INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF THE CONSTITUTIONAL TRIBUNAL (CAMBA CAMPOS *ET AL.*) *v.* ECUADOR

JUDGMENT OF AUGUST 28, 2013

(Preliminary objections, merits, reparations and costs)

In the case of the *Constitutional Tribunal (Camba Campos et al.)*,

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

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

also present,

Pablo Saavedra Alessandri, Secretary, and
Emilia Segares Rodríguez, Deputy Secretary,

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter also "the American Convention" or "the Convention") and Articles 31, 32, 42, 65 and 67 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure"), delivers this Judgment, 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 November 28, 2011, in accordance with the provisions of Articles 51 and 61 of the American Convention, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted to the jurisdiction of the Inter-American Court (hereinafter "submission brief"), the case of "Miguel Camba Campos *et al.* (Members of the Constitutional Tribunal)" against the Republic of Ecuador (hereinafter "the State" or "Ecuador"), concerning "the arbitrary termination of eight members of the Constitutional Tribunal of Ecuador by a decision of the National Congress of November 25, 2004," and the processing of impeachment proceedings against some of the members, during which the presumed victims "had no procedural guarantees and were not given the opportunity to defend themselves in relation to the termination, […] and had no procedural guarantees [with regard to the] impeachment." The Commission also indicated that "the [presumed] victims were arbitrarily and unreasonably prevented from filing *amparo* remedies against the termination decision and did not have access to an effective remedy for challenging the arbitrariness of the National Congress."

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

a) *Petition.* On February 23, 2005, Miguel Camba Campos and another seven former members of the Constitutional Tribunal of Ecuador lodged the initial petition before the Commission;

b) *Admissibility Report.* On February 27, 2007, the Commission approved Admissibility Report No. 5/07;[1]

c) *Merits Report.* On July 22, 2011, the Commission approved Merits Report No. 99/11,[2] under Article 50 of the Convention (hereinafter also "the Merits Report" or "Report No. 99/11"), in which it established:

   a. *Conclusions.* The Commission concluded that the State was "responsible for violating the rights to a fair trial, to freedom from *ex post facto* laws, and to judicial protection, enshrined in Articles 8, 9 and 25 of the American Convention, in relation to the obligations set out in Articles 1(1) and 2 thereof, with respect to Miguel Camba Campos, Oswaldo Cevallos Bueno, Enrique Herrería Bonnet, Jaime Nogales Izurieta, Luis Rojas Bajaña, Mauro Terán Cevallos, Simón Zabala Guzmán and Manuel Jaramillo Córdova."

   b. *Recommendations*. The Commission recommended:

      1(a) Reinstate the victims in the judiciary, in positions similar to those they had held, with the same remuneration, social benefits, and a rank comparable to that they would hold today if their functions had not been terminated, for the period of time that remained in their terms, or

[1] In this report, the Commission "concluded that the […] case is admissible and that it is competent to examine the claim lodged by the petitioners in relation to the presumed violation of Articles 8, 9 and 25 of the American Convention, in relation to its Articles 1(1) and 2." In addition, the Commission indicated that, "if true, the facts alleged by the petitioners would not constitute possible violations of Articles 23 or 24 of the American Convention." *Cf.* Admissibility Report No. 5/07, Petition 161-05, Miguel Camba Campos *et al.* (Members of the Constitutional Tribunal), Ecuador, February 27, 2007 (file of annexes to the report, tome IV, folios 1735 to 1745).

[2] Merits Report No. 99/11, Case 12,596, Miguel Camba Campos *et al.* "Members of the Constitutional Tribunal", Ecuador, July 22, 2011 (merits file, tome I, folios 9 to 45).

(b) If, for well-founded reasons, reinstatement is not possible, the State shall pay reasonable compensation to the victims or, if applicable, their heirs, taking into account the non-pecuniary harm caused.

2. Pay the victims the salaries, pensions, employment and/or social benefits they failed to receive from the time of their termination up to the date on which their terms would have ended.

3. Publicly acknowledge, with adequate publicity, the violations declared in the present case, in particular, the infringement on the independence of the Judiciary.

4. Adopt measures of non-repetition that ensure the independence of the Judiciary, including the measures necessary so that domestic law and applicable practice abide by clear criteria and ensure guarantees for the appointment, tenure, and removal of judges, in particular, a long enough term in judicial office to ensure their independence and determination of the grounds for impeachment, in accordance with the standards established in the American Convention.

d) *Notification to the State.* The Merits Report was notified to the State on July 28, 2011, granting it two months to provide information on compliance with the recommendations. The Commission accorded the State two extensions of this time limit to comply with the recommendations.

e) *Submission to the Court.* On November 28, 2011, as a result of "the need to obtain justice for the victims, owing to the failure of the State to comply with the recommendations, [and also] of the matters of inter-American public interest that the case represents," the Commission submitted the case to the Court. The Commission appointed Luz Patricia Mejía, Commissioner at the time, and Santiago A. Cantón, then Executive Secretary of the Commission, as its delegates before the Court, and Elizabeth Abi-Mershed, Deputy Executive Secretary, and Tatiana Gos, lawyer of the Commission's Executive Secretariat, as its legal advisers.

II
PROCEEDINGS BEFORE THE COURT

3. *Notification to the State and to the representatives.* The submission of the case by the Commission was notified to the State and to the representatives on December 19, 2011.

4. *Brief with pleadings, motions and evidence.* On February 25, 2012, Ramiro Ávila Santamaría and David Cordero Heredia (hereinafter "the representatives") presented their brief with pleadings, motions and evidence (hereinafter "pleadings and motions brief") to the Court. The representatives agreed substantially with the Commission's allegations and asked the Court to declare the international responsibility of the State for the violation of the same articles alleged by the Commission; they also asked that the Court declare the violation of Articles 23 (Right to Participate in Government) and 24 (Right to Equal Protection) of the Convention, in relation to the eight presumed victims.

5. *Answering brief.* On June 18, 2012, the State submitted to the Court its brief with preliminary objections, an analysis of the recommendations made by the Inter-American Commission, its answer to the submission of the case, and its observations on the brief with pleadings, motions and evidence (hereinafter "answering brief"). In addition, the State appointed Erick Roberts Garcés as its Agent, and Alonso Fonseca and Carlos Espín as Deputy Agents.

6. *Observations on the preliminary objections.* On August 20 and 30, 2012, the representatives of the presumed victims, and the Commission, respectively, presented their observations on the preliminary objections filed by the State.

7. *Public hearing and additional evidence.* By an Order of the President of the Court (hereinafter "the President") of February 15, 2013, the parties were convened to a public hearing on the case and it was established which statements would be admitted by affidavit and which would be made during the oral proceeding.[3] The public hearing took place on March 18, 2013, during the forty-seventh special session of the Court, held in Medellín, Republic of Colombia.[4] During the hearing, the Court required the parties to present certain helpful information and documentation. In addition, on March 13, 2013, the State and the representatives of the presumed victims submitted the affidavits, which were forwarded to the other parties for observations.

8. *Final written arguments and observations.* On April 19, 2013, the representatives of the presumed victims and the State forwarded their final written arguments and the Commission presented its final written observations. The parties and the Commission had the opportunity to present observations on the response presented in the final written arguments to the Court's questions, and on the requested information.

9. *Observations of the representatives, and the State*. On June 21, 2013, the Secretariat of the Court, on the instructions of the President, requested various elements of helpful evidence, which was presented by the State and the representatives on June 27 and 28, 2013, respectively. The parties had the opportunity to present observations on this information.

III
COMPETENCE

10. The Court is competent to hear this case in the terms of Article 62(3) of the American Convention, because Ecuador has been a State Party to the Convention since December 28, 1977, and accepted the contentious jurisdiction of the Court on July 24, 1984.

IV
PARTIAL ACKNOWLEDGEMENT OF RESPONSIBILITY BY THE STATE

A. Partial acknowledgement of responsibility by the State and observations of the Commission and the representatives

11. In this case, the State acquiesced to various facts and acknowledged its responsibility for some of the violations alleged by the Commission and the parties. The Court will now describe the terms and scope of the State's acknowledgement and, to this end, deems it pertinent to recall that this case relates to both the termination of the members of the Constitutional Tribunal for reasons presumably associated with their appointment, and also to two impeachment proceedings held in relation to two decisions adopted by the Tribunal (*infra* paras. 55 to 66 and 67 to 98).

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[3] *Cf. Case of Camba Campos et al. v. Ecuador*. Order of the President of the Inter-American Court of February 15, 2013. Available at: http://www.corteidh.or.cr/docs/asuntos/camba_15_02_13.pdf.

[4] At this hearing, there appeared: (a) for the Inter-American Commission: Silvia Serrano Guzmán and Erick Acuña; (b) for the representatives of the presumed victims: David Cordero Heredia and Ramiro Ávila Santamaría, and (c) for Ecuador: Alonso Fonseca and Carlos Espín.

12. The State presented "a partial acquiescence, solely and exclusively in relation to the procedure of the termination of the former members of the former Constitutional Tribunal," since this termination was based on "various inconsistencies in the Constitution that was repealed." It explained that the acquiescence was made because:

> "The presumed victims were not provided with guarantees of tenure and independence and, in general, guarantees of due process in their termination; because there were no grounds established by law for the removal from office of the presumed victims and because […] the State has not provided them with an effective and appropriate remedy to appeal their termination […]. Thus, the termination of the former members on November 24, 2004, which constitutes the factual framework of the case before the Inter-American Court, entails international responsibility […] which is assumed with regard to the right to judicial guarantees, the principle of legality, and judicial protection established in Articles 8, 9 and 25 of the American Convention on Human Rights."

13. Regarding the violation of Article 8 of the American Convention it indicated that:

> "The Constitutional Tribunal did not form part of the Judiciary and, therefore, by extension, the status of judge cannot be applied. However, both the Inter-American Court of Human Rights and Commission on Human Rights, and also the European Court of Human Rights have indicated that it should be understood that the principle of judicial independence applies to a juridical entity with the constitutional attributes of control of the Constitution, such as the Constitutional Tribunal of Ecuador, with a series of guarantee such as adequate appointment procedures, an established term of office, and safeguards against external pressure."

14. Regarding the violation of Article 9 of the American Convention in relation to the termination of the members of the Tribunal, it acknowledged its responsibility, "because there were no grounds established by law for the removal from office of the presumed victims." It clarified that, "although it is true that the National Congress could make a constitutional and legal analysis, this should have included clear mechanisms to submit to review the tenure and the duration of the terms of the former members of the Constitutional Tribunal. The absence of legal certainty concerning the grounds for removing the former members obliges the State to acknowledge its international responsibility in this regard."

15. Regarding the violation of Article 25 of the American Convention, it indicated that "the State has not provided them with an effective and appropriate remedy," taking into account that "the presumed victims filed remedies of *amparo* that were rejected systematically by the judges based on the decision of the Constitutional Court elected on November 25, 2004," to replace the members of the Tribunal who had been removed. This new court "determined that, in order to suspend the effects of a parliamentary decision owing to an eventual and supposed violation of the Constitution, the only action established was the action on constitutionality, which must be filed before the Constitutional Court." The State indicated that "[t]his analysis reveals that the State did not provide a simple, prompt, and effective legal remedy."

16. Nevertheless, it asked that the Court "declare that Articles 23, 24, 1(1) and 2 of the American Convention have not been violated, because the content of Articles 1(1) and 2 of the American Convention relates to a general obligation that cannot be verified in a specific case, contrary to the rights that are recognized in the American Convention and that admit analysis in a determined case."

17. The Commission "assesse[d] the partial acknowledgment of responsibility made by the State." However, it emphasized that "the State has not acknowledged the violation of Article 2 of the Convention," and concluded that it "underst[ood] that the partial acknowledgement of responsibility [was] limited to one of the two components of this case; that is, decision R-25-160 issued by the National Congress on November 25, 2004. The

Commission underst[ood] that the dispute subsisted with regard to the violations derived from the impeachment of the victims."

18. For their part, the representatives stated that that "the acquiescence […] would appear to refer only to the facts that occurred on November 25," and indicated "the need to make a legal and factual analysis of the facts relating to the impeachment." In addition, they stated that:

> "The State shares with the representatives of the victims the perception that the removal of judges, even when carried out by a decision that is not formally encompassed in a disciplinary proceeding, requires an increased guarantee in which the principle of legality, judicial guarantees, and judicial protection are applicable; in other words, it accepts that, in case of doubt, it should be assumed that the removal of a judge is punitive in nature. The State did not refer to the impeachments of December 1 and 8, 2004, in its acknowledgement of responsibility, but did do so in its final arguments in order to say that the judges of the Constitutional Court are no longer subject to impeachment. In Ecuador, impeachment still exists against some authorities of the Executive; a subsequent constitutional reform could again expand the number of public authorities subject to it. Consequently, […] it is very important for Ecuador, and for the other countries of the continent, that this […] Court develop the standards for due process of law in the case of the mechanisms, known as impeachment, and whether or not they are compatible with the principle of judicial independence."

B. Considerations of the Court

19. According to Articles 62 and 64 of the Rules of Procedure,[5] and in exercise of its authority as regards the international judicial protection of human rights, a matter that goes beyond the will of the parties, it is incumbent on the Court to ensure that acts of acquiescence are acceptable for the purposes of the inter-American system. In this task, it does not merely take note, confirm, and record the acknowledgement made by the State, or verify the formal conditions of the said acts, but it must relate them to the nature and severity of the violations that have been alleged, the requirements and interests of justice, the particular circumstances of the specific case, and the attitude and position of the parties,[6] so that it can clarify the truth of what has happened, to the extent possible and in exercise of its competence.[7]

20. In this case, the Court finds that the State's partial acquiescence to some legal claims makes a positive contribution to the development of these proceedings and to the exercise of the principles that inspire the American Convention,[8] and to the partial satisfaction of the needs for reparation of the victims of human rights violations.[9] In

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[5] Articles 62 and 64 of the Court's Rules of Procedure establish: Article 62. Acquiescence. If the respondent informs the Court of its acceptance of the facts or its total or partial acquiescence to the claims stated in the presentation of the case or the brief tabled by the alleged victims or their representatives, the Court shall decide, having heard the opinions of all those participating in the proceedings and at the appropriate procedural moment, whether to accept that acquiescence, and shall rule upon its juridical effects.

Article 64. Continuation of a case. Bearing in mind its responsibility to protect human rights, the Court may decide to continue the consideration of a case notwithstanding the existence of the conditions indicated in the preceding articles.

[6] *Cf. Case of Kimel v. Argentina*. Merits, reparations and costs. Judgment of May 2, 2008. Series C No. 177, para. 24, and *Case of García and family members v. Guatemala. Merits, reparations and costs.* Judgment of November 29, 2012 Series C No. 258, para. 16.

[7] *Cf. Case of Kimel v. Argentina*, para. 24, and *Case of Gudiel Álvarez et al. ("Diario Militar") v. Guatemala. Merits, reparations and costs.* Judgment of November 20, 2012 Series C No. 253, para. 20.

[8] *Cf. Case of El Caracazo v. Venezuela. Merits*. Judgment of November 11, 1999. Series C No. 58, para. 43, and *Case of Gudiel Álvarez et al. ("Diario Militar") v. Guatemala*, para. 28.

[9] *Cf. Case of Manuel Cepeda Vargas v. Colombia. Preliminary objections, merits, reparations and costs.* Judgment of May 26, 2010. Series C No. 213, para. 18, and *Case of Gudiel Álvarez et al. ("Diario Militar") v. Guatemala*, para. 28.

addition, the Court considers, as it had in other cases,[10] that this acknowledgement made by the State has full legal effects pursuant to Articles 62 and 64 of the Court's Rules of Procedure and has a significant symbolic value to ensure the non-repetition of similar acts.

21. In this regard, the Court underscores that the State partially acknowledged its responsibility in relation to Articles 8, 9 and 25 of the American Convention with regard to the termination of the members of the Tribunal on November 25, 2004.

22. Regarding the acknowledgement based on the violation of Article 9 of the Convention because the laws of Ecuador do not establish specific grounds for the termination of judges, the Court stresses that the State did not explain whether the termination was carried out as a punitive act, and this must be determined in order to establish whether Article 9 should be analyzed in this case. The acquiescence made does not establish clearly the elements of Article 9 of the Convention that have been violated, nor does it respond to several of the allegations presented by the Commission and the representatives in this regard (*infra* paras. 145 to 147); consequently, some of the disputes on this point remain.

23. In addition, the Court underscores that a dispute subsists regarding the presumed violations of the Convention that were not included in the State's acknowledgement of responsibility; namely, those related to the violation of Articles 2, 23 and 24 of the American Convention concerning the termination of the former members of the Tribunal. Furthermore, the dispute persists with regard to the facts and violations alleged concerning the impeachments of the presumed victims on December 1 and 8, 2004. The dispute also persists regarding the possible reparations and costs. Consequently, the Court finds it necessary to deliver a judgment in which it determines the facts that occurred, clarifies the scope of the violations that have been acknowledged, and decides the disputes that persist. The Court emphasizes that this determination contributes to making reparation to the victims, to avoiding a repetition of similar acts and, in sum, to achieving the objectives of the inter-American human rights jurisdiction.[11]

V
PRELIMINARY OBJECTIONS

Arguments of the Commission and of the parties

24. The State presented two preliminary objections. First, it argued that the Commission had violated the right of defense by holding a single hearing for cases No. 12,597: Miguel Camba Campos *et al.* (Members of the Constitutional Tribunal) and 12,600: Hugo Quintana Coello *et al*. (Justices of the Supreme Court), even though there is no provision of the Convention, or the Commission's Statute or Rules of Procedure, that permits the joinder of hearings of more than one case. Second, the State argued the impossibility of complying with the recommendations made by the Commission in Merits Report 99/11 regarding the reinstatement of the presumed victims to the Judiciary, because, according to articles 198 and 275 of the Constitution, the members of the Constitutional Tribunal were not part of the Judiciary. It argued that, in addition to the supposed impossibility of complying with the

[10] *Cf. inter alia*, *Case of Kimel v. Argentina*, paras. 23 to 25, and *Case of Gudiel Álvarez et al. ("Diario Militar") v. Guatemala*, para. 28.

[11] *Cf. Case of Tiu Tojín v. Guatemala.* Merits, reparations and costs. Judgment of November 26, 2008. Series C No. 190, para. 26, and *Case of García and family members v. Guatemala*, para. 24.

Commission's recommendation – made on the basis of an incorrect analysis – it had not been able to comply with the payment of the compensation either, since "the main obligation was impossible because it ran counter to the basic structure of Ecuador's legal system."

25. The Commission indicated, first, that "this case was conducted before the Commission strictly respecting the principle of due process of law" and that, "throughout the proceedings, the State had numerous opportunities to present and dispute factual and legal arguments in exercise of its right of defense." Regarding the alleged violations of the State's right of defense in the proceedings before it, the Commission affirmed that "the State has not explained the reasons why a joint hearing on two cases with common elements prejudiced its ability to defend itself" because, in the Commission's opinion, "[t]he State was notified of the hearing, appeared before it, and played an active role." The Commission added that "the State has failed to prove a violation of the right of defense that could give rise to the Court's exceptional authority to review a procedural act of the Commission." The Commission concluded that the "position [of the State] was duly analyzed by the Commission and incorporated into its Merits Report"; hence, it "ask[ed] the Court to reject the preliminary objection of 'violation of the State's right of defense" filed by the State. Regarding the second preliminary objection filed by the State, the Commission indicated, first, that "the State never contested the judicial nature" of the members of the Constitutional Tribunal. In this regard, the Commission cited "the principle of estoppel," one of the "fundamental elements of which is precisely the need to safeguard the procedural positions that a party to the proceedings may assume based on the positions of the other party." The Commission also stated that, "regardless of the title 'judges,' 'justices,' 'magistrates,' or 'members,' there is no doubt that the members of the Constitutional Tribunal of Ecuador […] performed functions of a judicial nature."

26. The representatives also contested the preliminary objections filed by the State. Regarding the first preliminary objection presented by the State, the representatives argued that "the State was duly notified by the [Commission] to present its evidence and arguments in both hearings, because the notification for both was presented to the parties at the same time." They argued that "in this case, two hearings were held; one on admissibility on March 13, 2006, and the other on merits on March 10, 2008." And that, "at both hearings, the [Commission] decided to hear the arguments of the parties in cases 12,597 and 12,600." In addition, the representatives indicated that "the State did not ask that the hearing not be held, but presented its arguments"; hence, they considered that, in keeping with "the principle of estoppel […] the State cannot change its position in the proceedings to benefit itself." Regarding the second objection filed by the State, the representatives accepted that "the [Constitutional Tribunal,] according to Ecuadorian constitutional norms, was not part of the Judiciary," but stated that "the recommendation [made by the Commission] [was] clear and" that "the formal error in no way altere[d] the State's obligation to comply with the Commission's recommendations, because "the substance of the case is that the [Commission] considered that the rights of the former members of the [Constitutional Tribunal] had been violated, and that, consequently, it was necessary to make reparations."

Considerations of the Court

27. Based on the provisions of Article 42(6), in conjunction with the provisions of Articles 61, 62 and 64, all of its Rules of Procedure, the Court finds that, by making an acknowledgment of responsibility, the State has accepted the full competence of the Court to hear the case, so that, in the circumstances of this case, the filing of preliminary objections associated with the presumed violation of the right of defense or the impossibility

of complying with some of the recommendations are incompatible with this acquiescence.[12] Furthermore, the argument regarding the impossibility of complying with the recommendation to reinstate the presumed victims is closely related to what must be decided at the stage of reparations in the instant case. Consequently, the objections filed have no purpose and it is not necessary to analyze them,[13] in view of the terms of the acknowledgement of responsibility in this case.

VI
EVIDENCE

28. Based on the provisions of Articles 46, 50, 57 and 58 of the Rules of Procedure, as well as on its case law concerning evidence and its assessment,[14] the Court will examine and assess the documentary probative elements forwarded by the parties on different procedural occasion, the statements of the presumed victims and witnesses, the expert opinions provided by affidavit and during the public hearing before the Court, and also the helpful evidence requested by the Court. To this end, the Court will abide by the principles of sound judicial discretion within the corresponding legal framework.[15]

A. Documentary, testimonial, and expert evidence

29. The Court received various documents presented as evidence by the Inter-American Commission, the representatives, and the State, attached to their main briefs. The Court also received the affidavits of:

A) Presumed victims proposed by the representatives

1) Enrique Herrería Bonnet, Miguel Camba Campos,[16] *Manuel Jaramillo Córdova, Jaime Manuel Nogales Izureta, Luis Rojas Bajaña, Mauro Terán Cevallos* and *Simón Zabala Guzmán,* who testified on: (i) the presumed facts of the case, in particular the alleged way in which they were prosecuted and the manner in which they have experienced their dismissal; (ii) the alleged personal effects they suffered and continue to suffer owing to the presumed violation of their human rights, and (iii) how they would possibly feel should they receive redress if the Court declared the violation of their rights.

B) Witness proposed by the representatives

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[12] Similarly, regarding preliminary objections for failure to exhaust domestic remedies, *Cf. Case of the "Mapiripán Massacre" v. Colombia. Preliminary objections.* Judgment of March 7, 2005. Series C No. 122, para. 30, and *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations. Judgment of June 27, 2012. Series C No. 245, para. 30.*

[13] Similarly, *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, para. 30.

[14] *Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala.* Merits. Judgment of March 8, 1998. Series C No. 37, paras. 69 al 76, and *Case of Suárez Peralta v. Ecuador.* Preliminary objections, merits, reparations and costs. Judgment of May 21, 2013. Series C No. 261, para. 30.

[15] *Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Merits*, para. 76, and *Case of Suárez Peralta v. Ecuador*, para. 30.

[16] The President of the Court called on this presumed victim to be heard by means of an affidavit in the order of February 15, 2013. However, the representatives of the victims did not forward the affidavit prepared by Miguel Camba Campos (merits file, tome IV, folio 1445).

2) Luis Fernando Torres, who testified on: (i) the presumed events that occurred in the National Congress in relation to the removal of the members of the Constitutional Tribunal; (ii) how the alleged impeachment was conducted; the summons, and the composition of the parliamentary majority; (iii) the reasons given by the members of Congress during the sessions, and (iv) the supposed motives and reasons of Congress for the alleged removal, and the resolutions

C) Expert witness offered by the representatives

3) Alejandro Ponce Villacís, who testified on international standards for judicial independence, the scope of the rights involved in the case, and the guarantees of the judiciary, in relation to the facts of this case.

D) Expert witnesses offered by the State

4) Luis Ávila Linzán, who testified on: (i) the Constitutional Tribunal and the Constitutional Court; (ii) the institutional and juridical evolution in the case of Ecuador from a critical perspective; (iii) the historical context; (iv) the juridical, social and political nature of the Constitutional Tribunal in Ecuador; (v) the Constitutional Control Act and the Organic Law on Jurisdictional Guarantees and Constitutional Control, and (vi) the powers of the Constitutional Tribunal of Ecuador and the pertinent constitutional powers of the Constitutional Court of Ecuador in relation to this case.

5) Pablo Alarcón Peña, who testified on: (i) the evolution of jurisdictional guarantees in Ecuador; (ii) the changes in the jurisdictional guarantees established in the 1998 Constitution of Ecuador in comparison with the 2008 Constitution of the Republic of Ecuador; (iii) the change in the nature of guarantees (from precautionary to hearing proceedings, informal proceedings, competence, emergence of integral reparation), and (iv) the actual role of the Constitutional Court of Ecuador in relation to jurisdictional guarantees.

30. Regarding the evidence provided during the public hearing, the Court received the testimony of:

A) Presumed victim proposed by the representatives

1) Oswaldo Cevallos Bueno, who testified on: (i) the presumed facts of the case, in particular the alleged way in which they were prosecuted and the manner in which he has experienced his dismissal; (ii) the alleged personal effects he suffered and continues to suffer owing to the presumed violation of his human rights, and (iii) how he would possibly feel should he receive redress if the Court declared the violation of his rights.

B) Witness proposed by the representatives

2) Wilfrido Lucero, who testified on: (i) the presumed events that occurred in the National Congress in relation to the removal of the members of the Constitutional Tribunal; (ii) how the alleged impeachment was conducted; the summons, and the composition of the parliamentary majority; (iii) the reasons given by the members of Congress during the sessions, and (iv) the supposed motives and reasons of Congress for the alleged removal and the resolutions.

C) Expert witness offered by the Inter-American Commission

3) Leandro Despouy, who testified, with regard to the facts of this case, on the guarantees of due process of law that must be observed in impeachment proceedings, and the implications of the policy review in relation to judicial proceedings, in particular, determination of the grounds for the removal of judges.

D) Expert witness offered by the State

4) Juan Montaña Pinto, who testified on: (i) democratic constitutionalism in Ecuador from the Montecristi Constitution to the Transition Regime; (ii) the historical constitutional context; (iii) the political and juridical institutions prior to Ecuador's 2008 Constitution; (iv) the constituent procedure in Ecuador as regards the acceptance of democracy and the legal mechanisms of the Montecristi Constituent Assembly in Ecuador; (v) the referendum that approved the Constitution, and (vi) the transition regime.

B. Admission of the evidence

31. In this case, as in others, the Court admits those documents forwarded by the parties on the appropriate procedural occasion that were not contested or challenged, and the authenticity of which was not questioned, exclusively insofar as they are pertinent and useful for the determination of the facts and the eventual legal consequences.[17]

32. In addition, the Court finds that the statements of the presumed victims and the witnesses, and the expert opinions provided by affidavit and during the public hearing are pertinent only to the extent that they are in keeping with the purpose defined by the President of the Court in the Order requiring them (*supra* paras. 29 and 30). They will be assessed in conjunction with the other elements of the body of evidence. Furthermore, in accordance with this Court's case law, the statements made by the presumed victims cannot be assessed in isolation, but rather in the context of all the evidence in the proceedings, because they are useful insofar as they can provide further information on the presumed violations and their consequences.[18]

33. Regarding newspaper articles, the Court has considered that they may be assessed when they refer to well-known public facts or declarations by State officials, or when they corroborate aspects related to the case.[19] The Court decides to admit those documents that are complete or that, at least, allow their source and date of publication to be appreciated, and will assess them taking into account the body of evidence, the observations of the parties and the rules of sound judicial discretion.

34. Also, regarding some documents indicated by the representatives and the Commission by means of electronic links, the Court has established that if a party provides, at least, the direct electronic link to the document cited as evidence and it is possible to

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[17] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits*. Judgment of July 29, 1988. Series C No. 4, para. 140, and *Case of Mendoza et al. v. Argentina. Preliminary objections, merits and reparations.* Judgment of May 14, 2013, para. 53.

[18] *Cf. Case of Loayza Tamayo v. Peru. Merits.* Judgment of September 17, 1997. Series C No. 22, para. 43, and *Case of Mendoza et al. v. Argentina*, para. 54.

[19] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits*, para. 146, and *Case of Suárez Peralta v. Ecuador*, para. 33.

access this, neither legal certainty nor procedural balance is affected, because it can be located immediately by the Court and by the other parties.[20]

35. Based on the above, the Court admits the above-mentioned expert opinions to the extent that they are in keeping with the purpose that was defined, and will assess them in conjunction with the rest of the body of evidence, taking into account the observations of the State and pursuant to the rules of sound judicial discretion.[21]

36. The Commission requested "the transfer of the pertinent parts of the expert opinion of expert witness Param Cumaraswamy," whose testimony was proposed in the case of *Quintana Coello et al. v. Ecuador*. This expert opinion refers to the standards for judicial independence in international law. Neither the State nor the representatives presented observations on this request. The Court incorporates this expert opinion as relevant to this case.

37. Regarding the expert opinion provided by Leandro Despouy, the State argued that "his expert opinion relate[d] to the facts of the case, and to the reports that the expert witness had prepared when he was the United Nations Special Rapporteur on the independence of judges and lawyers, and not on the purpose of the expert opinion approved by the […] Court." It also argued that the fact that Mr. Despouy had been a "United Nations Special Rapporteur on the independence of judges and lawyers" would mean that he had "prior juridical positions and criteria that would make it difficult for him to provide an impartial, objective and neutral expert opinion."

38. In this regard, the Court observes that the Ecuadorian State had already presented this argument concerning the expert opinion of Mr. Despouy when it challenged his expert opinion offered by the Commission for the public hearing. On this point, in the Order of the President of the Court of February 15, 2013 (*supra* para. 7), the latter ruled in this regard. The Court recalls that, in the said Order, the President indicated that "the State did not present evidence, beyond the references to the mandate and report of the Special Rapporteur, that the latter had intervened in any way in the proceedings analyzed in this case, either at the domestic level or during the processing of the case before the inter-American system, in a way that could raise any doubt as regard the obligation of objectivity of an expert witness before this Court. Contrary to the State's assertion, it is precisely his knowledge of the situation in Ecuador in 2005, as United Nations Special Rapporteur, that would be an element that would allow it to be inferred *prima facie* that he had a better understanding of the situation in his eventual task as an expert witness in this case."[22]

VII
PROVEN FACTS

39. In this chapter on proven facts the Court will analyze: (i) the context of the facts that occurred; (ii) the termination of the members of the Constitutional Tribunal; (iii) the facts related to the impeachments of some of the members; (iv) the decision of the new

[20] *Cf. Case of Escué Zapata v. Colombia. Merits, reparations and costs*. Judgment of July 4, 2007. Series C No. 165, para. 26, and *Case of the Santo Domingo Massacre v. Colombia. Preliminary objections, merits and reparations*. Judgment of November 30, 2012 Series C No. 259, para. 44.

[21] *Cf. Case of Loayza Tamayo v. Peru*. *Merits*, para. 43, and *Case of Mohamed v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 23, 2012 Series C No. 255, para. 37.

[22] Order of the President of the Court of February 15, 2013, considering paragraph 16.

Constitutional Tribunal on the inadmissibility of the remedy of *amparo*; (v) the remedies of *amparo* filed by five members of the Tribunal, and (vi) events subsequent to the termination.

A. Context

40. From 1996 until 2007, the Republic of Ecuador had seven Presidents. Over this period none of them could complete the four-year constitutional mandate.[23] Thus, from 1996, when Abdalá Bucaram was elected President, until 2007, when Rafael Correa took office, the following were Presidents of Ecuador, in chronological order: Abdalá Bucaram (1996-1997), Rosalía Arteaga (February 1997), Fabián Alarcón (February 1997–August 1998), Jamil Mahuad (August 1998–January 2000), Gustavo Noboa (January 2000–January 2003), Lucio Gutiérrez (January 2003–April 2005) and Alfredo Palacio (April 2005–January 2007).

41. Over the years, structural reforms and changes to the composition of the high courts have been frequent in Ecuador[24] and, at times, the high courts were intervened by the political authorities. According to expert witness Mónica Rodríguez, proposed by the State, "[i]n Ecuador, the independence of the Supreme Court of Justice has been compromised and the institution exploited throughout its history."[25]

42. The context of this case is related to the termination of mandates of members of the Constitutional Tribunal, the Supreme Electoral Tribunal, and the Supreme Court of Justice of Ecuador in November and December 2004 (*infra* paras. 55 to 66). These terminations emanated from the National Congress. This case focuses on the termination of the members of the Constitutional Tribunal, as well as the impeachment of some of the members. In this regard, the Court considers it necessary to present the background to these facts.

1. The referendum called on April 7, 1997, and the amendments to the Constitution enacted on July 23, 1997

43. President Abdalá Bucaram was elected on August 10, 1996;[26] however, his government only lasted 180 days, because Congress removed him from office in February 1997.[27]

44. Following his removal, Fabián Alarcón Rivera was appointed interim President of the Republic.[28] On April 7, 1997, this President convened a referendum[29] by Executive Decree No. 201.[30] The political objective of the referendum was to legitimate Alarcón's government, because the constitutionality of his appointment had been questioned.[31] However, the

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[23] *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2013. Series C No. 266, para. 39.

[24] *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, para. 40.

[25] *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, para. 40.

[26] *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, para. 42.

[27] *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, para. 42.

[28] *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, para. 43.

[29] *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, para. 43.

[30] *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, para. 43.

[31] *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, para. 43.

consultation had two other clear objectives: to legitimate the actions of the public organs and to restore the country's institutional framework. The referendum authorized amendments to the Constitution and, also, constituted the basis for convening a Constituent Assembly.[32]

45. Some of the questions posed in the referendum were aimed at defining specific contents that would be binding for the Assembly and that would become automatic amendments to the Constitution, as established in the last question.[33] Questions 5 to 13 related to the party system and the electoral regime, the composition of the legislature, the election mechanisms for elected office at the local level, the ways that the control bodies should be appointed, the revocation of the mandate of those elected, and issues related to justice. Meanwhile, question 11 asked whether the population agreed that the Superior Council of the Judicature should perform administrative functions, and that its members be appointed by the Supreme Court of Justice.

46. In particular, question 10 referred to judicial independence and to the Supreme Court of Justice (hereinafter "SCJ"):

> ¿Do you consider it necessary to modernize the Judiciary, reform the system for appointing judges of the Supreme Court of Justice, so that they come from the Judiciary; appointments that are not subject to a fixed term that respect the criteria of professionalization and of the judicial career established by law?[34]

47. The referendum was held on May 25, 1997, and the answers to all the questions of the consultation were mostly in the affirmative.[35] According to official data published in the official gazette by the Supreme Electoral Tribunal, question 10 was approved with 1,651,162 votes, representing the support of 60.73% of voters.[36]

2. The Constitution adopted by the National Constituent Assembly in 1998

48. As previously mentioned, the referendum also accepted the creation of a National Constituent Assembly.[37] This Assembly was summoned by the approval of a "Special Law for the election of representatives to the National Assembly."[38] The Assembly approved the New Constitution of the Republic of Ecuador, which was published on August 11, 1998.[39]

49. The new Constitution contained norms to guarantee judicial independence.[40] First, it established the principle of the separation of powers and of judicial independence in article 199.[41] Second, it determined that, in public law, the public authorities could only do what is

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32 *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, para. 43.

33 *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, para. 44.

34 *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, para. 45.

35 *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, para. 46.

36 *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, para. 46.

37 *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, para. 54.

38 *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, para. 54.

39 *Cf.* Constitution of the Republic of Ecuador of August 11, 1998 (file of annexes to the answering brief, tome I, folio 3365).

40 *Cf.* Constitution of the Republic of Ecuador of August 11, 1998 (file of annexes to the answering brief, tome I, folio 3694).

41 Article 199. The organs of the Judiciary shall be independent in the exercise of their obligations and attributes. No branch of the State may interfere in matters that are inherent in the functions of the Judiciary.

established in the Constitution[42] and took away the competence of the National Congress to examine matters relating to the Judiciary.[43]

3. The appointment of the members of the Constitutional Tribunal in 2003

50. Article 275 of the 1998 Constitution of the Republic of Ecuador[44] established that the Constitutional Tribunal, with national jurisdiction, would have its seat in Quito; it would be composed of nine members, with their respective alternates; they would serve four-year terms and could be re-elected. The National Congress elected the titular judges and their alternates in January and March 2003 to be members of the Constitutional Tribunal and to have the competences defined in article 276 of the Constitution.[45]

Magistrates and judges shall be independent in the exercise of their jurisdictional powers, even in relation to the other organs of the Judiciary; they shall only be subject to the Constitution and the law. *Cf.* Constitution of the Republic of Ecuador of August 11, 1998 (file of annexes to the answering brief, tome I, folio 3694).

[42] Article 119. The institutions of the State, their agencies and departments, and public officials shall only have the powers that are set out in the Constitution and by law, and shall have the obligation to coordinate their actions towards the achievement of the common good. Those institutions determined by the Constitution and the law shall enjoy autonomy in their organization and functioning. *Cf.* Constitution of the Republic of Ecuador of August 11, 1998 (file of annexes to the answering brief, tome I, folio 3679).

[43] Article 130. The National Congress shall have the following duties and powers: 1. To swear in the President and the Vice President of the Republic whose election has been proclaimed by the Supreme Electoral Tribunal. To accept their resignation, to remove them following their impeachment; to establish their physical or mental incapacity or abandonment of their functions, and to declare them dismissed. […] 4. To amend the Constitution and to interpret it in a way that is usually binding. 5. To enact, to amend, and to repeal laws and to interpret them in a way that is usually binding. […] 8. To monitor the actions of the Executive Power and those of the Supreme Electoral Tribunal and to request public officials to provide any information that it deems necessary. 9. To institute impeachment proceedings, at the request of a quarter of the members of the National Congress, against the President and the Vice President of the Republic, the Ministers of State, the Comptroller General and the Attorney General, the Ombudsman, the Prosecutor General; the superintendents, the members of the Constitutional Tribunal and of the Supreme Electoral Tribunal, during the exercise of their functions and up to one year after their terms have concluded. *Cf.* Constitution of the Republic of Ecuador of August 11, 1998 (file of annexes to the answering brief, tome I, folio 3681).

[44] *Cf.* Constitution of the Republic of Ecuador of August 11, 1998 (file of annexes to the answering brief, tome I, folio 3707): Art. 275. The Constitutional Tribunal, with national jurisdiction, shall have its seat in Quito. It shall be composed of nine members, who shall have their respective substitutes. They shall perform their functions for four years and may be re-elected. The organic law shall determine the rules for their organization and functioning, and the procedures for their actions.

The members of the Constitutional Tribunal shall meet the same requirements as those required of justices of the Supreme Court of Justice, and shall be subject to the same prohibitions. They shall not incur liability for the opinions they issue and for the opinions they formulate in the exercise of their functions.

They shall be appointed by the National Congress, by a simple majority, as follows:
- two, from slates provided by the President of the Republic
- two, from slates provided by the Supreme Court of Justice, excluding its members
- two, elected by the National Congress, excluding legislators
- one, from the slate provided by mayors and provincial prefects
- one, from the slate provide by legally recognized national labor confederations and indigenous and peasant organizations
- one, from the slate provided by the legally recognized manufacturing chambers.

The law shall regulate the procedure for drawing up the slates referred to in the last three elements.

The Constitutional Tribunal shall elect a president and a vice president from among its members, and they will perform their functions for two years and may be re-elected.

[45] *Cf.* Constitution of the Republic of Ecuador of August 11, 1998 (file of annexes to the answering brief, tome I, folios 3707, 3709): Art. 276. The Constitutional Tribunal shall have competence:

> 1. To hear and decide appeals filed on the unconstitutionality, in substance or in form, of organic and ordinary laws, decree-laws, ordinances, statutes, regulations, and resolutions issued by organs of the institutions of the State, and to suspend all or some of their effects.

51. The nine members and their alternates were elected by the National Congress. This election was held so that seven of the nine members of the Constitutional Tribunal were elected from slates proposed by different State authorities and the other two were appointed directly by Congress.[46] The appointments corresponding to Congress, which did not result from a slate, were made on January 9, 2003, and corresponded to Enrique Herrería Bonnet and Oswaldo Cevallos Bueno. Manuel Jaramillo Córdova was appointed as the alternate for Judge Cevallos.[47]

52. Subsequently, on March 19, 2003, based on the different slates proposed, Congress appointed Milton Burbano and Simón Zabala Guzmán (from the slate presented by the President of the Republic), René de la Torre and Miguel Camba Campos (from the slate presented by the Supreme Court), Jaime Nogales (from the slate presented by the mayors and provincial prefects), Mauro Terán Cevallos (from the slate presented by the labor confederations and indigenous organizations) and Luis Rojas Bajaña (from the slate presented by the manufacturing chambers) as the titular judges of the Constitutional Tribunal.[48]

53. With the exception of the appointment of judges Herrería and Cevallos, the members were chosen by a "single list" *(en plancha)* election; in other words, without voting on each proposed slate, but rather by the approval of a single list.[49] The use of this method gave rise to some discussion during the election. During the regular session of March 19, 2003, some members of Congress maintained that the vote should have been held "name by name on each slate"; others considered that the initial selection and proposal made by one of the members of Congress should be "voted by single list" without discussing the persons

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2. To hear and decide on the unconstitutionality of the administrative acts of all public authorities. The declaration of unconstitutionality shall result in the annulment of the act, without prejudice to the administrative organ adopting the necessary measures to preserve respect for the constitutional norms.

3. To examine decisions that deny *habeas corpus, habeas corpus data*, and *amparo*, and cases of appeal established in the action for *amparo*.

4. To rule on objections of unconstitutionality by the President of the Republic, in the law drafting process.

5. To rule on conformity with the Constitution, and international treaties and conventions prior to their approval by the National Congress.

6. To decide disputes concerning competence or attributes assigned by the Constitution.

7. To exercise the other attributes conferred on it by the Constitution and the laws. The decisions of the Judiciary shall not be susceptible to control by the Constitutional Tribunal.

[46] *Cf.* Article 275 of the Constitution of the Republic of Ecuador of August 11, 1998 (file of annexes to the answering brief, tome I, folio 3707).

[47] *Cf.* National Congress Resolution No. R-24-016 of January 9 2003 (file of annexes to the report, tome I, folio 4).

[48] *Cf.* National Congress Resolution No. R-24-054 of March 19, 2003 (file of annexes to the report, tome I, folios 6 and 7).

[49] According to the representatives, the "single list" (*por plancha*) election is "a common exception in the Ecuadorian political sphere and consists in the practice of voting for a whole list instead of selecting candidates from several lists for election to office. In multi-person elections in Ecuador, it is possible to choose candidates from several lists (party or political movement) to occupy collegiate bodies. For example, if five members of the provincial Assembly must be elected in a province, each list must register five candidates and, if there are two lists, the elector may select four candidates from one list and one from the other; three candidates from one and two from the other; or vote 'by single list'; in other words elect the five candidates from the same list. This popular expression was used in the National Congress in 2003 to indicate that the judges were elected in a single act instead of being chosen one by one." Final written arguments of the representatives of the presumed victims (merits file, tome IV, folios 1791 and 1792).

proposed on each slate individually.[50] In this context, the Speaker proposed as a prior motion, to be approved by a simple majority, a consultation concerning whether the "the election of members of the Constitutional Tribunal should be […] held by the "single list" procedure."[51] The result of the vote was 53 of the 95 members of Congress present in favor.[52] Consequently, the vote was held on the candidates proposed on the slates, by a "single-list" vote;[53] in other words, by "a single vote for the first names on the slates and their alternates or substitutes."[54] Congress approved the "motion on the incorporation of the individuals representing the different entities on the Constitutional Tribunal" with 60 of the 97 members present in favor.[55]

54. All the members of the Constitutional Tribunal were sworn in before the Speaker of the National Congress on March 24, 2003.[56]

B. The termination of the members of the Constitutional Tribunal owing to the presumed illegality of the way they were appointed during the session of November 25, 2003

55. On November 9, 2004, in the National Congress, the parties opposing the Government prepared the impeachment of the President of the Republic for the offense of embezzlement.[57] To counteract this action, the evidence in the case file, which was not disputed by the State, indicates that the Government was able to put together a parliamentary majority and entered into political agreements with, among others, the Ecuadorian Roldosista Party (PRE).[58] The leader of the PRE, the former President of the

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[50] *Cf.* National Congress Record No. 24-031 of March 19, 2003 (file of annexes to the report, tome I, folios 33 to 53) and Affidavit prepared by Simón Zavala (merits file, tome III, folio 1236).

[51] *Cf.* National Congress Record No. 24-031 of March 19, 2003 (file of annexes to the report, tome I, folio 54).

[52] *Cf.* National Congress Record No. 24-031 of March 19, 2003 (file of annexes to the report, tome I, folio 54).

[53] *Cf.* National Congress Record No. 24-031 of March 19, 2003 (file of annexes to the report, tome I, folios 54 and 55).

[54] Affidavit prepared by Simón Zavala (merits file, tome III, folio 1236).

[55] *Cf.* National Congress Record No. 24-031 of March 19, 2003 (file of annexes to the report, tome I, folios 68 and 69).

[56] *Cf.* National Congress, Record of swearing in of the judges (file of annexes to the report, tome I, folios 8 to 29).

[57] *Cf.* Newspaper articles: "*Juicio político divide el Congreso*" [Impeachment divides Congress] in *Hoy* of November 5, 2004 (file of annexes to the report, tome III, folio 1125); "*Primer asalto para el Gobierno*" [First attack on the Government] in *Hoy* of November 10, 2004 (file of annexes to the report, tome III, folio 1128); "*Inicio de juicio, cuestión de horas*" [Start of trial, a matter of hours] in *Hoy* of November 4, 2004 (file of annexes to the report, tome III, folio 1124); "*Llevaré a juicio a un dictadorzuelo*" [Aspiring dictator brought to trial] in *Hoy* of November 5, 2004 (file of annexes to the report, tome III, folio 1125), and "*Gobierno 'vira' diputados y 'anula' juicio*" [Government 'turns around' members of Congress and 'annuls' trial], in *Hoy* of November 10, 2004 (file of annexes to the merits, tome III, folio 1126).

[58] *Cf.* Newspaper articles: "'*Ximenazo' salva la cabeza de Gutiérrez*" ['Ximenazo' saves Gutiérrez's head]; "*Primer asalto para el Gobierno*" [First attack on the Government] and "*El verdadero triunfo es el retorno de Bucaram*" [Real triumph is return of Bucaram] in *Hoy* of November 10 and 11 (file of annexes to the report, tome III, folios 1127 and 1128); "*Buscan reestructurar TC*" [Seeking to restructure the CT] in *El Telégrafo* of November 23, 2004 (file of annexes to the report, tome III, folio 1129); "*Gobierno busca reestructurar el TC*" [Government seeking to restructure CT] in *La Hora* of November 23, 2004 (file of annexes to the report, tome III, folio 1130); "*El oficialismo quiere controlar el Congreso*" [Ruling party seeks to control Congress] in *Expreso de Guayaquil* of November 25, 2004 (file of annexes to the report, tome III, folio 1132); "*Mayoría reestructuró la integración del TC and TSE*" [Majority restructured composition of CT and SET] and "*Mayoría no logró censurar a los ex vocales del TC*" [Majority unable to censure former CT members] in *El Universo* of November 26 and December 3, 2004 (file of

Republic, Abdalá Bucaram Ortíz, sought the annulment of several criminal trials that were being processed before the Supreme Court of Justice, based on which there was an order for his arrest and he was a fugitive from justice in Panama.[59]

56. On November 23, 2004, the President of the Republic, Lucio Gutiérrez, announced the Government's intention of submitting to Congress a proposal for the reorganization of the Constitutional Tribunal, the Supreme Electoral Tribunal, and the Supreme Court of Justice.[60]

57. On November 24, 2004, the Constitutional Tribunal issued and published a press communiqué in which it stated that "[t]he members of the Tribunal [were] ready to respond for any acts or omissions in the exercise of [their] functions by means of the constitutional procedure, namely impeachment; any other procedure w[ould] not be in keeping with the constitutional norms and, consequently, would violate the Constitution."[61] In this communiqué they added that "[i]f the members of the Constitutional Tribunal should be removed by a simple decision, this would violate the social state based on the rule of law."[62]

58. On November 25, 2004, a session of the National Congress was held. The agenda for this session indicated: "1. Continuation of the nominal vote on the admissibility of appeals to the Speaker of the National Congress. 2. Debate and decision on the motion of

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annexes to the report, tome III, folios 1133 and 1164); "*Lo que se está negociando en el Parlamento*" [What is being negotiated in Parliament] in *Expreso de Guayaquil* of November 26, 2004 (file of annexes to the report, tome III, folio 1135), "*Mayoría consiguió nombrar a II Vicepresidente y reorganizar al TC*" [Majority able to name second Vice President and reorganize CT], and "*Mayoría busca ampliar espacios de negociación*" [Majority seeks to expand negotiating mechanisms] in *El Telégrafo* of November 26 and 27, 2004 (file of annexes to the report, tome III, folios 1136 and 1139).

