

**INTER-AMERICAN COURT OF HUMAN RIGHTS**

**CASE OF CUYA LAVY ET AL. v. PERU**

**JUDGMENT OF SEPTEMBER 28, 2021**

**(Preliminary Objections, Merits, Reparations and Costs)**

In the case of *Cuya Lavy et al. v. Peru*,

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

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

also present,

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

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

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## I INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. *Proceedings before the Court.* On August 6, 2019, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted the case of *Cuya Lavy et al. against the Republic of Peru* (hereinafter "the State of Peru", "the State", or "Peru") to the jurisdiction of the Court. According to the Commission, the case is related to a series of alleged violations in the context of the National Council of the Judiciary's (hereinafter also "CNM" as per its initials in Spanish) evaluation and ratification process undergone by the alleged victims in this case, the judges and prosecutors Jorge Luis Cuya Lavy ( hereinafter also "Jorge Cuya" or "Cuya Lavy" or "Mr. Cuya"), Jean Aubert Díaz Alvarado (hereinafter also "Jean Díaz" or "Díaz Alvarado" or "Mr. Díaz"), Marta Silvana Rodríguez Ricse (hereinafter also "Marta Rodríguez" or "Rodríguez Ricse" or "Ms. Rodríguez") and Walter Antonio Valenzuela Cerna (hereinafter also "Walter Valenzuela" or "Valenzuela Cerna" or "Mr. Valenzuela"), between 2001 and 2002. According to the Inter-American Commission, the State violated, under the judicial guarantees provided by the American Convention, the right to know in advance and in detail the accusation made and to have adequate time and means for a defense, since during the procedure of evaluation and ratification, the alleged victims would not have had the opportunity to present evidence in their defense regarding the accusations, charges, reports and complaints against them, since they were not informed of their existence prior to the decision. The Commission also established the violation of the principle of legality, because the decisions of non-ratification issued by the CNM lacked substantiation and the legal procedural framework did not establish duly defined grounds that would allow the alleged victims to understand the specific behaviors evaluated and which of these could be considered as serious offenses justifying non-ratification. Additionally, the Commission considered the violation of the right to appeal the ruling and the right to judicial protection, since the current regulatory framework established that the CNM's decisions regarding evaluations and ratifications of judges and prosecutors were not reviewable in court, and that no possibility existed for the presentation of a judicial remedy against a potential violation of human rights emanating from said resolutions. Finally, the Commission concluded that the State violated the alleged victims' political rights.

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

- a) *Petition.* Between May 2003 and July 2008, the Commission received four petitions presented by Jorge Luis Cuya Lavy, Jean Aubert Díaz Alvarado, Marta Silvana Rodríguez Ricse and Walter Antonio Valenzuela Cerna, alleging Peru was responsible for the violation of various provisions of the American Convention. The petitions were recorded under No. 320-03, No. 948-04, No. 739-08 and No. 1065-08, respectively.
- b) *Admissibility Report.* On March 24, 2015, the Commission approved Admissibility Report No. 19/15<sup>1</sup>, which was notified to the parties on April 13 of the same year. In said report, petitions No. 320-03, No. 948-04, No. 739-08 and No. 1065-08 related to Messrs. Cuya, Valenzuela, and Díaz, and Ms. Rodríguez, respectively, were joined. The Commission made this available to the parties in order to reach an amicable solution.<sup>2</sup>
- c) *Merits Report.* On December 7, 2018, the Commission approved Merits Report No. 159/18 (hereinafter also "the Merits Report" or "Report No. 159/18"), in accordance with

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<sup>1</sup> The Commission declared the case admissible with respect to Articles 8, 9, 23 and 25 of the American Convention, in relation to Articles 1(1) and 2 of the American Convention and inadmissible with respect to the claims related to Articles 5, 11, 24 and 26 of the same instrument.

<sup>2</sup> During the processing of the petition before the Commission, three of the alleged victims, Messrs. Valenzuela and Díaz Alvarado, and Ms. Rodríguez Ricse initiated a friendly settlement procedure with the State, which did not reach an agreement.

Article 50 of the Convention, in which it reached a series of conclusions<sup>3</sup> and made several recommendations to the State.

- d) *Notification to the State.* On February 6, 2019, Report No. 159/18 was notified to the State, granting it a period of two months to report on compliance with the recommendations. After the term granted, on May 6, 2019, the Commission granted Peru an extension of three months to comment on the assigned recommendations. The State requested a second extension, which was not granted by the Commission.
- e) *Submission to the Court.* On August 6, 2019, the Commission submitted to the jurisdiction of the Inter-American Court all the facts and human rights violations described in the Merits Report.<sup>4</sup>

3. *Requests from the Inter-American Commission.* The Commission asked this Court to conclude and declare the State's international responsibility for the violations contained in the Merits Report and to order to Peru, as reparation measures, the recommendations included therein (*supra* para. 2.c). This Court notes with concern that, between the presentation of the initial requests before the Commission and the submission of the case before the Court, 11 and 16 years have elapsed (*supra* para. 2a).

## II PROCEEDINGS BEFORE THE COURT

4. *Appointment of Inter-American Public Defenders.* By means of a note from the Secretariat of October 4, 2019, the General Coordinator of the Inter-American Association of Public Defenders (AIDEF) was asked to appoint an inter-American public defender to represent, separately for the alleged victim, Mr. Cuya Lavy, and for the alleged victim, Mr. Valenzuela Cerna. On November 13, 2019, said Association communicated to the Inter-American Court the appointment of two inter-American public defenders, Mariano Patricio Maciel and Leonardo Cardoso de Magalhaes, to defend Mr. Cuya Lavy and on November 21, 2019 reported the appointment of the two inter-American public defenders, Rivana Barreto Ricarte de Olivieira and Hugo Cesar Gimenez Ruiz Díaz to defend Mr. Valenzuela Cerna (hereinafter, in indistinct reference to the persons who will act in this capacity, "inter-American public defenders" or "the representatives").

5. *Notification to the representatives and the State.* – The case was notified by the Court to the State and to the representative<sup>5</sup> of Mr. Díaz Alvarado and Ms. Rodríguez Ricse on November 28, 2019, to the inter-American defenders of Mr. Valenzuela Cerna on November 29, 2019, and to the inter-American defenders of Mr. Cuya Lavy on December 13, 2019.

6. *Brief of pleadings, motions and evidence.* – On January 29, 2020, the representative of Mr. Díaz Alvarado and Ms. Rodríguez Ricse presented two briefs of pleadings, motions and evidence (hereinafter "brief of pleadings and motions"), one for each alleged victim and requested several reparation measures. On January 30, 2020, the representatives of Mr. Valenzuela Cerna and on February 13, 2020, the representatives of Mr. Cuya Lavy, respectively, presented the brief of

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<sup>3</sup> The Commission concluded that the State is responsible for the violation of the rights to judicial guarantees, the principle of legality, political rights and judicial protection, enshrined in articles 8(1), 8(2)(b), 8(2)(c), 8(2)(h), 9, 23(1)(c) and 25(1) of the American Convention on Human Rights, in relation to the obligations established in Articles 1(1) and 2 of the same instrument, to the detriment of Jorge Luis Cuya Lavy, Jean Aubert Díaz Alvarado, Marta Silvana Rodríguez Ricse and Walter Antonio Valenzuela Cerna.

<sup>4</sup> The Commission appointed as its delegates before the Court the then Commissioner Joel Hernández and the then Executive Secretary Paulo Abrão, and Christian González Chacón, lawyer of the Executive Secretariat of the IACHR, as legal advisor.

<sup>5</sup> The alleged victims Jean Aubert Díaz Alvarado and Marta Silvana Rodríguez Ricse are represented by Enrique Tazza Chaupis.

pleadings and motions, in accordance with Articles 25 and 40 of the Court's Rules of Procedure. The representatives of Messrs. Cuya and Valenzuela agreed with the alleged violations of the articles of the Convention indicated by the Commission in the Merits Report. In their briefs, they asked the Court to order the State to adopt various measures of reparation and the reimbursement of costs and expenses. Similarly, Messrs. Cuya Lavy and Valenzuela Cerna requested, through their representatives, to avail themselves of the Victims' Legal Assistance Fund of the Inter-American Court (hereinafter "Court Assistance Fund" or the "Fund").

7. *Answering brief.* – On August 20, 2020, the State<sup>6</sup> presented its brief filing preliminary objections, answering the submission of the case and the briefs of pleadings and motions<sup>7</sup> (hereinafter "answering brief"). The State presented five preliminary objections and made two preliminary questions.

8. *Observations on the preliminary objections.* On October 13, 2020, Mr. Cuya Lavy's representatives, on October 15, 2020, Mr. Valenzuela Cerna's representatives, and on October 16, 2020, the Commission forwarded, respectively, their observations on the preliminary objections and requested that they be rejected. Mr. Cuya's representatives submitted four annexes, which, as they indicated, were already in the file. The representative of Mr. Díaz Alvarado and Ms. Rodríguez Ricse did not submit observations.

9. *Victims Legal Assistance Fund.*

On November 4, 2020, the parties and the Commission were informed that the request of the alleged victims Messrs. Cuya Lavy and Valenzuela Cerna, presented through their inter-American defenders in the brief of requests and arguments, to avail themselves of the Fund was admissible.

10. *Public Hearing.* – By order of the President of the Court of January 28, 2021<sup>8</sup>, the parties and the Inter-American Commission were summoned to a public hearing to receive their final arguments and final oral observations on the preliminary objections, and possible merits, reparations and costs, as well as to receive the testimony of two alleged victims and an expert. Also ordered was the presentation of the statements, by affidavit, of an alleged victim<sup>9</sup>, a witness<sup>10</sup> and two expert witnesses<sup>11</sup> called by the representatives, a witness and an expert proposed by

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<sup>6</sup> In a communication dated December 18, 2019, the State appointed Carlos Miguel Reaño Balarezo as Principal Agent and Carlos Llaja Villena and Silvana Lucía Gómez Salazar as alternate agents. On December 3, 2020, the State reported the termination of the appointment of Silvana Lucía Gómez Salazar.

<sup>7</sup> The State requested an additional month to present the answer, considering, among other things, the plurality of presumed victims, representatives and four pleadings and motions briefs. On March 12, 2020, the extension of one month was authorized within the period provided in article 41(1) of the Rules of Procedure, so it had a period of three months to present its response. In addition, it should be noted that due to the exceptional circumstances caused by the Covid-19 pandemic, the Court issued two communications, Inter-American Court Communication CP-18/2020 and Inter-American Court Communication CP-28/2020, in which it was reported that the Court decided suspend the calculation of terms that were in progress, which included the cases at the merits stage (Court Agreements of 1/20 of March 17 and 2/20 of April 16, 2020). The Inter-American Court Press Release CP-18/2020 reported on the suspension from March 17 to April 21 inclusive and the Inter-American Court Press Release CP-28/2020 reported on the suspension from April 22 to May 20 inclusive. Finally, through the Inter-American Court Press Release CP-37/2020, the Court communicated that the calculation of the term was resumed as of May 21, 2020, including at the merits stage.

<sup>8</sup> Cf. *Case of Cuya Lavy et al. v. Peru. Call for hearing.* Order of the President of the Inter-American Court of Human Rights of January 28, 2021. Available at: [http://www.corteidh.or.cr/docs/asuntos/cuya\\_lavy\\_y\\_otros\\_28\\_01\\_21.pdf](http://www.corteidh.or.cr/docs/asuntos/cuya_lavy_y_otros_28_01_21.pdf)

<sup>9</sup> In addition, due to the request made on March 5, 2021 by Mr. Díaz Alvarado's representative so that the alleged victim could speak during the hearing in the presentation of the final arguments, the Secretariat informed him, following instructions from the President of the Court, that during the time allowed for his representation to present the allegations, said alleged victim could make his statements.

<sup>10</sup> On March 2, 2021, the representatives reported that the witness Walter Albán Peralta "will not be able to testify at the hearing," and they did not present his affidavit.

<sup>11</sup> On March 2, 2021, the representatives informed that Mrs. Gabriela Knaul will not render her expertise due to the Covid-19 situation. On March 3, 2021, Mr. Valenzuela's representatives forwarded the expert opinion of Mr. Rogerio Varela in Portuguese. In a communication dated March 5, 2021, the Secretariat of the Court, following the instructions of the

the State, and an expert called by the Commission. Due to the exceptional circumstances caused by the Covid-19 pandemic, the public hearing was held by videoconference in accordance with the provisions of the Court's Rules of Procedure, on March 8 and 9, 2021, during the 140<sup>th</sup> regular session of the Court<sup>12</sup>.

