INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF GUEVARA DÍAZ V. COSTA RICA

JUDGMENT OF JUNE 22, 2022
(Merits, reparations and costs)

In the case of *Guevara Díaz v. Costa Rica.*

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

Ricardo C. Pérez Manrique, President;
Humberto Antonio Sierra Porto, Vice President
Eduardo Ferrer Mac-Gregor Poisot, Judge
Verónica Gómez, Judge;
Patricia Pérez Goldberg, Judge, and
Rodrigo de Bittencourt Mudrovitsch, Judge,

also present,

Pablo Saavedra Alessandri, Registrar, and
Romina I. Sijniensky, Deputy Registrar,

pursuant to articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter also "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 of Procedure"), delivers this judgment, which is structured as follows:

[*] Judge Nancy Hernández López, a Costa Rican national, did not take part in the deliberation and signing of this judgment, pursuant to Articles 19(2) of the Court's Statute and 19(1) of its Rules of Procedure.

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I
INTRODUCTION OF THE CASE AND CAUSE OF ACTION

1. *The case submitted to the Court.* On March 24, 2021, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted to the jurisdiction of the Court the case of "Luis Fernando Guevara Díaz v. the Republic of Costa Rica" (hereinafter "the state" or "Costa Rica"). As indicated by the Commission, the case is related to the violation of the human rights of Mr. Luis Fernando Guevara Díaz in the framework of a competitive hiring process at the Ministry of Finance in which he was not selected due to his status as a person with an intellectual disability. The Commission also noted that the authorities who denied the appeals for reversal and *amparo* made by Mr. Guevara against the decision were not adequately justified, nor was any substantive review made of his allegation of discrimination, with the response limited to confirming that the authority had discretion. In this regard, the Commission concluded the State was responsible for the violation of the rights to judicial guarantees, judicial protection, equal protection, and work, established in articles 8(1), 25(1), 24, and 26 of the American Convention on Human Rights, read in conjunction with the obligations established in Article 1(1).

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

a) *Petition*. On July 12, 2005, the Labor Union of Employees of the Ministry of Finance submitted the initial petition before the Commission.

b) *Admissibility Report.* On March 20, 2012, the Commission approved Admissibility Report 13/12, in which it notified the parties of admissibility and made itself available to reach a friendly settlement.

c) *Report on the Merits.* On July 2, 2020, the Commission approved Report on the Merits 175/20 (hereinafter also "Report on the Merits"), in which it reached a series of conclusions and made several recommendations to the State.

d) *Notification to the State*. The Commission notified the State of the Report on the Merits in a communication dated August 24, 2020. The Commission granted the State two months to report on compliance with the recommendations. After it was granted two extensions, the State reported its willingness to comply with the Commission's recommendations, but given the petitioner's lack of interest in holding a meeting, it would not request a new extension.

3. *Submission to the Court*. On March 24, 2021, the Commission submitted to the Court all the facts and human rights violations involved in the case. It did so, it indicated, out of the need to obtain justice and reparation for the victim.[1] This Court notes with concern that more than 15 years have elapsed between the presentation of the initial petition before the Commission and the submission of this case to the Court.

4. *Requests of the Commission*. The Commission asked this Court to find and declare Costa Rica internationally responsible for the violations set forth in the Report on the

[1] The Commission appointed Commissioner Julissa Mantilla Falcón and the Deputy Executive Secretary at the time, Marisol Blanchard, as its delegates before the Court, as well as Jorge Huberto Meza Flores and Christian González Chacón as legal advisors.

Merits and to order the State to carry out the measures of reparation included in that report.

II
PROCEEDINGS BEFORE THE COURT

5. *Notification to the State and to the representative of the alleged victims*. The representative of the alleged victim[2] (hereinafter "the representative") and the State were notified of the submission of the case on May 10, 2021.

6. *Brief with pleadings, motions and evidence.* On June 22, 2021, the representative presented the brief with pleadings, motions, and evidence (hereinafter "pleadings and motions brief") pursuant to articles 25 and 40 of the Rules of Procedure. The representative substantially agreed with the Commission's arguments and made additional arguments on the merits. He also asked that Costa Rica be ordered to adopt several measures of reparation complementary to ones requested by the Commission.

7. *Answering brief.* On October 13, 2021, in a letter from the Office of the Registrar, the State was informed that the deadline for submitting the answering brief had passed without it being received. It was therefore informed that the processing of the case would continue without the answering brief. On October 15, 2021, the State reported that the answering brief had not been submitted due to human error and reiterated its interest in continuing to process the case.[3]

8. *Public hearing.* On February 17, 2022, the President of the Court issued an order calling the parties and the Commission to a public hearing on eventual merits, reparations, and costs, and to hear the oral pleadings and final observations of the parties and of the Commission, respectively.[4] Due to the exceptional circumstances caused by the COVID-19 pandemic, and in accordance with the provisions of the Court's Rules of Procedure, the public hearing was held via videoconference on March 24, 2022, during the 147th regular sessions of the Court.[5]

9. *Amicus curiae*. The Tribunal received an amicus curiae brief from the International Human Rights Practicum of the Boston College of Law.[6]

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[2] Jorge Emilio Regidor Umaña represented the victim.

[3] The State appointed Natalia Córdoba Ubate, legal director of the Ministry of Foreign Affairs, and Fernando Castillo Padilla, lawyer of the Constitutional Chamber of the Supreme Court of Justice, as agents in the case.

[4] *Cf. Case of Guevara Díaz v. Costa Rica.* Call to hearing. Order of the President of the Inter-American Court of Human Rights of February 17, 2022. Available at: https://www.corteidh.or.cr/docs/asuntos/guevara_diaz_17_02_22.pdf.

[5] This hearing was attended by: (a) on behalf of the Inter-American Commission: Edgar Stuardo Ralón Orellana, Marisol Blanchard, Jorge Meza Flores, and Christian González; (b) on behalf of the representatives: Jorge Emilio Regidor Umaña and Luis Fernando Guevara Díaz, (c) on behalf of the State: Natalia Córdoba Ulate, Fernando Castro Padilla, José Carlos Jiménez Alpízar, Rodolfo Lizano Ramírez, Alberto David Guzmán Pérez, and Maripaz de la Torre Herrera.

[6] The brief, signed by Daniela Urosa, Estelle Davrieux, Nathaniel Jaffe, Andrian Lee, Jane Yu, and Raad Alsowaying, offers considerations regarding the scope of the right to work and the right to equality and non-discrimination with regard to intellectual disability, as well as the positive obligations that the state has to protect those rights.

10. *Final written arguments and observations.* On April 19, 2022, the state submitted its closing written arguments, along with accompanying documentation. On April 25, 2022, the representative and the Commission presented their final written arguments and observations, respectively.

11. *Observations on the annexes to the final written arguments.* On May 6, 2022, the Commission reported that it had no observations to make regarding the documents included by the state together with its final written arguments. The representative did not forward any observations on the state's annexes.

12. *Deliberation of the case.* The Court deliberated on this judgment on June 22, 2022.

III
COMPETENCE

13. The Court is competent to hear this case, pursuant to Article 62(3) of the Convention, because Costa Rica has been a State Party to the Convention since April 8, 1970, and accepted the contentious jurisdiction of the Court on July 2, 1980.

IV
ACKNOWLEDGMENT OF RESPONSIBILITY

A. Acknowledgment of responsibility by the state and observations of the representative and the Commission

14. The ***state*** indicated during the public hearing that "fully supporting and trusting of inter-American institutions, the Costa Rican state recognizes its international responsibility for the violation of articles 8(1), 24, 25(1), and 26 of the American Convention, read in conjunction with the obligations established in Article 1(1), to the detriment of Mr. Guevara Díaz." It indicated that its recognition "is limited to the facts of the Report on the Merits, in terms of both its analysis of the facts and its legal analysis." Later, in its final written arguments, the State indicated that its "acknowledgment of international responsibility is limited to what happened in this specific case at the moment of the dismissal and subsequent administrative and judicial actions, conceding the [Commission's] analysis of the merits." The State also asked the Court to establish measures to guarantee the rights violated and reparations for the consequences of the violations committed, in keeping with the principles of its case law.

15. The ***Commission*** viewed positively the acknowledgment made by the state. However, it noted that the dispute over the facts persists with regard to the representatives' claims with regard to the work that Mr. Guevara did at the Ministry of Finance during the years prior to his hiring and with regard to the pleading of the representatives regarding the violation of the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities. The ***representative*** did not make any specific observations on the state's acknowledgment of responsibility.

B. Considerations of the Court

16. Pursuant to Articles 62 and 64 of the Rules of Procedure, and in exercise of its authority in relation to the international protection of human rights, a matter of

international law, the Court must ensure that acts of recognition of responsibility are acceptable for the purposes pursued by the inter-American system.[7]

B.1. Regarding the facts

17. In this case, the Court considers that the statements made by the state during the public hearing of March 24, 2022, and its final written arguments clearly show that the State has made a full acknowledgment of responsibility with regard to the facts laid out by the Commission in its Report on the Merits.

B.2. Regarding the legal claims

18. The Court considers that the statements made by the State during the public hearing of March 24, 2022, and its final written arguments clearly indicate that Costa Rica has made a full acknowledgment of responsibility with regard to the human rights violations as laid out by the Commission in its Report on the Merits and has recognized the need to adopt measures of reparation. Consequently, the Court considers that the dispute has ceased with regard to the following:

a) The violation of the rights to equality before the law and to work, set forth in articles 24 and 26 of the American Convention, read in conjunction with article 1(1), as a result of the discrimination of which Mr. Guevara was a victim in competitive hiring process 010179 due to his intellectual disability.
b) The violation of the rights to judicial protection and the duty to offer justification, set forth in articles 8(1) and 25 of the American Convention, read in conjunction with Article 1(1), as a result of the response of the authorities that denied the appeals filed by Mr. Guevara.

19. Additionally, the Court notes that the representative alleged the violation of a series of articles of the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities (hereinafter also the "CIADDIS"), violations not acknowledged by the state. In this regard, the Court underscores that in the case of case of González et al. ("Cotton Field") v. Mexico, it ratified the possibility of exercising its contentious competence with respect to other inter-American instruments beyond the American Convention in the context of instruments establishing a system of petitions subject to international supervision regionally.[8]

20. In this regard, the Court notes that in its Article VI, the CIADDIS establishes that states commit to creating a Committee for the Elimination of All Forms of Discrimination against Persons with Disabilities, but does not recognize the Court's competence to review direct violations of it.[9] Therefore, in the absence of any provision recognizing the

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[7] *Cf. Case of Kimel v. Argentina. Merits, Reparations, and Costs.* Judgment of May 2, 2008. Series C No. 177, para. 24, and *Case of Vélez Restrepo and Relatives v. Mexico*. *Preliminary Objections, Merits, Reparations, and Costs.* Judgment of November 25, 2021. Series C No. 447, para. 19.

[8] *Cf. Case of González et al. ("Cotton Field") v. Mexico. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 16, 2009. Series C No. 205, para. 37.

[9] Article VI of the CIADDIS establishes the following: "1. To follow up on the commitments undertaken in this Convention, a Committee for the Elimination of All Forms of Discrimination against Persons with Disabilities, composed of one representative appointed by each state party, shall be established. 2. The committee shall hold its first meeting within the 90 days following the deposit of the eleventh instrument of ratification. Said meeting shall be convened by the General Secretariat of the Organization of American States

Court's competence to analyze direct violations of the CIADDIS, it is not appropriate to rule on the direct violations of the instrument alleged by the representative. This does not prevent the articles of the CIADDIS from being used to interpret the American Convention and other pertinent inter-American instruments.[10]

B.3. Regarding reparations

21. The Court notes that although the state considered admissible the determination of measures of reparation in this case, dispute persists as to the content of those measures, and the Court will therefore proceed to examine them.

B.4. Assessment of the acknowledgment of responsibility

22. The recognition made by the State constitutes a total acceptance of the facts and a total recognition of the violations alleged by the Commission in the Report on the Merits. This Court finds that the total acknowledgment of international responsibility makes a positive contribution to the development of these proceedings and the observance of the principles that inspire the Convention, as well as to the alleged victims' needs for reparation.[11] The state's acknowledgment has full legal effects, pursuant to articles 62 and 64 of the Rules of Procedure of the Court, as indicated. Owing to the comprehensive acknowledgment made by the state, the Court considers that the legal dispute in this case has ceased with regard to the facts, the relevant law, and the need to adopt measures of reparation, pursuant to the terms established by the Commission in its Report on the Merits.

23. In the specific circumstances of this case, the Court finds it pertinent to deliver a judgment in which the facts are determined, based on the evidence gathered during the proceedings before this Court and the acceptance of those facts, as well as their legal consequences and the corresponding reparations. Additionally, the Court does not deem it necessary to rule on the human rights violations that took place to the detriment of Mr. Guevara as far as the response of the authorities to reject the administrative and judicial appeals filed by the victim, as these violations were explicitly acknowledged by the state in

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and shall be held at the Organization's headquarters, unless a state party offers to host it. 3. At the first meeting, the states parties undertake to submit a report to the Secretary General of the Organization for transmission to the Committee so that it may be examined and reviewed. Thereafter, reports shall be submitted every four years. 4. The reports prepared under the previous paragraph shall include information on measures adopted by the member states pursuant to this Convention and on any progress made by the states parties in eliminating all forms of discrimination against persons with disabilities. The reports shall indicate any circumstances or difficulties affecting the degree of fulfillment of the obligations arising from this Convention. 5. The Committee shall be the forum for assessment of progress made in the application of the Convention and for the exchange of experience among the states parties. The reports prepared by the committee shall reflect the deliberations; shall include information on any measures adopted by the states parties pursuant to this Convention, on any progress they have made in eliminating all forms of discrimination against persons with disabilities, and on any circumstances or difficulties they have encountered in the implementation of the Convention; and shall include the committee's conclusions, its observations, and its general suggestions for the gradual fulfillment of the Convention. 6. The committee shall draft its rules of procedure and adopt them by a simple majority. 7. The Secretary General shall provide the Committee with the support it requires in order to perform its functions."

[10] *Cf. Case of Furlán and Relatives v. Argentina. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of August 31, 2012. Series C No. 246, para. 133; *Case of Chinchilla Sandoval et al. v. Guatemala. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of February 29, 2016. Series C No. 312, para. 207, and *Case of Guachalá Chimbo et al. v. Ecuador. Merits, Reparations, and Costs.* Judgment of March 26, 2021. Series C No. 423, para. 75;

[11] *Cf. Case of Benavides Cevallos v. Ecuador. Merits, Reparations, and Costs.* Judgment of June 19, 1998. Series C No. 38, para. 57, and *Case of Palacio Urrutia et al. v. Ecuador. Merits, Reparations, and Costs.* Judgment of November 24, 2021. Series C No. 446, para. 29.

its acknowledgment of international responsibility and the subject has been extensively developed in the Inter-American Court's case law.

V
EVIDENCE

A. Admission of the documentary evidence

24. The Court received a variety of documents presented as evidence by the Commission and by the representative, attached to their main briefs (*supra* paras. 5 and 6). As in other cases, this Court admits those documents presented at the proper procedural moment (Article 57 of the Rules of Procedure)[12] by the parties and the Commission, whose admissibility was neither contested nor opposed, and whose authenticity was not questioned.[13]

B. Admission of expert testimony and evidence

25. This Court finds it pertinent to admit the statements provided by expert witness Silvia Judith Quan Chang via video and by José Guevara Díaz via public hearing, as they are in keeping with the purpose defined by the President in the order requiring them and the purpose of this case.[14]

VI
FACTS

26. In view of the scope of the state's acknowledgment of responsibility, the Court will review the facts of the case in the following order: (a) Luis Fernando Guevara Díaz and the competitive hiring process for selecting a "Miscellaneous Worker 1"; (b) the appeal for reversal; (c) the amparo proceeding; and (d) the proceeding before the National Office of the Labor Ombudsperson.

A. Luis Fernando Guevara Díaz and the competitive hiring process for selecting a "Miscellaneous Worker 1"

27. Luis Fernando Guevara Díaz is a person with an intellectual disability.[15]

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[12] Documentary evidence can generally be submitted, according to Article 57(2) of the Rules of Procedure, with the briefs submitting the case, with pleadings and motions, or answering the submission of the case, as applicable. Evidence forwarded outside the appropriate procedural moments is not admissible, except in the cases established in the above-mentioned Article 57(2) of the Rules of Procedure (force majeure or serious impediment) or if it relates to a supervening fact—that is, a fact that took place after the these procedural moments.

[13] *Cf.* Article 57 of the Rules of Procedure; also *Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4, para. 140, and *Case of Manuela et al. v. El Salvador. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of November 2, 2021. Series C No. 441, para. 31.

[14] The subjects of these statements are set forth in the Order of the President of the Court of February 17, 2022. The representative dropped his efforts to put forward the statements of Roxana Rodríguez Barquero and Dionisia Vega Fernández.

[15] *Cf.* Medical certification of May 9, 2001 (evidence file, folio 1044). According to the diagnosis of the National Children's Hospital, Mr. Guevara's disability takes the form of, inter alia, "learning problems," "emotional blockage," and "behavior disorders."

28. On June 4, 2001, Mr. Guevara was selected on an interim basis as a Miscellaneous Worker 1 by the Ministry of Finance.[16] Subsequently, the Human Resources Technical Unit of the Ministry of Finance, in coordination with the General Civil Service Directorate, launched external competitive hiring process 01-02 to permanently fill position 010179, Miscellaneous Worker 1. Mr. Guevara participated in that process.[17]

29. On March 6, 2003, the Human Resources Technical Unit sent the list of candidates for the position, containing the following information on their evaluations:[18]

Name	Score
Guevara Díaz Luis Fernando	78.97
P.V.M.	78.50
P.C.L.	78.49

30. During the selection process, Mr. Guevara took special tests due to his disability (the Specific Test for Miscellaneous Worker and questions from the "Mini-Mult")[19] and he was later called to be interviewed at the Technical Supply and General Services Unit of the Ministry of Finance on March 31, 2003.[20]

31. In a document dated June 13, 2003, the Head of the Maintenance Area sent official letter 044-2003 to the General Coordinator of Procurement and General Services Technical Unit in which he stated the following:

> Since last June 4, 2001, Mr. Luis Fernando Guevara Días (sic) was temporarily appointed to position 010179, miscellaneous class. I would like to note that despite the opportunities that have been extended to him in maintenance as an assistant, cleaning facilities, elevators, etc., his work is not satisfactory. Therefore, and because of our need for personnel, I ask for the appointment of a functional person to the position.
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> Additionally, I would note that due to his problems of retardation and emotional blockage that he suffers, (information provided by his mother), I do not consider him to be qualified for the position. If the intention is to help him, there are several ways to do so.[21]

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16 *Cf.* Official letter from the General Coordinator of the Human Resources Technical Unit of the Ministry of Finance of June 1, 2001 (evidence file, folio 937). The victim's brother testified during the public hearing that, prior to his interim contract, Mr. Guevara performed various tasks at the Ministry of Finance such as "taking out the garbage from the office, from multiple offices, cleaning floors, cleaning windows," and that "he spent about eight years" doing this work. The state indicated that during this time, Mr. Guevara was accompanied by his mother, who worked in the ministry, that he had never been explicitly authorized for consideration as an intern or trainee at the Ministry of Finance. In this regard, the Court notes that there is no evidence in the file to verify that Mr. Guevara worked informally for the Ministry of Finance during the years prior to his interim contract as Miscellaneous Worker 1, or that he had been part of a job reinsertion program through which he was incorporated into the ministry.

17 *Cfr*. Decision of the Senior Officer and General Administrative and Financial Director of the Ministry of Finance of July 9, 2003 (evidence file, folio 952).

18 *Cf.* Letter from the Human Resources Technical Unit of the Ministry of Finance (evidence file, folio 939).

19 *Cf.* Technical Supply and Services Unit of the Ministry of Finance, Specific test for miscellaneous worker (evidence file, folios 102 to 108), and Minnesota Multiphasic Personality Inventory, Mini-Mult (evidence file, folios 113 to 115).

20 *Cf.* Letter from the Technical Supply and Services Unit (evidence file, folio 941).

21 Letter from the Head of the Maintenance Area of the Ministry of Finance to the General Coordinator U.T.A.S. (evidence file, folio 943).

32. In a document of the same date, the general coordinator of the Technical Supply and General Services Unit, who was in charge of making the selection in the competitive hiring process to permanently fill position 010179,[22] addressed a letter to the general coordinator of the Human Resources Technical Unit, forwarding official letter 044-2003 sent by the head of maintenance. In that letter, he stated the following:

> Attached hereto, I am sending you letter 044-2003 from Mr. German Mora Salazar, in charge of the maintenance and custodial section, regarding the future employment of Luis Fernando Díaz Guevara as a civil servant through his eventual appointment to a miscellaneous position.
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> As can be inferred from the official letter, in view of the functions he performs and the opportunities he has been given in his position, the behavior of Mr. Luis Fernando has had a negative impact on his future employment, and his attitudes may even affect his personal safety in view of the type of functions that would be performed. It is therefore suggested that his selection be reconsidered.[23]

33. In a document dated June 12, 2003, Senior Officer and Administrative and Financial Director of the Ministry of Finance informed Mr. Guevara that he was not selected in the competitive hiring process to permanently fill position 010179, therefore his appointment as interim official in the position of Miscellaneous Worker 1 would end on June 16, 2003. It stated the following:

> […] according to article 121 of the Autonomous Regulations of this Ministry [which] states: in the case of interim officials, their service relationship concludes: (b) when a candidate is chosen from the list (a) to permanently fill a position.
>
> On behalf of this Institution, we thank you for the interest and effectiveness you have shown in performing the duties assigned during your employment relationship; and we reiterate our desire to collaborate with you in any process related to the administrative function of the Institution […].[24]

B. Appeal for reversal

34. On June 18, 2003, Mr. Guevara filed an "appeal for reversal with subsidy appeal and absolute nullity" against the decision to remove him from the position.[25] On July 9, 2003, the Senior Officer and General Administrative and Financial Director of the Ministry of Finance stated that all the procedures established by the legal system for cases like that of Mr. Guevara had been followed and declared the appeal inadmissible.[26] In this regard, he concluded as follows:

> Reviewing the personnel file of Mr. Guevara Díaz, it was determined that there is no report on what you described as "presumed inappropriate labor conduct."

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[22] *Cf.* Decision of the Senior Officer and General Administrative and Financial Director of the Ministry of Finance of July 9, 2003 (evidence file, folio 973).

[23] Letter from the Technical Supply and Services Unit (evidence file, folio 945).

[24] Letter from the Senior Officer and Administrative and Financial Director of the Ministry of Finance addressed to the alleged victim (evidence file, folio 947).

[25] *Cf.* Appeal for reversal with subsidy appeal and absolute nullity of June 18, 2003 (evidence file, folio 949).

[26] *Cf.* Decision of the Senior Officer and General Administrative and Financial Director of the Ministry of Finance of July 9, 2003 (evidence file, folio 953).

> However, at this point it should be noted that using his discretionary authority, Mr. E.P. chooses the candidate that he considered suitable for the position. Likewise, via official letter UTAS-124-2003, he indicated that "the behavior of Mr. Luis Fernando has had a negative impact on his future employment, and his attitudes may even affect his personal safety in view of the type of functions that would be performed. It is therefore suggested that his selection be reconsidered."
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> […] it should be noted that pursuant to the arguments given and the regulations and case law cited, this Office does not find omissions in the procedure that would indicate unequal treatment as claimed in his letter, since the process set forth by the law for cases like this one has been faithfully followed, ensuring that Mr. Guevara Díaz was able to participate on equal footing with the others taking part in the competitive hiring process and with the eligible candidates."