[59] *Cf.* Witness Wilfrido Lucero testified that "[u]ndoubtedly, we were in the presence of a significant political maneuver. The fact that a parliamentary majority had been created was undisputed; the problem was that this majority was created to violate the Constitution and achieve the Government's political interests, such as avoiding the impeachment of President Gutiérrez and eliminating the Supreme Court of Justice […] in order to annul a criminal proceeding against President Abdalá Bucarám." Affidavit prepared by witness Lucero Bolaños on May 13, 2013 (merits file, tome III, folio 1369). Also, witness Torres stated that "[a]s soon as the members of the [Constitutional Tribunal] and the justices of the [Supreme Court of Justice] had been removed, the new judicial authorities denied any possibility of declaring the unconstitutionality of the arbitrary actions perpetrated by Congress, the trial of President Bucaram was annulled and he returned to the country and, finally, all the courts and even the President of the Republic had to resign and the latter even had to leave the country." Testimony of witness Torres Torres (merits file, tome III, folio 1365). "*El poder de Bucaram se afinca en el Parlamento"* [Bucaram's authority installed in Parliament] in *El Comercio* of January 6, 2005 (file of annexes to the report, tome III, folio 1145); "*TC se mantiene en el debate por Bucaram"* [CT continues debate over Bucaram] in *El Universo* of November 29, 2004 (file of annexes to the report, tome I, folio 1207); "*El verdadero triunfo es el retorno de Bucaram*" [Real triumph is the return of Bucaram] in *Hoy*, November 10, 2004 (file of annexes to the merits, tome III, folio 1128), and "*Oposición desacelera a gobiernistas*" [Opposition slows down governing party] in *El Universo* of November 25, 2004 (file of annexes to the report, tome VIII, folio 3429).

[60] *Cf.* Newspaper articles "*Buscan reestructurar TC*" [Seeking to restructure VT] in *El Telégrafo* of November 23, 2004 (file of annexes to the report, tome III, folio 1129); "*Gobierno busca reestructurar el TC*" [Government seeks to restructure CT] in *La Hora* of November 23, 2004 (file of annexes to the report, tome III, folio 1130); "*La Corte y el Tribunal Constitucional piden respecto a la Carta Magna vigente"* [The Court and the Constitutional Tribunal demand respect for the actual Constitution] and "*El oficialismo quiere controlar el Congreso*" [The official party seeks to control Congress] in *Expreso de Guayaquil* of November 25, 2004 (file of annexes to the report, tome III, folios 1131, 1132).

[61] *Cf.* Press communiqué of the Constitutional Tribunal in *La Hora* entitled "From the Constitutional Tribunal to the Country" of November 24, 2004 (file of annexes to the report, tome I, folio 74).

[62] *Cf.* Press communiqué of the Constitutional Tribunal in *La Hora* entitled "From the Constitutional Tribunal to the Country" of November 24, 2004 (file of annexes to the report, tome I, folio 74).

congressman Roberto Rodríguez to include on the agenda the election of the Second Deputy Speaker of the National Congress and other senior officials."[63]

59. At the start of the session, several members of Congress mentioned that a decision was pending to terminate the members of the Constitutional Tribunal for a presumed error in their appointment. For example, congressman Haro Páez indicated that the "PRE-PRI Alliance, which has been called the constitutionalist Parliamentary bloc, had already prepared a draft decision that was not only related to the Constitutional Tribunal and the Supreme Electoral Tribunal, but would also declare the termination of the Attorney General and the country's courts of justice."[64]

60. Subsequently, two items on the agenda were discussed.[65] When that discussion was concluded, congresswoman María Augusta Rivas filed a motion to submit the termination of the members of the Constitutional Tribunal to debate owing to the presumed illegal way in which they had been appointed on March 19, 2003, which entailed adding a new item to the agenda.[66] In this regard, several members of Congress indicated that changing the agenda was contrary to parliamentary procedure.[67]

61. Following the intervention of several members, Congress approved Resolution No. R-25-160, deciding that the appointment of the titular members of the Constitutional Tribunal and their alternates in 2003 had been illegal, and terminating their term of office, by 55 votes in favor and 34 abstentions.[68]

62. Resolution No. R-25-160 stipulated:

THE NATIONAL CONGRESS

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[63] *Cf.* National Congress Record No. 24-323 of November 25, 2004 (file of annexes to the report, tome I, folio 126).

[64] *Cf.* National Congress Record No. 24-323 of November 25, 2004 (file of annexes to the report, tome I, folio 134).

[65] *Cf.* National Congress Record No. 24-323 of November 25, 2004 (file of annexes to the report, tome I, folios 129 to 346).

[66] *Cf.* National Congress Record No. 24-323 of November 25, 2004 (file of annexes to the report, tome I, folios 347 to 349).

[67] National Congress Record No. 24-323 of November 25, 2004 (file of annexes to the report, tome I, folios 133, 138, 154 and 166). In this regard, congressman Haro Paez indicated that "[y]esterday, when the session of the Ecuadorian parliament had just commenced, congressman Roberto Rodríguez asked for a change in the agenda; according to article 51 of the rules of procedure governing the sessions, this was not possible because, also, it was not possible to discuss the request concerning the appeal to the Speaker of the National Congress." In addition, congressman Landázuri Carrillo stated that "[a]t the start of the session, with a single item on the agenda, congressman Roberto Rodríguez requested the inclusion of another item on the agenda, a situation that was contrary to the Constitution, the law and the rules of procedure. However, the Speaker of the National Congress must facilitate the will of the majority, even when, in many cases, that majority jeopardizes the Constitution and the law." Congressman Carlos Torres Torres affirmed that "[t]he pertinent part of article 87 states: 'The agenda of these sessions shall be prepared based on the matter or matters that led to calling for the session, and may not be changed.' We are violating this, Mr. Speaker. This is why the appeal to the Speaker of the National Congress, Guillermo Landázuri, is not in order." Furthermore, congressman Bustamante Vera stated that "[t]herefore, Mr. Speaker, it is evident that the agenda of yesterday's session could not have been altered for any reason, because this regular session, Mr. Speaker, let me remind you, is the continuation of yesterday's session as you stated when closing that session at 2.15 p.m. Consequently, Mr. Speaker, how is that here, on this agenda, which should have been yesterday's agenda, a second item appears which states discussion and resolution on the motion of congressman Roberto Rodríguez to include on the agenda the election of the second Deputy Speaker of the National Congress and other senior officials."

[68] *Cf.* National Congress Record No. 24-323 of November 25, 2004 (file of annexes to the report, tome I, folio 418).

Considering:

That the people of Ecuador are unanimous in demanding the end of the situation of institutional chaos prevailing in the public institutions;

That the titular members of the Constitutional Tribunal and their alternates were appointed in an illegal manner;

[…]

That it is the institutional duty of the National Congress to comply with and to enforce the Constitution of the Republic and the laws, and

In exercise of its constitutional and legal authority,

Resolves:

1. To declare that the titular members of the Constitutional Tribunal and their alternates were appointed in an illegal manner and to proceed to appoint them pursuant to the provisions of the Constitution of the Republic and the law, from the names provided on the slates duly received by the National Congress

To designate the two titular members of the Constitutional Tribunal and their alternates that the National Congress must appoint directly. Those appointed must be sworn in before the Speaker and/or either of the Deputy Speakers of the National Congress and shall remain in office until they are legally replaced in January 2007.

[…]

3. This resolution shall enter into force immediately, without prejudice to its publication in the official gazette."[69]

63. Thus, the 18 members of the Constitutional Tribunal (9 titular members and 9 alternate members), including the presumed victims in this case, were removed from office.

64. Furthermore, the National Congress issued Resolutions Nos. R-25-161, 162, 163, 164, 165, 166, 167, 168 and 169, by which it appointed – based on the 2003 slates: from the slates provided by the President of the Republic and by the Supreme Court of Justice, 4 titular members and 4 alternate members of the Constitutional Tribunal. It also appointed 1 titular member and 1 alternate member of the Constitutional Tribunal from the slate provided by the mayors and provincial prefects, 1 titular member and 1 alternate member of the Constitutional Tribunal from the slate provided by labor confederations and indigenous and peasant organizations, and 1 titular member and 1 alternate member of the Constitutional Tribunal from the slate provided by the manufacturing chambers. In these resolutions, the National Congress cited articles 130(11) and 275 of the Constitution of the Republic.[70] In addition, it established that the new members should be sworn in the following day.[71]

65. The members of the Constitutional Tribunal who had been removed were not notified before the session, or heard during the session.[72]

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[69] *Cf.* National Congress, Resolution No. R-25-160 of November 25, 2004 (file of annexes to the report, tome I, folios 80 and 81).

[70] *Cf.* National Congress, Resolutions Nos. R-25-161, R-25-162, R-25-163, R-25-164, R-25-165, R-25-166, R-25-167, R-25-168 and R-25-169 of November 25, 2004 (file of annexes to the report, tome I, folios 81 to 83).

[71] *Cf.* National Congress Record No. 24-323 of November 25, 2004 (file of annexes to the report, tome II, folio 589).

[72] *Cf.* National Congress Record No. 24-323 of November 25, 2004 (file of annexes to the report, tome I, folios 347 and 348); Affidavit prepared by Manuel Jaramillo Córdova on March 6, 2013 (merits file, tome III, folio 1302); Affidavit prepared by Jaime Nogales Izurieta on March 4, 2013 (merits file, tome III, folio 1321), and Affidavit prepared by Mauro Terán Cevallos on March 6, 2013 (merits file, tome III, folio 1314).

66. Meanwhile, by Resolution No. R-25-160, the National Congress also declared the removal from office of the titular judges and alternates of the Supreme Electoral Tribunal "because they had been appointed without taking into account the provisions of article 209 of the Constitution," and issued seven resolutions on November 26, 2004, in which it designated nine titular judges and their alternates of the Supreme Electoral Tribunal.[73]

C. Facts related to the impeachment of some members of the Constitutional Tribunal

1. Processing of the impeachments under the laws in force at the time of the facts

67. Article 130(9) of the 1998 Constitution established the possibility of impeaching certain officials to decide whether they were guilty of "statutory or constitutional offenses committed in the performance of their functions."[74] In particular, this article stipulated that it was a function of Congress:

> Article 130(9): To proceed to impeach, at the request of at least one quarter of the members of the National Congress, the President and Vice President of the Republic, the Ministers of State, the Comptroller General, and the Attorney General, the Ombudsman, the Prosecutor General, the superintendents, **the members of the Constitutional Tribunal** and of the Supreme Electoral Tribunal, during the exercise of their functions and up to one year after their term has concluded. (Bold added)

68. The impeachment proceedings were regulated in articles 86 to 91 of the 1992 Law on the Organization of the Legislative Function.[75] Also, the motions of censure and the possibility of the impeachment of the members of the Constitutional Tribunal were regulated in articles 92 to 104 of that law.[76]

69. Regarding the procedure of bringing charges, the proceeding was as follows: (i) the charges were filed before the Speaker by submitting, in writing, the charges against the official, for acts or omissions attributed to him in the exercise of his functions that were classified as offenses by the legislator or legislators bringing the charges, who could not be more than one for each bloc of political parties represented in the National Congress; (ii) once signed, the charges were submitted to the President of the Legislature and then forwarded by him to the Political Monitoring and Control Committee for verification; (iii) the Political Monitoring and Control Committee, within five days, forwarded the charges and the evidence obtained to be examined by the plenary of the National Congress; (iv) during the said five days, the official who had been accused could exercise his right of defense before the Political Monitoring and Control Committee orally and in writing; (v) at the request of the party concerned, an additional period of five days could be granted in order to verify all the evidence; (vi) once this non-extendible five-day period has expired, all the proceedings were forwarded to the Speaker of the National Congress, and (vii) in the five days following the expiry of the last time frame, the Speaker or the legislators who had filed the charges could propose the respective motion of censure to Congress through the Speaker and,

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[73] *Cf.* National Congress Resolutions No. R-25-170, R-25-171, R-25-172, R-25-173, R-25-174, R-25-175 and R-25-176 of November 26, 2004 (file of annexes to the report, tome I, folios 83 to 85).

[74] 1998 Constitution of the Republic of Ecuador, article 130(9) (file of annexes to the answering brief, tome I, folio 3681).

[75] *Cf.* Law on the Organization of the Legislative Function of Ecuador (file of annexes to the answering brief, tome I, folios 3639 to 3641).

[76] *Cf.* Law on the Organization of the Legislative Function of Ecuador (file of annexes to the answering brief, tome I, folios 3640 and 3641).

should this time frame expire, it was considered that they had lost the right to submit the motion of censure and that the proceeding had concluded.

70. The motion of censure commenced when the accusation proceeding had concluded with the submission or proposal of the motion by the legislators who had filed the charges.[77] Once the motion had been proposed, "the Speaker of the National Congress or his deputy [would] indicate the date and time of the session during which the debate [would] start that [would] conclude with the respective vote. **This date c[ould] not be less than five days or more than ten days from the date on which the motion of censure was proposed** and if the National Congress was not sitting in an regular session, it [would] be called to a special session within **no more than thirty days**"[78] (bold added). This special period could be prolonged for sixty days more by the Speaker of the National Congress at the written request of ten members of Congress.[79]

71. Once the foregoing procedure had been completed, on the pre-established date and time, the impeached official could exercise his right of defense, in person, before the National Congress for a maximum time of eight hours. Subsequently, "the legislators who ha[d] filed the charges and who ha[d] presented the respective motion of censure, ha[d] to substantiate their accusations for two hours each, in the chronological order in which they had proposed the motion of censure. Then, the impeached official could respond for a maximum of four hours."[80]

72. Once the impeached official's formal intervention before the National Congress had concluded, he would withdraw from the room, so that the Speaker of the National Congress could open the debate in which all the legislators could participate and expound their arguments for 20 minutes each. This procedure ended with the closure of the final discussions and, then, the Speaker would "order that a nominal vote be taken for or against the censure. The motion of censure [was] considered approved with an absolute majority of the total number of members of the National Congress."[81]

73. According to subparagraphs 9, 10 and 11 of article 130 of the 1998 Constitution, the effects of the adoption of the motion of censure were as follows:[82] (i) the immediate removal of the official; (ii) if the censure provided evidence of the criminal liability of the official, a decision would be taken to refer the matter to be heard by the competent judge, and (iii) in the cases in which the appointments had been the result of slates, slates for the vacancy in the position should be presented within the following 20 days and, if the said slates were not received within this period, Congress would proceed to make the appointments without them.

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[77] *Cf.* Article 91 of the Law on the Organization of the Legislative Function of Ecuador (file of annexes to the answering brief, tome I, folio 3640).

[78] Article 92 of the Law on the Organization of the Legislative Function of Ecuador (file of annexes to the answering brief, tome I, folio 3640).

[79] *Cf.* Article 93 of the Law on the Organization of the Legislative Function of Ecuador (file of annexes to the answering brief, tome I, folio 3640).

[80] Article 94 of the Law on the Organization of the Legislative Function of Ecuador (file of annexes to the answering brief, tome I, folio 3640).

[81] Articles 94 and 95 of the Law on the Organization of the Legislative Function of Ecuador (file of annexes to the answering brief, tome I, folio 3640).

[82] *Cf.* 1998 Constitution of the Republic of Ecuador, article 130 (file of annexes to the answering brief, tome I, folio 3681).

2. Rulings of the Constitutional Tribunal No. 0004-2003-TC of April 29, 2003, and No. 025-2003-TC of February 17, 2004

74. The impeachment of the members of the Constitutional Tribunal was initiated by some members of Congress owing to their disagreement with two decision adopted by that court. One of them related to a "fourteenth salary" and the other to a system for assigning electoral seats, known as the "D'Hondt method."

75. The decision on the unconstitutionality of the "fourteenth salary" was adopted by Ruling No. 0004-2003-TC of April 29, 2003. Judges Miguel Camba Campos, René de la Torre, Jaime Nogales, Luis Rojas and Oswaldo Cevallos Bueno voted in favor of this judgment, while Judges Milton Burbano, Enrique Herrería, Mauro Terán and Simón Zavala abstained.[83]

76. The ruling decided an appeal on unconstitutionality that challenged the constitutionality, owing to the substance and form, of "Law No. 2002-88 Interpretive of Article 113 of the Labor Code." Regarding the form, the appeal indicated that the National Congress had erroneously classified the law as interpreting rather than amending and, therefore, had forwarded it to the official gazette for publication without having sent it previously to the President of the Republic for his approval or objection, as the Constitution established.[84] Regarding the substance, the appeal indicated that the amendment established by that law of the legal framework for calculating the fourteenth salary or educational bonus – which ceased to be the general minimum living wage (SMVG) and became the minimum basic wage – signified a threefold increase in the value of this extra salary, even for public sector workers, which entailed a violation of the constitutional provision establishing that only the President of the Republic "shall have legislative powers to increase public expenditure."[85]

77. The Constitutional Tribunal accepted the arguments concerning the substance and declared that Law No. 2002-8 was unconstitutional.[86]

78. The decision on the unconstitutionality of the D'Hondt method[87] for the assignment of seats was adopted by para Ruling No. 025-2003-TC of February 17, 2004. Judges Miguel

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[83] *Cf.* Ruling No. 004-2003-TC of the Constitutional Tribunal (file of annexes to the report, tome II, folios 598 to 613).

[84] *Cf.* Ruling No. 0004-2003-TC of the Constitutional Tribunal (file of annexes to the report, tome II, folio 598).

[85] *Cf.* Ruling No. 0004-2003-TC of the Constitutional Tribunal (file of annexes to the report, tome II, folio 598).

[86] *Cf.* Ruling No. 0004-2003-TC of the Constitutional Tribunal (file of annexes to the report, tome II, folio 598).

[87] The Constitutional Tribunal indicated that "[13.] Article 99 of the Constitution determines two situations: (1) A system of open lists, because citizens do not have the obligation to vote for a list, but can elect the candidates on an individual basis, without the list on which they appear having any importance; (2) A law that conciliates the system of open lists with that of the proportional representation of minorities. [14.] Although it is true that the D'Hondt method has been designed to facilitate the representation of minorities, it is also true that its application is inappropriate in an open list system […], hence this method should not appear in the law to conciliate the open election system with the proportional representation of minorities, thus becoming, contrary to the constitutional mandate. [15.] The D'Hondt method is considered inappropriate with the open election system, because one of its errors, even though this is involuntary, is that the elector who prefers one candidate must vote not only for him, but also for the others on the list, even though he has no preference for them, because this is the only way that ensures the possibility that his candidate will win the desired seat. This occurs because the system of assigning seats under the D'Hondt method is implemented based on the votes received by the list, rather than by the individual, thus achieving an effect that is contrary to the one sought by the people's sovereignty when opting

Camba Campos, Luis Rojas Bajaña, Simón Zavala, Manuel Jaramillo and Jaime Nogales voted in favor of this judgment, while Judges Milton Burbano, René de la Torre, Enrique Herrería and Mauro Terán abstained.[88] The alternate judge, Manuel Jaramillo participated in this ruling, replacing Judge Oswaldo Ceballos.

79. The Constitutional Tribunal decided an appeal on unconstitutionality owing to the content of articles 105 and 106 of the Election Act, which indicated that the D'Hondt system for the distribution of seats disregarded the intentions of the electorate in those countries with electoral systems based on open lists.[89] The Constitutional Tribunal admitted the arguments submitted and declared the unconstitutionality of articles 105 and 106 of the Election Act. In the decision, it indicated that the D'Hondt method was a system for assigning seats, the application of which:

> "[was] inappropriate with the system of open elections [… given that] it is implemented based on the votes received by the list, not by the individual, the effect of which is contrary to the effect sought. […] For this reason, the D'Hondt method is appropriate and successful in closed system elections, where it achieves the objective of providing proportional representation to minorities. […] Although it is true that the D'Hondt method guarantees the representation of minorities, it disrupts the open election system, because it counteracts the specific democratic power of the electorate to choose candidates of their preference from a list or between lists, in the case of open lists, and has the effect of producing important differences as regards the representativeness that the elector sought and, consequently, the legitimacy of various persons who accede to the respective public offices becomes debatable."[90]

3. The motions of censure against the members of the Constitutional Tribunal

80. In this case, six motions of censure were presented with regard to the rulings adopted by the Constitutional Tribunal in relation to the "fourteenth salary" and the D'Hondt method (*supra* paras. 74 to 79):

> a) On May 6, 2003, congressman Luis Villacís Maldonado filed an accusation against Oswaldo Cevallos, Luis Rojas, Jaime Nogales, Miguel Camba and René de la Torre based on their votes on the decision of the Constitutional Tribunal in Ruling No. 0004-2003-TC (fourteenth salary).[91] The motion of censure (A) was presented on June 13, 2003;[92]

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for a system of open lists. […] [17.] The D´Hondt Method established in articles 105 and 106 of the Elections Act and article 111 of its General Regulations is not the appropriate system to conciliate the spirit embodied in the Constitution by the principle of open lists with that of the proportional representation of minorities, so that it contravenes article 99 of the Constitution of the State, violates the democratic participation of Ecuadorian citizens embodied in articles 18, 26, 27 and 97(17), of this instrument, and fails to respect the principle of constitutional rank that, in our legal system is established in article 272 of the Constitution, which stipulates that the Constitution has prevalence over any law and anything that contradicts it is ineffective." Ruling No. 025-2003-TC of the Constitutional Tribunal (file of annexes to the report, tome II, folios 627, 628 and 629).

88 *Cf.* Ruling No. 025-2003-TC of the Constitutional Tribunal (file of annexes to the report, tome II, folios 627 and 628)

89 *Cf.* Ruling No. 025-2003-TC of the Constitutional Tribunal (file of annexes to the report, tome II, folio 633).

90 *Cf.* Ruling No. 025-2003-TC of the Constitutional Tribunal (file of annexes to the report, tome II, folios 627 and 628).

91 *Cf.* National Congress Record No. 24-326 of December 1, 2004 (file of annexes to the report, tome II, folios 915 and 916).

92 *Cf.* Motion of censure of June 13, 2003 (file of annexes to the report, tome II, folio 593). In this motion, the congressman alleged that the judges "had assumed functions of legislators, reserved only to the members of Congress of the Republic" and that the Constitutional Tribunal's decision to rule on the form and not on the substance of the law in question had "resulted in chaos and an objectionable inequality among Ecuadorians."

b) On May 8, 2003, congressman Antonio Posso Salgado filed an accusation against Oswaldo Cevallos, Luis Rojas, Jaime Nogales, Miguel Camba and René de la Torre based on their votes on the decision of the Constitutional Tribunal in Ruling No. 0004-2003-TC (fourteenth salary).[93] The motion of censure (B) was presented on June 24, 2003;[94]

c) On May 8, 2003, congressman Marco Proaño Maya filed an accusation against Oswaldo Cevallos, Luis Rojas, Jaime Nogales, Miguel Camba and René de la Torre based on their votes on the decision of the Constitutional Tribunal in Ruling No. 0004-2003-TC (fourteenth salary).[95] The motion of censure (C) was presented on June 16, 2003;

d) On May 13, 2003, congressman Segundo Serrano Serrano submitted an accusation against Oswaldo Cevallos, Luis Rojas, Jaime Nogales, Miguel Camba and René de la Torre based on their votes on the decision of the Constitutional Tribunal in Ruling No. 0004-2003-TC (fourteenth salary).[96] The motion of censure (D) was presented on June 11, 2003;

e) On April 5, 2004, congressman Segundo Serrano Serrano submitted an accusation against Oswaldo Cevallos, Manuel Jaramillo (alternate judge for Oswaldo Cevallos), Jaime Nogales, Miguel Camba, Luis Rojas and Simón Zabala based on their votes on the decision of the Constitutional Tribunal in Ruling No. 025-2003-TC (D'Hondt method)[97]. The motion of censure (E) was presented on May 31, 2004,[98] and

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93 *Cf.* National Congress Record No. 24-326 of December 1, 2004 (file of annexes to the report, tome IIII, folios 915 and 916).

94 Regarding the motion of censure presented by congressman Segundo Serrano Serrano, it was presented because, presumably, the judges, "when delivering their ruling, accepted an erroneous fact; namely, that 1,000 citizens with political rights had supposedly filed an action on unconstitutionality, pursuant to the provisions of article 277(5) of the Constitution. As established in this proceeding, the authenticated signatures and the Ecuadorian citizens with political rights do not exist and, furthermore, Gustavo Pinto, who appears as Attorney General, has never been appointed to this position. Hence, since the said judges did not verify the supporting signatures, they have committed the offense defined in article 339 of the Criminal Code and, therefore, are guilty of this violation of the law, committed while exercising their functions. Similarly, with their decision, they have ignored the exclusive and specific authority of the National Congress to interpret the law, as established in article 130(5) of the Constitution, as well as in article 14(7) of this instrument, article 3 of the Civil Code, and article 73 of the Law on the Organization of the Legislative Function. At the same time, with this decision, the said judges have violated the provisions of numbers 1, 3, 4 and 6 of the Constitution, as well as articles 4, 5 and 7 of the Labor Code." National Congress Record No. 24-326 of December 1, 2004 (file of annexes to the report, tome III, folios 1012 and 1013).

95 *Cf.* National Congress Record No. 24-326 of December 1, 2004 (file of annexes to the report, tome IIII, folios 915 and 916).

96 *Cf.* National Congress Record No. 24-326 of December 1, 2004 (file of annexes to the report, tome IIII, folios 915 and 916).

97 *Cf.* National Congress Record No. 24-326 of December 1, 2004 (file of annexes to the report, tome IIII, folios 915 and 916).

98 According to the motion of censure presented by congressman Serrano Serrano, "[t]he members of the Constitutional Tribunal […] who processed and approved Ruling No 025-2003-TC […], as proved in these proceedings, with the respective evidence, by delivering their judgment, Jaime Nogales Izurieta, Miguel Camba Campos, Luis Rojas Bajaña, Simón Zavala Guzmán, and Manuel Jaramillo Córdova, alternate member for Oswaldo Cevallos Bueno, and the latter, as President of that Tribunal, by admitting the complaint filed by Xavier Neira Menéndez, have acted according to their personal interests and to benefit those who enabled their election to the Constitutional Tribunal; namely, the Social Christian Party, prejudicing and placing at a disadvantage all the other political parties that exist in the country; also, by ignoring the formula for calculating proportional representation that permitted plural and democratic political representation, with the participation of majorities and minorities, as established in art. 99 of the Constitution, they have jeopardized the next elections; with this dangerous attack on the democratic life of the country, as well as on the rights and freedoms guaranteed in the Constitution, they have committed offenses defined in arts. 277 and 213, respectively, of the Criminal Code; and also violated the following articles of the Constitution: 1 – which defines our State as participative and inclusive; 18 – which establishes that a decision may restrict the exercise of constitutional rights and guarantees; 26 – which allows Ecuadorians to

f) On April 15, 2004, congressman Antonio Posso Salgado submitted an accusation against Manuel Jaramillo (alternate judge for Oswaldo Cevallos), Jaime Nogales, Miguel Camba, Luis Rojas and Simón Zabala based on their votes on the decision of the Constitutional Tribunal in Ruling No. 025-2003-TC (D'Hondt method).[99] The motion of censure (F) was presented on July 7, 2004.

81. On November 24, 2004 the Speaker summoned the members of the Constitutional Tribunal to appear for the impeachment proceeding on December 1, 2004, "to the debate on the motions of censure tabled against them by congressmen Luis Villacis Maldonado, Antonio Posso Salgado, Segundo Serrano and Marco Proaño Maya." [100]

4. The vote on the motions of censure in the impeachment proceeding of December 1, 2004

82. Regarding the summons issued on November 24, 2004, in accordance with the first item on the agenda, in the session of December 1, 2004, Congress dealt with the debate on the motions of censure tabled against the judges who were removed from the Constitutional Tribunal.[101]

83. On December 1, 2004, these judges had already been terminated (*supra* para. 63). However, paragraph 9 of article 130 of the 1998 Constitution indicated that judges could be prosecuted "during the exercise of their functions and up to one year after ending them."

84. The session opened with 53 legislators sitting in a regular session. The agenda was as follows: "1. Debate on the motions of censure tabled in the impeachment proceedings against […] Oswaldo Cevallos, Luis Rojas, Jaime Nogales, Miguel Camba, Manuel Jaramillo, René de la Torre, [… and] 2. First debate on the bill for the creation of the canton of La Concordia."[102] Following the opening of the session, the Secretary read out the legal and constitutional norms relating to the impeachment procedure and the six motions of censure.[103]

85. During the session, the interventions of judges Oswaldo Cevallos, Miguel Camba Campos, René de la Torre, Manuel Jaramillo, Jaime Nogales, Luis Rojas and Simón Zavala

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exercise political rights such as voting and being elected; 27 – which defines elections, and art. 97(17) – which allows citizens to participate in the country's political, civil and community life, honestly and transparently." *Cf.* motion of censure tabled by congressman Segundo Serrano Serrano, Note No. 106-SISS-KB-HCN-JP, of May 31, 2004 (file of annexes to the report, tome II, folio 617).

99 *Cf.* National Congress Record No. 24-326 of December 1, 2004 (file of annexes to the report, tome IIII, folios 915 and 916).

100 National Congress, Note No. 1212-PCN of November 24, 2004. (file of annexes to the report, tome I, folio 78). In addition, a record exists that "the communication sent to Simón Zavala, under note No. 1218 PCN of November 24, 2004, was delivered to the office of Mr. Zavala on November 25, 2004, at 12.50 p.m." National Congress Record No. 23-326 of December 1, 2004 (file of annexes to the report, tome II, folio 914). However, during the session on November 25, 2004, the Secretary of Congress certified that all the members of the Constitutional Tribunal had been notified and summoned. *Cf.* National Congress Record No. 24-323 of November 25, 2004 (file of annexes to the report, tome I, folio 212).

101 *Cf.* National Congress Record No. 24-326 of December 1, 2004 (merits file, tome I, folios 433 to 529). *Cf.* Affidavit prepared by Simón Zabala Guzmán on March 12, 2013 (merits file, tome III, folio 1246), and Affidavit prepared by Jaime Manuel Nogales Izurieta on March 4, 2013 (merits file, tome III, folio 1331).

102 *Cf.* National Congress Record No. 24-326 of December 1, 2004 (file of annexes to the report, tome II, folios 911).

103 *Cf.* National Congress Record No. 24-326 of December 1, 2004 (file of annexes to the report, tome II, folios 911 a 916).

were heard.[104] In their interventions, the judges set out their reasoning with regard to the rulings and argued the illegality of establishing responsibility for having voted in one way or another on the rulings.[105]

86. Once the statements of the judges had concluded, the congressmen who had tabled the motions of censure were invited to speak. In particular, congressmen Serrano and Posso took the floor. Congressman Posso stated that the dismissal on November 25, 2004, had been arbitrary and that the appropriate proceeding to remove the judges was by means of impeachment.[106] The judges did not present a rejoinder.[107]

87. A vote was then held on the motions of censure. The result of each motion was as follows:

a) On November 30, 2004, congressman Marco Proaño had withdrawn his motion of censure (C) of June 16, 2003;[108]
b) Congressman Luis Villacís withdrew, orally, his motion of censure (A) of June 13, 2003, during the session of December 1, 2004;[109]
c) The first motion of censure (D) tabled by congressman Segundo Serrano Serrano on June 11, 2003, in relation to the fourteenth salary was not approved, because it did not obtain the necessary votes;[110]

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104 *Cf.* National Congress Record No. 24-326 of December 1, 2004 (file of annexes to the report, tome II, folios 923 a 975).

105 *Cf.* National Congress Record No. 24-326 of December 1, 2004 (file of annexes to the report, tome II, folios 923 a 975).

106 *Cf.* National Congress Record No. 24-326 of December 1, 2004 (file of annexes to the report, tome III, folio 1002).

107 In this regard, the Speaker of the National Congress stated that "by law and the regulations, it was in order […] for the members of the Constitutional Tribunal who had been accused to present a rejoinder. [He asked] whether they w[ould] present a rejoinder. They w[ould] not present a rejoinder. [Mr. Secretary, p]lease read the provision concerning the conduct of the proceedings from now on, once the interventions by the congressmen who have brought the charges have been heard and there [has been] no rejoinder by the judges." National Congress Record No. 24-326 of December 1, 2004 (file of annexes to the report, tome III, folio 1005).

108 Regarding the withdrawal of the motion of censure, congressman Proaño stated that "[m]ore than 18 months ha[d] passed since the submission of the impeachment proceeding, which had been processed as established in the Constitution and in the Organic Law of the Legislative Function. […] The setting of the date for the debate and the continuation of the proceedings was determined more than 17 months later and, only recently, on November 26, 2004. […] It was detrimental to the reputation of Congress to seek to process an action that, furthermore, [was] totally time-barred; it c[ould] no longer be implemented and w[ould] not achieve its legal effects, because: […] the law on which the impeachment was based relating to the fourteenth salary, [was] fully in effect. […] To continue the impeachment of individuals who no longer perform that public function [was] futile […]. It was inappropriate to proceed with this parliamentary action because it was time-barred and inopportune. Consequently, and in exercise of [his] powers as a legislator, [he] withdr[ew] the motion of censure and dismissal tabled on June 16, 2003." National Congress Record No. 24-326 of December 1, 2004 (file of annexes to the report, tome II, folios 917 and 918).

109 In this regard, congressman stated that "18 months ha[d] passed since [he and congressman Marco Proaño Maya had] tabled the accusation [… . T]he impeachment proceedings were not undertaken opportunely. 18 month ha[d] passed and they ha[d] just been presented. On June 16, 2003, [they had] presented the motion of censure and […] the time indicated in the Organic Law of the Legislative Function had passed […] and the right moment had not been found. […] Consequently, […] it [was] futile that the issue [was] being dealt with at [that] time and, therefore, since the matter relating to the fourteenth salary [was] also time-barred, [they] also withdr[ew] [their] motion of censure." National Congress Record No. 24-326 of December 1, 2004 (file of annexes to the report, tome III, folio 919).

110 The result of the vote was "43 abstentions. Against: 21. In favor: 20. Valid votes: 41." National Congress Record No. 24-326 of December 1, 2004 (file of annexes to the report, tome III, folio 1037).

d) A vote was not held on the motion of censure (B) tabled by congressman Antonio Posso Salgado on June 21, 2004, in relation to the fourteenth salary, because the congressman considered it inopportune to hold another vote on the same issue that had been rejected owing to the failure to adopt the first motion of censure of congressman Serrano,[111] and

e) The motions of censure presented by congressman Serrano (E) and congressman Posso (F) were joindered, and voted on together.[112] These motions were not approved, because they did not obtain the necessary votes.[113]

88. Therefore, and based on the above, the certification of the results of the voting on the motions of censure during the session of December 1, 2004, indicated that "none of the motions of censure tabled were approved."[114]

5. The vote on the motions of censure during the session of December 8, 2004

89. On December 5, 2004, the President of the Republic at the time, Lucio Gutiérrez Borbúa, called a special session of the National Congress, citing articles 133[115] and 171(8)[116] of the Constitution, and article 6[117] of the Organic Law of the Legislative Function, issuing the convocation as follows:

> Single article. The National Congress is summoned to a special session on Wednesday, December 8, 2004, at 11 a.m. to hear and decide the following matters: 1. Vote in the impeachment proceeding against the former members of the Constitutional Tribunal; 2. Analysis of the decision on the legal and constitutional situation of the Judiciary, and 3. Vote on the amendment of the Organic Law on Elections related to the right of proportional representation of minorities in multi-person elections.[118]

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111 Congressman Posso Salgado indicated that members of Congress should "be practical; [they should] not hold another vote on the same issue; [it was] clear, Congress had already issued a ruling on the matter. The logical procedure now [was] to vote on the spirit of the other element relating to the D'Hondt method." National Congress Record No. 24-326 of December 1, 2004 (file of annexes to the report, tome III, folio 1037).

112 On this point, congressman Posso Salgado proposed to hold "a single additional vote," which the Speaker of the National Congress accepted by stating that "this initiative [was] in order; it refer[red] to the same issue raised by congressmen Posso and Serrano. Consequently, one more vote and the session [would] conclude." National Congress Record No. 24-326 of December 1, 2004 (file of annexes to the report, tome III, folio 1037).

113 The result of the vote was as follows: "50 votes in favor, 20 against, 7 abstentions. Valid votes: 70. […] the motion is rejected because there are insufficient valid votes; […] there are not the 51 votes required to approve the motion of censure. Therefore, it is rejected; the session is closed." National Congress Record, 24-326, session of December 1, 2004 (file of annexes to the report, tome III, folio 1055). In this regard, it should be pointed out that, according to article 95 of the 1992 Organic Law of the Legislative Function it was necessary to obtain the affirmative vote of the absolute majority of the members of Congress; that is, at least 51 votes, in order to approve the motion of censure. National Congress Record No. 24-326 of December 1, 2004 (file of annexes to the answering brief, tome I, folio 3640).

114 *Cf.* National Congress, Certification of the Secretary General of the National Congress issued on December 2, 2004, Note No. 371-HAV-CN-2004 (file of annexes to the report, tome II, folio 647).

115 The text of the article is as follows: "During recesses, the Speaker of Congress or the President of the Republic may summon members to special sessions of the National Congress to examine, exclusively, the specific matters indicated in the summons. The Speaker of the National Congress may also summon these special sessions at the request of two-thirds of the members." National Congress Record No. 24-001-IV of December 8, 2004 (merits file, tome II, folio 585).

116 The text of the article is as follows: "The President of the Republic shall have the following powers and duties: […] 8. To call a special session of the National Congress. The summons shall determine the specific matters to be examined during such sessions." National Congress Record No. 24-001-IV of December 8, 2004 (merits file, tome II, folio 585).

117 *Cf.* National Congress Record No. 24-001-IV of December 8, 2004 (merits file, tome II, folio 585).

118 *Cf.* National Congress Record No. 24-001-IV of December 8, 2004 (merits file, tome II, folios 584 and 585).

90. On December 8, 2004, the special session of the National Congress opened with 53 legislators,[119] of the total of 100 members of Congress. Congress declared itself in permanent regular session.[120] The members of the Constitutional Tribunal had not been informed of the session.[121]

91. The members of Congress began to examine the first item on the agenda relating to the vote in the impeachment proceeding concerning the Constitutional Tribunal (*supra* para. 82). The debate on this item focused on the following issues: (i) some members of Congress indicated that the summons to a special session issued by the President of the Republic was unconstitutional, because the impeachment proceeding had already concluded,[122] and the censure and removal of the members of the Constitutional Tribunal had been rejected and, therefore, the call to special sessions constituted an interference in the monitoring task that was exclusive to the National Congress,[123] and (ii) the impeachment proceeding had concluded with the vote by the members of Congress, and that the mechanism to review the decision adopted on December 1, 2004, was reconsideration, and that, since this had not occurred opportunely, a second vote on the impeachment would constitute a violation of the *res judicata* principle.[124] In fact, several members of Congress asked the Secretariat of Congress to certify the results of the votes on the motions of censure held on December 1, 2004.[125]

92. Meanwhile, some members of Congress considered that it was "totally pertinent to hold the vote again,"[126] because they considered that the joinder of the motions of censure tabled by congressmen Serrano (E) and Posso (F) in relation to the D'Hondt method had not been appropriate. The main reason for this assertion was that the motion of censure tabled by congressman Posso had not included Judge Oswaldo Cevallos, while congressmen Serrano's motion included him; hence, the individuals accused in the joindered motions were not identical.[127] Based on this discussion and as a preliminary motion, a vote was held on "whether to hold another vote on the motions of censure against the members of the Constitutional Tribunal."[128] The vote was held based on a simple majority and passed with 54 votes.[129]

93. Once the motion had been approved according to which the joinder was not appropriate, the motion of censure tabled by congressman Segundo Serrano on the D'Hondt

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119 *Cf.* National Congress Record No. 24-001-IV of December 8, 2004 (merits file, tome II, folio 583).

120 *Cf.* National Congress Record No. 24-001-IV of December 8, 2004 (merits file, tome II, folio 580).

121 *Cf.* Affidavit prepared by Manuel Jaramillo Córdova on March 6, 2013 (merits file, tome III, folio 1303); Affidavit prepared by Jaime Manuel Nogales Izurieta on March 4, 2013 (merits file, tome III, folio 1323), and Statement made by Oswaldo Cevallos at the public hearing of March 18, 2013.

122 *Cf.* National Congress Record No. 24-001-IV of December 8, 2004 (merits file, tome II, folios 602, 604, 617 and 636).

123 *Cf.* National Congress Record No. 24-001-IV of December 8, 2004 (merits file, tome II, folios 602, 611, 614, 621 and 635).

124 *Cf.* National Congress Record No. 24-001-IV of December 8, 2004 (merits file, tome II, folio 602).

125 *Cf.* National Congress Record No. 24-001-IV of December 8, 2004 (merits file, tome II, folio 606).

126 *Cf.* National Congress Record No. 24-001-IV of December 8, 2004 (merits file, tome II, folio 607).

127 *Cf.* National Congress Record No. 24-001-IV of December 8, 2004 (merits file, tome II, folios 608 and 609).

128 *Cf.* National Congress Record No. 24-001-IV of December 8, 2004 (merits file, tome II, folio 638).

129 *Cf.* National Congress Record No. 24-001-IV of December 8, 2004 (merits file, tome II, folio 638).

method (E) was read out.[130] Then, a vote was held on the motion of censure, "the debate procedure having concluded and this being the explicit mandate of the Plenary."[131] The vote culminated with 57 votes in favor of censuring the "former members of the Constitutional Tribunal,"[132] which meant that the motion against Oswaldo Cevallos, Jaime Nogales, Miguel Camba, Luis Rojas, Simón Zavala and Manuel Jaramillo was adopted.

94. Then, the motion of censure tabled by congressman Antonio Posso concerning the Tribunal's decision on the D´Hondt Method (F)[133] was read. Immediately afterwards, a vote was held on the motion, resulting in 56 votes in favor of the motion of censure.[134] Therefore, the motion against Jaime Nogales, Miguel Camba, Luis Rojas, Simón Zavala and Manuel Jaramillo was adopted.

95. When this vote had concluded, the Speaker asked if any motions of censure remained pending a vote, and the Secretary of Congress responded that "Congressmen Luis Villacís Maldonado and Marco Proaño Maya had withdrawn their motions of censure. Consequently, based on the decision taken by Congress, a vote should be taken on the motion of censure concerning the violations of the Constitution in relation to the fourteenth salary that had been tabled by congressman Segundo Serrano against the members of the Constitutional Tribunal: Oswaldo Cevallos, Jaime Nogales, René de la Torre, Miguel Camba and Luis Rojas."[135] The vote was then held on the motion of censure tabled by congressman Serrano in relation to the fourteenth salary (D), resulting in 45 votes against and six in favor – in other words, 51 valid votes – and the motion was rejected.[136]

96. Immediately after this the Speaker called a vote on the motion of censure tabled by congressman Posso in relation to the fourteenth salary (B) against Judges Oswaldo Cevallos, Luis Rojas, Miguel Camba, Jaime Nogales and René de la Torre. The result of this vote was 44 votes against and five in favor; hence 49 valid votes.[137] Those present requested the rectification of this vote, and it was held again with the following result: 43 votes against and four in favor, for a total of 47 valid votes and, consequently, this motion was also rejected.[138]

97. The members of Congress then turned to the second item on the agenda: "Analysis of the decision on the legal and constitutional situation of the Judiciary."[139] As a result of this debate, National Congress issued Resolution No. R-25-181,[140] by which it terminated

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130 *Cf.* National Congress Record No. 24-001-IV of December 8, 2004 (merits file, tome II, folio 639).

131 *Cf.* National Congress Record No. 24-001-IV of December 8, 2004 (file of annexes to the report, tome II, folio 710).

132 It is worth noting that there were 57 valid votes, because the other members of Congress refused to vote. National Congress Record No. 24-001-IV of December 8, 2004 (merits file, tome II, folio 649).

133 *Cf.* National Congress Record No. 24-001-IV of December 8, 2004 (merits file, tome II, folio 650).

134 *Cf.* National Congress Record No. 24-001-IV of December 8, 2004 (merits file, tome II, folio 659).

135 *Cf.* National Congress Record No. 24-001-IV of December 8, 2004 (merits file, tome II, folios 659 and 660).

136 *Cf.* National Congress Record No. 24-001-IV of December 8, 2004 (merits file, tome II, folio 668).

137 *Cf.* National Congress Record No. 24-001-IV of December 8, 2004 (file of annexes to the report, tome II, folio 749).

138 *Cf.* National Congress Record No. 24-001-IV of December 8, 2004 (merits file, tome II, folio 685).

139 *Cf.* National Congress Record No. 24-001-IV of December 8, 2004 (merits file, tome II, folio 687).

140 *Cf.* National Congress, Resolution No. R-25-181 of December 9, 2004 (file of attachments to the report, tome I, folios 85 and 86).

the mandate of all the justices of the Supreme Court of Justice.[141] This resolution was adopted by 52 votes in favor and three against.[142] The same resolution appointed the new justices of the Supreme Court of Justice.

98. Immediately after adopting the resolution and, even though it was not on the agenda, a motion was tabled on the amendment of the Constitution so that Congress would again have competence to impeach the members of the Supreme Court of Justice.[143] This motion was adopted by 34 votes in favor.[144] The third and last item on the agenda, relating to the Organic Law on Elections was then discussed.[145] The session concluded at 12.40 a.m. next day.[146]

D. The Constitutional Tribunal's decision on the inadmissibility of actions for *amparo* against decisions of Congress

99. On December 2, 2004, one day after the National Congress had been unable to adopt several motions of censure on the removal of the members of the Constitutional Tribunal in the context of the impeachment proceedings (*supra* paras. 87 and 88), the new Constitutional Tribunal appointed on November 25, 2004, issued a decision in response to a request from the President of the Republic "to prevent the judges of the domestic courts from admitting for processing actions for constitutional *amparo* against Parliamentary Resolution R-25-160, adopted by the […] National Congress on November 25, 2004."[147] In this regard, the Constitutional Tribunal decided:

> To establish that, in order to suspend the effects of a parliamentary resolution, including No. 25-160, adopted by the National Congress on November 25, 2004, for supposed violation of the Constitution, in substance and form, the only admissible action is the action on unconstitutionality that must be filed before the Constitutional Tribunal, pursuant to the ruling of the Supreme Court of Justice of June 27, 2001, published in Official Gazette No. 378 of July 27 that year; and, that any remedy of *amparo* that may be filed in the country's courts related to the said resolution must be reject outright by the judges and not admitted, because, to the contrary, they would be hearing a case contrary to an explicit law and this would entail the corresponding judicial actions.[148]

100. The ruling of the Supreme Court of Justice of June 27, 2001, referred to in the decision of the Constitutional Tribunal of December 2, 2004, was a ruling clarifying the criteria applicable to constitutional protection.[149] The Constitutional Tribunal's decision of December 2, 2004, cites article 2(a) of the said ruling of the Supreme Court of Justice that indicated:

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141 *Cf.* National Congress Record No. 24-001-IV of December 8, 2004 (merits file, tome II, folio 810 and 811).

142 *Cf.* National Congress Record No. 24-001-IV of December 8, 2004 (merits file, tome II, folio 810 and 811).

143 *Cf.* National Congress Record No. 24-001-IV of December 8, 2004 (merits file, tome II, folio 822).

144 *Cf.* National Congress Record No. 24-001-IV of December 8, 2004 (merits file, tome II, folio 822).

145 *Cf.* National Congress Record No. 24-001-IV of December 8, 2004 (merits file, tome II, folios 822 to 835).

146 *Cf.* National Congress Record No. 24-001-IV of December 8, 2004 (merits file, tome II, folio 835).

147 *Cf.* Ruling of the Constitutional Tribunal of December 2, 2004 (file of annexes to the report, tome III, folio 1058).

148 *Cf.* Ruling of the Constitutional Court of December 2, 2004 (file of annexes to the report, tome III, folio 1059).

149 *Cf.* Ruling of the Supreme Court of Justice of June 27, 2001 (file of annexes to the report, tome III, folios 1068 to 1071).

> In particular, the action for *amparo* is inadmissible and shall be rejected outright when it is filed with regard to:
> a) Legislative acts issued by a public authority, such as organic and ordinary laws, decree-laws, decree, ordinances, statutes, regulations and decisions that are binding (*erga omnes*), because, in order to suspend their effects owing to violation of the Constitution, in substance or in form, the action on unconstitutionality is the appropriate mechanisms, and this must be filed before the Constitutional Tribunal.[150]

E. Refusal to admit the remedies of *amparo* filed by several members of the Constitutional Tribunal who were terminated

101. As already indicated (*supra* para. 50), according to article 276 of the Constitution, the Constitutional Tribunal was competent to rectify the unconstitutional acts of the other branches of the State, and to make a final ruling, on the actions for judicial protection and other jurisdictional guarantees. Five of the members of the Constitutional Tribunal who were removed filed a remedy of *amparo* against the decision of Congress to remove them from office of November 25, 2004 (*supra* para. 63).

102. On December 7, 2004, the Twelfth Civil Court of Pichincha issued a decision on the remedy of *amparo* filed by Luís Vicente Rojas Bajaña, a member of the Constitutional Tribunal who had been terminated. In this decision, it decided "not to admit for processing [the said] constitutional remedy," based on the ruling of the Constitutional Tribunal of December 2, 2004, and indicated that, "in this case, the action on unconstitutionality can be filed before the Constitutional Tribunal."[151]

103. Likewise, on December 13, 2004, the First Civil Court of Pichincha issued a decision on the remedy of *amparo* against Resolution No. R-25-160 of the National Congress filed by Miguel Ángel Camba Campos, a member of the Constitutional Tribunal who had been terminated. In this remedy, he argued that the National Congress had removed him by means of a "simple parliamentary resolution" on November 25, 2004, "without respecting due process of law […] established in the Constitution." In this regard, he indicated that: (i) "[e]ven though the creation of a majority, and the decisions adopted by the National Congress are inherent expressions of the democratic system, the majority is obliged to be particularly faithful to the Constitution […]; (ii) "all the formalities and procedures [had] been complied with […] to ensure that his appointment [as a member of the Constitutional Tribunal] had not only formal validity, but also the legitimacy without which mere formalism has no value"; (iii) the "exercise of the functions of judge […] by legal and constitutional mandate should have a term of four years, which can only be interrupted by an impeachment proceeding that concludes with censure and dismissal"; (iv) "in this case, not only was the filing of objections in the context of the impeachment proceeding prevented [with the termination decision], but matters reached the dangerous extreme of preventing the trial itself, thereby denying any possibility of exercising the right of defense that […] belongs [to] legally appointed judges," and (v) "there is no legal or constitutional provision that [would] allow the National Congress to remove the members of the Constitutional Tribunal with a mere parliamentary decision; therefore, they c[ould] not do this; such an act, far from constituting an exercise of legislative powers, degenerate[d] into an unlawful administrative act, because […] it [was] not based on any legal provision."[152]

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[150] *Cf.* Ruling of the Supreme Court of Justice of June 27, 2001 (file of annexes to the report, tome III, folios 1068 and 1069).