11. *Amicus curiae*. – On March 25, 2021, an *amicus curiae* brief was received, submitted by Javier Eduardo Fernández Dávila, President of the District Association of Magistrates of Arequipa<sup>13</sup>.

12. *Final written arguments and observations*. On April 6, 2021, the representative for Mr. Díaz Alvarado and Ms. Rodríguez Ricse presented their final written arguments. On April 11, 2021, Mr. Cuya Lavy's representatives presented their final arguments. On April 12, 2021, the representatives for Mr. Valenzuela Cerna and the State presented their final written arguments, and the State included several annexes. On that same date, the Commission presented its final written observations. On April 15, 2021, a period was granted to the representatives and the Commission to present, no later than April 28, 2021, the observations they deemed relevant to the documentation attached by the State.

13. *Observations on the annexures to final arguments of the State*. On April 22 and 27, 2021, the representative for Mr. Díaz Alvarado and Ms. Rodríguez Ricse, and the representatives for Mr. Cuya Lavy and the representatives for Mr. Valenzuela Cerna presented, respectively, their observations on the annexes to the final arguments brief presented by the State. On April 28, 2021, the Commission reported that it had no observations to make in this regard.

14. *Additional evidence*. On August 17, 2021, the State and the representatives were requested to send certain information, regulations, and documentation as additional evidence, in accordance with Article 58(b) of the Court's Rules of Procedure. On August 26, 2021, the representatives for Mr. Cuya and Mr. Díaz and Ms. Rodríguez, and on August 27, 2021, the State presented the information and documentation requested. The State argued that it was impossible to collect certain requested evidence due to the measures adopted due to the Covid-19 pandemic and requested an additional period for its submission. In light of the foregoing, on September 1, 2021, the State and a representative of the alleged victims were requested to present, no later than September 8, 2021, the outstanding documentation. On September 8, 2021, the State presented the supplementary report. On September 10, 2021, the State sent observations regarding the additional evidence sent on August 26, 2021. The Commission stated that it had no observations. On September 20, 2021, Mr. Cuya's representatives submitted their observations regarding the State's supplementary report, and on September 21, 2021, the Commission stated that it had no

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President of the Court, requested the representatives to forward the expert opinion in Spanish, the working language of the case. On March 10, 2021, the deadline was granted as March 18, 2021 for the presentation of the translation into Spanish of the expert opinion. On March 23, 2021, it is indicated that the Spanish translation of the affidavit of the expert opinion was not presented, therefore, following the instructions of the President of the Court, the expert opinion presented was declared inadmissible.

<sup>12</sup> The following appeared at this hearing: a) for the Inter-American Commission on Human Rights: Mr. Edgar Stuardo Ralón Orellana, Commissioner, Mrs. Marisol Blanchard, Deputy Executive Secretary, and Mr. Jorge Meza Flores and Mrs. Daniela Saavedra, advisors; b) for the representatives of Jorge Luis Cuya Lavy: Leonardo Cardoso de Magalhaes, Mariano Maciel, and Javier Mongrovejo, Inter-American Public Defenders; c) for the representatives of Walter Antonio Valenzuela Cerna: Rivana Barreto Ricarte de Oliveira and Hugo Giménez, Inter-American Public Defenders; d) for the representatives of Jean Aubert Díaz Alvarado and María Silvana Rodríguez Ricse: Enrique Tazza Chaupis and Guissepe Francescolli and the alleged victims Jean Aubert Díaz Alvarado and Martha Silvana Rodríguez Ricse, and e) for the representation of the State of Peru: Carlos Miguel Reaño Balarezo, Agent, Supranational Specialized Public Prosecutor, and Domingo Enrique Rojas Chacaltana and Angela Fiorella Huasupoma Soto, Lawyers of the Supranational Specialized Public Prosecutor's Office.

<sup>13</sup> The brief was signed by Javier Eduardo Fernández Dávila Mercado, President of the District Association of Magistrates of Arequipa. The brief makes considerations on ways the evaluation and ratification process is contrary to the international obligations of the Peruvian State and orders a measure of reparation contained in a guarantee of non-repetition that expels said figure from the Peruvian legal system.

observations in this regard.

15. *Disbursements in application of the Victims' Assistance Fund.* On August 17, 2021, the Secretariat, following instructions from the President of the Court, forwarded information to the State on the disbursements made in application of the Victims' Legal Assistance Fund in this case and, pursuant to Article 5 of the Court's Rules for the Operation of the aforementioned Fund, granted it a period to present any observations it deemed pertinent. On August 27, 2021, the State presented its observations.

16. *Deliberation of this case.* The Court began the deliberation of this Judgment on September 27, 2021.<sup>14</sup>

### **III JURISDICTION**

17. The Inter-American Court is competent to hear this case pursuant to Article 62(3) of the American Convention, given that Peru ratified the American Convention on July 28, 1978, and accepted the contentious jurisdiction of the Court on July 21, January 1981.

### **IV PRELIMINARY OBJECTIONS**

18. In this section, the Court will analyze the arguments aimed at examining the jurisdiction of this Court on the grounds of: (a) the alleged failure to exhaust domestic remedies by the alleged victims and the need for a review of legality by the Inter-American Court; (b) the alleged lack of jurisdiction of the Court to act as a "fourth instance", and (c) the alleged improper inclusion of Article 26 of the Convention in the case of Walter Antonio Valenzuela Cerna, Jean Aubert Díaz Alvarado and Marta Silvana Rodríguez Ricse. Additionally, the State presented as preliminary objections the alleged improper inclusion in the brief of motions and pleadings of allegations on the alleged impact on rights not included in Admissibility Report No. 19/15, regarding Walter Antonio Valenzuela Cerna, Jean Aubert Díaz Alvarado and Marta Silvana Rodríguez Ricse and the alleged improper inclusion of facts and allegations proposed by the representatives of Walter Antonio Valenzuela Cerna. Regarding the latter two, as in other cases, the Court considers that the State's arguments do not constitute a preliminary objection, as it does not state the reasons the case submitted would be inadmissible or that the Court would be incompetent to hear it, therefore, it will analyze these allegations as preliminary considerations.<sup>15</sup> The representative of Mr. Díaz and Ms. Rodríguez did not present observations on the preliminary objections.

#### **A. Exception regarding the alleged failure to comply with the exhaustion of domestic remedies and request for review of legality**

##### **A.1. Arguments of the State and observations of the Commission and the representatives**

19. The **State** maintained that the decisions of the CNM are open to legal review if their content undermines the fundamental rights recognized by the Constitution, with the suitable appeal process in the case of due substantiation and its possible connection with the principle of legality, being the Writ of Amparo as held by the Constitutional Court, through Resolution of November 7,

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<sup>14</sup> Due to the exceptional circumstances caused by the Covid-19 pandemic, this judgment was deliberated and approved during the 144th regular session, which was held virtually via technological means in accordance with the provisions of the Court's Rules of Procedure.

<sup>15</sup> Cf. *Case of Rodríguez Revolorio et al. v. Guatemala. Preliminary Objections, Merits, Reparations and Costs.* Judgment of October 14, 2019. Series C No. 387, para. 18, and *Case of Workers of the Fireworks Factory in Santo Antônio De Jesus and their Families v. Brazil. Preliminary Objections, Merits, Reparations and Costs.* Judgment of July 15, 2020. Series C No. 407, para. 16.



2002 No. 2409- 2002-AA / TC. It therefore argued that it was not for the Commission to apply the exception of Article 46(2)(a), considering the fact that the result of the writs of amparo filed by the alleged victims was not favorable to them did not at all imply the absence of a suitable and effective remedy<sup>16</sup>. Regarding the appeals filed by the alleged victims, it added the following:

a. *Jorge Luis Cuya Lavy*: obtained a definitive ruling from the Constitutional Court in the context of the amparo process presented on July 15, 2003, after the date of presentation of the petition, therefore the domestic jurisdiction had not been exhausted. In addition, it pointed out that the Commission declared the violation of the principle of legality in the Merits Report, but the alleged victim did not allege impairment of said principle within the writ of amparo filed.

b. *Walter Antonio Valenzuela Cerna*: filed a writ of amparo that was settled by the Constitutional Court on January 9, 2004 but indicated that the alleged victim did not question the facts and rights related to the duty of substantiation of reasoning. It added that with respect to the principle of legality in the domestic proceedings, it only alleged violations of the retroactivity and legality of the application of the 1993 Constitution and did not make an argument with the approach that was stated by the Commission in the Merits Report.

c. *Jean Aubert Díaz Alvarado and Marta Silvana Rodríguez Ricse*: both filed a late application for amparo against the decision not to ratify them, therefore they did not properly exhaust the available remedies. In addition, the State argued that in said amparo applications the violation of the principle of legality was not alleged.

20. In all cases, the State argued that it did not have the opportunity to present the preliminary objection of lack of exhaustion of remedies at the appropriate procedural stage, because in the admissibility stage, the alleged victims did not present allegations related to violations of the principle of legality and did not indicate facts in accordance with the approach taken by the Commission in the Merits Report. It requested that the Court carry out appropriate review of the legality of the Commission's actions on compliance with the requirement of exhaustion of domestic remedies, because it did not correctly apply the application provided for in Article 46(2)(a) of the Convention, which violates the State's right of defense.

21. Regarding ***Jorge Luis Cuya Lavy***, the representatives argued that "it is not in dispute that [Mr. Cuya] exercised domestic remedies of writ of amparo, a remedy of appeal against the rejection *in limine* of that claim and an extraordinary appeal before the Constitutional Court and consequently exhausted the domestic jurisdiction." They argued that these facts prove that the writ of amparo was neither suitable nor effective. They pointed out that in Mr. Cuya's petition it appears that he was dismissed without knowing if there was an accusation against him, which makes it clear that the State was aware of the alleged victims' allegations regarding the principle of legality. They added that the preliminary objection, "apart from [...]there being no such difference in approach as [...] stated], is thus inconsistent, due to not being raised in a timely manner it becomes late and therefore, it must be rejected due to late submission."

22. Regarding ***Walter Antonio Valenzuela Cerna***, the representatives indicated that the objection raised by the State should be rejected because the alleged victim had exhausted the remedies because he initiated the amparo process before the irregular process, and obtained a judicial decision from the Constitutional Court, almost two years after starting it. They added that the State had not previously raised the argument of due substantiation and its possible connection with the principle of legality, nor is there such a "difference in approach" between what was stated by the Commission and the representatives and, thus, said allegation would be considered as late.

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<sup>16</sup>In this regard, the State also referred to the ruling of the Constitutional Court of February 11, 2009, File No. 01412-2007-PA/TC, which refers to a writ of amparo initiated on September 10, 2003 by a former magistrate against the CNM for not deciding to ratify him, in which new criteria were established and the amparo process presented was declared to have merit.

23. The **Commission** reiterated the indication regarding the issue of exhaustion in its Admissibility Report in relation to the fact that at the time the CNM issued the non-ratification decisions between 2001 and 2002, there was, in the legal framework, a prohibition to present judicial and administrative appeals against CNM decisions. Therefore, the alleged victims did not have a quick and effective remedy to question their non-ratification.

24. Furthermore, the Commission stated that the State itself acknowledges that the preliminary objection was filed late, since it was not alleged in the admissibility stage of the case. It held that violations of the principle of legality were part of the debate in the admissibility stage, as stated in the Admissibility Report. In addition, the Commission argued that the violation of the principle of legality derives from a principal violation relating to violations of due process and "it is not the practice of the organs of the inter-American system, because they do not meet reasonable parameters, to demand the exhaustion of internal remedies separately and independently against each of the effects derived from a principal violation."

25. Finally, the Commission requested that the preliminary objection be dismissed, taking into account its late submission and its lack of substantive legal basis.

## **A.2. Considerations of the Court**

26. The Court has indicated that Article 46(1)(a) of the American Convention provides that, in order to determine the admissibility of a petition or communication presented before the Commission, in accordance with Articles 44 or 45 of the Convention, it is necessary to have filed and exhausted domestic remedies, in accordance with generally recognized principles of International Law.<sup>17</sup> These principles do not refer only to the formal existence of such remedies, but also to their being adequate and effective, by virtue of the exceptions referred to in article 46(2).