35. On July 7, 2003, in response to a request for information, the General Coordinator of the Human Resources Technical Unit reported that Mr. Guevara obtained the highest score on the short list for the competitive hiring process in which he was participating and that there were no reports of labor or conduct problems.[27]

36. On July 22, 2003, the Legal Department of the National Council for Rehabilitation and Special Education issued a report concluding that because he was not selected in the competitive hiring process, the dismissal of Mr. Guevara violated the Equal Opportunities for Persons with Disabilities Act (Law 7600) because it amounted to discrimination with regard to access to work.[28]

C. Amparo process

37. On August 5, 2003, the victim filed an appeal for amparo before the Constitutional Chamber of the Supreme Court of Justice (hereinafter "the Constitutional Chamber") against the Minister of Finance, alleging workplace discrimination.[29] On September 1, 2003, the Senior Officer and Director General of the Ministry of Finance answered the amparo appeal by rejecting the charges alleged by Mr. Guevara. Specifically, he indicated that "the procedure followed for the appointment complied with all the guidelines set for cases like this one."[30] On October 14, 2003, the Ombudsperson of the Republic of Costa Rica filed in support of the amparo appeal and requested that the external competitive hiring process for position 010179 be annulled.[31]

38. On February 14, 2005, the Constitutional Chamber declared the appeal filed by Mr. Guevara "without merit."[32] The Constitutional Chamber found as follows regarding the specific case:

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[27] *Cf.* Official letter from the General Coordinator of the Human Resources Technical Unit of the Ministry of Finance of July 7, 2003 (evidence file, folio 958).

[28] *Cf.* Report of the Legal Counsel of the National Council for Rehabilitation and Special Education of Costa Rica (evidence file, folio 960).

[29] *Cf.* Amparo appeal filed by Mr. Guevara Díaz before the Constitutional Chamber of the Supreme Court on August 5, 2003 (evidence file, folio 964).

[30] *Cf.* Response to the amparo appeal filed by the Senior Officer and General Director of the Ministry of Finance of September 1, 2003 (evidence file, folio 971).

[31] *Cf.* Formal brief supporting the *amparo* appeal filed by the Ombudsperson of the Republic of Costa Rica on October 14, 2003 (evidence file, folio 978).

[32] *Cf.* Judgment of the Constitutional Chamber of the Supreme Court of Justice of February 14, 2005 (evidence file, folio 985).

> VI. Specific case. From examination of the evidence placed on the record and the reports rendered under oath, it is concluded that the protected person was appointed on an interim basis to the position of Miscellaneous Worker 1 within the defendant Ministry; subsequently, in order to fill the vacant position, an external competitive hiring process was launched in which Guevara Díaz had full opportunity to participate. As part of the process, special and specific tests were applied due to his disability, in compliance with the regulations in force. The tests were also evaluated by the psychologist of the Technical Unit of Medical Services of that body. The appellant was eligible to hold the position and participate fully in the process to select the candidate to hold the position in question, since he made the respective short list. From the foregoing, it can be deduced that the appellant had access to the position he sought on equal footing with the other applicants, there being no actions in the procedure to his detriment that could be considered discriminatory. Although it is true that there is a note from the head of the maintenance of the Ministry of Finance that mentions the problems the appellant has with his disability, this Court has been informed under oath (with the consequences of law) that the selection to fill the vacant position was made prior to the letter in question and that it had no influence on the selection of the ideal person for the position. Thus, and in accordance with the established criteria of this Constitutional Court, constitutional protection is satisfied in the protection of the interested party's ability to participate on an equal footing by forming part of the respective short list and it does not fall to this Court to review the legality, timeliness, or appropriateness of the decision of the competent bodies to make the choice they have, having done so in the exercise of their discretionary authorities.
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> VII. In view of the foregoing considerations, the conclusion is reached that the constitutional rights of the appellant have not been threatened or violated by the facts in question. This is without detriment to challenges to the legality of the procedure used to select the candidates to fill the position sought by Mr. Guevara Díaz in the corresponding administrative instance, which is beyond the competence of this Constitutional Court.

D. Proceeding before the National Directorate of Labor Inspection and letter of the National Directorate of Social Security

39. On August 6, 2003, the General Secretary of the Employees Union of the Ministry of Finance (hereinafter "General Secretary of the Union") filed a complaint with the National Directorate of the General Labor Monitor (hereinafter "National Labor Directorate") on behalf of Mr. Guevara alleging discrimination in the workplace.[33] On November 26, 2003, the complaint was declared inadmissible through resolution 1657-03, upon finding it had not proven that there had indeed been discrimination committed in the workplace by the Ministry of Finance. On January 27, 2004, the General Secretary of the Union filed an appeal for reversal with subsidy appeal and absolute nullity. On February 3, 2004, the National Directorate of Labor declared the appeal for reversal admissible.[34] In its resolution, it stated the following:

> Following analysis of the appeal for reversal with subsidy appeal and absolute nullity against resolution DNI-1657-2003, it is decided to revoke the resolution based on the arguments given. Regarding the other claims, no ruling is issued

[33] *Cf.* Complaint from the Union of Employees of the Ministry of Finance filed with the Director General of the Labor Inspection on August 6, 2003 (evidence file, folio 1009).

[34] *Cf.* Resolution DNI -277-04 of the National Directorate of the General Labor Monitor of February 3, 2004 (evidence file, folio 1013).

> because the foregoing was revoked insofar as the discriminatory letters led to Mr. Guevara Díaz not being made permanent in the position, thereby violating Law 7600, as the management of the Ministry of Finance, via the Human Resources Department, has complied with all the proceedings and requirements in place for hiring, the performance of examinations, and equality by opting to hire a person with some degree of disability. However, it is reiterated that the letters indicated above had some impact on the decision to not hire Mr. Guevara. Therefore, the inspectors are ordered […] to continue with the procedure in this regard and send it to the respective Courts.[35]

40. On March 5, 2004, the Employees' Union of the Ministry of Finance sent a communication to the Minister of Finance requesting the "immediate reinstatement of our fellow worker Luis Fernando Guevara Díaz" in light of the resolution of the National Directorate of Labor.[36] On March 18, 2004, the Minister of Finance replied to the communication by indicating that the reinstatement of the victim was not appropriate given that "nothing was omitted from the procedure carried out that would be indicative of unequal treatment, arbitrariness, or some another discriminatory act […]."[37] In response to the ruling of the Constitutional Chamber of February 14, 2005 (*supra* para. 38), on September 1, 2006, the National Labor Directorate ordered the closure of Mr. Guevara's case.[38]

41. On August 22, 2005, the National Director of Social Security sent an official letter to the Minister of Labor and Social Security. In the letter, she stressed that the reasons given for not appointing Mr. Guevara "are contrary to what is established in the Equal Opportunities for Persons with Disabilities Act," and therefore, the administrative process should be reviewed. In particular, the office verified that Mr. Guevara was certified to work as a miscellaneous employee by the National Council for Rehabilitation and Special Education; he performed his duties efficiently while in the position; and that his disability never limited him from performing his duties.[39] This information was brought to the attention of the President of the Republic through a communication dated August 29, 2005.[40]

VII
MERITS

42. The Court recalls that the State recognized its international responsibility for the violation of the rights to judicial guarantees, judicial protection, equal protection, and the right to work, set forth in articles 8(1), 25, 24, and 26 of the American Convention, read in conjunction with Article 1(1), to the detriment of Luis Fernando Guevara Díaz. Without prejudice to this, and in consideration of the reasoning indicated above (*supra*

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35 Resolution DNI-277-04 of the National Directorate of the General Labor Monitor of February 3, 2004 (evidence file, folio 1023).

36 *Cf.* Letter from the Employees' Union of the Ministry of Finance addressed to the Minister of Finance dated March 5, 2004 (evidence file, folio 1025).

37 Response of the Minister of Finance to the Employees' Union of the Ministry of Finance of March 18, 2004 (evidence file, folio 1031).

38 *Cf.* Resolution DNI-801-06 of the National Directorate of Labor Inspection of the Ministry of Labor and Social Security of September 1, 2006 (evidence file, folio 1035).

39 *Cf.* Note of the National Director of Social Security of August 25, 2005 (evidence file, folios 1002 to 1004).

40 *Cf.* Official Letter from the Minister of Labor and Social Security to the President of the Republic of August 29, 2005 (evidence file, folio 1006).

para. 23), the Court will address the arguments on the violation of the right to equal protection and the prohibition of discrimination, as well as the violation of the right to work.

VII-I
RIGHT TO EQUAL PROTECTION, PROHIBITION OF DISCRIMINATION, AND RIGHT TO WORK

A. Arguments of the parties and of the Commission

43. The ***Commission*** indicated that disability is one of the reasons for discrimination that is prohibited by articles 1(1) and 24 of the American Convention. It also indicated that one of the immediate obligations with regard to the right to work, protected by Article 26 of the Convention, is the obligation to guarantee its exercise without any discrimination, as well as the obligation to take deliberate steps towards its realization. In this specific case, the Commission noted a series of facts indicating the existence of surreptitious discrimination that arbitrarily impacted Mr. Guevara's exercise of his right to work. The Commission therefore concluded that Mr. Guevara was not hired by the Ministry of Finance because of his disability, thus amounting to a case of surreptitious discrimination that violated article 24 and 26 of the American Convention, read in conjunction with Article 1(1).

44. The ***representative*** reiterated the legal arguments put forth by the Commission in the Report on the Merits. He also presented specific arguments. As regards Article 24 of the Convention, he held that the right to equality was violated in that the reason Mr. Guevara was not selected for the position at the Ministry of Finance was his disability. This was despite the fact that the disability did not prevent him from properly doing his job, and additionally, he received excellent scores during the selection process. As regards Article 26 of the Convention, the representative held that the State had violated its commitment to progressive development by denying a person with a disability has right to work.

45. The ***state*** recognized its responsibility for the violation of articles 24 and 26 of the American Convention, read in conjunction with Article 1(1), to the detriment of Mr. Guevara (*supra* para. 18).

B. Considerations of the Court

B.1. Right to equal protection and prohibition of discrimination against persons with disabilities

46. The Court has stated that the notion of equality stems directly from the oneness of the human family and is linked to the essential dignity of the individual, and that principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority; it is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified.[41] States must abstain from any action that may, in any way, be directly or

[41] *Cf. Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica.* Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, para. 55, and *Rights to freedom to organize, collective bargaining, and strike, and their relation to other rights, with a gender perspective. (interpretation and scope*

indirectly aimed at creating situations of de jure or de facto discrimination.[42] The Court's case law has also indicated that at the current moment of the development of international law, the fundamental principle of equal protection and nondiscrimination has taken on the status of *ius cogens*. On it rests the entire legal framework of the national and international public order, and it permeates all legal systems.[43]

47. Additionally, the Court has established that Article 1(1) of the Convention is a general norm the content of which extends to all the provisions of the treaty and establishes the obligation of the States Parties to respect and ensure the full and free exercise of the rights and freedoms recognized therein "without any discrimination." In other words, whatever the origin or the form it takes, any conduct that could be considered discriminatory with regard to the exercise of any of the rights guaranteed in the Convention is per se incompatible with it.[44] The State's non-compliance with the general obligation to respect and ensure human rights through any different treatment that may be discriminatory—that is, that does not pursue legitimate purposes, is unnecessary, and/or is disproportionate—generates international responsibility. Thus, there is an indissoluble connection between the obligation to respect and ensure human rights and the principle of equality and non-discrimination.[45]

48. Additionally, this Court has found that while the general obligation set forth in Article 1(1) addresses the State's duty to respect and guarantee, "without discrimination," the rights set forth in the American Convention, Article 24 protects the right to "equal protection of the law."[46] That is, Article 24 of the American Convention prohibits discrimination not only as regards the rights enshrined in the treaty but also with respect to all laws enacted by the State and their application.[47] In other words, if a State discriminates in respecting or guaranteeing a right set forth in the Convention, it fails to comply with the obligation set forth in Article 1(1) and the substantive right in question. On the other hand, if the discrimination involves unequal protection under a domestic law or its application, the facts should be reviewed pursuant to Article 24 of the American Convention, read in conjunction with the categories protected by Article

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of articles 13, 15, 16, 24, 25, and 26 in relation to articles 1(1) and 2 of the American Convention on Human Rights; articles 3, 6, 7, and 8 of the Protocol of San Salvador; articles 2, 3, 4, 5, and 6 of the Convention of Belém do Pará; articles 34, 44, and 45 of the Charter of the Organization of American States; and articles II, IV, XIV, XXI, and XXII of the American Declaration on the Rights and Duties of Man). Advisory Opinion OC-27/21 of May 5, 2021. Series A No. 27, para. 152.

[42] *Cf. Juridical Condition and Rights of Undocumented Migrants.* Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 103, and Advisory Opinion OC-27/21, *supra*, para. 152.

[43] *Cf.* Advisory Opinion OC-18/03, *supra*, para. 101, and Advisory Opinion OC-27/21, *supra*, para. 152.

[44] *Cf.* Advisory Opinion OC-4/84, *supra*, para. 53; and *Case of Pavez Pavez v. Chile. Merits, Reparations, and Costs.* Judgment dated February 4, 2022. Series C No. 449, para. 65.

[45] *Cf.* Advisory Opinion OC-18/03, *supra*, para. 85; and *Case of Pavez Pavez v. Chile*, *supra*, para. 65.

[46] *Cf.* Advisory Opinion OC-4/84, *supra*, paras. 53 and 54; and *Case of Pavez Pavez v. Chile*, *supra*, para. 65.

[47] *Cf. Case of Yatama v. Nicaragua. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of June 23, 2005. Series C No. 127, para. 186; and *Case of Pavez Pavez v. Chile*, *supra*, para. 66.

1(1).[48] Additionally, the Court has found a mandate aimed at guaranteeing material equality stemming from Article 24 of the Convention.[49]

49. In this regard, the right to equal protection and nondiscrimination incorporates two concepts: one related to the prohibition of arbitrary differentiation of treatment, and another related to the obligation of States Party to create real equal conditions toward groups who have been historically excluded or who are exposed to a greater risk of being discriminated.[50] The Court has also found that a difference in treatment is discriminatory when it has no objective or reasonable justification[51]; in other words, when it does not pursue a legitimate purpose and there is no proportionality between the means used and the objective pursued.[52] This Court has thus established that with a ban on discrimination based on one of the protected categories set forth in Article 1(1) of the Convention, any restriction of a right must be rigorously justified, which implies that the state's grounds for the difference in treatment must be particularly serious and supported by exhaustive arguments.[53]

50. In this regard, the Court recalls that persons with disabilities are bearers of the rights established in the American Convention, rights that must be guaranteed in accordance with the tenets of the right to equality and the prohibition on discrimination. In addition, the Court has established that disability is a protected category in the terms of Article 1(1) of the American Convention, and therefore, any discriminatory legal provision, act, or practice based on a person's real or perceived disability is prohibited. Consequently, no legal provision, decision, or practice of domestic law applied by either State authorities or private individuals may reduce or restrict in a discriminatory way the rights of an individual based on their disability.[54] In the same way, as regards disability as a protected category in the terms of Article 1(1) of the American Convention, the burden of proof to demonstrate that the different treatment of a person with a disability is justified falls on the state, and its decision cannot be justified based on stereotypes.

51. The Court highlights that in 1999, the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities was adopted,

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48 *Cf. Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela. Preliminary Objections, Merits, Reparations, and Costs*. Judgment dated August 5, 2008. Series C No. 182, para. 209; and *Case of Pavez Pavez v. Chile*, *supra*, para. 66.

49 *Cf. Case of the Employees of the Fireworks Factory of Santo Antonio de Jesus v. Brazil. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of July 15, 2020. Series C No. 407, para. 199, and Advisory Opinion OC-27/21, *supra*, para. 156.

50 *Cf.* Advisory Opinion OC-18/03, *supra*, para. 92, and Advisory Opinion OC-27/21, *supra*, para. 158.

51 *Cf. Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 46, and *Case of Guzmán Albarracín et al v. Ecuador. Merits, Reparations, and Costs.* Judgment of June 24, 2020. Series C No. 405, para. 193.

52 *Cf. Case of Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile. Merits, Reparations, and Costs.* Judgment of May 29, 2014. Series C No. 279, para. 200, and *Case of Guzmán Albarracín et al v.* Ecuador, *supra*, para. 193.

53 *Cf. Case of Gonzales Lluy et al. v. Ecuador. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of September 1, 2015. Series C No. 298, para. 257, and *Case of Ramírez Escobar et al. v. Guatemala. Merits, Reparations, and Costs.* Judgment of March 9, 2018. Series C No. 351, para. 278.

54 *Cf. Case of Guachalá Chimbo et al. v. Ecuador. Merits, Reparations, and Costs.* Judgment of March 26, 2021. Series C No. 423, para. 79, and *Case of Vera Rojas et al. v. Chile. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of October 1, 2021. Series C No. 439, para. 101.

ratified by Costa Rica on August 12, 1999. This Convention uses a social model in its approach to disability, meaning that disability is not defined exclusively by the presence of a physical, mental, intellectual, or sensory impairment, but is rather interrelated with the social barriers or limitations preventing persons from exercising their rights effectively.[55] The types of limitations or barriers commonly encountered by functionally diverse persons in society are, among other things, physical or architectural barriers, as well as communication, attitudinal, or socioeconomic barriers.[56]

52. Additionally, the Court highlights that on May 3, 2008, the Convention on the Rights of Persons with Disabilities (hereinafter the "CRPD") entered into force. This Convention establishes nondiscrimination as one of its general principles and prohibits all discrimination on the basis of disability.[57] The CRPD, which was ratified by Costa Rica on October 1, 2008, establishes a series of guiding principles regarding the rights of persons with disabilities, including non-discrimination; full and effective participation and inclusion in society; and accessibility.[58] It also recognizes states' obligation to "refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention."[59]

53. This Court also emphasizes that, in compliance its special protection duties regarding any person facing vulnerability, the state must adopt positive measures to protect rights, determined according to the particular needs for protection of the bearer of the right, whether due to the bearer's personal condition or the specific situation facing the individual, such as disability.[60] In this sense, states have an obligation to strive for the inclusion of persons with disabilities by offering equal conditions, opportunities, and participation at all levels of society[61] in order to guarantee that legal or de facto limitations are dismantled. States must therefore promote social inclusion practices and establish affirmative action measures to remove these barriers.[62] In this regard, as indicated by expert witness Sylvia Quan, attitudinal barriers are a particularly significant obstacle to the exercise of rights by persons with disabilities "due to prejudices, stigmas, and discrimination in multiple forms."[63]

54. Based on the same logic, the Court notes that persons with disabilities are often subject to discrimination based on their status, and therefore states must take every legislative, social, educational, workplace, or other measure necessary to ensure that

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55 *Cf. Case of Furlán and Relatives v. Argentina*, *supra*, para. 133, and *Case of Vera Rojas et al. v. Chile*, *supra*, para. 102.

56 *Cf. Case of Furlán and Relatives v. Argentina*, *supra*, para. 133, and *Case of Vera Rojas et al. v. Chile*, *supra*, para. 102.

57 *Cf.* CRPD, articles 3 and 5.

58 *Cf.* CRPD, article 3.

59 CRPD, article 4.

60 *Cf.* Case of Ximenes Lopes *v. Brazil.* Judgment of July 4, 2006. Series C No. 149, para. 103, and *Case of Manuela et al. v. El Salvador, supra*, para. 257.

61 *Cf. Case of Furlán and Relatives v. Argentina*, *supra*, para. 134, and *Case of Guachalá Chimbo et al. v. Ecuador*, *supra*, para. 86.

62 *Cf. Case of Furlán and Relatives v. Argentina*, *supra*, para. 134, and *Case of Guachalá Chimbo et al. v. Ecuador*, *supra*, para. 86.

63 Expert opinion of Silvia Judith Quan Chang (evidence file, audiovisual material folder, min. 2:10).

discrimination based on disability is eliminated and to promote full social integration of persons with disabilities.[64] In this regard, the Committee on Economic, Social and Cultural Rights has underscored the obligation to take special measures "to the maximum extent of their available resources, to enable such persons to seek to overcome any disadvantages, in terms of the enjoyment of the rights specified in the Covenant, flowing from their disability."[65]

B.2. Right to work of persons with disabilities

55. The Court recalls that the Commission and the representatives alleged violation of the right to work, as established in Article 26 of the Convention, and that the state acknowledged this violation. Regarding this, the Court has established its material competence to hear and resolve disputes related to article 26 of the American Convention as an integral part of the rights set forth therein, rights regarding which Article 1(1) establishes an obligation for states to respect and guarantee.[66] The Court also recalls that this competence has been reaffirmed in at least 22 contentious cases,[67] as well as in two advisory opinions.[68]

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[64] *Cf.* Case of Ximenes Lopes *v. Brazil*, *supra*, para. 105, and *Case of Guachalá Chimbo et al. v. Ecuador*, *supra*, para. 87.

[65] Committee on Economic, Social, and Cultural Rights, General Comment 5: Persons with Disabilities, E/1995/22, of December 9, 1994, para. 5.

[66] *Cf., inter alia, Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller") v. Peru. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of July 1, 2009. Series C No. 198, paras. 97-103, *Case of Lagos del Campo v. Peru. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of August 31, 2017. Series C No. 340, paras. 142 and 154; and *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence v. Peru. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of November 21, 2019. Series C No. 394, para. 33.

[67] *Cf. Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller") v. Peru, Case of Lagos del Campo v*. *Peru, supra, Case of Dismissed Employees of Petroperú et al. v. Peru. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of November 23, 2017. Series C No. 344; *Case of San Miguel Sosa et al. Venezuela. Merits, Reparations, and Costs.* Judgment of February 8, 2018. Series C No. 348; Case of Poblete Vilches *et al. v. Chile. Merits, Reparations, and Costs.* Judgment of March 8, 2018. Series C No. 349; Case of Cuscul Pivaral *et al. v. Guatemala. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of August 23, 2018. Series C No. 359; *Case of Muelle Flores v. Peru. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of March 6, 2019. Series C No. 375; *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence v. Peru, supra, Case of Hernández v. Argentina. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of November 22, 2019. Series C No. *395; Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, Reparations, and Costs.* Judgment of February 6, 2020. Series C No. 400; *Case of Spoltore v. Argentina. Preliminary Objections, Merits, Reparations, and Costs*. Judgment June 9, 2020. Series C No. 404, *Case of the Employees of the Fireworks Factory of Santo Antonio de Jesus v. Brazil*, *supra*; *Case of Casa Nina v. Peru. Preliminary Objections, Merits, Reparations, and Costs.* Judgment dated November 24, 2020. Series C No. 419; *Case of Guachala Chimbo et al. v*. *Ecuador, supra; Case of the Miskito Divers (Lemoth Morris et al.) v. Honduras.* Judgment of August 31, 2021. Series C No. 432; *Case of Vera Rojas et al. v. Chile, supra; Case of the Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala. Merits, Reparations, and Costs.* Judgment of October 6, 2021. Series C No. 440; *Case of Manuela et al. v. El Salvador, supra; Case of Former Judicial Branch Workers v. Guatemala. Preliminary Objections, Merits, and Reparations.* Judgment of November 17, 2021. Series C No. 445; *Case of Palacio Urrutia et al. v. Ecuador, supra; Case of the National Federation of Maritime and Port Workers (FEMAPOR) v. Peru. Preliminary Objections, Merits, and Reparations.* Judgment dated February 1, 2022. Series C No. 448; and *Case of Pavez Pavez v. Chile*, *supra.*

[68] *Cf. The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights, in conjunction with articles 1(1) and 2).* Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23, and Advisory Opinion OC-27/21, *supra*.

56. In this regard, this Court notes that a literal, systematic, teleological, and evolving interpretation of the scope of its competence leads to the conclusion that Article 26 of the American Convention protects the rights derived from the economic, social, educational, scientific, and cultural provisions set forth in the Charter of the Organization of American States (hereinafter the "OAS Charter"). It has also recognized that the scope of these rights must be understood in conjunction with the other provisions of the American Convention. They are therefore subject to the general obligations contained in articles 1(1) and 2 of the Convention and can be subject to supervision by this Court, pursuant to the terms of article 62 and 63 of the Convention. This conclusion is not based solely on formal argumentation: it is the result of the interdependence and indivisibility of civil and political rights with economic, social, cultural, and environmental rights,[69] as well as their compatibility with the objective and aim of the Convention, which is to protect the fundamental rights of human beings. In this sense, the Court has established that in each specific case requiring an analysis of Economic, Social, Cultural and Environmental Rights (hereinafter "ESCER"), it must be determined whether a human right protected by Article 26 of the American Convention is derived explicitly or implicitly and the scope of its protection.[70]

57. It must also be taken into account that human rights are interdependent and indivisible, and therefore, the hypothesis that ESCER are beyond the jurisdictional control of this Court—which in this case has been explicitly acknowledged by the state through its acknowledgment of responsibility (*supra* para. 18) is inadmissible.

