INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF THE WORKERS OF THE FIREWORKS FACTORY IN SANTO ANTÔNIO DE JESUS AND THEIR FAMILIES *V.* BRAZIL

JUDGMENT OF JULY 15, 2020

(Preliminary objections, merits, reparations and costs)

In the *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their families v. Brazil*,

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

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

also present,

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

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

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I
INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. *The case submitted to the Court.* On September 19, 2018, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted to the jurisdiction of the Inter-American Court the *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their families against the Federative Republic of Brazil* (hereinafter "the State" or "Brazil"). According to the Inter-American Commission, the case relates to the explosion in a fireworks factory in Santo Antônio de Jesus on December 11, 1998, in which 64 persons died and six survived; they included 22 children. The Commission determined that the State had violated: (i) the rights to life and to personal integrity of the presumed victims and their families, because it had failed to comply with the obligations of inspection and oversight pursuant to its domestic legislation and international law; (ii) the rights of the child; (iii) the right to work, because it was aware that serious irregularities were being committed in the factory that entailed a high risk and imminent danger for the life and personal integrity of the workers; (iv) the principle of equality and non-discrimination because, at the time of the facts, the manufacture of fireworks was the principal and, even, the only employment option for the inhabitants of the municipality who, in view of their situation of poverty had no alternative but to accept high-risk employment, with low pay and without adequate safety measures, and (v) the rights to judicial guarantees and judicial protection because, in the civil, criminal and labor proceedings undertaken in this case, the State did not ensure access to justice, determination of the truth of the facts, the investigation and punishment of those responsible, and reparation of the consequences of the human rights violations committed.

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

a) *Petition.* On December 3, 2001, Justiça Global, the Movimento 11 de Dezembro, the Human Rights Committee of the Ordem dos Advogados do Brazil (OAB), Salvador sub-section, the Human Rights Forum of Santo Antônio de Jesus/Bahia, Ailton Jose dos Santos, Yulo Oiticica Pereira and Nelson Portela Pellegrino lodged the initial petition in representation of the presumed victims.

b) *Public hearing before the Commission, acquiescence and friendly settlement.* On October 19, 2006, the Commission held a public hearing on the case. During this hearing, the State indicated that it would not contest the admissibility of the case and acknowledged its responsibility for the lack of oversight. In addition, it proposed that the parties initiate a friendly settlement procedure. The following day, October 20, 2006, a working meeting was held between the parties during which they agreed to initiate a friendly settlement procedure.[1] However, on October 18, 2010, the petitioners asked the Commission to suspend the friendly settlement procedure and to issue the Merits Report,[2] a request they ratified on December 17, 2015.[3] This request was based on the fact that no reparations had been provided for the alleged violations.

[1] *Cf.* Minutes of the meeting to initiate the friendly settlement procedure, October 20, 2006 (evidence file, folios 803 and 804).

[2] *Cf.* Communication No. 090/10 JG/RJ, sent by the petitioners to the Inter-American Commission, October 18, 2010 (evidence file, folios 191 to 193).

[3] *Cf.* Communication No. JG 76/15 sent by the petitioners to the Inter-American Commission, December 17, 2015 (evidence file, folios 618 to 623)

c) *Admissibility and Merits Report.* On March 2, 2018, the Commission issued Admissibility and Merits Report No. 25/18 (hereinafter "the Admissibility and Merits Report" or "Report No. 25/18"), in which it reached a series of conclusions[4] and made various recommendations to the State.

d) *Notification to the State.* This report was notified to Brazil in a communication of June 19, 2018, granting it two months to report on compliance with the recommendations. The State did not provide any information in this regard.

3. *Submission to the Court.* On September 19, 2018, the Commission submitted all the facts and presumed human rights violations described in Report No. 25/18 to the jurisdiction of the Court "due to the need to obtain justice and reparation for the presumed victims and their families."[5]

4. *Requests of the Inter-American Commission.* Based on the foregoing, the Commission asked the Court to conclude and declare the international responsibility of the State for the violations contained in its Admissibility and Merits Report (*supra* para. 2.d) and to order the State to adopt the measures of reparation included in the said report. The Court notes with concern that, almost 17 years elapsed between the lodging of the initial petition before the Commission and the submission of the case to the Court.

II
PROCEEDINGS BEFORE THE COURT

5. *Notification to the State and to the representatives.* The submission of the case was notified to the State and to the representatives of the presumed victims[6] on October 30, 2018.

6. *Brief with pleadings, motions and evidence.* On January 8, 2019, the Movimento 11 de Dezembro, Justiça Global, the Rede Social de Justiça e Direitos Humanos, the Human Rights Forum of Santo Antônio de Jesus/Bahia, Ailton José dos Santos, Yulo Oiticica and Nelson Portela Pellegrino (hereinafter "the representatives") submitted their brief with pleadings, motions and evidence (hereinafter "the pleadings and motions brief"), pursuant to Articles 25 and 40 of the Court's Rules of Procedure. They agreed with the Commission's conclusions on the articles of the Convention that had been violated and also alleged the violation of the rights to life and to personal integrity in relation to the protection of the family established in Article 17 of the Convention. They asked the Court to order the State to adopt diverse measures of reparation and to reimburse costs and expenses.

7. *Answering brief.* On March 18*,* 2019, the State[7] presented its brief answering the

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[4] The Commission concluded that the State was responsible for violating the rights to life and to personal integrity in relation to the obligation to provide special protection for children; the rights to work, and to equality and non-discrimination, and the rights to judicial guarantees and judicial protection, established in Articles 4(1), 5(1), 19, 24, 26, 8(1) and 25(1) of the American Convention, in relation to the obligations established in Articles 1(1) and 2 of this instrument, to the detriment of the presumed victims individualized in the Admissibility and Merits Report.

[5] The Commission appointed Commissioner Antonia Urrejola Noguera, Executive Secretary Paulo Abrão and the Special Rapporteur on Economic, Social Cultural and Environmental Rights, Soledad García Muñoz, as its delegates, and Silvia Serrano Guzmán, Paulina Corominas Etchegaray and Luis Carlos Buob Concha, Executive Secretariat lawyers, as legal advisers.

[6] The representatives of the presumed victims are the Movimento 11 de Dezembro, Justiça Global, the Rede Social de Justiça e Direitos Humanos, the Human Rights Forum of Santo Antônio de Jesus/Bahia, Ailton José dos Santos, Yulo Oiticica and Nelson Portela Pellegrino.

[7] On March 15, 2019, the State sent the Court an updated list of the agents it had appointed in this case: Minister João Lucas Quental Novaes de Almeida; Counselor Marco Túlio Scarpelli Cabral; Secretary Bruna Vieira de Paula Silveira, assistant head, Human Rights Division; Secretary Vanessa Sant'Anna Bonifácio Tavares, adviser, Human Rights Division; Secretary Daniel Leão Sousa, adviser, Human Rights Division; Secretary Débora Antônia

submission of the case and the pleadings and motions brief (hereinafter "the answering brief") in which it filed four preliminary objections[8] and contested the alleged violations and the requests for measures of reparations presented by the Commission and the representatives.

8. *Observations on the preliminary objections.* On April 26, 2019, the Inter-American Commission and the representatives presented their observations on the preliminary objections filed by the State.

9. *Public hearing.* In an order of November 27, 2019, the President called the parties and the Commission to a public hearing to receive their final oral arguments and final oral observations, respectively, on the preliminary objections and eventual merits, reparations and costs.[9] The hearing was held on January 31, 2020, at the seat of the Court, during its 133rd regular session.[10] During this hearing, members of the Court requested the parties and

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Lobato Cândido, adviser, Human Rights Division; Sávio Luciano de Andrade Filho, adviser, Cabinet of the Minister of Defense; Vital Lima Santos, adviser, Cabinet of the Minister of Defense; Homero Andretta Junior, Director, International Department, Attorney General's Office; Tonny Teixeira de Lima, lawyer, Attorney General's Office; Taiz Marrão Batista da Costa, lawyer, Attorney General's Office; Daniela Oliveira Rodrigues, lawyer, Attorney General's Office; Beatriz Figueiredo Campos da Nóbrega, lawyer, Attorney General's Office; Andrea Vergara da Silva, lawyer, Attorney General's Office; Milton Nunes Toledo Junior, Head, Special Advisory Services for International Affairs, Ministry of Women, the Family and Human Rights (MMFDH); Juliana Mendes Rodrigues, Coordinator for the Inter-American Human Rights System, Special Advisory Services for International Affairs, MMFDH; Tatiana Leite Lopes Romani, adviser, Special Advisory Services for International Affairs, MMFDH; Stéfane Natália Ribeiro e Silva, adviser, Special Advisory Services for International Affairs, MMFDH; Thiago de Oliveira Gonçalves, legal consultant, MMFDH; Aline Albuquerque Sant'Anna de Oliveira, Coordinator, General Coordination for International and Judicial Affairs, Legal Services Department, MMFDH; Danuta Rafaela Nogueira de Souza Calazans, Coordinator, General Coordination for International and Judicial Affairs, Legal Services Department, MMFDH; Renata Maia Barbosa Namekata, labor inspector, Assistant Secretariat for Labor Inspection, Ministry of Economy; José Honorino de Macedo Neto, labor inspector, Regional Labor Superintendence, Bahia; Maria Dolores P. de A. Cunha, Minister at the Brazilian Embassy in San José; Sylvia Ruschel de Leoni Ramos, Counselor at the Brazilian Embassy in San José, and Marcelo Gameiro, Second Secretary at the Brazilian Embassy in San José. On April 1, 2019, the State advised the Court of the following additions to the updated list of State agents: Colonel Luciano Antônio Sibinel and Lieutenant Colonel André de Freitas Porto. On January 10, 2020, the State added to its list of agents: Antônio Francisco Da Costa e Silva Neto, Ambassador Extraordinary and Plenipotentiary of Brazil to Costa Rica; Colonel Décio Adriano da Silva, representative of the Brazilian Army; Dênis Rodrigues da Silva, Coordinator, International Human Rights Litigation, Special International Affairs Adviser, MMFDH, and Clara Fontes Ferreira, technical assistant, International Human Rights Litigation Coordinator, Special International Affairs Adviser, MMFDH. On January 21, 2020, the State asked the Court to add João Henrique Nascimento de Freitas, President of the Amnesty Committee and Special Adviser to the Vice President of the Republic, to the list of State agents.

[8] The State filed an objection to a witness proposed by the representatives as one of its preliminary objections, which it entitled "unsuitability of the testimonial evidence requested by the representatives." The objection was decided in the order of November 27, 2019; therefore, the Court will not rule on it in this judgment.

[9] *Cf. Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus v. Brazil. Call to a hearing.* Order of the President of the Inter-American Court of Human Rights of November 27, 2019. Available at: http://www.corteidh.or.cr/docs/asuntos/fabrica_de_fuegos_29_11_2019_por.pdf.

[10] At this hearing, there appeared: (a) for the Inter-American Commission: Paulina Corominas, Adviser; Jorge H. Meza Flores, Adviser, and Cristian González, Adviser; (b) for the representatives: Eduardo Baker Valls Pereira, Justiça Global; Raphaela de Araújo Lima Lopes, Justiça Global; Rosângela Santos Rocha, Movimento 11 de Dezembro; Sandra Carvalho, Justiça Global; Benedita Lima Lopes Coelho and Felipe Bastos Coelho, and (c) for the State: Ambassador Antônio Francisco Da Costa e Silva Neto, Head of Delegation; Taiz Marrão Batista da Costa, lawyer, the Attorney General's Office; Bruna Vieira de Paula, head of the Human Rights Division, Ministry of Foreign Affairs; Daniel Leão Sousa, adviser to the Human Rights Division, Ministry of Foreign Affairs; Marcelo Gameiro de Moura, head of the Political and Technical Cooperation Section, Brazilian Embassy in San José; Colonel Décio Adriano da Silva, representative of the Brazilian Army; Lieutenant Colonel André de Freitas Porto, representative of the Brazilian Army; Vital Lima Santos, representative of the Ministry of Defense; Savio Luciano de Andrade Filho, representative of the Ministry of Defense; Dênis Rodrigues da Silva, Coordinator, International Human Rights Litigation of the Special Advisory Services for International Affairs, Ministry of Women, the Family and Human Rights (MMFDH); Clara Fontes Ferreira, technical assistant to the Coordination of International Human Rights Litigation of the Special Advisory Services for International Affairs, MMFDH; Aline Albuquerque Sant'Anna de Oliveira, representative of the Legal Services Department, MMFDH; Renata Maia Barbosa Namekata, labor inspector of the Ministry of the Economy; Ana Guiselle Rodríguez Guzmán, administrative assistant of the Brazilian Embassy in San José, and João Henrique Nascimento de Freitas, President of the Amnesty Committee and Special Adviser to the Vice President of the Republic.

the Commission to provide information and explanations.

10. *Amici curiae.* The Court received seven *amicus curiae* briefs presented by: (1) the Initiative for Economic, Social, Cultural and Environmental Rights of the Laboratorio de Derechos Humanos and Justicia Global (LabDH) and the Brazilian Human Rights Institute (IBDH);[11] (2) the Labor Public Prosecution Service of Brazil;[12] (3) the Clinic on Policy Advocacy in Latin America at the University of New York;[13] (4) the Human Rights Clinic of the Universidade Federal da Bahia;[14] (5) the Human Rights Clinic of the Law School at the Brazilian institute of Public Law (CDH-IDP);[15] (6) the Human Rights and Environmental Rights Clinic of the Universidade do Estado do Amazonas,[16] and (7) students of the master's program in international law at the Universidad de La Sabana.[17]

11. *Final written arguments and observations.* On March 2, 2020, the representatives and the State forwarded their final written arguments with annexes, and the Commission presented its final written observations.

12. *The State's objections to the amici curiae*. On May 20, 2020, the State presented a brief in which it contested five of the *amicus curiae* briefs that had been presented and asked the Court to declare them inadmissible. In this regard, the Court notes that the State's observations on the admissibility of the *amici curiae* were not presented within the respective time frame; that is, with the final written arguments; therefore, they are considered to be time-barred.[18]

13. *Observations of the parties and of the Commission.* On March 23, 2020, the Commission

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[11] The brief was signed by Rodrigo Vitorino Souza Alves, César Oliveira de Barros Leal, Natalia Brigagão F.A. Carvalho and José Renato V. Resende. The brief relates to the right to equality and non-discrimination with regard to economic and social rights in Santo Antônio de Jesus and the coexistence and complementarity of State and corporate obligations to respect human, economic and social rights.

[12] The brief was signed by Alberto Bastos Balazeiro, Labor Prosecutor General. The brief describes the actions taken by the Labor Public Prosecution Service in the region of Santo Antônio de Jesus in relation to the companies that work in the manufacture of fireworks.

[13] The brief was signed by María Florencia Saulino. It deals with the State's responsibility due to the lack of mechanisms to prevent human rights violations committed by third parties.

[14] The brief was signed by Bruna Rafaela de Santana Santos, Bruno Simões Biscaia, Marina Muniz Pinto de Carvalho Matos, Bruna Matos da Silva, Carolina Muniz de Oliveira, Christian Lopes Oliveira Alves, Gabriel Santiago dos Santos Goncalves, Matheus Ferreira Goés Fontes. It refers to poverty and human rights, the historical and social context of the "Recôncavo Baiano," measures of reparation in general, and measures of non-repetition in particular.

[15] The brief was signed by Priscilla Sodré and Wellington Pantaleão. It addresses issues relating to violations of the right to decent work, especially with regard to the worst forms of child labor and inadequate and degrading working conditions.

[16] The brief was signed by Sílvia Maria da Silveira Loureiro, Emerson Victor Hugo Costa de Sá, Ana Paula Simonete Castelo Branco Bremgartner, Débora Lira de Lacerda, Elize Lacerda Vasconcellos, Emily Silva Assad, Gabriel Henrique Pinheiro Andion, Laís Rachel Brandão de Mello, Luane Antella Moreira, Paula Melissa Coelho da Silva Saraiva, Paula Mércia Coimbra Brazil and Rildo Amorim da Silva Júnior. The brief provides an analysis of the factual context of the manufacture of fireworks in Santo Antônio de Jesus and the norms that regulate labor relations, particularly with regard to the manufacture of fireworks in Brazil. It also addresses the protection of child labor; describes the role of labor inspectors in overseeing workplace activities; outlines legal considerations on the impact of the implementation of legislative reform in Brazil, and the issue of business and human rights.

[17] The brief was signed by Juan Pablo Acosta Peñaloza, Carolina Gómez López, Mónica María Soler Ayala and María Alejandra Vega García. The brief analyses the international standards for the protection of human rights required of States in the area of business and human rights.

[18] Nevertheless, the Court notes, as it did in the *Case of the Xucuru Indigenous People and its members v. Brazil,* that, under Article 2(3) of the Rules of Procedure, the entity presenting an *amicus curiae* brief is a person or institution that is unrelated to the case and to the proceedings before the Court, and submits reasoned arguments on the facts contained in the submission of the case or legal considerations on the subject of the proceedings. In addition, the Court finds that the observations on the content and scope of the said *amici curiae* do not affect its admissibility. *Cf. Case of the Xucuru Indigenous People and its members v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of February 5, 2018. Series C No. 346, para. 13.

presented a brief in which it indicated that it had no observations to make on the annexes presented with the final written arguments of the State and of the presumed victims' representatives. On May 29, 2020, the State presented observations on the annexes to the final arguments of the representatives.

14. *Deliberation of this case.* The Court deliberated on this judgment virtually, on July 13, 14 and 15, 2020[19].

III
JURISDICTION

15. The Inter-American Court has jurisdiction to hear this case pursuant to Article 62(3) of the Convention because Brazil has been a State Party to the American Convention since September 25, 1992, and accepted the contentious jurisdiction of the Court on December 10, 1998.

IV
PRELIMINARY OBJECTIONS

16. In the instant case, Brazil presented three preliminary objections regarding: (a) the alleged inadmissibility of submitting the case due to the publication of the Admissibility and Merits Report by the Commission; (b) the alleged lack of jurisdiction *ratione materiae* regarding the supposed violations of the right to work, and (c) the alleged failure to exhaust domestic remedies. It also presented as a preliminary objection an allegation that it entitled "lack of jurisdiction *ratione personae* concerning presumed victims who were unidentified or inadequately represented." The Court points out that this allegation does not constitute a preliminary objection because its analysis cannot lead to the inadmissibility of the case or to the Court's lack of jurisdiction to hear it.[20] Therefore, the Court will examine this matter in a separate section as a preliminary consideration (*infra* paras. 34 to 49).

A. Alleged inadmissibility of submitting the case to the Court due to the publication of the Admissibility and Merits Report by the Commission

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

17. The ***State*** indicated that, by publishing the Admissibility and Merits Report on this case on its website, the Commission had opted for the maximum sanction established in Article 51 of the American Convention, and this prevented it from submitting the case to the Court. It cited the interpretation made by the Court of Articles 50 and 51 of the Convention in Advisory Opinion 13/93 and indicated that those articles establish successive stages. Thus, if a case has been submitted to the Court, the Commission is not authorized to publish the report because, according to Article 50, this would be a preliminary report. In addition, it substantiated its position based on the considerations included by Judge Máximo Pacheco Gómez in his dissenting opinion to Advisory Opinion 15/97. According to the State, the publication of the report indicates its final nature, and this prevents the submission of the

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[19] Due to the exceptional circumstances caused by the COVID-19 pandemic, this judgment was deliberated and adopted during the 135th regular session, which was held virtually using technological tools, as established in the Court's Rules of Procedure.

[20] *Cf. Case of Rodríguez Revolorio et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of October 14, 2019. Series C No. 387, para. 18, and *Case of Noguera et al. v. Paraguay. Merits, reparations and costs.* Judgment of March 9, 2020. Series C No. 401, para. 12.

case to the Court. In addition, the State asked the Court to declare that the Commission's practice of publishing its preliminary reports violated Articles 50 and 51 of the Convention and, therefore, require the Commission to remove the report from its website.

18. The ***Commission*** indicated that the State's allegation did not constitute a preliminary objection because it did not refer to issues of jurisdiction or admissibility requirements. It also indicated that the State had filed the same argument in other cases,[21] in which the Court had rejected the admissibility of this preliminary objection considering that the practice of publishing the report after a case had been submitted to the Court did not contravene any regulatory or conventional rule.

19. The ***representatives*** reiterated the arguments presented by the Commission.

A.2. Considerations of the Court

20. The Court affirms, as it indicated in the *Cases of the Hacienda Brasil Verde Workers,*[22] *Favela Nova Brasilia*[23] and *the Xucuru Indigenous People,*[24] in which Brazil presented the same argument, that the publication of the Merits Report in the way in which the Commission has done this does not lead to the preclusion of the case or violate any regulatory or conventional norm. In addition, the State has not demonstrated that the published Merits Report differed from the Commission's report or that, in this case, the publication was made contrary to the provisions of the American Convention. Consequently, the State's argument is inadmissible and this preliminary objection is rejected.

B. Alleged lack of jurisdiction *ratione materiae* regarding the supposed violations of the right to work

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

21. The ***State*** indicated that the Court did not have jurisdiction to rule on the alleged violation of the right to work in the terms of Article 26 of the Convention, because the economic, social and cultural rights were not subject to the system of individual petitions regulated by Articles 44 to 51 and 61 to 69 of the American Convention and, therefore, to the contentious jurisdiction of the Inter-American Court.

22. The ***Commission*** and the ***representatives*** asked the Court to reject this objection because, since it referred to the interpretation of Article 26 of the Convention, it did not constitute a preliminary objection, but rather a matter that should be decided when examining the merits of the case. They also indicated that, since the judgment in the *Case of Lagos del Campo v. Peru*, the argument on the Court's lack of jurisdiction to rule on the violation of Article 26 was a matter that had been largely superseded.

B.2. Considerations of the Court

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[21] The Commission referred to the following cases: *Case of the Hacienda Brasil Verde Workers v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of October 20, 2016. Series C No. 318, paras. 25 to 27; *Case of Favela Nova Brasilia v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of February 16, 2017. Series C No. 333, paras. 24 to 29, and *Case of the Xucuru Indigenous People and its members v. Brazil, supra*, paras. 24 and 25.

[22] *Cf. Case of the Hacienda Brasil Verde Workers v. Brazil, supra*, paras. 23 to 28.

[23] *Cf. Case of Favela Nova Brasilia v. Brazil, supra*, paras. 24 to 29.

[24] *Cf. Case of the Xucuru Indigenous People and its members v. Brazil, supra*, paras. 24 and 25.

23. The Court reaffirms its jurisdiction to hear and decide disputes concerning Article 26 of the American Convention as an integral part of the rights listed in its text, regarding which Article 1(1) establishes obligations of respect and guarantee.[25] As indicated in previous decisions,[26] the arguments concerning the possible occurrence of such violations must be examined with the merits of the case. Therefore, the Court rejects this preliminary objection.

C. Alleged failure to exhaust domestic remedies

C.1. Arguments of the State, observations of the Commission and of the representatives

24. The ***State*** argued that, when the initial petition was lodged, the appropriate domestic remedies to elucidate the facts and responsibilities related to the explosion of the fireworks factory had not been exhausted and, in some cases, had not even been filed. It indicated that the exhaustion of remedies after the presentation of the petition inverted the order of complementarity between the domestic and the inter-American systems and that, although the Court had indicated that those remedies may be exhausted after the case has been lodged, this should occur before the State is notified and asked to submit its first observations on the petition.[27] Lastly, it indicated that it had filed this objection before the Commission at the appropriate procedural moment.

25. Specifically, regarding the criminal proceedings, the State argued that, when the case was lodged before the Commission, only three years had elapsed since the explosion and slightly more than two years since the formal filing of an action by the Brazilian Public Prosecution Service (April 1999), a period of time that, in its opinion, was more than reasonable for police investigations and criminal cases in which several defendants and victims were involved. On this basis, it added that several stages of the domestic criminal proceedings occurred in parallel to the procedure before the Commission. Regarding the civil proceedings, it indicated that these had not been exhausted previously and that, in fact, they were, and continue to be, regularly and progressively exhausted with favorable results for the victims. In the case of the labor proceedings, it indicated that these had been filed by the surviving presumed victims and heirs in 2000 and 2001, and this was why the petition lodged before the Commission was not accompanied by evidence that they had been exhausted; moreover, several stages had occurred in parallel to the procedure before the Commission. With regard to the administrative process, it stressed that the State had reacted to the explosion rapidly and effectively and helped to determine the administrative responsibilities

[25] *Cf. 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; *Case of the Dismissed Employees of PetroPerú et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2017. Series C No. 344, para. 192; *Case of San Miguel Sosa et al. v. Venezuela. Merits, reparations and costs.* Judgment of February 8, 2018. Series C No. 348, para. 220; *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349, para. 100; *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, paras. 75 to 97; *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375, paras. 34 to 37; *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 21, 2019. Series C No. 394, paras. 33 and 34; *Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2019. Series C No. 395, para. 62; *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, para. 195, and Case of Spoltore v. Argentina. *Preliminary objection, merits, reparations and costs.* Judgment of June 9, 2020. Series C No. 404, para. 85.

[26] *Cf. Case of Muelle Flores v. Peru, supra*, para. 37, and *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru, supra*, para. 37.

[27] The State cited the Court's considerations in the *Case of Castillo Petruzzi et al. v. Peru. Preliminary objections.* Judgment of September 4, 1998. Series C No. 41, paras. 54 and 55.

of the owners of the fireworks factory, and its closure.

26. Lastly, the State indicated that none of the exceptions to the requirement that domestic remedies be exhausted established in Article 46(2) of the Convention were applicable because: (1) the Brazilian legal system had and has robust laws on constitutional and infra-constitutional rights and guarantees to protect the rights presumably violated; (2) the State had not denied the presumed victims access to domestic remedies or prevented the exhaustion of these remedies. In fact, the criminal and civil actions were filed by the competent state organs, and (3) the State had not incurred in an unjustified delay in processing the domestic remedies. On this point, it underlined that, contrary to the logic established by the Convention, the Commission – instead of analyzing the requirement of "unjustified delay" in relation to the period between the occurrence of the incident and the time of the petition – tried to justify the admissibility of the case almost 17 years after its presentation, using a much longer period of time.

27. The ***Commission,*** in its brief with observations on the preliminary objections, reiterated the argument included in its Admissibility and Merits Report that "although, in its initial briefs. The State argued the failure to exhaust domestic remedies, subsequently, it expressly waived contesting the admissibility of the case."[28] The Commission alluded to the State's position during the hearing held on October 19, 2006, during which it indicated that it would not contest the admissibility of the case and considered that, citing an admissibility requirement compliance with which it had expressly waived, constituted a violation of the principle of estoppel. Nevertheless, and subsidiarily, the Commission emphasized that it had ruled on the requirement of the exhaustion of domestic remedies in its Admissibility and Merits Report, applying the exception of unjustified delay established in Article 46(2)(c) of the American Convention. Lastly, it referred to the considerations of the Court in the *Case of Wong Ho Wing v. Peru*, that the exhaustion of domestic remedies should be verified at the time of the ruling on admissibility and not necessarily when the petition is lodged.

28. The ***representatives*** indicated that the appropriate moment for examining the requirement of prior exhaustion of domestic remedies was in the decision on the admissibility of the case. They pointed out that the admissibility stage took place together with the merits stage and ended with the Admissibility and Merits Report almost 20 years after the event that caused the human rights violations, without the presumed victims having received any of the compensation resulting from the labor, civil and criminal proceedings in full. They also indicated that the State could not use the argument that the Commission had undermined the complementarity of the inter-American system because, even during the procedure before that organ, it had had several opportunities to resolve the matter.

C.2. Considerations of the Court

29. Article 46(1)(a) of the Convention establishes that the admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 of the Convention, is subject to the requirements that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law.[29]

30. The Court has also developed clear standards to analyze a preliminary objection based

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[28] Admissibility and Merits Report of the Inter-American Commission, No. 25/18, Case of No. 12,428, Workers of the Fireworks Factory of Santo Antônio de Jesus and their families - Brazil, March 2, 2018, OEA/Ser.L/V/II.167 Doc. 29 (merits file, folio 13).

[29] *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary objections.* Judgment of June 26, 1987. Series C No. 1, para. 85, and *Case of Montesinos Mejía v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of January 27, 2020. Series C No. 398, para. 24.

on a presumed failure to comply with the requirement of exhaustion of domestic remedies. First, the Court has interpreted the objection as a defense available to the State, "because it seeks to exempt it from responding before an international organ for acts attributed to it before it has had the opportunity to remedy them by its own means"[30] and, as a mechanism of defense, it may be waived expressly or tacitly.[31] Second, this objection must be filed opportunely so that the State may exercise its right to defend itself. Third, the Court has affirmed that the State that files this objection must specify the domestic remedies that have not yet been exhausted and demonstrate that they are applicable and effective.[32] Regarding the appropriate procedural moment for filing the objection of failure to exhaust domestic remedies, the Court has indicated that this is during the admissibility procedure before the Commission.[33]

31. The Court notes that, the representatives' petition of November 23, 2001,[34] alleged the excessive delay in deciding the judicial proceedings that were underway before the domestic jurisdiction. While the State, in its brief of October 12, 2005, argued that several important, adequate and effective remedies remained to be exhausted before the petition could be admitted by the inter-American human rights system.[35] The Court finds that the State filed the preliminary objection of failure to exhaust domestic remedies at the appropriate procedural moment during its initial acts in the processing of this matter. Nevertheless, the Commission argued that, during the admissibility procedure before it – in particular during the public hearing held on October 19, 2006 – the State asserted that it would not contest the admissibility of the case. Meanwhile, Brazil indicated during the hearing before the Court,[36] as well as in its final written arguments, that the statement in question was made in the context of the friendly settlement procedure initiated by the parties in October 2006. Consequently, the Court must analyze the content and the circumstances of the said statement made by Brazil.

32. According to the body of evidence in this case, the Inter-American Commission called the parties to a public hearing to discuss the admissibility of the case on October 19, 2006. During this hearing, the State's Agent informed "all the petitioners and members of the Commission that it w[ould] not dispute any matter or challenge the admissibility of this case."[37] By making this statement, Brazil not only ceased to allege the failure to exhaust domestic remedies or to file any other objection to the admissibility of the case, but also expressly indicated that it would not contest its admissibility. On October 20, that is the day after this statement was made, the Commission held a working meeting to discuss the possibility of initiating a friendly settlement procedure. Thus, the analysis of the content of the Brazil's statement and of the moment at which it was made, allows the Court to conclude that it occurred during the hearing on the admissibility of the case, prior to the commencement of the friendly settlement procedure.

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30 *Case of Cruz Sánchez et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of April 17, 2015. Series C No. 292, para. 48.

31 *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary objections, supra*, para. 88, and *Case of Montesinos Mejía v. Ecuador, supra*, para. 25.

32 *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary objections, supra*, para. 88, and Case of *Carranza Alarcón v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of February 3, 2020. Series C No. 399, para. 15.

33 *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary objections, supra*, para. 88, and Case of *Carranza Alarcón v. Ecuador, supra*, para. 15.

34 *Cf.* Communication No. JG-RJ No. 212/2001, sent by the representatives to the Inter-American Commission, November 23, 2001 (evidence file, folios 407 and 408)

35 *Cf.* Communication sent by the State to the Inter-American Commission, October 12, 2005 (evidence file, folios 238 to 249).

36 *Cf.* Oral arguments of the State during the public hearing held on January 31, 2020, before the Court.

37 *Cf.* Audio file of the hearing held on October 19, 2006, during the 126th regular session of the Inter-American Commission; this corresponds to annex No. 4 of the Admissibility and Merits Report.

33. That said, after the State desisted from contesting the admissibility of the case *sub judice* during the public hearing before the Commission, it proceeded to file the preliminary objection of failure to exhaust domestic remedies before the Court. This constituted a change in the position assumed previously, which is not admissible under the principle of estoppel. Therefore, the Court recalls that, in keeping with international practice and pursuant to its case law, when a party to a litigation has adopted a specific position that prejudices itself or benefits the other party, it cannot, under the principle of estoppel, assume another position that is contradictory to the first.[38] Consequently, the Court rejects this preliminary objection.

V
PRELIMINARY CONSIDERATION

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

34. The ***State*** presented a series of objections in relation to the persons identified as presumed victims by the representatives and by the Commission, in particular with regard to: (a) one of the persons who was identified as having died in the explosion and 26 family members identified by the representatives in the pleadings and motions brief because they had not been mentioned by the Commission in its Admissibility and Merits Report; (b) 18 persons who are mentioned in the case file, but had not granted a formal power of attorney to the representatives to file the action before the inter-American system, and (c) 26 family members presented as presumed victims without the way in which their rights were affected having been specifically alleged or proved. The State also objected to the inclusion of two powers of attorney submitted with the pleadings and motions brief corresponding to Andressa Santos Costa and Vera Lúcia Silva, whose names do not appear on any of the lists of presumed victims provided by the Commission or the representatives, arguing that, therefore, they could not be included as presumed victims in this case.

35. The ***Commission*** referred to the situations in which the exception established in Article 35(2) of the Rules of Procedure is applicable and, among them, underlined the situation of poverty and vulnerability of the presumed victims. It indicated that it was for the Court to assess whether that exception was applicable in this case.

36. With regard to the powers of attorney, the Commission argued that, although not all the presumed victims included on the list that had been presented had granted a formal power of attorney to the representatives, based on the complexity of the case and in application of the flexibility established by case law in this regard, the Court was able to rule on the presumed victims who had not granted powers of attorney or take a decision to overcome this shortcoming.

37. The ***representatives*** indicated that the list presented with the pleadings and motions brief had been supported by the State in the domestic instances. In addition, they referred to the need to update the list sent by the Commission in application of Article 35(2) of the Rules of Procedure. Also, regarding the absence of the powers of attorney of some persons, they indicated several documents provided to the case file that supported the delegation of powers to the representatives by some of the presumed victims who had been challenged.

[38] *Cf. Case of Neira Alegría et al. v. Peru. Preliminary objections.* Judgment of December 11, 1991. Series C No. 13, para. 29*, and Case of Munárriz Escobar et al. v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of August 20, 2018. Series C No. 355, para. 23.

B. Considerations of the Court

38. According to Article 35(1) of the Court's Rules of Procedure and its consistent case law, the presumed victims should be identified in the Merits Report issued in accordance with Article 50 of the Convention.[39] However, Article 35(2) of the Rules of Procedure establishes that when it has been justified that it has not been possible to identify some presumed victims because the case relates to massive or collective violations, the Court shall decide whether to consider them as such.[40] Accordingly, based on the particularities of the case and the magnitude of the violation, the Court has admitted individuals who have not been mentioned in the Merits Report as presumed victims, provided the right of defense has been respected and these persons are connected to the facts described in that report and the evidence provided.[41]

39. Thus, the Court has assessed the application of Article 35(2) in relation to the particular characteristics of each case and has applied it when there have been difficulties in identifying or contacting all the presumed victims. This has occurred, for example, owing to the presence of armed conflict,[42] forced displacement,[43] or the massive murder of families, the incineration of their bodies and the absence of records or certificates that could identify them,[44] or in cases in which whole families have been disappeared.[45] The Court has also taken into account the difficulty of accessing the area where the facts occurred,[46] the absence of records of the inhabitants of a place,[47] and the passage of time,[48] as well as particular characteristics of the presumed victims in the case, such as when they consist of family clans with similar first and last names,[49] when they are migrants[50] or from nomadic communities whose ancestral social structure involves the dynamic of fusioning into new communities and separating to create others.[51] It has also considered the conduct of the State; for example, when there are allegations that the absence of an investigation has contributed to the incomplete identification of the presumed victims[52] and in a case of slavery.[53]

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[39] *Cf. Case of the Ituango Massacres v. Colombia.* Judgment of July 1, 2006. Series C No. 148, para. 98, and Case of *Noguera et al. v. Paraguay, supra*, para. 15.

[40] *Cf. Case of the Río Negro Massacres v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of September 4, 2012. Series C No. 250, para. 48, and *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, supra*, para 35.

[41] *Cf. Case of the Plan de Sánchez Massacre v. Guatemala. Merits.* Judgment of April 29, 2004. Series C No. 105, para. 48, and *Case of the Hacienda Brasil Verde Workers v. Brazil, supra*, para. 45.

[42] *Cf. Case of the Río Negro Massacres v. Guatemala*, supra, para. 48, and *Case of Members of the village of Chichupac and neighboring communities of the municipality of Rabinal v. Guatemala. Preliminary objections, merits, reparations and costs.* Judgment of November 30, 2016. Series C No. 328, para. 65.

[43] *Cf. Case of the Río Negro Massacres v. Guatemala, supra,* para. 48, *and Case of Members of the village of Chichupac and neighboring communities of the municipality of Rabinal v. Guatemala, supra,* para. 65.

[44] *Cf. Case of the Massacres of El Mozote and neighboring places v. El Salvador. Merits, reparations and costs.* Judgment of October 25, 2012. Series C No. 252, para. 50.

[45] *Cf. Case of the Río Negro Massacres v. Guatemala, supra,* para. 48*.*

[46] *Cf. Case of the Afro-descendant Communities displaced from the Rio Cacarica Basin (Operation Genesis) v. Colombia. Preliminary objections, merits, reparations and costs.* Judgment of November 20, 2013. Series C. No. 270, para. 41.

[47] *Cf. Case of the Río Negro Massacres v. Guatemala, supra,* para. 48, *and Case of the Massacres of El Mozote and neighboring places v. El Salvador, supra,* para. 50*.*

[48] *Cf. Case of the Río Negro Massacres v. Guatemala*, *supra,* para. 51, and *Case of Members of the village of Chichupac and neighboring communities of the municipality of Rabinal v. Guatemala*, *supra,* para. 65.

[49] *Cf. Case of the Río Negro Massacres v. Guatemala*, *supra,* para. 48.

[50] *Cf. Case of Nadege Dorzema et al. v. Dominican Republic*. *Merits, reparations and costs.* Judgment of October 24, 2012. Series C No. 251, para. 30.

[51] *Cf. Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, supra*, para. 35.

[52] *Cf. Case of the Río Negro Massacres v. Guatemala, supra,* para. 48, and *Case of the Massacres of El Mozote and neighboring places v. El Salvador*, *supra,* para. 50.

[53] *Cf. Case of the Hacienda Brasil Verde Workers v. Brazil, supra*, para. 48*.*

40. In the instant case, the Court finds that the information on the presumed victims listed in the Admissibility and Merits Report does not coincide with that forwarded by the representatives, in addition to some inconsistencies that were alleged by the State. In this regard, it reiterates that, in principle, it corresponds to the Commission and not to the Court to identify the presumed victims in a case, precisely and at the appropriate time. However, this case relates to an alleged collective violation of human rights. This situation, added to the time that has elapsed and the difficulty to contact the presumed victims owing to their situation of exclusion and vulnerability, gives rise to the application of Article 35(2) of the Court's Rules of Procedure. Consequently, the Court will now take the corresponding decisions.

B.1 Regarding the presumed victims who died and those who survived

41. In the brief submitting the case and in the Admissibility and Merits Report, the Commission indicated that 64 persons lost their life in the explosion at the fireworks factory and six survived it, for a total of 70 presumed victims. However, when comparing the list attached to the Commission's Admissibility and Merits Report with the list attached to the pleadings and motions brief of the representatives of the presumed victims, the Court found some inconsistencies that, once rectified, allowed it to identify 60 presumed victims who died and six presumed victims who survived.[54] Among the persons who presumably lost their life were 20 children from 11 to 17 years of age and, among the six presumed survivors, were one girl and two boys.[55] The persons identified by the Commission as survivors included one unborn child, Vitória França da Silva, who survived despite the death of her mother.[56] And,

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[54] In both the brief submitting the case and in the Admissibility and Merits Report, the Commission indicated that 64 persons lost their life and 6 persons had serious injuries, for a total of 70 direct presumed victims of the explosion (merits file, folios 2 and 9). However, when reviewing the list attached to the Admissibility and Merits Report, inconsistencies were found that, once rectified, allowed the Court to establish that the correct number is the one indicated in this paragraph. The Court found and corrected the following inconsistencies:

(1) The Commission did not present a list of 70 presumed victims, but rather 68. This inconsistency was due to an error in the numbering of the list attached by the Commission, which, as can be seen from folio 47 of the merits file, omitted Nos. 45 and 46, and passes from No. 44 (Francineide Jose Bispo Santos) to No. 47 (Alexandra Gonçalves da Silva);

(2) The list contained two names that were repeated: Karla Reis dos Santos/Carla Reis dos Santos and Arlete Silva Santos/Alrlete Silva Santos, and

(3) In one of the tables of the list, the Commission only indicated the name "Maisa." This name was not included on the list presented by the representatives in the pleadings and motions brief or with their final arguments, so that it is considered to be an error.

This revision resulted in a total of 59 persons who presumably died and 6 survivors. However, the Commission's list does not include Izabel Alexandrina da Silva, who is mentioned on the representatives' list, as a presumed fatality of the explosion. The identity of this presumed victim is proved in several documents included in the case file (evidence file, folios 170, 849 and 2012) and the State has not contested her inclusion on the list forwarded by the representatives. With this inclusion, the Court concludes that there are a total of 60 presumed victims who died and six survivors.

[55] The Admissibility and Merits Report had some inconsistencies with regard to the following presumed victims who were children:

(1) It included Arlete Silva Santos twice and indicated a different age for each record (14 and 15 years). The Court has accepted a single record (merits file, folio 47), and

(2) It does not indicate the age of Alex Santos Costa (14 years of age) or of Maria Joelma de Jesus Santos (17 years of age), however, the ages were included by the representatives (merits file, folios 279 and 280).

In addition, the representatives indicated that 25 children died. However, the evidence reveals that the number of children is that indicated in this paragraph. Thus, for example, the pleadings and motions brief indicates that Edilene Silva dos Santos was 17 years old, which differs from the information provided by the Commission in its Admissibility and Merits Report, in which it indicates that she was 18 years old. This is the age that should be taken into account according to the information contained on folios 167 and 615 of the evidence file.

[56] According to the Commission and the representatives, at the time of the explosion of the fireworks factory, Vitória França da Silva's mother was five months' pregnant. It also alleged that, both the premature birth of Vitória and the child's alleged physical and mental problems up until the present were a direct consequence of the explosion of the factory. Therefore, the Court will consider Vitória França da Silva as a presumed surviving victim in this judgment, in addition to being a family member of a presumed victim who died (Rosângela de Jesus França, Vitória

there were four pregnant women among the persons who presumably died, two of them minors and the other two aged 18 years and 19 years.

42. The State, in its answering brief, contested the inclusion of "Maria de Jesus Santos Costa" in the pleadings and motions brief as a direct presumed victim of the explosion because she had not been identified on the list attached to the Admissibility and Merits Report. After reviewing the case file, the Court considers that the inclusion of that name may be due to a case of duplication, because the pleadings and motions brief includes two persons of the same age (15 years), one identified as "Mairla Santos Costa" and the other with the name "Maria de Jesus Santos Costa," while the annex to the Admissibility and Merits Report includes just the name of "Mairla de Jesus Santos Costa" 15 years of age. This conclusion is supported by the final arguments of the representatives, which refer to the State's objection that Mairla de Jesus Santos was not included on the list sent by the Commission. In this regard, they indicated that she was on the list and corresponded to No. 18.[57] However, in reality the State was objecting to the inclusion of Maria de Jesus Santos Costa. The foregoing reveals that the representatives considered that "Mairla" and "Maria" are the same person. The Court also finds that there is no evidence in the case file that supports the existence of Maria de Jesus Santos Costa, while Mairla Santos Costa is adequately identified.[58]

43. In conclusion, the Court rejects the objection filed by the State with regard to one of the persons who presumably died in the explosion, understanding that it is a case of a duplication on the list. Also, having reviewed the documents provided to these proceedings, the Court concludes that 60 presumed victims died and six presumed victims survived.

B.2 Regarding the next of kin of the presumed victims who died

44. The ***State*** contested the inclusion of some family members of the persons who died in the explosion or survived it as presumed victims because: (i) they were not included in the Admissibility and Merits Report, but were included in the pleadings and motions brief; (ii) they had not provided a formal power of attorney to the representatives, and (iii) they had not proved the connection that resulted in an eventual violation of their rights.

45. The Court considers that the specific characteristics of this case allow it to conclude that there are reasonable causes that justify the fact that the list of presumed victims included in the Admissibility and Merits Report may contain inconsistencies in both the full identification of the presumed victims, and their representation. The Court finds that, in this case, the exceptional circumstance established in Article 35(2) of the Court's Rules of Procedure is applicable, according to which, in the case of massive or collective violations, this Court may decide whether it considers certain persons as presumed victims.[59] Consequently, the Court will not admit the objections relating to the failure to include some of the next of kin of the presumed victims in the Admissibility and Merits Report or the lack of official representation, because the context of the case, added to the time that has elapsed and the difficulty to

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França da Silva's mother).

[57] In its answering brief, the State argued: "Maria de Jesus Santos Costa, was identified as a presumed victim in the list attached to the pleadings and motions brief, but was not identified as a presumed victim in the annex to the IACHR Report" (merits file, folio 409). In their final arguments, the representatives indicated: "Mairla de Jesus Santos: the State affirms that the victim does not appear on the list sent by the IACHR, but she is No. 18 on the list" (merits file, folio 1542).

[58] The Commission forwarded as an annex to the Admissibility and Merits Report a "*Leaflet with the photos of all the victims with their respective names and ages"* in which the name of "Mairla de Jesus Santos Costa (15) appears" (evidence file, folio 524). Furthermore, Mairla Santos Costa was recognized as a victim in this case by the State's domestic instances, as recorded in the body of evidence (evidence file, folios 1993, 2063, 2091 and 2140).

[59] *Cf. Case of the Hacienda Brasil Verde Workers v. Brazil, supra*, para. 49, and *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, supra*, para. 31.

contact them, justify the fact that the list presented by the Commission was incomplete or that evidence of official representation has not been presented in some cases.

46. In its answering brief, the State objected to 26 next of kin because it had not found evidence of a connection resulting in the possible violation of their right to personal integrity. The objection referred to family members listed in the Admissibility and Merits Report and in the pleadings and motions brief. Since the objection refers to evidence of the possible violation of the right to integrity of the next of kin of the presumed victims, it will be assessed in the corresponding section (*infra* paras. 248 to 256) and not as a preliminary matter.

47. Regarding the objection concerning the inclusion of two powers of attorney with the pleadings and motions brief, corresponding to Andressa Santos Costa and Vera Lúcia Silva, whose names do not appear on any of the lists of presumed victims provided by the Commission and the representatives, the Court finds that the State has reason on its side and that these persons should not be considered presumed victims in this case because they have not been presented as such in any document.

48. Lastly, the Court has found and corrected some inconsistencies in the list of next of kin presented by the Commission. Thus, Adriana Santos Rocha appears listed as a presumed victim of the explosion and, on the list of next of kin, the same name appears as if she were Adriana Santos Rocha's sister; in other words, her own sister. This is also the case of Fabiana Santos Rocha.

49. Based on the foregoing, the Court finds that in this case, 100 persons, who are listed in Annex 2 of this judgment, have been identified as next of kin of the those who presumably died in, or survived, the explosion and, therefore, they will be considered presumed victims.

VI
EVIDENCE

A. Admissibility of the documentary evidence

50. The Court received diverse documents presented as evidence by the Commission, the representatives and the State, attached to their principal briefs (*supra* paras. 1, 6, 7 and 8). It also received documents attached to the final written arguments of the representatives and the State (*supra* para. 11).

51. As always, the Court admits those documents presented at the appropriate procedural opportunity by the parties and the Commission, the admissibility of which was not contested or challenged, and whose authenticity was not questioned.[60] The parties and the Commission did not submit objections to the admissibility of the said documentation.

52. The Court notes that, with their final written arguments, the representatives presented a table with all the expenses related to the processing of the case before the Court, together with the vouchers. It also notes that several of the expenses included had been incurred before the submission of the pleadings and motions brief and, despite this, these were not forwarded with that document. The Court considers that, pursuant to Article 40(b) of its Rules of Procedure, this offer of evidence is time-barred; consequently, when calculating the costs and expenses, it will not take into consideration any voucher forwarded with the final

[60] *Cf.* Article 57 of the Rules of Procedure, and *Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4, para. 140, and *Case of Azul Rojas Marín et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 12, 2020. Series C No. 402, 17, para. 34.

arguments that is dated prior to the presentation of the pleadings and motions brief on January 8, 2019.

B. Admissibility of the testimonial and expert evidence

53. During the public hearing, the Court received the statements of Maria Balbina dos Santos, Leila Cerqueira dos Santos, Sônia Marise Rodrigues Pereira Tomasoni and Viviane de Jesus Forte. It also received affidavits from presumed victims Bruno Silva dos Santos and Claudia Reis dos Santos, from witness Aline Cotrim Chamadoira, and from expert witnesses Christian Courtis and Miguel Cillero Bruñol. These statements are admitted insofar as they are in keeping with the purpose defined by the order requiring them and the purpose of the case.[61]

VII
FACTS

54. Taking into account the factual framework established in the Admissibility and Merits Report, the arguments presented by the parties and the Commission, as well as the body of evidence, the Court will describe the proven facts as follows: (a) Context; (b) Working conditions in the factory of "Vardo dos Fogos";[62] (c) The explosion in the fireworks factory; (d) The domestic proceedings, and (e) Regulatory framework at the time of the facts.

55. The facts that occurred before Brazil accepted the contentious jurisdiction of this Court (December 19, 1998), are only included to provide background information.

A. Context

A.1 Relevant characteristics of the population of the region of Santo Antônio de Jesus

56. The municipality of Santo Antônio de Jesus is located in the region of the Recôncavo Baiano, 187 km from Salvador, capital of the state of Bahia,[63] beside one of the country's busiest highways.

57. The region of the Recôncavo Baiano is known, historically, for having a significant presence of Afro-descendants owing, in part, to the fact that in the sixteenth century it received a large number of slaves brought in to work in agriculture, especially on the cane sugar plantations and in tobacco farming. Even after they had obtained their freedom, the Afro-descendant population of Brazil were denied a series of rights by the State, because the exercise of citizenship was extremely restricted and the rights to housing and property, and entry into the labor market were obstructed.[64]

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[61] The purposes of the statements were established in the order of the then President of the Court of November 27, 2019. Available at: http://www.corteidh.or.cr/docs/asuntos/fabrica_de_fuegos_29_11_2019_por.pdf.

[62] The factory of "Vardo dos Fogos" was the name by which the fireworks factory that is the subject of this case was known among the inhabitants of Santo Antônio de Jesus. "Vardo dos Fogos" was the nickname given to one of the owners of the factory. Hereinafter, the Court will use the expressions "fireworks factory of Santo Antônio de Jesus" or "factory of Vargo dos Fogos," indistinctly to refer to the fireworks factory that is the subject of the case *sub judice*.

[63] *Cf. Amicus curia*e of the Labor Public Prosecution Service presented on February 14, 2020 (merits file, folios 952 to 985).

[64] *Cf. Amicus curiae* of the Human Rights Clinic of the Universidade da Bahia presented on February 14, 2020 (merits file, folios 1005 to 1074).

58. During the period following the abolition of slavery,[65] many former slaves remained in a situation of bonded labor in the region where the events occurred. Moreover, for years, they only found employment in the informal sector where the use of unqualified labor predominated, and this has kept a large part of the population in conditions of poverty.

59. According to the census conducted by the Brazilian Institute of Geography and Statistics (IBGE) in 2010, 76.5% of the population of Santo Antônio de Jesus identified themselves as Afro-descendant.[66] In addition, 38.9% of the population of Santo Antônio de Jesus and the other municipalities of the Recôncavo Baiano had a nominal monthly per capita income of less than half the minimum wage.[67] Similarly, the data indicated that those whose income was only half or a quarter of the minimum wage corresponded to 42.18% and 16.40%, respectively, of the population of Santo Antônio de Jesus.[68] In 2010, 13.3% of the population between 15 and 24 years of age neither studied nor worked, and 38.9% of those over the age of 18 years who had not completed primary school were engaged in informal work, such as the manufacture of fireworks.[69] In this regard, during the hearing held on October 19, 2006, before the Commission, the State acknowledged that "there is great poverty in Santo Antônio de Jesus and, therefore, many families work in clandestine factories."[70]

60. Data obtained from the Atlas on Human Development in Brazil for 2000, two years after the events of this case occurred, reveal a situation of social vulnerability in the municipality of Santo Antônio de Jesus. In this context 65% of the population was composed of people vulnerable to poverty and 25.51% of children were living in extreme poverty. Furthermore, even though 69% of those over 18 years of age were employed, 58% of this group was engaged in precarious informal work.[71]

A.2 The manufacture of fireworks in the municipality of Santo Antônio de Jesus

61. Currently, Brazil occupies second place in the global production of fireworks, exceeded only by China,[72] and Santo Antônio de Jesus is the city with the second highest production in Brazil[73] and the most important center of production in the northeastern part of the country.[74]

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[65] In Brazil, slavery was abolished by law in 1888. Brazil was the last country in the occidental hemisphere to abolish slavery. *Cf.* United Nations. *"Racial Discrimination and Miscegenation: The Experience of Brazil."* Available at: https://www.un.org/en/chronicle/article/racial-discrimination-and-miscegenation-experience-brazil.

[66] According to the classification of the Brazilian Institute of Geography and Statistics (IBGE), 52.6% of the population of Santo Antônio de Jesus considered themselves to be "mulatto" and 23.8% considered themselves to be "black." Data available at: https://sidra.ibge.gov.br/tabela/2093#/n1/all/n6/2928703/v/allxp/p/last%201/c86/all/c2/0/c1/0/c58/0/d/v93%200/l/v,p+c86+c2,t+c1+c58/resultado.

[67] In 1998, the minimum wage was R$130.00 (one hundred and thirty reals) a month, which was equal to US$104.00 (one hundred and four United States dollars).

[68] *Cf. Amicus curiae* of the Human Rights Clinic of the Universidade da Bahia*, supra.*

[69] *Cf.* Atlas on Human Development in Brazil. Profile of Santo Antônio de Jesus, BA. Available at: http://www.atlasBrazil.org.br/2013/pt/perfil_m/santo-antonio-de-jesus_ba.

[70] *Cf.* Information provided by the State during the public hearing on admissibility before the Inter-American Commission on October 19, 2006 (annex 4 to the Admissibility and Merits Report of the Commission; evidence file, folio 11), starting at minute 38:25.

[71] *Cf. Amicus curiae* of the Human Rights Clinic of the Law School at the Brazilian Institute of Public Law, presented on February 17, 2020 (merits file, folios 1076 to 1104) and Atlas on Human Development in Brazil. Profile of Santo Antônio de Jesus, BA, *supra.*

[72] *Cf.* Article in Russia Beyond on January 21, 2014, entitled. *"Para alcanzar líder China, Rusia quiere exportar pirotecnia"* [Russia wants to export fireworks to catch up with the leader, China] (merits file, link cited by the representatives in the pleadings and motions brief, folio 283). Available at: https://br.rbth.com/economia/2014/01/21/_para_alcancar_lider_china_russia_quer_exportar_pirotecnia_23777.

[73] *Cf. Amicus curiae* of the Human Rights and Environmental Law Clinic at the Universidade do Estado do Amazonas, presented on February 15, 2020 (merits file, folios 1106 to 1237).

[74] *Cf.* BARBOSA JÚNIOR, José Amândio. *"La Producción de Fuegos Artificiales en el Municipio of Santo Antônio de Jesus/BA: un análisis de su contribución para el desarrollo local"* [The manufacture of fireworks in the municipality

However, production is characterized by the participation of workers employed in highly informal conditions.[75] It is unclear when the mass production of fireworks started in the city; however, there are documents dating back to 1603 that link the city to the production of fireworks owing to the celebration of religious festivals of the Catholic Church. Today, fireworks are manufactured year-long, but especially to meet the demands of festivities held in June and the year-end celebrations.[76]

62. The fireworks are frequently produced in unhealthy, clandestine sheds located in areas around the city that lack the minimum safety conditions required for an activity of this nature. In addition to the possibility of burns, the activity entails other risks to the health of workers, such as repetitive strain injuries, eye and upper respiratory irritation, and lung diseases.[77]

63. Despite the risks involved, the clandestine production of fireworks[78] without respecting safety standards generates employment and income in the municipality.[79] Thus, in 2005, it was estimated that 10% of the population of 80,000 inhabitants survived on earnings obtained from this activity.[80] Other sources affirm that, in 2008, between 10,000 and 15,000 persons worked in the manufacture of fireworks in Santo Antônio de Jesus.[81]

64. Most of the workers of the factory to which this case refers live in the neighborhoods of "Irmã Dulce" and "São Paulo," which are outlying districts of Santo Antônio de Jesus. They are characterized not only by poverty, but also by a lack of access to formal education. In addition, they suffer from problems of lack of infrastructure, especially as regards basic sanitation,[82] and a prevalence of people with a low level of schooling and, consequently, with low earnings. There are also structural problems that produce and reproduce the informal and precarious work of the manufacture of bangers and rockets.[83 and 84]

65. The manufacture of fireworks is distinguished by female labor (adult women, girls and older women) and "it is characterized by intense precarity, subordination and exclusion from

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of Santo Antônio de Jesus/BA: an analysis of its contribution to local development], Human Sciences Department, Universidade do Estado da Bahia, Master's thesis, 2008 (evidence file, folios 1200 to 1333).

[75] *Cf.* Synthesis document of the Working Group, December 2007 (evidence file, folios 24 to 37) and SANTOS, Ana Maria. *"La Clandestinidad como Expresión de la Precarización del Trabajo en la Producción del Cohete de Masa en la municipalidad de Santo Antônio de Jesus – Bahía: un estudio de caso en el barrio Irmã Dulce"* [Clandestinity as an expression of the precarious nature of work in the production of fireworks in the municipality of Santo Antônio de Jesus, Bahia: a case study in the Irmã Dulce neighborhood], Social Services course, Delta Faculty, UNIME Salvador, 2012 (evidence file, folios 1524 to 1578).

[76] *Cf. Amicus curiae* of the Human Rights and Environmental Law Clinic at the Universidade do Estado do Amazonas, *supra*.

[77] *Cf. Amicus curiae* of the Human Rights Clinic of the Law School of the Brazilian Institute of Public Law, *supra*.

[78] *Cf.* Synthesis document of the Working Group, *supra*.

[79] *Cf.* BARBOSA JÚNIOR, José Amândio. *"La Producción de Fuegos Artificiales en el Municipio of Santo Antônio de Jesus/BA: un análisis de su contribución para el desarrollo local," supra.*

[80] *Cf.* PACHECO, José. Report *"Jugar con fuego, nunca más"* [Playing with fire, never again] (evidence file, folios 2 a 4).

[81] *Cf.* BARBOSA JÚNIOR, José Amândio. *"La Producción de Fuegos Artificiales en el Municipio of Santo Antônio de Jesus/BA: un análisis de su contribución para el desarrollo local," supra and* SANTOS, Ana Maria. *"La Clandestinidad como Expresión de la Precarización del Trabajo en la Producción del Cohete de Masa en la municipalidad de Santo Antônio de Jesus – Bahia: un estudio de caso en el barrio Irmã Dulce," supra*.

[82] *Cf.* TOMASONI, Sônia Marise Rodrigues Pereira. "*Dinámica socioespacial de la producción de fuegos artificiales en Santo Antônio de Jesus-BA*," [Socio-spatial dynamics of the production of Fireworks in Santo Antônio de Jesus, BA] Doctoral thesis, Universidade Federal do Sergipe, 2015 (evidence file, folios 1335 to 1504).

[83] *Cf.* In this judgment, the words " bangers" and "rockets" refer to types of fireworks.

[84] *Cf*. SANTOS, Ana Maria. *"La Clandestinidad como Expresión de la Precarización del Trabajo en la Producción del Cohete de Masa en el Municipio de Santo Antônio de Jesus – Bahia: un estudio de caso en el barrio Irmã Dulce"*, *supra*, and TOMASONI, Sônia Marise Rodrigues Pereira. *"Dinámica socioespacial de la producción de fuegos artificiales en Santo Antônio de Jesus-BA"*, *supra*.

formal work, labor rights and citizenship."[85] Workers in this sector are usually women who have not completed primary studies, who begin to work in the industry when they are between 10 and 13 years of age, and who learn from neighbors and family members, without receiving any type of formal training. These are women who are marginalized from society, without any other work options.[86] Moreover, the women and girls who work in the manufacture of fireworks are employed in this activity owing to their manual dexterity, which is why they are preferred for this type of work.[87] In 1998, around 2,000 women were involved in the manufacture of fireworks and, of these, more than 60% were Afro-descendants. Furthermore, between 30% and 40% of all the workers were children. The evidence in the case file reveals that the women initiate their children into the manufacture of fireworks not only because this allows them to increase their productivity, but also because they have no one with whom to leave their children who will take care of them.[88]

66. The work of manufacturing fireworks in Santo Antônio de Jesus was not restricted exclusively to women, men were also employed but in activities other than the production of fireworks and in different places to those devoted to their elaboration. In general, the men were involved in making the so-called "dough."[89]

67. The production of fireworks in the municipality was characterized by a high degree of informality, its clandestine nature, the use of child labor, and work by women – even from home – which was essential artisanal and with a very low level of technology.[90] In addition, one of the main sources of work in the municipality was, and continues to be, the manufacture of fireworks in a way that is extremely hazardous for the life and personal integrity of the workers,[91] with the result that the explosion of December 11, 1998, was not the first. On April 22, 1996, one of the owners of the fireworks factory to which this case refers – Osvaldo Prazeres Bastos – was convicted in a criminal proceedings for an explosion that occurred in the context of his activities involving fireworks.[92] Also, between 1991 and 1998, 46 deaths involving fireworks were recorded in the country.[93]

B. Working conditions in the factory of "Vardo dos Fogos"

68. The population knew the fireworks factory that exploded on December 11, 1998, in Santo Antônio de Jesus, as the factory of "Vardo dos Fogos." It was located in Fazenda Joeirana, owned by Osvaldo Prazeres Bastos,[94] in the rural area of Santo Antônio de Jesus,

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[85] *Cf.* TOMASONI, Sônia Marise Rodrigues Pereira. *"Dinámica socioespacial de la producción de fuegos artificiales en Antônio de Jesus-BA," supra*.

[86] *Cf.* Expert opinion provided by Sônia Marise Rodrigues Pereira Tomasoni during the public hearing held by the Inter-American Court on January 31, 2010.

[87] *Cf.* Expert opinion provided by Sônia Marise Rodrigues Pereira Tomasoni, *supra.*

[88] *Cf.* Expert opinion provided by Sônia Marise Rodrigues Pereira Tomasoni, *supra,* and SANTOS, Ana Maria. *"La Clandestinidad como Expresión de la Precarización del Trabajo en la Producción del Cohete de Masa en la municipalidad de Santo Antônio de Jesus – Bahia: un estudio de caso en el barrio Irmã Dulce," supra*, and TOMASONI, Sônia Marise Rodrigues Pereira. "*Dinámica socioespacial de la producción de fuegos artificiales en Santo Antônio de Jesus-BA," supra.*

[89] The "dough" is a mixture of silver nitrate, sand, alcohol and nitric acid. *Cf.* Expert opinion provided by Sônia Marise Rodrigues Pereira Tomasoni, *supra.*

[90] *Cf.* BARBOSA JÚNIOR, José Amândio. *"La Producción de Fuegos Artificiales en el Municipio of Santo Antônio de Jesus/BA: un análisis de su contribución para el desarrollo local," supra, and* Judgment of the Labor Court of Santo Antônio de Jesus in action No. 42.01.00.1357-01, of March 29, 2001 (evidence files, folios 14 to 22).

[91] *Cf.* PACHECO, José. Reportaje *"Jugar con fuego nunca más," supra*.

[92] *Cf.* Certification of criminal record of Osvaldo Prazeres Bastos, signed by Iracema Silva de Jesus, dated April 12, 1999 (evidence file, folios 8 and 9) and criminal charges filed by the prosecutor Kristiany Lima de Abreu (evidence file, folios 1585 to 1588).

[93] *Cf.* Newspaper article *"Más de 60 muertes"* [More than 60 dead], published in *Revista Veja*, on December 23, 1998 (evidence file, folio 6)**.**

[94] During the processing of the criminal case, the prosecution service of the state of Bahía and the judge

state of Bahia, and registered in the name of his son, Mário Fróes Prazeres Bastos.[95]

69. The factory consisted in a series of sheds in fields with some shared workbenches. Most of the explosive materials were kept in the place where the people worked. There were no specific places allocated for rest periods or meals, and no washrooms.[96]

70. Regarding the fireworks factory's workers, they were mostly Afro-descendant women,[97] living in poverty,[98] and with low levels of schooling.[99] In addition, they were hired informally, with verbal contracts, and were not formally registered as employees.[100]

71. Furthermore, they had very low wages[101] and earned nothing extra based on the risk they faced in their work every day. Regarding their earnings, the workers received R$0.50 (fifty cents[102]) for each one thousand fireworks.[103] The inhabitants of the municipality of Santo Antônio de Jesus worked in the fireworks factory in the absence of any other economic alternative and owing to their situation of poverty. The fireworks factory's women employees were unable to obtain work in commerce due to their lack of literacy[104] and were not hired for domestic service due to stereotypes that associated them with illegal activities for example.[105]

72. The factory's workers were not provided with individual protection equipment[106] or training to do their work.[107] Also, several children worked in the factory,[108] even from 6 years of age.[109] The children worked six hours a day in school term time and all day during vacations, weekends and festive seasons.[110] In general, the women worked all day,[111] from

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recognized that Osvaldo Prazeres Bastos was the real owner of the fireworks factory. *Cf.* Judgment of the Criminal Court of Santo Antônio de Jesus of November 9, 2004 (evidence file, folios 107 to 109).

[95] *Cf.* Registration certificate No. 381 - SFPC/6 of December 19, 1995, in the name of Mário Fróes Prazeres Bastos (evidence file, folio 48).

[96] *Cf.* Statement made by Maria Balbina dos Santos during the public hearing held by the Inter-American Court on January 31, 2010.

[97] *Cf.* Statement made by Leila Cerqueira dos Santos during the public hearing held by the Inter-American Court on January 31, 2010, and Expert opinion provided by Sônia Marise Rodrigues Pereira Tomasoni, *supra*.

