

## **Inter-American Court of Human Rights**

### **Case of the Dismissed Congressional Employees (Aguado-Alfaro *et al.*) v. Peru**

#### **Judgment of November 24, 2006 (*Preliminary Objections, Merits, Reparations and Costs*)**

In the case of the *Dismissed Congressional Employees (Aguado Alfaro et al.)*,  
the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or  
"the Court"), composed of the following judges:\*

Sergio García Ramírez, President  
Alirio Abreu Burelli, Vice President  
Antônio A. Cançado Trindade, Judge  
Cecilia Medina Quiroga, Judge  
Manuel E. Ventura Robles, Judge, and  
Diego García-Sayán, 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 "the Convention" or "the American Convention") and Articles 29, 31, 37,  
56 and 58 of the Rules of Procedure of the Court (hereinafter "the Rules of  
Procedure"), delivers this judgment.

#### **I**

#### **INTRODUCTION OF THE CASE**

1. On February 4, 2005, in accordance with the provisions of Articles 50 and 61  
of the American Convention, the Inter-American Commission on Human Rights  
(hereinafter "the Commission" or "the Inter-American Commission") lodged before  
the Court an application against the State of Peru (hereinafter "the State" or "Peru"),  
which originated in petitions Nos. 11,830 and 12,038, received by the Secretariat of  
the Commission on October 18, 1997, and July 10, 1998, respectively.

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\* Judge Oliver Jackman informed the Court that, due to circumstances beyond his control, he  
would be unable to attend the seventy-third regular session, and would therefore be unable to take part in  
the deliberation and signature of this judgment.

2. The Commission submitted the application for the Court to decide whether Peru was responsible for violating Articles 8(1) (Right to a Fair Trial) and 25(1) (Judicial Protection) of the American Convention on Human Rights, and also for failing to comply with the provisions of Articles 1(1) (Obligation to Respect Rights) and 2 (Domestic Legal Effects) thereof. The facts set forth in the application refer to the alleged "dismissal of a group of 257 employees from the National Congress of the Republic of Peru[...] who are part of a group of 1,117 employees who were dismissed [from this institution] by Resolutions adopted by Congress on December 31, 1992."

3. The Commission also asked the Court, in accordance with Article 63(1) of the Convention, to order the State to adopt specific measures of reparation indicated in the application. Finally, it requested the Court to order the State to pay the costs and expenses arising from processing the case in the domestic jurisdiction and before the organs of the inter-American system.

## II JURISDICTION

4. The Court is competent to hear this case, in the terms of Articles 62 and 63(1) of the Convention, because Peru has been a State Party to the American Convention since July 28, 1978, and accepted the compulsory jurisdiction of the Court on January 21, 1981.

## III PROCEEDINGS BEFORE THE COMMISSION

5. On October 18, 1997, the Commission received a request for precautionary measures from five of the alleged victims: Ángela Valdez Rivera, Adolfo Fernández Saré, Roberto Ribotte Rodríguez, María Huaranga Soto and Manuel Carranza Rodríguez.

6. On November 10, 1997 the Commission began "to process [the] petition [...], identified as number" 11,830, forwarded the pertinent parts to the State and requested it to provide information within 90 days, in accordance with its Rules of Procedure in force at the time. On January 26, 1998, Peru responded to this communication.

7. On February 13, 1998, the Commission informed the petitioners, *inter alia*, that, according to Article 29 of its Rules of Procedure, the situation described "[i]n principle [...] d[id] not constitute an urgent case in which it [was] necessary to request precautionary measures to prevent irreparable harm to persons."

8. On March 26, 1998, Adolfo Fernández Saré and another 126 persons, 124 of them alleged victims in this case, presented a petition to the Commission within the framework of case No. 11,830, based on the same facts as those contained in the request for precautionary measures (*supra* para. 5).

9. On July 10, 1998, 20 persons presented another petition to the Commission, on their own behalf and on behalf of "other employees dismissed from the Peruvian Congress."

10. On August 4, 1998, the Commission opened case No. 12,038, forwarded the pertinent parts of the petition to the State and requested it to provide information within 90 days. On November 11, 1998, after an extension had been granted, Peru sent its response.

11. On February 4, 1999, two persons asked to be considered co-petitioners in case 11,830 (*supra* para. 5). Also, on October 20, 1999, the Lima Lawyers' Professional Association asked to be considered a co-petitioner in the case and submitted notes from 15 alleged victims requesting this institution to represent them in the same case.

12. On June 9, 2000, applying the provisions of Article 40(2) of its Rules of Procedure in force at the time, the Commission decided to joinder cases Nos. 11,830 and 12,038, so as to process them both under the file of case No. 11,830. At the same time, the Commission notified this decision to Peru and to all the petitioners.

13. On June 15, 2000, the Commission adopted report No. 52/00, in which it declared the petition admissible as regards the possible violation of Articles 8 and 25 of the American Convention. This report was notified to the State and the petitioners on June 27, 2000.

14. On July 11, 2000, the Commission made itself available to the parties in order to reach a friendly settlement. On August 11, 2000, the petitioner, Adolfo Fernández Saré, asked for an extension in view of the meetings that were being held with the State "to find mechanisms that [would] allow [them] to reach a friendly settlement." On August 11 and October 1, 2000, the State requested an extension of the period granted in order "to continue exploring the possibility of initiating a friendly settlement procedure."

15. On October 13, 2000, the Commission held a hearing on the case. On November 20 that year, the State declared that it was not interested in continuing the friendly settlement procedure and requested that the case should be filed. This communication was forwarded to the petitioners' representatives who presented their comments in communications of February 5, 7 and 12, 2001.

16. In response to the request of the alleged victims' representatives, and in accordance with the provisions of Article 38(3) of its Rules of Procedure, the Commission convened the parties to a hearing during its 116<sup>th</sup> regular session. The hearing was held on October 14, 2002.

17. On October 2, 2003, the State advised that the "Multisectoral Commission responsible for drawing up the final settlement proposal concerning case No. 11,830" had concluded its sessions on April 7, 2003, without having reached a friendly settlement.

18. On October 19, 2004, having examined the positions of the State and the petitioners, the Commission adopted Report on Merits No. 78/04, in which it concluded:

That the State [...] is responsible for violating the right to judicial protection embodied in Article 25(1), the right to judicial guarantees embodied in Article 8(1) and the obligation to adopt domestic legal provisions contained in Article 2 of the American Convention, to the detriment of the 257 employees dismissed from Congress [...]. In addition, the

foregoing constitutes a violation by the State [...] of the obligation imposed by Article 1(1) to respect and ensure the rights embodied in the Convention.

And recommended to the State that it should:

- a. Guarantee to the congressional employees identified and listed in the appendix [to the] report, a simple, prompt and effective recourse to examine their claims concerning their dismissal under Resolutions Nos. 1303-A-92-CACL and 1303-B-92-CACL of November 6, 1992, of the Administrative Commission of the Congress of the Republic, published on December 31, 1992. This recourse should be conducted with full judicial guarantees and should lead to a ruling on the merits of the claims filed.
- b. Modify article 9 of Decree Law [No.] 25640 of July 21, 1992, and article 27 of Resolution No. 1239-A-92-CACL of October 13, 1992, to harmonize them with the American Convention.

19. On November 4, 2004, the Commission forwarded the Report on Merits to the State, granting the latter two months to provide information on the measures adopted to comply with its recommendations.

20. On November 4, 2004, the Commission notified the petitioners of the adoption of the Report on Merits and its transmittal to the State. It also asked them to state their position regarding the possible submission of the case to the Inter-American Court. On December 3 and 22, 2004, the petitioners expressed their wish that the case be submitted to the Court.

21. On January 19, 2005, having been granted an extension, Peru presented information on compliance with the recommendations contained in Report on Merits No. 78/04 (*supra* para. 18).

22. On February 3, 2005, considering "that the State had not adopted its recommendations satisfactorily," the Inter-American Commission decided to submit this case to the consideration of the Court.

#### IV

#### PROCEEDINGS BEFORE THE COURT

23. On February 4, 2005, the Inter-American Commission lodged the application before the Court (*supra* para. 1), attaching documentary evidence and offering expert evidence. The Commission appointed José Zalaquett and Santiago Canton as delegates, and Ariel Dulitzky, Víctor H. Madrigal, Pedro E. Díaz and Lilly Ching as legal advisers.

24. On April 4, 2005, on the instructions of the President of the Court, the Secretariat informed the alleged victims' representatives (hereinafter "the representatives") accredited before the Commission when the application was submitted, and also the Commission and the State, that a preliminary examination of the application was being made pursuant to Article 34 of the Rules of Procedure. In addition, it advised them that, based on this initial examination of the application, the President had determined that various problems concerning representation had arisen during the proceedings before the Commission, and they subsisted at the time the application was lodged before the Court. These problems included the alleged victims granting powers of attorney to different representatives at different times; differences in the purpose of the representation, which become apparent from the

examination of these powers of attorney; and the lack of representation of some of the alleged victims whose representation the Commission assumed provisionally. Consequently, the Secretariat asked the representatives, in accordance with Article 23 of the Rules of Procedure of the Court, to coordinate with the alleged victims to designate a common intervenor to represent them, so that it could notify the application and the representatives' common intervenor would then have 60 days to submit requests and arguments. This request was reiterated to the representatives on May 30, 2005, and they were granted until June 6 that year to comply with the requirement.

25. On June 5, 2005, Adolfo Fernández Saré forwarded the "original minutes of the general assembly of the employees who form part of this case," which stated that "[he had] been designated common intervenor to represent [his] colleagues before the Inter-American Court and was duly signed by those who took part in this assembly [...]; [and the] list of deceased employees; and [of those who] were abroad at that time."

26. On June 6, 2005, Manuel Abad Carranza Rodríguez, Henry William Camargo Matencio, Máximo Jesús Atauje Montes and Jorge Luis Pacheco Munayco designated Javier Mujica Petit and/or Francisco Ercilio Moura as common intervenor.

27. On June 13, 2005, on the instructions of the Court in plenary session, the Secretariat requested the Commission and Messrs. Pacheco Munayco, Carranza Rodríguez, Camargo Matencio, Atauje Montes, Mujica Petit and Fernández Saré to remit, by June 20, 2005, at the latest, their respective comments on the communications of June 5 and 6, 2005 (*supra* paras. 25 and 26), to enable the Court to take a decision concerning the designation of a common intervenor for the representatives.

28. On June 20, 2005, Mr. Fernández Saré, on the one hand, and Messrs. Carranza Rodríguez, Camargo Matencio, Atauje Montes and Pacheco Munayco, on the other, forwarded their respective comments on the said communications, in accordance with the Court's instructions (*supra* para. 27).

29. On June 20, 2005, the Inter-American Commission forwarded its comments on the representatives' communications of June 5 and 6, 2005, as requested on the Court's instructions (*supra* para. 27).

30. On June 28, 2005, Messrs. Carranza Rodríguez, Camargo Matencio, Atauje Montes and Pacheco Munayco remitted comments on the communications of June 20, 2005, of the Commission and of Mr. Fernández Saré (*supra* para. 28).

31. On July 1 and 7, 2005, Messrs. Carranza Rodríguez, Camargo Matencio, Atauje Montes and Pacheco Munayco, on the one hand and Mr. Mujica Petit, on the other, forwarded comments on the communication of June 5, 2005, of Mr. Fernández Saré (*supra* para. 25).

32. On July 20, 2005, Mr. Fernández Saré presented comments on the communications of June 20, 2005, remitted by the Commission and by Messrs. Pacheco Munayco, Atauje Montes, Carranza Rodríguez and Camargo Matencio (*supra* para. 28).

33. On August 1, 2005, Mr. Fernández Saré submitted comments on the communication of June 29, 2005, remitted by Messrs. Pacheco Munayco, Atauje Montes, Carranza Rodríguez and Camargo Matencio (*supra* para. 29).

34. On October 20, 2005, after the President of the Court had made a preliminary review of the application, the Secretariat notified it, together with the appendix, to the State and to the persons designated as the common intervenors of the alleged victims' representatives (hereinafter "the common intervenors"). It also informed the State of the time limit for answering the application and appointing its representatives in the proceedings. In addition, the Secretariat advised the parties that, given the failure of the representatives to reach an agreement on the designation of a common intervenor, the Court had decided, in accordance with Article 23 of the Rules of Procedure, that the common intervenors who would represent the alleged victims were Javier Mujica Petit and Francisco Ercilio Moura. When making this designation, the Court took into account, *inter alia*, that: from the examination of all the powers of attorney in the Court's file, Manuel Abad Carranza Rodríguez, Henry William Camargo Matencio, Máximo Jesús Atauje Montes and Jorge Luis Pacheco Munayco had 166 valid powers of attorney granted by alleged victims, where the purpose of the representation was more specifically for the processing of the case before the Court; that is, to represent them "before the Peruvian State, the Congress of the Republic of Peru, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights." In contrast, the powers of attorney granted to Adolfo Fernández Saré, together with two of those representatives and one other person in 2003 had a limited representation purpose, which was to act before the Commission established at the domestic level; that is: "in the negotiations to be held [...] before the [...] Multisectoral Commission responsible for drawing up the final proposal for settling IACHR Case No. 11,830 – Dismissed Congressional Employees." The Court also informed them that the common intervenors should submit a single brief with requests, arguments and evidence and their designation did not imply any limitation to the right of the alleged victims or their next of kin to submit their own requests and arguments to the Court or to offer evidence. Consequently, in their briefs and oral arguments and in the evidence they provided, the common intervenors should channel the different claims and arguments of the various representatives of the alleged victims or their next of kin, even though these should be submitted to the Court in a single brief. Finally, with regard to the alleged victims who were not represented [as a result of the Court's decision] or who had no representative, the Court indicated that, according to the provisions of Article 33(3) of the Rules of Procedure, the Commission must safeguard their interests to ensure that they are represented effectively during the different procedural stages before the Court.

35. On November 14, 2005, Mr. Fernández Saré expressed his "concern and disagreement with the contents of the notes" of October 20, 2005, concerning the designation of the common intervenors, and asked the Court "to reconsider this designation." On November 17, 2005, the common intervenors referred to Adolfo Fernández Saré's note. The Court was advised of Mr. Fernández Saré's communication; it considered that the designation had been decided and that it was not in order to make any change in this decision; accordingly, it could not agree to this request. The parties were advised accordingly on November 18, 2005.

36. On November 21, 2005, Peru appointed Oscar Manuel Ayzanoa Vigil as its Agent. Subsequently, on February 1, 2006, he was substituted by Julia Carmela Arnillas D'arrigo.

37. On December 22, 2005, the common intervenors submitted their brief with requests, arguments and evidence (hereinafter "requests and arguments"), attaching documentary evidence and offering testimonial and expert evidence.

38. On January 23, 2006, Adolfo Fernández Saré, Jorge Ore León, Víctor Ampuero Ampuero, Telmo Barba Ureña, Ricardo Hernández Fernández, Ronald Revello Infante and Carlos la Cruz Crespo submitted a "brief with requests, arguments and evidence within the period established by the Court to this end." On February 3, 2006, the Secretariat reiterated to them that the designation of the common intervenor had been decided by the Court on October 20, 2005 (*supra* para. 34), and that it was not in order to make any change in the decision; according the brief would not be processed.

39. On February 23, 2006, Peru presented its brief with preliminary objections, in answer to the application and with observations on the requests and arguments, attaching documentary evidence and offering expert evidence.

40. On April 4, 2006, on the instructions of the President and in the terms of Article 45(2) of the Court's Rules of Procedure, the Secretariat requested the parties to forward documentation and information to be considered as useful evidence by April 18, 2006, at the latest. On that date, and also on April 25 and May 2, 2006, the Commission, Peru, and the common intervenors, respectively, presented some of this evidence.

41. On April 7 and 11, 2006, the Commission and the common intervenors, respectively, submitted their arguments on the preliminary objections filed by the State (*supra* para. 39).

42. On April 12, 2006, the common intervenors requested the substitution of Luis Miguel Sirumbal Ramos, offered as an expert witness, by Paúl Noriega Torero. On May 2, they advised that this substitution was requested because the former was abroad.

43. On May 8, 2006, the State declared, *inter alia*, that Paúl Noriega Torero (*supra* para. 42) did not have the appropriate curriculum vitae to determine measures of compensation. On May 24 that year, the common intervenors referred to these comments by the State.

44. On May 17, 2006, the President issued an Order in which he called upon Ricardo Julio Callirgos Tarazona, Margarita Agustina Álvarez Chavarri (widow of Purizaca), María de los Ángeles Chang Begazo, Jacqueline Magallán Galoc, Frida Luisa Salas Sobrino and Luisa Chara Pacheco, proposed as witnesses by the common intervenors, to provide their testimonies through statements made before notary public (affidavits). He also called upon Paúl Noriega Torero, proposed as an expert witness by the common intervenors, and Rosario Teresa Cordero Borja, proposed as an expert witness by the State, to provide their expert evidence by statements made before notary public (affidavits). In addition the President convened the Commission, the common intervenors and the State to a public hearing to be held at the seat of the Supreme Court of Justice of El Salvador starting on June 27, 2006, to hear their final oral arguments on the preliminary objections and merits, reparations and costs, as well as the expert evidence of Samuel Abad Yupanqui, proposed as an expert witness by the Commission. The President also informed the parties that they had a

non-extendible period until July 27, 2006, to submit their final written arguments on the preliminary objections and merits, reparations and costs.

45. On June 2, 2006, the State appointed Carlos Fernando Mesía Ramírez as deputy Agent. On June 19, 2006, the common intervenors stated that the latter "had not been designated deputy Agent when he was presented to [the Court] in this capacity," and therefore asked the Court "to bear this fact in mind for any action it considered appropriate."

46. On June 13, 2006, the Inter-American Commission advised that, due to circumstances beyond his control, the expert witness, Samuel Abad Yupanqui, would be unable to attend the hearing to which he had been convened and, therefore, asked the Court to allow him to forward his sworn statement. The President agreed to this request.

47. On May 26 and June 20, 2006, the common intervenors and the Commission, respectively, forwarded a copy of the sworn written statements made by the witnesses and expert witnesses (*supra* para. 44). On June 21, 2006, the State presented its comments on the sworn written statements made by the witnesses and expert witnesses proposed by the common intervenors. The same day, the Commission stated that it had no comments to make on these statements. On June 21 and 23, 2006, the State submitted its comments on the expert statement made before notary public (affidavit) by Paúl Noriega Torero and the testimonial statements forwarded by the common intervenors.

48. On June 21, 2006, the expert witness proposed by Peru presented, autonomously, her "technical, juridical, legal, economic and financial observations" on the expert statement made before notary public (affidavit) by Paúl Noriega Torero, expert witness proposed by the common intervenors.

49. On July 6, 2006, on the instructions of the Court, the Secretariat informed the parties that the brief mentioned in the preceding paragraph could not be admitted, because it was time-barred and, also, it did not refer to the purpose of the expert opinion requested by the President in the respective Order (*supra* para. 44), and had not been asked for by the Court.

50. On June 27, 2006, during its twenty-ninth special session, the Court held the public hearing on preliminary objections and merits, reparations and costs, at the seat of the Supreme Court of Justice of El Salvador, in San Salvador. There appeared: (a) for the Inter-American Commission: Florentín Meléndez, Commissioner, Santiago Canton, Executive Secretary, Víctor H. Madrigal Borloz, Juan Pablo Albán and Lilly Ching, advisers; (b) for the common intervenors: Javier Antonio Mujica Petit and Francisco Ercilio Moura, and (c) for the State of Peru: Julia Antonia Carmela Arnillas D'arrigo, Agent, and Carlos Fernando Mesía Ramírez, deputy Agent. The Court heard the final oral arguments of the parties.

51. On July 26 and 27, 2006, the State, the Commission, and the common intervenors, respectively, presented their final written arguments on the preliminary objections and merits, reparations and costs. The common intervenors attached documents as appendixes.

52. On August 2, 2006 the common intervenors forwarded "comments on the brief of June 21, 2006," in which Peru submitted comments on the expert opinion



and the testimonial statements made before notary public provided by the common intervenors (*supra* para. 47).

53. On October 20 and 24, 2006, on the instructions of the President and in the terms of Article 45(2) of the Rules of Procedure, the Secretariat again requested the parties to forward documentation and information to be considered as useful evidence, which should be remitted by October 27 and 30, 2006, respectively, at the latest. On October 26, 27 and 30, and on November 1, 10 and 13, 2006, the State, the Commission, and the common intervenors, respectively, presented part of the useful evidence requested by the Court, after an extension had been granted to the intervenors.

## V PRELIMINARY OBJECTIONS

54. In the brief answering the application and with observations on the requests and arguments brief, the State filed three preliminary objections, which it called: "(a) objection based on expiration; (b) legal defects, and (c) lack of legitimacy to act." The Court will now consider them in the same order.

### FIRST PRELIMINARY OBJECTION *"Objection based on expiration"*

#### *The State's arguments*

55. The Commission's Rules of Procedure do not establish the procedure of adhesion. However, this institution admitted several adhesions to the petitions in cases Nos. 11,830 and 12,038, with the further problem that they were admitted when the six-month period following the exhaustion of domestic remedies had expired; in other words, after January 12, 1998, the date on which the judgment delivered by the Constitutional Court in this case was published. These adhesions were admitted by the Commission in July 1998, February, July and November 1998, and July and November 1999. This fact resulted in almost all the adhering petitioners being considered alleged victims in the application, even though their adhesion was time-barred. Consequently, the State requested the Court to exclude the alleged victims who "adhered" when this was time-barred from the case.