58. This Court has held that the right to work is a right that is protected by Article 26 of the Convention.[71] In relation to the foregoing, this Court has noted that articles 45(b) and (c) and articles 46 and 34(g) of the OAS Charter establish a series of provisions that

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[69] The Court "has repeatedly maintained the interdependence and indivisibility of civil and political rights and economic, social and cultural rights, because they should all be understood integrally as human rights, without any specific hierarchy, and be enforceable in all cases before the competent authorities." *Cf. Case of Lagos del Campo v.* Peru, *supra*, para. 141.

[70] *Cf. Case of Cuscul Pivaral et al. v. Guatemala*, *supra*, paras. 75 to 97; *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence v.* Peru, *supra*, para. 34, and *Case of Vera Rojas et al. v. Chile*, *supra*, para. 33.

[71] *Cf. Case of Lagos del Campo v. Peru*, *supra*, para. 145; *Case of Dismissed Employees of Petroperú et al. v. Peru*, *supra*, para. 192; *Case of San Miguel Sosa et al. Venezuela, supra,* paras. 219 and 220; *Case of Spoltore v. Argentina*, *supra*, para. 82; *Case of the Employees of the Fireworks Factory of Santo Antonio de Jesus v. Brazil*, *supra*, para. 68; *Case of Casa Nina v. Peru*, *supra*, para. 104; *Case of the Miskito Divers (Lemoth Morris et al) v.* Honduras, *supra*, para. 68; *Case of Former Judicial Branch Workers v. Guatemala*, *supra*, paras. 128 to 133; *Case of Palacio Urrutia et al. v. Ecuador*, *supra*, para. 153; *Case of the national Federation of Maritime and Port Workers (FEMAPOR) v. Peru*, *supra*, para. 107; *Case of Pavez Pavez v. Chile*, *supra*, para. 87.

make it possible to identify the right to work.[727][374] Specifically, the Court has found that Article 45(b) of the OAS Charter establishes the following: "b) Work is a right and a social duty, it gives dignity to the one who performs it, and it should be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working." The Court has thus found that the connection to the right to work is sufficiently specific to derive its implicit existence and recognition from the OAS Charter.

59. Regarding the content and scope of this right, the Court recalls that Article XIV of the American Declaration of the Rights and Duties of Man establishes that "[e]very person has the right to work, under proper conditions, and to follow his vocation freely [...]." Similarly, Article 6 of the Protocol of San Salvador establishes that "[e]veryone 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." At the universal level, the Universal Declaration of Human Rights establishes that "[e]veryone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment."For its part, the International Covenant on Economic, Social and Cultural Rights (hereinafter "ICESCR") establishes that "[t]he 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."[75]

60. The Court notes that in its General Comment No. 18 on the right to work, the Committee on Economic, Social and Cultural Rights stated that states have an obligation "to assure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly."[76] Likewise, the Committee established that States have the obligation to respect this right, meaning they must "refrain from interfering

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[72] *Cf.* Article 45 of the OAS Charter. "The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms: [...] b) Work is a right and a social duty, it gives dignity to the one who performs it, and it should be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working; c) Employers and workers, both rural and urban, have the right to associate themselves freely for the defense and promotion of their interests, including the right to collective bargaining and the workers' right to strike, and recognition of the juridical personality of associations and the protection of their freedom and independence, all in accordance with applicable laws [...]."

[73] *Cf.* Article 46 of the OAS Charter. "The Member States recognize that, in order to facilitate the process of Latin American regional integration, it is necessary to harmonize the social legislation of the developing countries, especially in the labor and social security fields, so that the rights of the workers shall be equally protected, and they agree to make the greatest efforts possible to achieve this goal."

[74] *Cf.* Article 34(g) of the OAS Charter. "The Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development. To achieve them, they likewise agree to devote their utmost efforts to accomplishing the following basic goals: [...] g) Fair wages, employment opportunities, and acceptable working conditions for all."

[75] International Covenant on Economic, Social and Cultural Rights (ICESCR), article 7(b).

[76] *Cf.* Committee on Economic, Social and Cultural Rights. General Comment No. 18. The Right to Work (Art. 6), E/C.12/GC/18, of November 24, 2005, para. 4.

directly or indirectly with the enjoyment of that right."[77] In addition, it indicated that "any discrimination in access to the labour market or to means and entitlements for obtaining employment on the grounds of race, colour, sex, language, age, religion, political or other opinion, national or social origin, property, birth or any other situation with the aim of impairing the equal enjoyment or exercise of economic, social and cultural rights constitutes a violation of the Covenant."[78]

61. This Court notes that specific obligations to protect the right to work of persons with disabilities arise from Article 26 of the Convention, read in conjunction with articles 24 and 1(1). In this regard, the Court notes that, as indicated above, the right to equal protection and the prohibition of discrimination entail for states a special duty to protect the rights of persons facing vulnerability. This duty therefore includes respecting and guaranteeing the right to work—a right protected by the Convention—of persons with disabilities, as they are vulnerable persons. Thus, states must refrain from conduct that violates the right to work as a result of acts of discrimination and must take positive measures to protect persons with disabilities as much as possible by addressing the circumstances specific to them.

62. In this regard, the Court notes that the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights—the "Protocol of San Salvador"—indicates in its article 18 that "[e]veryone affected by a diminution of his physical or mental capacities is entitled to receive special attention designed to help him achieve the greatest possible development of his personality." The article establishes that, to this end, the states parties undertake to adopt the necessary measures for that purpose and, in particular, recognizes their obligation to implement specific programs aimed at providing persons with disabilities the resources and environment needed for attaining this goal, "including work programs consistent with their possibilities and freely accepted by them or their legal representatives, as the case may be."[79]

63. Additionally, the CIADDIS establishes a series of obligations that states must fulfill in order to objective of "prevent[ing] and eliminat[ing] all forms of discrimination against persons with disabilities and [...] promot[ing] their full integration into society."[80] To achieve this, states commit to adopting the "legislative, social, educational, labor-related, or any other measures needed to eliminate discrimination against persons with disabilities and to promote their full integration into society."[81] This includes the measures necessary to "eliminate discrimination gradually and to promote integration by government authorities and/or private entities in providing or making available goods, services, facilities, programs, and activities such as employment [...]."[82]

64. For its part, the CRPD recognizes "the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities." Likewise, it establishes the

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77 *Cf.* Committee on Economic, Social and Cultural Rights. General Comment No. 18, *supra*, para. 22.

78 *Cf.* Committee on Economic, Social and Cultural Rights. General Comment No. 18, *supra*, para. 33.

79 Protocol of San Salvador, Article 18.

80 CIADDIS, article II.

81 CIADDIS, article III.1.

82 CIADDIS, article III.1.a.

obligation of States to safeguard and promote the right to work, through measures that include the following: "a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;" "c) Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others;" and "g) Employ persons with disabilities in the public sector."[83]

65. The Committee on the Rights of Persons with Disabilities (hereinafter also the "CORPD") interpreted the scope of article 27 of the CRPD in its General Comment No. 6, on equality and non-discrimination. The CODPD indicated that, in order to achieve de facto equality in compliance with the CRPD, states must ensure that there is no employment discrimination, for which they must also make reasonable adjustments that include the adoption of measures such as "ensure that there is no discrimination on the grounds of disability in connection to work and employment" and "ensure equal and effective access to benefits and entitlements, such as retirement or unemployment benefits."[84]

66. Also, in its General Comment No. 5 on persons with disabilities the Committee on Economic, Social and Cultural Rights stated that "the 'right of everyone to the opportunity to gain his living by work which he freely chooses or accepts' (art. 6 (1)) is not realized where the only real opportunity open to disabled workers is to work in so-called 'sheltered' facilities under sub-standard conditions." Similarly, the Committee indicated that according to the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (hereinafter also "Standard Rules"), approved by the General Assembly of the United Nations, "persons with disabilities, whether in rural or urban areas, must have equal opportunities for productive and gainful employment in the labour market."[85] The Standard Rules further establish that "[i]n their capacity as employers, States should create favourable conditions for the employment of persons with disabilities in the public sector."[86]

67. Additionally, the Court notes that the International Labour Organization (hereinafter "ILO") established in Convention No. 111 on Discrimination in Respect of Employment and Occupation that states must "undertake [...] to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and ocupation, with a view to eliminating any discrimination in respect thereof."[87] Similarly, Convention 159 on professional rehabilitation and employment, to which Costa Rica has been a party since June 23, 1991, establishes that States must formulate, implement, and review a national policy on vocational rehabilitation and employment of disabled persons. That Convention also states that the policy must be based on the principle of equal

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[83] CRPD, article 27.

[84] Committee on the Rights of Persons with Disabilities. General Comment No. 6. On equality and non-discrimination, CRPD/C/GC/6, approved by the Committee at its 19th period of sessions (February 14 to March 9, 2018), para. 67.

[85] Committee on Economic, Social and Cultural Rights. General Comment No. 5. Persons with Disabilities, E/1995/22, of September 12, 1994, paras. 21 to 22.

[86] Standard Rules on the Equalization of Opportunities for Persons with Disabilities, adopted by the United Nations General Assembly, 48th session, annex to resolution 48/96, article 7.5.

[87] ILO, Convention Concerning Discrimination in Respect of Employment and Occupation, adopted on June 25, 1958 (Num. 111), article 2.

opportunity and treatment. In this sense, the positive measures adopted to achieve equality shall not be considered discriminatory.[88] ILO Recommendation 168 established that persons with disabilities "should enjoy equality of opportunity and treatment in respect of access to, retention of and advancement in employment which, wherever possible, corresponds to their own choice and takes account of their individual suitability for such employment."[89]

68. It should be noted that one of the objectives of the 2030 Agenda for Sustainable Development, approved in September 2015 by the UN General Assembly, is to "create conditions for sustainable, inclusive and sustained economic growth, shared prosperity and decent work for all." The instrument indicates that half of the world's population lives on the equivalent of 2 US dollars per day, which requires reflection on the "slow and unequal" progress, and reviewing [the] economic and social policies aimed at eradicating poverty." Additionally, in order to achieve this objective, a specific goal was set: "[b]y 2030, achieve full and productive employment and decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value"[90]

69. The Court also notes that the highest courts in the region have addressed the scope of the protection of the right to work for persons with disabilities, specifically with regard to protection from dismissal. The Constitutional Court of Colombia has found that the right to job security enjoys enhanced protection with regard to workers with disabilities, such that a person with a disability cannot be dismissed without the authorization of the Ministry of Labor. The Court also found unconstitutional any legal provision or action preventing access to positions to people "(i) whose disability is not demonstrated to be on compatible with the essential functions to be performed; (ii) who have disabilities that are incompatible with functions of the position that are incidental, accessory, or can be delegated, but are compatible with the essential function; (iii) who can adequately perform the functions of the respective position or job if reasonable workplace adjustments are made."[91]

70. For its part, the Supreme Court of Justice of the Nation of Mexico has found that in order to head off any potential discriminatory violation, the jurisdictional authorities hearing cases where the worker alleges having been fired due to a situation of discrimination have an enhanced obligation to justify their decisions.[92] According to the court, this is because "when a decision is made or action taken based on a discriminatory situation, the agent who is acting or deciding often does not recognize that the central or real motive behind their decision is discrimination—rather, they tend to conceal it."[93]

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88 *Cf.* ILO, Convention on Vocational Rehabilitation and Employment, adopted on June 20, 1983 (Num. 159), articles 2-5.

89 ILO, Vocational Rehabilitation and Employment (Num. 168). 1983, para. 7.

90 United Nations. Resolution 70/01. Transforming our World: The 2030 Agenda for Sustainable Development, approved by the General Assembly on September 25, 2015. 8.

91 *Cf.* Constitutional Court of Colombia, Judgment T-340/17, of May 19, 2017, pgs. 26 and 27.

92 *Cf.* Supreme Court of Justice of the Nation of Mexico, direct amparo appeal number 3708/2016, of May 2017, pg. 28.

93 Supreme Court of Justice of the Nation of Mexico, direct amparo appeal number 3708/2016, of May 2017, pg. 29.

71. Likewise, the Supreme Federal Court of Brazil has found that the Convention on the Rights of Persons with Disabilities was incorporated into the Brazilian legal system as a constitutional norm. In this regard, it found a law excluding maritime workers from the public policy for inclusion of persons with disabilities to be unconstitutional. Based on article 27 of the CRPD, said Court established that physical disability does not, in and of itself, disqualify a worker from working on boats, as there is no legal or conventional requirement of full physical capability for any and all maritime activity. It likewise found that leaving out maritime jobs when calculating the number of vacant positions filled with persons with disabilities was both unreasonable and disproportionate, constituting a discriminatory legal differentiation and an arbitrary obstacle to work by reducing the availability of positions open to this category persons.[94]

72. Additionally, in reviewing the decision of an appeals court upholding the firing of a person with disability, the Constitutional Court of Ecuador found that beyond a mere review of the legality of and authority to unilaterally terminate temporary service contracts, a constitutional analysis was both necessary and obligatory. This analysis required reviewing whether or not the entity guaranteed the rights and dignity of persons with disabilities, and whether it fully considered all the regulatory instruments applying to the matter that were enacted to make this group of citizens a priority and provide them with special protection in order to guarantee them true equality in the workplace.[95]

73. In view of the foregoing, this Court notes that, in the public sector, states have an enhanced responsibility to respect the right to work of persons with disabilities. This obligation translates, first of all, into a prohibition on any act of discrimination based on disability with respect to the exercise of their labor rights, particularly with respect to the selection and hiring of the employee, as well as their permanence in the position or promotion, and workplace conditions. Second, deriving from the mandate of real or material equality, it translates into an obligation to take affirmative action to incorporate persons with disability into the labor force, action that must be aimed at progressively removing the barriers that prevent them from fully exercising their labor rights. In this regard, states are required to adopt measures to ensure that persons with disabilities have effective and equal access to competitive public hiring processes through vocational training and education, as well as by making special adjustments to the evaluation mechanisms so as to enable them to participate on an equal footing and make it possible to employ persons with disabilities in the public sector.

74. This Court additionally finds that the enhanced obligation to protect the right to work of persons with disabilities entails specific obligations for authorities hearing complaints alleging acts of discrimination in the workplace.[96] This obligation requires rigorous diligence in guaranteeing and respecting the rights of persons with disabilities in the context of administrative and judicial remedies analyzing violations of the right to work.[97] First, therefore, the authorities must refrain from basing their decisions on

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94 *Cf.* Supreme Federal Court of Brazil, Direct Constitutional Challenge No. 5,760 of September 13, 2019.

95 *Cf*. Constitutional Court of Ecuador, ruling 258-15 of August 12, 2015, pg. 20.

96 *Cf.* Mutatis mutandis*, Case of Furlán and Relatives v. Argentina. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of August 31, 2012. Series C No. 246, para. 201

97 *Cf. Case of Furlán and Relatives v. Argentina. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of August 31, 2012. Series C No. 246, paras. 201 and 202. Similarly, see Supreme Court of Justice of the Argentine Nation, *Terruli, Jorge Miguel v. González, Manuel Enrique et al. on mortgage foreclosure*, judgment of December 22, 2015, considering paragraphs 7 and 13, and Brasilia Regulations Regarding Access to Justice for Vulnerable People, adopted during the 16th Ibero-American Judicial Summit held in Brasilia in March 2008, rule 25.

discriminatory reasoning.[98] Second, they must analyze more rigorously whether the right to work of people with disabilities could have been affected by discriminatory acts committed by authorities or third parties.[99] Regarding this point, the Court considers that the authorities handling these remedies must analyze whether it has been sufficiently demonstrated that different treatment for a person with a disability is justified, with special consideration to their situation of vulnerability.[100]

B.3. Analysis of the specific case

75. Pursuant to the above paragraphs, and in view of the state's full acknowledgment of its responsibility, it falls to the Court to analyze the state's conduct with respect to compliance with its obligations to respect the rights to equal protection and work, as well as the prohibition of discrimination, as regard's Mr. Guevara's participation in the competitive hiring process for permanent position 010179 of Miscellaneous Worker 1 in the Ministry of Finance, and regarding the termination of his employment in an interim position after he was not selected through that process.

76. The Court recalls that on June 4, 2001, Mr. Guevara was hired by the Ministry of Finance on an interim basis as a Miscellaneous Worker 1. In 2003, Mr. Guevara participated in competitive hiring process 01-02, seeking permanent appointment to that position. On March 6, 2003, the Human Resources Technical Unit sent the list of candidates for the position, on which Mr. Guevara had received the highest score among the candidates. In a document dated June 13, 2003, the Head of Maintenance stated to the General Coordinator of the Procurement and General Services Technical Unit that Mr. Guevara's work in the "Miscellaneous 1" position "is not satisfactory" and asked for the "selection of a functional person to the position." He added that "due to his problems of retardation and emotional blockage that he suffers, (information provided by his mother), I do not consider him to be qualified for the position. If the intention is to help him, there are several ways to do so."

77. In a document of that same date, the general coordinator of the Procurement and General Services Technical Unit forwarded the letter sent by the head of maintenance to the general coordinator of the Human Resources Technical Unit, adding that "the behavior of Mr. Luis Fernando has had a negative impact on his future employment, and his attitudes may even affect his personal safety in view of the type of functions that would be performed. It is therefore suggested that his selection be reconsidered." Later, the senior officer and administrative and financial director of the Ministry of Finance informed Mr. Guevara that he was not selected in the competitive hiring process in question, and therefore his interim appointment would end on June 16, 2003. In several appeals, Mr. Guevara alleged acts of discrimination against him based on his intellectual

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98 *Cf.* Mutatis mutandis*, Case of Atala Riffo and girls v. Chile. Merits, Reparations, and Costs.* Judgment of February 24, 2012. Series C No. 239, para. 237, and *Case of Manuela et al. v. El Salvador. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of November 2, 2021. Series C No. 441, para. 159.

99 *Cf.* Mutatis mutandis*, Case of San Miguel Sosa et al. Venezuela. Merits, Reparations, and Costs.* Judgment of February 8, 2018. Series C No. 348, paras. 181, 191, and 221. In this regard, see Supreme Court of Justice of the Nation of Mexico, direct amparo appeal number 3708/2016, of May 2017, pgs. 28 and 29; and Constitutional Court of Ecuador, ruling 258-15 of August 12, 2015, pg. 20.

100 *Cf.* Supreme Court of the Argentine Nation, *Terruli, Jorge Miguel v. González, Manuel Enrique et al. on mortgage foreclosure*, 12.22.2015.

disability. In those appeals, he presented additional information indicating he had performed the job adequately and indicating a lack of negative reports.[101]

78. The Court finds that the references to Mr. Guevara contained in communication 044-2003 from the head of maintenance addressed to the general coordinator of the Procurement and General Services Technical Unit and in the latter's communication addressed to the general coordinator of the Human Resources Technical Unit constitute sufficient evidence to demonstrate that the reason Mr. Guevara was not selected for the position of Miscellaneous Worker 1 was his status as a person with an intellectual disability.[102] This conclusion, acknowledged by the state, derives from the content of the letters, which clearly alludes to Mr. Guevara's disability as the reason to not hire him, with further proof being the elements leading to the conclusion that the victim met the requirements to hold the position he sought. This includes the fact that he had the highest score in competitive hiring process 010179, that he had two years of experience in the position, that there were no reports of poor performance in the exercise of his duties, and that, on the contrary, his effectiveness at the job was recognized.[103]

79. In this regard, the Court notes that during the selection process for competitive hiring process 010179, Mr. Guevara was treated differently based on his intellectual disability. There was no objective and reasonable justification for this difference in treatment and it was the main reason that Mr. Guevara was not selected for the permanent position of Miscellaneous Worker 1. This amounted to active direct discrimination with regard to access to work, and was therefore a violation of Mr. Guevara's right to work.

80. Regarding this, the Court underscores that the decision to not appoint a person based on their disability could be reasonable and admissible should the disability be incompatible with the essential functions to be performed. However, a lack of adequate justification when deciding not to select a person based on their disability gives rise to the presumption that the measure is discriminatory nature. Such a decision requires more rigorous argumentation to establish objective grounds for making it. In this sense, when the administrative authorities involved in the decision to select the winner of the competitive hiring process for position 010179 decided not to select Mr. Guevara because of his disability, in the exercise of "discretionary authorities," as indicated by the senior official and general administrative and financial director of the Ministry of Finance in his response to the appeal for reversal, the state failed to comply with its duty to provide sufficient justification for the decision.

81. Additionally, Court recalls that the Autonomous Regulations of the Ministry of Finance indicated that the labor relationship of interim employees concluded once a candidate was selected from the short list to hold the position permanently. Mr. Guevara was thus dismissed from his interim position as Miscellaneous Worker 1 at the Ministry of Finance as a result of not having been selected in competitive hiring process 01-02. As indicated above, the victim was discriminated against during that competitive hiring process based on his intellectual disability, leading to him not being selected for the permanent position. The Court therefore finds that the dismissal of Mr. Guevara was not

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101 *Cf.* Amparo appeal filed by Mr. Guevara Díaz before the Constitutional Chamber of the Supreme Court on August 5, 2003 (evidence file, folio 965).

102 *Cf.* Expert opinion of Silvia Judith Quan Chang (evidence file, audiovisual material folder, minute 15:00).

103 *Cf.* Amparo appeal filed by Mr. Guevara Díaz before the Constitutional Chamber of the Supreme Court on August 5, 2003 (evidence file, folio 965).

justified, to the extent that it took place as a direct consequence of the discrimination he experienced during competitive hiring process 01-02. His dismissal therefore constituted a violation of his right to keep his job.

82. In view of the foregoing, and in accordance with the state's acknowledgment of responsibility, this Court concludes that the discrimination experienced by Mr. Guevara with regard to his ability to remain at his job amounted to a violation of the right to work and the right to equal protection, as well as the state's failure to comply with its duty to prohibit discrimination. Consequently, the state is responsible for the violation of articles 26 and 24 of the American Convention, read in conjunction with article 1(1), to the detriment of Mr. Luis Fernando Guevara Díaz.

VIII
REPARATIONS

83. Pursuant to the provisions of Article 63(1) of the American Convention, the Court has held that every violation of an international obligation which results in harm creates a duty to make adequate reparation, and that this provision reflects a customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility.[104] This Court has also established that reparations must have a causal nexus with the facts of the case, the alleged violations, the proven damages, as well as the measures requested to repair the resulting damages. Therefore, the Court must observe such coincidence in order to adjudge and declare according to law.[105]

84. Consequently, without detriment to any form of reparation agreed upon previously between the state and the victims, and based on its considerations on the merits and the violations of the Convention declared in this judgment and on the state's acknowledgment of responsibility, the Court will proceed to examine the claims presented by the Commission and the victims' representative, together with the corresponding observations of the state's acknowledgment of responsibility, in light of the criteria established in its case law on the nature and scope of the obligation to make reparation, in order to establish measures to redress the harm caused to the victims.[106]

A. Injured party

85. Pursuant to Article 63(1) of the Convention, the Court considers that anyone who has been declared a victim of the violation of any right recognized therein is an injured party. Therefore, the Court considers that Luis Fernando Guevara Díaz is the "injured party" and, as the victim of the violations declared in Chapter VII, he will be considered the beneficiary of the reparations that the Court orders.

B. Measure of restitution

B.1. Requests of the Commission and the parties

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104 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and Costs.* Judgment of July 21, 1989. Series C No. 7, paras. 24 and 25; and *Case of Pavez Pavez v. Chile*, *supra*, para. 161.