[98] *Cf.* Statement made by Leila Cerqueira dos Santos, *supra*, and Expert opinion provided by Sônia Marise Rodrigues Pereira Tomasoni, *supra*.

[99] *Cf.* Synthesis document of the Working Group, *supra*, and Expert opinion provided by Sônia Marise Rodrigues Pereira Tomasoni, *supra*.

[100] *Cf.* Statement made by Leila Cerqueira dos Santos, *supra*.

[101] *Cf.* Synthesis document of the Working Group, *supra*.

[102] At the date of the facts of this case, the United States dollar was equal to 1.2 reals.

[103] The firework is composed of the following raw materials: sand, acid, silver, sulphur and aluminum, which is melted on a hot fire and stored in a plastic bag. When storing, it must be dampened with alcohol to avoid an accident *Cf.* SANTOS, Ana Maria. *"La Clandestinidad como Expresión de la Precarización del Trabajo en la Producción del Cohete de Masa en la municipalidad de Santo Antônio de Jesus – Bahia: un estudio de caso en el barrio Irmã Dulce," supra*.

[104] *Cf.* Synthesis document of the Working Group, *supra.*

[105] According to the statement made by Leila Cerqueira dos Santos, "we worked in the factory or in family homes, but many families would not employ us because they thought that we were from a poor district and that we might steal or take things and so they discriminated against us; they did not accept us and they said come again tomorrow and the following day they said the same." *Cf.* Statement made by Leila Cerqueira dos Santos, *supra*. Similarly: Expert opinion provided by Sônia Marise Rodrigues Pereira Tomasoni, *supra*.

[106] *Cf.* Synthesis document of the Working Group, *supra*; Statement made by Leila Cerqueira dos Santos, *supra*; Expert opinion provided by Sônia Marise Rodrigues Pereira Tomasoni*, supra,* and Affidavit made by Bruno Silva dos Santos on January 7, 2020 (merits file, folios 876 and 877).

[107] *Cf.* Synthesis document of the Working Group, *supra*, and Affidavit made by Bruno Silva dos Santos, *supra*.

[108] *Cf.* Expert opinion provided by Viviane de Jesus Forte during the public hearing held by the Inter-American Court on January 31, 2010.

[109] *Cf.* Expert opinion provided by Viviane de Jesus Forte, *supra.*

[110] *Cf.* Affidavit made by Bruno Silva dos Santos, *supra*.

[111] *Cf.* Affidavit made by Claudia Reis dos Santos on January 7, 2020 (merits file, folios 878 and 879).

6 a.m. to 5:30 p.m.[112] and could make between 3,000 and 6,000 fireworks.[113]

73. It appears that there has been little change in the manufacture of fireworks in the region.[114] For example, the Labor Court's decision of March 29, 2001, indicated that the irregular activities for the production of fireworks continued in Santo Antônio de Jesus. Also, reports on the Brazilian television network "Record" on March 21 to 23, 2007, revealed that, at that time, the "Prazeres" family continued employing the poor (including children) as their workforce, in very dangerous conditions, and that they paid them only 50 cents of a real for every 1,000 fireworks they produced.[115]

C. The explosion in the fireworks factory

74. On December 11, 1998, at around 12 m., there was an explosion in the factory of "Vargo dos Fogos."[116] According to the charges brought by the Public Prosecution Service, the owners of the factory were aware that "it was dangerous and could explode at any time and cause a tragedy"; moreover, although they had an authorization from the Ministry of the Army,[117] the activities were carried out "irregularly."[118]

75. As a result of the explosion, 60 people died and six survived. Those who lost their life included 40 women, 19 girls and one boy. The survivors consisted of three women, two boys and one girl, for a total of 23 children, and also Vitória França da Silva who, owing to the serious state of health of her pregnant mother (who subsequently died), was born prematurely, due to the explosion, and whose health was consequently harmed.[119] Four of the women who died were also pregnant. The bodies of those who died had severe burns and some were mutilated.[120]

76. The survivors were treated by the hospital in the city of Salvador, capital of Bahia, because Santo Antônio de Jesus did not have a hospital with a unit to treat the people who had been burned. However, none of them receive adequate treatment to recover from the consequences of the accident. Most of the survivors suffered severe injuries, from loss of hearing, to burns that covered almost 70% of the body. One of the survivors of the explosion, Leila Cerqueira dos Santos, stated before this Court that she had third-degree burns on her face, arms and legs, swelling in her ear, and pain in various parts of her body.[121] Another two survivors, a boy at the time of the facts and a woman, stated that they had received no medical assistance to treat the aftereffects of the explosion.[122]

77. Leila Cerqueira dos Santos recounted that she was rescued by a couple who took her to the hospital in Santo Antônio de Jesus in a small car, without any kind of medical assistance.

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112 According to the statement made by Leila Cerqueira dos Santos during the public hearing before the Inter-American Court, they worked from 6 a.m. to 5:30 p.m. *Cf.* Statement made by Leila Cerqueira dos Santos, *supra*. *Cf.* BARBOSA JÚNIOR, José Amândio. *"La Producción de Fuegos Artificiales en el Municipio of Santo Antônio de Jesus/BA: un análisis de su contribución para el desarrollo local," supra.*

113 *Cf.* Statement made by Maria Balbina dos Santos, *supra*.

114 *Cf.* Expert opinion provided by Sônia Marise Rodrigues Pereira Tomasoni, *supra*.

115 *Cf.* Article in "*Record*" on March 21, 2007 (evidence file, folio 82).

116 *Cf.* Charges brought by the Public Prosecution Service on April 12, 1999, criminal case file 0000447-05.1999.8.05.0229 (evidence file, folios 39 to 43).

117 The Ministry of the Army at the time (1967 to 1999) is now the Ministry of Defense. Prior to 1967, the Ministry was called the War Ministry.

118 *Cf.* Charges brought by the Public Prosecution Service on April 12, 1999, *supra.*

119 The representatives affirmed, for example, that Vitória still suffers from epileptic attacks and a psychological condition that has jeopardized her whole learning process.

120 *Cf.* Newspaper article *"Más de 60 muertes," supra.*

121 *Cf.* Statement made by Leila Cerqueira dos Santos, *supra*.

122 *Cf.* Affidavits made by Bruno Silva dos Santos and Claudia Reis dos Santos, *supra*.

She also stated that she was transferred from that hospital, together with the other survivors, to the hospital in Salvador, without any medical treatment, they were merely undressed.[123]

78. At the time of the explosion, the factory had a license from the Ministry of the Army and from the municipality,[124] and Registry certificate No. 381, issued on December 19, 1995, valid until December 31, 1998. This certificate authorized the company to store 20,000 kg of potassium nitrate and 2,500 kg of black powder.[125] However, from the time the fireworks factory was registered until the time of the explosion there is no record of any oversight activity by the state authorities,[126] either of the working conditions or with regard to control of dangerous activities. During the 2006 public hearing held before the Commission, the State indicated that it had erred by failing to monitor the fireworks factory of Santo Antônio de Jesus.[127]

79. Two days after the explosion, in the course of the administrative procedure opened as a result of this, Army First Lieutenant Ednaldo Ribeiro Santana Júnior went to the site of the incident and confirmed that various materials were deposited there in violation of the safety standards for the storage and handling of explosives, and also verified the unauthorized storage of products, which were therefore seized.[128]

80. On January 8, 1999, the civil police issued a technical appraisal which determined that the explosion had been caused by the absence of safeguards at the site, not only in relation to the storage of the explosive propellants and accessories, but also because this material had been handled improperly by persons who were not qualified in this regard.[129]

81. In the context of the said administrative process, the Military Commander for the Sixth Military Region (Northeast) issued a conclusive report in which he indicated that the company had committed a series of irregularities (*infra* para. 92).[130] On June 23, 1999, six months after the explosion, the factory's registration certificate was cancelled.[131] However, it is on record that, on October 26, 1999, Mário Fróes Prazeres Bastos was still involved in irregular activities manufacturing fireworks.[132]

D. The domestic proceedings

82. Regarding the explosion on December 11, 1998, civil, labor, criminal and administrative proceedings were initiated. At the date of the adoption of the Commission's Admissibility and

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[123] *Cf.* Statement made by Leila Cerqueira dos Santos, *supra*.
[124] *Cf.* Judgment of the Labor Court of Santo Antônio de Jesus, *supra,* and Operating License issued by the Municipality of Santo Antônio de Jesus, municipal registration No. 004-312/001-50 (evidence file, folio 1776).
[125] *Cf.* Registration certificate No. 381 - SFPC/6 of December 19,1995, of the Ministry of the Army, in the name of Mário Fróes Prazeres Bastos (evidence file, folio 48).
[126] *Cf.* Synthesis document of the Working Group, *supra.*
[127] *Cf.* Admissibility hearing before the Inter-American Commission, Case of 12,428, starting at minute 38:25 of the recording (evidence file, folio 11). Similarly, in the decision taken on the appeal against the victim's action against the Federal Government and the state of Bahía, the Federal Regional Court concluded that, following the granting of the factory's operating license, no inspection was carried out by the respective federal agency, except after the accident. *Cf.* Ruling of the Federal Regional Court of the First Region deciding the appeal filed in the context of civil action No. 2002.33.00.005225-1, filed by the presumed victims against the Federal Government and the state of Bahía (evidence file, folios 2194 and 2295).
[128] *Cf.* Record of seizure by the Ministry of the Army on December 13, 1998 (evidence file, folios 56 and 57).
[129] *Cf.* Expert appraisal by the Ministry of Public Security of January 8, 1999 (evidence file, folios 59 to 63).
[130] *Cf.* Decision in administrative proceeding of the Ministry of the Army of December 2, 1994 (evidence file, folio 53).
[131] *Cf.* Communications No. 592-SFPC/6 and 612-SFPC/6 and Decision No. 13/DMB de 1999 (evidence file, folios 50 to 54).
[132] *Cf.* Judgment of the Labor Court of Santo Antônio de Jesus, *supra.*

Merits Report, only the administrative process and some labor proceedings had concluded, although the reparations ordered in the latter had not been executed. After more than 18 years, various stages of the other proceedings remained pending.

D.1 The criminal proceedings

83. Following the explosion on December 11, 1998, the civil police opened an investigation *ex officio* as a result of which, on April 12, 1999, the Public Prosecution Service of the state of Bahía filed charges for first-degree murder and attempted murder against the owner of the factory, Mário Fróes Prazeres Bastos, his father, Osvaldo Prazeres Bastos, and six of the persons who exercised administrative functions in the factory.[133]

84. On November 9, 2004, the Criminal Trial Court of Santo Antônio de Jesus, finding sufficient indications that a crime had possibly been committed, decided that the accused should be referred to the Jury Court.[134] On July 18, 2007, the Public Prosecution Service asked the Bahia Court of Justice to transfer the case to the city of Salvador, considering that the economic and political influence of the accused could interfere with the decision. This request was accepted on November 7, 2007.[135]

85. On October 20, 2010, five people were convicted, including the owner of the factory and his father, and three of the accused were acquitted.[136] The convicted men filed ordinary remedies against this decision, and these were rejected by the Bahia Court of Justice on April 26, 2012. While an appeal filed on November 12, 2018, was pending before the Federal Supreme Court, in 2019, the convicted men filed applications for *habeas corpus*. Based on the application for habeas corpus filed by Osvaldo Prazeres Bastos, the Bahia Court of Justice declared[137] the extinction of the punishment due to prescription.[138] The purpose of the other applications for *habeas corpus* filed before the Superior Court of Justice (STJ), was to annul the appeal decision because the accused's lawyers had not been summoned to the session

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[133] *Cf.* Charges filed by the Public Prosecution Service, *supra*.

[134] *Cf.* Judgment of the Criminal Trial Court of Santo Antônio de Jesus of November 9, 2004 (evidence file, folios 107 to 109).

[135] *Cf.* Summary of criminal proceedings No. 0000447-05.1999.8.05.0229 on the website of *Servicios e-SAJ* of the Court of Justice of the state of Bahía (evidence file, folios 134 to 138).

[136] *Cf.* Summary of criminal proceedings No. 0000447-05.1999.8.05.0229, *supra*.

[137] *Cf.* Decision of the Bahia Court of Justice in *habeas corpus* proceeding No. 8016892-66.2019.8.05.0000 (evidence file, folios 4472 to 4475).

[138] Prescription is regulated in articles 109 to 119 of the Brazilian Criminal Code. According to these provisions, there are two types of prescription: prescription of the *prosecution* prerogative, which may occur while a final criminal conviction has not yet been delivered, and prescription of the *execution of judgment* prerogative that can occur only after a final criminal sentence has been delivered. The prescription limit for *prosecuting* an offense, which generally begins to run on the day the crime is committed, varies from one crime to another, and is defined based on the maximum penalty established, in abstract, for the criminal conduct. Meanwhile, the prescription limit for execution of judgment is regulated by the penalty that is effectively applied in the judgment and begins to run from the day on which the sentence is final. However, this type of prescription can only be recognized after the sentence is final for both parties. According to Brazilian criminal law, there is also a third type of prescription, which occurs after the criminal judgment has been delivered, when only the defense has filed an appeal; that is, when the judgment is already final for the prosecution. As of that moment, the time frame for prescription will be calculated based on the penalty applied (and not on the maximum penalty in abstract). The prescription of the prosecution prerogative can be interrupted by the following actions: the admissibility of the complaint, the decision to submit the case to the Jury Court ("*decisão de pronúncia*"), the decision that confirms this submission to the Jury Court, and the publication of the non-final judgment. Once the calculation of the prescription time frame has been interrupted, it will begin to run again, from zero, starting on the date of the interruption. Another relevant provisions of the Brazilian Criminal Code establishes that the prescription time frame will be reduced by half when the criminal is under 21 years of age on the date of the crime or more than 70 years of age on the date of the judgment. *Cf.* Criminal Code of Brazil, Legislative Decree No. 2,848, promulgated on December 7, 1940, articles 109 to 119. Available at: http://www.planalto.gov.br/ccivil_03/Decree-lei/del2848compilado.htm.

when the appeal was deliberated.[139] These applications were granted, and it was therefore determined that the appeal should be re-examined, duly notifying the defense counsel.[140] Consequently, the criminal proceedings have not yet concluded.

D.2 The civil proceedings

86. Two actions were filed in the civil sphere: (i) against the State of Brazil, the state of Bahía, the municipality of Santo Antônio de Jesus and the company of Mário Fróes Prazeres Bastos, and (ii) against Osvaldo Prazeres Bastos, Maria Julieta Fróes Bastos and Mário Fróes Prazeres Bastos.

a. Civil case against the State of Brazil, the state of Bahía, the municipality of Santo Antônio de Jesus and the company of Mário Fróes Prazeres Bastos (fireworks factory)

87. On March 4, 2002, the presumed victims and their families filed an action against the State of Brazil, the state of Bahía, the municipality of Santo Antônio de Jesus and the company of Mário Fróes Prazeres Bastos for pecuniary and non-pecuniary damage. In this complaint they also requested advance relief[141] for the children under 18 years of age whose mothers had died in the explosion.[142] The request for advance relief was admitted by the federal judge on March 5, 2002.[143] In the brief presented to the Commission on October 18, 2010, the petitioners indicated that, of the 44 children who lost their parents and sued the federal Government, only 39 benefited from the advance relief decision with a monthly pension of a minimum wage and, of these, only 16 effectively received this payment because, owing to the passage of time, the others were already over 18 years of age (the maximum age to receive the pension, according to the judicial decision). The other family members have received no reparation from the State.[144]

88. Following to the issue of the decision on advance relief, the main proceedings continued and they were disaggregated owing to the large number of co-litigants (84). As a result of this decision, 14 different proceedings were filed, each one with a maximum of five plaintiffs.[145] The representatives indicated that the first instance judgments were delivered between July 7, 2010, and August 26, 2011, and appeals were filed against them that were rejected between August 31, 2013, and March 20, 2017. Also, appeals for clarification were filed against the appeal decisions and these were decided between October 26, 2015, and May 5, 2018. Lastly, the Federal Government and the state of Bahía filed special and

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[139] *Cf.* Decision in *habeas corpus* proceeding No. 527,573 of August 26, 2019 (evidence file, folios 4477 and 4478), and Decision on the precautionary measure in the request to extend *habeas corpus* proceeding No. 527,573-BA of August 28, 2019 (evidence file, folio 4480).

[140] *Cf.* Decision of the STJ to annul the appeal judgment in *habeas corpus* proceeding No. 527,573 of September 25, 2019 (evidence file, folios 4483 and 4484) and Decision del STJ to annul the appeal judgment in *habeas corpus* proceeding No. 527,605 of October 25, 2019 (evidence file, folios 4486 and 4487).

[141] As described by the State in its answering brief, the purpose of advance relief is that, in those cases in which the duration of the proceedings may prejudice the effectiveness and the attainment of justice, when certain requirements are met, it is possible to advance the protection claimed, Currently, this is regulated in article 300 and *ff.* of the 2015 Code of Civil Procedure. *Cf.* Code of Civil Procedure of Brazil. Law No. 13,105, promulgated on March 16, 2015. Available at: http://www.planalto.gov.br/ccivil_03/_Ato20152018/2015/Lei/L13105.htm#art1046.

[142] *Cf.* Initial action filed before Federal Justice in the state of Bahía, file No. 2002.33.00.005225-1 of March 4, 2002 (evidence file, folios 140 to 185).

[143] *Cf.* Preliminary decision on advance relief of the Federal Trial Judge, file No. 2002.33.00.005225-1, of March 5, 2002 (evidence file, folios 187 to 189).

[144] *Cf.* Communication No. 090/10 JG/RG of the representatives of October 18, 2010 (evidence file, folios 191 to 193).

[145] *Cf.* Table of the civil proceedings processed by Federal Justice (evidence file, folios 1617 to 1619). In the State's summary of the proceedings in its answering brief, it does not mention case No. 2004.33.00.021817-9.

extraordinary remedies in 12 of the 14 proceedings, so that 10 of them remain pending and two had decisions that became final in September 2017 and April 2018. The Commission indicated that it did not have information on the payment of reparations by the State, other than the partial payments related to the decision on advance relief. The State did not provide information on this issue either.

b. Civil action *ex delicto* against Osvaldo Prazeres Bastos, Maria Julieta Fróes Bastos and Mário Fróes Prazeres Bastos

89. The State indicated that the same year that the explosion of the fireworks factory occurred (1998), the prosecution service of the state of Bahia filed precautionary measure No. 0002335-43.1998.805.0229 before the First Civil Court of Santo Antônio de Jesus, requesting an embargo on the assets of the accused, Osvaldo Prazeres Bastos and Mário Prazeres Bastos, in order to guarantee reparations for the harm caused to the surviving victims and the heirs of the victims who died in the explosion.

90. On January 9, 1999, *ex officio*, the Public Prosecution Service of the state of Bahía together with several family members of the victims of the explosion filed civil action No. 0000186-40.1999.805.0229 before the First Civil Court against Osvaldo Prazeres Bastos, Mário Fróes Prazeres Bastos and Maria Julieta Fróes Bastos in order to obtain reparations.[146] This action ended in first instance due to an agreement signed on October 8, 2013, by the victims of the explosion, their next of kin, and the defendants[147] that was ratified by the trial court on December 10, 2013. The agreement established compensation of approximately R$1,280,000 (one million two hundred and eighty thousand reals), to be divided between the beneficiaries of the agreement. As the defendants failed to comply with the agreement, the Public Prosecution Service filed a request for execution of judgment in which it required that a fine be imposed. It also provided a list of properties owned by Osvaldo Prazeres Bastos so that they could be embargoed if the debt were not paid.[148] The State, in its answering brief, indicated that, at October 2017, the defendants had paid the sum of R$1,940,000 (one million nine hundred and forty thousand reals). Subsequently, according to the State, the defendant made three deposits for a total of R$270,000 (two hundred and seventy thousand reals) and one of his properties was auctioned for the sum of R$84,500 (eighty-four thousand five hundred reals). Therefore, the defendant's current debt amounted to R$475,038 (four hundred and seventy-five thousand and thirty-eight reals). Between November 25, 2016, and May 4, 2018, judicial authorizations were issued for the payment of the sums collected to each victim.[149] The local prosecutor continued requesting compliance with the remaining debt[150] and, in March 2019, this culminated with the ratification by the civil judge of a new agreement to facilitate payment of the remaining sums.[151]

D.3 The labor proceedings

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146 In its answering brief, the State of Brazil underscored that, under the laws of Brazil, criminal, civil and administrative proceedings are independent of each other, and this is why, in 1998, the Public Prosecution Service was able to institute civil proceedings to obtain compensation for the victims, even though the criminal proceedings had not concluded

147 *Cf.* Agreement facilitated by the Public Prosecution Service of Bahia on October 8, 2013 (evidence file, folios 1956 to 1959).

148 *Cf.* Summary of civil proceedings No. 0000186-40.1999.8.05.0229 on the website of Servicios e-SAJ of the Court of Justice of the state of Bahía (evidence file, folios 216 to 230).

149 *Cf.* Payment authorizations issued by the First Civil Court of Santo Antônio de Jesus (evidence file, folios 1964 to 2189).

150 *Cf.* Brief of the Prosecution Service of the state of Bahía, Case No. 0000186-40.1999.8.05.0299 of June 17, 2018 (evidence file, folio 2191 and 2192).

151 *Cf.* Summary of civil proceedings No. 0000186-40.1999.8.05.0229 on the website of Servicios e-SAJ of the Court of Justice of the state of Bahía (evidence file, folios 4924 to 4957) and Certification of the First Civil Court of Santo Antônio de Jesus of March 26, 2019 (evidence file, folios 3997 to 4002).

91. In 2000 and 2001, 76 actions were instituted in the labor jurisdiction before the Labor Court of Santo Antônio de Jesus; of these, 30 were archived, and the other 46 were declared inadmissible in first instance. An ordinary appeal was filed against the decisions declaring the actions inadmissible and, as a result of this, the Regional Labor Court of the Fifth Region decided in favor of the workers of the fireworks factory and ordered a new ruling.[152] The new ruling recognized the workers' employment relationship with Mário Fróes Prazeres Bastos and declared that 18 of the actions filed were partially admissible and one totally admissible. Six of these proceedings remained provisionally filed for several years[153] because it had not been possible to locate assets of the convicted man (Mario Prazeres Bastos) that would allow the decisions to be executed.[154] In August 2018, in the context of the labor proceeding of Leila Cerqueira dos Santos, a property of Osvaldo Prazeres Bastos, father of Mário Fróes Prazeres Bastos, was embargoed for the sum of R$1,800,000 (one million eight hundred thousand reals), which would be sufficient to compensate the victims of all the actions in which execution remained pending.[155]

D.4 The administrative process

92. An administrative process was filed, *ex officio*, by the Sixth Military Region of the Army. In the context of this process, two days after the explosion, on December 13, 1998, irregular products found in the fireworks factory were confiscated,[156] and on December 15, that year, it was advised that the materials seized had been destroyed.[157] On June 6, 1999,[158] the administrative process was decided ordering the cancellation of the company's registration because the following irregularities had been verified: (1) unsafe conditions in the facilities; (2) unregistered storage areas next to the production sheds; (3) manufacture of black powder without the respective authorization; (4) storage of large quantities of white powder without the corresponding authorization or records; (5) absence of fire extinguishers in most of the storage spaces; (6) storage of packets of fireworks of a brand with which there was no business relationship; (7) no justification of the origin of some of the controlled products found in the storage spaces, and (8) inappropriate storage, by storing potassium chlorate, potassium nitrate, black powder, white powder and the finished fireworks, in the same warehouse.[159]

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[152] *Cf.* Report of the Deputy Director of the Labor Secretariat in Santo Antônio de Jesus of October 5, 2005 (evidence file, folio 233).

[153] The Court does not have exact information on the processing of each labor action. However, the records of the processing of the case of Leila Cerqueira dos Santos, presented by the State with its answering brief, reveals that this was provisionally archived from November 8, 2002, to October 27, 2009, and owing to the impossibility of executing the decision, was suspended from August 6, 2010, to November 24, 2011, and from December 18, 2013, to May 14, 2014 (evidence file, folio 2624).

[154] *Cf.* Report of the Deputy Director of the Labor Secretariat in Santo Antônio de Jesus, *supra.*

[155] *Cf.* Communication of Judge Cássia Magali Moreira Daltro of the Labor Court of Santo Antônio de Jesus to the Attorney General of February 21, 2019 (merits file, folio 4106).

[156] *Cf.* Record of seizure by the Sixth Region of the Military Command of the Northeast, of December 13, 1998 (evidence file, folio 1875 and 1876).

[157] *Cf.* Record of destruction by the Sixth Region of the Military Command of the Northeast, of December 15, 1998 (merits file, folio 1878).

[158] Two dates have been indicated for the issue of this decision. The Commission and the representatives indicated that the process ended on December 2, 1999. However, this date is incorrect because they have based themselves on the date on which the certified copies of this decision were granted and not on the date of its issue. The State has indicated that the date is July 6, 1999, and this is supported by the date that appears in the decision of the Ordnance Department of the Ministry of Defense. However, even though neither of the parties has indicated this, the Court considers that there could be an error in the date in the document presented as evidence, because the cancellation of the company's registration occurred on June 23, 1999; therefore, the decision ordering this could not be issued subsequently – on July 6, 1999. Consequently, the Court considers it probable that the real date of this decision would be June 6, 1999. *Cf.* Decision on the administrative proceeding (evidence file, folio 53) and Decision of the Ordnance Department of the Ministry of Defense (evidence file, folios 1868 and 1869).

[159] *Cf.* Decision of the Ordnance Department of the Ministry of Defense of July 6, 1999, *supra.*

93. In compliance with the said decision, on June 23, 1999, by Decree No. 013/DMB, the Ministry of the Army cancelled the registration certificate of the factory concerned (*supra* para. 81). On October 13, 1999, the Commander of the Sixth Military Region informed the Chief of the Civil Police of Santo Antônio de Jesus that the material found in the manufacturing sheds would be destroyed and the products kept in the storage spaces would be seized for inspection and to avoid the risk of new explosions.[160]

E. Regulatory framework at the time of the facts

E.1 Regarding control of dangerous activities

94. The activity of manufacturing fireworks is established and defined under No. 8121-05 of the Brazilian Professions Code,[161] and the worker in this sector is referred to with the generic name of "pyrotechnician."

95. At the time of the facts, regulations existed in Brazil for the control of dangerous activities. Thus, article 11 of Decree No. 55,649 of January 28, 1965,[162] established that it was the responsibility of the War Ministry to authorize the production of controlled products, including fireworks, and to oversee their sale and according to article 4 of this decree this task could be delegated to other organs of the Federal Government, the states or municipalities by an agreement

96. This decree also established that it was compulsory for all companies manufacturing fireworks, among other products, to be registered and that the document authorizing their operations was the so-called "registration certificate," which was valid for three years.[163]

97. The decree also gave the then War Ministry the following powers:

> (a) to decide which products should be considered controlled items; (b) to decide which companies to register for the purpose of the manufacture, recovery, conservation, industrial use, handling, export, import, storage and trading of controlled products, including fireworks workshops; (c) to decide on the cancellation of registrations granted when the legal and regulatory requirements were not met, and to apply the established sanctions; […] (g) to inspect the manufacture, recovery, industrial use, handling, export, import, customs clearance, storage, trading and marketing of controlled products.[164]

98. Regarding the compulsory nature of registration and oversight by the State, Decree 55,649 indicated that the responsibility for, *inter alia*, registering companies, conducting oversight activities and carrying out inspections corresponded to each military region.[165]

99. In particular, with regard to oversight, the said decree determined that the inspection of the storage facilities of the factories would be carried out by the inspection department of the War Ministry in collaboration with the civil police and the municipal governments. This

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[160] *Cf.* Communication No. 592-SFPC/6 of the Commander of the Sixth Military Region, of October 13, 1999 (evidence files, folio 50 and 51).

[161] *Cf.* Ministry of Labor. Brazilian Professional Code, No. 8121-05: Pyrotechnician, and 8121-10: Worker in the manufacture of munitions and explosives. Available at: http://www.mtecbo.gov.br/cbosite/pages/pesquisas/BuscaPorTituloResultado.jsf. .

[162] *Cf.* Decree No. 55,649 of January 28, 1965. Available at: http://www.planalto.gov.br/ccivil_03/Decree/Antigos/D55649.htm. Decree No. 55,649 of January 28, 1965, was revoked by Decree No. 2,998 of March 23, 1999, which was then revoked by Decree No. 3,665 of November 20, 2000. This was revoked by Decree No. 9,493 of September 5, 2018, which was, in turn, revoked by Decree No. 10,030 of September 30, 2019, in force currently.

[163] *Cf.* Decree No. 55,649, *supra,* articles 32 and 33*.*

[164] *Cf.* Decree No. 55,649, *supra,* article 21*.*

[165] *Cf.* Decree No. 55,649, *supra,* article 23.

provision also attributed to the local police the task of constantly verifying the inventories kept in the storage facilities, as well as implementing technical decisions and monitoring safety conditions in order to communicate any irregularity to the oversight organ of the War Ministry.[166]

100. Decree 55,649 also established that, following in-person verification or based on reports or information on the existence of violations of the law, misdemeanors or criminal offenses, the military authority charged with inspecting the controlled products by the War Ministry should proceed to take the necessary measures to investigate a possible offense.[167]

101. The laws of the state of Bahía also contained similar provisions. For example, State Decree 6,465 of 1997 assigned to the state's Public Security Secretariat the authority to approve the operation of establishments that produced or sold fireworks and to inspect the manufacture, sale, and use of fireworks.[168]

E.2 Regarding the right to work

102. The Constitution of the Federative Republic of Brazil (hereinafter "the Brazilian Constitution or "the Constitution"),[169] promulgated in 1988, refers to the right to work and to the guarantees derived from this. Articles 6 and 7 indicate:

> Art. 6. Education, health, food, work, housing, transportation, recreation, safety, social security, protection of maternity and childhood, and care for those in need are social rights under this Constitution.
>
> Art. 7. Urban and rural workers shall have the following rights: […] 4. The minimum wage; […] 8. The thirteenth salary; […] 16. Higher remuneration for outstanding service; […] 22. Mitigation of the risks inherent in the work through health, hygiene and safety regulations; 23. Additional remuneration for difficult, unhealthy or dangerous activities; […] 28. Accident insurance; […] 33. Prohibition of night work, and hazardous or unhealthy work for persons under 18 years of age, and any work for children under the age of 16, unless as an apprentice from the age of 14; […].

103. The social provisions established in the Constitution are reaffirmed in the Consolidated Labor Laws (hereinafter "CLT"),[170] which apply to all the country's workers. The CLT also establish the minimum wage,[171] the thirteenth salary,[172] remuneration for outstanding service,[173] additional remuneration for difficult, unhealthy or dangerous activities,[174] accident insurance,[175] prohibition of night work, or hazardous and unhealthy work for persons under 18 years of age and any work for children under the age of 16 unless as an apprentice from 14 to 16 years of age,[176] among many other rights possessed by workers in the territory of Brazil.

104. The CLT also contain a specific chapter on the regulations for the prevention of

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166 *Cf.* Decree No. 55,649, *supra,* article 256.

167 *Cf.* Decree No. 55,649, *supra,* article 279.

168 *Cf. Amicus Curiae* of the Human Rights and Environmental Law Clinic of the Universidade do Estado do Amazonas, *supra*, and Decree of the state of Bahía No. 6,465 of June 9, 1997, Available at: https://governo-ba.jusBrazil.com.br/legislacao/79274/Decree-6465-97.

169 *Cf.* Constitution of the Federative Republic of Brazil, 1988. Available at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm.

170 *Cf.* Consolidated Labor Laws. Legislative decree No. 5,452, of May 1, 1943. Available at: http://www.planalto.gov.br/ccivil_03/Decree-lei/del5452.htm.

171 *Cf.* Consolidated Labor Laws, *supra,* articles 76 to 83.

172 *Cf.* Consolidated Labor Laws, *supra,* article 611-B, V.

173 *Cf.* Consolidated Labor Laws, *supra,* articles 142, §5 and 611-B, X.

174 *Cf.* Consolidated Labor Laws, *supra,* article 193, § 1.

175 *Cf.* Consolidated Labor Laws, *supra,* article 458, IV.

176 *Cf.* Consolidated Labor Laws, *supra,* article 611-B, XXIII.

occupational accidents and diseases. However, in 1998, there was no specific legislation on accident prevention in the fireworks sector.[177] In this regard, article 166 of the CLT establishes a company's obligation to provide its employees, free of charge, with individual protective equipment adapted to the risk, when the general measures do not provide complete protection against the risk of accidents and harm to the health of employees. In addition, article 193 of the CLT indicates that, based on the regulations adopted by the Ministry of Labor, dangerous activities and operations are considered to be those that entail permanent contact with explosives in a situation of heightened risk.[178] Meanwhile, article 195 stipulates that the characterization and classification of unhealthiness and danger, in accordance with the standards of the Ministry of Labor, are established by an inspection by a doctor or engineer registered with the Ministry, without prejudice to oversight by the Ministry of Labor and inspections, *ex officio,* by this organ.

105. The CLT also impose important safeguards in relation to child labor. Thus, it expressly prohibits this when it may prejudice a child's schooling, in places that are dangerous and unhealthy, and during hours that affect school attendance.[179]

106. The CLT are supplemented with administrative regulations issued by the Ministry of Labor and Employment that regulate the professions in greater detail; for example, providing standards that the employer must follow to ensure a healthy and safe workplace.

107. Ordinance No. 3,214 of 1978, which contains Regulation No. 16, regulates hazardous conditions. This regulation defined dangerous activities, including the storage and handling of explosives.[180]

108. In addition, Regulation No. 16[181] of the Ministry of Labor, as well as article 193(1) of the CLT (*supra* para. 104), stipulate the payment of an additional 30% of the regular salary for workers involved in dangerous activities, while Regulatory Standard No. 19[182] of the CLT regulated activities involving explosives and established occupational safety provisions and workplace regulations.

109. Lastly, in addition to the legal provisions mentioned above, the Statute of the Child and Adolescent prohibits any work for children under 14 years of age.[183] The Statute also prohibits hazardous, unhealthy or difficult work for adolescents.[184]

VIII
MERITS

110. The facts of this case relate to the presumed international responsibility of the Brazilian

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177 *Cf.* Expert opinion provided by Viviane de Jesus Forte, *supra*.
178 *Cf.* Consolidated Labor Laws, *supra*, article 193*.*
179 *Cf.* Consolidated Labor Laws, *supra*, articles 403 to 405*.*
180 *Cf.* Regulation No. 16 (NR16–dangerous activities and operations). Available at: https://enit.trabalho.gov.br/portal/images/Arquivos_SST/SST_NR/NR-16-atualizada-2019.pdf, and Ordinance No. 3.214 of June 8, 1978, Available at: https://enit.trabalho.gov.br/portal/images/Arquivos_SST/SST_Legislacao/SST_Legislacao_Portarias_1978/00Portaria-MTb-n.-3.214_78.pdf.
181 *Cf.* Regulation No. 16, *supra*, article 16.2.
182 *Cf.* Regulatory Standard No. 19 (NR 19–Explosives), Decree No. 3,214 of June 8, 1978. Available at: https://enit.trabalho.gov.br/portal/images/Arquivos_SST/SST_NR/NR-19.pdf.
183 *Cf.* Statute of the Child and Adolescent, Law No. 8,069 of July 13, 1990, article 60. Available at: http://www.planalto.gov.br/ccivil_03/leis/l8069.htm.
184 *Cf.* Statute of the Child and Adolescent, *supra*, article 67, II*.* In this context, the word "adolescent" refers to children between 14 and 18 years of age.

State for the alleged human rights violations resulting from the explosion of a fireworks factory in which 60 people died (40 adult women, 19 girls and one boy) and six survived (three adult women, one girl, two boys, and a girl who was born after the explosion and as a direct consequence of this).

111. In this chapter, the Court will examine the merits of the case. To determine the scope of the international responsibility of Brazil, it will examine the alleged violations as follows: (1) first, it will refer to the possible violation of the rights to life and to personal integrity, and the rights of the child (Articles 4(1), 5(1) and 19 of the Convention) in relation to Article 1(1) of the Convention; (2) then, it will refer to the right to equal and satisfactory conditions that ensure safety, health and hygiene in the workplace, the rights of the child, the right to equality and the prohibition of discrimination (Articles 1(1), 19, 24 and 26 of the Convention); (3) third, it will refer to the rights to judicial guarantees and to judicial protection (Articles 8(1) and 25 of the Convention) and, lastly, (4) it will analyze the right to personal integrity of the next of kin of the presumed victims (Article 5 of the Convention).

VIII-1
RIGHTS TO LIFE AND TO PERSONAL INTEGRITY AND RIGHTS OF THE CHILD IN RELATION TO THE OBLIGATIONS OF RESPECT AND GUARANTEE (ARTICLES 4(1), 5(1) AND 19 OF THE AMERICAN CONVENTION IN RELATION TO ARTICLE 1(1) OF THIS INSTRUMENT)

A. Arguments of the parties and of the Commission

112. The ***Commission*** argued that, under the laws of Brazil, activities related to explosives had to be authorized and inspected by the State. In the instant case, the fireworks factory where the explosion occurred had an operating license granted by the Army. On this basis, it concluded that the State was directly related to the activities that were being carried out in the factory and was therefore aware of the potential risk to life and personal integrity to which the workers were exposed, and should have known that one of the worst forms of child labor existed there. Nevertheless, the Commission indicated that the State had not provided any information to prove that any inspection or oversight of the factory had been conducted during the three years between the granting of the authorization and the occurrence of the explosion, and that this had been acknowledged in the hearing held before the Inter-American Commission. Therefore, in the Commission's opinion, the fact that no inspection or oversight of the factory had been conducted, while the State was aware of the general context of dangerous activities involving fireworks in the area, was sufficient to establish that the State had not only failed to comply with its obligations, but also that it had tolerated and acquiesced to what happened, and was therefore responsible for non-compliance with the obligation to respect and ensure the rights to life and to personal integrity, in relation to the obligations established in Articles 19 and 1(1) of the American Convention.

113. The ***representatives*** added that, according to the laws in force at the time, it was the responsibility of the Ministry of the Army to authorize the production of controlled products, and to oversee their manufacture, storage and sale and that this task could be delegated to other organs of the Federal Government, the states or the municipalities. They therefore concluded that the State was responsible for the violation of the right to life of the victims of the explosion because there was no evidence that any State institution had conducted any act of oversight, even though the clandestine manufacture of fireworks in Santo Antônio de Jesus was a well-known public fact. Regarding the surviving victims, the representatives indicated that they had suffered gross violations of their physical and mental integrity in violation of Article 5(1) of the Convention, owing to the injuries and the aftereffects of the burns and also the loss of their loved ones. Moreover, this suffering had been augmented by

the total absence of medical, psychiatric or psychological care.

114. The ***State*** argued that it could not be considered responsible for the violation of the right to life and person integrity, because it had not been proved that state agents had intentionally consented to the occurrence of the unlawful act. It indicated that, to the contrary, the requirement of a license for the company to operate had been duly met, and this had determined the capacity of the private individuals to work in the fireworks manufacturing sector; while the Army and other state or municipal inspection agencies had not been specifically notified of unlawful actions prior to the explosion of the factory. It indicated that the State had demonstrated compliance with its obligations concerning protection of the right to life because, following the explosion, it had made the domestic remedies available to the presumed victims and preliminary or final decisions had been reached in some of these, resulting in determination of the guilty parties and reparation for the victims. Consequently, it asked the Court to take into considerations the relevant domestic decisions in order to recognize that the Brazilian State had exercised its primary responsibility to protect human rights, and also to ensure that the Court did not to act as a fourth instance.

B. Considerations of the Court

115. According to Article 1(1) of the American Convention, States have the obligation *erga omnes* to respect and ensure the norms for the protection and exercise of the human rights recognized in this instrument.[185] Therefore, the international responsibility of the State is based on acts or omissions of any of its organs or powers, regardless of their hierarchy, that violate the rights recognized in the Convention.[186] Consequently, States undertake not only to respect the rights and freedoms recognized therein (negative obligation), but also to adopt all appropriate measures to ensure them (positive obligation).[187] The Court has established that it is not sufficient that States refrain from violating the rights; rather, it is essential that they adopt positive measures, determined based on the particular needs for protection of the subjects of law, due either to their personal condition or to the specific situation in which they find themselves.[188]

116. The Court has also established repeatedly that the right to life plays a fundamental role in the American Convention and that its guarantee is essential for the exercise of the other rights.[189] It has understood that Article 4, in relation to Article 1(1) of the Convention, reveals that no one may be deprived of their life arbitrarily (negative obligation) and that States must adopt all appropriate measures to protect and preserve this right (positive obligation).[190] Thus, Article 4 of the Convention entails the State obligation to adopt the necessary measures to create an adequate legal framework to dissuade any threat to the right to life.[191] With

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[185] *Cf. Case of the 'Mapiripán Massacre" v. Colombia.* Judgment of September 15, 2005. Series C No. 134, para. 111, and *Case of Vereda La Esperanza v. Colombia. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2017. Series C No. 341, para. 82.

[186] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits, supra*, para. 164, and *Case of Díaz Loreto et al. v. Venezuela. Preliminary objections, merits, reparations and costs.* Judgment of November 19, 2019. Series C No. 392, para. 69.

[187] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits, supra*, paras. 165 and 166, and *Case of Noguera et al. v. Paraguay, supra*, para. 65.

[188] *Cf. Case of the Pueblo Bello Massacre v. Colombia.* Judgment of January 31, 2006. Series C No. 140, para. 111, and *Case of Vereda La Esperanza v. Colombia, supra*, para. 82.

[189] *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits.* Judgment of November 19, 1999. Series C No. 63, para. 144, and *Case of Noguera et al. v. Paraguay, supra*, para. 65.

[190] *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala, supra*, para. 139, and *Case of Noguera et al. v. Paraguay, supra*, para. 65.

[191] *Cf. Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, reparations and costs*. Judgment of March 29, 2006. Series C No. 146, para. 153, and *Case of Ortiz Hernández et al. v. Venezuela. Merits, reparations and costs.* Judgment of August 22, 2017. Series C No. 338, para. 110.

regard to personal integrity, Article 5(1) of the Convention establishes this in general terms when referring to physical, mental and moral integrity. The Court has recognized that the eventual violation of this right has different connotations of degree and that the physical and mental effects of its presumed violation vary in intensity based on endogenous and exogenous factors that must be proved in each specific case.[192] In addition, since some of the presumed victims in this case were children, it should be pointed out that, according to Article 19 of the American Convention, every child has the right to the measures of protection required by their condition as such.

117. That said, the obligation of guarantee extends beyond the relations between the state agents and the persons subject to their jurisdiction and encompasses the duty to prevent third parties, in the private sphere, from violating the protected rights.[193] Nevertheless, the Court has considered that a State cannot be responsible for all human rights violations committed by private individuals subject to its jurisdiction. The nature *erga omnes* of the State obligations of guarantee under the Convention do not entail its unlimited responsibility for any act by third parties. Thus, although an act or omission by a private individual has the legal consequence of violating the rights of another person, this cannot be automatically attributed to the State; rather the particular circumstances of the case must be examined and whether the obligation to guarantee rights has been met.[194] Accordingly, the Court must verify whether the State can be attributed with international responsibility in the specific case.[195]

118. In the instant case, the Court finds that States have the duty to regulate, supervise and monitor the implementation of dangerous activities that entail significant risks for the life and integrity of the persons subject to their jurisdiction, as a measure to protect and preserve their rights.

119. The Court has ruled on the obligation of regulation on various occasions; in particular in relation to the provision of public health services.[196] In this regard it has indicated that the State has the specific duty to regulate activities that entail significant risks to a person's health, such as the operation of blood banks.[197] The European Court of Human Rights has also ruled on the obligation to regulate in a case concerning a methane explosion in a household-refuse tip. In its decision, the European Court found that the obligation to take all appropriate steps to safeguard the right to life entailed "the primary duty of the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life," and that "this obligation indisputably applie[d] in the particular context of dangerous activities."[198]

120. Regarding oversight and monitoring, the Court has affirmed that this is a State obligation even when the activity is carried out by a private entity. The Court has established the responsibility of the State for violations committed by third parties who provided health

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[192] *Cf. Case of Loayza Tamayo v. Peru. Merits.* Judgment of September 17, 1997. Series C No. 33, para. 57, and *Case of Montesinos Mejía v. Ecuador, supra*, para. 150.

[193] *Cf. Case of the 'Mapiripán Massacre" v. Colombia*, *supra*, para. 111, and *Case of the Xucuru Indigenous People and its members v. Brazil, supra*, para. 173.

[194] *Cf. Case of the Pueblo Bello Massacre v. Colombia, supra*, para. 123, and *Case of Gómez Virula et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of November 21, 2019. Series C No. 393, para. 56.

[195] *Cf. Case of Ximenes Lopes v. Brazil.* Judgment of July 4, 2006. Series C No. 149, paras. 99 and 125, and *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 1, 2015. Series C No. 298, para. 170.

[196] *Cf. Case of Ximenes Lopes v. Brazil, supra,* para. 99; *Case of Suárez Peralta v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of May 21, 2013. Series C No. 261, para. 134, and *Case of Gonzales Lluy et al. v. Ecuador, supra*, para. 177.

[197] *Cf. Case of Gonzales Lluy et al. v. Ecuador, supra,* para. 178.

[198] *Cf.* ECHR, *Case of Öneryildiz v. Turkey*, No. 48939/99, Judgment of November 30, 2004, paras 89 and 90.

care services when these were due to the absence of state oversight[199] and it has indicated that the State's obligation of oversight includes both the services provided, directly or indirectly, by the State, and those offered by private individuals.[200] The Court has established the scope of the State's responsibility when it fails to comply with these obligations in relation to private entities, as follows:

> When it relates to the essential competence of the supervision and regulation of the provision of services of public interest, such as health, by private or public entities (as is the case of a private hospital), the State's responsibility results from failure to comply with the duty to supervise the provision of the service in order to protect the respective right.[201]

121. That said, this case does not involve the provision of health care services, but rather the performance of an especially hazardous activity under the supervisions and oversight of the State.[202] Regarding this activity, owing to the specific risks that it involved for the life and integrity of the individual, the State had the obligation to regulate, supervise and oversee its exercise, to prevent the violation of the rights of those who were working in this sector.

122. On this basis, the Court will now establish whether the State can be attributed with international responsibility for the violation of the rights to life and personal integrity of the presumed victims who died in, and those who survived, the explosion of the factory of "Vardo dos Fogos." To this end, it will: (1) refer to the regulations that, at the time of the facts, imposed on the State the duty to oversee the exercise of dangerous activities. Then, (2) it will analyze the attribution of responsibility in this specific case. In this section, the Court will establish whether Brazil failed to comply with its obligations to regulate, supervise and oversee the exercise of a hazardous activity and whether that omissive conduct had an impact on the violation of the rights to life and personal integrity in this specific case.

123. Finally, it should be pointed out that Brazil accepted the contentious jurisdiction of the Inter-American Court on December 10, 1998 (*supra* para. 15); that is, one day before the explosion of the fireworks factory to which this case refers. However, Brazil had acceded to the American Convention on September 25, 1992, the date as of which the Convention began to take effect for the Brazilian State and following which the obligations of the State were enforceable.

B.1 Regulation of the manufacture of fireworks in Brazil

124. At the date of the explosion of the fireworks factory, Brazil had federal and state regulations that classified the manufacture of fireworks as a hazardous activity and that established the obligation to oversee this activity. Article 11 of Decree No. 55,649 of January 28, 1965,[203] stipulated that it was the responsibility of the War Ministry to authorize the production of controlled products, including fireworks, and to oversee their sale and according to article 4 of this decree this task could be delegated to other organs of the Federal

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[199] *Cf. Case of Ximenes Lopes v. Brazil, supra,* para. 95*; Case of Suárez Peralta v. Ecuador, supra,* para. 144, and *Case of Gonzales Lluy et al. v. Ecuador, supra,* para. 191.

[200] *Cf. Case of Ximenes Lopes v. Brazil, supra,* para. 141, *Case of Suárez Peralta v. Ecuador, supra,* para. 149, and *Case of Gonzales Lluy et al. v. Ecuador*, *supra*, para. 184.

[201] *Case of Albán Cornejo et al. v. Ecuador*. *Merits, reparations and costs.* Judgment of November 22, 2007. Series C No. 171, para. 119.

[202] According to the resolution of the United Nations General Assembly on Responsibility of States for internationally wrongful acts, it is possible to attribute responsibility to the State in the case of a conduct that is under its direction or control. Thus, article 8 of the resolution indicates: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct." United Nations General Assembly, *Responsibility of States for internationally wrongful acts*, January 28, 2002, UN Doc. AG/56/83, article 8.

[203] *Cf.* Decree No. 55,649 of January 28, 1965, *supra,* article 11.

Government, the states or municipalities by an agreement.

125. The said decree also established that it was compulsory for all companies manufacturing fireworks, among other products, to be registered and that the document authorizing their operations was the so-called "registration certificate," which was valid for three years.[204]

126. In addition, this decree gave the War Ministry the following competences:

> (a) to decide which products should be considered controlled items; (b) to decide which companies to register for the purpose of the manufacture, recovery, conservation, industrial use, handling, export, import, storage and trading of controlled products, including fireworks workshops; (c) to decide on the cancellation of registrations granted when the legal and regulatory requirements are not met, and to apply the established sanctions; […] (g) to inspect the manufacture, recovery, industrial use, handling, export, import, customs clearance, storage, trading and trafficking of controlled products.[205]

127. Regarding the compulsory nature of registration and oversight by the State, Decree 55,649 indicated that it corresponded to each military region, *inter alia,* to register and inspect the companies.[206]

128. In particular, with regard to oversight, the said decree determined that the inspection of the storage facilities of the factories would be carried out by the inspection departments of the War Ministry in collaboration with the civil police and the municipal governments. This provision also attributed to the local police the task of constantly verifying the inventories kept in the storage facilities, as well as implementing technical decisions and monitoring safety conditions in order to communicate any irregularity to the oversight organ of the War Ministry.[207]

129. Decree 55,649 also established that, following in-person verification or based on reports or information on the existence of violations of the law, misdemeanors or criminal offenses, the military authority charged with inspecting the controlled products by the War Ministry should proceed to take the necessary preparatory steps for the ordinary investigation of a possible offense.[208]

130. The laws of the state of Bahía also contained similar provisions. For example, State Decree 6,465 of 1997 assigned to the state's Public Security Secretariat the authority to authorize the operation of establishments that produced or sold fireworks and to inspect the manufacture, sale and use of fireworks.[209]

131. Based on the foregoing, activities that involved contact with or handling of explosives were considered dangerous; the companies that carried out such activities had to be registered, and the national, state and municipal authorities, in particular, the then Ministry of the Army, the Public Security Secretariats, the civil police and the municipal governments, all within their terms of reference, had to oversee the activities of those companies. In addition, the level of supervision and oversight of the said activity should be the highest possible, taking into account the risks that the exercise of such a dangerous activities involved.

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[204] *Cf.* Decree No. 55,649 of January 28, 1965, *supra,* articles 32 and 33.

[205] *Cf.* Decree No. 55,649 of January 28, 1965, *supra,* article 21.

[206] *Cf.* Decree No. 55,649 of January 28, 1965, *supra,* article 23.

[207] *Cf.* Decree No. 55,649 of January 28, 1965, *supra,* article 256.

[208] *Cf.* Decree No. 55,649 of January 28, 1965, *supra,* article 279.

[209] *Cf. Amicus Curiae* presented by the Human Rights and Environmental Law Clinic of the Universidade do Estado do Amazonas, *supra*, and Decree of the state of Bahía No. 6,465 of June 9, 1997*, supra.*

132. The Court notes that, at the time of the facts, Brazil had specific regulations concerning the manufacture of fireworks and for the control and oversight of activities involving explosives. In other words, it had complied with its obligation to regulate the activity and had norms that recognized that the manufacture of fireworks was a hazardous activity. The purpose of those norms was to avoid accidents by overseeing the manufacture of fireworks. The Court must therefore establish whether the State of Brazil had complied with the obligations resulting from the regulation of this hazardous activity.

B.2 Analysis of the presumed attribution of responsibility to the State in this case

133. With regard to the State's responsibility for the violation of the rights to life and to personal integrity of those who died in and the survivors of the explosion that occurred on December 11, 1998, the Court finds that the State had classified the manufacture of fireworks as a hazardous activity (*supra* para. 124) and had regulated the conditions under which it should be executed. Accordingly, this activity could only be carried out following registration and with an official license (*supra* para. 125). In this case, the license had been obtained and the operation of the factory in question, although irregular, was not clandestine. In other words, the State had granted permission for the factory to operate and, therefore, knew the type of activity that it carried out. Consequently, it had the clear and enforceable obligation to supervise and oversee its operation. This obligation related to the manufacture of fireworks and the handling and storage of the powder inventories, and involved national, state and municipal authorities.

134. Nevertheless, although the authorities had granted the license for the operation of the factory and, as a result of this license, the State had an oversight obligation, this did not mean – and the case file does not show – that it took any action of control or oversight prior to the explosion. Rather, during the hearing held on October 19, 2006, before the Inter-American Commission, the State acknowledged that "there had been an oversight failure."[210]

135. Furthermore, a judgment delivered in one of the domestic proceedings on these facts, when deciding that the action filed by the victims against the Federal Government and the state of Bahía was partially admissible,[211] ratified that the State had incurred responsibility by failing to comply with its oversight obligation. Similarly, one of the labor judgments stated that the manufacture of fireworks was a common but hazardous activity, which was a "well-known public fact," and recognized the lack of oversight.[212]

136. The absence of State oversight was also the purpose of a complaint filed by the Commander of the Brazilian Army on October 26, 1999, before the Criminal Court of Santo Antônio de Jesus, in which he indicated that "the manufacture of fireworks is carried out freely, with the consent of the municipal government." Also, during the public hearing held on January 31, 2020, the State's agents acknowledged that, taking into account the vastness of the State's land area, there were "reasonable limitations" to conducting actions to verify and oversee the different economic activities and that the State was unable "to guarantee that 100% of establishments and situations are supervised."[213]

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[210] *Cf.* Statement by the State during the public hearing on admissibility before the Inter-American Commission, on October 19, 2006, *supra*.

[211] *Cf.* Judgment on appeal of the Federal Regional Court of the First Region. Case 0005241-13.2002.4.01.3300 (evidence file, folio 2200).

[212] *Cf.* Judgment of the Labor Court of Santo Antônio de Jesus, *supra*.

[213] *Cf.* Statement made by the State during the public hearing held in this case on January 31, 2020.

137. In short, after analyzing the evidence in the case file and the State's obligations, the Court finds that the Brazilian State failed to comply with its obligation to oversee the factory of "Vardo dos Fogos" and allowed the procedures required for the manufacture of fireworks to be carried out ignoring the minimum standards required by domestic law for this type of activity. This, in turn, was the cause of the explosion of the fireworks factory, as revealed by the appraisals carried out at the domestic level by the competent authorities (*supra* para. 80). Therefore, the omissive conduct of the State contributed to the explosion.

138. That omissive conduct by the different instances of the State resulted in the violation of the right to life of the 60 people who lost their life as a direct consequences of the explosion of the fireworks factory of Santo Antônio de Jesus, and of the right to personal integrity of the six people who survived. In particular, in the case of the survivors, this Court finds that it can be asserted that their personal integrity was violated owing to the physical and mental aftereffects they suffered. For example, the survivors had to cope with the death of their co-workers who included women and children - and some of the women and girls were pregnant – and, in some cases, those who died were members of their families; they experienced severe physical and mental suffering on account of the explosion, which is revealed, for example, by severe burns and other injuries, and they suffered owing to the lack of adequate care for their physical and mental ailments. In the Court's opinion, this suffering constituted a violation of the right to personal integrity with long-lasting effects on their lives. In addition, considering that there were children among those who died and survived, the Court finds that Article 19 of the American Convention was violated in this case.

B.3 Conclusion

139. Based on the analysis made in the preceding paragraphs and the determinations made in this chapter, the Court concludes that Brazil is responsible for the violation of Articles 4(1) and 19 of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of the 60 people who died, who included 20 children,[214] and of Articles 5(1) and 19 of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of the six survivors, three of whom were children,[215] as identified in Annex No. 1 of this judgment, as a result of the State's omissions that resulted in the explosion of the factory of "Vardo dos Fogos" in Santo Antônio de Jesus on December 11, 1998.

VIII-2
RIGHTS OF THE CHILD, RIGHTS TO EQUAL PROTECTION OF THE LAW, TO THE PROHIBITION OF DISCRIMINATION AND TO WORK, IN RELATION TO THE OBLIGATIONS OF RESPECT AND GUARANTEE (ARTICLES 19, 24 AND 26 OF THE AMERICAN CONVENTION IN RELATION TO ARTICULO 1(1) OF THIS INSTRUMENT)

A. Arguments of the parties and of the Commission

140. The ***Commission*** indicated that article 45 of the Charter of the Organization of American States (OAS) establishes that work is a right and a social duty that gives dignity to the one

[214] The State is responsible for the violation of Articles 4(1) and 19 in relation to Article 1(1) of the Convention to the detriment of the children Adriana dos Santos, Adriana Santos Rocha, Aldeci Silva dos Santos, Aldeni Silva dos Santos, Alex Santos Costa, Andreia dos Santos, Aristela Santos de Jesus, Arlete Silva Santos, Carla Alexandra Cerqueira Santos, Carla Reis dos Santos, Daiane dos Santos Conceição, Daniela Cerqueira Reis, Fabiana Santos Rocha, Francisneide Bispo dos Santos, Girlene dos Santos Souza, Luciene Oliveira dos Santos, Luciene dos Santos Ribeiro, Mairla Santos Costa, Núbia Silva dos Santos and Rosângela de Jesus França, who died in the explosion.

[215] The State is responsible for the violation of Articles 5(1) and 19 of the Convention in relation to Article 1(1) with regard to the children Maria Joelma de Jesus Santos, Bruno Silva dos Santos and Wellington Silva dos Santos, survivors of the explosion.

who performs it and should be performed under conditions that include a system of fair wages that ensure life, health, and a decent standard of living. The Commission added that Article 34(g) of this instrument includes among the goals to achieve integral development, fair wages, employment opportunities, and acceptable working conditions for all. In addition, Article XIV of the American Declaration on the Rights and Duties of Man establishes "the right to work under proper conditions" and, similarly, the Protocol of San Salvador stipulates that "Everyone has the right to work, which includes the opportunity to secure the means for living a dignified and decent existence." On this basis, the Commission concluded that the right to work constituted one of the economic and social norms mentioned in Article 26 of the Convention, and therefore States must ensure its progressive development and implement the necessary measures to make it effective.

141. Furthermore, in light of the fact that, in this case, several children were victims of the explosion, the Commission considered it necessary to incorporate the specific international standards on child labor into the analysis. It recalled that, as the Court had established, children are titleholders of all the rights recognized in the American Convention and, accordingly, the State must pay special attention to their needs and rights.

142. The Commission also indicated that, in this case, there was a clear connection between the State's failure to comply with its obligations, the victims' situation of poverty, and the lack of employment options. It argued that, "at the time of the facts, the manufacture of fireworks was the main, if not the only, employment option for the inhabitants of Santo Antônio de Jesus, who, in view of their situation of poverty, had no alternative but to accept work that was high-risk, low-paid and without adequate safety measures." It also underscored the increased risk of human rights violations as a result of the conditions of poverty and that, in the case of children, this situation exposes them to informal work and the worst forms of child labor.

143. Based on these arguments, the Commission concluded that the State had violated, to the detriment of the victims, the right to work established in Article 26 of the American Convention, in relation to the obligations established in Articles 1(1) and 2 of this instrument, as well as Article 19 in the case of the children. In addition, it argued that since there was an obvious connection between the failure to comply with the said obligations and the victims' situation of poverty, the State was also responsible for violating the principle of equality and non-discrimination established in Articles 24 and 1(1) of the Convention.

144. The ***representatives****,* in addition to the arguments of the Commission, indicated that, at the date of the explosion, both the Constitution and also the labor laws and administrative regulations of the Brazilian Ministry of Labor guaranteed a series of workers' rights. They also indicated that the State had, and has, norms that protect those who work in dangerous activities. However, these were not, and are not, implemented adequately. They also mentioned – and provided – three reports which established that the situation of inequality, precarization of the labor market, risk, and absence of oversight continued in the municipality of Santo Antônio de Jesus.[216]

145. Finally, regarding the violation of Article 19 of the Convention, they indicated that, as established in the preamble to the Convention on the Rights of the Child, States are obliged to safeguard and care for children both before and after birth.

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[216] *Cf.* BARBOSA JÚNIOR, José Amândio. *"La Producción de Fuegos Artificiales en el Municipio of Santo Antônio de Jesus/BA: un análisis de su contribución para el desarrollo local," supra*; SANTOS, Ana Maria. *"La Clandestinidad como Expresión de la Precarización del Trabajo en la Producción del Cohete de Masa en la municipalidad de Santo Antônio de Jesus – Bahia: un estudio de caso en el barrio Irmã Dulce," supra,* and TOMASONI, Sônia Marise Rodrigues Pereira. "*Dinámica socioespacial de la producción de fuegos artificiales en Santo Antônio de Jesus-BA," supra.*

146. The ***State,*** regarding the violation Article 24 of the Convention, indicated that it had an effective legal framework for the protection of the social rights addressed at reducing inequalities. It also indicated that it had complied faithfully with the progressive obligation to guarantee the said rights because, in the course of the procedure before the Commission, various federal, state and municipal public policies had been implemented to this end. Specifically, it referred to the *Bolsa Familia* program from which, in December 2018, 9,418 families of the municipality of Santo Antônio de Jesus had benefited, with a total of R$1,509,750. It also stressed the implementation of the programs to eradicate child labor (PETI) and to eradicate slave labor, as a result of which the presence of children and adults in high-risk and precarious jobs had been reduced. Lastly, it indicated that, in application of the standards for "business and human rights," the Brazilian Ministry of Women, the Family and Human Rights had taken various steps, including promotional and reinforcement activities in relation to Decree No. 9,571 of November 22, 2018, which established the national guidelines for business and human rights for medium and large enterprises, including transnationals active in the country.

147. Regarding the violation of the right to work, it argued, first, that this was not directly justiciable under the inter-American system. Nevertheless, it indicated that Brazil had, and has, a broad legal framework that protects the rights of workers, including those involved in dangerous activities. It also clarified that it had complied with the obligation of progressive development of the right to work without there appearing to be any setbacks. Lastly, it indicated that the causal nexus or the predictability of the real and immediate danger that the factory supposedly represented had not been specifically proved in order to assign responsibility to the State for acts of private individuals in application of the Court's case law.

B. Considerations of the Court

148. First, the Court recalls that the explosion that this case refers to occurred in a privately-owned fireworks factory and that, as established in Chapter VIII-1, the State cannot be considered responsible for every human rights violation committed by private individuals within its jurisdiction. Therefore, the Court must examine the particular circumstances of the case and the implementation of the obligation to ensure rights in order to establish whether the State can be attributed with international responsibility in the specific case (*supra* para. 117).

149. In this regard, the Court recalls that the State had the obligation to ensure the rights recognized in the American Convention and that this entailed the adoption of the necessary measures to prevent possible violations. Previously, it determined that the manufacture of fireworks is a dangerous activity (*supra* para. 121); thus, in this case, the State was obliged to regulate, supervise and oversee that the working conditions were safe in order to prevent occupational accidents caused by the handling of dangerous materials.

150. This conclusion is reinforced by the United Nations Guiding Principles on Business and Human Rights, which indicate that "[i]n meeting their duty to protect, States should: (a) enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps; […]."[217]

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[217] Human Rights Council *United Nations Guiding Principles on Business and Human Rights,* UN Doc. A/HRC/17/31, June 16, 2011, Principle No. 3. Regarding oversight of working conditions, the contents of the Guidelines concerning Corporate Social Responsibility in the Field of Human Rights and the Environment in the Americas is also relevant. In this regard, the Guidelines indicate: "(j) Enterprises and the States where they operate should strengthen, respectively, their internal and external systems for the follow-up, monitoring, and control of

151. In this regard, article 193 of the CLT indicates that, based on the regulations adopted by the Ministry of Labor, activities or operations that are considered dangerous are those that involve permanent contact with explosives under high-risk conditions,[218] while article 195 establishes that, in accordance with the regulations of the Ministry of Labor, the description and classification of the danger and lack of hygiene will be made based on an inspection conducted under the responsibility of a doctor or engineer registered with the Ministry, without prejudice to oversight by the Ministry of Labor and inspections, *ex officio,* by this organ.[219]

152. In addition, the Court finds that the Brazilian Constitution and the domestic laws on labor rights and on the rights of the child established the absolute prohibition of the employment of young people under 18 years of age in dangerous activities (*supra* paras. 102, 105 and 109) and that it was a well-known fact that children worked in the fireworks factory, in some cases from as young as 6 years of age (*supra* para. 72). Thus, in light of the duty to ensure rights, the State had the obligation to take the necessary measures to prevent possible violations of the rights of the child and, in this specific case, these measures involved monitoring the working conditions and verifying that no children were working in the fireworks factory.