27. The Court recalls that an objection to the exercise of its jurisdiction based on the alleged failure to exhaust domestic remedies must be presented during the admissibility stage of the case before the Commission.<sup>18</sup> To this end, the State must, first, clearly specify before the Commission, during the admissibility stage of the case, the remedies that, in its opinion, have not yet been exhausted and demonstrate that these remedies are applicable and effective. Furthermore, the arguments that inform the preliminary objection filed by the State before the Commission during the admissibility stage must correspond to those put forward before the Court.<sup>19</sup> Following is an examination of whether the State presented the preliminary objection of failure to exhaust domestic remedies at the appropriate procedural moment in relation to the petitions presented by the alleged victims.

28. Regarding Mr. Cuya's petition No. 320-03, in response to the Commission's communication of July 25, 2012, in its report No. 199-2012-JUS / PPES of September 6, 2012<sup>20</sup>, in the admissibility stage, the State focused its allegations on the implementation of different measures related to legislative changes and steps to reach friendly settlement agreements. In the merits

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<sup>17</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 1, para. 85, and *Case of Martínez Esquivia v. Colombia. Preliminary Objections, Merits, and Reparations*. Judgment of October 6, 2020. Series C No. 412, para. 20.

<sup>18</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary Objections, supra*, para. 88, and *Case of Martínez Esquivia v. Colombia, supra*, para. 21.

<sup>19</sup> Cf. *Case of Furlan and Family v. Argentina. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 31, 2012. Series C No. 246, para. 29, and *Case of Martínez Esquivia v. Colombia, supra*, para. 21.

<sup>20</sup> Cf. State Report No. 199-2012-JUS/PPES related to the petition filed by Mr. Cuya on September 6, 2012 (Merits file, fs. 537 to 549).

stage, in report No. 174-2016-JUS / PPES of September 12, 2016<sup>21</sup>, the State made reference to the fact that Mr. Cuya Lavy had exhausted the remedies.

29. Regarding Mr. Díaz's petition No. 739-08, in response to the Commission's communication of November 20, 2013, in its report No. 35-2014-JUS / PPES of March 5, 2014<sup>22</sup>, at the admissibility stage, the State indicated that it has provided effective judicial remedies to Mr. Díaz, in accordance with the rules of due process, all within the obligation to guarantee the free and full exercise of the rights recognized in the American Convention.

30. From the foregoing, as regards the petitions of Messrs. Cuya and Díaz, it does not appear that the State has filed the objection of non-exhaustion of domestic remedies during the admissibility stage before the Commission.

31. Regarding Mr. Valenzuela's petition No. 948-04, in response to the Commission's communication of May 6, 2009, in its report No. 197-2014-JUS / PPES of December 1, 2014<sup>23</sup>, at the admissibility stage, the State indicated that "to the extent that the plaintiff did not duly exhaust the means provided in domestic law, he did not comply with the mandatory requirement of prior exhaustion of domestic remedies provided for in Article 46(1)(a) of the American Convention, and in that sense, the present petition must be declared inadmissible."

32. Regarding petition No. 1065-08, from Ms. Rodríguez in response to the Commission's communication of January 14, 2014, in its report No. 81-2014-JUS / PPES of May 19, 2014<sup>24</sup>, at the admissibility stage, the State considered that the admissibility requirement regarding the filing and exhaustion of domestic remedies had not been met. It added that "at the time of the alleged infringing act, the country had a suitable remedy to which it could resort: the right of amparo." In addition, it argued that the writ of amparo filed by Ms. Rodríguez was declared inadmissible at all instances for failing to comply with the requirement of the fundamental process of its presentation within the legal term established in internal regulations. Therefore, it requested the inadmissibility of the petition, "since the petitioner had not presented a timely remedy to exhaust the domestic jurisdiction."

33. From the above information available to this Court, it appears that the State specifically argued during the admissibility stage before the Commission that the petitions of Mr. Valenzuela and Ms. Rodríguez were inadmissible, on the grounds that the petition had not complied with the exhaustion of domestic remedies. Regarding Mr. Valenzuela's petition, the State did not specifically mention the suitable and effective remedy that should be exhausted, and regarding Ms. Rodríguez's petition it only alluded to the lateness of the filing of the writ of amparo without establishing the suitability and effectiveness of said remedy.

34. For the reasons stated, the Court rejects the aforementioned preliminary objection, since: (i) it was not presented in a timely manner in relation to Messrs. Cuya and Díaz; (ii) in relation to Mr. Valenzuela, the State, at the admissibility stage before the Commission, did not specify which remedies he should exhaust, and (iii) in relation to Ms. Rodríguez, it did not explain why the

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<sup>21</sup> Cf. Report No. 174-2016-JUS/PPES of the State related to the petition filed by Mr. Cuya at the merits stage of September 12, 2016 (merits file, fs. 3182 to 3192).

<sup>22</sup> Cf. Report No. 35-2014-JUS/PPES of the State related to the petition filed by Mr. Díaz at the admissibility stage of March 5, 2014 (evidence file, fs. 954 to 963).

<sup>23</sup> Cf. State Report No. 197-2014-JUS/PPES related to the petition filed by Mr. Valenzuela at the admissibility stage on December 1, 2014 (evidence file fs. 2531 to 2542). The State provided said report and argued that said report is not part of the file forwarded by the Commission to the Court, thus affecting the State's right to defense, Mr. Walter Antonio Valenzuela failed to exhaust the domestic remedies provided for in the legislation regarding the questioning of the due substantiation and its possible link with the principle of legality, as stated in report No. 159/18, for which the State did not have the opportunity to know and internally repair a possible violation of rights.

<sup>24</sup> Cf. Report No. 81-2014-JUS/PPES of the State related to the petition filed by Ms. Rodríguez at the admissibility stage of May 19, 2014 (evidence file, fs. 1157 to 1164).

appeal for amparo was suitable and effective to dispute the decision taken by the CNM, a matter that is also related to the Merits of this dispute.

35. Similarly, the State requested that a review of legality be made of the actions of the Inter-American Commission in relation to the lack of exhaustion of domestic remedies, with regard to the normative framework applied. The Court recalls that, in matters brought to its attention, it has the power to review the legality of the Commission's actions. However, this does not necessarily imply an *ex officio* review of the procedure that was carried out in that instance. In addition, the Court must maintain a fair balance between the protection of human rights, the ultimate goal of the Inter-American System, and the legal security and procedural fairness that ensure the stability and reliability of international protection. The review indicated may proceed, then, in those cases in which one of the parties alleges that there is a serious error that violates their right of defense, in which case they must effectively demonstrate such harm. A complaint or discrepancy of criteria in relation to the actions of the Inter-American Commission is not sufficient.<sup>25</sup>

36. In this case, Peru alleged that Messrs. Cuya Lavy, Valenzuela Cerna, and Díaz Alvarado, and Ms. Rodríguez Ricse had not alleged, in domestic jurisdiction or before the Commission, the violation of the principle of legality, so it did not have the opportunity to file the preliminary objection of the lack of exhaustion of domestic remedies in relation to this matter, at the appropriate procedural moment. In this regard, the Court finds that the litigation in this case has been related from the beginning to the process that gave rise to the alleged victims' non-ratification in office, and this necessarily includes the normative framework applied and the possible violations to the principle of legality due to the lack of classification of the causes that gave rise to the non-ratification. Thus, the State has had knowledge of the subject matter of the dispute since then and could have presented arguments on this point or a preliminary objection at the appropriate procedural moment.

37. Consequently, the Court concludes that both the request for review of legality and the preliminary objection of failure to exhaust domestic remedies are not admissible.

## **B. Exception on the alleged lack of jurisdiction of the Court to act as fourth instance**

### ***B.1. Arguments of the State and observations of the Commission and the representatives***

38. The **State** argued that the Commission has acted as a court of fourth instance and its role is not to act as a substitute for the national jurisdictional authorities in interpreting the substantive and procedural norms applicable to cases. However, it also stated that it is not unaware that the Commission or the Court can carry out the review of internal processes as long as there are violations of human rights recognized in the American Convention. Regarding *Mr. Cuya Lavy* and *Mr. Valenzuela Cerna*, Peru alleged that, in the Final Report, the Commission questioned the reasoning of the order that decided not to ratify them and its connection with the principle of legality, despite the fact that this allegation was not raised domestically. Regarding the alleged victims *Díaz Alvarado* and *Rodríguez Ricse*, the State declared that their proceedings were submitted after the deadline and therefore there was not actually an exhaustion of remedies and, nevertheless, the Commission questions the violation of rights at a supranational level. The State concluded that the Commission acted as an appellate court by classifying, in its Merits Report, aspects that were not exhausted at the domestic level.

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<sup>25</sup> Cf. *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, para. 32, and *Case of Urrutia Laubreaux v. Chile. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 27, 2020. Series C No. 409, para. 25.

39. **Mr. Cuya Lavy's representatives** stated that the fact that the state act in violation of the American Convention is an internal judicial process does not prevent the organs of the Inter-American Human Rights System from examining it under the States' obligations pursuant to the Convention. It is therefore scrutiny in respect to the convention and not internal legal scrutiny.

40. **Mr. Valenzuela Cerna's representatives** stated that "the Court has not been required to settle the legal issue of the irregular process and the non-ratification of Walter Antonio Valenzuela Cerna, nor does it analyze the unfavorable result obtained before the Constitutional Court". They concluded that in the case of Mr. Valenzuela Cerna there is debate as to whether the domestic law decisions violated his rights to judicial guarantees, the principle of legality, judicial protection and political rights, for which they considered that the argument of the "fourth instance" is inadmissible and must be rejected.

41. The **Commission** concluded that the alleged victims argue a series of violations of due process, the principle of legality, and other substantive rights, which is why it is not a mere disagreement with the internal proceedings. To that extent, the Commission emphasized that, according to the Court's precedents, the preliminary objection filed by the State is inadmissible.

## **B.2. Considerations of the Court**

42. This Court has indicated that the decision as to whether the actions of judicial bodies constitute a violation of the State's international obligations may lead to it having to examine the respective domestic processes, to establish their compatibility with the American Convention. Consequently, this Court is not a fourth instance of judicial review, insofar as it examines the compliance of domestic judicial decisions with the American Convention and not in accordance with domestic law.<sup>26</sup>

43. The Court notes that in this case there are an alleged series of violations of due process, the principle of legality, as well as other substantive rights related to the domestic proceedings against the alleged victims, which are not related to the disagreement with the outcome of the process. The questions raised must be examined on the merits of the matter and it will be up to this Court to determine whether the international obligations established in the American Convention were respected in the domestic proceedings. Consequently, the Court dismisses the State's preliminary objection.

## **C. Exception regarding the alleged improper inclusion of Article 26 of the Convention in the case of Walter Antonio Valenzuela Cerna, Jean Aubert Díaz Alvarado and Marta Silvana Rodríguez Ricse**

### **C.1 Arguments of the State and observations of the Commission and the representatives**

44. The **State** alleged the improper inclusion of Article 26 of the Convention in the brief of motions and pleadings of Messrs. Valenzuela Cerna, Jean Aubert Díaz Alvarado and Ms. Marta Rodríguez Ricse, since it was included under the alleged erroneous idea that this case has affected the right to work, which is without further factual support or any other basis. Regarding Article 26, Peru stated that according to Article 19(6) of the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (ESCR) "Protocol of San Salvador", it cannot be analyzed, questioning the justiciability of said right. It concluded

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<sup>26</sup> Cf. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*. Judgment of November 19, 1999. Series C No. 63, para. 222, and *Case of Grijalva Bueno v. Ecuador. Preliminary Objection, Merits, Reparations and Costs*. Judgment of June 3, 2021. Series C No. 426, para. 22.

that it is not pertinent to carry out an analysis on the impact on ESCR (specifically the right to work) specified by the representatives of the aforementioned alleged victims, and even more so when the Commission declared it inadmissible in the Admissibility Report, therefore said claim must be dismissed.

45. **Mr. Valenzuela Cerna's representatives** referred to the Court's case law, citing in particular the case of *Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller") v. Peru*, in which it is indicated that the Court has competence to assess whether there was a violation of Article 26 in the terms provided by Articles 62 and 63 of the Convention. Therefore, they requested the rejection of this objection.