105 *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 Pavez Pavez v. Chile*, *supra*, para. 163.

106 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and Costs*, *supra*, paras. 25 and 26; and *Case of Palacio Urrutia et al. v. Chile*, *supra*, para. 165.

86. The ***Commission*** asked that the state be ordered to reinstate the victim as a public servant at the same or higher level as the one at which he served at the moment of his dismissal. Should the victim not want this or should there be objective reasons preventing his reinstatement, the Commission asked that the state be ordered to pay compensation, additional to the pecuniary and nonpecuniary damages.

87. The ***representative*** asked that Mr. Guevara be reinstated in the position from which he was dismissed.

88. The ***state*** indicated that Mr. Guevara could not be reinstated in the position he had held at the Ministry of Finance because it was an interim position at the time of his dismissal. In this regard, it indicated that the reinstatement had to be evaluated because the person currently holding the position that Mr. Guevara sought had already secured permanent status in it. Additionally, it indicated that Mr. Guevara had been receiving a pension under the Non-contributor Regime provided by the Costa Rican Social Security System since 2017, which he could lose if he were reinstated in his job. Consequently, the state argued that the representative's request was not admissible, and instead suggested that an amount be set, in equity, to repair the damage caused.

B.2. Considerations of the Court

89. In this case, the Court determined that Mr. Guevara's right to work had been violated after he was removed from his position at the Ministry of Finance in an act of discrimination based on his intellectual disability. In this regard, the Court deems it pertinent to order, as a measure of restitution, that Mr. Guevara be appointed to a position of equal or greater seniority to the one for which he applied in the competitive process for filling position 010179 at the Ministry of Finance. Should Mr. Guevara decline appointment to a position with the Ministry of Finance, or should there be other reasons he cannot work there, the state shall extend the victim the opportunity to be appointed to another job in another public institution that matches with his aptitudes and needs.

90. To comply with this measure, Mr. Guevara or his representatives shall inform this Court whether the victim wishes to be appointed to a position at the Ministry of Finance or at another public institution, pursuant to the above terms, within no more than six months, counting from the notification of this judgment. In the event Mr. Guevara or his representatives do not inform the Court by the aforementioned deadline, or in the event that the victim does not wish to be appointed to a public-sector position in the terms above, the state shall pay an indemnity of USD 25,000 (twenty-five thousand dollars of the United States of America). This amount is in addition to any other amount established in the section of this judgment on compensatory damages.

C. Measure of satisfaction

C.1. Requests of the Commission and the parties

91. The ***Commission***, the ***representative***, and the ***state*** did not specifically address this measure.

C.2. Considerations of the Court

92. As it has in other cases,[107] the Court orders the State to publish the following, within six months of notification of this judgment and in a font that is legible and appropriate: (a) the official summary of this judgment prepared by the Court, once, in the Official Gazette and in a newspaper with national circulation, and (b) this judgment in its entirety, available for one year, on the official website of the Judiciary of Costa Rica and the Ministry of Finance, accessible to the public and from the home page of the website. The state must inform this Court immediately when it has made each of the publications ordered, irrespective of the one-year timeframe for presenting its first report established in the ninth operative paragraph of this judgment.

D. Guarantee of non-repetition

D.1. Requests of the Commission and the parties

93. The ***Commission*** asked that the state be ordered to adopt necessary measures of non-repetition to prevent similar incidents from taking place in the future. Specifically, it asked that the state be ordered to adopt legislative, administrative, and other measures to prevent discrimination based on disability and promote the workplace inclusion of persons with disabilities. In this framework, it asked that the state conduct training programs for public servants and justice officials on the prohibition of discrimination based on disability in the workplace and on the obligation to adopt positive measures to guarantee that persons with disabilities have access to the workplace and can remain in it.

94. The ***state*** indicated that it had carried out training and awareness-raising programs from the Office of the Vice President of the Republic and the Office of the President of the Judicial Branch. It also indicated that, to implement the recommendations of the Commission's Report on the Merits, it had developed a recruitment course for positions reserved for officials involved in personnel recruitment and selection processes. In addition, it held a seminar titled "Disability and Human Rights: Current Status and Challenges for 2021," which was attended by more than 100 public servants. With regard to the Judiciary, it reported that two workshops have been held, underscoring that their content addressed employment discrimination based on disability.

D.2. Considerations of the Court

95. This Court views positively the efforts made by the State to train public officials on equality and nondiscrimination. However, this Court deems it pertinent to adopt specific training programs aimed at preventing the repetition of facts similar to what happened in this case, based on the aspects addressed in the judgment. In this regard, the Court orders the state to, within one year, implement educational and training programs on equality and nondiscrimination for persons with disabilities for officials of the Ministry of Finance over a period of three years. Specifically, these programs should address the essential content of state obligations to respect and guarantee the right to work of persons with disabilities in hiring, selection, promotion, and dismissal, as well as the special duties arising when handling allegations of acts of discrimination based on disability.

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[107] *Cf. Case of Cantoral Benavides v. Peru. Reparations and Costs.* Judgment of December 3, 2001. Series C No. 88, para. 79; and *Case of Pavez Pavez v. Chile*, *supra*, para. 168.

E. Other measures requested

E.1. Requests of the Commission and the parties

96. The ***Commission*** asked that the state be ordered to adopt measures promoting the employment of persons with disabilities in the public sector and enabling them to remain in their positions and receive promotions.

97. The ***representative*** asked the Court to order the State (a) to declare that it would fully comply with Costa Rican and international law as regards disability; (b) to make Costa Rican sign language universal in primary and secondary school, as well as ensure that the curriculum takes an inclusive and human rights approach; (c) to establish professional training programs with a system of scholarships for the population of persons with disabilities; (d) to establish an admissions quota for persons with disabilities in the public and private sector; (e) to establish sports and cultural programs that are inclusive of the population of persons with disabilities and launch a campaign on the social inclusion of persons with disabilities; (f) to ensure that persons with disabilities are hired in all offices and agencies; (g) to correct the laws and regulations that protect persons with disabilities from the moment of hiring; and (h) to establish a dissemination and promotional program to ensure that in the private sector, companies that can hire persons with disabilities do so, not only in the framework of social responsibility but also as part of their inclusive hiring projects.

98. The ***state*** reported on the implementation of a series of measures aimed at promoting compliance with the human rights of persons with disabilities, which include the adoption of legislation and the execution of government plans and actions.

E.2. Considerations of the Court

99. The ***Court*** recalls that in this case, it has not been established that Costa Rica's policy on protecting the rights of persons with disabilities had any legal impacts. This Court also notes that the state has taken legislative and public policy action aimed at achieving equality and preventing employment discrimination against persons with disabilities.[108] Therefore, the Court does not deem it pertinent to order general measures

[108] Specifically, the State pointed to the adoption of the following measures and their main components: the adoption of the Equal Opportunities for Persons with Disabilities Act (1996) and its Regulations (1998); the approval of the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities (1999); the adoption of Executive Order 027-2001 (2001); the creation of the Equal Opportunities Unit for Persons with Disabilities of the Ministry of Labor and Social Security (2002); the creation of the Inter-agency Technical Commission on the Employability of Persons with Disabilities (2006); the adoption of an institutional policy on Equality for Persons with Disabilities in the Judiciary (2008); the adoption of a resolution of the General Directorate of the Civil Service on hiring of people with disabilities in the public sector under the Civil Service Regime (2008); the approval of the Convention on the Rights of Persons with Disabilities (2008); the adoption of the Inclusion and Labor Protection for People with Disabilities in the Public Sector Act (2010); the adoption of a National Disability Policy (2011); the adoption of the National Plan for Labor Insertion of the Population of Persons with Disabilities (2012); the creation of institutional committees on accessibility and disability (2013); the creation of the inter-agency coordination protocol on training and employing persons with disabilities (2014); the adoption of the Pact for an Accessible and Inclusive country (2014); the transformation of the CNREE into the National Council for Persons with Disabilities (2015); the adoption of the Labor Procedure Amendment (2016); the adoption of the Promotion of the Personal Autonomy of Persons with Disabilities Act (2016); the creation of the ABC of labor inclusion of people with disabilities (2017); the creation of the Disability Certification Service (2017); the adoption of the Empléate Inclusivo Program (2017); the creation of the National Commission on Employability and Jobs for Persons with Disabilities (2019); the creation of the National Employment System (2019); the constitutional reform for the

to amend Costa Rican law on disability or additional professional training and inclusion measures for persons with disabilities. Additionally, the Court finds that the reparation measures ordered in this Judgment are sufficient and adequate for the violations declared and for prevention of similar situations in the future. Consequently, it does not consider it necessary to order the adoption of additional reparation measures.

F. Compensation

E.1.1. Pecuniary damage

100. The ***Commission*** asked that the State provide adequate reparations for the human rights violations declared in this report, both pecuniary and non-pecuniary.

101. The ***representative*** requested payment of unpaid wages from the month after Mr. Guevara's dismissal and until his reinstatement; the payment of interest, as required under Costa Rican law, from the first day the salary was not received through to its payment in full; the payment of the indexation for all the above purposes, from the first day the salary was not received through to its payment in full.

102. The ***state*** requested that an amount be established in equity for the damage caused to Mr. Guevara.

103. In its case law, the Court has developed the concept of pecuniary damage and has established that this supposes "the loss of or detriment to the victims' incomes, the expenses incurred owing to the facts and consequences of a pecuniary nature that have a causal nexus with the facts of the case."[109]

104. In relation to the loss of earnings or loss of income, the Court observes that there is not enough information to determine the income that Mr. Guevara effectively stopped receiving due to his dismissal from the Ministry of Finance, nor the real economic impact that this had on his net worth from not being able to find a steady job following his dismissal. Therefore, in view of circumstances of his employment termination as a result of an act of discrimination, the Court finds it pertinent to grant, in equity, an amount of USD 50,000.00 (fifty thousand dollars of the United States of America) for loss of earnings to Mr. Guevara.

E.1.2. Non-pecuniary damage

105. The ***Commission*** asked that the State provide adequate reparations for the human rights violations declared in this report, both pecuniary and non-pecuniary.

106. The ***representative*** requested payment of compensation for moral damages of USD 300,000 (three hundred thousand United States dollars) in favor of Mr. Guevara. As a second, alternate proposal, the representative requested a single payment of

special protection of persons with disabilities (2019); the recognition and fulfillment of the right of access to justice for persons with disabilities (2019); the formalization of the Inserta Por Talento Program (2020); the regulatory improvement for the application of Law 8862 and its regulations in the institutions under the Civil Service Regime (2020); and surveillance and monitoring in applying Law 8862 and its regulations by the Executive Council (2022).

[109] *Case of Bámaca Velásquez v. Guatemala. Reparations and Costs.* Judgment of February 22, 2002. Series C No. 91, para. 43; and *Case of Pavez Pavez v. Chile*, *supra*, para. 192.

USD 750,000 (seven hundred and fifty thousand United States dollars) to Mr. Guevara for pecuniary and non-pecuniary damage.

107. The ***state*** requested that an amount be established in equity for the damage caused to Mr. Guevara.

108. The Court has developed the concept of non-pecuniary damage and has established that this "may include the suffering and affliction caused to the direct victim and his family, the impairment of values that are very significant for the individual, and also the changes of a non-pecuniary nature in the living conditions of the victim or his family."[110]

109. Therefore, in view of the circumstances of this case, the harm caused to the victim by the violations committed, and the other non-pecuniary impacts he suffered, the Court deems it pertinent to establish, in equity, compensation equivalent to USD 30,000.00 (thirty thousand dollars of the United States of America) for Mr. Guevara.

G. Costs and Expenses

110. The ***representative*** asked that for costs and expenses, the state be ordered to pay an amount equivalent to 20% of the compensation it was ordered to pay.

111. The ***state*** argued that the costs are part of reparations and must be included in the calculation of expenses incurred before the courts, taking into account the circumstances of the specific case and the nature of international jurisdiction. In the specific case, it held that the representative had not provided evidence to enable assessment or establishment of an approximate amount for costs and expenses, and therefore, the request was contrary to the practice of the Court.

112. The Court reiterates that, based on its case law,[111] costs and expenses form part of the concept of reparation, because the efforts made by the victims to obtain justice, both at the national and international level, entail disbursements that must be compensated when the state's international responsibility has been declared in a condemnatory judgment. Regarding the reimbursement of costs and expenses, it is for the Court to prudently assess their scope, which includes expenses incurred before the authorities of the domestic courts and those generated during the proceedings before the Inter-American system, taking into account the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment may be based on the principle of equity, taking into account the expenses indicated by the parties, provided that their *quantum* is reasonable.[112]

113. Additionally, the Court has found that as regards claims of financial expenditures, the representatives must describe the line items clearly and justify them.[113] In this case,

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[110] *Cf. Case of Bámaca Velásquez v. Guatemala. Merits, Reparations, and Costs*, *supra*, para. 56; and *Case of Pavez Pavez v. Chile*, *supra*, para. 197.

[111] *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 Pavez Pavez v. Chile*, *supra*, para. 200.

[112] *Cf. Case of Garrido and Baigorria v. Argentina*, *supra*, para. 82; and *Case of Pavez Pavez v. Chile*, *supra*, para. 200.

[113] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v.* Ecuador, *supra*, para. 277; and *Case of Pavez Pavez v. Chile*, *supra*, para. 201.

the representative did not provide any evidence to justify the amounts requested. However, the Court finds that the case file indicates that Jorge Emilio Regidor Umaña represented the victim throughout the domestic and international proceedings, for which it finds it reasonable to establish, in equity, the payment of a total amount of USD 20,000.00 (twenty thousand dollars of the United States of America) for costs and expenses. This amount shall be delivered directly to the representative. At the stage of monitoring compliance with this judgment, the Court may order the state to reimburse the victim or his representative for any reasonable expenses incurred during that procedural stage.[114]

H. Method of complying with the payments ordered

114. The State shall make the payments ordered for restitution and compensation of pecuniary and non-pecuniary damage, as established in this judgment, directly to Luis Fernando Guevara Díaz and his representative within one year of notification of this judgment, or it may make full payment in advance of that date.

115. Should the beneficiary pass away before he receives the respective compensation, it shall be delivered directly to their heirs, pursuant to the applicable domestic law.

116. The state shall comply with its monetary obligations through payment in United States dollars, or their equivalent in local currency, using for the respective calculation the market exchange rate published or calculated by a relevant banking or financial authority on the date closest to the day of payment.

117. If, for reasons that can be attributed to the beneficiary of the compensation or his heirs, it is not possible to pay the amounts established within the time frame indicated, the state shall deposit the said amounts in their favor in an account or certificate of deposit in a solvent Costa Rican financial institution, in United States dollars, and on the most favorable financial terms permitted by the country's law and banking practice. If, after 10 years, the compensation remains unclaimed, the amounts shall be returned to the State with the accrued interest.

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

119. Should the state fall into arrears, it shall pay interest on the amount owed, corresponding to banking interest on arrears in the Republic of Costa Rica.

IX
OPERATIVE PARAGRAPHS

120. Therefore,

THE COURT

DECIDES,

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[114] *Cf. Case of Gudiel Álvarez et al. (Diario Militar) v. Guatemala.* Interpretation of the Judgment on the Merits, Reparations, and Costs. Judgment of August 19, 2013. Series C No. 262, para. 62; and and *Case of Pavez Pavez v. Chile*, *supra*, para. 202.

Unanimously:

1. To accept the state's acknowledgment of responsibility, pursuant to paragraphs 16 to 23 of this judgment.

DECLARES,

Unanimously that:

2. The State is responsible for the violation of the rights to equal protection and work, recognized in articles 24 and 26 of the American Convention on Human Rights, read in conjunction with the state's obligation to respect rights without discrimination, established in Article 1(1), to the detriment of Luis Fernando Guevara Díaz, in the terms of paragraphs 46 to 82 of this judgment (Judge Humberto Antonio Sierra Porto and Judge Patricia Pérez Goldberg dissent with regard to violation of article 26 of the American Convention on Human Rights, read in conjunction with Article 1(1), as expressed in their opinions).

3. The State is responsible for the violation of the rights to judicial guarantees and judicial protection, established in articles 8 and 25 of the American Convention on Human Rights, read in conjunction with Article 1(1), to the detriment of Luis Fernando Guevara Díaz, in the terms of paragraph 18 of this judgment.

AND ESTABLISHES:

unanimously, that:

4. This judgment constitutes per se a form of reparation.

5. The State shall adopt all necessary measures such that Luis Fernando Guevara Díaz is appointed to a position of equal or greater rank than the one for which he had applied, or to another position that suits his skills and needs, in the terms of paragraph 89 of this judgment. Should Mr. Guevara or his representative fail to inform the Court of his wish to be appointed to a position at the Ministry of Finance or another public institution within six months of the notification of this judgment, the state must pay the amount indicated in paragraph 90 of this judgment.

6. The state shall make the publications ordered in paragraph 92 of this judgment within six months of its notification.

7. The state shall devise and implement, within one year, a training plan for officials of the Ministry of Finance on equality and non-discrimination of persons with disabilities, specifically addressing the essential content of the state's obligation to respect and guarantee the right to work of persons with disabilities in hiring, selection, promotion, and dismissal, as well as the special duties arising when handling allegations alleging acts of discrimination based on disability, pursuant to the terms of paragraph 95 of this judgment.

8. The State shall pay the amounts established in paragraphs 104, 109, and 113 of this judgment for pecuniary and non-pecuniary damages and costs and expenses, in the terms of paragraphs 114 to 119 of this judgment.

9. 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, in accordance with the provisions of paragraph 92 of this judgment.

10. The Court will monitor full compliance with this judgment, in exercise of its authority and in compliance with its obligations under the American Convention on Human Rights, and will consider this case closed once the State has complied fully with its provisions.

Judge Humberto Antonio Sierra Porto issued a partially concurring and partially dissenting opinion, Jueza Patricia Pérez Goldberg issued her partially dissenting opinion, and Judge Rodrigo de Bittencourt Mudrovitsch issued an individual concurring opinion.

DONE, at San José, Costa Rica, on June 22, 2022, in the Spanish language

I/A Court H.R. *Case of Guevara Díaz v.* Costa Rica. Merits, reparations and costs. Judgment of June 22, 2022. Judgment adopted in San José, Costa Rica.

Ricardo C. Pérez Manrique
President

Humberto Antonio Sierra Porto

Eduardo Ferrer Mac-Gregor Poisot

Verónica Gómez

Patricia Pérez Goldberg

Rodrigo de Bittencourt Mudrovitsch

Pablo Saavedra Alessandri
Registrar

So ordered

Ricardo C. Pérez Manrique
President

Pablo Saavedra Alessandri
Registrar

CONCURRING AND PARTIALLY DISSENTING OPINION OF

JUDGE HUMBERTO ANTONIO SIERRA PORTO

INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF GUEVARA DÍAZ V. COSTA RICA

JUDGMENT OF JUNE 22, 2022
(Merits, reparations and costs)

1. With all due respect for the decisions of the Inter-American Court of Human Rights (hereinafter "the Court"), the purpose of this opinion is to offer a partial dissent regarding operative paragraph 2 of the judgment. That paragraph declares the State of Costa Rica internationally responsible for violating the rights to equal protection and to work, read in conjunction with the prohibition on discrimination, to the detriment of Mr. Luis Fernando Guevara Díaz. For these purposes, I will address (i) the relevance of the analysis of the right to work as an autonomous right in this case; and (ii) the new change in the modality for declaring violations in operative paragraphs.

2. This opinion is complementary to the stance already expressed in my partially dissenting opinions in the cases of *Lagos del Campo v. Peru*,[1] *Dismissed Employees of Petroperú et al. v. Peru*,[2] *San Miguel Sosa et al. v.* Venezuela,[3] *Muelle Flores v.* Peru[4], *Hernández v. Argentina*,[5] *ANCEJUB-SUNAT v. Peru*,[6] *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*,[7] *Employees of the Fireworks Factory of Santo Antonio de Jesus v. Brazil*[8], *Casa Nina v. Peru*,[9] *Guachalá*

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[1] *Case of Lagos del Campo v. Peru.* Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 31, 2017. Series C No. 340. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[2] *Case of Dismissed Employees of Petroperú et al. Peru. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of November 23, 2017. Series C No. 344. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[3] *Case of San Miguel Sosa et al. v. Venezuela.* Merits, reparations and costs. Judgment of February 8, 2018. Series C No. 348. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[4] *Case of Muelle Flores v. Peru.* Preliminary Objections, Merits, Reparations, and Costs. Judgment of March 6, 2019. Series C No. 375. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

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

[6] *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence v. Peru. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of November 21, 2019. Series C No. 39. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[7] *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v.* Argentina. Merits, reparations and costs. Judgment of February 6, 2020. Series C No. 400. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[8] *Case of the Employees of the Fireworks Factory of Santo Antonio de Jesus v. Brazil*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of July 15, 2020. Series C No. 407. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[9] *Case of Casa Nina v. Peru.* Preliminary Objections, Merits, Reparations, and Costs. Judgment dated November 24, 2020. Series C No. 419. Concurring and partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

Chimbo v. Ecuador,[10] *FEMAPOR v. Peru*;[11] as well as in my concurring opinions in the cases of *Gonzales Lluy et al. v. Ecuador*,[12] *Poblete Vilches et al. v. Chile*,[13] *Cuscul Pivaral et al. v. Guatemala*,[14] *Buzos Miskitos v. Honduras*,[15] *Vera Rojas et al. v. Chile,*[16] *Manuela et al. v. El Salvador*,[17] *Former Judicial Branch Workers v. Guatemala*,[18] *Palacio Urrutia v. Ecuador*,[19] and *Pavez Pavez v. Chile*.[20]

A. Incorrect analysis of the right to work as an autonomous right in this case.

3. The judgment reiterates the stance taken starting with the case of *Lagos del Campo v. Peru* regarding the direct and autonomous justiciability of economic, social, cultural and environmental rights (hereinafter ESCER) through Article 26 of the American Convention on Human Rights (hereinafter the ACHR or the Convention). There is no need to remake the arguments demonstrating the lack of legal basis for this theory in the framework of the Inter-American Court's contentious jurisdiction, and I would simply point to the opinions referenced in the above paragraph.[21] What I would like to express at this time is the Court's blunder in analyzing the case pursuant to Article 26 and not Article 23 of the Convention, which regulates the right to access to public service under conditions of equality.

4. In its judgment, the Court found a violation of the right to equality before the law and the States obligation to respect rights without discrimination on finding it proven that "the reason Mr. Guevara was not selected for the position of

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[10] *Case of Guachalá Chimbo et al. v. Ecuador*. Merits, reparations and costs. Judgment of March 26, 2021. Series C No. 423. Concurring and partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[11] *Case of the national Federation of Maritime and Port Workers (FEMAPOR) v. Peru.* Preliminary Objections, Merits, and Reparations. Judgment dated February 1, 2022. Series C No. 448. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[12] *Case of Gonzales Lluy et al. v. Ecuador*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 1, 2015. Series C No. 298. Concurring opinion of Judge Humberto Antonio Sierra Porto.

[13] *Case of Poblete Vilches et al. v. Chile*. Merits, reparations and costs. Judgment of March 8, 2018. Series C No. 349. Concurring opinion of Judge Humberto Antonio Sierra Porto.

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

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

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

[17] *Case of Manuela et al. v. El Salvador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 2, 2021. Series C No. 441. Concurring opinion of Judge Humberto Antonio Sierra Porto.

[18] *Case of Former Judicial Branch Workers v. Guatemala.* Preliminary Objections, Merits, and Reparations. Judgment of November 17, 2021. Series C No. 445. Concurring opinion of Judge Humberto Antonio Sierra Porto.

[19] *Case of Palacio Urrutia et al. v. Ecuador*. Merits, reparations and costs. Judgment of November 24, 2021. Series C No. 446. Concurring opinion of Judge Humberto Antonio Sierra Porto.

