to carry out an evolutionary interpretation of the scope of the rights enshrined in Article 26 of the American Convention. In this regard, the developments in various constitutions of the region and the practice of various national courts, within the framework of their own constitutional norms, provide important examples of analysis based on the obligation to respect and guarantee the right to work and the use of the corpus juris on international obligations in relation to the right to work to promote direct judicial protection of this right.

33. Among the constitutional norms of the States Parties to the American Convention that refer in some way to the protection of the right to work, are the following: Argentina (art. 14 bis),[38] Bolivia (art. 46 and 48),[39] Brazil (art. 6),[40] Colombia (art. 25),[41] Costa Rica (art. 56),[42] Chile (art. 19),[43] Ecuador (art. 33),[44] El Salvador (art. 37 and 38),[45] Guatemala (art. 101),[46]

Constitution of the Republic of Colombia" (fundamental rights of the child) are considerable. *Case of the Mapiripán Massacre, supra*, para. 153.

[38] "Article 14 bis. *Labor in its several forms shall be protected by law*, which shall ensure to workers: dignified and equitable working conditions;[…] equal pay for equal work; […] protection against arbitrary dismissal; stability of the civil servant […]."

[39] "Article 46. I. *Every person has the following rights*: 1. *To dignified work*, with industrial and occupational health and safety, without discrimination, and with a fair, equitable and satisfactory remuneration or salary that assures a dignified existence for the worker and his or her family. 2. To a stable source of work under equitable and satisfactory conditions."

[40] Art. 6. Education, health, nutrition, *labor*, housing, transport, leisure, security, social security, protection of motherhood and childhood and assistance to the destitute, are social rights, as set forth in this Constitution.

[41] "Article 25. *Work is a right* and a social obligation and enjoys, in all its forms, the special protection of the State. *Every individual is entitled to a job under dignified and equitable conditions.*"

[42] "Article 56. *Work is a right of the individual and an obligation toward society*. The State must ensure that everyone has an honest and useful occupation, duly remunerated, and because of this to impede the establishment of conditions that in some form diminish the freedom or the dignity of man or degrade his work to the condition of simple merchandise […]".

[43] "Article 19. The Constitution assures to all persons: 16. *Freedom to work and its protection. Any person has the right to freely contract [for] and to the free choice [of] work, with a just compensation*."

[44] "Article 33. *Work is a right and a social duty*, as well as an economic right, source of personal fulfillment and the basis for the economy. The State shall guarantee full respect for the dignity of working persons, a decent life, fair pay and retribution, and performance of a healthy job that is freely chosen and accepted."

[45] "Article 37. *Labor is a social function; it enjoys the protection of the State*, and it is not regarded an article of commerce. The State shall employ all resources that are in its reach to provide employment to manual or intellectual workers, and to ensure him and his family the economic conditions for a dignified existence. In the same form, it shall promote the work and the employment of people with physical, mental or social limitations or disabilities."

"Article 38. Labor shall be regulated by a Code which shall have the principal objective of harmonizing the relations between employers and workers, establishing their rights and obligations. It shall be based on general principles that tend toward the improvement of the living conditions of workers […]."

[46] "Article 101. *Right to work*. Work is a right and a social obligation of the person. The labor regime of the country must be organized in accordance with the principles of social justice."

Haiti (art. 35),[47] Honduras (arts. 127 and 129),[48] Mexico (art. 123),[49] Nicaragua (arts. 57 and 80),[50] Panama (art. 64),[51] Paraguay (art. 86),[52] Peru (art. 2),[53] Dominican Republic (art. 62),[54] Suriname (art. 4),[55] and Uruguay (art.36).[56] The Venezuelan Constitution also refers to the protection of the right to work (art. 87).[57]

34. These norms have been enforced on many occasions by the highest national courts, including through "direct" protection and using treaties and various international sources. In addition, several examples in comparative law illustrate the direct justiciability of the right to work. Below are some that are related to the right to work issues relevant to this case.

35. The Supreme Court of Justice of Argentina has pointed out, with respect to the content of the right to work in the Constitution, that: "Article 14 *bis* of the National Constitution, a norm that has no other purpose than to make all working men and women subjects of preferential constitutional protection [contemplates] a protective principle: 'Work in its various forms shall enjoy the protection of the laws', and [these laws] 'shall assure the

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47 "Article 35. Freedom to work is guaranteed; every citizen has the obligation to engage in work of his choice to meet his own and his family's needs, and to cooperate with the State in the establishment of a social security system."

48 "Article 127. *Every person has the right to work,* to freely choose his occupation and to give it up, to equitable and satisfactory conditions of work and to protection against unemployment."

"Article 129. The law guarantees the stability of workers in their jobs, in accordance with the characteristics of the industries and professions and the just causes for dismissal. When an unjustified dismissal occurs and the respective decision is final, the worker shall have the right, at his option, to remuneration in the form of wages lost as damages, and to the legal and contractual indemnities provided for: or to be reinstated to work with the recognition of wages lost, as damages."

49 "Article 123. *Every person has the right to have a decent and socially useful job*. Therefore, job creation and social organization of work shall be encouraged according to the law."

50 "Article 57. *Nicaraguans have the right to work* in accordance with their human nature."

"Article 80. *Work is a right and a social responsibility*. The labor of Nicaraguans is the fundamental means to satisfy the needs of society and of individuals, and is the source of wealth and prosperity of the nation. The State shall strive for full and productive employment of all Nicaraguans under conditions that guarantee the fundamental rights of the person."

51 "Article 64. *Work is a right and duty of the individual* and accordingly the State is obliged to devise economic policies to promote full employment, and to ensure to every workman the necessary conditions for a decent existence."

52 "Article 86. *All the inhabitants of the Republic have the right to a legal job*, freely chosen and to realize it in dignified and just conditions. The law will protect labor in all its forms and the rights that it grants to the workers are non-renounceable."

53 "Article 2. Every person has the right: […] 15. *[to] work freely*, in accordance with the law."