#### *The Commission's arguments*

56. The Inter-American Commission requested the Court to reject the preliminary objection presented by the State since it "lacked any grounds," because:

- (a) The alleged expiry has no basis in the provisions of the American Convention or in the Statutes or Rules of Procedure of the system's organs, and
- (b) The list of the 257 Dismissed Congressional Employees has an "objective source," which is the judgment of the Constitutional Court of November 24, 1997. It was drawn up applying the provisions of the American Convention and the *pro homine* principle. The State, in exercise of the right of defense and the adversarial principle, received

the document at the appropriate time and, despite this, it did not submit any objection or observation on the said list.

*The common intervenors' arguments*

57. The common intervenors requested the Court to reject the objection and argued that:

- (a) The State is attempting to disregard the usual practice in the processing of individual petitions for the violation of rights embodied in the Convention, and
- (b) What the State refers to as "adhesion" corresponds to the co-petitioner mechanism; this relates to third parties who, after the petition has been lodged before the Commission, express their desire to be considered petitioners in the case also. This frequent practice of admitting third parties who have not been named as petitioners is admissible provided that, as in this case, the original petitioner in the case does not oppose the admission of the co-petitioner.

*The Court's findings*

58. The State acknowledged, as regards the exhaustion of domestic remedies, that the "the period referred to in Article 32 of the [...] Rules of Procedure [of the Commission should be] calculated as of January 12, 1998, the date of publication of the judgment delivered by the Constitutional Court in File No. 338-1996-AA/TC." In point of fact, "Adolfo Fernández Saré and another [126] employees dismissed from the Congress of the Republic of Peru" lodged their petition before the Commission on March 26, 1998, and, subsequently, other petitions or requests to adhere to the petitions were presented<sup>1</sup> (*supra* paras. 5 to 12).

59. From the case file before the Commission, particularly from the contents of its Admissibility Report No. 52/00 of June 15, 2000 (*supra* para. 13), it is clear that "since the petitions in both case 11,830 and case 12,038 specifically name some individuals adding 'and others' and that, during the processing of the case, the [Commission] received different lists of names of the alleged victims from the petitioners, as well as adhesion requests from other individuals who asked to be incorporated as alleged victims, [the Commission] presumed that all those included in the Constitutional Court's judgment of November 24, 1997, were alleged victims." In other words, at that procedural opportunity, the Commission used "all those included" in the Constitutional Court's judgment as a basis for determining the alleged victims (*infra* para. 89(21) and 89(24)). In addition, in accordance with the right of defense and the adversarial principle, the Commission forwarded this information to the State, which never submitted any objection or observation to the

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<sup>1</sup> In July 1998, another petition was submitted (12,038) by at least 21 individuals. On February 4, 1999, two people asked to be considered "adherents" to the petition submitted by Mr. Fernández Saré. In April 1999, Mr. Fernández Saré indicated that there were 200 petitioners. Subsequently, on December 9, 1999, the Lima Lawyers' Professional Association submitted several lists which included 52 individuals who appear in the first petition lodged by Mr. Fernández Saré; 16 individuals who, according to the Lawyers' Professional Association, had not exhausted domestic remedies; 14 individuals who are included in petition 11,830; 13 individuals who are included in petition 12,038; two people who adhered to petition 12,038; and three people who adhered to petition 12,038 but who, according to the Lawyers' Professional Association, had also not exhausted domestic remedies.

Commission concerning the list of petitioners prepared on the basis of the judgment of the Constitutional Court, until it filed this preliminary objection. Furthermore, the Court notes that, during the remainder of the proceedings before the Commission, Peru did not present any objection regarding the legitimacy of those who lodged the petition or those who appear as alleged victims. Moreover, the State held various extensive meetings with representatives of the petitioners aimed at reaching a friendly settlement.<sup>2</sup>

60. Consequently, the State cannot validly adduce the Commission's actions in relation to the processing and admission of the petitions and, even less, concerning the determination of the alleged victims at this procedural stage, because even though fact that it received timely information on these issues it did not express its disagreement in this regard during the proceedings before the Commission. Since no objection regarding this issue was filed at the proper procedural opportunity, the Court concludes that, based on the estoppel principle, the State cannot adduce it before this Court,<sup>3</sup> because it has tacitly waived this possibility. In view of the foregoing, the Court rejects the first preliminary objection "based on expiration" filed by the State.

## **SECOND PRELIMINARY OBJECTION "Legal defects"**

### 61. *The State's arguments*

- (a) The Commission denaturalized the formalities of the procedure defined in Articles 29 and 37 of its Rules of Procedure by validating facts that it had been informed about as grounds for a precautionary measure, when the domestic jurisdiction had not been exhausted. The State therefore alleged that the Commission should have admitted the petition that originated case 11,830 as a new case, dispensing with the background information contained in the said precautionary measure, regarding which the Commission itself had indicated that "it did not constitute an urgent case," and
- (b) In its application, the Commission unduly considered as alleged victims some individuals who are currently employed in Congress as well as dismissed employees who aspire to be reinstated in their posts even though they have collected their social benefits. Consequently, the State requested the Court to exclude those who were in this situation from the case.

### *The Commission's arguments*

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<sup>2</sup> Cf. minutes of the induction and meetings of the Multisectoral Commission responsible for preparing a final settlement proposal in IACHR 11,830 – Dismissed Congressional Employees dated February 7, 11, 20, and 27, March 31 and April 7, 2003 (file of appendixes to the application, appendix 4, tome 5, folios 3101, 3104, 3106, 3109, 3111 and 3114).

<sup>3</sup> Cf. *Case of Almonacid Arellano et al.* . Judgment of September 26, 2006. Series C No. 154, para. 65; *Case of Acevedo Jaramillo et al.*. Judgment of February 7, 2006. Series C No. 144, para. 176, and *Case of the Moiwana Community* . Judgment of June 15, 2005. Series C No. 124, para. 58.

62. The Inter-American Commission considered that the State's argument relating to the characterization of the application was not in order, because:

- (a) The American Convention does not establish any limitation that would provide grounds for this argument. In this regard, the text and language of Article 48(1) of the Convention is particularly comprehensive and there is no reason to suppose that cases should be opened based only on documents entitled "petitions," and
- (b) The opening of the case based on the request for precautionary measures does not harm the State's right of defense. In this case the provisions of the Convention and the Rules of Procedure were applied and the right of defense and the adversarial principle were respected. Furthermore, the State was informed of the request on which the case was based, and submitted arguments and information with regard to it.

63. In relation to the argument concerning the "reinstatement of some victims," the Commission considered that the alleged reinstatement does not prevent the Court from having competence, because this circumstance constitutes a finding on merits and the examination and consideration of its effects relate to the issue of reparations.

*The common intervenors' arguments*

64. The common intervenors requested the Court to reject the objection relating to alleged legal defects in the processing of the petitions that gave rise to the case and argued that precautionary measures and petitions are distinct within the framework of the inter-American system for the protection of human rights. The former seek the avoidance of the irreparable violation of human rights rather than a ruling on merits, "consequently, granting them does not constitute prejudgment"; in contrast, the latter seek to sanction the State's international responsibility for the violation of human rights. They also endorsed the Commission's arguments.

*The Court's findings*

a) *The alleged denaturalizing of the formalities*

65. The Court has verified that the petition presented by Mr. Fernández Saré in March 1998, on behalf of himself and 126 other dismissed employees reiterated the facts that formed the grounds for the request for precautionary measures that the same Mr. Fernández Saré and four other individuals had previously presented to the Commission and which had been rejected because the Commission considered that it did not comply with the requirements for requesting precautionary measures (*supra* paras. 5 to 8).

66. The Court has previously considered that the American Convention endows the Court with full jurisdiction over all matters relating to a case submitted to its consideration, including the procedural requirements on which the possibility of

exercising its competence is based,<sup>4</sup> without this necessarily supposing a review of the proceedings before the Commission, unless there has been a grave error that violates the State's right of defense. In the instant case, the State has not demonstrated how this action of the Commission prejudiced it during the proceedings before that organ of protection.

67. Notwithstanding the above, once the Commission is given specific information regarding alleged human rights violations, it is the Commission that determines the procedure through which this information should be channeled, within the sphere of its extensive mandate, established in both the Charter of the Organization of American States and the American Convention, for the promotion and protection of such rights.

68. Based on the above findings, the Court rejects subparagraph (a) of the second preliminary objection filed by the State.

*b) The alleged undue consideration of alleged victims*

69. The State alleged that the Commission had unduly considered as alleged victims some of the 257 persons who are currently employed in the Congress of the Republic of Peru and others who, having collected their social benefits, are attempting to achieve reinstatement in their posts.

70. The Court observes that, in these international proceedings, determination of the effects of some of the alleged victims having returned to work in the institution from which they had allegedly been dismissed, and also the validity of their claims for reinstatement, correspond to considerations that belong to the stages on merits and, possibly, reparations. In other words, these alleged facts and claims do not constitute reasons or assumptions that can limit the Court's competence to formally consider as alleged victims those persons who may be in the situation indicated by the State. Consequently, the relevance of these facts must be determined and assessed at the stages of merits and, if applicable, reparations.

71. Hence, the arguments contain in subparagraph (b) of the second preliminary objection filed by the State do not constitute a defense of this type, and must therefore be rejected.

**THIRD PRELIMINARY OBJECTION**  
***"Objection of lack of legitimacy to act"***

*The State's arguments*

72. The State alleged that the Inter-American Commission did not take into account, as stipulated in Article 33 of the Court's Rules of Procedure, that 41 people considered victims in the application have not granted powers of attorney to be represented before the international jurisdiction. Hence, the State asked the Court to

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<sup>4</sup> Cf. *Case of Acevedo Jaramillo et al.*, *supra* note 3, para. 121; *Case of the Girls Yean and Bosico*. Judgment of September 8, 2005. Series C No. 130, para. 59, and *Case of the Serrano Cruz Sisters*. Preliminary Objections. Judgment of November 23, 2004. Series C No. 118, para. 132.

exclude from the case the employees who were not duly represented in the proceedings before this jurisdiction.

*The Commission's arguments*

73. The Inter-American Commission indicated that this preliminary objection was not based on any norm that established the lack of "legal representation" before the Court as an obstacle to accede to the Court's jurisdiction. In this regard, the Court's Rules of Procedure establish that, in the absence of information regarding representation, the Commission shall be the procedural representative "as guarantor of the public interest under the American Convention on Human Rights to ensure that they have the benefit of legal representation." In addition, as an argument concerning the second preliminary objection, the Commission had indicated that the "lack of a representative" is not an obstacle "to the Court's competence" because, as established in Article 44 of the Convention, any group of persons may report the violation of the rights it establishes. In this case, the petitioners are a "group of persons" and this complies with the hypothesis for legitimacy established in the said Article 44.

*The common intervenors' arguments*

74. The common intervenors requested the Court to reject the third objection because the Inter-American Commission was responsible for representing the alleged victims who had not granted a special power of attorney to represent them in the processing of the case. They also based their arguments on the criteria adopted by the Court in similar cases.

*The Court's findings*

75. Article 33 (Filing of the application) of the Court's Rules of Procedure establishes that:

The brief containing the application shall indicate: [...]

3. The names and addresses of the representatives of the alleged victims and their next of kin. If this information is not provided in the application, the Commission shall act on behalf of the alleged victims and their next of kin in its capacity as guarantor of the public interest under the American Convention on Human Rights to ensure that they have the benefit of legal representation.

76. The Court observes that when the Commission submitted the case to the Court's consideration, it attached the powers of attorney of more than 215 alleged victims. The said powers of attorney were granted to two different groups of representatives. Given that the groups of representatives were unable to agree on a common intervenor, the Court appointed Javier Mujica Petit and Francisco Ercilio Moura as the common intervenors of the representatives pursuant to the provisions of Article 23(2) of the Rules of Procedure. Moreover, when notifying the application, the Court indicated that "in the case of the alleged victims who were not represented [as a result of this decision] or who had no representative, the Commission would be their representative in the proceedings as guarantor of the public interest to ensure that they have the benefit of legal representation," pursuant to the provisions of Article 33(3) of the Rules of Procedure (*supra* para. 34).

77. In this regard, the Court has established that the designation of a legal representative in the proceedings before the Court is a right rather than an obligation of the alleged victims.<sup>5</sup> Also, in relation to the participation of the victims and their next of kin, the Court has indicated that their representatives exercise the representation of those who have granted a valid power of attorney to this end and, that, in the case of those who lack this representation, it is assumed by the Inter-American Commission, which must safeguard their interests and ensure that they are represented effectively at the different procedural stages before the Court, “as guarantor of the public interest under the American Convention on Human Rights to ensure that they have the benefit of legal representation” (Article 33(3) of the Rules of Procedure). This is the Court’s understanding; consequently, its assessments and decisions concerning merits and possible reparations will not depend on the organization, institution or persons who exercise the specific representations, in compliance with its inherent functions as an international human rights tribunal and in application of the *pro persona* principle.<sup>6</sup>

78. Based on the foregoing, the Court rejects the third preliminary objection.

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79. Having rejected the three preliminary objections filed by the State, the Court will proceed to examine the merits of the case.

## VI EVIDENCE

80. Based on the provisions of Articles 44 and 45 of the Rules of Procedure, and also on the Court’s case law regarding evidence and its assessment,<sup>7</sup> the Court will proceed to examine and assess the probative elements forwarded by the common intervenors, the Commission, and the State at different procedural opportunities or as helpful evidence that they were requested to provide on the instructions of the President. To this end, the Court will observe the principles of sound criticism, within the corresponding legal framework.<sup>8</sup>

### A) DOCUMENTARY EVIDENCE

81. The parties forwarded certain testimonial and expert statements called for in the President’s order of May 17, 2006 (*supra* para. 44). The Court will summarize these statements below:

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<sup>5</sup> Cf. *Case of Acevedo Jaramillo et al.*, *supra* note 3, para. 143, and *Case of Yatama*. Judgment of June 23, 2005. Series C No. 127, para. 86.

<sup>6</sup> Cf. *Case of the Pueblo Bello Massacre*. Judgment of January 31, 2006. Series C No. 140, para. 59.

<sup>7</sup> Cf. *Case of Almonacid Arellano et al.*, *supra* note 3, paras. 66 to 69; *Case of Servellón García et al.*. Judgment of September 21, 2006. Series C No. 152, paras. 32 to 35, and *Case of Acevedo Jaramillo et al.*, *supra* note 3, paras. 183 to 185.

<sup>8</sup> Cf. *Case of Goiburú et al.*. Judgment of September 22, 2006. Series C No. 153, para. 55

*Testimonies proposed by the common intervenors*

a) *Ricardo Julio Callirgos Tarazona, alleged victim*

On his dismissal from the Congress of the Republic he had no other source of income for the upkeep of his household. His dismissal occurred "in the context of the disruption of the rule of law," and "[his] dismissal is characterized by its [alleged] illegality"; in addition, the right of the dismissed employees to have access to an *amparo* remedy (recourse for the protection of constitutional rights) was allegedly suspended.

He resorted to the administrative proceeding and, when he had exhausted this, he had recourse to judicial proceedings, subsequently addressing himself to the Inter-American Commission.

Since his dismissal, he "has been unable to recover his former standard of living[, and had] to resort to different jobs that allowed him to survive, [...] all of this without any work benefits." Up until he was dismissed, he "enjoyed job security, social security, and the probability of a pension." His family was prejudiced owing to "the lack of adequate nutrition, [because he] did not have the money to maintain them and [his] family's life project was changed totally, [because] when the State dismissed [him,] it took away not only his job, but the possibility of physical and spiritual development[. The State eliminated his children's] possibility of a more appropriate education. "[His] wife had a stroke as a result of the penury they endured." Currently, he is working temporarily as a maintenance and cleaning assistant in a dentistry clinic.

He has not lost "hope of recovering [his] employment" and "trusts that the Court [...] can end these 14 years of financial and moral frustration [...]." He hopes to "recover [his] job [and for] financial reparation for the damage caused."

b) *Margarita Agustina Álvarez Chavarri widow of Purizaca (wife of José Humberto Purizaca Arambulo), deceased alleged victim*

Her husband was the only source of maintenance for their household. She described the actions taken by her husband to contest his dismissal, first through administrative and then judicial channels, including the Constitutional Court. When her husband was dismissed "he obtained temporary work, but it was badly paid [...], which prejudiced his health [and he required] a heart valve transplant owing to aortic insufficiency." Since her husband no longer had social security, he was unable to have the operation and, in 1999, four years after receiving the diagnosis of his illness, he died of a heart attack.

Her husband "was depressed; at times he wanted to die of despair" and, when he died, she "had to resort to friends" for financial aid in order to bury him. Her school-age children had to go out to work, "because the family did not have enough money; [...] at times there was not enough food; there was no money to pay for electricity or water. [...They felt] frustrated and powerless." Her children could not continue their schooling.



A year after her husband's death, she asked for a "widow's pension," but this "does not provide enough to live on," so that she now lives with her parents. Her father receives a "very small [pension] and they subsist with this."

She asked for "justice, not only for [herself,] but for all those who are in the same situation."

c) *María de los Ángeles Chang Begazo, daughter of Zoila Luz Ynés Begazo Salazar de Chang, alleged victim*

Her mother was the sole support of the family and even maintained her grandmother, because her father was ill and unable to work.

Her mother resorted to judicial channels to obtain reinstatement in her post and, owing to her age, could not find any work despite her "excellent curriculum." Consequently, she "returned home crying every day," "her self-esteem was affected" and she had to find cleaning work [as] a domestic employee, among other jobs. "When she was unable to obtain work, there was no money for food."

As a result of her mother's dismissal, the witness was transferred to another school, which involved having to travel to that establishment without a bus service. "After [her] mother's dismissal, her grandmother was greatly affected, [...] she had heart problems [and subsequently died]."

She hopes that her mother will obtain "the total restitution of all her rights, [...] that justice will be done, and that she is ensured a decent future."

d) *Jackeline Magallán Galoc, alleged victim*

Following her dismissal from the Congress of the Republic she had recourse to an administrative proceeding, then to the courts, including the Constitutional Court, seeking her reinstatement unsuccessfully; hence, finally, she resorted to the Inter-American Commission.

After her dismissal, she said that she had had to work "in whatever she could find," because she could not find work related to her professional experience and this has made her feel "frustrated, hurt [and] very bitter." She could not continue to pay the private education of her three daughters and had to transfer them to a State school. The witness stated that she felt frustration as a mother since she could not give more to her daughters and because she has had health problems since the death of one of her daughters.

She resorted to the Inter-American Court "in the hope of obtaining justice" and asked that the Court should "decide on sanctions for the State; that [they] be reinstated [in their posts]; receive reparation for all these years; be compensated because [their] life projects were frustrated, and be paid the remuneration [they] ceased to receive."

e) *Frida Luisa Salas Sobrino, alleged victim*

After the administrative proceedings were exhausted, she resorted to the courts in order to seek her reinstatement in Congress. The dismissed employees had recourse

to the parliamentarians, the Ombudsman, the political parties, the representatives of the Catholic Church, human rights organizations and the public prosecutors.

The fact that she was dismissed from her employment in Congress "cut short [her] career and [her] will to realize her full potential and advance professionally." Since she did not have enough money, she sought other sources of income, but "finding herself without stable employment has been very hard and has prejudiced [her] health. [...Moreover, since she does not have] health insurance, [she has] not been able to take proper care of [herself] and [her] physical condition is worsening." The bank "took away" her house, because she was unable to continue making the monthly payments. "Believing that it was the best thing for [her] son," she sent him to live with her sister, and the separation was "very hard." Finding herself without work "affected [her] a great deal; the change in her life was very difficult [and her] health has been affected."

She "hope[s] for justice from the Inter-American Court" and asks that "it try and resolve [her] problems; [...] that they are given what [they] have a right to, [...and] that [their] sufferings are ended."

*f) Luisa Chara Pacheco de Rivas, alleged victim*

Following her dismissal as a congressional employee, she resorted unsuccessfully to the administrative proceeding to demand reinstatement; she then filed a complaint before the courts, which reached the Constitutional Court. Since these measures were ineffective, she had recourse to the Inter-American Commission.

When she found herself without employment, she had "to sell food to street vendors." Subsequently, she went to live in Argentina "seeking better financial conditions [in order] to help maintain [her] children." She "was unable to continue paying the university studies of [her] daughter[,...] who had to work to help the household." She feels frustrated "because she was a good worker, a good secretary [and she] did [her] job well." She feels that her "life project was disrupted [and that her] emotional state caused [her] to develop diabetes."

Her children have a "right to the health care and education" she has been unable to give them. Furthermore, she has not "been able to give [them ...] a home where they can live safely, because [she] is unemployed."

*Expert witness proposed by the Inter-American Commission*

*g) Samuel Abad Yupanqui, expert in constitutional law*

The expert witness referred to body that called itself the "National Emergency and Reconstruction Government," which acted "contrary to the Constitution and legislated by decree laws. [...T]o return to the democratic institutional framework and, owing to international pressure, [...] elections were called to choose a new Congress," known as the Democratic Constituent Congress (CCD).

From December 5 to 30, 1992, 748 decree laws were issued, one of which provide for the establishment of a commission to administer the patrimony of the Congress of the Republic, and to adopt "the necessary administrative measures and actions concerning personnel." Decree 25640 stipulated that this reorganization commission would implement a streamlining process and also established the inadmissibility of

the action for *amparo* to contest the application of this decree directly or indirectly. In addition, a resolution of October 1992 had established that the Commission to Administer the Patrimony of Congress would not accept complaints concerning the results of the selection examination.