153. That said, the Court notes that the legal point raised by the representatives relates to the alleged international responsibility of the State for the lack of oversight that resulted in the violation of the right to just and favorable conditions that guarantee safety, health and hygiene in the workplace, understood as a right protect by Article 26 of the American Convention. In this regard, the Court recalls that, in the *Case of Poblete Vilches et al. v. Chile,* it indicated:

> Thus, it can clearly be interpreted that the American Convention incorporated into its list of protected rights the so-called economic, social, cultural and environmental rights (ESCER), by derivation from the norms recognized in the Charter of the Organization of American States (OAS), and also the rules of interpretation established in Article 29 of the Convention itself; particularly, insofar as they prevent excluding or limiting the enjoyment of the rights established in the American Declaration and even those recognized by domestic law. Furthermore, based on a systematic, teleological and evolutive interpretation, the Court has resorted to the national and international *corpus iuris* on the matter to give specific content to the scope of the rights protected by the Convention, in order to derive the scope of the specific obligations relating to each right.[220]

154. In this section, the Court will rule on the right to just and favorable conditions of work as a component of the right to work,[221] and on its alleged violation in relation to the workers of the fireworks factory. To this end, it will proceed as follows: first, it will refer (1) to the right to just and favorable conditions that guarantee safety, health and hygiene in the workplace. Then, in response to the arguments of the Commission and the representatives, that children were exposed to an especially hazardous type of work, the Court will refer (2) to the prohibition of child labor in hazardous and unhealthy conditions and the employment of children under 14 years of age. Third, (3) it will refer to the prohibition of discrimination

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compliance with labor rights, human rights, and environmental protection laws. This necessarily involves State implementation of efficient policies for the inspection and supervision of enterprises in the course of their activities as well as the enterprises' establishment of policies to ensure respect for human rights and environmental laws in their operations. Both monitoring mechanisms should consult outside sources, including the parties affected. (k) Internal and external monitoring mechanisms should be transparent and independent of the businesses' control structures and of any sort of political influence."

[218] *Cf.* Consolidated Labor Laws, *supra*, article 193.

[219] *Cf.* Consolidated Labor Laws, *supra*, article 195.

[220] *Case of Poblete Vilches et al. v. Chile, supra*, para. 103.

[221] *Cf.* Committee on Economic, Social and Cultural Rights. General Comment No. 23*: The right to just and favorable conditions of work,* UN Doc. E/C.12/GC/23, April 27, 2016, and Case of Spoltore v. Argentina, *supra,* paras. 82 to 100.

and its relationship to this specific case and, lastly, (4) it will present its conclusions on this section.

B.1 The right to just and favorable conditions that guarantee safety, health and hygiene in the workplace

155. To identify those rights that can be derived by interpretation from Article 26 of the American Convention, it should be considered that this article makes a direct referral to the economic, social, educational, scientific and cultural norms contained in the OAS Charter. From a reading of the Charter, the Court notes that Articles 45(b) and (c),[222] 46[223] and 34(g)[224] of this instrument establish a series of norms that allow the right to work to be identified.[225] In particular, the Court notes that Article 45(b) of the OAS Charter establishes that: "(b) Work is a right and a social duty, it gives dignity to the one who performs it, and it should be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working." Thus, the Court considers that there is a reference with a sufficient degree of specificity to the right to just and favorable conditions of work to derive its existence and implicit recognition in the OAS Charter. Consequently, the Court considers that the right to just and favorable conditions that ensure safety, health and hygiene in the workplace is a right protected by Article 26 of the Convention. In this case, the Court does not find it necessary to rule on other possible elements of the right to just and favorable conditions of work that are also protected by Article 26.

156. The Court must determine the scope of the right to conditions of work that ensure the safety, health and hygiene of the worker in the context of this case, in light of the relevant international *corpus iuris* and the domestic legislation of the State of Brazil. The Court recalls that the obligations contained in Articles 1(1) and 2 of the American Convention constitute, ultimately, the basis for determining the international responsibility of a State for violations of the rights recognized in the Convention,[226] including those recognized in light of Article 26. Nevertheless, the Convention itself refers explicitly to the norms of international law for its interpretation and application, specifically in Article 29, which establishes the *pro persona*

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[222] *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; […].

[223] *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.

[224] *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.

[225] *Cf. Case of Lagos del Campo v. Peru, supra*, para. 143, and *Case of San Miguel Sosa et al. v. Venezuela, supra*, para. 220.

[226] *Cf. Case of the 'Mapiripán Massacre" v. Colombia, supra*, para. 107, and *Case of Hernández v. Argentina, supra*, para. 65.

principle.[227] In this way, as it has been the consistent practice of this Court,[228] when determining the compatibility of the acts and omissions of a State or of its laws with the Convention or other treaties for which it has jurisdiction, the Court is able to interpret the obligations and rights they contain in light of other pertinent treaties and norms.[229]

157. Consequently, the Court will use the sources, principles and criteria of the international *corpus iuris* as special standards applicable to determine the content of the right to just and favorable conditions of work. The Court has indicated that the use of the said standards to determine the right in question will be used to supplement the provisions of the Convention. In this regard, the Court affirms that it is not assuming competence over treaties for which it does not have this; nor is it granting conventional rank to norms contained in other national or international instruments relating to the economic, social, cultural and environmental rights (hereinafter "the ESCER").[230] To the contrary, the Court will make an interpretation in keeping with the provisions of Article 29 and its case law practice, which allow it to update the meaning of the rights derived from the OAS Charter that are recognized in Article 26 of the Convention. In addition, when determining the conditions of work that ensure the safety, health and hygiene of the worker, it will place particular emphasis on the American Declaration because, as this Court has established:

> […] the Member States of the Organization have understood that the Declaration contains and defines the fundamental human rights referred to in the Charter. Thus, the Charter of the Organization cannot be interpreted and applied, as far as human rights are concerned, without relating its norms to the corresponding provisions of the Declaration, in keeping with the practice of the organs of the OAS,.[231]

158. Similarly, the Court has indicated on other occasions that human rights treaties are living instruments and their interpretation should evolve over time and in keeping with current circumstances. This evolutive interpretation is consequent with the general rules of interpretation established in Article 29 of the American Convention, and also in the Vienna Convention on the Law of Treaties.[232] In addition, Article 31(3) of the Vienna Convention authorizes the use of means of interpretation such as any relevant agreements, practice or rules of international law that the States have agreed to concerning the subject-matter of the treaty, and these are some of the methods related to an evolutive vision of the treaty. Thus, in order to determine the scope of the right to working conditions that ensure the safety, health and hygiene of the worker, as derived from the economic, social, educational, scientific and cultural standards of the OAS Charter, the Court will refer to the relevant instruments of the international *corpus iuris*.

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227 *Cf. Case of the Pacheco Tineo family v. Bolivia. Preliminary objections, merits, reparations and costs.* Judgment of November 25, 2013. Series C No. 272, para. 143, and *Case of Hernández v. Argentina, supra*, para. 65.

228 *Cf. Case of Gelman v. Uruguay. Merits and reparations.* Judgment of February 24, 2011. Series C No. 221, para. 78 and 121; *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs.* Judgment of February 24, 2012. Series C No. 239, para. 83; *Case of the Pacheco Tineo family v. Bolivia, supra*, para. 129; *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs.* Judgment of November 30, 2016. Series C No. 329, para. 168; *Case of Lagos del Campo v. Peru, supra*, para. 145; *Case of Poblete Vilches et al. v. Chile, supra*, para. 103; *Case of Cuscul Pivaral et al. v. Guatemala, supra*, para. 100; *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru, supra*, para. 158, and *Case of Hernández v. Argentina, supra*, para. 65.

229 *Cf. Case of Muelle Flores v. Peru, supra*, para. 176, and *Case of Hernández v. Argentina, supra*, para. 65.

230 *Cf. Case of the Pacheco Tineo family v. Bolivia, supra*, para. 143, and *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, supra*, para. 199.

231 *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights,* Advisory Opinion OC-10/89, July 14, 1989. Series A No. 10, para. 43.

232 *Cf. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law,* Advisory Opinion OC-16/99, October 1, 1999. Series A No. 16, para. 114, and *Case of Hernández v. Argentina, supra*, para. 65.

159. The Court will now proceed to verify the meaning and scope of this right for the purposes of the instant case.

B.1.1 The content of the right to just and favorable conditions that guarantee safety, health and hygiene in the workplace

160. As indicated in the preceding section, Article 45(b) of the OAS Charter indicates explicitly that work should be performed under conditions that ensure the life and health of the worker (*supra* para. 155). In addition, Article XIV of the American Declaration of the Rights and Duties of Man (hereinafter "the American Declaration") allows the right to just and favorable conditions of work to be identified when indicating that everyone has "the right to work under proper conditions."

161. The right to just and favorable conditions of work has been recognized in different international instruments in addition to the OAS Charter and the American Declaration. Within the inter-American system, Article 7 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" (hereinafter "Protocol of San Salvador")[233] establishes that "[t]he States Parties to this Protocol recognize that the right to work to which the foregoing article refers presupposes that everyone shall enjoy that right under just, equitable, and satisfactory conditions, which the States Parties undertake to guarantee in their internal legislation, particularly with respect to: […] (e) Safety and hygiene at work."

162. In the universal sphere, the Universal Declaration of Human Rights establishes that: "[e]veryone has the right to […] just and favorable conditions of work."[234] Meanwhile, the International Covenant on Economic, Social and Cultural Rights establishes that: "[t]he States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favorable conditions of work which ensure, in particular: […] (b) Safe and healthy working conditions." [235]

163. Similarly, Article 11(1) of the Convention on the Elimination of All Forms of Discrimination against Women establishes that the States "shall take the appropriate measures to eliminate discrimination against women in the field of employment," and includes among these measures "the right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction."[236]

164. Within the framework of the International Labour Organization (hereinafter "the ILO"), its Constitution states that "an improvement of [working] conditions is urgently required; as, for example, by […] the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons and women."[237] Meanwhile, ILO Convention No. 81 of 1947 on Labour Inspection[238] establishes that each State party to the Convention "shall maintain a system of labour inspection in industrial workplaces";[239] that this system "shall apply to all workplaces in respect of which legal provisions relating to conditions of work and the protection of workers while engaged in their work are enforceable

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[233] Brazil acceded to the Protocol of San Salvador on August 21, 1996.
[234] Universal Declaration of Human Rights, Article 23.
[235] International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 7(b). Brazil acceded to the ICESCR on January 24, 1992.
[236] Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Article 11(1)(f).
[237] International Labour Organization. *Constitution*. Preamble.
[238] Ratified by Brazil on October 11, 1989, and in force at the time of the events.
[239] International Labour Organization, *Convention No. 81 on Labour Inspection,* 1947, Article 1.

by labour inspectors,"[240] and "[t]he functions of the system of labour inspection shall be: (a) to secure the enforcement of the legal provisions relating to conditions of work and the protection of workers while engaged in their work, such as provisions relating to hours, wages, safety, health and welfare, the employment of children and young persons, and other connected matters, in so far as such provisions are enforceable by labour inspectors."[241]

165. In addition, ILO Convention No. 155 of 1981 on occupational safety and health,[242] establishes that the States must "formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment," in order "to prevent accidents and injury to health arising out of, linked with or occurring in the course of work."[243] According to an expert opinion received by this Court, that policy "should identify activities that are dangerous to the health and safety of the workers, determine those operations, processes, agents or substances that, due to their risk, should be prohibited, restricted, or subject to authorization or control by the competence authority, and establish procedures for the declaration of occupational accidents by employers, and the elaboration of statistics."[244]

166. The Committee on Economic, Social and Cultural Rights has also referred to the right to just and favorable conditions of work, both in relation to other rights, and specifically. General Comment No. 14, on the right to the highest attainable standard of health, refers to the need for "preventive measures in respect of occupational accidents and diseases,"[245] and General Comment No. 18, on the right to work, refers to "the right of the worker to just and favourable conditions of work, in particular to safe working conditions."[246]

167. Specifically, General Comment No. 23 on the right to just and favorable conditions of work, indicates that this is a right recognized in the International Covenant on Economic, Social and Cultural Rights (hereinafter "the ICESCR"), and that it is a component and a corollary of other labor rights.[247] It also includes other relevant consideration for the analysis of this case. First, it reiterates that "the right to just and favorable conditions of work is a right of everyone, without distinction of any kind," regardless of gender, age or the sector in which the work is performed, including the informal sector.[248] Second, it refers to a non-

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[240] International Labour Organization, *Convention No. 81, supra,* Article 2(1).

[241] International Labour Organization, *Convention No. 81, supra,* Article 3(1)(a).

[242] Ratified by Brazil on May 18, 1992, and in force at the time of the events.

[243] International Labour Organization, *Convention No. 155 on occupational safety and health,* 1981, art. 4.

[244] Expert opinion presented to the Inter-American Court by Christian Courtis (merits file, folio 897).

[245] Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health,* UN Doc. E/C.12/2000/4, August 11, 2000, para. 15.

[246] Committee on Economic, Social and Cultural Rights, *General Comment No. 18: The right to work*, UN Doc. E/C.12/GC/18, November 24, 2005, para. 12(c).

[247] *Cf.* Committee on Economic, Social and Cultural Rights, *General Comment No. 23, supra*, para. 1.

[248] *Cf.* Committee on Economic, Social and Cultural Rights, *General Comment No: 23, supra*, para. 5. In this case, it must be emphasized that the fireworks factory was a small private enterprise that operated within the informal economy. In this regard, Principle No. 14 of the United Nations Guiding Principles on Business and Human Rights indicates that: "The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts." Meanwhile, the Working Group on the issue of human rights and transnational corporations and other business enterprises has verified that: "Workers in the informal sector do not have legal and social protection through their work and are generally not unionized, and their working conditions more easily escape the oversight of labour inspectorates." Despite this, human rights obligations subsist. "This means that all business enterprises, from small and medium-sized enterprises to large multinational enterprises, are expected to exercise human rights due diligence (as described in Guiding Principles 17 to 21), to avoid causing or contributing to adverse human rights impacts, and to take steps to mitigate and address any such adverse impact that is directly linked to their operations, including by cooperating in their remediation." *Cf. United Nations Guiding Principles on Business and Human Rights, supra,* Principle No. 14 and *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, UN Doc. A/HRC/35/32,

exhaustive list of fundamental components of this right. Among those components, which are listed in Article 7 of the ICESCR, are "safe and healthy working conditions."

168. In particular, with regard to occupational safety and health, General Comment No. 23 establishes that "[p]reventing occupational accidents and disease is a fundamental aspect of the right to just and favourable conditions of work, and is closely related to other Covenant rights, in particular the right to the highest attainable level of physical and mental health."[249] And, it indicates that the States "should adopt a national policy for the prevention of accidents and work-related health injury by minimizing hazards in the working environment."[250]

169. In addition to being widely recognized in the international *corpus iuris*,[251] the right to just and favorable conditions of work has also been recognized in the Constitutions and the laws of the countries that have accepted the contentious jurisdiction of the Inter-American Court[252] and, in particular, by the Brazilian State. At the date of the explosion of the fireworks factory, the latter not only recognized the right to just and favorable conditions of work, but also had laws that imposed on it the obligation to supervise such conditions.

170. The Brazilian Constitution establishes the right to work and the guarantees that derive from this. For example, its article 7 indicates that the rights of urban and rural workers include the reduction of work-related hazards through health, hygiene and safety regulations; accident insurance, and the prohibition of dangerous, unhealthy and night work for young people under 18 years of age, and any work for children under 16 years of age, except as an apprentice from 14 to 16 years of age, among other measures.

171. Meanwhile, the Consolidated Labor Laws contains a specific chapter on the regulations concerning the prevention of occupational accidents and diseases. For example, its article 166 establishes the obligation of the enterprise to provide its employees, free of charge, with individual protection equipment that is appropriate to the associated risk, when the general measures do not offer a complete protection against occupational accidents and harm to health.[253] Article 195 establishes that, in keeping with the Ministry of Labor's regulations, the description and classification of unhealthy and hazardous work will be made by an inspection under the responsibility of a doctor or an engineer registered with the Ministry, without

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April 24, 2017, paras. 10 and 16.

[249] Committee on Economic, Social and Cultural Rights, *General Comment No. 23, supra*, para. 25.

[250] Committee on Economic, Social and Cultural Rights, *General Comment No. 23, supra,* para. 25.

[251] See also: European Social Charter, Article 2; Charter of Fundamental Rights of the European Union, Article 31, and African Charter on Human and Peoples' Rights, Article 15 (Brazil is not a party to these treaties).

[252] *Cf. Constitution of Argentina,* article 14 bis, and *Employment Contract Act,* No. 20,744, article 75; *Constitution of the Plurinational State of Bolivia,* article 46, and *General Labor Act*, article 67; *Constitution of the Republic of Chile,* articles 5 and 19.16, Labor Code, article 153, and Law 16,744 on risks of occupational accidents and diseases; *Constitution of Colombia,* articles 25 and 53, and Decree 1072 of 2015 or *Decree regulating the employment sector,* Volume 2, Part 2, Title 4 (Occupational risks), Chapter 6; *Constitution of the Republic of Costa Rica*, article 56, and *Labor Code*, articles 283 and 284; *Constitution of the Republic of Ecuador,* article 33, and *Labor Code,* articles 38 and 42; *Constitution of El Salvador*, article 2, and *Labor Code*, articles 106 and 314; *Constitution of Guatemala*, article 101, and *Labor Code*, articles 61, 122, 148, 197 and 278; *Constitution of the Republic of Haiti,* article 35, and *Labor Code* articles 438 to 441 and 451 to 487; *Constitution of the Republic of Honduras*, article 128, and *Labor Code,* articles 391 and 395; *Constitution of Mexico,* article 123, and *Federal Labor Act*, articles 23, 166, 175, 541 and 542; *Constitution of the Republic of Nicaragua*, article 83 and *Labor Code,* articles 100 to 105; *Constitution of Panama,* article 64, and *Labor Code*, articles 282 and 284; *Constitution of the Republic of Paraguay*, articles 86, 89, 90, 92 and 99, and *Labor Code*, articles 36, 49, 194, 273, 274 and 398; *Constitution of Peru*, articles 22 and 24, and *General Labor Act*, article 322; *Constitution of the Dominican Republic,* article 62, and Decree 522-06 of 2006 (*Regulations on occupational safety and health*); *Constitution of the Republic of Suriname*, article 28; *Constitution of the Oriental Republic of Uruguay*, articles 7, 53 and 54; Law 5,032 of 1914 and Law 5,350 of November 19, 1915.

[253] *Cf.* Consolidated Labor Laws, *supra,* article 166.

prejudice to oversight by the Ministry of Labor and inspections, *ex officio,* by this organ.[254] The CLT are supplemented by the administrative regulations issued by the Ministry of Labor and Employment that regulate the professions in greater detail and provide, for example, the criteria that the employer should follow to ensure a healthy and safe workplace. Thus, Regulatory Standard No. 19 of the Ministry of Labor regulates activities with explosives and includes provisions relating to occupational safety and to the workplace.[255] According to this regulation, the State had the obligation to oversee the existence of just and favorable working conditions that ensured occupational safety and health.

172. The Court considers that the nature and scope of the obligations derived from the protection of working conditions that ensure the worker's safety, health and hygiene, include aspects that are enforceable immediately, as well as others of a progressive nature.[256] In this regard, the Court recalls that, regarding the former (obligations that are enforceable immediately), States must guarantee that this right is exercised without discrimination, and also take effective measures to ensure its full realization.[257] Regarding the latter (obligations of a progressive nature), progressive realization means that States Parties have the specific and constant obligation to advance as effectively and rapidly as possible towards the full effectiveness of the said rights,[258] subject to available resources, by legislation or other appropriate means. Moreover, they have the obligation of *non-retrogressivity* as regards the realization of other rights that have been attained.[259] Consequently, the treaty-based obligations of respect and guarantee, as well as to adopt domestic legal measures (Articles 1(1) and 2), are essential to achieve their effectiveness.[260]

173. Nevertheless, the Court notes that this case does not relate to the progressive obligations derived from Article 26 of the Convention, but rather to the failure to guarantee the right to just and favorable conditions that ensure occupational safety, health and hygiene owing to the lack of oversight.

174. Taking into account the facts and the particularities of this case, the Court concludes that this right means that the worker must be able to carry out his work in adequate conditions of safety, hygiene and health that prevent occupational accidents,[261] and this is especially relevant in the case of activities that involve significant risk to the life and integrity of the workers. Also and in particular, in light of the Brazilian legislation, this right involves the adoption of measures to prevent or reduce work-related risks and occupational accidents; the

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[254] *Cf.* Consolidated Labor Laws, *supra*, article 195.

[255] *Cf.* Regulatory Standard No. 19 (NR 19 – Explosives), *supra*.

[256] *Mutatis mutandi, Cf. Case of Poblete Vilches et al. v. Chile, supra*, para. 104, and *Case of Cuscul Pivaral et al. v. Guatemala*, *supra*, para. 98.

[257] *Cf.* Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, para. 1, of the Covenant),* UN Doc. E/1991/23, December 14, 1990, para. 3 and Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The right to social security (Article 9)*, UN Doc. E/C.12/GC/19, February 4, 2008, para. 40.

[258] *Cf.* Committee on Economic, Social and Cultural Rights, *General Comment No. 3, supra*, para. 9 and Committee on Economic, Social and Cultural Rights, *General Comment No. 19*, *supra*, paras. 40 and 41.

[259] *Cf. Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2009. Series C No. 198, paras. 102 and 103, and *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru, supra*, para. 173.

[260] *Cf. Case of Poblete Vilches et al. v. Chile, supra*, para. 104, and *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru, supra*, para. 173.

[261] According to the International Labour Organization (ILO): "(a) the terms "occupational accident" covers an occurrence arising out of, or in the course of, work which results in fatal or non-fatal injury; (b) the term "occupational disease" covers any disease contracted as a result of an exposure to risk factors arising from work activity." *Cf.* International Labour Organization. *Protocol 155 to the Occupational Safety and Health Convention,* Article 1. Brazil has not ratified this protocol.

obligation to provide adequate protection equipment for work-related hazards; the classification by the labor authorities of unhealthy and unsafe workplaces, and the obligation to oversee such conditions, also under the responsibility of the labor authorities.

B.1.2 Violation of the right to just and favorable conditions of work in this specific case

175. As already indicated, Brazil had the obligation to ensure just and favorable conditions of work as described in the preceding paragraph. However, the workers of the factory of "Vardo dos Fogos" worked in precarious, unhealthy and unsafe conditions, in sheds located in fields that did not meet even the minimum standards of safety for carrying out a dangerous activity and that did not meet the conditions that would have avoided or prevented occupational accidents. They never received any information on safety measures, or work-related protection equipment. And all this took place without the State exercising any supervision or oversight actions to verify the working conditions of those employed in the fireworks factory, or taking any action to prevent accidents, even though domestic law characterized the activities carried out in the factory as especially dangerous.

176. Based on the above, the State failed to recognize the right to just and favorable conditions of work, to the extent that it failed to comply with its duty to prevent occupational accidents. This obligation was especially relevant owing to the magnitude of the events in the instant case, which resulted in gross violations of the life and personal integrity of the workers. Even though Brazil had complied with its duty to regulate the activity carried out in the fireworks factory (*supra* para. 171), it failed to exercise oversight and control of the conditions of work, as a necessary measure to prevent accidents. And this was despite the fact that labor regulations required the State to exercise supervision, especially in the case of dangerous activities. Therefore, the State violated the right contained in Article 26 of the American Convention.

B.2 Prohibition of child labor

177. The Court has verified that several children and adolescents worked in the fireworks factory. Thus, of the 60 people who died, 19 were girls and one was a boy, the youngest of whom was 11 years of age. Meanwhile, the survivors included a girl and two boys who were between 15 and 17 years of age.

178. In this regard, Article 19 of the American Convention establishes that children have the right to special measures of protection. According to the Court's case law, this mandate has an impact on the interpretation of the other rights recognized in the Convention,[262] including the right to work in the terms defined in the preceding section. In addition, this Court has understood that Article 19 of the Convention establishes an obligation for the State to respect and ensure the rights recognized to children in other international instruments; accordingly, when defining the meaning and scope of the State's obligations in relation to the rights of the child it is necessary to have recourse to the international *corpus iuris*,[263] in particular, to the Convention on the Rights of the Child (hereinafter "the CRC").[264]

179. Article 32 of the CRC establishes "the right of the child to be protected from economic

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[262] *Cf. Case of Ramírez Escobar et al. v. Guatemala. Merits, reparations and costs.* Judgment of March 9, 2018. Series C No. 351, para. 150, and *Case of Rochac Hernández et al. v. El Salvador. Merits, reparations and costs.* Judgment of October 14, 2014. Series C No. 285, para. 106.

[263] *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and costs.* Judgment of May 26, 2001. Series C No. 77, para. 194, and *Case of Rochac Hernández et al. v. El Salvador*, *supra,* para. 106.

[264] Brazil ratified the Convention on the Rights of the Child on September 24, 1990.

exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or […] development."[265] This obligation matches the provisions of the Brazilian Constitution, article 8 of which prohibits dangerous, unhealthy or night work for young people under 18 years of age, and work for children under 16 years of age, unless as an apprentice (*supra* para. 102). Similarly, the CLT prohibits dangerous, unhealthy or night work for young people under 18 years of age, and any work for children under 16 years of age, unless as an apprentice from 14 to 16 years of age.[266] Lastly, in addition to the said provisions, the Statute of the Child and Adolescent prohibits any type of work for children under 14 years of age,[267] and bans adolescents from performing dangerous, unhealthy or difficult work.[268]

180. Based on the standards described above, the Court finds that, in light of the American Convention, children have a right to special measures of protection. These measures, according to the CRC, include protection from work that may interfere with their education or be harmful to their health and development, as in the case of the manufacture of fireworks. In addition, the Court finds, in application of Article 29(b) of the American Convention and in light of the laws of Brazil, that dangerous, unhealthy and night work was absolutely prohibited in Brazil for children under 18 years of age at the date of the facts. Therefore, the State should have taken every measure available to it to ensure that no child was working in activities such as those carried out in the fireworks factory.[269]

181. Based on the foregoing, the Court finds that the State failed to comply with the mandate contained in Article 19 of the American Convention in relation to Article 26 of this instrument with regard to the children who died and those who survived the explosion of the fireworks factory, by failing to adopt the measures of protection that their condition as children imposed and by allowing children, from 11 years of age, to be working at the time of the explosion.

B.3 Prohibition of discrimination

182. As it has indicated on previous occasions, the Court recalls that, at the current stage of the evolution of international law, the fundamental principle of equality and non-discrimination has entered the domain of *jus cogens* and permeates the whole legal system. Moreover, national and international public order are based on this principle. Consequently, States must refrain from carrying out actions that, in any way, directly or indirectly create situations of discrimination *de jure* or *de facto.*[270] In this regard, under the general obligation

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[265] In this regard, the Committee on the Rights of the Child has recognized that child labor in the informal economy placed the rights of the child at particular risk and that children who work in hidden areas of informal work face "precarious employment status, low, irregular or no remuneration, health risks, a lack of social security, limited freedom of association and inadequate protection from discrimination and violence or exploitation." Committee on the Rights of the Child, *General Comment No. 16: State obligations regarding the impact of the business sector on children's rights.* UN Doc. CRC/C/GC/16, April 17, 2013, para. 35.

[266] *Cf.* Consolidated Labor Laws, *supra,* article 611-B, XXIII.

[267] *Cf.* Statute of the Child and Adolescent, *supra*, article 60.

[268] *Cf.* Statute of the Child and Adolescent, *supra*, article 67, II.

[269] This conclusion is reinforced by the content of the ILO conventions on child labor that, although they were ratified by Brazil after the date of the facts, indicate that young people under 18 years of age should not carry out dangerous activities. Article 3 of ILO Convention 138 of 1993 on the minimum age, establishes that: "The minimum age for admission to any type of employment or work which by its nature or the circumstances in which it is carried out is likely to jeopardise the health, safety or morals of young persons shall not be less than 18 years" (Brazil ratified ILO Convention 138 of 1973 on June 28, 2001; that is, after the events of this case). Meanwhile, ILO Convention 182 of 1999 on the worst forms of child labor indicates that one of the worst forms of child labor is "work that, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children," and that the State must "design and implement programmes of action to eliminate as a priority the worst forms of child labour" (Brazil ratified ILO Convention 182 of 1999 on the worst forms of child labor on February 2, 2000, after the events of this case). See also: ILO Declaration on Fundamental Principles and Rights at Work adopted in 1998.

[270] *Cf. Juridical Condition and Rights of the Undocumented Migrants,* Advisory Opinion OC-18, September 17,

established in its Article 1(1), the American Convention establishes the obligation of the State to respect and to ensure "without discrimination" the rights contained in the Convention, while Article 24 protects the right to "equal protection of the law."[271] In other words, Article 1(1) ensures that all the rights of the Convention are guaranteed without discrimination, while Article 24 requires that the domestic laws of each State or their application should not grant unequal treatment. Accordingly, if a State discriminates with regard to the respect and guarantee of a Convention right, it would be in non-compliance with the obligation established in Article 1(1) and the substantive right in question. To the contrary, if the discrimination refers to an unequal protection by domestic law or its application, the fact must be examined in light of Article 24 of the American Convention.[272]

183. In keeping with the above, the Court has indicated that "States have the obligation not to introduce discriminatory regulations into their legal system, to eliminate regulations of a discriminatory nature, to combat practices of this nature, and to establish norms and other measures that recognize and ensure the effective equality before the law of everyone."[273] On this basis, in this case, the Court will analyze the alleged violations in light of Articles 1(1) and 24 of the Convention, because the arguments of the Commission and the representatives focus on both the alleged discrimination suffered by the presumed victims owing to their condition as Afro-descendant women and their situation of poverty, and also due to the failure to adopt positive measures to ensure the Convention rights.

184. In particular, in relation to Article 1(1) of the Convention, the Court has established that this is a general provision the content of which extends to all the provisions of the treaty and entails the obligation of the States Parties to respect and ensure the free and full exercise of the rights and freedoms recognized therein "without any discrimination." In other words, whatever the origin or the form it takes, a treatment that could be considered discriminatory in relation to the exercise of the rights guarantees in the Convention is, *per se,* incompatible with this instrument.[274] Thus, non-compliance by the State, due to any discriminatory treatment, with the general obligation to respect and to ensure human rights gives rise to its international responsibility.[275] This is why there is an indissoluble link between the obligation to respect and to ensure human rights and the principle of equality and non-discrimination.[276]

185. Regarding discrimination owing to the situation of poverty of the workers of the fireworks factory, the Court must first point out that this is not considered a special category of protection according to the literal sense of Article 1(1) of the American Convention. However, this is not an obstacle to consider that discrimination for this reason is prohibited by the Convention. First, because the list contained in Article 1(1) of the Convention is not exhaustive but merely illustrative and, second, because poverty may well be understood to fall within the category of "economic status" to which the said Article expressly refers, or in relation to other categories of protection such as "social origin" or "any other social

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2003. Series A No. 18, para. 103, and *Case of Montesinos Mejía v. Ecuador, supra*, para. 125.

[271] *Cf. Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of August 5, 2008. Series C No. 182, para. 209, and *Case of V.R.P., V.P.C. et al. v. Nicaragua. Preliminary objections, merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 350, para. 289.

[272] *Cf. Case of Apitz Barbera et al., supra,* para. 209, and *Case of San Miguel Sosa et al. v. Venezuela, supra*, para. 162.

[273] *Case of V.R.P., V.P.C. et al. v. Nicaragua, supra*, para. 289.

[274] *Cf. Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica,* Advisory Opinion OC-4/84, January 19, 1984. Series A No. 4, para. 53, and *Case of Ramírez Escobar et al. v. Guatemala, supra*, para. 271.

[275] *Cf. Juridical Condition and Rights of the Undocumented Migrants,* Advisory Opinion OC-18*, supra*, para. 85, *and Case of Ramírez Escobar et al. v. Guatemala, supra*, para. 271.

[276] *Cf. Juridical Condition and Rights of the Undocumented Migrants, supra*, para. 85, *and Case of Ramírez Escobar et al. v. Guatemala, supra*, para. 271.

condition,”[277] in view of its multidimensional nature.

186. In this regard, the Court recalls that States are obliged “to adopt positive measures to reverse or modify any discriminatory situations that exist in their societies that affect a specific group of persons. This entails the special obligation of protection that the State must exercise with regard to the actions and practices of third parties that, with its tolerance or acquiescence, create, maintain or encourage discriminatory situations”[278] and, also, that States are obliged to adopt positive measures, to be determined based on the particular needs for protection of the subjects of law, due either to their personal condition or to the specific situation in which they find themselves,[279] such as extreme poverty or marginalization.[280]

187. The Inter-American Court has already ruled on poverty and the prohibition of discrimination for reasons of economic status. It has recognized in several of its decisions that the human rights violations had been accompanied by situations of marginalization and exclusion due to the situation of poverty of the victims, and it has identified poverty as a factor of vulnerability that increased the impact of the victimization.[281] Recently, in the *Case of the Hacienda Brasil Verde Workers v. Brazil*, it found that “the State had not considered the vulnerability of the 85 workers rescued on March 15, 2000, owing to the discrimination based on their economic situation to which they were subjected,”[282] and found the State responsible for the situation of historic structural discrimination owing to the economic status of the victims.[283] In addition, in the *Case of the Hacienda Brasil Verde Workers v. Brazil*, the Court indicated that, in the case of structural discrimination, it is necessary to consider to what extent the victimization in the specific case reveals the vulnerability of those who belong to a group.

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[277] Regarding the ICESCR, the Committee on Economic, Social and Cultural Rights, in its General Comment No. 20, has indicated that “the inclusion of “other status” indicates that this list is not exhaustive and other grounds may be incorporated in this category.” It has indicated that “the nature of discrimination varies according to context and evolves over time. A flexible approach to the ground of “other status” is thus needed in order to capture other forms of differential treatment that [(i)] cannot be reasonably and objectively justified and [(ii)] are of a comparable nature to the expressly recognized grounds. These additional grounds are commonly recognized when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalization. In this regard, the CESCR has indicated that other possible prohibited grounds of discrimination could be caused by an intersection of two or more explicit or tacit prohibited grounds of discrimination. *Cf.* Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights (Art. 2, para. 2 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/20, July 2, 2009, paras. 15 and 27.

[278] *Cf. Juridical Condition and Rights of the Undocumented Migrants, supra,* para. 104, and *Case of the Hacienda Brasil Verde Workers v. Brazil, supra*, para. 336.

[279] *Cf. Case of the ‘Mapiripán Massacre” v. Colombia*, *supra*, paras. 111 and 113, and *Case of the Hacienda Brasil Verde Workers v. Brazil, supra*, para. 337.

[280] *Cf. Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra*, para. 154, and *Case of the Hacienda Brasil Verde Workers v. Brazil, supra*, para. 337.

[281] *Cf. Case of the "Juvenile Re-education Institute" v. Paraguay. Preliminary objections, merits, reparations and costs*. Judgment of September 2, 2004. Series C No. 112, para. 262; *Case of the Moiwana Community v. Suriname. Preliminary objections, merits, reparations and costs.* Judgment of June 15, 2005. Series C No. 124, para. 186; *Case of the ‘Mapiripán Massacre” v. Colombia*, *supra*, para. 180; *Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra*, para. 154; *Case of Ximenes Lopes v. Brazil, supra*, para. 104; *Case of Servellón García et al. v. Honduras*. Judgment of September 21, 2006. Series C No. 152, para. 116; *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of August 24, 2010. Series C No. 214, para. 233; *Case of Rosendo Cantú et al. v. Mexico. Preliminary objection, merits, reparations and costs*. Judgment of August 31, 2010. Series C No. 216, para. 201; Case of *Furlan and family v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2012. Series C No. 246, para. 201; *Case of Uzcátegui et al. v. Venezuela. Merits and reparations.* Judgment of September 3, 2012. Series C No. 249, para. 204; *Case of the Santo Domingo Massacre v. Colombia. Preliminary objections, merits and reparations.* Judgment of November 30, 2012. Series C No. 259, paras. 273 and 274, and *Case of Gonzales Lluy et al. v. Ecuador, supra*, para. 193.

[282] *Case of the Hacienda Brasil Verde Workers v. Brazil, supra,* para. 341.

[283] *Cf. Case of the Hacienda Brasil Verde Workers v. Brazil, supra,* fourth operative paragraph

188. In the instant case, the Commission argued that there was a connection between the State's failure to comply with its obligations and the situation of poverty faced in the municipality of Santo Antônio de Jesus, so that the situation of poverty of the fireworks factory workers had resulted in the violation of their right to just and favorable conditions of work without discrimination. This would indicate that the case involves an alleged structural discrimination for reasons of poverty.[284] In this regard, the Court notes that the presumed victims were individuals who, on account of the structural discrimination based on their situation of poverty, were unable to access any other source of income and had to accept employment in conditions of vulnerability that disregarded the mandates of the American Convention and that exposed them to victimization.

189. Thus, the fact that an especially dangerous economic activity had been set up in the area was related to the poverty and marginalization of the population that lived, and still lives, there. For the inhabitants of the districts in which the workers of the fireworks factory lived, the work they were offered there was not only the main, but also the only, employment option because they had very low levels of schooling and literacy; they were also perceived as being rather untrustworthy and were therefore unable to obtain other employment.[285] In this regard, the United Nations Guiding principles on extreme poverty and human rights recognize that "persons living in poverty experience unemployment, underemployment, unreliable casual labour, low wages and unsafe and degrading working conditions."[286]

190. In addition to the structural discrimination due to the presumed victim's poverty status, the Court considers that various structural disadvantages coalesced around them and had an impact on their victimization. These disadvantages were both economic and social, and also related to certain groups of individuals.[287] In other words, there was a convergence of factors of discrimination. The Court has referred to this concept explicitly or tacitly in various judgments[288] and has referred to different categories in this regard.

191. That said, in this case, the intersection of factors of discrimination increased the comparative disadvantages of the presumed victims. Thus, the presumed victims shared specific factors of discrimination suffered by those living in poverty, women, and Afro-descendants, but they also suffered a specific form of discrimination owing to the confluence of all these factors and, in some cases, because they were pregnant, because they were girls, or because they were girls and pregnant. In this regard, it is important to stress that the Court has established that pregnancy may constitute a situation of particular vulnerability[289] and, in some cases of victimization, pregnancy may result in a differentiated violation.[290]

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[284] Structural discrimination refers to conducts that are "deeply entrenched in social behaviour and organization, often involving […] indirect discrimination" against certain groups, which is expressed in practices which create relative disadvantages. These practices may appear neutral, but they have a disproportionate impact on discriminated groups. *Cf.* Committee on Economic, Social and Cultural Rights*, General Comment No. 20, supra*, para. 12.

[285] In this regard, Leila Cerqueira dos Santos, stated: "This was the only job available because either we worked in the factory or in family homes, but many families would not employ us because they thought that we came from a poor neighborhood and that we might steal from them and so they discriminated against us, they did not accept us." Statement made by Leila Cerqueira dos Santos, *supra*.

[286] Human Rights Council*, United Nations Guiding principles on extreme poverty and human rights*, UN Doc. A/HRC/21/39, September 27, 2012, principio 83.

[287] *Cf.* Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston, UN Doc. A/HRC/29/31, Mat 27, 2015, para. 7.

[288] *Cf. Case of the Miguel Castro Castro Prison v. Peru. Merits, reparations and costs.* Judgment of November 25, 2006. Series C No. 160, paras. 233 and 293; *Case of Fernández Ortega et al. v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of August 30, 2010. Series C No. 215, para. 185; *Case of Rosendo Cantú et al. v. Mexico, supra*, para. 169; *Case of Gonzales Lluy et al. v. Ecuador, supra*, para. 290; *Case of V.R.P., V.P.C. et al. v. Nicaragua, supra*, para. 154; *Case of Ramírez Escobar et al. v. Guatemala, supra*, para. 304, and *Case of Cuscul Pivaral et al. v. Guatemala, supra,* paras. 128 and 138.

[289] *Cf. Case of Gelman v. Uruguay. Merits and reparations, supra,* para. 97.

[290] *Cf. Case of the Miguel Castro Castro Prison v. Peru, supra,* para. 292, and *Case of Gelman v. Uruguay.*

192. Regarding the discrimination suffered by women,[291] in a 2012 report, the United Nations Committee for the Elimination of Discrimination against Women indicated that "the achievement of equality between men and women in the field of employment remains a challenge" in Brazil and that it was "concerned that stereotypes related to gender and race contribute to the segregation of the Afro-descendant and indigenous women into lower quality jobs."[292]

193. Discrimination against the afro-descendant population in Brazil has been a historic constant. According to the Committee on the Rights of the Child, based on data for 2006, "[i]n Brazil, among the richest 10% of the population, only 18% are people of African descent (mixed-race or black); in the poorest 10%, 71% are black or mixed-race."[293] Meanwhile, on various occasions, the Committee for the Elimination of Racial Discrimination has informed the State of its concern owing to the inequality that affects the black and mixed-race communities owing to the impact of this on the exercise of other rights.[294]

194. Regarding the situation of children, the Inter-American Commission found that, in Brazil, in 1997, one year before the explosion, school absenteeism by afro-descendant children was due to the fact that they were compelled to contribute to their families' income[295] and that it was very common that children worked in industry, with toxic and unhealthy materials and under dangerous conditions,[296] even though the Brazilian Constitution prohibited the work of children under 16 years of age, unless they were apprentices, and the work of people under 18 years of age in dangerous and unhealthy conditions. In addition, according to an expert opinion presented to the Court, there is a high incidence of child labor in Brazil. According to official figures, in 2015, 2.7 million children and adolescents were working, most of them Afro-descendant children who live in urban areas and have paid jobs. Furthermore, child labor affects those groups that are particularly vulnerable.[297]

195. That said, economic and social disadvantages, when related to the above-mentioned

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Merits and reparations, *supra*, para. 97.

[291] According to the National Household Census conducted in Brazil by the IBGE (PNAD 2003), approximately 21% of Afro-descendant women were domestic workers and only 23% of them were formally registered as employees, this compares to 12.5% of white women who were domestic workers, of whom 30% were fully registered. The average monthly earnings of Afro-descendant women in Brazil in 2003 were almost half the amount received by white women. There was a difference of almost nine percentage points in the unemployment rate between white men and Afro-descendant women. While the rate for white men was 8.3%, for Afro-descendant women it was 16.6%. Of Brazilian women of 16 years of age or more who were employed, 17% were domestic workers and, among these, most were Afro-descendant women who, in general, did not enjoy any labor rights because they did not have a formal contract. The data also revealed that Afro-descendant women earned 65% of what Afro-descendant men earned and only 30% of the average income of white men. *Cf. Retrato de las Desigualdades: Género and Raza,* [Portrait of inequalities: gender and race], UNIFEM and IPEA, Brazil, 2003. Available at: https://www.ipea.gov.br/retrato/pdf/primeiraedicao.pdf.

[292] Committee for the Elimination of Discrimination against Women, Concluding observations on Brazil, UN Doc. CEDAW/C/BRA/CO/7, March 23, 2012, para. 26.

[293] Committee on the Rights of the Child, Consideration of reports submitted by the States parties under article 44 of the Convention, Brazil, UN Doc. CRC/C/BRA/2-4, December 8, 2014, para. 99.

[294] On various occasions, the Committee for the Elimination of Racial Discrimination has informed the State of Brazil of its concern owing to "the persistence of deep structural inequalities affecting black and mestizo communities and indigenous peoples." In a 1996 report, this Committee found that "discriminatory attitudes persist[ed] […] at a number of levels in the political, economic and social life of the country [and] concern[ed], *inter alia*, the right to life and security of persons." *Cf.* Committee for the Elimination of Racial Discrimination, UN Doc. CERD/C/64/CO/2, April 28, 2004, para. 12 and Committee for the Elimination of Racial Discrimination, UN Doc. CERD/C/304/Add.11, September 27, 1996, paras. 8 to 10.

[295] *Cf. Report on the situation of human rights in Brazil,* Racial discrimination. OEA/Ser.L/V/II.97, Doc. 29 rev.1, September 29, 1997, Chapter IX, para. 3.

[296] *Cf. Report on the situation of human rights in Brazil, supra,* Chapter V, para. 40.

[297] *Cf.* Expert opinion presented to the Court IDH by Miguel Cillero Bruñol (merits file, folios 911, 912 and 943).

groups of the population may impose increased disadvantages. Thus, for example "[i]n many countries, the poorest sector of the population coincides with social and ethnic groups that experience discrimination."[298] Similarly, the United Nations Committee for the Elimination of Discrimination against Women, in its views on Communication No. 17 of 2008, and in relation to its concluding observations on Brazil of August 15, 2007, underlined that discrimination against women in that country was "exacerbated by regional, economic and social disparities" and recalled "that discrimination against women based on sex and gender is inextricably linked to other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste, and sexual orientation and gender identity."[299]

196. In the same sense, the UN Committee for the Elimination of Discrimination against Women has expressed its concern "about the impact of poverty on Brazilian women of African descent, and […] other socially excluded or marginalized groups of women about their disadvantaged position with respect to access to education, health, basic sanitation, employment, information and justice,"[300] and because "the poor conditions of employment of women, in general, including vertical and horizontal segregation, are aggravated by race or ethnicity."[301]

197. In this case, the Court was able to verify that the presumed victims were immersed in patterns of structural and intersectional discrimination. The presumed victims were in a situation of structural poverty, most of them were Afro-descendant women and girls,[302] four of whom were pregnant, and they had no other economic option but to accept dangerous work under exploitative conditions. The confluence of those factors enabled a factory such as the one described in these proceedings to be able to set up shop and operate in the area and that the women and children who are the presumed victims were compelled by their circumstances to work there.

198. In this regard, it should be emphasized that the fact that the presumed victims belonged to a particularly vulnerable group increased the State's obligations to respect and ensure their rights. However, as revealed by the body of evidence in this case, the State failed to adopt measures to guarantee the exercise of the right to just and favorable conditions of work without discrimination, and the intersection of comparative disadvantages signified that, in this case, the victimization was compounded.

199. The Court finds that an obligation to ensure material equality is derived from Article 24 of the Convention, and this did not happen in the instant case. The right to equality guaranteed by Article 24 of the Convention has two dimensions. The first is a formal dimension that establishes equality before the law; the second is a material or substantial dimension that requires the adoption of positive measures of promotion in favor of groups that have historically been discriminated against or marginalized due to the factors referred to in Article 1(1) of the American Convention. This means that the right to equality entails the obligation to adopt measures that ensure that the equality is real and effective;[303] in other words, to

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298 Report of the Special Rapporteur on extreme poverty and human rights, *supra*, para. 24.

299 Committee for the Elimination of Discrimination against Women, Alyne da Silva Pimentel Teixeira v. Brazil (Communication No. 17 of 2008), UN Doc. CEDAW/C/49/D/17/2008, para. 7.7. Views adopted on July 25, 2011.

300 Concluding observations of the Committee for the Elimination of Discrimination against Women, Brazil, UN Doc. A/58/38, July 18, 2003, para. 110.

301 Concluding observations of the Committee for the Elimination of Discrimination against Women, *supra,* para. 124.

302 *Cf.* Statement made by Leila Cerqueira dos Santos, *supra*.

303 In this regard, the Court has established, *mutatis mutandi*, that "[t]he presence of real inequality calls for compensatory measures that help to reduce or eliminate the obstacles and deficiencies that prevent or decrease the effective defense of inherent interests. In the absence of those compensatory measures, widely recognized at various stages of the proceedings, it could hardly be said that those who face disadvantages enjoy true access to justice and

correct existing inequalities, to promote the inclusion and participation of historically marginalized groups, and to guarantee to disadvantaged individuals or groups the effective enjoyment of their rights and, in short, to provide individuals with the real possibility of achieving material equality.[304] To this end, States must actively combat situations of exclusion and marginalization.

200. In this specific case, the Court has determined that the workers of the fireworks factory were part of a discriminated or marginalized group because they were in a situation of structural poverty and also most of them were Afro-descendant women and girls. However, the State failed to take any measure that could be assessed by the Court as a way of addressing or seeking to reverse the situation of structural poverty and marginalization of the fireworks factory workers based on the factors of discrimination that coalesced in this case.

201. Furthermore, in this case, the Court finds that the State was aware of the presumed victims' situation of special vulnerability because, according to data published by the State's own agencies, at the time of the facts a significant number of the inhabitants of the municipality of Santo Antônio de Jesus were living in poverty. Also, according to state databases, the State knew that Afro-descendant women were particularly vulnerable because, among other factors, they had less access to formal employment. Consequently, after allowing the fireworks factory to locate and operate in an area in which a substantial part of the population was vulnerable, the State had an enhanced obligation to oversee the operating conditions of the factory and to ensure that real measures were taken to protect the life and health of the workers and to guarantee their right to material equality. Therefore, since it failed to oversee the conditions of hygiene, health and safety of the work of the factory, and the activity of the manufacture of fireworks, especially to avoid occupational accidents, the State of Brazil not only failed to ensure the right to just and favorable conditions of work of the presumed victims, but also contributed to increasing their situation of structural discrimination.

202. When referring to the alleged violation of Article 24 of the Convention, the State indicated that it had an effective legal structure to reduce inequalities and that it had put in place various public policies to this end in the municipality of Santo Antônio de Jesus. However, the Court finds that the State did not prove that the situation of structural discrimination experienced by the women who manufacture fireworks had changed.

203. In sum, the Court finds that the situation of poverty of the presumed victims, added to the intersectional factors of discrimination described above that exacerbated the condition of vulnerability: (i) facilitated the installation and operation of a factory dedicated to a particularly dangerous activity, without any oversight of the hazardous activity or the occupational health and safety conditions by the State, and (ii) led the presumed victims to accept work that jeopardized their life and integrity and that of their underage children. In addition, (iii) the State failed to take measures to ensure material equality in the right to work for a group of women who were marginalized and faced discriminated. This situation signifies

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benefit from due process of law under the same conditions as those who do not face such disadvantages." *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, supra,* para. 119.

[304] According to the expert opinion presented to this Court by Christian Courtis, "the State had the obligation to adopt specific and deliberate measures to ensure the full realization of the right to work, particularly in the case of disadvantaged and marginalized individuals and groups. It should be pointed out that the State is able to choose among a wide range of measures – including, promotion of private employment, creation of public employment, measures to formalize workers employed in the informal sector, measures to regularize factories and enterprises that are in non-compliance with the labor laws – promoting the conversion of work in unacceptable conditions into decent work." Expert opinion presented to the Inter-American Court by Christian Courtis, *supra* (merits file, folio 908).

that, in this case, the State failed to ensure the right to just and favorable conditions of work, without discrimination, as well as the right to equality established in Articles 24 and 26, in relation to Article 1(1) of the Convention.

B.4. Conclusion

204. Based on the analysis made in the preceding paragraphs and the determinations made in this chapter, the Court concludes that Brazil is responsible for the violation of Articles 19,[305] 24 and 26 of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of the 60 people who died in, and the six survivors of, the explosion of the factory of "Vardo dos Fogos" in Santo Antônio de Jesus on December 11, 1998, identified in Annex No. 1 of this judgment.

VIII-3
RIGHTS TO JUDICIAL GUARANTEES AND JUDICIAL PROTECTION, IN RELATION TO THE OBLIGATIONS OF RESPECT AND GUARANTEE (ARTICLES 8(1) AND 25 OF THE AMERICAN CONVENTION IN RELATION TO ARTICLE 1(1) OF THIS INSTRUMENT)

A. Arguments of the parties and of the Commission

205. The ***Commission*** found that the State had failed to comply with its duty to investigate the facts with due diligence and within a reasonable time. It recalled that access to justice should ensure, within a reasonable time, the right of the presumed victims or their family members that everything necessary is done to know the truth of what happened and to punish those eventually found responsible. It also pointed out that the Committee on Economic, Social and Cultural Rights (hereinafter "the CESCR") had established that States "must provide appropriate means of redress to aggrieved individuals or groups and ensure corporate accountability."

206. In this context, in relation to the criminal proceedings, the Commission indicated that: (1) the number of victims could not be considered a reasons for the delay in processing them because those possibly responsible were determined during the initial stages of the investigation and the victims had been proved because it was a single event that caused the deaths and injuries: the explosion; (2) the delay could not be attributed to the conduct of the plaintiffs because, since this was a case of egregious human rights violations, it was the State that had the duty to expedite the investigation, *ex officio*; (3) the delay could not be attributed to the Jury Court procedure, because the delay in this case related not to the characteristics of that procedure, but rather to the actions of the authorities during the judicial processing of the case, and (4) the state authorities who failed to comply with their oversight duties remained unpunished because they were not investigated. It also indicated that impunity persists; because more than 20 years after the explosion, the convictions are not final and the prescription of the action has been decreed in favor of Osvaldo Prazeres.

207. With regard to the civil proceedings, the Commission indicated that, in the case of the

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[305] The State is responsible for the violation of the articles indicated in this paragraph in relation to Article 19 of the Convention to the detriment of the children: Adriana dos Santos, Adriana Santos Rocha, Aldeci Silva Santos, Aldenir Silva Santos, Alex Santos Costa, Andreia dos Santos, Aristela Santos de Jesus, Arlete Silva Santos, Carla Alexandra Cerqueira dos Santos, Daiane Santos da Conceicao, Daniela Cerqierira Reis, Fabiana Santos Rocha , Francineide Jose Bispo Santos, Girlene dos Santos Souza , Karla Reis dos Santos, Luciene Oliveira Santos, Luciene Ribeiro dos Santos, Mairla de Jesus Santos Costa, Núbia Silva dos Santos and Rosângela de Jesus França, who died in the explosion, and of the children: Maria Joelma de Jesus Santos, Bruno Silva dos Santos and Wellington Silva dos Santos, who survived the explosion, because it failed to implement the special measures of protection that their condition as children required.

action filed against the State of Brazil, the state of Bahía, the municipality of Santo Antônio de Jesus and the company of Mário Fróes Prazeres Bastos, even though the proceedings had been divided up owing to the large number of co-litigants, after 15 years, only one civil proceeding had been decided definitively. The Commission also pointed out that payment of the amounts obtained under the request for advance relief for the victims under 18 years of age, whose mothers had died, only commenced in September 2006 and only to five of the 39 beneficiaries because, at that time, most of them were already more than 18 years of age. In the case of the proceedings filed against Osvaldo Prazeres Bastos, Maria Julieta Fróes Bastos and Mário Fróes Prazeres Bastos, the Commission emphasized that the compensation agreement signed on October 8, 2013, by the next of kin of the victims and the defendants did not refer to the responsibility of the State, but rather to the harm caused to the individuals. The Commission also alluded to the statements made during the hearing before the Inter-American Court by María Balbina dos Santos and Leila Cerqueira dos Santos, stressing that the presumed victims had mentioned that they had not had legal representation when they signed that agreement and had felt compelled to sign because they were afraid that they might not receive anything, a fear stoked by the prosecutor who had mediated the agreement. Lastly, the Commission indicated that the State had not provided information on whether the amounts had been updated and whether they had been delivered to the victims in full.

208. Finally, with regard to the labor proceedings, it indicated that the case file does not reveal that all possible measures were taken to obtain the payment of the compensation, and more than 20 years have passed without this being executed. Thus, even though these were the only proceedings that culminated in a final decision, in practice, it proved to be illusory.

209. The ***representatives*** agreed with the Commission's position and added that, due to both the excessive delay in the processing and prosecution of the proceedings instituted as a result of the explosion and to the successive filing of judicial appeals, the State had violated the right to the truth and to redress. With regard to the civil proceedings filed by the prosecution service against Osvaldo Prazeres Bastos, Maria Julieta Fróes Bastos and Mário Fróes Bastos, they indicated that, to date, the victims have not been able to receive all that is owed to them as a result of the ratification of the agreement.

210. The ***State*** indicated, first, that it could not be held responsible for the violation of Article 8(1) of the Convention because, in its opinion, that article protected the defendants rather than the plaintiffs. Thus, since the petitioners were not the defendants in any of the actions that had been filed, Article 8(1) was not applicable. In addition, it indicated that it could not be held responsible for the violation of Articles 8 and 25 of the Convention because the appropriate and effective remedies for the protection of the rights had been filed by the State in keeping with the ordinary procedure in the domestic jurisdiction.

211. Regarding the administrative process, it stressed that this was filed, *ex officio*, by the State, made a detailed analysis of the activities of the private individuals and determined, less than a year after the explosion (June 6, 1999), to apply the respective penalties, including the cancellation of the company's operating license.

212. In the case of the criminal trial, it indicated that after the complex preliminary investigation stage, in 2004, it was decided that a trial should be held before the Jury Court, but the transfer of the proceedings to the city of Salvador in order to guarantee the independence of the ruling delayed the trial before that court. The State pointed out that there had been no irregularities in the subsequent filing of appeals or an unjustified delay that could be attributed to the State; rather, it had been a party to the adversarial proceedings.

213. With regard to the civil remedies, it argued that they had followed their normal course

and consisted in adequate and effective domestic remedies to ensure the satisfaction of the victims' claims. It underscored that, in the case of the civil action *ex delicto* against Osvaldo Prazeres Bastos and Mário Fróes Prazeres Bastos, an agreement had been reached between the parties in 2013 establishing compensation of two million six hundred and eleven thousand three hundred and fifty-seven reals (R$2,611,357).[306] The State had been requiring and guaranteeing compliance with that agreement and also a new agreement ratified by the court in March 2019, as a result of which it had been fully executed, with the issue of court orders for payment to the victims. Furthermore, regarding the civil action filed against the Federal Union,[307] the state of Bahía, the municipality of Santo Antônio de Jesus, and the company, the Brazilian State emphasized the granting of advance relief in favor of the children of the victims, the disaggregation of the proceedings to expedite their processing, and the effectiveness of the execution of the rulings. It pointed out that there were no irregularities, acts or omissions that had caused unjustified delays in the proceedings; that the processing of the remedies continued without irregularities and in accordance with the laws of Brazil, and that, to date, the courts had reaffirmed the decisions granting redress.

214. Regarding the labor proceedings, it argued that the State could not be held responsible for the cases in which reparation had not been obtained using this procedure, because this was a result of the conduct of the plaintiffs concerning procedural issues that affected the analysis of the merits of the case, as well as the insufficiency of the evidence presented to the court. In addition, in those cases in which judgment had been achieved, contrary to the arguments of the representatives, the State had acted diligently in seeking assets in order to execute the rulings. As a result of that activity, it indicated that it had been able to embargo a property of Osvaldo Prazeres Bastos valued at R$1,800,000, which would be sufficient to pay the compensation to the victims.

215. Lastly, regarding each of the judicial proceedings, the State argued that it was not aware that the victims had questioned their processing before the internal Judiciary or before the existing disciplinary administrative instances.

B. Considerations of the Court

216. The Court has repeatedly indicated that the judicial guarantees established in Article 8(1) of the Convention are closely linked to due process of law, which "includes the requirements that must be met to ensure the adequate protection of those persons whose rights or obligations are pending judicial determination."[308] Meanwhile, Article 25 of the Convention refers to "the obligation of the States Parties to ensure to all persons subject to their jurisdiction, a simple, prompt and effective remedy before a competent judge or court."[309]

217. Articles 8, 25 and 1(1) are interrelated insofar as "[t]he effective judicial remedies […] must be substantiated pursuant to the rules of due process of law, […] within the general obligation of the […] States to ensure to all persons subject to their jurisdiction the free and

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306 This amount is the result of the monetary correction applied to the original amount (R$1,280,000.00) in October 2017.

307 The Federal Union is the federative entity with juridical personality corresponding to the State of Brazil.

308 *Cf. Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 American Convention on Human Rights),* Advisory Opinion OC-9/87, October 6, 1987. Series A No. 9, para. 28; *Case of the Constitutional Court v. Peru. Merits, reparations and costs*. Judgment of January 31, 2001, Series C No. 71, paras. 69 and 108, and *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, *supra*, para. 294.

309 *Cf. Case of Mejía Idrovo v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of July 5, 2011, Series C No. 228, para. 95, and *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, supra*, para. 294.

full exercise of the rights recognized by the Convention (Art. 1)."[310] The effectiveness of the remedies must be assessed in each specific case taking into account whether "domestic remedies existed that guaranteed true access to justice to claim reparation of the violation."[311] Access to justice can be verified when the State ensures, within a reasonable time, the right of the presumed victims or their families that all necessary measures are being taken to learn the truth of what happened and, as appropriate, punish those eventually found responsible.[312]

218. The Court recalls that Articles 8 and 25 of the Convention also establish the right to obtain a response to the claims and requests filed before the judicial authorities, because the effectiveness of the remedy involves a positive obligation to provide a response within a reasonable time.[313]

219. Bearing in mind the arguments of the parties and of the Commission, as well as the specific characteristics of each procedure and the different times needed to process them, the Court finds it pertinent to examine the alleged violations of the rights to judicial guarantees and judicial protection in relation to each type of domestic procedure. To this end, this chapter is divided as follows: 1. Due diligence and a reasonable time; 1.1. the criminal proceeding; 1.2. the civil cases; 1.3. the labor proceedings; 2. Effective judicial protection, and 3. Conclusion.

B.1. Due diligence and a reasonable time

220. When referring to due diligence in criminal proceedings, the Court has indicated that the investigation must be conducted using all available legal means and in order to determine the truth and ensure the pursuit, capture, prosecution and eventual punishment of all the masterminds and perpetrators of the facts.[314] It has also indicated that impunity must be eradicated by determining the responsibilities, both the general responsibilities of the State and the individual responsibilities – criminal and of any other type – of its agents or of private individuals. Consequently, to comply with this obligation the State must remove all obstacles, *de facto and de jure*, that maintain impunity.[315]

221. As a result of the proven facts in this case, the explosion of the fireworks factory in Santo Antônio de Jesus on December 11, 1998, resulted in the opening of administrative, criminal, civil and labor proceedings. The Court understands that, in the criminal proceedings, due diligence will be proved if the State is able to demonstrate that it has made every effort,[316] within a reasonable time, to permit the determination of the truth, and the identification and

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[310] *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary objections, supra*, para. 91, and *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, supra,* para. 294.

[311] *Cf. Case of Goiburú et al. v. Paraguay. Merits, reparations and costs.* Judgment of September 22, 2006. Series C No. 153, para. 120, and *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, supra,* para. 294.

[312] *Cf. Case of Bulacio v. Argentina. Merits, reparations and costs.* Judgment of September 18, 2003. Series C No. 100, para. 114, and *Case of Coc Max et al. (Xamán Massacre) v. Guatemala. Merits, reparations and costs.* Judgment of August 22, 2018. Series C No. 356, para. 80.

[313] *Cf. Case of Cantos v. Argentina. Merits, reparations and costs.* Judgment of November 28, 2002. Series C No. 97, para. 57, and *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, supra,* para. 295.

[314] *Cf. Case of Baldeón García v. Peru. Merits, reparations and costs.* Judgment of April 6, 2006. Series C No. 147, para. 94, and *Case of Terrones Silva et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of September 26, 2018. Series C No. 360, para. 182.

[315] *Cf. Case of Myrna Mack Chang v. Guatemala. Merits, reparations and costs.* Judgment of November 25, 2003. Series C No. 101, para. 277, and *Case of Members of the village of Chichupac and neighboring communities of the municipality of Rabinal v. Guatemala, supra*, para. 285.

[316] The Court has established repeatedly that the duty to investigate is an obligation of means rather than of results. *Cf. Case of Velásquez Rodríguez v. Honduras. Merits, supra*, para. 177, and *Case of Terrones Silva et al. v. Peru, supra,* para. 182.

punishment of all those responsible, whether private individuals or state officials. In the civil proceedings for damages, due diligence is verified by analyzing whether the state authorities (judges and prosecutors) conduct the proceedings in a simple and prompt way in order to identify the agents who caused the harm and, as appropriate, provide adequate redress to the victims. When examining due diligence in the labor proceedings, the Court must take into consideration the measures adopted by the judicial authorities to establish the employment relationship between the workers of the fireworks factory and its owners, to identify the amounts owed, and to decide and execute the payment of those amounts.

222. Regarding the celerity of the proceedings, the Court has indicated that the reasonable time referred to in Article 8(1) of the Convention must be assessed in relation to the total duration of the proceedings, from the first procedural act until the final judgment is delivered, including any appeals that may be filed.[317] The right of access to justice means that the dispute must be decided within a reasonable time,[318] because a prolonged delay may, in itself, constitute a violation of judicial guarantees.[319]

223. The Court has also established that the assessment of the reasonable time must be made in each specific case in relation to the total duration of the proceedings, which could include the execution of the final judgment. Thus, it has considered four elements to analyze whether the guarantee of a reasonable time has been met, namely: (i) the complexity of the matter;[320] (ii) the procedural activity of the interested party;[321] (iii) the conduct of the judicial authorities,[322] and (iv) the effects of the delay on the legal situation of the presumed victim.[323]

224. Thus, the Court has established that if the passage of time has a relevant impact on the legal situation of the individual concerned, the proceedings must advance with greater diligence so that the case is decided promptly.[324] The Court recalls that, based on the above-mentioned criteria, the State must justify why it has required the time that has passed to process the case and, if it does not do so, the Court has broad authority to form its own opinion in this regard.[325]

225. The Court has had recourse to different factors to determine the complexity of the matter, including: (i) the complexity of the evidence;[326] (ii) the diversity of procedural

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[317] *Cf. Case of Suárez Rosero v. Ecuador. Merits.* Judgment of November 12, 1997. Series C No. 35, para. 71, and *Case of Carranza Alarcón v. Ecuador, supra*, para. 92.

[318] *Cf. Case of Suárez Rosero v. Ecuador. Merits, supra,* para. 71, and *Case of Quispialaya Vilcapoma v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2015. Series C No. 308, para. 176.

[319] *Cf. Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago. Merits, reparations and costs*. Judgment of June 21, 2002. Series C No. 94, para. 145, and *Case of Noguera et al. v. Paraguay, supra*, para. 83.

[320] *Cf. Case of Genie Lacayo v. Nicaragua. Preliminary objections*. Judgment of January 27, 1995. Series C No. 21, para. 78, and *Case of Noguera et al. v. Paraguay, supra*, para. 83 and footnote 83.

[321] *Cf. Case of Cantos v. Argentina, supra*, para. 57, and *Case of Noguera et al. v. Paraguay, supra,* 401, para. 83 and footnote 84.

[322] The Court has understood that, in order to achieve the full effectiveness of a judgment, the judicial authorities must act rapidly and without delay, because the principle of effective judicial protection requires that judgments must be executed without obstacles or undue delays, in order to achieve their purpose in a prompt, simple and integral manner. *Cf. Case of Mejía Idrovo v. Ecuador, supra,* para. 106, and *Case of Noguera et al. v. Paraguay, supra*, para. 83 and footnote 85.

[323] The Court has indicated that, to determine whether the time taken is reasonable, the effects of the duration of the proceedings on the legal situation of the person concerned must be taken into account considering, among other elements, the subject-matter of the dispute. *Cf. Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru*, *supra*, para. 148, and *Case of Noguera et al. v. Paraguay, supra*, para. 83 and footnote 86.