[151] *Cf.* Decision of the Twelfth Civil Court of Pichincha of December 7, 2004 (file of annexes to the report, tome III, folios 1073 and 1074).

[152] First Civil Court of Pichincha, remedy of *amparo* of December 13, 2004 (file of annexes to the report, tome III, folios 1076 to 1081).

104. In the ruling of December 13, 2004, the First Civil Court indicated that it was "public knowledge that, on Wednesday, December 8 that year, most of the members of the National Congress had proceeded to hold an impeachment proceeding against the members of the Constitutional Tribunal […], an act that was eminently legal and legitimate, because it was established in the Constitution, so that it had legal effects, including the censure that resulted in the immediate removal of the official."[153] In addition, it cited the ruling of the Constitutional Tribunal of December 2, 2004, and concluded that, "based on the preceding considerations, the action for *amparo* was inadmissible, and should be rejected outright, without examining the merits of the matter."[154]

105. In addition, on December 14, 2004, the Eleventh Civil Court of Pichincha refused to admit the remedy of constitutional *amparo* filed by Mauro Leonidas Terán Cevallos, dismissed member of the Constitutional Tribunal. This court indicated that an "action for *amparo* is inadmissible […] when it is filed in relation to […] legislative acts issued by a public authority."[155] The reasoning for this decision was based on the ruling of the Supreme Court of Justice of June 27, 2001, establishing that this type of action "should be filed before the Constitutional Tribunal."[156]

106. Furthermore, on December 15, 2004, the Tenth Civil Court of Pichincha refused to admit the action for constitutional *amparo* filed by Simón Bolívar Zabala Guzmán, dismissed member of the Constitutional Tribunal. The court took this decision based on the Constitutional Tribunal's ruling of December 2, and "reject[ed] outright [the remedy and would] not admit the action for *amparo.*"[157]

107. On the same date, the Eighth Civil Court of Pichincha ruled on the action for *amparo* filed by Freddy Oswaldo Cevallos Bueno, dismissed member of the Constitutional Tribunal. Based on article 2(a) of the ruling of the Supreme Court of Justice of June 27, 2001, and the ruling of the Constitutional Tribunal of December 2, 2004, it refused to admit the action for *amparo.*[158]

108. Some of the judges who decided these actions for *amparo* had, at first, suspended temporarily the decision of Congress ordering the termination of the members of the Constitutional Tribunal.[159] As a result of this suspension, congressman Luis Fernando Almeida Moran submitted briefs to four of the courts in which he indicated that, if the judges did not revoke the said suspension and did not recuse themselves from continuing to

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153 Decision of the First Civil Court of Pichincha of December 13, 2004 (file of annexes to the report, tome III, folio 1084).

154 Decision of the First Civil Court of Pichincha of December 13, 2004 (file of annexes to the report, tome III, folio 1084).

155 Decision of the Eleventh Civil Court of Pichincha of December 14, 2004 (file of annexes to the report, tome III, folio 1086).

156 *Cf.* Decision of the Eleventh Civil Court of Pichincha of December 14, 2004 (file of annexes to the report, tome III, folio 1086).

157 Decision of the Tenth Civil Court of Pichincha of December 15, 2004 (file of annexes to the report, tome III, folio 1088).

158 Decision of the Eighth Civil Court of Pichincha of December 15, 2004 (file of annexes to the report, tome III, folio 1090).

159 *Cf.* Decision of the Eighth Civil Court of Pichincha of December 3, 2004 (file of annexes to the report, tome III, folio 1365); Decision of the First Civil Court of Pichincha of December 3, 2004 (file of annexes to the report, tome III, folio 1405), and Decision of the Tenth Civil Court of Pichincha of December 3, 2004 (file of annexes to the report, tome III, folio 1517).

hear the actions, their conduct would entail the "offense of malfeasance in office" and he would request an "order of preventive detention" against the said judges.[160] Meanwhile, according to newspaper articles, two of the nine members of the Constitutional Tribunal rejected the decisions related to the suspension of the parliamentary decision.[161]

F. Events following the dismissals from the high courts of Ecuador

109. The removal from office of the members of the Supreme Electoral Tribunal, the Constitutional Tribunal, and the Supreme Court of Justice brought on a political and social crisis, the main characteristic of which was the lack of institutional stability.[162] In January 2005, demonstration began against the national Government, considering that it was violating the Constitution and the rule of law.[163]

110. Once installed, the new Supreme Court of Justice adopted a series of decisions of political significance.[164] Among these decisions, the most important included the declaration that the proceedings against the former Presidents of the Republic, Abdalá Bucaram and Gustavo Noboa, and the former Vice President, Alberto Dahik, were null and void.[165]

111. On April 2, 2005, former President Bucaram, returned to Ecuador, where he was being criminally prosecuted, charged with illicit enrichment and mismanagement of public funds, a fact that increased the civilian population's protests against the Government.[166] According to the observations of the United Nations Special Rapporteur on the independence of judges and lawyers during his visit to Ecuador from July 11 to 15, 2005, these decisions "aggravated the social and political tensions in the country and the crisis spread to the main institutions."[167]

112. In this context, on April 15, 2005, the President of the Republic at that time, Lucio Gutiérrez, issued Executive Decree No. 2752, in which he dismissed the members of the Supreme Court of Justice appointed on December 8, 2004.[168] The considerations contained in the Decree included that, "to date, the National Congress ha[d] not settled the matter of the termination of the members of the Supreme Court of Justice [appointed on December 8,

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[160] Briefs of congressman Luis Fernando Almeida Moran addressed to the eighth and first civil judges of Pichincha, December 7, 2004 (file of annexes to the report, tome IV, folios 1375, 1376, 1427 and 1428); to the twelfth civil judge of Pichincha, December 7, 2004 (file of annexes to the report, tome IV, folio 1492), and to the tenth civil judge of Pichincha, December 7, 2004 (file of annexes to the report, tome IV, folio 1532).

[161] Newspaper article "*Nuevos vocales del TC rechazan suspensión preventiva de la reorganización del organismo*" [New CC judges reject preventive suspension of the court's reorganization], *El Universo*, December 5, 2004 (file of annexes to the report, tome III, folio 1142).

[162] *Cf.* Report of the Special Rapporteur on the independence of judges and lawyers of August 31, 2005 (file of annexes to the report, tome III, folios 1106 and 1107).

[163] *Cf.* Report of the Special Rapporteur on the independence of judges and lawyers of August 31, 2005 (file of annexes to the report, tome III, folio 1106).

[164] *Cf.* Report of the Special Rapporteur on the independence of judges and lawyers of August 31, 2005 file of annexes to the report, tome III, folio 1106).

[165] *Cf.* Report of the Special Rapporteur on the independence of judges and lawyers of August 31, 2005 (file of annexes to the report, tome III, folio 1106).

[166] *Cf.* Report of the Special Rapporteur on the independence of judges and lawyers of August 31, 2005 (file of annexes to the report, tome III, folio 1106).

[167] *Cf.* Report of the Special Rapporteur on the independence of judges and lawyers of August 31, 2005 (file of annexes to the report, tome III, folio 1106).

[168] *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador,* para. 94.

2004], which [was] causing serious national unrest […] so that it was essential to abide by the verdict of the citizens of Quito and of the Republic who reject[ed] the functioning of the actual Supreme Court of Justice."[169] Consequently, the President of the Republic decreed:

> Art. 2. Based on the express mandate and sovereign will of the Ecuadorian people, and in compliance with the duty of the State to recognize and guarantee the right to legal certainty embodied in art. 23(26) of the Constitution of the Republic, the judges of the actual Supreme Court of Justice, appointed by Resolution 25-181 of December 8, 2004, are declared to be terminated.[170]

113. The same Executive Decree declared a state of emergency in Quito.[171] The following day, April 16, 2005, the President of the Republic issued Executive Decree No. 2754, in which he considered that "the cause of the internal unrest and disquiet in Quito arising from the crisis of the Supreme Court of Justice ha[d] been overcome" and, consequently, he declared "the end of the state of emergency."[172]

114. At the same time, on April 17, 2005, the National Congress annulled the resolution, of December 8, 2004, regarding the appointment of the new Supreme Court of Justice.[173] However, it did not order the reinstatement of the judges who had been removed from office.[174]

115. The foregoing increased the "wave of tension and violence which was becoming particularly intense in the capital," and, consequently, on April 20, 2005, the National Congress declared that the President of the Republic had left office;[175] implementing the constitutional succession mechanism, the Vice President, Alfredo Palacio, assumed the presidency.[176]

116. On April 26, 2005, the National Congress approved the amendment to the Law on the Organization of the Judiciary.[177] The new Law established an *ad hoc* mechanism to administer the procedure of the qualification and appointment of the new judges and assistant judges of the Supreme Court of Justice.[178] This *ad hoc* mechanism consisted of the creation of a Qualifications Committee in order "to compensate for the fact that the constitutional clause on the principle of co-optation cannot be applied because the body authorized to do this, namely, the Supreme Court of Justice, is non-existent."[179]

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169 *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador,* para. 94.

170 *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador,* para. 94.

171 *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador,* para. 95.

172 *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador,* para. 95.

173 *Cf.* Report of the Special Rapporteur on the independence of judges and lawyers of August 31, 2005 (file of annexes to the report, tome III, folio 1107).

174 *Cf.* Report of the Special Rapporteur on the independence of judges and lawyers of August 31, 2005 (file of annexes to the report, tome III, folio 1107).

175 *Cf.* Report of the Special Rapporteur on the independence of judges and lawyers of August 31, 2005 (file of annexes to the report, tome III, folio 1107).

176 *Cf.* Report of the Special Rapporteur on the independence of judges and lawyers of August 31, 2005 (file of annexes to the report, tome III, folio 1107).

177 *Cf.* Report of the Special Rapporteur on the independence of judges and lawyers of August 31, 2005 (file of annexes to the report, tome III, folio 1107).

178 *Cf.* Report of the Special Rapporteur on the independence of judges and lawyers of August 31, 2005 (file of annexes to the report, tome II, folio 525).

179 Report of the Special Rapporteur on the independence of judges and lawyers of August 31, 2005 (file of annexes to the report, tome II, folio 525).

117. As a result of all the foregoing, Ecuador remained without a Supreme Court of Justice for approximately seven months.[180]

118. On April 26, 2005, also, the resolution appointing the new Constitutional Tribunal was annulled, but the judges who had been removed were not reinstated. In this regard, the United Nations Special Rapporteur:

> Observe[d] that the National Congress has adopted a decision similar to the one taken regarding the Supreme Court, which was illegally dismissed in late 2004: it reversed the decision of 25 November 2004 whereby it had appointed a new Constitutional Tribunal, but did not order the reinstatement of the members who had been removed under that decision. The Special Rapporteur is concerned to note that, in the absence of a Supreme Court, which is responsible for proposing a shortlist of candidates, it is impossible to appoint the members of the Constitutional Tribunal. As a result, the country is bereft of its highest authority for ruling on matters relating to human rights and constitutional guarantees, raising constitutional challenges and issuing legal opinions in relation to the adoption of international agreements.[181]

119. Since 2004, the Constitutional Tribual has had four different compositions.[182] Following the events of April 26, 2005, in other words, after almost a year in recess, a new court was elected in 2006; however, the members were removed in 2007, to make way for the last composition of the Constitutional Tribunal.[183] By parliamentary resolution approved on April 24, 2007, the National Congress, arguing that the four-year term of the Constitutional Tribunal had concluded, removed the members of the Constitutional Tribunal of Ecuador who had been appointed in February del 2006, after the Court had been vacant for 10 months following the removal of the previous members in April 2005.[184]

120. On November 30, 2007, the National Constituent Assembly was installed in order to draft a new Constitution of the Republic of Ecuador.[185] The National Constituent Assembly, known as "of Montecristi," eliminated the institution of the Constitutional Tribunal and created the Constitutional Court.[186]

121. The new Constitution entered into force on October 20, 2008.[187] It incorporated the international human rights instruments as part of Ecuador's legal system and accorded them

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180 *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador,* para. 99.

181 Report of the Special Rapporteur on the independence of judges and lawyers of August 31, 2005 (file of annexes to the report, tome III, folio 1110).

182 The representatives indicated that, "in 1997, the Constitutional Tribunal [was removed]" and this "occurred [again] in 2004, 2005 and 2007" (merits file, tome IV, folio 1773); expert witness Alejandro Ponce Villacís explained that in "February 1997, the judges of the Court of Constitutional Guarantees, which had been acting as a Constitutional Tribunal, […] were removed by a resolution of the National Congress" (merits file, tome III, folio 1344), and Human Rights Watch, "Ecuador: Removal of Judges Undermines Judicial Independence, May 11, 2007," available at: http://www.hrw.org/news/2007/05/10/ecuador-removal-judges-undermines-judicial-independence.

183 *Cf.* Human Rights Watch, "Ecuador: Removal of Judges Undermines Judicial Independence, May 11, 2007," available at: http://www.hrw.org/news/2007/05/10/ecuador-removal-judges-undermines-judicial-independence

184 *Cf.* Human Rights Watch, "Ecuador: Removal of Judges Undermines Judicial Independence, May 11, 2007," available at: http://www.hrw.org/news/2007/05/10/ecuador-removal-judges-undermines-judicial-independence

185 *Cf.* Affidavit prepared by expert witness Alarcón Peña (merits file, tome III, folio, 1414).

186 Affidavit of March 13, 2013, prepared by expert witness Ávila Linzán (merits file, tome III, folio 1385).

187 *Cf.* Affidavit prepared by expert witness Alarcón Peña (merits file, tome III, folio, 1414).

constitutional rank.[188] The nature, composition, functions and functioning of the Constitutional Court are regulated in articles 429 to 440 of the 2008 Constitution,[189] and the 2009 Organic Law on Jurisdictional Guarantees and Constitutional Control.[190] The 2008 Constitution establishes that the members of the Constitutional Court shall not be subject to impeachment.[191]

VIII
JUDICIAL GUARANTEES, THE PRINCIPLE OF LEGALITY, POLITICAL RIGHTS, DOMESTIC LEGAL EFFECTS, EQUALITY BEFORE THE LAW, AND JUDICIAL PROTECTION

122. In this Chapter, the Court will proceed to analyze the arguments presented by the parties and the Commission, and also to develop the legal considerations pertinent to this case. Initially, it will summarize the (A) Arguments of the Commission and of the parties and then set out the (B) Considerations of the Court concerning the Inter-American Court's case law on judicial guarantees in relation to impeachment (1), and then analyze the alleged violations of the said guarantees in relation to the termination and the impeachments (2). Next, the Court will examine the standards for judicial independence, as well as their institutional aspect (3). Subsequently, the Court's considerations on judicial protection (4), and on the right to equality (5) will be defined.

A. Arguments of the Commission and of the parties

1. Arguments on judicial independence, competence, and political rights

123. Regarding the decision to terminate the members of the Constitutional Tribunal, the Commission argued that "imposing a *de facto* sanction without the possibility of being able

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188 *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador,* para. 101.

189 Constitution of the Republic of Ecuador, 2008: Art. 429. The Constitutional Court is the highest organ for the control and interpretation of the Constitution, and for the administration of justice in this area. It has national jurisdiction and its seat is in Quito. Decisions on the attributes established in the Constitution shall be adopted by the Court in plenary. Art. 432. The Constitutional Court shall be composed of nine members who shall exercise their functions in plenary sessions and in chambers pursuant to the law. Their term of office is nine years, without immediate re-election, and a third of the members shall be renewed every three years. The law shall determine the mechanism for replacing an absent member. Art. 433. The requirements for appointment to the Constitutional Court are: […] 5. Not to belong or have belonged to the executive committee of any political party or movement for the past 10 years […]. Art. 434. The members of the Constitutional Court shall be appointed by a Qualifications Committee which shall be composed of two persons designated for each function – legislative, executive, and social transparency and control. The selection of the members shall be made from among the candidacies submitted by the aforesaid functions, by means of a public competition procedure, with oversight and the possibility of challenges by the citizenry. The composition of the Court shall endeavor to ensure parity between men and women. The procedure, time frames and other elements of qualification and selection shall be determined by law. 2008 Constitution of the Republic of Ecuador (file of annexes to the answering brief in the *Case of the Supreme Court of Justice (Quintana Coello et al.),* tome I, folio 3560).

190 *Cf.* Organic Law on Jurisdictional Guarantees and Constitutional Control (file of annexes to the answering brief, tome I, folios 3553 to 3607).

191 Constitution of the Republic of Ecuador, 2008, art. 431. The members of the Constitutional Court shall not be subject to impeachment and may not be removed by those who appoint them. However, they shall be subject to the same controls as the other public authorities and shall be held accountable for any acts or omissions they commit in the exercise of their functions. Without prejudice to civil responsibility, in case of criminal responsibility, they shall only be accused by the Prosecutor General and tried by the National Court of Justice in plenary and, to this end, the affirmative vote of two-thirds of its members shall be required. Their dismissal shall be decided by two-thirds of the members of the Constitutional Court. The procedure, requirements and grounds shall be determined by law (file of annexes to the answering brief of the *Case of the Supreme Court of Justice (Quintana Coello et al.),* tome I, folio 3560).

to defend themselves resulted in the violation of judicial guarantees." It argued that Article 8(1) of the American Convention had been violated in relation to the right to be tried by a competent authority, because "at the time the victims were appointed, the only legal mechanism for their removal prior to the end of their term was an impeachment proceeding." It considered that "it is not possible to grasp clearly how the resolution to terminate the members of the Constitutional Tribunal of November 25, 2004, could have had as its objective to rectify the illegality in the appointment of the judges, based on the application of the 'single list' voting mechanism, considering the time that had elapsed and the lack of other actions aimed at questioning or determining the application of this voting system," and that "the information available indicates that the 'single list' voting mechanism is not expressly provided for in Ecuador's domestic legislation, but has been used from time to time by Congress. Without prejudice to the authority of the National Congress to decide on its […] voting mechanism, the Commission is unaware of any attempted legislative, administrative or judicial actions to call into question or regulate the scope and admissibility of the 'single list' voting mechanism following the appointment of the members of the Constitutional Tribunal on March 19, 2003." Based on the foregoing, the Commission concluded that "at the time of the facts of this case, the Constitution established the duration of the term for members of the Constitutional Tribunal to be one uninterrupted four-year term, and the mechanism for removing the judges from their positions, impeachment."

124. Regarding the impeachment proceedings, the Commission indicated that "domestic law expressly prohibited the impeachment of the judges who sat on the Constitutional Tribunal based on their judgments and the opinions they express, and establishes that they may be impeached for committing 'constitutional or statutory infractions or acts or omissions in discharging their duties characterized as infractions,'" and that "the decision to impeach the judges – almost a year and a half after the first motion of censure and in the context of the debate on the termination resolution – was politically motivated, over and above the task of oversight of infractions allegedly committed by the judges."

125. Regarding the termination and the impeachment proceedings, the Commission argued that the alleged facts "did not constitute a possible violation of the rights recognized in Article 23(1)(c) of the American Convention."

126. The representatives argued in relation to the termination of the judges that the "National Congress did not have competence to remove the members […] of the [Constitutional Tribunal] from office. Its competence was merely to appoint them; once [the] members had been selected […] the only way to remove them from their functions was by impeachment." They indicated that the National Congress could hardly guarantee independence, because it was, by nature, a political organ, and "particularly when it responded, as in this case, to the interests of the Government and of parliamentary majorities," so that "Congress did not act or guarantee the right to an independent judge, in its individual aspect."

127. Regarding the alleged violation of Article 23 of the American Convention, the representatives argued that "the possessors of the political right to hold public office are not only those elected by the people, but [include] other ways of acceding to public office." They added that, "in the Constitution in force at the time of the facts, the Republic of Ecuador recognized that all Ecuadorians had the right to "perform" public functions or employment," and that their performance "should be understood as permanence in public office and that they should not be removed arbitrarily from their posts." They argued that in the case of "judges […], they should have an enhanced guarantee as regards the exercise of their functions" and added that "stability play[ed] a dual role" because, "on the one hand, it

ha[d] an individual dimension related to the judge himself as the possessor of rights" and, "on the other hand, stability guarantee[d] judicial independence." They argued that "[i]n the hypothesis of a State in which judges [were] removed arbitrarily from their posts owing to the content of their rulings, especially if there was certainty that they [could] only retain their posts if they favor[ed] one political party, the guarantee of access in equal conditions [would be] non-existent," which "would mean that ethical professionals who refused to accept political pressure on compliance with their functions as a judge, would exclude themselves […] from the selection process."

128. The State did not refer explicitly to the alleged lack of competence of the National Congress to declare the termination of the judges.

129. The State argued that Article 23(1)(c) of the American Convention was not violated, because: (i) "Article 23[(1)(c)] refers to political rights in relation to access to public service and participation in public life, [and] the political rights [of the judges] as citizens, were not restricted in any way"; (ii) the former members of the Constitutional Tribunal were not restricted under any constitutional or infra-constitutional norm from having access and acquiring elected office"; (iii) "they were not prevented by any administrative decision from having access to positions of trust," and (iv) "over the last five years, the former members of the Constitutional Tribunal have had full access to the numerous competitions to select judges and justices, and could have been examined by the different selection mechanisms." The State also argued that several of the judges became professors at public universities, and that the guarantee of stability of the post of judge was fully regulated in the 1998 Constitution, and in the domestic laws, such as the Organic Law on Constitutional Control in force at the time of the facts.

2. Arguments on the nature of the termination decision

130. The Commission argued that the "supposed illegality in the appointment was merely a justification to impose a *de facto* sanction, infringing the principle of legality." It indicated that it "does not ignore the fact that there may be removals from office in which doubts can arise about whether this has occurred as a result of the passage of time or a forced retirement, or whether, as an expression of the State's punitive powers," and that "there may be decisions that are formally valid, but that are not used as legitimate recourses for administration of justice, but rather as mechanisms to achieve undeclared objectives that are not evident at first sight, and that are aimed at establishing an 'implicit' sanction with a different objective from that for which they have been established by law." Therefore, "in case of doubt about whether it was a removal owing to completion of the term or conditions, or whether it was a punitive removal, it is important to consider the existence of a series of indications about the possible causal relationship between the circumstantial evidence, the act that appears to be legal, and the removal of the judge from office. In this type of case, the circumstantial evidence is necessary in order to find that the elements leading to the presumption of the existence of an implicit sanction are objective and to allow it to be affirmed that an act of the public authorities is not congruent with the objectives apparently sought."

131. The representatives argued that "[t]he resolution adopted by the National Congress sought to give the appearance that it was not a punitive action, but rather the rectification of an error of the National Congress; nevertheless, the statements made by the members of Congress during the debate on the day of the resolution, as well as the statement of the State's Agent during the hearing before the [Commission] reveal that the intention behind the resolution was to remove the judges […] from office for supposed acts of corruption and membership in certain political parties."

3. Arguments on the scope of the judicial guarantees established in Article 8 of the American Convention

132. The Commission argued that, in this case, the guarantees of both Article 8(1) and 8(2) of the Convention should be analyzed. It indicated that although Article 8(1) of the Convention "does not establish minimum guarantees in matters relating to the determination of rights and obligations of a civil, labor, fiscal, or any other nature, the full range of minimum guarantees stipulated in its second paragraph are also applicable in those areas and, therefore, in this type of matter, the individual also has the overall right to the due process applicable in criminal proceedings."

133. The representatives also argued that both Article 8(1) and 8(2) had been violated. They indicated that "[t]he right to a hearing is established in the second paragraph of Article 8 of the Convention."

134. The State alleged that the arguments of the Commission and of the representatives "essentially ignore the importance of political control for the exercise of healthy democracy," given "the juridical nature of political control and its characteristics," and since "there is no legal definition of the facts that corresponds to the right violated." It considered that "the legal mechanism of impeachment is a political responsibility," and that "the decisions resulting from an impeachment proceeding are not taken based on law, but on votes," and that "it is not the decision of a legal organ, but rather of a political one." The State also indicated that impeachment "concerns subjective political control, even though it is based on criteria of trust and opportunity, and the grounds are based on the freedom of opinion of those hearing the proceeding." It added that "impeachment proceedings exercise control by the political power in order to determine the political responsibility of public officials and authorities who hold offices of particular importance in the context of which they can affect fundamental public interests owing to the actions they have taken during the exercise of their functions." The State argued that, "since [an impeachment proceeding] is not a court trial or one that determines rights or obligations, the minimum guarantees established in Article 8(2) of the Convention cannot be applied rigidly," because "these guarantees cannot be applied in the same way in proceedings that are not judicial in nature."

4. Arguments on the right to a hearing and the right of defense

135. Regarding the termination of the judges, the representatives also argued the presumed violation of the right to be tried by a competent, independent and impartial court, the right to a hearing, to prior notification, to adequate time to prepare a defense, the right to appeal, the right not to be subjected to a new trial for the same facts, and the obligation to provide the reasoning for decisions.

136. With regard to the impeachment proceedings, the Commission noted that "the call for impeachment [on December 1, 2004,] was made after the regulatory period had expired and in the context of the debate on the termination of the members of the Constitutional Tribunal." In addition, as regards the second vote taken in the impeachment proceedings on December 8, 2004, the Commission considered that "the victims did not have the opportunity to participate in this proceeding or to exercise their right of defense."

137. In relation to the impeachment proceeding, the representatives indicated that the presumed victims "were notified on November 24, 2004, of their impeachment proceeding on December 1, 2004; in other words, six days before the first proceeding," and that, after

"December 1, 2004, [when] the members of the Constitutional Tribunal […] had been acquitted, […] the President of the Republic called members of Congress to a special meeting of Congress, but failed to convene the judges." Consequently, "[o]n December 8, 2004, the National Congress met [without] notifying the judges who were going to be tried a second time." They concluded that "[t]he judges […] had no opportunity to intervene […] in the proceeding [of December 8, 2004], to be heard, to exercise the right of defense and [to be able to influence] the decision in the case."

5. Arguments on the obligation to provide the reasoning

138. Regarding the impeachment proceeding, the Commission argued that "the disciplinary sanctions imposed on a judge, can never be motivated by the legal opinion that he or she has expounded in a decision."

139. In relation to the impeachment proceeding, the representatives argued that "since the motion of censure was the ruling in a proceeding in which Congress acted as judge […], the motion should have been duly reasoned, [and] not merely approved the removal of the members of the Constitutional Tribunal, because [Congress] had sufficient votes to do this." They added that, even though "the legitimate reason to remove [judges] relates to ineptitude or conduct that disqualifies the judge," "the members of the Constitutional Tribunal were removed […] owing to […] their opinions in two rulings, [and] the debates reveal that accusations of corruption and partiality were made, which were the real reason for their impeachment and which were not even mentioned in the motion of censure."

140. The State did not comment on the obligation to provide the reasoning in impeachment proceedings.

6. Arguments on impartiality

141. Regarding the presumed lack of impartiality of the National Congress, the Commission indicated that even though, initially, insufficient votes had been obtained to censure the judges, the President of the Republic called a special session in which a second vote was taken, obtaining the majority needed to achieve a motion of censure. In the Commission's opinion "[t]his sequence of events indicates that […] the actions of the National Congress were not objective."

142. The representatives considered that the principle of impartiality was violated "[d]ue to the existence of political, rather than legal, grounds, owing to preconceived interests, based on which it was not important whether or not the members of the [Constitutional Tribunal] were guilty of the charges against them, or that they had previously been acquitted of these same charges [on December 1, 2004], and because the matter responded to the interests of the President and of several political parties at that time."

143. The State argued that "it would appear difficult to respect […] the principle of impartiality in an impeachment proceeding […] owing to the juridical nature of this type of control, which is political." It considered that "since [impeachment] is based on freedom of opinion and the political interpretation of the law, processed by a State organ that seeks to protect fundamental public interests, the principle of impartiality it not easy to apply."

7. Arguments on the right to appeal the judgment

144. The representatives argued, in relation to the termination of the judges, "[t]he violation of the right to appeal […] *de iure* and *de facto*: *de iure* because the Constitution

did not establish any procedure to review that the resolution, based on the proceeding or on the substance, did not violate rights; *de facto*, because there was no other body before which to file an appeal against the resolution."

8. Arguments on the principle of legality

145. The Commission argued that "the imposing of a *de facto* sanction, without legal grounds, resulted in the violation of the principle of legality." Regarding the termination of the judges, it argued that: (i) "the Constitution and the law established expressly that [the] mandate [of the judges] was four years, and the only way to remove them established in the Constitution was by impeachment"; (ii) "in a difficult political context of tension among the different branches of government, Congress created an *ad hoc* mechanism not provided for in the Constitution or by law to proceed to terminate all the members of the Constitutional Tribunal based on the argument that they had been elected illegally in 2003 and that it was necessary to correct that illegality," and (iii) "due to the creation of an *ad hoc* mechanism not provided for by law to determine the termination of the members of the Constitutional Tribunal, […] Ecuador violated the right recognized in Article 9 of the American Convention." In addition, the Commission added that "it is not possible to understand clearly how the resolution to terminate the members of the Constitutional Tribunal […] could have had as its objective to rectify the illegality of their appointment," "considering the time that had elapsed and the lack of other actions designed to question or determine the application of this voting system."

146. Regarding the impeachments, the Commission referred to the expression "constitutional or statutory infractions" and argued that "this formulation of the grounds for removal does not offer sufficient standards of determination, and that with a view to safeguarding the principle of judicial independence these grounds must be described with the greatest possible clarity. In this regard, the lack of certainty with regard to the grounds for removal of the judges, in addition to raising doubts as to the independence of the judiciary, may give rise to arbitrary actions of abuse of authority with direct repercussions on the rights to due process and to legality."

147. The representatives argued that the State had "violated Article 9 of the Convention by not establishing by law the causes for the removal of a judge and by prosecuting them on December 1 on grounds that were expressly prohibited by the Constitution at the time. The judges enjoyed immunity based on their rulings in their decisions."

148. In relation to the termination of the judges, during the public hearing, the State acknowledged that it had not had "grounds established by law to remove the presumed victims from their functions." It indicated that, regarding the termination, although "the National Congress could make a legal and constitutional analysis, this should have contained clear mechanisms to review the duration and stability of the positions of the former members of the Constitutional Tribunal".

149. Regarding the impeachment proceedings, the State alleged that the arguments of the Commission and of the representatives "essentially ignore the importance of political control for the exercise of healthy democracy," given "the juridical nature of political control and its characteristics," and since "there is no legal definition of the facts that corresponds to the right violated."

9. Arguments on the right not to be tried twice for the same facts

150. The Commission did not refer specifically to the presumed violation of the right not to be tried twice for the same facts. It merely indicated that "as regards the second vote on impeachment of December 8, 2004, the Commission considers that, according to the information available, it was not a new impeachment, but a repetition of the vote already adopted. In effect, in light of the pressure brought to bear by the President of the Republic by the call to special sessions, the National Congress repeated the vote on impeachment and modified the decision adopted previously on December 1. The information available allows one to conclude that the Congress once again adopted a resolution on a matter already decided without a mechanism being provided for this purpose, and that the victims did not have the opportunity to participate in this proceeding or to exercise their right to defense."

151. The representatives argued that "the purpose of the impeachment proceeding was to determine the guilt of the defendants for 'statutory or constitutional infractions in the exercise of their office'; that Article 8(4) of the American Convention applies "not only in the criminal jurisdiction, but also to any sanctions proceeding," and that if "a motion of guilt is not approved by the National Congress, this is equivalent to an acquittal, [which] cannot be revised by the same body."

152. The State argued that the special session of December 8, 2003, "was held to rectify and error that had occurred in the session" of December 1, related to a "joinder of motions when the law did not permit this."

10. Arguments on Articles 1(1) and 2 of the Convention

153. The Commission argued that "[a]t the time of the events, the National Congress had not enacted the law establishing clearly the causes for impeaching the judges […], nor had it established a procedure that established the norms of due process and guaranteed an adequate defense." It added that "given the absence of the regulation in Ecuador's legal system of any other mechanisms that would permit a review of the dismissal decision, the Ecuadorian legal framework did not offer the victims an effective judicial remedy, which resulted in a violation of Article 2 of the American Convention in this case."

154. The representatives agreed with the Commission and added that, "at the time of the dismissal, Ecuador had not enacted a law in which it established the causes for the dismissal of the members of the Constitutional Tribunal," nor had it determined "the conducts that would be grounds for dismissal, or established a general procedure." They added that "even though normative progress has undoubtedly been made, such as the enactment of the 2008 Constitution, and the Organic Law on Jurisdictional Guarantees and Constitutional Control, […] the political organs still exercise an indirect control over the Constitutional Court by means of the mechanisms for selecting the judges, so that it is relevant to declare a violation of Article 2 of the Convention."

155. The State asserted that Article 2 had not been violated, because "a public policy was underway in relation to the protection of human rights and the re-engineering of the administration of justice, the first signs of which could be seen in the 1998 Constitution, the Organic Law on the Council of the Judicature, and the Law on Constitutional Control, which was developed, strengthened and consolidated in the 2008 Constitution, the Organic Code on the Judicial Function, and the Organic Law on Jurisdictional Guarantees and Constitutional Control." It indicated that, "in relation to the general obligations contained in Articles 1(1) and 2 […], the Ecuadorian State [had complied] with these, because […] the

1998 Constitution contained guarantees of independence for the functioning of the former Constitutional Tribunal, even though, nowadays there are greater guarantees, and the possibility of impeachment has been eliminated." Thus, declaring "the violation of Articles 1(1) and 2 of the American Convention would be inconsistent and without evidence, because Ecuadorian laws and, consequently, the general intention of the State, expressed in its different norms over time, has always aimed at respect for human rights. Thus, one specific case should not be used to prove non-compliance with a general obligation."

11. Arguments on judicial protection

156. The Commission considered that "the [presumed] victims were prevented, arbitrarily and without justification from filing appeals for *amparo* against the termination resolution of the National Congress," and that the indicated remedy for the Constitutional Tribunal; that was, the action on unconstitutionality, was not suitable for challenging the particular effects of that resolution." In addition, it argued that "the [presumed] victims did not have access to an effective remedy to argue violations of due process during the impeachment proceedings, such as the right to heard and the right of defense."

157. The representatives argued that the "members […] of the Constitutional Tribunal […] were unable to avail themselves of the action for constitutional protection, nor was this an effective remedy, [and] did not have any simple and prompt remedies that would have protected their fundamental rights violated by the decision of the National Congress to remove them from office." They considered that: "(1) the remedies of *amparo* filed by the members of the CT were systematically rejected; (2) court judges were threatened if they decided in favor of the *amparo*; (3) the President of the Republic asked the *de facto* CC to take a general decision to reject the remedies of *amparo*; (4) the court judges were neither independent nor impartial; (5) an interpretive decision of the SCJ on the scope of the *amparo* was applied that disallowed its application to the resolutions of the National Congress".

158. The representatives considered that "the remedy of *amparo* was not effective to contest the termination decisions adopted by the National Congress, because the actions filed by the members of the [Constitutional Tribunal] were rejected based on the political pressure placed on the court judges. Moreover, it was senseless to appeal the resolutions, owing to the evident partiality of the judges. The action on unconstitutionality was also ineffective for two reasons: (1) access, and (2) the result. Regarding access, the action could only be filed on the initiative of some State institutions and with the support of 1,000 persons making use of their political rights. The victims in this case, at the time of the violation of their rights, ceased to be judges; hence, they were not legitimated to file the remedy. They could only have sought 1,000 supporting signatures, which meant that it was difficult to have access to this remedy. With regard to the result, according to the above-mentioned constitutional norms, the purpose of the action is to examine the formal and substantial conformity of a norm or of an administrative act with the Constitution. The action on unconstitutionality does not provide the possibility to repair a right."

159. The State acquiesced to the violation of this article of the Convention with regard to the facts relating to the termination of the members of the Constitutional Tribunal. In its answering brief, the State argued that "regarding access" to a judicial remedy, "article 277 of the Constitution establishe[d] the possibility that citizens, with a minimum of 1,000 signatures, could file an action on unconstitutionality, a situation that was not an impossible requirement for the former members of the Constitutional Tribunal to meet." In addition, it indicated, in relation to the action on unconstitutionality following a report of the Ombudsman, that, "in numerous cases, [the latter] applied the 1998 Constitution directly

and issued favorable reports to file actions on unconstitutionality." Regarding the "result of the remedy," it argued that the action on unconstitutionality "incorporated the appropriate response to this situation: the total or partial suspension, as appropriate, of the effects of the resolution," with "the total suspension of the effects as a reparatory aspect." Lastly, regarding the presumed lack of impartiality of the new Constitutional Tribunal, it considered that "the situation of political necessity clearly revealed a crisis with juridical elements of instability; hence collateral damage to the population could have arisen if the situation concerning the appointment of the former members of the Constitutional Tribunal had not been rectified."

12. Arguments on equality

160. The Commission considered that the alleged facts "do not characterize a possible violation [of] Article […] 24 of the American Convention."

161. The representatives argued that the State "discriminated against the judges at two moments: (i) when it removed one group of judges and not another, and (ii) when it left the judges without access to the constitutional guarantee of the *amparo* remedy, which was a right of everyone else on the State's territory."

162. Regarding the first action, the representatives added that "the National Congress treated the two groups of judges who were in equal conditions differently." According to the representatives, "the Government considered one group corrupt, inept, incompetent to exercise their functions, and considered that the other group, who were pro-government, could continue to exercise their functions." In addition, the representatives argued that "the motive [for the termination of some judges and not others] […] was the perception of the parliamentary majority that the judges responded to political directives," and they underlined that "the result of this differentiated treatment materialized in the annulment of the right to exercise public office."

163. Regarding the second action, the representatives stated that "the Constitution of Ecuador [had established] that everyone, without distinction, ha[d] the right to file an action for *amparo*, solely based on the fact that they felt that their rights were being violated." The representatives argued, regarding the resolution of December 2, 2004, under which access to the remedy of *amparo* was denied, that "although it could be interpreted […] as a general decision that could affect anyone who decided to file an action for *amparo* against a resolution of the National Congress, the title of the resolution alluded to the action for which the judges were removed" (namely, resolution No. 25-160 of November 25, 2004). The representatives added that the criterion used to make this differentiation "was having been the target of a parliamentary resolution, which should be understood as a prohibited category in the sense of 'any other difference." According to the representatives, "the purpose and the result of this differentiation were to annul the right to judicial protection." The representatives concluded that, "for all these reasons, the Ecuadorian State ha[d] violated Article 24 in relation to Article 1(1) of the Convention."

164. For its part, the State maintained that the affirmation of the representatives of the victims with regard to the discriminatory treatment was "imprecise," because "the only element that the National Congress had considered was the illegality at the origin of some appointments, and the legality of others […], so that it was the law itself that made the differences." In addition, the State reiterated that "not all unequal treatment should be considered discrimination" and that, in this case, "the Ecuadorian State had proved that the representatives' assertions [were] inconsistent and inappropriate in relation to their allegation of discriminatory treatment, because the only factor that the National Congress

had considered was the illegality of the origin of some appointments, and the legality of others." Therefore, the State concluded that "no consistent elements existed to analyze a violation of Article 24 of the American Convention on Human Rights."

B. Considerations of the Court

165. In this section, first, the Court considers it opportune to ratify the fundamental criteria contained in the case of *the Constitutional Court v. Peru*. Second, it will analyze the possible effects on the judicial guarantees of the presumed victims, in both their removal from office, and in the impeachment proceedings that were held. Third, the Court will refer to the main standards relating to the principle of judicial independence. Fourth, it will explain the particularities of the institutional aspect of judicial independence in the circumstances of this case.

1. The Inter-American Court's case law on judicial guarantees in impeachment proceedings

166. The Court has ruled on judicial guarantees in relation to the procedure for the removal of judges of a Constitutional Court in the context of an impeachment proceeding held by Congress in the case of *the Constitutional Court v. Peru*. The Court ratifies the following criteria mentioned in that case:[192]

> 68. Respect for human rights constitutes a limit to a State's activity, and this is true for any organ or official in a situation of power, due to its official nature, with regard to other persons. Consequently, any form of exercising public power that violates the rights recognized in the Convention is unlawful. This is even more important when the State exercises its power to sanction, because this not only presumes that the authorities act with total respect for the legal system, but it also involves granting the minimum guarantees of due process to all persons who are subject to its jurisdiction, as established in the Convention.
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> 69. Although Article 8 of the American Convention is entitled "Judicial Guarantees" [in the Spanish version - "Right to a Fair Trial" in the English version], its application is not strictly limited to judicial remedies, "but rather the procedural requirements that should be observed in order to be able to speak of effective and appropriate judicial guarantees" so that a person may defend himself adequately in the face of any kind of act of the State that affects his rights.
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> 70. The Court has already established that, although this article does not establish minimum guarantees in matters relating to the determination of rights and obligations of a civil, labor, fiscal or any other nature, the full range of minimum guarantees stipulated in the second paragraph of this article are also applicable in those areas and, therefore, in this type of matter, the individual also has the overall right to the due process applicable in criminal matters.
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> 71. Although the jurisdictional function belongs, in particular, to the Judiciary under the separation of powers that exists in the rule of law, other public organs or authorities may exercise functions of the same type. In other words, when the Convention refers to the right of everyone to be heard by a competent judge or court to "determine his rights," this expression refers to any public authority, whether administrative, legislative or judicial, which, through its decisions determines individual rights and obligations. For that reason, this Court considers that any State organ that exercises functions of a materially jurisdictional nature has the obligation to adopt decisions that are in consonance with the guarantees of due legal process in the terms of Article 8 of the American Convention.
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> […]
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> 75. This Court considers that, under the rule of law, the independence of all judges and, in particular, that of constitutional judges, must be guaranteed owing to the nature of the matters submitted to their consideration. As the European Court has indicated, the independence of any

[192] *Cf. Case of the Constitutional Court v. Peru. Merits, reparations and costs.* Judgment of January 31, 2001. Series C No. 71, paras. 68 to 71, 75 and 77.

judge presumes that there is an appropriate appointment process, a fixed term in the position and a guarantee against external pressures.

[…]

77. Regarding the exercise of the authority of Congress to conduct impeachment proceedings, which engages the responsibility of a public official, the Court believes that it should be recalled that any person subject to a proceeding of any nature before an organ of the State must be guaranteed that this organ is competent, independent and impartial and that it acts in accordance with the procedure established by law for hearing and deciding the case submitted to it.

167. Similarly, in the case of *Baena Ricardo v. Panama,* the Court established that:[193]

125. The Court observes that the series of minimum guarantees established in paragraph 2 of Article 8 of the Convention is applied to the jurisdictions referred to in paragraph 1 of this article, namely, the determination of rights and obligations of "a civil, labor, fiscal, or any other nature." This reveals the broad scope of due process; the individual has the right to due process as understood in the terms of Article 8(1) and 8(2) in both criminal matters and in all of these other jurisdictions.

126. In any matter, including labor and administrative matters, the discretionality of the administration has limits that may not be passed, one such limit being respect for human rights. It is important that the administration's conduct be regulated and it may not invoke public order to reduce the guarantees of the population discretionally. For instance, the administration may not dictate punitive administrative decisions without granting the individuals sanctioned the guarantee of due process.

127. It is a human right to obtain all the guarantees that make it possible to arrive at fair decisions, and the administration is not exempt from comply with this obligation. The minimum guarantees must be observed in administrative proceedings and in any other proceeding whose decision may affect the rights of the individual.

[…]

129. Justice, provided through due process of law, as a real, juridically protected right, must be ensured in any disciplinary proceeding, and States cannot escape this obligation based on the argument that the due guarantees of Article 8 of the American Convention do not apply in the case of sanctions that are disciplinary rather than criminal. Allowing States to make this interpretation would be equivalent to leaving the application of the right of every individual to due process up to their free will.

168. In the *case of the Constitutional Court v. Peru*, the judges were penalized by impeachment proceedings held by Congress based on actions that had supposedly harmed due process when ruling on a case, when, among other aspects, a draft judgment had been leaked to the press, a vote had been held that was classified as irregular, and the three judges who were prosecuted had taken a decision without consulting the other members of that organ.[194] The Court observed that several members of Congress who had sent a letter to the Constitutional Court asking it to rule on whether or not a law on presidential re-election was constitutional, subsequently took part in different committees and sub-committees appointed in the removal process and, contrary to the congressional rules of procedure, some members of the Permanent Commission participated in the vote of the

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[193] *Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs.* Judgment of February 2, 2001. Series C No. 72, paras. 125 to 127 and 129.

[194] In that case it was proved that: "on May 5, 1997, the congressional Investigation Committee submitted constitutional charges against Justices Aguirre Roca, Rey Terry and Revoredo Marsano to the congressional Permanent Commission, accusing them of violating the Constitution by submitting a working paper as "if it was a judgment that had already been discussed and adopted by the full Constitutional Court" and also for issuing a ruling on the petition for clarification filed by the Lima Bar Association on behalf of the Constitutional Court. Lastly, it indicated that Justice Nugent had acted unlawfully by "justifying the constitutional violation" and not convening the full Constitutional Court to decide the said petition for clarification." *Cf. Case of the Constitutional Court v. Peru*, para. 56.19.

plenary on the removal of the constitutional judges.[195] Consequently, the Court considered that "Congress did not ensure the dismissed judges the guarantee of impartiality required by Article 8(1) of the American Convention."[196]

169. In addition, the Court noted that:[197] (i) the Investigation Committee was given the express mandate that it could not examine any matter related to the exercise of the jurisdictional function of the Constitutional Court; but, in its report, the Committee ignored this mandate and indicated that there were irregularities during the adoption of various jurisdictional decisions of that Court; (ii) that the judges victims in the case were not summoned before the Committee again, so that when the latter drew up its report, it assumed that what two other judges of the Constitutional Court had said was true, without offering the alleged victims the possibility of exercising their right to present evidence for the defense; (iii) the defendants were not informed opportunely and fully of the charges against them and their access to the body of evidence was limited; (iv) once the victims had been informed of the constitutional charges against them the time granted to them to prepare their defense was extremely short; (v) they were not allowed to cross-examine the witnesses on whose testimony the members of Congress had based themselves to initiate the impeachment procedure that concluded with the consequent dismissal, and (vi) the decision adopting the dismissal was not substantiated in any way.

2. The violation of judicial guarantees in relation to the termination of the judges and the impeachment proceedings against them

170. Having expounded the precedent of the case of the *Constitutional Court v. Peru*, the Court will proceed to determine, initially, whether the resolution adopted by Congress declaring the termination of the judges, as well as the impeachment proceedings held against some of them, constituted an arbitrary decision that violated the guarantee of competence and the right to a hearing. In order to make this analysis, the Court finds it necessary to examine: (i) the legal grounds and the competence of the Congress to terminate the judges. Subsequently, (ii) the scope of the right to a hearing in relation to the decision to terminate the judges and to the impeachment proceedings, as well as the "*ne bis in idem*" principle. Then, the Court will describe (iii) the general standards for judicial independence and, lastly, will analyze (iv) the institutional aspect of judicial independence, the separation of powers, and democracy.

2.1. Legal grounds and competence to declare the termination

171. Article 8(1) of the Convention guarantees that the decision in which the rights of the individual are determined must be adopted by the competent authorities determined by domestic law. In this case, the termination of the judges entailed a determination of their rights in the sense that the consequence of this termination was their immediate removal from office, so that the judicial guarantees established in Article 8(1) of the American Convention are applicable. Accordingly, the Court will proceed to determine whether Congress had competence to terminate the judges.

172. The Court finds it necessary to examine the grounds used in Resolution No. R-025-2005 of November 25, 2004, by which the National Congress terminated the members of the Constitutional Tribunal, in order to determine whether this removal from office falls

195 *Cf. Case of the Constitutional Court v. Peru*, para. 78.

196 *Cf. Case of the Constitutional Court v. Peru*, para. 78.

197 *Cf. Case of the Constitutional Court v. Peru*, paras. 80 and 83.

within any of the permitted circumstances; in other words, completion of the term of office or for serious disciplinary offenses (*supra* para. 62). In this regard, the Court observes that the main reason stated in the resolution was that "the permanent members of the Constitutional Tribunal and their alternates were appointed illegally" (*supra* para. 63). According to the statements of the members of Congress during the session in which the decision was taken, the irregularity in the appointment of the judges was related to the way in which the voting was conducted, by the method known as the "single list," which they considered was not the one established by law to appoint the judges (*supra* para. 53).

173. During the session of November 25, 2004, the members of Congress debated the legality of the termination of the judges.[198] However, this Court takes into account the State's acquiescence in the instant proceedings, acknowledging that "the termination of the […] former judges […], [had] violated guarantees of stability and independence […] because the removal from office of the presumed victims was not based on grounds determined by law." Indeed, in Resolution No. R-025-2005, Congress did not cite any law as the legal basis for declaring the termination; moreover, the State did not indicate on which law this decision could have been based.

174. Even though the "single-list" voting mechanism was not to be found explicitly in Ecuador's domestic laws, no evidence was provided to the Court on any type of legislative, administrative or judicial action that was filed to contest or to regulate the scope and admissibility of the "single-list" voting mechanism, following the appoint of the members of the Constitutional Tribunal on March 19, 2003, until the time of the political crisis towards the end of 2004. If Congress considered that the appointment had been made irregularly, it should not have waited more than a year and a half to rectify this irregularity.

