



The Right to Social Security in the Case Law of the Inter-American Court of Human Rights: Standards and Challenges for its Protection

El derecho a la seguridad social en la jurisprudencia de la Corte Interamericana de Derechos Humanos: estándares y desafíos para su tutela

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Abstract

The right to social security is of undoubted importance today. Especially after the Covid-19 pandemic, its content, features and other aspects are being debated in some Latin American countries. This article aims to delve into the standards of this right according to the case law of the Inter-American Court of Human Rights on the matter, and certain reports of the Inter American Commission on Human Rights. As necessary background, we will study the evolution of ESCR and their justiciability, and we will then examine the content of this right and its link with other rights and principles, such as equality and non-discrimination. Likewise, the principles of progressivity and non-regressivity and their effects will be analyzed, as well as how economic aspects affect the effectiveness of the right to social security today.

Keywords: *Social security; Inter-American Court of Human Rights; Progressivity; Economic and social rights (ESCR); equality and non-discrimination.*

Resumen

El derecho a la seguridad social posee una importancia actual indudable. Especialmente luego de la pandemia por Covid-19, su contenido, prestaciones y demás aspectos están siendo objeto de debate en algunos países de Latinoamérica. El artículo se propone ahondar en cuáles son los estándares de este derecho conforme a la jurisprudencia de la Corte IDH en la materia y algunos informes de la CIDH. En ello, como necesario antecedente, se estudia la evolución habida en relación con la justiciabilidad directa de los DESCAs, y se adentra luego en el examen del contenido de este derecho y de su vínculo con otros derechos y principios, como el de igualdad y no discriminación. Asimismo, se analizan los principios de progresividad y no regresividad y sus efectos, preguntándose cómo inciden los aspectos económicos en la efectividad del derecho a la seguridad social en la actualidad.

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I. INTRODUCTION

Article 16 of the American Declaration of the Rights and Duties of Man (ADRDM) states that: “Every person has the right to social security which will protect him from the consequences of unemployment, old age, and any disabilities arising from causes beyond his control that make it physically or mentally impossible for him to earn a living.” Similarly, the right to social security is recognized in article 22 of the Universal Declaration of Human Rights and, more specifically, in article 22 of the International Covenant on Economic, Social and Cultural Rights. Article 26 of the American Convention on Human Rights (ACHR) refers to economic, social and cultural rights, and the right to social security is set forth in Article 9 of the Protocol of San Salvador.

Social security is, therefore, a human right with regional and international recognition and protection, without prejudice to its recognition and development in the law of each State. But social security is also a regional problem. It is, surely, the Economic, Social, Cultural and Environmental Right (ESCER) that represent the greatest public expenditure, given the multiplicity of risks it covers and, consequently, the diversity of benefits it provides. It is an issue that has become more important after the Covid-19 pandemic, especially due to the economic and financial crisis that it represented for some States, and its impact on budgets, spending, and public and state financing.

What does the right to social security entail? What benefits should be granted and what risks should be covered? What happens if the State can't afford it? What measures may be taken and how does this affect this right as well as other rights? The protection of the right to social security is intrinsically related to the effectiveness of various rights, since its collection and the amount of these benefits will determine the possibility of facing costs that will guarantee other rights, such as maintaining a dignified life, food, health, and housing, among others. Can a State decide to "freeze" or not update pension amounts? Is it possible to raise the retirement age indefinitely? Is it legitimate to burden these benefits with taxes? What are the limits?

In this article, I propose to address some aspects of this topic, analyzing the standards set forth by the Inter-American Court of Human Rights (I/A Court H.R.) on the matter. To this end, in the first section I will study the evolution of the justiciability of ESCER before the I/A Court H.R. (Section II). Then, I will concentrate on what the content of the right to social security is, its standards, its practical application, and limits. I will relate social security to other rights and principles, such as equality and non-discrimination (Section III). Thirdly, I will link this topic to the principles of progressivity and non-regressivity. I will ask what implications they have and how economic aspects affect the effectiveness of this right (Section IV). Finally, I will reach some conclusions on the matter, trying to identify the impact that the case law of the I/A Court H.R. has on the protection of this right, and on the analysis of possible limits, reflecting on the points that, in my opinion, represent an important and current challenge for its protection (Section V).

II. THE DIRECT JUSTICIABILITY OF ESCER BEFORE THE INTER-AMERICAN COURT OF HUMAN RIGHTS

It is not possible to address the standards of an ESCER in the Inter-American System, such as the right to social security, without describing, at least succinctly, beforehand, and by way of background, the evolution of justiciability of ESCER before the I/A Court H.R.

2.1 Background: The Problem with the Protocol of San Salvador and the Jurisdiction of the Inter-American Court of Human Rights

As indicated above, at the Inter-American level, the right to social security is recognized in Article 9 of the Protocol of San Salvador. However, this Protocol establishes a limit on the jurisdiction of the I/A Court H.R. with respect to the rights recognized therein. Article 19.6 of the Protocol provides that the system of individual petitions regulated by Articles 44 to 51 and 61 to 69 of the ACHR is applicable only to the rights set forth in Article 8 (a) (trade union rights) and Article 13 (right to education). Does this imply that the other rights recognized in the Protocol of San Salvador cannot be enforced through the system of individual petitions before the Inter-American Commission of Human Rights (IACHR) and the I/A Court H.R.?

For many years, the majority position of the I/A Court H.R. was the rejection of the direct justiciability of ESCER, based on Article 19.6 of the Protocol of San Salvador.¹ Sergio García Ramírez's separate opinion in the case *Albán Cornejo v. Ecuador* (2007), made it clear that: "So far, the protection of health is not a readily actionable right under the Protocol of San Salvador."² For his part, Pérez Pérez's separate opinion in the case *Suárez Peralta v. Ecuador* (2013) made it clear that the right to health was not being judged on the basis of the provisions of the Protocol of San Salvador:

The purpose of this separate opinion is exclusively to make it clear that the references to the right to health contained in the judgment do not mean that the Court is assuming competence with regard to this right in particular, or to the economic, social and cultural rights in general. The contentious competence of the Court is established in Article 62 of the American Convention, and in paragraph 6 of Article 19 of the Protocol of San Salvador, without prejudice to the pertinent provisions in other inter-American human rights conventions.³

In addition to the literal meaning of Article 19.6 of the Protocol of San Salvador, a historical argument could be used to reaffirm this position. According to Mejía, during the elaboration of the ACHR, both the Inter-American Council of Jurisconsults in 1959, and the delegations of Chile and Uruguay in 1965 proposed the incorporation of ESCR into the ACHR. However, the precedents of the universal and European systems were followed, and its regulation was separated into two instruments.⁴

This reasoning clashes with the indivisibility and interdependence of rights⁵ and with the understanding of these rights in the same rank and hierarchy. In Mejía's words, "the supposed

¹ For a more in-depth discussion of this doctrinal position, see: RUIZ CHIRIBOGA (2013).