[324] *Cf. Case of Valle Jaramillo et al. v. Colombia. Merits, reparations and costs.* Judgment of November 27, 2008. Series C No. 192, para. 155, and *Case of Muelle Flores v. Peru, supra*, para. 162.

[325] *Cf. Case of Anzualdo Castro v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of September 22, 2009. Series C No. 202, para. 156, and *Case of Noguera et al. v. Paraguay, supra*, para. 83.

[326] *Cf. Case of Genie Lacayo v. Nicaragua. Merits, reparations and costs*. Judgment of January 29, 1997. Series

subjects[327] or the number of victims;[328] (iii) the time that has passed since the State became aware of the presumed criminal act;[329] (iv) the characteristics of the remedy contained in domestic law,[330] or (v) the context in which the facts occurred.[331]

226. In order to analyze whether the State of Brazil had complied with its obligation to act with due diligence and within a reasonable time contained in Article 8(1) of the Convention, the Court finds it pertinent to briefly review the actions in the proceedings filed following the explosion on December 11, 1998, and will analyze each one.

227. In the case of the administrative process conducted by the Brazilian Army to assess the operating conditions of the fireworks factory following its explosion, this was initiated on December 13, 1998, and culminated with the definitive cancellation of the company's registration on June 6, 1999, following the verification of a series of irregularities. The Court considers that the State was able to demonstrate that it acted with due diligence and within a reasonable time during this process.

B.1.1 The criminal proceedings

228. In the criminal jurisdiction, the civil police opened an investigation, *ex officio*, following the explosion with the result that, on April 12, 1999, the Public Prosecution Service of the state of Bahía brought charges for the crimes of first-degree murder and attempted murder against Mário Fróes Prazeres Bastos, Osvaldo Prazeres Bastos, Ana Cláudia Almeida Reis Bastos, Helenice Fróes Bastos Lírio, Adriana Fróes Bastos de Cerqueira, Berenice Prazeres Bastos da Silva, Elísio de Santana Brito and Raimundo da Conceição Alves. On November 9, 2004, the trial court decided that the case should be referred to the Jury Court. The defendants filed an appeal against this decision which was rejected by the Court of Justice of the state of Bahía on October 27, 2005. On July 18, 2007, the Public Prosecution Service requested the transfer of the case to the city of Salvador due to the risk that the economic and political influence of the accused could interfere with the decision This request was accepted by the Court of Justice on November 7, 2007. After several appeals filed by the accused had been decided and denied, the case file was forwarded to the Bahía Court of Justice on November 9, 2009. On April 27, 2010, the Bahía Court of Justice forwarded the case file to the county of Santo Antônio de Jesus. However, the latter did not have competence owing to the transfer that had been ordered. On June 30, 2010, the proceedings were again received by the Bahía Court of Justice which then forwarded them to the First Criminal Judicial Circuit of Salvador. On October 20, 2010, the Jury Court delivered judgment convicting five of the accused and acquitting three of them. On April 26, 2012, this decision was confirmed in second instance. Special and extraordinary remedies and other interlocutory appeals were filed before the Superior Court of Justice (STJ) and the Federal Supreme Court (STF). In the course of 2019, three applications for *habeas corpus* were filed before the Bahía Court of Justice in favor of the accused which resulted in recognition of the prescription of the action in favor of Osvaldo Prazeres Bastos, with the consequent extinction of the possibility of

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C No. 30, para. 78, and *Case of Montesinos Mejía v. Ecuador, supra*, para. 182.

[327] *Cf. Case of Acosta Calderón v. Ecuador.* Merits, reparations and costs. Judgment of June 24, 2005. Series C No. 129, para. 106, and *Case of Montesinos Mejía v. Ecuador, supra*, para. 182.

[328] *Cf. Case of Furlan and family v. Argentina, supra*, para. 156, and *Case of Montesinos Mejía v. Ecuador, supra*, para. 182.

[329] *Mutatis mutandis, Cf. Case of Heliodoro Portugal v. Panama*. Preliminary objections, merits, reparations and costs. Judgment of August 12, 2008. Series C No. 186, para. 150, and *Case of Montesinos Mejía v. Ecuador, supra*, para. 182.

[330] *Cf. Case of Salvador Chiriboga v. Ecuador. Preliminary objection and merits.* Judgment of May 6, 2008. Series C No. 179, para. 83, *and Case of Montesinos Mejía v. Ecuador, supra*, para. 182.

[331] *Cf. Case of Furlan and family v. Argentina*, supra, para. 156, and *Case of Montesinos Mejía v. Ecuador, supra*, para. 182.

convicting him and also the annulment of the second instance decision owing to the failure to summon the defense counsel of the accused.

229. With regard to the reasonable time, after analyzing the criminal proceedings in light of the four elements consistently established in its case law and taking into account the body of evidence, the Court observes that: (i) regarding the complexity of the matter, the victims and those possibly responsible, as well as the circumstances and causes of the explosion were determined during the administrative process that concluded in 1999; (ii) there is no record in the case file of any procedural activity of the interested parties that could have contributed to the delay in the proceedings, especially as these depended exclusively on official impetus; (iii) the conduct of the judicial authorities was the main factor that originated the excessive delay in the criminal proceedings owing to the excessive time taken to examine the different appeals filed by the accused, the errors in the transfer of the case file described previously, and the serious lapse of failing to summon the defense counsel of the accused to the hearing in which the second instance decision was delivered, which resulted in a delay of more than six years in the processing of the case due to the annulment of the said decision, and (iv) regarding the effects on the legal situation of the victims, the Court considers that the excessive delay and the impunity exacerbated their situation, especially in light of their extreme vulnerability owing to their situation of poverty and structural discrimination.

230. The Court notes that, even though the suspects, the victims and the circumstances of the explosion were identified rapidly, the lack of due diligences and the mistakes committed by the judicial authorities resulted in significant delays in this case, together with its total impunity. The lack of due diligence can be seen especially in the unjustified delays of the judicial authorities in processing the different appeals filed by the accused, the problems with the incorrect transfers of the case file, and the errors in the notification of the second instance judgment to the defense counsel of the accused, which resulted in the annulment of that decision.

231. The Court considers that the State has not proved that an acceptable justification existed for the long periods of time during which no actions were taken by the judicial authorities and the prolonged delay in the criminal proceedings. Therefore, the Court notes that, in this case, the delay of almost 22 years without a final decision constitutes a lack of reasonableness in the time taken by the State to conduct the criminal proceedings. The Court also considers that the judicial authorities did not act with due diligence to reach a decision in the criminal proceedings.

B.1.2 The civil cases

232. In the civil sphere, two different proceedings were filed: the civil case requiring compensation for pecuniary and non-pecuniary damage against the State of Brazil, the state of Bahía, the municipality of Santo Antônio de Jesus, and the company of Mário Fróes Prazeres Bastos, and the civil action *ex delicto* against Osvaldo Prazeres Bastos, Maria Julieta Fróes Bastos and Mário Fróes Prazeres Bastos.

233. The first civil case, initiated on March 4, 2002, by the victims and their next of kin, contained a request for advance relief in favor of the young people under 18 years of age whose mothers had died in the explosion, which was accepted by the competent federal judge the following day. Of the 44 children who lost their mothers and sued the Federal Government, 39 benefited from the preliminary protection decision with a monthly pension of a minimum wage and, of these, only 16 effectively received this payment because, owing to the passage of time, the others had already reached 18 years of age. The other family members received no reparation from the State. Following the decisions on the appeals filed against the decision

on the advance relief, in 2004, the proceedings were disaggregated owing to the large number of co-litigants (84) and, as a result, 14 different claims were filed. The first instance judgments were delivered between July 2010 and August 2011, and appeals were filed against them that were rejected between August 2013 and March 2017. Appeals for clarification were filed against the appeal decisions, and these were decided between October 26, 2015, and May 5, 2018. Special and extraordinary appeals were filed in 12 of the 14 proceedings, resulting in 10 remaining pending and two with final decisions in September 2017 and April 2018. The available evidence reveals that the presumed victims received no payments as a result of these proceedings.

234. Regarding the guarantee of a reasonable time, the Court considers that: (i) the complexity of the matter cannot be cited for the reasons described in the analysis of the criminal proceedings; (ii) the body of evidence does not contain sufficient elements to allow the Court to examine the procedural activity of the interested parties; (iii) regarding the conduct of the judicial authorities, the Court notes that there was an unjustified delay when the disaggregation of the proceedings was ordered (2 years), before the first instance judgments were delivered (6 or 7 years after the disaggregation of the proceedings), and before the different appeals were decided (approximately 7 years), and (iv) regarding the effects on the legal situation of the presumed victims, the Court finds that the absence of compensation, which was the purpose of the civil proceedings in question, had a significant impact, because, as shown throughout the processing of this case, the presumed victims and their families did not have sufficient financial resources to pay the costs of the medical and psychological treatment they required, or even for the treatment of the different injuries of those who survived the explosion. Consequently, the Court has verified that the State failed to comply with the guarantee of a reasonable time in relation to the proceedings described above.

235. In relation to due diligence in the first civil case, the Court observes that the disaggregation of the proceedings, decided in 2004, only two years after the civil suit had been filed – the purpose of which was to facilitate and expedite justice according to the State – did not achieve this purpose, because the initial first instance judgments were delivered in 2010, eight years after the principal lawsuit had been filed and, to date, there have only been two final decisions, which have not yet been executed. The Court finds that there was an excessive delay in the issue of the decisions on the appeals averaging 7 years, without the State having presented any justification for this. Consequently, added to the absence of a final decision and the execution of the judicial decision more than 20 years after the filing of the principal civil case, the Court considers that the State has not acted with due diligence.[332]

236. The second civil case, that is the civil action *ex delicto*, was filed the same year that a precautionary measure was granted, 1998, and it requested an embargo on the assets of the accused, Osvaldo Prazeres Bastos and Mário Fróes Prazeres Bastos, in order to guarantee the reparations for damage in favor of the victims. The main proceedings began on January 9, 1999. The judge in charge of the proceedings, exercising a power established by Brazil's laws on criminal procedure,[333] suspended the processing of this civil action until the criminal action had been decided in order to avoid possible conflictive judgments, under the hypothesis of an acquittal in the criminal trial with repercussions on the civil trial.[334] The civil action culminated on October 8, 2013, with an agreement between the victims, the next of kin, and the defendants, mediated by the Public Prosecution Service and ratified by the Trial Court on

332 Regarding the fact that only 16 of the 39 persons receive the payment ordered in the decision on advance relief, the Court does not have sufficient evidence to determine whether there was a lack of diligence by the State in the determination of the beneficiaries

333 *Cf. Brazilian Code of Criminal Procedure,* article 64.

334 *Cf.* Affidavit made by Aline Cotrim Chamadoira on January 9, 2020 (merits file, folios 873 to 875).

December 10, 2013, establishing compensation of approximately R$1,280,000.00 (one million two hundred and eighty thousand reals) to be shared between the victims and the next of kin. In view of the fact that the defendants failed to comply with the agreement, the Public Prosecution Service took several steps to guarantee its execution. However, it was not until the end of March 2019, that the amounts established by the 2013 agreement, duly updated, were delivered to the victims, as the result of a new agreement between the parties signed in March 2019.

237. The Court does not have sufficient evidence to determine whether or not the obligation of due diligence was complied with in the civil action *ex delicto*.

238. In relation to the processing of the action within a reasonable time, the Court notes that: (i) the complexity of the matter cannot be argued for the reasons described in the analysis of the criminal proceedings; (ii) there are insufficient elements in the body of evidence to allow the Court to examine the procedural activity of the interested parties and, also, the civil action *ex delicto* was filed by the Public Prosecution Service, so that the duty to expedite the proceedings was the responsibility of that state organ; (iii) in relation to the conduct of the judicial authorities, the Court has verified an excessive and unjustified delay between the criminal judgment (2010) and the first agreement signed (2013), as well as between this agreement and the last payment made to provide redress to the presumed victims (2019), and (iv) regarding the effects on the legal situation of the presumed victims, the Court considers that the passage of more than 20 years for the presumed victims to access compensation, which is what they sought with this civil action, affected the presumed victims and their next of kin very significantly because they were living in a context of poverty and discrimination, which meant that they did not have sufficient financial resources to cover the expenses of the required medical and psychological treatment, or even the care needed to treat the different injuries suffered in the explosion by the survivors. Based on the foregoing, the Court finds that the judicial authorities failed to ensure the means or take the appropriate measures to obtain adequate reparation within a reasonable time.

B.1.3 The labor proceedings

239. In the labor sphere, 76 actions were filed before the Labor Court of Santo Antônio de Jesus in 2000 and 2001; of these, 30 were archived and another 46 were declared inadmissible in first instance. An ordinary remedy was filed against the decision declaring the actions inadmissible, and as a result the Regional Labor Court of the Fifth Region, ruling in favor of the victims, ordered a new decision. The new decisions recognized the victims' employment relationship with Mário Fróes Prazeres Bastos; accordingly, 18 actions were declared partially admissible and one totally admissible. Of these, execution of judgment is underway in six of them; however, they remained temporarily archived for several years[335] because it had not been possible to locate assets of the convicted man (Mario Fróes Prazeres Bastos) that would allow their execution.[336] In August 2018, in the labor proceeding of Leila Cerqueira dos Santos, an asset of Osvaldo Prazeres Bastos, father of Mario Fróes Prazeres Bastos, was embargoed for the sum of R$1,800,000, and according to the judge of the Labor

[335] The Court does not have precise information on the processing of each labor procedure. However, the record of the processing of the case of Leila Cerqueira dos Santos, presented by the State with its answering brief, reveals that the case was archived temporarily between November 8, 2002, and October 27, 2009; and owing to the impossibility of executing the decision, it was suspended from August 6, 2010, to November 24, 2011, and from December 18, 2013, to May 14, 2014 (evidence file, folios 2624 to 2638).

[336] The report of October 5, 2005, presented by the Deputy Director of the Labor Secretariat of Santo Antônio de Jesus indicates that the actions decided in favor of the plaintiffs had been temporarily archived because it had not been possible to locate assets of the convicted man that would allow the judgments to be executed. *Cf.* Report of the Deputy Director of the Labor Secretariat of Santo Antônio de Jesus, *supra*.

Court of Santo Antônio de Jesus,[337] this would be sufficient to compensate the victims of all the actions that were awaiting execution of judgment.

240. On analyzing the four elements to evaluate the reasonableness of the time, the Court finds that: (i) the matter was not highly complex because the conditions in which the direct victims in this case worked had been verified in the Army's appraisal following the explosion, and the identification of the persons who had an employment relationship with the owners of the factory could have been established, for example by examining the death certificates attached to the criminal complaint of the Public Prosecution Service of Bahia; (ii) the case file does not reveal that the procedural activity of the interested parties prejudiced or facilitated the delay in the case; (iii) the conduct of the judicial authorities was inadequate, because they had enough evidence to demonstrate the role of Osvaldo Prazeres Bastos in the factory and, therefore, could have ordered the embargo of his assets earlier. However, there was an excessive delay, because it was only 18 years after the proceedings had initiated that it was possible to embargo an asset that appeared to be sufficient for execution of the judgments, and lastly (iv) regarding the general effects on the legal situation the presumed victims, the Court considers that the fact that 18 years passed without any of the presumed victims receiving the amounts owed due to the occupational accident (explosion) and the violations of the labor laws, affected them very significantly, because they lived in a context of poverty and discrimination, as a result of which they did not have sufficient financial resources to cover the expenses of the required medical and psychological treatment, and even the care needed to treat the different injuries suffered in the explosion by the survivors. Therefore, the Court finds that there is sufficient evidence to conclude that the State failed to ensure that the labor proceedings were processed within a reasonable time, particularly as regards execution of the judgments.

241. Moreover, the labor proceedings in which the factory workers obtained a favorable judgment were temporarily archived for many years because, initially, the labor courts did not recognize the employment relationship between the workers and Osvaldo Prazeres Bastos, because it was his son, Mario Fróes Prazeres Bastos, who formally appeared to be the owner of the enterprise, and it had not been possible to locate assets to embargo. However, in the context of the civil and criminal actions, the relationship of Osvaldo Prazeres Bastos with the fireworks factory had been verified and he did have assets that could ensure the payment to the victims. The Court finds that the State did not prove that it had taken effective steps to achieve the successful execution of judgment in these cases; thus, it was only in August 2018, 18 years after the labor actions had been filed, that it was possible to confiscate an asset of Osvaldo Prazeres Bastos that was sufficient to cover the compensation amounts. Based on the foregoing, the Court concludes that the State also failed to comply with its obligation of due diligence in the labor proceedings.

B.2 Absence of effective judicial protection

242. The Court has reiterated that legal proceedings should contribute to the protection of the right recognized in the judicial ruling, by the appropriate execution of this ruling.[338] Therefore, the effectiveness of judgments depends on their execution,[339] and "a judgment

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[337] *Cf.* Communication of Judge Cássia Magali Moreira Daltro, of the Labor Court of Santo Antônio de Jesus, addressed to the Attorney General of the Unión, February 21, 2019 (evidence file, folio 4106).

[338] *Cf. Case of Baena Ricardo et al. v. Panama. Jurisdiction. Judgment of November 28, 2003. Series C No. 104*, para. 73, and *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru, supra*, para. 103.

[339] *Cf. Case of Baena Ricardo et al. v. Panama. Jurisdiction. supra*, para. 73, and *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru, supra*, para. 103.

that is *res judicata* grants certainty about the right or dispute discussed in the specific case and, consequently, one of its effects is that its execution is compulsory. The contrary would suppose the negation of the right involved."[340] Accordingly, it is essential that the State guarantee the means to execute final decisions.[341]

243. The Court considers that the execution of judgment should be governed by those specific standards that allow the principles of judicial protection, due process, legal certainty, judicial independence and the rule of law, *inter alia,* to be made effective. The Court agrees with the European Court of Human Rights, considering that, in order to achieve the full effectiveness of the judgment, its execution must be complete, perfect, integral and prompt.[342]

244. In the instant case, the Court recalls that the criminal proceedings were filed, *ex officio*, following the explosion and charges were brought on April 12, 1999. On October 20, 2010, almost 12 years after the opening of the investigations, five individuals were convicted, including Mario Fróes Prazeres Bastos and Osvaldo Prazeres Bastos, and this decision was confirmed on appeal. However, owing to the failure to summon the defense counsel of the accused to the session when the appeal was deliberated, the convictions were not final. In addition, the criminal action against Osvaldo Prazeres Bastos prescribed. Furthermore, no final decision was reached in either the civil proceedings filed by the victims or the labor proceedings held between 1999 and 2002; this only occurred in two of the civil proceedings.

245. Based on the foregoing, more than 21 years after the events occurred, the Court finds that no one has been punished and the victims of the explosion and their next of kin have not received adequate redress.

246. Consequently, the Court finds that the State did not guarantee effective judicial protection for the fireworks factory workers because, although it allowed them to use the judicial remedies established by law, those remedies either did not achieve a final solution more than 18 years after they were filed, or they produced a decision that was favorable to the victims that could not be executed owing to unjustified delays by the State.

B.3. Conclusion

247. Based on the analysis and the determinations made in this chapter, the Court concludes that the State is responsible for the violation of the right to judicial protection, established in Article 25 of the American Convention, and also the obligation of due diligence and the judicial guarantee of a reasonable time established in Article 8(1) of the Convention, both in relation to Article 1(1) of this instrument, to the detriment of: (a) six victims who survived the explosion of the factory of "Vardo dos Fogos" in Santo Antônio de Jesus on December 11, 1998, identified in Annex No. 1 of this judgment, and (b) 100 members of the deceased victims' families, identified in Annex No. 2 of this judgment.

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[340] *Cf. Case of Muelle Flores v. Peru, supra*, para. 123.

[341] *Cf. Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 American Convention on Human Rights),* Advisory Opinion OC-9/87, *supra*, para. 24; *Case of Acevedo Jaramillo et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of February 7, 2006. Series C No. 144, para. 220, and *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru, supra*, para. 143.

[342] *Cf. Case of Mejía Idrovo v. Ecuador, supra*, para. 105, and *Case of Muelle Flores v. Peru, supra*, para. 126. See also: ECHR, Case of Matheus v. France, No. 62740/01, judgment of March 31, 2005, para. 58; ECHR, *Case of Cocchiarella v. Italy* (GC), No. 64886/01, judgment of March 29, 2006, para. 89, and Case of *Gaglione and Others v. Italy*, No. 45867/07, judgment of December 21, 2010, para. 34.

VIII-4
RIGHT TO PERSONAL INTEGRITY OF THE NEXT OF KIN OF THE PRESUMED VICTIMS (ARTICLE 5 OF THE AMERICAN CONVENTION)

A. Arguments of the parties and of the Commission

248. The ***Commission*** argued that the next of kin of the victims of certain human rights violations may be considered victims as a result of the violation of their physical and moral integrity resulting from the situations experienced by the direct victims and the subsequent acts or omissions of the State. It indicated that the deaths that occurred in the fireworks factory were a source of suffering for the next of kin of the direct victims, and this was augmented by the lack of justice.

249. The ***representatives*** agreed with the arguments of the Commission.

250. The ***State*** referred to this matter in its preliminary objections. It contested the inclusion of some family members presented as presumed victims, without the extent to which their rights had been violated having been specifically alleged or proved, and presented a list of 36 names. However, several of the names correspond to the same person and, following a review of the names provided, the Court finds that this objection refers to 26 individuals.[343] The State cited the Court's decision in the *Case of Gomes Lund et al. v. Brazil,* concerning the presumption of harm to mental and moral integrity in the case of the direct family of the victims (mothers, fathers, children, husband and wives), and the need to prove the violation of the integrity of the indirect next of kin.

B. Considerations of the Court

251. This Court has recognized that members of the direct family may be victims of violations of Article 5 of the Convention in their own right owing to the afflictions suffered by their loved ones.[344] Therefore, it corresponds to the Commission and the representatives to provide evidence of the harm suffered by the next of kin so that they may be considered presumed victims of a violation of the right to personal integrity.

252. In the instant case, the Court finds that that State contested the inclusion of 26 individuals on the list of next of kin presented by the Commission and the representatives based on the absence of evidence on how their rights were violated. Therefore, the Court understands that, in the State's opinion, the violation of the right to personal integrity of the remaining next of kin has been proved, to the extent that the events caused them direct suffering owing to the conditions in which the deaths occurred, resulting in the burnt and mutilated bodies of adult women, girls and boys, and pregnant women and girls; and owing to their helplessness in the face of the response of the state authorities who have taken more than 20 years to provide them with justice.

253. Based on the above, the Court must establish whether, in the case of the 26 individuals

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[343] 1. Adriana Santos Rocha; 2. Antônio José dos Santos Ribeiro; 3. Antônio Rodrigues dos Santos; 4. Claudia Reis dos Santos; 5. Claudimeire de Jesus Bittencourt; 6. Cleide Reis dos Santos; 7. Cristiane Ferreira de Jesus; 8. Dailane dos Santos Souza; 9. Fabiana Santos Rocha; 10. Geneis dos Santos Souza; 11. Guilhermino Cerqueira dos Santos; 12. Lourival Ferreira de Jesus; 13. Lucinete dos Santos Ribeiro; 14. Luís Fernando Santos Costa; 15. Maria Antônia dos Santos; 16. Maria Joelma de Jesus Santos; 17. Maria Vera dos Santos; 18. Marimar dos Santos Ribeiro; 19. Marinalva Santos; 20. Marlene dos Santos Ribeiro; 21. Marlene Ferreira de Jesus; 22. Neuza Maria Machado; 23. Roque Ribeiro da Conceição; 24. Samuel dos Santos Souza; 25. Wellington Silva dos Santos; 26. Zuleide de Jesus Souza.

[344] *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala, supra,* paras. 174 to 177, and *Case of Roche Azaña et al. v. Nicaragua. Merits and reparations.* Judgment of June 3, 2020. Series C No. 403, para. 100.

regarding whom the State found that this violation had not been proved, it can be concluded that their right to personal integrity was violated. In this regard, the Court concludes that:

i. The State raised objections to Adriana Santos Rocha, Fabiana Santos Rocha and Claudia Reis dos Santos because they had been presented as sisters of some of the presumed victims who died. However, Adriana Santos Rocha and Fabiana Santos Rocha died in the explosion of the fireworks factory; therefore it has been proved that their right to life was violated as a direct result of the explosion, as established in Chapter VIII-1 of this judgment and, consequently, they will not be declared victims of the violation of Article 5(1) based on the suffering of the next of kin. Meanwhile, Claudia Reis dos Santos was one of the workers of the fireworks factory who survived the explosion, so that the violation of her right to personal integrity as a direct result of the explosion has been proved, as established in in Chapter VIII-1 of this judgment. In the case of Claudia Reis dos Santos, the Court also finds that the violation of her right to personal integrity has been proved due to the suffering endured by her family members, as verified in the evidence provided to this Court.[345]

ii. Wellington Silva dos Santos was identified as a presumed victim by the Commission, because he was the brother of Aldeci Silva dos Santos, Aldeni Silva dos Santos and Bruno Silva dos Santos (survivor). The State argued that the violation of his rights had not been specifically proved on this basis and the Court did not find any document that proved this violation. However Wellington Silva dos Santos was one of the workers of the fireworks factory who survived the explosion so that the violation of his right to personal integrity as a direct consequences of the explosion has been proved, as established in in Chapter VIII-1 of this judgment. Therefore, he will not be declared a victim of the violation of Article 5(1) due to the suffering endured by the next of kin..

iii. Antônio José dos Santos Ribeiro was identified as a presumed victim by the Commission, as the brother of Luciene dos Santos Ribeiro. However, the Court finds that the Commission also presented Antônio José dos Santos Ribeiro as a presumed victim as son of Luzia dos Santos Ribeiro and that the State did not contest the existence of a violation of his rights on this basis. Thus, he will be understood as a victim. Also, the Court finds that the violation of his right to personal integrity has been proved, as established in the video file forwarded by the representatives.[346]

iv. Antônio Rodrigues dos Santos, Maria Antônia dos Santos, Maria Vera dos Santos and Marinalva Santos were identified as presumed victims by the representatives, because they were the uncle and aunts of Andreia dos Santos. In this regard, in their final arguments, the representatives indicated that they were, indeed, the uncle and aunts of the person who died in the explosion and that the mother of the presumed victim, Maria Expedita dos Santos was deceased, so that they were the only living relatives of the person who died in the explosion. Therefore, the representatives asked that they be considered victims in this case. In the Court's opinion, the representatives' argument does not refer to the violation of the rights of Antônio Rodrigues dos Santos, Maria Antônia dos Santos, Maria Vera dos Santos and Marinalva Santos; accordingly, they will not be considered victims of the violation of the right to personal integrity. However, if the domestic instances – pursuant to Brazilian law – determine that the rights of Andreia dos Santos and Maria Expedita dos Santos were violated, this does not prevent them from acceding to whatever corresponds to them as heirs, pursuant to paragraphs 297 and 304 of this judgment.

v. Claudimeire de Jesus Bittencourt was identified as a presumed victim by the Commission and the representatives as the sister of Vanessa de Jesus Bittencourt and of Vânia de Jesus Bittencourt. The State argued that the violation of her rights had not been specifically proved on this basis. Nevertheless, the Court finds that the Commission also presented Claudimeire de Jesus Bittencourt as a presumed victim as the daughter of Maria lsabel de Jesus Bittencourt and the State did not contest the existence of a violation of her rights on

345 *Cf.* Affidavit made by Claudia Reis dos Santos, *supra*.

346 *Cf.* Documentary "*Salve, Santo Antônio*," presented by the representatives (annex 8 to the Admissibility and Merits Report of the Commission; evidence file, folio 45).

that basis. Therefore, she will be considered a victim of the violation of the right to personal integrity.

vi. Cleide Reis dos Santos was identified as a presumed victim by the representatives as the sister of Carla Reis dos Santos. The State argued that the violation of her rights had not been specifically proved. The representatives argued that the next of kin had not been identified on the original list and, therefore, it was particularly important to consider rectifying the list and including the sisters of Carla Reis dos Santos. Nevertheless, the Court does not find any evidence in the case file to prove the violation of their rights; therefore, it will not consider that their right to personal integrity has been violated.

vii. Cristiane Ferreira de Jesus, Dailane dos Santos Souza, Geneis dos Santos Souza, Marlene Ferreira de Jesus, Zuleide de Jesus Souza, Lourival Ferreira de Jesus and Samuel dos Santos Souza were identified as presumed victims by the Commission and by the representatives, as siblings of Girlene dos Santos Souza. The State argued that the violation of their rights had not been specifically proved on this basis. However, the Court finds that the Commission also presented Cristiane Ferreira de Jesus, Dailane dos Santos Souza, Geneis dos Santos Souza, Marlene Ferreira de Jesus, Zuleide de Jesus Souza, Lourival Ferreira de Jesus and Samuel dos Santos Souza as presumed victims as children of Maria Antonia de Jesus and that the State did not contest the existence of a violation of their rights on that basis. Therefore, they will be considered victims of the violation of the right to personal integrity.

viii. Guilhermino Cerqueira dos Santos was identified as a presumed victim by the representatives, as a family member of Carla Alexandra Cerqueira Santos, Daniela Cerqueira Reis and Matilde Cerqueira Santos. The State argued that the violation of his rights had not been specifically proved. The Court does not find any evidence in the case file to prove the violation of his rights; therefore, it will not consider that his right to personal integrity has been violated. In their final arguments, the representatives indicated that, although he was the brother of Carla Alexandra Cerqueira Santos, the original list of presumed victims included the names of the presumed victim's parents: Bernardo Bispo dos Santos and Maria Nascimento Cerqueira Santos, who died during the procedure before the inter-American system, so that the inclusion of the brother would be as their heir. In the Court's opinion, the representatives' arguments does not refer to the violation of his rights. However, if the domestic instances – pursuant to Brazilian law – determine that the rights of Carla Alexandra Cerqueira Santos, Bernardo Bispo dos Santos and Maria Nascimento Cerqueira Santos were violated, this does not prevent Guilhermino Cerqueira dos Santos from acceding to whatever corresponds to them as one of their heirs, pursuant to paragraphs 297 and 304 of this judgment.

ix. Lucinete dos Santos Ribeiro, Marimar dos Santos Ribeiro and Marlene dos Santos Ribeiro were identified as presumed victims by the Commission, as sisters of Luciene dos Santos Ribeiro. The State argued that the violation of their rights had not been specifically proved. However, the Court finds that the Commission also presented Lucinete dos Santos Ribeiro Marimar dos Santos Ribeiro and Marlene dos Santos Ribeiro as presumed victims as daughters de Luzia dos Santos Ribeiro, and that the State did not contest the existence of a violation of their rights on that basis. Therefore, they will be considered victims of the violation of the right to personal integrity.

x. Luís Fernando Santos Costa was identified as a presumed victim by the representatives, as a brother of Alex Santos Costa and Mairla Santos Costa. The State argued that the violation of his rights had not been specifically proved. However, the Court finds that the representatives also presented Luís Fernando Santos Costa as a presumed victim as the son of Maria Aparecida de Jesus Santos and that the State did not contest the existence of a violation of his rights on that basis. Therefore, he will be considered a victim of the violation of the right to personal integrity.

xi. Maria Joelma de Jesus Santos was identified as a presumed victim by the Commission, as the sister of Maria Joelia de Jesus Santos. The State argued that the violation of her rights

had not been specifically proved on that basis. In this regard, the Court finds that Maria Joelma de Jesus Santos was one of the fireworks factory workers who survived the explosion, so that the violation of her right to personal integrity as a direct result of the explosion has been proved, as established in in Chapter VIII-1 of this judgment. The Commission also presented Maria Joelma de Jesus Santos as a presumed victim as a sister of Carla Reis dos Santos and the State did not contest the existence of a violation of her rights on that basis. Consequently, she will also be considered a victim of the violation of the right to personal integrity owing to the suffering endured by her family member.

xii. Neuza Maria Machado was identified as a presumed victim by the Commission, as a sister of Maria Creuza Machado dos Santos. The State argued that the violation of her rights had not been specifically proved on that basis. The Court finds that there is no evidence of a violation of her rights in the case file and, therefore, she will not be considered a victim of a violation of the right to personal integrity in this case.

xiii. Roque Ribeiro da Conceição was identified as a presumed victim by the representatives, as a brother of Daiane dos Santos Conceição. In this regard, the Court finds that there is an error, because Roque Ribeiro da Conceição was the father, and not the brother of Daiane dos Santos Conceição. In addition, the Court finds that the Commission also presented Roque Ribeiro da Conceição as a presumed victim as the husband of Antônia Cerqueira dos Santos, and that the State did not contest the existence of a violation of his rights on that basis. Consequently, he will be considered a victim of the violation of the right to personal integrity. In addition, the Court finds that this violation has been proved, insofar as he made a statement that is in the evidence file concerning the suffering he had endured.[347]

254. Based on the foregoing, the Court finds that, as indicated by the State, the violation of the right to personal integrity of some of the next of kin of the presumed victims had not been proved, in particular as regards the relationships between siblings and between uncles and aunts and nephews and nieces. In the other cases, the State has not questioned the eventual violation of the right to personal integrity of the family members. Therefore, having analyzed the evidence in the case file, the Court concludes that it is not possible to prove the violation of the right to personal integrity of Antônio Rodrigues dos Santos, Maria Antônia dos Santos, Maria Vera dos Santos, Marinalva Santos, Guilhermino Cerqueira dos Santos, Neuza Maria Machado and Cleide Reis dos Santos. Therefore, these persons will not be considered victims of the violation of the right to personal integrity. The other next of kin identified as presumed victims by the Commission and the representatives will be considered victims of the violation of the right to personal integrity because the State did not raise any objection to the arguments of the Commission and the representatives in this regard.

255. Adriana Santos Rocha and Fabiana Santos Rocha died in the explosion of the fireworks factory, so that the violation of the right to life as a direct consequence of the explosion has been proved, as established in in Chapter VIII-1 of this judgment; therefore, they cannot be considered victims of the violation of the right to integrity under the violations suffered by the next of kin. In the case of Claudia Reis dos Santos and Wellington Silva dos Santos, they are two fireworks factory workers who survived the explosion, so that the violation of their right to personal integrity has been proved, as established in Chapter VIII-1 of this judgment. In the case of Claudia Reis dos Santos it has also been proved that her right to personal integrity was violated as a result of the violation of the rights of her family members.

256. Based on the foregoing, the Court concludes that the State is responsible for the violation of the right to personal integrity, recognized in Article 5(1) of the Convention, in relation to Article 1(1), to the detriment of the 100 next of kin of the persons who died in or survived the explosion, who are identified in Annex 2 of this judgment.

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[347] *Cf.* Statement by Roque Ribeiro da Conceição provided to the representatives of the presumed victims (evidence file, folios 451 and 564).

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

257. Based on Article 63(1) of the American Convention, the Court has indicated that any violation of an international obligation that has caused harm entails the obligation to repair it adequately[348] and that this provisions reflects a customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility.[349]

258. The reparation of the harm caused by the violation of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists in the re-establishment of the previous situation. If this is not feasible, as in most cases of human rights violations, the Court will determine measures to guarantee the rights that have been violated and to redress the consequences of those violations.[350]

259. This Court has established that the reparations must have a causal nexus to the facts of the case, the violations that have been declared, the harm proved, and the measures requested to redress the respective harm. Therefore, the Court must observe the concurrence of these factors to rule appropriately and pursuant to law.[351]

260. Based on the violations declared in the preceding chapter, the Court will proceed to examine the claims presented by the Commission and the victims' representatives, as well as the arguments of the State, in light of the criteria established in its case law concerning the nature and scope of the obligation to make reparation,[352] in order to establish measures to redress the harm caused to the victims.

A. Injured party

261. The Court reiterates that, pursuant to Article 63(1) of the Convention, it considers that the injured parties are those who have been declared victims of the violation of any right recognized in this instrument.[353] Therefore, the Court considers that the 60 deceased victims, and the six survivors of the explosion, identified in Annex 1 of this judgment, as well as the 100 next of kin of those who died in, and the survivors of, the explosion, identified in Annex 2 of this judgment, are the injured parties and, as victims of the violations declared in Chapter VIII of this judgment, they will be considered beneficiaries of the reparations that the Court orders below.

262. In the case the victims identified in Annex 2, and declared as such because they are family members of those who died in or survived the explosion, the State must establish a system that allows them to be identified adequately and that takes into account that there may be typographical differences or errors in their first and last names.

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348 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs.* Judgment of July 21, 1989. Series C No. 7, para. 25, and *Case of Roche Azaña et al. v. Nicaragua, supra*, para. 103.

349 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, *supra,* para. 25, and *Case of Roche Azaña et al. v. Nicaragua, supra,* para. 103.

350 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs, supra,* para. 26, and *Case of Roche Azaña et al. v. Nicaragua, supra,* para. 104.

351 *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 Roche Azaña et al. v. Nicaragua, supra,* para. 105.

352 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs, supra,* paras. 25 to 27, and *Case of Roche Azaña et al. v. Nicaragua, supra,* para. 106.

353 *Cf. Case of the La Rochela Massacre v. Colombia. Merits, reparations and costs.* Judgment of May 11, 2007. Series C No. 163. para. 233, and *Case of Roche Azaña et al. v. Nicaragua, supra,* para. 107.

B. Obligation to investigate

263. The ***Commission*** requested that, in this case, a diligent, effective and prompt investigation be conducted to clarify the facts completely, to identify all those potentially responsible, and to impose the penalties corresponding to the human rights violations that occurred. According to the Commission, this refers to both administrative and criminal investigations of individuals with links to the fireworks factory and of the state authorities who failed to comply with their inspection and oversight duties. It also asked that the State take the necessary steps to ensure that both the responsibilities and the reparations established in the respective labor and civil proceedings be implemented effectively.

264. The ***representatives*** asked that the State guarantee the prompt settlement of the cases that remain pending, as well as the effective execution of the judgments that have already been handed down. They also requested the creation of an investigation committee to clarify the facts, because, as yet, the State had been unable to investigate, process and prosecute those responsible for the violations denounced in this case, and also due to the possibility that this obligation cannot be guaranteed owing to a statute of limitations.

265. The ***State*** argued that the domestic proceedings were being processed normally and that it had not committed any omissions. It also indicated that, taking into account that appropriate domestic remedies existed for the victims of the facts of this case to claim reparations and that these were underway, the representatives' claim should be considered illegitimate, inappropriate, and also impossible.

266. The Court recalls that, in Chapter VIII-3, it declared that the investigations conducted, and the different proceedings – in the criminal, civil and labor jurisdiction – instituted since the explosion of the factory of "Vardo dos Fogos" in Santo Antônio de Jesus had been inadequate because they failed to comply with the reasonable time, there was a lack of due diligence, and the judicial protection of the victims was ineffective, The Court also recalls that the victims and their next of kin have the right that everything necessary is done to know the truth about what happened and that those found responsible are investigated, prosecuted and punished, as appropriate.[354]

267. Consequently, the Court establishes that, based on the findings of this judgment (*supra* paras. 228 to 231), the State must continue the criminal proceedings, with due diligence and pursuant to domestic law, in order to prosecute and punish, as appropriate, those responsible for the explosion of the fireworks factory of Santo Antônio de Jesus within a reasonable time. Due diligence signifies, in particular, that all the corresponding state authorities are obliged to refrain from acts that lead to the obstruction or delay of the criminal proceedings[355] – taking into account that almost 22 years have passed since the facts of this case occurred – in order to guarantee the victims' right to know the truth.

268. Regarding the civil cases seeking compensation for pecuniary and non-pecuniary damages against the Federal State, the state of Bahía, the municipality of Santo Antônio de Jesus, and the company of Mário Fróes Prazeres Bastos, and also the labor proceedings, based on the findings of this judgment (*supra* paras. 232 to 238), the State must continue, with due diligence, the proceedings that are still underway, in order to conclude them within a

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[354] *Cf. Case of Bulacio v. Argentina, supra*, para. 114, and *Case of Azul Rojas Marín et al. v. Peru, supra*, para. 173.

[355] *Cf. Case of the Río Negro Massacres v. Guatemala, supra*, para. 194, and *Case of Alvarado Espinoza et al. v. Mexico. Merits, reparations and costs.* Judgment of November 28, 2018. Series C No. 370, para. 301.

reasonable time and, as appropriate, expedite their full implementation, in addition to executing the final judgments with the effective delivery of the sums owed to the victims.

C. Measures of rehabilitation

269. The ***Commission*** asked that the State establish measures to treat the physical and mental health of the victims who survived the explosion. Also, that it establish the mental health measures required by the direct families of the victims of the explosion. It also asked that these measures be implemented in accordance with the victims wishes and in agreement with them and their representatives.

270. The ***representatives*** indicated the importance of the State providing care, free of charge, by a team of psychologists or psychiatrists to the survivors and the next of kin of the victims who died, as well as payment of any medicine and treatment that might be necessary. They indicated that this care could be provided by the relevant public institutions but, if this were no possible, the State must pay for the assistance of the private health care network. In either case, they asked that individualized treatment be provided, taking into account the particularities of each situation. They also requested effective and immediate care for the physical and mental health of the survivors and the next of kin of the victims who died and those who survived, as well as the reconstructive surgery required in relation to the burns suffered.

271. The ***State*** considered that the measures of rehabilitation requested by the representatives were inappropriate because the State had complied by providing a Unified Health System (SUS) that guaranteed comprehensive, universal and free access to the whole of the country's population without any discrimination, including mental health care.

272. The Court finds that, in the instant case, there is no evidence that the victims and their next of kin have had effective access to medical, psychological or psychiatric care despite the suffering experienced as a result of the facts that still affects them. Consequently, the Court considers that the State must provide, free of charge and immediately, through its specialized health care institutions, the adequate and effective medical, psychological and psychiatric treatment that the victims require, following their informed consent, and for as long as necessary, including the provision of medicines free of charge. In addition, the treatment must be provided, insofar as possible, in the centers chosen by the beneficiaries. If there are no health care centers nearby, transportation and food expenses must be covered. The victims have 18 months from notification of this judgment to advise the State that they require this treatment.[356]

D. Measures of satisfaction

273. The Court will now determine measures that seek to repair the non-pecuniary damage, as well as measure of a public scope or repercussion.[357] International case law and, in particular, that of this Court, has established repeatedly that the judgment constitutes, *per se,* a form of reparation.[358]

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[356] *Cf. Case of Rosendo Cantú et al. v. Mexico, supra*, para. 253, and *Case of Azul Rojas Marín et al. v. Peru, supra*, para. 237.

[357] *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and costs, supra,* para. 84, and *Case of Montesinos Mejía v. Ecuador, supra*, para. 238.

[358] *Cf. Case of Neira Alegría et al. v. Peru. Reparations and costs.* Judgment of September 19, 1996. Series C No. 29, para. 56, and *Case of Gorigoitía v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of September 2, 2019. Series C No. 382, para. 63.

D.1. Publication of the judgment

274. The ***representatives*** requested the publication of the judgment on the merits of this matter. In particular, they emphasized that the Court's case law has established that the publication of its judgments must include: an official summary in the Official Gazette; an official summary in a national newspaper with widespread circulation, and the judgment itself available for one year on an official website.

275. In addition, bearing in mind the reach of public television in Brazil, they asked that a program be created on the history of this case with an explanation of the judgment on one of the regional and national public television news channels. They also asked that this be available on the websites of the state of Bahía and of the Federal Government, preferably on the main page and for at least one month.

276. The ***State*** considered that the symbolic measures of reparation requested by the representatives were excessive. It argued that, if the Court decided against the State, the publication of the official summary of the judgment and of the complete text on an official website, as traditionally ordered by the Court in its judgments, would achieve the purpose sought by the representatives. It considered that any additional penalty would be unreasonable and would have an excessive and unnecessary impact on the public treasury.

277. The Court establishes, as it has in other cases,[359] that the State must publish, within six months of notification of this judgment: (a) the official summary of this judgment prepared by the Court, once, in the Official Gazette, in an appropriate and legible font; (b) the official summary of this judgment prepared by the Court, once, in a national newspaper with widespread coverage in an appropriate and legible font, and (c) this judgment in its entirety, available for one year on an official website of the state of Bahía and of the Federal Government. The State must inform the Court immediately when it has made each of the publications ordered, irrespective of the one-year time frame for presenting its first report established in the twenty-first operative paragraph of this judgment.

278. The State must also produce at least five minutes of material for radio and television in which it presents the summary of the judgment. The content of this material must be agreed with the victims' representatives. The material must be broadcast by the State at peak hours by the public radio and television channels of the state of Bahía, if they exist, or else by at least one of the public radio and television channels of the Federal State. The material must also be transmitted at least once by the official social networks of the Federal State and be available on the websites of the state of Bahía and of the Federal Government for one year. The State has two years as of notification of this judgment to produce and distribute this material.

D.2. Public act to acknowledge responsibility

279. The ***representatives*** requested that a public event be held where the State would acknowledge its international responsibility in the presence of authorities of the state of Bahía and the Federal Government, and of the victims' next of kin, to be transmitted by radio and television.

280. The ***State*** did not refer to this matter specifically.

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[359] *Cf. Case of Cantoral Benavides v. Peru. Reparations and costs.* Judgment of December 3, 2001. Series C No. 88, para. 79, and *Case of Roche Azaña et al. v. Nicaragua, supra*, para. 118.

281. The Court considers that the State should hold an act to acknowledge international responsibility with regard to the facts of this case and their subsequent investigation. During this act, the State must refer to the facts and the human rights violations declared in this judgment. The act must take place in a public ceremony and must be disseminated. The State must ensure the participation of those who have been declared victims in this judgment, if they wish, and must invite to the event the organizations that have represented them before the national and international instances. The victims and their representatives must be previously and duly consulted with regard to all the details of this public ceremony. The State authorities who must be present or participate in this act must be senior officials of the state of Bahía, as well as of the Federal Government. The event must be transmitted by the public radio and television stations. The local and the Federal Governments must define those who are in charge of this task. The State has two years from notification of this judgment to comply with this obligation.

E. Guarantees of non-repetition

282. The ***Commission*** asked that legislative, administrative and other measures be adopted to avoid the occurrence of similar incidents in future. In particular, the necessary and sustainable measures to provide employment opportunities in the area other than those examined in this case. It also asked that the State adopt all necessary measures to prevent, eradicate and penalize child labor, and to reinforce its institutions to ensure they comply satisfactorily with their obligation to inspect and oversee enterprises that carry out dangerous activities. This signifies that adequate accountability mechanisms must exist with regard to authorities who fail to comply with these obligations.

283. The ***representatives*** asked that the State, together with the *Movimento 11 de Dezembro,* facilitate the elaboration of a socio-economic project to enable the women employed in the manufacture of fireworks to enter other labor markets and to provide vocational training to young people who are about to enter the job market. They also requested that the measures to oversee and to combat clandestine fireworks factories in the country be strengthened. Additionally, they asked that the Court order the State to strengthen the regulation of the manufacture, sale and use of fireworks, by defining the regulations, the agencies responsible for ensuring compliance with them, and the penalties to be applied in cases of non-compliance. In this regard, they referred to a bill[360] adopted by the Senate in 2017 that proposes the establishment of new regulations for the manufacture, sale and use of fireworks, repealing the existing law. They indicated that, even though it contains very general provisions on some relevant issues, such as the definition of inspection agencies, it does provide improvements such as the prohibition of the sale and display of non-certified fireworks, sales by unlicensed establishments, and the operation of fireworks factories in urban areas.

284. The ***State*** considered that it could not be sentenced to amend its legislation because the control of the manufacture of fireworks not only existed, but was structured and robust. Thus, inspection was well regulated both by law and by regulations, and a clear structure existed with regard to the attributes of each organ of the State; in addition, the applicable penalties were established for cases of non-compliance with the provisions. Also, if the Court determined this measure, it would signify an abstract control of the conventionality of the laws of Brazil.

285. The Court recalls that the State must prevent the occurrence of human rights violations

[360] *Cf.* Bill PL 7433/2017 before the Federal Senate of Brazil. Available at: https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2129817.

such as those described in this case and, therefore, adopt all the legal, administrative and other measures required to this end.[361]

286. The Court appreciates the progress made by the State in regulating the manufacture of fireworks[362] and providing legal protection for labor rights.[363] However, it points out that there is no record in the briefs and evidence submitted, or in the statements or oral arguments made during the public hearing, that the State has been able to implement measures to ensure that, in practice, the places in which fireworks are manufactured in Brazil are inspected regularly.

287. The Court recalls that the failure of the state authorities to oversee the factory of "Vardo dos Fogos" was the main factor that engaged the international responsibility of the State. Accordingly, in order to bring a halt to the operation of the clandestine factories and/or those that operate in non-compliance with the regulations for the control of dangerous activities, and to ensure just and favorable conditions of work in such places, the State must take steps to implement a systematic policy of regular inspections of places that make fireworks, both to verify the health and safety conditions of the workplace, and to oversee compliance with the regulations on the storage of the materials involved. The State must ensure that the regular inspections are conducted by inspectors who are qualified to oversee matters relating to health and safety in the specific area of the manufacture of fireworks. To comply with this measure, it is suggested that the State have recourse to organisations such as the ILO and UNICEF that are able to provide advice or assistance that may be useful in ensuring compliance with the measure ordered. The State has two years from notification of this judgment to present a report to the Court on the progress made in implementation of this policy.

288. With regard to the bill mentioned by the representatives (Brazilian Federal Senate Bill PL 7433/2017), the Court finds it pertinent to order the Brazilian State to provide a report on the status of the legislative processing of this bill. The report should include details of the main proposed changes to the current legislation, their possible practical impact, and the proposed timetable for the bill's final adoption. This report should be provided within one year of notification of this judgment.

289. The Court recalls that, in this judgment (*supra* para. 188), it has established the extreme vulnerability of the workers of the factory of "Vardo dos Fogos" owing to their situation of intersectional discrimination and poverty. In addition, in this case it has been proved that these workers had no other employment alternative to the manufacture of fireworks. The Court appreciates the efforts made by the State to ensure that facts such as those of this case do not happened again (*supra* para. 146). Nevertheless, the evidence provided by the State does not reveal the specific impact that the public policies of the last 20 years may have had

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361 *Cf. Case of Suárez Rosero v. Ecuador. Merits, supra*, para. 106, and *Case of Quispialaya Vilcapoma v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2015. Series C No. 308, para. 274.

362 *Cf.* Decree No. 3,665, promulgated on November 20 2000, available at: http://www.planalto.gov.br/ccivil_03/Decree/d3665.htm (evidence file, folios 3197 to 3236); Decree No. 9,493, promulgated on September 5, available at: http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2018/Decree/D9493.htm (evidence file, folios 3238 to 3262), regulating the registration and operation of the factories; Decree No. 10,030, promulgated on September 30, 2019, available at: http://www.planalto.gov.br/ccivil_03/_Ato2019-2022/2019/Decree/D10030.htm#art6; Ordinance No. 56-COLOG, of June 5, 2017 (evidence file, folios 3264 to 3317); and Ordinance No. 42-COLOG, of March 28, 2018 (evidence file, folios 3319 to 3365).

363 Regulatory Standard No. 19 was updated by the adoption of Annex 1 on March 30, 2007; this includes several new measures owners must take to prevent workplace accidents, specifically in the manufacture of fireworks. Also, following the accident, Brazil ratified ILO Convention 182 on the worst forms of child labor in 2000 and, in 2008, regulated this Convention by a decree that listed several economic activities in which the employment of young people under 18 years of age was prohibited, including the manufacture of fireworks. See also, Decree No. 4,085 of January 15, 2002, promulgating ILO Convention 174 and Recommendation 181 (evidence file, folios 3367 to 3374).

on those who work in the manufacture of fireworks in the municipality in which the facts occurred. Added to this, the statements received during the hearing and other elements of the body of evidence in this case[364] indicate that the situation of this vulnerable population of Santo Antônio de Jesus has not changed significantly. Therefore, the Court orders the State, within two years of notification of this judgment, to design and execute a socio-economic development program especially for the population of Santo Antônio de Jesus, in coordination with the victims and their representatives. The State must provide the Court with a yearly progress report on its implementation. The program must focus on the lack of employment options, especially for young people over 16 years of age and Afro-descendant women living in poverty. The program should include, *inter alia*: the creation of professional and/or vocational training courses that permit workers to enter other labor markets, such as commerce, agriculture, data-processing, among other relevant economic activities in the region; measures to address school drop-out caused by the entry of children into the labor market, and awareness-raising campaigns on human rights and the risks inherent in the manufacture of fireworks.

290. To comply with this measure, the State should take into account the main economic activities of the region, the eventual need to provide incentives for other economic activities, the need to ensure an adequate training for the workers so that they may perform different professional activities, and the obligation to eradicate child labor in accordance with the standards of international law.[365]

291. Bearing in mind that this case refers also to the issue of business and human rights, the Court finds it pertinent to order the State, within one year, to provide a report on the implementation and application of the National Guidelines on Business and Human Rights,[366] especially with regard to: promotion of and support for measures of inclusion and non-discrimination by the creation of programs of incentives for hiring vulnerable groups,[367] and implementation by businesses of educational activities on human rights, including information on domestic laws and the international parameters, focusing on the relevant standards with regard to the actions of individuals and the risks to human rights.[368]

F. Compensation

F.1. Pecuniary damage

292. The ***Commission*** requested that the victims in this case receive adequate redress, for both pecuniary and the non-pecuniary damage.

293. The ***representatives*** underscored that reparation of the pecuniary damage should include compensation for consequential damage, as well as loss of earnings, and referred to

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[364] *Cf.* Statements made by Maria Balbina dos Santos and Leila Cerqueira dos Santos during the public hearing, *supra*; Expert opinion provided by Sônia Marise Rodrigues Pereira Tomasoni, *supra*; Synthesis document of the Working Group, *supra*; BARBOSA JÚNIOR, José Amândio. *"La Producción de Fuegos Artificiales en el Municipio of Santo Antônio de Jesus/BA: un análisis de su contribución para el desarrollo local," supra*, and SANTOS, Ana Maria. *"La Clandestinidad como Expresión de la Precarización del Trabajo en la Producción del Cohete de Masa en la municipalidad de Santo Antônio de Jesus – Bahia: un estudio de caso en el barrio Irmã Dulce," supra*.

[365] *Cf.* International Labour Organization. *Convention 138: Minimum age Convention*, 1973; International Labour Organization, *Convention 182: Convention concerning the prohibition and immediate action for the elimination of the worst forms of child labour,* 1999 and International Labour Organization. ILO Declaration on Fundamental Principles and Rights at Work, 1998. Available at: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_467655.pdf.

[366] *Cf.* Decree No. 9,571 of November 21, 2018. Available at: http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/Decree/D9571.htm.

[367] *Cf.* Decree No. 9,571 of November 21, 2018, *supra*, article 3, XIII.

[368] *Cf.* Decree No. 9,571 of November 21, 2018, *supra*, article 5, III.

the amounts awarded by the Court in the cases of *Gomes Lund et al. v. Brazil* and the "*Juvenile Re-education Institute" v. Paraguay*. They also requested compensation for the expenses incurred by the victims who survived and the next of kin for psychologists, psychiatrists, medication and all the other treatments used when seeking medical and/or psychological rehabilitation.

294. The ***State*** argued that this request should be examined in light of the evidence provided, in keeping with the rules of due process and not merely based on the representatives' assertions. It also stressed the importance of not attributing it with two-fold responsibility for the facts of this case, or allowing the victims to be made wealthier unjustifiably by the duplication of compensation payments for pecuniary damage, non-pecuniary damage and pension; accordingly, it indicated that the Court should take into account the levels of the amounts decided in the domestic sphere and respect the primary role of the Brazilian judge. It noted that this should also serve as a parameter for a just analysis of the claim for monetary correction presented by the representatives, avoiding possible distortions.

295. The Court has developed the concept of pecuniary damage in its case law and has established that it supposes "the loss of, or detriment to, the income of the victims, the expenses incurred as a result of the facts, and the consequences of a pecuniary nature that have a causal nexus with the facts of the case."[369]

296. Based on the criteria established in its consistent case law and the circumstances of this case, the Court finds it pertinent to establish, in equity, for pecuniary damage payment of US$50,000 (fifty thousand United States dollars) in favor of each of the victims who died in, and those who survived, the explosion of the fireworks factory.

297. The amounts established in favor of those who died in the explosion (Annex 1) must be paid in accordance with the following criteria:

a. Fifty per cent (50%) of the compensation shall be shared, in equal parts, between the victim's children. If one or several of the victim's children are deceased, the part that would have corresponded to them shall be delivered to their children or spouses if these exist or, if they do not exist, the part that would have corresponded to them will augment that of the other children of the same victim;

b. Fifty per cent (50%) of the compensation shall be delivered to the person who was the spouse, or permanent companion of the victim at the time of the facts;

c. If there are no family members in one of the categories defined in the preceding paragraphs, the amount that would have corresponded to the next of kin in that category will augment the amount that corresponds to the other category;

d. If the victim had neither children, nor spouse or permanent companion, the compensation for pecuniary damage shall be delivered to his or her parents, and

e. If none of the persons mentioned above exist, the compensation shall be paid to the heirs pursuant to domestic inheritance laws.

298. The preceding compensation shall be paid irrespective of the amounts recognized, or to be recognized in future, in the domestic proceedings in favor of the victims in this case.

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369 *Cf. Case of Bámaca Velásquez v. Guatemala.* Reparations and costs. Judgment of February 22, 2002. Series C No. 91, para. 43, and *Case of Azul Rojas Marín et al. v. Peru, supra,* para. 256.

F.2. Non-pecuniary damage

299. The ***Commission*** asked that measures of financial compensation and satisfaction for the non-pecuniary harm be adopted that provided full redress for the violations proved in this case.

300. The ***representatives*** referred to the amounts that the Court had established in other cases and indicated the relevance of the criteria used to establish those amounts. They included the time that had passed between the harmful event and adequate reparation; the destruction of the life project; the decrease in the working capability; the manner of death and the type of injuries; the absence of subsequent care, and the conditions of detention as a form of ill-treatment that, in this case, according to the representatives, could be considered analogous to the degrading working conditions to which the victims were subjected.

301. The ***State*** referred to this matter when addressing the pecuniary damage (*supra* para. 294).

302. The Court has developed the concept of non-pecuniary damage in its case law and has established that this "may include both the suffering and afflictions caused by the violation and the impairment of values of great significance for the individual, as well as any alteration of a non-pecuniary nature in the living conditions of the victims."[370] Given that it is not possible to allocated a precise monetary equivalent to the non-pecuniary damage, this can only be compensated. Accordingly, to ensure full reparation to the victims, it will be compensated by the payment of a sum of money determined by the Court in application of sound judicial criteria and in fairness.[371]

303. In Chapter VIII the Court declared the international responsibility of the State for the violation of the rights established in Articles 4(1), 5(1), 8(1), 19, 24, 25 and 26 of the American Convention, in relation to Article 1(1) of this instrument. Based on its findings, the Court establishes, in equity, the following sums as compensation for non-pecuniary damage:

a. US$60,000 (sixty thousand United States dollars) for each of the victims who died in, and those who survived, the explosion. In the case of Luciene Ribeiro dos Santos, Girlene dos Santos Souza, Aldeci Silva Santos, Aldenir Silva Santos, Aristela Santos de Jesus, Karla Reis dos Santos, Francineide Bispo dos Santos, Rosângela de Jesus França, Luciene Oliveira Santos, Arlete Silva Santos, Núbia Silva dos Santos, Alex Santos Costa, Maria Joelma de Jesus Santos, Wellington Silva dos Santos, Bruno Silva dos Santos, who were minors at the date of the explosion, an additional US$15.000 (fifteen thousand United States dollars) must be paid to them. In the case of Vitória França she must receive an additional US$20,000 (twenty thousand United States dollars).

b. US$10,000 (ten thousand United States dollars) to each of the next of kin accredited as victims of the violation of Article 5 of the Convention.

304. The foregoing amounts established in favor of those who died in the explosion (Annex 1) should be delivered in keeping with the following criteria:

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[370] *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and costs, supra,* para. 84, and *Case of Roche Azaña et al. v. Nicaragua, supra,* para. 133.

[371] *Cf. Case of Cantoral Benavides v. Peru*, *supra*, para. 53, and *Case of Roche Azaña et al. v. Nicaragua, supra,* para. 133.

a. Fifty per cent (50%) of the compensation shall be shared, in equal parts, between the victim's children. If one or several of the victim's children are deceased, the part that would have corresponded to them shall be delivered to their children or spouses if these exist or, if they do not exist, the part that would have corresponded to them will augment that of the other children of the same victim;

b. Fifty per cent (50%) of the compensation shall be delivered to the person who was the spouse, or permanent companion of the victim at the time of the facts;

c. If there are no family members in one of the categories defined in the preceding paragraphs, the amount that would have corresponded to the next of kin in that category will augment the amount that corresponds to the other category;

d. If the victim had neither children, nor spouse or permanent companion, the compensation for pecuniary damage shall be delivered to his or her parents, and

e. If none of the persons mentioned above exist, the compensation shall be paid to the heirs pursuant to domestic inheritance laws.

305. The preceding compensation shall be paid irrespective of the amounts recognized, or to be recognized in future, in the domestic proceedings in favor of the victims in this case.

306. The Court considers that the amounts established in equity compensate and form part of the full reparation of the victims, taking into consideration their suffering and afflictions.

G. Costs and expenses

307. The ***representatives*** requested reimbursement of the expenses incurred during the processing of this case from the lodging of the petition before the Commission up until the measures taken before the Court. According to the representatives, these expenses included costs related to air fares to Salvador, transportation in car or bus to Santo Antônio de Jesus, and board and lodging during the 18 years of litigation before the Inter-American Commission and Court. They also indicated that they had incurred expenses to attend the hearing at the Inter-American Commission in Washington, D.C., including air fares, accommodation and per diems for five representatives of the victims. The costs and expenses amounted to a total of US$20,000 (twenty thousand United States dollars).

308. The ***State*** asked the Court to take into account the parameters generally applied in its case law, considering only the reasonable, duly proven and necessary costs incurred by the actions of the representatives before the inter-American system, considering the amount claimed, the supporting documentation, the direct relationship between the amount claimed and the specific case, as well as the circumstances of the case. In addition, it indicated that it hoped that the Court would take into account that the request for reimbursement of the cost of the brief with pleadings, motions and evidence was based on percentages that were simple estimates. Lastly, it asked the Court not to sentence it to pay costs and expenses if it found that the Brazilian State had not incurred in international responsibility.

309. The Court reiterates that, according to its case law, costs and expenses are part of the concept of reparation, because the actions taken by the victims in order to obtain justice, at both the national and the international level, entail disbursements that must be compensated when the international responsibility of the State has been declared in a judgment. With regard to the reimbursement of expenses, the Court must assess their scope prudently; they include the expenses arising before the authorities of the domestic jurisdiction, as well as

those arising during the procedure 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 made based on the principle of equity and taking into account the expenses indicated by the parties, provided their *quantum* is reasonable.[372]

310. As it has indicated on other occasion, the Court recalls that "the claims of the victims or their representatives for costs and expenses, and the evidence that supports these, must be presented to the Court at the first procedural opportunity granted to them, that is in the pleadings and motions brief, without prejudice to those claims being updated subsequently, in keeping with the new costs and expenses incurred as a result of the proceedings before the Court."[373] In addition, the Court reiterates that it not sufficient merely to forward probative documents; rather the parties are required to include arguments that relate the evidence to the fact that it is considered to represent and, in the case of alleged financial disbursements, the items and their justification must be clearly established.[374]

311. From the analysis of the documentation provided, the Court finds that, although the representatives alleged in their brief with pleadings, motions and evidence that the costs and expenses in which they incurred amounted to US$20,000 (twenty thousand United States dollars), they did not provide any evidence to justify this amount. Subsequently, with their final arguments, and belatedly, they presented supporting documentation for costs and expense of US$42,526.52 (forty-two thousand five hundred and twenty-six United States dollars and fifty-two cents). The State, in its observations on the annexes provided by the representatives, requested, among other matters, that the monthly personnel expenses included by the representatives be clarified and explained.

312. The Court finds that the supporting documents for the costs and expenses were not presented at the proper procedural moment. Therefore, it will calculate the payment of costs and expenses, in equity, and taking into account that the international litigation lasted more than 15 years. Thus, the Court finds it in order to award a reasonable sum of US$35,000.00 (thirty-five thousand United States dollars) to the representatives in this case for costs and expenses.

H. Method of complying with the payments ordered

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

314. The State must comply with its monetary obligations by payment in United States dollars or the equivalent in Brazilian currency, using the exchange rate in force on the New York Stock Exchange (United States of America) the day before the payment to make the respective calculation.

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[372] *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 Azul Rojas Marín et al. v. Peru*, *supra*, para. 274.

[373] *Cf. Case of Garrido and Baigorria v. Argentina*. Reparations and costs, *supra,* para. 79, and *Case of Azul Rojas Marín et al. v. Peru*, *supra*, para. 275.

[374] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador.* Preliminary objections, merits, reparations and costs. Judgment of November 21, 2007. Series C No. 170, para. 275; and *Case of Women Victims of Sexual Torture in Atenco v. Mexico.* Preliminary objection, merits, reparations and costs. Judgment of November 28, 2018. Series C No. 371. para. 379.

315. If, for causes that can be attributed to any of the beneficiaries of the compensation or their heirs, it is not possible to pay all or part of the amounts established within the indicated time frame, the State shall deposit the said amounts in their favor in a deposit certificate or account in a solvent Brazilian financial institution, in United States dollars, and in the most favorable financial conditions allowed by the State's banking laws and practice. If the corresponding compensation is not claimed, after ten years the amounts shall be returned to the State with the interest accrued.

316. The amounts allocated in this judgment as compensation for pecuniary and non-pecuniary damage and as reimbursement of costs and expenses must be delivered to the persons and organisations indicated in full, as established in this judgment, without any deductions due to eventual taxes or charges.

317. If the State falls in arrears, it must pay interest on the amount owed corresponding to banking interest on arrears in the Federative Republic of Brazil.

X
OPERATIVE PARAGRAPHS

318. Therefore,

THE COURT

DECIDES,

Unanimously:

1. To reject the preliminary objection concerning the alleged inadmissibility of submitting the case due to the publication of the Admissibility and Merits Report by the Commission, pursuant to paragraph 20 of this judgment.