175. The State did not provide any information on the illegality of using the "single-list" vote under domestic law. Meanwhile, expert witness Ponce, whose opinion was not contested by the State, explained that the declaration of a possible illegality in the appointment would correspond to the contentious-administrative jurisdiction by means of an action for prejudice (*acción de lesividad*) [Translator's note: action that allows the Administration to file an action against its own decisions].[199] Thus, if Congress considered that the appointment was irregular, it should have had recourse to the contentious-administrative courts for the latter to determine whether the appointment was licit.

176. Furthermore, the available evidence indicates that the only way in which it was possible to terminate the Constitutional Tribunal was by an impeachment proceeding, as established in article 275 of the 1998 Constitution (*supra* para. 50). In this regard, expert witness Ávila Linzán, proposed by the State, explained that article 275 of the 1998 Constitution did not "establish any kind of removal or 'termination' of office; however, it referred to another norm in the phrase: 'The members of the Constitutional Tribunal shall

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198 *Cf.* National Congress, Resolution No. R-25-160 of November 25, 2004 (file of annexes to the report, tome I, folios 347 to 405).

199 Expert witness Ponce Villacís explained that "[t]he mechanism that the National Congress should have used was the so-called action for prejudice (*acción de lesividad*) established in article 23 of the Law of the Contentious Administrative Jurisdiction […]. It is evident that if the National Congress considered that its decision appointing the members of the Constitutional Tribunal was illegal, it should have had recourse to the contentious administrative system of justice, so that this could determine whether the annulment of the appointment was legal; evidently, in the understanding that the appointment of members of the Constitutional Tribunal, which is a constitutional attribute, is clearly an administrative decision, because it is obviously not a legislative decision. Clearly, only the National Congress had the power to file this action because it had adopted the decision appointing the members of the Constitutional Tribunal." Affidavit prepared by expert witness Alejandro Ponce Villacís on March 13, 2013 (merits file, tome III, folio 1351).

meet the same requirements as the justices of the Supreme Court of Justice, and shall be subject to the same prohibitions."[200] Expert witness Ávila also indicated that, although article 39 of the Law on the Organization of the Judicial Function established the requirements for justices of the Supreme Court of Justice, this article did "not include, in any case, an explicit effect for the case in which a member of the [Constitutional Tribunal] was affected by one of the grounds for not meeting a requirement, ineptitude, incapacity or prohibition."[201] Therefore, according to expert witness Ávila Linzán, the National Congress did not have constitutional powers "to terminate" the members of the Constitutional Tribunal unless they used impeachment.[202]

177. In addition, article 202 of the 1998 Constitution did not refer to presumed formal errors in the appointment. Even though article 202 of the Constitution established the "termination" on "the grounds determined by the Constitution and the law,"[203] this article only applied to justices of the Supreme Court of Justice.

178. Moreover, neither the resolution that terminated the members of the Constitutional Tribunal nor the arguments presented by the State show clearly that Congress was competent to review the legality of the appointment of the judges. From the laws provided, the Court observes that Congress could try judges by means of impeachment proceedings, but these laws do not establish the legal grounds that empowered Congress to review the vote and to decide, should the vote have been conducted illegally, that the judges should be removed from office. The Court also underscores that the review of the presumed irregularity in the appointment of the judges was implemented more than a year and a half after their appointment. There is no reasonable explanation to help understand why Congress had allowed the Constitutional Tribunal to exercise its functions "illegally" for more than 18 months, if that was the case. The supposed intention to rectify the error in the appointment of the judges emerged precisely at a time of political crisis among the powers of the State, a context in which the termination of all the justices of the Supreme Court of Justice also occurred (*supra* para. 55).

179. In this regard, the Court considers that allowing the possibility of reversing an appointment of the highest court on constitutional matters to subsist for more than 18 months – in other words, that this possibility of examining and reversing supposed formal errors in an appointment of such importance does not expire after a reasonable time – affects the guarantee of stability in office and can permit the emergence of external pressures, aspects directly related to judicial independence (*infra* para. 188). In circumstances such as those of the instant case, this would mean legitimating the permanence of the members of a high court in legal uncertainty regarding the legality of their appointment, and could result in a constant threat of the possibility of being removed from their functions at any time, an aspect that, in certain political contexts, increases the risk of undue external pressure on the exercise of the judicial function.

180. Based on the foregoing, the Court concludes that even though the members of Congress stated that the judges were being terminated owing to an irregularity in the vote by which they were elected, the truth is that the State did not explain the legal grounds that established that the vote could not be held by the so-called "single-list" mechanism. This

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200 Affidavit prepared by expert witness Ávila Linzán on March 13, 2013 (merits file, tome III, folio 1402).

201 Affidavit prepared by expert witness Ávila Linzán (merits file, tome III, folio 1403).

202 *Cf.* Affidavit prepared by the expert witness Ávila Linzán (merits file, tome III, folios 1405 and 1406).

203 *Cf.* Article 202 of the Constitution of the Republic of Ecuador of August 11, 1998 (file of annexes to the answering brief, tome I, folio 3694).

means that the National Congress was not competent to take the decision to terminate the judges, and this was not an appropriate decision in light of the principles of judicial independence to be defined below (*infra* paras. 188 to 199).

2.2. Possibility of being heard and exercising the right of defense, and the "*ne bis in idem*" principle

181. Even though, it has already declared that Congress did not have competence to remove the members of the Constitutional Tribunal from office (*supra* para. 180), in the circumstances of the instant case, the Court finds it necessary to examine some of the rights that, according to the Commission and the representatives, were violated both by the termination decision, and by the impeachment proceedings; in particular, the right to a hearing, and the right of to defend oneself, and the "*ne bis in idem*" principle. The Court has developed the right to a hearing protected by Article 8(1) of the Convention, understanding that, in general, it signifies the right of everyone to have access to the court or the organ of the State responsible for determining his or her rights and obligations.[204] Regarding the right to a hearing, established in Article 8(1) of the Convention, the Court reiterates that the guarantees established in Article 8 of the American Convention suppose that the victims must have ample possibilities of being heard and acting in the respective proceedings,[205] so that they may submit their claims and present probative elements, and that these are analyzed completely and rigorously by the authorities before a decision is taken on the facts, responsibilities, sanctions, and reparations.[206]

182. In this regard, the European Court of Human Rights has indicated that the requirement that a person "be heard fairly, publicly and within a reasonable time, by an independent and impartial court," is equivalent to the right to a fair "trial" or "judicial proceedings." Thus, the European Court has developed the criterion according to which a fair proceeding supposes that the organ responsible for administering justice makes "an appropriate examination of the allegations, arguments and evidence submitted by the parties, without prejudice to its assessment as to whether they are relevant for its decision."[207] In the case of *Olujic v. Croatia* concerning the processing of a disciplinary proceeding against the President of the Supreme Court of Croatia, the European Court of Human Rights emphasized the importance of the right to a fair hearing.[208] Meanwhile, the Committee of Ministers of the Council of Europe has also indicated that, in dismissal proceedings it is necessary to guarantee judges "at least all the due process requirements of the [European] Convention [on Human Rights], for instance that the case should be heard within a reasonable time and that they should have a right to answer any charges."[209]

2.2.1. Rights to a hearing and of defense during the termination procedure on November 25, 2004

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204 *Cf. Case of Genie Lacayo v. Nicaragua. Merits, reparations and costs*. Judgment of January 29, 1997. Series C No. 30, para. 74, and *Case of Cabrera García and Montiel Flores v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of November 26, 2010. Series C No. 220, para. 140.

205 *Cf. Case of the Constitutional Court v. Peru*, para. 81.

206 *Case of Baldeón García v. Peru. Merits, reparations and costs.* Judgment of April 6, 2006. Series C No. 147, para. 146, and *Case of Barbani Duarte et al. v. Uruguay. Merits, reparations and costs*. Judgment of October 13, 2011. Series C No. 234, para. 120.

207 *Cf. Case of Barbani Duarte et al. v. Uruguay,* para. 121.

208 *Cf. Case of Barbani Duarte et al. v. Uruguay*, para. 121.

209 *Cf.* Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe on the independence, efficiency and role of judges, adopted on 13 October 1994.

183. In this regard, the sanctioned judges were not notified of the debate on the irregularities of their appointment during the session on November 25, 2004. Indeed, from the evidence in the case file, it is fully proved that the judges were removed from office without having the possibility of appearing before the National Congress to respond to the charges that were being made against them, or to contest the arguments based on which they were terminated (*supra* para. 65). Given that the termination entailed a determination of the rights of the judges, it was necessary that, in some way, their possibility of being heard was guaranteed in relation to the alleged irregularities because of the "single-list" vote.

2.2.2. *"Ne bis in idem,"* right to a hearing, and right of defense during the impeachment proceedings

184. Nevertheless, and in relation to the impeachment proceedings, the judges were notified on November 24, 2004, about the impeachment proceedings against them to be held on December 1, 2004 (*supra* para. 81). On December 1, 2004, they were able to defend themselves with regard to the decisions that they had adopted concerning the fourteenth salary and the D'Hondt method. On that occasion, the judges submitted their arguments against the motions of censure that would be submitted to a vote. Judge Cevallos argued that "impeachment was only admissible for statutory and constitutional infractions committed in the performance of functions," and that the Constitution stated clearly that judges were "not responsible for the votes they emit[ted] and for the opinions they express[ed] in exercise of their functions."[210] Judge Cevallos also emphasized the need for the total freedom of the Constitutional Tribunal, and explained that, "to the contrary, each time that it attempted to apply constitutional control to the decisions of the National Congress, there w[ould] be impeachment proceedings against those who do not agree with the wishes of the legislators, and Congress w[ould] become a court to review the decisions issued by the Constitutional Tribunal, in final instance."[211] Meanwhile, alternate Judge Jaramillo acknowledged the faculty of the National Congress to impeach the judges, but underscored that the Constitution indicated that "they w[ould] not be held responsible, either civilly or criminally, for the votes and opinions they issue[d] in the exercise of their functions."[212]

185. In this regard, the Court considers that, although the judges appeared at the session of December 1, 2004, during which the motions of censure that had been presented were not approved, and the content of the motions of censure on which a vote was taken on December 8, 2004, was not changed, nevertheless, at the December 8 session, the decision was taken to re-open the vote on the four motions of censure that had been voted on previously and, in fact, in the end the motions were adopted (*supra* paras. 93 and 94). It should be stressed that, according to article 92 of the Law on the Organization of the Legislative Function, once a motion of censure has been submitted, it "shall conclude with the respective vote."[213] In this regard, without claiming to establish a general principle

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210 National Congress Record No. 24-326 of December 1, 2004 (merits file, tome I, folio 446).

211 National Congress Record No. 24-326 of December 1, 2004 (merits file, tome I, folios 446 and 447).

212 National Congress Record No. 24-326 of December 1, 2004 (merits file, tome I, folio 476).

213 The first paragraph of article 92 of the Law on the Organization of the Legislative Function of Ecuador established: "[w]hen the motion of censure has been proposed, the Speaker of the National Congress or his deputy, shall indicate the date and time of the session in which the debate will commence that will conclude with the respective vote." Article 92 of the Law on the Organization of the Legislative Function of Ecuador (file of annexes to the answering brief, tome I, folio 3640).

about when and how the re-opening of a vote in a parliamentary entity should be carried out, the Court finds it necessary to underline that, in an impeachment proceeding, there must be clarity as to when it starts and when it ends.

186. In this case, the information provided to the Court only allows it to conclude that the vote conducted on December 8, 2004, re-opened an impeachment proceeding that had already been finalized. Indeed, on December 2, 2004, the Secretariat of the Congress issued an explicit certification[214] in which it indicated that it had not been approved and that it had been declared that the motions of censure had been rejected. Consequently, it can be affirmed that, according to domestic law, the procedural requirements had been met to consider that the impeachment proceeding had ended. Subsequently, a call to special sessions was used to re-open the vote, even though it had already been held. Consequently, this re-opening of the vote signified a new proceeding and the violation of the guarantee of "*ne bis in idem.*"

187. Furthermore, since a new proceeding was held, the obligation arose to hear the presumed victims as pertinent. In this regard, the Court notes that the judges were not notified about the session of December 8, 2004, in which it was decided to hold a second vote on the motions of censure (*supra* para. 90). Consequently, the judges had no opportunity to intervene in the proceeding on December 8, 2004, to have their arguments heard on the legality of this session and, specifically, on the legality of holding a second vote on the motions, or to exercise their right of defense and, thereby, to be able to influence a vote that signified their removal.

3. Judicial independence

3.1. General standards of judicial independence

188. In this section, the Court will summarize its case law on the principle of judicial independence. The Court's case law has indicated that the scope of real judicial guarantees and of judicial protection for judges must be examined in relation to the standards of judicial independence. In the case of *Reverón Trujillo v. Venezuela*, the Court stipulated that judges, contrary to other public officials, have specific guarantees owing to the necessary independence of the Judiciary, which the Court has understood to be "essential for the exercise of the judicial function."[215] The Court reiterated that one of the main objectives of the separation of the public powers is to guarantee the independence of judges.[216] The objective of protection stems from the need to avoid the judicial system, in general, and its members, in particular, being subjected to possible undue constraints in the exercise of their function by organs outside the Judiciary or even by those judges who exercise review or appeal functions.[217] According to the case law of this Court and of the European Court of Human Rights, as well as according to the United Nations Basic Principles on the

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[214] *Cf.* National Congress, Certification of the Secretary General of the National Congress issued on December 2, 2004, Note No. 371-HAV-CN-2004 (file of annexes to the report, tome II, folio 647).

[215] *Case of Reverón Trujillo v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of June 30, 2009. Series C No. 197, para. 67, citing *Case of Herrera Ulloa v. Costa Rica. Preliminary objections, merits, reparations and costs.* Judgment of July 2, 2004. Series C No. 107, para. 171, and *Case of Palamara Iribarne v. Chile. Merits, reparations and costs.* Judgment of November 22, 2005. Series C No. 135, para. 145.

[216] *Cf. Case of the Constitutional Court v. Peru*, para. 73, and *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs.* Judgment of February 24, 2012. Series C No. 239, para. 186.

[217] *Cf. Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of August 5, 2008. Series C No. 182, para. 55, and *Case of Atala Riffo and daughters v. Chile*, para. 186.

Independence of the Judiciary (hereinafter "Basic Principles"[218]), the following guarantees are required for judicial independence: an appropriate appointment procedure,[219] tenure,[220] and a guarantee against external pressure.[221]

189. Among the elements of tenure that are relevant for this case, the Basic Principles establish that "[t]he term of office of judges […] shall be adequately secured by law,"[222] and that "[j]udges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists."[223] Also, the Human Rights Committee has indicated that judges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the Constitution or the law.[224] This Court has endorsed these principles and has asserted that the authority in charge of the procedure for the dismissal of a judge must behave independently and impartially in the procedure established to this end and must allow the exercise of the right of defense.[225] This is so, because the free removal of judges fosters an objective doubt in the observer about the real possibility of judges to decide specific disputes without fear of reprisal.[226]

190. Regarding the guarantee against external pressure, the Basic Principles stipulate that "[t]he judiciary shall decide matters before them […] on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."[227] The said

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218 United Nations Basic Principles on the Independence of the Judiciary adopted by the Seventh Congress of the United Nations on the Prevention of Crime and the Treatment of Offenders held in Milan, Italy, from 26 August to 6 September 1985, and confirmed by the General Assembly in its resolutions 40/32 of 29 November 1985, and 40/146 of 13 December 1985.

219 *Cf. Case of the Constitutional Court v. Peru*, para. 75, and *Case of Chocrón Chocrón v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2011. Series C No. 227, para. 98. See also, European Court of Human Rights, Case of *Campbell and Fell v. the United Kingdom,* Judgment of 28 June 1984, para. 78; European Court of Human Rights, *Case of Langborger v. Sweden,* Judgment of 22 January 1989, para. 32, and Principle 10 of the United Nations Basic Principles.

220 *Cf. Case of the Constitutional Court v. Peru*, para. 75, and *Case of Chocrón Chocrón v. Venezuela*, para. 98. See also, Principle 12 of the United Nations Basic Principles.

221 *Cf. Case of the Constitutional Court v. Peru*, para. 75, and *Case of Chocrón Chocrón v. Venezuela*, para. 98. See also, Principles 2, 3 and 4 of the United Nations Basic Principles.

222 *Cf.* Principle 11 of the United Nations Basic Principles.

223 Principle 12 of the United Nations Basic Principles.

224 *Cf.* Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007, para. 20. In addition, in the same General Comment the Committee stated that "[t]he dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary" (para. 20). In addition, the Basic Principles establish that "Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties" and that "all disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct." Principles 18 and 19 of the United Nations Basic Principles.

225 *Cf. Case of the Constitutional Court v. Peru*, para. 74, and *Case of Chocrón Chocrón v. Venezuela*, para. 99.

226 *Cf. Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela*, para. 44, and *Case of Chocrón Chocrón v. Venezuela*, para. 99. See also, Principles 2, 3 and 4 of the United Nations Basic Principles.

227 Principle 2 of the United Nations Basic Principles.

Principles also establish that "[t]here shall not be any inappropriate or unwarranted interference with the judicial process."[228]

191. Nevertheless, the guarantee of stability and tenure for judges is not absolute. International human rights law admits that judges may be removed for conduct that is clearly unacceptable. In its General Comment No. 32, the Human Rights Committee established that "[j]udges may be dismissed only on serious grounds of misconduct or incompetence."[229] In addition, the Basic Principles on the Independence of the Judiciary establish the following concerning disciplinary measures, suspension and removal from office:

> "17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.
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> 18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties."[230]

192. In addition, other standards distinguish between applicable sanctions. They insist that the guarantee of tenure means that the removal must be based on fairly serious behavior, while other sanctions may be contemplated to deal with cases such as negligence or incompetence. In this regard, the recommendations of the Council of Europe on the independence, efficiency and role of judges establish:[231]

> "Principle I - General principles on the independence of judges […]
> 2. […] a.i. decisions of judges should not be the subject of any revision outside any appeals procedures as provided for by law;
>
> Principle VI – Failure to carry out responsibilities and disciplinary offences
> 1. When judges fail to carry out their duties in an efficient and proper manner or in the event of disciplinary offences, all necessary measures which do not prejudice judicial independence should be taken. Depending on the constitutional principles and the legal provisions and traditions of each state, such measures may include, for instance:
> a. withdrawal of cases from the judge;
> b. moving the judge to other judicial tasks within the court;
> c. economic sanctions such as a reduction in salary for a temporary period;
> d. Suspension.
> 2. Appointed judges may not be permanently removed from office without valid reasons until mandatory retirement. Such reasons, which should be defined in precise terms by the law, could apply in countries where the judge is elected for a certain period, or may relate to incapacity to perform judicial functions, commission of criminal offences or serious infringements of disciplinary rules.
> 3. Where measures under paragraphs 1 and 2 of this article need to be taken, states should consider setting up, by law, a special competent body which has as its task to apply any disciplinary sanctions and measures, where they are not dealt with by a court, and whose decisions shall be controlled by a superior judicial organ, or which is a superior judicial organ itself. The law should provide for appropriate procedures to ensure that judges in question are given at least all the due process requirements of the Convention, for instance that the case should be heard within a reasonable time and that they should have a right to answer any charges."

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228 Principle 4 of the United Nations Basic Principles.

229 *Cf.* Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007, para. 20. See also, Human Rights Committee, Communication No. 1376/2005, Soratha Bandaranayake *v.* Sri Lanka, CCPR/C/93/D/1376/2005, para. 7.3.

230 Principle 17 and 18 of the United Nations Basic Principles.

231 Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe on the independence, efficiency and role of judges, adopted on 13 October 1994 (at the fifty-eighth session of Vice Ministers).

193. Meanwhile, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa include a specific prohibition to remove judges in the context of the annulment of their rulings. The Principles and Guidelines established that "[j]udicial officials shall not be: […] removed from office or subject to other disciplinary or administrative procedures by reason only that their decision has been overturned on appeal or review by a higher judicial body."[232]

194. In addition, in relation to the protection granted by Article 23(1)(c) of the American Convention,[233] in the cases of *Apitz Barbera et al.,* and *Reverón Trujillo*, this Court stipulated that Article 23(1)(c) does not establish the right to have access to public office, but rather to do so "under general conditions of equality." This means that respect for and the guarantee of this right are complied with when "the criteria and processes for appointment, promotion, suspension, and dismissal are objective and reasonable" and when "no one is subject to discrimination" in the exercise of this right.[234] In this regard, the Court has indicated that equal opportunities in access to and tenure in a position guarantee freedom from any political interference or pressure.[235]

195. The Court has also indicated that the guarantee of tenure for judges is related to the right to permanence, on general terms of equality, in public office.[236] Indeed, in the case of *Reverón Trujillo,* the Court indicated that "access, on equal terms, would constitute an insufficient guarantee if it were not accompanied by the real protection of permanence in the office to which access is obtained."[237]

196. For its part, in cases of the arbitrary dismissal of judges,[238] the Human Rights

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[232] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted as part of the report of activities of the African Commission at the Second Summit and Meeting of Heads of State of the African Union held in Maputo from July 4 to 12, 2003, Principle A(4)(2).

[233] The pertinent part of Article 23(1) establishes that: "Every citizen shall enjoy the following rights and opportunities: […] (c) to have access, under general conditions of equality, to the public service of his country."

[234] *Cf. Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela*, para. 206, and *Case of Reverón Trujillo v. Venezuela*, para. 138. See also, Human Rights Committee, General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), CCPR/C/21/Rev. 1/Add. 7, 12 July 1996, para. 23.

[235] *Cf. Case of Chocrón Chocrón v. Venezuela*, para. 135. See also, Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007, para. 19.

[236] *Cf. Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela*, para. 43, and *Case of Chocrón Chocrón v. Venezuela*, para. 135. See also, Human Rights Committee, Communication No. 814/1998, *Mikhail Ivanovich Pastukhov v. Belarus*, CCPR/C/78/D/814/1998, para. 7.3; Communication No. 933/2000, *Adrien Mundyo Busyo, Thomas Osthudi Wongodi, René Sibu Matubuka et al. v. Democratic Republic of the Congo*, CCPR/C/78/D/933/2000, para. 5.2.

[237] *Case of Reverón Trujillo v. Venezuela*, para. 138, and *Case of Chocrón Chocrón v. Venezuela*, para. 135. Also, the Human Rights Committee, in the case of *Mikhail Ivanovich Pastukhov v. Belarus*, declared that "the author's dismissal from his position as a judge of the Constitutional Court, several years before the expiry of the term for which he had been appointed, constituted an attack on the independence of the judiciary and failed to respect the author's right of access, on general terms of equality, to public service in his country. Consequently, there has been a violation of article 25 (c) of the Covenant, read in conjunction with article 14, paragraph 1, on the independence of the judiciary." *Cf.* Human Rights Committee, Communication No. 814/1998, *Mikhail Ivanovich Pastukhov v. Belarus*, CCPR/C/78/D/814/1998, para. 7.3.

[238] In the case of *Soratha Bandaranayake v. Sri Lanka*, where the Committee concluded that "a dismissal of a judge in violation of article 25 (c) of the Covenant, may amount to a violation of this guarantee, read in conjunction with article 14, paragraph 1 providing for the independence of the judiciary." Human Rights Committee, Communication No. 1376/2005, *Soratha Bandaranayake v. Sri Lanka*, CCPR/C/93/D/1376/2005, para. 7.3."

Committee has considered that, by not respecting the basic requirements of due process, the right to due process established in Article 14[239] (the counterpart to Article 8 of the American Convention) is violated, in conjunction with the right to have access on equal terms to public service in his country protected by Article 25(c)[240] (the counterpart to Article 23()(c) of the American Convention).[241]

197. The foregoing elements allow the Court to clarify some aspects of its case law. For instance, in the case of *Reverón Trujillo v. Venezuela*, the Court indicated that the right to an independent judge established in Article 8(1) of the Convention only signified a right of the individual to be tried by an independent court or judge.[242] Nevertheless, it is important to point out that judicial independence should not only be analyzed in relation to the defendant, because the judge must have a series of guarantees that make judicial independence possible. The Court finds it pertinent to clarify that the violation of the guarantee of judicial independence, in relation to the tenure and stability of judges in their functions, must be analyzed in light of the Convention-based rights of judges when they are affected by a decision of the State that arbitrarily affects their term of appointment. In this sense, the institutional guarantee of judicial independence is directly related to a right of the judge to remain in office, as a result of the guarantee of tenure in office.

198. Lastly, the Court has indicated that the State must guarantee the autonomous exercise of the judicial function in both its institutional aspect, that is in relation to the Judiciary as a system, and also in relation to its individual aspect, that is, as regards the person of the specific judge.[243] The Court finds it pertinent to clarify that the objective dimension is related to essential aspects of the rule of law, such as the principle of the separation of powers, and the important role played by the judicial function in a democracy. Consequently, this objective dimension transcends the figure of the judge and has a collective impact on society. In addition, a direct relationship exists between the objective dimension of judicial independence and the right of judges to accede to and remain in office under general terms of equality, as an expression of their guarantee of stability.

199. Bearing in mind the standards indicated above, the Court considers that: (i) respect for judicial guarantees entails respect for judicial independence; (ii) the dimensions of judicial independence result in the subjective right of the judge that his removal from office

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239 Article 14(1) of the International Covenant on Civil and Political Rights establishes: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."

240 Article 25 of the International Covenant on Civil and Political Rights establishes: "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: […] (c) To have access, on general terms of equality, to public service in his country.

241 The Human Rights Committee concluded that ""the dismissal procedure did not respect the requirements of basic procedural fairness and failed to ensure that the author benefited from the necessary guarantees to which he was entitled in his capacity as a judge, thus constituting an attack on the independence of the judiciary. For this reason the Committee concludes that the author's rights under article 25(c) in conjunction with article 14, paragraph 1, have been violated." Human Rights Committee, Communication No. 1376/2005, *Soratha Bandaranayake v. Sri Lanka*, CCPR/C/93/D/1376/2005, para. 7.2.

242 *Case of Reverón Trujillo v. Venezuela*, para. 148.

243 *Cf. Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela*, para. 55, and *Case of Reverón Trujillo v. Venezuela*, para. 67.

is exclusively for the causes permitted, either by means of a procedure that complies with judicial guarantees or because the term or period of his mandate has ended, and (iii) when the permanence of judges in office is arbitrarily affected, the right to judicial independence established in Article 8(1) of the American Convention is violated, in conjunction with the right of access to and permanence in public service, under general conditions of equality, established in Article 23(1)(c) of the American Convention.

3.2. The sanction of the judges based on the judgments they delivered

200. As the Court has indicated previously, judges may only be removed for serious disciplinary offenses or incompetence, and by proceedings with due guarantees or when their term of office has ended (*supra* para. 191). Dismissal cannot be an arbitrary measure, and must be analyzed in light of the existing domestic legal framework and the circumstances of the specific case.

201. In the instant case, article 130(9) of the 1998 Constitution (*supra* para. 67) indicated that judges:

> May be impeached for legal or constitutional offenses in the exercise of their functions. Congress may censure them if they are found guilty by a majority of its members. The censure shall result in the immediate dismissal of the official.

202. In addition, article 199 of the 1998 Constitution of Ecuador (*supra* para. 49) indicated that:

> The organs of the Judiciary shall be independent in the exercise of their obligations and attributes. No function of the State may interfere in matters that are exclusive to them.
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> Justices and judges shall be independent in the exercise of their jurisdictional powers, even in relation to the other organs of the judicial function; they shall only be subject to the Constitution and the law.

203. Also, article 9 of the 1997 Law on Constitutional Control, established that the members of the Constitutional Tribunal "shall not be held responsible for the votes they emit and for the opinions they express in the exercise of the attributes inherent in their functions."[244] In this regard, expert witness Alejandro Ponce Villacís indicated that "the separation […] of a judge from his functions, as a sanction, should be reserved for the most egregious acts."[245]

204. Taking these elements into account, pursuant to the applicable domestic law at the time of the events, the purpose of an impeachment proceeding by the National Congress could not be the dismissal of a member of the Constitutional Tribunal based on a review of the constitutionality or legality of the judgments adopted by that body. This is due to the separation of powers and the exclusive competence of the Constitutional Tribunal to review the formal and/or substantial constitutionality of the laws enacted by the National Congress.

205. In the instant case, the six motions of censure that were submitted against the judges were directly related to judgments that the Constitutional Tribunal had delivered; in particular the decisions concerning the fourteenth salary and the D´Hondt method (*supra* para. 80). In fact, one of the motions of censure (E) tabled on May 31, 2004, requested expressly that impeachment proceedings be held owing to the decision of the judges in

[244] Article 9 of the 1997 Law on Constitutional Control (merits file, tome IV, folio 1761).

[245] Affidavit prepared by expert witness Alejandro Ponce Villacís on March 13, 2013 (merits file, tome III, folio 1357).

relation to the D´Hondt method. In this motion it was alleged that the judges had "acted based on their personal interests and to favor those who permitted their election to the Constitutional Tribunal […], to the detriment and prejudice of all the other political organizations that existed in the country [and …], disregarding a formula for calculating proportional representation that permitted plural and democratic political representation, [based on which] they ha[d] jeopardized the next elections, with a dangerous attack on the country's democratic life, as well as on the rights and freedoms guaranteed by the Constitution."[246]

206. Pursuant to Ecuadorian law, it was evident that the opinions provided in the rulings of the judges could not be the reason or grounds for their removal. An analysis of the records of Congress for December 1 and 8 allows this Court to conclude that no mention was made of specific facts relating to grave offenses committed by the judges. It was only their legal decisions that were mentioned. The Court observes that evidence that the impeachment was based on the type of legal decisions that the Constitutional Tribunal was taking within the framework of its competences is the fact that congressman Posso indicated that a letter had been handed to the President of the Constitutional Tribunal "dated February 16, 2004," and "signed […] by the leaders and heads of a bloc of six or seven political parties: *Izquierda Democrática, Partido Roldosista Ecuatoriano, Partido Renovador Institucional (PRIAN), Movimiento Pachakutik, Democracia Popular, Movimiento Popular Democrático,* and *Partido Socialista Frente Amplio*," warning the judges, "before they took the decision, following the complaint filed by the Social Christian Party, of the risks that could result from of a decision to strike down the D'Hondt method at that time; however, this warning […], presented by the majority of the political parties was not taken into account, but rather the eminently political criterion was given priority. Consequently, […several] members of Congress ha[d] presented a request for impeachment."[247] This is clear evidence of the impairment of judicial independence in this case.

3.3. Institutional aspect of judicial independence, separation of powers, and democracy

207. The Court has made some clarifications about the institutional aspect and the objective dimension of judicial independence (*supra* paras. 188 to 199). However, in the circumstances of this case, which are different from those of previous cases relating to the arbitrary removal of isolated judges, it is essential to develop in greater detail how the collective termination of judges, particularly of high courts, constitutes an attack not only on judicial independence but also on the democratic order.

208. The Court underscores that the 1998 Constitution included protection of judicial independence as an institutional aspect of the Judiciary (*supra* para. 49). Indeed, article 199 indicated that "the organs of the Judiciary shall be independent in the exercise of their obligations and attributes. No function of the State may interfere in matters that are exclusive to them." The Constitution also established that "justices and judges shall be independent in the exercise of their jurisdictional powers, even in relation to the other organs of the Judiciary."

209. This constitutional article, as well as the referendum held in Ecuador on this issue (*supra* para. 44), as a result of which it was decided that Congress no longer had the

[246] National Congress Record No. 24-326 of December 1, 2004 (file of annexes to the report, tome IIII, folio 1038).

[247] National Congress Record No. 24-326 of December 1, 2004 (file of annexes to the report, tome III, folio 1004).

authority to hold impeachment proceedings for justices of the Supreme Court, revealed the interest in safeguarding the separation of powers and judicial independence in the best possible way.

210. Thus, in the instant case, the Court finds it necessary to examine the context in which the facts surrounding the removal of the judges from office occurred, because this will be useful to understand the reasons or grounds on which this decision was made. This is because the reason or purpose of a specific decision of the State authorities is relevant for the legal analysis of a case, since a purpose or reason that differs from the norm that grants the State authority the power to act, may reveal whether the action can be considered an arbitrary act.[248] In this regard, the Court bases itself on the fact that the actions of State authorities are protected by a presumption of legal conduct; hence an irregular action by the State authorities must be proved in order to override the presumption of good faith.[249]

211. Based on the facts that were described in Chapter VII of this Judgment, the Court emphasizes that these reveal that, at the time the termination of the judges occurred, Ecuador was experiencing a situation of political instability that had involved the removal of several Presidents and the amendment of the Constitution on several occasion in order to deal with the political crisis. Furthermore, the alliance of the Government in power at the time with the political party headed by former President Bucaram provides an indication of the possible reasons or purpose for wanting to remove the justices of the Supreme Court and the members of the Constitutional Tribunal; particularly, the existence of an interest in annulling the criminal proceedings that the Supreme Court was hearing against former President Bucaram. To this end, it was sought to "re-organize" the high courts by the appointment of judges favorable to the Government.[250] In particular, witness Lucero Bolaños, a member of Congress present at the session of November 25, 2004, indicated that:

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[248] In this regard, the European Court of Human Rights has taken into account the real purpose or grounds that the State authorities had when exercising their functions, in order to determine whether or not there had been a violation of the European Convention on Human Rights. For example, in the *Case of Gusinskiy v. Russia*, the European Court considered that the restriction of the victim's detention, authorized by Article 5.1(c) of the European Convention was applied not only in order to make him appear before the competent judicial authority, considering that there were reasonable indications of the commission of an offense, but also in order to oblige him to sell his Company to the State. In the case of *Cebotari v. Moldavia,* it declared that Article 18 of the European Convention had been violated because the Government had not convinced the Court that there were reasonable indications that the applicant had committed an offense, and the Court concluded that the real purpose of the criminal proceeding and the applicant's detention was to put pressure on him and, thus, prevent his company "Oferta Plus" from suing before the Court. Finally, in the case of *Lutsenko v. Ukraine,* the European Court determined that the deprivation of liberty of the applicant, authorized by Article 5.1(c), had been applied not only in order to make him appear before the competent judicial authority, because there were reasonable indications that he had committed an offense, but also for other reasons related to the prosecutor's intention of accusing the applicant for publicly expressing his opposition to the charges against him. *Cf.* European Court of Human Rights, *Case of Gusinskiy v. Russia*, Judgment of 19 May 2004, paras. 71 to 78; Case of *Cebotari v. Moldavia*, Judgment of 13 February 2008, paras. 46 to 53, and *Case of Lutsenko v. Ukraine*, Judgment of 3 July 2012, paras. 100 to 110.

[249] The Inter-American Court has indicated that "direct evidence, either testimonial or documentary, is not the only evidence that may legitimately be considered to provide grounds for the judgment. Circumstantial evidence, indications and presumptions may be used, provided that consistent conclusions concerning the facts can be inferred from them." *Case of Velásquez Rodríguez v. Honduras. Merits*, para. 130.

[250] *Cf.* Affidavits prepared by Simón Zabala Guzmán on March 12, 2013 (merits file, tome III, folio 1241), Pablo Enrique Herrería Bonnet on March 17, 2013 (file of annexes to the report, tome III, folio 1263), Manuel Jaramillo Córdova on March 6, 2013 (merits file, tome III, folio 1302), Jaime Manuel Nogales Izurieta on March 4, 2013 (merits file, tome III, folio 1322), Lucero Bolaños on March 13, 2013 (merits file, tome III, folio 1369); Newspaper articles "*Buscan reestructurar TC*" [Re-structure of CT sought] in "*El Telégrafo*" of November 23, 2004 (file of annexes to the report, tome III, folio 1129), and "*Gobierno busca reestructurar el TC"* [Government seeks to restructure CT] in "*La Hora*" of November 23, 2004 (file of annexes to the report, tome III, folio 1130).

> "It was impossible to know that, during this session, the members of the Constitutional Tribunal would be removed [… and that] their replacements would be appointed. […] The fact that a parliamentary majority had been created was undisputed […;] the problem was that this majority was established to violate the Constitution and satisfy the Government's political interests, such as avoiding the impeachment of President Gutiérrez and eliminating the Supreme Court of Justice […] in order to annul a criminal proceeding against President Abdalá Bucaram."[251]

212. In addition, the Court stresses that, within a period of 14 days, not only the Constitutional Tribunal was removed, but also the Electoral Tribunal and the Supreme Court of Justice, which constitutes an abrupt and totally unacceptable course of action. All these acts signify an impairment of judicial independence. This allows the Court to conclude that, at the very least, at that time there was a climate of institutional instability in Ecuador that affected important State institutions. Moreover, the judges were prevented from using the remedy of *amparo* to counter the decision that Congress had taken against them (*infra* paras. 99, 102, 103, 105, 106 and 107).

213. Regarding the events that occurred during the session of November 25, 2004, the Court emphasizes that:

> a) During the debate concerning the presumed formal errors in the appointment of the judges on November 25, 2004, some members of Congress referred to presumed acts of corruption by the judges. In particular, several congressmen stated that: (i) the "judges [were] corrupt; that they ha[d] been quoting rates for their judgments";[252] (ii) "this Constitutional Tribunal contain[ed] corrupt aspects that c[ould] not be tolerated one moment more";[253] (iii) the members of the Constitutional Tribunal would have to "respond for the supposed acts of corruption, but […] before Congress in impeachment proceedings, and not by a simple resolution";[254] (iv) "the Constitutional Tribunal sold judgments [… and] the Constitutional Tribunal had rates for its measures,"[255] and (v) "even if the members of the Constitutional Tribunal are removed […] owing to the decision of this Parliament, if we want to defend the remnants of public ethics and moral, they should end up in prison";[256]
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> b) The motion to declare the presumed illegality of the judges' appointment was not included on the agenda previously, but was proposed during the session[257] when, precisely on November 23, 2004, the President of the Republic had announced the Government's intention of promoting the re-organization of the Constitutional Tribunal, the Supreme Electoral Tribunal, and the Supreme Court of Justice through Congress (*supra* para. 56). Faced by this proposal by the President, the

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[251] Affidavit prepared by the witness Lucero Bolaños on March 13, 2013 (merits file, tome III, folio 1369);

[252] National Congress Record No. 24-323 of November 25, 2004 (file of annexes to the report, tome I, folio 136).

[253] National Congress Record No. 24-323 of November 25, 2004 (file of annexes to the report, tome I, folio 148).

[254] National Congress Record No. 24-323 of November 25, 2004 (file of annexes to the report, tome I, folio 199).

[255] National Congress Record No. 24-323 of November 25, 2004 (file of annexes to the report, tome I, folios 362 and 363).

[256] National Congress Record No. 24-323 of November 25, 2004 (file of annexes to the report, tome I, folio 386).

[257] National Congress Record No. 24-323 of November 25, 2004 (file of annexes to the report, tome I, folio 349).

Constitutional Tribunal published a press communiqué on December 24, 2004, stating that "the members of the Tribunal [were] ready to respond for acts or omissions in the exercise of our functions by means of the constitutional procedure, namely impeachment; any other procedure [did] not fall with the constitutional norms and, therefore, would violate the Constitution itself" (*supra* para. 57);

c) Even though the holding of an impeachment proceeding against the judges for their presumed responsibility was only announced on November 25, 2004; that same day, the vote was taken to terminate them;[258]

d) While several motions of censure had been presented against the members of the Constitutional Tribunal, the presumed errors in the way in which they had been appointed had not been alleged previously (*supra* para. 178);

e) Based on Ruling No. 25-160, Congress cited the "unanimous demand of the people of Ecuador to terminate the situation of institutional chaos that prevail[ed] in the public institutions" (*supra* para. 62), which bore no relationship to the presumed interest of the National Congress to rectify a formal error in the appointment of the judges;

f) That same day, the National Congress, also citing presumed formal errors, terminated the judges of the Supreme Electoral Tribunal, thus using almost the same reasons (*supra* para. 66), and

g) With the termination of the members of the Constitutional Tribunal and the members of the Supreme Electoral Tribunal, within a few days, the President's prior announcement about restructuring the organs for the administration of justice had been fulfilled.

214. Based on these circumstances, the Court observes that the accusations made about presumed acts of corruption or the alleged politization of the judges were made in general, with no specific probative elements about the way in which this conduct had been implemented. In addition, the intention to debate the termination of the judges was not announced previously and publicly. In addition, several testimonial statements,[259] which the State has not contested, indicated that the substitution of the members of the Constitutional

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[258] *Cf.* National Congress Record, 24-323, session of November 25, 2004, folio 418.

[259] *Cf.* In this regard, witness Lucero stated that: "[t]he fact that a parliamentary majority had been created was undisputed […;] the problem was that this majority was established to violate the Constitution and satisfy the Government's political interests, such as avoiding the impeachment of President Gutiérrez and eliminating the Supreme Court of Justice (SCJ) in order to annul a criminal proceeding against President Abdalá Bucarám." Testimony of witness Lucero Bolaños on March 13, 2013 (merits file, tome III, folio 1369). Witness Torres Torres indicated that "[a]s soon as the members of the [Constitutional Tribunal] [and] the justices of the [Supreme Court of Justice] had been removed, the new judicial authorities rejected any possibility of declaring the unconstitutionality of the arbitrary acts perpetrated by Congress, [and] the proceeding against President Bucarám was annulled." Testimony of witness Torres Torres (merits file, tome III, folio 1363). In addition, Mr. Cevallos Bueno stated that "[t]he President of the Republic made a political pact to create a new majority and the political pact consisted of two elements: the first, to avoid the impeachment of the President, and the other, to bring back a former President against whom an arrest warrant had been issued and who […] [was] in the Republic of Panama and c[ould] not return to Ecuador. This was the political pact. And, in order to make it, he had to remove a Supreme Court that had ordered the pre-trial detention, and in order for the restitution of the Supreme Court to be effective and not to be controlled, they had to remove the Constitutional Tribunal. At the time, the Constitutional Tribunal […] had the authority to control the constitutionality of the decisions of the public authorities, [so that] it was a first obstacle." Testimony of Oswaldo Cevallos during the public hearing on March 18, 2013. See also: affidavits prepared by Simón Zabala Guzmán on March 12, 2013 (merits file, tome III, folio 1240), and Pablo Enrique Herrería Bonnet on March 17, 2013 (merits file, tome III, folio 1262).

Tribunal sought to prevent the effectiveness of the remedies of *amparo* that might be filed against the removal the Supreme Court of Justice that was imminent. The statements of the new members of the Constitutional Tribunal (*supra* para. 108) reveal the interest in not disputing the decisions adopted by Congress with regard to the high courts.

215. During the impeachment procedure several types of irregularities occurred in the proceeding conducted against some of the judges according to the laws in force at the time of the facts (*supra* paras. 67 to 73). Thus, articles 92 and 93 of the Law on the Organization of the Legislative Function indicated that the time frame for conducting the impeachment proceedings after the presentation of the respective motion of censure was from 5 to 10 days in cases of regular sessions of Congress and 30 days in case of special sessions of Congress, and that the latter time frame could be extended for up to a further 60 days (*supra* para. 70). However, when the impeachment proceeding commenced, these time frames had already expired. In this regard, congressmen Villacís and Proaño Maya withdrew their motions of censure owing to the expiry of the time frames (*supra* para. 87). Nevertheless, the statements about possible irregularities in relation to compliance with the time frame regarding the decision on the motions of censure submitted by several members of Congress[260] did not result in any kind of decision by Congress on the possible illegality of the proceedings.

216. When deciding on these impeachment proceedings, the context of the political crisis surrounding the decision to terminate the members of the Constitutional Tribunal on November 25, 2004, was ongoing (*supra* para. 109).

217. Regarding the vote taken on December 8, 2004, a series of presumed irregularities were mentioned:

> a) Several members of Congress indicated that the call made by the President of the Republic for a special session and to repeat the vote on the impeachment proceedings was irregular because Congress was not in recess. Indeed, article 133 of the Constitution stated that "during periods of recess, the President of Congress or the President of the Republic, may call for special sessions of the National Congress" (*supra* para. 89);
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> b) The vote was held, even though a similar vote had been held in the session of December 1 and the motions had not obtained sufficient votes, and therefore it had been declared that the "motion was rejected" (*supra* paras. 87 and 88);
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> c) Regarding the fact that an application for reconsideration was not lodged, congressman Posso, whose motion of censure of April 7, 2004, had not received sufficient votes for the motion to be approved, indicated that the "two legal options [were] the rectification of the vote [held on December 1, 2004,] or the

[260] In this regard, congressman Villacís Maldonado stated during the session on December 1 that, "[i]ndeed, this was […] presented by the MPD in the same package as this request to impeach the members of the Constitutional Tribunal. [But] 18 months ha[d] passed since these charges were submitted […] on June 16, 2003, [and …] the time frame indicated in the Law on the Organization of the Legislative Function ha[s] expired, […, so that they] also withdr[e]w [their] motion of censure." National Congress Record No. 24-326 of December 1, 2004 (merits file, tome I, folios 435 and 436). Also, during the same session, congressman Proaño Maya stated that "it harm[ed] the institutional reputation, attempting to process an action that, in addition, [was] totally time-barred […] and [did] not achieve its legal effects […]. Since the reasons that gave rise to the impeachment have been rectified, public opinion should be informed that it was not appropriate to continue with this parliamentary action, because it was time-barred and inopportune." National Congress Record No. 24-326 of December 1, 2004 (merits file, tome I, folios 434 and 435).

reconsideration at that time or in a future session."[261] Congressman Posso explained that this had not occurred and that, therefore, "the matter ha[d] concluded, ended, and the members of Congress c[ould] do nothing, absolutely nothing in this regard, once the normal process of an impeachment proceeding ha[d] finalized. Holding another vote on this issue […] would be an unfortunate precedent in Ecuadorian legislation."[262] Furthermore, witness Lucero Bolaños indicated that "[t]he session of [December 2, 2004,] was the only session during which it was possible to reconsider the vote in relation to the impeachment proceeding."[263] In addition, witness Torres Torres indicated that Congress "did not reconsider what had been decided and voted" on December 1, 2004.[264] The session of December 1, 2004, had closed without the members of Congress lodging an application for reconsideration in relation to the presumed inadmissibility of joindering two motions of censure, and this was not filed the following day either; hence it was not admissible to re-open the vote of December 8;

d) As on December 1, 2004, even though he had not voted in favor of the decision on the D´Hondt method, Judge Oswaldo Cevallos Bueno was again the subject of the motion of censure presented by congressman Segundo Serrano Serrano, and when this was voted on again, it received 57 votes in favor,[265] and

e) The new vote on the motions of censure against some of the judges was held during the same session in which the National Congress declared the termination of the justices of the Supreme Court of Justice (*supra* para. 97), without having announced this intention previously on the agenda.

218. Regarding the vote of December 1, 2004, the member and President of the Tribunal, Oswaldo Cevallos Bueno, was included in one of the motions of censure in relation to Ruling No.025-2003-TC. However, Oswaldo Cevallos Bueno had not taken part in this decision (*supra* para. 78). Furthermore, another serious irregularity is that, on December 1, 2004, the four motions of censure had already been submitted to a vote and had not received sufficient votes. Despite this, on December 8, 2004, Congress decided to re-open the vote. Even though in one of the repeated votes it was indicated that this was held owing to the presumed undue joinder of two of the motions of censure, when re-opening the motions of censure concerning the fourteenth salary, no legal grounds whatsoever were indicated to justify the new vote (*supra* para. 92).

219. Taking into account the preceding considerations concerning the sessions of Congress of November 25, December 1 and December 8, 2004, in the instant case the Court observes that the judges were removed by a resolution of the National Congress, which lacked competence in this regard (*supra* para. 180), by a decision without any legal grounds (*supra* para. 180), and without being heard (*supra* para. 183). Furthermore, a significant number of irregularities occurred during the impeachment proceedings: these proceedings were based on decisions relating to control of constitutionality adopted by the

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[261] National Congress Record No. 24-001-IV of December 8, 2004 (file of annexes to the report, tome II, folio 682).

[262] National Congress Record No. 24-001-IV of December 8, 2004 (file of annexes to the report, tome II, folio 682).

[263] Affidavit prepared by witness Lucero Bolaños on May 13, 2013 (merits file, tome III, folio 1373).

[264] Testimony of witness Torres Torres (merits file, tome III, folio 1363).

[265] National Congress Record No. 24-001-IV of December 8, 2004 (file of annexes to the report, tome II, folios 708, 709 and 710).

judges, which was prohibited by domestic law (*supra* para. 204), they violated the "*ne bis in idem*" principle (*supra* para. 186); also, the judges did not have the opportunity to be heard and to defend themselves (*supra* para. 187). As indicated previously (*supra* para. 55), the resolution deciding the termination of the judges was the result of a political alliance put together to create a Constitutional Tribunal that was aligned with the political majority that existed at that time and to prevent criminal proceedings against the President in power and a former President. It is worth underscoring that, the same day that the termination of the judges was declared, the judges who would replace them were appointed. Therefore, the apparent legality and justification of these decisions concealed the intention of a parliamentary majority to exercise greater control over the Constitutional Tribunal and to facilitate the termination of the justices of the Supreme Court. The Court has verified that the resolutions of Congress were not adopted based on the exclusive assessment of specific factual information and in order to ensure proper compliance with the laws in force, but sought a very different end related to an abuse of power aimed at obtaining control of the Judiciary by different procedures: in this case, the termination and the impeachment proceedings. This resulted in a destabilization of both the Judiciary and the country in general (*supra* para. 109) and intensified the political crisis, with the negative effects that this entailed for the protection of the rights of the population. Consequently, the Court emphasizes that these elements allow it to affirm that a collective and arbitrary termination of judges is unacceptable, owing to the negative impact that this has on the institutional aspect of judicial independence.