² *Albán Cornejo et al. v. Ecuador* (2007), García Ramírez's separate opinion, para. 2.

³ *Suárez Peralta v. Ecuador* (2013), Pérez Pérez's separate opinion, para. 1.

⁴ MEJÍA (2010), p. 59.

⁵ MEJÍA (2010), p. 56; NIKKEN (2010), p. 112. On this point, NIKKEN argues that: "In this sense, the separation between civil and political rights, on the one hand, and economic, social and cultural rights, on the other, is a mistake that can only be explained by political reasons and by the historical conjuncture present

superiority of some rights over others is unjustifiable [...] by recognizing only the justiciability of such rights, the [Pact of San Salvador] PSS establishes a new inadmissible hierarchy among the rights enshrined therein, since in terms of protection, it gives greater importance to freedom of association and education to the detriment of the rest.”⁶

In my view, this position also ignores Article 26 of the ACHR. Although we will be analyzing this in the third part of this section, it should be noted at the outset that the ACHR incorporated a specific provision on economic and social rights, without making any exclusion with respect to their justiciability by the I/A Court H.R. Consequently, in the position of setting aside the justiciability of ESCER, based on Article 19.6 of the Protocol of San Salvador, with the exception of freedom to unionize and education, the scope and effect of Article 26 of the ACHR is also being omitted. Thus, in relation to the rights that “derive from the economic, social, educational, scientific, and cultural norms contained in the Charter of the Organization of American States,” it would also be appropriate to identify the obligations that the States possess, obligations that should be judged by the I/A Court H.R., in view of the competence attributed by the ACHR.

2.2 The I/A Court H.R.’s Analysis of These Cases under the Scope of Protection of Other Rights: Indirect Justiciability?

Notwithstanding the foregoing, it should be noted at the outset that the I/A Court H.R. has protected these rights, under the scope of application of other rights. For some authors, this is indirect justiciability.⁷ Be that as it may, cases involving health or social security were also dealt with by the I/A Court H.R., and the States were ordered to take remedial measures. In this sense, the doctrine refers to various reports of the IACHR and judgments of the I/A Court H.R. in which the analysis of economic or social rights was deepened, although formally referring to other rights, such as equality and non-discrimination, a dignified life, or integrity.⁸

From early on the I/A Court H.R. linked the obligations of health care and education with the concept of a dignified life.⁹ Likewise, and if we concentrate on even more recent cases, it is possible to see that the relationship between health and the right to life and integrity is developed in *Suárez Peralta v. Ecuador* (2013) or in *Gonzalez Lluy v. Ecuador* (2015).

With respect to social security, the IACHR had invoked Article 26 of the ACHR in the case *Five Pensioners vs. Peru* (2003)¹⁰ however, the I/A Court H.R. addressed it with regards to the impact on property and acquired rights. Likewise, in the case of *Duque v. Colombia* (2016), it is analyzed under the right to equality and non-discrimination.

I will not go into the specific analysis that the IACHR or the I/A Court H.R. made with respect to economic and social rights, although in formal connection with another treaty right. However, I will note that, with respect to these rights, there has been a deeper analysis of obligations

when the United Nations Covenants were discussed (see above), but, as we will see later, has no conceptual foundation.” NIKKEN (2010), p. 70.

⁶ MEJÍA (2010), pp. 57 and 60.

⁷ ABRAMOVICH & COURTIS (2002).

⁸ PINTO (2012), pp. 166 *et seq.*; GARAT (2018), p. 24.

⁹ *Juvenile Reeducation Institute v. Paraguay* (2004), para. 161.

¹⁰ PINTO (2012), p. 171.

of state regulation, supervision and control, which represent concrete standards for the compliance and effectiveness of these rights. Therefore, whether it is called indirect justiciability or, something obliquely, because of the aforementioned position with respect to Article 19(6) of the Protocol of San Salvador, the fact is that the I/A Court H.R. also developed its case law regarding the content, scope, and fulfillment of various economic and social rights.

2.3 The direct justiciability of ESCER by virtue of Article 26 of the ACHR. Evolution, “leading case” and subsequent rulings

The case of *Acevedo Buendía v. Peru* (2009) constitutes, in my opinion, the first advance with respect to the direct justiciability of ESCER, as the I/A Court H.R. analyzed its competence by reason of the matter to judge the right to social security, in accordance with Article 26. In this case, the State had filed a preliminary objection of lack of jurisdiction, on the grounds that Article 19.6 of the Protocol of San Salvador excluded from the jurisdiction of the I/A Court H.R. ESCER other than freedom of association and education. The I/A Court H.R. rejected the objection, as it understood that “is competent to decide whether the State has failed to comply with or violated any of the rights enshrined in the Convention, even the aspect concerning Article 26 thereof.”¹¹

Notwithstanding this precedent, in the subsequent cases regarding ESCER, the I/A Court H.R. did not judge the autonomous violation of Article 26 of the ACHR, but addressed them through other rights, as indicated above.

The first voices raised in the I/A Court H.R. regarding the possibility of judging and ruling on economic and social rights in accordance with Article 26 of the ACHR were those of Margarette May Maculay and Eduardo Ferrer Mac-Gregor.

Then Judge May Maculay cast a concurring opinion in the case *Furlán and family v. Argentina* (2012) in which she stated that: “in this concurring opinion, I wish to state my personal opinions about the possibility of resolving a part of the controversy from a perspective regarding the direct justiciability of economic, social and cultural rights under the scope of article 26 of the American Convention.”¹²

The case refers to the State's delay in establishing compensation in favor of Sebastián Furlán, on which his medical treatment as a person with a disability depended. Substantially, then, and in addition to other rights, the right to health and social security were also affected.