By five votes to two:

2. To reject the preliminary objection concerning the alleged lack of jurisdiction *ratione materiae* regarding the supposed violations of the right to work, pursuant to paragraph 23 of this judgment.

Dissenting Judges Eduardo Vio Grossi and Humberto Antonio Sierra Porto.

Unanimously:

3. To reject the preliminary objection concerning the alleged failure to exhaust domestic remedies, pursuant to paragraphs 29 to 33 of this judgment.

DECLARES,

Unanimously that:

4. The State is responsible for the violation of the rights to life and of the child contained Articles 4(1) and 19, in relation to Article 1(1) of the American Convention on Human Rights, to the detriment of the sixty persons who died in the explosion of the fireworks factory of

Santo Antônio de Jesus on December 11, 1998, referred to in paragraph 139 of this judgment, who included twenty children, according to paragraphs 115 to 139 of this judgment

Unanimously that:

5. The State is responsible for the violation of the rights to personal integrity and of the child contained in Articles 5(1) and 19 in relation to Article 1(1) of the American Convention on Human Rights, to the detriment of the six survivors of the explosion of the fireworks factory of Santo Antônio de Jesus, on December 11, 1998, referred to in paragraph 139 of this judgment, who included three children, according to paragraphs 115 to 139 of this judgment.

By six votes to one, that:

6. The State is responsible for the violation of the rights of the child, to equal protection of the law, to the prohibition of discrimination, and to work contained in Articles 19, 24 and 26, in relation to Article 1(1) of the American Convention on Human Rights, to the detriment of the sixty persons who died in, and the six survivors of, the explosion of the fireworks factory of Santo Antônio de Jesus on December 11, 1998, referred to in paragraph 204 of this judgment, who included 23 children, according to paragraphs 148 to 204 of this judgment.

Dissenting Judge Eduardo Vio Grossi.

Unanimously that:

7. The State is responsible for the violation of the rights to judicial guarantees and judicial protection contained in Articles 8 and 25 in relation to Article 1(1) of the American Convention on Human Rights, to the detriment of the six survivors of the explosion of the fireworks factory of Santo Antônio de Jesus and the next of kin of the victims of the explosion of the fireworks factory on December 11, 1998, referred to in paragraph 247 of this judgment, according to paragraphs 216 to 247 of this judgment.

Unanimously that:

8. The State is responsible for the violation of the right to personal integrity, contained in Article 5(1) of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of the next of kin of the persons who died in, and the survivors of, the explosion of the fireworks factory of Santo Antônio de Jesus on December 11, 1998, referred to in paragraph 256 of this judgment, according to paragraphs 251 to 256 of this judgment.

AND ESTABLISHES,

Unanimously that:

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

10. The State shall continue the criminal proceedings that are underway in order, within a reasonable time, to prosecute and punish, as appropriate, those responsible for the explosion in the fireworks factory, pursuant to paragraph 267 of this judgment.

11. The State shall continue the civil cases on compensation for pecuniary and non-pecuniary damage and the labor proceedings that are underway in order to conclude them

within a reasonable time and, if appropriate, facilitate full execution of the judgments, pursuant to paragraph 268 of this judgment.

12. The State shall provide, immediately and free of charge, the medical and psychological or psychiatric treatment, as appropriate, to the victims in this case who request this, as established in paragraph 272 of this judgment.

13. The State shall, within six months of notification of this judgment, make the publications indicated in its paragraph 277 as established therein.

14. The State shall produce and disseminate material for radio and television related to the facts of this case, pursuant to paragraph 278 of this judgment.

15. The State shall hold a public act to acknowledge international responsibility in relation to the facts of this case, pursuant to paragraph 281 of this judgment.

16. The State shall inspect those sites where fireworks are manufactured, systematically and periodically, pursuant to paragraph 287 of this judgment.

17. The State shall provide a progress report on the legislative processing of Brazilian Federal Senate Bill PL 7433/2017, pursuant to paragraph 288 of this judgment.

18. The State shall design and execute a socio-economic development program, in consultation with the victims and their next of kin, in order to facilitate the insertion of those working in the manufacture of fireworks into other labor markets and to enable the creation of other economic alternatives, pursuant to paragraphs 289 and 290 of this judgment.

19. The State shall provide a report on the application of the National Guidelines on Business and Human Rights, pursuant to paragraph 291 of this judgment.

20. The State shall pay the amounts established in paragraphs 296, 303 and 312 of this judgment as compensation for pecuniary damage, non-pecuniary damage, and costs and expenses, pursuant to paragraphs 296, 297, 303, 304, 312 and 313 to 317 of this judgment.

21. 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, notwithstanding the provisions of paragraph 277 of this judgment.

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

Judges L. Patricio Pazmiño Freire, Eduardo Ferrer Mac-Gregor Poisot and Ricardo Pérez Manrique informed the Court of the concurring opinions. Judges Eduardo Vio Grossi and Humberto Antonio Sierra Porto informed the Court of their partially dissenting opinions.

DONE, at San José, Costa Rica on July 15, 2020, in the Spanish language.

IACtHR. Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their families *v.* Brazil. Preliminary objections, merits, reparations and costs. Judgment of July 15, 2020.

Elizabeth Odio Benito
President

L. Patricio Pazmiño Freire | Eduardo Vio Grossi

Humberto Antonio Sierra Porto | Eduardo Ferrer Mac-Gregor Poisot

Eugenio Raúl Zaffaroni | Ricardo C. Pérez Manrique

Pablo Saavedra Alessandri
Secretary

So ordered,

Elizabeth Odio Benito
President

Pablo Saavedra Alessandri
Secretary

ANNEX 1.
PEOPLE WHO DIED IN OR SURVIVED THE EXPLOSION

Victims who died	
1	Adriana dos Santos[375]
2	Adriana Santos Rocha[376]
3	Aldeci Silva dos Santos[377]
4	Aldeni Silva dos Santos[378]
5	Alex Santos Costa[379]
6	Alexandra Gonçalves da Silva[380]
7	Ana Claudia Silva da Hora[381]
8	Ana Lúcia de Jesus[382]
9	Andreia dos Santos[383]
10	Ângela Maria Conceição de Jesus[384]

[375] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Adriana dos Santos." However, the Court finds that the name of this person corresponds to the name indicated in the evidence provided by the representatives (evidence file, folio 1586) and by the State (evidence file, folios 1977, 2050 and 2104).
[376] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Adriana Santos Rocha." However, the Court finds that the name of this person corresponds to the name indicated in the evidence provided by the representatives (evidence file, folio 1586) and by the State (evidence file, folios 2098 and 2145).
[377] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Aldeci Silva Santos." However, the Court finds that the name of this person corresponds to "Aldeci Silva dos Santos," as recorded in the evidence provided by the State (evidence file, folios 1979, 2039 and 2163).
[378] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Aldenir Silva Santos." However, the Court finds that the name of this person corresponds to "Aldeni Silva dos Santos," as recorded in the evidence provided by the State (evidence file, folios 1979, 2038 and 2163).
[379] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Alex Santos Costa." However, the Court finds that the name of this person corresponds to the name indicated in the evidence provided by the representatives (evidence file, folio 1593) and by the State (evidence file, folios 2063, 2091 and 2140).
[380] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Alexandra Gonçalves da Silva." However, the Court finds that the name of this person corresponds to the name indicated in the evidence provided by the representatives (evidence file, folio 1113) and by the State (evidence file, folios 1986, 2018 and 2119).
[381] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Ana Claudia Sílvia da Hora." However, the Court finds that the name of this person corresponds to "Ana Claudia Silva da Hora," as recorded in the evidence provided by the State (evidence file, folios 1998, 2019 and 2118).
[382] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Ana Lucia de Jesus Santos." However, the Court finds that the name of this person corresponds to "Ana Lúcia de Jesus," as recorded in the evidence provided by the representatives (evidence file, folio 1112) and by the State (evidence file, folios 2048, 2178 and 2189).
[383] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Andreia dos Santos." However, the Court finds that the name of this person corresponds to the name indicated in the evidence provided by the representatives (evidence file, folio 1110) and by the State (evidence file, folios 1972, 2043 and 2165).
[384] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Ângela Maria da Conceição de Jesus." However, the Court finds that the name of this person corresponds to "Ângela Maria Conceição de Jesus," as recorded in the evidence provided by the State (evidence file, folios 1965, 2047 and 2103).

11	Antônia Cerqueira dos Santos[385]
12	Aristela Santos de Jesus[386]
13	Arlete Silva Santos[387]
14	Carla Alexandra Cerqueira Santos[388]
15	Carla Mércia Borges [389]
16	Carla Reis dos Santos[390]
17	Claudiane Maria Nascimento dos Santos[391]
18	Cristiane Lima Bittencourt [392]
19	Daiane dos Santos Conceição[393]
20	Daniela Cerqueira Reis[394]
21	Edilene Silva dos Santos[395]
22	Edna Silva dos Santos[396]

[385] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Antônia Cerqueira dos Santos." However, the Court finds that the name of this person corresponds to the name indicated in the evidence provided by the representatives (evidence file, folio 1586) and by the State (evidence file, folios 1994, 2025 and 2176).

[386] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Aristela Santos de Jesus." However, the Court finds that the name of this person corresponds to the name indicated in the evidence provided by the representatives (evidence file, folio 1586) and by the State (evidence file, folios 1980, 2038 and 2100).

[387] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Alrlete Silva Santos" and como "Arlete Silva Santos." However, the Court finds that the name of this person corresponds to "Arlete Silva Santos," as recorded in the evidence provided by the representatives (evidence file, folio 1587) and by the State (evidence file, folios 1968, 2030 and 2092).

[388] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Carla Alexandra Cerqueira dos Santos." However, the Court finds that the name of this person corresponds to "Carla Alexandra Cerqueira Santos," as recorded in the evidence provided by the State (evidence file, folio 2000).

[389] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Carla Mercês Borges." However, the Court finds that the name of this person corresponds to "Carla Mércia Borges," as recorded in the evidence provided by the representatives (evidence file, folio 1112) and by the State (evidence file, folios 1973, 2041 and 2101).

[390] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Carla Reis dos Santos" and "Karla Reis dos Santos." However, the Court finds that the name of this person corresponds to "Carla Reis dos Santos," as recorded in the evidence provided by the representatives (evidence file, folio 1587) and by the State (evidence file, folios 1958, 2046 and 2113).

[391] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Claudiane Maria Nascimento dos Santos." However, the Court finds that the name of this person corresponds to the name indicated in the evidence provided by the representatives (evidence file, folio 1587) and by the State (evidence file, folios 1987, 2020 and 2109).

[392] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Cristiane Lima Bittencourt." However, the Court finds that the name of this person corresponds to "Cristiane Lima Bitencourt," as recorded in the evidence provided by the representatives (evidence file, folio 1586) and by the State (evidence file, folio 2324).

[393] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Daiane Santos da Conceição." However, the Court finds that the name of this person corresponds to "Daiane dos Santos Conceição," as recorded in the evidence provided by the State (evidence file, folios 1995, 2088 and 2177).

[394] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Daniela Cerqueira Reis." In other documents provided as evidence (evidence file, folios 41 and 1586) it appears as "Daniela C. Reis."

[395] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Edilene Silva Santos." However, the Court finds that the name of this person corresponds to "Edilene Silva dos Santos," as recorded in the evidence provided by the representatives (evidence file, folio 1110) and by the State (evidence file, folios 1992, 2040 and 2148).

[396] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Edna Silva Santos." However, the Court finds that the name of this person corresponds

23	Edneuza Carvalho Santos[397]
24	Eunice dos Anjos da Conceição[398]
25	Fabiana Santos Rocha[399]
26	Francisneide Bispo dos Santos[400]
27	Girlene dos Santos Souza[401]
28	Izabel Alexandrina da Silva[402]
29	Joseane Cunha Reis[403]
30	Kátia Silene Lima Bittencourt[404]
31	Luciene Oliveira dos Santos[405]
32	Luciene dos Santos Ribeiro[406]
33	Luzia dos Santos Ribeiro[407]
34	Mairla Santos Costa[408]

to "Edna Silva dos Santos," as recorded in the evidence provided by the representatives (evidence file, folio 1110) and by the State (evidence file, folios 1992, 2040 and 2148).

[397] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Edneuza Carvalho Santos." However, the Court finds that the name of this person corresponds to the name indicated in the evidence provided by the representatives (evidence file, folio 1593) and by the State (evidence file, folios 1883, 2026 and 2122).

[398] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Eunice dos Anjos da Conceição." However, the Court finds that the name of this person corresponds to the name indicated in the evidence provided by the representatives (evidence file, folio 1113) and by the State (evidence file, folios 2009, 2071 and 2137).

[399] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Fabiana Santos Rocha." However, the Court finds that the name of this person corresponds to the name indicated in the evidence provided by the representatives (evidence file, folio 1586) and by the State (evidence file, folios 1974, 2098 and 2145).

[400] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Francineide Jose Bispo Santos." However, the Court finds that the name of this person corresponds to "Francisneide Bispo dos Santos," as recorded in the evidence provided by the State (evidence file, folios 1989, 2022 and 2121).

[401] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Girlene dos Santos Souza." However, the Court finds that the name of this person corresponds to the name indicated in the evidence provided by the representatives (evidence file, folio 1111) and by the State (evidence file, folios 1957, 2174 and 2302).

[402] This person appears on the list of victims provided with the brief with pleading, motions and evidence. On that list, the name appears as "Izabel Alexandrina da Silva." However, the Court finds that the name of this person corresponds to the name indicated in the evidence provided by the State (evidence file, folios 2012, 2110 and 2134).

[403] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Joseane Cunha Reis." However, the Court finds that the name of this person corresponds to the name indicated in the evidence provided by the representatives (evidence file, folio 1587) and by the State (evidence file, folios 1999, 2032 and 2155).

[404] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Katia Silene Lima Bittencourt." However, the Court finds that the name of this person corresponds to "Kátia Silene Lima Bittencourt," as recorded in the evidence provided by the representatives (evidence file, folio 1586) and by the State (evidence file, folio 2324).

[405] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Luciene Oliveira Santos." However, the Court finds that the name of this person corresponds to "Luciene Oliveira dos Santos," as recorded in the evidence provided by the representatives (evidence file, folio 1113) and by the State (evidence file, folios 2052, 2117 and 2342).

[406] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Luciene Ribeiro dos Santos." However, the Court finds that the name of this person corresponds to "Luciene dos Santos Ribeiro," as recorded in the evidence provided by the representatives (evidence file, folio 1111) and by the State (evidence file, folios 2015, 2126 and 2213).

[407] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Luzia dos Santos Ribeiro." However, the Court finds that the name of this person corresponds to the name indicated in the evidence provided by the representatives (evidence file, folio 1111) and by the State (evidence file, folios 2008, 2136 and 2239).

[408] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On

35	Maria Antonia de Jesus[409]
36	Maria Aparecida de Jesus Santos[410]
37	Maria Creuza Machado dos Santos [411]
38	Maria das Graças Santos de Jesus[412]
39	Maria de Lourdes Jesus Santos [413]
40	Maria Dionice Santana da Cruz[414]
41	Maria Joelia de Jesus Santos[415]
42	Maria José Bispo dos Santos[416]
43	Maria José Nascimento Almeida[417]
44	Maria Isabel de Jesus Bittencourt [418]
45	Maria Ramos Borges[419]

that list, the name appears as "Mairla de Jesus Santos Costa." However, the Court finds that the name of this person corresponds to "Mairla Santos Costa," as recorded in the evidence provided by the representatives (evidence file, folio 1114) and by the State (evidence file, folios 1993, 2063 and 2140).

[409] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Maria Antonia Santos Souza." However, the Court finds that the name of this person corresponds to "Maria Antonia de Jesus," as recorded in the evidence provided by the State (evidence file, folios 1998, 2095 and 2174).

[410] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Maria Aparecida de Jesus Santos." However, the Court finds that the name of this person corresponds to the name indicated in the evidence provided by the representatives (evidence file, folio 1114) and by the State (evidence file, folios 1967, 2044 and 2139).

[411] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Maria Creuza Machado Santos." However, the Court finds that the name of this person corresponds to "Maria Creuza Machado dos Santos," as recorded in the evidence provided by the State (evidence file, folios 1976, 2029 and 2124).

[412] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Maria das Graças Santos de Jesus." However, the Court finds that the name of this person corresponds to the name indicated in the evidence provided by the representatives (evidence file, folio 1586) and by the State (evidence file, folios 1980, 2039 and 2161).

[413] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Maria de Lourdes de Jesus Santos." However, the Court finds that the name of this person corresponds to "Maria de Lourdes Jesus Santos," as recorded in the evidence provided by the State (evidence file, folios 1966, 2051 and 2105).

[414] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Maria Dionice Santos Cruz." However, the Court finds that the name of this person corresponds to "Maria Dionice Santana da Cruz," as recorded in the evidence provided by the State (evidence file, folios 2005, 2160 and 2342).

[415] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Maria Joélia de Jesus Santos." However, the Court finds that the name of this person corresponds to "Maria Joelia de Jesus Santos," as recorded in the evidence provided by the State (evidence file, folios 1964, 2065 and 2187).

[416] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Maria Jose Bispo dos Santos." However, the Court finds that the name of this person corresponds to "Maria José Bispo dos Santos," as recorded in the evidence provided by the representatives (evidence file, folio 1111) and by the State (evidence file, folios 2003, 2111 and 2432).

[417] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Maria José Nascimento Almeida." However, the Court finds that the name of this person corresponds to the name indicated in the evidence provided by the representatives (evidence file, folio 1113) and by the State (evidence file, folios 1984, 2035 and 2123).

[418] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Maria lzabel de Jesus Bittencourt." However, the Court finds that the name of this person corresponds to "Maria Isabel de Jesus Bittencourt," as recorded in the evidence provided by the State (evidence file, folios 2028, 2129 and 2280).

[419] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Maria Ramos Borges." However, the Court finds that the name of this person corresponds to the name indicated in the evidence provided by the representatives (evidence file, folio 1587) and by the State (evidence file, folios 1973, 2041 and 2101).

46	Maria São Pedro Conceição[420]
47	Marinalva de Jesus[421]
48	Marize da Conceição dos Santos[422]
49	Marivanda de Souza Silva[423]
50	Matilde Cerqueira Santos [424]
51	Monica Rocha dos Santos[425]
52	Núbia Silva dos Santos[426]
53	Paulina Maria Silva Santos[427]
54	Rita de Cassia Conceição Santos[428]
55	Rosângela de Jesus França[429]
56	Silvana Santos de Jesus[430]
57	Sueli da Silva Andrade[431]

[420] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Maria São Pedro Conceição" as well as in other documents provided as evidence (evidence file, folios 42, 1113 and 1587).
[421] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Marinalva de Jesus." However, the Court finds that the name of this person corresponds to the name indicated in the evidence provided by the representatives (evidence file, folio 1113) and by the State (evidence file, folios 1971, 2064 and 2185).
[422] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Marise Conceição Santos." However, the Court finds that the name of this person corresponds to "Marize da Conceição dos Santos," as recorded in the evidence provided by the State (evidence file, folios 2049, 2114 and 2361).
[423] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18) . On that list, the name appears as "Marivanda de Souza Silva." However, the Court finds that the name of this person corresponds to the name indicated in the evidence provided by the representatives (evidence file, folio 1587) and by the State (evidence file, folios 1975, 2107 and 2143).
[424] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Matildes de Cerqueira Santos." However, the Court finds that the name of this person corresponds to "Matilde Cerqueira Santos," as recorded in the evidence provided by the State (evidence file, folio 2000).
[425] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Monica Santos Rocha." However, the Court finds that the name of this person corresponds to "Mônica Rocha dos Santos," as recorded in the evidence provided by the State (evidence file, folios 2010, 2016 and 2125).
[426] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Núbia Silva dos Santos." However, the Court finds that the name of this person corresponds to the name indicated in the evidence provided by the representatives (evidence file, folio 1587) and by the State (evidence file, folios 1983, 2106 and 2154).
[427] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Paulina Maria Silva Santos." However, the Court finds that the name of this person corresponds to the name indicated in the evidence provided by the representatives (evidence file, folio 1586) and by the State (evidence file, folios 1958, 2072 and 2171).
[428] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Rita de Cassia C. Santos." However, the Court finds that the name of this person corresponds to "Rita de Cassia Conceição Santos," as recorded in the evidence provided by the State (evidence file, folios 1996, 2075 and 2084).
[429] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Rosângela de Jesus França." However, the Court finds that the name of this person corresponds to the name indicated in the evidence provided by the representatives (evidence file, folio 1113) and by the State (evidence file, folios 2001, 2090 and 2150).
[430] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Silvana Santos de Jesus." However, the Court finds that the name of this person corresponds to the name indicated in the evidence provided by the representatives (evidence file, folio 1112) and by the State (evidence file, folios 1990, 2059 and 2149).
[431] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Suely da Silva Andrade." However, the Court finds that the name of this person corresponds to "Sueli da Silva Andrade," as recorded in the evidence provided by the State (evidence file, folios

58	Vanessa de Jesus Bittencourt[432]
59	Vânia de Jesus Bittencourt[433]
60	Verbena Silva Pires[434]
Survivors of the explosion	
61	Bruno Silva dos Santos
62	Claudia Reis dos Santos
63	Leila Cerqueira dos Santos
64	Maria Joelma de Jesus Santos
65	Vitória França da Silva
66	Wellington Silva dos Santos

1991, 2023 and 2162).

[432] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Vanessa de Jesus Bittencourt," However, the Court finds that the name of this person corresponds to the name indicated in the evidence provided by the representatives (evidence file, folio 1586) and by the State (evidence file, folios 2129 and 2141).

[433] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Vânia de Jesus Bittencourt." However, the Court finds that the name of this person corresponds to the name indicated in the evidence provided by the representatives (evidence file, folio 1112) and by the State (evidence file, folios 2129 and 2141).

[434] This person appears on the list of victims provided by the Commission (single annex to Report No. 25/18). On that list, the name appears as "Verbênia Silva Pires." However, the Court finds that the name of this person corresponds to "Verbena Silva Pires," as recorded in the evidence provided by the State (evidence file, folios 1978, 2068 and 2169).

ANNEX 2.
FAMILY MEMBERS OF THE VICTIMS WHO DIED IN OR SURVIVED THE EXPLOSION

1	Adriana Machado dos Santos
2	Aguinaldo Silva Costa
3	Alex da Conceição dos Santos
4	Alexandra Pires de Jesus
5	Ana Lúcia dos Santos Ribeiro Cardoso
6	Andersen da Conceição dos Santos
7	Anderson Santos dos Santos
8	Antonia Santos de Jesus
9	Antonio Claudio Nascimento dos Santos
10	Antônio de Souza Bittencourt
11	Antônio José dos Santos
12	Antônio José dos Santos Ribeiro
13	Antonio Manoel Ferreira Filho
14	Arlan Santos Nascimento
15	Aurelino Gonçalves de Jesus
16	Balbino Rocha dos Santos
17	Bárbara Laís da Cruz Santos
18	Bárbara Laís Rocha dos Santos
19	Bernardo Bispo dos Santos
20	Berneval Ferreira de Jesus
21	Cludia Reis dos Santos
22	Claudimeire de Jesus Bittencourt
23	Clóvis de Jesus Santos
24	Cosme Santos da Conceição
25	Crispiniana Santos da Conceição
26	Cristiane Ferreira de Jesus
27	Daiane Machado dos Santos
28	Dailane dos Santos Souza
29	Dalva da Silva Santos
30	Daniel dos Santos de Jesus
31	Deivesson Conceição de Jesus
32	Derivan Santos Nascimento
33	Edvaldo de Souza Bittencourt
34	Elaine dos Santos Pires
35	Elizangela Silva Costa
36	Elton Barreiro dos Santos
37	Ericles Silva Gonçalves
38	Esdra Santos Gomes
39	Francisco Miguel dos Santos

40	Geneis dos Santos Souza
41	Hebert Barreiro dos Santos
42	Helena de Souza Silva
43	Jaiane de Jesus Silva
44	Jamille de Jesus Santos
45	Janderson de Jesus Santos
46	Jenildo de Jesus Santos
47	Jéssica da Hora Andrade
48	Joandson de Jesus Santos
49	Jocelene de Jesus Santos
50	Jonas de Jesus Silva
51	José Ramone Santos Nascimento
52	José Ribeiro dos Santos
53	Josete Silva dos Santos
54	Josué Jesus Santos
55	Karilane de Jesus Santos
56	Keliane Santos Pires
57	Leandro Rocha dos Santo
58	Lourival Ferreira de Jesus
59	lracy da Silva da Hora
60	lsvanda Maria dos Santos
61	Lucinete dos Santos Ribeiro
62	Luís Fernando Santos Costa
63	Luiz Lourenço Costa
64	Luzia de Jesus Silva
65	Marcelino Miguel dos Santos
66	Maria Magdalena Santos Rocha
67	Maria Antonia de Jesus Santos
68	Maria Balbina dos Santos
69	Maria da Conceição Lima Bittencourt
70	Maria de Lourdes Borges
71	Maria do Carmo de Jesus Santos
72	Maria Expedita dos Santos
73	Maria Joelma de Jesus Santos
74	Maria Lúcia Oliveira dos Santos
75	Maria Lucia Rodrigues da Silva
76	Maria Magdalena Santos Rocha
77	Maria Nascimento Cerqueira Santos
78	Maria Odete Carvalho Santo
79	Maria Santos de Souza
80	Mariane Gonsalves da Silva

81	Marimar dos Santos Ribeiro
82	Marlene dos Santos Ribeiro
83	Marlene Ferreira de Jesus
84	Michele Santos de Jesus
85	Paulo Cesar Barreiro dos Santos
86	Pedro Barreira dos Santos
87	Rebeca Nascimento Almeida
88	Reijan dos Santos Almeida
89	Roberto Carlos de Jesus
90	Rodrigo Conceição Silva
91	Roque Ribeiro da Conceição
92	Rozangelo Silva da Silva
93	Samuel dos Santos Souza
94	Silvano Passos dos Santos
95	Sueli Andrade da Hora
96	Therezinha do Nascimento Almeida
97	Valdelice Cunha Reis
98	Vitória França da Silva
99	Zorilda Bispo dos Santos
100	Zuleide de Jesus Souza

CONCURRING OPINION OF JUDGE L. PATRICIO PAZMIÑO FREIRE

CASE OF THE WORKERS OF THE FIREWORKS FACTORY IN SANTO ANTÔNIO DE JESUS AND THEIR FAMILIES *V.* BRAZIL

JUDGMENT OF JULY 15, 2020

I. Introduction

1. The judgment in the case of the *Workers of the Fireworks Factory in Santo Antônio de Jesus and their families v. Brazil* (hereinafter, "the judgment") recognized the structural poverty in which the 60 victims who died in, and the 6 who survived the explosion of the fireworks factory on December 11, 1998,[1] lived and this, added to other intersectional factors of discrimination, meant that these people were living in a situation of extreme vulnerability. The Court concluded that this situation was constituted and facilitated because the operation of the fireworks factory, which was dedicated to an extremely dangerous activity without any type of State oversight, led the workers, who are the victims in this case, to accept employment in conditions that entailed a risk to their life and integrity, as well as to that of their children.[2]

2. In addition, the judgment considered that the factory workers had no other employment alternative than the manufacture of fireworks[3] and concluded that, as it had not overseen the dangerous activity carried out in the factory, or the working conditions – they "worked in precarious, unhealthy and unsafe conditions, in sheds located in fields […]; [and t]hey never received any information on safety measures, or work-related protection equipment"[4] – the State of Brazil had violated the right to just and favorable conditions that guaranteed the safety, health and hygiene of the workplace contained in Article 26 of the American Convention.

3. Based on the said factors, which form part of the body of evidence in this case and that relate to the persistence of the vulnerable situation of those who work in the manufacture of fireworks in Santo Antônio de Jesus, the judgment ordered the State to design and execute a socio-economic development program addressed specifically at the population of that town. The Court determined that the said program – taking into consideration the main economic activities of the region and the eventual need to promote other activities – should provide solutions to the lack of employment options, "especially for young people over 16 years of age and Afro-descendant women living in poverty." In addition, it established that the program should include "professional and/or vocational training courses that permit workers to enter other labor markets […]; measures to address school drop-out caused by the entry of children into the labor market, and awareness-raising campaigns on human rights and the risks inherent in the manufacture of fireworks."[5]

4. Bearing this in mind, as well as the measure of reparation requiring the State of Brazil to undertake effective measures to resolve and overcome, in the medium- and long-term, the conditions and the context in which the workers of the fireworks factory were inserted, a situation and conditions that persist in the region where the facts occurred, and in order to avoid a recurrence of violations such as those committed in this case, I issue this concurring opinion in order to reinforce the responsibility borne by the State of Brazil and its public servants – particularly at the respective levels of government involved in the implementation and execution of the

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[1] Paragraphs 70, 91, 183, 185 to 191, 197, 200, 201 and 203.
[2] Paragraph 203.
[3] Paragraph 188.
[4] Paragraph 175.
[5] Paragraphs 289 and 290.

judgment and the measures of reparation – in relation to the Convention obligation to respect and implement the principle of progressivity and non-retrogressivity of the economic, social, cultural and environmental rights. To this end, I will review Amendment No. 95 to the Brazilian Constitution[6] and, in the conclusions, I will argue why, from a conventionality point of view, it should be interpreted pursuant to the inter-American precedents and case law and, therefore, should not be an obstacle to compliance with the measure of reparation ordered.

II. Constitutional amendment No. 95

5. On December 16, 2016, the proposal of the Federal Government of Brazil to put in place a cap on federal public expenditure, which was the subject of Proposed Amendment to the Constitution of Brazil 241/55,[7] was adopted as Constitutional Amendment No. 95 (hereinafter "CA/95" or "the amendment"). CA/95, which instituted a new fiscal regime for the State of Brazil, entered into force in 2017 and will continue in force until 2036.[8]

6. The proposed amendment was accompanied by a justification[9] based on the alleged need to prevent the future growth of public expenditure in order to restore confidence in the sustainability of expenditure and the public debt. Thus, the alleged reason for proposing CA/95 was the need to stabilize the growth of primary expenditure in order to contain the expansion of the public debt. It is worth noting that the justification indicates that the benefits of implementing fiscal restraint will be: an increase in the predictability of the macro-economic policy and the strengthening of stakeholders' confidence; the elimination of the upward trend of the real growth of public expenditure, and the reduction of country risk and the consequent opening up of opportunities for the structural reduction of rates of interest. It also alleged that "[f]rom a social perspective, the implementation of this measure will lever the economy's capacity to generate employment and earnings, in addition to stimulating the more efficient application of public resources. Therefore, it will contribute to improving the quality of life of Brazilian citizens."[10]

7. The amendment establishes individualized limits, regardless of the increase in GDP (Gross Domestic Product), for the State's primary expenditure. For 2017, it established a limit equal to 2016 expenditure, determined by the inflation observed in 2016. Starting in the second year, in other words 2018, guidelines for the budget and the annual budget law were introduced in order to limit primary expenditure; these consisted in the value of the previous year's limit, adjusted by the previous year's inflation.[11]

8. Consequently, the rules established by CA/95 do not allow real and total public expenditure to exceed inflation, even if there is an increase in economic growth rates, and this differentiates the Brazilian case from that of other countries which have adopted a cap on public expenditure. Thus, it is only possible to increase investments in one area if there are cutbacks in others. According to the provisions of the amendment, any change in the rules can only be made after the tenth year that the

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[6] *Cf.* Constitutional Amendment No. 95, of December 15, 2016 (evidence file 4356 to 4360), available at: http://www.planalto.gov.br/ccivil_03/constituicao/emendas/emc/emc95.htm.

[7] Proposed amendment to the Constitution of Brazil 55 and 241 of 2016, available at: https://www25.senado.leg.br/web/atividade/materias/-/materia/127337 and https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2088351.

[8] *Cf.* Constitutional Amendment No. 95, *supra*, article 1, art. 106 of the Transitory Constitutional Provisions (hereinafter, "TCP").

[9] *Cf.* EMI No. 00083/2016 MF MPDG, of June 15, 2016, available at: https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=1468431&filename=PEC+241/2016.

[10] *Cf.* EMI No. 00083/2016 MF MPDG, *supra*, para. 8.

[11] *Cf.* Constitutional Amendment No. 95, *supra*, article 1, art. 107 of the TCP, para. 1, I and II.

new fiscal regime is in force, and will be limited to changes in the correction of the annual rate of inflation.[12]

9. The provisions of CA/95 include some expenditures that are excluded from the cap, such as expenses related to elections to ensure electoral justice; constitutional transfers related to the participation of the states and municipalities in the proceeds of petroleum and natural gas exploration, and special credits opened to respond to unforeseeable and urgent expenses, such as those resulting from wars, internal unrest or public disasters.[13]

10. That said, the obligatory percentages for health and education expenses are not excluded from the cap. The Brazilian Constitution requires governments to apply a minimum percentage of their income to education[14] and health.[15] Before CA/95 entered into force, the Federal Government was obliged to dedicate at least the same amount as the previous year plus the percentage of variation of the GNP to health. The states and municipalities have to invest 12% and 15%, respectively. In the area of education, the Federal Government must spend 18% of what it levies, and the states and municipalities, 25%. Since 2017, pursuant to the CA/95, investments in health and education must be limited to the constitutional minimums plus the monetary correction due to inflation.[16]

III. The interdependence, indivisibility, progressivity and non-retrogressivity of human rights

11. The indivisibility and interdependence of human rights has been recognized and reaffirmed on many occasion by different national and international organizations. Consequently, the understanding that civil and political rights and economic, social, cultural and environmental rights are indivisible and interdependent is quietly and generally accepted. In other words, they are connected in a way that means not only that they must be understood as a whole, but also that the enjoyment and exercise of one right is linked to the others being guaranteed, and also that the violation of one of these rights jeopardizes all the other rights as a whole.

12. In this regard, the Preamble to the American Convention recognizes the principle of the indivisibility and interdependence of human rights when it states that "the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights."[17]

13. Similarly, the Inter-American Court, starting with the case of *Acevedo Buendía et al.,*[18] has referred on many occasions to this principle and its implications. For example, in the judgment in the case of *Cuscul Pivaral et al.*, the Court indicated the following:

> The Court notes that the fact that the rights derived from Article 26 are subject to the general obligations of the American Convention results not only from formal matters, but also from the reciprocal indivisibility and interdependence of the civil and political rights and the economic, social, cultural and environmental rights. In this regard, the Court has recognized that both categories of rights should be

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[12] *Cf.* Constitutional Amendment No. 95, *supra*, article 1, art. 108 of the TCP.

[13] *Cf.* Constitutional Amendment No. 95, *supra*, article 1, art. 107 of the TCP, para. 6, I, II and III.

[14] *Cf.* Constitution of the Federative Republic of Brazil, promulgated on October 5, article 212, available at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm.

[15] *Cf.* Constitution of Brazil, *supra*, article 198, para. 2.

[16] *Cf.* Constitutional Amendment No. 95, *supra*, article 1, art. 110 of the TCP.

[17] *Cf.* American Convention on Human Rights, Preamble, para. 4.

[18] *Cf. Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2009 Series C No. 198, para. 101.

> understood integrally and indivisibly as human rights, without any hierarchy between them, enforceable in all cases before the competent authorities. Similarly, the Court notes that the Preamble to the Convention, as well as various articles of the American Declaration, reveal that both civil and political rights, and ESCER were recognized by the States in the region as essential rights of the individual.[19]

14. Also, United Nations General Assembly Resolution 32/130 of December 16, 1977, states that: "(a) All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights; (b) The full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible; the achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development […]."[20] Therefore, from the standpoint of compliance with and respect for the superior ranking norm in the global domain,[21] these statements clarify and reaffirm the importance and validity of those principles and rights.

15. The principle of the progressivity and non-retrogressivity of human rights, also known as the prohibition of regression and the irreversibility of the benefits or protection achieved, is established in different international human rights instruments and has been the subject of several of the Court's decisions;[22] thus, owing to its repetition, it represents not only a precedent, but also constitutes constant and consistent case law.

16. Article 26 of the American Convention establishes that States must undertake, progressively, to achieve the full realization of the "rights derived from the economic, social, educational, scientific and cultural standards set forth in the Charter of the Organization of American States."[23]

17. The obligation of progressivity is also established in the Protocol of San Salvador, ratified by Brazil in 1996.[24] This instrument reveals that States Parties are

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[19] *Cf. Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, para. 85.

[20] *Cf.* UN, General Assembly Resolution. http://www.worldlii.org/int/other/UNGA/1977/127.pdf, A/RES/32/130, adopted on December 16, 1977, 1(a) and 1(b).

[21] It is true that a superior international hierarchical order has gradually been established of principles and values that form part of an ontological body. The reasoning for the interpretation and application of the provisions of international human rights law must be based on this ontological body. It is also true that the international *corpus juris* is enriched by founding principles, organizing values and, evidently, written rules and norms which should be understood from a literal perspective, provided that their meaning and sense is sufficient and clear. However, when this is not possible or is insufficient, the interpreter of the right must make use of a teleological review that seeks support in the origin, the spirit of the texts, trying to extract what their authors were trying to transmit, in the context of a systematic reflection on the norm, in its living version – evolutive – but always interconnected with the normative hierarchical order to which it belongs. Thus, the hermeneutic work of the Court is directly connected and solidly grounded in the principles, purposes and values that constitute the said regional and global superior hierarchical order.

[22] *Cf. Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru, supra*, paras. 101 to 103; *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349, para. 104; *Case of Cuscul Pivaral et al. v. Guatemala, supra*, para. 98; *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375, para. 190; *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 21, 2019. Series C No. 394, para. 173; *Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2019. Series C No. 395, para. 81; *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, paras. 229, 272 and 281, and *Case of Spoltore v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of June 9, 2020. Series C No. 404, paras. 97 and 98.

[23] *Cf.* American Convention on Human Rights, Article 26.

[24] *Cf.* "Protocol of San Salvador," Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights, Article 1.

prohibited from adopting policies or administrative measures, and enacting laws that worsen the situation of the economic, social and cultural rights of its population without specific and satisfactory justification.

18. The principle of progressivity is also established in the International Covenant on Economic, Social and Cultural Rights (hereinafter, "ICESCR"), which establishes that: "[e]ach State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."[25]

19. In December 1990, when interpreting the ICESCR, the United Nations Committee on Economic, Social and Cultural Rights (hereinafter, "the CESCR") indicated that "any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources."[26] More recently, the CESCR reiterated this interpretation, considering that "State parties should avoid taking any deliberately retrogressive measure without careful consideration and justification." [27]

20. Following the case of *Poblete Vilches et al. v. Chile*, the case law of the Inter-American Court has been consistent in indicating that two types of obligations can be derived from Article 26: one that can be required immediately, which means that each State must ensure the exercise of the ESCER without discrimination, as well as take effective measures for their full realization,[28] and the other, of a progressive nature, insofar as the "States Parties have the specific and constant obligation to advance as effectively and rapidly as possible towards the full effectiveness of the said rights."[29] Furthermore, the Court has also recognized that the progressive nature of the obligations derived from Article 26 also imposes on the States the obligation of *non-retrogressivity* in relation to the realization of the rights achieved.[30] In this way, the obligations to respect and to ensure rights, and to adopt domestic legal provisions, (Articles 1(1) and 2), are essential to achieve their effectiveness.[31]

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[25] *Cf.* International Covenant on Economic, Social and Cultural Rights, adopted on December 16, 1966, Article 2(1).

[26] *Cf.* United Nations, Committee on Economic, Social and Cultural Rights, General Comment No. 3, para. 9.

[27] *Cf.* CESCR, General Comment No. 23 *on the right to just and favorable conditions of work (Art. 7 of the* International Covenant on Economic, Social and Cultural Rights*),* E/C.12/GC/23, April 26, 2016, para. 52.

[28] Paragraph 172 of the judgment; *Cf. Case of Poblete Vilches et al. v. Chile, supra, para. 104;* Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The nature of States Parties' Obligations (para. 1 of Art. 2 of the Covenant),* UN Doc. E/1991/23, December 14, 1990, para. 3, and *Case of Spoltore v. Argentina, supra*, para. 97. See also, Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The right to social security (Art. 9)*, UN Doc. E/C.12/GC/19, February 4, 2008, para. 40.

[29] Paragraph 172 of the judgment; *Cf. Case of Poblete Vilches et al. v. Chile, supra, para. 104;* Committee on Economic, Social and Cultural Rights, *General Comment No. 3, supra*, para. 9, and *Case of Spoltore v. Argentina, supra*, para. 97. See also, Committee on Economic, Social and Cultural Rights, *General Comment No. 19*, *supra*, paras. 40 and 41.

[30] Paragraph 172 of the judgment; *Cf. Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru, supra*, paras. 102 and 103; *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru, supra*, para. 173, and *Case of Spoltore v. Argentina, supra*, para. 97.

[31] Paragraph 172 of the judgment; *Cf. Case of Poblete Vilches et al. v. Chile, supra*, para. 104; *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru, supra*, para. 173, and *Case of Spoltore v. Argentina, supra*, para. 97.

21. That said, as already indicated, the principle of progressivity of human rights is related to the dimension of the gradual realization of these rights in order to achieve their complete fulfillment. Even though the principle of progressivity has been related, above all, to the economic, social, cultural and environmental rights, its application, especially based on the indivisibility and interdependence of the human rights, is also verified for the civil and political rights. Indeed, it is evident that the guarantee and protection of civil and political rights also requires positive measures by the State, in addition to the duties of abstention, as in the case of the right of defense under which the State has the obligation to provide a free public defense counsel to the accused who lack the financial resources to cover the costs of a private lawyer.

22. Similarly, the laws of Brazil establish provisions related to the prohibition of social retrogression, and even address this prohibition in relation to all the fundamental rights, without distinguishing between civil, political, economic, social, cultural and environmental rights. Thus, the Brazilian Constitution establishes:

> "Art. 3. The fundamental objectives of the Federative Republic of Brazil are: 1. To construct a free, just and caring society; 2. To guarantee national development; 3. To eradicate poverty and marginalization, and to reduce social and regional inequalities; 4. To promote the well-being of everyone, without prejudices for reasons of origin, race, sex, color, age or any other form of discrimination."[32]
>
> "Art. 60 […] §4 No proposed amendment shall be deliberated that seeks to abolish: I – the federative structure of the State; II – the direct, secret, universal and periodic vote; III – the separation of powers; IV – individual rights and guarantees."[33]

23. Thus, as indicated above, it is essential to note that, pursuant to both national and international laws, the human rights policies and laws of the State of Brazil must be guided by the principle of the progressivity and non-retrogressivity of those rights. And this includes not adopting legislative measures that result in social retrogression, or implementing them in such a way that they result in retrogression.

IV. Conclusion

24. Brazil ratified the American Convention on September 25, 1992, and the Protocol of San Salvador, on August 21, 1996, and it accepted the contentious jurisdiction of the Court on December 10, 1998. Evidently, this has resulted in the State's obligation to comply with the provisions of these instruments and to respect and ensure the rights established in them,[34] as well as to comply fully with the judgments of the Court.[35]

25. As a result of the analysis made in the section on CA/95 and based on a literal interpretation of this norm, it is possible to foresee that its implementation might have a significant negative impact on the guarantee of the economic, social, cultural and environmental rights of the Brazilian population over the 20 years that this amendment to the Constitution is in effect and, in particular, on the rights to health and education.

26. It is true that the public budged is an essential factor for the realization of the ESCER because the exercise of those rights requires the implementation of projects, programs, public policies, laws and regulations, in general; in other words, positive services on the part of the State. Thus, if a specific norm imposes a fixed and strict

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[32] *Cf.* Constitution of Brazil, *supra*, article 3.
[33] *Cf.* Constitution of Brazil, *supra*, article 60, paragraph 4.
[34] *Cf.* American Convention, Article 1, and Protocol of San Salvador, Article 1.
[35] *Cf.* American Convention, Articles 33(b), 62 and 63.

limit on this budget, the application of that norm may result in serious eventual infringements and restrictions of the economic, social, cultural and environmental rights, which would violate the principle of progressivity and non-retrogressivity in relation to the ESCER. In this regard, and to avoid such anti-conventional conducts, it will be necessary to take into consideration that one of the conceptual categories of the progress indicators used by the OAS General Assembly to measure the realization of the rights established in the Protocol of San Salvador is precisely the State's basic financial context and budgetary commitments. The indicators included in this category permit an assessment of the effective availability of the State's resources to execute social public expenditure, *inter alia*.[36] Therefore these instruments must be taken into account to avoid States Parties incurring in the violations described above.

27. Based on the foregoing, I wish to express my concern with regard to the possible use of a literal reading or interpretation of CA/95, the connotations of which may constitute an impediment or argument to avoid complying with the measures of reparation ordered in the judgment. In this regard, I wish to stress that, owing to the international obligations assumed by the State, it cannot allege CA/95 as an obstacle to complying, in particular, with the measure of reparation relating to the creation and implementation of the socio-economic program ordered in the judgment. I express this concern, bearing in mind that this program will call for a considerable investment of public resources because it relates to a structural policy, whose main purpose is to provide the vulnerable population of Santo Antônio de Jesus with access to other labor markets. And this, without prejudice to the eventual impact that the implementation of the provisions contained in CA/956 may have in future in relation to the prohibition of retrogressivity.

28. Taking into account the considerations expressed above, it is essential that the State of Brazil, in order to comply with the measures of reparation, guarantee the application of the principles of progressivity and non-retrogressivity, based on an interpretation in keeping with the American Convention on Human Rights and in application of the control of conventionality, in light of the case law of this international court, which clearly prohibits alleging the existence of existing domestic laws to fail to comply with, or to evade, the international responsibilities arising from a judgment.

L. Patricio Pazmiño Freire
Judge

Pablo Saavedra Alessandri
Secretary

[36] *Cf.* OAS, "Adoption of progress indicators for measuring rights under the Protocol of San Salvador", resolution AG/RES. 2713 (XLII-O/12) adopted at the second plenary session on June 4, 2012, Para. 1 of the resolution available at: https://www.oas.org/en/sla/docs/AG05796E04.pdf.

PARTIALLY DISSENTING OPINION OF JUDGE EDUARDO VIO GROSSI

INTER-AMERICAN COURT OF HUMAN RIGHTS
CASE OF THE WORKERS OF THE FIREWORKS FACTORY IN SANTO ANTÔNIO DE JESUS AND THEIR FAMILIES *V.* BRAZIL

JUDGMENT OF JULY 15, 2020
(Preliminary objections, merits, reparations and costs).

I. INTRODUCTION

1. This partially dissenting opinion is issued[1] in relation to the judgment in reference,[2] in order to explain the reasons why I disagree, in the first place, with its operative paragraphs 2[3] and 6.[4] Based on the provisions of Article 26 of the American Convention on Human Rights,[5] the former rejects the objection filed by the State regarding the lack of jurisdiction of the Inter-American Court of Human Rights[6] to examine violations of the rights referred to in the said article and the latter declares the violation of those rights, thus making them justiciable before the Court. However, this opinion is also issued because I disagree with operative paragraph 6, owing to the reference it makes to Article 24 of the Convention concerning equality before the law.

2. That said, in order to explain the position held in this text adequately, it is necessary, first, to reiterate some general considerations within which this opinion is inserted, and then refer to the said Articles 26 and 24, in addition to placing on record a consideration relating to operative paragraph 4 of the judgment on the right to life.[7]

II. GENERAL PRELIMINARY CONSIDERATIONS

3. Evidently, this opinion is issued respecting the decisions taken in this case.

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1 Art. 66(2) of the Convention: "If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment."
Art. 24(3) of the Court's Statute: "The decisions, judgments and opinions of the Court shall be delivered in public session, and the parties shall be given written notification thereof. In addition, the decisions, judgments and opinions shall be published, along with judges' individual votes and opinions and with such other data or background information that the Court may deem appropriate."
Art. 65(2) of the Court's Rules of Procedure: "Any judge who has taken part in the consideration of a case is entitled to append a separate reasoned opinion to the judgment, concurring or dissenting. These opinions shall be submitted within a time limit to be fixed by the President so that the other judges may take cognizance thereof before notice of the judgment is served. Said opinions shall only refer to the issues covered in the judgment,"
Hereafter, each time that a provisions is cited without indicating the legal instrument to which it corresponds, it shall be understood that it is part of the American Convention on Human Rights.

2 Hereinafter, the judgment.

3 "To reject the preliminary objection concerning the alleged lack of jurisdiction *ratione materiae* regarding the supposed violations of the right to work, pursuant to paragraph 23 of this judgment."

4 "The State is responsible for the violation of the rights of the child, to equal protection of the law, to the prohibition of discrimination, and to work contained in Articles 19, 24 and 26, in relation to Article 1(1) of the American Convention on Human Rights, to the detriment of the sixty persons who died in, and the six survivors of, the explosion of the fireworks factory of Santo Antônio de Jesus on December 11, 1998, referred to in paragraph 204 of this judgment, who included 23 children, according to paragraphs 148 to 204 of this judgment."

5 Hereinafter, the Convention.

6 Hereinafter, the Court.

7 "The State is responsible for the violation of the rights to life and of the child contained Articles 4(1) and 19, in relation to Article 1(1) of the American Convention on Human Rights, to the detriment of the sixty persons who died in the explosion of the fireworks factory of Santo Antônio de Jesus on December 11, 1998, referred to in paragraph 139 of this judgment, who included twenty children, according to paragraphs 115 to 139 of this judgment."

4. That said, this opinion is based on the principle of public law, the domain to which public international law belongs and, consequently, international human rights law also, as a component of the latter. Consequently, it is only possible to do what the norm permits; therefore, whatever is not regulated falls within the internal or domestic jurisdiction or the reserved domain of the States.[8] This principle thus differs from the one that governs private law; namely, that it is possible to do everything that the law does not forbid.

5. This text is also based on the value of law, including its procedural rules that, especially in the area of human rights, are as essential as the substantive rules because respect for the former allows the latter to be truly effective. Thus, the form is indissolubly linked to the substance. And, to a great extent, the procedural rules – at times considered mere formalities and, consequently, susceptible to being disregarded in order to give precedence to the substantive rules – condition the applicability of the latter. Consequently, if an international judicial instance overlooks the procedural rules, it could be encouraging the whole of international society and, even national society, to act in the same way and this could have a devastating effect on the real exercise of international human rights law.

6. In this regard, I consider that legal norms are, undoubtedly, the result of agreements between their authors, the legislators in the domestic sphere and the States in the international domain, who reach agreement on them by conciliating their positions in order to put in practice principles, doctrines and ideology, safeguard their own or third party interests, consolidate or increase positions of power, and obtain economic benefits, etc. Therefore, it should be taken into account that, in general, the said consensus relates not only to the rationale for the respective norm, but also to what it states.

7. Regarding the matter in hand, this consensus constitutes, above all – bearing in mind considerations made in relation to the Universal Declaration of Human Rights – a practical pact with regard to what was agreed, although not its rationale. Given the structure of international society, which is basically still composed of sovereign States, this has been the method that has permitted progress in the area of human rights, even though this has evidently been uneven according to the continent and the countries concerned.

8. This opinion also takes into account that the law is the only instrument available to the individual to confront the immense and overwhelming power held by the State, particularly on the international scene. The relationship between the two is abysmally unequal. In the situation before us, without the support of international human rights law and its institutions, the individual would be almost defenseless in the international sphere or, at least, in a situation of evident inequality or helplessness.

9. It should also be added that this opinion is supported by the function inherent in the Court as a judicial entity, which is to interpret and apply the Convention,[9] pursuant to the rules

[8] "The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain." Permanent Court of International Justice, Advisory Opinion on Nationality Decrees issued in Tunis and Morocco (French zone), Series B No. 4, p. 24.
Protocol No. 15 amending the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 1: "At the end of the preamble to the Convention, a new recital shall be added, which shall read as follows: Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention."

[9] Art. 62(3) of the Convention: "The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case

of interpretation established in the Vienna Convention on the Law of Treaties,[10] which are addressed at determining the meaning and scope of what the Convention establishes and not to seek in it what the interpreter would like it to convey.[11]

10. Consequently, the interpretation and application of the Convention signifies that the function of the Court is to impart justice in the area of human rights using the law and, even more specifically, in keeping with what the law establishes, a function that differs from the one assigned to the Inter-American Commission on Human Rights,[12] which consists in promoting respect for and the defense of human rights, including before itself.[13]

11. Therefore, the Court's jurisdictional function imposes on it the need to proceed in accordance with the dignity stemming from the fact that it is a court and, also, that it is autonomous; thus, in exercise of its prerogatives, it cannot be monitored or controlled by any other entity while, at the same time, it is unable to ensure that its rulings are executed by the use of coercive measures. The gravitas inherent in the judicial function that has been entrusted to the Court entails the obligation to proceed adhering fully to the limits to its exclusive powers that have been established so that its decisions are obeyed, above all, because they are considered just

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recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.

[10] Hereinafter, the Vienna Convention.

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

[12] Hereinafter, the Commission.

[13] Art. 41: The main function of the Commission shall be to promote respect for and defense of human rights. In the exercise of its mandate, it shall have the following functions and powers:
a. to develop an awareness of human rights among the peoples of America;
b. to make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights;
c. to prepare such studies or reports as it considers advisable in the performance of its duties;
d. to request the governments of the member states to supply it with information on the measures adopted by them in matters of human rights;
e. to respond, through the General Secretariat of the Organization of American States, to inquiries made by the member states on matters related to human rights and, within the limits of its possibilities, to provide those states with the advisory services they request;
f. to take action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51 of this Convention; and
g. to submit an annual report to the General Assembly of the Organization of American States."

owing, *inter alia*, to is moral authority and its strict adherence to what was effectively agreed by the States in the Convention.

III. ARTICLE 26

12. In order to provide a clearer explanation of my reflections with regard to Article 26 of the Convention, it is essential to include some specific preliminary considerations on this provision, and then refer to the interpretation of both this article of the Convention and the Charter of the Organization of American States[14] to which this provision refers, as well as to the Protocol of San Salvador which corroborates what I expound in this brief.

A. Specific preliminary considerations on Article 26

13. First, it is necessary to indicate that I reiterate the considerations included in my other separate opinions[15] regarding the citing of this article of the Convention in the corresponding judgments, including the preliminary and general considerations made in those opinions.

14. It is also essential to indicate, at once, that this text does not refer to the existence of the right to just and favorable conditions that ensure safety, health and hygiene in the workplace or to the other economic, social and cultural rights. The existence of those rights is not the purpose of this brief. Instead, this text merely affirms that the Court, contrary to the considerations in the judgment, lacks jurisdiction – based on the provisions of Article 26 of the Convention[16] – to examine violations of those rights; in other words, that presumed violations of those rights are not justiciable before the Court.

15. This does not mean, however, that violations of those rights are not justiciable before the corresponding domestic jurisdictions. This will depend on the provisions of the respective domestic laws, a matter that does not concern the purpose of this text and that falls within the domestic, internal or exclusive jurisdiction of the States Parties to the Convention.[17]

16. This opinion affirms that it is necessary to distinguish between human rights in general that, in all circumstances, must be respected owing to the provisions of international law, and those that, in addition, are justiciable before an international jurisdiction. In this regard, it is worth calling attention to the fact that there are only three international human rights courts; namely, the Inter-American Court of Human Rights, the European Court of Human Rights and the African Court of Human and Peoples' Rights. However, not all the States of the respective regions have accepted the jurisdiction of the corresponding court. Furthermore, not all the regions of the world have an international human rights jurisdiction, nor has a universal human rights court been created.

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[14] Hereinafter, the OAS.

[15] Partially dissenting opinion of Judge Eduardo Vio Grossi to the judgment of November 22, 2019, Inter-American Court of Human Rights, *Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs;* Partially dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, *Case of Muelle Flores v. Peru, Judgment of March 6, 2019 (Preliminary objections, merits, reparations and costs);* Partially dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, *Case of San Miguel Sosa et al. v. Venezuela, Judgment of February 8, 2018 (Merits, reparations and costs);* Partially dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, *Case of Lagos del Campo v. Peru, Judgment of August 31, 2017 (Preliminary objections, merits, reparations and costs), and Separate Opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, Case of the Dismissed Workers of PetroPeru et al. v. Peru, Judgment of November 23, 2017 (Preliminary objections, merits, reparations and costs).*

[16] Hereinafter, Article 26.

[17] *Supra*, footnote 8.

17. Thus, the fact that a State has not accepted to be subject to an international human rights jurisdictional instance does not mean that such rights do not exist and that they cannot eventually be violated. The State must necessarily respect them even though there is no international court to which recourse can be had if it violates them and, especially, if they are established in a treaty to which that State is a party. In that eventuality, international society can use diplomatic or political measures to achieve the re-establishment of respect for the rights concerned. Thus, the international enshrinement of human rights is one issue, and the international instrument used to achieve the re-establishment of their exercise in the situation in which they are violated is another.

B. The interpretation of Article 26

18. In light of the fact that the Convention is a treaty between States and, consequently, governed by public international law,[18] the reasons that support this discrepancy are based, mainly, on how Article 26 should be interpreted, pursuant to the means for the interpretation of treaties established in the Vienna Convention. These means, which must be congruent and harmonious without any one prevailing over the others, relate to good faith, the ordinary meaning to be given to the terms of the treaty in their context, and in light of its object and purpose.[19]

19. Therefore, it is a question of using these means to interpret Article 26, which establishes:

> "Progressive Development. The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, subject to available resources, by legislation or other appropriate means, the full realization of the rights derived from the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires."

a. Good faith

20. The method supported by good faith signifies that what was agreed by the States Parties to the treaty in question should be understood on the basis of what they effectively intended to agree, so that this would truly be applied or for it to have a practical effect. Thus, good faith is closely related to the "*pacta sunt servanda*" principle established in Article 26 of the Vienna Convention.[20]

21. From this perspective, it is very evident that the practical effect of this norm is that the States Parties to the Convention really adopted the article in order to achieve progressively the full realization of the rights derived from the OAS norms and, in particular, according to the resources available. The State obligation established in Article 26 is, therefore, that of taking measures to make the said rights effective and not that they really are effective. The obligation is of conduct, and not of result.

22. In this regard, it is necessary to call attention to the fact that what Article 26 establishes is similar to the provisions of Article 2 of the Convention; that is, the States are obliged to adopt measures, in the latter, if the exercise of the rights established in Article 1 of the Convention are not ensured,[21] and, in the former, measures in order to achieve progressively the full realization

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[18] Art. 2 of the Vienna Convention: "Use of terms. 1. For the purposes of this Convention: (a) "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."

[19] *Supra,* footnote 11.

[20] "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

[21] Art. 2: "Domestic Legal Effects. Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional

of the rights derived from the OAS norms that it mentions, although the two provisions differ in that the latter conditions compliance with its provisions on the availability of the necessary resources.

23. Bearing in mind the foregoing, it is important to ask ourselves why the States Parties agreed to Article 26 and, therefore, why they did not address the rights to which it refers in the same way as the civil and political rights. Based on good faith, the response can only be that the Convention established that both types of human rights, although closely interrelated due to the ideal to which they aspire – which, according to its Preamble, is to create the conditions that allow their "enjoyment"[22] – are, however, different and, particularly, unequally developed in the sphere of public international law, so that they should be treated differently, which is precisely what the Convention does as also indicated in its Preamble.[23]

24. Consequently, and pursuant to the principle of good faith, it is necessary to underline that, it cannot be understood – as the judgment does – that the practical effect of Article 26 is that the violation of the rights to which it refers are justiciable before the Court based on the fact that the Preamble to the Convention states that individuals should enjoy their economic, social and cultural rights, as well as their civil and political rights; but rather that the States should take the pertinent steps to make those rights progressively effective.

25. Furthermore, it is essential to note that it is surprising that the judgment has not referred anywhere to good faith as an element that is as essential as the other elements established in Art. 31(1) of the Vienna Convention for the interpretation of treaties, all of which should be employed simultaneously and harmoniously without preferring or downplaying one or other. Similarly, it is also strange that it does not provide any explanation of the inclusion of Article 26 in a different chapter to the political and civil rights and, in particular, the reason and the practical effect. The judgment provides no answer with regard to the reason for the existence of Article 26 as a provisions that differs from those established for the civil and political rights.

26. In short, good faith leads to considering Article 26 on its own merits, which means that it should be interpreted not as recognizing rights that it does not list or develop, as the judgment does, but rather as a referral – in order to understand them – to norms other than those of the Convention, such as the norms of the OAS Charter. Consequently, the specific practical effect is, I reiterate, that the States Parties to the Convention should take steps to make the rights that are derived from those norms effective progressively, and this in accordance with available resources.

b. Ordinary meaning

27. When interpreting Article 26 in light of its ordinary or literal meaning, it can be concluded that this article:

i. Is the only provision in Chapter III entitled "Economic, Social and Cultural Rights,"[24] of Part I, entitled "State Obligations and Right Protected," which includes Chapter I "General

processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."

[22] Para. 4 of the Preamble to the Convention: Reiterating that, in accordance with the Universal Declaration of Human Rights, the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights."

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

[24] Chapter IV of Part I is entitled "Suspension of Guarantees, Interpretation and Application" and Chapter V is entitled "Personal Responsibilities."

Obligations" and Chapter II "Civil and Political Rights"; consequently, this means that the Convention itself makes a clear distinction between the civil and political rights and the economic, social and cultural rights, giving each of these categories of rights special and different consideration;

ii. Does not list or describe or specify the rights to which it alludes; it merely identifies them as "derived[25] from the economic, social, educational, scientific and cultural standards set forth in the Charter of the Organization of American States; in other words, rights that are revealed or may be inferred[26] from the latter's provisions;

iii. It does not order respect for the rights to which it refers or ensure respect for them, and it does not recognize or establish them;

iv. It does not make those rights effective or enforceable because, if this had been the intention, it would have been indicated explicitly and without any ambiguity; in other words, contrary to what the judgment states, it does not "make a direct referral to the economic, social, educational, scientific and cultural norms contained in the OAS Charter,"[27] but rather merely contemplates, according to its wording, an "implicit recognition in" the Charter;[28]

v. To the contrary, it establishes an obligation of conduct, and not of result, in that the States Parties to the Convention must "adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, […] the full recognition of the rights" to which it alludes;

vi. It indicates that the obligation of conduct that it establishes should be complied with "subject to available resources, by legislation or other appropriate means," thereby not only reinforcing the lack of effectiveness of the said rights, but also conditioning the possibility of fulfilling them to the existence of the resources available to the respective State for this purpose, and

vii. It makes the adoption of the measures in question depend not only on the unilateral will of the corresponding State, but also on the agreements that it may reach with other States - that are also sovereign – and international cooperation organizations.

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[25] "*Derivar: Dicho de una cosa: Traer su origen de otra." Cf.* Diccionario de la Lengua Española, Real Academia Española, 2018 [Derive: obtain something from, OED].

[26] "*Inferir: Deducir algo o sacarlo como conclusión de otra cosa,*" *idem* [Infer: deduce from evidence, OED].

[27] Para. 155 of the judgment.

[28] *Idem*.

28. It can also be concluded that the rights in question are not, in the terms used by the Convention, "recognized,"[29] "set forth,"[30] "guaranteed,"[31] "enshrined"[32] or "protected"[33] in it or by it, and in relation to the right to just and favorable conditions that ensure health and safety in the workplace, and this is not as the judgment indicates, "a right protected by Article 26 of the Convention"[34] or "a right recognized" by "Article 26,"[35] rather it is a right that derives from the economic, social, educational, scientific and cultural standards contained in the OAS Charter; in other words, a rights that originates from the latter and not from the Convention.

29. In short, the Convention does not, as the judgment states "make a direct referral to the economic, social, educational, scientific and cultural norms contained in the OAS Charter," but rather, as it textually indicates, the rights in question "can be derived by interpretation from Article 26," from which, also, their "existence and implicit recognition in the OAS Charter" can be inferred.[36] In order to determine those rights and consider them to be "recognized," "established," "guaranteed," "enshrined" or "protected" by the Convention, it would be necessary to interpret the said norms of the OAS Charter, derive from them the corresponding rights, and consequently, consider them recognized, although not expressly but only implicitly, by that treaty; an intellectual exercise that is too abstruse in relation to the clear and direct language of the Convention in relation to the rights to which it refers.

30. Evidently, I cannot share the position adopted in the judgment. In particular because Article 26 does not recognize any right, but merely refers to the norms of the OAS that it indicates, from which rights would then be derived, and also because, in view of what the judgment indicates, this differs totally from what the norm explicitly establishes, without providing any

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[29] Art. 1(1): "Obligation to Respect Rights, The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."
Art. 22.(4): "Freedom of Movement and Residence. The exercise of the rights recognized in paragraph 1 may also be restricted by law in designated zones for reasons of public interest.
Art. 25(1)*:* "Right to Judicial Protection. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties."
Art. 29(a*):* "Restrictions Regarding Interpretation. No provision of this Convention shall be interpreted as: (a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein."
Art. 30: "Scope of Restrictions. The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established."
Art. 31: "Recognition of Other Rights. Other rights and freedoms recognized in accordance with the procedures established in Articles 76 and 77 may be included in the system of protection of this Convention."
Art. 48(1)(f): "1. When the Commission receives a petition or communication alleging violation of any of the rights protected by this Convention, it shall proceed as follows: […] it shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention."
[30] Art. 45(1): "Any State Party may, when it deposits its instrument of ratification of or adherence to this Convention, or at any later time, declare that it recognizes the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention."
[31] Art. 47(b): "The Commission shall consider inadmissible any petition or communication submitted under Articles 44 or 45 if: [… it] does not state facts that tend to establish a violation of the rights guaranteed by this Convention."
[32] *Supra*, Art. 48.1.f), *cit.* footnote 29.
[33] Art. 4(1): "Right to Life. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life."
Art. 63(1): "If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."
[34] Para. 155.
[35] Paras. 156 and 157.
[36] *Idem,* footnote 34.

justification, but only explanations that appear designed to interpret it in a way that is completely contrary to what it textually and clearly indicates.

31. By adopting this approach, the judgment plainly disregards the literal meaning of Article 26 and, consequently, does not apply the provisions of Article 31(1) of the Vienna Convention to it harmoniously or, strictly, make an interpretation of it. It appears that, for the judgment, the literal meaning of what was agreed has no relevance whatsoever and, therefore, it considers it a mere formulism, which allows it to attribute to this provision a meaning and scope that is far from that expressly established by the States, as if they really meant to establish something else, which is evidently illogical.