220. The Court also recalls that impartiality calls for the judicial authority that intervenes in a specific dispute to approach the facts of the case without any subjective prejudices and, also, offering sufficient guarantees of an objective nature that allow the elimination of any doubt that the defendant or the community may have.[266] Based on the aspects mentioned in the preceding paragraph, this Court concludes that the National Congress did not ensure the judges who were dismissed the guarantee of impartiality required by Article 8(1) of the American Convention.

221. In addition, the Court underscores that Article 3 of the Inter-American Democratic Charter stipulates that "[e]ssential elements of representative democracy include, *inter alia*, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, […] and the separation of powers and independence of the branches of government." The Court concludes that the dismissal of all the members of the Constitutional Tribunal entailed a destabilization of the democratic order that existed at that time in Ecuador, because the attack on the three high courts of Ecuador at that time resulted in a rupture of the separation and independence of the branches of government. This Court stresses that the separation of powers is closely related not only to the consolidation of the democratic system, but also seeks to preserve the human rights and freedoms of the people.

3.4. Conclusion of the Court on judicial guarantees and political rights

222. Consequently, the Court declares the violation of Article 8(1), and the pertinent parts of Article 8(2) and 8(4), in relation to Article 1(1) of the American Convention, owing to the arbitrary termination and the impeachment proceedings that occurred, facts that gave rise to the violation of judicial guarantees to the detriment of the eight victims in this case. Furthermore, the Court declares the violation of Article 8(1), in relation to Article 23(1)(c) and Article 1(1) of the American Convention, owing to the arbitrary effects on tenure in the

[266] *Cf. Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela*, para. 55.

exercise of the judicial function and the consequent harm to judicial independence and the guarantee of impartiality, to the detriment of the eight victims in this case.

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223. Having determined that the organ that carried out the termination was not competent, it is not necessary to analyze the other guarantees established in Article 8(1) of the Convention, because this determination signifies that the decision adopted by Congress was totally unacceptable.[267] Accordingly, the Court will not examine the arguments presented by the Commission and the representatives in relation to other judicial guarantees. Also, regarding the termination of the judges, owing to the harm to the separation of powers and the arbitrary nature of the actions of Congress, the Court finds that it is not necessary to make a detailed analysis of the arguments of the parties concerning whether the termination decision constituted a punitive act, and other aspects related to the possible implications that the principle of legality would have had in this case.

224. Moreover, in relation to the impeachment proceedings, although it has been argued that the obligation of Congress to provide the reasoning was not complied with, the motions of censure included the reasons why the respective members of Congress considered that it was in order to remove the judges. Also, even though it was argued that the possibility of prosecuting judges for "constitutional and statutory infractions" could be associated with causes for removal that were excessively broad and violated the principle of legality (*supra* para. 146), the Court does not find it pertinent to examine these arguments in detail, bearing in mind that it has indicated that Ecuadorian law expressly prohibited the prosecution of the members of the Constitutional Tribunal based on the legal content of their opinions and, in particular, on the Legislature's disagreement with a judicial ruling. The harmful implications of these irregularities on judicial independence has been assessed above (*supra* paras. 207 to 220 and 222).

225. In this case, the State argued that Article 1(1) of the Convention had not been violated, owing to its autonomous nature, and to the respect that existed for the obligations of prevention and guarantee in this case. In this regard, the Court recalls its consistent case law since the case of *Velásquez Rodríguez*, according to which Article 1(1) of the American Convention "contains the obligation assumed by the States Parties in relation to each of the protected rights, so that any claim that one of these rights has been harmed, necessarily means that Article 1(1) of the Convention has also been infringed."[268] Article 1(1) of the American Convention is a general norm, whose content extends to all the provisions of the treaty, and it establishes the obligation of States Parties to respect and ensure the free and full exercise of the rights and freedoms recognized therein "without any discrimination," and that, whatever the origin or form it may take, any treatment that may be considered discriminatory with regard to the exercise of any of the rights guaranteed in the Convention

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[267] Similarly, in other cases concerning the military criminal jurisdiction, the Court has indicated that it is not necessary to rule on additional arguments relating to the independence or impartiality of the judge, as well as other guarantees, once it has reached the conclusion that the said jurisdiction was not competent. *Cf. Case of Cabrera García and Montiel Flores v. Mexico*, para. 201; *Case of Rosendo Cantú et al. v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of August 31, 2010. Series C No. 216, para. 161; *Case of Fernández Ortega et al. v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of August 30, 2010. Series C No. 215, para. 177; *Case of Usón Ramírez v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of November 20, 2009. Series C No. 207, para. 124, and *Case of Cantoral Benavides v. Peru. Merits.* Judgment of August 18, 2000. Series C No. 69, para. 115.

[268] *Case of Velásquez Rodríguez v. Honduras*. Merits, para. 162.

is *per se* incompatible with it.[269] Hence, having declared the violation of rights established in the Convention (*supra* para. 222), the general obligation of respect and guarantee contained in Article 1(1) of the American Convention has also been violated.

226. Lastly, the representatives and the Commission argued the violation of Article 2 of the Convention based on three arguments; namely that: (i) no norms existed establishing clearly the grounds on which the members of the Constitutional Tribunal could be removed from office; (ii) a legal framework with appropriate remedies against the termination resolution of the National Congress did not exist, and (iii) currently, no appropriate legislation exists to guarantee judicial independence and due process (*supra* para. 154).

227. Regarding the first argument, this Court has already verified that, at the time of the facts, the legal framework in force on impeachment proceedings did not permit this type of proceeding to be held against the judges for the decisions they took, and that the actions of the National Congress were arbitrary and contrary to domestic law (*supra* paras. 204 and 224). Similarly, regarding the termination of the judges, the termination was the result of an arbitrary action of the National Congress that was not supported by domestic law (*supra* para. 180). Consequently, the violations of the Convention in this case did not arise from problems in the laws that existed at the time in themselves, but from their arbitrary application. Regarding the second argument, the Court considers that it has already established the relevant elements, by concluding that preventing the members of the Constitutional Tribunal from using the remedy of *amparo* constituted a violation of the right to judicial protection (*infra* paras. 228 to 238). Third, the representatives did not provide sufficient evidence to allow the Court to relate the presumed shortcomings in the current laws to the violations declared in this case; hence, the Court observes that it is not possible to make an abstract analysis of norms that are not related and that did not have any kind of impact on the violations declared in this Judgment. Based on the foregoing, the Court concludes that Article 2 of the American Convention was not violated.

4. Judicial protection

228. The Court has indicated that "Article 25(1) of the Convention establishes the obligation of the States Parties to guarantee, to all persons subject to their jurisdiction, an effective judicial remedy against acts that violate their fundamental rights. The said effectiveness supposes, in addition to the formal existence of remedies, that these provide results or responses to the violations of rights established in either the Convention or the Constitution, or by law."[270] Article 25(1) of the Convention[271] guarantees the existence of a simple, prompt and effective remedy before a competent judge or court. The Court recalls its consistent case law that this remedy must be appropriate and effective.[272] Regarding the effectiveness of the remedy, the Court has established that, for an effective remedy to

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[269] *Cf. Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, para. 53.

[270] *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 Forneron and daughter v. Argentina. Merits, reparations and costs*. Judgment of April 27, 2012. Series C No. 242, para. 107.

[271] Article 25(1) of the American Convention (Judicial Protection) establishes that: 1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

[272] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits*, para. 63, and *Case of Mejía Idrovo v. Ecuador*, para. 91.

exist, it is not sufficient that it be established by the Constitution or by law, or that it is formally admissible; rather, it must be truly appropriate to establish whether a human rights violation has been committed and ensure what is necessary to provide redress. Those remedies that are illusory, owing to the general situation of the country or even the particular circumstances of a given case, cannot be considered effective.[273] This may occur, for example, when their ineffectiveness has been demonstrated in the practice, because the mechanisms to execute the resulting decisions are absent, or due to any other circumstance that constitutes a situation of denial of justice.[274] Thus, the procedure must be aimed at implementing the protection of the right recognized in the judicial ruling by the appropriate application of this ruling.[275]

229. The Court has indicated that, under Article 25 of the Convention, two specific State obligations can be identified. The first is to establish by law, and ensure the due application of, effective remedies before the competent authorities that protect every person subject to the State's jurisdiction against acts that violate their fundamental rights or that lead to the determination of their rights and obligations. The second is to guarantee the means to implement the respective final rulings and judgments delivered by these competent authorities,[276] so that the rights that have been declared or recognized are truly protected. The right established in Article 25 is closely related to the general obligation of Article 1(1) of the Convention, by attributing protective functions to the domestic law of the States Parties.[277] Hence, the State has the responsibility not only to draft and enact an effective remedy, but also to ensure the due application of this remedy by its judicial authorities.[278]

230. The Court notes that, during the public hearing, the State acquiesced to the violation of Article 25 of the American Convention in relation to the events surrounding the termination of the members of the Constitutional Tribunal. Specifically, during this hearing, the State expressly declared the following:

> "The State has not provided them [the members of the Constitutional Tribunal] with an effective and appropriate remedy to appeal their termination […] as established […] in [Article…] 25 [of the American Convention]."

231. In this case, the Court has accepted the State's acknowledgement of international responsibility in relation to the violation of Article 25 of the American Convention in the terms expressly indicated by the State. Nevertheless, the scope of the acquiescence must be clarified and, in this context, the Court must decide the subsisting disputes, including whether Article 25 has been violated owing to the State's failure to comply with the obligation to provide, to all persons subject to its jurisdiction, an effective judicial remedy against acts that violate their fundamental rights.

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273 *Cf. Case of Ivcher Bronstein v. Peru. Merits, reparations and costs.* Judgment of February 6, 2001. Series C No. 7, para. 137, and *Case of García and family members v. Guatemala*, para. 142.

274 *Cf. Case of Las Palmeras v. Colombia. Reparations and costs.* Judgment of November 26, 2002. Series C No. 96, para. 58, and *Case of Forneron and daughter v. Argentina*, para. 107.

275 *Cf. Case of Baena Ricardo et al. v. Panama. Competence.* Judgment of November 28, 2003. Series C No. 104, para. 73, and *Case of Furlan and family members v. Argentina*, para. 209.

276 *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*. Judgment of November 19, 1999. Series C No. 63, para. 237, and *Case of Mohamed v. Argentina*, para. 83.

277 *Cf. Case of Castillo Páez v. Peru. Merits.* Judgment of November 3, 1997. Series C No. 34, para. 83, and *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, reparations and costs*. Judgment of August 24, 2010. Series C No. 214, para. 141.

278 *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*, para. 237, and *Case of the Xákmok Kásek Indigenous Community v. Paraguay*, para. 141.

232. In this regard, on December 2, 2004, the recently appointed Constitutional Tribunal issued a decision in response to a request by the President of the Republic in which it ruled that "in order to suspend the effects of a parliamentary resolution, including No. 25-160, adopted by the National Congress on November 25, 2004, owing to the supposed violation of the Constitution, based on form or substance, the only action admissible is the action on unconstitutionality that must be filed before the Constitutional Tribunal" (*supra* para. 99). This meant that, if the domestic judges received an action for *amparo* against the decision declaring the termination of the members of the Constitutional Tribunal or similar legislative decisions, they were ordered to "reject it outright and not to admit it, because, to the contrary, they would be hearing a case contrary to an explicit law and this would entail the corresponding judicial actions" (*supra* para. 99).

233. In fact, the members of the Constitutional Tribunal filed five remedies of *amparo* in order to contest the legality of the decision by which they were dismissed and, in the five cases, these *amparo*s were rejected outright (*supra* para. 212). The reasoning given by the judges of the *amparo* was the decision taken by the new Constitutional Tribunal (*supra* paras. 102 and 104 to 107). Furthermore, it was proved that, in the case of several of the remedies of *amparo,* a member of Congress intervened and reminded the judges hearing these appeals that judges who admitted them could be subject to judicial actions or disciplinary sanctions (*supra* para. 108). In this regard, it is clear that the decision taken by the new Constitutional Tribunal prevented the judges who had been removed from making use of the remedy of *amparo* in order to try and contest the legality and constitutionality of the decision of Congress and, in this way, protect their rights.

234. In view of the foregoing, by express mandate of the new Constitutional Tribunal, the action on unconstitutionality was available to the presumed victims. Regarding this action, it should be underscored that, pursuant to the provisions of the Constitution of the Republic of Ecuador in force at that time, the filing of this action required, either that it be supported by the signature of 1,000 persons, "exercising their political rights,"[279] or that it be supported by a favorable report of the Ombudsman.[280] It should also be pointed out that, the purpose of this action was to examine the formal and substantial conformity of a norm or an administrative decision with the Constitution,[281] but it did not offer the possibility of

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[279] *Cf.* Article 277(5) of the Constitution of the Republic of Ecuador of August 11, 1998 (file of annexes to the answering brief, tome I, folio 3708).

[280] *Cf.* Article 277 of the 1998 Constitution of the Republic of Ecuador: Actions on unconstitutionality may be presented by: 1. The President of the Republic, in the cases established in Art. 276(1). 2. The National Congress, following a resolution by the majority of its members, in the cases established in subparagraphs (1) and (2) of this article. 3. The Supreme Court of Justice, following a resolution by the Court in Plenary, in the cases described in subparagraphs (1) and (2) of the same article. 4. The provincial councils or the municipal councils, in the cases indicated in the same article. 5. One thousand citizens exercising their political rights, or any person following a favorable report of the Ombudsman on its admissibility, in the cases of subparagraphs (1 and (2) of the same article. Constitution of the Republic of Ecuador of August 11, 1998 (file of annexes to the answering brief, tome I, folio 3708).

[281] *Cf.* Article 276 of the 1998 Constitution of the Republic of Ecuador: The Constitutional Tribunal shall have competence: 1. To examine and decide actions on unconstitutionality, in form or substance, that are filed concerning organic and ordinary laws, decree-laws, decrees, ordinances, statutes, regulations and resolutions issued by organs of the institutions of the State, and to suspend their effects totally or partially. 2. To examine and decide on the unconstitutionality of the administrative decisions of any public authority. The declaration of unconstitutionality shall result in the revocation of the decision, without prejudice to the administrative organ adopting the necessary measures to preserve respect for the constitutional norms. Constitution of the Republic of Ecuador of August 11, 1998 (file of annexes to the answering brief, tome I, folios 307 and 3708).

repairing a violated right, an objective that was offered by the remedy of *amparo,*[282] to which the presumed victims did not have access (*supra* para. 233).

235. Furthermore, it should be emphasized that the action on unconstitutionality would have been heard by the recently installed Constitutional Tribunal, the composition of which did not provide sufficient guarantees of impartiality, especially when it is considered that the new members of the Constitutional Tribunal had a direct interest in an eventual unfavorable decision on any action or remedy relating to the terminations of the Supreme Court of Justice or of the previous Constitutional Tribunal, because a favorable decision would automatically signify the invalidity of the appointment of the new members of that Court.

236. Regarding the existence of a judicial remedy against decisions taken in the context of an impeachment proceeding conducted by the National Congress against members of the Constitutional Tribunal, in the case of the *Constitutional Court v. Peru*, the Inter-American Court established the following, which is applicable in this case: "the proceedings that were held before Congress to remove the members of the Constitutional Court, which are subject to legal norms that must be observed precisely, may, on this basis, be the subject of a judicial action or remedy in relation to due process of law."[283]

237. In the instant case, the presumed victims did not file remedies of *amparo* or of unconstitutionality against the resolution of the National Congress to dismiss them by means of the impeachment proceedings. However, according to the text of the decision adopted by the new Constitutional Tribunal, that decision applied not only to resolution No. R-25-160, but to any resolution adopted by the National Congress. In fact, in the said decision, the new Constitutional Tribunal decided "to establish that, in order to suspend the effects of a parliamentary resolution, including No. 25-160, adopted by the National Congress on November 25, 2004, for the supposed violation of the Constitution, in form or substance, the only action admissible was the action on unconstitutionality" (*supra* para. 99). Therefore, the decision of December 2, 2004, could be understood to mean that the only admissible remedy against any decision of the National Congress was the action on unconstitutionality, and thus a court that examined remedies of *amparo* could not review a decision of the legislature.

238. Taking into account the State's acquiescence, as well as the fact that it has been proved that, in Ecuador, it was established by law that the remedy of *amparo* could be filed in cases such as this one, the Court considers that, in the specific circumstances of this case, it has been proved that the judges were prevented from using the remedy of *amparo* and that the action on unconstitutionality was not appropriate and effective to protect the rights of the members of the Constitutional Tribunal that had been violated. Therefore, the Court concludes that Article 25(1), in relation to Article 1(1) of the American Convention, was violated.

5. Equality before the law

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[282] *Cf.* Article 95 of the 1998 Constitution of the Republic of Ecuador: Anyone, on his own behalf, or as an accredited representative of a collectivity, may file an action for *amparo* before the organ of the Judiciary appointed by law. By this action, that shall be processed summarily and preferentially, the adoption of urgent measures shall be required designed to terminate, avoid the commission of, or rectify immediately, the consequences of any wrongful act or omission of a public authority that violates or may violate any right recognized in the Constitution or in an international treaty or convention in force, and that represents an imminent threat of causing serious harm. Constitution of the Republic of Ecuador of August 11, 1998 (file of annexes to the answering brief, tome I, folio 3674).

[283] *Cf. Case of the Constitutional Court v. Peru*, para. 94.

239. Regarding the analysis of the denial of access to the action for constitutional protection, the Court has already set out its considerations and concluded that preventing the members of the Constitutional Tribunal from making use of the remedy of *amparo* constituted a violation of the right to judicial protection.

240. Having determined that the termination of the judges was an arbitrary measure, contrary to the American Convention, and that the impeachment was conducted without observing judicial guarantees, it is unnecessary to examine whether the appointment of the new judges represented arbitrary and unequal treatment in relation to the judges who were removed and not re-elected.[284]

241. In addition, although it has been argued that some judges who had been terminated owing to the problems of their appointment by the "single list" were re-elected to the Constitutional Tribunal because of their political affinity to the Government, the evidence provided[285] is insufficient to assess whether there was discrimination for political reasons in the instant case, taking into account that the procedure for the appointment of the judges who presumably had been the object of political favoritism has not been explained or analyzed in detail.

242. Considering the foregoing, this Court finds that, in the instant case, Article 24 of the Convention was not violated.

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

243. Based on the provisions of Article 63(1) of the American Convention,[286] the Court has indicated that any violation of an international obligation that has resulted in harm entails the duty to make adequate reparation,[287] and that this provision reflects a customary norm that constitutes one of the basic principles of contemporary international law on State responsibility.[288]

244. The reparation of the harm caused by the violation of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists in 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

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284 Similarly, Case of *Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela*, para. 200, and *Case of Mejía Idrovo v. Ecuador*, para. 122.

285 In this regard, witness Lucero, who was a member of Congress at the time of the facts and took part in the discussions concerning the termination of the judges and the impeachment proceedings, indicated that "[t]wo judges were re-appointed merely because they had political support among the parliamentary majority." Testimony of witness Lucero (merits file, tome III, folio 1372).

286 Article 63(1) of the American Convention stipulates that "[i]f 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."

287 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs*. Judgment of July 21, 1989. Series C No. 7, para. 25, and *Case of Suárez Peralta v. Ecuador*, para. 161.

288 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, para. 25, and *Case of Suárez Peralta v. Ecuador*, para. 161.

violated and to make reparation for the consequences of the violations.[289] Consequently, the Court has considered the need to grant different types of reparatory measures in order to redress the harm integrally; thus, in addition to pecuniary compensation, measures of restitution and satisfaction, and guarantees of non-repetition have particular relevance to the harm caused.[290]

245. This Court has established that reparations must have a causal nexus with the case, the violations that have been declared, the harm proved, and also the measures requested to make reparation for the respective harm. Therefore, the Court must take these factors into account in order to rule appropriately and according to law.[291]

246. Based on the considerations on the merits and the violations of the American Convention that have been declared in the preceding chapter, the Court will now examine the arguments and recommendations presented by the Commission and the claims of the representatives, and also the arguments of the State, in light of the criteria established in the Court's case law concerning the nature and scope of the obligation to make reparation,[292] in order to establish measures designed to redress the harm caused to the victims.

A. Injured party

247. The Court reiterates that it considers injured party, in the terms of Article 63(1) of the American Convention, to be anyone who has been declared a victim of the violation of a right recognized therein. Hence, this Court considers that Miguel Camba Campos, Freddy Oswaldo Mauricio Cevallos Bueno, Pablo Enrique Herrería Bonnet, Manuel Stalin Jaramillo Córdova, Jaime Manuel Nogales Izureta, Luis Vicente Rojas Bajaña, Mauro Leonidas Terán Cevallos and Simón Bolívar Zabala Guzmán are the "injured party" and, as such, they will be considered the beneficiaries of the reparations ordered by the Court.

248. The State asked that Mr. Jaramillo Córdova not be considered an injured party, "because he was an alternate judge; in other words, […] he served as a judge only when the titular judge was absent, and therefore the State would considering the position of [Mr.] Jaramillo Córdova, with regard to both pecuniary and non-pecuniary reparations, in a different way, regardless of whether the said alternate occupied the position of a judge."

249. The Court observes that Mr. Jaramillo was in a similar situation to the other victims as regards the violations declared in this Judgment. Indeed, he was a victim of arbitrary removal and of impeachment proceedings for reasons that constituted an infringement of judicial independence (*supra* para. 222). Therefore, Mr. Jaramillo Córdova must be recognized as an injured party. Nevertheless, the State's arguments will be taken into account when determining the scope of the pecuniary damage in this case (*infra* paras. 281 and 289 to 296).

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289 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, para. 26, and *Case of Mendoza et al. v. Argentina*, para. 307.

290 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs,* para. 25, and *Case of Mendoza et al. v. Argentina*, para. 307.

291 *Cf. Case of Ticona Estrada v. Bolivia. Merits, reparations and costs.* Judgment of November 27, 2008. Series C No. 191, para. 110, and *Case of Mendoza et al. v. Argentina*, para. 306.

292 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, paras. 25 to 27, and *Case of Suárez Peralta v. Ecuador*, para. 161.

250. The Court will determine measures to make reparation for the non-pecuniary damage that are not of a monetary nature, and will establish measures of public scope and repercussion.[293] International case law and, in particular, that of the Court, has established repeatedly that the judgment constitutes *per se* a form of reparation.[294] Nevertheless, considering the circumstances of the case *sub judice*, based on the harm to the victims, as well as the consequences of a non-material and non-pecuniary nature resulting from the violation of the Convention declared to their detriment, the Court finds it pertinent to establish measures of satisfaction and restitution, and guarantees of non-repetition.

B. Measures of satisfaction and restitution, and guarantees of non-repetition

1. Measures of satisfaction: publication of the Judgment

Arguments of the Commission and of the parties

251. The Commission asked the Court to order the State "[t]o acknowledge publicly, ensuring adequate dissemination mechanisms, the violations declared in this case; in particular, the violation of judicial independence."

252. The representatives indicated that the State must "acknowledge publicly its international responsibility by publishing the main paragraphs of the judgment on merits handed down in the main national media with the most widespread local circulation. That is, in […] Guayaquil [and in] Quito." They also asked that "the judgment be published in the official gazette. Lastly, "the entire judgment must be available on the official websites of the Judiciary, the Attorney General's office, and the Constitutional Court".

253. The State indicated that "should the Court find against it, […] as a measure of satisfaction, it will publish the judgment in a national newspaper, and also in the official gazette," and that the Judgment "will also be made available on the websites of the Attorney General's office, the Constitutional Court, and the Ministry of Justice, Human Rights and Worship."

Considerations of the Court

254. The Court orders the State to publish, within six months of notification of this Judgment: (a) the official summary of the Judgment prepared by the Court, once, in the official gazette of Ecuador; (b) the official summary of this Judgment prepared by the Court, once, in a national newspaper with widespread circulation, and (c) this Judgment in its entirety, available for one year, on an official website of the Judiciary.

2. Measures of restitution

Arguments of the Commission and of the parties

255. The Commission requested that the State "[r]einstate the victims in the Judiciary, in positions similar to those they held, with the same remuneration, social benefits, and rank

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[293] *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and costs*. Judgment of May 26, 2001. Series C No. 77, para. 84, and *Case of Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica. Preliminary objections, merits, reparations and costs.* Judgment of November 28, 2012. Series C No. 257, para. 323.

[294] *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 Mendoza et al. v. Argentina*, para. 355.

comparable to the one they would hold today if their functions had not been terminated, for the period of time that remained in their terms," or "if, for well-founded reasons, reinstatement is not possible, the State must compensate the victims or their heirs."

256. The representatives asked that the State "reinstate the judges […] in the Constitutional Tribunal […] in the same or a similar position to the one they held, with the same remuneration, social benefits, and rank comparable to the one they would hold today if they had not been removed arbitrarily," and that "[i]f the State is able to prove that it is not possible to reinstate them for well-founded reasons, it must pay compensation to each of the victims or their legitimate heirs, that sh[ould] not be less […] than US$60,000."

257. The State argued "the impossibility of reinstating [the judges] in the position they had [in the Constitutional Tribunal,] since this institution no longer exists […], because the 2008 Constitution of Ecuador eliminated it and created the Constitutional Court, which is a different institution, […] with fully jurisdictional functions, contrary to the Constitutional Tribunal, which was merely administrative in nature." In addition, it indicated that "the Constitutional Court is now composed of tenured judges." Regarding the compensation of US$60,000.00, the State indicated that "since there is no clear violation of human rights in this case, this claim is unnecessary" and that "should the Court […] deliver judgment against Ecuador," it considered this sum "in excess of the amounts established by the Court."

Considerations of the Court

258. The Court determined that the dismissal of the victims was the result of a decision that impaired judicial guarantees, judicial independence, tenure, and judicial protection (*supra* para. 222). The Court bears in mind that all judges, whether titular or provisional, should be ensured tenure or stability in office, in order to permit reinstatement to the status of judge for those who were arbitrarily deprived of this.[295]

259. In the instant case, at the time of the facts, the term of the members of the Constitutional Tribunal had been established from 2003 to 2007.

260. However, the changes to the Constitution in 2008 created a new Constitutional Court. Article 432 of this Constitution stipulated that "the Constitutional Court shall be composed of nine members who shall exercise their functions in plenary sessions and in chambers pursuant to the law. They shall perform their functions for a period of nine years, without immediate re-election, and one-third of the members shall be renewed every three years."

261. Under the Regulations for the Appointment of Judges of the Constitutional Court of May 17, 2012, the Plenary of the Council for Citizen Participation and Social Control established the norms and procedures for the evaluation and appointment of judges of the first Constitutional Court, by public competition, with the possibility of oversight and

[295] Similarly, in the case of *Apitz v. Venezuela*, the Court established that "taking into account that all judges, whether titular or provisional, should be guaranteed tenure or stability in office in order to permit the reinstatement to the position of judge of anyone who has been arbitrarily deprived of this, the Court considers that, as a measure of reparation, the State must reinstate the victims to the Judiciary, if they so wish, in a position with the same remuneration, social benefits, and rank comparable to the one that would correspond to them today, if they had not been dismissed." *Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela*, para. 246.

challenge by citizens.[296] On October 31, 2012, the Evaluation Committee to select the judges of the Constitutional Court appointed the nine members of the Constitutional Court for the nine-year period from 2012 to 2021.[297]

262. The Court notes the 2008 amendment of Ecuador's Constitution, as well as the subsequent restructuring of the Constitutional Court, which entailed important changes in matters such as the number, composition, and election of the members of the Constitutional Court. In addition, the Court underscores that, in the cases in which it has ordered the reinstatement of judges to their positions or to one with similar characteristics, these were judges who exercised their functions in lower courts of the Judiciary[298] while, in this case, the members of the Constitutional Tribunal could only be appointed to another high court of the Judiciary, which makes their reinstatement difficult or even impossible. Consequently, the Court considers that, owing to the new constitutional circumstances, the difficulties to appoint the judges in the same position or one of a similar rank, as well as the new norms to protect the tenure of officials of the judicial career, the reinstatement of the judges would not be possible.

263. Regarding the request to reinstate the judges in a position that has comparable remuneration, social benefits and rank to the one that would correspond to them, the Court observes that this is not appropriate, taking into account the reasons associated with the amendments that have been made to the Constitution (*supra* paras. 260 to 262). Moreover, insufficient evidence has been provided to allow the Court to determine whether an organ exists that is comparable to the Constitutional Tribunal, other than the Constitutional Court.

264. Despite the foregoing, the Court recalls its case law[299] according to which, in cases in which it is not possible to reinstate judges removed from their position arbitrarily, compensation should be ordered owing to the impossibility of reinstating them in their functions as judge. Therefore, the Court establishes the sum of US$60,000.00 (sixty thousand United States dollars), as a measure of compensation for each victim. This amount must be paid within one year of notification of this Judgment.

3. Guarantees of non-repetition – amendment of domestic laws

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296 *Cf.* Regulations for the Appointment of Judges of the Constitutional Court (file of annexes to the answering brief, tome I, folios 3821 to 3831).

297 This selection procedure was in keeping with the provisions of the Organic Law on Jurisdictional Guarantees and Constitutional Control, which in its sixth transitory provision indicates that: "[w]hen the new Legislative, Executive and Transparency and Social Control functions have been constituted, the Evaluation Committee shall be organized to appoint the judges of the Constitutional Court. The Council for Citizen Participation shall draft the norms and procedures for the public competition, as established in the Constitution and in this law." See also, the ninth transitory provisions of the said law, which stipulates that: "[i]n the third year of the functioning of the Constitutional Court, the Plenary shall hold a draw among its members to determine who must be replaced in accordance with the rules on partial renewal established in the law; during the sixth year, the draw will be held among the members of the Court who continued in office following the first draw." *Cf.* Organic Law on Jurisdictional Guarantees and Constitutional Control (file of annexes to the answering brief, tome I, folio 3605).

298 Thus, for example, in the *case of Chocrón Chocrón v. Venezuela*, the victim was a judge of the First Instance Court of the Criminal Judicial Circuit of the Judicial Circumscription of the Metropolitan Area of Caracas when she was removed. In the *case of Reverón Trujillo v. Venezuela*, the victim was a first instance judge of the Criminal Judicial Circuit of the Judicial Circumscription of the Metropolitan Area of Caracas. Meanwhile, in the case of *Apitz v. Venezuela*, the judges were members of the First Contentious Administrative Court. *Cf. Case of Chocrón Chocrón v. Venezuela*, para. 78; *Case of Reverón Trujillo v. Venezuela*, para. 49, and *Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela*, para. 2.

299 *Cf. Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela*, para. 246, and *Case of Chocrón Chocrón v. Venezuela*, para. 154.

Arguments of the Commission and of the parties

265. The Commission asked the Court to order the State to "adopt measures of non-repetition, that ensure the increased independence of the Judiciary, including the measures necessary so that domestic law and applicable practice abide by clear criteria and ensure guarantees in the appointment, tenure, and removal of judges, in particular, a long enough term in judicial office to guarantee their independence, and determination of the grounds for impeachment, in accordance with the standards established in the American Convention."

266. The representatives argued that although "Ecuador has carried out an extensive legal reform by enacting the 2008 Constitution, which took away from the Legislature the power to impeach the judges of the Constitutional Court, […t]he legislation required to guarantee the principle of legality and judicial guarantees has not yet been enacted. In addition, the system for constituting the Constitutional Court permits the political composition of the organ, without an open competition on the basis of merits, and this seriously compromises the independence of this important entity." They added that "[t]he fact that only candidates proposed by the President of the Republic, the National Assembly, and the Council for Transparency and Social Control participate would result in the composition of the Court being easily manipulated; also, each organ may only proposed three candidates, so that they are elected without competing for the position. This jeopardizes the principle of the independence and impartiality of justice."

267. The representatives asked, *inter alia*: (i) "to extend the norms established for the Judiciary in the current Constitution, to the functioning of the actual Constitutional Court"; (ii) "to establish as a cause for impeachment, undue and unconstitutional interference in the independence of the Constitutional Court"; (iii) "to define by law […] as an offense any attempt against judicial independence, from either internal or external sources," and (iv) that the State "undertake a legislative reform at all levels that permits amending the manner of selecting the judges of the Constitutional Court, in accordance with the principle of judicial independence, particularly the free proposal of candidates, a public competition on merits, and the possibility of challenges by the citizens."

268. The State argued that Ecuador "is undergoing a time of change initiated as of the 2008 Constitution of the Republic," and that "a Council on Citizen Participation and Social Control is responsible for the selection of the new judges of the Constitutional Court," which is "developing effective procedures for the appointment of the new judges of the Constitutional Court."

269. Regarding the request to extend the norms for the Judiciary of the current Constitution to the actual Constitutional Court, it indicated that "there is a difference between the Judiciary and constitutional supremacy; the Constitutional Court is part of the latter; in other words, there is clear independence of functions." In its final written arguments, the State indicated that the actual Constitutional Court possesses total administrative and financial independence, and that the provision that its members are subject to impeachment has been eliminated.

270. In relation to the request for a reform of the law with regard to the selection of the judges of the Constitutional Court, the State stressed the "subsidiary nature" of the inter-American human rights system, and that "this is the responsibility of the domestic organs; namely, the Legislature," clarifying that the "Council for Citizen Participation and Social Control [was] developing effective procedures for the appointment of the new judges of the Constitutional Court".

Considerations of the Court

271. From the arguments presented by the Commission and the representatives, the Court notes that there are disputes with regard to the laws that are currently in force in Ecuador concerning the selection, appointment, and tenure of the judges in the Judiciary and the impact that this could have on judicial independence. In this regard, article 90 of the Code on the Organization of the Judiciary (in force since March 9, 2009), establishes the right of the members of the Judiciary to "stability in their positions or functions," stipulating that they "may only be removed, suspended or dismissed from the exercise of their functions pursuant to the law."[300]

272. In addition, regarding the situation of the judges of the Constitutional Court, the Court observes that article 431 of the 2008 Constitution indicates that:

> "The members of the Constitutional Court shall not be subject to impeachment and may not be removed by those who appoint them. However, they shall be subject to the same controls as the rest of the public authorities and shall respond for any other acts or omissions they commit in the exercise of their functions. Without prejudice to civil liability, in the case of criminal liability, they shall only be charged by the Prosecutor General and tried by the plenary of the National Court of Justice and, to this end, the affirmative vote of two-thirds of its members shall be required. Their removal shall be decided by two-thirds of the members of the Constitutional Court. The procedure, requirements, and grounds shall be determined by law."

273. Article 186 of the Organic Law on Jurisdictional Guarantees and Constitutional Control, which entered into force on September 21, 2009,[301] establishes that "the judges of the Constitutional Court, are subject [to a] special regime of responsibilities," in which:

> "1. The judges of the Constitutional Court may not be subjected to impeachment by the National Assembly, or be removed by the authorities who intervened in their appointment.
>
> 2. Without prejudice to civil liability, criminal liability for punishable acts committed during and on the occasion of the functions exercised in the Judiciary, shall be subject to complaint, investigation, and charges only and exclusively by the Prosecutor General, and to trial by the plenary of the National Court of Justice with the affirmative vote of two-thirds of its members; except for matters that are related to opinions, rulings, and votes issued in the exercise of their office, in which case, they shall not be subject to criminal liability.
>
> 3. Removal shall be decided by the plenary of the Constitutional Court with the affirmative vote of two-thirds of its members."

274. Article 181 of the Organic Code of the Judicial Function establishes that:

> "The members of the Constitutional Court shall be tried by the plenary of the national Court of Justice, with the vote of two-thirds of its members, in case of criminal offenses, following charges brought by the Prosecutor General. To this end, a judge shall conduct the preliminary investigation, the instruction of the prosecution, and the intermediary stage, and the Plenary shall deliver the decisions and judgments established in the Code of Criminal Procedure, pursuant to the instructions issued to this end."[302]

275. The Court recalls that Article 2 of the Convention obliges the States Parties to adopt, pursuant to their constitutional procedures and the provisions of the Convention, the legislative or other measures necessary to ensure that the rights and freedoms protected by

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300 *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, para. 219.

301 *Cf.* Organic Law on Jurisdictional Guarantees and Constitutional Control (file of annexes to the answering brief, tome I, folios 3552 to 3607).

302 Organic Code of the Judicial Function. Official gazette, Supplement 544 of March 9, 2009 (file of annexes to the answering brief of the case of the Supreme Court of Justice (Quintana Coello *et al.),* tome I, folio 3585).

the Convention are effective.[303] In other words, States not only have the positive obligation to adopt the necessary legislative measures to ensure the exercise of the rights recognized in the Convention, but they must also avoid enacting laws that prevent the free exercise of these rights, and eliminating or amending laws that protect them.[304] As the Court has indicated previously (*supra* para. 227), Article 2 of the American Convention has not been violated in this case.

276. In the instant case, the main issue – and the one on which the Court has focused – is the examination of the alleged human rights violations resulting from the decisions taken by the National Congress on November 25, 2004, and December 8, 2004. The Court did not analyze the compatibility of a specific law with the American Convention, because that was not the purpose of this case. Furthermore, the representatives did not provide sufficient evidence to allow the Court to infer that the violations arose from a specific problem in the text of the laws, so that it is not possible to order the amendment of laws that are not directly related to the violations declared in this case. Consequently, in the circumstances of this case, it is not pertinent to order the adoption, amendment or adaptation of specific provisions of domestic law.

C. Compensation for pecuniary and non-pecuniary damage

1. Pecuniary damage

Arguments of the Commission and the parties

277. The Commission asked the Court to order the State "[t]o pay the victims the salaries, pensions, and employment and/or social benefits that they failed to receive from the time they were terminated until the date on which their mandate would have ended."

278. The representatives asked that the Court order the State to pay "monetary compensation for damage related to the amount of the remuneration that the judges failed to receive […] during the time that remained until the end of their legal and constitutional term." They indicated that the calculation should be made "based on the remuneration (salary plus social benefits) that the [judges] failed to receive owing to their dismissal." They requested that the amount should not be less than the "result of multiplying the number of months that remained of their term (27 months) by their average monthly remuneration during the year in which they were dismissed (2004)." They calculated the pecuniary damage for judges Miguel Camba Campos, Pablo Enrique Herrería Bonnet, Manuel Stalin Jaramillo Córdova, Jaime Manuel Nogales Izureta, Luis Vicente Rojas Bajaña, Mauro Leonidas Terán Cevallos and Simón Bolívar Zabala Guzmán as US$219,112.70 and for Freddy Oswaldo Mauricio Cevallos Bueno as US$220,089.83. The representatives indicated that "the amounts contributed by both parties should be considered an acceptance by the State of the amounts corresponding to loss of earnings for the months remaining of the term of office of the former" judges. They also asked that "interest should be calculated from the time of their dismissal until effective compliance with the judgment."

279. Regarding Manuel Jaramillo Córdova, the representatives indicated that "he was the alternate member for Oswaldo Cevallos, President of the Constitutional Tribunal," and that "[u]nder the internal regulations of the Constitutional Tribunal in force at the time, since the

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[303] *Cf. Case of Garrido and Baigorria v. Argentina. Reparations and costs.* Judgment of August 27, 1998. Series C No. 39, para. 68, and *Case of Mendoza et al. v. Argentina*, para. 323.

[304] *Cf. Case of Castillo Petruzzi et al. v. Peru. Merits, reparations and costs.* Judgment of May 30, 1999. Series C No. 52, para. 207, and *Case of Mendoza et al. v. Argentina*, para. 323.

President of the Tribunal, in addition to all his obligations as a judge, had to take on the administrative burden of managing the Tribunal, the President's substitute could act when necessary as a member of the chamber; in other words, in the jurisdictional tasks of the President in the chamber to which the latter belonged." They considered that Mr. Jaramillo Córdova "was exercising the functions of a member of the Second Chamber indefinitely, at the explicit request of the President of the Tribunal," and that the latter, "since he had been appointed President of the organ, was empowered to delegate his jurisdictional functions permanently to his substitute so as to be able to devote himself to the tasks of administration and representation." Thus, they argued that, although the "alternate members received per diems, in other words payments for days worked replacing the titular members […] [Mr.] Jaramillo's situation [was] different to the other members because [… h]e exercised the attributes of titular member permanently, so that his remuneration was comparable to the complete remuneration of a titular member." They concluded that Judge Jaramillo Córdova "was called on to replace the President on a permanent basis […] as of December 1, 2003, so that there was no need to notify him each time he was required, which [… was almost all the time during which [judge] Cevallos was President and the time that remained to him in office." In the observations on the State's final arguments, the representatives reiterated that the member Jaramillo Córdova "should [be treated] in the same way as the other members." The representatives also argued that "[t]he interventions of [Mr.] Jaramillo as an alternate member of the Constitutional Tribunal, were not isolated and sporadic, as it is sought to make it appear," so that "although, the number of hours occupied in the examination and analysis of the cases that were submitted to his consideration were often not recognized, the judgments that [Mr.] Jaramillo signed as a judge reveal the amount of work he had within the Court".

280. The State indicated that if it "was sentenced, it would recognize the recommendations made by the […] Commission in its Report No. 99/11," and assured that it would pay the victims "[t]he sums they failed to receive […] from December 2004 to March 24, 2007," but "without the addition of 'interest.'" In its final written arguments, it "consider[ed] it appropriate that the pecuniary reparation establish the amounts corresponding to the salaries, pensions, and employment and/or social benefits that were not received from the time they were removed, that is December 2004, until March 24, 2007, the date on which the period for which they were elected terminated, without the addition of interest."

281. Regarding Mr. Jaramillo Córdova, the State indicated the need for his situation to be "analyzed in a different and specific way." In this regard, it indicated that "the assistant judges […] were only called in the absence of the titular, or merely to ensure a prompt processing of the cases, and to that end, the Tribunal could order that the chamber be composed of assistant judges, which constituted a temporary appointment." It indicated that the only way in which the assistant judges could be appointed permanently, was if the "titular member was absent permanently"; thus, the assistant judge would assume the functions of the titular member for the remainder of the term for which the titular member had been appointed. The State argued that Mr. Jaramillo Córdova acted in replacement of Oswaldo Cevallos for 31 days in 2003, and for 98 days in 2004. In the observations on the final written arguments, the State reiterated that Mr. Jaramillo "was not a titular member of the former Constitutional Tribunal," and "assumed functions as a replacement, without having been granted titular status at any time, because, for this to have occurred, it would have been necessary to verify the permanent absence of the titular member, which never happened, and the representatives have not been able to contest this fact." Hence, the State argued that since his was not "a position with any relationship of dependence with the State […], because [Mr. Jaramillo] only assumed functions in the absence of the titular member, […] he does not have the right to compensation or reparation."

Considerations of the Court

282. In its case law, the Court has developed the concept of pecuniary damage and has established that this supposes "the loss of or detriment to the earnings of the victims, the expenditure 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."[305]

283. According to the arguments presented by the parties and the Commission, the Court finds it necessary to determine the criteria used to establish the amounts corresponding to pecuniary damage. To this end it will determine: (i) the amounts of compensation for pecuniary damage of the titular members Oswaldo Cevallos, Jaime Nogales, Mauro Terán, Simón Zabala, Miguel Camba, Luis Rojas and Enrique Herrería; (ii) it will decide the dispute on the compensation for the alternate member Manuel Jaramillo Córdova, and (iii) it will determine if the payment of interest is appropriate.

1.1. Calculation of the pecuniary damage of the titular members

284. This Court takes into consideration the representatives' request to take into account the details of the earnings as documentary proof, and the State's position in its arguments indicating that, if it should be sentenced, it would pay the victims the amounts they failed to receive from December 2004 to March 24, 2007 (*supra* paras. 277 and 280).

285. Among the relevant evidence for making the calculation, the Court observes that, together with the pleadings and motions brief, the representatives forwarded, *inter alia*, the "payroll" slips of the Constitutional Tribunal from July 2003 to October 2004 for Mr. Terán Cevallos, and from February to July 2004 for Mr. Cevallos Bueno; together with a table of the Constitutional Court with the remunerations of Mr. Rojas Bajaña during December 2004, and bank certifications for Mr. Herrería Bonnet.[306] In addition, with the said brief, the representatives included a table with the projected amount of the total owed to the judges by the State, indicating that, in the case of Messrs. Camba Campos, Herrería Bonnet, Jaramillo Córdoba, Nogales Izurieta, Rojas Bajaña, Terán Cevallos and Zabala Guzmán, the amount is US$219,112.70, and for former member Cevallos Bueno the amount would be US$220,089.83 (*supra* para. 278).[307] In addition, the representatives provided notes of the Constitutional Court with "details of the earnings, per diems and other benefits" received by seven of the eight former members in 2003 and 2004.[308]

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[305] *Cf. Case of Bámaca Velásquez v. Guatemala. Reparations and costs.* Judgment of February 22, 2002. Series C No. 91, para. 43, and *Case of Suárez Peralta v. Ecuador*, para. 212.

[306] *Cf.* Constitutional Tribunal, Payment of salaries of Mauro Leónidas, Terán Cevallos from July 2003 to October 2004, and Freddy Oswaldo Cevallos Bueno from February to July 2004; Constitutional Court, Remuneration of Luis Vicente Rojas Bajaña, December 2004, and Banco Pichincha, statements of Pablo Enrique Herrería Bonnet for 2003 and 2004 (file of annexes to the pleadings and motions brief, tome I, folios 3501 to 3548).

[307] According to the representatives, this difference is related to the fact that the average monthly earnings of Mr. Cevallos Bueno in 2003 and 2004 were higher than the other former judges.

[308] *Cf.* Constitutional Court, Notes Nos. 0034-CC-SG-2012 (Miguel Camba Campos); 0035-CC-SG-2012 (Simón Bolívar Zabala Guzmán); 0036-CC-SG-2012 (Jaime Manuel Nogales Izurieta); 0037-CC-SG-2012 (Luis Vicente Rojas Bajaña); 0038-CC-SG-2012 (Mauro Leónidas Terán Cevallos); 0039-CC-SG-2012 (Pablo Enrique Herrería Bonnet) of April 20, 2012, and Note No. 040/CC/SGI/2012 (Freddy Oswaldo Cevallos Bueno) of July 9, 2012 (merits file, tome II, folios 896 to 916).

286. For its part, the State attached a table of settlement payments to seven of the eight former members with a calculation from December 1, 2004, to March 23, 2007; in other words up until the date of the end of their mandate.[309] According to the State, "[t]he legal basis to support the amounts of the remuneration of the members of the former Constitutional Tribunal, are the Regulations for the Remuneration of the members of the Constitutional Tribunal and of the official gazette."[310] The State provided a list indicating: (i) the earnings, including bonuses; (ii) the deductions (individual contribution and retirement fund), and (iii) the institutional contributions to the Ecuadorian Social Security Institute (IESS) (employer's contribution and reserve fund) of the members. In addition, the State certified the following total amounts for the period from December 1, 2004 to March 23, 2007:

a) Oswaldo Cevallos Bueno: (i) earnings: US$265,071.86; (ii) deductions: US$7,008.54, and (iii) institutional contribution to the IESS: US$8,538.86;
b) Jaime Manuel Nogales Izureta: (i) earnings: US$254,996.84; (ii) deductions: US$6,711.21, and (iii) institutional contribution to the IESS: US$8,(1)76.61;
c) Mauro Leónidas Terán Cevallos: (i) earnings: US$244,921.86; (ii) deductions: US$6,413.88, and (iii) institutional contribution to the IESS: US$7,814.35;
d) Simón Bolívar Zabala Guzmán: (i) earnings: US$244,921,.86; (ii) deductions: US$6,413.88 and (iii) institutional contribution to the IESS: US$7,814.35;
e) Miguel Camba Campos: (i) earnings: US$226,948.05; ii) deductions: US$6,413.88; and (iii) institutional contribution to the IESS: US$7,814.35;
f) Luis Vicente Rojas Bajaña: (i) earnings: US$218(2)06,80; (ii) deductions: US$6,413.88, and (iii) institutional contribution to the IESS: US$7,814.35, and
g) Pablo Enrique Herrería Bonnet: (i) earnings: US$230,755.02; (ii) deductions: US$6,413.88, and (iii) institutional contribution to the IESS: US$7,814.35.

287. The Court observes that the representatives did not provide precise information on the earnings of the judges between 2004 and 2007. However, the State did not present any objections with regard to possible employment or professional activities that the judges may have carried out during those years. Therefore, the Court will not analyze a reduction in the amounts of pecuniary damage for other earnings obtained by the judges.

288. Consequently, the Court establishes the following amounts as pecuniary damages for the remuneration and social benefits that the judges ceased to receive over the period December 1, 2004, to March 23, 2007:

a) For Judge Oswaldo Cevallos Bueno, it establishes the sum of US$265,071.86 (two hundred and sixty-five thousand and seventy-one United States dollars and eighty-six cents);
b) For Judge Jaime Manuel Nogales Izureta, it establishes the sum of US$254,996.84 (two hundred and fifty-four thousand nine hundred and ninety-six United States dollars and eighty-four cents);
c) For Judge Mauro Leónidas Terán Cevallos, it establishes the sum of US$244,921.86 (two hundred and forty-four thousand nine hundred and twenty-one United States dollars and eighty-six cents);

[309] *Cf.* Constitutional Court, Memorandum DF-C-242-2011 of September 13, 2011 (file of annexes to the answering brief, tome I, folios 4163 to 4206).

[310] *Cf.* Constitutional Court, Memorandum DF-C-242-2011 of September 13, 2011 (file of annexes to the answering brief, tome I, folios 4163 and 4164).

d) For Judge Simón Bolívar Zabala Guzmán, it establishes the sum of US$244,921.86 (two hundred and forty-four thousand nine hundred and twenty-one United States dollars and eighty-six cents);
e) For Judge Miguel Camba Campos, it establishes the sum of US$226,948.05 (two hundred and twenty-six thousand nine hundred and forty-eight United States dollars and five cents);
f) For Judge Luis Vicente Rojas Bajaña, it establishes the sum of US$218,206.80 (two hundred and eighteen thousand two hundred and six United States dollars and eighty cents), and
g) For Judge Pablo Enrique Herrería Bonnet, it establishes the sum of US$230,755.02 (two hundred and thirty thousand seven hundred and fifty-five United States dollars and two cents).