May Maculay made an extensive argument justifying the application of Article 26 of the ACHR. To this end, she made use of various principles provided for in the Vienna Convention on the Law of Treaties, such as interpretation in good faith and in accordance with the object and purpose of the treaty. The opinion also cited article 4 of the Protocol of San Salvador insofar as it formulates the principle of a norm-preference guideline, as it indicates that no right recognized or in force in a State by virtue of its domestic law or international conventions may be restricted or impaired, on the grounds that the Protocol does not recognize them or does so to a lesser extent. Finally, she concluded that applying Article 19 of the Protocol of San Salvador to limit the jurisdiction of the Court, forgetting Article 26 of the ACHR, would lead to absurd reasoning, since

¹¹ *Acevedo Buendía et al. v. Peru* (2009), para. 17.

¹² *Furlán and family v. Argentina* (2012), May Macaulay's concurring opinion, para. 336 (1).

then “the American Convention can have some effects among the Participating States of the San Salvador Protocol while having another effect for the States that are not parties to the said Protocol.”¹³

For his part, Ferrer Mac-Gregor began his vote with an initial premise that makes up its first section: “the possibility of having addressed the right to health directly and autonomously (Articles 26 and 1.1 of the American Convention).”¹⁴ He explained that there is an evolution in Inter-American case law towards full effectiveness of Article 26 of the ACHR, based on the interdependence and indivisibility of all rights, on Article 33 of the ACHR, on the literal interpretation of Article 26, and on other interpretative tools, such as the most favorable interpretation, and systematic, teleological, and evolutionary methods of interpretation.

The case of *Lagos del Campo v. Peru* (2017) was the first ruling in which the Court condemned the State for the violation of Article 26 of the ACHR, with regards to the right to labor stability. It was then a *leading case* in this area, which was later followed by others, such as the case of *Miguel Sosa et al. v. Venezuela* (2018) on the right to labor, *Poblete Vilches v. Chile* (2018) and *Cuscul Pivaral et al. v. Guatemala* (2018), in which Article 26 was judged with regards to the right to health, or the case of *Muelle Flores v. Peru* (2019) in which the right to social security was analyzed autonomously, through Article 26 of the ACHR.

Article 26 provides:

The State Parties undertake to take measures, both domestically and through international cooperation, especially economic and technical, to achieve progressively the full realization of the rights deriving from the economic, social, educational, scientific, and cultural norms contained in the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, to the extent of available resources, through legislation or other appropriate means.

The justiciability of ESCER, through Article 26, requires, as the IACHR and the I/A Court H.R. have held,¹⁵ recourse to the OAS Charter in order to identify the “economic, social, educational, scientific and cultural norms” referred to in Article 26, and to determine, from these, which rights are protected. In addition, in Advisory Opinion 10/89, the I/A Court H.R. held that the essential rights referred to in the OAS Charter are contained and defined in the ADRDM, so that “the Charter of the Organization in the area of human rights cannot be interpreted and applied without integrating the pertinent norms of the Charter with the corresponding provisions of the Declaration, as results from the practice of the organs of the OAS.”¹⁶

In the case of *Muelle Flores v. Peru* (2019), the I/A Court H.R. rejected the preliminary objection of lack of jurisdiction by reason of the matter, referring to the *Lagos del Campo* and *Cuscul Pivaral* judgments, arguing once more, that a literal, systematic, teleological and evolutionary interpretation with respect to the scope of its jurisdiction over Article 26 of the Convention, must be made. It concluded that: (a) Article 26 protects the rights deriving from the economic, social, educational, scientific, and cultural norms contained in the OAS Charter; (b) these rights must be understood in relation to the other rights of the ACHR, so that the general obligations of Articles

¹³ *Furlán and family v. Argentina* (2012), May Macaulay’s concurring opinion, para. 343 (8).

¹⁴ *Suárez Peralta v. Ecuador* (2013), Ferrer Mac-Gregor’s concurring opinion.

¹⁵ *T. B. and S.H. Jamaica* (2020), para. 106; *Poblete Vilches et al. v. Chile* (2018), para. 105-106.

¹⁶ I/A Court H.R., OC-10/89, para. 43; *Lagos del Campo v. Peru* (2017), para. 143; *Poblete Vilches et al. v. Chile* (2018), para. 107.

1.1 and 2 of the ACHR apply to them; (c) these rights may be subject to oversight by the I/A Court H.R. under Articles 62 and 63 of the ACHR; and (d) the foregoing is what is consistent with the interdependence and indivisibility of rights, and with their compatibility with the object and purpose of the ACHR, which is the protection of fundamental rights.¹⁷

In accordance with this, and following the reasoning with respect to the OAS Charter, the I/A Court H.R. also held that the right to social security derives from the Charter and is therefore protected by Article 26 of the ACHR. In this regard, the I/A Court H.R. pointed out that the right to social security derives from Articles 3.(j), 45.(b), 45.(h), and 46 of the aforementioned OAS Charter.¹⁸

Notwithstanding the foregoing, it is necessary to mention the dissenting opinions of Vio Grossi, Sierra Porto and Pérez Goldberg,¹⁹ for whom the reasoning indicated does not correspond to the analysis of the ACHR in accordance with the Protocol of San Salvador, and the justiciability of ESCER should not be considered on the basis of Article 26. In this regard, Vio Grossi pointed out that “in order for economic, social and cultural rights to be claimed before the Court, it would be necessary to sign a complementary protocol, which has not happened, except partially by signing the Protocol of San Salvador, but for matters unrelated to those of the present case.”²⁰ In line with this, Pérez Goldberg emphasized that “conceiving Article 26 of the Convention as a norm of reference to all ESCER included in the OAS Charter disregards the commitment adopted by the State Parties.”²¹ For the latter, the correct way for the I/A Court H.R. to protect ESCER is through the protection of other rights, which the I/A Court H.R. did before this doctrine, as we already pointed out.²²

The truth is that either through Article 26 or in conjunction with other rights, ESCER were part of a considerable case law of the I/A Court H.R., and, among them, the right to social security.