54 "Article 62. *Work is a right, a duty, and a social function* that is exercised with the protection and assistance of the State. It is an essential objective of the State to promote dignified and paid employment. The public powers shall promote dialogue and agreement between workers, employers, and the State […]."

55 "Article 4. The concern of the State is aimed at: […] c. Sufficient employment under the guarantee of freedom and justice."

56 "Article 36. *Every person may engage in labor*, farming, industry, commerce, a profession, or any other lawful activity, save for the limitations imposed by general interest which the law may enact."

57 "Article 87. *All persons have the right and duty to work*. The State guarantees the adoption of the necessary measures so that every person shall be able to obtain productive work providing him or her with a dignified and decorous living and guaranteeing him or her the full exercise of this right. It is an objective of the State to promote employment. Measures aimed at guaranteeing the exercise of the labor rights of self-employed persons shall be adopted by law. Freedom to work shall be subject only to such restrictions as may be established by law."

worker: dignified and equitable conditions of work'."[58] With regard to the integration of international human rights law into the content of the right to work, the Supreme Court of Argentina established that,

> "[t]he constitutional mandate of [Article 14.bis] has been strengthened and enhanced by the unique protection recognized to all workers in international human rights texts which, since 1994, have constitutional rank […]. The International Covenant on Economic, Social and Cultural Rights (ICESCR) is quite conclusive in this regard, since Article 7 of the Covenant establishes that: "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: [...] ii) A decent living for themselves and their families [...]; b) safe and healthy working conditions." […] Moreover, the special protection of child workers, clearly provided for in Article 32 of the Convention on the Rights of the Child and, in general, in Article 19 of the American Convention on Human Rights, cannot be overlooked.[59]

36. For its part, the Constitutional Chamber of the Supreme Court of Justice of El Salvador has considered that the right to work is a manifestation of the right to liberty and, as such, "said liberty cannot be arbitrarily determined or conditioned, either by the State or by any private individual."[60] The Chamber has recognized the interrelation of human rights by establishing a link between the right to work and the individual right to liberty. It has also included job security within this relationship by establishing that "a violation of job security implies in itself a violation of the exercise of the right to work enjoyed by its holder." [61] Moreover, according to the Constitutional Chamber of El Salvador, job security, in addition to being a human right in itself, is closely related to other human rights recognized as fundamental. Specifically, the Chamber has defined the job security of public employees as "the right to retain a job or employment and [that] such security is inevitably relative, since the employee does not have the right to complete irremovability, but only the full right to retain his position without time limitation, provided that the following factors concur: that the position remains available; that the employee does not lose his or her physical or mental capacity to perform the work; that the work is performed efficiently; that no serious misconduct is committed which the law considers a grounds for dismissal; that the institution for which the service is rendered still exists; and that the position is not one that requires trust, either personal or political." [62]

37. Regarding the specific content of the right to work that contemplates the need to ensure that termination of the employment relationship does not violate the rights of workers, the Constitutional Court of Colombia has held that the employer's power to unilaterally terminate the work contract cannot be absolute or abusive; thus, the termination of the employment relationship must be fair, reasonable, proportionate and must respect the worker's right of defense.[63] Similarly, the Constitutional Court of Colombia has established that the unilateral termination of the employment contract by the employer must be carried out in accordance with a minimum due process, which includes the disclosure to the worker of the specific

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[58] Supreme Court of Justice of the Nation of Argentina, *Aquino, Isacio vs. Cargo Servicios Industriales S. A*. s/ accidents ley 9688, Considering paragraph 7, September 21, 2004.

[59] Supreme Court of Justice of the Nation of Argentina, *Aquino, Isacio vs. Cargo Servicios Industriales S. A*. s/ accidents ley 9688, Considering paragraph 7, September 21, 2004.

[60] Judgment of 30-IV-2002, Constitutional Court, Amparo proceeding 232-2001.

[61] Constitutional Court, Action of Unconstitutionality 3-93.

[62] Judgment of 30-IV-2002, Constitutional Chamber, Amparo proceeding 232-2001.

[63] Constitutional Court of Colombia, Judgments SU-667 of 1998.

reasons why he/she will be dismissed and the opportunity to contest the accusations made, as a guarantee of the rights of workers.[64]

38. Likewise, the Constitutional Chamber of the Supreme Court of Costa Rica has developed elements that must be considered in order to determine whether a dismissal was due to just cause or not. In this regard, the Constitutional Chamber has concluded, in cases involving dismissals that have been considered unjustified, that "the dismissal […]was not due to any justified cause contemplated in the legal system, nor is it demonstrated that the need for the appellant's function has ceased and therefore the respondent cannot allege that the function performed by the appellant is unnecessary, so that the dismissal of the appellant from his position constitutes a violation of the principle of job security."[65]

39. For its part, the Constitutional Court of Guatemala in various rulings has referred to the notion of indemnification and has stated that all State workers have the right to receive such compensation when their dismissal is unjustified, in accordance with Article 110 of the Guatemalan Constitution.[66] The Constitutional Court has established that the purpose of an indemnity is to ensure that the employer provides economic compensation when a worker has been dismissed without just cause, and to repair the harm caused by the termination of the contract.[67]

40. Finally, it should be noted that in comparative jurisprudence there are cases that distinguish between the dismissal of private sector workers and the dismissal of public employees or civil servants, taking into account that in the latter case the protection is further reinforced. Indeed, the guarantee of job security with respect to civil servants also translates into a way of ensuring efficiency in the fulfillment of the functions entrusted to the State. In Colombia, where Article 125 of the Constitution protects the job security of civil servants through the administrative career, the country's Constitutional Court has stated that the general labor principle for these workers is job security, "understood as the certainty that the employee must have that, as long as he complies with the conditions established by law in relation to his performance, he will not be removed from his job."[68] With regard to career positions, job security is essential since workers enrolled therein may only be dismissed from their positions for objective reasons, based on an evaluation of the employee's performance or discipline. However, in the case of positions in which workers are freely appointed and removed, by their very nature, the employee's tenure is subject to the discretion of the employer or nominator, provided that there is no arbitrariness or misuse of this power.[69]

41. As is evident, a set of instruments, governmental actions and norms exists in favor of social rights, which have evolved chronologically. In addition, the General Assemblies of the Organization of American States have placed special emphasis on social rights and have approved a number of resolutions on poverty and social development issues.[70] The 42nd

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64 Constitutional Court of Colombia, Judgment T-1103 of 2002.