1.2. Analysis of the situation of the alternate member Manuel Jaramillo Córdova

289. For Manuel Jaramillo Córdova, who was the alternate member for Mr. Cevallos Bueno, President of the Constitutional Tribunal at the time of the facts, the representatives requested a remuneration equivalent to that of a titular member because he had presumably acted as a full-time member to assist the President of the Constitutional Tribunal in his activities (*supra* para. 279).

290. Regarding the appointment of Mr. Jaramillo Córdova, the Court observes that the case file contains Note No. 694-TC-SG dated November 26, 2003, in which the Secretary General of the Constitutional Tribunal informed Mr. Jaramillo Córdova that "[i]n accordance with paragraph (v) of article 24 of the Organizational and Operating Regulations, I wish to inform you that, as an alternate member, you should incorporate the Second Chamber of the Tribunal starting on Monday, December 1, 2003."[311] In this regard, article 24(v) of the Organizational and Operating Regulations of the Constitutional Tribunal established that "[i]n order to expedite the processing of administrative and financial matters, as well as a better attention to the matters submitted to the consideration of the Chamber to which he belongs, [the President] may excuse himself from incorporating the Chamber, if he considers this necessary."[312]

291. For its part, the State provided a Note of the Constitutional Court of July 6, 2012, according to which Mr. Jaramillo Córdova "acted as assistant judge of the former Constitutional Tribunal" and that "the position, for the purposes of payment for his activities, was included in the concept of substitution of functions, which is calculated based on the daily rate of the unified monthly remuneration of the titular member, for the number of days on which the General Secretariat of the entity certifies his activities. The alternate members are not included on the entity's payroll and their activities are carried out owing to the absence of the titular member; hence they do not have a fixed income."[313]

292. The State also presented a note of the Constitutional Court of April 18, 2013, certifying that Mr. Jaramillo Córdova "received an amount proportionate to the remuneration of the titular member for the time that he was a member of the chambers of

311 Constitutional Tribunal, Note No. 694-TC-SG of November 26, 2003 (merits file, tome V, folio 1907).

312 Article 24(v) of the Organizational and Operating Regulations of the Constitutional Tribunal of October 30, 1997 (merits file, tome V, folios 1910 to 1917).

313 Constitutional Court, Note No. 039/CC/SGI/2012 of July 6, 2012 (merits file, tome I, folio 397).

the former Constitutional Tribunal, so that there was no relationship of dependence with the Tribunal, and there is no contractual document that connects him permanently to it."[314]

293. This note also certified the following earnings received by Mr. Jaramillo Córdova in 2003 and 2004: (i) US$4,200.35 for the period December 1 to 31, 2003; (ii) US$559.83 for the period January 13 to 16, 2004; (iii) US$4,419.34 for the period February 17 to March 19, 2004; (iv) US$414.48 for the period June 15 to 17, 2004; (v) US$ 4,144.48 for the period from July 1 to 30, 2004; (vi) US$1,567.15 for the period August 24 to 30, 2004; (vii) US$2,072.39 for the period October 4 to 18, 2004, and (viii) US$2,072.39 for the period November 1 to 15, 2004.[315]

294. From the notes of November 26, 2003, of the Constitutional Tribunal, and of July 6, 2012, and April 18, 2013, of the Constitutional Court, it can be understood that Mr. Jaramillo Córdova was indeed an alternate member, and did not receive the same salary as the titular members, because he received a proportional amount to the remuneration of the titular member during the days that he was a member of the chambers of the former Constitutional Tribunal in 2003 and 2004.

295. Moreover, with regard to the legal framework applicable to alternate judges, article 10 of the 1997 Law on Constitutional Control[316] established that "[i]n cases of replacement owing to the definitive absence of a member of the Constitutional Tribunal, the alternate, once he had been sworn in, would remain in functions only for the period for which the titular member he was replacing had been elected or appointed." Article 15 of this law indicated that "[t]he Constitutional Tribunal w[ould] elect the President for a period of two years, and he could be re-elected." Article 16 stated that "[t]he Vice President of the Court w[ould] replace the President […] in case of temporary or permanent absence." The Court underscores that Judge Ceballos Bueno had commenced his presidency in March 2003, so that, pursuant to article 15 of the Law on Constitutional Control, the President's mandate would end in March 2005. Thus, March 2005 will be used as the last date when calculating the amount of the compensation for Mr. Jaramillo Córdova, as this was date on which it would not be necessary for him to continue exercising as alternate member for judge Cevallos Bueno.

296. Based on the above, the Court will calculate what Mr. Jaramillo would have failed to receive from November 2004, the date on which the members of the Constitutional Tribunal were terminated, to March 2005; in other words, five months. In this regard, the Court underlines that the State has proved that Mr. Jaramillo Córdova was paid for six days' work in 2004, which is equivalent to three months' work. On this basis, the Court considers that, if he worked approximately three months a year, very possibly in five months he would have worked the equivalent of one month. Thus, the Court observes from the evidence provided by the State (*supra* paras. 291 to 293), that, for a month of work, Mr. Jaramillo was paid the equivalent of US$4,200.00 (*supra* para. 293). Taking the above-mentioned factors into account, as well as the possible updating to the real value of this amount based on inflation and the consumer price index in the United States of America, the Court establishes, in equity, the sum of US$10,000.00 (ten thousand United States dollars) for Manuel Jaramillo Córdova for pecuniary damage.

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[314] Constitutional Court, Note No. 041/CC/DRH/2013 of April 18, 2013 (merits file, tome IV, folio 1754 to 1758).

[315] Constitutional Court, Note No. 041/CC/DRH/2013 of April 18, 2013 (merits file, tome IV, folios 1755 to 1758).

[316] Law on Constitutional Control of 1997 (merits file, tome IV, folios 1760 to 1771).

1.3. Request for payment of interest

297. Regarding the payment of interest requested by the representatives, the Court recalls that, in some cases, it has recognized different types of interest on the pecuniary damages awarded.[317] Nevertheless, in this case, the representatives have not submitted clear information on how interest should be calculated; therefore, the Court will abstain from ruling on this request.

2. Non-pecuniary damage

Arguments of the Commission and of the parties

298. The Commission argued that "if, for well-founded reasons, reinstatement is not possible, the State shall pay compensation […] to the victims, or their heirs if applicable, taking into account the non-pecuniary harm caused."

299. The representatives argued that "the statements [of the judges] reveal [their] suffering," and asked that "both the facts and also the impact of the violations on the victims should be taken into account in order to assess the non-pecuniary damage." Regarding the national context, they highlighted that the fact of "having been removed for [presumably] being corrupt, inept, and politicized warrants a considerable amount," and that "the non-pecuniary damage suffered to the honor of the judges […], as regards employment, and also the family and society, extended over time and was severe." They considered that "the amount for non-pecuniary damage should not be less than US$500,000." The representatives also asked for "integral reparation," taking into account the effects on the "life project" of the judges.

300. The State indicated that the life project of the former members of the Constitutional Tribunal "was not brought to a halt by the State for any reason." It indicated that the Court has not established a financial sum with regard to the life project. In addition, it considered that the sworn statements presented by the victims "do not constitute appropriate probative documents within an inter-American system that is the guarantor of due process." The State also argued that many of the members indicated that their health had been affected, but this had not been substantiated. Regarding the sum of US$500,000.00 requested by the representatives, the State indicated that this "could not be considered by the Court, because in the interests of impartiality and procedural balance, the Court should not accept evidence that cannot be contested by the parties."

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[317] In the case of the *Dismissed Congressional Employees v. Peru*, the Court determined the pecuniary damage based on the "legal interest" and the "interest based on the reports issued by the Superintendence of Banks and Insurance." *Cf. Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 24, 2006. Series C No. 158, para. 81 h). In the case of *Chaparro Álvarez and Lapo Íñiguez v. Ecuador,* it ordered the State to pay the pecuniary damage "plus the interest corresponding to bank interest on arrears in Ecuador". *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. 245. In the case of *Salvador Chiriboga v. Ecuador,* which related to an expropriation, the Court concluded that, under Ecuadorian law, simple interest was applicable, and that this type of interest had also been ordered by the European Court of Human Rights in cases of pecuniary damage. In this regard, the Court emphasized that "the European Court of Human Rights has indicated that the measures used, combined with the excessive duration of the judicial proceedings, places the petitioners in a situation of great uncertainty, which increases the prejudicial effects of these measures, so that they have had to support a special burden that disrupts the just balance between the requirements of general interest and the safeguard of the right to respect for property. In cases such as this, the European Court has ordered the payment of interest calculated on the basis of a legal rate." *Cf. Case of Salvador Chiriboga v. Ecuador. Reparations and costs*. Judgment of March 3, 2011. Series C No. 222, para. 93.

Considerations of the Court

301. In its case law, the Court has developed the concept of non-pecuniary damage and has established that this "may include both the suffering and difficulties caused to the direct victim and his next of kin, the impairment of values that are of great significance to the individual, as well as the changes, of a non-pecuniary nature, in the living conditions of the victim or his family."[318] Given that it is not possible to allocate a precise monetary equivalent to non-pecuniary damage, it can only be compensated, in order to achieve the integral reparation of the victim, by the payment of a sum of money or by the delivery of goods and services that have a monetary value, determined by the Court by the reasonable application of sound judicial discretion and based on equity.[319]

302. In addition, the Court reiterates the compensatory nature of indemnities, the type and amount depend on the harm caused, so that they should not entail either the enrichment or the impoverishment of the victims or their heirs.[320]

303. The Court has maintained that non-pecuniary damage is evident, because it is inherent in human nature that any person who endures a violation of his human rights experiences suffering.[321] However, this suffering does not necessarily have to be redressed with money. Depending on the specific case, adequate reparation could be the Court's delivery of a judgment sentencing the State.[322]

304. In this case, in their affidavits, several of the judges who were terminated and subjected to impeachment proceedings referred to the effects that the events had had on them. Thus, Mr. Herrería Bonnet stated that "[t]he termination […] had severe effects on his personal and family life," because "[t]he extensive media coverage of the activities of the Ecuadorian Congress and the unfounded accusation that it had made, […] ended up affecting [his] right to honor and a good reputation," and that "it caused distress in [his] home, because its peace, privacy and family harmony were jeopardized." In addition, he stated that "there are members of the public who do not understand that the termination of which [he] was the victim was unjustified, and the doubt remains that [he] may have committed an offense." Mr. Jaramillo Córdova felt that "it affected [his] daily work in [his] professional field and, for the same reason, [he] was marginalized from some possible functions that he would have liked to occupy." Mr. Terán Cevallos declared that the events made him feel "an unspeakable anguish and a feeling of helplessness […], to such a degree that [he] experienced a state of depression and stress that affected [him] for a long time," and that "[t]he emotional crisis […] affected [his] family." He indicated that he "was unable

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318 *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and costs*, para. 84, and *Case of Mendoza et al. v. Argentina*, para. 350.

319 *Cf. Case of Cantoral Benavides v. Peru. Reparations and costs.* Judgment of December 3, 2001. Series C No. 88, para. 53, and *Case of Vélez Loor v. Panama. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2010 Series C No. 218, para. 310.

320 *Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala*. Reparations and costs. Judgment of May 25, 2001. Series C No. 76, para. 79, and *Case of Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica*, para. 362.

321 *Cf. Case of Reverón Trujillo v. Venezuela*, para. 176, and *Case of the Massacres of El Mozote and nearby places v. El Salvador.* Merits, reparations and costs. Judgment of October 25, 2012. Series C No. 252, para. 383.

322 *Cf. Case of Fermín Ramírez v. Guatemala. Merits, reparations and costs.* Judgment of June 20, 2005. Series C No. 126, para. 130, and *Case of Reverón Trujillo v. Venezuela*, para. 176.

to start exercising his profession again for two reasons: one, owing to the emotional crisis and, the other, because he had lost his clientele; thus [he] had to cut [himself] off completely from the exercise of his profession and any other similar activity." Mr. Nogales Izurieta stated that "[t]he facts affected [him] personally, causing […] serious psychological depression that turned into a state of stress and anguish, […] emotional problems that even affected [his] health and this situation even affected [his] personal relationships. In addition, having moved to Quito, this caused an emotional crisis in [his] family." Lastly, Mr. Rojas Bajaña stated that his "health was seriously affected as a result of the negative events, [and …] also [his] financial situation, having lost [his] work and [his] income." He also indicated that "the health of [his] wife and children were severely affected, […] owing to the negative psychological, financial and health effects that affected [him] and still affect [him] today."

305. The Court considers it evident that the termination of their functions, the dismissal by means of impeachment proceedings, and the way in which this occurred, caused non-pecuniary damage to the judges, which was manifested by symptoms such as the depression that some of them suffered or the feelings of shame and uncertainty. The judges also suffered non-pecuniary damage because they could not work as judges of the Judiciary, and receive a remuneration for their work that would allow the victims and their families to enjoy a similar way of life to the one they had before the termination and the impeachment proceedings. Nevertheless, the Court underlines that, in this case, only the statements of the victims were provided as evidence of non-pecuniary damage. However, when weighing all the factors to determine the amount for non-pecuniary damage, the Court takes into account its case law in the matter. Accordingly, the Court establishes, in equity, the sum of US$5,000.00 (five thousand United States dollars) for each victim, and grants a time frame of one year for the payment of this amount.

D. Other measures of reparation

Arguments of the Commission and of the parties

306. The Commission asked the Court to order the State "[t]o acknowledge publicly […] the violations declared in the present case."

307. The representatives requested, as other measures of satisfaction, that the Court order the State "[t]o place a plaque with the names of the victims in this case, in recognition of their struggle to defend the institutional framework and democracy, in a visible place in the Constitutional Court's building." They also asked that "it remove any record of the passage through the institution (in the corridors, plaques etc.) of the persons who usurped the functions of the members […] of the Constitutional Tribunal."

308. The representatives also asked that: (i) "it be made mandatory to study the Court's judgment in this case in the Judicial School and that it be incorporated into the School's curriculum"; (ii) the "Center for the Study and Dissemination of Constitutional Law, which is attached to the Constitutional Court, must disseminate and promote the exercise of the independence of each judge, by different means, such as the organization of forums and academic events, and the publication of books or leaflets"; (iii) "the Judicial School should incorporate a compulsory course on the theory and practice of judicial independence and impartiality, in keeping with current legal doctrine and international human rights standards," and (iv) "the Council of the Judiciary should consider it a serious offense if any agent of justice should seek to harm judicial independence."

309. Regarding the obligation to investigate, prosecute and punish those responsible, the representatives argued that the "obligation to investigate and sanction those responsible for the human rights violations committed against the victims in this case should be implemented by two types of proceedings: one criminal and the other constitutional." They indicated that "based on the judgment delivered by the Court, the State should require the prosecutor's office to initiate the corresponding investigations against the persons implicated in this case." They considered that, "in this case, the persons who intervened in the violation of the victims' rights are fully identified"; they are "the President of the Republic at that time, Colonel Lucio Gutiérrez, because he called a special session to address the issue of the dismissal of the judges; […] each and every member of Congress who voted for the resolution that terminated the judges […] and those who voted in the impeachment proceeding [on December 8, 2004,] and whose names appear in the case file; [and] the judges of the *de facto* Constitutional Tribunal […], whose decisions and interventions before the local judges, eliminated the possibility of the victims being able to request judicial protection by the remedy of *amparo*." With regard to the constitutional responsibility for the violation of rights, they argued that "the State should open a proceeding to obtain reimbursement for the payment made for the reparations that have involved costs for the State" and that the "Organic Law on Jurisdictional Guarantees and Constitutional Control establishes the proceeding for obtaining reimbursement from third parties, which should be followed in order to comply fully with the principle of investigating and sanctioning those responsible for violating human rights." The representatives also considered that considering "the public humiliation suffered by the victims in this case and the mistreatment received at the hands of the State for almost nine years […], the publication of the judgment is not sufficient, and they deserve a public apology."

310. The State indicated that it "w[ould] only implement as a measure of satisfaction" the publication of the Judgment. It also indicated that "it was organizing continual training campaigns not only on judicial independence, but also on different points of law."

311. The State indicated that "should the Court sentence [it, it] will conduct the necessary investigations in order to establish the responsibility of the persons mentioned by the petitioners." It also indicated that, based on articles 11(9) and 417 of the Constitution, it "will file a claim for reimbursement against those persons who are declared responsible for the violations alleged by the representatives." It added that "the exercise of the right to claim reimbursement is not part of the obligation to make reparation to a victim, but rather an obligation of the public administration towards the citizens in relation to the consequences of an act that violates rights."

Considerations of the Court

312. Regarding the other measures of reparation that have been requested, the Court considers that the delivery of this Judgment and the reparations ordered in this chapter are sufficient and appropriate to redress the violations suffered by the victims and does not find it necessary to order the said measures.[323]

E. Costs and expenses

Arguments of the parties

[323] *Cf. Case of Radilla Pacheco v. Mexico. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2009. Series C No. 209, para. 359, and *Artavia Murillo et al. (In vitro fertilization) v. Costa Rica*, para. 344.

313. The representatives indicated that "the victims have incurred numerous expenses in the steps taken before the domestic authorities to obtain the evidence for this case, as well as numerous expenses that have arisen during the proceedings before the [Inter-American Commission] and the Court, which include the disbursements made to attend the hearings on admissibility, the hearing on merits, expenses for mail, copying documents, travel, accommodation and meals, and the fees of expert witnesses." They added that, owing to "the new structure of the proceedings before the Inter-American Court, the representatives of the victims have to cover all the travel costs and the payment of expert witnesses before the Inter-American Court, as well as all the expenses of the proceedings before the Inter-American Commission, all of this signifies very elevated litigation costs, that differ from those incurred by the representatives of the victims in previous years when the [Inter-American Commission] could provide financial support for the presentation of victims and expert witnesses." They indicated that "[s]ince [they did] not have all the vouchers, [they asked] the Court that, in equity, it consider a reimbursement of US$50,000 for costs and expenses generated in the domestic and the international jurisdictions."

314. The State indicated that the representatives' claim "was in excess of the standards established by the Court, and therefore contested [this] request […] and ask[ed] the Court to establish [this item] based on the different cases in which Ecuador has been sentenced, which has never been more than US$20,000.00."

Considerations of the Court

315. As the Court has indicated on previous occasions, costs and expenses are included in the concept of reparations established in Article 63(1) of the American Convention.[324]

316. The Court reiterates that, in accordance with its case law,[325] costs and expenses are part of the concept of reparation, because the activities deployed by the victims in order to obtain justice, at both the domestic and the international level, entail disbursements that must be compensated when the State's international responsibility has been declared in a guilty verdict. With regard to their reimbursement, it is for the Court to make a prudent assessment of their scope, which includes the expenses generated before the authorities of the domestic jurisdiction, and also those incurred during the proceedings before the inter-American system, taking into account the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment may be made based on the equity principle and taking into account the expenses indicated by the parties, provided that the *quantum* is reasonable.[326]

317. In this regard, the Court has indicated that "the claims of the victims or their representatives concerning costs and expenses, and the evidence that substantiates these must be presented to the Court at the first procedural moment granted to them; that is, in the pleadings and motions brief, without prejudice to updating these claims subsequently, in accordance with the new costs and expenses incurred owing to the proceedings before this Court."[327] Furthermore, the Court reiterates that it is not sufficient to forward probative

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[324] *Cf. Case of Garrido and Baigorria v. Argentina. Reparations and costs*, para. 79, and Case of Suárez Peralta v. Ecuador, para. 217.

[325] *Cf. Case of Garrido and Baigorria v. Argentina. Reparations and costs*, para. 79, and Case of Suárez Peralta v. Ecuador, para. 217.

[326] *Cf. Case of Garrido and Baigorria v. Argentina. Reparations and costs*, para. 82, and Case of Suárez Peralta v. Ecuador, para. 218.

[327] *Case of Garrido and Baigorria v. Argentina. Reparations and costs*, para. 79, and *Case of Mohamed v. Argentina*, para. 173.

documents; rather the parties are required to provide 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.[328]

318. In the instant case, the file does not contain any precise probative elements to support the costs and expenses incurred by the victims' representatives.

319. Nevertheless, the Court can infer that the representatives incurred expenditure to attend the hearings of this case in Washington and in Medellín (*supra* para. 7), as well as expenses relating to the exercise of legal representation, such as forwarding their briefs, as well as communication expenses during the proceedings before this Court. It is also reasonable to suppose that, during the years that this case was processed before the Commission, the victims and the representatives had to make financial outlays. Taking all this into account, and given the absence of vouchers for these expenses, the Court establishes, in equity, that the State must deliver the sum of US$7,000.00 (seven thousand United States dollars) for costs and expenses in the litigation of this case.

F. Method of complying with the payments ordered

320. The State must pay the compensation for pecuniary and non-pecuniary damage and to reimburse costs and expenses established in this Judgment directly to the persons indicated herein, within one year of notification of this Judgment, in accordance with the following paragraphs. If the beneficiaries have died or die before the respective compensation is delivered to them, this shall be delivered directly to their heirs, in accordance with the applicable domestic law.

321. The State must comply with the pecuniary obligations by payment in United States dollars.

322. If, for reasons that can be attributed to the beneficiaries of the compensation or their heirs, it is not possible to pay the amounts established within the indicated time frames, the State shall deposit the said amounts in their favor in an account of certificate of deposit in a solvent Ecuadorian financial institution, in United States dollars, and in the most favorable financial conditions permitted by banking law and practice. If, after ten years, the amount established has not been claimed, it shall be returned to the State with the interest accrued.

323. The amounts established in this Judgment as compensation for pecuniary and non-pecuniary damage, and to reimburse costs and expenses must be delivered to the persons indicated integrally, as established in this Judgment, without any deductions derived from possible taxes or charges, within one year of notification of this Judgment.

324. If the State should fall in arrears, it must pay interest on the amount owed corresponding to banking interest on arrears in Ecuador.

325. In keeping with its consistent practice, the Court reserves the faculty inherent in its attributes, and also derived from Article 65 of the American Convention, to monitor full compliance with the Judgment. The case will be concluded when the State has complied fully with the provisions of this Judgment.

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[328] *Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*, para. 277, and *Case of Rosendo Cantú et al. v. Mexico*, para. 285.

326. Within one year of notification of this Judgment, the State must provide the Court with a report on the measures adopted to comply with it.

X
OPERATIVE PARAGRAPHS

327. Therefore,

THE COURT

DECIDES,

unanimously,

1. To reject the preliminary objections filed by the State concerning the presumed violation of the right of defense and the alleged impossibility of complying with some of the recommendations made by the Inter-American Commission, in the terms of paragraph 27 of this Judgment.

DECLARES,

unanimously, that:

2. The State is responsible for the violation of Article 8(1), and the pertinent part of Article 8(2) and 8(4) in relation to Article 1(1) of the American Convention, to the detriment of the eight victims in this case, based on the arbitrary termination and the impeachment proceedings that occurred, facts that resulted in the violation of judicial guarantees, in the terms of paragraphs 165 to 222 of this Judgment.

3. The State is responsible for the violation of Article 8(1) in relation to Article 23(1)(c) and Article 1(1) of the American Convention, based on the arbitrary harm to the permanence in the exercise of the judicial function and the consequent harm to judicial independence and the guarantee of impartiality, to the detriment of the eight victims in this case, in the terms of paragraphs 188 to 222 of this Judgment.

4. The State is responsible for the violation of Article 25(1) in relation to Article 1(1) of the American Convention, based on the impossibility of accessing an effective judicial remedy, to the detriment of the eight victims, in the terms of paragraphs 228 to 233 of this Judgment.

5. The State is not responsible for the violation of Article 24 in relation to Article 1(1) of the American Convention, in the terms of paragraphs 239 to 242 of this Judgment.

6. The State is not responsible for the violation of Article 2 of the American Convention, in the terms of paragraphs 226 a 227 of this Judgment.

By six votes in favor and one against, that

7. It is not required to make a ruling on the alleged violation of Article 9 of the American Convention on Human Rights, in the terms of paragraphs 223 and 224 of this Judgment.

AND ESTABLISHES

unanimously that:

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

9. The State must make the publications indicated in paragraph 254 of this Judgment, within six months of its notification.

10. The State must compensate the eight victims for the impossibility of returning to their functions as members of the Constitutional Tribunal, by paying the amounts established in paragraph 264 of this Judgment, within six months at the most of notification of the Judgment.

11. The State must pay the amounts established in paragraphs 288, 296 and 305 of this Judgment as compensation for pecuniary and non-pecuniary damage, and to reimburse costs and expenses, in the terms of paragraph 319 of this Judgment.

12. The State, within one year of notification of this Judgment, must provide the Court with a report on the measures adopted to comply with it.

13. In exercise of its attributes and pursuant to its obligations under the American Convention on Human Rights, the Court will monitor complete compliance with this Judgment and will consider this case concluded when the State has complied fully with its provisions.

Judge Ferrer Mac-Gregor Poisot advised the Court of his partially dissenting opinion, which accompanies this Judgment.

Diego García-Sayán
President

Manuel E. Ventura Robles

Alberto Pérez Pérez

Eduardo Vio Grossi

Roberto F. Caldas

Humberto Antonio Sierra Porto Eduardo Ferrer Mac-Gregor Poisot

Pablo Saavedra Alessandri
Secretary

So ordered

Diego García-Sayán
President

Pablo Saavedra Alessandri
Secretary

PARTIALLY DISSENTING OPINION OF JUDGE EDUARDO FERRER MAC-GREGOR POISOT ON THE JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS IN THE *CASE OF THE CONSTITUTIONAL TRIBUNAL (CAMBA CAMPOS ET AL.) v. ECUADOR, OF AUGUST 28, 2013*

I. PREAMBLE

1. The separation of powers is a substantive element of constitutional democracy. Judicial independence (in its individual and collective aspects) represents an inseparable element for the consolidation – and very existence – of a genuine constitutional and democratic rule of law. The context of this case is of particular importance, because it relates to the "collective removal of the judges" (in the space of two weeks) of the three high courts of Ecuador; that is, the members of the Constitutional Tribunal, the Supreme Court of Justice, and the Electoral Tribunal.

2. As emphasized in this *Judgment on preliminary objections, merits, reparations and costs* (hereinafter "the Judgment"),[1] this collective dismissal "constitutes an attack not only on judicial independence, but also on the democratic order," which "constitutes a totally unacceptable and inopportune course of action" resulting in "a destabilization of the existing democratic order. And, it is stressed that "the separation of powers is closely related not only to the consolidation of the democratic regime, but also seeks to preserve the human rights and freedoms of the people."[2]

3. In the Judgment, the Inter-American Court of Human Rights (hereinafter "the ICourtHR" or "the Inter-American Court") declared the respondent State internationally responsible for the violation of the rights to judicial guarantees and judicial protection established in Articles 8(1), and the pertinent parts of Article 8(2) and Article 8(4), in relation to Articles 1(1) and 25(1) of the American Convention on Human Rights (hereinafter "the American Convention" or "the Pact of San José"), as well as for the violation of Article 8(1), in relation to Article 23(1)(c) and Article 1(1) of the American Convention, based on the arbitrary impairment of the permanence of the victims in the exercise of judicial office, and the consequent harm to judicial independence and the guarantee of impartiality.

4. I am essentially in agreement with what was decided in this important Judgment. My dissent is focused on the seventh operative paragraph of the Judgment,[3] because I consider that the ICourtHR should have made an autonomous analysis of the violation of Article 9 of the Pact of San José (Freedom from *Ex Post Facto* Laws or the principle of legality) and declared that this principle had been violated. This is because, on the one hand, the State had expressly acknowledged its international responsibility in relation to the principle of legality, "because there were no grounds established by law for the removal from office of the presumed victims"[4] and, on the other hand, because there was evidence of the "abuse

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[1] *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador. Preliminary objections, merits, reparations and costs).* Judgment of August 28, 2013, Series C No. 268.

[2] *Ibidem*, paras. 207, 212 and 221.

[3] "7. It is not required to make a ruling on the alleged violation of Article 9 of the American Convention on Human Rights, in the terms of paragraphs 223 and 224 of this Judgment."

[4] This partial acknowledgment of responsibility by the State was indicated in relation to the violation of Article 9 of the American Convention based on the termination of the members of the Constitutional Tribunal. During the public hearing, the State affirmed that "although it is true that the National Congress could make a constitutional and legal analysis, this should have included clear mechanisms to submit to review the tenure and the duration of the functions of the former members of the Constitutional Tribunal. The absence of legal certainty

of power" and the arbitrary nature of the sanction imposed on the members of the Constitutional Tribunal of Ecuador who were removed from office and, subsequently, subjected to impeachment proceedings, which culminated in the admissibility of the motion of censure that resulted in the "immediate dismissal" under domestic law; impeachment proceedings regarding which, in the Judgment, the members of the Inter-American Court unanimously declared that a series of human rights had been violated, which constitute treaty-based due process and judicial protection established Articles 8(1), 8(2), 8(4) and 25(1), in relation to Article 1(1) of the Pact of San José.

5. Indeed, as was clearly studied in the Judgment "dismissal cannot be an arbitrary measure,"[5] and "the purpose of an impeachment proceeding by the National Congress could not be the dismissal of a member of the Constitutional Tribunal based on a review of the constitutionality or legality of the judgments adopted by that body. This is due to the separation of powers and the exclusive competence of the Constitutional Tribunal to review the formal and/or substantial constitutionality of the laws enacted by the National Congress,"[6] pursuant to the domestic legal framework existing at that time.

6. The ICourtHR found it "opportune to ratify the fundamental criteria" contained the important precedent of the case of the *Constitutional Court v. Peru,*[7] almost a decade ago, where, for the first time, it dealt with the issue of violations of rights that are part of due process of law in the impeachment of judges in light of the American Convention and the international standards. This is the second time in the history of the inter-American jurisdiction that it decides matters relating to impeachment, judicial independence, and due process. It is relevant to underscore that, in the Judgment the ICourtHR found it appropriate to follow the guidelines adopted on that occasion, which reflects a continuity in its case law, even though the judges who, today, are members of this inter-American court are completely different; and even though, the instant case has very important characteristics, particularly since they occurred in the above-mentioned context of the "collective termination of judges" of the three high courts, which has special relevance for the institutional aspect of judicial independence and its relationship with democracy.

7. Based on the foregoing consideration, I find it opportune, under Article 66(2) of the American Convention,[8] to attach this opinion to the Judgment, in order to clarify the important implications that the matter has, in general, for judicial independence in Latin America; to state why I consider that the other judicial guarantees that were alleged should be examined, and to provide the reasons for my dissent from the seventh operative paragraph of the Judgment. Accordingly, I will examine the following issues: (i) the function of judicial independence under the constitutional and democratic rule of law (paras. 8-20); (ii) the importance of the context in the instant case (paras. 21-26); (iii) judicial independence in the Inter-American Court's case law concerning the removal of judges (paras. 27-51); (iv) the different concepts of judicial independence: institutional and personal (paras. 52-61); (v) the institutional aspect of judicial independence in this case

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concerning the grounds for removing the former members obliges the State to acknowledge its international responsibility in this regard." Para. 14 of the Judgment.

5 Para. 200 of the Judgment.

6 Para. 204 of the Judgment.

7 *Case of the Constitutional Court v. Peru. Merits, reparations and costs.* Judgment of January 31, 2001. Series C No. 71.

8 Article 66(2) of the American Convention establishes: "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." See also Articles 24(3) of the Inter-American Court's Statute and 32(1)(a), 65(2) and 67(4) of its Rules of Procedure.

and its relationship with democracy (paras. 62-71); (vi) the jurisdictional nature of impeachment and the different rights related to the Convention's provisions on due process of law, political rights, and judicial protection that were violated (paras. 72-96); (vii) the failure to make a specific analysis of the rights established in Article 8(2) of the Pact of San José (paras. 97-102) and, lastly, (viii) my dissent owing to the failure to analyze the principle of legality established in Article 9 of the American Convention, and its violation owing to the sanction imposed on the victims (paras. 103-140).

II. THE FUNCTION OF JUDICIAL INDEPENDENCE UNDER THE CONSTITUTIONAL AND DEMOCRATIC RULE OF LAW

8. This case underlines the importance of one of the main defining factors of the constitutional and democratic rule of law, which is that of the independence of judges. In general terms, it can be said, first, that a judge is independent if he takes his decisions based only on the case, without being influenced by specific considerations relating to the parties that are not relevant for the particular matter, and if he takes his decision free of considerations relating to his own interest or to the interests of the persons or body that appointed him.[9]

9. To achieve this objective, institutional guarantees can be established that permit a judge to exercise his independence. These guarantees include tenure, a secure remuneration, and the method and form of appointment and the termination of his or her functions.[10] Indeed, in the *Federalista LXXVIII* it is said that nothing can contribute as effectively to his rigor and independence as tenure, and good conduct should be the rule for the duration of judges in office.[11] However, these guarantees will never be sufficient if the judge does not wish to exercise them.[12]

10. However, from an institutional perspective, judicial independence is consubstantial with the principle of the separation of powers; while both elements are essential for understanding an authentic rule of law. Regarding the principle of the separation of public powers, it is common to assert that, nowadays, this cannot be conceived in an absolute and rigid manner; rather the modern concept entails a distribution of the State's functions by means of the appropriate organization of mutual and reciprocal relationships and controls among the powers. Thus, instead of their absolute separation, what this principle really seeks is to avoid a concentration of powers.[13]

11. Since its most remote historical origins, the separation of powers has always signified the independence of the Judiciary in relation to the political power. The independence of the Judiciary has always been understood as a necessary consequence of the separation of powers designed to ensure the resistance of judges to pressures or

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[9] MacDonald, Roderick A. and Kong, Hoi, "Judicial Independence as a constitutional virtue", in Michel Rosenfeld and András Sajó, *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, 2012, p. 832. Similarly, Chaires Zaragoza, Jorge, "La independencia del poder judicial", *Boletín Mexicano de Derecho* Comparado, new series, year XXXVII, No. 110, May-August 2004, p. 532.

[10] Ernst, Carlos, "Independencia judicial and democracia", in Jorge Malem, Jesús Orozco and Rodolfo Vázquez (comps.), *La función judicial. Ética and democracia*, Barcelona, Gedisa, 2003, p. 236.

[11] Hamilton, A., Madison, J. and Jay, J., *El federalista,* translated by Gustavo R. Velasco, Mexico, Fondo de Cultura Económica, 1st re-edition, 2004, pp. 331 and 335.

[12] MacDonald, Roderick A. and Kong, Hoi, *op. cit.*, p. 834.

[13] Kelsen, Hans, *General Theory of Law and State*, translated by Anders Wedberg, Cambridge, Harvard University Press, 2009, p. 282.

attacks by either the Legislature or the Executive. Thus, from the start, the independence of judges constituted an essential element of the separation of powers. The independence of the judicial function can be conceived as a crucial factor for the democratic rule of law that, also, involves other related requirements, such as a regular, ordered and coherent procedural system, that is guarantor of legal certainty and the human rights of the individual.[14]

12. Furthermore, the independence of a Judiciary with regard to the political powers may be conceived as one of the constitutional mechanisms that prevents or obstructs the arbitrary and illegitimate exercise of power, and halts or thwarts its abuse or its illegal exercise.[15] Hence, it makes sense to ensure that the imparting of justice should never be a manifestation of political power, or be subjected in any way to the organs of the State that exercise this power, because it would be useless to enact laws that limit the activity of those who govern if, later, during the contentious phases of law, they could influence the decisions taken in litigations.[16]

13. Evidently, the function of judicial independence in the democratic rule of law could not be overlooked by the Inter-American Democratic Charter (cited in the Judgment),[17] in which, after reaffirming representative democracy as an essential element for the stability, peace, and development of the region, it establishes the following in its Article 3:

> Essential elements of representative democracy include, *inter alia*, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government (underlining added).

14. Thus, the Inter-American Democratic Charter does not merely recognize respect for human rights and fundamental freedoms as essential elements of representative democracy, and as elements of electoral democracy, but also requires the separation and independence of the branches of government, among which, in this case, the one relating to the jurisdictional function should be underscored. The role of judges in the democratic governance of the State includes recognizing to them a genuine separation and independence from others; in other words, from the political powers, not only in the personal aspect that corresponds to each member of the judiciary, *but also in its institutional aspect*, as a separate authority among the authorities of which the State is composed.

15. The ICourtHR has emphasized the democratic roots of judicial independence in various judgments and advisory opinions, and has also used the Inter-American Democratic Charter to explain the importance of judicial independence in the region's constitutional systems. In this regard, I believe that it is important to mention that the separation of powers is closely related not only to the consolidation of the democratic system, but also seeks to preserve the human rights and freedoms of the individual, to avoid the concentration of power that can become tyranny and oppression, and also to permit satisfactory and effective achievement of the goals assigned to each branch of government.

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[14] *Cf.* Díaz, Elías, *Estado de derecho and sociedad democrática*, Madrid, Taurus, 1998, p. 48.

[15] *Cf.* Bobbio, Norberto, *Liberalismo and democracia*, translated by José F. Fernández Santillán, Mexico, Fondo de Cultura Económica, 2001, pp. 19-20.

[16] *Cf.* Díez-Picazo, Luis María, "Notas de derecho comparado sobre independencia judicial", *Revista Española de Derecho Constitucional*, No. 34, January-April 1992, pp. 19-20.

[17] Para. 221 of the Judgment.

However, the separation of powers entails not only a specialization of the State's work in accordance with the way such powers have been assigned, but also implies the existence of a system of "checks and balances" that enable reciprocal control and monitoring among each branch of power. Thus, the separation of powers reveals the exercise of a limited power, as well as one that is susceptible to control, organized in diverse entities responsible for different functions, with the essential goal of ensuring the freedom of the individual vis-à-vis the State within a framework of participative and pluralist democracy.[18]

16. In the very significant case of the *Constitutional Court v. Peru*, the ICourtHR considered that one of the main purposes of the separation of public powers is precisely the guarantee of the independence of judges and noted that, to this end, the different political systems have created strict procedures, both for their appointment, and for their dismissal. In this regard, it cited the "United Nations Basic Principles on the Independence of the Judiciary,"[19] which establishes that:

> The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.[20]

17. Regarding the possibility of removing judges, it underlined that these same "Principles" stipulate:

> A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.[21]

18. Hence, in this significant judgment, the Inter-American Court emphasized that the authority responsible for the procedure to dismiss a judge must be impartial in the proceeding established to this end and permit the exercise of the right of defense. It then underscored that, under the rule of law, it is necessary to ensure the independence of any judge and, "especially," that of the constitutional judge owing to the nature of the matters submitted to his or her consideration. Referring to the European Court, it specified that the independence of any judge supposes that there is an appropriate appointment procedure, an established term of the mandate, and guarantees against external pressures.[22]

19. At this time, the point that I wish to emphasize is that the ICourtHR has maintained that judicial independence *constitutes an institutional guarantee under a democratic system that is connected to the principle of the separation of powers,* which is now embodied in Article 3 of the Inter-American Democratic Charter. In this case, also, it should be taken into account that it was the Constitutional Tribunal, which the victims formed part of in their capacity as judges, that was the democratic institution required to ensure the rule of law.

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[18] Regarding these concepts, see Constitutional Court of Colombia, Judgment C-141 of February 26, 2010.

[19] Adopted by the Seventh Congress of the United Nations on the Prevention of Crime and the Treatment of Offenders held in Milan from 26 August to 6 September 1985, and confirmed by the General Assembly in its resolutions 40/32 of 29 November 1985, and 40/146 of 13 December 1985.

[20] Principle 1, *Ibidem.*

[21] Principle 17, *Ibidem.*

[22] *Case of the Constitutional Court v. Peru. Merits, reparations and costs.* Judgment of January 31, 2001. Series C No. 71, paras. 73-75.

20. It could even be considered whether it is possible to constitute a sort of right of the defendants to the democratic conditions of public institutions, based not only on the said Article 3, but also on Article 29 of the Convention,[23] which would be supported by the State's international obligation to exercise its powers in accordance with the rule of law, the separation of powers and, evidently, the independence of the judges, as has been proposed in other cases in which the Court has decided similar issues.[24] A standard of this type would go beyond the concept of democracy in interpretive terms, as the ICourtHR has indicated, in the sense that "the just requirements of democracy must […] guide the interpretation of the Convention and, in particular, of those provisions that are significantly related to the preservation and functioning of the democratic institutions."[25]

II. THE IMPORTANCE OF THE CONTEXT IN THIS CASE

21. In keeping with the proven facts in this case, the dismissal of the members of the three high courts of Ecuador; that is, the Constitutional Tribunal, the Supreme Court of Justice, and the Supreme Electoral Tribunal occurred as a result of a political arrangement between the President of the Republic at the time, Lucio Gutiérrez, who it was sought to impeach for the offense of embezzlement, and the Ecuadorian Roldosista Party. Meanwhile, the leader of that party, the former President of the Republic, Abdalá Bucaram, sought the annulment of several criminal proceedings that were being processed before the Supreme Court.[26]

22. Thus, on November 23, 2004, President Gutiérrez Borbúa announced the Government's intention of proposing to Congress the reorganization of the Constitutional Tribunal, the Supreme Electoral Tribunal and the Supreme Court of Justice. On November 25, 2004, the National Congress, by a resolution, decided that the titular members of the Constitutional Tribunal and their alternates had been appointed illegally in 2003, and terminated the functions of all the titular members and their alternates, some of whom were impeached by Congress several days later. In addition, Congress determined the termination of the titular judges of the Supreme Electoral Tribunal and their alternates, because they had been appointed without taking into account the provisions of article 209 of the Constitution.

23. On December 1, 2004, a first attempt was made to impeach some members of the Constitutional Tribunal, without obtaining the necessary votes to remove them. Accordingly, on December 5, President Gutiérrez Borbúa called for a special session of the National

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[23] "Article 29. *Restrictions regarding interpretation*

No provision of this Convention shall be interpreted as:

a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;

b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;

c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or

d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have."

[24] *Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of August 5, 2008. Series C No. 182, para. 222.

[25] *Cf. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights).* Advisory Opinion OC-5/85, para. 44.

[26] *Cf.* paras. 55, 56, 211 and 219 of the Judgment.

Congress which was held on December 8, during which the required votes were obtained to censure the former members of the Constitutional Tribunal in an impeachment proceeding. As a second item on the agenda, the judges of the Supreme Court of Justice were also terminated, unduly applying the twenty-fifth transitory provision of the 1998 Constitution, according to which officials and members of bodies appointed by the National Congress for a four-year period, as of August 10, 1998, would remain in office until January 2003. These decisions would subsequently be reversed by the National Congress, but this did not entail the reinstatement of the members who had been removed.

24. It is important to stress that the United Nations Special Rapporteur on the independence of judges and lawyers at that time, Leandro Despouy, participated in the settlement of this political and social crisis by recommending different solutions and an evaluation of their implementation. At that time, he indicated that, in the case of the removal of the judges of the Constitutional Tribunal, the right of defense and other principles of due process had been infringed.[27] Regarding the removal of the judges of the Supreme Court of Justice, he indicated that the National Congress was not empowered to do this, and neither was it authorized to appoint substitutes.[28]

25. The importance of taking into account the context is that this is a determinant factor when deciding the institutional structure to be implemented in a specific place in order to isolate judges from undue influences.[29] The factors that can have an impact on the effective exercise of judicial independence include: (a) the existence of an authoritarian regime; (b) the existence of cultural patterns that may minimize the usefulness of the jurisdiction as a mechanism to settle disputes; (c) the commitment of civil society to judicial independence, and policies that promote this, and (d) the legal tradition, either continental European or common law.[30] In point of fact, in the case of Latin American in general, it has been said that democracy continues to be weak and strong Executives Branches have been a constant source of attacks on judicial independence.[31]

26. In this specific case, among the proven facts, the ICourtHR considered that, at times during Ecuador's history, "the high courts were intervened by the political authorities," and that according to "expert witness Mónica Rodríguez, proposed by the State, `[i]n Ecuador, the independence of the Supreme Court of Justice has been compromised and the institution exploited throughout its history.´"[32]

IV. JUDICIAL INDEPENDENCE IN THE CASE LAW OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS IN RELATION TO THE REMOVAL OF JUDGES

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27 U.N. document E/CN.4/2005/60/Add.4 of 29 March 2005, p. 3. See also U.N. documents A/60/321 of 31 August 2005 and A/HCR/11/41 of 24 March 2009.

28 *Ibidem.*

29 MacDonald, Roderick A. and Kong, Hoi, *op. cit*., p. 846. Similarly, Linares considers that the study of independence in a country requires a qualitative knowledge of the political agents and relevant issues on which power is exercised. Linares, Sebastián, "Independencia judicial: conceptualización y medición", in Germán Burgos S. (ed.), *Independencia Judicial en América Latina. ¿De quién? ¿Para qué? ¿Cómo?*, ILSA, Bogotá, 1ª ed., 2003, pp. 121 and 122.

30 MacDonald, Roderick A. and Kong, Hoi, *Ibidem.*

31 Horan, Jennifer E. and Meinhold, Stephen S., "Separation of powers and the Ecuadorian Supreme Court: exploring presidential-judicial conflict in a post-transition democracy", *The Social Science Journal*, 2012, vol. 29, pp. 232-234.

32 Para. 41 of the Judgment.

27. In the case of the *Constitutional Court v. Peru*, the ICourtHR examined the congressional resolution of May 28, 1997, removing some of the judges of the country's Constitutional Court for presumed irregularities in the processing of the clarification of a judgment that declared the inapplicability of Law No. 26,657. In that case, the Inter-American Court determined that the guarantees established in both paragraphs 1 and 2 of Article 8 of the American Convention were applicable in civil, labor, fiscal or any other matter, as well as criminal matters, so that due process of law was required.[33]

28. In addition, it indicated that any authority, whether administrative, legislative or judicial that, by means of its decisions, determines rights and obligations of the individual, is obliged to comply with due process.[34] Likewise, it clarified that one of the main purposes of the separation of powers is the guarantee of judicial independence, and to this end, rigorous procedures of different kinds have been conceived for both the appointment and the removal of judges.[35] The authority that executes this procedure must be impartial and allow the exercise of the right of defense.[36]

29. The Court also stipulated that the independence of any judge supposes that there is an adequate appointment procedure, with an established term of office, and a guarantee against external pressure.[37]

30. Regarding impeachment, in which the sanction of dismissal is applied,[38] it established that "any person subject to a trial of any nature before an organ of the State must be guaranteed that the said organ is competent, independent and impartial, and acts in accordance with the legally established procedure to hear and decide the case submitted to it."[39] And, of special importance for the instant case, it considered:

> 69. Although Article 8 of the American Convention is entitled "Judicial Guarantees" [in the Spanish version - "Right to a Fair Trial" in the English version], its application is not strictly limited to judicial remedies, "but rather the procedural requirements that should be observed in order to be able to speak of effective and appropriate judicial guarantees" so that a person may defend himself adequately in the face of any kind of act of the State that affects his rights.
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> 70. The Court has already established that, although this article does not establish minimum guarantees in matters relating to the determination of rights and obligations of a civil, labor, fiscal or any other nature, the full range of minimum guarantees stipulated in the second paragraph of this article are also applicable in those areas and, therefore, <u>in this type of matter, the individual also has the overall right to the due process applicable in criminal matters</u>[40] (underlining added).[41]

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33 *Case of the Constitutional Court v. Peru. Merits, reparations and costs*. Judgment of January 31, 2001. Series C, No. 71, para. 70.

34 *Ibidem*, para. 71.

35 *Ibidem*, para. 73.

36 *Ibidem*, para. 74.

37 *Ibidem*, para. 75.

38 *Ibidem*, paras. 67 and 68.

39 *Ibidem*, para. 77.

40 *Cf. Case of Paniagua Morales et al. v. Guatemala. Merits*. Judgment of March 8, 1998. Series C No. 37, para. 149.

41 Para. 167 of the judgment that prompts this opinion, in relation to the minimum guarantees established in Article 8(2) of the American Convention, also refers to the precedent of the *Case of Baena Ricardo et al. Merits, reparations and costs*. Judgment of February 2, 2001. Series C No. 72, paras. 125 to 129.

31. Furthermore, it found that the remedy of *amparo* that was filed against the removal decision was not decided within a reasonable time or by an impartial judge.[42]

32. In the case *Apitz Barbera et al. v. Venezuela*, the ICourtHR examined the dismissal of the former provisional judges of the First Contentious Administrative Court, because they had committed an inexcusable judicial error of granting a *precautionary amparo* that suspended the effects of an administrative decision that had denied the registration of a sale. In that case, the Inter-American Court observed that States are obliged to ensure that provisional judges are independent and, consequently, must grant them certain stability and permanence in office, because the temporary nature of their posting is not equivalent to removal at any time. In addition, the temporary nature should not entail any changes in the system of guarantees of the performance of the judge and the safeguard of the defendants.[43] Indeed, for the ICourtHR, an appropriate appointment procedure and an established term of office are ways of guaranteeing the independence of judges.[44]

33. Moreover, the Court repeated that the authority in charge of the proceeding to dismiss a judge must act impartially in the procedure established to this end, and permit the exercise of the right of defense,[45] in addition to being an independent court.[46] It also recalled that *all the organs that exercise functions of a substantially jurisdictional nature* are obliged to adopt just decision based on full respect for the guarantees of due process established in Article 8 of the American Convention.[47]

34. Regarding judicial independence, the ICourtHR reiterated the importance that this has for the separation of powers, and the State's obligation to guarantee its institutional aspect, in relation to the Judiciary as a system, as well as with regard to its individual aspect; that is, with regard to the person of the specific judge.[48] Furthermore, impartiality requires that the judge who intervenes in a particular dispute approaches the facts of the case, subjectively, without any prejudice and, also, offering sufficient objective guarantees that allow any doubts that the defendant or the community may have about the absence of impartiality to be overcome.[49]

35. The ICourtHR also argued that, under international law, the valid reasons to proceed to suspend or remove a judge may be, *inter alia*, improper conduct or ineptitude. And judges cannot be removed merely because a decision they made was annulled following an appeal or review by a higher judicial organ.[50] In addition, it considered that the State had failed to comply with its obligation to provide the grounds for the sanction of dismissal

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42 *Case of the Constitutional Tribunal v. Peru*, *Merits, reparations and costs*, Judgment of January 31, 2001. Series C, No. 71, paras. 93 and 96.