III. THE RIGHT TO SOCIAL SECURITY STANDARDS REGARDING ITS CONTENT AND ITS RELATIONSHIP WITH THE PRINCIPLE OF EQUALITY AND NON-DISCRIMINATION

In this section, I will delve into the standards that have been established regarding the right to social security.²³ For this purpose, in the first section I will focus on the content of this right, with the case *Muelle Flores v. Peru* (2019)²⁴ being key. Then, I will link social security with the principle

¹⁷ *Muelle Flores v. Peru* (2019), para. 36.

¹⁸ *Muelle Flores v. Peru* (2019), para. 172.

¹⁹ *Lagos del Campo v. Peru* (2017), partially dissenting opinions of Sierra Porto and Vio Grossi; *Guevara Díaz v. Costa Rica* (2022), Pérez Goldberg’s partially dissenting opinion.

²⁰ *Lagos del Campo v. Peru* (2017), partially dissenting opinion of Vio Grossi.

²¹ *Guevara Díaz v. Costa Rica* (2022), Pérez Goldberg’s partially dissenting opinion.

²² *Guevara Díaz v. Costa Rica* (2022), Pérez Goldberg’s partially dissenting opinion.

²³ I will not go into other protection systems, but on this point see: *Muelle Flores v. Peru* (2019), Ferrer Mac-Gregor’s separate opinion, para. 12-19.

²⁴ At this point, it is necessary to note the evolution, current attention, and the importance of the case *Muelle Flores v. Peru* in relation to this right. In this regard, MENDIZABAL BERMÚDEZ & DÁVILA SOTO (2021), p. 212, argued that the case law of the I/A Court H.R., regarding the right to social security “has been almost non-existent for almost 50 years, compared to other ESCER.” On the other hand, *Muelle Flores v. Peru* (2019), Ferrer Mac-Gregor’s separate opinion, para. 2, pointed out the importance of this case, since “for the first time, the I/A Court H.R. directly addresses *the right to social security*, as an autonomous and justiciable right through Article 26 of the American Convention, declaring its violation and establishing relevant

of equality and non-discrimination, using the postulates of the case *Duque v. Colombia* (2016). Finally, I will examine the tools that the I/A Court H.R. uses to analyze the limits to this and other rights, an aspect that will later be relevant with regards to the study of the principles of progressivity and non-regressivity, which will be analyzed in the following section.

3.1 The content of the right to social security: the case of *Muelle Flores v. Peru* (2019)

The case of *Muelle Flores v. Peru* refers to the State's failure to comply (for 24 years) with a court ruling in favor of Muelle Flores ordering his reinstatement to a pension system.

For the purposes of its analysis, the I/A Court H.R. differentiated some constituent elements of the right to social security from certain standards that make up its content. For the former, it refers to Article 45 of the OAS Charter and the ACHR. For the latter, and as it has done with other rights, the I/A Court H.R. resorted to the General Comments of the United Nations Committee on Economic, Social and Cultural Rights, and to pronouncements of the International Labor Organization (ILO).²⁵

The I/A Court H.R. defined the right to social security through its purpose: "It is a right that seeks to protect the individual from future contingencies, which, if they occur, would cause harmful consequences for the person, in such a way that measures must be taken to protect them."²⁶ It also stressed that a constituent element of this right is its sufficiency, that is, that "social security must be exercised in such a way as to guarantee conditions that ensure life, health and a decent economic level."²⁷

We can synthesize the standards set by the Court as follows:²⁸

- a) In the first place, the I/A Court H.R. refers to the right to access a pension after a certain age and meeting other normative requirements. Quoting the ILO, it points out that a pension is "a kind of deferred salary of the worker," and defines it as an "acquired right," which is accessed "after an accumulation of contributions and labor time served."²⁹
- b) The benefits must be sufficient in amount and duration. The emphasis placed by the I/A Court H.R. on this characteristic has already been identified above, since it considers it to be a "constituent element" of this right. The I/A Court H.R. specifies that they must allow "retirees to enjoy adequate living conditions and sufficient access to health care, without discrimination."³⁰
- c) In addition, the Court adds that pensions must be granted in a timely manner and without delay. In my opinion, this attribute may be linked to both the procedure for granting the pension and also to the conditions of access, since an unreasonable age or requirements for access to retirement could mean that it is not timely.

standards, since the victim is an individual *in a situation of special protection because he or she is an older person with a disability.*"

²⁵ On the content of General Comment 19 of the Committee on Economic, Social and Cultural Rights, see MARTÍNEZ LAZCANO (2019), pp. 27-33.

²⁶ *Muelle Flores v. Peru* (2019), para. 183.

²⁷ *Muelle Flores v. Peru* (2019), para. 183.

²⁸ *Muelle Flores v. Peru* (2019), para. 192.

²⁹ *Muelle Flores v. Peru* (2019), para. 185.

³⁰ *Muelle Flores v. Peru* (2019), para. 192.

- d) The I/A Court H.R. holds that there must be “accessibility to obtain a pension, that is, reasonable, proportionate and transparent conditions must be provided to access it.”³¹ In addition, the costs of contributions must be affordable, and beneficiaries must receive information in a clear and transparent manner.
- e) For all of the above, the I/A Court H.R. indicates that it is necessary for the State to establish a social security system, which is either administered by the State, or supervised and controlled by the State if it is provided by private parties.
- f) It also provides for the special importance of the rights of access to justice and effective judicial protection, requiring the State to provide effective mechanisms for complaints in the event of a violation of the right to social security. Special consideration should be given to the guarantee of a reasonable time, since one of the elements for analyzing compliance, that is, the impact on the person’s situation, is particularly important when referring to these cases and, consequently, will require a more rigorous analysis and, in practice, a more agile procedure.

It is important to re-emphasize the terms adopted by the I/A Court H.R., which characterize the pension as having a level of sufficiency, timeliness, and duration. In this regard, in the case of *National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru* (2019), the I/A Court H.R. emphasized the relationship between the right to social security and other rights, such as life, stating that failure to pay a pension to an elderly person has an impact on his or her dignity, as it is the main source of income for the realization of other rights.³²

Finally, it is worth noting an important difference made by the I/A Court H.R. in relation to the obligations that make the protection of the right to social security. The I/A Court H.R. distinguishes between obligations that are immediately enforceable and others that are progressive in nature. The I/A Court H.R. held that:

“(..) Regarding the former (obligations of an immediate nature), the Court recalls that States must take effective measures to ensure access, without discrimination, to the benefits recognized by the right to social security and equal rights for men and women, among other matters. Regarding the latter (obligations of a progressive nature), this means that the States Parties have the specific and constant obligation to advance as rapidly and efficiently as possible towards the full realization of this right, subject to available resources, by legislation or other appropriate means.”³³

I will return to this point later.