65 Supreme Court of Costa Rica, Constitutional Chamber, Judgment 9755-11, 2011.

66 Constitutional Court of Guatemala, Compensation. Form of payment. Reasons for which the payment of compensation is ordered. File 1464-2012. Judgment of January 17, 2013.

67 Constitutional Court of Guatemala, File 72-2007. Judgment of July 3, 2007.

68 Constitutional Court of Colombia. Judgment C-479 of 1992.

69 Constitutional Court of Colombia. Judgments C-479 of 1992 and C-016 of 1998.

70 AG/DEC. 74 (XLIV-O/14) DECLARATION OF ASUNCION: DEVELOPMENT WITH SOCIAL INCLUSION (Adopted at the second plenary session, held on June 4, 2014). The General Assembly recognizes that "social inclusion, equality

Regular Session of the OAS held in Cochabamba, Bolivia (2012) focused on "Food Security with Sovereignty in the Americas." One of the main advances in this area is the approval of the Social Charter of the Americas in 2012 (*supra* para. 31). Another initiative of the States Parties of special relevance in this area is the consolidation of the "Working Group to Examine the National Reports Envisioned in the Protocol of San Salvador, which has issued several reports in recent years.[71] In sum, the account of this regulatory evolution and of the practices of the States justifies that the interpretation of Article 26 of the Convention be updated by the Court with the guidance given by the States in the sense of extending the effectiveness of social rights.

42. It is important to emphasize that this understanding of the right to work as fundamental in the States, or of the direct justiciability of the right to work in the context of the American Convention, does not imply an understanding of the right to work as an absolute right, as a right without limits or as a right that must be protected every time that it is invoked. Notwithstanding the justiciability of a right - civil or social - its absolute protection cannot be assumed in all litigation. Every case, whether civil or social law, must always be resolved through an imputation analysis and by verifying how the obligations of respect and guarantee operate with respect to each situation that is alleged to violate a given right.

V. SCOPE OF THE RIGHT TO WORK THAT SHOULD HAVE BEEN ESTABLISHED AS RELEVANT TO THIS CASE

43. We, the undersigned, consider that the State violated the right to work of Carlos Alberto Canales Huapaya, José Castro Ballena and María Barriga Oré. In order to analyze this violation, the Court should have taken as a starting point certain information received during the stage of monitoring compliance with the judgment issued in the case of the *Dismissed Congressional Employees,* whose facts are related to those of the present case. Indeed, the State established a "Special Committee for the Execution of the Judgment in the Case of the Dismissed Congressional Employees," which issued its final report on December 14, 2010.[72] This report established the irregular and unjustified nature of the dismissal of the 257 victims of the case decided by the Court, in the following terms:

> 4. That the rights that were violated by the irregular dismissal of the 257 victims were:
>
> a) Their right to dignity and decorum which is inherent to every human being and should be subject to respect and protection by all;
>
> b) Their right to due process of law and to jurisdictional protection thereof;

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of opportunity, equity and social justice are critical to democracy; and that the promotion, protection and effective exercise of human rights, in particular economic, social, and cultural rights, as well as access to justice, and dialogue among all sectors of the population, are essential for the strengthening of democracy." AG/RES. 2779 (XLIII-O/13) ADVANCING HEMISPHERIC INITIATIVES ON INTEGRAL DEVELOPMENT. (Adopted at the second plenary session, held on June 5, 2013). This resolution states that the General Assembly reaffirms "that the Charter of the Organization of American States proclaims the organization's essential purposes in Article 2," including to "promote, by cooperative action, their economic, social, and cultural development" and "eradicate extreme poverty, which constitutes an obstacle to the full democratic development of the peoples of the hemisphere."

[71] The Working Group is comprised of government experts, an independent expert and an expert of the Inter-American Commission on Human Rights. The reports produced by the Working Group include: approval of Progress Indicators For Measuring Rights Under the Protocol of San Salvador AG/RES. 2713 (XLII-O/12); Progress Indicators: First Group of Rights (OAS/Ser.L/XXV.2.1, GT/PSS/doc.2/11 rev.2); Adoption of the Follow-up Mechanism for the Implementation of the Protocol of San Salvador AG/RES. 2823 (XLIV-O/14), and Progress Indicators: Second Group of Rights OAS/Ser.L/XXV.2.1 GT/PSS/doc.9/13.

[72] *Cf.* Special Committee for the Execution of the Judgment of the Inter-American Court of Human Rights in the case of "Dismissed Congressional Employees." Session of December 14, 2010 (evidence file, folios 3340 to 3353).

c) Their right to work and to retain their jobs without being deprived of them except for a just cause provided for by law and with the guarantees of due process;

d) The corresponding salary compensation for the work for which they had been hired and which they were prevented from carrying out for reasons beyond their control, as well as the fruits that such salaries should have produced; and

e) Their right to social security and the respective recognition of their years of service and the corresponding contributions to the National Pension System (SNP) or to the Private Pension Fund Management System (SPP) during the time that they were wrongfully deprived of their jobs, as appropriate, for the purpose of their subsequent retirement as well as to ensure their access to social security healthcare for themselves and their families.

[...] 6. That the "irregular and unjustified" dismissal of the employee resulted from a unilateral and arbitrary act by the employer, which terminated the worker's employment relationship in the absence of a just cause to justify it or a prior procedure to guarantee the worker's right of defense, for which reason such act constitutes, objectively, an unjustified dismissal, in addition to being arbitrary.