43 *Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela.* Preliminary objection, merits, reparations and costs. Judgment of August 5, 2008. Series C No. 182, para. 43.

44 *Ibidem,* para. 138.

45 *Ibidem*, para. 44.

46 *Ibidem*, para. 137.

47 *Ibidem*, para. 46.

48 *Ibidem*, para. 55.

49 *Ibidem*, para. 56.

50 *Ibidem*, para. 84.

because it did not analyze whether the inexcusable judicial error constituted a disciplinary offense.[51]

36. Regarding the victims' request for evidence in order to clarify a specific aspect of the case, the ICourtHR decided that the disciplinary organ should have provided at least some response, accepting or refusing to produce this evidence, or even ordering that the parties themselves provide it.[52]

37. In the case of *Reverón Trujillo v. Venezuela*, the ICourtHR examined the arbitrary removal of a judge from the provisional position she occupied on February 6, 2002. On October 13, 2004, the Political and Administrative Chamber of the Supreme Court of Justice decreed the annulment of the decision to dismiss her, considering that it was not in keeping with the law, but did not order the reinstatement of the presumed victim, or the payment of the salary and social benefits that she had ceased to receive.

38. In that case, the Inter-American Court indicated that judges, contrary to other public officials, have increased guarantees, owing to the necessary independence of the Judiciary. It reiterated the importance that this has for the separation of powers, and also repeated the State's obligation to ensure its institutional aspect; that is, in relation to the Judiciary as a system, as well as in relation to its individual aspect; in other words, in relation to the person of the specific judge.[53]

39. It also insisted on the guarantees that result from judicial independence: an adequate appointment procedure, tenure, and a guarantee against external pressures.[54] It recalled that the authority in charge of the removal procedure must act independently and impartially during the proceeding established to this end, and permit the right of defense.[55] Tenure is a guarantee of judicial independence; and is itself composed of the following guarantees: permanence in office, an adequate promotion procedure, and no unjustified dismissal, or removal at will.[56] In addition, tenure should ensure the reinstatement in office of any judge who may be arbitrarily deprived of this.[57] This does not mean that provisional judges have an unlimited permanence in their functions, but they should be guaranteed a certain term in office.[58] In other words, they should have the certainty of permanence for a set time, which protects them from pressure from different sectors.[59]

40. In the same way, the ICourtHR argued that Article 8(1) recognizes that "[e]very person has a right to a hearing […] by an independent […] judge or court." The terms in which this article is drafted indicate that the subject of the right is the defendant, the person situated in front of the judge who will decided the case that has been submitted to him. Two obligations arise from this right: the first of the judge, and the second of the

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51 *Ibidem*, paras. 86 and 91.

52 *Ibidem*, para. 94.

53 *Case of Reverón Trujillo v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of June 30, 2009. Series C No. 197, para. 67.

54 *Ibidem*, para. 70.

55 *Ibidem*, para. 78.

56 *Ibidem*, para. 79.

57 *Ibidem*, para. 81.

58 *Ibidem*, paras. 115 and 116.

59 *Ibidem*, para. 117.

State. The judge has the obligation to be independent; an obligation that he meets when he judges only in accordance with – and based on – the law. Meanwhile, the State has the obligation to respect and ensure, pursuant to Article 1(1) of the Convention, the right to a hearing by an independent judge. The obligation of respect consists in the negative obligation of the public authorities to abstain from interfering unduly in the Judiciary or with its members; in other words, in relation to the specific judge. The obligation of guarantee consists in preventing the said interferences and investigating and punishing those who commit them. In addition, the obligation of prevention consists in the adoption, pursuant to Article 2 of the American Convention, of an appropriate legal framework that ensures an adequate appointment procedure, the tenure of judges, and the other requirements.

41. Now, the said State obligations give rise, in turn, to rights for the judges and for all other citizens. For example, the guarantee of an adequate appointment procedure for judges necessarily entails the right of the citizen to have access to public office in equal conditions; the guarantee of not being subject to removal at will signifies that, in the case of judges, the disciplinary and punishment procedures must necessarily respect the guarantees of due process, and those subject to such procedures must be provided, among other matters, with an effective remedy; the guarantee of stability should translate into an appropriate employment regime for judges, in which transfers, promotions, and other conditions are sufficiently controlled and respected.

42. Lastly, in the case of *Chocrón Chocrón v. Venezuela*, the ICourtHR examined the arbitrary dismissal of the provisional criminal judge of first instance from the Judicial Circumscription of the Metropolitan Area of Caracas, without the minimum guarantees of due process and without adequate grounds, without the possibility of being heard, and of exercising her right of defense, and without having been provided with an effective judicial remedy to contest the violations of her rights, all as a result of the absence of guarantees in the Judiciary's transition process.

43. The Inter-American Court reiterated that one of the main purposes of the separation of public powers is the guarantee of the independence of judges. The objective of protection stems from the need to avoid the judicial system, in general, and its members, in particular, being subjected to possible undue constraints in the exercise of their functions by organs outside the Judiciary, or even by those judges who exercise functions of review and appeal.[60]

44. The Court insisted once again on the guarantees that result from judicial independence: an adequate appointment procedure, tenure, and the guarantee against external pressure, and stated that the authority in charge of the procedure to remove a judge must act with independence and impartiality in the proceeding established to that end, and permit the exercise of the right of defenses. This is because the removal of judges at will leads to the objective doubt of the observer about their real possibility of deciding specific disputes without fear of reprisal.[61]

45. The ICourtHR reiterated that, even though titular and provisional judges have the same guarantees, they do not provide equal protection for the two types of judge, because provisional and temporary judges are, by definition, appointed in a different way and do not have an unlimited permanence in office. Thus, provisional and temporary judges have not

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[60] Case of *Chocrón Chocrón v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2011. Series C No. 227, para. 97.

[61] *Ibidem*, para. 99.

proved that they have the qualifications and aptitude to exercise the office with the guarantees of transparency imposed by public competition. However, this does not mean that provisional and temporary judges should not have an appointment procedure because, according to the United Nations Basic Principles on the Independence of the Judiciary: "[a]ny method of judicial selection shall safeguard against judicial appointments for improper motives."

46. In addition, the Inter-American Court stated that, in the same way in which the State is obliged to guarantee an adequate appointment procedure for provisional judges, it must guarantee them a certain stability in office. In this way, in the case of provisional judges, the guarantee of stability translates into the requirement that they can enjoy all the benefits of tenure until the resolutory condition that ends their mandate.

47. The ICourtHR also indicated that the stability of provisional judges is closely linked to the guarantee against external pressure, because if provisional judges do not have certainty about their permanence for a specific time, they will be vulnerable to pressure from different sectors, above all from those who have the power to decide on dismissals or promotions in the Judiciary.[62]

48. The Inter-American Court also stated that provisional appointments should be exceptional in nature and not the rule, and that they should not be extended indefinitely.[63]

49. It also indicated that any public authority, whether administrative, legislative or judicial, whose decisions may affect the rights of the individual, is required to adopt these decisions with full respect for the guarantees of due process of law. In addition, it reiterated that, any organ of the State that exercises functions of a *substantially jurisdictional nature*, is obliged to adopt decisions that abide by the guarantees of due process of law in the terms of Article 8 of the American Convention.[64]

50. Furthermore, the ICourtHR stipulated that the authority to annul the appointment of judges based on "observations" must be minimally justified and regulated, at least as regards the exact description of the facts that support these observations; also that the respective motivation shall not be of a disciplinary or punitive nature, because, if it was a disciplinary sanction, the requirement of motivation would be even greater, since disciplinary control is designed to assess the conduct, aptness and performance of the judge as a public official and, consequently, it would be necessary to analyze the seriousness of the conduct and the proportionality of the sanction.[65]

51. In the judgment that inspires this separate opinion, the Inter-American Court considered its case law on judicial independence,[66] and especially on guarantees in impeachment proceedings,[67] based also on the relevant standards of the Human Rights Committee and the United Nations Basic Principles on the Independence of the Judiciary, the criteria of the European Court of Human Rights, and the recommendations of the

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62 *Ibidem*, paras. 104 to 106.

63 *Ibidem*, para. 107.

64 *Ibidem*, para. 115.

65 *Ibidem*, para. 120.

66 Paras. 188 to 199 of the Judgment.

67 Paras. 165 to 169 of the Judgment.

Council of Europe on the independence, efficiency and role of judges, as well as on the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.[68]

V. DIFFERENT CONCEPTS OF JUDICIAL INDEPENDENCE: INSTITUTIONAL AND PERSONAL

52. Different concepts of judicial independence have been developed by both legal doctrine and the case law of the Inter-American Court and, in this case, it is important to stress its institutional and personal aspects.

53. According to Linares, "analytically, we are able to distinguish two dimensions of judicial independence: a negative one and a positive one. The former consists in the ability to avoid different sources of coercion and loyalty, while the latter consists in the application of law – and all its sources – to decide a specific case."[69]

54. Meanwhile, Chaires distinguishes between objective-institutional and subjective-functional independence.[70] The former is identified with the absence of external pressures on this power;[71] the latter to the mechanisms to ensure that the decisions of the judge abide by the law to the greatest extent possible.[72]

55. Judicial independence has also been conceived based on its distinction as a value or guarantee. With regard to judicial independence as a value, its significance coincides with what is called "functional independence" (also known as "substantive" or "decisional" independence). This notion of judicial independence gives rise to the basic rule of the legal system according to which the judge, in exercise of the jurisdictional function, must be subject only to legality; that is, the system of sources of law in force. In addition, judicial independence, as a guarantee, is a series of legal mechanisms designed to safeguard and to achieve the said value, which is protected by other principles such as the above-mentioned separation of powers, the ordinary judge, impartiality, exclusivity, etc.[73]

56. Several different elements can also be distinguished within the concept of judicial independence as a guarantee. The first of these is the so-called "personal independence," which is the one that protects each judge individually and which consists in the series of characteristics of his constitutional status that protects him from eventual pressure from the State organs of a political nature – Parliament and the Executive Branch. In addition, more recently, the "collective" and "internal" elements of judicial independence as a guarantee have been identified. Collective judicial independence tends to protect the judiciary as a whole vis-à-vis the other powers of the State, while individual judicial independence protects the judge considered personally vis-à-vis the rest of the judicial structure.[74]

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68 Paras. 188 to 199 of the Judgment.

69 Linares, Sebastián, *op. cit.,* p. 116.

70 Chaires Zaragoza, Jorge, *op. cit.*, p. 531.

71 *Ibidem*, p. 534.

72 *Ibidem*, p. 536.

73 *Cf.* Díez Picazo, *op. cit*., pp. 20 and 21.

74 *Cf.* Díez Picazo, *op. cit.,* p. 21.

57. Regarding the case law of the ICourtHR — as can be seen in the preceding section – this has developed both the independence of the Judiciary as an expression of the principle of the separation of powers in a democratic system, and also the independence of the judges as a right they possess in the exercise of their functions, and even as a right of the citizen of access to justice and to judicial guarantees.

58. Thus, as indicated in the preceding section, the ICourtHR has established that one of the main purposes of the separation of the powers is to guarantee the independence of judges.[75] The State must ensure the autonomous exercise of both the institutional aspect, that is with regard to the Judiciary as a system, and also in relation to its individual aspect; that is, in relation to the person of the specific judge. The objective of the protection is to avoid the judicial system, in general, and its members, in particular, being subjected to possible undue constraints in the exercise of their function by organs outside the Judiciary or even by those judges who exercise functions relating to review or appeal.[76] The purpose of the principle of the separation of powers is satisfied in two ways, which correspond to these two aspects: the institutional and the individual. When the State is obliged to protect the Judiciary as a system, it guarantees its external independence. When it is obliged to provide protection to the person of the specific judge, it guarantees its internal independence.

59. The ICourtHR has also maintained that, since Article 8(1) of the Convention recognizes that "[e]very person has a right to a hearing […] by an independent […] judge or court," the terms in which this article was drafted indicate that the subject of law is the defendant, the person placed in front of the judge who will decide the case that has been submitted to him.[77] The two obligations referred to when examining the case law of the ICourtHR arise from this right: the first that of the judge, and the second that of the State.[78]

60. Now, the ICourtHR has also determined that, in turn, the said obligations of the State give rise to rights for judges or for other citizens. For example, the guarantee of an adequate procedure for the appointment of judges necessarily entails the right of the citizen to accede to public office in equal conditions; the guarantee not to be subject to removal at will results in the disciplinary and sanctioning proceedings for judges necessarily respecting the guarantees of due process of law, and those prejudiced being offered an effective remedy; the guarantee of tenure should result in an adequate employment regime for the judge in which, *inter alia*, transfers, promotions and other conditions are sufficiently controlled and respected.[79]

61. The ICourtHR, in this specific case, found that "the objective dimension is related to essential aspects of the rule of law, such as the principle of the separation of powers, and the important role played by the judicial function in a democracy. Consequently, this objective dimension transcends the figure of the judge and has a collective impact on society. In addition, a direct relationship exists between the objective dimension of judicial

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[75] *Case of the Constitutional Court v. Peru. Merits, reparations and costs.* Judgment of January 31, 2001. Series C No. 71, para. 73.

[76] *Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela*. Preliminary objection, merits, reparations and costs. Judgment of August 5, 2008. Series C No. 182. para. 55.

[77] *Case of Reverón Trujillo v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of June 30, 2009. Series C No. 197, para. 148.

[78] *Ibidem*, para. 146.

[79] *Ibidem*, para. 147.

independence and the right of judges to accede to and remain in office under general terms of equality, as an expression of their guarantee of stability."[80] Therefore, "when the permanence of judges in office is arbitrarily affected, the right to judicial independence established in Article 8(1) of the American Convention is violated, in conjunction with the right of access to and permanence in public service, under general conditions of equality, established in Article 23(1)(c) of the American Convention."[81] On this point, it is relevant to emphasize that this interactive interpretation of Articles 8(1) and 23(1)(c) of the American Convention allows the ICourtHR to complement its case law in the case of *Reverón Trujillo* by clarifying that the institutional guarantee of judicial independence derived from Article 8(1) of the American Convention, results in a subjective right of the judge that his permanence in public office is not affected arbitrarily, under Article 23(1)(c) of the Pact of San José.

VI. THE INSTITUTIONAL ASPECT OF JUDICIAL INDEPENDENCE IN THIS CASE AND ITS RELATIONSHIP WITH DEMOCRACY

62. In this case, the Inter-American Commission on Human Rights argued that it was difficult for the National Congress to be able to guarantee independence, since, by nature, it was a political body and, in particular, since it responded to interests of the Government and of parliamentary majorities, with the result that Congress did not guarantee the right to an independent judge, in its individual aspect, nor acted as such. In addition, the Commission argued that, with regard to the impeachment of the members of the Constitutional Tribunal, the expression "constitutional or statutory offenses," and the formulation of grounds for removal did not provide clear, certain and sufficiently determined standards to safeguard the principle of judicial independence. In addition, the Commission and the victims' representatives noted that the call to impeachment on December 1, 2004, was made after the statutory time frame had expired. Also the victims were summoned to it with only six days' notice and, in the case of the second vote on the impeachment proceeding of December 8, 2004, the victims were not notified, and did not have the possibility of taking part in the proceeding or exercising their right of defense.

63. In this regard, the Judgment expressly examined the institutional aspect of judicial independence, in order to determine to what extent the collective termination of the judges of the three high courts of Ecuador constituted "an attack not only on judicial independence but also against the democratic order."[82] The ICourtHR reached the conclusion that the members of the Constitutional Tribunal were removed by a resolution of the National Congress, even though it was not empowered to do this, without any legal grounds, and without being heard. It also verified irregularities in the impeachment proceedings, which, in addition, were based on jurisdictional decisions adopted by the members of the Constitutional Tribunal, which was even prohibited by domestic law.

64. The resolution by which it was agreed to terminate the members of the Constitutional Tribunal was the result of a political alliance aimed at creating a judicial apparatus that was favorable to the political majority of the time, as well as to prevent the criminal proceedings against the President in office and a former President. Thus, the resolution of Congress was not adopted based exclusively on the assessment of specific

[80] Para. 198 of the Judgment.

[81] Para. 199 of the Judgment.

[82] Para. 207 of the Judgment.

factual information and in order to comply with the laws in force, but had a completely different purpose related to the abuse of power. As the judgment stated:[83]

> [T]he alliance of the Government in power at the time with the political party headed by former President Bucaram provides an indication of the possible reasons or purpose for wanting to remove the justices of the Supreme Court and the members of the Constitutional Tribunal; particularly, the existence of an interest in annulling the criminal proceedings that the Supreme Court was hearing against former President Bucaram (underlining added).

65. Indeed, the main violations in the instant case constitute an abrupt and totally unacceptable course of action of the political authorities, as the Judgment states,[84] against a basic pillar of the democratic rule of law such as the Judiciary and an authentically independent Constitutional Tribunal. The actions that attacked this essential principle of constitutional democracy represented a disregard for any manifestation of that independence and, therefore, for the principle of the separation of public powers, which is also a cornerstone of the entire protection of the human rights of the individual. A single fact that was found to be proved in this matter is sufficient to reveal the parliamentary abuse of power in this case. This is that, within the space of 14 days, not only the Supreme Court of Ecuador was dismissed, but also the country's Electoral Tribunal and Constitutional Tribunal, as a result of the political and institutional context in this case, within a framework that was evidently contrary to the democratic rule of law.

66. The Judgment reaches this conclusion to which this opinion has also been referring. Thus, in in paragraph 221, it cites Article 3 of the Inter-American Democratic Charter, concluding that the dismissal of all the members of the Constitutional Tribunal entailed a destabilization of the existing democratic order in Ecuador, because it involved a rupture of the separation and independence of the public powers by the attack on the three high courts of Ecuador at that time.

67. Nevertheless, I consider that the Judgment should have placed greater emphasis on the anti-democratic attack that the public authorities made on the Constitutional Tribunal in this case. Thus, even though the ICourtHR declared the violation of Article 8(1) of the American Convention, owing to the violation of the right to be heard and to the guarantee of competence to the detriment of the eight victims as a result of their arbitrary termination and the impeachment proceedings; it should also have analyzed the violation of Article 8 in greater depth, from the perspective of the safeguard that the inter-American system professes for the democratic rule of law and, in particular, the independence of the judges who ensure its functioning, and who make it resistant to the assault of the political authorities. In addition, the Judgment should have made greater progress in the jurisprudential development of the Inter-American Democratic Charter, specifically in relation to the content of Article 3. The contentious function of the Inter-American Court consists in deciding the disputes that the Inter-American Commission and the parties submit to it in a specific case. It is undoubtable that it also has the mission to be guarantor of the principles that compose the inter-American human rights system. It can achieve this by guiding, by means of interpretation, the meaning of the said principles in order to clarify them. Thus, deciding the dispute between the parties and the implications of the law is one of the mandates of the inter-American jurisdiction, but not the only one, because it is also responsible for interpreting the American Convention, the importance of which is increased owing to the very few cases it hears.

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83 Para. 211 of the Judgment.

84 Para. 212 of the Judgment.

68. The proven facts reveal a violation on many fronts of the judicial independence protected by the American Convention, as it is enhanced by the Inter-American Democratic Charter; especially as regards its aspect of the institutional independence of the members of the Constitutional Tribunal of Ecuador. And also the institutional independence of the Constitutional Tribunal, in its capacity as guarantor of the country's democratic system, based on the legal and constitutional framework of Ecuador in force when the judges terminated by the National Congress were originally appointed. In this regard, these aspects should have been related more strongly to the inter-American case law on judicial independence that has been mentioned previously in this opinion and, in this regard, an emphatic reprimand should have been issued owing to the flagrant abuse of political power that occurred in this case against the Constitutional Tribunal and its independence.

69. Indeed, at the session of November 25, 2004, during which resolution No. R-025-2005 was approved, which terminated the members of the Constitutional Tribunal because of supposed problems in the way in which they had been appointed, Congress failed to cite any norm as legal grounds for declaring the termination and, in the instant case, nor did the State indicate the norm on which the said decision was based. Even though the "single list" voting mechanism was not expressly established in Ecuador's domestic laws, no legislative, administrative or judicial actions were filed to contest that mechanism following the appointment of the judges on March 19, 2003.

70. Thus, a serious lack of logical congruence by Congress can be seen, because it waited more than 18 months to rectify the supposed irregularity, the explanation for which was eminently political, given the crisis of the powers of the State at the exact moment in which the dismissal of both the Constitutional Tribunal and the other high courts of the State occurred. Even though Congress could have impeached the judges – as it finally did, with the irregularities that will be emphasized below in this opinion – no legal grounds can be noted that empowered Congress to review and repeat the first vote, and then to decide – as it ended up doing – the approval of the motion of censure with the consequent immediate removal from office of the judges.[85]

71. The instant case reveals the conditions in which the termination and the impeachment of the members of the Constitutional Tribunal took place, violating the stability of their posts, in the context of external pressures associated with the infringement of the institutional and personal aspects of judicial independence. The proven facts, which reflect an authentic political assault and attack on the basic principles of the democratic rule of law postulated by the inter-American human rights system, reveals the need to emphasize the limits that this international system imposes, not only with regard to the personal aspect of judicial independence, but also with regard to institutional judicial independence, in favor of the eight victims as a group, who composed the Constitutional Tribunal of Ecuador, illegally terminated and tried by the National Congress.

VII. THE SUBSTANTIALLY JURISDICTIONAL NATURE OF IMPEACHMENT AND THE VIOLATIONS OF DIFFERENT RIGHTS OF DUE PROCESS UNDER THE CONVENTION (ART. 8), POLTICAL RIGHTS (ART. 23) AND JUDICAL PROTECTION (ART. 25)

A) Substantially jurisdictional nature of impeachment

[85] According to article 130(9) of the 1998 Constitution of Ecuador.

72. Traditional legal doctrine distinguishes between "legal control" and "political control."[86] Both types of control form part of "institutionalized controls"; however, the former are objectively determined controls; that is, they are based on legal reasons and on a pre-existing canon that is not available to the organ exercising the control. Thus, legal control applies pre-established limitations; it is a necessary control, because the controlling organ must exercise this control when it is asked to and, if appropriate, issue a sanction; and it is exercised by an independent and impartial body, endowed with exclusive technical competence to decide matters of law. The latter – political control – is subjective in nature, because there is no fixed and predetermined canon of assessment, since it is based on the assessment freely made by the controlling organ, based on reasons of opportunity; it is exercised voluntarily, because the controlling organ or subject is free to exercise the control or not to do so, and it does not necessarily entail the issue of a sanction; and the political body, or the empowered authority or subject is in a situation of supremacy or hierarchy.[87]

73. If we follow Aragón's characterization and we take into account the references that the ICourtHR has cited in relation to the impeachment of judges[88] — as happens in numerous countries of the region, where this is carried out by the Legislature[89] — it follows that impeachment constitutes "legal control" as regards the function it performs. Even though it is true that the organ carrying out the impeachment, the type of offenses penalized,[90] and the sanctions that can be imposed are political in nature,[91] in the exercise of this function, Congress must act as an independent and impartial organ, complying with the guarantees of due process. Hence, the control exercised by Congress by means of impeachment is of a jurisdictional nature, as an important sector of legal doctrine has accepted.[92] Indeed, as Aragon himself asserts, the jurisdictional nature of the organ is a consequence of the type of control and not vice versa.[93] Thus, I consider that we should not

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[86] Among others, see Valadés, Diego, *El control del poder,* Mexico, UNAM, 1998 (3ra. ed., Porrúa-UNAM, 2006); and Aragón, Manuel, *Constitución, democracia y control*, Mexico, UNAM, 2002, especially pp. 136 to 141.

[87] Aragón, Manuel, *op. cit*., pp. 130, 131, 136-137.

[88] *Case of the Constitutional Court v. Peru. Merits, reparations and costs.* Judgment of January 31, 2001. Series C No. 71, especially paras. 71 to 77.

[89] This occurs in various countries that have signed the American Convention, where the impeachment of judges of the high courts is carried out by the Legislature (in a constitutional proceeding of one or two chambers, depending on the country). However, it is relevant not to lose sight of what was said by expert witness Despouy in his statement during the public hearing on March 18, 2013: "*…today, the word impeachment is above all a historical reminder of the fact that it used to be the political power, in this case, Congress, generally the Senate in many countries, that made a ruling, those that took the decision, or even the chamber of members of congress and senators that operated as an indictment chamber and a trial chamber; but, today, evolution has determined with growing strength the need to establish independent autonomous bodies"* (underlining added).

[90] We should not lose sight of the fact that, according to international standards, tenure is one of the main guarantees of judicial independence, and can only be infringed in exceptional circumstances, as a result of disciplinary measures established by law, applied by an independent body using a specialized procedure that complies with the guarantees of due process, subject to judicial control. Misconduct or ineptitude are causes for the removal of judges, but not judicial errors. A/HCR/11/41 of 24 March 2008 of the United Nations Special Rapporteur on the independence of judges and lawyers, paras. 52-64.

[91] Fix-Zamudio, Héctor, *Estudio de la defensa de la Constitución en el ordenamiento mexicano*, 2ª ed., México, Porrúa/UNAM, 2011, pp. 190-191.

[92] Fix-Zamudio, *op. cit.,* p. 191. Sabsay, Daniel Alberto, "El juicio político a la Corte Suprema en la República argentina", *Anuario Iberoamericano de Justicia Constitucional*, 2004, No. 8, p. 506. Arteaga Nava, Elisur, *Derecho Constitucional*, Mexico, Oxford University Press, 1999, pp. 701 ss. Huerta Ochoa, Carla, *Mecanismos constitucionales para el control del poder político*, México, UNAM, 2ª ed., 2001, p. 30. González Oropeza, Manuel, "Juicio político", in Carbonell, Miguel (coord.), *Diccionario de Derecho Constitucional*, Mexico, Porrúa/UNAM, 2002, p. 335. Orozco Henríquez, J. Jesús, "Artículo 110", *Constitución Política de los Estados Unidos Mexicanos. Comentada y concordada*, 18ª ed., México, Porrúa/UNAM, t. IV, 2004, p. 195.

[93] *Ibidem*, p. 137.

confuse the nature of the organ with the nature of the function it exercises in the case of the impeachment of judges. Furthermore, when characterizing the "political control" to which he refers, Aragón cites examples such as that exercised by the electoral body, or that carried out by parliament, or the government over the local entities or the autonomous communities; without referring to the specific element of "impeachment" at any time.[94]

74. Impeachment takes its inspiration historically from the institution of impeachment in the 1787 Constitution of the United States of America (Article I, section III, paragraph c), according to which the federal Senate "shall try all impeachments" of senior officials of the three branches of Government for political offenses, especially of the federal Constitution. The judgment only entails the removal from office and disqualification from holding office of the official in question. However, since the United States Constitution protects the tenure of federal judges (Article III, section 1), this has taken away its incentive to act against the Judiciary when it is recalled that the records show that it has only tried twice, unsuccessfully, to impeach a federal judge.[95] In this regard, it is interesting to recall the characteristics attributed to the Senate in *El Federalista LXV* when it acts in an impeachment proceeding, which are those of the "judicial nature of the Senate"[96] and of an "independent and impartial court."[97]

75. Meanwhile, Joseph Story, when commenting on the United States Constitution, and addressing the issue of impeachment began his reflection with the following eloquent words: "The great objects, to be attained in the selection of a tribunal for the trial of impeachments, are, impartiality, integrity, intelligence, and independence. If either of these is wanting, the trial must be radically imperfect. To ensure impartiality, the body must be in some degree removed from popular power and passions, from the influence of sectional prejudice, and from the more dangerous influence of mere party spirit."[98]

76. Furthermore, the jurisdictional nature of the function exercised by Congress in impeachment proceedings does not infringe the separation of powers, because it does not prevent one branch of power from exercising functions that, in principle, correspond to another. As Loewenstein explains, this is an exceptional case in which Congress exercises judicial functions.[99]

77. Meanwhile, a contemporary understanding of impeachment should consider it to be a real "constitutional guarantee" in the actual conception of constitutional procedural law.[100] The only way to understand the "control" exercised by Congress by means of this proceeding is in a sense that accords with the constitutional rule of law; that is, as a vehicle

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94 Aragón, Manuel, *op. cit*., pp. 173-174.

95 The last time that a federal judge was subjected to impeachment was long ago, in 1805. *Cf.* Artola, Miguel, *Constitucionalismo en la historia*, Barcelona, Ed. Crítica, 2005, pp. 252-253.

96 Hamilton, A., Madison, J. and Jay, J., *op. cit.*, pp. 277.

97 *Ibidem*, p. 278.

98 Story, Joseph, *Commentaries on the Constitution of the United States*, Cambridge/Boston, 1833, Volume II, Chapter X: The Senate, para. 743

99 Loewenstein, Karl, *Teoría de la Constitución*, translated by Alfredo Gallego Anabitarte, Barcelona, Ariel, 2ª ed., 1976, p. 297.

100 Fix-Zamudio, Héctor, *Estudio de la defensa de la Constitución en el ordenamiento mexicano*, 2ª ed., México, Porrúa/UNAM, 2011, p. 191; Ferrer Mac-Gregor, Eduardo, *Panorámica del derecho procesal constitucional and convencional,* Madrid, Marcial Pons-UNAM, 2013.

for implementing limitations to power in order to avoid its abuse.[101] But, if this is the purpose of impeachment, the very least that can be required of the body conducting it is precisely that its implementation does not convert it into a weapon against the constitutional State itself, which would occur if it was the Legislature that exceeded its powers of prosecution and incurred in an abuse of power against those who it was prosecuting. As one author has indicated, "the dangerous aspect of the matter is that impeachment is very useful for carrying out dismissals in order to remove from the chambers all the minority legislators who do not obey the orders of the majority group or alliance. But also, owing to the way in which it is conceived, it leaves in the hands of those who have a sufficient majority in the legislative organs the *possibility of easily annulling the other public organs, bringing them to a halt, dominating them and, finally, ending their independence"*[102] (italics added).

78. Although the organ with competence to hear and decide an impeachment proceeding is a political organ (in those countries where the Legislature has this power), the whole process must be conducted with legal meticulousness, in accordance with the provisions of the Constitution, and the legal norms that regulate it,[103] as well as with the relevant standards established in the Convention. Impeachment involves a trial similar to a judicial proceeding, in the sense that the legislative chamber that is conducting the hearing in some way becomes a professional judge. It involves legal control insofar as it is regulated by law, and also jurisdictional control because it cannot be understood to be exempt of the formal and substantial element of due process. Thus, González Oropeza had defined impeachment as the "proceeding to establish the individual or official responsibility of a public servant [that] entails the practical exercise of a jurisdictional function by an organ with political functions, but respecting the essential formalities of a jurisdictional proceeding."[104]

79. Consequently, in reality, impeachment involves mixed control: "political control" only as regards the institutional status of the organ conducting it, the offenses and the sanctions to be imposed; "legal control" because the monitoring action is subject to the law, and it is jurisdictional as regards the nature of the function and the human rights of due process of those who are tried. If those who are put on trial are members of the State's Judiciary – or of any of the high jurisdictional organs – there are also other significant elements to consider, such as the principles of the separation of powers and, as I have expounded above, the institutional aspect of the independence of judges, which entail important practical consequences.

80. Indeed, it is only by acknowledging the "jurisdictional nature" of the function of Congress in relation to impeachment that it is possible to ensure judicial independence.[105] Hence, if we wish to protect judicial independence we must consider that impeachment is an exceptional means to remove judges, and not a mechanism at the service of the parliamentary majorities to try and control the Judiciary. In other words, if it is understood

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101 *Cf.* Aragón, Manuel, *op. cit.,* pp. 121-122.

102 Valdés S., Clemente, *El juicio político. La impunidad, los encubrimientos y otras formas de opresión*, México, Ediciones Coyoacán, 2000, p. 190.

103 *Cf.* Carpizo, Jorge, "Algunas garantías procesal-constitucionales en México", in the author's book, *Temas constitucionales*, 2ª ed., Mexico, Porrúa/UNAM, 2003, pp. 229-230.

104 González Oropeza, Manuel, "Juicio político", *op. cit*., p. 335.

105 On this point expert witness Despouy indicated that, in an impeachment proceeding, "the guarantees of due process of law" must be respected and "especially, in the case of judges of the Supreme Courts of Justice and also, as in this case, the members of the Constitutional Tribunal" (Statement during the public hearing on March 18, 2013).

that impeachment is an exceptional mechanism for the removal of judges, the exceptional nature of which seeks to protect them against undue removal, it is only fitting to continue the jurisprudential line of the ICourtHR, in the sense that, in the exercise of its function, Congress must act independently and impartially and provide the person impeached with the guarantees of due process. To the contrary, what, in principle, sought to be a guarantee of judicial independence — an exceptional proceeding for removal on limited grounds – may become a mechanism at the service of the Government in power to control or to intimidate the Judiciary.[106] Expert witness Despouy had a similar opinion, when he indicated that "[when] a political entity exercises jurisdictional functions […], there is a greater risk that the basic principles of due process will be violated; hence, international jurisprudence requires the guarantee of tenure, or that the decisions are made, above all, based on predetermined grounds that are reasoned; the decisions must be well-founded; the reasons must evidently be serious because, to the contrary, [a judge] could be removed for conduct that has no significance from the point of view of his performance."[107]

81. As one sector of legal doctrine has recognized, the possibility that Congress may remove judges for very lax criteria and without the appropriate guarantees of due process, jeopardizes the faculty of the courts to exercise the control of constitutionality – and we should also add the control of conformity with the Convention – in order to protect minority rights.[108] Indeed, to enable judges to feel free to interpret the law without waiting for the reaction of Congress, limits must be established for the Legislature to impeach and remove judges.[109] Consequently, any reasoning concerning the analysis of an alleged violation of the judicial independence and judicial guarantees of judges subjected to impeachment by the Legislature, must analyze different standards, in the context of the detailed scrutiny required by the greater guarantees enjoyed by judges under the constitutional and democratic rule of law.

B) Following the precedent of the 2001 case of the Constitutional Court v. Peru (applicability "in general" to impeachment of the rights established in Article 8(2))

82. According to a long line of the case law of the Inter-American Court, the guarantees established in Article 8(2) of the American Convention are applicable to any action of any branch of the State in which the rights of the individual are affected. This was also recognized with regard to the impeachment in the oft-cited case of the *Constitutional Court v. Peru.* And, specifically in the present case, the ICourtHR found it "opportune to ratify the fundamental criteria contained"[110] in this 2001 precedent, and thus "ratife[d] the following criteria mentioned in that case":[111]

> 68. Respect for human rights constitutes a limit to a State's activity, and this is true for any organ or official in a situation of power, due to its official nature, with regard to other persons. Consequently, any form of exercising public power that violates the rights recognized in the Convention is unlawful. This is even more important when the State exercises its power to sanction, because this not only presumes that the authorities act with total respect for the legal system, but

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106 Redish, Martin H, "Response: Good Behavior, Judicial Independence, and the Foundations of American Constitutionalism", *Yale Law Journal*, vol. 136, 2006-2007, p. 148-149 and 156.

107 Statement of expert witness Despouy during the public hearing on March 18, 2013.

108 *Ibidem*, p. 141.

109 Perlin, Adam A., "The Impeachment of Samuel Chase: Redefining Judicial Independence", *Rutgers Law Review*, vol. 62:3, 2010, pp. 729, 788.

110 Para. 165 of the Judgment.

111 Para. 166 of the Judgment.

it also involves granting the minimum guarantees of due process to all persons who are subject to its jurisdiction, as established in the Convention.

69. Although Article 8 of the American Convention is entitled "Judicial Guarantees" [in the Spanish version - "Right to a Fair Trial" in the English version], its application is not strictly limited to judicial remedies, "but rather the procedural requirements that should be observed in order to be able to speak of effective and appropriate judicial guarantees"[112] so that a person may defend himself adequately in the face of any kind of act of the State that affects his rights.

70. The Court has already established that, although this article does not establish minimum guarantees in matters relating to the determination of rights and obligations of a civil, labor, fiscal or any other nature, the full range of minimum guarantees stipulated in the second paragraph of this article are also applicable in those areas and, therefore, in this type of matter, the individual also has the overall right to the due process applicable in criminal matters.[113]

71. Although the jurisdictional function belongs, in particular, to the Judiciary under the separation of powers that exists in the rule of law, other public organs or authorities may exercise functions of the same type.[114] In other words, when the Convention refers to the right of everyone to be heard by a competent judge or court to "determine his rights," this expression refers to any public authority, whether administrative, legislative or judicial, which, through its decisions determines individual rights and obligations. For that reason, this Court considers that any State organ that exercises functions of a materially jurisdictional nature has the obligation to adopt decisions that are in consonance with the guarantees of due legal process in the terms of Article 8 of the American Convention.

[…]

75. This Court considers that, under the rule of law, the independence of all judges and, in particular, that of constitutional judges, must be guaranteed owing to the nature of the matters submitted to their consideration. As the European Court has indicated, the independence of any judge presumes that there is an appropriate appointment process,[115] a fixed term in the position,[116] and a guarantee against external pressures.[117]

[…]

77. Regarding the exercise of the authority of Congress to conduct impeachment proceedings, which engages the responsibility of a public official, the Court believes that it should be recalled that any person subject to a proceeding of any nature before an organ of the State must be guaranteed that this organ is competent, independent and impartial and that it acts in accordance with the procedure established by law for hearing and deciding the case submitted to it. (Underlining added)

83. The actual members of the ICourtHR have ratified what was stated in the 2001 precedent, which, in my opinion, has great significance today if we consider a continuation in the line of case law on due process under the Convention that the Inter-American Court has been developing since then; so that the rights established in Article 8(2) of the American Convention — in principle addressed at the "minimum guarantees" in criminal proceedings – also extend to the civil, labor, fiscal, or any other order; in other words, the minimum guarantees established in Article 8(2) of the American Convention are applicable to those orders also and, consequently, in that type of matter also there is, "in general," a

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112 *Cf. Judicial guarantees in States of Emergency* (Arts. 27.2, 25 and 8 American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 27.

113 *Cf. Case of Paniagua Morales et al.* Judgment of March 8, 1998. Series C No. 37, para. 149.

114 *Cf. Eur. Court H.R., Campbell and Fell, judgement of 28 June 1984, Series A no.* 80, para. 76, and *Eur. Court H.R., case of X v. the United Kingdom, judgement of 5 November 1981, Series A no. 46,* para. 53.

115 *Cf. Eur. Court H.R., Langborger case, decision of 27 January 1989, Series A no. 155*, para. 32, and *Eur. Court H.R., Campbell and Fell, supra* note 47*,* para*.* 78.

116 *Cf. Eur. Court H.R., Langborger case, supra* note 51*,* para. 32; *Eur. Court H.R., Campbell and Fell, supra* note 47*,* para*.* 78; and *Eur. Court H.R., Le Compte, Van Leuven and De Meyere, judgement of 23 June 198I, Series A no. 43,* para. 55.

117 *Cf. Eur. Court H.R., Langborger case, supra* note 51, para. 32; *Eur. Court H.R., Campbell and Fell, supra* note 47*,* para*.* 78, and *Eur. Court H.R., Piersack judgement of I October 1982, Series A no. 53,* para*. 27.*

right to the due process of law that applies in criminal matters.[118] To reinforce this position, in the Judgment in the instant case,[119] the Inter-American Court also based itself on the case of *Baena Ricardo et al. v. Panama,* which indicates, *inter alia*, "that the series of minimum guarantees established in paragraph 2 of Article 8 of the Convention apply to the spheres mentioned in paragraph 1 of this article; that is the determination of rights and obligations of a civil, labor, fiscal, or any other nature. This reveals the broad scope of due process; the individual has the right to due process understood in the terms of Article 8(1) and 8(2), in both criminal matters and in all these other spheres."[120]

84. It should be stressed that, in the Judgment that prompts this opinion, the ICourtHR does not make a specific analysis of the meaning that the 2001 precedent attributes to the expression "in general,"[121], which is fundamental in order to determine whether each and every one of the "minimum guarantees" established in Article 8(2) apply to spheres other than criminal matters and, specifically, if they all apply to impeachment. However, the Judgment declared the violation of Article 8(2) (for different forms of adequate defense) and 8(4) (the guarantee of *ne bis in idem*). I consider that, in the future, the Inter-American Court will have to clarify, precisely, the full applicability – or case by case – of the "minimum guarantees" established in Article 8(2) for the other non-criminal procedures and proceedings; a matter of extreme importance for understanding due process under the Convention, and over and above the specific case of impeachment.

85. As established in the Judgment, when the Court considers its own most representative precedents, it must be understood that judges can only be removed based on serious disciplinary offenses or incompetence, and in accordance with proceedings with due guarantees, or when their mandate has ended. Removal can never be the result of an arbitrary measure, and this must be examined in light of the existing domestic context and the circumstances of the specific case.[122].

C) The violation of different rights established in Articles 8 of the American Convention, as well as of Articles 23(1)(c) and 25 of the Pact of San José in this case

86. In the instant case, in order to reveal the different violations of due process in the impeachment proceedings filed against the members of the Constitutional Tribunal, it is sufficient to refer to the proven facts and to the domestic law in force and applicable in this respect, which is outlined in the Judgment.

87. At the time of the facts, articles 92 and 93 of the Organic Law on the Legislative Function indicated that the time frame for filing impeachment proceedings after the presentation of the respective motion was 5 to 10 days in cases of ordinary sessions of Congress and 30 days in the case of special sessions, and that this period could be extended for up to 60 days. However, when the impeachment proceeding started, these time frames had expired. Also, when Congress decided on the impeachments, the context

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118 *Case of the Constitutional Court v. Peru. Merits, reparations and costs.* Judgment of January 31, 2001. Series C No. 71, para. 70.

119 Para. 167 of the Judgment.

120 *Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs.* Judgment of February 2, 2001. Series C No. 72, para. 125.

121 *Case of the Constitutional Court v. Peru. Merits, reparations and costs.* Judgment of January 31, 2001. Series C No. 71, para. 70.

122 Para. 200 of the Judgment.

of political crisis persisted during which the arbitrary decision to terminate the members of the Constitutional Tribunal was taken on November 25, 2004.

88. As the Judgment records, one of the serious irregularities was that, on December 1, 2004, four motions of censure had already been submitted to a vote and had not obtained sufficient affirmative votes. Despite this, on December 8, 2004, Congress decided to hold the votes again. Although, in one of the votes that was held for a second time, it was indicated that this was done owing to the presumed undue joinder of two of the motions of censure, when re-opening the said motions of censure to a vote no legal grounds were given to justify this new vote.

89. Regarding the vote held on December 8, 2004, and just to mention the most visible inconsistencies: (a) the session was called by the President of the Republic as a special session, even though Congress was not in recess; (b) the vote was held even though, during the session on December 1, a similar vote had been held and the motions had not obtained sufficient votes, based on which it had been declared that the "the motion is rejected"; (c) the session on December 1, 2004, had been closed without the members of Congress filing an appeal for reconsideration concerning the presumed inadmissibility of joindering the two motions of censure, and thus it was inadmissible to hold the vote again on December 8; (d) the vote on the removal of the judges was held in the session during which the termination of all the justices of the Supreme Court of Justice was declared, without having been announced previously on the agenda, and (e) the statements made by the members of Congress during that session made no mention of specific facts or evidence related to the accusations against the members of the Constitutional Tribunal.

90. In relation to the legal grounds applicable to impeachment that were in force at the time of the facts, article 130(9) of the Ecuadorian Constitution indicated that the members of the Constitutional Tribunal:

> […] could be impeached for statutory or constitutional offenses, committed in the performance of their functions. Congress may censure them in the case of a declaration of guilt, by a majority of its members. The censure shall result in the immediate removal of the official (underlining added).

91. While article 199 of the Constitution stipulated that:

> The organs of the judiciary shall be independent in the exercise of their obligations and attributes. No function of the State may interfere in matters within their competence.
>
> The justices and judges shall be independent in the exercise of their jurisdictional powers and even vis-à-vis the other organs of the Judiciary; they shall only be subject to the Constitution and the law.

92. Meanwhile, article 9 of the 1997 Law on Constitutional Control established that the members the Constitutional Tribunal:

> (…) shall not be held responsible for the votes they emit or for the opinions they express in the exercise of the attributes of their office.

93. In these conditions, the applicable domestic law at the time of the facts recognized the mechanism of impeachment for the members of the Constitutional Chamber in relation to their office, but its purpose could not be for the National Congress to review the control of legality or constitutionality made in the judgments delivered by the Constitutional Tribunal, based on the principle of the separation of powers and the Constitutional Tribunal's exclusive competence in this area. In addition, the Constitution established the term of office of the judges as an uninterrupted period of four years (articles 275 and 276

of the Ecuadorian Constitution in force at that time).[123]

94. Despite this, the six motions of censure that were presented against the judges were directly related to judgments that the Constitutional Tribunal had handed down; in particular, the decisions in the case of the "fourteenth salary" and the case of the "D'Hondt method." This is illustrated by one of the motions of censure that requested impeachment supposedly because, in the decision on the "D'Hondt method," there had been a presumed:

> Personal interest and to benefit those who had enabled their election to the Constitutional Tribunal […] prejudicing and placing at a disadvantage all the other political parties that exist in the country [and …] ignoring the formula for calculating proportional representation that permitted plural and democratic political representation [… based on which] they have jeopardized the next elections, with this dangerous attack on the democratic life of the country, as well as on the rights and freedoms guaranteed in the Constitution.[124]

95. As the Judgment notes,[125] Ecuadorian law was sufficiently clear in the sense that the opinions given in the judgments delivered by the judges could not be grounds for their removal. The congressional records for December 1 and 8, 2004, allow it to be concluded that there was no mention of specific facts related to the supposed "serious offenses" committed by the judges; rather, reference was only made to their decisions, which were based on legal grounds and delivered within the framework of their competence.

96. Based on the above-mentioned reasons, legal grounds and factual evidence, it can be clearly understood that, in the Judgment, the Inter-American Court declared the respondent State internationally responsible for the violation of different rights established in Article 8(1) and (2), as well as in Article 8(4) (*ne bis in idem*),[126] in relation to Article 1(1)

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123 *Cf.* Constitution of the Republic of Ecuador of August 11, 1998.

"Art. 275. The Constitutional Tribunal with national jurisdiction, shall have its seat in Quito. It shall be composed of nine members, who shall have their respective substitutes. They shall perform their functions for four years and may be re-elected. The organic law shall determine the rules for their organization and functioning, and the procedures for their actions."

"Art. 276.- The Constitutional Tribunal shall have competence:

1. To hear and decide appeals filed on the unconstitutionality, in substance or in form, of organic and ordinary laws, decree-laws, ordinances, statutes, regulations, and resolutions issued by organs of the institutions of the State, and to suspend all or some of their effects.

2. To hear and decide on the unconstitutionality of the administrative acts of all public authorities. The declaration of unconstitutionality shall result in the annulment of the act, without prejudice to the administrative organ adopting the necessary measures to preserve respect for the constitutional norms.

3. To examine decisions that deny *habeas corpus, habeas corpus data*, and *amparo*, and cases of appeal established in the action for *amparo*.

4. To rule on objections of unconstitutionality by the President of the Republic, in the law drafting process.

5. To rule on conformity with the Constitution, and international treaties and conventions prior to their approval by the National Congress.

6. To decide disputes concerning competence or attributes assigned by the Constitution.

7. To exercise the other attributes conferred on it by the Constitution and the laws. The decisions of the Judiciary shall not be susceptible to control by the Constitutional Tribunal

124 *Cf.* National Congress record, 24-326, session of December 1, 2004.

125 Para. 208 of the Judgment.

126 The ICourtHR found that Article 8(4) of the Pact of San José had been violated, considering that, pursuant to domestic law, the impeachment proceedings held against the judges had concluded on December 1, 2004, and according to the explicit certification issued by the Secretariat of Congress that the motions of censured had been rejected because they had not obtained sufficient votes; because the "re-opening of the vote signified a new proceeding" in the session of Congress on December 8 that year. See, especially, paragraphs 184 to 186 of the Judgment.

of the American Convention; and even, of Article 8(1) on relation to Article 23(1)(c) and Article 1(1) of the Pact of San José, owing to the arbitrary termination of the permanence in the exercise of judicial functions, and the consequent infringement of judicial independence and the guarantee of impartiality. The Court also declared the State's international responsibility for the violation of Article 25(1), in relation to Article 1(1) of this instrument, because the victims were prevented from filing the "remedy of *amparo*," owing to the decision issued by the new Constitutional Tribunal.

VIII. THE FAILURE TO MAKE A SPECIFIC ANALYSIS OF THE RIGHTS ESTABLISHED IN ARTICLE 8(2) OF THE AMERICAN CONVENTION CITED BY THE COMMISSION AND ALLEGED BY THE PARTIES

97. The ICourtHR failed to make a detailed examination of different judicial guarantees cited by the Inter-American Commission and alleged by the victims established in Article 8(2), considered that "[h]aving determined that the organ that carried out the termination was not competent, it is not necessary to analyze the other guarantees established in Article 8(1) of the Convention, because this determination signifies that the decision adopted by Congress was totally unacceptable."[127]

98. I consider that the Inter-American Court could have analyzed the specific violations of other rights established in Article 8(2) of the American Convention, because the National Congress did have competence to conduct impeachment proceedings; in other words, the ICourtHR only considered the lack of competence with regard to the decision to terminate the judges on November 25, 2004, and not the competence of Congress with regard to the impeachment proceedings, regarding which specific violations were alleged of other judicial guarantees that were not examined in the Judgment.