32. To the contrary, there are grounds for affirming that, based on its literal meaning and the principle of good faith, Article 26 does not suggest various possibilities for its application; in other words, raise doubts about its meaning and scope that, consequently, would justify the interpretation that ostensibly differs from what was agreed and, furthermore, it does not establish any human right and, especially, one that is enforceable before the Court, but rather alludes to obligations of conduct rather than of result assumed by the States Parties to the Convention.

33. Ultimately, it is possible to conclude, contrary to what the judgment indicates, that "in accordance with the ordinary meaning to be given to the terms of the treaty," Article 26 does not constitute sufficient grounds to have recourse to the Court to safeguard the rights that "derive" from the OAS Charter and that, consequently, are not "recognized," "established," "enshrined" or "protected" in or by the Convention, the only ones that, if they are violated, are justiciable before the inter-American jurisdictional instance.

c. Subjective method

34. When attempting to understand the intention of the States Parties to the Convention with regard to Article 26, it is necessary to refer, always pursuant to the provisions of the Vienna Convention, to the context of the terms; thus, it is necessary to refer to the system established in the Convention in which this article is inserted. This means that:

a) This system is made up of the rights and obligations that it establishes, the organs responsible for ensuring their respect and requiring their fulfillment, and provisions concerning the Convention;[37]

b) With regard to the obligations, these are two-fold, namely: the "Obligation to Respect Rights"[38] and the obligation to adopt "Domestic Legal Effects"[39] and, regarding the rights, they are the "Civil and Political Rights" and the "Economic, Social and Cultural Rights,"[40] and

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[37] "Part III. "General and Transitory Provisions."

[38] *Supra*, footnote 29, Art. 1(1).

[39] Supra, footnote 21.

[40] Part I, Chapter II, Arts. 3 to 25. Right to Recognition of Juridical Personality (Art. 3), Right to Life (Art. 4), Right to Humane Treatment (Art. 5), Freedom from Slavery (Art. 6), Right to Personal Liberty (Art. 7), Right to a Fair Trial (Art. 8), Freedom from Ex-Post Facto Laws (Art. 9), Right to Compensation (Art. 10), Right to Privacy (Art. 11), Freedom of Conscience and Religion (Art. 12), Freedom of Thought and Expression (Art. 13), Right of Reply (Art. 14), Right of Assembly (Art. 15), Freedom of Association (Art. 16), Rights of the Family (Art. 17), Right to a Name (Art. 18), Rights of the Child (Art. 19), Right to Nationality (Art. 20), Right to Property (Art. 21), Freedom of Movement and Residence (Art. 22), Right to Participate in Government (Art. 23), Right to Equal Protection (Art. 24) and Right to Judicial Protection (Art. 25). Art.26, *cit.*

c) Regarding the organs, these are the Commission, the Court[41] and the OAS General Assembly, corresponding to the first the promotion and defense of human rights;[42] to the second, the interpretation and application of the Convention,[43] and to the third, the adoption of the necessary measures to ensure compliance with the respective ruling.[44]

35. Based on the harmonious interpretation of these norms, it is possible to understand that, in the case of the States that have accepted the contentious jurisdiction of the Court, all that can be required of them, in relation to a case that has been submitted to the Court's consideration, is due respect for the civil and political rights "recognized," "established," "enshrined" or "protected" by the Convention as well as, if this becomes necessary, the adoption "in accordance with [the] constitutional processes [of the corresponding State] and the provisions of this Convention, [of] such legislative or other measures as may be necessary to give effect to those rights or freedoms."

36. In contrast, with regard to the rights "derived from the economic, social, educational, scientific and cultural standards set forth in the Charter of the" OAS, the States can only be required to adopt, "by legislation or other appropriate means," "measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, […] the full realization" of those rights, and this, "subject to available resources."

37. That said, it is necessary to place on record, for the purposes of the application of this method of interpretation that, according to paragraph 5 of the Preamble to the Convention, the OAS Charter incorporated "broader standards with respect to economic, social, and educational rights" and that the Convention determined "the structure, competence, and procedure of the organs responsible for these matters."

38. In other words, it was the Convention itself that, in compliance with this mandate and as already indicated, gave the civil and political rights a differentiated treatment from the economic, social and cultural rights, and – as already noted – established the former in Chapter II of Part I of the Convention and the latter in Chapter III of the same part and instrument. Thus, the indivisibility of the civil and political rights and the economic, social and cultural rights referred to in the Preamble to the Convention, is in relation to the "enjoyment" of both types of human rights and not that they should be subject to the same rules for their exercise and international oversight.

39. In addition, it should be recalled that, regarding what Article 31(2) of the Vienna Convention considers to be context, there is "no agreement relating to the treaty which was made between all the parties in connection with the conclusion of the" Convention, nor "any instrument which was made by one or more parties in connection with the conclusion of the [Convention] and accepted by the other parties as an instrument related to" it.

40. Moreover, as established in Article 31(3) of the Vienna Convention, "together with the context," there is no "subsequent agreement between the parties regarding the interpretation of the [Convention] or the application of its provisions," or "any subsequent practice in the

[41] "Part II Means of Protection. Art. 33: "The following organs shall have competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to this Convention:
a) the Inter-American Commission on Human Rights, referred to as "The Commission," and
b) the Inter-American Court of Human Rights, referred to as "the Court."

[42] *Supra*, footnote 13.

[43] *Supra*, footnote 9, Art. 62.3.

[44] Art. 65: "To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations."

application of the treaty which establishes the agreement of the parties regarding its interpretation," with the exception of the Protocol of San Salvador, which will be referred to below.

41. Consequently, it is unacceptable that, in the absence of what is known as the "authentic interpretation"[45] of the Convention, its meaning and scope are determined by the Court outside and even in contradiction to what was agreed by its States Parties. The Convention, as a treaty, does not exist outside what was expressly agreed to by the latter.

42. Furthermore, in an attempt to justify the judicialization before the Court of the right to just and favorable conditions that ensure safety, health and hygiene in the workplace, and based on Article 31(3)(c) of the Vienna Convention, the judgment has recourse to treaties ratified by Brazil as – consequently – autonomous sources of international law; that is, that create rights. However, these sources only allude to the existence of the said right which, as indicated, was not the purpose of this case and, consequently, is not addressed in this text, and makes absolutely no mention of the judicialization of eventual violations of the right.

43. In this way, the judgment refers to the International Covenant on Economic, Social and Cultural Rights,[46] the Convention on the Elimination of All Forms of Discrimination against Women,[47] the Constitution[48] of the International Labour Organization,[49] ILO Convention No. 81 of 1947 on Labour Inspection,[50] and ILO Convention No. 155 of 1981 on occupational safety and health,[51] legal instruments that, it should be repeated, do not establish the possibility of resorting to the Court or another international court owing to an eventual violation of the right to work.

44. However, the judgment does not have recourse to subsidiary sources of international law; in other words, sources that help to determine the rules of law applicable, such as jurisprudence, doctrine or the resolutions of international organizations establishing customary law.[52] It merely refers either to its own case law, which is useful basically to reveal coherence in its conduct, but not necessarily to determine the applicable rules of law, or to resolutions of international organisations that are not binding for the States – in other words, mere recommendations – and that neither interpret the Convention nor are supposed to.

45. This is the case of General Comments Nos. 14,[53] 18[54] and 23[55] of the Committee on Economic, Social and Cultural Rights of the United Nations Economic and Social Council. However, these instruments, rather than interpreting a treaty-based provision and, in particular of the Convention, constitute the expression of legitimate aspirations for change or for the development of international law in relation to the issue to which they each refer. Moreover, it should not be overlooked that they do not even emanate from an international official or organ of the inter-American system of human rights.

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[45] Name given by doctrine.
[46] Para. 162 of the judgment.
[47] Para. 163.
[48] Para. 164.
[49] Hereinafter, the ILO.
[50] Para. 164.
[51] Para. 165.
[52] Article 38 of the Statute of the International Court of Justice: "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states: (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.
[53] Para. 166 of the judgment.
[54] *Idem*.
[55] Art. 167.

46. In the case of the Universal Declaration of Human Rights[56] and the American Declaration of the Rights and Duties of Man[57] referred to in the judgment, although it is true that they are resolutions establishing customary law because they express general principles of law applicable to the corresponding subject-matter, also recognized by the Convention as "the essential rights of man [… that] are based upon attributes of the human personality" and that they are "principles […] set forth in" it,[58] it is no less true that these declarations do not establish or refer to any mechanism of control with regard to the said principles. It is worth adding that since the American Declaration preceded the Convention it does not interpret it; rather, more precisely, the latter was concluded owing to the specific mandate included in the former to establish control mechanisms.[59]

47. Regarding the reference that the judgement makes to Article 29 of the Convention,[60] known as the *pro personae* principle, it should be recalled that this article relates to the interpretation of the rights recognized in this instrument and not to the control mechanisms established in it. Also, it should not be disregarded that this article concerns the interpretation of the Convention, and mandates that, the meaning and scope of this interpretation cannot entail a restriction of the human right in question, as recognized by the Convention or by the other legal instruments it indicates. Consequently, the purpose of the said article was not to grant the Court authority to rule on the judicialization of presumed violations of human rights, but rather, it established conditions for the interpretation of the Convention. Moreover, it did not establish the authority of the Court to interpret other international treaties or legal instruments, unless as necessary to determine whether they established a broader meaning and scope than the one determined by the human right guaranteed in the Convention.

48. It also appears necessary to include some brief comments on the mention made in the judgment that "human rights treaties are living instruments, the interpretation of which should evolve over time and in keeping with current circumstances."[61] The first comment is that this is envisaged in Article 31(3)(a) and (b) of the Vienna Convention, when it establishes that "there shall be taken into account, together with the context," any agreements and practice of the States regarding the interpretation of the treaty in question. Thus, the evolutive nature relates more to the applicable law than to the case law issued in relation to the treaty.

49. The second comment is that, consequently, the interpretation must take into account that, in order to determine "the evolution over time and the current circumstances," a general assertion by non-state entities, at times without any scientific support, is not sufficient; rather, it

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[56] Para. 162.

[57] Para. 161.

[58] Paras. 2 and 3 of the Preamble. "Recognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states;
Considering that these principles have been set forth in the Charter of the Organization of American States, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights, and that they have been reaffirmed and refined in other international instruments, worldwide as well as regional in scope."

[59] *Supra*, footnote 23.

[60] "Restrictions regarding interpretation. No provision of this Convention shall be interpreted as:
(a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein.
(b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
(c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
(d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have."

[61] Para. 158.

must be shared by international society and, in the case of the Convention, by inter-American society, both of which still consist, mainly, of sovereign States. Otherwise, the Court would be conferring on such private entities the authority to determine the said evolution and current circumstances, which not only could lead to arbitrary assertions, but could also prejudice the participation of the individual, through the democratic State, in international affairs.

50. In short, bearing in mind that the above-mentioned instruments are cited in the judgment in order to substantiate its position that the Court has jurisdiction to examine and decide eventual violations of the right to just and favorable conditions that ensure safety, health and hygiene in the workplace, it can be categorically affirmed that, at best, the truth is that those instruments could be considered as a recognition of the existence of those rights, but not of the said jurisdiction. Thus, it is irrefutable that none of them, I repeat, none, relate to or establish that presumed violations of the said rights may be submitted to the Court for it to rule on them.

51. Moreover, it should be added that neither do the references made in the judgment to the domestic laws of the State[62] justify its thesis that they allow recourse to the Court for violations of the said rights. The Court's jurisdiction is derived from the authority accorded to it by the Convention and not by a provision of the domestic law of the State concerned although, evidently, this law should be taken into account, as indicated in Article 29 cited above, when interpreting the Convention to ensure that this does not limit the enjoyment and exercise of a right recognized by domestic law.

52. In this regard, it should be emphasized that the judgment itself indicates that it relates to determination of the meaning and scope of the right to just and favorable conditions that ensure safety, health and hygiene in the workplace[63] and, on this basis, concludes "that there is a reference with a sufficient degree of specificity to the right to just and favorable conditions of work to derive its existence and implicit recognition in the OAS Charter."[64] Therefore, this does not refer to judicialization before the Court.

53. Furthermore, it should be noted that, in other judgments of the Court, a similar result to that sought in this case has been achieved merely by applying provisions of the Convention that refer to rights that the Convention recognizes and, logically, within the limits of these provisions, without needing to resort to Article 26. Consequently, I do not understand the reason for the insistence in indicating the said article as grounds for affirming that violations of the human rights "derived" from the OAS Charter can be examined by the Court, when it is evident that this is superfluous.

54. This is even more evident when it is noted that the judgment, when declaring – based on Article 26 – the violation of the right to just and favorable conditions that ensure safety, health and hygiene in the workplace, does so while also declaring that Article 19 on the rights of the child has been violated, thereby depriving the latter of the strength that it enjoys, *per se,* and establishing a precedent that, in future, it cannot be cited as the only grounds for declaring its eventual violation. A regrettable retrogression in this area.

55. Based on the foregoing, it can therefore be concluded that the application of the subjective means of interpretation of treaties leads to the result indicated previously; namely – and contrary to the considerations in the judgment – that at no time were the economic, social and cultural rights "*derived*" from the standards of the OAS Charter, including the right to just

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62 Paras. 150, 151 and 152.

63 Para. 156.

64 Para. 155.

and favorable conditions that ensure safety, health and hygiene in the workplace, included in the protection regime established in the Convention.

d. Functional or teleological method

56. When attempting to define the object and purpose of the article of the Convention in question, it can be affirmed that:

a) The purpose of the States on signing the Convention was "to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man";[65]

b) To this end, as indicated above,[66] "the Third Special Inter-American Conference (Buenos Aires, 1967) approved the incorporation into the Charter of the Organization itself of broader standards with respect to economic, social, and educational rights and resolved that an Inter-American Convention on human rights should determine the structure, competence, and procedure of the organs responsible for these matters";

c) Thus, it is evident that the decision taken during the said Conference was implemented, as regards the economic, social and educational rights with the Protocol of Buenos Aires and as regards the structure, jurisdiction and procedures of the organs responsible for these matters, with the Convention, and

d) It was, therefore, in compliance with that mandate that Article 26 was included in the Convention in a separate chapter from the one on civil and political rights and, also, establishing a special obligation for the States Parties to the Convention, that did not exist with regard to the recently mentioned rights; namely, that of adopting "measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively […], the full realization of the rights" referred to, and this "subject to available resources, by legislation or other appropriate means."

57. In other words, the object and purpose of Article 26 is that the measures it indicates be taken to achieve the realization of the rights that it indicates and not that they are enforceable immediately, and least of all, that they may be justiciable before the Court as the judgment asserts.[67] In this regard, it should be recalled that the very name of the provision is "Progressive Development," and that the title of Chapter III, of which it is the only article, is "Economic, Social and Cultural Rights," from which it can be understood that what is established in that article – its object and purpose – is that measures be adopted to achieve, progressively, the realization of the rights it refers to and not that they have been realized.

58. If it is accepted that, in order to interpret a specific provision of the Convention, it would be sufficient to cite its general object and purpose mentioned above, which is extremely vague and imprecise, this would impair the legal security and certainty that should characterize every ruling of the Court, because it would leave it with a broad margin of discretion to determine the rights that derive from the said standards of the OAS Charter; therefore, the States Parties to the Convention would not know what those rights are prior to the corresponding litigation.

59. This is why I am unable to share the opinion set forth in the judgment that, based on the provisions of Articles 1 and 2 of the Convention, Article 26 distinguishes between "aspects

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65 Para. 1 of the Preamble

66 *Supra,* footnote 23.

67 Para. 172.

that are enforceable immediately" and "others of a progressive nature,"[68] because this strays ostensibly from the content of those articles, which establish that the rights to which they refer are only those "recognized," "established," "guaranteed" or "protected" by the Convention, which is not the case of those referred to in Article 26. In addition, this distinction made in the judgment is confusing and even contradictory because, on the one hand, it is not possible to know in advance which aspects or more exactly which rights referred to in Article 26 would be enforceable immediately and which would need to be developed progressively for that purpose and, on the other hand, the former would not require the adoption of measures to make them enforceable, while the others could not be enforced until measures had been adopted.

60. Moreover, an approach such as the one mentioned would result in the Court assuming an international normative function that, in the case of the Convention, corresponds only to its States Parties.[69] And, this is because, in the absence of a specification of the rights derived from the standards of the OAS Charter, the Court could establish rights that are not expressly established in the said standards and decide that these are justiciable before it.

61. In conclusion, dissenting with the judgment, I can affirm that the application of the functional or teleological means of interpretation of treaties with regard to Article 26 of the Convention leads to the same conclusions reached by using the other means of interpretation of treaties; in other words, that the purpose of this article is not to establish human rights of any kind, but merely to establish the obligation of the States Parties to adopt measures towards the realization of the economic, social and cultural rights "derived" from the OAS Charter.

e. Supplementary means

62. With regard to the supplementary means of interpretation of treaties, it should be emphasized that, during the 1969 Inter-American Specialized Conference on Human Rights at which the final text of the Convention was adopted, two articles on this issue were proposed. One was Article 26 which appears in the Convention; this article was adopted.[70]

63. The other proposed article, 27, stated:

> "Monitoring Compliance with the Obligations. The States Parties shall transmit to the Inter-American Commission of Human Rights a copy of each of the reports and studies that they submit annually to the Executive Committees of the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture, in their respective fields, so that the Commission can verify their compliance with the obligations determined previously, which are the essential basis for the exercise of other rights enshrined in this Convention."

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[68] *Idem.*

[69] Art. 31: "Recognition of Other Rights. Other rights and freedoms recognized in accordance with the procedures established in Articles 76 and 77 may be included in the system of protection of this Convention."
Art. 76: "1. Proposals to amend this Convention may be submitted to the General Assembly for the action it deems appropriate by any State Party directly, and by the Commission or the Court through the Secretary General.
2. Las Amendments shall enter into force for the States ratifying them on the date when two-thirds of the States Parties to this Convention have deposited their respective instruments of ratification. With respect to the other States Parties, the amendments shall enter into force on the dates on which they deposit their respective instruments of ratification."
Art. 77: "1. In accordance with Article 31, any State Party and the Commission may submit proposed protocols to this Convention for consideration by the States Parties at the General Assembly with a view to gradually including other rights and freedoms within its system of protection.
2. Each protocol shall determine the manner of its entry into force and shall be applied only among the States Parties to it."

[70] *Cf.* Proceedings of the Inter-American Specialized Conference on Human Rights, November 7 to 22, 1969, OEA/Ser.K/XVI/1.2, p. 318.

64. It should be noted that this draft article 27, which was not adopted,[71] refers to "reports and studies" for the Commission to verify whether the said obligations were being complied with and, therefore, distinguished between, on the one hand "the obligations determined previously," obviously in Article 26 – in other words, those relating to the rights "derived from the economic, social, educational, scientific and cultural standards set forth in the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires" and, on the other hand, "other rights enshrined in this Convention"; that is, "the civil and political rights."

65. Thus, the adoption of Article 26 was not intended to incorporate the economic, social and cultural rights into the protection regime established in the Convention. The only proposal in this regard was that compliance with the obligations relating to those rights should be submitted to examination by OAS organs, considering that such compliance was the basis for the realization of the civil and political rights. And, as indicated, that proposal was not accepted. This confirms that the States Parties to the Convention did not have any intention of including the economic, social and cultural rights in the protection regime that, to the contrary, it does establish for the civil and political rights.[72]

C. The OAS Charter

66. That said, considering that Article 26 makes a referral to "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," it is essential, in order to understand its scope, to refer to the content of the said standards and, in particular, those cited in the judgment.

67. Regarding the right to just and favorable conditions that ensure safety, health and hygiene in the workplace, the judgment cites Articles 45(b) and (c),[73] 46[74] and 34(g)[75] of the OAS Charter.[76]

68. On the basis of those articles, the judgment asserts that "the Court considers that there is a reference with a sufficient degree of specificity to the right to just and favorable conditions of work to derive its existence and implicit recognition in the OAS Charter."[77] However, it is sufficient to merely read the said provisions to conclude, clearly and without the least doubt, that they establish obligations of conduct or action, expressed in the "every effort" that the States undertake

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[71] *Cf.* Proceedings of the Inter-American Specialized Conference on Human Rights, November 7 to 22, 1969, OEA/Ser.K/XVI/1.2, p. 448.

[72] *Cf.* Concurring opinion of Alberto Pérez Pérez, *Case of Gonzales Lluy et al. v. Ecuador.* Preliminary objections, merits, reparations and costs. Judgment of September 1, 2015

[73] 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.

[74] 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.

[75] 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."

[76] Para. 155.

[77] *Idem*.

to make for the application of "principles and mechanisms" or to facilitate the process of Latin American integration, the harmonization of labor laws and the protection of the rights of workers, or to achieve the "basic objective" consisting in "fair wages, employment opportunities acceptable working conditions for all." It should not be forgotten that all the provisions cited are to be found in Chapter VII of the Charter, entitled "Integral Development." Consequently, those provisions do not establish obligations of result; in other words, they do not establish that the human rights derived from the said standards be respected, but rather that every effort be made to achieve the principles, mechanisms and goals they indicate.

69. In this context, the range of possibilities from which the interpreter could "derive" human rights that are not explicitly established in any international norm would be enormous, and even unlimited. If the Court continues with this tendency and takes it to its extreme, all the States Parties to the Convention that have accepted its jurisdiction could eventually be brought before it because they had not fully achieved the "principles," "goals," or "mechanisms" established in the OAS Charter from which the judgment derives rights and, evidently, this would appear to be very far from what the States Parties intended when they signed the Convention or, at least, from the logic implicit in it; especially, owing to the way in which the said Chapter VII is worded.

70. Thus, it is evident that, from "the economic, social, educational, scientific and cultural standards set forth in the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires" to which Article 26 refers, contrary to the considerations in the judgment, it is not possible to infer the Court's jurisdiction to hear and decide eventual violations of the rights derived from them.

D. The Protocol of San Salvador

71. It is also necessary to refer to the "Addition Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights," which is also cited in the judgment to support its interpretation of Article 26.[78] However, I consider that, to the contrary, its signature and validity support this opinion.

72. This instrument[79] was adopted considering the provisions of Articles 31, 76 and 77[80] of the Convention, and as its Preamble itself expressed, when indicating that:

> "Bearing in mind that, although fundamental economic, social and cultural rights have been recognized in earlier international instruments of both world and regional scope, it is essential that those rights be reaffirmed, developed, perfected and protected in order to consolidate in America, on the basis of full respect for the rights of the individual, the democratic representative form of government as well as the right of its peoples to development, self-determination, and the free disposal of their wealth and natural resources; and [c]onsidering that the American Convention on Human Rights provides that draft additional protocols to that Convention may be submitted for consideration to the States Parties, meeting together on the occasion of the General Assembly of the Organization of American States, for the purpose of gradually incorporating other rights and freedoms into the protective system thereof."

73. The foregoing reveals, consequently, that it is an agreement "additional to the Convention," whose specific purpose is to reaffirm, develop and perfect the economic, social and cultural rights and to progressively include them in its protection regime and achieve their full realization.

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78 Para. 161.

79 Hereinafter, the Protocol.

80 *Supra*, footnote 69.

74. In other words, the Protocol was adopted because, when it was signed, the economic, social and cultural rights had not been reaffirmed, developed, perfected and protected or included under the Convention's protection system, and this means that they had not been fully realized under Article 26. Otherwise, it is not possible to understand the need for, or the purpose of, the Protocol.

75. In this regard, the Protocol recognizes,[81] establishes,[82] sets forth[83] or enshrines[84] the following rights: the right to work (Art. 6), the right to just, equitable, and satisfactory conditions of work (Art. 7), trade union rights (Art. 8), the right to social security (Art. 9), the right to health (Art. 10), the right to a healthy environment (Art. 11), the right to food (Art. 12), the right to education (Art. 13), the right to the benefits of culture (Art. 14), the right to the formation and the protection of families (Art. 15), the rights of children (Art. 16), the protection of the elderly (Art. 17) and the protection of the handicapped (Art. 18). It should be recalled that, to the contrary, Article 26 does not establish or set forth any right, it merely refers to those "derived" from the OAS Charter.

76. And, with regard to the rights recognized by the Protocol, the States Parties undertook to adopt, progressively, measures to guarantee their full realization (Arts. 6(2), 10(2), 11(2) and 12(2)). This coincides with the provisions of Article 26; that is, that both the Protocol and Article 26 refer to rights that have not been realized or, at least, not fully.

77. The Protocol also includes a provision, Article 19, concerning the measures to protect the above-mentioned rights. These measures consist of the reports that States Parties must present to the OAS General Assembly "on the progressive measures they have taken to ensure due respect for the rights set forth in this Protocol"; of how the OAS Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture should respond to those reports, and of the opinion that the Commission may eventually provide.[85] It should be

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[81] Art. 1: "Obligation to Adopt Measures. The States Parties to this Additional Protocol to the American Convention on Human Rights undertake to adopt the necessary measures, both domestically and through international cooperation, especially economic and technical, to the extent allowed by their available resources, and taking into account their degree of development, for the purpose of achieving progressively and pursuant to their internal legislations, the full observance of the rights recognized in this Protocol."
Art. 4: "Inadmissibility of Restrictions. A right which is recognized or in effect in a State by virtue of its internal legislation or international conventions may not be restricted or curtailed on the pretext that this Protocol does not recognize the right or recognizes it to a lesser degree."

[82] Art. 2: "Obligation to Enact Domestic Legislation. If the exercise of the rights set forth in this Protocol is not already guaranteed by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Protocol, such legislative or other measures as may be necessary for making those rights a reality."
Art. 5: "Scope of Restrictions and Limitations. The State Parties may establish restrictions and limitations on the enjoyment and exercise of the rights established herein by means of laws promulgated for the purpose of preserving the general welfare in a democratic society only to the extent that they are not incompatible with the purpose and reason underlying those rights."
Art. 19(6): "Means of Protection. Any instance in which the rights established in paragraph a) of Article 8 and in Article 13 are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights."

[83] Art. 3: "Obligation of non-discrimination. The State Parties to this Protocol undertake to guarantee the exercise of the rights set forth herein without discrimination of any kind for reasons related to race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition."

[84] Art. 19(1): "Means of Protection. Pursuant to the provisions of this article and the corresponding rules to be formulated for this purpose by the General Assembly of the Organization of American States, the States Parties to this Protocol undertake to submit periodic reports on the progressive measures they have taken to ensure due respect for the rights set forth in this Protocol."

[85] Art. 19: "Means of Protection. 1. Pursuant to the provisions of this article and the corresponding rules to be formulated for this purpose by the General Assembly of the Organization of American States, the States Parties to this

noted that this provisions is similar to the proposed article 27 of the Convention, which was rejected by the corresponding Conference.

78. The foregoing signifies, first, that for the States Parties to the Protocol, the realization of the economic, social and cultural rights is progressive in nature; that is, *a contrario sensu,* those rights have not been realized or, at least, fully realized.

79. Second and consequently, this means that, for the said States, the provisions of Article 26 signify that the said rights are not included among those to which the protection system established in the Convention applies or that they are in effect because, to the contrary, it would not have been necessary to adopt the Protocol.

80. It should also be recalled that the OAS has created the Working Group to Examine the National Reports Envisioned in the Protocol,[86] as a mechanism to monitor compliance with the undertakings made in that instrument in this regard. This confirm that, undoubtedly, the intention of the said States was to create a non-jurisdictional mechanism for the international supervision of compliance with the Protocol.

81. The only exception to this system is established in paragraph 6 of Article 19:

> Any instance in which the rights established in paragraph (a) of Article 8[87] and in Article 13[88] are violated by action directly attributable to a State Party to this Protocol may give rise,

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Protocol undertake to submit periodic reports on the progressive measures they have taken to ensure due respect for the rights set forth in this Protocol."

2. All reports shall be submitted to the Secretary General of the OAS, who shall transmit them to the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture so that they may examine them in accordance with the provisions of this article. The Secretary General shall send a copy of such reports to the Inter-American Commission on Human Rights.

3. The Secretary General of the Organization of American States shall also transmit to the specialized organizations of the inter-American system of which the States Parties to the present Protocol are members, copies or pertinent portions of the reports submitted, insofar as they relate to matters within the purview of those organizations, as established by their constituent instruments.

4. The specialized organizations of the inter-American system may submit reports to the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture relative to compliance with the provisions of the present Protocol in their fields of activity.

5. The annual reports submitted to the General Assembly by the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture shall contain a summary of the information received from the States Parties to the present Protocol and the specialized organizations concerning the progressive measures adopted in order to ensure respect for the rights acknowledged in the Protocol itself and the general recommendations they consider to be appropriate in this respect.

6. Any instance in which the rights established in paragraph a) of Article 8 and in Article 13 are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights.

7. Without prejudice to the provisions of the preceding paragraph, the Inter-American Commission on Human Rights may formulate such observations and recommendations as it deems pertinent concerning the status of the economic, social and cultural rights established in the present Protocol in all or some of the States Parties, which it may include in its Annual Report to the General Assembly or in a special report, whichever it considers more appropriate.

8. The Councils and the Inter-American Commission on Human Rights, in discharging the functions conferred upon them in this article, shall take into account the progressive nature of the observance of the rights subject to protection by this Protocol."

[86] *Cf.* AG/RES. 2262 (XXXVII-O/07) of 05/06/2007.

[87] Art. 8: "Trade Union Rights. 1. The States Parties shall ensure: (a) The right of workers to organize trade unions and to join the union of their choice for the purpose of protecting and promoting their interests. As an extension of that right, the States Parties shall permit trade unions to establish national federations or confederations, or to affiliate with those that already exist, as well as to form international trade union organizations and to affiliate with that of their choice. The States Parties shall also permit trade unions, federations and confederations to function freely."

[88] Art. 13: "Right to Education. 1 Everyone has the right to education.

2. The States Parties to this Protocol agree that education should be directed towards the full development of the human personality and human dignity and should strengthen respect for human rights, ideological pluralism, fundamental

> 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.

82. This means that it is only if the rights relating to trade unions and to education are violated that the pertinent cases are justiciable before the Court. To the contrary, with regard to the violation of the other rights, including the right to just and favorable conditions that ensure safety, health and hygiene in the workplace, there is merely the system of reports established in Article 19 of the Protocol.

83. Thus, the Protocol is an amendment to the Convention. This is revealed by its text, which considers that it is a protocol, a mechanism that is explicitly established in the Convention.[89] It should also be noted that its Preamble indicates that it is adopted considering that the Convention establishes this possibility.[90] Thus, it is an "additional protocol" to the Convention, signed "for the purpose of gradually incorporating other rights and freedoms into the protective system thereof," which, therefore, the system does not include.

84. Consequently, this instrument, by establishing in its Article 19 the competence of the Court to examine eventual violations of the rights relating to trade unions and to education, is not limiting its competence, but rather expanding it. If the Protocol did not exist, the Court could not even examine the violation of those rights.

85. Thus, the foregoing proves categorically that, for the States Parties to the Protocol, the provisions of Article 26 of the Convention cannot be interpreted to establish or to recognize economic, social or cultural rights, or that it authorizes submitting a case to the Court based on their violation. Let me repeat, that if Article 26 had established this, it is evident that the States would not have adopted the Protocol. Consequently, it was for that reason that it was necessary to adopt it. Its signature cannot be explained in any other way.

86. Based on the above, it can be concluded that the Protocol is clear evidence that the provisions of Article 26 do not establish any human right or, in particular, as maintained in the judgment, provide legitimacy to litigate before the Court for the violation of the economic, social and cultural rights to which it refers.

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freedoms, justice and peace. They further agree that education ought to enable everyone to participate effectively in a democratic and pluralistic society and achieve a decent existence and should foster understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups and promote activities for the maintenance of peace.
3. The States Parties to this Protocol recognize that in order to achieve the full exercise of the right to education:
a. Primary education should be compulsory and accessible to all without cost;
b. Secondary education in its different forms, including technical and vocational secondary education, should be made generally available and accessible to all by every appropriate means, and in particular, by the progressive introduction of free education;
c. Higher education should be made equally accessible to all, on the basis of individual capacity, by every appropriate means, and in particular, by the progressive introduction of free education;
d. Basic education should be encouraged or intensified as far as possible for those persons who have not received or completed the whole cycle of primary instruction;
e. Programs of special education should be established for the handicapped, so as to provide special instruction and training to persons with physical disabilities or mental deficiencies.
4. In conformity with the domestic legislation of the States Parties, parents should have the right to select the type of education to be given to their children, provided that it conforms to the principles set forth above.
5. Nothing in this Protocol shall be interpreted as a restriction of the freedom of individuals and entities to establish and direct educational institutions in accordance with the domestic legislation of the States Parties.

[89] Supra, footnote 69.

[90] *Supra*, Para. 73.

E. Conclusions with regard to Article 26.

87. It is therefore for the above reasons that I dissent partially from the judgment; that is, from the provisions of its operative paragraphs 2[91] and 6.[92]

88. In this regard, I must insist, once again, that this brief does not relate to the existence of the right to just and favorable conditions that ensure safety, health and hygiene in the workplace. This is not its purpose. I merely maintain that its possible violation cannot be submitted to the Court's consideration and decision.

89. Furthermore, it is necessary to point out that this opinion should not be seen to indicate that I am not in favor of violations of the economic, social and cultural rights eventually being submitted to the consideration of the Court. In this regard, I consider that if this occurs, it must be decided by the entity that holds the international normative function. It does not appear appropriate that the organ that holds the inter-American judicial function should assume the international normative function, especially when the States concerned are democratic and, in this regard, governed by the Inter-American Democratic Charter,[93] which establishes the separation of powers and citizen participation in public affairs; and evidently the Court must respect this, particularly in the case of those norms that are more directly related to the intervention of the citizenry.

90. From this perspective, it is worth insisting that interpretation does not consist in determining the meaning and scope of a norm so that it expresses the interpreter's preference, but rather what it objectively establishes and, in the case of the Convention, it is a question of defining how the text agreed by its States Parties may be applied at the time and under the circumstances in which the respective dispute is submitted; in other words, how to make the "*pacta sunt servanda*" principle applicable at the time and in the circumstances in which the dispute occurs. Thus, the issue is how to ensure that human rights treaties are, *per se,* truly living instruments; that is, that they are susceptible to understanding or being applicable to the new realities and not that that it is their interpretation – as if it was a separate entity – that evolves with the times and current circumstances, changing what they have established.

91. Lastly, it is essential to repeat that, if the Court continues on the course adopted by the judgment, the inter-American system of human rights[94] as a whole could be seriously restricted. This is because, very probably it would not encourage – but rather discourage – the accession of other States to the Convention, or the acceptance of the Court's contentious jurisdiction by those who have not yet accepted this and, furthermore, the tendency of the States Parties to the Convention not to comply fully and promptly with its rulings could recommence or even increase. In short, it would undermine the principle of legal security or certainty that, in the case of human rights also benefits the victims of their violation, by ensuring compliance with the Court's judgments because these are solidly based on the sovereign undertakings made by the States.

92. In this regard, it should not be overlooked that, in the practice and over and above any theoretical consideration, the function of the Court is, after all, to deliver judgments that re-establish, as soon as possible, respect for the human rights violated. It is not sure that this is achieved in relation to the violations of human rights that the Convention did not consider to be justiciable before the Court.

[91] *Supra*, footnote 3.
[92] *Supra*, footnote 4.
[93] Adopted at the twenty-eight special session of the OAS General Assembly held in Lima, Peru, September 11, 2001.
[94] Hereinafter, ISHR.

IV. ARTICLE 24

93. As indicated initially, this opinion is presented because I also disagree with the declaration in operative paragraph 6 of the judgment[95] that Article 24 of the Convention[96] was violated, as I consider this inappropriate.

94. The said article indicates that:

> All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

95. In order to explain my discrepancy as simply as possible, the reasons that support it will be set out in similar terms to those used previously for the interpretation of Article 26; that is, pursuant to the provisions of Article 31 of the Vienna Convention.[97]

A. Good faith

96. Interpreting this article in accordance with good faith means that it should be understood in the sense that its practical effect is that everyone has the right to be treated by the law in the same way; therefore, the law protects everyone without discrimination.

97. Accordingly, an eventual violation of this right would be committed by the law itself and not because the free and full exercise of any other right recognized in the Convention has not been guaranteed. In other words, the practical effect of this right is that it is considered, in itself, a human right. The unequal treatment it might establish, or the discrimination it might reveal as regards the protection it provides, would be the cause that gives rise to the international responsibility of the State.

98. Thus, the rule of good faith leads us to consider that what is established by the provisions of Article 24 of the Convention is clearly different from the content of Article 1(1) of this instrument, which establishes a conditional obligation of the States to ensure the free and full exercise of all the rights recognized therein including, evidently, the one that relates to equality before the law.

99. Consequently, it is incomprehensible that the judgment declares that the said Article 24 was violated without indicating the specific law that committed this internationally wrongful act. The judgment indicates a generic situation as the cause of this wrongful act; namely the structural situation of discrimination based on poverty, or the condition of being a woman or an Afro-descendant,[98] without making any specific reference to the law as the cause of this. It should be recalled that Article 24 explicitly establishes that it is the law that must grant equality among human beings and provide the corresponding protection, without discrimination.

B. Ordinary meaning

100. Regarding the ordinary or literal meaning of the terms, it should be recalled that the Convention does not give the term "law" a special meaning,[99] so that its ordinary meaning should be used, which is "*precepto dictado por la autoridad competente, en que manda o prohíbe algo*

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[95] Supra, footnote 3.
[96] Hereinafter, Article 24.
[97] *Supra*, footnote 11.
[98] Paras. 185 to 200.
[99] Art. 31(4) of the Vienna Convention: "A special meaning shall be given to a term if it is established that the parties so intended."

en consonancia con la justicia and para el bien de los gobernados"[100] [precept issued by the competent authority that orders or prohibits something in accordance with justice and for the good of those who are governed].

101. This concept coincides, broadly speaking, with what was indicated in Advisory Opinion OC-6/86 of May 9, 1986; namely "that the word 'laws' in Article 30 of the Convention[101] means a general legal norm tied to the general welfare, passed by democratically elected legislative bodies established by the Constitution, and formulated according to the procedures set forth by the constitutions of the States Parties for that purpose."

102. It should be pointed out that, on that occasion, the Court recalled that "[i]t is, therefore, not a question of giving an answer that can be applied to each case where the Convention uses such terms as 'laws,' 'law,' 'legislative provisions,' 'legal effects,' 'legislative measures,' 'legal restrictions' or 'domestic laws,' rather "[o]n each occasion that such expressions are used, their meaning must be specifically determined."[102] And, it was precisely this that Advisory Opinion OC-12/91 of December 6, 1991, did when it indicated, for the effects of Article 64(2) of the Convention,[103] "that, in certain circumstances and pursuant to the powers conferred on it by Article 64(2), the Court may render advisory opinions regarding the compatibility of 'draft legislation' with the Convention."

103. Consequently, it can be asserted that, in the absence of an explicit indication in the Convention and of a more general ruling by the Court, the concept of law provided by the Court, for the purpose of Article 30 of the Convention, is also applicable to the provisions of its Article 24, including in it the Constitution and regulations, resolutions or instructions of a general nature.

104. Thus, the method of the literal interpretation of the terms leads to the same results as those achieved with the method of good faith; which is that it is the law that must consider all persons as equal and accord all of them due protection without discrimination and, if it does not, the human right of equality before the law is violated. The cause of that violation is, therefore, the law and, for the corresponding purposes, it is necessary to specify which law, and this did not occur in the judgment.

C. The subjective method

105. Regarding the application to this matter of the subjective method that tries to determine the intention of the parties to the Convention based on its context, attention should be called to the fact that the said Article 24 is situated among the articles that refer to each of the human rights recognized by the Convention, so that, the provisions of Articles 1 and 2 of the Convention are applicable to it – in the same way as they are to the other human rights – and, consequently, both the Commission and the Court may determine whether it is respected.

106. The said Article 24 is located in Chapter II of the Convention entitled "Civil and Political Rights," and this is in Part I of the Convention entitled "State Obligations and Rights Protected," which also includes Chapter I entitled "General Obligations," from which it can be inferred that the latter concerns the State obligations that are applicable to all the human rights recognized by

[100] *Cf.* Diccionario de la Lengua Española, Real Academia Española, 2020.
[101] "Scope of Restrictions. The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established."
[102] Para. 16 of OC-6/86.
[103] "The Court, at the request of a member state of the Organization, may provide that State with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments."

the Convention; in other words, those established in the said Chapter II, including the one set forth in Article 24.

107. In this regard, I do not agree with the judgment when it indicates that, "if a State discriminates with regard to the respect and guarantee of a Convention right, it would be in non-compliance with the obligation established in Article 1(1) and the substantive right in question. To the contrary, if the discrimination refers to an unequal protection by domestic law or its application, the fact must be examined in light of Article 24 of the American Convention."[104]

108. And I cannot agree with this reasoning because Article 24 does not refer only to the right to equal protect of the law but, above all, to the right to equality before the law. Second, I disagree with the judgment that, whereas the provisions of Article 1(1) of the Convention concern the obligation of the States to respect and ensure all the rights recognized therein, Article 24 relates only to one of the rights that the Convention recognizes – that is, the right to equality before the law. Third, I disagree with the position taken in the judgment because, while Article 1(1) does not indicate the reason for the discrimination, Article 24 identifies this as the law.

109. To affirm what the judgment indicates would entail considering Article 24 to be redundant or unnecessary because, for all practical effects, Article 1 of the Convention also establishes the possibility that, the violation of any of the Convention rights, for any cause, entails discrimination.

110. In this regard, it can be concluded that the rule of interpretation concerning the determination of the intention of the parties to the Convention in keeping with its context leads us to the same conclusion as the two preceding methods; namely, that to determine the violation of the provisions of the said Article 24, it is essential to specify the law that does not consider everyone equal or that does not provide due protection without discrimination and, as already indicated, the judgment did not do this.

D. Functional or teleological method

111. Regarding the specific object and purpose of the provisions of the said Article 24, it should be pointed out that this article plays a similar role to that of Articles 8 and 25 of the Convention. This is that, while Articles 3 to 7 and 9 to 23 of the Convention establish human rights, the provisions of Articles 8 and 25 guarantee that, if the organs of the executive and legislative functions of the State fail to repair or redress eventual violations of the said rights, the judicial organ must do so in all circumstances and, to this end, recourse to this organ is established, *per se*, as a human right.

112. The same is true of the provisions of Article 24, which, when establishing equality before the law and the corresponding protection that the law should provide as a human right, *per se*, makes it possible that States can be found responsible for the acts or omissions of its organ that exercises the normative function. In this way, the inter-American system of human rights and, in particular, the Convention leave no space for the State to evade responsibility for an internationally wrongful act.

113. Moreover, to ensure this, it is essential that individuals are able to lodge petitions before the Commission and, in this way, initiate the corresponding procedure;[105] in other words, they

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[104] Para. 182.

[105] Art. 44: "Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party."

must have *locus standi*, which, in the case of the said Article 24, means that a law has denied a person equality before it or has not provided this person with the pertinent protection, discriminating against them, and they file a claim, substantiating that they have the corresponding interest in the matter.

114. Consequently, the object and purpose of Article 24 is also to stress that the cause of violations involving inequality among individuals and the failure to protect equality among them, must be related to the law.

E. Conclusion on Article 24.

115. In conclusion, I dissent from operative paragraph 6 of the judgment because, on the one hand, it omits any reference to the law that violates the right to equality before the law and to equal protection of the law, established in Article 24 and, on the other, it merely substantiates its position on the basis of a structural situation of poverty or discrimination for reasons of race or sex to declare its violation, which may be useful to determine the context in which this occurred, but is insufficient to be the only consideration taken into account in this regard.

V. FINAL CONCLUSIONS

116. Taking advantage of this opportunity, I wish to place on record two additional consideration with regard to this judgment.

117. First, that since operative paragraph 6 includes a reference to Article 19[106] together with Articles 26 and 24, all of the Convention, I was obliged to vote against its adoption, but this should not be understood as a denial of the fact that this article was violated.

118. And second, that since operative paragraph 4 of the judgment[107] refers to Article 4(1) of the Convention,[108] and as it had been established as a fact that "[f]our of the women who died [in the event in question] were also pregnant,"[109] it would have been desirable to apply the said article of the Convention in relation to the unborn children or *nasciturus*, as indicated in other opinions I have issued.[110] However, this was not possible because, on the one hand, the issue was not raised in this case and, on the other, the Court had no information on the stage of these women's pregnancies.

Eduardo Vio Grossi
Judge

Pablo Saavedra Alessandri
Secretary

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[106] "Rights of the Child. Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state."

[107] "The State is responsible for the violation of the rights to life and of the child contained Articles 4(1) and 19, in relation to Article 1(1) of the American Convention on Human Rights, to the detriment of the sixty persons who died in the explosion of the fireworks factory of Santo Antônio de Jesus on December 11, 1998, referred to in paragraph 139 of this judgment, who included twenty children, according to paragraphs 115 to 139 of this judgment."

[108] "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

[109] Para. 75.

[110] *Cf.* Concurring opinion of Judge Eduardo Vio Grossi, *Case of the Massacres of El Mozote and neighboring places v. El Salvador,* Judgment of October 25, 2012 *(Merits, reparations and costs),* Inter-American Court of Human Rights, and Dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, *Case of Artavia Murillo et al. (In Vitro fertilization) v. Costa Rica,* Judgment of November 28, 2012 *(Preliminary objections, merits, reparations and costs).*

PARTIALLY DISSENTING OPINION OF JUDGE HUMBERTO ANTONIO SIERRA PORTO

CASE OF THE WORKERS OF THE FIREWORKS FACTORY IN SANTO ANTÔNIO DE JESUS AND THEIR FAMILIES *V.* BRAZIL

JUDGMENT OF JULY 15, 2020
(Preliminary objections, merits, reparations and costs)

1. With my reiterated respect for the decisions of the Inter-American Court of Human Rights (hereinafter "the Court"), and although I share most of the considerations that support the judgment adopted, I should like to present this partially dissenting opinion. The opinion sets out: (i) the reasons that support my disagreement with the decision taken by the majority in relation to the preliminary objection *ratione materiae,*[1] and (ii) my comments in relation to the analysis made when attributing international responsibility to the State for the violation of the right to just and favorable conditions that ensure safety, health and hygiene in the workplace.[2]

2. These reflections supplement those expressed in my partially dissenting opinions in the Cases of Lagos del Campo *v.* Peru,[3] Dismissed Workers of PetroPeru *et al. v.* Peru,[4] San Miguel Sosa *et al. v.* Venezuela,[5] Cuscul Pivaral *et al. v.* Guatemala,[6] Muelle Flores *v.* Peru,[7] National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) *v.* Peru,[8] Hernández *v.* Argentina,[9]

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[1] Paragraph 23 of the judgment.

[2] Paragraphs 153 to 176 of the judgment.

[3] *Cf. Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 340. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[4] *Cf. Case of the Dismissed Workers of PetroPeru et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2017. Series C No. 344. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

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

[6] *Cf. Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[7] *Cf. Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[8] *Cf. Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 21, 2019. Series C No. 394. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[9] *Cf. Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2019. Series C No. 395. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

and Indigenous Communities of the Lhaka Honhat (Our Land) Association *v.* Argentina,[10] as well as my concurring opinions in the Cases of Gonzales Lluy *et al v.* Ecuador,[11] Poblete Vilches *et al. v.* Chile[12] and Rodríguez Revolorio *et al v.* Guatemala.[13]

3. In this case, the State argued that the Court did not have jurisdiction to rule on the alleged violation of the right to work because the economic, social and cultural rights were not subject to the system of individual petitions regulated in the American Convention (para. 21). Meanwhile, the Commission and the representatives asked the Court to reject the preliminary objection because, in their opinion, since it referred to the interpretation of Article 26 of the Convention, it was a matter that should be decided when examining the merits of the case and because, following the decision adopted in the Case of Lagos del Campo *v.* Peru, the argument that the Court did not have jurisdiction to rule on a possible violation of Article 26 was a matter that had been superseded (para. 22). Based on the arguments submitted, the Court reaffirmed its jurisdiction to hear and decide disputes concerning Article 26 of the American Convention and reiterated that the possible violation of this article of the Convention would be considered in the section on the merits of the case. Consequently, it rejected the preliminary objection (para. 23).

4. In this regard, it should be recalled that preliminary objections are objections to the *admissibility* of a matter or to the *jurisdiction* of the Court to hear a case or any of its aspects, due to the person, the matter, the time or the place, provided that these objections are preliminary in nature.[14] Objections that are not of this nature, such as those that refer to the merits of a matter, cannot be analyzed as such,[15] because the purpose of preliminary objections is, ultimately, to prevent the analysis of the merits. Therefore, regardless of the name given to them by the State if, when examining the State's arguments, it is determined that these refer to an objection to the *admissibility* of the matter or to the Court's *jurisdiction* to hear the case, they must be decided as preliminary objections at the corresponding stage of the proceedings.[16]

5. In this case, the State argued that the Court did not have *jurisdiction* to examine the alleged violation of Article 26 of the American Convention and, therefore, it was

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[10] *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. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[11] *Cf. Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 1, 2015. Series C No. 298. Concurring opinion of Judge Humberto Antonio Sierra Porto.

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

[13] *Cf. Case of Rodríguez Revolorio et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of October 14, 2019. Series C No. 387. Concurring opinion of Judge Humberto Antonio Sierra Porto.

[14] *Cf. Case of Las Palmeras v. Colombia. Preliminary objections.* Judgment of February 4, 2000. Series C No. 67, para. 34, and *Case of Herzog et al. v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of March 15, 2018. Series C No. 353, para. 97.

[15] *Cf. Case of Castañeda Gutman v. Mexico. Preliminary objections, merits, reparations and costs.* Judgment of August 6, 2008. Series C No. 184, para. 39, and *Case of Herzog et al. v. Brazil, supra*, para. 97.

[16] *Cf. Case of Castañeda Gutman v. Mexico, supra*, and *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2017. Series C No. 340, para. 17.

incumbent on the Court to determine whether it was, in fact, competent to examine a possible violation of the right to work directly. Accordingly, the Court should not have rejected the preliminary objection that had been filed point-blank, indicating that the matter would be analyzed with the merits of the case, because the State's arguments referred to preliminary matters that should have been examined when deciding on the preliminary objection. Additionally, in my opinion, the Court should have concluded that it did not have jurisdiction to examine possible violations of the right to work directly and therefore the preliminary objection filed by the State should have been admitted. The arguments on why I consider that Court was not competent to examine such violations directly are presented in the following section in greater detail.

6. In this judgment, the Court concluded that Brazil was responsible "responsible for the violation of Articles 19,[17] 24 and 26 of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of the 60 people who died in, and the six survivors of, the explosion of the factory of "Vardo dos Fogos" in Santo Antônio de Jesus on December 11, 1998, identified in Annex No. 1 of this judgment."[18] The Court reached this conclusion after considering, among other matters, that the State had failed to comply with its duty to prevent occupational accidents. The judgment indicates that this duty "was especially relevant owing to the magnitude of the events in the instant case that severely affected the life and personal integrity of the workers" (para. 176).

7. Although, in general, I share the opinion of my colleagues, and this is expressed by my vote in favor of the sixth operative paragraph of the judgment, I consider it important to clarify that this does not mean that I have distanced myself from what I have indicated in other previous dissenting or concurring opinions (supra, para. 2). I repeat that asserting the justiciability of the ESCER by a direct application of Article 26 of the Convention involves at least two major problems. First, Article 26 does not contain a list of rights, but rather refers to the Charter of the Organization of American States, and neither does the Charter contain a clear and precise list of rights from which obligations can be derived that can then be required of the States under the system of individual petitions.[19] Second, the argument used in the judgment to justify the Court's jurisdiction ignores the fact that the States agreed, in the Protocol of San Salvador, that the competence of the Court to examine violations of the ESCR under the system of individual petitions was restricted to a few aspects of trade union rights and the right to

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[17] The State is responsible for the violation of the articles indicated in this paragraph in relation to Article 19 of the Convention to the detriment of the children: Adriana dos Santos, Adriana Santos Rocha, Aldeci Silva Santos, Aldenir Silva Santos, Alex Santos Costa, Andreia dos Santos, Aristela Santos de Jesus, Arlete Silva Santos, Carla Alexandra Cerqueira dos Santos, Daiane Santos da Conceicao, Daniela Cerqierira Reis, Fabiana Santos Rocha , Francineide Jose Bispo Santos, Girlene dos Santos Souza , Karla Reis dos Santos, Luciene Oliveira Santos, Luciene Ribeiro dos Santos, Mairla de Jesus Santos Costa, Núbia Silva dos Santos and Rosângela de Jesus França, who died in the explosion, and of the children: Maria Joelma de Jesus Santos, Bruno Silva dos Santos and Wellington Silva dos Santos, who survived the explosion, because it failed to implement the special measures of protection that their condition as children required.

[18] Paragraph 204 of the judgment.

[19] *Cf. Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 1, 2015. Series C No. 298. Concurring opinion of Judge Humberto Antonio Sierra Porto, paras. 7 to 9, *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 340. Partially dissenting opinion of Judge Antonio Humberto Sierra Porto, para. 9, and *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, para. 3.

education.[20]

8. Consequently, if I voted with the majority of my colleagues, it was because the analysis of the alleged violations of the right to work was combined with the rights of the children and the right to equality and non-discrimination (Chapter VIII-2); and due to the way in which the said violations were declared, jointly, in the sixth operative paragraph of the judgment. Nevertheless, as I have affirmed in my previous concurring and dissenting opinions, the analysis by connectivity of the violations of matters relating to this category of rights leads to the same practical result as the autonomous analysis that most of the recent judgments have proposed, and that was made in this judgment.

9. There can be no doubt that the violations of the human rights of those who died or were injured as a result of the explosion of the fireworks factory – and which were declared in the judgment – were a result of the failure to inspect and oversee the dangerous activity of the manufacture of fireworks, despite the risks involved in this activity. Therefore, in my opinion, the Court should have linked the analysis of the obligation to prevent occupational accidents to the analysis of the violation of the rights to life and integrity. This line of argument would have achieved the same practical result without causing institutional attrition and without the weakness of the arguments and evidence that the contrary analysis signifies. And I have affirmed this repeatedly with regard to other cases.[21]

10. Indeed, in this case, the analysis of the violation of the right to just and favorable conditions that guarantee safety, health and hygiene in the workplace, and that entail the duty to prevent occupational accidents, is closely linked to the violation of the life and personal integrity of the victims who died or were injured as a result of the explosion. Moreover, it is quite difficult to establish where the obligations relating to each right whose non-compliance led to the declaration of the State's international responsibility begin and end.

11. Therefore, in this case, the autonomous analysis of Article 26 was pointless. Indeed, that analysis involved unnecessary duplication as regards the declaration of the violated rights, and this is revealed by the fact that the State's acts and omissions that constituted the violation of the right to just and favorable conditions in work and to life and personal integrity are, essentially, the same.

12. Consequently, I clarify that my vote in favor of the sixth operative paragraph of the judgment should not be understood as an acceptance of the thesis – which I consider to be erroneous – that the Court has held recently regarding the possibility of declaring autonomous violations of Article 26 of the American Convention. To the contrary, it should be understood as a vote in favor of the international responsibility of Brazil for

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[20] Article 19(6) of the *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador"* stipulates the following: "Any instance in which the rights established in paragraph (a) of Article 8 and in Article 13 are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Articles 44 through 51 and 61 through 69 of the American Convention on Human Rights."

[21] *Cf. Case of Rodríguez Revolorio et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of October 14, 2019. Series C No. 387. Concurring opinion of Judge Humberto Antonio Sierra Porto, para. 7.

the failure to oversee the hazardous activity of the manufacture of fireworks, which resulted in the violation of the right to life and to integrity of those who died or were injured in the explosion of the fireworks factory, among whom were children who, pursuant to the American Convention and the Convention on the Rights of the Child, merit special protection.

13. The foregoing also leads me to reiterate my comments on the scope of the principles of interdependence and indivisibility in relation to the interpretation of Article 26 of the Convention. These principles indicate that all rights have equal rank and importance, and that the enjoyment of one right depends on the realization of others. However, this does not mean that the ESCER should automatically be incorporated into the contents of the Convention as autonomous and justiciable rights. Although it is true that the rights are intrinsically connected and the respect and enjoyment of certain rights and freedoms cannot justify the denial of others, this argument is not sufficient to modify the jurisdiction of a court, as proposed by those who seek direct justiciability by a broad interpretation of Article 26 of the Convention.[22] The principles of indivisibility and interdependence and the idea according to which it is necessary to provide "the same attention and urgent considerations to the application, promotion and protection of both the civil and political rights and the economic, social and cultural rights,"[23] are consistent with an analysis of the ESCER from the perspective of connectivity, because their application does not imply an unlimited expansion of the Court's competences, but does allow a broad understanding of the rights protected by the Convention that entails the respect and guarantee of all human rights, including the economic, social, cultural and environmental rights.[24] Also, the fact that human rights are interrelated and even considered indivisible, does not mean that they cannot be distinguished from one another and, consequently, each one has its own scope.[25]

Humberto Antonio Sierra Porto
Judge

Pablo Saavedra Alessandri
Secretary

[22] *Cf. Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 1, 2015. Series C No. 298. Concurring opinion of Judge Humberto Antonio Sierra Porto, para. 4.

[23] Cf. United Nations General Assembly. *Alternative Approaches and Ways and Means Within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms.* Resolution 32/130 of December 16, 1977.

[24] *Cf. Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349. Concurring opinion of Judge Humberto Antonio Sierra Porto, para. 15.

[25] *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. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto, para. 11.

SEPARATE OPINION OF JUDGE EDUARDO FERRER MAC-GREGOR POISOT

CASE OF THE WORKERS OF THE FIREWORKS FACTORY IN SANTO ANTÔNIO DE JESUS AND THEIR FAMILIES V. BRAZIL

JUDGMENT OF JULY 15, 2020
(Preliminary objection, merits, reparations and costs)

INTRODUCTION:

BUSINESS AND HUMAN RIGHTS, RIGHT TO WORK, POVERTY, INTERSECTIONAL AND STRUCTURAL DISCRIMINATION, AND MATERIAL EQUALITY

1. Can the State be internationally responsible for the violation of human rights as a result of acts committee by a private enterprise? The facts of this case refer to the explosion in a fireworks factory in which 60 people died and six more were injured, all of them women and children who worked in the factory.

2. The Inter-American Court of Human Rights (hereinafter "the Court" or "the Inter-American Court") analyzed how the failure to oversee a private enterprise dedicated to the manufacture of fireworks resulted in a failure by the State to protect the rights to life and personal integrity of the 66 victims. In this regard, international responsibility was examined from the perspective of the State's obligation to ensure rights, specifically the failure of oversight in relation to both the rights described above and from the perspective of the workplace conditions and, particularly, in the case of employment in which individuals are exposed to working with dangerous materials. The principal State obligation analyzed was that of adopting "the necessary measures to prevent" eventual violations of the rights of the women workers (some of whom were pregnant) and of the children who lost their lives and of those who were seriously injured.

3. The important participation of civil society by means of *amicus curiae* briefs[1] should be underscored. This is not the first occasion on which the Inter-American Court has ruled on: (a) structural discrimination; (b) intersectional discrimination; (c) discrimination based on economic status – analyzed from the perspective of the "poverty" of the victims, and (d) the content of the social rights that can be derived from Article 26 of the American Convention on Human Rights (hereinafter "the American Convention" or "the Pact of San José"). However, it is the first occasion on which the Court has examined the way in which the confluence of different factors present in the victims living in poverty subjected them to a situation of structural discrimination in relation to the enjoyment of specific conditions of the right to work.

4. The judgment addresses the context of *social exclusion* faced by those who resided or reside in some neighborhoods of the municipality of Santo Antônio de Jesús, in the region of the Recôncavo Sur, state of Bahía. In this context, the manufacture of fireworks constituted the main source of employment (or even the only employment option) for the women who lived or live there, who have a very low level of schooling and literacy and are perceived as

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[1] The *amici curiae* briefs were presented by: (1) the Initiative for Economic, Social, Cultural and Environmental Rights of the Laboratorio de Derechos Humanos and Justicia Global (LabDH) and the Brazilian Human Rights Institute (IBDH); (2) the Labor Public Prosecution Service of Brazil; (3) the Clinic on Policy Advocacy in Latin America at the University of New York; (4) the Human Rights Clinic of the Universidade Federal da Bahia; (5) the Human Rights Clinic of the Law School at the Brazilian institute of Public Law (CDH-IDP); (6) the Human Rights and Environmental Rights Clinic of the Universidade do Estado do Amazonas, and (7) students of the master's program in international law at the Universidad de La Sabana.

"rather unreliable and therefore unable to obtain any other employment."[2] The Inter-American Court considered that, in addition to the *structural discrimination owing to the condition of poverty,* various structural disadvantages – both economic and social and in relation to a determined group of persons – coalesced in the victims that had an impact on their victimization, so that the *intersection* of factors of discrimination "increased the comparative disadvantages of the victims."[3]

5. The Inter-American Court analyzed Articles 1(1) and 24 of the American Convention together, in relation to both the discriminatory situation of the victims and the presence of discriminatory factors, such as the existing inequalities, owing to the absence of actions to mitigate the situation in which they worked or so that they could access other types of employment. It is particularly relevant that the Court "finds that an obligation to ensure *material or substantial equality* is derived from Article 24 of the Convention," which "entails the obligation to adopt measures that ensure that *the equality is real and effective*; in other words, to correct the existing inequalities, to promote the inclusion and participation of historically marginalized groups, to guarantee to disadvantaged individuals or groups the effective enjoyment of their rights and, in short, to provide individuals with the real possibility of achieving *material equality* for themselves. To this end, States must actively combat situations of exclusion and marginalization."[4]

6. I share fully all that was decided in the judgment. I issue this separate opinion considering the need to emphasize and analyze some elements of the case that I consider crucial for the inter-American system, and these will be addressed as follows: **(I)** *Business and human rights: the obligation of a State guarantee regarding the acts of private individuals* (paras. 7 to 23)*;* **(II)** *The right to just and favorable conditions of work for the protection of safety, health and hygiene in the workplace: one more step for the content of Article 26 of the American Convention* (paras. 24 to 51); **(III)** *Poverty as part of the economic status and structural and intersectional discrimination: from the Hacienda Brasil Workers to the Workers of the Fireworks Factory* (paras. 52 to 68)*;* **(IV)** *Equal protection of the law, without discrimination: the evolution from formal equality to the mandate of real equality* (paras. 69 to 96); **(V)** *Material or substantial equality for the victims of the explosion of the fireworks factory* (paras. 97 to 114), *and* **(VI)** Conclusions (paras. 115 to 123).

I. BUSINESS AND HUMAN RIGHTS: THE OBLIGATION OF A STATE GUARANTEE REGARDING THE ACTS OF PRIVATE INDIVIDUALS

7. The Inter-American Court has been consistent in its case law when indicating that a State cannot be held responsible for all human rights violations committed by private individuals within its jurisdiction. The *erga omnes* nature of the Convention obligations of guarantee for which the State is responsible do not signify unlimited responsibility in relation to acts of private individuals. Thus, even if the legal consequence of an act or omission of a private individual is the violation of the rights of another individual, this cannot be automatically attributed to the State; rather, it is necessary to analyze the specific

[2] *Cf. Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of July 15, 2020. Series C No. 407, para. 189.

[3] The victims in this case "shared specific factors of discrimination suffered by those living in poverty, women, and Afro-descendants but, also, they suffered a specific form of discrimination owing to the confluence of all these factors and, in some cases, because they were pregnant, because they were girls, or because they were girls and pregnant." *Cf. Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, supra,* para. 191.

[4] *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, supra,* para. 199.

circumstances of the case and the implementation of the guarantee obligations.[5] Therefore, it is necessary to verify whether international responsibility can be attributed to the State in each specific case.[6]

8. The international responsibility of the State is based on acts or omissions of any of its organs or powers, regardless of their rank, that violate the rights recognized in the Convention.[7] Consequently, the States undertake not only to respect the rights and freedoms recognized therein (negative obligation), but also to adopt all appropriate measures to ensure them (positive obligation).[8] In this regard, the Inter-American Court has established that it is not sufficient that the States merely refrain from violating the rights; it is also essential that they *adopt positive measures*, to be determined based on the particular needs for protection of the subjects of law, due either to their personal condition or to their specific situation.[9]

9. We should recall that, in this case, the IACtHR concluded that the violations of the rights to life and to personal integrity, the rights of the child, and the right to just and favorable conditions of work (that ensure safety, health and hygiene in the workplace), were due to the State's omissions or inaction,[10] which resulted in the explosion of the fireworks factory of Santo Antônio de Jesus in which 60 people (women and children) lost their lives, and six people survived, but with injuries. The principal obligation analyzed in this case was that relating to the adoption of "the necessary measures" "to prevent" possible violations of the rights of the women workers and of the children, where the appropriate mechanisms to guarantee that prevention was "oversight" – and this obligation was even established in the country's laws. The obligation of oversight or supervision (or "inspection," as it is referred to in some domestic legislations), was of fundamental importance to ensure the rights that were analyzed in this case.[11]

10. The judgment cited the *United Nations Guiding Principles on Business and Human Rights* (hereinafter "the GPBHR" or "the Ruggie principles") in order to "reinforce" State obligations in relation to business activities – in this case of a high-risk or hazardous nature.[12] Although it is not the first occasion on which the IACtHR has had recourse to the GPBHR,[13] it

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[5] *Cf. Case of the Pueblo Bello Massacre v. Colombia*. Judgment of January 31, 2006. Series C No. 140, para. 123, and *Case of Gómez Virula et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of November 21, 2019. Series C No. 393, para. 56.

[6] *Cf. Case of Ximenes Lopes v. Brazil.* Judgment of July 4, 2006. Series C No. 149, paras. 99 and 125, and *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 1, 2015. Series C No. 298, para. 170.

[7] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits. Judgment of* July 29, 1988. Series C No. 4. para. 164, and *Case of Díaz Loreto et al. v. Venezuela. Preliminary objections, merits, reparations and costs.* Judgment of November 19, 2019. Series C No. 392, para. 69.