46. The **Commission** reiterated that the alleged victims and their representatives may invoke the violation of rights other than those included in the Merits Report. Furthermore, it considered that the State's argument does not constitute an objection of lack of material jurisdiction. Therefore, it requested that the objection be dismissed.

## **C.2 Considerations of the Court**

47. In consideration of the State's allegations, this Court reaffirms its competence to hear and resolve controversies related to Article 26 of the American Convention as an integral part of the rights listed in its text, with respect to which Article 1(1) confers obligations of respect and guarantee.<sup>27</sup> However, in this case, none of the representatives of Walter Antonio Valenzuela Cerna, Jean Aubert Díaz Alvarado and Marta Rodríguez Ricse presented specific allegations related to the violation of Article 26 of the American Convention. The alleged victims did not request, either in the petition or in the conclusion of their motions and pleadings briefs, the violation of said article.

48. Consequently, the Court considers the aforementioned preliminary objection presented by the State inadmissible.

## **V**

### **PRELIMINARY CONSIDERATIONS**

49. As indicated (*supra* para. 18), the Court will analyze the State's allegations as preliminary considerations.

#### **A. Factual Framework**

##### **A.1 On the alleged improper inclusion in the pleadings and motions brief of allegations regarding the alleged impact on rights not included in the Admissibility Report No. 19/15, regarding Walter Antonio Valenzuela Cerna, Jean Aubert Díaz Alvarado and Marta Silvana Rodríguez Ricse**

##### **A.1(1) Arguments of the State and observations of the Commission and the representatives**

50. The State declared that in Admissibility Report No. 19/15, the Commission declared the petitions inadmissible, in relation to Articles 5, 11, and 26 (specifically in relation to labor rights, understood as the right to work) of the Convention and that in its Merits Report No. 159/18, it did not consider said rights as having been violated. Despite this, the defense of Mr. Valenzuela Cerna "made a series of general statements by means of which they seek to discuss the impairment of the aforementioned rights," as the representation for Mr. Díaz Alvarado and Ms. Rodríguez Ricse

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<sup>27</sup> Cf. *Case of "Five Pensioners" v. Peru. Merits, Reparations and Costs*. Judgment of February 28, 2003. Series C No. 98, para. 155, and *Case of Garzón Guzmán et al. v. Ecuador. Merits, Reparations and Costs*. Judgment of September 1, 2021. Series C No. 434, para. 22.

also made allegations about the violation of the right to work. It asked the Court not to assess the allegations related to violations "declared inadmissible in the [Commission's] Admissibility Report, because they were not clearly defined and explained."

51. **Mr. Valenzuela Cerna's representatives** stated that the alleged rights arise from the "analysis of the facts that make up the causal material of the case, therefore, they do not modify, alter or disturb the factual framework of the dispute which remains intact". In addition, they stated that such procedure is supported by the Court's case law.

52. The **Commission** stated that the alleged victims and their representatives may invoke the violation of other rights not contained in the Merits Report, as long as they confine themselves to the facts of that brief.

### **A.1.2 Considerations of the Court**

53. This Court, in the face of the State's arguments, has repeatedly considered that the representatives or the alleged victims may invoke rights other than those indicated by the Commission, as the latter are the holders of the rights enshrined in the American Convention. Denying them this power would imply an undue restriction on their condition as subjects of International Human Rights Law. In any case, the case law has required that said allegations be based on the factual framework established in the Merits Report.<sup>28</sup> However, this Court has verified that, in Mr. Valenzuela's brief of motions and pleadings, it did not cite or present specific allegations regarding the violation of Articles 5 and 11 of the Convention in this case. Nor did Messrs. Valenzuela and Díaz and Ms. Rodríguez cite Article 26 in their brief of requests and arguments, nor present arguments to support the violation.

54. Therefore, the Court finds that the State's arguments, in relation to an improper inclusion of Articles 5, 11 and 26 of the American Convention in the aforementioned motions and pleadings briefs, are not admissible, without prejudice to the considerations made by this Tribunal on the merits.

### **A.2. On the alleged improper inclusion of facts and allegations proposed by the representatives of Walter Antonio Valenzuela Cerna**

#### **A.2.1 Arguments of the State and observations of the Commission and the representatives**

55. The **State** indicated that the alleged victims cannot propose new facts other than those presented by the Commission in its Merits Report and indicated that the Commission did not consider within the factual framework information related to the retroactive application of the Peruvian Political Constitution of 1993 in relation to Mr. Valenzuela Cerna.

56. **Mr. Valenzuela Cerna's representatives** indicated that the State confuses the detailed contextualization of the events, with the inclusion of new events. In this sense, they indicated that it is the Court that must ultimately determine its factual platform.

57. The **Commission** indicated that the factual framework of the process is constituted by the facts of the Merits Report, allowing presentation of facts that explain, clarify or reject those that have been mentioned in the Merits Report. Notwithstanding the foregoing, the Commission emphasized that the factual determinations do contain that on June 1, 2002, the National Council

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<sup>28</sup> Cf. *Case of the Pacheco Tineo Family v. Bolivia. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 25, 2013, para. 22, and *Case of Garzón Guzmán et al. v. Ecuador, supra*, para. 22.

of the Judiciary summoned Mr. Valenzuela Cerna to an evaluation and ratification process. Although the factual determinations do not expressly reflect the petitioner's allegation that his career was regulated by the 1979 Constitution, this is a supplementary fact or allegation insofar as it does not refer to a new fact, but rather indicates the conditions under which the evaluation and ratification process was called. Furthermore, regarding the State's argument that the Merits Report does not analyze the retroactive application of the Political Constitution in the case of Walter Valenzuela Cerna, in this regard the Commission stated that this is not related to the facts, but to the assessment of the right in light of the same, and as indicated, the alleged victims and their representatives may present different arguments provided they are subject to the determined factual framework.

### **A.2.2 Considerations of the Court**

58. Regarding the improper inclusion of facts and allegations related to the alleged retroactive application of the 1993 Constitution in Mr. Valenzuela's motions and pleadings brief, the Court recalls that, although the allegations are required to be based on the factual framework established in the Merits Report, it has also indicated that facts can be presented that allow the explanation, clarification or rejection of those that have been mentioned in the Merits Report<sup>29</sup>. In this regard, the Commission's Merits Report specifically refers to the fact that "he entered the judicial profession as a Judge of the Third Small Claims Court of Surco y Surquillo on January 10, 1985, under the validity of the Peruvian Political Constitution of 1979, which in article 242, paragraph 2, guaranteed tenure in service until the age of 70." From the foregoing, this Court concludes that the factual determinations expressly reflect that Mr. Valenzuela was linked to the Judiciary since 1985 and even refers to the petitioner's allegation that his career was regulated by the 1979 Constitution. Alternatively, regarding the State's argument that the Merits Report does not analyze the retroactive application of the 1993 Political Constitution in the case of Walter Valenzuela Cerna, the Court reiterates that the alleged victims and their representatives can present arguments related to the violation of rights under the convention other than those contained in the Merits Report provided that they adhere to the factual framework determined.

### **A.3. On the two preliminary observations presented by the State**

59. Finally, the State presented two "preliminary observations," the first called "accumulation of petitions under the erroneous idea that they presented a factual identity: Difference in the case of Mr. Walter Antonio Valenzuela Cerna", and the second called "mistaken comparison between the Process of Ratification of Magistrates and the Disciplinary Process". Regarding the first question, the Court notes that the State did not make any petition, therefore it will not rule on the matter, but it will take into account the arguments of the State, when examining the merits of the case. Regarding the second question, this Court considers that it is a substantive argument, which will be examined later in this Judgment.

## **VI EVIDENCE**

### **A. Admissibility of documental evidence**

60. The Court received various documents presented as evidence by the Commission, the representatives, and the State, attached to their main briefs (*supra* para. 1, 6, and 7). In this case, as in others,<sup>30</sup> this Court admits the probative value of those documents presented by the parties and by the Commission at the due procedural opportunity or requested as additional

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<sup>29</sup> Cf. *Case of "Five Pensioners" v. Peru. Fund, supra*, para. 153 and *Case of Bedoya Lima et al. v. Colombia. Merits, Reparations and Costs*. Judgment of August 26, 2021. Series C No. 431, para. 16.

<sup>30</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*. Judgment of July 29, 1988. Series C No. 4, para. 140, and *Case of Garzón Guzmán et al. v. Ecuador, supra*, para. 34.



evidence by its Presidency,<sup>31</sup> which were neither disputed nor objected, and whose authenticity was not questioned.<sup>32</sup>

61. On April 12, 2021, the State presented several annexes together with the final written arguments.<sup>33</sup> The State alleged that it is supervening evidence related to events that occurred after the presentation of the answer on August 20, 2020 and requested that it be admitted in accordance with Article 57(2) of the Court's Rules of Procedure. In this regard, the Court recalls

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<sup>31</sup> The following information was requested as additional evidence from the State and all the representatives of the alleged victims: (a) Documents or certificates showing the amount of salary and remuneration (bonuses) received at the time of the events by Messrs. Cuya Lavy, Díaz Alvarado and Ms. Rodríguez Ricse, and (b) remuneration for benefits received by the four alleged victims at the time of removal from office and, whether they currently receive a pension derived from their performance in their positions, respectively, and as of what date and, if applicable, the amount thereof, as well as any other related information. In addition, the State was asked to report on the current amount that would correspond for a similar position that the presumed victims would occupy for that item (with the exception of Mr. Valenzuela, of whom the information was already available), the presentation of different regulations and a report from the Ombudsman, and from the representatives of Mr. Díaz Alvarado and Ms. Rodríguez Ricse various documents related to briefs and appeals filed, as well as decisions adopted in the amparo and constitutional tort proceedings followed in the domestic jurisdiction.

<sup>32</sup> The State reported on points (a) and (b) requested as additional evidence (*supra* footnote 31). It also submitted the following documentation: (a) Reference report accrediting the contributions made by Mr. Cuya Lavy; (b) evidence related to the Recognition Bonus; (c) report of social security contributions; (d) report of payments made to Marta Silvana Rodríguez Ricse, until February 2021, and (e) Ombudsman's Report No. 109, entitled "Basic proposal of the Ombudsman for Justice reform in Peru. Generating Consensus on what should be reformed, who will be in charge of doing it and how they will do it", dated November 27, 2006. As well as the following regulations: (a) 1979 Political Constitution of Peru; (b) 1993 Political Constitution of Peru; (c) Decree Law No. 18060 of December 23, 1969; (d) Organic Law of the Judiciary, Decree Law No. 14605 of July 25, 1963, and (e) Organic Law of the National Council of the Judiciary, Law No. 30916 published on February 19, 2019. *The representative of Mr. Jean Aubert Díaz Alvarado and Ms. María Silvana Rodríguez Ricse* reported on points (a) and (b) requested as additional evidence (*supra* footnote 31). *Regarding Mr. Díaz Alvarado*, he presented the following documentation: (a) Writ of Amparo filed by Mr. Díaz Alvarado on December 6, 2006 before the Combined Court of Puente Piedra, Santa Rosa and Ancón; (b) Mr. Díaz Alvarado's appeal brief against the decision of December 12, 2006 (dated January 11, 2006), and (c) Constitutional tort appeal filed by Jean Aubert Díaz Alvarado before the Constitutional Court on September 4, 2007, against the Judgment of the Second Civil Chamber of the Supreme Court of Justice of Northern Lima (of August 3, 2007). *Regarding Ms. Rodríguez Ricse*, she presented the following documentation: (a) Supreme Resolution No. 094-87 appointing Marta Rodríguez Ricse as Deputy Provincial Prosecutor of the Huancayo Combined Provincial Prosecutor's Office of the Junín Judicial District, May 6, 1987; (b) Writ of amparo filed by Marta Rodríguez Ricse against the National Council of the Judiciary of December 11, 2006 before the Combined Court of Puente Piedra, of the Superior Court of Justice of North Lima; (c) Decision of the Combined Court of Puente Piedra, Santa Rosa and Ancón against Ms. Rodríguez Ricse of December 18, 2006; (d) Appeal filed by Marta Rodríguez Ricse against the Judgment of the Combined Court of Puente Piedra, Santa Rosa and Ancón of December 18, 2006, and (e) Constitutional tort appeal against the previous decision before the Constitutional Court filed by Ms. Rodríguez. *The representatives of Mr. Cuya Lavy* presented information on his monthly salary, for which he presented (a) Payment receipt for April 2002, position Judge/Member of Court I, with net payment to be paid of S/2,506.19 (remuneration); (b) Pay slip April 2002, position Judge/Member of Court I, with net payment to be paid of S/4,300.00 (operating expenses), and (c) Pay slip March 2002, position Judge/Member of Court I, with net payment of S / 3 143.00 (jurisdictional bonus). On September 8, 2021, the State forwarded the supplementary additional evidence, and attached the following annexes: (a) proof of payment of remuneration of Mr. Cuya Lavy, corresponding to the period of 2002; (b) proof of jurisdictional bonus payments of Mr. Cuya Lavy, corresponding to the 2002 period; (c) proof of payments of operating expenses of Mr. Cuya Lavy for the period 2002; (d) proof of payment of salaries and deductions of Mr. Díaz Alvarado, corresponding to the year 2001; (e) proof of payment of salaries and deductions of Ms. Rodríguez Ricse, corresponding to the year 2001; (f) report of the contributions made by Mr. Cuya Lavy from July 1999 to June 2021; (g) proof of payment of Mr. Valenzuela's pension from January 2021 to August 2021, and (h) proof of payment from January 2021 to July 2021 of Ms. Rodríguez Ricse.