Once the so-called Democratic Constituent Congress had been installed, it "declared that the 1979 Constitution was in force, except in the case of the decree laws issued by the Government. It also declared that the decree laws were in force until they were revised, modified or derogated" by this Congress. It did not question their validity.

It was the constitutional procedure of *amparo* that "suffered the greatest modifications as of the coup [d'état] of April 5, 1992," in addition to "the denaturalization of the procedural system of precautionary measures and [...] the creation of arbitrary grounds for inadmissibility[. ...]n each of the decree laws where it was considered necessary, the Government began to include a provision that prevented the use of the *amparo* procedure to contest the [alleged] arbitrary acts that were committed." In this regard, he listed 18 decree laws that contained such a provision - including Decree Law No. 25640. Subsequently, these grounds for inadmissibility "issued during the exercise of the *de facto* regime, denaturalized the *amparo* procedure, because they established areas outside jurisdictional control. Thus, specific international human rights norms were affected." He also cited a judgment of the Constitutional Court of April 1997 establishing that "no authority could prevent individuals from exercising such actions when acts occur that threaten or violate constitutional rights that could be safeguarded by actions for protection (*acciones de garantía*)."

The Constitutional Court did not rule on the validity of Decree Law No. 25640 in this case, even though it could have "made it inapplicable by means of diffuse control"; also, it used "an erroneous criterion to calculate time limits."

Moreover, in this regard, at the time of the facts "it was impossible to file an action for unconstitutionality, because the justices of the Constitutional Court [...] had been removed from office [...]. Also, an action for *amparo* would have been declared inadmissible, because the decree law that regulated this matter prevented it. [...Further still,] the Judiciary was not totally and absolutely independent[, which] made it difficult for the judges to implement diffuse control." "All of this affected the right to an effective recourse before the courts."

"At the administrative level, it was not possible to raise objections because [the said Resolution of October 1992 established that] the Administrative Commission [...] would not accept complaints about the result of the examination." In that regard, "this norm contradicted the provisions of the Regulations of the General Norms for Administrative Procedures [...] in force [at the time of the facts,] which permitted the presentation of a recourse for reconsideration against any administrative act that affected the rights or interests of the individual concerned."

*Expert witness proposed by the common intervenors*

h) *Paúl Noriega Torero, economist*

He presented the technical calculations corresponding to the alleged loss of earnings and benefits of the dismissed employees. To this end, he based himself on the pay

scale report, the documents attesting to the variations in remuneration from 1993 to 2001, and the payrolls of the dismissed employees in the Congress of the Republic of Peru, by occupational categories.

He stated that, in order to determine technically the loss of earning and benefits, he had calculated the income and benefits that the dismissed employees would have received if they had continued working in Congress. The resulting information was prepared in accordance with the norms established in general national laws, including payment of legal interest. The amount of interest owing for failure to pay was calculated on the basis of the reports issued by the Office of the Superintendent of Banks and Insurance, which was considered an appropriate criterion.

#### *B) ASSESSMENT OF THE DOCUMENTARY EVIDENCE*

82. In this case as in others,<sup>9</sup> the Court accepts the probative value of the documents presented by the parties at the proper procedural opportunity, which were not contested or opposed, and whose authenticity was not questioned.

83. Regarding the documents forwarded as helpful evidence, clarification and explanation (*supra* para. 53), the Court incorporates them into the body of evidence in this case, in accordance with Article 45(2) of its Rules of Procedure, taking in account the observations submitted by the parties (*supra* para. 53).

84. The State contested the sworn statement of the expert witness Noriega Torero, presented by the common intervenors (*supra* paras. 47 and 81(h)), considering, *inter alia*, that it “was inexact [... and, also, because this expert witness] was not on the list of list of experts accredited to the Lima Superior Court of Justice, so that if he is not authorized to issue legal expert opinions in Peru, he was even less authorized to do so at a supranational level.” In this regard, the Court admits the opinion of Mr. Noriega Torero to the extent that it complies with the purpose defined in the President’s order of March 17, 2006 (*supra* para. 44), and assesses it together with the body of evidence, applying the rules of sound criticism and bearing in mind the State’s observations (*supra* para. 47).

85. The State also contested, in general, the sworn statements of the witnesses proposed by the common intervenors (*supra* para. 47). In this regard, the Court considers that these statements can help the Court determine the facts in this case to the extent that they comply with the purpose defined in the President’s order of March 17, 2006 (*supra* para. 44), and therefore assesses them applying the rules of sound criticism and bearing in mind the State’s observations (*supra* para. 44). The Court also recalls that, as they are alleged victims or their next of kin and have a direct interest in this case, their statements must be assessed together with all the evidence in the case and not in isolation.

86. With regard to the newspaper articles submitted by the parties, the Court has considered that they can be assessed when they refer to well-known public facts or declarations of State officials, or when they corroborate aspects related to the case.<sup>10</sup>

<sup>9</sup> Cf. *Case of Goiburú et al.*, *supra* note 8, para. 57; *Case of Servellón García et al.*, *supra* note 7, para. 38, and *Case of Ximenes Lopes*. Judgment of July 4, 2006. Series C No. 149, para. 44.

<sup>10</sup> Cf. *Case of Almonacid Arellano et al.*, *supra* note 3, para. 81; *Case of Servellón García et al.*, *supra* note 7, para. 50, and *Case of Ximenes Lopes*, *supra* note 9, para. 55.

87. The Court notes that only the common intervenors forwarded a few of the administrative recourses filed by some of the dismissed employees, although the common intervenors, the State, and the Commission had been asked to provide them as helpful evidence. In this regard, the State declared that "it does not have the corresponding administrative files, owing to the changes in the Administration at that time and the fire in the administrative offices on April 6, 1994, and therefore had been unable to obtain this information." The common intervenors stated that they had been unable to obtain most of the recourses "because of the passage of time." Consequently, the Court has no information on the content of all the recourses filed or the scope of the decisions taken in many of those recourses, or the date on which they were filed. In addition, it is not clear who and how many of the alleged victims filed administrative recourses, or if any administrative resolution was issued other than the 18 that appear among the documentation provided to the Court.

88. Regarding the documentation and information that the State and the common intervenors were repeatedly requested to provide (*supra* para. 53) and that they did not submit, the Court recalls that the parties should send the Court the evidence it requests. The Commission, the representatives and the State should facilitate all the probative elements requested so that the Court has all possible evidence in order to examine the facts and to justify its decisions.

## VII PROVEN FACTS

89. Based on the evidence provided and taking into account the statements made by the parties, the Court considers that the following facts have been proved:

### *Historical context of Peru at the time of the facts*

89(1) On July 28, 1990, Alberto Fujimori Fujimori assumed the Presidency of Peru under the 1979 Constitution, with a five-year mandate.<sup>11</sup>

89(2) On April 5, 1992, President Fujimori Fujimori broadcast the "Manifesto to the Nation" in which he stated, *inter alia*, that he considered that he had "the responsibility to assume an exceptional approach to try and accelerate the process of [...] national reconstruction and ha[d] therefore, [...] decide[d] [...] to temporarily dissolve the Congress of the Republic[, ...] to modernize the public administration, [and] to reorganize the Judiciary completely." The following day, based on this manifesto, Mr. Fujimori established transitorily the so-called "Emergency and National Reconstruction Government" by Decree Law No. 25418,<sup>12</sup> which stipulated:

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

<sup>11</sup> Cf. *Case of the Constitutional Court* . Judgment of January 31, 2001. Series C No. 71, para. 56(1).

<sup>12</sup> Cf. Decree Law No. 25418 of April 6, 1992, published the following day, which issued the Basic Law for the Emergency and National Reconstruction Government (file of appendixes to the application, tome I, appendix 5, folios 488 to 490).

- 1) To propose the modification of the Constitution so that the new instrument will be an effective mechanism for development.
- 2) To improve the moral fabric of the administration of justice and related institutions; and the national control system, decreeing the comprehensive reorganization of the Judiciary, the Constitutional Court, the National Council of the Judiciary, the Attorney General's Office (*Ministerio Público*) and the Comptroller General's Office.
- 3) To modernize the public administration, reforming the central Government structure, public enterprise and the decentralized public agencies, so that they become elements that promote productive activities. [...]

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

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

Article 8. The articles of the Constitution and legal provisions that are contrary to this Decree Law are suspended.<sup>13</sup>

89(3) As a result of various factors and in the context of the application of Resolution 1080 adopted by the OAS General Assembly on June 5, 1991, the instability led to the call for elections and the formation of the so-called "Democratic Constituent Congress" (CCD), which was supposed to draw up a new Constitution, among other matters. One of the first actions of this Congress was to issue the so-called "constitutional laws." The first of these, adopted on January 6, 1993, and published three days later, declared that the 1979 Constitution was in force, except in the case of the decree laws issued by the Government, and stated that they were in force until they were revised, modified or derogated by Congress itself.<sup>14</sup>

89(4) At the time the facts of the instant case occurred, when the alleged victims filed the administrative and judicial recourses, several decree laws included a provision that prevented an action for *amparo* being filed to contest their effects; this denaturalized the *amparo* procedure, because situations outside jurisdictional control were established.<sup>15</sup>

89(5) On October 31, 1993, a new Peruvian Constitution was adopted, promulgated by the so-called Democratic Constituent Congress on December 29, that year.<sup>16</sup>

89(6) Alberto Fujimori Fujimori was re-elected President of Peru in 1995 and assumed the Presidency again in July 2000. In November 2000 he renounced the

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<sup>13</sup> Cf. Decree Law No. 25418 of April 6, 1992, published the following day, which issued the Basic Law for the Emergency and National Reconstruction Government (file of appendixes to the application, tome I, appendix 5, folio 480).

<sup>14</sup> Cf. OAS General Assembly Resolution, AG/RES.1080 (XXI-0-91), adopted on June 5, 1991; Report of the Mission of the Inter-American Commission on Human Rights to Peru on April 23 and 24, 1992, Appendix VII, and sworn statement made by the expert witness Samuel Abad Yupanqui (evidence file, tome 17, folio 4981).

<sup>15</sup> Cf. sworn statement made by the expert witness Samuel Abad Yupanqui (evidence file, tome 17, folios 4983 and 4984).

<sup>16</sup> Cf. Peruvian Constitution, published in the official gazette on December 30, 1993 (appendixes to the application, appendix 4, tome 6, folios 3467 to 3481).

Presidency of his country from Japan; consequently, Congress appointed Valentin Paniagua Corazao, who was then President of Congress, as President of the transition Government, so that he could call elections.<sup>17</sup>

*The dismissal of the congressional employees*

89(7) On April 16, 1992, the "Emergency and National Reconstruction Government" issued Decree Law No. 25438 establishing the Commission to Administer the Patrimony of the Congress of the Republic (hereinafter "Administrative Commission"), mandated "to adopt the administrative measures and prepare the personnel actions that [were] necessary."<sup>18</sup>

89(8) On May 6, 1992, Decree Law No. 25477 stipulated that the Administrative Commission should "initiate an administrative streamlining process, to be concluded within 45 days of the publication of [the said] decree."<sup>19</sup>

89(9) Decree Law No. 25640 of July 21, 1992, authorized the implementation of the process to streamline the personnel of the Congress of the Republic.<sup>20</sup> This decree, under which the 257 alleged victims in this case were dismissed, established, *inter alia*:

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

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

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<sup>17</sup> A well-known fact.

<sup>18</sup> Cf. Article 1 of Decree Law No. 25438 of April 16, 1992, published on April 20, 1992, "constituting a Commission to administer the patrimony of the Congress of the Republic" (file of appendixes to the application, tome I, appendix 6, folio 492).

<sup>19</sup> Cf. Article 4 of Decree Law No. 25477 of May 6, 1992, published the following day, which established the terms of reference of the transitory Administrative Commission of the Legislative Chambers (file of appendixes to the application, tome I, appendix 7, folio 495). This Commission was presided by retired Peruvian Army Brigadier General Wilfredo Mori Orzo. On October 22, 1992, General (r) Wilfredo Mori Orzo requested leave, which was granted the same day for 60 days. Supreme Resolution 532-92-PCM, issued on November 5, 1992, and published the following day, established that General (r) Mori Orzo would be replaced by Colonel (r) Carlos Novoa Tello as of that date, "during the absence of the incumbent." On November 6, 1992, Colonel Novoa Tello, acting as President of the Administrative Commission, issued Resolution No. 1303-92-CACL, which was published on November 9, 1992. This Resolution adopted the merits classification for the evaluation and selection procedure for the personnel of the Congress of the Republic. (Cf. Supreme Resolution No. 498-92-PCM of October 22, 1992, granting leave to the PCM Adviser and President of the Commission to Administer the Patrimony of the Congress of the Republic (file of appendixes to the application, tome I, appendix 10, folio 501); Supreme Resolution No. 532-92-PCM of November 5, 1992, published the following day, with the mandate of the President of the Commission to Administer the Patrimony of the Congress of the Republic (file of appendixes to the application, tome I, appendix 11, folio 502); Resolution 1303-92-CACL of November 6, 1992, published on November 9, 1992, adopted the merits classification for the evaluation and selection procedure for the personnel of the Congress of the Republic (file of appendixes to the application, tome I, appendix 17, folios 540 to 543).

<sup>20</sup> Cf. Article 1 of Decree Law No. 25640 of July 21, 1992, published on July 24, 1992, authorizing the Commission to Administer the Patrimony of Congress to carry out the process of streamlining the personnel of the Congress of the Republic (file of appendixes to the application, tome I, appendix 8, folio 497).

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

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

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

Article 10. Any provisions that are opposed to this Decree Law shall be annulled or suspended, as applicable.<sup>21</sup>

89(10) Decree Law No. 25759 of October 1, 1992, stipulated that "the streamlining process" would conclude on November 6 that year, and the Administrative Commission was mandated to conduct the "Personnel Evaluation and Selection Procedure" by means of examinations to classify the personnel. It also stipulated that the employees who passed the examination would occupy, "the posts established in the new Congress Personnel Allocation Table strictly in order of merit"; and that those who did not find a vacancy for the position they were applying for or who did not take the examination would be "terminated owing to the reorganization and [would] only have the right to receive their legally-established social benefits." This Decree Law derogated article 4 of Decree Law No. 25640 (*supra* para. 89(9)).<sup>22</sup>

89(11) Resolution No. 1239-A-92-CACL of October 13, 1992, issued by the acting President of the Administrative Commission, adopted the "new Congress Personnel Allocation Table"; the requirements for taking the selection examinations for the posts established on this table; the bases for the selection examinations, and the regulations for the congressional personnel evaluation and selection procedure. It also stipulated that the "Administrative Commission [...] [would] not accept complaints concerning the results of the examination," and that this Commission would "issue resolutions declaring the termination of those employees who had not found a vacancy or who had not registered for the competitive examination."<sup>23</sup>

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

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<sup>21</sup> Cf. Decree Law No. 25640 of July 21, 1992, published on July 24, 1992, authorizing the Commission to Administer the Patrimony of Congress to carry out the process of streamlining the personnel of the Congress of the Republic (file of appendixes to the application, tome I, appendix 8, folio 497).

<sup>22</sup> Cf. Decree Law No. 25759 of October 1, 1992, published on October 8, 1992, establishing the date on which the process of streamlining the personnel of the Congress of the Republic would end (file of appendixes to the application, tome I, appendix 9, folio 500).

<sup>23</sup> Cf. Resolution No. 1239-A-92-CACL of October 13, 1992, published on October 22, 1992, adopting the new personnel allocation table, and the requirements, bases and regulations for the evaluation and selection procedure for personnel of the Congress of the Republic (file of appendixes to the application, tome I, appendix 24, folios 769(b) and 769(c)).



employees two days before the date of the examination [...] and, on the day itself, it [had been] detected that some employees arrived for the examination with the document completed."<sup>24</sup> Consequently, this evaluation procedure was annulled and it was established that the examination would be held on October 24 and 25, 1992.<sup>25</sup>

89(13) On November 6, 1992, the acting President of the Administrative Commission issued two resolutions under which 1,110 congressional officials and employees were dismissed – including the 257 alleged victims:

- (a) Resolution No. 1303-A-92-CACL, published on December 31, 1992, by which the employees who "decided not to register for the competitive examination and/or those who, having registered, did not complete the corresponding examination," were dismissed "owing to reorganization," and
- (b) Resolution No. 1303-B-92-CACL, published on December 31, 1992, by which the employees "who did not find a vacancy on the personnel allocation table of the Congress of the Republic" were dismissed "owing to reorganization and streamlining."<sup>26</sup>

89(14) On December 31, 1992, most of the employees who were dismissed by Resolutions Nos. 1303-A-92-CACL and 1303-B-CACL received cheques on the *Banco de la Nación* corresponding to the "payment of social benefits for 1992." These employees included at least 217 of the alleged victims.<sup>27</sup>

*The administrative measures taken before Congress by some former employees*

89(15) During the first days of January 1993, some of the dismissed employees filed a recourse for reconsideration before the President of the so-called Democratic Constituent Congress, to which "there was no response." Subsequently, these employees filed an appeal, and "there was no response [to this] either." Then, "Resolution 1534-93-CCD/OGA-OPER and others were issued declaring, in a single and final instance, that the methods they were using to file complaints were inadmissible, without ruling on the merits of these complaints."<sup>28</sup>

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<sup>24</sup> Cf. newspaper article in the *Diario La República* of October 21, 1992, entitled "Pruebas de evaluación del Congreso habrían sido vendidas en 500 dólares" (file of appendixes to the application, tome I, appendix 25, folio 770).

<sup>25</sup> Cf. Analysis of the viability of the recommendations issued by the Special Committees established to review the collective dismissals in the Final Report of the Multisectoral Commission of March 2002, Act No. 27586 (file of useful evidence presented by the State, folio 442).

<sup>26</sup> Cf. Resolutions 1303-A-92-CACL and 1303-B-92-CACL, both dated November 6, 1992, published on December 31, 1992, dismissing officials and employees of the Congress of the Republic (file of appendixes to the application, tome I, appendix 12, folios 503 to 510).

<sup>27</sup> Cf. Report No. 182-2001/CR/DT/AP of December 4, 2001 (file of useful evidence presented by the State, folios 4453, 4454, 4458, 4459, 4460 and 4479), and Report 013-2002-DT/CR issued by the Treasury Department of the Congress of the Republic on January 8, 2002 (file of useful evidence presented by the State, tome 12, folio 4453).

<sup>28</sup> Cf. judgment of the Constitutional Court of November 24, 1997 (file of appendixes to the application, tome I, appendix 13, folios 512 and 513).

89(16) On March 23, 1993, Resolution No. 052-93-CD/CCD "authorized the Personnel Executive Directive to sign, in single and final instance, the decisions corresponding to the complaints filed by the former employees of the Congress of the Republic against the effects of the resolutions issued by the Administrative Commission [...] during the reorganization process."<sup>29</sup>

89(17) On August 12, 1993, the President of the Democratic Constituent Congress issued Resolution 159-93-CD/CCD, by which it was decided, *inter alia*, "[t]o recognize the payment of remunerations and other social benefits for the period from November 7 to December 31, 1992, in favor of 1,117 [sic] former congressional employees [...] who were dismissed owing to reorganization and streamlining under Resolutions Nos. 1303/A-92-CACL and 1303/B-92-CACL"<sup>30</sup> (*supra* para. 89(13)).

89(18) On September 18, 1994, some of the alleged victims filed a recourse in which they requested the annulment of the resolutions ordering their termination (*supra* para. 89(13)).<sup>31</sup>

89(19) Resolution No. 840-94-CCD/G.RRHH of September 26, 1994, issued by the so-called Democratic Constituent Congress, based on Resolution No. 052-93-CD/CCD (*supra* para. 89(16)) and on articles 100 and 102 of Decree Law No. 26111 (Law on the General Norms for Administrative Procedures), considered that "the inadmissibility of the complaint recourses filed by the said group of former employees having been declared on an individual basis, mandated by the highest administrative instance of the Democratic Constituent Congress, the processing of new complaint recourses regarding the same administrative acts was therefore inadmissible."<sup>32</sup>

89(20) On December 15, 1994, those dismissed employees filed an appeal for review before the Democratic Constituent Congress. 30 days later, in the absence of a reply, the employees "considered that the administrative proceeding had been exhausted."<sup>33</sup>

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<sup>29</sup> Cf. Resolution No. 840-94-CCD/G.RRHH of September 26, 1994 (file of useful evidence presented by the representatives, folio 4622).

<sup>30</sup> Cf. Supreme resolution 159-93-CD/CCD of August 12, 1993 (file of useful evidence presented by the representatives, folios 4620 and 4621).

<sup>31</sup> Cf. judgment of the Constitutional Court of November 24, 1997 (file of appendixes to the application, tome I, appendix 13, folios 513).

<sup>32</sup> Cf. judgment of the Constitutional Court of November 24, 1997 (file of appendixes to the application, tome I, appendix 13, folios 513), and Resolution No. 840-94-CCD/G.RRHH of September 26, 1994 (file of useful evidence presented by the representatives, folio 4622).

<sup>33</sup> Cf. judgment of the Constitutional Court of November 24, 1997 (file of appendixes to the application, tome I, appendix 13, folio 513); Resolution No. 840-94-CCD/G.RRHH of September 26, 1994 (file of useful evidence presented by the representatives), and article 100 of Resolution 002-94-JUS (file of appendixes to the application, tome I, appendix 14, folio 523).