[8] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits, supra,* paras. 165 and 166, and *Case of Noguera et al. v. Paraguay. Merits, reparations and costs*. Judgment of March 9, 2020. Series C No. 401, para. 65.

[9] *Cf. Case of the Pueblo Bello Massacre v. Colombia, supra,* para. 111, and *Case of Vereda La Esperanza v. Colombia. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2017. Series C No. 341, para. 82.

[10] *Cf. Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, supra,* para. 139.

[11] *Cf. Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, supra,* paras. 138 and 203.

[12] Regarding the rights to life and to personal integrity and the rights of the child, the Court established international responsibility owing to the "omissions" that were verified. In the case of the right to just and favorable conditions of work, it determined international responsibility because the State had "failed to implement," or "did not undertake actions." Regarding the prohibition of child labor, the Court indicated that international responsibility arose owing to "the failure to adopt measures." *Cf. Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, supra*, paras. 150, 175, 176 and 181.

[13] *Cf. Case of the Kaliña and Lokono Peoples v. Suriname. Merits, reparations and costs*. Judgment of November 25, 2015. Series C No. 309, para. 224. *Cf.* UN, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework. Report of the Special Representative of the Secretary-

is the first case in which the application of the content of the said principles is harmoniously adapted to the obligations that must be respected based on Articles 1(1) and 2 of the Pact of San José and other international instruments (such as Conventions 81 and 155 of the International Labour Organization) and interpretations that establish State obligations in this type of context.[14]

11. The Ruggie principles are based on the idea that States must ensure three principles (or basic obligations) in the context of business activities within their jurisdiction: *protect, respect and remedy*. In this section – considering the facts of the case, that is, the actions of private individuals – I will focus only on the obligation to protect. However, the obligations to respect and to remedy, together with that of to protect, are essential for the realization of human rights in this type of situation.[15]

12. The *Guiding Principles on Business and Human Rights* indicate that "States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises."[16] This is relevant because, although it is understood that States are not, *per se*, responsible for the activities of private individuals, they may eventually be held responsible if they do not take measures, or do not implement the measures adopted, to ensure – preventively – the human rights that may be at risk.

13. The GPBHR indicate that States also have the obligation to "enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights," and also "periodically to assess the adequacy of such laws and address any gaps."[17] Lastly, the principles establish that States, as guarantors of the human rights of everyone who is within their jurisdiction, "should exercise adequate oversight in order to meet their international human rights obligations,"[18] in particular by "adequate independent monitoring and accountability mechanisms."

14. As mentioned, the ruling of the IACtHR is consonant with the obligations of States in the context of human rights and business. Thus, for example, the Inter-American Commission on Human Rights (hereinafter "the IACHR" or "the Inter-American Commission") in a recent report entitled *Business and human rights: Inter-American Standards,* identified that, under the Convention – derived from the general obligations established by the Pact of San José – it can be understood that the content of the Ruggie principles is applicable within the inter-American system.

15. This report reveals that the obligations of States in relation to private individuals, acting through their businesses, results in four sub-obligations – or duties – that may be included within the obligation "to ensure" and "to adapt domestic law" (Arts. 1(1) and 2 of the American Convention). These four sub-obligations are: (i) duty to prevent human rights violations in the context of business activities; (ii) duty to regulate and adopt domestic legal provisions; (iii) duty to oversee such activities, and (iv) duty to investigate, sanction, and ensure access to

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General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. Presented during the seventeenth session of the United Nations Human Rights Council, A/HRC/17/31, March 21, 2011. The Human Rights Council endorsed these Principles and decided to establish a working group to promote their implementation, Resolution 17/4, UN Doc. A/HRC/17/4, July 6, 2011. See, also *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide.*.

[14] Expert opinion presented to the Court by Christian Courtis. *Cf. Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of July 15, 2020. Series C No. 407, paras. 164 and 165.

[15] *Cf.* Guiding Principles on Business and Human Rights, Principles: 11 to 24 and 25 to 31.

[16] *Cf.* Guiding Principles on Business and Human Rights, Principle 1.

[17] *Cf.* Guiding Principles on Business and Human Rights, Principle 3(a).

[18] *Cf.* Guiding Principles on Business and Human Rights, Principle 5.

comprehensive reparation for victims in these contexts.[19] However, from my perspective, duties (ii) and (iii) are, in reality, the expression of how prevention can be executed, as I will explain below.

16. Starting with its first judgment, the IACtHR has indicated that the obligation to ensure rights means that the State must implement a broad range of measures.[20] A first step to ensure human rights is "prevention." Regarding this aspect of the obligation to ensure rights, the Inter-American Court has indicated that this obligations is of means or conduct and non-compliance is not proved by the mere fact that a right has been violated.[21] In other words, non-compliance is not measured against the full effectiveness of the said measure; however, at least, it is to be expected that significant results are produced and that they are sufficient to consider that there has been an evolution between the initial situation and the current situation and, to this end, it is desirable that such progress should be measurable.

17. As a corollary to the above, the IACtHR has indicated that States must adopt "comprehensive measures to comply with the duty of prevention." In particular, States must have a legal protection framework that is enforced effectively, and prevention policies and practices that allow it to act effectively in response to reports of human rights violations. The prevention strategy should be comprehensive; in other words, it must prevent the risk factors while strengthening the institutions that are able to provide an effective response to the human rights violations at issue. States must also adopt measures of protection in specific cases in which it is evident that certain groups of persons may suffer violations of their rights.[22]

18. A first element that may be understood from the findings of the Inter-American Court is the obligation to have a *legal protection framework*; in other words, to regulate. As it has been interpreted from Articles 1(1) and 2 of the American Convention, "the State obligation to adapt its domestic laws to the provisions of the Convention is not limited to the constitutional or legislative text, but must permeate all the legal provisions of a regulatory nature and result in the effective practical application of the standards for the protection of human rights."[23] However, it is not sufficient to adopt or adapt domestic laws; rather, together with regulations, in order to implement the laws, it is necessary to have an institutional apparatus that has competence over these laws.[24]

19. Moreover, it is not enough that an institutional apparatus to which competence has been delegated exists formally; rather, it is necessary that the said apparatus ensures that the regulations are, in fact, implemented. To this end, as a second element, *the obligations of oversight, supervision or inspection* are particularly relevant, because they are the *means* that

[19] *Cf.* IACHR and REDESCA, *Report on business and human rights: Inter-American standards*. OEA/Ser.L/V/II IACHR/REDESCA/INF.1/19, November 1, 2019, para. 86.

[20] "The second obligation of the States Parties is to "ensure" the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation." *Case of Velásquez Rodríguez v. Honduras. Merits, supra,* para. 166.

[21] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits, supra,* para. 166, and *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, para. 208.

[22] *Mutatis mutandi, Case of the Hacienda Brasil Verde Workers v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of October 20, 2016. Series C No. 318, para. 320.

[23] See, *inter alia*, *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection.* Advisory Opinion OC-21/14 of August 19, 2014. Series A No. 21, para. 65.

[24] *Cf.* IACHR and REDESCA, *Report on business and human rights: Inter-American standards*, *supra,* para. 105.

allow the authorities or institutions to monitor the activities of private entities in relation to rights that the State recognizes and has undertaken to ensure.

20. In its case law, the IACtHR has had occasion to rule specifically on oversight or supervision in the area of health.[25] Therefore, the same obligations play an essential role in the area of business and the monitoring of human rights and, specifically, in the area of employment.

21. The Inter-American Commission has identified the importance of supervision, oversight or inspection in the private sector workplace, especially to control and supervise working hours,[26] working conditions that could have a repercussion on the life, integrity or health of workers,[27] the unsafe conditions of the activities carried out by workers,[28] and the exploitation of workers.[29]

22. Meanwhile, although the IACtHR has not addressed labor inspection as part of international responsibility, in a case of forced labor and contemporary forms of slavery, it indicated that "regarding the obligation to ensure the right recognized in Article 6 of the American Convention, […] the States have the obligation: […] (*iv) to conduct inspections or other measures to detect such practices* […]"[30] (emphasis added). A ruling that is clearly applicable to the protection of the right to decent working conditions.

23. Lastly, it is important to stress that, as the Inter-American Commission has indicated, prevention is compromised when "the State itself generates or consolidates a situation of risk for the enjoyment of human rights." In other words, "it can also be in non-compliance with these obligations if its prior conduct has created or contributed decisively to the existence of the risk for the materialization of a violation in the specific case." In order "to link a state conduct to the creation of the risk it will be necessary to establish the connection between specific acts or omissions and the creation or consolidation of real situations of risk for the perpetration of human rights violations, in this case, linked to business activities."[31] A circumstance that, as addressed in the judgment, resulted in international responsibility in this case.

II. THE RIGHT TO JUST AND FAVORABLE CONDITIONS OF WORK FOR THE PROTECTION OF SAFETY, HEALTH AND HYGIENE IN THE WORKPLACE: A STEP FORWARD IN THE CONTENT OF ARTICLE 26 OF THE AMERICAN CONVENTION

24. Although the judgment analyzes the rights to life and personal integrity in one chapter and the right to work in another, it is relevant to note that – given the interdependence and indivisibility of human rights – the violations should be understood integrally. That means, non-compliance (due to inaction or omission) of the obligation of prevention when a specific and express duty exists (to oversee, supervise or inspect), has an impact on each of the violations found.

[25] The case law of the IACtHR has not made a distinction between the two terms, so that they should be understood as synonymous.
[26] *Cf.* IACHR. *Situation of human rights in Honduras*, OEA/Ser.L/V/II. Doc. 42/15, December 31, 2015, para. 405 to 415.
[27] *Cf.* IACHR. *Situation of human rights in Honduras*, *supra,* paras.427 to 435.
[28] *Cf.* IACHR. *Situation of human rights in Honduras*, *supra*, paras.427 to 435.
[29] *Cf.* IACHR. *Situation of human rights in Honduras*, *supra,* paras.427 to 435 and *Situation of human rights in Dominican Republic*, OEA/Ser.L/V/II. Doc. 45/15, December 31, 2015, paras. 565-574 and 653.14.
[30] *Cf. Case of the Hacienda Brasil Verde Workers v. Brazil, supra,* para. 319.
[31] *Cf.* IACHR and REDESCA, *Report on business and human rights: Inter-American standards*, *supra,* para. 96.

25. Accordingly, whether or not the State had regulated, preventively, the activities that were considered dangerous, as part of the obligation to ensure rights, was not in discussion. In this case, the Court analyzed whether the norms had been implemented by the competent authorities and whether the actions of these authorities had prevented – by oversight, supervision or inspection – the human rights violations. In this way, the omissive and inactive conduct of the State in the context of a private enterprise engaged its international responsibility, under both the evolving norms on business and human rights, and the Convention-based framework developed by the case law of the IACtHR.

26. The intention of this section is to examine the importance of *oversight, supervision or inspection* as mechanisms to ensure, and to prevent violations of labor rights in the context of relations between private individuals. To this end, first, I will address "the content of the right identified in this case" derived from Article 26 of the Pact of San José and, subsequently, I will include some considerations on the importance of *oversight or inspection* as preventive mechanisms to ensure just and favorable conditions of work that guarantee safety, health and hygiene in the workplace.

A. Regarding the content of the right to just and favorable conditions of work

27. The right to work has constituted an essential link in the line of case law relating to the economic, social, cultural and environmental rights (hereinafter "the ESCER") since the case of *Lagos del Campo v. Peru.*[32] In this session (held virtually for the first time owing to the pandemic), the Court has decided the case of *Spoltore v. Argentina,* in which, in my separate opinion, I asserted that "[s]ince the *Case of Lagos del Campo,* the case law of the Inter-American Court has been identifying the different ways in which the right to work is conceived as the right of employers and workers to associate freely for the defense and promotion of their interests […]."[33]

28. In the *Spoltore* case, the IACtHR indicated that the right to just and favorable conditions, "as a component and part of the right to work,"[34] was derived from Article 45(b) of the Charter of the Organization of American States (hereinafter "the OAS Charter"). It considered that there was a reference, with a sufficient degree of specificity, to the right to adequate working conditions to derive its existence and implicit recognition in the said Charter.[35] Thus, as in other cases,[36] that judgment had recourse to the American Declaration

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[32] *Cf. Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2017. Series C No. 340, paras. 153 and 154. In this regard, in the case of *San Miguel Sosa et. al.,* I indicated that "[t]he case of *San Miguel Sosa et al. v. Venezuela*, supplements the approach that the Inter-American Court has rapidly taken to the social rights and their direct enforceability before the Court. The triad of labor cases – *Lagos del Campo, Dismissed Workers of PetroPeru et al.* and now the case of *San Miguel Sosa et al.* – allow a series of standards to be delineated that should be taken into consideration when exercising control of conventionality internally and to contribute to the jurisprudential dialogue that exists within the inter-American international sphere and within the States Parties to the American Convention. *Cf. Concurring and partially dissenting opinion in the Case of San Miguel Sosa et al. v. Venezuela. Merits, reparations and costs*. Judgment of February 8, 2018. Series C No. 348, para. 27. See, the applicable part of the opinion issued in the *Case of Spoltore v. Argentina*.

[33] The Inter-American Court concluded that "the State is responsible for the violation of Articles 16(1) and 26 in relation to Articles 1(1), 13 and 8 of the American Convention, to the detriment of Mr. Lagos del Campo". *Cf. Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs, supra,* para. 158, 163 and sixth operative paragraph.

[34] *Cf. Case of Spoltore v. Argentina. Preliminary objection, merits, reparations and costs.* Series C No. 404, para. 83.

[35] *Cf. Case of Spoltore v. Argentina, supra*, para. 84.

[36] *Cf. Case of Lagos del Campo v. Peru, supra*; *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).* Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23; *Case of the Dismissed Workers of PetroPeru et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2017. Series C No. 344; *Case of San Miguel Sosa et al. v. Venezuela. Merits, reparations and costs*. Judgment of February 8, 2018. Series C No. 348;

of the Rights and Duties Man, to an international *corpus iuris,* and to the Argentine Constitution to delimit the content, in a non-restrictive manner, of what "just and favorable" conditions could encompass."[37] However, in that case, the IACtHR only addressed that right in the context of access to justice; in other words, it did not develop a substantial and binding content with regard to just and favorable conditions that would include conditions of safety, health and hygiene in the workplace.

29. Contrary to the *Spoltore* case, although the Inter-American Court used the same normative support to derive the right in this case, it included important clarifications on its substantial content. For example, the judgment indicates that "taking into account the facts and the particularities of this case," the right to work means that:

> 174. […] the worker must be able to carry out his work in adequate conditions of safety, hygiene and health that prevent occupational accidents, and this is especially relevant in the case of activities that involve significant risk to the life and integrity of the workers. Also and in particular, in light of the Brazilian legislation, this right involves the adoption of measures to prevent or reduce work-related risks and occupational accidents; the obligation to provide adequate protection equipment for work-related hazards; the classification by the labor authorities of unhealthy and unsafe workplaces, and the obligation to oversee such conditions, also under the responsibility of the labor authorities.[38]

30. From the conceptualization provided by the IACtHR in its judgment, we can extract *four elements* that should be emphasized. First – as described extensively in section I of this opinion – it is necessary to adopt prevention measures. Second, prevention may be put in practice (especially in the activities of private individuals) by oversight. Third, prevention should be addressed at reducing "work-related risks and occupational accidents." Fourth, the risks that it is especially necessary to reduce are those that entail "significant risk" to the life and integrity of the individual.[39]

31. Some of the content that the IACtHR identified as being applicable to this case comes from Conventions No. 81 and No. 155 of the International Labour Organization, but especially from the interpretations made by the Committee on Economic, Social and Cultural Rights in General Comments Nos. 14, 18 and 23. In addition, the laws of Brazil were particularly relevant because they contain important standards regarding the content of just and favorable

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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 objection, 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 Workers of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru*. *Preliminary objections, merits, reparations and costs*. Judgment of November 21, 2019. Series C No. 394; *Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2019. Series C No. 395, and *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association) v. Argentina, supra*.

[37] *Cf. Case of Spoltore v. Argentina, supra,* paras. 84 to 87.

[38] *Cf. Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, supra*, para. 174.

[39] The IACtHR has referred to "significant risks" in the context of the environment and human rights: "135. The International Court of Justice has indicated that the obligation of prevention arises when there is risk of "significant damage." According to this Court, the significant nature of a risk may be determined based on the nature and size of the project and the context in which it is implemented"; and "136. Similarly, the International Law Commission's draft articles on prevention of transboundary harm from hazardous activities only refer to those activities that may involve significant transboundary harm […] susceptible of being measured by factual and objective standards. In addition, the International Law Commission indicated that a State of origin is not responsible for preventing risks that are not foreseeable. However, it also noted that States have the continuing obligation to identify activities which involve significant risk." *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), supra.*

conditions to guarantee the right to work;[40] for example, that the manufacture of fireworks is considered "a hazardous activity."[41]

B. Regarding the importance of oversight as a measure to prevent occupational risks and accidents

32. The case regarding which this opinion is issued constitutes the first ruling on the obligations in the context of "hazardous activities" within the working conditions. However, the decisions taken by the IACtHR are similar to the case law of the European Court of Human Rights (hereinafter "the European Court" or "the Strasbourg Court) and the European Committee on Social Rights (hereinafter "the European Committee"), as explained below.

33. In the judgment, the IACtHR considered that:

> 175. […] all this took place without the State exercising any supervision or oversight actions to verify the working conditions of those employed in the fireworks factory, or taking any action to prevent accidents, even though domestic lay characterized the activities carried out in the factory as especially dangerous.
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> 176. Based on the above, the State failed to recognize the right to just and favorable conditions of work, to the extent that *it failed to comply with its duty to prevent occupational accidents*. This obligation was especially relevant owing to the magnitude of the events in this case, *which resulted in gross violations of the life and personal integrity of the workers.* Even though Brazil had complied with its duty to regulate the activity carried out in the fireworks factory (*supra* para. 171), *it failed to exercise oversight and control of the conditions of work, as a necessary measure to prevent accidents*. And this was despite the fact that labor relations require the State to exercise supervision, especially in the case of dangerous activities. […][42] (emphasis added).

34. In the *Lagos del Campo* case, it had already been indicated that the State's obligations of protection in the context of the right to work and in relations between private individuals (in that case the Court examined an aspect relating to "job security"), included "taking adequate measures to ensure appropriate regulation and oversight."[43]

35. The case law of the Strasbourg Court has had occasion to examine contexts of "hazardous" activities from the perspective of Article 2 (right to life) of the European Convention on Human Rights.[44] It has affirmed that the positive obligations established in the said article "can be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake, and *a fortiori* in the case of industrial activities which by their very nature are dangerous,[45] such as the operation of waste-collection sites,[46] or

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[40] *Cf. Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, supra*, paras. 164 to 171.

[41] *Cf. Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, supra*, paras. 164 to 168, 170 and 171.

[42] *Cf. Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, supra*, parrs. 175 and 176.

[43] *Cf. Case of Lagos del Campo v. Peru, supra*, para. 149.

[44] The Human Rights Committee expressed similar views in General Comment No. 36 on the right to life, when it indicated that "the obligation of States parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life." *Cf.* Human Rights Committee, *General Comment No. 36, right to life,* CCPR//C/GC/36, September 3, 2019, para. 7. To date, this Committee has examined this situation in a case relating to the environment and violation of life owing to the use of agrochemicals, which, in the Committee's opinion, posed "a reasonably foreseeable threat to the authors' lives." *Cf.* Human Rights Committee, *Norma Portillo López v. Paraguay*, CCPR/C/126/D/2751/2016, July 25, 2019, paras. 7.3 and 7.5.

[45] *Cf.* ECHR, *Case of Brincat and Others v. Malta,* judgment of July 24, 2014, para. 79.

[46] *Cf.* ECHR, *Case of Öneryıldız v. Turkey,* judgment of November 30, 2011, para. 71.

nuclear testing,[47] or cases concerning toxic emissions from a fertilizer factory,"[48] or "the exposure to [materials that could harm their health] at a workplace run by a public corporation owned and controlled by the Government."[49]

36. In particular, the case law of the European Court has not only applied these obligations in the context of individuals who have lost their lives, but has also considered that they can be applied "when there is a serious risk of subsequent death."[50]

37. Meanwhile, the European Committee on Social Rights has addressed the issue based on the rights established in Articles 2(4)[51] and 3[52] of the European Social Charter (hereinafter "the Social Charter"). Regarding Article 2(4), it has indicated that, in the case of the so-called dangerous or unhealthy occupations, and the exposure of workers to such activities, they should enjoy "either a reduction of working hours or additional paid holidays."[53] This opinion has been shared to some extent by the European Court.[54] Regarding the right to safe and healthy working conditions established in Article 3 of the Social Charter, the European Committee has indicated that this right is linked to the right to personal integrity; thus, in accepting the said provision of the Social Charter, States had undertaken to guarantee "the right to physical and mental integrity at work," as a primary obligation.[55]

38. As a starting point, these two organs agreed that regulation is essential in the case of dangerous activities. The European Court has indicated that whenever a State "authorizes dangerous activities it must ensure through a system of rules and sufficient control that the risk is reduced to a reasonable minimum;"[56] thus, international responsibility may arise not

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47 *Cf.* ECHR, Case of *L.C.B. v. The United Kingdom,* judgment of June 9, 1998, para. 36.

48 *Cf.* ECHR, *Case of Guerra and Others v. Italy,* judgment of February 19, 1998, paras. 60 and 62, although in that case the Court considered that it was not necessary to examine the matter under Article 2, because it had examined it under Article 8.

49 *Cf.* ECHR, *Case of Brincat and Others v. Malta,* judgment of July 24, 2014, para. 81.

50 The examples include cases in which the physical integrity of an applicant was threatened by the action of a third party (ECHR, *Case of Osman v. The United Kingdom*, judgment of October 28, 1998, para. 115 to 122) or as a result of a catastrophe that left no doubt as to the existence of a threat to the physical integrity of the applicants (ECHR, *Case of Budayeva and Others v. Russia,* judgment of March 29, 2008, para. 146).

51 See "Article 2. The right to just conditions of work. With a view to ensuring the effective exercise of the right to just conditions of work, the Contracting Parties undertake: […] 4. to eliminate risks in inherently dangerous or unhealthy occupations, and where it has not yet been possible to eliminate or reduce sufficiently these risks, to provide for either a reduction of working hours or additional paid holidays for workers engaged in such occupation; […]."

52 See "Article 3. The right to safe and healthy working conditions. With a view to ensuring the effective exercise of the right to safe and healthy working conditions, the Parties undertake, in consultation with employers' and workers' organisations: 1. to formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment. The primary aim of this policy shall be to improve occupational safety and health and to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, particularly by minimising the causes of hazards inherent in the working environment; 2. to issue safety and health regulations; 3. to provide for the enforcement of such regulations by measures of supervision; 4. to promote the progressive development of occupational health services for all workers with essentially preventive and advisory functions.

53 *Cf.* ECDS, *Case of STTK ry and Tehy ry v. Finland*, Complaint No. 10/2000, decision of October 17, 2001, para. 27.

54 *Cf.* ECHR, *Case of Brincat and Others v. Malta,* judgment of July 24, 2014, para. 115. In this case, the Court examined the State's argument that "employees who had worked on asbestos (after its dangers became known to the Government) were offered compensation or a special allowance to perform such work. However, the ECHR rejected this argument because the Government had not provided information on "whether the applicants in [that] case had been entitled to such compensation and if so whether they had accepted it or received it;" or "as to when such compensation had in fact become available" (para. 115).

55 *Cf.* ECDS, *Confederazione Generale Italiano del Lavoro (CGIL) v. Italy*, Complaint No. 91/2013, decision on admissibility and the merits of the complaint, October 12, 2005, paras. 275 and 276.

56 *Cf.* ECHR, *Case of Binişan v. Romania,* judgment of May 20, 2014, para. *72,* and *Case of Kalender v. Turkey,* judgment of December 15, 2009, paras. 43 to 47.

only in the absence of regulations, but also due to insufficient regulations in this regard.[57] Meanwhile, the European Committee has indicated that to guarantee the right established in Article 3 of the Social Charter, States must "issue [workplace] health and safety regulations providing for preventive and protective measures against most of the risks recognized by the scientific community and laid down in Community and international regulations and standards."[58] This is consequent with the understanding of the inter-American system. However, the Strasbourg Court has also indicated that "while there is a primary duty to put in place a legislative and administrative framework, it cannot rule out the possibility, *a priori*, that in certain specific circumstances, in the absence of the relevant legal provisions, positive obligations may nonetheless be fulfilled in practice."[59]

39. In addition, regarding the importance of control as a measure of prevention, the European Court has indicated that, if damage arises, a breach of the State's positive obligations may occur due to insufficient control of the activity that was regulated.[60] Similarly, the European Committee has indicated that the provisions of Article 3 "cannot be ensured solely by the operation of legislation, if this is not effectively applied and rigorously supervised";"[61] thus, the Committee has asserted that "the enforcement of health and safety regulations required by Article 3(2), is therefore essential if the right embodied in Article 3 is to be effective."[62]

40. In relation to the above, in its General Comment No 23, the CESCR considered that, "for example, States should ensure that that the mandates of labour inspectorates […] cover conditions of work in the private sector and provide guidance to employers and enterprises."[63]

41. All the above is supplemented by the provisions of ILO Convention No. 81 of 1947 on labour inspection, which establishes that the Members of the organization "shall maintain a system of labour inspection in industrial workplaces";[64] that this system "shall apply to all workplaces in respect of which legal provisions relating to conditions of work and the protection of workers while engaged in their work are enforceable by labour inspectors,"[65] and "[t]he function of the system of labour inspection shall be: (a) to secure the enforcement of the legal provisions relating to conditions of work and the protection of workers while engaged in their work, such as provisions relating to hours, wages, safety, health and welfare, the employment of children and young persons, and other connected matters, in so far as such provisions are enforceable by labour inspectors."[66]

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[57] *Cf.* ECHR, *Case of Binişan v. Romania,* judgment of May 20, 2014, para. *72,* and *Case of Kalender v. Turkey,* judgment of December 15, 2009, paras. 43-47.

[58] *Cf.* ECDS, *Case of Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, Complaint No. 30/2005, decision on the merits of December 6, 2006, para. 224.

[59] *Cf.* ECHR, *Case of Brincat and Others v. Malta,* judgment of July 24, 2014, para. 112: In this case, the ECHR indicated that, for a certain period of time, there was no legislation on protection from the harmful effects of asbestos. In this understanding, the ECHR noted that the workers had been provided with disposable masks but, according to experts, these were of "inadequate quality." Thus, it considered that the State had not taken any measures other than the one mentioned, and this exacerbated the situation taking into consideration the absence of regulations on the risk and actions to reduce this risk from exposure to asbestos over a certain period. Therefore, even though the State had taken some actions, these were insufficient.

[60] *Cf.* ECHR, *Case of Binişan v. Romania,* judgment of May 20, 2014, para. *72,* and *Case of Kalender v. Turkey,* judgment of December 15, 2009, paras. 43 to 47.

[61] *Cf.* ECDS, *Confederazione Generale Italiano del Lavoro (CGIL) v. Italy*, Complaint No. 91/2013, decision on admissibility and the merits of the complaint, October 12, 2005, para. 276 and *International Commission of Jurists v. Portugal*, Complaint No. 1/1998, decision of September 9, 1999, para. 32,

[62] *Cf.* ECDS, *Case of Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, *supra*, para. 228.

[63] *Cf.* Committee on Economic, Social and Cultural Rights, *General Comment No. 23: The right to just and favorable conditions of work,* UN Doc. E/C.12/GC/23, April 27, 2016, para. 59.

[64] International Labour Organization, *Convention No. 81 on Labour Inspection,* 1947, Article 1.

[65] International Labour Organization, *Convention No. 81, supra,* Article 2.1.

[66] International Labour Organization, *Convention No. 81, supra,* Article 3.1.a.

42. Furthermore, ILO Convention No. 155 of 1981 on occupational safety and health establishes that States must "formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment," in order "to prevent accidents and injury to health arising out of, linked with or occurring in the course of work."[67]

43. In particular, oversight and the inspection of workplaces that contain dangerous materials are a way in which States can comply with Article 19 of the American Convention on the "special measures of protection" for children. This is because they would be able to identify those workplaces in non-compliance with the provisions of national and international laws on the prohibition of child labor,[68] and where, among other matters, the physical integrity and health of children are at risk. This prohibition has been established, above all, in the United Nations Convention on the Rights of the Child,[69] ILO Convention No. 138,[70] ILO Convention No. 182,[71] the African Charter on the Rights and Welfare of the Child[72] and the Nairobi Principles of the African Commission on Human Rights.[73]

44. The result of this state protection mechanism should be to generate adequate control of the regulations internally and to establish possible comprehensive responses to counteract

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[67] International Labour Organization, *Convention No. 155 on occupational safety and health,* 1981, art. 4.

[68] *Mutatis mutandi*, "In this regard, the Court underscores that the obligations that the State must meet in order to eliminate the worst forms of child labor are a priority and include the design and implementation of programs of action to ensure children the full enjoyment and exercise of their rights. *Case of the Hacienda Brasil Verde Workers v. Brazil, supra,* para. 332, and *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, supra*, paras. 137 to 139.

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

[70] See "Article 3: 1. The minimum age for admission to any type of employment or work which by its nature or the circumstances in which it is carried out is likely to jeopardise the health, safety or morals of young persons shall not be less than 18 years. 2. The types of employment or work to which paragraph 1 of this Article applies shall be determined by national laws or regulations or by the competent authority, after consultation with the organisations of employers and workers concerned, where such exist. 3. Notwithstanding the provisions of paragraph 1 of this Article, national laws or regulations or the competent authority may, after consultation with the organisations of employers and workers concerned, where such exist, authorise employment or work as from the age of 16 years on condition that the health, safety and morals of the young persons concerned are fully protected and that the young persons have received adequate specific instruction or vocational training in the relevant branch of activity."

[71] See "Article 3. For the purposes of this Convention, the term the worst forms of child labour comprises: […] (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children."

[72] See "Article 15. Child Labor. 1. Every child shall be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral or social development. 2. State Parties to the present Charter take all appropriate legislative and administrative measures to ensure the full implementation of this Article which covers both the formal and informal sectors of employment and having regard to the relevant provisions of the International Labour Organization's instrument relating to children. State Parties shall in particular: (a) provide through legislation, minimum wages for admission to every employment; (b) provide for appropriate regulation of hours and conditions of employment; (c) provide form appropriate penalties or other sanctions to ensure the effective enforcement of this Article; (d) promote the dissemination of information on the hazards of child labour to all sectors of the community."

[73] See "Protect children and young persons through the following: […] Measures governing work by children and young persons, within the family, to ensure that such work is not dangerous to them, harmful to their moral or physical well-being or likely to hamper their normal physical, intellectual and psycho-social development". *Cf. Principles and guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples' Rights*, October 27, 2011, Nairobi, Principle 95(aa) 4.

the situation experienced by children and adolescents who "work" in such contexts.[74] In this regard, in its General Comment No 16 on State obligations regarding the impact of the business sector on children's rights, the Committee on the Rights of the Child indicated that "States must regulate working conditions and ensure safeguards to protect children from economic exploitation and work that is hazardous or interferes with their education or harms their health or physical, mental, spiritual, moral or social development. Such work is often found, albeit not exclusively, within the informal and family economies. Therefore, States are required to design and implement programmes aimed at reaching businesses in these contexts, including by enforcing international standards regarding legal minimum age for work and appropriate conditions of work, investing in education and vocational training and providing support for the satisfactory transition of children to the world of work. States should ensure that social and child protection policies reach all, especially families in the informal economy."[75]

45. As indicated in the judgment, domestic law prohibited the presence of children in work considered dangerous. This is particularly serious because the State, by failing to implement the obligation established in its own laws, allowed and tolerated the existence of workplaces that were in non-compliance with the obligations regarding the prohibition of child labor. In addition, the State's omission resulted in the failure to detect the presence of children in the fireworks factory, which resulted in children losing their lives in the explosion or suffering injuries and aftereffects that affect them to this day and that have evidently had a devastating impact on their full development.[76]

46. As mentioned in section I of this opinion, it is not sufficient that institutions formally exist that have been authorized to oversee, supervise or inspect private sector workplace activities that are considered dangerous; it is necessary that, in practice, this institutional apparatus ensures that the regulations are enforced. It cannot be ignored that, during the public hearing, the State agents acknowledged that, taking into account the extent of the State's territory, there were "reasonable limitations" to conducting auditing and oversight activities of the different economic activities and that the State was unable "to guarantee that 100% of the establishments and situations were supervised."[77]

47. In this regard, in the context of the European system, the European Committee has indicated that, pursuant to Article 3 of the European Social Charter, read together with Article 20(5)[78] of this instrument, the States undertake to "maintain a system of labour inspection appropriate to national conditions." Although this Committee has indicated that, in principle, States have a margin of discretion – not only in the organization of inspections services, but also in the allocation of resources to the inspection services – the truth is that, since these services are the main guarantors of both health and safety in the workplace, the Committee must verify that sufficient resources are allocated so that they may periodically carry out a minimum number of inspection visits to ensure that the right established in Article 3 effectively benefits as many workers as possible and that the risk of accidents is reduced to the minimum. The States' margin of discretion is, therefore, limited and the Charter is violated when the

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[74] *Cf. Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, supra*, paras. 176 to 181.

[75] *Cf.* Committee on the Rights of the Child*, General Comment No 16 on State obligations regarding the impact of the business sector on children's rights*, CRC/C/GC/16, April 17, 2013, para. 37.

[76] *Cf. Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, supra*, paras. 137, 138 and 139.

[77] *Cf. Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, supra*, para. 136.

[78] See "Article 20. Undertakings […] 5. Each Contracting Party shall maintain a system of labour inspection appropriate to national conditions."

relationship between the personnel of the inspection services, the visits made, and the employees involved is manifestly insufficient.[79].

48. Similarly, the Inter-American Commission has indicated that, as part of the comprehensive prevention strategy, States must reinforce the institutions involved in the strategy "so that they are able to respond effectively to the phenomenon that it is intended to address."[80]

49. The State's omission was of such magnitude at the time of the facts that the importance of oversight or inspection was reflected in the measures of non-repetition ordered by the Inter-American Court in this judgment. Thus, as the judgment indicates, it did not question the fact that regulation existed at the domestic level, and it even assessed the adoption of the respective norms as a positive element.[81] However, it stipulated "that there [was] no record in the briefs and evidence submitted, or in the statements or oral arguments made during the public hearing, that the State has been able to implement measures *to ensure that, in practice, the places in which fireworks are manufactured in Brazil are inspected regularly*" (italics added).[82]

50. Thus, the Inter-American Court indicated that:

> 287. The Court recalls that the failure of the state authorities to oversee the factory on "Vardo dos Fogos" in Santo Antônio de Jesus was the main factor that engaged the international responsibility of the State. Accordingly, <u>in order to bring a halt to the operation of the clandestine factories and/or those that operate in non-compliance with the regulations for the control of dangerous activities, and to ensure just and favorable conditions of work in such places, the State must take steps to implement a systematic policy of regular inspections of places that make fireworks, both to verify the health and safety conditions of the workplace, and to oversee compliance with the regulations on the storage of the materials involved</u>. The State must ensure that the regular inspection are conducted by inspectors who are qualified to oversee matters relating to health and safety in the specific area of the manufacture of fireworks. (Underlining added)

51. Regarding the implementation of this measure, in addition to the considerations in the judgment,[83] some standards indicated by the European Committee, for example, could be illustrative and not limitative. The Committee has established that, in order to evaluate compliance with Article 3 of the European Social Charter, States must provide: (i) statistics on the number of establishments receiving inspection visits and the number of persons they employ; (ii) up-to-date figures on the staffing of the labour inspectorate and the number of visits carried out; (iii) breaches found and penalties imposed, and (iv) the proportion of workers covered by inspections compared with the total workforce.[84]

III. POVERTY AS PART OF ECONOMIC STATUS AND STRUCTURAL AND INTERSECTIONAL DISCRIMINATION: FROM THE HACIENDA BRASIL WORKERS TO THE WORKERS OF THE FIREWORKS FACTORY

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[79] *Cf.* ECDS, *Case of Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, *supra*, para. 229.

[80] *Cf.* IACHR and REDESCA, *Report on business and human rights: Inter-American standards*, *supra,* para. 94.

[81] *Cf. Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, supra*, para. 286.

[82] *Cf. Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, supra*, para. 286.

[83] "[…] To comply with this measures, it is suggested that the State have recourse to organisations such as the ILO and UNICEF that are able to provide advice or assistance that may be useful in ensuring compliance with the measure ordered. The State has two years from notification of this judgment to present a report to the Court on progress in the implementation of this policy." *Cf. Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, supra*, para. 287.

[84] *Cf.* ECDS, *Confederazione Generale Italiano del Lavoro (CGIL) v. Italy*, Complaint No. 91/2013, decision on admissibility and the merits of the complaint, October 12, 2005, para. 277.

A. Before and after the case of the Hacienda Brasil Verde Workers

52. As a starting point to examine poverty as one of the categories for which discrimination is prohibited, it is important to recall the words of the CESCR on how this should be understood, considering it "as a human condition characterized by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights."[85]

53. Meanwhile, the Guiding Principles on Extreme Poverty and Human Rights have considered that "[p]overty is an urgent human rights concern in itself. It is both a cause and a consequence of human rights violations and an enabling condition for other violations. <u>Not only is extreme poverty characterized by multiple reinforcing violations of civil, political, economic, social and cultural rights, but persons living in poverty generally experience regular denials of their dignity and equality</u>"; in addition, "Persons living in poverty are confronted by the most severe obstacles – physical, economic, cultural and social – to accessing their rights and entitlements. Consequently, they experience many interrelated and mutually reinforcing deprivations – including dangerous work conditions, […] – that prevent them from realizing their rights and perpetuate their poverty"[86] (underlining added).

54. In the *Case of the Hacienda Brasil Verde Workers v. Brazil,* I indicated that "'poverty' had not been expressly recognized as a category for special protection. Nevertheless, this does not mean that poverty cannot be assessed as part of one of the categories that are explicitly recognized or incorporated into 'any other social condition.' In this situation, the different systems for the protection of human rights (regional[87] and universal[88]) have their particularities as regards recognizing poverty as part of the category of 'economic status' based on which discrimination is prohibited. This has not been an obstacle for the permeation of obligations with regard to the eradication of poverty, although not as part of a category meriting special protection, but as an aggravating factor relating to social living conditions, that can vary from case to case."[89]

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[85] CESCR, *Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights.* May 10, 2001, E/C.12/2001/10, para. 8. Similarly, the *Guiding Principles on Extreme Poverty and Human Rights* (hereinafter "the GPEPHR"), define "extreme poverty" as "the combination of income poverty, human development poverty and social exclusion." UN, *Guiding Principles on Extreme Poverty and Human Rights,* adopted by the Human Rights Council, September 27, 2012, Resolution 21/11, Preface, para. 2.

[86] *Guiding Principles on Extreme Poverty and Human Rights*, *supra*, Preface paras. 3 and 4.

[87] In the case of the European System, Article 14 of the European Convention on Human Rights (EConHR) has been associated in an implicit, auxiliary and indirect manner with rights and freedoms protected by that Convention. Thus the prohibition of discrimination established in the European Convention has been related to the right to life (Art. 2 of the EConHR) based on living conditions or assistance; the prohibition of torture, or inhuman or degrading treatment, or the right to respect for private and family life (Arts. 3 and 8 of the EConHR) related to a decent level of life, or the right to respect for private and family life (Art. 8 of the EConHR) in relation to the deprivation of child custody rights and the placement of the children concerned in a state institution, and the right to property (Art. 1 of Protocol No. 1 to the EConHR). Similarly, we find a significant element in Article 30 of the European Social Charter which establishes "the right to protection against poverty and social exclusion." In the case of the African system, there has been limited development of case law on the conditions of poverty or economic status. See paras. 11, 12 and 16 of our opinion in the case of the *Hacienda Brasil Verde Workers v. Brazil.*

[88] Within the United Nations, both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights establish the prohibition of discrimination due to economic status. In this regard, I indicated that "[i]n relation to economic status as a category requiring special protection, the CESCR has indicated that, 'property status, as a prohibited ground of discrimination, is a broad concept and includes real property […] and personal property […] or the lack of it'; in other words, one of the aspects of property." See el para. 11, 12 and 16 of our opinion in the case of the *Hacienda Brasil Verde Workers v. Brazil.*

[89] See para. 17 of our opinion in the case of the Hacienda Brasil Verde Workers *v. Brazil.*

55. In the case of the inter-American system, in 2016, I indicated[90] that "[t]he issue of poverty and economic status has been present throughout the [contentious[91]] jurisprudence of the Inter-American Court; many human rights violations are related to situations of exclusion and marginalization because the victims are living in poverty. […] In all cases, poverty has been identified as a factor of vulnerability that intensifies the impact on the victims of human rights violations who are living in this situation."[92] From 1989 to 2016, the case law of the IACtHR examined poverty or the economic status of the victims in three different ways: first, poverty or economic status associated with traditionally identified vulnerable groups (children, women, indigenous peoples, people with disabilities, migrants, etc.); second, poverty or economic status analyzed as discrimination intersected with other categories,[93] and, third, poverty or economic status analyzed in isolation in view of the circumstances of the case, without relating it to any other category of special protection.[94]

56. Nevertheless, I consider that the *Case of the Hacienda Brasil Verde Workers* represented a fundamental step forward for the inter-American system (and international human rights law). In this contentious case, the IACtHR examined directly, solely and autonomously the category of "economic status" established in Article 1(1) of the Pact of San José. It was also truly innovative to examine "economic status" from the perspective of "poverty."[95] Thus, for example, in that case, the IACtHR considered that:

> 339. In this case, the Court notes some characteristics of specific victimization shared by the 85 workers rescued on March 15, 2000: [*i*] *they were poor; [ii] they came from the poorest regions of the country, [iii] with the lowest human development and possibilities of work and employment, [iv] they were illiterate, and [v] with little or no schooling […].* This placed them in a situation that made them more susceptible to recruitment by means of false promises and deception [96] (emphasis added).

57. In that case, as indicated in the judgment, poverty "is the main factor behind modern-day slavery in Brazil, since it increases the vulnerability of a significant portion of the population, making them easy prey for enticers of slave labor."[97] Poverty is not considered a condition, but rather a state of special vulnerability where the situation of exclusion and

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[90] See paras. 26 and 44 of our opinion in the case of the Hacienda Brasil Verde Workers *v. Brazil.*

[91] Previously, the IACtHR had indicated "22. The final section of Article 1(1) prohibits a State from discriminating on a variety of grounds, among them *economic status*. The meaning of the term discrimination employed by Article 24 must, then, be interpreted by reference to the list enumerated in Article 1(1). If a person who is seeking the protection of the law in order to assert rights which the Convention guarantees finds that his economic status (in this case, his indigency) prevents him from so doing because he cannot afford either the necessary legal counsel or the costs of the proceedings, that person is being discriminated against by reason of his economic status and, hence, is not receiving equal protection before the law. *Cf.* Advisory Opinion OC-11/90, August 10, 1990. Series A No. 11.

[92] See para. 26 of the opinion issued in the case of the Hacienda Brasil Verde Workers *v. Brazil.*

[93] See the *Case of Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica. Preliminary objections, merits, reparations and costs.* Judgment of November 28, 2012. Series C No. 257, and *Case of Gonzales Lluy et al. v. Ecuador*, *supra*.

[94] See: *Case of Uzcátegui et al. v. Venezuela. Merits and reparations.* Judgment of September 3, 2012. Series C No. 249.

[95] As I have previously indicated, although in this case the IACtHR analyzed poverty within the category of "economic status," this does not mean that in future, it can also be analyzed within other categories, because "[…] poverty, since it is a multidimensional phenomenon,[95] may be approached based on different grounds for protection in light of Article 1(1) of the American Convention, such as […] social origin or any other social condition." See para. 50 of my opinion in the *Case of the Hacienda Brasil Verde Workers v. Brazil.* In this regard, the Special Rapporteur on extreme poverty and human rights has indicated that: "In its jurisprudence, the Human Rights Committee has reiterated that the grounds for discrimination are not exhaustive and that "other status" has an open-ended meaning. [Moreover,] economic status and social condition are explicitly included as grounds of discrimination in Article 1 of the American Convention on Human Rights. Other prohibited grounds for discrimination such as "property" and even "social origin" may also be relevant in addressing issues of poverty" (underlining added). UN, *Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona*, A/66/265, August 4, 2011, footnote. 7.

[96] *Cf. Case of the Hacienda Brasil Verde Workers v. Brazil, supra*, para. 339.

[97] *Cf. Case of the Hacienda Brasil Verde Workers v. Brazil, supra*, para. 340.

marginalization, added to the structural and systemic denial (with historical grounds in this specific case), had an impact on the 85 workers rescued from Hacienda Brasil Verde.[98]

58. One aspect that was not addressed in the *Case of the Hacienda Brasil Verde Workers* (owing to the particularities of the case), but that I considered opportune to mention in 2016, was how economic status could intersect with other categories or factors of vulnerability analyzed by the case law of the IACtHR. Thus, I considered that:

> 53. […] it should be stressed that when, in addition to the situation of poverty, another category established in Article 1(1) is present, such as race, gender, ethnic origin, etc., a situation of […] intersectional discrimination exists, based on the particularities of the case and how this has been recognized by the Inter-American Court on other occasions.[99]

59. This is similar to the opinion of the Special Rapporteur on extreme poverty and human rights, who considered that "[p]eople living in poverty experience discrimination on the grounds of poverty itself, but also frequently due to membership in other disadvantaged sectors of the population, including but not limited to indigenous peoples, persons with disabilities, ethnic minorities and people living with HIV/AIDS."[100] In other words, although people living in poverty may also belong to other vulnerable sectors (women, children, persons with disabilities, indigenous peoples, Afro-descendants, older persons, etc.), this does not mean that people living in poverty may not belong to any other category.

60. In light of the fact that the precarious economic situation or the poverty experienced by the victim or victims has been given visibility by the analysis of "economic status" in the case law of the IACtHR, the tendency of case law has been to examine it intersectionally with other categories or factors of vulnerability[101] or as an element of accessibility to the social rights (physical accessibility); this is in significant contrast to pre-2016 case law. Even though, in previous decisions, poverty or economic status had been present in the rulings of the Inter-American Court, it was addressed tangentially or as an aggravating factor of the context in the different cases in which the IACtHR had ruled.

61. The approach described above (poverty and intersectionality) has been included with greater frequency following the judgment in the *Case of the Hacienda Brasil Verde Workers*. For example, in 2017, the Inter-American Commission on Human Rights issued its report on *Poverty and Human Rights*. In this report, the IACHR defined poverty, considering it a structural problem that affected the enjoyment and exercise of human rights and, at times, entailed violations that engaged the international responsibility of the State.[102] It also included important consideration on addressing poverty from the perspective of the prohibition of discrimination, derived from Articles 1(1) and 24 of the American Convention and with special emphasis on an intersectional approach.[103] In this report, the Inter-American Commission identified the following as groups that were especially vulnerable to poverty: women, children

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[98] See para. 99 of our opinion in the case of the Hacienda Brasil Verde Workers *v. Brazil.*

[99] See para. 53 of our opinion in the case of the Hacienda Brasil Verde Workers *v. Brazil.*

[100] Human Rights Council, *Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona*, A/HRC/23/36, March 11, 2013, para. 42.

[101] However, the first time that the IACtHR intersected the economic status in the *case of Gonzales Lluy*, it did not indicate that this was because it was a category contained in Article 1(1), either due to economic status, situation or other social condition.

[102] The Commission indicated "91. For the effects of the present report poverty is a problem presenting obstacles to the enjoyment and exercise of human rights in conditions of true equality of persons, groups and collectives. Poverty situations bring enhanced exposure to human rights violations; increased vulnerability to restrictions derived from individuals' socioeconomic situation. Likewise, in certain cases, poverty may also imply human rights violations involving the international responsibility of the State." *Cf.* IACHR*, Report on Poverty and Human Rights in the Americas*, OEA/Ser.L/V/II.164, September 7, 2017.

[103] *Cf.* IACHR, *Report on Poverty and Human Rights in the Americas*, *supra*, paras. 147 to 156.

and adolescents, indigenous (and tribal) peoples, Afro-descendants, migrants, persons deprived of liberty, persons with disabilities, members of the LGBTI community, and older persons.[104] The analysis of State obligations in the case of actions by third parties in the context of poverty should also be underlined.[105]

62. Regarding the case law of the IACtHR, the first recent case in which the Court began to consolidate this approach was in that of *I.V. v. Bolivia* (2016). The IACtHR approached a case of violence against women in a context of absence of consent in relation to sexual and reproductive health. When analyzing access to justice, it considered that, in addition to the victim's condition as a woman and her status as a refugee, another factor that was determinant was her "economic status" because, as a result of the changes in jurisdiction of the criminal proceedings, this became a geographical obstacle to the accessibility of the court. It entailed the elevated socio-economic cost of having to travel long distances, up to around 255 km, and cover the costs of the journey, accommodation and other related expenses not only for herself, but also for the witnesses, which evidently entailed an unjustified violation of her right of access to justice.[106]

63. Subsequently, in 2018, in the *Case of Ramírez Escobar et al. v. Guatemala*, the Inter-American Court addressed the violations resulting from a declaration of abandonment, where Mrs. Ramírez Escobar had been separated from her two children. In that case, the IACtHR considered that the separation was due to her "economic situation" and indicated that "the lack of material resources cannot be the only reason for a decision that supposes the separation of a child from his or her family.[107] In that case, Mrs. Ramírez Escobar's economic status intersected with her gender because she was also discriminated against owing to an assessment of what "being a good mother" meant; in other words, based on gender roles.[108]

64. Lastly, also in 2018, in the *Case of Cuscul Pivaral et al.*, the IACtHR examined economic status from the perspective of the "physical accessibility" of health care establishments in which five victims were supposed to receive treatment for HIV/AIDS. The Inter-American Court considered that "the distance from the health care center and the precarious economic status of five presumed victims constituted an obstacle for them to travel to the health care centers, and this had an impact on their possibility of receiving medical treatment and, therefore, their possibility of initiating or continuing their treatment adequately. The Court noted that the economic situation of the presumed victims was a determinant factor in their possibility of having access to health care centers, goods and services, and that the State had failed to take steps to mitigate that impact."[109]

B. Structural and intersectional discrimination in the case of the victims of the explosion of the fireworks factory

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[104] *Cf.* IACHR, *Report on Poverty and Human Rights in the Americas*, *supra*, Chapter 3.

[105] *Cf.* IACHR, *Report on Poverty and Human Rights in the Americas*, *supra*, paras. 237 to 248

[106] *Cf. Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*. Judgment of November 30, 2016. Series C No. 329, paras. 317 to 323.

[107] *Cf. Case of Ramírez Escobar et al. v. Guatemala. Merits, reparations and costs*. Judgment of March 9, 2018. Series C No. 351, paras. 288 and 304.

[108] The IACtHR indicated that "[…] In this regard, on the one hand, various reports looked at whether or not Mrs. Ramírez Escobar was able to assume her "maternal role" or "role of mother," without explaining the characteristics of this role; they analyzed whether "she accepted her feminine role," and also "the sexual model" attributed to this role; they based their analysis on statements according to which Mrs. Ramírez Escobar was an irresponsible mother because, *inter alia*, "she abandoned [her children] when she went to work," and, for this reason, among others, "her conduct was irregular." *Cf. Case of Ramírez Escobar et al. v. Guatemala, supra*, para. 296

[109] *Cf. Case of Cuscul Pivaral et al. v. Guatemala, supra*, para. 125.

65. Previously, I have indicated some of the elements that should be taken into consideration, merely as examples, to determine whether, derived from the context or from collective or massive patterns, we are faced with structural discrimination.[110] In this regard, the cases mentioned have considered that this refers to: (i) a group or groups of individuals with characteristics that cannot be changed or modified by the will of the individual or that are related to historical discriminatory practices, and this group of individuals may be a minority or a majority, and to the fact: (ii) that these groups have found themselves in a systemic or historical situation of exclusion, marginalization or subordination that prevents access to the basic requirements for human development; (iii) that the situation of exclusion, marginalization or subordination is concentrated in a specific geographical area or may be present throughout the territory of a State and, in some cases, may be intergenerational, and (iv) that members of these groups, despite the law's intention, its neutrality or the express mention of some distinction or explicit restriction based on the provisions and interpretations of Article 1(1) of the American Convention, are victims of indirect discrimination or *de facto* discrimination, owing to the State's actions or its application of measures or laws.

66. In the instant case, (i) the 66 victims had several characteristics, such as their economic status, sex, age, race or that some of them were pregnant;[111] (ii) it was indicated that the neighborhoods where most of the factory workers lived were characterized not only by poverty, but also by a lack of access to formal education. These places also had (have) problems relating to lack of infrastructure, especially as regards basic sanitation, and the prevalence of individuals with low levels of education and, consequently, with low earnings;[112] (iii) the facts were concentrated in the outlying neighborhoods of Santo Antônio de Jesus ("Irmã Dulce" and "São Paulo"), in the State of Bahía,[113] and (iv) despite the existence of domestic norms that regulated (and established) the oversight of hazardous work and the prohibition of child labor, their ineffective application and the total inaction of the authorities resulted in a particularly dangerous economic activity being set up in an area where the populated that lived and still live there were characterized by high rates of poverty and marginalization.[114] On this basis, the judgment found that the victims had been subjected to structural discrimination owing to their economic status.

67. That said, contrary to the *Case of the Hacienda Brasil Verde Workers* in which the analysis of structural discrimination was focused only on the economic status of the 85 victims, in the *Case of the Workers of the Fireworks Factory*, a new approach was added: an intersectional approach.

68. In this understanding, the judgment examined the way in which, in addition to the economic status, other forms of discrimination existed in the case of some of the victims that are also associated with structural factors – such as sex or race. Therefore, we can understand that the judgment contributes to the understanding of "intersectional and structural

[110] See para. 80 of our opinion in the *Case of the Hacienda Brasil Verde Workers*. See: *Case of Nadege Dorzema et al. v. Dominican Republic. Merits, reparations and costs*. Judgment of October 24, 2012. Series C No. 251, paras. 235, 237 and 238; *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*. Judgment of February 24, 2012. Series C No. 239, paras. 92 and 267, and *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, reparations and costs*. Judgment of August 24, 2010. Series C No. 214, paras. 273 and 274. Similarly: *Case of González et al. ("Cotton Field") v. Mexico. Preliminary objection, merits, reparations and costs*. Judgment of November 16, 2009. Series C No. 205, para. 450.

[111] *Cf. Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, supra*, para. 191.

[112] *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, supra*, para. 64.

[113] *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, supra*, paras. 56 and 64.

[114] *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, supra*, para. 189.

discrimination" in specific cases. Lastly, there was a group of victims who, added to the said intersectional structural factors, also suffered from discrimination based on age (in the case of the children) or pregnancy. In addition, a factor that was not explored, but that can be understood from the analysis made by the IACtHR, is that, although the intersectional approach has been viewed from a gender perspective (based on disadvantages suffered by some groups of women), the case shows us that poor, Afro-descendant children can also be victims of intersectional discrimination. In the face of this type of discrimination, the actions required to eliminate these situations of exclusion and marginalization must adopt a "differentiated approach" to ensure that the design of the measures takes into account possible particularities that may have an impact on different sub-groups of beneficiaries of such measures.[115]

IV. EQUAL PROTECTION OF THE LAW, WITHOUT DISCRIMINATION: THE EVOLUTION FROM FORMAL EQUALITY TO THE MANDATE OF REAL EQUALITY

A. Real or material equality in the human rights systems

69. Some international instruments of the universal system and the European system are aligned with the American Convention; that is, on the one hand, they contain provisions that refer to the prohibition of discrimination and, on the other hand, provisions designed to ensure that everyone is equal before the law.[116]

A.1. Universal system of human rights

70. Articles 2 and 26 of the International Covenant on Civil and Political Rights[117] stipulate the equivalent of Articles 1(1) and 24 of the American Convention. That said, the jurisprudence of the Human Rights Committee has not examined material equality from the perspective of article 26. However, in its General Comment No. 18 on discrimination, the Human Rights Committee indicated that "[i]n [its] view […], article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof."[118]

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[115] In this regard, in the judgment, the IACtHR ordered the State "within two years of notification of this judgment, to design and execute a socio-economic development program especially for the population of Santo Antônio de Jesus, in coordination with the victims and their representatives. […] The program must focus on the lack of employment options, especially for young people over 16 years of age and Afro-descendant women living in poverty" (underlining added). *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, supra*, para. 289.

[116] Even though there is no case law in this regard, Article 3 of the African Charter on Human and Peoples' Rights establishes the right of every individual to equality before the law and to equal protection of the law.

[117] See: "Article 2(1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status," and "Article 26. All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

[118] When the General Comment was issued in 1989, the Committee indicated that: "9. Reports of many States parties contain information regarding legislative as well as administrative measures and court decisions which relate to protection against discrimination in law, but they very often lack information which would reveal discrimination in fact. When reporting on articles 2(1), 3 and 26 of the Covenant, States parties usually cite provisions of their constitution or equal opportunity laws with respect to equality of persons. While such information is of course useful, the Committee wishes to know if there remain any problems of discrimination in fact, which may be practised either by public authorities, by the community, or by private persons or bodies. The Committee wishes to be informed about legal provisions and administrative measures directed at diminishing or eliminating such discrimination." *Cf.* Human Rights Committee, *General Comment No. 18, Non-discrimination,* thirty-seventh session, 1989, paras. 9 and 12.

71. In consonance with the foregoing, the said Committee has indicated that "the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions."[119]

72. The Committee on the Rights of Persons with Disabilities has developed the notion of equality in greater depth based on the Convention on the Rights of Persons with Disabilities. Article 5(1) and 5(2)[120] of this Convention are equivalent to Articles 24 and 1(1) of the American Convention, respectively. In its General Comment No. 6, the said Committee indicated that: "[*f]ormal equality* seeks to combat direct discrimination by treating persons in a similar situation similarly. It may help to combat negative stereotyping and prejudices, but it cannot offer solutions for the 'dilemma of difference', as it does not consider and embrace differences among human beings. *Substantive equality*, by contrast, also seeks to address structural and indirect discrimination and takes into account power relations. It acknowledges that the 'dilemma of difference' entails both ignoring and acknowledging differences among human beings in order to achieve equality."[121]

73. It also noted that Article 5(1) establishes, on the one hand, that persons are "equal before the law" and, on the other, that they are entitled to "equal protection […] of the law." Regarding the former, it indicated that "[s]everal international human rights treaties include the term 'equal before the law', which describes the entitlement of persons to equal treatment by and in the application of the law, as a field."[122] On the other hand, it stated that:

> 16. […] The phrase "equal protection of the law" is well known in international human rights treaty law and is used to demand that national legislatures refrain from maintaining or establishing discrimination against persons […] when enacting laws and policies. Reading article 5 in conjunction with [other articles of the Convention on the Rights of Persons with Disabilities] <u>it is clear that, in order to facilitate the enjoyment by persons […] on an equal basis of the rights guaranteed under legislation, States parties must take *positive actions*.</u>[123] (emphasis added).

74 Thus, "equal protection of the law" is addressed at equal opportunities or, in other words, "material equality."

A.2. European system of human rights

75. Article 14 of the European Convention on Human Rights and Article 1 of its Additional Protocol No. 12,[124] are equivalent articles to Articles 1(1) and 24 of the American Convention,

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119 *Cf.* Human Rights Committee, *General Comment No. 18, supra*, para. 10.

120 See: "Article 5. Equality and non-discrimination 1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law. 2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds." As in the case of Article 5(2), Article 4 stipulates: "States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability."

121 *Cf.* Committee on the Rights of Persons with Disabilities, *General Comment No. 6 (2018) on equality and non-discrimination*, CRPD/C/GC/6, April 26, 2018, para. 10.

122 *Cf.* Committee on the Rights of Persons with Disabilities, *General Comment No. 6, supra*, para. 14.

123 *Cf.* Committee on the Rights of Persons with Disabilities, *General Comment No. 6, supra*, para. 16.

124 See "Article 14. Prohibition of discrimination The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.2000. stipulates: "Article 1. General prohibition of discrimination. 1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion,

respectively. Regarding the interpretation made by the European Court, it has indicated that: "whereas Article 14 of the Convention prohibits discrimination in the enjoyment of 'the rights and freedoms set forth in [the] Convention', Article 1 of Protocol No. 12 extends the scope of protection to 'any right set forth by law.' It thus introduces a general prohibition of discrimination."[125] It has also indicated that: "the meaning of this term [discrimination] in Article 1 of Protocol No. 12 was intended to be identical to that in Article 14."[126]

76. For a better understanding of this concept, it is necessary to have recourse to the *Explanatory Report to the Protocol 12 to the European Convention,* in which it was considered that, "[i]n particular, the scope of protection under Article I concerns cases where a person is discriminated against: i. in the enjoyment of any right specifically granted to an individual under national law; ii. in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner; [… and] iv. by any other act or omission by a public authority […]."[127]

77. That said, this report indicates that, in principle, "Article 1 protects against discrimination by public authorities. The article is not intended to impose a general positive obligation on the Parties to take measures to prevent or remedy all instances of discrimination in relations between private persons."[128] However, it considered that:

> 26. […] *it cannot be totally excluded that the duty to "secure" under the first paragraph of Article 1 might entail positive obligations. For example, this question could arise if there is a clear lacuna in domestic law protection from discrimination. Regarding more specifically relations between private persons, a failure to provide protection from discrimination in such relations might be so clear-cut and grave that it might engage clearly the responsibility of the State and then Article 1 of the Protocol could come into play.*
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> […]
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> 28. *These considerations indicate that any positive obligation in the area of relations between private persons would concern, at the most, relations in the public sphere normally regulated by law, for which the state has a certain responsibility.* […] The precise form of the response which the state should take will vary according to the circumstances. It is understood that purely private matters would not be affected. […][129] (italics added).

78. In addition, another aspect that should be stressed is found in the Social Charter, which only contains a "non-discrimination clause" (art. E), that is similar to Article 1(1) of the American Convention. However, based on that provision, the Committee has linked non-discrimination to "equality of treatment" or "formal" equality. Thus, it has indicated that "to

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national or social origin, association with a national minority, property, birth or other status. 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1."

[125] *Cf.* ECHR, *Case of Sejdić and Finci v. Bosnia and Herzegovina*, December 22, 2009, para. 53 and Case of Maktouf and *Damjanović v. Bosnia-Herzegovina*, July 18, 2013, para. 88.

[126] *Case of Sejdić and Finci v. Bosnia and Herzegovina*, supra, para. 55 and 53. The concept of discrimination is the subject of constant interpretation in the case law of that Court in relation to Article 14 of the Convention. Case law has understood that by "discrimination" is understood a differentiated treatment, without any objective and reasonable justification, of persons who are in a similar situation.

[127] *Cf.* Council of Europe, *Explanatory Report to the Protocol 12 to the European Convention*, para. 22.

[128] *Cf.* Council of Europe, *Explanatory Report to the Protocol 12 to the European Convention*, para. 25. It added that: "An additional protocol to the Convention, which typically contains justiciable individual rights formulated in concise provisions, would not be a suitable instrument for defining the various elements of such a wide-ranging obligation of a programmatic character. Detailed and tailor-made rules have already been laid down in separate conventions exclusively devoted to the elimination of discrimination on the specific grounds covered by them (see, for example, the Convention on Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women, which were both elaborated within the United Nations). It is clear that the present Protocol may not be construed as limiting or derogating from domestic or treaty provisions which provide further protection from discrimination."

[129] Council of Europe, *Explanatory Report to the Protocol 12 to the European Convention*, paras. 26 and 28.

ensure equal treatment in accordance with article E, it is necessary to prohibit 'all forms of indirect discrimination' that 'may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all.'"[130] In this way, article E of the Charter covers, on the one hand, "the positive obligation to treat differently persons whose situations are different" and, on the other, "human difference should not only be viewed positively, but should be responded to with discernment in order to ensure real and effective equality."[131] It is understood that, depending on the case, element of both formal equality and material equality can be inferred from article E.

B. The mandate of real or substantial equality under Article 24 of the American Convention: The "autonomous" and "subordinate" clauses on equality and non-discrimination

B.1. General principles

79. From a doctrinal point of view, Article 24 of the American Convention contains an "autonomous" clause of non-discrimination that, in general, responds to the classic formulation of non-discrimination before the law; however, Article 1(1) also contains a non-discrimination clause, identified as "subordinate."[132]

80. The IACtHR has pointed out that when addressing the principle of equality and non-discrimination, it is necessary to bear in mind the continuing evolution of international law.[133] In this way, non-discrimination (Arts. 1(1) and 24), together with equality before the law (Art. 24) and equal protection of the law (Art. 24), for all persons and groups of persons, are elements that constitute a general and basic principle related to the protection of human rights. It is difficult to decouple the element of equality from non-discrimination; therefore, when referring to equality before the law, this principle should be ensured without any discrimination.[134]

81. Regarding Article 1(1) of the American Convention, the IACtHR has established that this is a norm of a general nature 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 free and full exercise of the rights and freedoms recognized therein "without any discrimination." In other words, whatever the origin or form it takes, any treatment that may be considered

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[130] ECDS, *International Federation for Human Rights (FIDH) v. Belgium*, Complaint No. 75/2011, decision of March 18, 2013, para. 206.

[131] *Cf.* ECDS, *European Roma and Travellers Forum (ERTF) v. France*, Complaint No. 119/2015, decision of April 16, 2018, paras. 108 and 109.

[132] See, Le Saux, Marianne Gonzáles and Parra Vera, Óscar, "Concepciones y claúsulas de igualdad en la jurisprudencia de la Corte Interamericana a propósito del Caso Apitz," in the *Revista del Instituto Interamericano de Derechos Humanos*, San José, No. 47, 2008, pp. 127-164; Uprimny Yepes, Rodrigo and Sánchez Duque, Luz María, "Igualdad ante la ley." in Christian Steiner and Marie-Christine Fucks (ed.) and Patricia Uribe, (academic coord.), *Convención Americana sobre Derechos Humanos, comentada*, 2nd ed., Bogotá, Konrad Adenauer Stiftung, 2019, pp. 708 and *ff.*; and Pérez, Edward Jesús, *La igualdad y no discriminación en el derecho interamericano de los derechos humanos*, Mexico, CNDH, Mexico, 2016, pp. 23-24.