[20] *Case of Pavez Pavez v. Chile*. Merits, reparations and costs. Judgment dated February 4, 2022. Series C No. 449. Concurring opinion of Judge Humberto Antonio Sierra Porto.

[21] It ignores the scope of Article 26 as determined based on the rules of interpretation of the Vienna Convention on the Laws Treaties (literal, systematic, and teleological interpretation); it changes the nature of the obligation of progressiveness set forth with total clarity in Article 26; it ignores the will of the States as provided for under Article 19 of the Protocol of San Salvador; and it undermines the legitimacy of the Court regionally, to mention only a few arguments.

Miscellaneous Worker 1 was his status as a person with an intellectual disability."[22] Toward this, it took into account not only the official letters issued by the employer referring to his mental condition but also that Mr. Guevara Díaz "had the highest score in competitive hiring process 010179, that he had two years of experience in the position, that there were no reports of poor performance in the exercise of his duties, and that, on the contrary, his effectiveness at the job was recognized."[23]

5. Additionally, as specifically regards the right to work, the Court found that "during the selection process for competitive hiring process 010179, Mr. Guevara was treated differently based on his intellectual disability. There was no objective and reasonable justification for this difference in treatment and it was the main reason that Mr. Guevara was not selected for the permanent position of Miscellaneous Worker 1. This amounted to active direct discrimination with regard to access to work, and was therefore a violation of the victim's right to work."[24] Additionally, it found that "the victim was discriminated against during that competitive hiring process based on his intellectual disability, leading to him not being selected for the permanent position,"[25] and therefore, his right to remain at his job had been violated. It is my view that these statements aimed at identifying an autonomous violation of the right to work should have been analyzed in relation to Article 23(1)(c) of the ACHR, which establishes the right to access to public service under conditions of equality.

6. Article 23(1)(c) of the ACHR establishes that "1. Every citizen shall enjoy the following rights and opportunities: [...] c. to have access, under general conditions of equality, to the public service of his country. It is my view that in this case, which addresses a position at the Ministry of Finance that should have been filled through a competitive process in accordance with national law, the right to access the public service under conditions of equality was violated. Effectively, as this Court has indicated, pursuant to General Observation 25 of the UN Human Rights Committee,[26] Article 23(1)(c) does not enshrine a right to access a public position but a right to do so under conditions of equality. This means respecting and guaranteeing that the criteria and procedures for appointment, promotion, suspension, and dismissal are reasonable and objective and that persons are not subject to discrimination during these procedures.[27] This was precisely the obligatory content violated in the case, as the officials of the Ministry of Finance did not use objective and rational criteria in filling the position; on the contrary, they used a prohibited category—the condition of disability—to limit Mr. Guevara Díaz's right to access to the position.

7. This is not a simply theoretical distinction. As I have indicated in other separate opinions, using Article 26 of the Convention to declare State responsibility is legally inadequate and impacts the legitimacy of the decision. Thus, not only would determining Costa Rica's responsibility based on Article 23(1)(c) read in conjunction with Article 1(1) of the ACHR have been more precise to Mr. Guevara Díaz's factual

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[22] *Case of Guevara Díaz v. Costa Rica.* Merits, reparations and costs. Judgment of June 22, 2022. Para. 78.

[23] Ibid.

[24] *Case of Guevara Díaz v. Costa Rica.* Merits, reparations and costs. Judgment of June 22, 2022. Para. 79.

[25] *Case of Guevara Díaz v. Costa Rica.* Merits, reparations and costs. Judgment of June 22, 2022. Para. 81.

[26] Cf. United Nations. Human Rights Committee. General Comment No. 25, The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), CCPR/C/21/Rev. 1/Add. 7, July 12, 1996, para. 23.

[27] Cf. Case of *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela.* Preliminary Objections, Merits, Reparations and Costs. Judgment dated August 5, 2008. Series C No. 182, para. 206

situation and enabled the Court to move forward with its case law on the scope of this right set forth in the American Convention, it would have avoided impacts to the effectiveness of the decision in the form of doubts arising as to the direct justiciability of Article 26 of the ACHR.

8. Also, addressing the matter in question through Article 23(1)(c) read in conjunction with Article 1(1) of the ACHR would have been enough to secure a broad range of protection in the specific case without setting a weak precedent. Although the State recognized its responsibility with respect to Article 26 of the Convention, the Court is not required to validate this stance; on the contrary, it is required to review it to ensure it complies with the law. The Court should have conducted this review by analyzing the case based on Article 23. Should it have done so, it would have reached a truly unanimous decision and strengthened the standard associated with respecting and guaranteeing the right to access to the public service under conditions of equality. Likewise, proceeding in this way would have provided the States and residents of the region with greater certainty in later cases, with respect to the consequences of using discriminatory criteria for preventing persons with disabilities from exercising the public service as regards international State responsibility and measures that must be implemented in domestic law to prevent it.

B. New change to the modality for declaring violations in operative paragraphs

9. Problems highlighted in section A—regarding which I have gone into more depth in other opinions—have resulted in a multiplicity of modalities for declaring violations in the operative paragraphs. Since the case law on the direct justiciability of ESCER via Article 26 of the Convention has prevailed, the Court has moved on some occasions to group violations of rights protected under the Convention under a single operative paragraph,[28] while in others it performs a differentiated analysis for each of the obligations and its effects in order to issue a declaration of State responsibility.[29] First, I should say that due to a lack of grounds justifying the changes in one case or another, it would seem this practice is not based on criteria of reasonability.

10. Second, as I pointed out in my opinions in the cases of *ANCEJUB-SUNAT v. Peru*,[30] *Hernández v. Argentina*,[31] *Casa Nina v. Peru*,[32] and *Guachalá Chimbo v. Ecuador*,[33] this practice obscures the internal discrepancies on the scope of Article 26 of the Convention and impacts the effectiveness of the judgment. Indeed, this

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[28] *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence v. Peru.* Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 21, 2019. Series C No. 394. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[29] *Case of Hernández v. Argentina*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 22, 2019. Series C No. 395.

[30] *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence v. Peru.* Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 21, 2019. Series C No. 394. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto, para. 6.

[31] *Case of Hernández v. Argentina*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 22, 2019. Series C No. 395. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto, para. 17.

[32] *Case of Casa Nina v. Peru.* Preliminary Objections, Merits, Reparations, and Costs. Judgment dated November 24, 2020. Series C No. 419. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto, para. 7.

[33] *Case of Guachalá Chimbo et al. v. Ecuador*. Merits, reparations and costs. Judgment of March 26, 2021. Series C No. 423. Concurring and partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

modality, which prevents expressing disagreement exclusively with the direct justiciability of ESCER, weakens the legal thrust of the decision against the main violation. My point is that, as a consequence of grouping together the violation of the right to work and the prohibition of discrimination, the decision was not made unanimously, despite the fact that all the judges of the Court agree that Costa Rica is responsible internationally for preventing Mr. Guevara Díaz from accessing the position of miscellaneous worker due to his disability.

11. Indeed, although operative paragraph 2—covering violations of articles 24 and 26, read in conjunction with Article 1(1)—is declared unanimously, it is stated that "Judge Humberto Antonio Sierra Porto and Judge Patricia Pérez Goldberg dissent with regard to violation of article 26 of the American Convention on Human Rights, read in conjunction with Article 1(1), as expressed in their opinions." Thus, while my disagreement and that of Judge Pérez are noted, the focus of the judgment is lost, when the appropriate thing to do would be to allow the Court to vote separately on the violation of Article 26, making clear the full consensus on the other violations.

12. I insist that the Court must not lose its focus on identifying and establishing legal consequences for State conduct that generates breaches of obligations under the Convention: In this case, that is, the actions of State agents that prevented Mr. Guevara Díaz from accessing public office due to his disability. This must be made clear as an expression of the will of the Court. and the fact that there may be disagreements regarding accessory elements of the decision must be handled separately and tangentially. Although it is true that human rights are interdependent and indivisible, when justifying its decision, the Court must analyze the factual circumstances and the obligatory contents related directly to the core of the main violation of the case, not examine the entire text of the Convention and other international instruments that may have an indirect or eventual relationship with the case. This is what makes it possible to give rigor, certainty, and clarity to inter-American standards and thereby guarantee further their validity in domestic law through review of compliance with human rights conventions.

Humberto Antonio Sierra Porto
Judge

Pablo Saavedra Alessandri
Registrar

PARTIALLY DISSENTING OPINION OF JUDGE PATRICIA PEREZ GOLDBERG

INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF GUEVARA DÍAZ V. COSTA RICA

JUDGMENT OF JUNE 22, 2022
(Merits, reparations and costs)

1. With full respect for the majority decision of the Inter-American Court of Human Rights (hereinafter, "the Court" or the "Court"), I hereby issue this partially dissenting opinion[1] to explain my stance on this Court's jurisdiction in matters of social, economic, cultural, and environmental rights (hereinafter, "ESCER"). Before addressing this particular topic, I will make some general comments in order to contextualize the subsequent analysis.

2. As is known, the law of treaties addresses the obligations arising from the express consent of states. Consequently, if their wishes converge on a certain subject, this consent must be expressed as established by Article 2(a) of the Vienna Convention on the Law of Treaties (hereinafter the VCLT).[2]

3. Under these types of international agreements, states can agree to establish courts charged with applying and interpreting their provisions and, through subsequent instruments, expand the competence of these bodies. International courts must therefore exercise their powers within the framework established by the relevant treaties. Such legal instruments constitute the grounds for as well as the limits to their action. From a Democratic perspective, this is coherent with due respect for domestic deliberative processes undertaken to ratify the treaty and with the type of interpretation done by international courts. This hermeneutic work is done regarding norms of international law and is not of a constitutional nature.

4. In light of these considerations, and taking into account that in this case, the Court finds a violation of the right to work based on the provisions of Article 26 of the American Convention on Human Rights (hereinafter, "the Convention" or "the ACHR "), it is worth asking whether the Court has jurisdiction to proceed in this way.

5. The answer to this question is no. Article 1(1) of the Convention is clear in indicating that states Parties "undertake to respect the rights and freedoms recognized **herein** and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination [...]." In line with this, the rules on the competence and functions of the Court are also clear where they establish that the Court is subject to the provisions of the ACHR. Effectively, Article 62(3) indicates that the "jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions **of this Convention** that are submitted to it [...]," and likewise, Article 63(1) establishes that, "if the Court finds that there has been a violation of a right or freedom protected

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[1] Article 65(2) of the Rules of Procedure of the Inter-American Court: "Any Judge who has taken part in the consideration of a case is entitled to append a separate reasoned opinion to the judgment, concurring or dissenting. These opinions shall be submitted within a time limit to be fixed by the Presidency so that the other Judges may take cognizance thereof before notice of the judgment is served. Said opinions shall only refer to the issues covered in the judgment."

[2] "'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."

by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated."[3]

6. For its part, Chapter III of the Convention entitled "Economic, social, and cultural rights" contains a single article, 26, which is entitled "progressive development." In line with its title, pursuant to the aforementioned provision, "The States Parties undertake to adopt **measures**, both internally and through international cooperation, especially those of an economic and technical nature, **with a view to achieving progressively**, **by legislation** or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American states as amended by the Protocol of Buenos Aires.[4]

7. A reading of this provision will find that in contrast to what happens with the civil and political rights identified and developed in Chapter II of the ACHR, here an obligation is established for states party to adopt the "measures"—that is, actions, measures, or public policies—necessary to "progressively" achieve full realization of the rights derived from the norms of the OAS Charter, "subject to available resources" (in line with the progressive nature of the obligation) and "by legislation or other appropriate means." In other words, each state party has an obligation to be formulating definitions and moving decisively forward on these issues, in accordance with their domestic deliberative procedures.

8. Conceiving of Article 26 of the Convention as a norm referencing all ESCER covered in the OAS Charter ignores the commitment adopted by the states parties.

9. Furthermore, articles 76(1) and 77(1) of the Convention[5] provide for a system agreed upon by the states to modify the agreement, either through an amendment or an additional protocol. It was precisely under this provision that the "Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights" of 1988 (hereinafter "the Protocol") was adopted in order to progressively include other rights and liberties as protected under the Convention.

10. While the aforementioned Protocol recognizes and develops a set of ESCER in its text,[6] Article 19(6), entitled Means of Protection, assigns jurisdiction to the Court to hear possible violations only with respect to two rights: the right to organize trade unions and to join a union and the right to education. The provision establishes that if any of the rights "are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights."

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[3] Emphasis added.

[4] Emphasis added.

[5] Article 76(1): "Proposals to amend this Convention may be submitted to the General Assembly for the action it deems appropriate by any State Party directly, and by the Commission or the Court through the Secretary General." Article 77(1): "In accordance with Article 31, any State Party and the Commission may submit proposed protocols to this Convention for consideration by the States Parties at the General Assembly with a view to gradually including other rights and freedoms within its system of protection."

[6] The right to work, to just, equitable and satisfactory conditions of work, to trade union rights, the right to social security, the right to health, the right to a healthy environment, the right to food, the right to education and the right to the benefits of culture, the right to the formation and protection of families, the rights of the child, protection of the elderly, and protection of the handicapped (*sic*).

11. Consequently, in light of the treaty (comprised of two instruments: the Convention and its Additional Protocol),[7] the Court lacks jurisdiction to declare the autonomous violation of the right to work.

12. Holding that ESCER are not directly justiciable before the Court does not mean ignoring their existence, the enormous importance of these rights, their independence and indivisible nature with respect to civil and political rights, or that they lack of protection or should not be protected. States have a duty to enable updates to the autonomy of persons, meaning that persons should be able to access the primary goods (broader than ones defined in the scope of political philosopher John Rawls)[8] that make it possible to develop their capacities—that is, access economic, social, and cultural rights.[9]

13. It is therefore necessary to distinguish between two spheres that are related but different. One is the national sphere, in which, through democratic procedures, citizens decide to translate ESCER into their respective legal system, also incorporating international law on this matter, as happens in the vast majority of member states of the inter-American human rights system. In this context, it is the national courts that, within the scope of their competences, exercise their authorities regarding the interpretation and justiciability of ESCER, in accordance with their constitutions and laws.[10]

14. The international sphere is different. As an international court, the Court's role is to decide whether or not the state whose responsibility is claimed has violated one or more of the rights established in the treaty. As explained, in light of its normative design and in accordance with Article 26, the Court is empowered to find a state internationally responsible if it has failed to comply with the obligations of progressive development and nonregression, not of ESCER considered individually.

15. In this context, nothing prevents the Court from considering the economic, social, and cultural dimensions of the rights recognized under the Convention and from exercising its adjudicative competence by way of connectivity. This is how the Court proceeded in cases prior to the sentence issued in the case of *Lagos del Campo v. Peru* (2017) as in, for example, the cases of *Ximenes Lopes v. Brazil* (2006);[11] *Gonzáles Lluy et al. v. Ecuador*[12] (2015); and *Chinchilla Sandoval v*. *Guatemala* (2016)[13] and that constitutes the correct doctrine to follow. Subsequent to Lagos del

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[7] Pursuant to article 2(a) of the Vienna Convention on the Law of Treaties, a treaty may be embodied in a single instrument or in two or more related instruments.

[8] For Rawls, primary goods include a set of goods necessary for developing and executing a rational life project. They Include freedom, opportunities, income, wealth, and self-respect. *Cf*. RAWLS, John: *Teoría de la Justicia*, Fondo de Cultura Económica, Mexico (1995), pg. 393.

[9] Cfr. PÉREZ GOLDBERG, Patricia: *Las mujeres privadas de libertad y el enfoque de capacidades*, Der Ediciones, Santiago (2021), pp. 94-109.

[10] Paragraphs 69 to 72 of the judgment include examples of notable case law developments on protecting the right to work of persons with disabilities in Colombia, Mexico, Brazil, and Ecuador.

[11] Mr. Ximenes Lopes died in a psychiatric establishment, approximately two hours after being medicated by the clinical director of the hospital, and without receiving care from any doctor. He was not given adequate care, and due to this lack of care, he was at the mercy of all manner of aggressions and accidents, endangering his life. The Court found the state responsible for violating the rights to life and personal integrity.

[12] In this case—involving a girl who was infected with HIV when receiving a blood transfusion—the Court protected the victim's right to health by way of connection to the rights to life and personal integrity, by declaring a violation of " the obligation to monitor and supervise the provision of health care services, within the framework of the right to personal integrity and of the obligation not to endanger life."

[13] The victim was a woman deprived of liberty with a physical disability who was not given adequate health care for the multiple illnesses she suffered from and who ended up dying in prison. This lack of health care led the Court to find a violation of the right to life and personal integrity.

Campo, the Court has been finding ESCER directly justiciable on the basis of Article 26, except in the cases of *Rodríguez Revolorio v*. *Guatemala* (2019) and *Martínez Esquivia v. Colombia* (2020). In the first of these cases, the Court decided to address the violations of the right to health in a prison in the framework of Article 5 of the ACHR, and in the second—which dealt with the unjustified dismissal of a prosecutor—the Court established that the arbitrary dismissal had affected the victim's right to remain in the position under conditions of equality, in violation of Article 23(1)(c) of the Convention.[14]

16. Regarding the system of interpretation applicable to the norms of the Convention, the rules of interpretation of the VCLT must be followed. This means considering good faith, the ordinary meaning of the terms in the context of the treaty, and their object and purpose as elements of interpretation. From this latter element—as Cecilia Medina teaches—emerges two specific criteria of the hermeneutics of human rights treaties: their dynamic and *pro persona* nature, which gives judges "ample margin for highly creative interpretation."[15]

17. One of the most relevant canons for interpretation of international human rights law is the evolutionary and *pro persona* interpretation. Thus, for example, in the case of *Atala Riffo and girls v. Chile*, regarding the right to equality and non-discrimination, the Court understood sexual orientation and gender identity as categories protected by the American Convention under the expression "another social condition" established in Article 1(1) of the Convention. This evolutionary and *pro persona* interpretation is faithful to the intention of the states parties. However, in this case, the Court does not apply that interpretative criterion, but rather asserts it has jurisdiction over areas where that the respective instruments have not conferred it—that is, without the states parties having consented to it. In other words, it is a mistake to use these hermeneutical tools as a basis to expand the jurisdiction of the Court when there is an explicit norm that precisely and clearly limits it.

18. The judgment refers to two provisions of the Protocol: the right to work established in Article 6 (paragraph 59) and Article 18, called "Protection of the Handicapped (*sic*)"[16] (paragraph 62). However, it omits any reference to an essential provision, Article 19, on the mechanisms of protection of the rights recognized in the agreement.

19. This omission is relevant, because what article 19 does is define two types of protective mechanisms. A general one—applicable to all the rights recognized in the Protocol—that consists of examinations, observations and recommendations issued by different organizations of the Inter-American System regarding the reports that the states must present about the progressive development of ESCER; and a second mechanism—admissible only with respect to the rights of union organization and affiliation and the right to education—makes it feasible that the Court may hear any eventual violation of them.

20. The state issued an acknowledgment of responsibility that included violation of Article 26 because it understood that the conduct displayed by its agents was in compliance with its obligations under the Convention; however, it does not follow

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[14] As Contesse notes, "it is vital for the Court to take special care in justifying the exercise and extent of its legal authority." See CONTESSE, Jorge: "The international authority of the Inter-American Court of Human Rights: a critique of the conventionality control doctrine," in *The International Journal of Human Rights* (2017), p.11.

[15] MEDINA, Cecilia: *La Convención Americana de Derechos Humanos. Teoría y jurisprudencia,* Ediciones Universidad Diego Portales*,* Santiago (2018), pg. 115.

[16] It is to be hoped that in the future, in addition to advancing with respect to the content and protection of ESCER, states parties could replace this unfortunate expression with another that is respectful of human dignity, such as, for example, "person with a disability."

from this that the Court has jurisdiction to declare a violation of the right to work, as already explained.

21. In the judgment, state responsibility was declared based on the consideration that during the selection process in which Mr. Guevara Díaz participated, he was treated differently to his detriment based on his intellectual disability, without an objective and reasonable justification. This violated his rights to equal protection before the law and to work, recognized in articles 24 and 26 of the ACHR, read in conjunction with the obligations to respect and guarantee. I agree with the considerations expressed in the judgment, with the exception of those referring to the direct violation of the right to work based on Article 26, as indicated above.

22. It should be borne in mind that paragraphs 78, 79, and 82 of the judgment indicate that it was proven that Mr. Guevara was not selected for the position of Miscellaneous Worker 1 due to his status as a person with an intellectual disability, without the state adequately justifying its decision. This without question violates the state's duty to prohibit all manner of discrimination against persons belonging to particularly vulnerable groups. But that same fact is classified as a violation of Mr. Guevara's right to work, without specifying any other fact that by itself violates the right that is said to be protected by Article 26 of the Convention. It is not in dispute that the state's conduct fails to comply with the duty of non-discrimination and the duty to adopt measures to achieve material equality for persons who belong to especially vulnerable groups, such as persons with disabilities, but the judgment does not explain the way in which that conduct produced an autonomous violation of the victim's right to work. In short, what the sentence does is establish the violation of the right to work based on the same fact and grounds that were used to establish the violation of the right to equal protection and non-discrimination, and we thus find ourselves within the same scope of protection. Of course, a fact can give rise to the violation of one or more rights of the Convention, but for it to be possible to declare such violations, the rights must be justiciable before the Court.

23. This approach impacts the legal certainty that an international court must guarantee and the legitimacy of its decisions, since the arguments put forward ignore a norm that does not grant the Court competence to hear possible violations of the right to work.

24. Lastly, I think that in this judgment, a valuable opportunity was lost to weigh the content of the right to equal protection and non-discrimination and the impacts of its violation. The exclusion of people with disabilities is one of the main problems posed by the classic contractarian theories of justice.[17] The multiple difficulties they face in order to be treated as equals in terms of consideration and respect are obstacles that prevent them from exercising authentic citizenship. In this particular case, Mr. Guevara Díaz's application was evaluated based on a stereotyped notion of his abilities due to his intellectual disability. This was evidence of the presence of attitudinal barriers blocking his inclusion, proving that, under the social model of disability, his inclusion is "positional" in the sense that it depends on his interaction with the social obstacles to a persons' ability to exercise their rights. Many times the source of these negative attitudes comes from the general ignorance about disability, its manifestations, and its issues, as well as about its potentialities. Sometimes, this disinformation is accompanied by indifference or, by an attitude that is directly detrimental to people with disabilities, as happened in this case. In this sense, one of the main challenges societies face is educational, since effective learning and inclusion help break down prejudices in the understanding that diversity is not a

[17] NUSSBAUM, Martha: *Las fronteras de la justicia. Consideraciones sobre la exclusión*, Paidós, Barcelona, (2007), pp.34-38.

threat or a hindrance, but rather enriches people and communities.

Patricia Pérez Goldberg
Judge

Pablo Saavedra Alessandri
Registrar

CONCURRING OPINION OF JUDGE RODRIGO MUDROVITSCH
INTER-AMERICAN COURT OF HUMAN RIGHTS
CASE OF GUEVARA DÍAZ V. COSTA RICA
JUDGMENT OF JUNE 22, 2022
(PRELIMINARY OBJECTIONS, MERITS, REPARATIONS AND COSTS)

1. The case of *Guevara Díaz v. Costa Rica* involves the state's international responsibility for acts of employment discrimination. In short, Mr. Luis Fernando Guevara Díaz, a Costa Rican citizen with an intellectual disability, was rejected in a public competitive hiring process for a position in the Ministry of Finance of Costa Rica—whose functions he had been performing on an interim basis for two years—despite having topped the shortlist.

2. I submit this concurring opinion with the purpose of offering a vertical approach to issues I believe to be fundamental in the long and worthy history of the Inter-American Court of Human Rights ("Court"), especially as regards the interpretation and application of economic, social, cultural, and environmental rights ("ESCER").

3. I believe that in this case, there has been a clear violation of the right to equal protection, set forth in Article 24 of the American Convention on Human Rights ("Convention"), and here there is no disagreement between the judges of the Court. However, significant disagreement has arisen regarding recognition of the violation of Article 26 of the Convention. With respect to the robustness and sophistication of the arguments made by my colleagues, it is my belief that this point deserves an in-depth analysis.