*The action for amparo filed by the 257 alleged victims*

89(21) On March 2, 1995, 20<sup>34</sup> dismissed employees filed an action for *amparo* before the Lima Twenty-eighth Civil Court, to which another 28<sup>35</sup> adhered on March 10, 1995, and 103<sup>36</sup> more on March 28, 1995, 71<sup>37</sup> more on April 12, 1995, and 15<sup>38</sup> more on April 20, 1995.<sup>39</sup>

<sup>34</sup> Rosa Ysabel Murillo Orihuela de Díaz, Nélica Gálvez Saldaña, Inés Belleza Cabanillas, Luz Angélica Talledo Añazco, Rommy Cecilia Rodríguez Campos, Jaime Jhonny Montoya Luna, Olimpio Huaraca Vargas, Juana Alcántara Ramos, Cecilia Victoria Gimeno Alemán, Rolando Alfonso Torres Prieto, Zoila Luz Begazo Salazar, Graciela Pedreshi Santín de Berropi, Marco Antonio Ordóñez Quispe, Rebeca Paucar Dávila, Dana Campos Alarcón, Lilia Carolina Flores Guillén, Luis Rodolfo Albornoz Alva, José Raúl Coronado Peña, Ricardo Callirgos Tarazona and Rosalía Pérez Polo.

<sup>35</sup> Ruth Cecilia Echevarría Suárez de Peña, Reyna Sánchez Alarcón, Nancy Violeta Ángeles Ponte, Nohemí Molina Ugarte, Guillermo Arias Infantes, Irene Ccapali Atoccca, Félix Cobeñas Pariamache, Zenón Ccapali Atoccca, Sergio Antonio Chala, Javier Sipan Guerra, Julio Lozano Muñoz, Rubén Javier Sotomayor Vargas, Hilda Valdez Tellez, Máximo Gonzáles Figueroa, José Raúl Araca Sosa, Gumercinda Echevarría Flores, Wilburt Villegas Guerra, Visitación Elizabeth Vera Vitorino, Rómulo Antonio Retuerto Aranda, Angela Valdez Rivera, Miguel Hurtado Gutiérrez, Carmen Zavaleta Saavedra, Lira Quiñones Atalaya, Berilda Muñoz Jesús, María Huaranga Soto, Johel Briones Rodríguez, Nina Díaz Céspedes and Jaime Barbarán Quispe.

<sup>36</sup> Elsi Judith Kitano la Torre, Félix Espinoza Fernández, Elisa Rodríguez García, Luis Rojas Figueroa, Isaías Román Toro, Luis Elera Molero, Edgar Dextre Cano, Inés Meléndez Saavedra, Vilma Burga Cardozo, Eva Vidal Vidal, Luis Gonzáles Panuera, Segundo García Vergara, Luz Sánchez Campos, César Montalván Alvarado, Liz Mujica Esquivel, Raúl Sánchez Candía, José Saavedra Ambrosio, Rosa Cherrez Córdova, Víctor Ampuero Ampuero, Juan Cajusol Bances, José Purizaca Arámbulo, Elsa Silvia Zapata Espinoza, Manuel Carranza Rodríguez, Lucas Herrera Rojas, Flavio Díaz Campos, Raquel Delgado Suárez, Rubén Reyes Caballero, Víctor del Castillo Meza, Edison Dextre Ordóñez, Ronald Santisteban Urmeneta, Edgar Velásquez Machuca, Leoncio Uchuya Chacaltana, José Clerque Gonzáles, Carmen Sosa Álvarez, Max Bautista Apolaya, Julio Rodas Romero, Gustavo Gonzáles Guillén, Elizabeth Luna Aragón, Luis Aliaga Lama, Carlos Ortega Martell, Juana Ugarte Pierrand, Cecilia Arcos Díaz, Rosario Zapata Zapata, Carlos Rivas Capeletti, Margarita Ramírez Granados, Neida Vizcarra Zorrilla, José Changanaqui Chávez, Mónica Lourdes Alvarado Suárez, Herlinda Ayala Palomino, Henry Camargo Matencio, Hipólito Cornelio Dávila, Edith Soria Cañas, Frida Salas Sobrino, Lucy Loayza Arcos, Iván Zumaeta Flores, Rosa Arévalo Torres, Elizabeth Carrillo Quiñones, Flavio Orillo Vásquez Torres, Juan Alvarado Achicahuala, Oscar Santiviáñez Velásquez, Wilder Solís Retuerto, Guadalupe Cabanillas Toro, Daysi Cornelio Figueroa, Fidel Vásquez Sánchez, Susana Ibarra Ñato, Oscar Owada Amado, Luz Gallegos Ramírez, Hermelinda Villarreal Rodríguez, Víctor Rojas Cortez, Lupo Cubas Vásquez, Andrés Hajar Cerpa, Marleni Álvarez Gutiérrez, Jorge Navarro Sánchez, María Romero Chang, Manuel Mendoza Michuy, Manuel Quiñones Díaz, José Aguado Alfaro, Guisella Aguilar Rojas, Rosa Canepa Campos, Alfredo Ballarta Rueda, Clemencia Solís Martell, Iván Silva Delgado, Tiburcio Chipana Quispe, Luis Chipana Rodríguez, Sara Ibáñez Ortiz, Manuel Margarito Silva, Irma Rojas Vega, José Villar Contreras, Juan Huaman Cárdenas, Wilfredo Chino Villegas, Eleuterio Solís Roca, Elmi Ramos de la Cruz, Juan Guzmán Rebatta, Mario Peredo Cavassa, Jorge Pacheco Munayco, Leti Torres Hoyos, Meri Huamantumba Vasquez, Delano Marcelo Navarro, Gloria Dergan Alcántara, Armando Saavedra Vega, Marco Antonio Jaimes Cano, Roberto Ribotte Rodríguez and Jhon Ravello Velásquez.

<sup>37</sup> Adolfo Fernández Saré, Héctor Malpartida Gutiérrez, José Clerque Gonzales, Iván Alex Vega Díaz, Valeriano Sebastián Bonifacio Ramón, Jorge Ganoza Rivera, Daniel Arnez Macedo, Teresa Pichilingue Romero, Nelly Rivera Martínez, Antonia Elizabeth Córdova Melgarejo, Edgar Velásquez Machuca, Dully del Águila Chamay, Catalina Paitan Mauricio, Bertha Rivera Delgado, Juan Francisco Delgado Gómez, Ricardo Hernández Fernández, Wilfredo Emilio Huaman Trinidad, Juan Torres Martínez, Víctor Manuel Urrunaga Linares, Jorge Martín Rivas Chara, César Augusto Bravo Sarco, Luisa Chara Pacheco, Freddy Varias Trabanco, Orlando Díaz López, Manuel Cuadros Livelli, Eugenio Rodríguez Espada, Reynaldo Herrera Valdez, Antonio Condezo Espinoza, Caro Herrera Madueño, Ricardo Gonzáles Castillo, Margarita Moreno Gonzáles, Cita Vereau Palma, Ana María García Hualpa, Felícita Meri Huamantumba Vásquez, Virginia Eugenio Centeno, Violeta Saavedra Mego, Alicia Peredo Cavassa, Juana Bracamonte Chiringano, María Salazar Venegas, Luis Marrugarra Neyra, Luisa Pilco Guerra, Leoncio Beltrán Aguilar, Víctor Nizama Zelaya, Jacinta Ramírez de Peña, Víctor Núñez Centeno, Consuelo Pizarro Sánchez, Carmen Núñez Morales, María Inga Coronado, Máximo Atauje Montes, Jackeline Magallán Galoc, Carlos La Cruz Crespo, César Grandez Alvarado, Jorge Ore León, José Marchena Alva, Gustavo Gonzáles Guillén, José Clerque

89(22) In a judgment of June 26, 1995, this court declared the complaint admissible and Resolutions 1303-A-92-CACL and 1303-B-92-CACL of November 6, 1992, inapplicable (*supra* para. 89(13)). Consequently, the court ordered that the plaintiffs be reinstated in the posts they occupied when their right was affected. This ruling found that:

Although it was issued on November 5, 1992, Resolution [...] 532-92-PCM was only published on November 6 and, consequently, [...] this decision could not come into force until the day following its publication, that is November 7, 1992, and only as of that date could Carlos Novoa Tello act as President of the Commission and issue the corresponding resolutions, particularly in the case of a streamlining process that would affect a number of congressional employees; in addition, there was a legal impediment, because the streamlining period had expired on November 6, 1992; therefore, Novoa Tello could not issue a Resolution in this respect as of November 7 when he was able to exercise this function; likewise, Resolutions 1303-A-92-CACL and 1303-B-92-CACL [...] are ineffective with regard to the plaintiffs because they were issued on November 6, 1992, by someone who, on that date, was not legally entitled to exercise the position; and it is symptomatic that the publication has only just been made on December 31, 1992, alleging that Supreme Resolution No. 532-92-PCM cannot have retroactive effects [...].<sup>40</sup>

89(23) In July 1995, the Legislature's Public Attorney filed an appeal before the Lima Twenty-eighth Civil Court with regard to the judgment of June 26, 1995 (*supra* para. 89(22)) for "the higher ranking court to revoke it."<sup>41</sup>

89(24) On August 22, 1995, 18<sup>42</sup> dismissed employees asked to take part as joint litigants in the proceedings. In October and November 1995, another 11<sup>43</sup> dismissed

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González, Nelly Rivera Martínez, Juan Vásquez Quezada, César Pérez Guevara, Bladimir Chávez García, Santiago Erquiñigo Ramón, César Sernaqué Vargas, Javier Flores Salinas, Eduardo Salazar Caycho, Oscar Vásquez Legua, Víctor Silva Baca, Elieberto Silva Baca, Tito Hinojosa Toro, Soledad Vásquez Quiñones, Walter de la Cruz Paredes and Carmen Sosa Álvarez.

<sup>38</sup> Juan Carlos Sánchez Lozano, Julio Antonio Rigaid Arévalo, Esther Cisneros Urbina, César Pérez Guevara, Moisés Pajares Godoy, Segundo Zegarra Zevallos, Walter Soto Santana, Carlos Unzueta Medina, Walter Soto Santana, María Infantes Vásquez, Jesús Hinojosa Silva, Félix Aguilar Rojas, Lidia Bereche Riojas, Carmen Rivera Loayza and Teodoro Castro Salvatierra.

<sup>39</sup> Cf. judgment of the Lima Twenty-eighth Civil Court of June 26, 1995 (file of appendixes to the application, tome I, appendix 15, folios 524, 530 to 532 and 536); *amparo* recourse filed by some employees on March 2, 1995, before the Lima Twenty-eighth Civil Court (file of appendixes to the application, tome I, appendix 22 A, folios 673 to 680), and briefs of March 10 and 28, 1995, adhering to the *amparo* recourse filed on March 2, 1995 (file of appendixes to the application, tome I, appendix 22 B and C, folios 682 to 687).

<sup>40</sup> Cf. judgment of the Lima Twenty-eighth Civil Court of June 26, 1995 (file of appendixes to the application, tome I, appendix 15, folios 524, 530 to 532 and 536).

<sup>41</sup> Cf. appeal filed by the Attorney General's Office before the Lima Twenty-eighth Civil Court (file of appendixes to the application, tome I, appendix 22 K, folios 744 to 751).

<sup>42</sup> Hugo Montes Yacsahuache, Ronald Luciano Revelo Infante, Agustín Miguel Arturo Polo Castañeda, Liduvina Salcedo Olivares, David Orlando Zegarra Castro, Laura Colan Villegas, Rodolfo Guevara Gallo, Mónica Emperatriz Ramírez Rodríguez, Anabel Iris González Sánchez, Eriberto Rodolfo Alvarado Galván, Marcial de la Cruz Paredes, Sergio Alejandro Medina Ramírez, Herver Víctor Cárdenas Pinto, Vicente Waldo Rodríguez Reaño, Telmo Jaime Barba Ureña, Folgges Luis Hayasshi Bejarano, Aquilino Menacho Salas and Hugo Montes Pacora.

<sup>43</sup> Carmen Rosa Paredes Cuba, Walter Roberto Paredes Cuba, Pablo Jorge Ferradas Núñez, Augusto Bellido Orihuela, Alfredo Cabrera Enriquez and Ronald Urquiza Alcántara, Pedro Quiñonez Seminario, María Elena Quineche Díaz, Amelia Rosario Pohl Luna, Walter Pereyra Salazar and Giovanna Elset Soto Santana.

employees joined the proceedings.<sup>44</sup> Thus, the 257 alleged victims in this case became appellants.<sup>45</sup>

89(25) On February 21, 1996, the Fifth Civil Chamber of the Lima Superior Court of Justice revoked the judgment appealed by the Public Attorney (*supra* para. 89(22) and 89(23)), reformed it and declared “totally inadmissible the action for *amparo* filed” by the dismissed employees. In this regard, it found, *inter alia*, that:

Article 37 of the Act [on Habeas Corpus and *Amparo* (] No. 23,506) establishes that the exercise of the action for *amparo* expires 60 working days after the right has been affected, provided that the person concerned has been able to file the action by that date; [...] that in the case sub-litis, the plaintiffs have not provided any evidence that they were unable to file the action; [...] that actions for protection are not admissible in cases of termination of employment or irreparability of the harm; [...] that article 28 of the above-mentioned Act [...] determines that the exhaustion of prior procedures cannot be required when this has not been regulated or it has been initiated unnecessarily by the claimant; given that Resolution No. 1239-A-92-CACL stipulated that no recourse could be accepted against the resolutions issued by the Commission to Administer the Patrimony of the Congress, and it was the final instance [...].<sup>46</sup>

89(26) A group of at least 20<sup>47</sup> dismissed employees filed a special resource before the Constitutional Court against the Resolution of February 21, 1996, issued by the Fifth Civil Chamber of the Lima Superior Court of Justice (*supra* para. 89(25)).<sup>48</sup>

89(27) On June 15 and 16, 1996, a new Constitutional Court was established in Peru composed of the justices: Ricardo Nugent (President), Guillermo Rey Terry, Manuel Aguirre Roca, Luis Guillermo Díaz Valverde, Delia Revoredo Marsano, Francisco Javier Acosta Sánchez and José García Marcelo. On May 28, 1997, the Congress in plenary session, dismissed the following Constitutional Court justices: Manuel Aguirre Roca, Guillermo Rey Terry and Delia Revoredo Marsano. On November 17, 2000, Congress annulled the dismissal resolutions and reinstated them in their posts.<sup>49</sup> In another case, this Court has verified that, while this destitution lasted, the Constitutional Court “was dismantled and disqualified from exercising its jurisdiction appropriately,

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<sup>44</sup> Cf. judgment of the Lima Twenty-eighth Civil Court of June 26, 1995 (file of appendixes to the application, tome I, appendix 15, folios 524, 530 to 532 and 536).

<sup>45</sup> Although the names mentioned in paragraphs 89(21) and 89(24) add up to 266 appellants, the names of Clerque Gonzáles, José Luis; Gonzáles Guillén, Gustavo; Humantumba Vásquez, Felicita Merí; Pérez Guevara, César Dionisio; Rivera Martínez, Nelly Andrea; Sosa Álvarez, Carmen; Soto Santana, Walter Edgardo; Velásquez Machuca and Edgar Humberto are repeated, and one of them is repeated twice. Thus, there were a total of 257 appellants.

<sup>46</sup> Cf. judgment of the Fifth Civil Chamber of the Lima Superior Court of Justice of February 21, 1996 (file of appendixes to the application, tome I, appendix 16, folios 537 and 538).

<sup>47</sup> Rosa Ysabel Murillo Orihuela, Néida Gálvez Saldaña, Inés Belleza Cabanillas, Luz Angélica Talledo Añazco, Rommy Cecilia Rodríguez Campos, Jaime Jhonny Montoya Luna, Olimpio Huaraca Vargas, Juana Alcántara Ramos, Cecilia Victoria Gimeno Alemán, Rolando Alfonso Torres Prieto, Zoila Luz Begazo Salazar, Graciela Pedreshi de Berropi, Marco Antonio Ordóñez Quispe, Rebeca Paucar Dávila, Dana Campos Alarcón, Lilia Carolina Flores Guillén, Luis Rodolfo Alboronoz Alva, José Raúl Coronado Peña, Ricardo Callirgos Tarazona, Rosalía Pérez Polo, and others.

<sup>48</sup> Cf. judgment of the Tribunal Constitucional of November 24, 1997 (file of appendixes to the application, tome I, appendix 13, folio 511).

<sup>49</sup> Cf. *Case of the Constitutional Court*, *supra* note 11, paras. 56(3), 56(25) and 56(30).

particularly with regard to controlling constitutionality [...] and the consequent examination of whether the State's conduct was in harmony with the Constitution."<sup>50</sup>

89(28) On November 24, 1997, the Constitutional Court delivered a judgment, signed by the then justices Acosta Sánchez, Nugent, Díaz Valverde and García Marcelo, which confirmed the decision of the Fifth Civil Chamber of the Lima Superior Court of Justice (*supra* para. 89(25)). In this regard, the Constitutional Court found, *inter alia*, that:

It should be clarified that [...] the original complaint was filed on March 2, 1995, while [...] the Resolutions that are alleged to have violated rights were issued on December 31, 1992. [...]

Although the plaintiffs filed a delayed claim using the administrative proceeding, the latter was legally inadmissible, because article 27 of Resolution No. 1239-A-92-CACL of October 13, 1992, established explicitly that "the Commission to Administer the Patrimony of the Congress of the Republic shall not admit complaints concerning the results of the examination"; this means that they are non-appealable acts, at least in the strictly administrative sphere. [...]

Consequently, since, according to the law, there is no prior proceeding to resort to, article 28(3) of the Act [on Habeas Corpus and *Amparo*] (No. 23506) is fully applicable; it establishes that exhaustion cannot be invoked when "the prior proceeding has not been established by law, or if it has been filed unnecessarily by the claimant, even though he was not obliged to do this;" consequently, the period for calculating the extinguishment of this action, according to article 37 of the said Act, began 60 working days after the violations, which means that this period had expired a long time before the complaint was filed. [...]

In any case, extinguishment is not a mechanism intended to prevent the examination of the merits of situations that are submitted to constitutional proceedings without any other justification. Nevertheless, it should be understood that, if the interested parties do not act at the appropriate time to claim the constitutional defense of their rights, they cannot subsequently expect that a rule that is so necessary and logical for legal certainty will be dispensed with. [...]

Moreover, it should not be overlooked that if, in the actual circumstances – that is, under the 1993 Constitution – the organic structure of Congress and, consequently, its Personnel Allocation Table, has varied substantially in relation to the one it had under the previous Constitution, it is not possible, via *amparo*, to re-establish situations that, by their very nature, have become irreparable, and in such circumstances, article 6(1) of Act No. 23506 is applicable.<sup>51</sup>

#### *Other measures*

89(29) In October 1993 and January 1994, two alleged victims in this case<sup>52</sup> filed recourses under administrative law for, *inter alia*, the annulment or invalidation of the resolutions ordering their dismissal to be declared. The Lima Superior Court of Justice ruled that these recourses were inadmissible in November 1993 and December 1997.<sup>53</sup>

<sup>50</sup> Cf. *Case of the Constitutional Court*, *supra* note 11, para. 112.

<sup>51</sup> Cf. judgment of the Tribunal Constitucional of November 24, 1997 (file of appendixes to the application, tome I, appendix 13, folios 511 to 519).

<sup>52</sup> Lino Roberto Ribotte Rodríguez and Antonieta Elizabeth Córdova Melgarejo.

<sup>53</sup> Cf. administrative-law complaints filed by Lino Roberto Ribotte Rodríguez and Antonieta Elizabeth Córdova Melgarejo before the Lima Superior Court of Justice in October 1993 and January 1994 respectively; decisions of the Lima Superior Court of Justice of November 1994 and December 1997 (file of appendixes to the final arguments of the common intervenors, folios 5408 to 5424).

89(30) On March 3, 1998, six<sup>54</sup> dismissed employees filed a “constitutional complaint” against the justices of the Constitutional Court, Francisco Javier Acosta Sánchez, President, Ricardo Nugent López Chávez, José García Marcelo and Luis Díaz Valverde, for the offense of malfeasance “for having delivered the judgment [of November 24, 1997] against the clear and express text of the law, for having cited inexistent evidence and false facts, and for having based themselves on alleged or derogated laws.”<sup>55</sup> The result of this complaint does not appear in the file.

*Facts subsequent to the administrative and judicial measures*

89(31) After the alleged victims had filed recourses at the administrative and judicial level, and following the installation of the transition Government in 2000 (*supra* para. 89(6)), laws and administrative provisions were issued ordering a review of the collective dismissals in order to provide the employees dismissed from the public sector the possibility of claiming their rights (*infra* paras. 89(32) to 89(37)) .

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

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

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

Within 45 calendar days of their installation, the Special Committees shall prepare a report containing the list of the employees who were dismissed irregularly, if there are any, and also the recommendations and suggestions to be implemented by the Head of the sector or local government.<sup>56</sup> [...]

89(33) Supreme Decrees 021 and 022-2001-TR established the “terms of reference for the composition and operation of the Special Committees responsible for reviewing the collective dismissals in the public sector.”<sup>57</sup> Among them, the Special Committee responsible for reviewing the collective dismissals of congressional personnel under Act No. 27487 was established (*supra* para. 89(32)) and, in its report of December 20, 2001, it concluded *inter alia*, that:

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

<sup>54</sup> Mónica Alvarado Suárez, Rosario Zapata Zapata, Margarita Ramírez Granados, Cecilia Echevarría Suárez, María Huaraca Soto and Adolfo Fernández Saré.

<sup>55</sup> Cf. impeachment of four justices of the Constitutional Court of March 3, 1998 (file of appendixes to the application, tome I, appendix 23, folios 752 and 766).