7. That, in the national system, the Constitutional Court has established that the "right to work," enshrined in Article 22 of the Constitution, comprises two aspects: "the right to have access to a job, on the one hand, and, on the other, the right not to be dismissed except for just cause."[73] Based on this concept of the content and scope of the "right to work", the Constitutional Court has defined "unjustified dismissal" as that which occurs when "a worker is dismissed, either verbally or by means of a written communication, without stating any reason derived from his conduct or work that justifies it."

8. That, the Constitutional Court has also ruled on the legal invalidity of this type of dismissal, stating that "(...) *the unilateral termination of the employment relationship, based solely and exclusively on the will of the employer, is subject to annulment - and therefore the dismissal will lack legal effect - when it occurs in violation of the fundamental rights of the individual, recognized by the Constitution or treaties relating to the promotion, defense and protection of human rights.*"

[...] 12. That, in accordance with the criteria established by the Inter-American Court and the Constitutional Court, regarding the content of the reparation for wrongful dismissal, it must be taken into account that the loss of the job represented for the victims i) the loss of their regular salary, complementary allowances and bonuses for national holidays and Christmas, including, of course, the readjustment of said salaries over time; ii) the loss of their time of service and the receipt, if applicable, of the allowance provided for in Article 54 a) of Legislative Decree No. 276; iii) compensation for length of service; and, iv) the loss of their status as members of the Social Security Health System and the National Pension System or the Private Pension System, since the contributions of the worker and the employer to said social security systems were interrupted.

DECIDES: ARTICLE ONE: Irregular and unjustified termination. Ratify Article 1 of the resolution dated April 16, 2009, of the Special Evaluation Commission created by Supreme Resolution No. 118-2008-JUS, which declares, in a definitive and binding manner, that the 257 victims included in the Judgment of the Inter-American Court of Human Rights were irregularly and unjustifiably dismissed by the Congress of the Republic.

44. Based on this information, and given the similarities between the present case and the case of the *Dismissed Congressional Employees*, the Court should have considered it appropriate to determine whether the type of arbitrariness that occurred in the dismissal could constitute a violation of the right to work.

45. On this point, we refer to General Comment Nº 18[74] of the Committee on Economic, Social and Cultural Rights, which states that "the right to work is an individual right that

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[74] Committee of Economic, Social and Cultural Rights, Application of the International Covenant on Economic, Social and Cultural Rights, General Comment Nº 18, Right to Work (Thirty-fifth session, 1999), U.N. Doc. E/C.12/GC/18 (2006).

belongs to each person and is at the same time a collective right. It encompasses all forms of work, whether independent work or dependent wage-paid work. The right to work should not be understood as an absolute and unconditional right to obtain employment." It includes "the right of every human being to decide freely to accept or choose work. This implies not being forced in any way whatsoever to exercise or engage in employment and the right of access to a system of protection guaranteeing each worker access to employment. It also implies the right not to be unfairly deprived of employment. Furthermore, it must be *decent work*, which said Committee has defined as "work that respects the fundamental rights of the human person as well as the rights of workers in terms of conditions of work safety and remuneration" and that "also provides an income allowing workers to support themselves and their families."[75] These fundamental rights also include respect for the physical and mental integrity of the worker in the exercise of his or her employment.

46. For its part, ILO Convention Nº 158 on Termination of Employment (1982)[76] defines the lawfulness of dismissal in its article 4 and specifically imposes the requirement to provide valid grounds for dismissal as well as the right to legal and other redress in the case of unjustified dismissal. Likewise, in General Comment Nº 18 on the right to work, the Committee on Economic, Social and Cultural Rights reaffirmed the obligation of States parties to guarantee individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly. It also noted that job security is one of the objectives covered by the obligation to protect the right to work:

> 25. Obligations to *protect* the right to work include, *inter alia*, the duties of States parties to adopt legislation or to take other measures ensuring equal access to work and training and to ensure that privatization measures do not undermine workers' rights. Specific measures to increase the flexibility of labour markets must not render work less stable or reduce the social protection of the worker [...].[77]

47. We consider that in the context established in the judgment in the instant case, the conclusions of the Special Committee regarding the arbitrariness of the dismissals that occurred allow us to conclude that there was a disproportionate restriction of the victims' right to work, which had an impact on the effective enjoyment of their salaries and other benefits. In fact, the Special Committee and Law 27803 noted the existence of irregularities in some of the dismissals of nearly 10,000 workers at the time of the facts, including the three victims in this case. These irregularities implied that there was no just cause for the dismissals, which violated the right to work and adversely affected acquired rights that had entered the patrimony of the victims. Thus, the Special Committee stated:

> 12. "[...] it should be noted that for the victims, the loss of their jobs represented i) the loss of their regular salary, complementary allowances and bonuses for national holidays and Christmas, including, of course, the readjustment of said salaries over time; ii) the loss of their time of service and the receipt, if applicable, of the allowance provided for in Article 54 a) of Legislative Decree No. 276; iii) compensation for length of service; and, iv) the loss of their status as members of the Social Security Health System and the National Pension System or the Private Pension System, since the contributions of the worker and the employer to said social security systems were interrupted."

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[75] Committee on Economic, Social and Cultural Rights, Application of the International Covenant on Economic, Social and Cultural Rights, General Comment Nº 18, Right to Work(Thirty-fifth session, 1999), U.N. Doc. E/C.12/GC/18 (2006).

[76] Convention concerning Termination of Employment at the Initiative of the Employer (Entry into force: November 23, 1985).

[77] Committee on Economic, Social and Cultural Rights, Application of the International Covenant on Economic, Social and Cultural Rights, General Comment Nº 18, Right to Work (Thirty-fifth session, 1999), U.N. Doc. E/C.12/GC/18 (2006). Also, in General Comment Nº 2, said Committee emphasized the need for special efforts to ensure that the right to work is protected in all structural adjustment programs.