3.2 Social security protection in relation to equality and non-discrimination. The case of *Duque v. Colombia* (2016)

The I/A Court H.R. also linked the protection of social security to other rights, such as equality and non-discrimination. The case of *Duque v. Colombia* addressed the problem of a homosexual person who, because of his sexual orientation, was prevented from accessing a survivor's pension after the death of his partner, a benefit that was provided to heterosexual couples. It makes the content and standards of the right to social security, seen above, so that access to benefits is

³¹ *Muelle Flores v. Peru* (2019), para. 192.

³² *ANCEJUB-SUNAT v. Peru* (2019), para. 185.

³³ *Muelle Flores v. Peru* (2019), para. 190.

without discrimination. This assertion derives from the conjunction of Article 26 with Article 1.1 of the ACHR, as well as from the autonomous application of Article 24 of the ACHR.

It is important to reflect here on the non-relevance and application, at this point, of arguments relating to the progressivity of economic and social rights, an aspect that will be developed later. In this sense, and in the case under review, Colombia argued that the protection of economic and social rights is “covered by the principle of progressive realization, which recognizes that full satisfaction of these rights cannot be guaranteed immediately.”³⁴

Regarding this allegation, the I/A Court H.R. said that the argument of progressivity was not applicable to the case “because the quality, nature or scope of the survivor’s pension or the service provided by health services in Colombia is not at issue. Instead, what is at issue is the application of a domestic norm that establishes exclusion for same-sex couples with regard to pension rights.”³⁵ It is also pertinent to recall the distinction made by the I/A Court H.R., cited above, in terms of obligations that are immediately enforceable and those that are progressive in nature. As far as equality and non-discrimination are concerned, this is clearly an immediate obligation and there is no room for analysis of progressivity on this point.

In addition, it is also important to make a brief comparison of this issue in the Inter-American System as addressed by the I/A Court H.R., who declared the violation of equality and non-discrimination (Article 24 of the ACHR) in the case, with respect to the European System.

The European Court of Human Rights (ECHR), when analyzing cases similar to *Duque*, recurred to the doctrine of margin of appreciation. Since this was an issue on which the European States did not have a consensus, it found a wide margin of appreciation, and, therefore, did not find a violation of the non-provision of equal benefits to homosexual couples, with respect to heterosexual couples.³⁶

The issue is addressed by Clérico, who alludes to the contemporaneity of the ruling *Duque v. Colombia*, decided in 2016, with the ruling in the case *Aldeguer Tomás v. Spain* decided by the ECHR also in 2016. Clérico points out that the ECHR considered what was addressed in the report on the merits issued by the IACHR, although it later reached the opposite conclusion to the one reached by the I/A Court H.R.³⁷

Notwithstanding the foregoing, it may also be noted that in the case of *P.B. v. Austria*, decided in 2001, the ECHR had considered that there was a violation in a similar situation to the ones analyzed, in which Austrian law did not allow access to a social security benefit to same-sex cohabitants, but reserved them for heterosexual couples. At that time, the ECHR considered that the margin of appreciation is narrow when it concerns discrimination, and that the State had not

³⁴ Ángel Alberto Duque. *Colombia* (2014), para. 32.

³⁵ Ángel Alberto Duque. *Colombia* (2014), para. 72.

³⁶ In this regard, in the case of *Aldeguer Tomás v. Spain*, it is possible to find a contradiction. The ECHR points out that, on the one hand, the margin of appreciation is narrow, since it refers to a case in which the difference in treatment is based on gender or sexual orientation (*Aldeguer Tomás v. Spain* (2016), para. 81); but, on the other hand, it also maintains that the margin of appreciation is wide, insofar as “these are economic or social measures, which are closely linked to the financial resources of the State” (*Aldeguer Tomás v. Spain* (2016), para. 82).

³⁷ CLERICO (2019), pp. 6 *et seq.*

provided any justification for the differentiation. It therefore considered it to be contrary to the European Convention on Human Rights.³⁸

After several years, the ECHR changed its position on the legal recognition of same-sex couples,³⁹ aligning its case law with that previously upheld by the I/A Court H.R.,⁴⁰ so it is to be hoped that, in this area, a change will also emerge with respect to the case *Aldegier* and the differences between the courts marked by Clérico.

3.3 The case law of the I/A Court H.R. in the analysis of the limits to rights and the impact on the protection of the right to social security

As a final aspect of this section, which also concerns the standards on the right to social security, it is appropriate to question its limits. Is the right to social security subject to limits? What tools can we use to analyze these constraints?

Although Article 26 of the ACHR does not refer to limits, but to progressivity and non-regression (that we will go further into later), it should also be analyzed with the rest of the articles and, in this regard, with Article 33 of the ACHR. It is also necessary to refer to the cases that have already been decided, in which the I/A Court H.R. analyzed some of the restrictions that the States have imposed with respect to this right.

The case of *Five Pensioners v. Peru* (2003) referred to the modification of the pension system carried out by the State with regards to five persons. Although the I/A Court H.R. analyzed the case from the perspective of the right to property, I believe that the reasoning can help us to delve into the limits of the right to social security, as its intrinsic relationship, and given that the I/A Court H.R. also alluded in this matter to the necessary safeguarding of acquired rights.

The analysis of property rights is also taken up in *Acevedo Buendía et al. v. Peru* and in *Muelle Flores v. Peru*. The I/A Court H.R. stated that “from the time that a pensioner pays his contributions to the pension fund, ceases to work for the institution in question, and opts for the retirement regime established by law, he acquires the right to have his pension governed by the terms and conditions established by said law.”⁴¹

In these cases, is it possible to affect the acquired right? The I/A Court H.R. would seem to answer in the negative. The analysis carried out in *Muelle Flores* has two stages: first, it explains why it was an acquired right, and second, it analyzes how and why the State's decision affected that right.⁴²

A similar examination was carried out in the case *National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru*. The I/A Court H.R. examined how and why the victims' rights to social security and to life were affected, as income became insufficient to meet their living costs.⁴³

In the case *Duque v. Colombia*, the Court had resorted to a proportionality test to analyze whether the restriction to the right to equality and non-discrimination was contrary to the Convention. In this case, however, and since it is a suspect category in accordance with Article 1.1

³⁸ *P.B. and J.S. v. Austria* (2010), para. 41-42.