<sup>56</sup> Cf. Act No. 27487, of June 21, 2001, published on June 23, 2001, derogating Decree Law No. 26093 and authorizing the establishment of committees to review the collective dismissals in the public sector (file of appendixes to the application, appendix 4, tome 4, folio 2649).

<sup>57</sup> Cf. supreme decrees 021 and 022-2001-TR of July 4 and 15, 2001, respectively (file of useful evidence presented by the State, folios 4383 to 4389).

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

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

[...] Pursuant to the [Peruvian] laws in force, the Special Committee has abstained from examining any claim that is before a judicial instance, in either the domestic or the supranational sphere.<sup>58</sup>

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

Since this matter was being decided by a supranational instance, under the laws in force, it was unable to rule on it; particularly since a group of the said former employees have formally requested the international organ to rule on the merits; hence, it abstained from issuing an opinion in this regard. [Moreover, it should not be overlooked that the 257 former employees were the only ones who exhausted the judicial proceedings.<sup>59</sup>

In other words, the 257 alleged victims in this case were not included in the hypotheses for the application of these supreme decrees.

89(34) Act No. 27586 of November 22, 2001, published on December 12, 2001, established that the latest date for the Special Committees to conclude their final reports was December 20, 2001 (*supra* para. 89(33)). The Act also created a Multisectoral Commission composed of the Ministers of Economy and Finance, Labor and Social Promotion, the Presidency, Health, and Education, as well as by four representatives of the provincial municipalities and by the Ombudsman, or their respective representatives. This Multisectoral Commission would be:

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

The said Multisectoral Commission may, also, review the reasons for the dismissals and determine the cases in which the payment of earned or pending remuneration or social benefits is owing, provided these aspects have not been the object of legal action.<sup>60</sup>

89(35) On March 26, 2002, the Multisectoral Commission issued its final report, concluding, *inter alia*, that "the norms that regulated the collective dismissals should not be questioned [...], merely the procedures by which they were implemented." It also agreed "that any recommendation on reincorporation or reinstatement should

<sup>58</sup> Cf. Report No. 002-2001-CERCC/CR of the Special Committee responsible for reviewing the collective dismissal of the congressional employees under Act No. 27487 (file of appendixes to the application, appendix 4, tome 3, Vol. II, folios 2187, 2240 to 2247).

<sup>59</sup> Cf. Report No. 002-2001-CERCC/CR of the Special Committee responsible for reviewing the collective dismissal of the congressional employees under Act No. 27487 (file of appendixes to the application, appendix 4, tome 3, Vol. II, folio 2227).

<sup>60</sup> Cf. Act No. 27586, published on December 12, 2001 (file of appendixes to the application, Appendix 4, tome 4, folio 2650).



be understood as a new labor relationship, which could be a new contract or a new appointment, provided that there are vacant budgeted posts in the entities or that such posts are opened up; that the employees comply with the requirements for these posts; that there is legal competence to hire, and that there is a legal norm authorizing appointments." Based on the Special Committee's recommendations, it considered that there had been 60 cases of irregular dismissals under the 1992 evaluation and selection procedure (*supra* para. 89(7) to 89(13)), with regard to the employees dismissed from the Congress of the Republic.<sup>61</sup>

89(36) On July 29, 2002, Congress issued Act No. 27803 concerning the implementation by the Multisectoral Commission of "the recommendations of the [Special] Committees created by Acts Nos. 27452 and 27586, responsible for reviewing the collective dismissals in the State enterprises undergoing processes to promote private investment and in entities of the public sector and local government."<sup>62</sup>

89(37) The Peruvian Ministry of Labor has published lists of the former public sector employees dismissed irregularly based on the previous law with a total of 28,123 individuals, of whom 27,187 had opted for the benefits established in Act No. 27803. According to the State, "2,229 had reincorporated [the public sector], 6,981 were pending, and payments of financial compensation had been made to 16,681 former employees [...] who were also dismissed from their respective jobs and had received financial compensation."<sup>63</sup>

*Concerning the alleged victims*

89(38) The list of the 257 alleged victims appears in the Appendix to this judgment, which forms part thereof for these effects.

*Damage caused to the alleged victims and costs*

89(39) The 257 dismissed employees have suffered damage as a direct result of the facts.

89(40) Jorge Pacheco Munayco, Manuel Abad Carranza Rodríguez, Henry William Camargo Matencio, Adolfo Fernández Saré, Máximo Jesús Atauje Montes and Javier Mujica Petit took measures before the Inter-American Commission. Moreover, the foregoing and Javier Mujica Petit and Francisco Ercilio Moura, as common intervenors for the representatives, intervened in the proceedings before the Inter-American Court, in representation of the majority of the alleged victims.

<sup>61</sup> Cf. Final report of the Multisectoral Commission, Act No. 27586 of March 26, 2002 (file of useful evidence presented by the State, folios 4395, 4442 and 4447), and note of March 26, 2002, in which the President of the Multisectoral Commission forwarded its Final Report to the President of the Congress of the Republic (file of useful evidence presented by the State, folio 4391).

<sup>62</sup> Cf. Act No. 27803 that "implements the recommendations arising from the [Special] Committees created by Acts Nos. 27452 and 27586, responsible for reviewing the collective dismissals carried out in the State enterprises subject to processes of promotion of private investment and in the entities of the public sector and local governments."

<sup>63</sup> Cf. "Final list of former employees to be registered in the National Register of Employees Dismissed irregularly," published in the official gazette of October 2, 2004 (evidence file, appendix 3 to the communication presented to the Commission on December 14, 2004, folios 5215 to 5290), and final written arguments of the State (merits file, tome III, folios 893 and 894).

**VIII**  
**ARTICLES 8 AND 25 OF THE CONVENTION**  
**(RIGHT TO A FAIR TRIAL AND JUDICIAL PROTECTION)**  
**IN RELATION TO ARTICLES 1(1) AND 2 THEREOF**  
**(OBLIGATION TO RESPECT RIGHTS AND DOMESTIC LEGAL EFFECTS)**

*The Commission's arguments*

90. Regarding Article 25 of the American Convention, the Commission alleged that:
- (a) The State denied the alleged victims their right to judicial protection and thus violated the provisions of Article 25(1) of the Convention;
  - (b) According to the Court's case law, this article includes recourses such as *amparo* and protection that should be simple, brief procedures for the protection of fundamental rights;
  - (c) In Peru, the action for *amparo* is conceived as a procedure aimed at protecting the fundamental rights of the individual; and also as an action to protect constitutional guarantees designed to "re-establish the situation prior to the violation or threat of violation of a constitutional right";
  - (d) The elimination of the possibility of review or control of the administrative act that gave rise to the violation suffered by the alleged victims violated the right to a simple and prompt recourse;
  - (e) The existence of acts of the State that are not controlled either administratively or judicially is incompatible with the American Convention;
  - (f) The Lima Superior Court did not examine the merits of the appeal concerning the application for *amparo*;
  - (g) By conditioning the admissibility of the action to the terms of an administrative resolution and by failing to rule on the merits, based on the arguments and the evidence provided by the parties, the ruling of the Constitutional Court eliminated the possibility of judicial guarantees for the congressional employees. This violation continues for numerous individuals who have not had a response concerning the merits of their claims;
  - (h) The grounds for the Constitutional Court's decision denied the congressional employees any possibility of judicial control or review of their claims;
  - (i) The ordinary proceeding cited by the Constitutional Court was barred, because the alleged victims had exceeded the time limit for resorting to an administrative-law proceeding; consequently, they were left without any protection based on an arbitrary decision;

- (j) Even if it were to be interpreted that the congressional employees had free access to the jurisdiction by way of a judicial recourse before the ordinary courts and the Constitutional Court, this would be insufficient to consider that the judicial guarantee imposed on the State by Article 25 of the Convention had been complied with. The mere formalities of a proceeding do not ensure the effectiveness of the recourse, since it is conceived as a means of obtaining effective judicial protection of human rights that requires a result;
- (k) The congressional employees had the right to the judicial authorities, including the highest instance in the country, the Constitutional Court, reviewing the merits of their complaint and making a thorough examination of the matter in order to obtain a decision that admitted their arguments and reinstated their rights or, to the contrary, rejected their claims, and
- (l) The situation that the alleged victims experienced is not an isolated fact or one that arose from the State's intention of reorganizing one of its institutions. President Fujimori's Government generated an environment of legal and institutional instability to facilitate the installation of the new regime by the absence of controls.

91. Regarding Article 8(1) of the Convention, the Commission alleged that:

- (a) The State denied the alleged victims their right to judicial guarantees and thereby violated the provisions of Article 8(1) of the Convention;
- (b) It is essential to examine or re-examine the legality of any decision that imposes on an individual an irreparable obligation or when this obligation affects fundamental rights and freedoms, in application of judicial guarantees extended to determining obligations of a work-related nature;
- (c) The resolution that denied the review of the examinations by way of an administrative proceeding excluded the alleged victims from judicial protection by constituting a regulatory requirement for the admissibility of an action for the protection of constitutional rights, and
- (d) The resolution that denied the review of the examinations by way of an administrative proceeding excluded the victims from judicial protection and, furthermore, the ordinary proceeding to review the case was time-barred. The admission of either of these interpretations by the organs of the inter-American system would amount to eliminating the petitioners' enjoyment of the right to protection and to judicial guarantees, contrary to the provisions of Article 29(a) of the Convention.

92. Regarding Article 1(1) of the Convention, the Commission alleged that the State failed to comply with its obligation to respect the rights and freedoms embodied in the Convention, and also to ensure and guarantee the free and full exercise of the rights to judicial guarantees and protection to all persons subject to its jurisdiction, because it had the obligation to organize the governmental structures

and all the structures by which public power was exercised so that they were able to ensure the free and full exercise of those rights juridically.

93. Regarding Article 2 of the Convention, the Commission alleged that:
- (a) The elimination of the possibility of the review and control of the administrative act by article 9 of Decree Law No. 25640 and article 27 of Resolution 1239 A-9-CACL violated the alleged victims' right to a simple and prompt recourse by removing the administrative act from governmental control and, subsequently, from jurisdictional scrutiny, in the terms of Articles 25(1) and 8(1) of the American Convention, and
  - (b) The State has not adapted its laws to the Convention and has therefore failed to comply with the obligation imposed on the States Parties by Article 2 thereof. In this regard, Act No. 27487 "which derogated Decree Law No. 26093 and authorizes the establishment of committees to review the collective dismissals in the public sector" does not refer to the derogation of Decree Law No. 25640.

*The common intervenors' arguments*

94. In addition to endorsing most of the arguments set out by the Inter-American Commission, the common intervenors alleged that the State had violated Article 25(1) of the American Convention by denying the right of the alleged victims to a simple, prompt and effective recourse that would protect them from the violations to which they were subjected by being arbitrarily deprived of their employment and other rights inherent in their working conditions, removing this situation from the control of the competent judicial authorities without any justification.

95. The common intervenors also alleged that the State had violated Article 8(2) of the Convention, specifically the right of the alleged victims to have access to minimum guarantees of due process: by establishing, as part of the evaluation process introduced after the April 1992 coup d'état, motives for dismissal from employment other than those included in the Framework Law on the Administrative Career governing these employees; by not notifying them personally and individually of the results of the process, or allowing those affected to review and contest the decisions adopted as a result of the evaluation process before an administrative body, and by the fact that those decisions were executed by a person who, throughout the entire evaluation process, lacked the requisite legal authority.

96. Regarding Article 1(1) of the American Convention, the common intervenors alleged that, as a result of the violation of the rights embodied in Articles 8, 25 and 26 of the Convention, the State had also violated its obligation to respect the rights and freedoms recognized in the Convention, as well as its duty to ensure their free and full exercise to all persons subject to its jurisdiction.

97. Finally, the common intervenors alleged that Peru was responsible for failing to comply with the obligation to adopt domestic legal provisions, contain in Article 2 of the Convention, by adopting and implementing laws that prevented the congressional employees from enjoying rights that were protected and guaranteed in the Convention.

*The State's arguments*

98. Regarding Article 25 of the Convention, the State alleged that:
- (a) Article 27 of Resolution 1239-A-92-CACL "was never applied to the internal procedures of the Public Administration designed to organize or operate its own activities or services";
  - (b) Although the complaint by way of the administrative proceeding was inadmissible, the dismissed employees could have used the judicial proceeding to assert the rights they considered had been violated;
  - (c) The dismissed employees received erroneous advice and filed improper administrative recourses, eliminating the possibility of filing an action for *amparo* within the established time of their own accord;
  - (d) The Twenty-eighth Civil Court considered that the action for *amparo* had not extinguished because it did not calculate the time from the date of publication of the resolutions dismissing the congressional employees;
  - (e) The Constitutional Court's decision was delivered in accordance with the formalities recognized by the American Convention;
  - (f) Neither the judicial ruling that admitted the *amparo* procedure, nor the judicial ruling that revoked it, referred to article 9 of Decree Law No. 25640, which was not used to justify the declaration of the inadmissibility of the action for *amparo*;
  - (g) The dismissed employees included in the resolutions ordering their dismissal and who filed the respective actions under administrative law within the legally-defined time period, obtained recognition of their violated rights, and were reinstated in Congress with recognition of their loss of earnings from the date of their respective dismissal;
  - (h) On December 6, 2002, the Constitutional Court delivered a judgment in another case in which it confirmed the findings of the judgment declaring the action for *amparo* filed by the alleged victims inadmissible. This shows that, at the time, this court, abided by the Constitution and the national laws, and
  - (i) According to the case law of the Inter-American Court, the Inter-American Commission has not interpreted the concept of effective recourse correctly in its application.
99. With regard to Article 8(1) of the Convention, the State alleged that the Constitutional Court had observed that, in some cases, it might be admissible for the extinguishment mechanism to be made more flexible so as to permit the examination of matters concerning merits. Nevertheless, it made it clear that, in the case of actions where there is a lack due diligence, such as the action in this case, together with the incorrect legal advice, it is not possible to dispense with the application of the procedural requirements.

100. Regarding Article 1(1) of the Convention, the State alleged that:
- (a) Even though it could be understood that the mere issuance of article 9 of Decree Law No. 25640 and article 27 of Resolution 1239-A-92CACL was incompatible with the Convention, it could also be understood that constitutional and legal provisions were in force that allowed the dismissed employees to opt for the appropriate proceeding. This is illustrated by two cases of former employees who filed the corresponding judicial action within the legal time period and were reinstated in Congress with recognition of their accrued earnings from the date of the irregular dismissal, and
  - (b) Essentially, the said provisions did not prevent the dismissed employees from exercising their right to file an action for *amparo* or an action under administrative law and for this to be admitted, provided they filed the respective recourse within the legal time limit.
101. Lastly, in relation to Article 2 of the Convention, the State alleged that:
- (a) Even though, in theory, a norm may violate the said Article and it could be considered that the promulgation of the norms that are being examined in this case violated this article, the Court should consider that the State's laws have been adapted to the Convention. Thus, article 9 of Decree Law No. 25640 was annulled by Act No. 27487;
  - (b) If the alleged victims had filed the application for *amparo* within the legal time limit, the judge would have applied the diffuse control of the constitutionality of the laws, which was in force in the Constitution; thus, he would have ruled on the merits of the matter and not applied this article, and
  - (c) In this case, laws and administrative provisions were adopted ordering a review of the collective dismissals in order to provide the employees who had been dismissed irregularly with the possibility of claiming their rights.

*The Court's findings*

102. Article 1(1) of the Convention establishes:

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

103. Article 2 of the Convention stipulates that:

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

104. Article 8 of the Convention establishes that:

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

- a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;
- b. prior notification in detail to the accused of the charges against him;
- c. adequate time and means for the preparation of his defense;
- d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
- e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;
- f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
- g. the right not to be compelled to be a witness against himself or to plead guilty; and
- h. the right to appeal the judgment to a higher court.

[...]

105. Article 25 of the Convention stipulates 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.

2. The States Parties undertake:

- a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the State;
- b. to develop the possibilities of judicial remedy; and
- c. to ensure that the competent authorities shall enforce such remedies when granted.

106. The Court has affirmed that, under the American Convention, the States Parties are obliged to provide effective judicial remedies to the victims of human rights violations (Article 25), remedies that must be implemented according to the rules of due process of law (Article 8(1)), all within the general obligation of States

to ensure to all persons subject to their jurisdiction the free and full exercise of the rights established in the Convention (Article 1(1)).<sup>64</sup>

107. The Court recalls that the purpose of international human rights law is to provide the individual with the means of protecting internationally recognized human rights before the State. In the international jurisdiction, the parties and the issue in dispute are, by definition, different from those in the domestic jurisdiction.<sup>65</sup> When establishing the international responsibility of the State for the violation of the human rights embodied in Articles 8(1) and 25 of the American Convention, a substantial aspect of the dispute before the Court is not whether judgments or administrative decisions were issued at the national level or whether certain provisions of domestic law were applied with regard to the violations that are alleged to have been committed to the detriment of the alleged victims of the facts, but whether the domestic proceedings ensured genuine access to justice, in keeping with the standards established in the American Convention, to determine the rights that were in dispute.<sup>66</sup>

108. Before examining the specific and pertinent arguments of the parties, the Court deems it essential to emphasize the context in which the facts of this case occurred and the general actions adopted by the State subsequently. In this regard, this case is situated in a historical context during which numerous irregular dismissals took place in the public sector. This was acknowledged by the State as of 2001 when it enacted "laws and administrative provisions ordering a review of the collective dismissals in order to provide the employees who had been dismissed irregularly with the possibility of claiming their rights" (*supra* para. 89(31)). Among these measures, one of the most important was Act No. 27487 of June 21, 2001, which ordered the establishment of Special Committees to review the collective dismissals carried out within the framework of personnel evaluation procedures. One of these was the Special Committee responsible for reviewing the collective dismissals of the congressional personnel (*supra* para. 89(32)), even though it did not include the alleged victims in this case in its conclusions (*supra* para. 89(33)). In addition, a "Multisectoral Commission" was established, responsible, *inter alia*, for assessing the viability of the suggestions and recommendations contained in the final reports of the Special Committees; and Act No. 27586 was promulgated to implement its recommendations (*supra* para. 89(34)). Indeed, Peru asked the Court, should it declare that there had been a violation of the Convention, to accept the State's "commitment [...] to establishing a Multisectoral Commission to review [...] the respective dismissals and grant benefits [...] to the employees considered [alleged] victims in the Inter-American Commission's application, following the guidelines established in the legal norms ordering the review of the collective dismissals" (*infra* para. 139(a)). These actions show that the State has acknowledged this context and has expressed its willingness to establish the possibility for those affected by this situation to claim or repair certain prejudicial consequences thereof, to some extent.

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<sup>64</sup> Cf. *Case of Goiburú et al.*, *supra* note 8, para. 110; *Case of Claude Reyes et al.*. Judgment of September 19, 2006. Series C No. 151, para. 127, and *Case of Ximenes Lopes*, *supra* note 9, para. 175.

<sup>65</sup> Cf. *Case of the Ituango Massacres*. Judgment of July 1, 2006. Series C No. 148, para. 365; *Case of the "Mapiripán Massacre"*. Judgment of September 15, 2005. Series C No. 134, para. 211, and *Case of the Serrano Cruz Sisters*. Judgment of March 1, 2005. Series C No. 120, para. 56.

<sup>66</sup> Cf. *Case of the Ituango Massacres*, *supra* note 65, para. 339; *Case of the Pueblo Bello Massacre*, *supra* note 6, para. 206, and *Case of the "Mapiripán Massacre"*, *supra* note 65, para. 211.



109. It has also been demonstrated (*supra* para. 89(27)) that the independence and impartiality of the Constitutional Court, as a democratic institution guaranteeing the rule of law, were undermined by the removal of some of its justices, which “violated *erga omnes* the possibility of exercising the control of constitutionality and the consequent examination of the adaptation of the State’s conduct to the Constitution.”<sup>67</sup> The above resulted in a general situation of absence of guarantees and the ineffectiveness of the courts to deal with facts such as those of the instant case, as well as the consequent lack of confidence in these institutions at the time.

110. Furthermore, the Court observes that the facts of the instant case occurred within the framework of the so-called “streamlining of the personnel of the Congress of the Republic,” which was justified by the so-called Emergency and National Reconstruction Government, *inter alia*, as a reorganization or restructuring of the State legislature. The Court considers that States evidently have discretionary powers to reorganize their institutions and, possibly, to remove personnel based on the needs of the public service and the administration of public interests in a democratic society; however, these powers cannot be exercised without full respect for the guarantees of due process and judicial protection, because, to the contrary, those affected could be subjected to arbitrary acts. Despite the foregoing, the Court has indicated that it will examine the dispute in this case in light of the State’s obligations arising from Articles 8 and 25 of the American Convention, in relation to Articles 1(1) and 2 thereof (*supra* para. 107). Consequently, the Court will not examine the scope of this “streamlining process” as such, but whether, in the historical context mentioned above and according to the norms under which they were dismissed, the alleged victims could determine with legal certainty the proceeding to which they could and should resort to claim the rights they considered had been violated and whether they were guaranteed real and effective access to justice.

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111. Once the alleged victims had been dismissed by resolutions of the Administrative Commission (*supra* para. 89(13)), the parties have indicated three channels by which, at least formally, they could have contested their dismissal; namely, an administrative proceeding before Congress itself, an action under administrative law, and the action for *amparo*.

112. Regarding the administrative proceeding before Congress attempted by some of the alleged victims, the Court is unable to examine what happened in this regard more thoroughly, because it lacks sufficient and adequate probative elements (*supra* paras. 87 and 89(29)). Also, when examining the laws brought to its attention in this context, the Court found it unclear whether it was necessary to resort to this mechanism before having recourse to the courts in order to contest congressional acts.