[133] In this regard, the IACtHR, in its Advisory Opinion OC-16/99 indicated that: "The *corpus juris* of international human rights law comprises a set of international instruments of varied content and juridical effects (treaties, conventions, resolutions and declarations). Its dynamic evolution has had a positive impact on international law in affirming and building up the latter's faculty for regulating relations between States and the human beings within their respective jurisdictions. This Court, therefore, must adopt the proper approach to consider this question in the context of the evolution of the fundamental rights of the human person in contemporary international law." Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 115.

[134] *Cf. Juridical Condition and Rights of the Undocumented Migrants,* Advisory Opinion OC-18, September 17, 2003. Series A No. 18, para. 83.

discriminatory with regard to the exercise of any of the rights ensured in the Convention is *per se* incompatible with this instrument.[135] Non-compliance by the State, due to any discriminatory treatment, of the general obligation to respect and to ensure human rights gives rise to its international responsibility.[136] Thus, there is an inseparable link between the obligation to respect and to ensure human rights and the principle of equality and non-discrimination.[137]

82. The principle of equal and effective protection of the law and of non-discrimination, constitutes an outstanding element of the system for the protection of human rights established in numerous international instruments and developed by doctrine and case law.[138] In addition, the IACtHR has indicated that the notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. Thus it is incompatible with any situation in which, considering that a given group is superior, it is given privileged treatment; or, to the contrary, that considering it inferior, it is treated with hostility or otherwise subjected to discrimination in the enjoyment of rights which are accorded to others not so classified.[139] At the current stage of evolution of international law, the fundamental principle of equality and non-discrimination has entered the domain of *jus cogens,* and the juridical framework of the legal system rests on it.[140]

83. Throughout its almost forty years of existence, the IACtHR has been improving and applying the standards on the right to equality and non-discrimination. It is possible to discern three stages in the Court's case law when it has applied Articles 1(1) and 24: (i) from 1984 to 2007, when these articles were applied on a case-by-case basis; (ii) after the case of *Apitz Barbera et al. v. Venezuela* (2008), in which it established a possible distinction in the application of Articles 1(1) and 24 of the Convention, and (iii) some exceptional situations in which, owing to the circumstances of the facts of the case, the application of Articles 1(1) and 24 did not warrant making a distinction.

B.1.i) From Advisory Opinion No. 4 (1984) to the *Case of the Saramaka People v. Suriname* (2007)

84. The first time that the Inter-American Court had occasion to explore the content of Articles 1(1) and 24 was in 1984. In Advisory Opinion No. 4, the IACtHR established a difference in the scope of the two provisions. Thus, regarding Article 1(1) of the Convention, it indicated:

> Article 1(1) of the Convention [is] a rule general in scope which applies to all the provisions of the treaty, […] any treatment that can be considered to be discriminatory with regard to the exercise of any of the rights guaranteed under the Convention is *per se* incompatible with that instrument. […].[141]

85. And, regarding Article 24, it indicated that:

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[135] *Cf.* Advisory Opinion OC-4/84, January 19, 1984. Series A No. 4, para. 53, and *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs.* Judgment of February 26, 2016. Series C No. 310, para. 94.

[136] *Cf.* Advisory Opinion OC-18/03, *supra*, para. 85, and *Case of Duque v. Colombia, supra*, para. 94.

[137] *Cf. Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03, *supra*, para. 85, and *Case of Duque v. Colombia, supra*, para. 94.

[138] See: *Case of the Xákmok Kásek Indigenous Community v. Paraguay, supra*, para. 269, and *Case of Nadege Dorzema et al. v. Dominican Republic, supra*, para. 225.

[139] *Cf. Case of Atala Riffo and daughters v. Chile, supra*, para. 79.

[140] *Cf. Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03, *supra*, para. 101; *Case of Nadege Dorzema et al. v. Dominican Republic, supra*, para. 225, and *Case of Atala Riffo and daughters v. Chile, supra*, para. 79.

[141] Advisory Opinion OC-4/84, January 19, 1984. Series A No. 4, para. 53.

> Although Articles 24 and 1(1) are conceptually not identical – the Court may perhaps have occasion at some future date to articulate the differences – Article 24 restates to a certain degree the principle established in Article 1(1). In recognizing equality before the law, it prohibits all discriminatory treatment originating in a legal prescription. The prohibition against discrimination so broadly proclaimed in Article 1(1) with regard to the rights and guarantees enumerated in the Convention thus extends to the domestic law of the States Parties, permitting the conclusion that, based on these provisions, the States Parties, by acceding to the Convention, have undertaken to maintain their laws free of discriminatory regulations.[142]

86. However, in 1990, when issuing Advisory Opinion No. 11, it indicated that "the meaning of the term *discrimination* employed by Article 24 must, then, be interpreted by reference to the list enumerated in Article 1(1)."[143] Subsequently, in 2002, in Advisory Opinion No. 17, the IACtHR reiterated the distinction made in OC-4/84.[144] In OC-18/03, the Inter-American Court again indicated the distinction established in OC-4/84, in the understanding that "regardless of which of those rights are recognized by each State in domestic or international norms, the Court considers it clear that all States, as members of the international community, must comply with [the] obligations [to respect and to ensure human rights] without any discrimination."[145]

87. Regarding the contentious cases, the first mentions of the possible application of Articles 1(1) and 24 were in relation to indigenous issue (*Moiwana Community v. Suriname*[146] and *Yakye Axa Indigenous Community v. Paraguay*[147]), without declaring the violation of the said articles. It was not until the case of *Yatama v. Nicaragua* that the IACtHR found a violation, establishing the distinction in accordance with OC-4/84.[148] However, when declaring international responsibility it did not clarify the scope of the said articles and it would appear that the interpretation based on which the State's responsibility was declared was more in keeping with the provisions of OC-11/90.[149]

88. It would seem that the tendency of the Court's case law up until 2005 was to differentiate the content of the articles in accordance with OC-4/84; in other words, Article 1(1) applied to all the provisions of the Convention (in particular, in accordance with the prohibition of discrimination for suspect classification), while Article 24 applied to domestic law. However, two pre-2008 decisions break with the standard that was being developed.

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142 Advisory Opinion OC-4/84, *supra*, para. 54.

143 Advisory Opinion OC-11/90, August 10, 1990. Series A No. 11, para. 22.

144 *Cf. Juridical Status and Human Rights of the Child,* Advisory Opinion OC-17/02, August 28, 2002. Series A No. 17, paras. 43 and 44.

145 Advisory Opinion OC-18/03, *supra*, para. 100.

146 *Cf. Case of the Moiwana Community v. Suriname. Preliminary objections, merits, reparations and costs.* Judgment of June 15, 2005, Series C No. 124, para. 94.

147 Thus, "the Court deem[ed] it appropriate to recall that, pursuant to Articles 24 […] and 1(1) […] of the American Convention, States must ensure, on an equal basis, full exercise and enjoyment of the rights of these individuals who are subject to their jurisdiction. However, it is necessary to emphasize that to effectively ensure those rights, when they interpret and apply their domestic legislation, States must take into account the specific characteristics that differentiate the members of the indigenous peoples from the general population and that constitute their cultural identity." *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of June 17, 2005, Series C No. 125, para. 51.

148 *Cf. Case of Yatama v. Nicaragua. Preliminary objections, merits, reparations and costs.* Judgment of June 23, 2005, Series C No. 127, para. 186.

149 "The Court understands that, in accordance with Articles 23, 24, 1(1) and 2 of the Convention, the State has the obligation to guarantee the enjoyment of political rights, which implies that the regulation of the exercise of such rights and its application shall be in keeping with the principle of equality and non-discrimination, and it should adopt the necessary measures to ensure their full exercise." *Cf. Case of Yatama v. Nicaragua, supra*, para. 201. A similar situation exists in the *Yean and Bosico* case in which the IACtHR indicated "that, for discriminatory reasons and contrary to the pertinent domestic law, the State failed to grant nationality to the girls, which constituted an arbitrary deprivation of their nationality and left them stateless for more than four years and four months, in violation of Articles 20 and 24 of the American Convention, in relation to Article 19 of this instrument, and also in relation to its Article 1(1)." *Case of the Yean and Bosico Girls v. Dominican Republic.* Judgment of September 8, 2005. Series C No. 130, para. 174.

89. In 2006, the IACtHR decided the case of *López Álvarez v. Honduras*, in which the victim belonged to a Garifuna community and was prohibited from speaking his mother tongue while he was deprived of his liberty. The IACtHR determined the violation of his rights to freedom of thought and expression and to equality before the law established in Articles 13 and 24 of the American Convention, and also failure to comply with the general obligation to respect and to ensure the rights and freedoms established in Article 1(1).[150] Thus, two issues arise in that case. According to the facts, "an internal norm" was not applied arbitrarily; therefore, pursuant to the standard that the IACtHR had been developing, the violation of Article 24 would not have been admissible; rather the discrimination originated from "speaking his language," a matter that was directly related to a category established in Article 1(1). However, in that case, Article 1(1) was used in relation to the obligations "to respect and to ensure" rights.

90. The other case that broke with the standard that the IACtHR was establishing was the case of the *Miguel Castro Castro Prison* (2006). The Inter-American Court concluded that the State had failed to comply with the obligation not to discriminate against women in detention, and that sexual violence was a form of discrimination; it also recognized the existence of situations of sexual violence within the prison and, on that basis, declared the violation of Articles 7(b) of the Convention of Belém do Pará and 5(1) of the American Convention.[151] However, it did not decide that these violations of integrity were also violations of the obligation not to discriminate by reason of sex/gender contemplated in Article 1(1).

91. Lastly, as a preface to consolidation of the distinction that existed between Articles 1(1) and 24, in 2007, the IACtHR decided the case of the *Saramaka People v. Suriname*. Although, in that case, the IACtHR did not address Article 24, it took an approach from the perspective of non-discrimination based on categories established in Article 1(1) in relation to the special measures in favor of indigenous peoples. It considered that, to the extent that legislative or other measures necessary to make the rights of the Convention effective are not adopted, those rights will not be ensured and respected without discrimination.[152] Thus, this precedent reaffirms the provisions of OC-4/84.

92. As can be appreciated, over this period, the IACtHR did not have a uniform opinion on how to understand the content of the provisions of Article 24 (and, consequently, when it was appropriate to examine this provision), as distinct from the provisions of Article 1(1), which relate to the presence of suspect classifications or criteria that, *prima facie,* allow a presumption of discriminatory treatment to be arrived at.

B.1.ii) After 2008 and the *Apitz Barbera* case

93. The situation described above changed substantially after 2008. Following the case of *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, the IACtHR considered clearly and conclusively that the difference between Article 1(1) and Article 24 of the Pact of San José was that:

> 209. […] The difference between the two articles lies in that the general obligation contained in Article 1(1) refers to the State's duty to respect and guarantee "non-discrimination" in the enjoyment of the rights enshrined in the American Convention, while Article 24 protects the right to "equal treatment

[150] *Cf. Case of López Álvarez v. Honduras. Merits, reparations and costs*. Judgment of February 1, 2006. Series C No. 141, para. 174.

[151] *Cf. Case of the Miguel Castro Castro Prison v. Peru. Merits, reparations and costs*. Judgment of November 25, 2006. Series C No. 160, paras. 303, 308 and 312.

[152] *Cf. Case of the Saramaka People v. Suriname. Preliminary objections, merits, reparations and costs.* Judgment of November 28, 2007. Series C No. 172, para. 175.

> before the law." In other words, if the State discriminates in the enforcement of conventional rights containing no separate non-discrimination clause a violation of Article 1(1) and the substantial right involved would arise. If, on the contrary, discrimination refers to unequal protection by domestic law, a violation of Article 24 would occur.[153]

94. Since then, the IACtHR has consistently considered that Article 24 of the American Convention prohibits discrimination *de jure,* not only in relation to the rights contained in the Convention, but also in relation to all the laws that the State enacts and their implementation.[154]

B.1.iii) The conjunction of Articles 1(1) and 24 of the American Convention

95. Even though the IACtHR has indicated that there is, *prima facie,* this distinction between the two articles, it has also recognized that, in some situations, the violations committed include both types of discrimination and, therefore, it is not necessary to make a distinction between the two articles.[155] In the cases of *Véliz Franco,* and *Velásquez Paiz*, both against the Guatemalan State, the Inter-American Court considered that the ineffectiveness of the actions taken by the authorities or their indifference constituted, in themselves, a form of discrimination in access to justice so that, in relation to the violation of Articles 1(1) and 24, it was not necessary to establish a difference[156] in the sense indicated following the case of *Apitz Barbera et al.*

96. Subsequently, in the case of *V.R.P., V.C.P. et al. v. Nicaragua*, the IACtHR indicated that, pursuant to Article 24 of the Convention, States have the obligation not to introduce discriminatory regulations into their legal system, *to eliminate regulations of a discriminatory nature, to combat practices of this nature, and to establish norms and other measures that recognize and ensure true equality before the law for everyone.*[157] In that case, this led to a joint analysis of Articles 1(1) and 24 of the Pact of San José. Consequently, the said ruling was the predecessor of what, in the instant case, is recognized "as the mandate of material equality based on Article 24."[158]

V. *MATERIAL OR SUBSTANTIAL EQUALITY* FOR THE VICTIMS OF THE EXPLOSION OF THE FIREWORKS FACTORY

97. The positive or affirmative actions that the State is obliged to take under inter-American case law had been associated only with the content of Article 1(1) under "the obligation to ensure" rights. The consistent case law of the IACtHR had indicated that "States are obliged to adopt positive measures to revert or change any discriminatory situations that

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153 *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of August 5, 2008. Series C No. 182, para. 209.

154 *Cf. Case of Duque v. Colombia, supra*, para. 94; *Case of Flor Freire v. Ecuador. Preliminary objection, merits, reparations and costs*. Judgment of August 31, 2016. Series C No. 315, para. 112, and *Case of Ramírez Escobar et al. v. Guatemala. Merits, reparations and costs*. Judgment of March 9, 2018. Series C No. 351, para. 272. Even though, following the *Apitz case*, the IACtHR has referred to its case law in the Yatama case – in other words, that Article 24 prohibits discrimination "*de facto* and *de jure*"; the Inter-American Court understand that Article 24 refers to the prohibition of discrimination *de jure*.

155 *Cf. Case of Véliz Franco et al. v. Guatemala. Preliminary objections, merits, reparations and costs.* Judgment of May 19, 2014. Series C No. 277, para. 215, and *Case of Velásquez Paiz et al. v. Guatemala. Preliminary objections, merits, reparations and costs*. Judgment of November 19, 2015. Series C No. 307, para. 199.

156 *Cf. Case of Véliz Franco et al. v. Guatemala, supra*, para. 208, and *Case of Velásquez Paiz et al. v. Guatemala, supra*, para. 176.

157 *Case of V.R.P., V.P.C. et al. v. Nicaragua. Preliminary objections, merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 350, para. 289.

158 This was not the first occasion on which the Court indicated this. The same analysis was made in the Yatama and Vélez Loor cases. In those cases, however, it had not been as precise as it was in the case of *V.R.P., V.C.P. et al.*. *Cf. Case of Yatama v. Nicaragua, supra*, para. 185, and *Case of Vélez Loor v. Panama. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2010. Series C No. 218, para. 248.

exist in their societies to the detriment of a certain group of individuals. This entails the special duty of protection that the State must exercise in relation to acts and practices of third parties who, with its tolerance or acquiescence, create, maintain or favor discriminatory situations."[159]

98. In the judgment, the IACtHR indicate that it would analyze Article 24 because:

> "On this basis, in this case, the Court will analyze the alleged violations in light of Articles 1(1) and 24 of the Convention, because the arguments of the Commission and the representatives focus on both the alleged discrimination suffered by the presumed victims owing to their condition as Afro-descendant women and to their situation of poverty, <u>and also due to the failure to adopt positive measures to ensure the Convention rights</u>." (underlining added).[160]

99. This assertion in the judgment has important consequences for the understanding of equality and non-discrimination as fundamental pillars of the American Convention. It responds both to the adoption of measures based on "the obligation to ensure" rights under Article 1(1), but also to the concept of equality as non-discrimination or *material equality* under Article 24.

100. This is not the first time within the inter-American system that it is asserted that the system promotes not only formal equality or non-arbitrary treatment, but it is also understood that material, substantial, or real equality of opportunities is protected. For example, in 2007, the Inter-American Commission indicated that:

> 99. While the inter-American system espouses a formal notion of equality in the sense of requiring that any difference in treatment be based on reasonable and objective criteria, thus precluding any unreasonable, capricious or arbitrary differences in treatment, it is also moving toward a concept of material or structural equality that is premised upon an acknowledgement of the fact that for certain sectors of the population, special equalizing measures have to be adopted. The circumstances of the disadvantaged group might necessitate a difference in treatment because equal treatment could have the effect of limiting or encumbering their access to some service or good or the exercise of a right.[161]

101. The Inter-American Commission has also examined situations of structural discrimination and has indicated that "the broad principles of non-discrimination and equality reflected in Articles 1 and 24 of the American Convention require action to address inequalities in internal distribution and opportunity."[162]

102. Doctrine has been emphatic in indicating that, at least, in international law there are two notions of equality and they have been established in international instruments: (i)

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[159] Advisory Opinion OC-18/03, *supra*, para. 104; *Case of the Xákmok Kásek Indigenous Community v. Paraguay, supra*, para. 271; *Case of Atala Riffo and daughters v. Chile, supra*, para. 80; *Case of Nadege Dorzema et al. v. Dominican Republic, supra*, para. 236; *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. 201; *Case of Espinoza Gonzáles v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 20, 2014. Series C No. 289, para. 220; *Case of Duque v. Colombi*a, *supra*, para. 92, and *Case of the Hacienda Brasil Verde Workers v. Brazil, supra*, para. 336.

[160] *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, supra*, para. 183.

[161] IACHR. *"Access to justice for women victims of violence in the Americas."* OEA/Ser.L/V/II, Doc. 68, January 20, 2007, para. 99. In this report (footnote 136), the Inter-American Commission cited Young, Iris Marion, *Justice and the Politics of Difference*, Princeton University Press, 1990; Ferrajoli, Luis, *Igualdad y Diferencia* [Equality and Difference], in *Derechos y Garantías. La ley del más débil,* Editorial Trota, 1999, pp. 73-96; Barrere Unzueta, María Ángeles, *Discriminación, Derecho Antidiscriminatorio y Acción Positiva a favor de las Mujeres* [Discrimination, Anti-discrimination Law and Affirmative Action for Women], Madrid, Civitas, 1997; *Igualdad y discriminación positiva: un esbozo de análisis conceptual*; Fiss, Owen, "Another Equality." and "Grupos y la cláusula de igual protección" [Groups and the Equal Protection Clause], in Gargarella, Roberto (comp.), *Derecho y grupos desaventajados*, Gedisa, Barcelona, 1999, pp. 137-168.

[162] IACHR, *Report on the situation of human rights in Ecuador 1997*, Chapter II. B. The Socio-economic context and attendant rights.

equality as a "prohibition of arbitrary treatment" or "formal equality," and (ii) equality "as non-discrimination," "equality as non-subjugation" or "material equality." That said, in the case of Article 24, it has been indicated that while the first part of the article "all persons are equal before the law" refers to what has been called equality as the prohibition of arbitrary treatment or formal equality; the second part "without discrimination, to equal protection of the law" refers to equality as the prohibition of discrimination or non-subjugation, which would be complemented by the provisions of Article 1(1).[163]

103. That said, the notion of "equality as a prohibition of discrimination" or "non-subjugation," is based on the idea that there are sectors that have been systematically or historically subordinated, subjugated, excluded or marginalized, so that there is a need for States to take measures to improve the situation of those groups in order to allow them to overcome their disempowerment. This concept of equality requires the State not only to refrain from taking actions that increase the marginalization of such groups, but also to review any norms that are neutral in appearance but that have a discriminatory impact on groups in a situation of exclusion, and to take positive measures to promote their integration into society and their access to social assets.[164] Accordingly, the State's actions should be addressed at reversing the situations of social inequality of individuals or some groups of individuals.

104. The considerations of the Inter-American Commission and doctrine agree in substance with the initial case law developed by the IACtHR. In the case of *Furlan and family v. Argentina*, it recognized that the right to equality and non-discrimination encompassed two concepts: a negative concept related to the prohibition of arbitrary differences in treatment, and a positive concept related to the obligation of States to create conditions of real equality for groups that have historically been excluded or that are at greater risk of discrimination.[165] In the case of *Yatama v. Nicaragua*, the IACtHR had already indicated that "Article 24 of the American Convention prohibits discrimination de *jure* and *de facto*, not only with regard to the rights contained in the Convention, but also with regard to all the laws enacted by the State and their implementation.[166]

105. Nevertheless, even though the Court's case law affirmed that Article 24 also protected "*de facto* equality" owing to the equal protection of the law, in the specific analyses made, that content was redirected to the content of Article 1(1) and to "the obligation of States to respect and to ensure, without discrimination, the rights recognized in this treaty."

106. The Court's case law following *Apitz* referred to Article 24 of the Convention insofar as a norm was applied arbitrarily in the specific case, but did not address how the inexistence of norms – that is, the fact that it was desirable that the State adopt actions or norms to ensure rights – or the insufficiency/ineffectiveness of these (over and above whether they had been applied in the specific case), had an impact on the "equal protection of the law [without discrimination]."

107. One of the dilemmas was whether "the failure to apply norms/actions" or "the failure to adopt norms/actions" had an unequal and, consequently, discriminatory impact (because it

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[163] See, Le Saux, Marianne Gonzáles and Parra Vera, Óscar, "*Concepciones y claúsulas de igualdad en la jurisprudencia de la Corte Interamericana: a propósito del Caso Apitz,*" in *Revista del Instituto Interamericano de Derechos Humanos*, San José, Inter-American Institute of Human Rights, No. 47, 2008, p. 147.

[164] *Cf.* Saba, Roberto, *Pobreza, derechos humanos y desigualdad estructural,* Mexico, Supreme Court of Justice of the Nation-Electoral Tribunal of the Federal Judiciary-Electoral Institute of the Federal District, 2012, p. 46 and *ff.,* and Fiss, Owen, see various texts on disadvantaged groups and the equal protection clause, in *Gargarella, Roberto* (comp.), *Derecho y grupos desaventajados*, Gedisa, Barcelona, 1999, pp. 137-168.

[165] *Cf. Case of Furlan and family v. Argentina. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2012. Series C No. 246, para. 267.

[166] *Cf. Case of Yatama v. Nicaragua. supra*, para. 186.

resulted in exclusion from the enjoyment of a right), from the point of view of "the equal protection of the law," especially when the existence of indirect discrimination and patterns of structural discrimination against groups that were systematically discriminated against had been demonstrated.[167]

108. Thus, in the judgment the IACtHR recognized explicitly, for the first time, that:

> 199. The Court finds that an obligation to ensure *material equality* is derived from Article 24 of the Convention, and this did not happen in the instant case. The right to equality guaranteed by Article 24 of the Convention has two dimensions. The first is *a formal dimension* that establishes equality before the law; the second is *a material or substantial dimension* that requires the adoption of *positive measures* of promotion in favor groups that have historically been discriminated against or marginalized due to the factors of discrimination referred to in Article 1(1) of the American Convention. This means that the right to equality entails the obligation to adopt measures that ensure that the equality is real and effective; in other words, to correct existing inequalities, to promote the inclusion and participation of historically marginalized groups, and to guarantee to disadvantaged individuals or groups the effective enjoyment of their rights and, in short, to provide individuals with the real possibility of achieving material equality. To this end, States must actively combat situations of exclusion and marginalization.[168] (italics added).

109. The foregoing reveals that to the extent that there is a context of structural discrimination, the expression "without discrimination" in Article 24 should be read in conjunction with the same statement contained in Article 1(1); and, consequently, it should be understood that, in order to ensure rights, positive obligations exist based on Article 24 of the Convention. These positive obligations should lead, for example, to: (i) the elimination of laws that may appear to be neutral but have an indirect impact on certain groups; (ii) the adoption of laws that respond to the particular factual situations of systematically excluded groups, or (iii) the adoption of measures of compensation so that the existing laws can be applied in reality rather than being ineffective.

110. Understanding the expression "without discrimination" in Article 24 in light of Article 1(1) of the Convention is in keeping with the spirit behind the creation of Protocol 12 in the European system. In addition, the considerations in paragraph 199 of the judgment on the implications of "equal protection of the law," accord with the mandate of *material equality* contained in Article 5 of the Convention on Persons with Disabilities and the interpretation made by the Committee on the Rights of Persons with Disabilities. In addition, as indicated, at the very least, the Human Rights Committee understands that, under Article 26 (equivalent to Article 24 of the American Convention), an obligation is established to adopt positive measures.

111. Therefore, the mandate under Article 24 of the Convention includes not only: (a) refraining from issuing norms that create an arbitrary treatment, or (b) applying existing norms in an arbitrary way (obligation to respect rights), but also means that States must adopt provisions to overcome situations of inequality, or else eliminate the norms or practices that perpetuate that inequality (positive obligations) and, until this is implemented in domestic law, there will be a lack of "equal protection of the law."[169]

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[167] See: *Case of Nadege Dorzema et al. v. Dominican Republic, supra*, and *Case of the Hacienda Brasil Verde Workers v. Brazil, supra*.

[168] *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, supra*, para. 199.

[169] This was also indicated in the case of *V.R.P, V.C.P. et al. v. Nicaragua,* and in less detail in the cases of *Vélez Loor* and *Yatama*. See *supra*, para. 96 and footnote 157 of this opinion.

112. In the instant case, international responsibility results from the lack of protection of the law in the sense that the State had not adopted any measure that the IACtHR could assess as addressing or seeking to revert the situation of poverty and structural marginalization of the workers of the fireworks factory, paying special attention to the factors of discrimination that coalesced in each specific case. Also, despite the argument that an effective legal framework existed to reduce inequalities and that several public policies had been implemented to this end in the municipality of Santo Antônio de Jesus, the State did not prove that the situation of structural discrimination experienced by the women dedicated to the manufacture of fireworks had changed; in other words, the State failed to prove that the said measures had been effective.[170]

113. In light of the lack of oversight of the conditions of hygiene, health and safety of the work manufacturing fireworks and, in particular, to avoid occupational accidents (despite the existence of laws requiring this action), the State not only failed to ensure the presumed victims' right to just and favorable conditions of work, but also contributed to exacerbate their situation of structural discrimination. Moreover, there was a failure to take measures that would have allowed them to enjoy the real content of that right, for example by promoting formal employment in the region.[171]

114. In conclusion, the judgment considered that, in certain contexts, Article 1(1) and Article 24 of the American Convention may be violated by the States when it is proved that, on the one hand, the measures adopted were ineffective and, on the other, measures were not adopted to compensate for situations of inequality. Thus, the understanding of the ineffectiveness, insufficiency or absence of measures, norms, actions or policies in favor of structurally marginalized groups is analyzed not only under Article 1(1) of the Pact of San José, but also under its Article 24.

VI. CONCLUSIONS

115. Explosions in places in which hazardous materials are stored are not a new phenomenon, either in our hemisphere or throughout the world. Regrettably, explosions of fireworks, such as those that occurred in this case, continue to result in loss of life and survivors who suffer severe violations of their physical and mental integrity. The importance of this judgment stems from the fact that it reveals how, despite the existence of the relevant regulations – which are often robust – the intended protection will be ineffective when such regulations are not implemented in practice and in reality.

116. In addition, the judgment confirms the obligations that States have in relation to the business activities of private individuals; in this case a private enterprise that handled and stored hazardous materials. In particular, this has been the first situation in which the Court has been able to interpret the provisions of the American Convention (Arts. 1(1) and 2) based on the developments that have been made in the context of business and human rights, especially under the obligation of "protection," which coincides with interpretations made in case law under the obligation to ensure rights and the duty to prevent violations.

117. The judgment also underscores the subjugation of groups of persons who, in view of their social, economic and personal conditions, are forced to accept jobs that do not meet the minimum content of internal and international norms (which reveals the importance of

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[170] *Cf. Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, supra*, paras. 200 and 202.

[171] An issue addressed by the reparations. *Cf. Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, supra*, paras. 289 and 290.

oversight or inspection as a means of preventing violations). In many cases, a link exists between the acceptance of dangerous work and the victims' economic situation.

118. In this context, both regulation – which, as mentioned, usually exists – and oversight (or inspection), as a means of ensuring compliance with the norms, are particularly relevant in contexts in which, not only are dangerous substances or materials stored, but also people work. That said, oversight or inspection becomes a requirement *sine qua non* to ensure the right to safe, healthy and equitable working conditions; otherwise, the content of that right would not be made effective, particularly in the case of actions by private individuals when the laws themselves order strict oversight. In the absence of adequate compliance with regulations and monitoring human rights violations, such as those in this case in which 60 people lost their life and six suffered serious physical and emotional effects, cannot be prevented.

119. The foregoing forms part of the reflection on why these victims of the events did not have the option of other sources of employment. Thus, when addressing discrimination in this case, it helps to understand that the victims had different factors that made them exponentially vulnerable. In addition, although laws existed that regulated dangerous activities, the fact that oversight measures were not implemented made those norms ineffective in practice. Accordingly, even though, based on its domestic law, the State had an obligation of oversight, in the context of the facts of the case, in a geographical area in which there were high rates of poverty and in which it was known that dangerous work was being carried out, this oversight was not implemented.

120. Moreover, at the time of the facts, no measures were taken to provide the victims with other possibilities of employment. In other words, the State did not demonstrate that there were laws, norms, policies or practices that took into consideration the situation of poverty of the people who lived in the municipality in order to reverse the situation of inequality to which the victims were subject.

121. Based on the above, understanding of the principle of equality and non-discrimination jointly, especially based on Article 24 of the American Convention, with a mandate of *material equality*, contributes to a great extent to recast the scope of *structural discrimination* (exacerbated when other factors coalesce). The notion of *substantive equality* is in keeping with the gradual development of international law, but also the region's constitutional law, either because it is established in the Constitutions[172] or by case law.[173]

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[172] The Constitutions of Colombia and Ecuador provide clear examples of this. In the case of Colombia, Article 13(2) indicates that "The State shall promote conditions for *equality to be real and effective and shall adopt measures in favor of marginalized or discriminated groups."* The Constitution of Ecuador, Article 66(4), establishes the "Right to formal equality, material equality, and non-discrimination."

Other Constitutions contain similar wording: (i) Argentina: Article 75(2) and (23) (attributes of Congress) identifies mandates of "equal opportunities" and "real equality of opportunities and treatment"; (ii) Bolivia: Article 8 (Principles, values and purposes of the State), para. II, indicates that "The State is based on values of […] equality, […] equal opportunities […]"; (iii) Chile, in Article 1(5) it is possible to identify a mandate of "equal opportunities"; (iv) Mexico: we can find mandates of "equal opportunities" in favor of indigenous and Afro-Mexican peoples (art. 2(B) and that the right to education "shall be based on […] a human rights approach and "*substantive equality*" (art. 3(4)); (v) Paraguay: Article 47 (On guarantees of equality) indicates "[t]he State shall ensure to all the inhabitants of the Republic: […] (4) equal opportunities to participate in the benefits of nature, material goods, and culture," and (vi) Peru: Article 26 of the Constitution establishes that "[t]he following principles shall be respected in labor relations: 1. Equal opportunities without discrimination".

[173] Some judgment of the highest national courts that have addressed *substantive equality* are: (i) Colombia: "Thus, equality supposes [that] those who are in a different situation (constitutionally relevant) should be treated differently. It is also conceived from a *substantive or material dimension*, that imposes on the State the ethical and legal commitment to promote conditions to ensure that equality is real and effective, adopting measures in favor of those groups that are plainly discriminated against, marginalized or in a vulnerable situation (affirmative actions)" (Constitutional Court of Colombia, Judgment C- 657/2015 of October 21, 2015); (ii) Ecuador: "it should be noted that

122. This is especially important in view of the ineffectiveness of the norms that are supposed to ensure rights or when it can be seen that the actions taken – or the failure to take such actions – have "excluded" or "marginalized" specific groups of the population. This does not mean that, when interpreting the American Convention, the notion of *formal equality* should be eliminated or that *material equality* should be preferred. It should be understood that the two concepts and interpretations co-exist, and complement each other on aspects in which one of them is insufficient.

123. Equality and non-discrimination are two of the most fundamental principles and rights of international human rights law and are essential components of a constitutional democracy. Therefore, their scope must be understood jointly, in contexts of a clear situation of disadvantage, inequality and exclusion. Situations that always exacerbate the violation of the human rights protected by the American Convention, whose "transformative mandate"[174] is crucial in the most unequal region in the world, with important levels of poverty and with enormous social and economic challenges[175] that regrettably seem to increase and have been brought to the fore by the crisis that we are experiencing as a result of the pandemic and its effects.[176]

Eduardo Ferrer Mac-Gregor Poisot
Judge

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there is a distinction between the so-called *formal equality or legal equality*, and *material or real equality.* In legal terms, both types of equality possess a common core that consists in the comparability of certain characteristics to establish their application; however, their effects differ, as the former relates to the restriction of discrimination and the latter to respect for differences. Thus, *formal equality* relates to the guarantee of equality of treatment for all the beneficiaries of a legal provision, avoiding the unjustified existence of privileges, while *material equality* does not relate to formal issues, but rather to the real social position of the individual to whom the law will be applied, in order to avoid injustices" (Constitutional Court of Ecuador, Judgment No. 002-14-SIN-CC, August 14, 2014, p. 44); (iii) Mexico: "[…] it is considered that the human right to legal equality has not only a formal or legal aspect or dimension, but also a *substantive or factual* aspect, the purpose of which is to remove and/or reduce the social, political, cultural, economic or any other obstacles that prevent certain persons or social groups from enjoying or truly and effectively exercising their human rights in equal conditions to another set of persons or social group" (First Chamber of the Supreme Court of Justice of the Nation. Ruling: 1a./J. 125/2017 (10a.), December 2017); and (iv) Peru: "[…] the Peruvian State, defined by the 1993 Constitution, has the basic characteristics of the social and democratic rule of law, which requires the constitution of two basic aspects: the existence of minimum material conditions to implement its decisions, and the identification of the State with the purposes of its social content"; thus, "this essential minimum, seeks to ensure equal opportunities at all social levels, as well as to neutralize discriminatory situations that violate the dignity of the human being; therefore, the achievement of these minimum material conditions of existence should motivate the State and society to act together to achieve this goal" (Constitutional Court of Peru, File No. 2945-2003-AA/TC, judgment of April 20, 2004).

[174] See, the interventions in the panel discussion: "From the interpretation of norms to the social change: Human rights treaties as living instruments in light of reality," during the meeting of the three human rights courts on the occasion of the fortieth anniversary of the entry into force of the American Convention and of the creation of the Inter-American Court, held at the seat of the Court on July 17, 2018. Regarding this "transformative mandate" and its implications, see the presentation made by Armin von Bogdandy, "The mandate of the inter-American system: transformative constitutionalism by a common law of human rights. *Cf. Dialogue between Regional Human Rights Courts,* San José, IACtHR, 2020, pp. 59-73, as well as the comments on this presentation by Judges Ângelo Matusse (African Court), Branko A. Lubarda (European Court) and Elizabeth Odio Benito (IACtHR,) and the panel conclusions by the moderator, Mónica Pinto, on pp. 75-81, 83-105, 107-112 and 113-116, respectively. Judge Odio Benito considered that this "transformative mandate […] operates through evolutive interpretation." The proceedings may be consulted at: https://www.corteidh.or.cr/sitios/libros/todos/docs/dialogo-es.pdf.

[175] Regarding the "persistence of inequality," "poverty" and "social exclusion," and their impact on people or groups in a situation or condition of vulnerability, see, Economic Commission for Latin American and the Caribbean (ECLAC), Social Panorama of Latin America, Santiago de Chile, United Nations, 2017, 2018 and 2019.

[176] According to ECLAC "poverty, extreme poverty and inequality will increase in all countries of the region," ECLAC, *The social challenges in times of COVID-19,* Santiago de Chile, United Nations, 2020 p. 1.

Pablo Saavedra Alessandri
Secretary

CONCURRING OPINION OF JUDGE RICARDO C. PÉREZ MANRIQUE

CASE OF THE WORKERS OF THE FIREWORKS FACTORY IN SANTO ANTÔNIO DE JESUS AND THEIR FAMILIES V. BRAZIL

JUDGMENT OF JULY 15, 2020
(Preliminary objections, merits, reparations and costs)

I. Introduction

1. The judgment declares, *inter alia*, the violation of Articles 19, 24 and 26 of the American Convention on Human Rights (hereinafter "the Convention") because the Court found that a situation of intersectional discrimination violated the human rights of women, adolescents and children of a region of northeastern Brazil with a significant historical presence of Afro-descendants living in poverty and social vulnerability.

2. In this judgment, the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court") rejected the preliminary objections on the inadmissibility of the submission of the case due to the publication of the Admissibility and Merits Report by the Commission, the lack of jurisdiction *ratione materiae* with regard to the supposed violation of the right to work, and the failure to exhaust domestic remedies, and concluded that the State of Brazil was responsible for the violation of the rights to life, personal integrity, equal protection of the law, prohibition of discrimination, work, judicial guarantees and judicial protection, and the rights of the child.

3. I agree with the findings of the judgment and submit this opinion in order to: (i) examine the way in which I consider that the Inter-American Court should approach cases that involve violations of the economic, social, cultural and environmental rights based on the universality, indivisibility, interdependence and interrelation of all human rights as grounds for their justiciability; (ii) describe how intersectional and structural discrimination against poor Afro-descendant women and children constitutes a situation that calls for special protection, and (iii) stress the reasons why the obligation to design and implement a socio-economic program for the population of Santo Antônio de Jesus in coordination with the victims and their representatives, as a measure of non-repetition, should be adapted to the goals of the 2030 Agenda for Sustainable Development, and the recommendations of the United Nations Children's Fund (hereinafter UNICEF) and the International Labour Organization (hereinafter ILO).

II. The issue of the justiciability of the economic, social, cultural and environmental rights: jurisdiction of the Inter-American Court

a) The preliminary objection of lack of jurisdiction *ratione materiae*

4. The State argued that the Inter-American Court did not have jurisdiction to rule on the violation of the right to work pursuant to Article 26 of the Convention because the economic, social, cultural and environmental rights could not be submitted to the system of individual petitions (paragraph 21 of the judgment). Meanwhile, the Inter-American Commission on Human Rights (hereinafter "the Commission") and the representatives asked the Court to reject the objection because it did not constitute a preliminary objection, but rather referred to a matter related to the merits (paragraph 22 of the judgment).

5. The Court rejected the preliminary objection because it related to a matter that should be addressed when examining the merits of the case, and reaffirmed its jurisdiction "to hear and decide disputes concerning Article 26 of the American Convention as an integral part of the rights listed in its text, regarding which Article 1(1) establishes obligations of respect and guarantee" (paragraph 23 of the judgment).

6. I voted to reject the objection that had been filed considering that the arguments set forth by the Inter-American Court in the case of *Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office v. Peru)*[1] could be transferred to the position held in this case. In particular, I share the arguments adopted that: (1) the Court "has the authority inherent in its powers to determine the scope of its own competence (*compétence de la compétence*)"; (2) when a State has accepted the optional clause on the compulsory jurisdiction established in Article 62(1) of the Convention, this signifies the State's acceptance of the authority of the Court to decide any dispute regarding its jurisdiction; (3) the Court exercises full jurisdiction over all the articles and provisions of the Convention, which therefore encompasses Article 26, and (4) if a State is a party to the American Convention and has accepted the Court's contentious jurisdiction, the Court is competent to decide whether the said State has incurred in a violation or has failed to comply with any of the rights recognized in the Convention, even with regard to its Article 26. Therefore, I am in agreement with what was decided in the understanding that the analysis of this dispute – that is, the determination of whether the State is responsible for failing to comply with Article 26 of the Convention – should be addressed in the chapter on merits of this judgment.

b) The justiciability of the economic, social, cultural and environmental rights: precedents, the discussion in the Court and the different positions. My position

7. The justiciability of the economic, social, cultural and environmental rights has been the subject of discussions based on both doctrine and within the Court, and three positions have been taken in this regard as I mentioned in, *inter alia,* my concurring opinion in the judgment of November 21, 2019, in the *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru.*[2] The first position considers that the analysis of individual violations of the economic, social, cultural and environmental rights should be made exclusively in relation to the rights expressly recognized by Articles 3 to 25 of the Convention and based on what is explicitly permitted by the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (hereinafter "Protocol of San Salvador") in its Article 19(6).[3] While the second affirms that the Court has competence to examine autonomous violations of the economic, social, cultural and environmental rights based on Article 26 of the Convention, understanding that they are justiciable on an individual basis.[4]

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

[2] *Cf. Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 21, 2019. Series C No. 394.

[3] *Cf. Case of the "Juvenile Re-education Institute" v. Paraguay. Preliminary objections, merits, reparations and costs.* Judgment of September 2, 2004. Series C No. 112; or the *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of June 17, 2005. Series C No. 125, just to mention two examples; but also the *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2015. Series C No. 298.

[4] *Cf. 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; *Case of the Dismissed Employees of PetroPeru et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November

8. As I have indicated in previous concurring opinions, and reiterating the arguments presented in them,[5] I adhere to a different position that I have called "the thesis of the indivisibility–simultaneity" which is based on the universality, indivisibility, interdependence and interrelationship between the human rights in order to argue that the Court has jurisdiction to examine individual violations of the economic, social, cultural and environmental rights. And, I do so because I believe that human rights are interdependent and indivisible, so that civil and political rights are intertwined with economic, social, cultural and environmental rights. This interdependence and indivisibility permits envisaging the human being integrally as a titleholder of all rights. Human rights and human dignity would be artificially fragmented if the individual is not considered in this way,

9. A similar view is affirmed in the Preamble to the Protocol of San Salvador: "Considering the close relationship that exists between economic, social and cultural rights, and civil and political rights, in that the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human person, for which reason both require permanent protection and promotion if they are to be fully realized, and the violation of some rights in favor of the realization of others can never be justified."

10. Under this view, Article 26 of the Convention functions as a framework article, in the understanding that it make a general allusion to the economic, social, cultural and environmental rights and, for their examination and determination, it refers us to the OAS Charter. Second, the Protocol of San Salvador individualizes and provides content to the economic, social, cultural and environmental rights, explaining that cases related to trade union rights and the right to education are justiciable before the Court by means of individual petitions (Art. 19(6)). The Protocol mentions that "it is essential that those rights be reaffirmed, developed, perfected and protected" (see Preamble). Finally, there are a series of instruments of the inter-American *corpus juris* that also refer to the ESCER.

11. I have already underlined the importance of Article 4 of the Protocol of San Salvador on the inadmissibility of restrictions to the ESCER. Article 4 of the Protocol of San Salvador states that: "[a] right which is recognized or in effect in a State by virtue of its internal legislation or international conventions may not be restricted or curtailed on the pretext that this Protocol does not recognize the right or recognizes it to a lesser degree." In application of the provisions of the Protocol, the Working Group on the Protocol of San Salvador has been created as a monitoring mechanism and is responsible for defining indicators that must be included in the reports of the States Parties and monitoring compliance with the obligations under the Protocol.

12. In my opinion, based on the foregoing and the precedents, it must be concluded that it is not admissible to restrict access to inter-American justice in

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23, 2017. Series C No. 344, para. 192; *Case of San Miguel Sosa et al. v. Venezuela. Merits, reparations and costs.* Judgment of February 8, 2018. Series C No. 348, para. 220; *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349, para. 100; *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, paras. 75 to 97; *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375, paras. 34 to 37; *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 21, 2019. Series C No. 394, paras. 33 and 34; *Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2019. Series C No. 395, para. 62, and *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, para. 195.

[5] *Cf.* Concurring opinion in the judgment of November 21, 2019, in the *case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru* and in the judgment of November 22, 2019, in the case of *Hernández v. Argentina.*

relation to alleged violations of economic, social, cultural and environmental rights. This would even be contrary to the principle of interpretation *pro persona* of human rights established in Article 29 of the Convention considering this as a systemic hermeneutic tool of the inter-American system for the protection of human rights.

13. I have also noted that the Protocol of San Salvador, when developing the content of the economic, social and cultural rights, expressly indicates the use of the system of individual petitions with regard to the rights to work and to education in Article 19(6). Thus, in these cases, it is not necessary to develop any arguments, because the Court's competence stems from the text of the treaty.

14. It should also be taken into account that, in Part II the Convention, Article 44 indicates that: "Any person or group of persons […] may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party." Meanwhile, Article 48 indicates that: "When the Commission receives a petition or communication alleging violation of any of the rights protected by this Convention, it shall proceed as follows … ." Similarly, Article 62(3) of the Convention 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 …" (underlining added by the author).

15. The analysis of the foregoing articles reveals that: (1) civil, political, economic, social, cultural and environmental rights can be submitted to the consideration of both organs of protection: (2) the Inter-American Commission and Court may have competence in the cases lodged in this regard; (3) no distinction is made between civil, political, economic, social, cultural and environmental rights as regards their protection, and (4) claiming that the inter-American protection organs can only examine civil and political rights would be contrary to the aspects of the universality, indivisibility, interdependence and interrelationship of human rights, and would entail a fragmentation of the international protection of the individual that would be directly harmful to human dignity which is the object and purpose of human rights.

16. As a result of the explosion in the fireworks factory examined in this judgment, the Court was called on to intervene owing to the violation of both civil and political rights and the right to work. According to my position, the violations of each of these are justiciable based on the principles of the universality, interdependence, indivisibility and interrelationship of all human rights.

17. Thus, using a harmonious interpretation of the American instruments, the Court, by considering the interdependence and indivisibility of the civil and political rights on the one hand, and the economic, social, cultural and environmental rights on the other, is able to rule on the violations of both. Accordingly, the same fact, by act or omission, may simultaneously signify the violation of a civil and political right, and also of an economic, social, cultural and environmental right. And, this is what has occurred in the case, due to the existence of a pattern of intersectional and structural discrimination characteristic of the region.

18. According to the sixth operative paragraph of the judgment: "The State is responsible for the violation of the rights of the child, to equal protection of the law, to the prohibition of discrimination, and to work contained in Articles 19, 24 and 26, in relation to Article 1(1) of the American Convention on Human Rights, to the detriment of the sixty persons who died in, and the six survivors of, the explosion of the fireworks factory of Santo Antônio de Jesus […]."

19. I agree with the operative paragraph because it indicates that there was a joint and simultaneous violation of the rights: to the special protection due to childhood in the case of the children, even one who had not been born at the time of

the explosion, established in Article 19 of the Convention; the situation of a structural pattern of discrimination significantly influenced by the situation of poverty, gender, age, and ethnicity of the victims violated the right to equality (Art. 24 of the Convention) and the right to work, insofar as the right to just and favorable conditions that guaranteed safety, health and hygiene in the workplace were not ensured, according to Article 26 of the Convention.

20. In my opinion, this joint and indivisible violation of rights provides the grounds for the jurisdiction of the Inter-American Court of Human Rights in this case.

21. This is based on my position that the civil and political rights that were violated are indivisible from the right to work, because the violation of the rights recognized in Articles 19 and 24 of the American Convention are directly related and cannot be separated from the violation of the right to work. The deplorable and anti-conventional working conditions were possible, in the case of the children, because of the failure to comply with the obligation of special protection and respect for all the direct victims of the violation of the right to equality insofar as they were subjected to particularly discriminatory conditions, in the context of generalized poverty.

III. Existence of a pattern of intersectional discrimination

a) The concept of intersectionality in the inter-American human rights system

22. I understand intersectionality as the confluence in a single person or group persons, who are victims of discrimination, of the violation of different types of rights. In my opinion, the confluence of multiple discriminations increases the devastating effects on the human dignity of the persons who suffer from them and result in a greater and more diverse violation of rights than when these discriminations are constituted in relation to a single right.

23. The first person to address the concept of intersectionality was Kimberle Crenshaw when indicating that "Black women encounter combined race and sex discrimination." Thus, compared to a white woman or an Afro-descendant man, their situation may be similar or different, but involves greater vulnerability.[6] She also developed the importance of its significance when designing and evaluating policies in order to avoid remedies focused on the acceptance of the predominant factor of discrimination that make the intersection of other factors of discrimination invisible.[7]

24. The concept of intersectionality as a hermeneutic element allows the Court to determine persons or groups who suffer discrimination and analyze the causes of this situation. As it has in this judgment, the assessment of this phenomenon, the adequate understanding of its severity and the analysis of its causes and effects for the individual, helps the Court decide the merits of the cases submitted to its consideration and, also, provides the necessary perspective for establishing reparations that include, *inter alia*, appropriate measures of non-repetition that impose on the States conducts aimed at overcoming discrimination and the violation of rights.

25. The Inter-American Court used the concept of "intersectionality" for the first time in the analysis of the discrimination suffered by a child in access to education in

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[6] *Cf.* Kimberle Crenshaw, «Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics», *University of Chicago Legal Forum* 1, No. 8, 1989, p. 149. Available at: https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1052&context=uclf.

[7] *Cf.* Kimberle Crenshaw, *supra*, p 152.

the case of *Gonzales Lluy et al. v. Ecuador.*[8] It that case, it asserted that: "numerous factors of vulnerability and risk of discrimination intersected that were associated with her condition as a minor, a female, a person living in poverty, and a person living with HIV. The discrimination experienced by Talía was caused not only by numerous factors, but also arose from a specific form of discrimination that resulted from the intersection of those factors; in other words, if one of those factors had not existed, the discrimination would have been different. Indeed, the poverty had an impact on the initial access to health care that was not of the best quality and that, to the contrary, resulted in the infection with HIV. The situation of poverty also had an impact on the difficulties to gain access to the education system and to lead a decent life."[9]

26. In addition, the Commission, in an analysis of poverty,[10] has referred to the differentiated impact of poverty as a factor of vulnerability that is increased and exacerbated when it is added to the vulnerability of certain groups of the population such as women, children and adolescents.

27. Within the universal system for the protection of human rights, added to what has been mentioned in the judgment, the United Nations High Commissioner for Human Rights, in his 2017 report to the Human Rights Council, referred to the effects of multiple and intersecting forms of discrimination and violence in the context of racism, racial discrimination, xenophobia and related intolerance on the full enjoyment of all human rights by women and girls.[11] He also indicated the need to offer special protection, adapted to the needs of women and girls, emphasizing the violation of rights owing to socio-economic exclusion and poverty.

28. Specifically with regard to the right to work, the United Nations High Commissioner for Human Rights indicated that: "Women are deeply affected by intersectional discrimination when seeking employment or at the workplace. Stereotypes held by employers, colleagues or business partners, whether subtle or explicit, may surface during the hiring process or at the workplace."[12]

29. Similarly, the Special Rapporteur on extreme poverty and human rights has indicated that: "the amount, intensity and drudgery of unpaid care work increase with poverty and social exclusion, while the situation is often worse for women who experience discrimination and social exclusion on other grounds, such as ethnicity, race, colour, health or marital status."[13]

30. Meanwhile, the European Court of Human Rights related characteristics that are assumed to define a vulnerable group to the violation of rights they have suffered; for example, determination of the essential content of a right differs in the case of

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[8] *Cf. Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 1, 2015. Series C No. 298.

[9] *Cf. Case of Gonzales Lluy et al. v. Ecuador, supra,* para. 290.

[10] *Cf.* IACHR. *Report on poverty and human rights in the Americas.* OEA/Ser.L/V/II.164, September 7, 2017.

[11] *Cf.* Human Rights Council, *Impact of multiple and intersecting forms of discrimination and violence in the context of racism, racial discrimination, xenophobia and related intolerance on the full enjoyment of all human rights by women and girls*, Report of the United Nations High Commissioner for Human Rights, April 21, 2017, UN Doc. A/HRC/35/10.

[12] Human Rights Council, *Impact of multiple and intersecting forms of discrimination and violence in the context of racism, racial discrimination, xenophobia and related intolerance on the full enjoyment of all human rights by women and girls*,, supra, para. 16.

[13] United Nations General Assembly, *Extreme poverty and human rights.* Report of the Special Rapporteur on extreme poverty and human rights, August 9, 2013, UN Doc. A/68/293, paras. 14 and 18. Cited in: Human Rights Council, *Impact of multiple and intersecting forms of discrimination and violence in the context of racism, racial discrimination, xenophobia and related intolerance on the full enjoyment of all human rights by women and girls*, supra, para. 17.

gypsies,[14] prisoners,[15] or unaccompanied minors.[16] In this regard, the European Court has use the concept of "particular vulnerability" considering that "the domestic courts failed to take account of the applicant's particular vulnerability inherent in her position as an African woman working as a prostitute."[17] Based on the concept of the "particular vulnerability" of the applicant, an African woman offering sexual services on the street, it is possible to appreciate the intersection of factors such as her race, sex, and social and work situation.

31. Intersectionality has been considered a useful tool for interpreting human rights as interdependent, interrelated and indivisible, because they allow the different factors of oppression and violation to be examined.[18] In the instant case, it is possible to analyze the different factors of vulnerability that have their own profile, but at the same time interact in an intersectional manner with the others.

b) Intersectional discrimination as a pattern in the region that requires special attention in this case

32. On various occasions, the Commission has indicated that intersectionality especially affects women of the region in relation to their economic, social and cultural rights.[19] In this regard, the "Report on poverty and human rights in the Americas" indicated that "Women are affected by poverty to a greater extent and are at a particular disadvantage in exercising their civil, political, economic, social, and cultural rights."[20] In its thematic report on "Guidelines for preparation of progress indicators in the area of economic, social and cultural rights," the Commission recognized the immediate nature of the obligation not to discriminate and to guarantee equality in the exercise of the economic, social and cultural rights, and identified women as a population that had historically been discriminated against and excluded from the exercise of those rights. "In mid-2014, there were 612 million people living in Latin America, more than half of whom were women (310 million women and 302 million men). For that year it was estimated that '28.0% of the region's population lived in poverty and 12% in indigence. The majority of those living in such conditions are children, indigenous peoples, and Afro-descendants.'"[21]

33. Regarding child labor and its prohibition, the judgments indicates: "179. Article 32 of the CRC establishes 'the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or [...] development.'"[22] This obligation is reflected in article 7 of the Brazilian Constitution

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[14] *Cf.* ECHR, *Case of Buckley v. The United Kingdom*, No. 20348/92, Judgment of September 29, 1996.

[15] *Cf.* ECHR, *Case of Salman v. Turkey, No. 21986/93,* Judgment of June 27, 2000 and *Case of Algür v. Turkey,* No. 32574/96, Judgment of October 22, 2002.

[16] *Cf.* ECHR, *Case of Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, No. 13178/03, Judgment of October 12, 2006.

[17] ECHR, *Case of B.S. v. Spain,* No. 47159/08, Judgment of July 24, 2012, para. 71.

[18] *Cf.* Andrea Catalina Zota-Bernal, «*Incorporación del análisis interseccional en las sentencias de la Corte IDH sobre grupos vulnerables, su articulación con la interdependencia e indivisibilidad de los derechos humanos*» [Incorporation of the intersectional analysis into the judgments of the IACtHR on vulnerable groups, its articulation with the interdependence and indivisibility of human rights]. *Eunomía. Revista en Cultura de la Legalidad*, 2015. Available at: https://e-revistas.uc3m.es/index.php/EUNOM/article/view/2803/1534.

[19] *Cf.* IACHR, *Guidelines for preparation of progress indicators in the area of economic, social and cultural rights*, OEA/Ser.L/V/II.132, July 19, 2008, para. 56 and *ff.*

[20] *Cf.* IACHR, *Report on poverty and human rights in the Americas, supra*, para. 304.

[21] *Cf.* IACHR, *Report on poverty and human rights in the Americas*, *supra*, para. 305.

[22] In this regard, the Committee on the Rights of the Child has recognized that children's rights can be particularly at risk when they work in the informal economy, and that children found in in hidden areas of informal work face "precarious employment status, low, irregular or no remuneration, health risks, a lack of social security, limited freedom of association and inadequate protection from discrimination and violence or exploitation." Committee on the Rights of the Child, *General Comment No. 16: State obligations regarding the impact of the business sector on children's rights,* UN Doc. CRC/C/GC/16, April 17, 2013,

which prohibits work that is unhealthy, dangerous or during the night for young persons under 18 years of age and any work for those under 16 years of age, unless they are apprentices (*supra* para. 102). Similarly, the CLT prohibit dangerous, unhealthy and night work for young persons under 18 years of age and any work for those under 16 years of age, unless they are apprentices aged from 14 to 16 years.[23] Lastly, in addition to these provisions, the Statute of the Child and Adolescent prohibits any work for children under 14 years of age,[24] and bans adolescents from performing hazardous, unhealthy or difficult work.[25]

34. Expert witness Miguel Cillero Bruñol referred to the observations that the Committee on the Rights of the Child has made to Brazil, and also to the information provided by UNICEF on child labor, which is very frequent in Brazil, that "most of the victims are black children who live in urban areas and are generally performing paid work," while "the proportion of girls who work in domestic service" is also significant. In this regard, the expert witness concluded that, "in Brazil, child labor constitutes a structural situation of the violation of the rights of children and adolescents."[26] These children are employed in work that is prohibited as one of the worst forms of child labor by ILO Convention 182 and by the domestic legislation of Brazil, as noted.

35. The Inter-American Court, in the case of the *Hacienda Brasil Verde Workers v. Brazil*, identified elements that may constitute a collective pattern of structural discrimination, and indicated that it is necessary to take into consideration whether this involves: (i) a group or groups of individuals with characteristics that cannot be changed or modified by the will of the individual or that are related to historical discriminatory practices, and this group of individuals may be a minority or a majority; and the fact: (ii) that these groups have found themselves in a systematic or historical situation of exclusion, marginalization or subordination that prevents access to the basic requirements for human development; (iii) that the situation of exclusion, marginalization or subordination is concentrated in a specific geographical area or may be present throughout the territory of a State and, in some cases, may be intergenerational, and (iv) that members of these groups, despite the law's intention, its neutrality or the express mention of some distinction or explicit restriction based on the provisions and interpretations of Article1(1) of the American Convention, are victims of indirect discrimination or *de facto* discrimination, due to the State's actions or its application of measures or laws."[27]

36. It is based on the above that I assert that the intersectional discrimination suffered by the women and children in this case, for reasons of poverty, race and sex, constituted a cascading violation of rights in relation to the conditions in their workplace where the explosion occurred. A pattern that increased their disadvantages and vulnerabilities and that culminated in the incident in the fireworks factory. Special attention must be paid to this pattern of intersectional discrimination to prevent and avoid any future lack of protection for, and violation of, the rights that the women and children of the fireworks factory were also victim of before the explosion.

37. In this case, due to their condition as women and because they lived in certain neighborhoods, the women could only obtain work making fireworks; this was their family's only income. They had to take their children with them in order to improve the earnings that maintained their families. The children were deprived of their rights

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para. 35.

[23] *Cf.* Consolidated Labor Laws (CLT), article 611-B, XXIII.

[24] *Cf.* Statute of the Child and Adolescent, *supra*, article 60.

[25] *Cf.* Statute of the Child and Adolescent, *supra*, article 67, II.

[26] *Cf.* Expert opinion presented to the Inter-American Court by Miguel Cillero Bruñol (merits file, folios 911 to 943).

[27] *Case of the Hacienda Brasil Verde Workers v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of October 20, 2016. Series C No. 318, para. 80.

due to the situation of their mothers. All these vulnerabilities acted together and, owing to their intersectionality, they increased the special situation of helplessness in view of the State's failure to comply with its obligation to respect and, above all, to ensure the human rights of these people. In this regard, paragraph 197 of the judgment describes the patterns of structural and intersectional discrimination.

38. This case relates to a situation of structural poverty, of Afro-descendant women and girls, some of whom were pregnant, who had no other economic option but to accept dangerous work under exploitative conditions. The wages paid for this work were pitiful, so that the women took their children in order to increase the number of fireworks they made as a way of increasing their pay. The confluence of these factors and the existence of this pattern of intersectional discrimination meant that the women and children victims had no alternative but to work there.

39. The victims suffered structural discrimination because they belonged to historically marginalized sectors – the origin of which is linked to the phenomenon of slavery; and this has persisted despite the progress made in the laws that were never effectively enforced. In addition, they suffered from intersectional discrimination because they belonged to classifications considered suspect by the American Convention: ethnicity, sex, age, social origin, and others that coalesced in a series of violations of their rights.

40. The Court has already referred to the existence of patterns of conduct in relation to certain situations of vulnerability in the case of *González et al. ("Cotton Field") v. Mexico,*[28] in which it verified the existence of a systematic pattern of violence and discrimination against women in Ciudad Juárez. The Inter-American Commission indicated the same in its report on the case of María Da Penha.[29]

41. In general, the experience of women is not based on a single type of subordination; rather, there is an interaction of various factors and systems of subordination as a result of which this particular type of experience is not the same as that suffered based on just one of the factors.

42. The existence of patterns of intersectional discrimination against poor women and children in different parts of the region[30] is a problem that requires special protection by the State. In this case, the victims belonged to a group in a special situation of vulnerability; the deprivation of rights and the intersectionality augmented the State's obligations of respect and guarantee (Art. 1(1) of the Convention). However, the State failed to adopt measures designed to ensure the exercise of the right to just and favorable conditions of work without discrimination, and the existence of an employment option other than the manufacture of fireworks (as indicated in paras. 198 and 289 of the judgment).

IV. Measure of non-repetition related to the intersectionality of the violation of rights that was verified

43. The positive obligation of the State, following verification of a pattern of intersectional and structural discrimination such as that described, consists in the development of lines of action by implementing systematic policies that act on the origins and causes of its existence.

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[28] *Cf. Case of Gonzales et al. ("Cotton Field") v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of November 16, 2009. Series C No. 205, para. 132.

[29] *Cf.* IACHR, Report No. 54/01. Case 12,051. Maria Da Penha Maia Fernandes. Brazil. April 16, 2001.

[30] *Cf.* Committee for Latin America and the Caribbean for the Defense of Women's Rights (CLADEM), *Patterns of violence against women in Latin America and the Caribbean.* Report presented by the UN Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, 2014.

44. In this regard, in 2015, the United Nations Committee on the Rights of the Child concluded that it was necessary "to address the root causes of children living in marginalized urban areas, particularly Afro-Brazilian children, dropping out of school, including poverty, family violence, child labour and teenage pregnancy, and develop a comprehensive strategy to address the problem." It observed that, "*inter alia,* the measures adopted should include support for pregnant teenagers and adolescent mothers to continue their education."[31]

45. Accordingly, I consider it essential to strengthen the measure of non-repetition linked to the verified intersectionality of violations in order to address the structural pattern of discrimination that was corroborated in relation to women, children and adolescents.

46. In this opinion, I wish to place special emphasis on the 2030 Agenda and its Sustainable Development Goals, the main purpose of which is to "leave no one behind." The 2030 Agenda responds to a rights approach in development policies and strategies, and its content recognizes that development is a human right that can be demanded of governments and that development policies must be based on human rights. Human rights are an essential element in the design of development policies and strategies.

47. Point 35 of the Declaration that precedes the goals affirms that: "Sustainable development cannot be realized without peace and security; and peace and security will be at risk without sustainable development. The new Agenda recognizes the need to build peaceful, just and inclusive societies that provide equal access to justice and that **are based on respect for human rights (including the right to development), on effective rule of law** and good governance at all levels and on transparent, effective and accountable institutions […]" (bold added).

48. This relationship between human rights and sustainable development is established in the 2030 SDGs as the road map resulting from international consensus to enable people to overcome situations in which their rights are violated, such as those proved in this judgment. It is Goal 16 that reflects this relationship, promoting the rule of law at the national and international levels (16.3); the development of effective, accountable and transparent institutions (16.6); public access to information and protection of fundamental freedoms (16.10), and the promotion and enforcement of non-discriminatory law and policies for sustainable development (16.b).

49. The situation in the instant case is related, in particular, to Goals: 1. "End poverty in all its forms everywhere"; 5. Achieve gender equality and empower all women and girls"; 8. "... sustainable economic growth ... and decent work for all"; 10. "Reduce inequality," and 16. Promote peace, justice and inclusive institutions.

50. The Court has recommended that the State have recourse to specialized agencies of the universal human right system such as the ILO and UNICEF to conduct systematic inspections, and for useful advice and technical assistance (paragraph 287 of the judgment).

51. The violations of the rights proved in this case require the State to act with the utmost diligence in the execution of its obligations to ensure and to respect the human rights that were violated (Art. 1(1) of the Convention) and to adopt the measures established in this judgment, requesting the appropriate international cooperation in order to comply with them.

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[31] *Cf.* Committee on the Rights of the Child. *Concluding observations on the combined second to fourth periodic reports of Brazil*, CRC/C/BRA/CO/2-4, October 30, 2015, para. 74(b).

V. Conclusion

52. The Court should not lose sight of the fact that its primary function is to hear cases submitted to its consideration that require the interpretation and application of the provisions of the Convention in order to decide whether a protected right or freedom has been violated, and to establish that the injured parties be ensured the enjoyment of their right or freedom that has been violated. The Court's vocation is to do justice in specific cases within the limits established by the law of treaties. But, it also has a function of contributing to achieve the purposes of the Convention, and this means addressing the problems that afflict our societies. It is important to consider that the Court's legitimacy is founded on the soundness of its reasonings, its adherence to the law, and the prudence of its rulings.

53. Consequently, the Court's case law seeks structural remedies and, with this opinion, I seek to contribute to this. Based on the three points I have developed, my position stresses that the explosion of the fireworks factory and its consequences are directly connected to the structural and intersectional phenomenon of discrimination suffered by the poor and Afro-descendant women, children and adolescents of Santo Antônio de Jesus, which responds to a historical pattern from a social, economic and cultural perspective. This signifies that the fact of being a child or a woman who is Afro-descendant and poor coalesces in structural and intersectional discrimination with the consequence and effect that such an individual must resort to employment in illegal conditions from the point of view of international human rights law, which has the terrible consequence of loss of lives and gross violations of physical and mental integrity of the victims, such as in this case.