³⁹ *Fedotva et al. v. Russia* (2023).

⁴⁰ I/A Court H.R., OC 24/17.

⁴¹ *Muelle Flores v. Peru* (2019), para. 213. Also, *Five Pensioners v. Peru* (2003), para. 103.

⁴² *Muelle Flores v. Peru* (2019), para. 215-218.

⁴³ *ANCEJUB-SUNAT v. Peru* (2019), para. 188 and 191.

of the ACHR, a strict analysis of the reasons alleged for the difference in treatment was appropriate, which was not overcome in the case.⁴⁴

It should be noted, then, that the I/A Court H.R. did not resort to applying a proportionality analysis in all cases. Both in the consideration of acquired rights and in the examination of the sufficiency of the benefits, the I/A Court H.R. did not weigh it against other purposes, but directly understood that social security was affected. These points are relevant, especially in view of what will be analyzed below, that is, when and how economic or financial reasons could cause a detriment in the amounts of benefits and pensions, if at all.

In almost all the cases discussed, the I/A Court H.R. began with the granting of a social security benefit, by virtue of domestic law, to certain persons and, later, moved on to its affectation or non-collection, derived from privatization, a change of legal regime, or other state acts. As indicated, the I/A Court H.R. examined whether the persons had an acquired right to the pension or social benefit and, after verifying non-compliance, concluded that the State had violated the obligations that give substance to the right to social security.

We could also link this aspect with the doctrine of the essential content of rights, in the understanding that even if we accept the analysis of proportionality in the restriction of this right, this could not affect its essential content, since, for example, once the right of access to a pension has been acquired, it cannot be later eliminated, or the amount of a pension should be sufficient and timely to cover the purpose it intends to fulfill, and make a dignified life possible.

IV. THE PRINCIPLES OF PROGRESSIVITY AND NON-REGRESSIVITY: HOW MUCH DOES THE ECONOMY AFFECT THE PROTECTION OF SOCIAL RIGHTS SECURITY?

Here we come to the most controversial point of this issue, which refers to the principles of progressivity and non-regressivity, but also to the impact that the economic and financial situation of a State can have on the effectiveness of this right.

I will first analyze what the principles of progressivity and non-regressivity imply, and then return to the restrictions on this right and its limits, in view of the possible allegations of financial inability to meet its cost. Finally, I will make an additional consideration of the obligations of state supervision and control in this matter.

4.1 The Principles of Progressivity and Non-Regressivity in the Jurisprudence of the Inter-American Court of Human Rights

Article 26 of the ACHR is located in Chapter III, entitled “Economic, Social and Cultural Rights,” and its section expressly refers to “Progressive development.” At the same time, in its content, it indicates that States commit to adopt measures to “progressively achieve the full realization of rights,” adding later “to the extent of available resources.”

Let us return here to what we previously analyzed, regarding the distinction that the I/A Court H.R. made with respect to the obligations linked to the right to social security. The I/A Court H.R. referred to obligations of “*immediate enforceability*,” and others of a “*progressive nature*.” In this regard, and as mentioned above, in relation to obligations of a progressive nature, the I/A Court H.R. held that States have the obligation to “advance as rapidly and efficiently as possible towards

⁴⁴ *Duque v. Colombia* (2016), para. 106-107 and 124-125.

the full realization of this right, subject to available resources.”⁴⁵ Likewise, the I/A Court H.R. added that States also have an obligation of non-regressivity.⁴⁶

The Court ruled on progressivity and non-regressivity in the cases *Five Pensioners v. Peru* and *Acevedo Buendía v. Peru*. In both cases, it appealed to the United Nations Committee on Economic, Social and Cultural Rights in its General Comment No. 3. In this regard, the Committee held that:

The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. [...] Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, 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.⁴⁷

Throughout its case law, the I/A Court H.R. has identified some obligations that are immediately enforceable, to which it does not apply any consideration of progressivity.⁴⁸ The same applies to certain cases, which are not related to the progressivity of the effectiveness of this right, but to other aspects. By way of example, in the case of *Muelle Flores v. Peru* the Court expressly clarifies: “...the Court notes that the instant case does not concern the obligations of progressive development derived from Article 26 of the American Convention, but rather the failure to implement the right to a pension as an integral part of Mr. Muelle Flores’ right to social security, owing to the failure to execute and comply with the judgments handed down in his favor in the domestic courts, in the context of the privatization of the State company, following his retirement.”⁴⁹

At the same time, and without prejudice to the differentiated reality according to the State, it is appropriate in my opinion to note the rights that the system of each country already grants to

⁴⁵ *Muelle Flores v. Peru* (2019), para. 190.

⁴⁶ *Muelle Flores v. Peru* (2019), para. 190.

⁴⁷ CESCR (1990), p. 9.

⁴⁸ For example, it has held that: “The Court considers that the State failed to fulfill its obligations, namely, the obligation to adopt safeguards to prevent the negative effects of the privatization process resulting from a decision taken by the State itself; the obligation to inform Mr. Muelle Flores of the manner in which his legally recognized pension would be guaranteed; the obligation to clearly establish which entity would be responsible for paying his pension; and the obligation to comply with and execute domestic judicial decisions. These are all obligations of an immediate nature, which have nothing to do with the progressive development of the right.” *Muelle Flores v. Peru* (2019), para. 202.