113. In this regard, article 27 of Resolution 1239-A-CACL issued by the Administrative Commission stipulated that “it would not accept claims relating to the results of the examination” on which the permanence in Congress or the termination of the labor relationship of those who had taken the examination depended to a large extent. Nevertheless, the content of this article, which prevented objections being

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<sup>67</sup> Cf. *Case of the Constitutional Court*, *supra* note 11, para. 112.

raised before the Administrative Commission regarding its own decisions, contradicts other subsequent acts of Congress itself, which reflect the State's willingness to establish the possibility of examining the recourses filed (*supra* para. 89(16)). Hence, it is unclear whether these decisions were also removed from the control of other organs of Congress. This lack of clarity is such that, despite the express prohibition, some dismissed employees filed the said administrative recourse before Congress (*supra* para. 89(15) and (20)). In any case, irrespective of the need to exhaust the administrative proceeding, the fact that alleged victims filed recourses using this channel should not be understood to prejudice them in this context, particularly taking into account that another provision of the decree establishing the "streamlining of Congress" was in force that prevented filing an action for *amparo* to counter its effects (*supra* paras. 89(4) and 89(9) and *infra* paras. 117 to 121).

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114. The State has also argued that the alleged victims could have resorted to the administrative-law proceeding, which it considered the adequate and appropriate domestic remedy for filing their claims and, despite this, it was not used.

115. The Court observes that, according to the information in the file, six dismissed congressional employees – two who are alleged victims in this case (*supra* para. 89(29)) and four who are not – opted to resort to the administrative-law proceeding to request, *inter alia*, the annulment of one of the decisions ordering their dismissal. The actions were declared admissible in only two of these cases, even though most of the basic facts were almost identical.<sup>68</sup> Also, from the said judgments it is clear that these employees filed recourses for reconsideration and/or of appeal using the administrative proceeding.

116. Accordingly, from the rulings of the domestic courts in the administrative-law jurisdiction in the six cases provided to the Court's file, it is unclear whether it was necessary to exhaust the administrative proceeding before filing an action before the courts. In this regard, it is also unclear whether the administrative-law jurisdiction was viable or appropriate for the alleged victims to be able to contest their dismissal; consequently, the State cannot defend itself by arguing that the alleged victims have not attempted it, in order to allege that its obligation to provide an effective recourse has been fulfilled.

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117. In relation to the norms applied to those who were dismissed, it has been established that article 9 of Decree Law No. 25640 expressly prohibited the possibility of filing an action for *amparo* against its effects (*supra* para. 89(4), 89(9) and 113). As the expert witness Abad Yupanqui has stated, at the time of the facts "in each of

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<sup>68</sup> Thus, in November and December 1993 and December 1997, the Supreme Court of Justice considered inadmissible four administrative-law actions filed by the two alleged victims and another two persons. Also, in November and December 1995, the Supreme Court considered admissible two of these actions filed by the other two dismissed employees, who are not alleged victims in this case. From the November 1995 judgment it is clear that the plaintiff had filed recourses of reconsideration and appeal by way of the administrative channels, "which had not been decided."

the decree laws where it was considered necessary, the Government began to include a provision that prevented the use of the *amparo* procedure" (*supra* para. 81(g)).<sup>69</sup>

118. Regarding the provisions called into question by the Commission and by the common intervenors in these proceedings, the State declared that:

During the period of the process to streamline the personnel of the National Congress of the Peruvian Republic, legal and administrative provisions were in force, which are at issue in these proceedings, that violated the rights embodied in Articles 1(1) and 2 of the American Convention.

Article 9 of Decree Law No. 25640, which has been called into question in these proceedings, violated the provisions of Articles 8(1) and 25(1) of the American Convention.

[...] It could be understood that the mere issuance of article 9 [of the said] Decree [...] and article 27 of Resolution 1239-A-92CACL were incompatible with the Convention.

119. The Court finds it evident that the alleged victims were affected by the provisions under consideration in the international proceedings. The prohibition to contest the effects of Decree Law No. 25640, contained in the said article 9, constituted a norm of immediate application, since the people it affected were prevented *ab initio* from contesting any effect they deemed prejudicial to their interests. The Court finds that, in a democratic society, a norm containing a prohibition to contest the possible effects of its application or interpretation cannot be considered a valid limitation of the right of those affected by the decree to a genuine and effective access to justice, which cannot be arbitrarily restricted, reduced or annulled in light of Articles 8 and 25 of the Convention, in relation to Articles 1(1) and 2 thereof.<sup>70</sup>

120. In the context described above, article 9 of Decree Law No. 26540 and article 27 of Resolution 1239-A-CACL of the Administrative Commission helped promote a climate of absence of judicial protection and legal security that, to a great extent, prevented or hindered the persons affected from determining with reasonable clarity the appropriate proceeding to which they could or should resort to reclaim the rights they considered violated.

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121. Indeed, this situation of lack of judicial protection and legal certainty which resulted, in particular, from the entry into force of article 9 of Decree Law No. 25640, was reflected by the fact that, for more than two years, the alleged victims did not attempt to file an action for *amparo*. It was not until March 1995, that the alleged victims filed an action of this type before the Lima Twenty-eighth Civil Court. That court examined the merits of the allegations, and declared the *amparo* admissible and the decisions providing for the dismissal of the appellants inapplicable (*supra* para. 89(21)). However, the Prosecutor General appealed the judgment before the Fifth Civil Chamber of the Superior Court of Justice, which revoked it and declared

<sup>69</sup> In this regard, the expert witness listed 17 decree laws that contain a similar provision.

<sup>70</sup> Cf., in this regard, *Case of Goiburú et al.*, *supra* note 8, para. 131; *Juridical Status and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 126; *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.

the *amparo* inadmissible, finding that the appellants had not filed this recourse within the legally-established time period, as it was not necessary for them to “exhaust the prior mechanisms,” because “[article 27 of] Resolution No. [1239-A-CACL] provided that no recourse of any kind would be admitted against the resolutions of the Commission to Administer the Patrimony of Congress, since it was the final instance”; in addition, it found that the alleged damage was irreparable (*supra* para. 89(23) and 89(25)). Consequently, the employees filed a special resource before the Constitutional Court, which confirmed the ruling of the Superior Court of Justice (*supra* para. 89(26) and 89(28)). In other words, neither the Superior Court nor the Constitutional Court considered the merits of the case, but rejected the recourse based on procedural or admissibility considerations and not on the said article 9 of Decree Law No. 25640.

122. The Court has interpreted that the terms of Article 25(1) of the American Convention imply:

The obligation of the States to provide to all persons within their jurisdiction, an effective judicial remedy for violations of their fundamental rights [... and] for the application of the guarantee recognized therein not only to the rights contained in the Convention, but also to those recognized by the Constitution or laws.<sup>71</sup>

123. The Court has also considered that:

The habeas corpus and *amparo* procedures are the essential judicial guarantees for the protection of various rights whose suspension is forbidden by Article 27(2) [of the Convention]; they also serve to preserve the legality of a democratic society.<sup>72</sup>

124. In addition to calling into question the grounds for the Constitutional Court's decision that declared *amparo* inadmissible, the Commission argued, based on its precedents,<sup>73</sup> that the alleged victims had the right to a decision on the merits of the matter from the judicial authorities. The State, on the other hand, cited other reports on merits issued by the Inter-American Commission<sup>74</sup> and alleged that, even though in these other cases the courts of justice had not ruled on the merits of a case for procedural reasons, the Commission had not considered that the State had violated the right to an effective recourse.

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<sup>71</sup> Cf. *Case of the Constitutional Court*, *supra* note 11, para. 89, citing *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and 8 American Convention on Human Rights), *supra* note 70, para. 23.

<sup>72</sup> Cf. *Case of López Álvarez*. Judgment of February 1, 2006. Series C No. 141, para. 92; *Case of García Asto and Ramírez Rojas*. Judgment of November 25, 2005. Series C No. 137, para. 112, and *Case of Acosta Calderón*. Judgment of June 24, 2005. Series C No. 129, para. 90.

<sup>73</sup> In one case, the Commission considered that the failure to rule on the merits of the issue raised in an action for *amparo* eliminated the possibility of filing this action and, consequently, constituted a violation of the right embodied in Article 25 of the Convention (Cf. Report 48/00 of the Inter-American Commission of April 13, 2000, in the Walter Humberto Vásquez Vejarano case (11,166) v. Peru, para. 91). In addition, the Commission alleged that the decision concluding a judicial proceeding should not be merely formal, because it should examine the merits of the facts, verify whether they occurred as has been alleged and proved, since, if it fails to do this, the recourse becomes inconclusive and ineffective to protect the plaintiff from the violation and provide him with adequate reparation (Cf. Report 119/99 of the Inter-American Commission of October 6, 1999, in Susana Higuchi Miyagua (11,428) v. Peru, para. 54).

<sup>74</sup> Cf. Inadmissibility Report 90/03 of the Inter-American Commission of October 22, 2003, in Gustavo Trujillo Gonzáles v. Peru, paras. 27, 28, 32 and 33.

125. In this regard, the Court has understood that, for an effective recourse to exist, it is not enough for it to be established by the Constitution or law, or be formally admissible; rather it needs to be truly appropriate for establishing whether there has been a human rights violation and for providing whatever is necessary to repair this.<sup>75</sup> However, the fact that a specific recourse is decided against the party who filed it does not necessarily mean a violation of the right to judicial protection.<sup>76</sup>

126. The Court considers that, in any proceeding or process that exists under the State's domestic system there should be extensive judicial guarantees, which should include the formalities that must be observed in order to guarantee access to these guarantees. To ensure legal certainty, for the proper and functional administration of justice and the effective protection of human rights, the States may and should establish admissibility principles and criteria for domestic recourses of a judicial or any other nature. Thus, although these domestic recourses must be available to the interested parties and result in an effective and justified decision on the matter raised, as well as potentially providing adequate reparation, it cannot be considered that always and in every case the domestic organs and courts must decide on the merits of the matter filed before them, without verifying the procedural criteria relating to the admissibility and legitimacy of the specific recourse filed.

127. In this regard, the State alleged that "if the alleged victims had filed the action for *amparo* within the time established by law, [the judge would have] applied the diffuse control of the constitutionality of the laws [...] and would have ruled on the merits of the case, without applying [article 9 of Decree 25640]." The Court observes that this consisted in the power of the judge not to apply a particular norm in a specific case. There is no evidence in the file that, in cases heard by the Constitutional Court at the time of the facts, the latter would have applied that type of control. Furthermore, the expert witness Abad Yupanqui stated that "based on a norm [such as article 9 of Decree No. 25640], it was impossible to file an action for unconstitutionality at the time, because the justices of the Constitutional Court had been removed. [...] At the time, the Judiciary lacked total and absolute independence from the Government. This made it difficult for judges to implement diffuse control by giving preference to the constitutional norm and not applying this decree based on unconstitutionality." The State did not contest this opinion.

128. When a State has ratified an international treaty such as the American Convention, the judges are also subject to it; this obliges them to ensure that the *effet util* of the Convention is not reduced or annulled by the application of laws contrary to its provisions, object and purpose. In other words, the organs of the Judiciary should exercise not only a control of constitutionality, but also of "conventionality"<sup>77</sup> *ex officio* between domestic norms and the American Convention; evidently in the context of their respective spheres of competence and the corresponding procedural regulations. This function should not be limited exclusively to the statements or actions of the plaintiffs in each specific case, although neither

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<sup>75</sup> Cf. *Case of the Indigenous Community Yakye Axa*. Judgment of June 17, 2005. Series C No. 125, para. 61; *Case of the "Five pensioners"*. Judgment of February 28, 2003. Series C No. 98, para. 136, and *Case of the Mayagna (Sumo) Awas Tingni Community*. Judgment of August 31, 2001. Series C No. 79, para. 113.

<sup>76</sup> Cf. *Case of Raxcacó Reyes*. Judgment of September 15, 2005. Series C No. 133, para. 112, and *Case of Fermín Ramírez*. Judgment of June 20, 2005. Series C No. 126, para. 83.

<sup>77</sup> Cf. likewise, *Case of Almonacid Arellano et al.*, *supra* note 3, para. 124.

does it imply that this control must always be exercised, without considering other procedural and substantive criteria regarding the admissibility and legitimacy of these types of action.

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129. In conclusion, the Court observes that this case took place within the framework of practical and normative impediments to a real access to justice and a general situation of absence of guarantees and ineffectiveness of the judicial institutions to deal with facts such as those of the instant case. In this context and, in particular, the climate of legal uncertainty promoted by the norms that restricted complaints against the evaluation procedure and the eventual dismissal of the alleged victims, it is clear that the latter had no certainty about the proceeding they should or could use to claim the rights they considered violated, whether this was administrative, under administrative-law, or by an action for *amparo*.

130. In this regard, in *Akdivar v. Turkey*, the European Court of Human Rights found, *inter alia*, that the existence of domestic recourses must be sufficiently guaranteed, not only in theory, but also in practice; to the contrary, they would not comply with the required accessibility and effectiveness. It also considered that the existence of formal recourses under the legal system of the State in question should be taken into account, and also the general political and legal context in which they operate as well as the personal circumstances of the petitioners or plaintiffs.<sup>78</sup>

131. In this case, the existing domestic recourses were not effective, either individually or as a whole, to provide the alleged victims dismissed from the Peruvian Congress with an adequate and effective guarantee of the right of access to justice in the terms of the American Convention.

132. Based on the above, the Court concludes that the State violated Articles 8(1) and 25 of the American Convention, in relation to Articles 1(1) and 2 thereof, to the detriment of the 257 individuals listed in the Appendix to this judgment.

## IX ARTICLE 26 OF THE AMERICAN CONVENTION (PROGRESSIVE DEVELOPMENT OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS)

### *The Commission's arguments*

133. The Commission did not allege failure to comply with Article 26 of the Convention.

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<sup>78</sup> Cf. *Eur. Court. HR. Akdivar and others v. Turkey, judgment (Preliminary Objections) of 16 September 1996, Reports 1996-IV Court (Grand Chamber), paras. 66 and 69*. See also, *inter alia*, *Vernillo v. France, judgment of 20 February 1991, Series A no. 198, pp. 11-12, para. 27*; *Johnston and Others v. Ireland, judgment of 18 December 1986, Series A no. 112, p. 22, para. 45*, and *Van Oosterwijck v. Belgium, judgment (Preliminary Objections) of 6 November 1980, Series A no. 40, pp. 18, para. 35*.

*The common intervenors' arguments*

134. Regarding Article 26 of the Convention, they alleged that:
- (a) Peru is a State party to the International Covenant on Economic, Social and Cultural Rights, and to the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights "Protocol of San Salvador," so that the scope of Article 26 of the Convention should be determined, bearing in mind the evolutive interpretation of international instruments and in accordance with the *pro homine* principle established in Article 29(b) of the Convention;
  - (b) The progressive development obligation is violated in this case, in relation to the right to social security established in Article 45 of the OAS Charter;
  - (c) The fact that the State's Administration has not reinstated the dismissed employees constitutes a grave violation of their labor and social security rights recognized in various international instruments for the protection of human rights;
  - (d) This case is an example of the State's recurrent policy of failing to comply with its international obligation to protect fundamental human rights, such as the right to employment and to social security, so that there is a systematic practice of violation of economic, social and cultural rights in Peru;
  - (e) The alleged victims were dismissed arbitrarily; they were unjustly deprived of their employment and of their right to remuneration and other work-related benefits; as a result, their poverty level increased and this substantially affected their life projects;
  - (f) The violation of the alleged victims' right to social security occurred when their access and that of their dependants to the coverage provided by the former Peruvian Social Security Institute, as insured parties, was interrupted;
  - (g) The arbitrary dismissal of the alleged victims and the failure to reinstate them in their posts meant that they ceased to accumulate years of service for social security purposes, which prevented many employees from obtaining a retirement pension;
  - (h) Many of the dismissed employees were denied their right to receive a disability pension because, during the years they endeavored to claim their labor rights, their health was seriously affected and they were unable to obtain the necessary financial resources for a decent life. This situation has even led to the death of many of them and, to date, the right of their families to a surviving spouse pension has not been recognized.

*The State's arguments*

135. The State did not refer to the alleged non-compliance with Article 26 of the Convention.

*The Court's findings*

136. In this case the common intervenors alleged that the State is responsible for the violation of Article 26 of the Convention, based on the fact that the alleged arbitrary nature of the victims' dismissal and the failure to reinstate them resulted, among other matters, in the unjust deprivation of their employment and the right to remuneration and other work-related benefits; the interruption of the access to social security of the alleged victims and their dependents; the discontinuation of accumulating years of service, which prevented many of them from obtaining a retirement pension; and also serious effects on their health. However, the purpose of this judgment is not to determine the alleged arbitrary nature of the alleged victims' dismissals or their non-reinstatement, on which the arguments of the common intervenors are based. The Court has declared that the State violated Articles 8(1) and 25 of the Convention, relating to judicial guarantees and judicial protection, in relation to the alleged victims, owing to the lack of certainty about the proceeding they should or could resort to in order to claim the rights they considered violated, and to the existence of normative and practical impediments to an effective access to justice (*supra* paras. 129 and 132). The Court is aware that the violation of these guarantees necessarily had prejudicial consequences for the alleged victims, to the extent that any dismissal has consequences for the exercise and enjoyment of other rights inherent in labor relations. Such consequences can be considered, when pertinent, in the following chapter on reparations (*infra* para. 149).

**X**

**REPARATIONS**

*APPLICATION OF ARTICLE 63(1)*  
*Obligation to Repair*

*The Commission's arguments*

137. The Inter-American Commission alleged, *inter alia*, that:

- (a) The beneficiaries of the reparations are those named in the Report on admissibility and merits, and they, in turn, correspond to the persons established in the judgment delivered by the Constitutional Court in this case;
- (b) Regarding pecuniary damage, the dismissed congressional employees not only ceased receiving their salaries, but also incurred significant expenditure in order to try and obtain due protection and judicial guarantees in the face of the administrative act establishing their dismissal. Therefore, the State should adopt the necessary measures for the alleged victims to receive adequate and opportune reparation



for the pecuniary damage suffered. Consequently, it requested the Court to establish, based on the principle of equity, the amount of the compensation corresponding to indirect damage and loss of earnings, without detriment to the claims that the common intervenors would submit at the opportune procedural moment.

- (c) It is important to recognize the non-pecuniary damage caused to the alleged victims, who were the object of sudden dismissal – which was a cause of anguish, bearing in mind that their employment was the principal source of income for the families of most of the alleged victims – and who were unable to contest these decisions before any competent body. Hence, the State should adopt the necessary measures to ensure that the alleged victims receive adequate and opportune reparation for the non-pecuniary damage suffered;
- (d) Regarding other forms of reparation, in this case integral reparation is necessary; consequently, it asked the Court to order the State to:
  - i. Guarantee the 257 dismissed congressional employees access to a simple, prompt and effective judicial recourse so that their claims in relation to their dismissal by the Commission to Administer the Patrimony of the Congress of the Republic are reviewed;
  - ii. Guarantee the 257 dismissed congressional employees that this recourse will enjoy the corresponding judicial guarantees and lead to a ruling on the merits of the claims presented by the employees in the domestic sphere;
  - iii. Modify article 9 of Decree Law No. 25,640 and article 27 of Resolution No. 1239-A-92-CACL, to harmonize them with the American Convention, and
  - iv. Adopt the legal, administrative and any other measures necessary to avoid similar facts occurring in future, in compliance with the obligations of prevention and guarantee of the fundamental rights recognized by the American Convention, and
- (e) Regarding costs and expenses, it stated that, when it had heard the common intervenors, the Court should order the State to pay the costs and expenses duly authenticated by them, bearing in mind the special characteristics of the case in its processing before both the inter-American system and at the national level.