4. The issue of the applicability of Article 26 of the Convention has been addressed before in the Court's case law, but that does not take away from the reflections that naturally arise from the matter and justify the varying approaches to it. I believe that the justiciability of economic, social, cultural, and environmental rights raises important questions not only for international courts, but also for the constitutional courts of states.

5. The community of interpreters of conventional and constitutional norms is therefore facing a hermeneutical problem. This caveat is not simply rhetorical or formal—rather, this concurring opinion centers on the premise that coherence and integrity are fundamental for the legitimacy and functioning of the inter-American human rights system ("IAHS" or the "System").

6. With this concurring opinion, I intend to demonstrate that the Court's case law supporting a finding of the violation of Article 26 of the Convention must continue to be recognized, mainly for reasons of integrity and coherence. I also maintain that the interpretive framework developed around the enforcement of ESCER has already been incorporated into the language of the Court and states, as well as of that of other actors comprising the open society of interpreters of the Convention.[1] The path to take, therefore, is not to dismantle the bloc of precedents recognizing the justiciability of ESCER but rather to recognize the evolution of robust reparation parameters for interpreting and applying Article 26 of the Convention. In my view,

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[1] The expression "open society of the interpreters of the Convention" is inspired by the idea of "*die offene gesellschaft der verfassungsinterpreten*," or "open society of the interpreters of the Constitution," put forward by Peter Häberle in the much-cited work *Hermenêutica Constitucional. A sociedade aberta dos intérpretes da Constituição: contribuição para a interpretação pluralista e procedimental da Constituição.* Translation: Gilmar Ferreira Mendes. Porto Alegre. Sergio Antonio Fabris Editor, 2002. The correct understanding of this concept will be duly explained in chapter III of this concurring opinion.

the main sticking point is not whether to recognize the existence of a violation of this provision of the Convention but how to define proper reparations for it, leading to considerations as to the technique used to decide on and select the adequate reparations to apply.

7. The reasoning for this conclusion will be broken down into four parts: (i) review of the relevant factual aspects of this specific case; (ii) direct justiciability of ESCER as an element of the IAHRS; (iii) interpretation of Article 26 of the Convention in the framework of Latin American open society; and (iv) violations of Mr. Guevara Díaz's right to work and right to participate in the government.

I. The case in question

8. Luis Fernando Guevara Díaz is a Costa Rican citizen who was born in 1969. Since 2001, he has held the position of "Miscellaneous Worker 1" in the Ministry of finance of Costa Rica, performing a variety of maintenance and cleaning tasks.[2] According to a medical certification issued the year he was hired, Mr. Camara has an intellectual disability that essentially takes the form of difficulty with learning.[3] I would note here that this condition did not prevent him from performing his duties in the Ministry, as shown and confirmed by the state in the training certificate for the "miscellaneous" area issued in 1993 by the National Council on Rehabilitation and Special Education.[4] Mr. Guevara therefore performed his duties in an exemplary manner during the period he worked there. He was praised and recognized for his work, exemplified by the formal recognition signed by the coordinator of the Technical Supply and Services Unit ("UTAS") for his work at the Ministry.[5]

9. In 2003, Mr. Guevara took part in Competitive Hiring Process 010179, launched by the Ministry of Finance to the permanent version of the position that he had been working in the on an interim basis for two years. As part of the selection process, Mr. Guevara took a written test—with the appropriate adaptations—and underwent an interview at the UTAS.[6] Despite his excellent performance in the competitive hiring process, in which he topped the shortlist of three candidates, Mr. Guevara was notified that he had not been selected for the permanent position. The day after the result was announced, his intern position was eliminated and he was informed that he would be dismissed from the Ministry in four days.[7] Consequently, not only was Mr. Guevara removed from the position he held, he was unemployed.

10. The dismissal had a devastating psychological effect on the victim. As described by his brother during the public hearing held on March 24, 2022, prior to his unjustified dismissal, Mr. Guevara was cooperative and happy, feeling "very useful in the job he was doing."[8] But when faced with unemployment following his dismissal, he began experiencing episodes of depression, along with a lack of motivation and

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[2] *Case of Guevara Díaz v. Costa Rica. Merits, Reparations, and Costs.* Judgment of June 22, 2022, hereinafter the "Judgment," para. 28.

[3] Medical certification of May 9, 2001 (evidence file, folio 1044).

[4] *Cf.* Certificate issued December 10, 1993, Annex 7 of the Case File on the Proceedings before the Commission.

[5] *Cf.* Official Letter UTAS/169-2001 of September 17, 2001, Annex 5 of the case file on the Proceedings before the Commission. Folio 68.

[6] *Cf.* Judgment, para. 30.

[7] *Cf.* Judgment, para. 33.

[8] Public hearing on March 24, 2022, testimony of José Guevara Díaz.

interest, impacting his willingness to perform basic activities like eating, drinking, and leaving the house.[9]

11. In addition to the decision to not hire Mr. Guevara, of note also is the derogatory and discriminatory content of some of the internal communications exchanged between the state entities responsible for the competitive hiring process. In Official Letter 044-2003, the head of maintenance—the victim's supervisor while he held the interim position—said his workplace performance was unsatisfactory and that, because of his "problems of retardation and emotional blockage," he was not right for the position.[10] He therefore recommended choosing someone "functional" for the position.[11] In another letter, signed by the UTAS genera coordinator, it was suggested that the victim's appointment be reconsidered on the grounds that his behavior could have a negative impact on his work.[12] I would note that the UTAS itself interviewed the candidates and considered Mr. Guevara Díaz to be competent to hold the position for which he had applied.

12. Although he filed administrative and judicial appeals, the victim was not able to secure a review of the outcome of the competitive hiring process. In 2003, the legal department of the National Council on Rehabilitation and Special Education issued a report alleging flagrant discrimination through discriminatory acts regarding access to employment and a violation of the Equal Opportunities for Persons with Disabilities Act (Law 7600), in force in Costa Rica at the time of the facts.[13] In 2005, given the insufficiency of domestic remedies, the case was brought before the Inter-American Commission on Human rights ("Commission").

13. Following its internal procedures, the Commission issued its Report on the Merits in which it indicated that the unjustified rejection and subsequent dismissal of Mr. Guevara Díaz generated a presumption of discrimination, meaning the burden of proof fell to the state. The state was therefore responsible to duly provide the rationale justifying the decision, which must go beyond simply invoking the discretionary authority of the government to select a candidate from the shortlist. The absence of an objective and reasonable justification amounted to not only violation of the right to nondiscrimination (articles 24 and 1(1)) but also Article 26 of the Convention. After all, the right to work means the state has an obligation to "guarantee its exercise without any discrimination and adopt measures to take deliberate and concrete stops toward fully realizing the right in question,"[14] enforceable immediately.

14. For their part, the representatives underscored that the victim's dismissal amounted to cutting short the personal progress that he was making in his work. They also argued that the action was a denial of access to work for a person with disability precisely and exclusively because of that disability. For these reasons, in addition to supporting the Commission's conclusions as to the violation of the Convention, the representatives also alleged a failure to abide by the Inter-American

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9 *Ibidem*.

10 *Cf.* Official letter AM 044-2003 of June 13, 2003, Annex 4 of the Report on the Merits. Folio 943.

11 *Cf.* Official letter AM 044-2003 of June 13, 2003, Annex 4 of the Report on the Merits. Folio 943.

12 *Cf.* Official Letter UTAS 124-2003 of June 13, 2003, Annex 5 of the Report on the Merits. Folio 945.

13 Memorandum CNREE-AJ-091-03 of July 22, 2003, Annex 10 of the Report on the Merits. Folio 960.

14 IACHR. Report on the Merits 175/20, case 12,861, *Guevara Díaz v. Costa Rica.* July 2, 2020, para. 55.

Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities[15]

15. The processing of the case before the Court culminated in acknowledgment by the state of Costa Rica—during the public hearing held on March 24, 2022, and in its final arguments—of its international responsibility for the violation of the aforementioned articles of the Convention to the detriment of Mr. Guevara Díaz, pursuant to the terms of the Report on the Merits of the Commission.[16] This full acknowledgment of responsibility was welcomed by the Court as a valuable contribution to the processing of the case and to the validity of the principles inspiring the Convention.[17] I would note that the state acknowledgment is extremely healthy and, in some sense, a part of reparations, to the extent that it embodies the respect for the victim's feelings in the search for justice and protection.

16. Lastly, the Court reiterated its jurisdiction to hear disputes relating to Article 26 of the Convention and its applicability to cases on the right to work. It applied this right to this specific case, together with the right to equal protection (Article 24), and concluded that the petitioner had suffered discrimination in access to work and job security.[18]

17. Although the Court unanimously recognized the violation of Article 24 of the Convention, there was disagreement as to whether Article 26 had been violated. As I indicated in the preliminary considerations of this opinion, this respectful disagreement, with the potential to be projected forward into a series of future cases on ESCER, whether decided in terms of individual or collective rights violations, was the motivation for this concurring opinion. My view is that the direct justiciability of ESCER must be addressed from an approach that centers the coherence and integrity of the IAHRS.

II. Direct justiciability of ESCER as an element of the IAHRS

18. The bringing of cases before this Court that either directly or indirectly have to do with ESCER has made it possible to progressively improve understanding of the scope of state obligations to respect, promote, and guarantee these rights, as well as set the parameters for analyzing state conduct that interferes with its area of protection. The development of the Court's case law has led to valuable internal and external debates, with laudable positions taken by different actors seeking to add to the understanding of the best way to promote, protect, and monitor ESCER on the American continent.

19. Given the existence of a single article of a peculiar nature, the Court has had to exercise its hermeneutics within the possibilities of each era in which it has taken action. Even so, reconstructing the history of the case law surrounding the justiciability of ESCER enables us to observe that their protection has been central to the Court's work since the beginning.

20. Interdependence with civil and political rights initially enabled the Court to address ESCER with regard to their relationship to the rights guaranteed in Chapter II of the Convention, including in cases where ESCER were central. For example, in

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15 Brief with pleadings, motions and evidence. Case 12,861. *Guevara Díaz v. Costa Rica.* Pg. 22 (folio. 82)

16 Final arguments of the state, pg. 13-19.

17 Judgment, para. 22.

18 Judgment, para. 82.

the case of the *Juvenile Reeducation Institute v. Paraguay* (2004),[19] the Court chose to discuss the petitioners' rights to health, education, and recreation in the framework of the rights to a life with dignity (Article 4) and protection of the child (Article 19). Even without mentioning article 26, the Court made its protection of ESCER clear:

> The examination of the state's possible failure to comply with its obligations under Article 19 of the American Convention ["Rights of the Child"] should take into account that **the measures of which this provision speaks go well beyond the sphere of strictly civil and political rights.** The measures that the state must undertake, particularly given the provisions of the Convention on the Rights of the Child, **encompass economic, social and cultural aspects that pertain, first and foremost, to the children's right to life and right to humane treatment.**[20]

21. The Court continued to use this technique of subsumption in its initial decades as a mechanism to protect ESCER,[21] turning to it as a means of building a *corpus iuris* as a foundation for enhancing protection of these rights. It also served as a backdrop for arguments that would be essential to understanding the direct justiciability of ESCER.

22. A notable step forward was the case of *Acevedo Buendía et al. v. Peru*(2009),[22] in which the representatives of the victims argued that the fact that the state did not make provisions for the payment of benefits to hundreds of dismissed employees violated their right to social security, a right provided for under article 26 of the Convention. The state tried to argue in a preliminary objection that the Court lacked material competence to apply the article. However, the Court affirmed its jurisdiction to hear violations of any provision of the Convention, including Article 26, in the Court's first explicit recognition of its competence to adjudicate violations of that article.[23]

23. In addition, the Court reinforced the interdependence between categories of rights by asserting the applicability of the general obligations of articles 1(1) and 2 of the Convention to Article 26. Although the Court found the provision was not applicable to the case in question, it was an important step for sustained protection of ESCER to begin taking on the contours of direct justiciability.

24. The logical and natural continuity between the protection of ESCER by the Court carried out by way of connection and the eventual opening of direct justiciability is evidenced in the concurring opinion of Judge Macaulay in the case of *Furlan and Family v. Argentina* (2012).[24] The following year, in his concurring opinion in the case Suárez Peralta vs. Ecuador (2013),[25] Judge Mac-Gregor brilliantly set forth the

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[19] *Case of the "Juvenile Reeducation Institute" v. Paraguay. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of September 2, 2004. Series C No. 112.

[20] Ibidem, para. 149.

[21] According to section 17 of the opinion issued by Judge García Ramírez in the case of *Acevedo Buendía v. Peru*, which recognizes that the Court has examined issues that refer essentially to social rights via civil and political rights—in particular, those related to property, integrity, and the rights of children. *Cf*. *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller") v. Peru. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of July 1, 2009. Series C No. 198, opinion of Judge García Ramírez, para. 17.

[22] *Cf. Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller") v. Peru. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of July 1, 2009. Series C No. 198.

[23] However, it is important to note that the recognition of its competence to declare violations of Article 26 of the Convention differs substantially from a recognition of direct justiciability of ESCER through this provision.

[24] *Cf. Case of Furlán and Relatives v. Argentina. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of August 31, 2012. Series C No. 246.

[25] *Cf. Case of Suárez Peralta v. Ecuador. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of May 21, 2013. Series C No. 261

argumentative basis of what would become the main line of argument for the direct justiciability of ESCER under Article 26.

25. The years 2015 and 2016 were key for developing the Court's understanding of the direct justiciability of ESCER, as demonstrated by the judgments and valuable argumentative contributions made by judges in their separate opinions in the cases of *Canales Huapaya et al. v. Peru* (2015), *Gonzales Lluy v*. *Ecuador* (2015), *Chinchilla Sandoval et al. v. Guatemala* (2016), *Case of the Hacienda Brasil Verde Workers v. Brazil (2016), Yarce et al. v. Colombia* (2016) and *I.V. v. Bolivia* (2016).

26. This fertile ground—greatly facilitated by the Court's findings in the case of *Acevedo Buendía et al. v. Peru* (2009)—set the backdrop for the Court to declare a violation of Article 26 of the Convention. Additionally, the case of *Lagos del Campo v. Peru* (2017),[26] regarding a petitioner fired for statements denouncing irregularities within the company in that capacity as a representative of the workers, the Court concluded that not only had the state acted in violation of the rights to freedom of expression, judicial guarantees, and freedom of association, it had also committed an autonomous violation of the right to work pursuant to Article 26 of the Convention.

27. The analysis of the argument presented by the Court in the case of *Lagos del Campo v. Perú* illustrated the successive protection of ESCER by the Court, taking as its starting point a series of prior cases in which the Court had "repeatedly maintained the interdependence and indivisibility of civil and political rights and economic, social and cultural rights, because they should all be understood integrally as human rights, without any specific hierarchy, and be enforceable in all cases before the competent authorities."[27]

28. Although it neither started nor finished the debate over the direct justiciability of ESCER before the Court,[28] the precedent set in the case of *Lagos del Campo v. Peru* has been reiterated in subsequent decisions of the Court to the point that today, they largely amount to a paradigmatic jurisprudential truth that remains valid: the immediate enforceability and full justiciability of ESCER go hand in hand with the effectiveness of civil and political rights.

29. It should also be recalled that, in addition to applying Article 26 two cases related to the right to work[29]—a process already begun in the 2017 judgment—other ESCER have been recognized as cases on different subjects have been right before the Court. In the case of *Poblete Vilches v. Chile* (2018),[30] for example, the Court recognized an autonomous violation of the right to health, previously considered as falling under articles 4 and 5 of the Convention.[31] For its part, the right to social

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[26] *Cf. Case of Lagos del Campo v. Peru. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of August 31, 2017. Series C No. 340.

[27] Ibidem, para. 141.

[28] Still seen in the most recent case before the Court, *Case of the national Federation of Maritime and Port Workers (FEMAPOR) v. Peru. Preliminary Objections, Merits, and Reparations.* Judgment dated February 1, 2022. Series C No. 448.

[29] *Cf. Case of Dismissed Employees of Petroperú et al. v. Peru. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of November 23, 2017. Series C No. 344; *Case of Spoltore v. Argentina. Preliminary Objections, Merits, Reparations, and Costs.* Judgment June 9, 2020. Series C No. 404, and *Case of the Employees of the Fireworks Factory of Santo Antonio de Jesus v. Brazil. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of July 15, 2020. Series C No. 407.

[30] *Cf. Case of Poblete Vilches et al. v. Chile. Merits, Reparations, and Costs.* Judgment of March 8, 2018. Series C No. 349. Para. 118-124.

[31] *Cf.*, subsequently, Case of *Cuscul Pivaral et al. v. Guatemala. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of August 23, 2018. Series C No. 359, para. 103-107.

protection was first recognized in the case of *Muelle Flores v. Peru* (2019)[32] and advanced in the case of *Former Employees of the Judiciary v. Guatemala* (2021).[33] The case of the *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina* (2020) served as a backdrop to better establish the scope of Article 26's protection, to include protection of the right to a healthy environment, to food, to drinking water, and to participation in cultural life. More recently, in the case *Veras Rojas v. Chile,* the Court addressed the right to health from an innovative perspective, recognizing the state's obligation to supervise the provision of health services in conjunction with the rights of children and persons with disabilities, and the right to social security.[34]

30. In this context, as already recognized in the judgment in this case, the Court has found a violation of some ESCER by directly applying Article 26 of the Convention in at least 24 contentious cases and two advisory opinions.[35]

31. The Court recognized likewise with respect to provisional measures, most notably in the pioneering decision handed down in the case of *Vélez Loor v. Panama,* in which it decided to issue health measures to protect the right to health of the migrant population amid the COVID-19 pandemic.[36] Also worth recognizing with the current composition of the Court is the case of the *Yanomami, Ye'kwana, and Munduruku indigenous peoples v. Brazil.*[37]

32. I would emphatically note here that this number only includes cases handed down subsequent to the precedent set in *Lagos del Campo* and to which must be added to the multitude of prior judgments in which the Court found violations of ESCER based on connections to civil and political rights.

33. The gradual elaboration of meanings that maximize the effectiveness of Article 26—not always perfectly linear, but notably progressive—embodies the generational effort of the judges of this Court to produce the authentic "chain novel" that Dworkin called a central element for the integrity of rights-focused case law.

34. Comparing the work of judges to drafting a collective work of art, the celebrated legal philosopher states that in especially difficult cases:

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[32] *Cf. Case of Muelle Flores v. Peru. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of March 6, 2019. Series C No. 375, para. 187.

[33] *Cf. Case of Former Judicial Branch Workers v. Guatemala. Preliminary Objections, Merits, and Reparations.* Judgment of November 17, 2021. Series C No. 445.

[34] *Cf.* Case of *Vera Rojas et al. v. Chile. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of October 1, 2021. Series C No. 439.

[35] Judgment, para. 55. See: *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights, in conjunction with articles 1(1) and 2).* Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23; *Rights to freedom to organize, collective bargaining, and strike, and their relation to other rights, with a gender perspective. (interpretation and scope of articles 13, 15, 16, 24, 25, and 26 in relation to articles 1(1) and 2 of the American Convention on Human Rights; articles 3, 6, 7, and 8 of the Protocol of San Salvador; articles 2, 3, 4, 5, and 6 of the Convention of Belém do Pará; articles 34, 44, and 45 of the Charter of the Organization of American States; and articles II, IV, XIV, XXI, and XXII of the American Declaration on the Rights and Duties of Man).* Advisory Opinion OC-27/21 of May 5, 2021. Series A No. 27.

[36] *Cf. Case of Vélez Loor v. Panama.* Provisional measures. Adoption of Urgent Measures. Order of the President of the Inter-American Court of Human Rights of May 26, 2020.

[37] *Cf. Matter of the Members of the Yanomami, Ye'kwana, and Munduruku Indigenous Peoples regarding Brazil.* Adoption of Provisional Measures. Order of the Inter-American Court of Human Rights of July 1, 2022.

> "Each judge is then like a novelist in the chain. He or she must read through what other judges in the past have written not only to discover what these judges have said, or their state of mind when they said it, but to reach an opinion about what these judges have collectively done, in the way that each of our novelists formed an opinion about the collective opinion so far written."[38]

35. There is therefore first an exercise of discovering and following legal principles that provide a point of continuity between the past and the present. In this ongoing work of draft a novel out of case law, every composition of the Court, inserted in specific historical circumstances and dealing with the current hermeneutical challenges presented by cases that come before it, has always done the work of interpreting the Convention so as to arrive at a protection of ESCER that is compatible with the principles of *pro persona* and *effect utile.*

36. It is true that this understanding of the Court cannot be reached without significant participation from the judges whose stances were not adopted by the majority, without prejudice to which their arguments were duly considered and added to the interpretation of the Court as counterpoints or warnings for later development of the case law.

37. Indeed, the chain novel is not a mere linear summation of opinions and decisions but the dialogic construction of an argument around a certain subject, such that the positions arrived at also contribute to the Court's understanding, even if they were already considered and effectively rejected.

38. Thus, despite the robustness of the divergent arguments made over the course of the extensive and expert debate carried forth in this Court, a review of the early chapters of the Court's case law unquestionably reveals a solid basis for recognizing the full and direct justiciability of ESCER through Article 26 of the treaty. In Dworkinian parlance, the Court takes ESCER seriously; it does not see them as social commitments or mere political objectives that can be set aside depending on the circumstances.

39. I would also note that some time ago, the Court consolidated the understanding that all rights require, to a certain degree, a positive application and structured public policies, both if they are worded negatively, predominantly incorporating attempts at abstention (as with civil and political rights), and if they are worded positively, in the form of requiring state action for implementation. In the end, they all depend on state resources and consistent action within the institutions and bureaucracies that states maintain at the national level to be truly effective.

40. Confirming the incompatibility of artificially dividing human rights into "categories" based on "negative" or "positive" aspects of protection (or into "generations," referring to a supposedly chronological progression) leads to a renewed understanding that favors the aggregation of new dimensions of protection (normally provisional in nature) to what is understood as the essential core of all rights. I therefore do not think it is appropriate for objections related to the difficulty of implementing ESCER to justify vetoing their direct justiciability before this Court. The status of "immediate" and "free of charge" associated exclusively with application of civil and political rights is a mistaken idea already corrected by this Court, whose argumentative authority always depends—it is worth reiterating—on laying to rest the periodically-revived debates on the justiciability of any of the rights protected under the Convention.

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[38] DWORKIN, Ronald. *A matter of principle.* Cambridge: Harvard University Press, 2000, pg. 159.

41. Much earlier compositions of this Court even demonstrated that they understood the artificiality of dividing rights into categories based on positive versus negative characteristics, as made clear in the opinion of judges Cançado Trindade and Abreu Burelli in the case of *Street Children v. Guatemala* (1999):

> **The right to life implies not only the negative obligation not to deprive anyone of life arbitrarily, but also the positive obligation to take all necessary measures to secure that that basic right is not violated.** Such interpretation of the right to life, so as to comprise positive measures of protection on the part of the state, finds support nowadays in international case-law as well as doctrine. (...) The arbitrary deprivation of life is not limited, thus, to the illicit act of homicide; it extends itself likewise to the deprivation of the right to live with dignity. **This outlook conceptualizes the right to life as belonging, at the same time, to the domain of civil and political rights, as well as economic, social and cultural rights, thus illustrating the interrelation and indivisibility of all human rights.**[39]

42. Again in the always vital and inspiring words of the renowned Judge Cançado Trindade:

> (...) **all human rights**, even economic, social and cultural rights, **are promptly and immediately demandable and justiciable**, once the interrelation and indivisibility of all human rights are affirmed at both the doctrinal and the operational levels – in other words, both in legal writings and in hermeneutics and the application of human rights.[40]

43. The case of Mr. Guevara is emblematic in this respect because not only does it reveal the equivalence of the cost of the different generations of rights, it elucidates the inseparability of the right to equal protection and the right to work. The right to equal protection of a victim of discrimination in public service is only fully guaranteed when the right to work, in its positive dimension, is also covered by judicial protection. It takes on a special dimension as a place for the political participation of citizens, as I will develop later.