48. In view of the foregoing, we consider that these effects, which are a consequence of the violation of the right to work, prevented the victims from fully enjoying their remuneration and social benefits. Therefore, it is our opinion that the Inter-American Court should have declared the international responsibility of the Peruvian State, within the framework of the provisions of Article 26 of the American Convention, in relation to the obligations set forth in Articles 1(1) and 2 of the same instrument, to the detriment of Carlos Alberto Canales Huapaya, José Castro Ballena and María Gracia Barriga Oré.

Roberto F. Caldas
Judge

Eduardo Ferrer Mac-Gregor Poisot
Judge

Pablo Saavedra Alessandri
Registrar

CONCURRING OPINION OF JUDGE ALBERTO PÉREZ PÉREZ

CASE OF CANALES HUAPAYA ET AL. V. PERU

JUDGMENT OF JUNE 24, 2015

(Preliminary objections, Merits, Reparations and Costs)

1. I fully agree with the content of the judgment delivered in the instant case, but I feel compelled to issue a concurring opinion in view of the constant proposals made during the deliberation of this case to invoke the right to work as the main right violated by the State's action. In other words, to invoke a right not included among those recognized by the American Convention on Human Rights, but rather among those contained in the Protocol of San Salvador - and one that is not one of the two rights that Article 19 of said Protocol includes in the specific protection regime of the system, i.e. through the intervention of its organs: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. I consider these proposals to be totally unfounded, for the reasons that I will now explain.

I. RECOGNITION OF RIGHTS AND THEIR INCLUSION IN THE SYSTEM OF PROTECTION.

2. The American Convention fulfils a dual function with respect to the rights set forth therein: on the one hand, it recognizes them, and on the other hand it includes them in a system of protection that is the main innovation introduced by this instrument.

A. Recognition of rights

3. The American Convention *recognizes the civil and political rights* included in Chapter II of Part I:[1] right to juridical personality, right to life, right to humane treatment (personal integrity), prohibition of slavery and servitude, right to personal liberty, judicial guarantees, principle of legality and retroactivity, right to compensation in case of judicial error, protection of honor and dignity, freedom of conscience and religion, freedom of thought and expression, right of reply, right of assembly, freedom of association, rights of the family, right to a name, rights of the child, right to nationality, right to property, right of movement and residence, political rights, equality before the law and judicial protection. Those are the rights and freedoms "included in the protection system of this Convention."[2]

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[1] In the draft considered by the Specialized Conference that adopted the Convention, it was entitled "Rights Protected" and included an article related to the progressive development of economic, social and cultural rights.

[2] Article 31 of the American Convention on Human Rights.

4. This does not mean that only those rights and freedoms exist; rather, it determines which rights and freedoms are included in the protection system of the Convention. Articles 31, 76 and 77 regulate the way in which other rights may be included in the system of protection of the Convention; furthermore, Article 29 ("Rules of Interpretation", including in Chapter IV, "Suspension of Guarantees, Interpretation and Application") *recognizes* other rights and guarantees (particularly those that "are inherent to the human being or are derived from the democratic republican form of government"), but it says nothing about its inclusion in the system of protection.

5. Article 31, entitled "Recognition of Other Rights," regulates the manner in which those other rights "[m]ay be included in the system of protection of this Convention" "in accordance with the procedures established in Articles 76 and 77".

6. This means that "other rights" exist in addition to those recognized by the Convention that may be justiciable under domestic law or under another legal system, but they will only be "recognized" for the purposes of the Convention (Article 1(1)) and will be included in the system of protection created by the latter when the procedures of Article 76 or of Article 77 have been followed (either by amendments or protocols).

B. The system of protection

7. The system of protection is established in Part II, entitled, "Means of Protection", which assigns this competence to the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights (according to Article 33). This entire protection system refers to the human rights established in the Convention or to the rights and freedoms recognized by the Convention. Let us consider the relevant provisions:

a) *The Commission (Chapter VII)*: The pertinent articles refer to the competence of the Commission, to the admissibility of cases and to procedures. The Commission has *competence* with respect to "petitions" lodged by "[a]ny person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization [of American States]" that contain "denunciations or complaints of violation of this Convention by a State Party" (Article 44) or "communications in which a State Party alleges that another State Party has committed *a violation of a human right established in this Convention"* (Article 45). It will consider *inadmissible* any petition or communication that "does not state facts that tend to establish *a violation of the rights guaranteed by this Convention*" (Article 47(b)). The section on "*Procedure*" refers to cases in which the Commission receives a petition or communication alleging the *violation of any of the rights enshrined in this Convention."*

b) *The Inter-American Court of Human Rights (Chapter VIII):* The relevant articles refer to cases that may be submitted to the Court and to its jurisdiction. Regarding the submission of cases: the Court may only hear a case submitted to it by the States Parties or the Commission after the procedures before the Commission have been exhausted (Article 61), so that all the above-mentioned rules are applicable to the Commission. With respect to *jurisdiction*, it is incumbent upon the Court to decide whether "*there has been a violation of a right or freedom protected by this Convention*" and, if so, "shall rule that the injured party be ensured *the enjoyment of the right or freedom that was violated",* and if appropriate, that the consequences of the measure or situation that constituted *the breach of such right or freedom* be remedied."

8. Scope of the "compétence de la compétence". Adding rights is not the competence of the Inter-American Court, but of the States. However, competence to decide in each specific case whether or not it has jurisdiction does not mean that the Court can modify the scope and meaning of the jurisdiction assigned to it by the provisions of the Convention.

II. MERE COMMITMENT TO PROGRESSIVE DEVELOPMENT AND NON-RECOGNITION OF RIGHTS.

9. A reading of Article 26 - the only article of Chapter III, Part I (Economic, Social and Cultural Rights), entitled "Progressive Development" – shows that this article does not recognize or guarantee economic, social and cultural rights, but establishes something quite different: a commitment by the States to progressively achieve the full realization of the economic, social and cultural rights derived from the relevant norms of the Charter of the Organization of American States "subject to available resources." The text of this article is absolutely clear, and so is its context. This interpretation is corroborated by subsequent agreements between the parties and by their subsequent conduct. Likewise, the background of the provision fully confirms it.