⁴⁹ *Muelle Flores v. Peru* (2019), para. 191. In a similar vein, see *Cuscul Pivaral v. Guatemala* (2018), para. 81.

people, that is, those in which the State has already advanced in progressive compliance with its obligations, to which correspond the application of non-regressivity.⁵⁰

In addition, it should also be added that this progressivity is an obligation to do, that is, the State must demonstrate that it has adopted all the possible measures, in accordance with its resources, and also that it has complied with the related obligations. In the latter, for example, the IACHR also clarified that progressive development can never be discriminatory.⁵¹

In view of progressivity, therefore, it will be necessary to distinguish between cases in which it is not applicable, and obligations to which such reasoning does not apply due to immediate enforceability. At the same time, even in the face of progressive development obligations, this is not and should not be an excuse for non-compliance. The State must prove that it has complied with the adoption of all available measures in order to fully ensure the enforceability of this right, and, once adopted, to comply with non-regressivity. At the same time, this compliance will be subject to control, as the I/A Court H.R. held: “Hence, the progressive implementation of said measures may be subjected to accountability and, if applicable, compliance with the respective commitment assumed by the State may be demanded before instances called to decide on possible human rights violations.”⁵²

4.2 The impact of the economic aspect on protection of this right. Back to the “limits to the limits”

Now, what would happen if we are faced with an unfavorable economic or financial situation, and the State cannot afford the cost of continuing to provide social security benefits? The question is particularly connected with the argument regarding the progressive development of these obligations, but especially with their non-regressivity.

In these cases, I believe that the first thing to consider is the distinction made by the I/A Court H.R. between cases and obligations that are related to this argument, and those that are not related to this argument. Scarcity or economic problems cannot be transformed into an excuse for not complying with rights, least of all those that are immediately enforceable, which have no link to this argument, but neither do those that may be included within progressive development.⁵³

Likewise, a clarification must be made. It is possible that domestic law, constitutional or infra-constitutional law, imposes obligations on the State that it must necessarily comply with.⁵⁴ For example, article 67 of the Constitution of Uruguay provides that “adjustments to retirement and

⁵⁰ On this point, MENDIZABAL BERMÚDEZ & DÁVILA SOTO (2021), p. 211, highlight that the principle of progressivity “confers protective measures, such as non-regression and progressive improvement, by prohibiting States from reducing the protection and recognition given to a right.”

⁵¹ *Ángel Alberto Duque. Colombia* (2014), para. 73.

⁵² *Acevedo Buendía et al. v. Peru* (2009), para. 102.

⁵³ The point is addressed by the I/A Court H.R. in the case of *Cuscul Pivaral v. Guatemala*. In turn, in this regard, FERRER MAC-GREGOR argued that: “The central thesis held by the majority in *Cuscul Pivaral* is that, although the State enjoys a margin of action for the fulfillment of its obligations of progressivity in the area of ESCR, this cannot be interpreted as a blank check not to adopt any protective measures, or to adopt measures that are so precarious in their scope that they leave people in a situation of vulnerability in a situation of lack of protection, who also have a risk of suffering serious effects on their integrity or their lives.” FERRER MAC-GREGOR (2020), p. 249.

⁵⁴ I will not go into the analysis, but it should be added that some Constitutions also provide for the principle of progressivity. Regarding this issue and the decisions of internal courts in this matter, see FERRER MAC-GREGOR (2020), pp. 252 *et seq.*

pension allowances may not be less than the variation in the Average Wage Index, and shall be made on the same occasion as adjustments or increases in the remuneration of officials of the Central Administration.”⁵⁵ This is a clear rule, and one that would not admit non-compliance under the pretext of progressivity or scarcity. The clarification seeks to take into account the principle of the guideline of preference of norms, according to which it is not possible to disapply a more protective domestic norm, under the pretext of the content of an international provision (Article 29 of the ACHR).

According to the analysis of the I/A Court H.R., in cases of acquired rights, or of insufficient benefits, it would not be possible to affect them and a violation would be found. Notwithstanding the foregoing, and in reference to non-regressivity, the I/A Court H.R. also held in *Acevedo Buendía v. Peru* that this duty of non-regression “should not always be understood as a prohibition of measures that restrict the exercise of a right,” but should be carefully evaluated, finding reasons of sufficient weight, with reference to the totality of rights and in the context of the maximum use of available resources.⁵⁶

Other courts have applied the principle of proportionality to measures aimed at “freezing” or detracting from pensions or retirements.⁵⁷ In this understanding, it will be necessary to analyze the legitimacy of the purpose, suitability, necessity and proportionality.

The examination, if admitted, will be very complex, and we must necessarily take into account the potential impact on other rights, in addition to social security, since it is possible that a loss of purchasing value or not receiving a sufficient pension will have an impact on the effectiveness of the right to health, food, housing and, as held by the I/A Court H.R., to a dignified life.

Also, in the stage of necessity, in which we will have to ask ourselves if there is no other measure available that would allow us to achieve the end affecting rights to a lesser extent, we will surely delve into temporal aspects and the quantification of the means. It will also be necessary to add an equality examination, taking into account the affected sector and its possible differential—or more harmful—treatment with respect to others, which could also contribute to the containment of public expenditure.⁵⁸

In the event of modifications to retirement regulations, the standards of this right should be reviewed and applied, analyzing accessibility, sufficiency or opportunity. At the same time, and in view of the requirements of age, years worked and so on, it would be necessary to carry out an examination of proportionality, as they all involve a restriction of access to benefits and it is not enough to adduce economic reasons for their justification, but to delve into their necessity and proportionality in the strict sense.

⁵⁵ In the area of health, article 44 of the Constitution may also be mentioned in similar terms.

⁵⁶ *Acevedo Buendía et al. v. Peru* (2009), para. 103; and *Cuscul Pivaral v. Guatemala* (2018), para. 143.

⁵⁷ For example: MASALA (2016) referring to Italy, or FERRER MAC-GREGOR (2020), p. 257, in relation to the Colombian Constitutional Court. In the latter, it should be noted that the Colombian Constitutional Court has held that the analysis is more rigorous if vulnerable groups are affected.

⁵⁸ With regard to Italian case law, MASALA argued: “A number of decisions specify that sacrifices, even burdensome ones, justified by the need to safeguard the financial balance, are legitimate as long as they are not unreasonably long-lasting or irrationally distributed among different categories of citizens: according to these criteria, provisions that reduce the incomes of pensioners and public employees are considered reasonable.” MASALA (2016), p. 234.