<sup>33</sup> The annexes presented by the State are: (a) Official Letter No. 1718-2000-JUS/CDJE-PPES of September 16, 2020 and proposal for the draft Friendly Settlement Agreement, with the alleged victims Díaz Alvarado and Rodríguez Ricse; (b) Official Letter No. 000234-2000-SG/JNJ of November 12, 2020, issued in the context of the negotiations on a possible Friendly Settlement Agreement, with the alleged victims Díaz Alvarado and Rodríguez Ricse, and (c) Resolution No. 260-2020-JNJ of December 9, 2020, which approved and annexed the Regulations for the Comprehensive Evaluation Procedure and Ratification of Judges of the Judiciary and Prosecutors of the Public Prosecution. In addition, the State presented: (a) report on the payment of pensions from September 2020 to February 2021, of Mr. Walter Antonio Valenzuela Cerna, contained in the certificate of payment of pensions dated March 10, 2021, and (b) report on the payment of pensions from September 2020 to February 2021, of Ms. Marta Silvana Rodríguez Ricse, contained in the proof of payment of March 10, 2021. Finally, the State sent information regarding the amount of the salary that Mr. Valenzuela Cerna received in the time of the events and the current amount that would correspond to him or similar position that the alleged victim would occupy, requested in the order of the President of the Court of January 28, 2021. To this end, it presented information and clarifications in this regard, as well as the proof of payment of remuneration, jurisdictional bonus and operating expenses for the 2002 period for Mr. Valenzuela Cerna.

that evidence related to supervening facts can be presented to the Court by the parties at any procedural stage, before the judgment. This does not mean that any situation or event constitutes a supervening fact for the purposes of the proceedings, since such facts must be directly related.<sup>34</sup> The Court considers that the evidence provided by the State refers to events that occurred after the presentation of the answer, which are related to the subject matter of the instant case, therefore, in accordance with Article 57(2) of the Rules of Procedure, it admits these documents.

62. On August 27, 2021, the representative of Mr. Díaz and Ms. Rodríguez and the representatives of Mr. Cuya, additionally presented other documents together with the additional evidence.<sup>35</sup> In this regard, the State, in its observations on the additional evidence presented by the aforementioned alleged victims, argued that certain documents were already in the file,<sup>36</sup> for which reason it requested their inadmissibility. This Court has verified that said documentation already appears in the body of evidence in this case, therefore it is dispensed with because it is already incorporated.

63. Furthermore, in the observations to the additional evidence, the State made several clarifications on the documentation presented<sup>37</sup> by the representatives of the three alleged named victims, which will be taken into account by the Court when analyzing information pertinent to the resolution of this case. The State also requested the inadmissibility of documentation and information<sup>38</sup> that was not requested nor was its presentation justified, as it considered it to be late, since it was not submitted at the appropriate time. In this regard, this Court notes that the representatives of Mr. Cuya and the representative of Mr. Díaz and Ms. Rodríguez did present certain information and documentation that was not requested, which were presented together

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<sup>34</sup> Cf. *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 21, 2019. Series C No. 394, para. 45.

<sup>35</sup> Namely: *Regarding Mr. Díaz Alvarado*: (a) Supreme Resolution No. 115-89-JUS of May 24, 1989; (b) Resolution of the National Council of the Judiciary No. 095-2001CNM of July 13, 2021; (c) Resolution No. 1 of December 12, 2006; (d) Hearing Resolution, issued by the Second Civil Chamber of the North Lima Court of Justice, on August 3, 2007, and (e) Resolution of the Constitutional Court on December 19, 2007. *Regarding Ms. Rodríguez Ricse*: (a) Resolution of the National Council of the Judiciary No. 095-2001CNM of July 13, 2001; (b) Resolution No. 128 of June 22, 2007 issued by the First Specialized Chamber of the Supreme Court of Justice of Northern Lima; and (c) Resolution of the Constitutional Court of December 20, 2007. *Regarding Mr. Cuya*: (a) Supreme Decree No. 058-2002-EF of April 5, 2002. Gratuity for education; (b) Supreme Decree No. 110-2002-EF of July 8, 2002. Gratuity for National Holidays, and (c) Emergency Decree No. 065-2002 of December 4, 2002. Christmas Gratuity.

<sup>36</sup> Such as the document offered by the *representative of Mr. Díaz and Ms. Rodríguez* in point 4.3.2 regarding the resolution of the hearing, issued by the Second Civil Chamber of the Supreme Court of Justice of Northern Lima, on August 3, 2007, which is incomplete, as well as the one indicated in point 5.2.2, which is the CNM resolution No. 095-2001 CNM of June 13, 2001, which although it was not requested by the Court, the document provided does not coincide with the one provided that consists of Official Letter No. 565-SG-CNM-2001 of July 13, 2001. As well as the following documents presented by the *representatives of Mr. Cuya* on October 13, 2020 together with the brief of preliminary objections and the additional evidence: (a) Report No. 199-2012-JUS/PPES; (b) Report No. 174-2016-JUS/PPES; (c) Report No. 106-2016-JUS/CDJE-PPES; (d) brief with observations on the Admissibility Report No. 19/15 of October 15, 2015, and (e) Emergency Decree No. 114-2001 of September 27, 2001. In addition it dispensed with, since they are already part of the file, documentation not requested as additional evidence and presented by the State regarding a newspaper publication of the call for ratification procedures for the year 2001, Phase Three, held on January 22, 2001, and the schedule of activities of the call for ratification procedures for the year 2001, Phase Three, dated May 22, 2001, which had already been submitted by the State with the response. Finally, the State also presented Legislative Decree No. 25 issued on January 30, 1981, which is also dispensed with as it was not requested.

<sup>37</sup> The clarifications refer: regarding the representative of Mr. Díaz and Ms. Rodríguez, they are related to the position that each one held, the remuneration of each of the victims at the time of their non-ratification and their erroneous comparison since they received different remunerations, and that the use of the exchange rate is not objective or exact, the incorrect use of proof of income for the two victims, among others. In the case of Mr. Cuya, the clarifications are related to the payment slips provided. Furthermore, regarding the arguments presented by the State regarding the expert opinion of Mr. Leandro Despoy rendered in the case of *López Lone et al. v. Honduras*, it is recalled that this question was already settled in the Resolution of the President of the Court of January 28, 2021, *supra*.

<sup>38</sup> Regarding information from the *representative of Mr. Díaz and Ms. Rodríguez* on "the income of a Provisional Provincial Prosecutor at present, as well as the allegations about the exchange rate" and the additional documents that were presented and not requested, as well as the relation to the legal provisions applicable in general to the magistrates, presented by the representatives of Mr. Cuya.

with the additional evidence, without justifying their submission of in accordance with the provisions of Articles 57 and 58 of the Court's Rules of Procedure, for which the Court considers that they are inadmissible. Lastly, with regard to the allegations in the briefs of the three alleged victims mentioned at the time of submitting the additional evidence, the Court recalls that requesting additional evidence from the parties does not represent a new opportunity to present additional arguments, for which reason those arguments on the merits presented in the briefs referring to the evidence are inadmissible.

### **B. Admissibility of the alleged victims' statements, testimonial and expert evidence**

64. Similarly, the Court deems it pertinent to admit the statements of the alleged victims, the testimony of the witness and the expert opinions rendered, in public hearing and before a notary public, in the framework of this case to the extent that they are in accordance with the object defined by the President in the Resolution that ordered their receipt<sup>39</sup>.

## **VII FACTS**

65. In this chapter, the Court will address the facts of the case based on the factual framework submitted to this Court by the Inter-American Commission, taking into account the facts presented by the parties that allow the explanation, clarification or rejection of that factual framework<sup>40</sup> By virtue of this, the facts of the specific case will be addressed in the following order: a) relevant regulatory framework regarding the evaluation and ratification procedure of judges and prosecutors by the CNM, and b) regarding the evaluation and ratification procedure of the alleged victims.

### **A. Relevant regulatory framework regarding the evaluation and ratification procedure of judges and prosecutors by the CNM**

66. Article 242 of the 1979 Political Constitution of the Republic of Peru (hereinafter "1979 Constitution"), in force until December 29, 1993, guaranteed the right of magistrates to hold office until the age of 70, provided they conducted themselves appropriately.<sup>41</sup> Regarding the appointment of magistrates, Article 245 established that "[t] he President of the Republic appoints the Magistrates at the proposal of the National Council of the Judiciary. The Senate ratifies the appointments of the Supreme Court Magistrates."<sup>42</sup>

67. Article 154 of the 1993 Political Constitution of the Republic of Peru (hereinafter "1993 Constitution"), which entered into force on January 1, 1994, established the powers of the National Council of the Judiciary, which within its duties had: "[...] 2. Ratify judges and prosecutors at all

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<sup>39</sup> In a public hearing, the Court received the statements of two alleged victims, Jorge Luis Cuya Lavy and Walter Antonio Valenzuela Cerna, offered by the representatives, and of the expert Janery Elizabeth Boyer Carrera, proposed by the State. In addition, the Court received the statements before notary public of the presumed victims Jean Aubert Díaz Alvarado, proposed by the representatives, of the witness Norma Gutiérrez Vega, proposed by the State, and of the expert witnesses Rodrigo Uprimny Yepes and Renzo Cavani, proposed by the Commission. and the state, respectively. The purpose of the aforementioned statements is established in the Order of the President of the Court issued on January 28, 2021, *supra*.

<sup>40</sup> Cf. Case of "Five Pensioners" v. Peru, *supra*, para. 153, and Case of Vicky Hernández et al. v. Honduras. Merits, Reparations and Costs. Judgment of March 6, 2021. Series C No. 422, para. 28.

<sup>41</sup> Cf. Political Constitution of Peru, published on July 13, 1979 (evidence file, pages 3893 to 3942). In this regard, article 242 indicated that the State guaranteed judicial magistrates: 1.- Their independence. They are only subject to the Constitution and the law. 2.- Their permanence in office until they are seventy years old and tenure in their positions, while they observe the conduct and suitability of their position. The magistrates cannot be promoted or transferred without their consent and 3.- A remuneration that ensures a standard of living worthy of their mission and standing.

<sup>42</sup> Political Constitution of Peru, published on July 13, 1979, article 245, *supra*.

levels every seven years. Those not ratified cannot re-enter the Judiciary or the Public Prosecution Service. The ratification process is independent of disciplinary measures".<sup>43</sup>

68. Article 142 of the 1993 Constitution established: "[n]or are the decisions of the National Elections Jury on electoral matters, nor those of the National Council of the Judiciary in matters of evaluation and ratification of judges, subject to review in the courts".<sup>44</sup>

69. Article 158 of the 1993 Political Constitution provided:

The Public Prosecution Service is autonomous. The National Attorney General presides over it. He is elected by the Board of Supreme Prosecutors. The position of Attorney General lasts three years, and is renewable, by re-election, only for another two. The members of the Public Prosecution Service have the same rights and prerogatives and are subject to the same obligations as those of the Judiciary in the respective category. They are affected by the same incompatibilities. Their appointment is subject to requirements and procedures identical to those of the members of the Judiciary in their respective category.<sup>45</sup>

70. The Organic Law of the National Council of the Judiciary, Law No. 26397, established where pertinent, that:

Article 2.- The National Council of the Judiciary is responsible for the selection, appointment, ratification and removal of judges and prosecutors at all levels, except when they come from popular election, in which case it is only empowered to extend the title and apply the sanction of dismissal when appropriate pursuant to law.