A. Rules of treaty interpretation

10. According to the general rules of interpretation contained in Article 31 of the Vienna Convention on the Law of Treaties, "1. A treaty shall be interpreted in good faith in accordance with the *ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose*." The context includes, *inter alia*, the preamble of the treaty, and "together with the context" there shall be taken into account any subsequent agreement and any subsequent practice:

a) "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" and

b) "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."

11. Furthermore, "[r]ecourse 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 […]."[3]

12. The case law of the Inter-American Court, correctly interpreted, does not support the position contrary to the one presented here. The case of Acevedo Buendía is sometimes cited to support the thesis that Article 26 recognizes economic, social and cultural rights as such, but an analysis of the judgment reveals that this is not so.

[3] In addition, supplementary means may be used "to determine the meaning when the interpretation given in accordance with Article 31: a) leaves the meaning ambiguous or obscure; or b) leads to a result which is manifestly absurd or unreasonable", but that is not the case here.

B. The Protocol of San Salvador as the application of Articles 31 and 77 and as subsequent agreement or subsequent practice

13. In relation to economic, social and cultural rights, the States Parties have effectively followed the path of Article 77, in the *Protocol of San Salvador* (adopted on November 17, 1988, and entered into force on November 16, 1999). Said Protocol:

a) Proclaims "*the close relationship that exists between economic, social and cultural rights, and civil and political rights,* in that the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human person, for which reason both require permanent protection and promotion if they are to be fully realized, and the violation of some rights in favour of the realization of others can never be justified (Preamble, third paragraph).

b) *Recognizes numerous economic, social and cultural rights*: the right to work and to just, equitable and satisfactory working conditions; trade union rights; right to social security; right to health; right to a healthy environment; right to food; right to education; right to the benefits of culture; right to the formation and protection of the family; rights of children, protection of the elderly, and protection of the disabled.

c) But *only two of these rights are included in the system of protection of the Convention* (in one case, only partially): "[a]ny instance in which the rights established in paragraph a) of Article 8[4] and in Article 13[5] are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Articles 44 through 51 and 61 through 69 of the American Convention on Human Rights." (Article 19(6) of the Protocol of San Salvador). This means that the system of the Protocol is very different from that of the Convention. While in the latter the recognition of a right or freedom implies its inclusion in the system of protection, in the Protocol recognition does not entail inclusion as a consequence. Inclusion is exceptional and occurs only in two cases.

14. The Protocol of San Salvador also constitutes a subsequent agreement between the States Parties and a subsequent practice thereof, which confirms the interpretation of Article 26 described above.

III. DIFFERENCE WITH THE PROGRESSIVE INTERPRETATION

15. Consequently, the Inter-American Court cannot assume jurisdiction over the alleged violation of a right or freedom that is not included in the protection system, either by the American Convention or by the Protocol of San Salvador. On some occasions it may achieve – and has done so in several cases, including the present case– an analogous result by applying, correctly, other provisions, such as those that protect the right to personal integrity, to property or to judicial guarantees and judicial protection.

16. Nor can a principle such as the progressive interpretation of international instruments be invoked to add rights to the system of protection. The appropriate sphere

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[4] Trade union rights. Right to organize and join trade unions and to establish national and international federations and confederations.

[5] Right to education.

for the application of this principle is the interpretation of a right or freedom, or of a State obligation, that exists and is included in the system of protection of the Convention or the Protocol, in a different and generally broader sense than that originally envisaged by its authors. An example of this is the inclusion of gender orientation in the mention of "any other social condition" as one of the grounds for discrimination prohibited by Article 1(1) of the Convention.[6]

IV. PREPARATORY WORKS

17. The preparation of the American Convention took many years, and some of the drafts recognized several economic, social and cultural rights, although this did not necessarily imply their inclusion in the same system of protection provided for civil and political rights. We consider it appropriate to limit this analysis to the Inter-American Specialized Conference on Human Rights during which the final text of the American Convention was adopted.

18. First of all, it should be pointed out that the characterization made of the antecedents in the judgment in the *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller") v. Peru* is not correct. It states the following:

> In this sense, the Court notes that the content of Article 26 of the Convention was the subject-matter of an intense debate in the preparatory works of the Convention, as a result of the States Parties' interest in assigning a "direct reference" to economic, social and cultural "rights;" "a provision establishing a certain legal mandatory nature […] in 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 that, according to some States, "only "contemplated, in a merely declarative text, the conclusions reached in 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 conditions specific to most of the American States" [Brazil]. Thus, as part of the debate in the preparatory works, it was also proposed "to materialize the exercise of [said rights] by means of the action of the courts" [Guatemala]. (The footnotes have been replaced with the mention of the State to which the different proposals are attributed)

19. A direct study of the minutes of the Specialized Conference reveals a completely different panorama. To begin with, the Court's judgment contains fragments of the observations made by four States out of a total of 23 participating States, which is certainly not indicative of a massive or majority movement in a certain direction. In reality, there were observations from several other states. All of these are transcribed below:

Observations of Uruguay[7]

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[6] *Case of Atala Riffo and Daughters v. Chile. Merits, reparations and costs.* Judgment of February 24, 2012. Series C No. 239, para. 91.

[7] Minutes of the Inter-American Specialized Conference on Human Rights, November 7–22, 1969, OAS/Ser.K/XVI/1.2, p. 37.

10. Article 25, paragraph 2, includes in a merely declarative text, conclusions established at the Buenos Aires Conference. Its content does not seem appropriate for a convention, but it may not be politically convenient to oppose the inclusion of such text.