The foregoing also applies to tax measures. In some cases, and without directly affecting the amount of the retirement pension or its updating, the State uses its taxing power to tax this income and, thus, indirectly reduce it.⁵⁹ In all cases, and in any case, it is necessary to carry out an examination of proportionality and equality, in which it is necessary to take into consideration the essential elements and the standards pronounced by the I/A Court H.R. regarding this right. It will be necessary to consider, as Martínez Lazcano does in the case of *Muelle Flores v. Peru* referred to above, “the alimony nature and the special importance that an old-age pension has in the life of a retired person, since it could constitute the only amount of salary that he receives in his old age to meet his basic subsistence needs. Pensions, and social security in general, are a means of protection of a dignified life.”⁶⁰

4.3 Additional consideration: the link between this right and the obligations of state control and supervision

I will make a brief additional consideration, emphasizing the State’s obligations of control and supervision, with respect to the guarantee of this right, its benefits and payments, but also its judicial protection, when appropriate. The purpose of this addendum is to emphasize that these obligations do not, in any case, fall under the argument of progressivity, and that they are aspects that the State must take into consideration in a social security system, and in its activity with respect to it, both in the case of direct provision, as well as, and especially, when private parties are involved.

The case law of the I/A Court H.R. has developed the obligations of the State to regulate, supervise and control,⁶¹ an aspect on which I am not going to dwell, but only to observe the impact that this requirement has in practice on the State’s responsibility in the fulfilment of its obligations.

In this regard, and applying the considerations of the I/A Court H.R. in its cases,⁶² while adding to this the social security standards described above, it will be up to the States to establish an adequate regulatory framework to regulate social security benefits, and to ensure access, sufficiency, timeliness and duration, as well as the other elements already indicated. Likewise, whether this is carried out by the State or by private individuals, mechanisms for State supervision and control must be provided, as well as administrative and judicial procedures to claim this right or its possible affectations, which must comply with the applicable guarantees, especially with the reasonable period of duration, taking into account the matter at hand and the potential to affect other rights.

V. CONCLUSIONS

In this paper I set out to delve into one of the topics that is being debated at the regional level: the right to social security.

⁵⁹ The point was widely discussed in Uruguay regarding the enactment of the Personal Income Tax (Law 18.083), and especially also in response to Article 67 of the Constitution, which has already been cited. I will not go into the point of the debate, which had pronouncements of doctrine and case law of the Supreme Court of Justice in different positions. A similar controversy could arise regarding the special and temporary taxes, created in Uruguay by virtue of the financial problems caused by the Covid-19 pandemic (Laws 19.874 and 19.949).

⁶⁰ MARTÍNEZ LAZCANO (2019), p. 44.

⁶¹ For example: *Suárez Peralta v. Ecuador* (2013), para. 132 *et seq.*; *González Lluy v. Ecuador* (2015), para. 178 *et seq.*; and *Empleados de la Fábrica de Fuegos v. Brazil* (2020), para. 118 *et seq.*

⁶² *Suárez Peralta v. Ecuador* (2013), para. 132.

I started from understanding social security as a right, recognized in various treaties and conventions, but also as an issue that has now acquired great relevance, and regarding which it is possible to formulate different questions.

I concentrated, first and by way of background, on addressing the evolution that the justiciability of ESCER has had in the case law of the I/A Court H.R. As we saw, social security had been addressed for several years, albeit under the scope of application of other rights, such as property, or equality and non-discrimination. It was only in 2017 that the I/A Court H.R. proclaimed the direct justiciability of ESCRs through Article 26 of the ACHR and this is echoed in the autonomous consideration of the right to social security, as set out in *Muelle Flores v. Peru*, in 2019.

Cases before and after the doctrine of direct justiciability aided in constructing the standards in relation to this right. I set out to determine them, not only in terms of their constituent elements and content, but also in terms of how the I/A Court H.R. analyzed the restrictions in the different cases. On the latter, I finally concentrated on progressivity and non-regressivity, aspects mentioned literally in Article 26 of the ACHR, and even in other treaties, such as Article 2 of the International Covenant on Economic, Social and Cultural Rights.

I understand that one of the most important controversies in relation to this right has to do with its possible constraints or regressions and, consequently, with the limits to these limits.

The inappropriate understanding of progressivity, and its use as a way of alleging or arguing restrictions beyond those allowed, would imply a detriment to this right, which could have repercussions, as already warned, on other rights, such as health, housing, or even a dignified life.

In this regard, as was discussed, the I/A Court H.R. differentiated between obligations of immediate enforceability and those of a progressive nature. As mentioned in *Duke v. Colombia*, the IACHR rejected the State's argument that the progressive nature of the protection of ESCERs based discriminatory treatment on the basis of sexual orientation. At the same time, in view of the obligations of a progressive nature, it is also necessary to examine in detail and, in my opinion, with an additional nuance that derives from the I/A Court H.R.'s case law.

The I/A Court H.R., like other courts, resorts to the principle of proportionality to analyze restrictions to rights. I understand that in the limitations to social security it should also be applied, serving as a tool for these purposes, however, not in all cases. Both with regard to certain acquired rights and the sufficiency of the amount to provide for a dignified life, the I/A Court H.R. limited itself to corroborating the factual situation and the impact on this minimum. As I have proposed, I believe that this can be linked to a violation of the essential content of this right, understanding these aspects within it. Nor can this examination serve as a utilitarian argument that would give legal coverage to the reduction in the assets of some, in order to cover benefits in a greater amount.

In my opinion, the impact of the case law of the I/A Court H.R. analyzed in this paper is significant. Not only to identify the content of the right to social security, but fundamentally to analyze its possible limits. I believe this poses three challenges.

First, its recurrence, interpretation, and application to other cases, in relation to other possible restrictions on this right. Second, to continue to delve into and develop the points about progressivity and non-regressivity. It is true that, in many cases, States are in unfavorable financial situations and that this is a costly right to protect. It is also true that, many times, this is nothing more than an excuse for not complying with the State's human rights obligations. The third challenge is, in my opinion, to be able to distinguish between the two cases, and even in the first case, to apply a

rigorous examination that considers that progressivity does not in itself imply a justification for non-compliance, that considers the essential content of this right, and that also applies other parameters that were developed and that will surely continue to be deepened by the case law of the I/A Court H.R. In this regard, we must conclude that, without a doubt, the impact that the case law of the I/A Court H.R. has on this matter will continue to be verified and projected in times to come.

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