44. In line with this, subparagraph 1 of Article 27 of the Convention on the Rights of Persons with Disabilities establishes the following:

> "States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation (…)"

45. There is, therefore, an indissoluble connection—especially in terms of the guarantee of the rights of persons with disabilities—between protection of the right to equality and the promotion of the right to work. There is no isonomy without positive state benefits associated with building an inclusive work environment.

46. Therefore, protecting a person with a disability who has been subjected to discrimination solely on the basis of Article 24 of the Convention is insufficient or, at a minimum, indifferent to a whole range of actions that must be adopted to protect and fully realize the right to work and the special right to inclusion. Therefore, with

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[39] *Cf. Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala. Merits.* Judgment of November 19, 1999. Series C No. 63, opinion of judges Cançado Trindade and Abreu Burelli, para. 2-4.

[40] *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, opinion of Judge Cançado Trindade, para. 7.

due respect to opinions otherwise, restricting analysis of this case to civil rights seems to me to be an error that can and should be avoided.

47. At this point, it should be noted that the interdependence between the different generations of rights does not support the argument that the direct justiciability of ESCER is unnecessary. The Court's action will only be effective and transparent once all the reasons invoked in each case are explicitly and fully considered, with the construction of a line of argumentation that encompasses the entire plexus of rights violated.

48. Thus, what is clearly under development and still requires reflection as regards ESCER is not the now-settled possibility of immediate declaration of their violation but the development of techniques for reaching the decision that prioritize the dialogic method with domestic jurisdictions, especially in cases with large-scale and persistent harm to social, economic, cultural, or environmental rights nationally.

49. The instantaneity or not of the appeal, however, has nothing to do with the lack of abstract justiciability of the right set forth in Article 26. To think otherwise, with all due respect, is an error in the dogmatics of human rights. Hence, it makes no sense to change the case law on the full and immediate effectiveness of ESCER, in my assessment.

50. From another angle, realization of ESCER in individual cases like this one does not require a hermeneutic that is much different from the one used for civil and political rights (as the Court has demonstrated in this case). However, in the situations most difficult to resolve—where a collective or mass human rights violation has taken place—due to political obstacles or shortcomings in institutional coordination at the domestic level, the Court, in my opinion, has no reason to retreat or find that the right violated is not justiciable; Rather, it is enough to take due care and administer dialogical remedies—distinct from the democratic process—by assigning responsibilities and finding a need for economic and fiscal planning to implement the right withheld (in the case of an omission) or provide reparations (in the event of an action that amounts to a rights violation). Lastly, the compliance structure must provide for a continual dialogue between the Court and states, similar to what jurist Roberto Gargarella[41] recommends for resolving domestic conflicts over complex constitutional rights.

51. However, these requirements as far as a special decision-making technique should in no way be mistaken for an unwanted return to a hands-off doctrine. Diametrically opposed to this, what this Court wants, from my perspective, is an effort of institutional imagination, permeable to some degree to experimentalism, such that at the conclusion of the transnational dialogue with the state in violation, full restoration of protection to some vulnerable ESCER is restored. Only then will the victims be placed in a *status activus* of full enjoyment of the rights protected by Article 26 of the Convention.

52. Lastly, with these precautions and reasonable collaboration with states—presumably, given their acquiescence to litigation before the Court—during the compliance with judgment phase, the tailored remedy will be more effective and not appear as merely comforting rhetoric or "evasive social therapy"[42] offered by professional theorists. Escaping the temptation to perform "rationalizing legal

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[41] GARGARELLA, *Por una Justicia Dialógica*. *El Poder Judicial como Promotor de La Deliberación Democrática.* Buenos Aires: Siglo Veintiuno, 2014, pg. 123.

[42] UNGER, Roberto Mangabeira. *O Direito e o Futuro da Democracia.* Rio de Janeiro: Boitempo, 2004. pg. 107.

analysis," so well described by Roberto Mangabeira Unger, is a compulsion not only of those who deny the direct justiciability of Article 26.

53. Having made these considerations, one could argue—and this topic will be developed in the concurring opinion—that the direct justiciability of ESCER is consolidated in the case law of the Court and an integral part of the common language of the IAHRS. This is the chapter of the chain novel where I think the Court should continue writing the story of the application of human rights on the American continent, as there is no significant change in society, change to current law, or change in the understanding in the democracies of the continent of the content of the Convention that would justify a hermeneutic step backwards.

54. Once again, it is essential to remember that the Court's past case law is not simply the idiosyncratic work of its judges, but also an inextricable part of the corpus of the Convention itself. The conventional norm, from this perspective, cannot be confused with its text. Rather, it must be objectively represented as the result of a process of interpretation and application.

55. Therefore, when implementing their obligations under this instrument, not only must signatory states take into account the wording of the Convention, they must also incorporate the concrete and settled interpretations of it made by this Court, in accordance with the paradigmatic precedent established in *Almonacid Arellano et al. v. Chile*.[43] The states parties themselves incorporate the meanings that the Court attributes to the Convention in guiding their domestic judicial bodies in the application of the Convention, and therefore, a sudden and unjustified change in the approach to the effectiveness of ESCER is unjustified.

56. Dismantling the meaning of the justiciability of ESCER would, in this regard, have unexpected and troubling effects on not only this Court's capacity to enforce overall compliance with the Convention and promote the unity and indivisibility of human rights, but also in the sense of threatening the integrity of the precedents set in national courts that enter into dialogue with the body of case law of the Court for guidance and to give consistence to what it means to enjoy human rights before the domestic jurisdiction.

57. In view of the ideal of legal certainty and foreseeability grounded in the values protected by the Convention, the new judges must therefore join the aforementioned and ongoing chain novel, whose imperative of integrity means that each new composition of this Court cannot make an original and unique interpretation of the Convention at a whim. Every new composition of the Court cannot simply overturn the foundations of application of the Convention, because human rights cannot be realized if the hermeneutics are allowed to vary at a whim.

58. Naturally, in view of the plasticity of law, the dynamics of and changes to international jurisdiction where the Convention is applied and the changing collective requirements of the peoples under that jurisdiction, a certain degree of judicial discretion must be maintained so new judges can update the Convention in the light of new disputes and new phenomena, thereby preventing the fossilization of inter-American human rights law. However, on the pretext of updating the meaning of the "living Convention," it is not permissible to undermine transgenerational unity.

59. Lastly, in setting the parameters of this "novel" that the current composition must continue, Dworkin points out that, "A judge's duty is to interpret the legal

[43] *Cf. Case of Almonacid Arellano et al. v. Chile. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of September 26, 2006. Series C No. 154, para. 124.

history he finds and not to invent a better history."[44] This is the line of reasoning I intend to follow.

60. My sense is that it is only through this incremental and minimalist approach that bows to the legal principles recognized in the past but with a view in the present on the problems at hand that the Court will become a forum for non-negotiable principles, fortified against any unstable agreement that could reduce the scope of the application of human rights to a matter contingent on the continent's international politics.

61. The stability of the Court's case law—as well as respect for the vocabulary of human rights protection that it has enabled—is without question the greatest guarantee that human rights will not become mere optional guidelines. If states have ratified the treaty and sovereignly assented to the contentious jurisdiction of the Court, its precedents become relevant guides that must be given special weight in deliberations when and if one day the question is whether to abandon them—something that does not appear to be the case with ESCER, especially following a pandemic that has imposed more suffering and inequality on one of the most unequal continents on the planet.

62. The generations of jurists who have gone before use in these chambers have clearly left a valuable legacy in the form of the body of law of the Convention, and it must be honored, not only for the quality of its argumentation but also, as has been stated elsewhere, because "liberty has no refuge in a jurisprudence of doubt."

III. Justiciability of ESCER in a Latin American open society of interpreters of the Convention

63. With the robustness of the Court's settled case law on the justiciability of ESCER demonstrated, and with the arguments lined up to justify keeping it in place, it is now time to expound on what has driven me to issue this concurring opinion, with an approach placing the understanding of Article 26 of the Convention in the cognitive context of the *Latin American open society of interpreters of the Convention.*

64. As Peter Häberle indicates, in a lesson on constitutional hermeneutics that can be applied to the field of universal human rights, "*todo aquele que vive no contexto regulado por uma norma e que vive com este contexto é, indireta ou, até mesmo diretamente, um intérprete dessa norma. O destinatário da norma é participante ativo, muito mais ativo do que se pode supor tradicionalmente, do processo hermenêutico. Como não são apenas intérpretes jurídicos da Constituição que vivem a norma, não detêm eles o monopólio da interpretação da Constituição.*"[45] When analyzing the interpretation and application of human rights norms by the European constitutional courts, Häberle concluded that the judicial authorities of each country were becoming true "European constitutional courts," transcending their eminently national nature and becoming active agents of the interpretation of European regional human rights law.[46]

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[44] DWORKIN, Ronald. Op. Cit. pg. 160.

[45] HÄBERLE, Peter. *Hermenêutica Constitucional*. *A sociedade aberta dos intérpretes da Constituição: contribuição para a interpretação pluralista e procedimental da Constituição.* Translation: Gilmar Ferreira Mendes. Porto Alegre. Sergio Antonio Fabris Editor, 2002. pg. 15.

[46] HÄBERLE, Peter. "A Sociedade Aberta dos Intérpretes da Constituição – Considerações do Ponto de Vista Nacional-Estatal Constitucional e Regional Europeu, Bem Como sobre o Desenvolvimento do Direito Internacional," translated by MENDES, Gilmar Ferreira, in *Direito Público* n°18, Oct.-Nov., 2007, pg. 73.

65. Given the proportions, I would expect a similar scenario in the inter-American context. In the area of rulings on constitutionality handed down by the supreme constitutional courts of the nations of the Americas, a review of compliance with human rights conventions is also exercised, given existing integration between the constitutional orders of the states Parties to the Convention and the inter-American order established under its *Ius Constitucionale Commune* governing the protection of human rights in our continent. It is impossible to think of the protection of human rights in the states of the Americas without considering the existing synergy and dialogue between nations and the inter-American regional bloc,[47] all centered, in the end, around the American Convention and imbued with the *pro persona* principle.

66. I also believe that the arguments of coherence and integrity underlying the reiteration of the Court's case law on Article 26 of the Convention are matched to the reality of transconstitutionalism. The fact of sharing objectives and problems between national courts (constitutional law) and international courts (international human rights law) has given rise to an irreversible process of converging agendas and reciprocal influence.

67. This movement has been recognized by illustrious judges of this Inter-American Court. In 2007, Judge Cançado Trindade noted that by the middle of the 20th century, there was already talk of the "internationalization" of constitutional law and, at the turn of the 20th century, there was talk of the "constitutionalization" of international law. Both processes have fostered interaction between national legal systems and the international legal system in the protection of human rights.[48]

68. In this same sense, in his dissenting opinion in the case of *Cabrera García and Montiel Flores v. Mexico* (2010), Judge Mac-Gregor recalled that concepts of constitutional law had been assimilated from the origin and during the development of international human rights law.[49] When analyzing the mechanisms for review of compliance with human rights conventions, which echo national mechanisms of constitutional oversight, the judge described this dynamic of approximation between international human rights law and constitutional law as the "internationalization" of constitutional categories. In the same vein, in a 2013 academic publication, Judge Pedro Nikken[50] pointed out that international human rights law tends to permeate constitutional law and originates from it.

69. As can be clearly seen, the interaction between the constitutional and conventional orders takes on special characteristics in the Latin American context as a result of the historical evolution of the constitutions of the countries that make up the region and as a result of the development of the IAHRS, which derives from the singular constitutional trajectory of the countries that compose it.

70. This dynamic of interaction is the objective of the so-called Ius Constitucionale Commune in Latin America, indicative of the existence of a "Latin American network

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47 *Cf.* CYRILLO, Carolina; FUENTES-CONTRERAS, Édgar Hernán; LEGALE, Siddharta. "The Inter-American Rule of Law in South American constitutionalism." In: *Sequência (Florianópolis)*, vol. 42, no. 88, pg. (1-27), 2021. pg. 19-20.

48 *Cf. Case of the Dismissed Congressional Employees (Aguado - Alfaro et al.) v. Peru. Interpretation of Judgment of Preliminary Objections, Merits, Reparations, and Costs.* Judgment of November 30, 2007, Series C No. 174. Separate opinion of Judge Cançado Trindade, para. 6-7.

49 *Cf. Case of Cabrera García and Montiel Flores v. Mexico. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of November 26, 2010. Series C No. 220. Separate opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, para. 21.

50 NIKKEN, Pedro. "El Derecho Internacional de los Derechos Humanos en el derecho interno." *Revista IIDH*, vol. 57, (pgs. (11-68), 2013. pg. 42-43.

of leading constitutionalism,"[51] made up of the Court and the national legal bodies, whose objective, ultimately, is the material realization of the guarantees and integration of the countries of the region around a structure of mutual support. The dissemination of human rights norms constitutes one of the mechanisms through which this objective can be achieved.[52]

71. I would emphasize that, from the perspective of developing constitutionalism globally, adding ESCER to constitutional texts is an authentic and unforgettable Latin American legacy, dating back to the Mexican Constitutional Charter of 1917. As the doctrine of the Ius Constitucionale Commune has highlighted, what we are seeing, especially after the broad movement to modify the constitutional systems of Latin American countries with the decline of authoritarian regimes toward the end of the 20th century and into the 21st century, is the adoption of constitutions that are even more focused on protecting human rights, with extensive provisions on ESCER.[53]

72. Attentive to the open network of interpreters of the Convention of which it is part, the Court is not oblivious to the developments taking place at constitutional levels regarding the justiciability of ESCER, illustrated as well by the many citations in the judgment in question of the precedents of the Constitutional Court of Colombia, the Supreme Court of Justice of the Nation of Mexico, the Supreme Federal Court of Brazil, and the Constitutional Court of Ecuador.[54]

73. The reciprocal is also true, since the Constitutional Courts have implemented the precedents of this Court in their decisions on ESCER. For example, in the Brazilian Federal Supreme Court, within the framework of the recent proceeding of the Hearing on Failure to Comply with Fundamental Precept in matters of environmental rights (ADPF no. 708), one of the illustrious judges of the Brazilian Constitutional Court invoked, in open dialogue with the hermeneutics practiced in this Court, Advisory Opinion 23/2017 and the *Case of Lhaka Honhat v*. *Argentina* (2020) when issuing their opinion.[55]

74. In this context, I understand that given the close relationship with states' constitutional courts, the Court's exercise of its institutional function, including by interpreting and applying the Convention's provisions on ESCER, must take into account any impacts on constitutional systems and the regional reality.

75. In my thinking, this means that the consistency and integrity of the Court's findings have a knock-on effect at the national level. This repeated finding by this Court—the final interpreter of the Convention—of the justiciability of ESCER has resulted in a generalized absorption of this understanding by the courts of the states Parties to the Convention, as one would expect would happen as a result of the dialogue between the different judicial bodies.

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[51] BOGDANDY, Armin von; MAC-GREGOR, Eduardo Ferrer; ANTONIAZZI, Mariela Morales; PIOVESAN, Flávia; SOLEY, Ximena. "Ius Constitutionale Commune en América Latina: un enfoque regional del constitucionalismo transformador" (pgs. 17-51). BOGDANDY; ANTONIAZZI; MAC-GREGOR (eds.). *Ius Constitucionale Commune en América Latina: Textos básicos para su comprensión.* Mexico: Instituto de Estudios Constitucionales del Estado de Querétaro; Max Planck Institute for Comparative Public Law and International Law, 2017. pg. 20.

[52] Ibidem. pg. 20.

[53] For example: Brazil (1988), Argentina (1994 reform), Colombia (1991), Paraguay (1992), Peru (1993), Ecuador (1998, 2008), Venezuela (1999), Bolivia (2009), Mexico (2011 reform) and, later, Chile, whose new constitution, which is in the process of being enacted this year, 2022, grants broad protection to ESCER.

[54] Judgment, para. 69-73

[55] Supreme Federal Tribunal. ADPF nº 708, Rapporteur Judge Luis Roberto Barroso. Court of July 04, 2022. Voto Vogal of Minister Edson Fachin.

76. National courts have consolidated this understanding and public policies have been built around this approach to ESCER. There is, therefore, a heavy burden on any potential reversal of the Court's case law—rhetorical in nature, but also political-institutional.

77. In fact, the Court's case law on ESCER has taken root so deeply in states' interpretations that I think it is possible to argue that the justiciability of ESCER has become an indelible element of the shared language of interpreters of the Convention.

78. In the process toward the consolidation of the direct justiciability of ESCER, concern arose as to how this evolution would be received by the states. In particular, there was concern that states might resist the direct justiciability of ESCER, which could give rise to tensions that impact the Court's perceived legitimacy.

79. In some cases, during the process of consolidating this understanding, preliminary objections were raised regarding the Court's jurisdiction to analyze ESCER based on Article 26 of the treaty. However, this debate ended some time ago in a majority of states that accept the direct justiciability of ESCER, which demonstrates their commitment to working together with the IAHRS bodies for their effective realization.

80. In the current dynamic, cooperation between states and inter-American bodies is constant, as national governments appoint members of the composition of inter-American entities, send representatives to hearings before the Commission and the Court, prepare periodic and thematic reports on the protection of human rights in their territories, and receive inter-American delegations to carry out evaluations and investigations.

81. Preliminary objections challenging the Court's competence to enforce Article 26 are, in line with the formation of this authentic culture of the justiciability of ESCER, increasingly infrequent.[56] There are even situations in which states spontaneously accept their international responsibility for direct violations of Article 26 of the Convention, which they would never have done if there were even the slightest doubt about its immediate applicability.[57] In this sense, Costa Rica's move in the case at hand of forthrightly acknowledging the violation of Mr. Guevara Díaz's right to work based on Article 26 is especially salutary and relevant, as is the similar acknowledgment made by Honduras last year.

82. In 2007, in its report on access to justice as a guarantee of economic, social and cultural rights, the Commission pointed out the importance of states' duty to provide effective mechanisms for access to justice in cases of judicialization of ESCER claims.[58] This duty derives precisely from the indivisibility, interdependence, and interrelation of civil and political rights and economic, social and cultural rights, such that, as stated in the 1997 Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights, states have the same responsibility for the violations of any other group.

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[56] It is noteworthy that, even in when more ESCER were added to the list given in Article 26, the respondent state did not raise this preliminary objection. *Cf. Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, Reparations, and Costs.* Judgment of February 6, 2020. Series C No. 400.

[57] *Cf. Case of the Miskito Divers (Lemoth Morris et al) v. Honduras.* Judgment of August 31, 2021. Series C No. 432.

[58] *Cf.* IACHR. Access to Justice as a Guarantee of Economic, Social and Cultural Rights. A review of the standards adopted by the IAHRS. OEA/Ser.L/V/II.129 Doc. 4, September 7, 2007.

83. From this point of view, in awareness of the need to guarantee access to justice as regards ESCER, in recent decades, states have extensively developed the jurisdictional protection of these rights and have set up mechanisms that even allow for direct justiciability in terms of constitutional enforcement.

84. An example is the Supreme Court of Justice of the Nation of Mexico,[59] which, within the scope of its constitutional mandate, has the power to declare a violation of ESCER through an amparo ruling, something that became possible thanks to the Mexican constitutional reform of 2011. In the same sense, when analyzing how the Federal Supreme Court of Brazil has ruled, it is observed that typical constitutional review has proven to be an authentic vehicle for promoting ESCER, and the case law emerging from this jurisdictional action gives life to these rights.

85. The recent development of the structuring processes within the Brazilian constitutional jurisdiction is also an unequivocal example of developing a shared language formed from recognition of the justiciability of ESCER. In its findings on breach of constitutional provision 347, the Supreme Court of Brazil found that the prison system was in violation, with mass violation of the fundamental rights of prisoners.[60] And this year, the same court began hearing a Claim of Failure to Observe Constitutional Provisions 760, which requests a finding of unconstitutionality with respect to protection of the environment, specifically in the struggle against deforestation of the Amazon, with opinions issued that are based on, among other things, judgments issued by this Court.[61] All of this demonstrates that the Court's rulings on ESCER today have the status of super-precedents that enter into direct dialogue with national legal systems and cannot be simply abandoned. Brazil is not alone in this. Among other Latin American nations, Colombia is a living laboratory of landmark decisions that have led to the development of a doctrine of findings of unconstitutionality to deal with coordination failures that endanger the realization of the various ESCER.

86. In cases brought before the Court, individuals and civil society groups—whose opportunities for active participation in the IAHRS were positively expanded by the 2000 and 2009 reforms of the Court's Rules of Procedure—also often make valuable contributions. to interpretation of the Convention, as reflected in the debates on Article 26. In the context of their participation in the IAHRS as petitioners, for example, they have submitted a notable number of petitions to the Commission and pleadings, motions, and evidence briefs to the Court alleging violations of Article 26 of the Convention in recent years.[62]

87. Through its system for processing individual petitions, the IAHRS receives endless petitions related to the violation of ESCER, and they are only more frequent

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[59] The Court recently published a teaching manual on the justiciability of ESCER. It illustrates the dialogues between the IAHRS and domestic courts on the protection of these rights.

[60] *Cf.* Supreme Federal Tribunal. ADPF 347-MC, Rapporteur Judge Marco Aurélio. Handed down on September 09, 2015.

[61] *Cf.* Supreme Federal Tribunal. ADPF 760, Rapporteur Judge Cármen Lúcia. Handed down on March 31, 2022.

[62] It is therefore essential to note that it has been almost 20 years since the petitioners have invoked such a provision in defense of ESCER. *Cf. Case of the "Five Pensioners" v. Peru. Merits, Reparations, and Costs.* Judgment of February 28, 2003. Series C No. 98; *Case of the "Juvenile Reeducation Institute" v. Paraguay. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of September 2, 2004. Series C No. 112, *Case of Yean and Bosico Children v. Dominican Republic. Interpretation of Judgment of Preliminary Objections, Merits, Reparations, and Costs.* Judgment of November 23, 2006. Series C No. 156; *Case of Acevedo Jaramillo et al. v. Peru. Interpretation of Judgment of Preliminary Objections, Merits, Reparations, and Costs.* Judgment of November 24, 2006. Series C No. 157; *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and Reparations.* Judgment of June 27, 2012. Series C No. 245, and *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.

as the health crisis caused by the COVID-19 pandemic continues to impact the protection of a number of rights in this category. A growing number of the cases brought before the IAHRS by the Commission openly assume Article 26 of the Convention to be a primary source of autonomous ESCER obligations, which once again demonstrates that ESCER justiciability is seen as a consolidated fact by inter-American society. I would also emphasize that the eventual arrival of some of these cases before the Court will reinforce the ongoing evolution of inter-American case law on the matter.

88. In addition to active participation in contentious cases, another notable form of participation for individuals and civil society groups in the IAHRS is via *amici curiae*. These contributions have been especially noteworthy in the Court's rulings on Article 26, in which a substantial part of this pluralistic group of interpreters of the Convention can be seen supporting the direct justiciability of ESCER. In the case at hand, for example, the Court was able to rely on valuable contributions by researchers from the Practicum on the International Protection of Human Rights at Boston College Law School, who highlighted that vulnerable groups have particular needs that must be addressed by states to guarantee access to work without discrimination, and that this compliance is immediately enforceable.[63]

89. It should also be noted that in addition to considering the existing peculiarities and dynamics of the IAHRS, the Court's actions take place as part of a dialogue with the universal human rights protection system, and therefore, the Court cannot ignore the reality of international ESCER protection and promotion mechanisms. As César Rodríguez Garavito indicates, regardless of the peculiarities of Latin American legal thought, which is based on the social reality in which it develops, "intellectual isolation" by turning away from the legal world must not be the approach.[64] The dynamic seen in the UN system is precisely a movement toward the justiciability of ESCER. The Inter-American Commission, for its part, has a broad agenda regarding ESCER. At the beginning of this century, the Commission tried to promote defense of these rights based on Article 26 of the Convention, as can be seen in the report on the case of Miltón García Fajardo *et al*. regarding Nicaragua (2001).[65] To go into further depth in this area, in 2014, the Special Rapporteurship on Economic, Social, Cultural, and Environmental Rights ("REDESCA") was created. It has contributed greatly to furthering the discussion on protecting ESCR in the IAHRS and to drafting standards for its organs on the scope of their protection.