Observations of Chile[8]

14. The provisions that remain in the draft on the subject of economic, social and cultural rights, are those that deserve the most criticism in terms of form and substance. These are Articles 25, 26 and 41. All direct mention of these rights has been eliminated; indirectly, in Article 25, paragraph 1, there is insufficient recognition of "the need for the States Parties to devote their best efforts to ensure that other rights set forth in the American Declaration of the Rights and Duties of Man and not included in the preceding articles are adopted and, where appropriate, guaranteed in domestic law." If, as has been claimed, the omission of these rights - which are not even dealt with in a separate chapter of the draft - is due to their inclusion in special chapters of the OAS Charter, in its text once the amendments contained in the Protocol of Buenos Aires are approved, there should at least be an explicit reference to the norms approved in that Protocol, which refer to economic, social or cultural rights.

15. In good legal technique, however, these rights should be given appropriate wording within the draft Convention, so that their implementation can be monitored. Naturally, their enumeration should not be in contradiction with the norms of the Buenos Aires Protocol. The economic provisions of the said Protocol, for example, which are the only ones included in the draft Convention (art. 5, para. 2), have a wording in the document under study that bears no relation whatsoever to a draft human rights convention. A simple reading of the paragraph in question confirms this. If the criterion of drafting a single Convention is maintained, the technique followed by the United Nations and the Council of Europe of enumerating economic, social and cultural rights and establishing in detail the means for their advancement and monitoring should be suggested.

16. In this regard, it is worth considering the question of whether the Commission on Human Rights, as it is conceived, i.e., as a legal and quasi-judicial body, is the appropriate body to receive periodic reports on these rights. If the Organization of American States is to have an Inter-American Economic and Social Council and an Inter-American Cultural Council, both with Permanent Executive Committees, it would be worth considering whether it is not more appropriate for these OAS bodies to examine the periodic reports referred to in Article 41 of the Charter of the Organization of American States. Thus, the Commission on Human Rights would only be competent to consider petitions and complaints on civil and political rights, in accordance with its origin, composition and rules of operation.

17. In any case, a provision should be included with respect to economic, social and cultural rights that establishes a certain legal obligation (to the extent permitted by the nature of these rights) in their fulfillment and application. To this end, *it would be necessary to contemplate a clause similar to that of article 2, paragraph 1, of the United Nations Covenant on the subject. This paragraph is worded as follows*:

> *"1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."*

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[8] "*Minutes and Documents* of the Inter-American Specialized Conference on Human Rights, November 7–22, 1969, OAS/Ser.K/XVI/1.2, pp. 42 and 43.

Observations of Argentina[9]

Article 25, second part and 26: It is noted that, although the second part of Article 25 is a verbatim transcription of Article 31 of the OAS Charter, as amended by the Protocol of Buenos Aires, Article 26 requires States to report periodically to the Commission on Human Rights on the measures they have adopted to achieve the purposes mentioned in Article 25. In addition, Article 26 recognizes the Commission's right to formulate recommendations to the States in this regard, which clearly goes beyond its competence and possibilities. On the other hand, the States are not given the possibility of formulating observations on the aforementioned recommendations of the Commission. In view of the foregoing, it is suggested that Article 26 be reviewed and reconsidered.

Observations of the Dominican Republic[10]

Article 25 (Note the change of order)

Paragraph 1: We believe that it is preferable to delete this paragraph since Article 70 already provides a procedure whereby protection can gradually be extended to include other rights contained in the American Declaration of the Rights and Duties of Man*. The obligations of the States Parties should be clearly stipulated and without vague attempts to incorporate other obligations by allusion.*

Paragraph 2: Since this paragraph is a reaffirmation of the economic and social objectives agreed upon when the amendments to the OAS Charter were signed in 1967, this article should also reaffirm it, and the form should be the same as that of the amended Charter.

The proposed title and amended text would be:

Article 25*. Economic and Social Objectives. The States Parties reaffirm the agreement set forth in the Amendments to the OAS Charter signed in 1967 to devote their utmost efforts to accomplishing the following basic goals in order to accelerate their economic and social development, in accordance with their own methods and procedures and within the framework of the democratic principles and institutions of the inter-American system:* a) Substantial and self-sustained increase in the national product per capita; b) Equitable distribution of national income; (c) Adequate and equitable systems of taxation; (d) Modernization of rural life and reforms leading to equitable and efficient land tenure systems, increased agricultural productivity, expanded use of land, diversification of production and improved processing and marketing systems for agricultural products; and the strengthening and expansion of the means to attain these ends; (e) Accelerated and diversified industrialization, especially of capital and intermediate goods; (f) Stability of domestic price levels, compatible with sustained economic development and the attainment of social justice; (g) Fair wages, employment opportunities and acceptable working conditions for all; (h) Rapid eradication of illiteracy and expansion of educational opportunities for all; (i) (Protection of man’s potential through the extension and application of modern medical science; (j) Proper nutrition, especially through the acceleration of national efforts to increase the production and availability of food; (k) Adequate housing for all sectors of the population; (l) Urban conditions that offer the opportunity for a healthy, productive, and full life; (m) Promotion of private initiative and

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[9] OAS “*Minutes and Documents* of the Inter-American Specialized Conference on Human Rights, November 7–22, 1969, OAS/Ser.K/XVI/1.2, p. 47.

[10] OAS “*Minutes and Documents* of the Inter-American Specialized Conference on Human Rights, November 7–22, 1969, OAS/Ser.K/XVI/1.2, pp. 69 and 70.

investment in harmony with action in the public sector; and (n) Expansion and diversification of exports.

Observations of Mexico[11]

III-3. Serious doubts arise as to the advisability of including in the preliminary draft the rights enshrined in Article 25 of the Draft: On the one hand, such an enunciation could be repetitive, since it already appears in Article 51 of the Protocol of Amendments to the OAS Charter. Next, unlike all the other rights mentioned in the draft -which are rights enjoyed by the individual as a person or as a member of a given social group- it is difficult at a given moment to establish precisely which person or persons would be directly affected in the event of a violation of the rights contained in the aforementioned Article 25.