*The common intervenors' arguments*

138. The common intervenors alleged, *inter alia*, that:
- (a) The beneficiaries are the dismissed employees mentioned by the Commission. Nevertheless, it should be taken into account that the list includes six persons who are now deceased, so that the reparations corresponding to them should be allocated to their legitimate successors;

- (b) Regarding measures of satisfaction and guarantees of non-repetition, they asked the Court to order the State to:
- i. Reinstate the alleged victims in their habitual posts or in similar ones at the same level, if appropriate. In this regard, they stated that the alleged victims did not consider it fair, lawful or in keeping with the standards defined in the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights that they should have to endure a new judicial proceeding – as requested by the Commission – so that, following an extended period of time, the expenditure and setbacks of many different types that this represents, an evident and manifestly illegal deprivation of their jobs is once again reviewed. This criteria would be a step backwards in the interpretative standards advocated by the Commission on other occasions;
  - ii. Acknowledge publicly its international responsibility for the alleged arbitrary dismissal of the 257 congressional employees and present a public apology to them and their next of kin. This act should be carried out by the President of the Congress of the Republic and the Minister of Justice, in the presence of the most senior State authorities and should be published by the media in general and, in particular, broadcast on the State's radio and television system;
  - iii. Publish at least once, within a reasonable time, in the official gazette and in another newspaper with widespread national circulation, the operative paragraphs and the proven facts of the judgment;
  - iv. Remove the provisions on which the human rights violations in this case were based. In that regard, modify article 9 of Decree Law No. 25640 and article 27 of Resolution No. 1239-A-92-CACL, to make them with compatible with the American Convention and avoid the repetition of situations such as those of the instant case, and
  - v. The State should adapt its domestic labor laws to the contents of the international conventions and treaties signed by Peru, including reform of the constitutional framework for the protection of labor-related human rights and, in particular, by completing the reform of the norms on individual and collective labor relations by adopting a new General Labor Act, in harmony with the international standards defined by the International Labor Organization.
- (c) Regarding measures of rehabilitation, they asked the Court to order the State to:
- i. Ensure that the alleged victims who had arbitrarily lost their jobs more than 12 years' ago could, in future, exercise their professional capabilities, in accordance with the advances and changes produced in their different disciplines and occupations, so that their reinstatement was not merely a formality;
  - ii. Implement a comprehensive program of professional rehabilitation for all the alleged victims, and

- iii. Ensure the education and health care of the children, and widows and widowers of the alleged victims deceased during the processing of this case in the supranational jurisdiction, by granting them scholarships and incorporating them into the services of the Social Security Health Care program (ESSALUD).
- (d) The State should compensate both the pecuniary and the non-pecuniary damage. In this regard, they asked the Court to order the State to:
- i. Recognize the years of service of the alleged victims, from the date of their dismissal, in order to calculate the compensation for their length of service, and retirement and other labor benefits they failed to perceive and which may correspond to them by law;
  - ii. Pay into the pension funds in which they were registered at the time of their dismissal, the contributions that should have been made to guarantee the exercise of the right to a retirement pension that corresponds to them by law;
  - iii. Pay the alleged victims compensation for loss of earnings, indirect damage and non-pecuniary damage in accordance with the expert opinion of Paúl Noriega Torero;
  - iv. Compensate the families of the former employees who are deceased;
  - v. Grant one-time financial compensation to those former employees who do not wish to be reinstated in active service in Congress. This compensation should amount to the equivalent of their total loss of earnings from 1993 to 2005;
  - vi. Provide early retirement to the former employees subject to the Pension Regime of Decree Law No. 19990 who opt not to be reinstated into the service of Congress and who are currently at least 55 years of age in the case of men and 50 years of age in the case of women, with a minimum of 20 years of contributing to the National Pension System at the date this judgment is executed, and
  - vii. Recognize the years which were not worked as a result of the dismissal for the effects of applying the benefit of early retirement, and
- (e) With regard to costs and expenses, they indicated that the State should reimburse the alleged victims for the expenses they incurred while seeking justice at the national level, and should reimburse the common intervenors the expenses they incurred when processing the international litigation.

*The State's arguments*

139. The State requested the Court to limit the reparations to those the State will provide to the employees dismissed irregularly under the guidelines established in Act No. 27803. In this regard:

- (a) It stated that it ratified its commitment to establish a Multisectoral Commission to review the respective dismissals and to grant benefits

to the employees considered alleged victims in the Inter-American Commission's application, following the guidelines established in the legal norms that provide for the review of the collective dismissals;

- (b) It requested the Court to "take into account, for reasons of equity, that the compensation it can grant to [the 257] dismissed congressional employees must be limited to the amounts indicated in Act No. 27803, [since] the [alleged] victims could have availed themselves of its terms opportunely, in accordance with the provisions of the fourth complementary provision [of the act]; however, they had preferred to resort to the supranational proceeding in the hope of obtaining greater financial benefits";
- (c) It stated that, following the procedure to determine the exceptional cases of coercion to resign and of irregular collective dismissals, the Peruvian Ministry of Labor had published three lists of former employees who were dismissed irregularly, with the names of 28,123 people, of whom 27,187 opted for the benefits established in Act No. 27803;
- (d) It alleged that 2,229 persons had been reinstated, while 6,981 persons were pending, and financial compensation had been paid to 16,681 former employees, and
- (e) It questioned the expert opinion presented by the common intervenors in this case, according to which the total amount of the income and social benefits owed to the 257 alleged victims amounted to 185,496,417.88 million Peruvian soles, since it considered it "inadmissible that 257 [former] dismissed congressional employees aspired to receive [that] amount, [...] while 16,681 former Public Administration employees who were also dismissed from their respective posts have received 149,604,079.00 [million Peruvian soles] in financial compensation."

140. Also, regarding the legal costs and expenses incurred by the alleged victims and their representatives, it stated:

- (a) It is unable to assume the payment of these items for the processing of the proceedings at the domestic level because, according to the provisions of the Peruvian Code of Civil Procedure, the payment of these items is assumed by the party that loses the proceedings, and
- (b) It should be exempt from the payment of these items in the proceedings before the inter-American system because the State has had to intervene in this instance to show that the claims that are the purpose of the application are mostly groundless, which amply justifies its intervention in the litigation.

*The Court's findings*

141. Based on the findings in the preceding chapters, the Court has decided that the State is responsible for violating Articles 8(1) and 25 of the Convention, in relation to Articles 1(1) and 2 thereof. In its case law, the Court has established that

it is a principle of international law that any violation of an international obligation that has produced damage entails the obligation to repair it adequately.<sup>79</sup> The Court has based its decision in this regard on Article 63(1) of the American Convention, which establishes that:

If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

142. Article 63(1) of the American Convention reflects a customary norm that constitutes one of the basic principles of contemporary international law on State responsibility. Thus, when an unlawful act occurs that can be attributed to a State, this gives rise to its international responsibility, with the consequent obligation to cause the consequences of the violation to cease and to repair the damage caused.<sup>80</sup>

143. Whenever possible, reparation of the damage caused by the violation of an international obligation requires full restitution (*restitutio in integrum*), which consists in the re-establishment of the previous situation. If this is not possible, the international Court must determine a series of measures to ensure that, in addition to guaranteeing respect for the violated rights, the consequences of the violations are remedied and it must establish the payment of compensation for the damage caused.<sup>81</sup> The responsible State may not invoke provisions of domestic law to modify or fail to comply with its obligation to provide reparation, which is regulated by international law.<sup>82</sup>

144. Reparations consist of measures tending to eliminate the effects of the violations that have been committed. Their nature and amount depend on the characteristics of the violation and on the pecuniary and non-pecuniary damage that as been caused. Reparations should not make the victims or their successors either richer or poorer and they should be proportionate to the violations declared in the judgment.<sup>83</sup>

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145. The Court considers that the persons it has determined to be victims of the violations declared in this judgment, whose names appear in the Appendix hereto, are the "injured party."

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<sup>79</sup> Cf. *Case of Vargas Areco*. Judgment of September 26, 2006. Series C No. 155, para. 139; *Case of Almonacid Arellano et al.*, *supra* note 3, and *Case of Goiburú et al.*, *supra* note 8, para. 140.

<sup>80</sup> Cf. *Case of Vargas Areco*, *supra* note 79, para. 140; *Case of Almonacid Arellano et al.*, *supra* note 3, para. 135, and *Case of Goiburú et al.*, *supra* note 8, para. 141.

<sup>81</sup> Cf. *Case of Vargas Areco*, *supra* note 79, para. 141; *Case of Almonacid Arellano et al.*, *supra* note 3, para. 136, and *Case of Goiburú et al.*, *supra* note 8, para. 142.

<sup>82</sup> Cf. *Case of Vargas Areco*, *supra* note 79, para. 141; *Case of Almonacid Arellano et al.*, *supra* note 3, para. 136, and *Case of Servellón García et al.*, *supra* note 7, para. 162.

<sup>83</sup> Cf. *Case of Vargas Areco*, *supra* note 79, para. 142; *Case of Almonacid Arellano et al.*, *supra* note 3, para. 137, and *Case of Goiburú et al.*, *supra* note 8, para. 143.

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146. The Court has found that this case occurred in the context of a situation of legal uncertainty promoted by laws that limited access to justice in relation to the evaluation procedure and eventual dismissal of the alleged victims, so that they did not have certainty about the proceedings they could or should resort to in order to claim the rights they considered had been violated. Consequently, without needing to determine the nature of the dismissals that have been verified, the Court found that the existing domestic recourses were ineffective, both individually and collectively, to provide an adequate and effective guarantee of the right of access to justice, and therefore declared the State responsible for the violation of Articles 8(1) and 25 of the American Convention, in relation to Articles 1(1) and 2 thereof (*supra* paras. 129 and 132).

147. International case law has established repeatedly that the judgment constitutes *per se* a form of reparation.<sup>84</sup>

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

149. The Court also decides that the State should establish a specific mechanism to provide the victims with competent legal advisory services, free of charge, for the procedure related to the provisions of the preceding paragraph.

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150. Moreover, in this case, the Court finds it necessary to establish compensation for the non-pecuniary damage suffered owing to the violations declared, and caused by the lack of protection arising from the absence of mechanisms and procedures to deal with facts such as those of the instant case. Since they did not have effective access to judicial guarantees and judicial protection for the competent authorities to take the pertinent decisions, the victims found themselves in a situation of defenselessness and uncertainty with regard to their future employment, which led them to seek justice and may have made it difficult for them to improve their living conditions.

151. Bearing in mind the different aspect of the non-pecuniary damage caused, the Court establishes, based on the equity principle, the sum of US\$15,000 (fifteen thousand United States dollars) or the equivalent in Peruvian currency, that the

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<sup>84</sup> Cf. *Case of Vargas Areco*, *supra* note 79, para. 150; *Case of Almonacid Arellano et al.*, *supra* note 3, para. 161, and *Case of Goiburú et al.*, *supra* note 8, para. 160.

State must pay, within one year, to each of the 257 persons declared to be victims in this case.

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#### *COSTS AND EXPENSES*

152. As the Court has indicated previously, costs and expenses are included in the concept of reparations embodied in Article 63(1) of the American Convention, because the activity deployed by the next of kin of the victims or their representatives in order to obtain justice at both the national and the international level entails expenditure that must be compensated when the State's international responsibility is declared in a judgment against it. Regarding their reimbursement, the Court must prudently assess their scope, which includes the expenses arising before the authorities of the domestic jurisdiction, and those generated during the proceedings before the inter-American system, bearing in mind the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment may be based on the principle of equity and taking into account the expenses indicated by the parties, provided the *quantum* is reasonable.<sup>85</sup>

153. The Court takes into account that the victims and their representatives incurred expenses during the processing of the domestic proceedings and before the Inter-American Commission and the Court. However, the Court will not consider the expenses that the victims may have incurred during the domestic proceedings, because it has no concrete evidence in this respect and is therefore unable to allocate compensation for such expenses directly. Furthermore, it has been verified that most of the proceedings before the Court were conducted by the common intervenors, Javier Mujica Petit and Francisco Ercilio Moura, from the Peruvian *Centro de Asesoría Laboral* (CEDAL). The Court also takes into consideration that Mr. Fernández Saré, representative of another group of victims accredited in the application before the Court, as well as Manuel Abad Carranza Rodríguez, Henry William Camargo Matencio and Jesús Atauje Montes, took measures before the Inter-American Commission and the Court.

154. With regard to the costs incurred by the representatives of the victims in the measures taken during the international proceedings, the Court establishes, based on the equity principle, a total of US\$5,000.00 (five thousand United States dollars) or the equivalent in Peruvian currency, to be delivered to the following persons: Adolfo Fernández Saré, Manuel Carranza Rodríguez, Henry William Camargo Matencio, Máximo Jesús Atauje Montes, Jorge Luis Pacheco Munayco, Javier Mujica Petit and Francisco Ercilio Moura. The State should pay these amounts within one year.

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\*            \*

#### *METHOD OF COMPLIANCE*

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<sup>85</sup> Cf. Case of Vargas Areco, *supra* note 79, para. 165; Case of Almonacid Arellano et al. , *supra* note 3, para. 163, and Case of Goiburú et al. , *supra* note 8, para. 180.

155. The State must establish the body indicated in paragraph 148 of this judgment as soon as possible, and its final decisions must be adopted within one year of notification of this judgment.

156. The State must pay the compensation for non-pecuniary damage directly to the victims, within one year of notification of this judgment, in the terms of paragraph 151 hereof. In the case of the victims who are deceased or who die before the respective compensation is delivered, this should be delivered to their successors, in accordance with the applicable domestic law.

157. The State must reimburse the costs within one year of notification of this judgment, in the terms of paragraph 154 hereof.

158. The State must comply with its pecuniary obligations by payment in United States dollars or the equivalent amount in Peruvian currency, using the exchange rate between the two currencies in force on the New York, United States of America, market the day prior to payment to make the respective calculation.

159. If, for reasons attributable to the victims or to each group of representatives, it is not possible for them to receive the amounts corresponding to non-pecuniary damage and costs established in the judgment within the indicated period of one year, the State shall deposit the amount in favor of each of them in an account or a deposit certificate in a solvent Peruvian banking institute in United States dollars or the equivalent in Peruvian currency and in the most favorable financial conditions permitted by law and Peruvian banking practice. If, after 10 years, the compensation has not been claimed, it shall revert to the State with the accrued interest.

160. The amounts allocated in this judgment for compensation and for reimbursement of costs may not be affected or conditioned by current or future taxes or charges. Consequently, they must be delivered integrally, as established in this judgment.

161. If the State falls into arrears, it shall pay interest on the amount owed, corresponding to banking interest on arrears in Peru.

162. In accordance with its consistent practice, the Court will exercise the authority inherent in its attributes and derived from Article 65 of the American Convention to monitor compliance with all the terms of this judgment. The case will be closed when the State has fully complied with all its terms. Within one year of notification of the judgment, Peru shall provide the Court with a report on the measures adopted to comply with the judgment.

## **XI OPERATIVE PARAGRAPHS**

163. Therefore,

**THE COURT**

**DECIDES,**

unanimously:



1. To reject the preliminary objections filed by the State, in the terms of paragraphs 58 to 60, 65 to 71 and 75 to 78 of this judgment.

**DECLARES,**

unanimously, that:

2. The State violated, to the detriment of the 257 victims listed in the Appendix to this judgment, the rights to a fair trial and to judicial protection embodied in Articles 8(1) and 25 of the Convention, in relation to the general obligation to respect and ensure rights and to adopt domestic legal provisions established in Articles 1(1) and 2 thereof, in the terms of paragraphs 106 to 132 of this judgment.

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

**AND ORDERS,**

unanimously, that:

4. The State must guarantee to the 257 victims listed in the Appendix to this judgment access to a simple, prompt and effective recourse and, to this end, it must establish, as soon as possible, an independent and impartial body with powers to decide in a binding and final manner, whether or not the said persons were dismissed in a justified and regular manner from the Congress of the Republic, and to establish the corresponding legal consequences, including, if applicable, the relevant compensation based on the specific circumstances of each individual, in the terms of paragraphs 148, 149 and 155 of this judgment. The final decisions of the body established for these effects must be adopted within one year of notification of this judgment.

5. The State must pay, within one year of notification of this judgment, the amount established in paragraph 151 of this judgment, in favor of the 257 victims whose names appear in the Appendix to this judgment, for non-pecuniary damage, in the terms of paragraphs 156 and 158 to 161 of this judgment.

6. The State must pay, within one year of notification of this judgment, the amounts established for costs in paragraph 154, in the terms of paragraphs 157 to 161 of this judgment.

7. The Court will monitor full compliance with this judgment and will consider the case closed when the State has fully executed all its terms. Within a year of notification of this judgment, the State must send the Court a report on the measures adopted to comply with it, in the terms of paragraph 162 hereof.

Done at San José, Costa Rica, on November 24, 2006, in Spanish and English, the Spanish text being authentic.

Judges Sergio García Ramírez and Antônio Augusto Cançado Trindade informed the Court of their separate opinions, which accompany this judgment.

Sergio García-Ramírez  
President

Alirio Abreu-Burelli

Antônio A. Cançado Trindade

Cecilia Medina-Quiroga

Manuel E. Ventura-Robles

Diego García-Sayán

Pablo Saavedra-Alessandri  
Secretary

So ordered,

Sergio García-Ramírez  
President

Pablo Saavedra-Alessandri  
Secretary

**APPENDIX TO THE JUDGMENT IN THE CASE OF THE DISMISSED CONGRESSIONAL EMPLOYEES  
(AGUADO ALFARO *ET AL.*) V. PERU**

**List of victims**

1.	Aguado Alfaro, José Alberto
2.	Aguilar Rojas, Félix
3.	Aguilar Rojas, Guisella Patricia
4.	Albornoz Alva, Luis Rodolfo
5.	Alcántara Ramos, Juana
6.	Aliaga Lama, Luis Arturo
7.	Alvarado Achicahuala, Juan
8.	Alvarado Galván, Eriberto Rodolfo
9.	Alvarado Suárez, Mónica Lourdes
10.	Alvarez Gutiérrez, Marleni Isabel
11.	Ampuero Ampuero, Víctor
12.	Angeles Ponte, Nancy Violeta
13.	Antonio Chala, Sergio
14.	Araca Sosa, José Raúl
15.	Arcos Díaz, Cecilia Patricia
16.	Arévalo Torres, Rosa Luz
17.	Arias Infantes, Guillermo
18.	Arnez Macedo, Daniel
19.	Atauje Montes, Máximo Jesús
20.	Ayala Palomino, Herlinda Adela
21.	Ballarta Rueda, Eusebio Alfredo
22.	Barba Ureña, Telmo Jaime
23.	Barbaran Quispe, Jaime Raúl
24.	Bautista Apolaya, Max Sergio
25.	Begazo Salazar de Chang, Zoila Luz Ynés
26.	Belleza Cabanillas, Inés Margarita
27.	Bellido Orihuela, Augusto
28.	Beltrán Aguilar, Leoncio
29.	Bereche Riojas, Lidia Rosa
30.	Bonifacio Ramón, Valeriano Sebastián
31.	Bracamonte Chiringano, Susana
32.	Bravo Sarco, Cesar Augusto
33.	Briones Rodríguez, Johel Homar
34.	Burga Cardozo, Vilma
35.	Cabanillas Toro, Guadalupe Violeta
36.	Cabrera Enríquez, Alfredo
37.	Cajusol Bances, Juan de la Cruz
38.	Callirgos Tarazona, Ricardo Julio
39.	Camargo Matencio, Henry William
40.	Campos Alarcón, Dana Rossana
41.	Cánepa Campos, Rosa
42.	Cárdenas Pinto, Herver Víctor
43.	Carranza Rodríguez, Manuel Abad
44.	Carrillo Quiñones, Elizabeth Madeleine
45.	Castro Salvatierra, Toedoro Abelardo
46.	Ccapali Atoccsa, Juana Irene
47.	Ccapali Atoccsa, Zenón
48.	Changanahui Chávez, José
49.	Chara Pacheco de Rivas, Luisa
50.	Chávez García, Bladimir Napoleón
51.	Cherrez Cordova, Rosa América

52.	Chino Villegas, Wilfredo Zenón
53.	Chipana Quispe, Tiburcio
54.	Chipana Rodríguez, Luis Manuel
55.	Cisneros Urbina, Esther
56.	Clerque Gonzáles, José Luis
57.	Cobeñas Pariamache, Félix
58.	Colán Villegas de Ormeño, Laura Beatriz
59.	Condezo Espinoza, Antonio Beato
60.	Córdova Melgarejo, Antonieta Elizabeth
61.	Cornelio Dávila, Hipólito
62.	Cornelio Figueroa, Daisy Gladys
63.	Coronado Peña, José Raúl
64.	Cuadros Livelli, Manuel Alberto
65.	Cubas Vásquez, Lupo
66.	De la Cruz Paredes, Marcial
67.	De la Cruz Paredes, Walter Melquíades
68.	Del Águila Chamay, Dully
69.	Del Castillo Meza, Víctor Roberto
70.	Delgado Gómez, Juan Francisco
71.	Delgado Suárez, Raquel Justina
72.	Dergan Alcántara, Gloria Telly
73.	Dextre Cano, Edgar
74.	Dextre Ordóñez, Edison
75.	Díaz Campos, Flavio
76.	Díaz Céspedes, Nina Francia
77.	Díaz López, Orlando
78.	Echevarría Flores, Gumercinda
79.	Echevarría Suárez de Peña, Ruth Cecilia
80.	Elera Molero, Luis Alberto
81.	Erquiñigo Ramón, Santiago Lino
82.	Espinoza Fernández, Félix
83.	Eugenio Centeno, Virginia
84.	Fernandez Saré, Adolfo
85.	Ferradas Nuñez, Pablo Jorge
86.	Flores Guillen, Lilia Carolina
87.	Flores Salinas, Javier Mauricio
88.	Gallegos Ramírez, Luz Guillermina
89.	Gálvez Saldaña, Nélica
90.	Ganoza Rivera, Jorge Luis
91.	García Hualpa, Ana María
92.	García Vergara, Segundo Reynaldo
93.	Gimeno Alemán, Cecilia Victoria
94.	Gonzáles Figueroa, Máximo
95.	Gonzáles Panuera, Luis
96.	Gonzáles Sánchez, Anabel Iris
97.	González Castillo, Ricardo
98.	González Guillén, Jesús Gustavo
99.	Grandez Alvarado, César
100.	Guevara Gallo, Rodolfo Eduardo
101.	Guzmán Rebatta, Juan
102.	Hayashi Bejarano, Folgges Luis
103.	Hernández Fernández, Ricardo Rolando
104.	Herrera Madueño, Caro Sabel
105.	Herrera Rojas, Lucas Erasmo
106.	Herrera Valdez, Reynaldo
107.	Hijar Cerpa, Andrés Avelino