Decisions on the matters referred to in the preceding paragraph cannot be reviewed in court. Its decisions cannot be challenged.

Article 21. The following powers correspond to the National Council of the Judiciary: [...] b) Ratify the judges and prosecutors at all levels every [seven] years. Those not ratified cannot re-enter the Judiciary or the Public Prosecution Service. The ratification process is independent of the disciplinary measures adopted by the Judiciary, the Public Prosecution Service or the sanction referred to in the following paragraph.

Article 30. For the purposes of the ratification of judges and prosecutors referred to in subsection b) of Article 21 of this Law, the National Council of the Judiciary evaluates the conduct and suitability in the performance of the position, considering the jurisdictional output, merits, reports, of the Bar Associations and Legal Associations, background information that they have accumulated on their conduct, with a personal interview to be granted in each case. [...]

Removal from office does not constitute a penalty nor deprivation of rights acquired in accordance with the law, but it does prevent re-entry to the Judiciary and Public Prosecution Service.

The resolution adopted is not subject to any appeal.<sup>46</sup>

71. The Regulation of the Evaluation and Ratification Process of Judges of the Judiciary and prosecutors of the Public Prosecution Service, issued through Resolution No. 043-2000-CNM of November 16, 2000, established that the CNM should convene judges and prosecutors for this process, setting a period of 10 days for them to present their updated and documented Curriculum Vitae, and copies of their annual affidavits of assets and income, among other documents.<sup>47</sup>

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<sup>43</sup> Political Constitution of Peru, enacted December 29, 1993, article 154 (evidence file, fs. 3943 to 4010).

<sup>44</sup> Political Constitution of Peru, enacted on December 29, 1993, article 142, *supra*.

<sup>45</sup> Political Constitution of Peru, enacted on December 29, 1993, article 158, *supra*. Articles 150 and 154 provided, according to relevant part of the same text: "Article 150. The National Council of the Judiciary is in charge of the selection and appointment of judges and prosecutors, except when they come from popular election. The National Council of the Judiciary is independent and is governed by its Organic Law", and "Article 154. The functions of the National Council of the Judiciary are: 1. Appoint, after a public contest of merits and personal evaluation, the judges and prosecutors of all levels. Said appointments require the affirmative vote of two thirds of the legal number of its members [...]".

<sup>46</sup> Law No. 26397, Organic Law of the National Council of the Judiciary, published on December 7, 1994 (evidence file, fs. 2548 to 2556).

<sup>47</sup> Regulations for the Process of Evaluation and Ratification of Judges of the Judiciary and Prosecutors of the Public Prosecution, Resolution 043-2000-CNM of November 16, 2000, Articles 1 and 2 (evidence file, fs. 2628 to 2631).

72. The aforementioned Regulation also regulated in its articles 6 and 8, that the personal interview included in the ratification procedure was given by decision of the Plenary or at the request of those evaluated, according to a role and term, and that, in it, they could refer to aspects of academic, professional and functional achievement.<sup>48</sup>

73. Additionally, this Regulation, among the general provisions, point II, established that:

Ratification is a Constitutional power granted to the collegiate body of the National Council of the Judiciary to decide, according to the criteria of each Counselor who participates in the plenary session of the respective session, whether to renew the trust in the evaluated person to continue in the position or to permanently remove them.<sup>49</sup>

74. Said Regulation was repealed in 2002 and a new one issued under Resolution No. 241-2002-CNM, which no longer indicates that the personal interview is carried out by decision of the plenary session or of those evaluated.<sup>50</sup>

75. In article 3 of each of the Evaluation and Ratification Regulations, the criteria to be evaluated were indicated:

- a) Attendance and punctuality at the workplace;
- b) Number of licenses granted, indicating the reason and their duration, as well as unwarned or unwarranted absences;
- c) Absences from the place where the position is held;
- d) Jurisdictional output, with statistics that indicate the percentage of resolutions revoked or confirmed by higher authorities;
- e) List of judges and prosecutors who are in charge of criminal proceedings with expired time limits and number of these with indication of time, and
- f) List of judges and prosecutors who have pending cases in their office, indicating the time from the moment they are issued.<sup>51</sup>

76. Similarly, in article 2 of each regulation, it was indicated that by means of a sworn statement, those summoned had to report on:

- a) If the individual has been sanctioned or is being prosecuted for being charged with criminal, civil or disciplinary responsibility, specifying, if applicable, the sanction applied, the reason and the authority that applied it.
- b) The date of entry to social and sports clubs.
- c) If they are related up to the fourth degree of consanguinity, second by affinity or by reason of marriage with workers or officials who work, as appropriate, in the Judiciary and the Public Prosecution Service, as well as other bodies linked in the field of their influence.
- d) Their physical and mental fitness.<sup>52</sup>

77. In addition, article 17 established that, there was no reconsideration by the CNM against the result of the ratification, nor a challenge by appeal, or judicial review.<sup>53</sup>

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<sup>48</sup> Regulations for the Process of Evaluation and Ratification of Judges of the Judiciary and Prosecutors of the Public Prosecution, Resolution 043-2000-CNM of November 16, 2000, articles 6 and 8, *supra*.

<sup>49</sup> Regulations for the Process of Evaluation and Ratification of Judges of the Judiciary and Prosecutors of the Public Prosecution, Resolution 043-2000-CNM of November 16, 2000, general provisions, section II, *supra*.

<sup>50</sup> Regulations for the Process of Evaluation and Ratification of Judges of the Judiciary and Prosecutors of the Public Prosecution, Resolution No. 241-2002-CNM, of April 13, 2002 (evidence file, fs. 2633 to 2641).

<sup>51</sup> Regulations for the Process of Evaluation and Ratification of Judges of the Judiciary and Prosecutors of the Public Prosecution, Resolution 043-2000-CNM and Resolution No. 241-2002-CNM, article 3, *supra*. Namely, in the 2002 Regulation, subsection d) of this article was added, which reads: "Jurisdictional output of the last seven years, with statistics of cases entered and resolved in each year, indicating the number of resolutions revoked or confirmed by higher instances; and in the case of prosecutors, the number of opinions issued and complaints filed and formalized."

<sup>52</sup> Regulations for the Process of Evaluation and Ratification of Judges of Judiciary and Prosecutors of the Public Prosecution, Resolution 043-2000-CNM and Resolution No. 241-2002-CNM, article 2, *supra*.

<sup>53</sup> Regulations for the Process of Evaluation and Ratification of Judges of the Judiciary and Prosecutors of the Public Prosecution, Resolution 043-2000-CNM and Resolution No. 241-2002-CNM, article 17, *supra*.

78. Regarding the judicial decisions on July 16, 2003, the Constitutional Court ruled that the norm that established the impossibility of returning to the Judiciary and Public Prosecution Service for non-ratified judges and prosecutors, considered that such prohibition:

[was] therefore incongruous with the institution of ratification, since [...] this did not constitute a sanction, but a vote of confidence regarding the exercise of the role [...] the prohibition of re-entering the judicial career is equated [as regulated] to a sanction the imposition of which [...] is not a consequence of having committed an offense. [...] For this reason [...] the non-ratified magistrates are not prevented from re-applying to the Judiciary or the Public Prosecution Service.<sup>54</sup>

79. Furthermore, on August 12, 2005 the Constitutional Court, with the entry into force of the Constitutional Procedural Code, established the possibility of constitutionally challenging the decisions of the CNM in court, when they are unfounded and/or when they have been issued without audience of the interested party.<sup>55</sup> Similarly, a judgment of the Constitutional Court of November 8, 2005,<sup>56</sup> established "the doctrine of the ability to review administrative decisions, in order to safeguard the protection of fundamental rights, and it was established that inability to be reviewed is a doctrine not admitted, [given] that it is possible that the jurisdictional bodies carry out review of constitutionality on any act with legal relevance, however, this review of the decision, if applicable, will not lead to the modification of a Resolution that would have respected due process."

80. Subsequently, through the constitutional reform enacted on January 9, 2019, Law No. 30904, Constitutional Reform Law on the formation and functions of the National Council of the Judiciary (hereinafter also "JNJ"), articles 154, 155 and 156 of the Political Constitution of Peru were modified, and Law No. 26397, Organic Law of the CNM, and its respective regulations were repealed. With the issuance of said regulation, the CNM ceased to exist to give way to the National Council of the Judiciary, an entity that would be in charge of the appointment and evaluation of the performance of the country's judges and prosecutors, in addition to the administrative sanctions, such as dismissal, among others.<sup>57</sup> Similarly, the regulations for the evaluation and ratification process have been amended on various occasions. The Regulations for the Comprehensive Evaluation and Ratification Process for Judges of the Judiciary and Prosecutors of the Public Prosecution Service, indicated by the State as currently in force, was approved by the National Council of the Judiciary through Resolution No. 260-2020-JNJ on December 9, 2020.<sup>58</sup>

81. Decree Supreme No. 017-93-JUS, of June 2, 1993, which contained the Organic Law of the Judiciary in force on the date of the events, regulated the requirements, actions, obligations, sanctions and other matters related to judges.<sup>59</sup>

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<sup>54</sup> Judgment of the Constitutional Court issued in file No. 1550-2003-AA/TC, of July 16, 2003 (evidence file, pages 1846 to 1856).

<sup>55</sup> Judgment of the Constitutional Court issued in file No. 3661-2004-AA/TC, of August 12, 2005 (evidence file, pages 1865 to 1896).

<sup>56</sup> The State mentioned the Judgment of the Constitutional Court issued in file No. 05854-2005-PA/TC, of November 8, 2005.

<sup>57</sup> The State also indicated that, within the framework of said process of justice system reform, the Executive Branch presented the JNJ Bill to the Congress of the Republic. On February 19, 2019, Law No. 30916 - Organic Law of the National Council of the Judiciary was published in the Official Gazette, 'El Peruano'. The National Council of the Judiciary, in accordance with article 2 of the Organic Law of the JNJ, has among its powers "Ratify, with a public and reasoned vote, the judges and prosecutors of all levels every seven (7) years. Those not ratified or dismissed cannot re-enter the Judiciary or the Public Prosecution Service." Organic Law of the National Council of Judiciary, Law No. 30916, published on February 19, 2019 (evidence file, pages 4085 to 4120).

<sup>58</sup> Cf. *Resolution No. 260-2020-JNJ of the National Board of Justice, published in the El Peruano newspaper on December 19, 2020 (evidence file, fs. 3440 to 3451).*

<sup>59</sup> Cf. *Decree Law No. 14605, Organic Law of the Judiciary of July 25, 1963 (evidence file, pages 4027 to 4084).*

82. Decree Law No. 052, which contained the Organic Law of the Public Prosecution Service in force on the date of the events, regulated the requirements, actions, obligations, sanctions and other matters related to prosecutors.<sup>60</sup>

## **B. On the process of evaluation and ratification of the alleged victims**

### **B.1 Regarding Jorge Luis Cuya Lavy**

83. Jorge Cuya was appointed as Specialized Civil Judge of the Lima Judicial District on November 4, 1994.<sup>61</sup> Subsequently, on November 21, 1994, he was permanently assigned to the Third Specialized Civil Court of the Northern Cone, through Administrative Resolution of the Executive Council of the Judiciary No. 115-94-CE-PJ.<sup>62</sup> He entered the judicial profession on November 4, 1994, after having participated in a public application process the same year and performed various roles throughout his career.<sup>63</sup> For the evaluation procedure, the Regulation for the Evaluation and Ratification Process of Judges of the Judiciary and Prosecutors of the Public Prosecution Service, approved through Resolution No. 241-2002-CNM of April 13, 2002, was applied.