Observations of Guatemala[12]

III) In the case of economic, social and cultural rights

Article 24. In order to protect and promote the observance of the economic, social and cultural rights set forth in this Convention, the Inter-American Commission on Human Rights, in addition to employing other measures permitted by international law in force in the Americas, shall have the authority to:

a) Request from the States Parties reports on the measures they have adopted and the progress made in order to ensure the observance of those rights;

b) Separately, or in cooperation with the governments concerned, to carry out studies and research in relation to these rights;

c) Approve recommendations of a general or specific nature for one or more States;

d) Seek, from the General Assembly or other organs of the Organization of American States, the necessary cooperation and adoption of the pertinent measures;

e) Hold regional and technical meetings;

e) Promote international conventions and agreements on the matter;

f) Enter into arrangements with national and international technical entities.

Article 25. The States Parties undertake to submit to the Commission periodic reports on the measures they have adopted to ensure the observance of economic, social, and cultural rights. The periodicity of these reports shall be determined by the Commission.

They are also required to submit to the Commission copies of the reports they transmit to other international bodies, agencies or organizations regarding the observance of these rights.

Article 26. i) The Commission may bring to the attention of international bodies concerned with technical cooperation or assistance, or to any other qualified international body, any matter arising out of the reports referred to in the preceding articles of this Convention which may assist such bodies in deciding, each within its competence, on the advisability

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[11] Minutes of the Inter-American Specialized Conference on Human Rights, November 7–22, 1969, OAS/Ser.K/XVI/1.2, p. 101.

[12] Minutes of the Inter-American Specialized Conference on Human Rights, November 7–22, 1969, OAS/Ser.K/XVI/1.2, pp. 115 and 116.

of adopting international measures that may contribute to the progressive implementation of this Convention.

ii) The Commission shall request that the aforementioned bodies transmit to it the results of the examinations carried out, as well as the measures adopted by such bodies on their own initiative based on the aforementioned reports.

Article 27. The Commission shall consider the reports it receives from States, from national and international entities and from individuals or groups of individuals and, if it deems it appropriate, may publicize the reports it receives, as well as the measures it has adopted or the requests addressed to other entities, for the purpose of facilitating the formation of national and international public opinion.

Observations of Brazil[13]

Article 25: Replace the wording of the draft with the following text:

1. The States Parties to this Convention undertake to *incorporate progressively into their domestic law*:

a) the rights contemplated in the American Declaration of the Rights and Duties of Man that have not been included among the rights defined in the preceding articles;

b) the rights and benefits contemplated in the economic, social, and educational, scientific, and cultural standards set forth in Articles 31, 43, and 47 of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires.

2. The law may exclude public services and essential activities from the right to strike.

Rationale

Civil and political rights entail effective domestic and international jurisdictional protection against violations by the organs of the State or their representatives. On the other hand, economic, social and cultural rights are contemplated in very different degrees and forms by the legislation of the different American States and, although the governments may wish to recognize them all, their validity depends substantially on the availability of material resources that allow for their implementation.

Article 25 of the draft has been inspired by such a concept but its text does not reflect its intent. The wording of paragraph 1 is vague, being limited to an expression of intent. Paragraph 2, in reproducing the content of Article 31 of the Protocol of Buenos Aires, omits the right to strike already enshrined, with certain limitations, in the domestic law of the American States, as well as the provisions on education, science and culture set forth in Article 47 of said Protocol.

The purpose of the amendment is to give economic, social and cultural rights the maximum protection compatible with the conditions characteristic of the great majority of the American States.

20. After several debates in which some previous positions were reiterated without reaching a consensus, and none of which proposed to include economic, social and cultural rights in the system of protection provided for civil and political rights, a chapter with two articles was drafted. The first of these was the same as Article 26 included in

[13] Minutes of the Inter-American Specialized Conference on Human Rights, November 7–22, 1969, OAS/Ser.K/XVI/1.2, pp. 124 and 125.

the final text of the Convention, while the second established a tenuous and indirect system for "monitoring compliance with obligations." The text of Articles 26 and 27, which were put to the vote, is found in the section entitled "Articles revised by the Style Commission":[14]

> 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 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.
>
> Article 27. Monitoring Compliance with Obligations
>
> The States Parties shall transmit to the Inter-American Commission on 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 may verify compliance with the aforementioned obligations, which are the indispensable basis for the exercise of the other rights enshrined in this Convention.

21. At the second plenary session,[15] the following decision was taken:

> Article 26 is adopted without any changes and Article 27 is deleted, with the subsequent articles being renumbered.

This means, therefore, that at no time was it proposed to include economic, social and cultural rights in the system of protection provided by the Convention, which remained limited to the civil and political rights recognized therein.

V. CONCLUSIONS

22. In conclusion, neither the specific recognition of economic, social and cultural rights nor their inclusion in the system of protection established by the Convention can be inferred from Article 26 of the American Convention. The recognition of other rights and their inclusion in the system of protection is not a matter for the Court but for the Member States, by means of amendments (Article 76) or protocols (Article 77) implementing Article 31.

23. This is not a case in which the Court can make a legitimate progressive interpretation, specifying or changing the way in which a right or freedom recognized by the Convention is to be understood. The principle of *compétence de la compétence* does not allow the Court to modify its own jurisdiction, but rather to decide in each

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[14] Minutes of the Inter-American Specialized Conference on Human Rights, November 7–22, 1969, OAS/Ser.K/XVI/1.2, p. 318.

[15] Minutes of the Inter-American Specialized Conference on Human Rights, November 7–22, 1969, OAS/Ser.K/XVI/1.2, p. 448.

specific case, and in accordance with the relevant rules, whether or not it has jurisdiction over that case.

24. Therefore, it is not appropriate for the Court to consider, and eventually declare, a violation of the right to work.

Alberto Pérez Pérez
Judge

Pablo Saavedra Alessandri
Registrar