108.	Hinojosa Silva, Jesús Calixto
109.	Hinostroza Toro, Tito Antonio
110.	Huaman Cárdenas, Juan
111.	Huaman Trinidad, Wilfredo Emilio
112.	Huamantumba Vásquez, Felicita Meri
113.	Huaraca Vargas, Olimpio
114.	Huaranga Soto, María
115.	Hurtado Gutiérrez, Julio Miguel
116.	Ibáñez Ortiz, Sara Haydee
117.	Ibarra Ñato, Faustina Susana
118.	Infantes Vásquez, Rosa María
119.	Inga Coronado, María Rosa
120.	Jaimes Cano, Marco Antonio
121.	Kitano la Torre, Elsi Judith
122.	La Cruz Crespo, Carlos Edmundo
123.	Loayza Arcos, Lucy Maruja
124.	Lozano Muñoz, Julio Amador
125.	Luna Aragón, Elizabeth
126.	Magallán Galoc, Jackeline
127.	Malpartida Gutiérrez, Héctor Fernando
128.	Marcelo Navarro, Delano
129.	Marchena Alva, José Luis
130.	Margarito Silva, Juan Manuel
131.	Marrugarra Neyra, Luis
132.	Medina Ramirez, Sergio Alejandro
133.	Meléndez Saavedra, Inés
134.	Menacho Salas, Aquilino
135.	Mendoza Michuy, Roger Manuel
136.	Molina Ugarte Nohemí
137.	Montalvan Alvarado, César Augusto
138.	Montes Pacora, Hugo
139.	Montes Yacsahuache, Hugo Enrique
140.	Montoya Luna, Jaime Jhony
141.	Moreno González, Margarita Soledad
142.	Mujica Esquivel, Liz OrenCIA
143.	Muñoz Jesús, Berilda
144.	Murillo Orihuela, Rosa Ysabel
145.	Navarro Sánchez, Jorge
146.	Nizama Zelaya, Víctor Fernando
147.	Núñez Centeno, Víctor
148.	Núñez Morales, Carmen Adela
149.	Ordóñez Quispe, Marco Antonio
150.	Ore León, Jorge Aurelio
151.	Orrillo Vásquez Torres, Flavia Jesús
152.	Ortega Martell, Carlos Alberto
153.	Owada Amado, Oscar
154.	Pacheco Munayco, Jorge Luis
155.	Paitan Mauricio, Catalina
156.	Pajares Godoy, Moisés
157.	Paredes Cuba, Walter Roberto
158.	Paredes Cuba, Carmen Rosa
159.	Paucar Dávila, Rebeca
160.	Pedreshi Santín de Berropi, Ana Graciela
161.	Peredo Cavassa, Alicia Amalia
162.	Peredo Cavassa, Mario Arturo
163.	Pereyra Salazar, Walter

164.	Pérez Guevara, Cesar Dionicio
165.	Pérez Polo, Rosalía
166.	Pichilingüe Romero, Teresa Victoria
167.	Pilco Guerra de Phang Chiong, Luisa Florentina
168.	Pizarro Sánchez, Consuelo Elena
169.	Pohl Luna, Amelia Rosario
170.	Polo Castañeda, Agustín Miguel Arturo
171.	Purizaca Arámbulo, José Humberto
172.	Quineche Díaz, María Elena
173.	Quiñonez Atalaya, Lira Inocencia
174.	Quiñones Díaz, Manuel
175.	Quiñonez Seminario, Pedro Antonio
176.	Ramírez de Peña, Jacinta Eudora
177.	Ramírez Granados, Margarita
178.	Ramírez Rodríguez, Mónica Emperatriz
179.	Ramos de la Cruz, Elmi Yoli
180.	Ravello Velásquez, John
181.	Retuerto Aranda; Rómulo Antonio
182.	Revelo Infante, Ronald Luciano
183.	Reyes Caballero, Rubén Manuel
184.	Ribotte Rodríguez, Lino Roberto
185.	Rigaid Arévalo, Fernando Julio Antonio
186.	Rivas Capeletti, Carlos Manuel
187.	Rivas Chara, Jorge Martín
188.	Rivera Delgado, Bertha Petronila
189.	Rivera Loayza, Carmen
190.	Rivera Martínez, Nelly Andrea
191.	Rodas Romero, Julio
192.	Rodríguez Campos, Rommy Cecilia
193.	Rodríguez Espada, Eugenio
194.	Rodríguez García, Elisa
195.	Rodríguez Reaño, Vicente Waldo
196.	Rojas Cortez, Víctor
197.	Rojas Figueroa, Luis Félix
198.	Rojas Vega, Irma Margot
199.	Román Toro, Isaías
200.	Romero Chang, María del Carmen
201.	Saavedra Ambrosio, José Fortunato
202.	Saavedra Mego, Santos Violeta
203.	Saavedra Vega, Armando
204.	Salas Sobrino, Frida Luisa
205.	Salazar Caycho, Eduardo
206.	Salazar Venegas, María
207.	Salcedo Olivares, Liduvina
208.	Sánchez Alarcón, Reyna
209.	Sánchez Campos, Luz Acela
210.	Sánchez Candía, Raúl Manuel
211.	Sánchez Lozano, Juan Carlos
212.	Santisteban Urmeneta, Ronald Leonardo
213.	Santivañez Velásquez, Oscar Alfredo
214.	Sernaqué Vargas, César Agustín
215.	Silva Baca, Elieberto
216.	Silva Baca, Víctor Raúl
217.	Silva Delgado, Iván Francisco
218.	Sipan Guerra, Javier Celso
219.	Solís Martell, Clemencia Claudia

220.	Solís Retuerto, Wilder Domingo
221.	Solís Roca, Eleuterio
222.	Soria Cañas, Lavinia Edith
223.	Sosa Álvarez, Carmen
224.	Soto Santana, Giovanna Elset
225.	Soto Santana, Walter Edgardo
226.	Sotomayor Vargas, Javier Rubén
227.	Talledo Añazco, Luz Angélica
228.	Torres Hoyos, Leti Dorinda
229.	Torres Martínez, Juan
230.	Torres Prieto, Rolando Alfonso
231.	Uchuya Chacaltana, Leoncio Constantino
232.	Ugarte Pierrend, Juana Inés Elena
233.	Unzueta Medina, Carlos
234.	Urquiza Alcántara, Ronald
235.	Urrunaga Linares, Víctor Manuel
236.	Valdez Rivera, Ángela Arminda
237.	Valdez Tellez, Hilda Orfa
238.	Varias Trabanco, Freddy Demesio
239.	Vásquez Legua, Oscar Arcadio
240.	Vásquez Quezada, Juan Félix
241.	Vásquez Quiñones, Soledad Clorinda
242.	Vásquez Sánchez, Fidel
243.	Vega Díaz, Iván Alex
244.	Velásquez Machuca, Edgar Humberto
245.	Vera Vitorino, Visitación Elizabeth
246.	Vereau Palma, Cita Amparo
247.	Vidal Vidal, Eva Isabel
248.	Villar Contreras, José Alberto
249.	Villareal Rodríguez, Hermelinda
250.	Villegas Guerra, Wilburt
251.	Vizcarra Zorrilla, Neida Eleonor
252.	Zapata Espinoza, Elsa Silvia
253.	Zapata Zapata, Rosario Emperatriz
254.	Zavaleta Saavedra, Carmen
255.	Zegarra Castro, David Orlando
256.	Zegarra Zevallos, Segundo Benito
257.	Zumaeta Flores, Iván

**SEPARATE OPINION OF JUDGE SERGIO GARCÍA RAMÍREZ  
CONCERNING THE JUDGMENT OF THE  
INTER-AMERICAN COURT OF HUMAN RIGHTS  
IN THE CASE OF THE *DISMISSED CONGRESSIONAL EMPLOYEES V. PERU*,  
OF NOVEMBER 24, 2006**

1. In this judgment, the Court has ruled on the control of “conventionality” (para. 128) that can and must be exercised by the national Judiciary with regard to acts of governmental authorities – including, norms of a general scope – pursuant to the powers conferred on them by the laws which govern them and the provisions of the international human rights law, to which the State that these national organs belong to are bound by different acts of a sovereign nature (ratification of or accession to a treaty, acceptance of a jurisdiction). The Court has referred to this “control” in its judgment in the *Almonacid case* (para. 124) previously this year.

2. In the instant case, when referring to the control of “conventionality,” the Inter-American Court has considered the applicability and application of the American Convention on Human Rights, Pact of San José. However, the same function is deployed, for the same reasons, with regard to other instruments of a similar nature, that comprise the *corpus juris* arising from the human rights conventions to which the State is a party: the Protocol of San Salvador, the Protocol to Abolish the Death Penalty, the Convention to Prevent and Punish Torture, the Convention of Belém do Pará on the Eradication of Violence against Women, the Convention on Forced Disappearance of Persons, etcetera. The task is to ensure consistency between actions at the national level and the international commitments made by the State that generate specific obligations for the latter and recognize certain rights for the individual.

3. The jurisdictional chain of the means of controlling acts of governmental authorities is well known; under diverse jurisdictional criteria – and not always in accordance with a system of instances that represent new stages of one and the same process – it endeavors to adjust the acts of the governmental authorities to the law. In the sphere that I am interested in referring to, this occurs each time that a proceeding on legality is heard (in the sense of ensuring that the act examined is in keeping with the norm that should govern it, at the different levels of the normative hierarchy): by the appeals body with regard to the body of first instance; by the cassation authority concerning the contested judicial decision; by the constitutional court with regard to acts of different national authorities, and by the international court as regards acts which can be attributed to a State that has accepted that court’s competence to settle contentious matters arising in the domestic sphere.

4. On other occasions, I have compared the function of international human rights tribunals to the mission of national constitutional courts. The latter are responsible for safeguarding the rule of law through their decisions concerning the subordination of acts of governmental authorities to the supreme law of the nation. A case law of principles and values (principles and values of the democratic system) has arisen in the development of constitutional justice, which illustrates the direction taken by the State, provides security to the individual, and establishes the route and the boundaries for the work of the State’s organs. Considered from another angle, the control of constitutionality, as an assessment of and a decision on the act of the governmental authority put on trial, is entrusted to a high-ranking organ within the



State's jurisdictional structure (concentrated control) or assigned to diverse jurisdictional bodies in the case of matters they hear pursuant to their respective competences (diffuse control).

5. In a similar way to that described in the preceding paragraph, there is a control of "conventionality" deposited in international – or supranational – tribunals, created by human rights conventions, which entrust these organs of the new regional human rights justice with the interpretation and application of the respective treaties and with ruling on facts that allegedly violate the obligations set out in the conventions that give rise to the international responsibility of the State which ratified the convention or acceded to it.

6. Every day fewer questions are being raised about the binding or merely indicative nature of the rulings of the international human rights courts. I will not examine here the possible value of the opinions issued by the latter in response to this type of request. Rather, I refer to the rulings issued during or at the conclusion of genuine proceedings, initiated on the basis of a dispute (litigation, in the substantive sense) filed before the jurisdiction by whosoever may legitimately file a complaint (in our case, pursuant to the American Convention, the Inter-American Commission on Human Rights or a State that has acknowledged the so-called compulsory jurisdiction of the Inter-American Court). The American Convention stipulates clearly – and there is widespread agreement on this point – that such decisions are binding for the parties to the dispute. It is possible to go even further when the proceedings deals with acts that, owing to their very nature, have a objective sphere of application that exceeds the parties to the litigation: for example, a law, as can be seen in the judgment on interpretation in the *Barrios Altos case*.

7. Since the American Convention and the Statute of the Inter-American Court – both of which are products of the normative intentions of the American States that issued them – confer on the Court the function of interpreting and applying the American Convention (and, if applicable and within its sphere, other treaties: protocols and conventions that establish, with multiple formulas, the same attribution within the human rights *corpus juris*), it is for the Court to establish the meaning and scope of the norms contained in these international treaties.

8. In keeping with the jurisdictional logic that underpins the Court's establishment and operation, it could not be considered that it would need to hear hundreds or thousands of cases on a single treaty-based issue – which would involve an enormous neglect of the individual – in other words, all the litigations that are ever filed in all the countries, resolving one by one the facts that violate rights, and guaranteeing, also one by one, the specific rights and freedoms. The only reasonable possibility of protection implies that once the "interpretation and application criteria" have been established, the States will include them in their legal system, through policies, laws and judgments that give transcendence, universality and effectiveness to the rulings of the Court, which was established – I insist – through the sovereign will of the States, to uphold their basic decisions, explicit in their national constitutions and, evidently, in their international treaty-based commitments.

9. Fortunately, in recent years – during which there has been a notable development of diverse elements of the inter-American system for the protection of human rights, including the jurisdictional aspect – that idea has prevailed explicitly and increasingly. Every day more high-ranking national courts accept it. The national

acceptance of international human rights law is an outstanding positive trait nowadays, and it should be recognized, sustained and increased.

10. The express and sufficient connection between the domestic system and the international system – which resolves disagreements and overcomes problems of interpretation that can signify uncertainty or a diminishing of the statute of individual rights and freedoms – must be encouraged in order to continue steadfastly in this direction. Several modern constitutions have confronted this matter and provided solutions that “build a bridge” between both systems and eventually benefit those whose interests must be served: human beings. This happens when a constitution grants the highest value to international human rights treaties or when it establishes that, in cases of difference or discrepancy, the norm that contains the maximum guarantees or most extensive rights for the individual will prevail.

11. If this clear and categorical connection exists – or at least one that is sufficient and intelligible, and that is not lost in uncertainties or a diversity of interpretations - and, because of this, international instruments are immediately applicable in the domestic sphere, the national courts can and must conduct their own control of “conventionality.” This has been done by various organs of national justice, improving the outlook that had been bleak, inaugurating a new stage of enhanced protection of the individual and confirming the idea – which I have reiterated – that the vital battle for human rights will be won in the domestic sphere, to which the international sphere is a contributor or a complement, but not a substitute.

12. This control of “conventionality” – on the successful results of which the increased dissemination of the regime of guarantees depends – can have (as has occurred in some countries) a diffuse nature; in other words, it can be in the hands of all the courts when they have to decide cases in which the provisions of international human rights treaties are applicable.

13. This would allow an extensive (vertical and general) system of control of the legality of the acts of governmental authorities to be drawn up – as regards the conformity of such acts to international human rights norms – without prejudice to the fact that the source of interpretation of the relevant international provisions is where the States have deposited it when setting up the protection system established in the American Convention and in other instruments of the regional *corpus juris*. I consider that this extensive control – to which the control of “conventionality” corresponds – is among the most relevant tasks for the immediate future of the inter-American system for the protection of human rights.

Sergio García-Ramírez  
Judge

Pablo Saavedra-Alessandri  
Secretary

## SEPARATE OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. I have voted in favor of the adoption of this judgment of the Inter-American Court of Human Rights in the case of the *Dismissed Congressional Employees*, with regard to the State of Peru. In this brief separate opinion, I wish to add some clarifications of a conceptual nature. Although I am not satisfied with the decision in this case, at least the Court's judgment reveals the importance of the right to an effective recourse in order to avoid the occurrence of a situation such as that of the employees dismissed from the Peruvian Congress in the *cas d'espèce*. It is no coincidence that, in this regard, in *Castillo Páez v. Peru* (judgment on merits of November 3, 1997), when first determining the content of the right to an effective domestic recourse (under Article 25 of the American Convention on Human Rights), the Court added that the right to an effective domestic recourse "is one of the fundamental pillars not only of the American Convention, but of the very rule of law in a democratic society in the terms of the Convention" (para. 82).

2. As I have been maintaining for many years, effective recourses under *domestic* law, to which specific provisions of human rights treaties refer expressly, are part of the *international* protection of human rights.<sup>1</sup> In this regard, it should not be forgotten, as the Court indicates in this judgment, that:

"When a State has ratified an international treaty such as the American Convention, the judges are also subject to it; this obliges them to ensure that the *effet util* of the Convention is not reduced or annulled by the application of laws contrary to its provisions, object and purpose. In other words, the organs of the Judiciary should exercise not only a control of constitutionality, but also of 'conventionality' *ex officio* between domestic norms and the American Convention; evidently within the framework of their respective jurisdictions and the corresponding procedural regulations. (...)."<sup>2</sup>

3. In other words, the organs of the Judiciary of each State Party to the American Convention should have an in-depth knowledge of and duly apply not only constitutional law but also international human rights law; should exercise *ex officio* the control of compliance with the constitution (constitutionality) and with international treaties (conventionality), considered together, since the international and national legal systems are in constant interaction in the domain of the protection of the individual. The case of the *Dismissed Congressional Employees* poses the question for future studies on the issue of access to justice of whether a lack of clarity with regard to domestic recourses *as a whole* can also lead to a denial of justice.

4. I would like to recall here that, in my separate opinion in the recent case of *Goiburú et al. v. Paraguay* (judgment of September 22, 2006), I indicated that, in that case, the Court had taken a step forward in the direction I had been advocating

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<sup>1</sup>. A.A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law*, Cambridge University Press, 1983, pp. 279-287; A.A. Cançado Trindade, *O Esgotamento de Recursos Internos no Direito Internacional*, 2a. ed., Brasília, Editora Universidade de Brasília, 1997, pp. 243 and 265.

<sup>2</sup>. Paragraph 128.

within the Court for some time,<sup>3</sup> by recognizing that this peremptory right also covers the right of access to justice *lato sensu*; in other words, the right to full jurisdictional benefits. In the words of the Court:

“(…) Access to justice is a peremptory norm of international law and, as such, gives rise to obligations *erga omnes* for the States to adopt all necessary measures to ensure that such violations do not remain unpunished, either by exercising their jurisdiction to apply their domestic law and international law to prosecute and, when applicable, punish those responsible, or by collaborating with other States that do so or attempt to do so” (para. 131).

5. I had argued precisely in the same sense in my extensive separate opinion (paras. 63-65)<sup>4</sup> in *the Pueblo Bello Massacre v. Colombia* (judgment of January 31, 2006), in which I also covered other aspects: (a) Articles 25 and 8 of the American Convention at the ontological and hermeneutic levels (paras. 14-15); (b) the genesis of the right to an effective domestic recourse in the *corpus juris* of international human rights law (paras. 16-21); (c) the right to an effective recourse in the case law of the Inter-American Court (paras. 24-27); (d) the indivisibility of access to justice (the right to an effective recourse) and the guarantees of due process of law (Articles 25 and 8 of the American Convention)(paras. 28-34); (e) the indivisibility of Articles 25 and 8 of the American Convention in the *consistent case law* of the Inter-American Court (paras. 35-43); (f) the indivisibility of Articles 25 and 8 of the American Convention as an inviolable advance in case law (paras. 44-52); (g) overcoming the difficulties concerning the right to an effective recourse in the case law of the European Court (paras. 53-59); and (h) the right of access to justice *lato sensu* (paras. 60-61).

6. In this judgment in the *Dismissed Congressional Employees case*, the Court has once again confirmed its *consistent case law* by considering Articles 8 and 25 of the American Convention in an indivisible and interrelated manner, in combination with Articles 1(1) and 2 of the Convention.<sup>5</sup> Nevertheless, I consider that the solution found by the Court<sup>6</sup> to the issue raised in this case does not do justice to the concepts it has adopted correctly on the right of access to justice (*supra*).

7. Regarding the unsatisfactory paragraph 136 of this judgment, which is similar to the unsatisfactory wording of Article 26 of the American Convention (a product of its time), owing to absolute lack of time, in view of the accelerated work “methodology” adopted recently by the Court, over my objection, I will merely reiterate my understanding, expressed in numerous publications over the years, that *all* human rights, even economic, social and cultural rights, are promptly and

<sup>3</sup>. Indeed, in my separate opinion in *Myrna Mack Chang v. Guatemala* (Judgment of November 25, 2003), I maintained that the *right to law* is necessary; in other words, the right to a legal system that effectively safeguards fundamental human rights (paras. 9 to 55).

<sup>4</sup>. In this separate opinion, I observed that “[t]he indivisibility between Articles 25 and 8 of the American Convention [...] leads me to characterize access to justice, understood as the *full realization of justice*, as forming part of the sphere of *jus cogens*; in other words, that the inviolability of all the judicial rights established in Articles 25 and 8 considered *together* belongs to the sphere of *jus cogens*. [...] the fundamental guarantees, common to international human rights law and international humanitarian law have a universal vocation because they are applicable in any circumstance, constitute a peremptory right (belonging to *jus cogens*), and entail obligations *erga omnes* of protection” (para. 64, and cf. paras. 60-62).

<sup>5</sup>. Paragraph 119 and the second operative paragraph.

<sup>6</sup>. Fourth operative paragraph.

immediately *demandable and justiciable*, once the interrelation and indivisibility of all human rights are affirmed at both the doctrinal and the operational levels – in other words, both in legal writings and in hermeneutics and the application of human rights.<sup>7</sup>

Antônio Augusto Cançado Trindade  
Judge

Pablo Saavedra-Alessandri  
Secretary

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<sup>7</sup>. A.A. Cançado Trindade, *La Cuestión de la Protección Internacional de los Derechos Económicos, Sociales y Culturales: Evolución y Tendencias Actuales*, San José, Costa Rica, IIDH (Serie para ONGs, vol. 6), 1992, pp. 1-61; A.A. Cançado Trindade, "La question de la protection internationale des droits économiques, sociaux et culturels: évolution et tendances actuelles", 44 *Boletim da Sociedade Brasileira de Direito Internacional* (1991) pp. 13-41; A.A. Cançado Trindade, "La Protección Internacional de los Derechos Económicos, Sociales y Culturales en el Final del Siglo", in *El Derecho Internacional en un Mundo en Transformación - Liber Amicorum en Homenaje al Prof. E. Jiménez de Aréchaga*, vol. 1, Montevideo, Fundación de Cultura Universitaria, 1994, pp. 345-363; A.A. Cançado Trindade, *El Derecho Internacional de los Derechos Humanos en el Siglo XXI*, 1st. ed., Santiago, Editorial Jurídica de Chile, 2001, pp. 91-142, among other publications.