84. On September 19, 2002, the Plenary of the National Council of the Judiciary made known the schedule of activities for the individual evaluation and ratification processes and agreed to summon the alleged victim, by means of Summons No. 004-2002 CNM. On October 29, 2002, his personal interview was held.<sup>64</sup>

85. On November 20, 2002, the CNM,<sup>65</sup> through Resolution No. 500-2002-CNM, decided his non-ratification, as well as the cancellation of his corresponding appointment and title. The decision was not substantiated.

86. On December 4, 2002, Mr. Cuya Lavy filed a writ of amparo before the Specialized Civil Court of Lima against the CNM, in which he requested a statement of the ineffectiveness and inapplicability of the agreement of the Plenary Council of the Judiciary and the CNM Resolution No. 500-2002-CNM, both dated November 20, 2002, as well as his reinstatement in his position as Specialized Civil Judge of the Northern Cone of Lima, and the full validity of his appointment as judge.<sup>66</sup> On December 5, 2002, the Twenty-fifth Specialized Civil Court of Lima, through order No. 1, declared the writ of amparo inadmissible, based on the fact that "the Judiciary is not competent to review the ratification decision issued by the [CNM]."<sup>67</sup> On December 16, 2002, Mr. Cuya Lavy filed an appeal against this decision before the Specialized Civil Judge of Lima, in which he requested reversal of the appealed decision.<sup>68</sup> On December 17, 2002, through order No. 2, the appeal was granted and the file was submitted to the Third Civil Chamber of the Supreme

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<sup>60</sup> Cf. Decree Law No. 052, Organic Law of the Public Prosecution Service of March 18, 1981 (evidence file, pages 268 to 288).

<sup>61</sup> Cf. Title of appointment of Mr. Cuya Lavy as Specialized Civil Judge of the Judicial District of Lima, issued by the Jury of Honor of the Judiciary by Resolution of November 9, 1994 (evidence file, fs. 8 and 9).

<sup>62</sup> Cf. Administrative resolution No. 115-94 -CE-PJ issued by the Supreme Court of Justice, November 21, 1994 (evidence file, f. 11).

<sup>63</sup> Cf. Statement of Mr. Cuya Lavy given before the Court at the public hearing held on March 8 and 9, 2021.

<sup>64</sup> Cf. Summons No. 004-2002-CNM, issued by the National Council of the Judiciary on September 19, 2002 (evidence file, f. 13).

<sup>65</sup> Cf. Resolution No. 500-2002-CNM issued by the National Council of the Judiciary on November 20, 2002 (evidence file, f. 18).

<sup>66</sup> Cf. Writ of Amparo filed by Mr. Cuya Lavy before the Specialized Civil Court of Lima on December 4, 2002 (evidence file, fs. 2762 to 2785).

<sup>67</sup> Cf. Resolution No. 1 of the Twenty-Fifth Specialized Civil Court of Lima of December 5, 2002 (evidence file, pages 2787 to 2789).

<sup>68</sup> Cf. Appeal filed by Mr. Cuya Lavy before the Specialized Civil Judge of Lima on December 16, 2002 (evidence file, fs. 2202 to 2210).

Court of Justice of Lima.<sup>69</sup> On March 21, 2003, the Third Civil Chamber declared resolution No. 1 of December 5, 2002, void and ordered the issuance of a new order. The order of the Third Civil Chamber was not favorable on the merits.<sup>70</sup>

87. Mr. Cuya Lavy filed an extraordinary appeal before the Constitutional Court and on July 15, 2003, in File No. 01525-2003-AA / TC, the Second Chamber of that court declared the amparo action unfounded, since the ratification function exercised by the CNM "may exceptionally be reviewed in the cases of irregular exercise" and in the case of the alleged victim "there are no objective reasons that suggest considering that such a situation has arisen."<sup>71</sup> It added that:

[...] The right to remain in office is not chronologically infinite or until a certain age is reached, but is fixed in time; that is, for 7 years, after which the tenure in the service is subject to the condition that the evaluated person is ratified [...]

[...] Non-ratification constitutes a vote of no confidence in the manner in which the magistrate fulfilled the role for which they were appointed for 7 years [...] is based on a set of indications that, in the opinion of the Board of Directors of the CNM, make it inconvenient to renew trust for the exercise of the position. [...] one that is built [...] from a conviction of conscience expressed in a secret ballot, although supported by certain criteria (*cf.* The Organic Law of the CNM and its Regulations); however, it does not involve the idea of a sanction, but only the withdrawal of confidence in the exercise of the position. [...] [T]he decision taken in the exercise of said competence does not need to be substantiated.

### **B.2 Regarding Walter Antonio Valenzuela Cerna**

88. Mr. Walter Valenzuela was appointed as Judge of the Third Small Claims Court of the Surco and Surquillo Districts on December 11, 1984.<sup>72</sup> He effectively entered the judicial profession on January 10, 1985 and performed various functions throughout his career. On October 6, 1994, he was appointed as Specialized Civil Judge of the Judicial District of Lima.<sup>73</sup> For the evaluation procedure, the Regulation for the Evaluation and Ratification Process of Judges of the Judiciary and Prosecutors of the Public Prosecution Service, approved by Resolution 241-2002-CNM of April 13, 2002, was applied.

89. On May 30, 2002, the Plenary of the CNM agreed to start the individual evaluation and ratification processes and summoned the alleged victim, through Summons No. 002-2002-CNM.<sup>74</sup> On June 20, 2002, Mr. Valenzuela filed an appeal for constitutional protection against the CNM, requesting that the Agreement of the CNM Plenary be declared inapplicable in the section that summons him to the evaluation and ratification process in his position after having completed 7 years of entering the judicial profession, and that his acquired labor rights were being infringed, given he entered the judicial position under the validity of the 1979 Constitution which did not consider said process and that guaranteed his tenure until the age of 70, which affects the principle of non-retroactivity of the Law as the 1993 Constitution and Organic Law of the CNM No. 26397<sup>75</sup> have been applied retroactively. The evaluation and ratification process continued in his absence, as he did not appear for the call.

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<sup>69</sup> Cf. Resolution No. 2 of the Specialized Civil Judge of Lima of file No. 2002-54661 of December 17, 2002 (evidence file, f. 2212).

<sup>70</sup> Cf. Resolution of the Third Chamber of the Supreme Court of Lima issued, in file No. 19-2003, of March 21, 2003 (evidence file, fs. 2220 to 2222).

<sup>71</sup> Cf. Judgment of the Second Chamber of the Constitutional Court issued, in file No. 1525-2003-AA/TC, of July 15, 2003 (evidence file, fs. 20 to 25).

<sup>72</sup> Cf. Supreme Resolution No. 471-84-JUS of title of appointment as Judge of the Third Magistrates Court of the Districts of Surco and Surquillo of Mr. Valenzuela Cerna issued by the President of the Republic, of December 11, 1984 (file evidence, pages 1791 and 1792).

<sup>73</sup> Cf. Resolution No. 10 of the title of appointment as Specialized Civil Judge of the District of Lima issued by the Jury of Honor of the Judiciary, of October 6, 1994 (evidence file, f. 2647).

<sup>74</sup> Cf. Summons No. 002-2002-CNM issued by the National Council of the Judiciary, on May 30, 2002, the summons was agreed upon and was published in the Official Gazette *El Peruano* on June 1, 2002 (evidence file, f. 1796).

<sup>75</sup> Cf. Application for constitutional amparo filed by Mr. Valenzuela Cerna on June 20, 2002 (evidence file, pages 1806 to 1816).



90. On August 28, 2002, through Resolution No. 415-2002-CNM, the CNM, through an unsubstantiated decision, declared his non-ratification and canceled his corresponding appointment and title.<sup>76</sup>

91. On September 12, 2002, the Fiftieth Civil Court of Lima declared the writ of amparo unfounded, considering that the norms of the 1993 Constitution, regarding the evaluation and ratification of magistrates, have immediate application to them if they performed said role at that time.<sup>77</sup> On September 24, 2002, Mr. Valenzuela Cerna filed an appeal, in which he alleged that a less favorable rule was retroactively applied to him, since under the validity of the 1979 Constitution in Article 242(2) he was "guaranteed, as Magistrate, tenure in service until seventy years of age."<sup>78</sup> On May 23, 2003, the Fifth Civil Chamber of the Supreme Court of Justice of Lima declared the appeal inadmissible, indicating the origin of the principle of immediate application of the Law enshrined in the first paragraph of the third article of the Civil Code that prescribes that the law applies "to the consequences of existing legal relationships and situations," since the 1993 Constitution was in force on May 30, 2002. Therefore, they confirmed the judgment of September 12, 2002.<sup>79</sup>

92. On July 16, 2003, the alleged victim filed an extraordinary appeal before the Second Chamber of the Constitutional Court, alleging the improper retroactive application of the 1993 Constitution.<sup>80</sup> On January 9, 2004, the Second Chamber of the Constitutional Court declared the appeal unfounded, arguing that, since the 1993 Constitution came into force, it regulates the legal situation of the public authorities and officials, with the obvious inclusion of the Judiciary and the Public Prosecution Service. The Constitutional Court considered that, in principle, "the fact that the CNM has submitted the appellant to the evaluation and ratification process does not result in a violation of the alleged constitutional right, since he completed his 7 years in office, and therefore, the expectation of continuing to in the position depended on his being ratified, which is outside the scope of what is constitutionally protected by subsection (3) of Article 146 of the Constitution."<sup>81</sup>

93. On March 30, 2004, Mr. Valenzuela Cerna filed an appeal for annulment with the President of the Constitutional Court.<sup>82</sup> On May 14, 2004, said court denied the appeal because it found that there was no procedural defect and that it had followed its line of case law regarding the ratification of magistrates.<sup>83</sup>

### ***B.3 Regarding Jean Aubert Díaz Alvarado***

94. Mr. Jean Díaz was appointed as Deputy Provincial Prosecutor to the Huancayo Combined Provincial Prosecutor's Office of the Junín Judicial District on May 24, 1989<sup>84</sup>, under the 1979 Constitution. For the evaluation procedure, the Regulations for the Evaluation and Ratification

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<sup>76</sup> Resolution No. 415-2002-CNM issued by the National Council of the Judiciary on August 28, 2002 (evidence file, f. 1798).

<sup>77</sup> Cf. Judgment of the Fiftieth Civil Court of Lima, order No. 6 issued in file No. 2002-26316-0-100-JCI-50º, on September 12, 2002 (evidence file, pages 1818 to 1824).

<sup>78</sup> Cf. Appeal filed by Mr. Valenzuela Cerna on September 24, 2002 (evidence file, pages 1826 to 1831).

<sup>79</sup> Cf. Judgment of the Fifth Civil Chamber of the Supreme Court of Justice of Lima, Resolution No. 11 issued, in file No. 2857-2002, of May 23, 2002 (evidence file, pages 1832 to 1835).

<sup>80</sup> Cf. Extraordinary appeal filed by Mr. Valenzuela Cerna on July 16, 2003 (evidence file, pages 1837 to 1841).

<sup>81</sup> Cf. Judgment of the Second Chamber of the Constitutional Court issued, in file No. 1892-2003-AA/TC, of January 9, 2004 (evidence file, fs. 2800 to 2802).

<sup>82</sup> Cf. Motion for annulment filed by Mr. Valenzuela Cerna on March 30, 2004 (evidence file, pages 1858 to 1862).

<sup>83</sup> Cf. Order of the Constitutional Court issued, in file No. 1892-2003 AA/TC, of May 14, 2004 (evidence file, f. 1864).

<sup>84</sup> Cf. Supreme Order No. 115-89 JUS of May 24, 1989 (evidence file, f. 88).

Process of Judges of the Judiciary and Prosecutors of the Public Prosecution Service, approved through Resolution No. 043-2000-CNM of November 16, 2000, were applied.

95. On January 22, 2001, the alleged victim was summoned to the "Process of Evaluation and Ratification, year 2001 – Phase Three", in the communication of the summons reference was made to the Agreements of the Plenary of the CNM of November 15, 2000 and January 10, 2001.<sup>85</sup> Mr. Díaz Alvarado requested an interview as part of the process and stated that in the same interview specific charges against him were not made. In addition, he argued that one of the members of the CNM questioned the reasons that led him to file a criminal complaint against the former Dean of the Junín Bar Association for the crime of illegal appropriation.<sup>86</sup>

96. On July 13, 2001, through Supreme Resolution No. 095-2001-CNM, the CNM decided the non-ratification of Mr. Díaz Alvarado and the cancellation of his corresponding appointment and title.<sup>87</sup> The decision is not substantiated.