99. In my opinion, the ICourtHR should have taken advantage of this opportunity to consolidate its case law concerning the due process of law applicable to the impeachment of judges. And this, because it has few opportunities to rule on the issue, and because of the institutional weakness in which the Judiciaries and constitutional courts of the region find themselves in the face of ambush by the political authorities, which, unfortunately, is not infrequent. As I have indicated previously (*supra* para. 67), nowadays, the Inter-American Court has an interpretive function *erga omnes* of the American Convention with exceeds the specific case, a situation of special importance bearing in mind the limited number of cases that it decides, owing to the design of the inter-American human rights system; a situation that differs greatly from that of the European system, especially following the entry into force of Protocol 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms under which the European Commission was eliminated and direct access was permitted to the European Court.[128] Thus, the binding expansion of the "interpreted provision of the Convention"[129] acquires particular relevance in inter-American justice, above and beyond the specific case (*res interpretata*), constituting one more element in the construction of a *ius constitutionale commune americanum* — or, at least

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[127] Para. 223 of the Judgment.

[128] According to its 2012 Annual Report, the European Court of Human Rights had 128,100 cases pending a decision. *Cf. European Court of Human Rights. Annual Report 2012*, Strasbourg, 2013, pp. 4, 6, 7 and 150.

[129] *Cf. Case of Gelman v. Uruguay. Monitoring compliance with judgment*. Order of March 20, 2013, para. 67 and *ff.* The ICourtHR has established that the "interpreted provision of the Convention" is binding in both the specific case (*res judicata*) and with general effects for the other States Parties to the American Convention (*res interpretata*). This is of particular importance for the "control of conformity with the Convention" that must be carried out by all the national authorities in keeping with their respective competences, and the corresponding procedural regulations, and is also useful for compliance with the decisions of the Inter-American Court.

and for the time being, *latinoamericanum*[130] — which permits ensuring a minimum standard of regional applicability of the American Convention in favor of human rights and dignity.

100. In the same way that the Inter-American Court analyzed the violations to the right to a hearing and some components of the right of defense, the Court could also have made a specific examination of alleged violations to other rights established in Article 8(2) of the American Convention expressly mentioned by the Inter-American Commission and alleged by the representatives of the victims, rather than evading their examination by considering that, since the Congress was not competent to terminate the judges, it was not necessary to make this analysis because the decision was "totally unacceptable."[131] Precisely because it was a decision of the National Congress that was characterized as unacceptable, the ICourtHR should have ruled on the other arguments relating to the rights under Article 8(2) of the Pact of San José and, especially, when it had examined the right to a hearing and some components of the right of defense and declared that they had been violated.

101. Indeed, on the one hand, Congress *was competent to conduct the impeachment proceedings;* and, on the other, it should not be overlooked that, in other cases, even though the ICourtHR has declared a specific violation, this has not been an obstacle to consider it pertinent to establish other implications of the State's international responsibility and, at times, to declare additional or complementary violations.[132] This was justified in the instant case, taking into account the "abrupt" nature of the termination of the titular judges of the main high courts of Ecuador and the dramatic impairment of the institutional aspect of judicial independence that was declared in the Judgment; hence, I consider that the Inter-American Court should not have avoided responding to the said allegations regarding due process under the Convention in the impeachment proceedings against the judges.

102. The need for thoroughness in the arguments, for example on the different components of the victims' right of defense in the impeachment proceedings, would have been particularly relevant, because it was highly probable that it would culminate in the autonomous declaration of the violation of the rights considered in themselves. Moreover, it should not be forgotten that the right to due process of law is, in fact, constituted by a series of inseparable and essential elements,[133] so that it is not respected unless they are all satisfied, in an integral manner. Thus, the examination of the other judicial guarantees, which it was alleged had been violated, would eventually have established more robust standards of protection for judge, justices or magistrates, subjected to impeachment by

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130 *Cf.* von Bogdandy, Armin, Morales Antoniazzi, Mariela, and Ferrer Mac-Gregor, Eduardo (coords.), *Ius Constitutionale Commune en Derechos Humanos en América Latina,* Mexico, Porrúa-IMDPC-Max Planck Institute for Comparative Public Law and International Law, 2013.

131 Para. 223 of the Judgment.

132 In the *Case of Kimel* the ICourtHR included considerations of the proportionality of the restriction to the victim's freedom of expression. Even though, based strictly on the analysis of legality the Inter-American Court declared the respective violation, it included an analysis of the other components of the considerations on proportionality. *Cf. Case of Kimel v. Argentina. Merits, reparations and costs.* Judgment of May 2, 2008 Series C No. 177, paras. 81 to 94. In addition, in the Case of the *Pueblo Bello Massacre*, even though the ICourtHR indicated the lack of competence of the military criminal jurisdiction to examine the facts, it analyzed how, during the intervention of this jurisdiction, the investigation was not conducted with due diligence. The Inter-American Court indicated that the "limited investigative measures, and also the speed with which they were carried out, reveal little or no interest of the military criminal jurisdiction in conducting a serious and exhaustive investigation into the events that had occurred." It is worth emphasizing that the ICourtHR also examined the effectiveness of the intervention of other systems of justice, such as the disciplinary jurisdiction. *Cf. Case of the Pueblo Bello Massacre v. Colombia*. Judgment of January 31, 2006. Series C No. 140, paras. 192 to 204.

133 *Cf.* García Ramírez, Sergio, *El debido proceso. Criterios de la jurisprudencia interamericana*, Mexico, Porrúa, 2012, p. 23.

congresses, which those congresses should never consider that they are exempt from complying with.

IX. DISSENT: THE NEED TO ANALYZE AND TO DECLARE THE AUTONOMOUS VIOLATION OF THE PRINCIPLE OF LEGALITY (ARTICLES 9 AND 1(1) OF THE AMERICAN CONVENTION)

A) Introduction and difference with the case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador

103. As I stated at the start of this opinion, I dissent from the majority opinion with regard to the seventh operative paragraph of the Judgment.[134] Indeed, I consider that the Inter-American Court should have made a specific analysis of the arguments concerning the violation of the principle of legality established in Article 9 of the American Convention, and have declared that, in this case, the said right was violated autonomously to the detriment of the eight victims.

104. In principle, it should not be overlooked that, in this case (related to an arbitrary termination and irregular impeachment proceedings against the victims), the State acknowledged expressly its responsibility with regard to the violation of Article 9 of the Pact of San José in relation to the termination of the victims as members of the Constitutional Tribunal. Indeed, the State indicated that this article had been violated:[135]

> because there were no grounds established by law for the removal from office of the presumed victims […] although it is true that the National Congress could make a constitutional and legal analysis, this should have included clear mechanisms to submit to review the tenure and the duration of the terms of the former members of the Constitutional Tribunal. The absence of legal certainty concerning the grounds for removing the former members obliges the State to acknowledge its international responsibility in this regard.

105. It is true that it was difficult to understand the scope of the acknowledgement of international responsibility on this point from the State's declaration. First, in this case, there were grounds for removing the members of the Constitutional Tribunal, on the basis of which impeachment proceedings could be conducted against them. It is also true that the State did not acknowledge any violation related to the impeachment proceedings that were held, because it limited its acquiescence to the facts of the termination resulting from the resolution of the National Congress of November 25, 2004.

106. Nevertheless, I believe that there is a substantial difference between what was decided in the case of *the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*[136] and the instant case, which is the reason I differed from the majority opinion on this aspect. In particular, it should be recalled that, in that case, the ICourtHR considered that the organ that terminated the justices did not have competence; whereas, in the case of the Constitutional Tribunal, which prompts this partially dissenting opinion, the litigation was not focused exclusively on the termination of the judges, but also on the alleged violations in relation to the impeachment proceeding, which the National Congress was competent to conduct. In other words, in the case of *the Supreme Court of Justice*, the

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134 "7. It is not required to make a ruling on the alleged violation of Article 9 of the American Convention on Human Rights, in the terms of paragraphs 223 and 224 of this Judgment.

135 Para. 14 of the Judgment.

136 *Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2013. Series C, No. 266.

Court did not analyze the possible existence of an act that warranted a sanction, because Congress did not have competence to terminate the justices of the Supreme Court, a competence that it did have to impeach the members of the Constitutional Tribunal as analyzed in the Judgment.

107. Indeed, contrary to the case of *the Supreme Court of Justice*, in the instant case that inspires this opinion, impeachment proceedings were held against the members of the Constitutional Tribunal who had previously been removed by a congressional resolution. And, in this regard, the ICourtHR based its assessment on the assumption that Congress had competence to conduct these impeachment proceedings. This variable allowed the ICourtHR to determine that, when deciding the sanction, the unstated purpose was related to an "abuse of power." Thus, the Judgment expressly states:[137]

> Therefore, the apparent legality and justification of these decisions concealed the intention of a parliamentary majority to exercise greater control over the Constitutional Tribunal and to facilitate the termination of the justices of the Supreme Court. The Court has verified that the resolutions of Congress were not adopted based on the exclusive assessment of specific factual information and in order to ensure proper compliance with the laws in force, but sought a very different end related to an abuse of power aimed at obtaining control of the judicial function by different procedures; in this case, the termination and the impeachment proceedings (underlining added).

108. To the contrary, in the case of *the Supreme Court of Justice*, it was not possible to reach this conclusion because the concept of "abuse of power" requires the respective organ to have competence to adopt the measure regarding which the "unstated" reasons are analyzed.[138] Meanwhile, in the case of the Constitutional Tribunal, the National Congress did have competence to hold the impeachment proceedings.

109. Nevertheless, I consider that, in both the case of *the Supreme Court of Justice v. Ecuador (Quintana Coello et al.)*[139] and in this case of the Constitutional Tribunal, the ICourtHR could have analyzed the violation of Article 9 of the Pact of San José, despite the lack of competence of the National Congress to terminate the justices of the Supreme Court of Justice and the lack of competence to determine the legality of the appointment of the members of the Constitutional Tribunal. Indeed, irrespective of whether Congress was incompetent to carry out the removals, it should not be overlooked that, in the case of *the Supreme Court of Justice*, the State acknowledged that it had held an *ad hoc* sanction proceeding while, in the instant case, the State acknowledged the violation of Article 9 of the American Convention, because it considered that "it did not have grounds determined by law to remove the presumed victims from office," and owing to "the absence of legal certainty with regard to the grounds for the removal of the former judges." In this situation, since it was clearly an *ad hoc* proceeding and given the State's acquiescence in this case, I consider that the possible violation of the principle of legality could have been analyzed in the case of both terminations.

110. In my opinion, in the Judgment that prompts this opinion, the "abuse of power" could have been examined with greater precision and from a different viewpoint. Not only from the perspective of the institutional aspect of judicial independence – as occurs in the Judgment[140] — but, in particular, by an analysis of the principle of legality established in

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137 Para. 219 of the Judgment.

138 *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2013. Series C, No. 266, para. 162.

139 *Cf.* My Concurring Opinion in the *Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2013. Series C No. 266.

140 Paras. 188 to 199, and 207 to 221 of the Judgment.

Article 9 of the American Convention. This is because the State acknowledged its international responsibility with regard to the violation of this principle,[141] and also because, in the Judgment, the ICourtHR — when analyzing the scope of the State's partial acknowledgement of responsibility – considered that "some of the disputes on this point remain."[142] Hence, I find insufficient the justification given in the Judgment to establish that "it is not necessary to make a detailed analysis of the arguments of the parties concerning whether the termination decision constituted a punitive act, and other aspects related to the possible implications that the principle of legality would have had in this case."[143]

111. Given the evident "harm to the separation of powers and the arbitrary nature of the actions of Congress" that the Judgment expressly indicates,[144] the competence of the National Congress to impeach the members of the Constitutional Tribunal,[145] and the Court's conclusion of the "abuse of power" that occurred in this case,[146] I consider that it was essential to analyze the violation of the principle of legality with regard to the impeachment proceedings and to conclude that Article 9 of the Pact of San José had been violated; hence, my dissent from the seventh operative paragraph of the Judgment.[147] I will now explain my position in greater depth.

B) The punitive nature of a decision in order to be able to apply Article 9 of the American Convention in a specific case

1. Case law of the Inter-American Court

112. According to the case law of the Inter-American Court, the principle of legality established in Article 9 of the American Convention is applicable, in principle, to criminal matters. However, the ICourtHR itself has also considered it applicable to matters relating to administrative sanctions.

113. Thus, in the case of *Baena Ricardo v. Panama,*[148] the Inter-American Court considered:

> 106. With regard to the foregoing, it is desirable to analyze whether Article 9 of the Convention is applicable to the matters of administrative sanction, in addition, evidently, to being applicable to criminal matters. The terms used in this article seem to refer exclusively to the latter. However, it is necessary to take into account that administrative sanctions, as well as criminal sanctions, constitute

141 Para. 14 of the Judgment.

142 Para. 22 of the Judgment.

143 Para. 223 of the Judgment.

144 *Ibidem.*

145 According to Article 130(9) of the 1998 Ecuadorian Constitution; *Cf.* paras. 67 and 201 of the Judgment.

146 *Cf.* para. 219 of the Judgment.

147 To the contrary, in the *case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, the National Congress did not have competence to terminate the justices of the Supreme Court, while it did have competence to conduct impeachment proceedings against the members of the Constitutional Tribunal. This absence of punitive competence, in principle, made it unnecessary for the Court to declare the existence of an implicit sanction and an abuse of power in the *case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*. Consequently, in that case, my opinion was concurring and not dissenting; *Cf.* my Concurring Opinion in the *Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2013. Series C No. 266, especially para. 89.

148 *Case of Baena Ricardo et al. v. Panama*. *Merits, reparations and costs*. Judgment of February 2, 2001. Series C, No. 72, para. 106.

> an expression of the State's punitive power and that, on occasions, the nature of the former is similar to that of the latter. They both entail impairment, deprivation or alteration of the rights of the individual, as a consequence of unlawful conduct. Therefore, in a democratic system it is necessary to take extreme care to ensure that the said measures are adopted with strict respect for the basic rights of the individual, and subject to a careful verification of the existence of the unlawful conduct. In addition, and to ensure legal certainty, it is essential that the punitive norm, whether criminal or administrative, exists and is known or can be known, before the act or omission occurs that violates it and for which punishment is intended. The definition of an act as being unlawful, and the determination of its legal effects must precede the conduct of the individual who is considered to be an offender. Otherwise, the individual would be unable to adjust his or her behavior in accordance with a valid and certain legal system that expresses the reproach of society and its consequences. These are the grounds for the principles of legality and the non-retroactivity of an unfavorable punitive norm.[149] (Underlining added)

114. Furthermore, the ICourtHR has stated that the principle of legality constitutes one of the central elements of criminal prosecution in a democratic society by establishing that "no one may be sentenced for acts or omissions that, at the time they were committed, were not illegal under the applicable law." This principle governs the actions of all the organs of the State, within their respective competences, particularly when the time comes to exercise punitive powers.[150] The Inter-American Court has also indicated that the principle of non-retroactivity is also intended to prevent an individual from being punished for an act that, when committed, was not an offense or that was not punishable or could not be prosecuted.[151] Additionally, the ICourtHR has established that the application of an administrative sanction or punishment that is substantially different to that established by law violates the principle of legality, because it is based on extensive interpretations of the criminal law.[152]

115. Consequently, there are two additional arguments that allow us to subsume what happened with regard to the impeachment proceedings into Article 9 of the American Convention. First, it should be considered that the "principle of legality" contains not only aspects relating to the existence of a prior law and sanction that explicitly mentions the literal meaning of the principle,[153] but also the guarantee of the principle of criminalization. The principle of criminalization means that the punitive law must define with sufficient detail the elements that constitute the offense.[154] Thus, not only must the guarantees of due

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149 *Cf., inter alia, Eur. Court H.R. Ezelin judgement of 26 April 1991, Series A no. 202*, para. 45; and *Eur. Court H.R. Müller and Others judgement of 24 May 1988, Series A no. 133*, para. 29.

150 *Cf. Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs*, para. 107, and *Case of Fermín Ramírez v. Guatemala. Merits, reparations and costs,* para. 90; *Case of Mohamed v. Argentina*, para. 130.

151 *Cf. Case of Ricardo Canese v. Paraguay. Merits, reparations and costs*. Judgment of August 31, 2004. Series C No. 111, para. 175, and *Case of García Asto and Ramírez Rojas v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of November 25, 2005. Series C No. 137, para. 191, and *Case of Mohamed v. Argentina*, para. 131.

152 Cf. *Case of Vélez Loor v. Panama. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2010. Series C No. 218, para. 187.

153 *Cf. Case of Vélez Loor v. Panama. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2010. Series C No. 218, para. 183 ("in the interest of legal certainty, it is essential that the punitive norm, whether criminal or administrative, exists and is known or may be known, before the act or omission that violates it, and which it is intended to punish. The definition of an act as illegal, and the establishment of its legal effects must precede the conduct of the individual who is considered an offender. Otherwise, the individual would be unable to adapt his or her behavior in accordance with a valid and certain legal system that expresses the reproach of society and its consequences. These are the grounds for the principles of legality and of the non-retroactivity of an unfavorable punitive norm"). See also *Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs.* Judgment of February 2, 2001. Series C No. 72, para. 106; *Case of Yvon Neptune v. Haiti. Merits, reparations and costs.* Judgment of May 6, 2008. Series C No. 180, para. 125, and *Case of García Asto and Ramírez Rojas v. Peru.* Judgment of November 25, 2005. Series C No. 137, para. 191.

154 Regarding criminal offenses, in the *Case of García Asto and Ramírez Rojas v. Peru,* the ICourtHR established that "definitions of crimes must clearly describe the criminalized conduct, establishing its elements, and

process of law be applied in impeachment proceedings, but also the need for grounds for removal that are sufficiently clear must be considered included in the principle of legality, in order to avoid or prevent the risk of abusive interpretations.[155] And, as I have mentioned, this also encompasses – without any doubt, from my point of view – the guarantee of the criminalization of all offenses of legal and public significance. The second argument to affirm that the institution of impeachment must be subsumed in Article 9 of the Pact of San José relates to what I have explained previously: granting Congress such broad and important powers as the removal of the members of the Constitutional Tribunal can only be compatible with the necessary constitutional checks and balance, if it is exercised based on specific grounds considered as a mechanism of protection against the attempts of the National Congress to resort to interpretations that consist in an abuse of power, that exceeds the admissible limits of the interpretation of the law (in this regard see, *supra* para. 15).

116. In other words, in order to be in conformity with the American Convention, the criteria for impeaching judges or members of the Constitutional Tribunal should have been clear and explicit. Hence, the connection between the separation of powers, judicial independence, and the principle of legality is fundamental in order to bring the mechanism of the impeachment of judges into line with what should be its only acceptable configuration under the Convention: that of an eventual non-arbitrary sanction, to be applied with the guarantees consubstantial with the rule of law, as required also by Article 3 of the Inter-American Democratic Charter (see *supra* para. 13).[156]

117. In this regard, the ICourtHR has considered that the principle of legality entails a clear definition of criminal conduct, which establishes its elements, and allows it to be distinguished from non-punishable conduct or unlawful conduct punishable with non-criminal measures. Ambiguity in the definition of disciplinary or criminal offenses gives rise to doubts and opens the way to the discretion of the authority, which is particularly undesirable when establishing the criminal responsibility of the individual and sanctioning this with penalties that have a severe impact on fundamental rights, such as life or

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the factors that distinguish it from other forms of conduct that are either not punishable or punishable with non-criminal measures. The American Convention requires States to make every effort to apply criminal sanctions with strict respect for the basic rights of the individual, after carefully ascertaining the actual existence of illegal conduct. In this regard, it is incumbent on the criminal judge, when applying criminal law, to abide strictly by its provisions and to be extremely rigorous when relating the conduct of the accused to the definition of the offense, in order not to punish acts that are not punishable under the legal system"; *Case of García Asto and Ramírez Rojas v. Peru.* Judgment of November 25, 2005. Series C No. 137, paras. 188 to 190. See also *Case of Fermín Ramírez v. Guatemala. Merits, reparations and costs.* Judgment of June 20, 2005. Series C No. 126, para. 90; *Case of Lori Berenson Mejía v. Peru. Merits, reparations and costs.* Judgment of November 25, 2004. Series C No. 119, para. 125; *Case of De la Cruz Flores v. Peru. Merits, reparations and costs*. Judgment of November 18, 2004. Series C No. 115, paras. 79, 81 and 82, and *Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs.* Judgment of February 2, 2001. Series C No. 72, para. 106.

155 In this regard, the ICourtHR has indicated that "administrative sanctions are, like criminal sanctions, an expression of the State's punitive power and, at times, they are similar to these in nature. They both entail impairment, deprivation or alteration of the rights of the individual, as a result of an unlawful conduct. Therefore, in a democratic system it is necessary to take maximum care to ensure that the said measures are adopted strictly respecting the basic rights of the individual and following a careful verification that the unlawful conduct actually existed"; *Cf. Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs.* Judgment of February 2, 2001. Series C No. 72, para. 106.

156 This article establishes that essential elements of representative democracy are respect for human rights, access to and "the exercise of power in accordance with the rule of law, […] and the separation of powers and independence of the branches of government."

freedom. Norms that fail to strictly delimit criminal conducts violate the principle of legality established in Article 9 of the American Convention.[157]

2. In this case

118. Some factual clarifications must be made in order to understand the possible application of the principle of legality in this case. In this regard, it should be stressed that the termination of the judges on November 25, 2004, and the impeachment proceedings that were held subsequently, were not of a criminal nature. However, and as indicated previously, there is no dispute about the punitive nature of impeachment, so that there is no discussion about the possible analysis of these facts in light of Article 9 of the American Convention, because, according to the case law of the ICourtHR, the principle of legality functions not only in criminal matters, as established in the preceding section.

119. Indeed, according to article 130(9) of the 1998 Constitution, *the effect of the adoption of the motion of censure was the immediate removal of the official.*[158] In this regard, in the session of December 8, 2004, when the vote was held on the motions of censure, it was concluded that "the motion of censure presented ha[d] been adopted."[159] Thus, since two of the motions of censure presented against the judges in the session of December 8, 2004, had been adopted, this entailed their removal, a sanction that added to the termination decision taken previously on November 25, by the resolution of the National Congress. Also, based on what was indicated previously (*supra* paras. 115 and 116), I must conclude that, owing to its scope, article 130(9) of the 1998 Ecuadorian Constitution could lead to abusive interpretations by the National Congress, as indeed occurred in this case, because this paragraph contained an extremely general and imprecise definition of the grounds for removal ("The other officials referred to in this paragraph may be impeached *for constitutional or statutory offenses,* committed in the performance of their functions"). In my opinion, this is clearly incompatible with the legal certainty that the principle of legality of Article 9 of the Convention seeks to ensure in the case of situations resulting from an abuse of power (see below paras. 120 to 137).

C) Regarding the concept and scope of the "abuse of power"

120. Analysis of the concept of "abuse of power" — particularly in Spanish legal doctrine – is based on the legal definition: "the exercise of administrative powers for purposes other than those established by law shall constitute abuse of power."[160] Thus, even though they support this concept, García de Enterría and Fernández state that it is not exhaustive, because, in their opinion, it is not necessary that the purpose sought is only specific to the administrative agent. They affirm that "it is sufficient that this purpose, even though public, should be other than the one conceived and established by the norm that grants the

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157 *Kimel v. Argentina. Merits, reparations and costs.* Judgment of May 2, 2008 Series C No. 177, para. 63. *Cf. Case of Castillo Petruzzi et al. v. Peru. Merits, reparations and costs*. Judgment of May 30, 1999. Series C No. 52, para. 121, and *Case of Lori Berenson Mejía v. Peru. Merits, reparations and costs*. Judgment of November 25, 2004. Series C No. 119, para. 125. The Court has also stressed that laws that establish restrictions "must use precise criteria and not grant unfettered discretionality to those responsible for their enforcement." *Cf. Case of Ricardo Canese v. Paraguay. Merits, reparations and costs*. Judgment of August 31, 2004. Series C No. 111, para. 124.

158 Paras. 73, 171 and 201 of the Judgment.

159 National Congress, record 24-001-IV, session of December 8, 2004 (merits file, tome II, folio 649 and 659).

160 García Enterría, Eduardo and Ramón Fernández, Tomás, *Curso de derecho administrativo I*, Editorial CIVITAS, Madrid, 1981, third edition, chapter VIII, section IV.1.B, p. 394.

power."[161] They state that, "consequently, what is at stake is the administrative legality and not the morality of the official or of the Administration itself. This is precisely why the abuse of power is not limited to the presumptions in which the real purpose sought is an objective specific to the agent, but extends, as stated, to all the cases in which, abstraction made of the conduct of the agent, it is possible to note the existence of a divergence between the purposes really sought and those that, according to the applicable norm, should guide the administrative decision."[162]

121. Continuing to develop this position, García de Enterría and Fernández point out the probative problems of their analysis. Indeed, they indicate that "…the main difficulty entailed by the use of the technique of the abuse of power is proving the divergence of purposes that constitutes its essence. It can easily be understood that this evidence may not be complete, because it is not easy to presume that the illegal act expressly acknowledges that its purpose is other than the one indicated in the norm."[163]

122. Furthermore, regarding the origin of the expression, it has been indicated that:

> "VI. Origin of the expression
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> The expression *détournement de pouvoir* (abuse of power) was first used by León Aucoc to refer to the policing powers of an administrative agent, who used these powers for reasons other than those established by positive law.
>
> Subsequently, Laferrière systematized and developed the expression to the level at which we know it today. Thus, he defined *détournement de pouvoir* as the irregularity consisting in diverting a legal power from the purpose for which it was established and using it for purposes for which it was not designed."
>
> […]
>
> "Abuse of power is an offense committed by a public official or agent by issuing an administrative decision with a subjective motive that impairs the purpose of general interest that the legislator had in mind when granting the power. […] In the abuse of power, the administrative decision has a purpose that is contrary to the general interest, because the agent who issues the decision is guided by subjective or internal motives. While in the case of unreasonableness and arbitrariness, the official may act in pursuit of the purpose of the law, but the means he uses are disproportionate."[164]

123. Similarly, it has been maintained that:

> "Theoretically, the principle of the abuse of power is applicable in three cases, in all of which the officials acts with a different objective to the one sought by the law he or she executes:
>
> a) *The official acts with a personal objective:* under this hypothesis, his actions are guided by revenge, partisanship, profit, etc. In these cases, even though the act responds objectively to the conditions expressly required by the law, it is illegal because it contravenes the purpose of the law;
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> b) *The official acts in order to benefit one or several third parties:* this happens, also without objectively violating the law, when the official uses administrative powers in order to benefit third parties; for example, if an official is authorized to enter into direct contracts without public competitions and he contracts a certain company because it belongs to his friends and he wants to help them win the contract, etc.
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> c) *The official acts in order to benefit the administration:* this is a fairly common case, and probably the one in which there is most abuse of power. The official, imbued with an erroneous statist and

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161 *Ibidem,* p. 394.

162 *Ibidem,* p. 394.

163 *Ibidem,* p. 395.

164 Barraza, Javier Indalecio, "La finalidad del acto administrativo y la desviación de poder", Revista *Ius Publicum,* Universidad Santo Tomás, v. 14, No. 29, 2012, pp. 51-52.

> fiscalist spirit, as the Argentine official usually is owing to the pressure of misguided doctrinaires, seeks to exercise the power of the law to the undue benefit of the administration or of the State. Thus, he tries to collect the most fines, not to discourage non-compliance with municipal ordinances, but to obtain funds for the municipality; he uses the powers granted to him by the state of emergency (internal security) for ordinary purposes of controlling morality, etc."[165]

124. For their part, authors such as Atienza and Ruiz Manero explain abuse of power as *"… a species within the genus of "exces de pouvoir," inasmuch as it is a category created to subject discretional administrative acts to judicial control."*[166] According to these authors, *"the abuse of power signifies the use of power exceeding the limits established in the corresponding norm that grants the power."*[167] In this regard, the authors present abuse as an alteration between the purpose or consequence of the norm and the result, but on the basis that, in the public sphere, there is no autonomy of action, finding the limit in the exercise of the public function at the service of general interest.[168] In addition, they understand that, in order to assess whether we are in the presence of an abuse of power, it is necessary to recall the legal principles that have led to the establishment of the reasons for the law.[169] Atienza and Ruiz Manero consider that their definition differs from those usually made by legal doctrine, because it goes beyond legal positivism, *"…the reference to the law is substituted by the legal principles that justify and that the implementation of the law that confers the corresponding power; namely, the principles that regulate how the result is obtained."*[170]

125. It should be emphasized that these authors indicate that the abuse of power does not refer only to administrative powers, but that it can also occur in jurisdictional and legislative spheres. Indeed, both judges and legislators have guidelines with objectives established within the framework of different principles from which they may stray, incurring in an abuse of power.[171]

D) "Abuse of power" in the case law of the Inter-American Court

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165 Gordillo, Agustín, *Tratado de derecho administrativo y obras selectas*, tome 5, primeras obras, 1st edition, Buenos Aires, FDA, 2012, p. EAA-IV-18; *ibíd., El acto administrativo*, 1ª edición, Buenos Aires, Abeledo-Perrot, 1963, reprinted as Libro II of the *Tratado de derecho administrativo y obras selectas*, *cit*., available at: http://www.gordillo.com/tome5.html and http://www.gordillo.com/pdf_tome5/02/02-capitulo4.pdf

166 Atienza, Manuel and Ruiz Manero, Juan, "Ilícitos atípicos", Editorial Trotta, Madrid, 2000, chapter IV, section 27, p. 92.

167 *Ibidem.*

168 *Ibidem.*

169 Atienza and Ruiz Manero, after providing this explanation, make the following analysis: *"Action 'A' carried out by public organ 'O' in the 'X' circumstances supposes an abuse of power if, and only if: there is a regulatory rule that permits organ 'O' to use the rule that grants (public) power, in 'X' circumstances, so that carrying out 'A ' produces as a result 'R', an administrative act or legal provision. 'R' produces a certain situation 'E' that, in accordance with the principles that justify the previous permission and other principles of the system, supposes an unjustified harm or an undue benefit, and there is no regulatory rule that prohibits producing 'R' (the legal provision in question), even though there may be a rule designed to avoid 'E'. 'R' is a means for 'E': 3.1) either in a subjective sense, give that, when doing 'A', 'O' did not seek any other discernible purpose than achieving, by means of 'R', the consequence 'E', and that 'R' is objectively appropriate for 'E'; 3.2) or in an objective sense: given that 'R' is objectively appropriate for 'E', even though 'O' did not have this purpose when carrying out 'A'. (4) The balance between the principles mentioned in (2) has sufficient strength to generate a new rule that establishes that in the circumstances 'X' ('X' plus any circumstance that supposes a way of achieving (2) and (3.1) or (3.2) it is prohibited to use the rule that grants power in a way that consequence 'E' is achieved by means of 'R'. Thus, the result 'R' (the legal provision or act in question) must be considered invalid (from a regulatory point of view) to the extent that it leads to 'E'."* Atienza, Manuel and Ruiz Manero, Juan, *Ilícitos atípicos*, *op. cit*, section 29, p. 97.

170 *Ibidem*, chapter IV, section 32, p. 101.

171 *Ibidem*, chapter IV, section 33, p. 106.

126. The Inter-American Court has referred to, or used, the mechanism of the "abuse of power" very infrequently, and in a limited way. In fact, in *Advisory Opinion OC-6/86*, it established[172]

> 18. In reading Article 30 in conjunction with other articles in which the Convention authorizes the application of limitations or restrictions to specific rights or freedoms, it is evident that the following conditions must be concurrently met if such limitations or restrictions are to be implemented:
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> a) That the restriction in question be expressly authorized by the Convention and meet the special conditions for such authorization;
>
> b) That the ends for which the restriction has been established be legitimate, that is, that they pursue "reasons of general interest" and do not stray from the "purpose for which (they) have been established." This teleological criterion, the analysis of which has not been requested here, establishes control for abuse of power, and
>
> c) That such restrictions be established by laws and applied pursuant to them. (Underlining added)

127. In addition, in *Advisory Opinion OC-8/87*, it was considered:[173]

> 39. The Court should also point out that since it is improper to suspend guarantees without complying with the conditions referred to in the preceding paragraph, it follows that the specific measures applicable to the rights or freedoms that have been suspended may also not violate these general principles. Such violation would occur, for example, if the measures taken infringed the legal regime of the state of emergency, if they lasted longer than the time limit specified, if they were manifestly irrational, unnecessary or disproportionate, or if, in adopting them, there was a misuse or abuse of power (underlining added).

128. In the case of *Apitz Barbera et al. v. Venezuela*, the ICourtHR alluded to this concept when stating that:[174]

> In sum, although in this case it has not been proved that the CFRSJ acted with *abuse of power*, directly pressured by the Executive to dismiss the victims, the Court concludes that, owing to the removal at will of the members of the CFRSJ, the due guarantee did not exist to ensure that the pressure brought to bear on the First Court did not influence the decisions of the disciplinary organ (underlining added).

E) Regarding the use of this mechanisms and the case law of the European Court of Human Rights

129. Taking into account the conceptualization of the abuse of power, it is clear that in order to determine whether this has been constituted in a specific case, it is necessary to analyze the real purpose behind the act. Regarding this aspect, in paragraph 210 of the Judgment, the ICourtHR indicated that:

> Thus, in the instant case, the Court finds it necessary to examine the context in which the facts surrounding the removal of the judges from office occurred, because this will be useful to understand the reasons or grounds on which this decision was made. This is because the reason or purpose of a specific decision of the State authorities is relevant for the legal analysis of a case, since a purpose or reason that differs from the norm that grants the State authority the power to act, may reveal

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172 *Advisory Opinion OC-6/86*, of May 9, 1986 (The Word "Laws" in Article 30 of the American Convention on Human Rights), requested by the Government of the Oriental Republic of Uruguay, para. 18.

173 *Advisory Opinion OC-8/87*, of January 30, 1987 (Habeas Corpus in Emergency Situations (Arts. 27.2, 25(1) and 7.6 American Convention on Human Rights), requested by the Inter-American Commission on Human Rights, para. 39.

174 *Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of August 5, 2008. Series C No. 182, para. 147.

> whether the action can be considered an arbitrary act.[175] In this regard, the Court bases itself on the fact that the actions of State authorities are protected by a presumption of legal conduct; hence an irregular action by the State authorities must be proved in order to override the presumption of good faith.[176] (underlining added).

130. As can be observed in this paragraph of the Judgment, the ICourtHR cited several precedents of the European Court in the footnote and, in my opinion, they warrant being examined in greater depth. In order to understand these precedents, it should be recalled that Article 18 of the European Convention on Human Rights indicates that "the restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

131. Regarding the possibility of applying Article 18 of the European Convention, the Strasbourg Court has indicated that: (i) Article 18 of the Convention does not have an autonomous role: (ii) that the said article can only be applied in conjunction with, or in relation to, the articles of the Convention that establish subjective rights, and (iii) from the wording of Article 18, it is understood that a violation of a right or freedom can occur only when the said right is subject to a restriction permitted under the Convention.

132. In the Judgment that inspires this opinion, the ICourtHR cited the cases of *Gusinskiy v. Russia*, *Cebotari v. Moldova,* and *Lutsenko v. Ukraine*. In this regard, it is worth underscoring that, in the last two cases, the European Court of Human Rights declared the violation of Article 18 of the Convention. Indeed, in the case of *Cebotari v. Moldova* it indicated that:

> ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION AND OF ARTICLE 18 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 5
>
> 48. The Court reiterates that in order for an arrest on reasonable suspicion to be justified under Article 5 § 1 (c) it is not necessary for the police to have obtained sufficient evidence to bring charges, either at the point of arrest or while the applicant is in custody (see *Brogan and Others v. the United Kingdom*, judgment of 29 November 1988, Series A no. 145-B, pp. 29-30, § 53). Neither is it necessary that the person detained should ultimately have been charged or brought before a court. The object of detention for questioning is to further a criminal investigation by confirming or dispelling suspicions which provide the grounds for detention (see *Murray v. the United Kingdom*, judgment of 28 October 1994, Series A no. 300-A, p. 27, § 55). However, the requirement

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[175] In this regard, the European Court of Human Rights has taken into account the real purpose or grounds that the State authorities had when exercising their functions, in order to determine whether there had been a violation of the European Convention on Human Rights. For example, in the Case *of Gusinskiy v. Russia*, the European Court considered that the restriction of the victim's detention authorized by Article 5.1(c) of the European Convention, was not only applied to make him appear before the competent judicial authority, because it was considered that there were reasonable indications that he had committed an offense, but also in order to oblige him to sell his company to the State. In the Case of *Cebotari v. Moldova,* it declared that Article 18 of the European Convention had been violated because the Government had not been able to convince the Court that it had a reasonable suspicion to consider that the applicant had committed a crime, and the said Court concluded that the real purpose of the criminal proceeding and the detention of the applicant was to pressure him and thus prevent his company "Oferta Plus" from pursuing its application before the Court. Lastly, in the *Case of Lutsenko v. Ukraine,* the European Court determined that the applicant's detention, authorized by Article 5.1(c), had been executed not only in order to ensure his appearance before the competent judicial authority, because there were reasonable indications that he had committed an offense, but also for other reasons related to the prosecution's attempt to file charges against the applicant for publicly contesting the accusations against him. *Cf.* European Court of Human Rights, *Case of Gusinskiy v. Russia*, Judgement of 19 May 2004, paras. 71 to 78; Case of *Cebotari v. Moldova*, Judgement of 13 February 2008, paras. 46 to 53, and *Case of Lutsenko v. Ukraine*, Judgement of 3 July 2012, paras. 100 to 110.

[176] The ICourtHR has indicated that direct evidence, whether testimonial or documentary, is not the only evidence that may legitimately be considered to provide grounds for the judgment. Circumstantial evidence, indications and presumptions may also be used, provided that consistent conclusions concerning the facts can be inferred from them". *Case of Velásquez Rodríguez v. Honduras.* Merits. Judgment of July 29, 1988. Series C No. 4, para. 130.

that the suspicion must be based on reasonable grounds forms an essential part of the safeguard against arbitrary arrest and detention. The fact that a suspicion is held in good faith is insufficient. The words "reasonable suspicion" mean the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence (see *Fox, Campbell and Hartley v. the United Kingdom,* judgment of 30 August 1990, Series A no. 182, pp. 16-17, § 32). The Court stresses in this connection that in the absence of a reasonable suspicion arrest or detention of an individual must never be imposed for the purpose of making him confess or testify against others or to elicit facts or information which may serve to ground a reasonable suspicion against him.

49. The Court further reiterates that Article 18 of the Convention, like Article 14, does not have an autonomous role. It can only be applied in conjunction with other Articles of the Convention. As in the case of Article 14, there may be a violation of Article 18 in connection with another Article, although there is no violation of that Article taken alone. It further follows from the terms of Article 18 that a violation can only arise where the right or freedom concerned is subject to restrictions permitted under the Convention (*Gusinskiy v. Russia*, cited above, § 73).

[…]

53. The Court recalls that the restriction on the right to liberty under Article 5 § 1(c) must be justified by the purpose of that provision. In the instant case, the Government has failed to satisfy the Court that there was a reasonable suspicion that the applicant had committed an offence, with the result that there was no justification for his arrest and detention. Indeed, having regard to its conclusion in paragraph 141 of the *Oferta Plus* judgment (cited above) the Court can only conclude that the real aim of the criminal proceedings and of the applicant's arrest and detention was to put pressure on him with a view to hindering Oferta Plus from pursuing its application before the Court. It therefore finds that the restriction on the applicant's right to liberty was applied for a purpose other than the one prescribed in Article 5 § 1(c). On that account there has been a breach of Article 18 of the Convention taken in conjunction with Article 5 § 1 (underlining added).

133. While in the case *Lutsenko v. Ukraine,* the European Court stated that:

105. The Court notes in this respect that Article 18 of the Convention does not have an autonomous role and can only be applied in conjunction with other Articles of the Convention (*Gusinskiy v. Russia*, no. 70276/01, § 75, ECHR 2004-IV). […]

106. The Court reiterates that the whole structure of the Convention rests on the general assumption that public authorities in the member States act in good faith. Indeed, any public policy or an individual measure may have a "hidden agenda", and the presumption of good faith is rebuttable. However, an applicant alleging that his rights and freedoms were limited for an improper reason must convincingly show that the real aim of the authorities was not the same as that proclaimed (or as can be reasonably inferred from the context). A mere suspicion that the authorities used their powers for some other purpose than those defined in the Convention is not sufficient to prove that Article 18 was breached.[…]

107. When an allegation under Article 18 is made, the Court applies a very exacting standard of proof. As a consequence, there are only few cases where a breach of that Convention provision has been found. Thus, in *Gusinskiy v. Russia* (cited above, § 73–78), the Court accepted that the applicant's liberty had been restricted, *inter alia,* for a purpose other than those mentioned in Article 5. The Court in that case based its findings on an agreement signed between the detainee and a federal Minister for the Press. It was clear from that agreement that the applicant's detention had been applied in order to make him sell his media company to the State. In *Cebotari v. Moldova* (no. 35615/06, §§ 46 et seq., 13 November 2007) the Court found a violation of Article 18 of the Convention in circumstances where the applicant's arrest was visibly linked to an application pending before the Court.

108. The Court notes that when it comes to allegations of political or other ulterior motives in the context of criminal prosecution, it is difficult to dissociate the pre-trial detention from the criminal proceedings within which such detention had been ordered. The circumstances of the present case suggest, however, that the applicant's arrest and detention, which were ordered after the investigation against the applicant had been completed, had their own distinguishable features which allow the Court to look into the matter separately from the more general context of politically motivated prosecution of the opposition leader. In the present case, the Court has already established that the grounds advanced by the authorities for the deprivation of the applicant's liberty were not only incompatible with the requirements of Article 5 § 1 but were also against the spirit of the Convention (see paragraphs 66 to 73 above). In this context, the Court observes that the profile of the applicant, one of the opposition leaders who had communicated with the media, plainly attracted considerable public attention. It can also be accepted that being accused of abuse of office, he had the right to reply to such an accusation through the media. The prosecuting authorities seeking the applicant's arrest explicitly indicated the applicant's communication with the media as one of the

> grounds for his arrest and accused him of distorting public opinion about crimes committed by him, discrediting the prosecuting authorities and influencing the upcoming trial in order to avoid criminal liability (see paragraph 26 above).
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> 109. In the Court's opinion, such reasoning by the prosecuting authorities clearly demonstrates their attempt to punish the applicant for publicly disagreeing with accusations against him and for asserting his innocence, which he had the right to do. In such circumstances, the Court cannot but find that the restriction of the applicant's liberty permitted under Article 5 § 1 (c) was applied not only for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence, but also for other reasons (underlining added(.

134. Thus, the European Court's case law cited above allows it to be inferred that the analysis of the real grounds for a decision are related to proving the existence of an abuse in a specific case. In the Judgment that prompts this opinion, the ICourtHR took into account, with particular emphasis, the context of this case, as well as a series of irregularities that allegedly occurred in the session of November 25, 2004.[177]

135. In addition, the ICourtHR took into consideration irregularities that had occurred in the impeachment proceedings during the sessions of December 1 and 8, 2004, the latter when a new vote was taken on the impeachment of the judges.[178] All the above allowed the Inter-American Court to conclude that:[179]

> Taking into account the preceding considerations concerning the sessions of Congress of November 25, December 1 and December 8, 2004, in the instant case the Court observes that the judges were removed by a resolution of the National Congress, which lacked competence in this regard […], by a decision without any legal grounds […], and without being heard […]. Furthermore, a significant number of irregularities occurred during the impeachment proceedings: these proceedings were based on decisions relating to control of constitutionality adopted by the judges, which was prohibited by domestic law […]. As indicated previously […], the resolution deciding the termination of the judges was the result of a political alliance put together to create a Constitutional Tribunal that was aligned with the political majority that existed at that time and to prevent criminal proceedings against the President in power and a former President. It is worth underscoring that, the same day that the termination of the judges was declared, the judges who would replace them were appointed. Therefore, the apparent legality and justification of these decisions concealed the intention of a parliamentary majority to exercise greater control over the Constitutional Tribunal and to facilitate the termination of the justices of the Supreme Court. The Court has verified that the resolutions of Congress were not adopted based on the exclusive assessment of specific factual information and in order to ensure proper compliance with the laws in force, but sought a very different end related to an abuse of power aimed at obtaining control of the judicial function by different procedures; in this case, the termination and the impeachment proceedings. This resulted in a destabilization of both the Judiciary and the country in general […] and intensified the political crisis, with the negative effects that this entailed for the protection of the rights of the population. Consequently, the Court emphasizes that these elements allow it to affirm that a collective and arbitrary termination of judges is unacceptable, owing to the negative impact that this has on the institutional aspect of judicial independence. (Underlining added)

136. In addition to the provisions of the case law of the Strasbourg Court, it is worth mentioning also the Judgment of the Court of First Instance of the European Communities of 25 February 1999, in the matter of *Giannini v. Commission* in which it was concluded that there was "objective, relevant and consistent evidence" indicating that the "contested measures [of the Commission of the European Communities] had been adopted with a view

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177 Paras. 210 to 214 of the Judgment.

178 Paras. 215 to 218 of the Judgment.

179 Para. 219 of the Judgment.

to achieving a purpose other than that of complying in good faith" with a judgment, and that the Commission had committed an "abuse of power."[180]

137. Thus, from my perspective, I consider that once it had been concluded in the Judgment that there had been an "abuse of power," and taking into account that the impeachments clearly involved the imposing of a sanction, it was even more necessary to analyze in detail the way in which the type of arbitrary acts that occurred during the said punitive proceeding entailed the violation of Article 9 of the American Convention. And this should have been done, taking into account, also, the State's explicit acknowledgement that the National Congress did not make a legal and constitutional analysis of the grounds when it arbitrarily removed the members of the Constitutional Tribunal from office by an impeachment proceeding as a punitive mechanism; the absence of legal certainty with regard to the grounds for the removal as a guarantee of prevention vis-à-vis arbitrary interpretations, and the abusive motives of the National Congress for invoking the mechanism of impeachment, which results in a conflict between the conformation and application of the mechanism of impeachment in this case, and the principle of legality established in Article 9 of the American Convention.

F) Conclusion

138. Taking into account the context in which this case occurred - "the collective termination of judges" of the three high courts in the space of 14 days; the real reasons for not only the decision to terminate the victims (resolution of the National Congress of November 25, 2004),[181] but also the impeachment proceedings against them (sessions of Congress of December 1 and 8, 2004), which concluded with the approval of "the motion of censure submitted"[182] — and the consequent "immediate removal"[183] — as well as the "abuse of power" that was revealed in the Judgment, I consider that not only should the violation of Article 9 of the American Convention have been examined, but also that it was possible to declare that this article had been violated.

139. This is because, even though the Ecuadorian Constitution established very broad and general grounds, consisting in "statutory or constitutional offenses,"[184] based on which the members of the Constitutional Tribunal could be impeached,[185] they were tried, as determined in the Judgment[186] and as I emphasize in this opinion (*supra* paras. 93 to 95),

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[180] Judgment of the Court of First Instance of the European Communities of 13 April 2000, Giannini/Commission (Case C-153/99 P), European Court Reports, Page I-02891.

[181] "Related to an abuse of power aimed at obtaining control of the Judiciary by different procedures: in this case, the termination and the impeachment proceedings. Para. 219 of the Judgment.

[182] National Congress Record 24-001-IV, session of December 8, 2004 (merits file, tome II, folios 649 and 659).

[183] A sanction that was additional to the termination decision taken previous by a resolution of the National Congress. It should not be overlooked that the censure produced the immediate removal of the officials under Article 130(9) of the Ecuadorian Constitution of 1998 and, in this specific case, it entailed a violation of the rights of the victims, because it represented the removal of the judges from office (which had already occurred previously with the congressional resolution of November 25,) with the negative effects implicit in this situation.

[184] See my previous observations on the principle of criminalization — included in the principle of legality — established in Article 9 of the American Convention, to the effect that not only should the guarantees of due process of law be applied in impeachment proceedings, but also grounds for the removal that are sufficiently clear must be considered included in the principle de legality, in order to avoid or prevent the risk of abusive interpretations (*supra* paras. 115 and 116 of this opinion).

[185] Art. 130(9) of the 1998 Constitution of Ecuador.

[186] Paras. 204 and 205 of the Judgment.

based on the rulings they had delivered within the framework of the competence of the Constitutional Tribunal as an organ for the control of constitutionality, which was expressly prohibited by domestic law,[187] and meant that the judges were sanctioned for actions that were not expressly indicated by law.[188]

140. Consequently, I consider that the Inter-American Court should have declared the State responsible for the violation of Article 9 of the American Convention, because it failed to respect the principle of legality in the impeachment proceedings conducted against the victims who were members of the Constitutional Tribunal. And, evidently, this constituted an additional factor for finding that the political authorities had clearly violated the institutional aspect of judicial independence in the instant case.

Eduardo Ferrer Mac-Gregor Poisot
Judge

Pablo Saavedra Alessandri
Secretary

[187] Art. 9 of the 1997 Law on Constitutional Control.

[188] It should not be overlooked that, according to the case law of the ICourtHR, the principle of legality established in Article 9 of the American Convention is not only applicable in criminal matters, but also in relation to administrative sanctions. *Cf. supra* paras. 112 to 119 of this opinion, and especially, *Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs*. Judgment of February 2, 2001. Series C, No. 72, para. 106; see also, Ruiz Robledo, Agustín, *El derecho fundamental a la legalidad punitiva*, Valencia, Tirant Lo Blanch, 2004. For example, the European Court of Human Rights has maintained that "the notion of "penalty" in Article 7 § 1 of the Convention, like those of "civil rights and obligations" and "criminal charge" in Article 6 § 1, has an autonomous meaning […]. To render the protection offered by Article 7 effective, the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a "penalty" within the meaning of this provision" (*Cf.* ECHR, *Case of Scoppola v. Italy (no. 2),* Judgement of 17 September 2009, No. 10249/03, para. 96; *Case of Welch v. the United Kingdom*, Judgement of 9 February 1995, Series A no. 307-A, para. 27).