90. The Commission's mandate in the IAHRS is one of the strongest indicators of the existence of an open society of interpreters of the Convention, characterized by dialogue between the recipients of the norms of the Convention, by pluralism, and by democratic ideals, to the extent that this body develops its activities and formulates its recommendations in direct contact with the other agents active in the Latin American network. The work done by the Commission and its special rapporteurs in gathering information on the situation of ESCER in the region is commendable insofar as it helps elucidate the continent's specific needs and contributes to improving the mechanisms for protecting them.

91. It is my contention that states' involvement in the agenda of the Court and the Commission and the participation of non-institutional actors work to refute

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[63] Amicus Curiae Practicum on the International Protection of Human Rights, Boston College Law School, *Case of Guevara Díaz v*. *Costa Rica*, pg. 22.

[64] GARAVITO, César Rodríguez. "Un nuevo mapa para el pensamiento jurídico latinoamericano." In: GARAVITO, César Rodríguez (ed.), *El derecho en América Latina: Un mapa para el pensamiento jurídico del siglo XXI*, Buenos Aires: Siglo Veintiuno Editores, 2011. pg. 16

[65] *Cf.* IACHR, Report 100/01, Case 11,381, Milton García Fajardo *et al*. regarding Nicaragua, October 11, 2001. (para. 95 and following).

arguments against the justiciability of ESCER that are based on the restrictive wording of Article 26 of the Convention and on reflections on the insufficiency of the mechanisms of the Protocol of San Salvador. The American community itself, at the state and civil society levels, has attempted to get past these legal obstacles to affirm the full applicability of ESCER.

92. This context of the participation of multiple actors—whether institutional (State) or not—amounts to the authentic open society to which Peter Häberle refers, with language that has been built over decades of collective argumentation. The work is not an exclusive or voluntary one of the judges of the Court, but the unfinished product of the American community. Without any bias, it can be stated that by this point, the Court's case law has transcended its beginnings to become a shared Latin American heritage with regard to rights.

93. Pursuant to what I have established throughout this concurring opinion, the open society of the interpreters of the Convention has absorbed and built the direct justiciability of ESCER. Despite possible deficiencies in terms of the drafting of Article 26 of the Convention and moments of hesitation on the part of the states Parties to it, it has been conclusively demonstrated that these rights are not only human, but fundamental to the trans-constitutional project, which has been underway for decades. Therefore, its value as a guide must not be underestimated—and therefore undermined—in the sense of overcoming poverty and the profound material inequalities in Latin America.

94. It is my belief that, serving the peoples of the continent as a judge of this Court, I am not interpreting the text of the Convention solely and in isolation. I understand the practices and arguments discussed collectively. I am in dialogue with the *amici curiae*, with the states, with the committees, and with the organized civil society of each state Party. It is not for me, therefore, to use a solipsistic interpretive approach that ignores the history, the meanings, the struggles, and the self-understanding of the American peoples as to the meaning of the rights of the Convention that they joined.

95. Obviously, exercising deference to the hermeneutic understanding of the open society of the interpreters of the Convention does not mean encouraging, or even tolerating, hypotheses of abusive conventionalism or interpretive fragmentation, since recognizing cognitive openness does not change the fact that the Court will always remain the ultimate interpreter of the Convention.

96. Essentially, incorporating the reality and the opinions of those to whom the norms of the Convention apply as elements for interpreting and applying Article 26 of the Convention is a coherent contribution to the norms governing conventional law and the specific principles that apply to international human rights law. In this sense, the examples given of the contributions of states, individuals, civil society groups, and the Commission as permanent subjects of the open society of interpreters of the Convention demonstrate that the enforceability of ESCER before the Court is already rooted in continental legal reality. This solid contribution cannot disappear into thin air by the mere fact that the composition of the Court periodically undergoes changes typical of the dynamics of changing appointments.

IV. Violation of the right to work and to participate in the government.

97. In the case at hand, there is a clear violation of the right to equal protection set forth in Article 24 of the Convention. No substantive rationale based on the public role that Mr. Guevara was to exercise was even invoked by Costa Rica to justify—rationally and adequately—the deprivation of this employment opportunity. Although the victim had a mental disability, his intellectual capacity for the job was sufficiently

demonstrated when he passed the competitive hiring process to fill the position. Additionally, if performed by the victim, the position would have posed any risk to public safety.

98. The flimsy excuses made for the authority's decision to deny him public employment are based on imprecise and stereotyped considerations based on his status as a person with a disability or his temperament, and the Republic of Costa Rica has not shown that access restriction was necessary for the proper functioning of public service, nor even appropriate for preserving some compelling public interest.

99. Thus, given that a discriminatory, hostile, illicit, process took place in filling a public position and that it revealed a true official animosity toward people with disabilities, the judgment declares the need to reestablish an equal legal regime and ostensibly rejects the spread of the disastrous practice of ableism (illegal discrimination based on a criterion of physical or mental disability), which is profoundly contrary to the spirit and text of the Convention.

100. However, the judgment will only provide comprehensive reparation to Mr. Guevara Díaz if this Court rules on violation of Article 26, the Convention's principle section on ESCER and, therefore, on labor protections.

101. At this point, it should be recalled that human rights—including ESCER—have effects before the state (vertical effects) and before individuals (horizontal effects). Although gauging the exact scope of the latter effect involves a deep doctrinal debate and varies depending on the nature of the right and the scope of the protection granted to private autonomy, the vertical effect is the most trivial and indisputable, since it is related to the need to control the state's tendency to abuse power.

102. Affirming that an individual is entitled to the right to work, in the dimension of vertical protection from state arbitrariness, means, to a large extent, holding two distinct positions: First, that the state cannot prevent an individual, duly accredited under domestic law, to exercise a certain trade from working, as determined by the authorities (negative dimension); and second, that the state, as the promoter of the common good, does not have the authority to establish disproportionate legal requirements that impede the exercise of a lawful profession freely chosen by an individual.

103. Note that, by invoking mental disability as an element of discrimination to deny the position to the victim without having demonstrated that the performance of the work by a person with a disability would put public safety or the suitability of the service at risk, Costa Rica has directly violated these two dimensions.

104. The scope of protection under the Convention of the right to work, with special emphasis on the right to work of people with disabilities, was extensively developed in the judgment,[66] in accordance with the legal texts on the matter and with the case law this Court has steadily developed.

105. However, I cannot fail to emphasize, once again paying due tribute to the Court's case law, that this has been a recurring theme in its latest judgments, since it was the subject of three of the Court's most recent judgments: *Pávez Pávez v. Chile* (judgment of February 4, 2022), *National Federation of Maritime and Port Workers v. Peru* (judgment of February 1, 2022) and *Former Judicial Branch Workers v. Guatemala*, (judgment of November 17, 2021).

[66] Judgment, para. 55-82

106. As the Court has exhaustively found, the right to work is guaranteed by articles 34(g),[67] 45(b)[68] and (c),[69] and 46 of the OAS Charter; by Article XIV[70] of the American Declaration of the Rights and Duties of Man; by Article 26 of the Convention; and by article 6[71] of the Protocol of San Salvador. This right includes not only the duty of the state to guarantee people access to employment with decent conditions, but also the right to employment stability, understood as the guarantee that the dismissal of a worker must be justified and that the worker may appeal the decision before the competent authorities.[72]

107. This latter approach to the right to work—especially relevant to the case at hand, given the unjustified and discriminatory dismissal of Mr. Guevara Díaz—was weighed by this Court in the case of *Pávez Pávez vs. Chile*, in which it added that the termination of employment through direct or indirect interference by public authorities impacts persons' freedom to earn a living in the job of their choosing.[73]

108. As this is an area of protection specifically of people with disabilities, the state also has an active and enhanced duty to guarantee the full enjoyment of the right to work, as analyzed by this Court in the judgment with which I concur.[74] This special duty translates into obligations that go beyond simply abstaining from discriminatory treatment to include a positive effort to develop public policies for these persons' effective inclusion and permanence in their respective jobs. In other words, rather than establishing policies to insert them into the labor market, the government has the responsibility to ensure that the work environment itself is adapted to be receptive to this social group.

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[67] Article 34: The Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development. To achieve them, they likewise agree to devote their utmost efforts to accomplishing the following basic goals: (...) g) Fair wages, employment opportunities, and acceptable working conditions for all;

[68] Article 45. The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms (...) b) Work is a right and a social duty, it gives dignity to the one who performs it, and it should be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working;

c) Employers and workers, both rural and urban, have the right to associate themselves freely for the defense and promotion of their interests, including the right to collective bargaining and the workers' right to strike, and recognition of the juridical personality of associations and the protection of their freedom and independence, all in accordance with applicable laws;

[69] Article 46: The Member States recognize that, in order to facilitate the process of Latin American regional integration, it is necessary to harmonize the social legislation of the developing countries, especially in the labor and social security fields, so that the rights of the workers shall be equally protected, and they agree to make the greatest efforts possible to achieve this goal.

[70] 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.

[71] 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.

[72] *Cf.*, for example, *Case of Lagos del Campo v. Peru. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of August 31, 2017. Series C No. 340, para. 150, and *Case of Casa Nina v. Peru. Preliminary Objections, Merits, Reparations, and Costs.* Judgment dated November 24, 2020. Series C No. 419, para. 107.

[73] *Case of Pavez Pavez v. Chile. Merits, Reparations, and Costs.* Judgment dated February 4, 2022. Series C No. 449, para. 88.

[74] Judgment, para. 73 and 74.

109. The principle of inclusion therefore requires not only policies that encourage the participation of people with disabilities in the workplace (public or private), but also the elimination of barriers (architectural, behavioral, and cultural) that pose an obstacle to equal opportunity. One cannot lose sight of the fact that modern ableism assumes a much more subtle and hidden bias. Crude and inhuman discrimination has given way to techniques of marginalization to remove people with disabilities from public spaces and confine them to domestic environments where they are left forgotten and immobile. The detrimental effect on human dignity that a policy of creating immune ghettos for the disabled can have must not be underestimated.

110. In this same thrust, concern for the right to work of persons with disabilities is, in the inter-American context, inseparable from general protection of the right to work itself. Thus, Article 6(2) of the Protocol of San Salvador devotes special attention to the employment and professional development of people with disabilities:

> 6.2. The State Parties undertake to adopt measures that will make the right to work fully effective, especially with regard to the achievement of full employment, vocational guidance, and the development of technical and vocational training projects, in particular those directed to the disabled. The States Parties also undertake to implement and strengthen programs that help to ensure suitable family care, so that women may enjoy a real opportunity to exercise the right to work.

111. In the case of *Guevara Diaz v. Costa Rica*, the set of facts alleged and proven unequivocally demonstrates that the victim was dismissed from the job that he had been doing for more than two years exclusively because of his condition of intellectual disability.

112. In addition, as the Commission argued and this Court found,[75] the state has not provided any evidence to refute the presumption of discrimination generated by Mr. Guevara's unjustified rejection after he came in at the top following the competitive hiring process.

113. All these reasons are sufficient in and of themselves to address the violation of articles 24 and 26 of the Convention read in conjunction with Article 1(1), to the detriment of Mr. Guevara Díaz. However, it is my contention that there are some additional factors that reinforce the obviousness of the violation of the victim's right to work.

114. First, the victim worked in a government job, which raises the question of civic duty and the issue of the necessary and essential inclusion of vulnerable groups in public life. Historically, persons with disabilities have faced limitations on their participation in the polis in a process that tends toward marginalizing them, as already highlighted in a previous section of this opinion.

115. Therefore, the state's duty in this sense is not limited to guaranteeing formal isonomy, but rather entails an effective commitment to guaranteeing the equality of these persons from an isocratic perspective—that is, the right of all to participate in management of public affairs, including access to government jobs.

116. The American Convention on Human Rights has, being aware of this right's importance, made it autonomous in Article 23, as a kind of special right, whether the right to hold political office or the right to hold government jobs. It has given it the generic name of the right to participate in the government, guaranteeing to the

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75 *Cf.* Paragraph 80 of the sentence, commented.

citizens of the states Parties the access, under general conditions of equality, to the public service of their country.

117. This civil right was denied to Mr. Guevara, whose standing as a citizen was diminished by the mere fact of being disabled, although his political rights remained intact.

118. As indicated by the World Health Organization, the fulfillment of development prospects requires the emancipation of people with disabilities by eliminating the obstacles (barriers) that prevent them from participating in the community. This includes the opportunity to perform work with dignity.[76]

119. Thus, the state, as the public space par excellence for the realization of citizenship, has enhanced duties to guarantee insertion of these persons and prevent any impingement of this guarantee.

120. Now, while in the case of *Guachalá Chimbo v. Ecuador*, this Court has already recognized that states are obliged to act to prevent third parties from maintaining or fostering discriminatory situations in relation to persons with disabilities,[77] this obligation is even more tangible when the state itself is the employer, as in the present case, since under this circumstance—as has been said—it is the vertical dimension of the law (directly the authorities of the state signatory to the Convention) that is in question. There is no room for a defense based on the autonomy of the will of the state in this public sphere.

121. In addition, as stated in the OAS Charter, one of the aspects of the right to work is that the performance of work confers dignity on those who do it. In the case of persons with disabilities, given the challenges for insertion into and affirmation in public life, this becomes even more relevant, such that any denial of access to or permanence in a job is liable to have adverse effects that are even more serious in the emotional and psychological sphere of the individual. In this regard, I would recall the statement of Mr. Guevara Díaz's brother to which I referred earlier, in which he recounted in detail the serious impacts suffered by the victim after he was dismissed from the Ministry of Finance.

122. Another aspect of the case *sub judice* that should be highlighted is that it helps to illustrate the fallacy of the rationale of the distinction—in terms of cost dependency—between civil and political rights, on the one hand, and ESCER, on the other, based on a supposed free negative dimension of the former and a costly positive dimension of the latter.

123. As I have already stated, every human right—whether or not it classifies as a—entails costs for the state and requires, to some degree, that permanent institutions and bureaucracies be maintained for it to be effective. All of them depend, at a minimum, on the vigilance and supervision of institutions that involve public spending, such as the judiciary, the police, and institutions like the public defender's office to guarantee access to justice.

124. The artificiality of this distinction—which is foundational to the thinking of those who maintain that social rights are mere programs of action, without immediate efficacy or justiciability—was approached with masterly clarity by professors Cass Sunstein and Stephen Holmes, who more than 20 years ago highlighted the

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[76] *Cf.* WHO, World Report on Disability, 2011, p. 5.

[77] *Cf. Case of Guachalá Chimbo et al. v. Ecuador. Merits, Reparations, and Costs.* Judgment of March 26, 2021. Series C No. 423, para. 80.

undeniable and omnipresent dependence of rights (of whatever nature) on the active behavior of the state and the provision of fiscal resources for their realization:

> "If rights were merely immunities from public interference, the highest virtue of government (so far as the exercise of rights was concerned) would be paralysis or disability. But a disabled state cannot protect personal liberties, even those that seem wholey "negative", such as the right against being tortured by police officers and prison guards. A state cannot arrange prompt visits to jail and prisons by taxpayer-salaried doctors, prepared to submit credible evidence at trial, cannot effectively protect the incarcerated against tortures and beatings. All rights are costly because all rights presuppose taxpayer funding or effective supervisory machinery for monitoring and enforcement".[78]

125. Naturally, as far as the approach to providing any right collectively, it is usually more complex, since it involves allocating economic resources that compete with each other in a democratic state and developing medium- and long-term public policies.

126. However, in the particular case that is now before the Court, respect for Mr. Guevara Díaz's right to work by the State of Costa Rica did not require any especially onerous positive provision. Rather, it was simply a question of refraining from interfering in the work the victim was already doing on a provisional basis and that would have become permanent if the outcome of the competitive hiring process had been respected.

127. By failing to select Mr. Guevara Díaz and, consequently, removing him from his job, the state has violated the victim's right to work in its most fundamental sense, in addition to having curtailed the right to participate in the government.

128. I would recall that, in accordance with the international instruments cited by the judgment,[79] the State of Costa Rica has ratified the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities, the Convention on the Rights of Persons with Disabilities, ILO Convention No. 111 Concerning Discrimination in Respect of Employment and Occupation, and the ILO Convention No. 159 on Vocational Rehabilitation and Employment (persons with disabilities), demonstrating that this state recognizes its mandate as the principle guarantor of the rights of persons with disabilities.

129. Specifically with regard to the Convention on the Rights of Persons with Disabilities, an instrument to which the inter-American states have widely adhered[80] and whose article 27 provides a valuable contribution with regard to labor guarantees for persons with disabilities, it should be noted that its paragraph "g" refers to the obligation to "Employ persons with disabilities in the public sector." This is a direct and clear mandate, which cannot be mistaken for an abstract command simply encouraging the hiring of persons with disabilities. It therefore amounts to the highest degree of state responsibility with respect to the right to work of this social group.

130. Under these obligations that fall to the state subject to their jurisdiction, the logic of a job selection process should be the reverse of what prevailed in the present case: the fact that a person qualified for the position has a disability should be a

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78 SUNSTEIN, Cass; HOLMES, Stephen. *The Cost of Rights. Why Liberty Depends on Taxes.* New York: W.W. Norton & Company, 1999, p.44.

79 Judgment, para. 51, 52, and 67.

80 Year of ratification by some of the states party to the Convention: Brazil (2008), Uruguay (2009), Argentina (2008), Chile (2008), Paraguay (2008), Bolivia (2009), Peru (2008), Ecuador (2008), Colombia (2011), Venezuela (2013), Honduras (2008), Mexico (2007), Nicaragua (2007).

circumstance weighing in favor of their selection (or serving at least as a favorable tiebreaker), not their rejection.

131. Given the undeniable contents of the right of persons with disabilities to work under equal conditions, when factual violations of this right take place, it is essential to find ways of recognizing and remedying the violation, and it is precisely here where the issue of justiciability of the right to work, specifically, overlaps with the justiciability of ESCER in general.

132. I would note that, as has been broadly argued in this opinion, the international and national jurisdictions work together in this mission of recognition and reparation, forming a single network of protection.

133. It can be seen that the constitutional courts of Latin American nations have been adopting their readings of the Convention and other human rights treaties in the sense of recognizing the qualified protection granted to this especially vulnerable social group's right to work.

134. Here I would refer in particular to the decision of the Constitutional Court of Colombia in the case of Ana Cristina Paz Gil v. the Mayor's Office of Bogotá and Empresa Transmilenio, S.A., handed down in 2014 within the framework of a suit for protection. At that time, the Colombian Court reinforced the need for its judicial action to address the situation of exclusion faced by persons with disabilities in public and in the labor market, invoking its own precedent and thereby highlighting the existing debate in a multilevel open society:

> The obligations of the Colombian state towards the disabled arise not only from the international treaties and conventions ratified by Colombia, but in general from the expressions of willingness by the international community to recognize their human rights and human dignity, principles that, in addition to applying to international law, are fundamental pillars of Colombian constitutionality.[81]

135. In the same vein, I would recall the ruling of the Constitutional Court of Ecuador in case No. 0664-14-EP, handed down in 2018 in a suit for special protection over the dismissal of a woman with a disability from her position in the Ecuadorian transportation agency. In the ruling, the Ecuadorian court invoked the case of *Lagos del Campo v. Peru* in addressing job stability in the framework of the right to work and provided that:

> In this regard, this Court takes note that the ruling of the Inter-American Court of Human Rights, of August 31, 2017, establishes a minimum standard of protection from terminations of the employment relationship that are unjustified or improper. As recognized in the Constitution of the Republic of Ecuador, the Convention on the Rights of Persons with Disabilities, and the Organic Law on Disabilities—specifically in its article 51—persons with disabilities enjoy special protection of their right to work, as well as job stability guarantees.[82]

136. Always in terms of the shared language presenting the justiciability of ESCER as an effective way to protect and promote these rights for the benefit of persons with disabilities, I would highlight the adoption by the UN system of the procedures for submitting individual petitions and investigation through the Convention on the Rights of Persons with Disabilities, which have already been accepted by the vast majority of inter-American states. These procedures not only help monitor and protect state compliance with the obligations established in the Convention, but also help outline states' duties and obligations in relation to the rights set forth by this

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81 Constitutional Court of Colombia, Judgment T-192/14.

82 Constitutional Court of Ecuador, Judgment 004-18-SEP-CC, p. 30.

important normative instrument, which ultimately assists the regional courts with respect to human rights protection.

137. In particular, I would highlight, the precedent issued by the Committee on the Rights of Persons with Disabilities in 2019 in the context of an individual petition, namely the decision in the case of *V.F.C. v. Spain*.[83]

138. Like the case of Mr. Guevara Díaz, this case concerned the dismissal of a public servant, a member of the local police, who suffered permanent motor disability as a result of a traffic accident. When he was dismissed, he was not offered the possibility of being reassigned to a position appropriate to his disability.

139. Taking this factual framework into account, the Committee found that the author's right to work had been violated in the context of discrimination with regard to his continued employment. On that occasion, therefore, there was the additional element of the need for reassignment.

140. In the case of Mr. Guevara Díaz, the factual framework is even simpler, given that the position to which he aspired through the competitive public hiring process was already clearly appropriate to his condition (and performed satisfactorily by him, without any impact on his performance related to his specific disability) and did not worsen between the period during which he held the position on an interim basis and the period in which he qualified for the permanent position.

141. In summary, the analysis of the specific contours of the case, approached from whatever perspective, leads to the logical conclusion that the victim's right to work and right to participate in government were violated by Costa Rica, which was magnanimous enough to acknowledge the inadequacy of its behavior under the Convention, thus publicly repudiating its actions.

V. Conclusion

142. Based on the foregoing, I believe that in order to ensure reparation for the violations suffered by Mr. Guevara is complete in light of the comprehensive protection conferred by the Convention, the Court must find that Costa Rica has violated not only the right to equality general, but also the right to work of a victim with a disability who is deserving of special public inclusion policies, as well as his right to equal participation in government. The state failed by arbitrarily treating his disability as a characteristic detrimental to his ability to perform a public service job accessible to all.

143. Beyond the result of the specific case, this concurring opinion seeks to demonstrate that the immediate justiciability of ESCER, in accordance with Article 26 of the Convention, has been set forth unequivocally in the case law of the Court for decades and ensures the indivisibility of human rights, the comprehensive protection of victims, and the continental projection of a transnational discourse on the protection of rights with the internal jurisdictions of the states, in a uniform language shared by an open inter-American society of interpreters of the Convention, whose hermeneutic contributions cannot be ignored.

144. Arguments contrary to this understanding have been duly considered by the Court in recent decades and rejected. The imperatives of case law coherence and integrity—which should be viewed as a chain novel by the judges of this Court, from

[83] Committee on the Rights of Persons with Disabilities. CRDP/C/21/D/34/2015. Decision of April 29, 2019.

a trans-generational approach—do not allow for backwards movement in this understanding.

145. Indeed, the immediate justiciability of ESCER has been fully absorbed into the language of the American human rights protection system, transforming it into a category that is fundamental for addressing the urgent problems facing the peoples of the continent, impacted by profound material inequalities. This category is, therefore, an integral part of the approach to be taken in future legal proceedings.

146. These conclusions are certainly not the conclusion of the process of building this case law. On the contrary, the groundwork laid in this case and in many others that go before it is to provide continuity and develop deeper reflections on the Court's delicate role in cases of violations of ESCER. In my opinion, the foundations have been laid for debating and developing techniques for making decisions and the remedies to apply. This is where the contributions of all the arguments—both victorious and defeated—will be crucial for arriving at appropriate remedies.

Rodrigo de Bittencourt Mudrovitsch
Judge

Pablo Saavedra Alessandri
Registrar