97. On November 12, 2006, Mr. Díaz Alvarado filed a writ of amparo against this decision before the Combined Court of Puente Piedra, Santa Rosa and Ancón, in which he requested that the Supreme Resolution of the CNM be declared inapplicable and that he be reinstated in the position he had held and that the rights inherent to the position be recognized.<sup>88</sup> On December 12, 2006, the Combined Court of Puente Piedra, Santa Rosa and Ancón declared the claim inadmissible.<sup>89</sup> On January 11, 2006, Mr. Díaz Alvarado appealed this decision<sup>90</sup> and on August 3, 2007, the Second Civil Chamber of the Supreme Court of Justice of North Lima confirmed the decision of December 12, 2006, and declared the amparo action inadmissible.<sup>91</sup>

98. On September 4, 2007, Mr. Díaz Alvarado filed a constitutional appeal before the Constitutional Court against the previous decision.<sup>92</sup> On December 19, 2007, the Constitutional Court declared the appeal inadmissible for having exceeded the statute of limitations for the action, due to the term established in article 44 of the Constitutional Procedural Code having expired.<sup>93</sup>

#### ***B.4. Regarding Marta Silvana Rodríguez Ricse***

99. Ms. Marta Rodríguez was appointed as Deputy Provincial Prosecutor to the Huancayo Combined Provincial Prosecutor of the Junín Judicial District on May 6, 1987.<sup>94</sup> For the evaluation procedure, the Regulation of the Evaluation and Ratification Process of Judges of the Judiciary and Prosecutors of the Public Prosecution Service, approved through Resolution No. 043-2000-CNM of November 16, 2000, was applied.

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<sup>85</sup> Cf. Communication of the Call for the Evaluation and Ratification Process of the year 2001, Third Phase, published on January 22, 2001 (evidence file, f. 2664), and Resolution of the National Judicial Council No. 095-2001-CNM of July 13, 2001 (evidence file, pages 90 to 92).

<sup>86</sup> Cf. Initial petition of Jean Aubert Díaz Alvarado before the Inter-American Commission of May 22, 2008 (evidence file, pages 969 to 980)

<sup>87</sup> Cf. Resolution of the National Judicial Council No. 095-2001-CNM of July 13, 2001, *supra*.

<sup>88</sup> Cf. Writ of Amparo against the National Council of the Judiciary, filed by Jean Aubert Díaz Alvarado, on November 12, 2006 (evidence file, fs. 3524 to 3535).

<sup>89</sup> Cf. Order No. 1 of the Combined Court of Puente Piedra, Santa Rosa and Ancón of December 12, 2006 (evidence file, f. 97).

<sup>90</sup> Cf. Brief of appeal filed by Mr. Díaz Alvarado on January 11, 2006 (evidence file, fs. 3539 to 3541).

<sup>91</sup> Cf. Order of the Second Civil Chamber of the North Lima Supreme Court of Justice issued, in file 00389-2007-0, on August 3, 2007 (evidence file, fs. 99 to 101).

<sup>92</sup> Cf. Constitutional tort appeal before the Constitutional Court filed by Mr. Díaz Alvarado on September 4, 2007 (evidence file, fs. 3547 to 3555).

<sup>93</sup> Cf. Order of the Constitutional Court issued, in file 5845-2007-PA/TC of December 19, 2007 (evidence file, fs. 2806 to 2807).

<sup>94</sup> Cf. Supreme Resolution No. 094-87-JUS of May 6, 1987 (evidence file, f. 103).

100. On January 22, 2001, the alleged victim was summoned to the "Process of Evaluation and Ratification, year 2001 – Phase Three", in the communication of summons reference was made to the Agreements of the Plenary of the CNM of November 15, 2000 and January 10, 2001.<sup>95</sup> Ms. Rodríguez Ricse stated that she was never summoned for a personal interview or charged.<sup>96</sup>

101. On July 13, 2001, through Supreme Resolution No. 095-2001-CNM, the CNM decided the non-ratification of Ms. Marta Rodríguez and the cancellation of her corresponding appointment and title.<sup>97</sup> The decision is not substantiated.

102. On December 11, 2006, Ms. Rodríguez Ricse filed a writ of amparo against the decision of non-ratification in which she requested that official communication No. 565-SG-CNM-2001 of July 13, 2001 be declared inapplicable, as well as CNM Resolution 095-2001-CNM and that she be reinstated in the position she had held and that the rights inherent to the position be recognized.<sup>98</sup> On December 18, 2006, the Combined Court of Puente Piedra, Santa Rosa and Ancón declared the writ of amparo inadmissible.<sup>99</sup>

103. On January 11, 2007, Ms. Rodríguez filed an appeal in which she requested reversal of the contested decision on the basis that "she was not summoned to a prior hearing, no charge was presented to [her] against which she could defend [herself]". She pointed out that "in her professional career [she has] always performed with rectitude and with respect for the legal and constitutional norms when resolving proceedings that she [has] heard". She also emphasized that the State recognized in a friendly settlement agreement signed by the Ministry of Justice that "in the process of ratification of the Magistrates of the Judiciary, serious irregularities have been incurred that affect the right to due process."<sup>100</sup> On June 22, 2007, the First Civil Specialized Chamber of the Supreme Court of North Lima declared the appeal inadmissible, arguing that the time period for filing the amparo action had expired.<sup>101</sup>

104. Finally, on August 29, 2007, Ms. Rodríguez filed a constitutional appeal against the previous decision before the Constitutional Court.<sup>102</sup> On December 20, 2007, the Constitutional Court declared the claim inadmissible for the untimely filing of the action, since upon filing the claim on December 11, 2006, the period provided for in Article 44 of the Constitutional Procedural Code had expired, having exceeded the statute of limitations and, additionally, the continuous nature of the affectation was not proven.<sup>103</sup>

## **VIII MERITS**

105. The Court will analyze in the merits of the case whether the State is responsible for the alleged violations of due process committed against the alleged victims, two judges and two

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<sup>95</sup> Cf. Communication of the Call for the Evaluation and Ratification Process for the year 2001, Third Phase, published on January 22, 2001, *supra*, and Resolution of the National Judicial Council No. 095-2001-CNM of July 13, 2001, *supra*.

<sup>96</sup> Cf. Initial petition of Marta Silvana Rodríguez Ricse before the Inter-American Commission of May 22, 2008 (evidence file, pages 1181 to 1194).

<sup>97</sup> Cf. Resolution of the National Judicial Council No. 095-2001-CNM of July 13, 2001, *supra*.

<sup>98</sup> Cf. Writ of amparo before the Constitutional Court filed by Marta Rodríguez Ricse against the National Council of the Judiciary filed on December 11, 2006 (evidence file, pages 3563 to 3573), and Order of the Constitutional Court issued, in file No. 5124-2007-PA/TC of December 20, 2007 (evidence file, pages 2809 and 2810).

<sup>99</sup> Cf. Order No. 1 of the Combined Court of Puente Piedra, Santa Rosa and Ancón of December 18, 2006 (evidence file, f. 107).

<sup>100</sup> Cf. Appeal filed by Mrs. Rodríguez Ricse against the Judgment of the Combined Court of Puente Piedra, Santa Rosa and Ancón of January 11, 2007 (evidence file, fs. 3576 to 3580).

<sup>101</sup> Cf. Order of the First Specialized Civil Chamber of the Supreme Court of Justice of North Lima of June 22, 2007 (evidence file, fs. 109 to 111).

<sup>102</sup> Cf. Constitutional tort appeal filed by Marta Rodríguez Ricse on August 29, 2007 (evidence file, fs. 3586 to 3594).

<sup>103</sup> Cf. Resolution of the Constitutional Court of December 20, 2007, issued in file No. 5124-2007-PA/TC, *supra*.

prosecutors, within the framework of an alleged arbitrary process of evaluation and ratification to which they were subjected by the National Council of the Judiciary between 2001 and 2002, which resulted in their removal from their positions. Among the alleged violations are the lack of justification for the non-ratification decisions and the principle of legality, the right to know in advance and in detail the accusation made and for the victims to have adequate time and means for a defense, political rights, the right to appeal the ruling and judicial protection.

106. First, the Court will refer to the specific guarantees necessary to safeguard the judicial independence of the judges and their applicability to prosecutors due to the nature of the duties they undertake. Second, it will examine the process of evaluation and removal from office of the judges and the prosecutor with respect to the alleged violations related to the right to have duly substantiated decisions (Article 8(1)); with the right to know in advance and in detail the accusation made and to have adequate time and means for a defense (Article 8(2)(b) and 8(2)(c)), and political rights due to the arbitrary separation of charges (Article 23(1)(c)). Finally, it will analyze the right to judicial protection (Article 25(1)).

**VIII-1**  
**RIGHTS TO JUDICIAL GUARANTEES, RIGHT TO PRIVACY AND POLITICAL RIGHTS, IN**  
**RELATION TO THE OBLIGATIONS TO RESPECT AND GUARANTEE RIGHTS and DUTY TO**  
**ADOPT DOMESTIC LAW PROVISIONS OF THE AMERICAN CONVENTION<sup>104</sup>**

**Arguments of the Commission and the parties**

***A.1. Right to judicial guarantees, judicial independence, right to expect duly substantiated decisions and the principle of legality***

107. The **Commission** held that within the context of the process of evaluation and ratification of judges and prosecutors by the National Council of the Judiciary undergone by the alleged victims Jorge Luis Cuya Lavy, Jean Aubert Díaz Alvarado, Marta Silvana Rodríguez Ricse and Walter Antonio Valenzuela Cerna, the State is responsible for the violation of various rights of the American Convention. The Commission considered that in order to adequately determine the guarantees that the State should provide to the alleged victims in each specific case, the nature of the process of evaluation and ratification of judges and prosecutors must be established and it considered that it is a procedure of a materially punitive nature, since it was essentially intended to assess the conduct, suitability and performance of judicial officers. It argued that in said process a criterion was used based on the convenience of the magistrates' tenure in office and pointed out that it was not a strict legal review, nor was it based on objective criteria that guaranteed real accountability and did not allow a wide margin of discretion to the decision-making authority in charge, which was incompatible with the guarantee of enhanced stability for judicial officers. It added that when it comes to sanctioning proceedings, both the Commission and the Court agree that the guarantees of Article 8(2) of the American Convention are similarly applied and that the due guarantees of Article 8(1) of the American Convention are also applicable. Consequently, the Commission concluded that the guarantees established in Articles 8(1), 8(2) and 9 of the American Convention would be applicable to the aforementioned process.

108. The representatives for the alleged victims also considered that the process to which the alleged victims were subjected is of a disciplinary nature and generally referred to the indications given by the Commission.<sup>105</sup>

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<sup>104</sup> Articles 1(e).1, 2, 8(1), 8(2)(b) y 8(2)(c) of the American Convention.

<sup>105</sup> Mr. Cuya Lavy's representatives indicated that, materially, it is a sanction with more serious scope than those of other administrative sanctions. Walter Valenzuela's representation indicated that the purpose of the process was to evaluate the conduct and suitability of judges and prosecutors in the performance of their duties, through a procedure of

109. Regarding **Jorge Luis Cuya Lavy**, in relation to the alleged violation of Article 9 of the Convention, the representatives indicated that the regulations in force at the time did not provide for the presentation of charges or a precise accusation for predetermined acts such as infractions, which would allow them to defend themselves, offer evidence and know the reasons why they may not be ratified. In addition, they observed that, according to the regulations, the CNM had absolute discretionary power to make the assessment of the tenure in the position. Thus, the individuals evaluated were unaware prior to the procedure which behaviors could be considered wrongdoing and which could not. Consequently, they concluded that the State violated Articles 8(1) and 9 of the Convention, as well as Articles 1(1) and 2 of the same treaty, to the detriment of Jorge Luis Cuya Lavy.

110. Regarding **Walter Antonio Valenzuela Cerna**, in relation to the principle of legality, his representatives reiterated within the legal framework of the evaluation and ratification process, duly defined grounds were not established that would allow the alleged victim to understand the conduct evaluated by the CNM that could be considered as serious offenses, thus justifying non-ratification. Consequently, they concluded that the State had violated the principle of legality, in relation to Articles 1(1) and 2 of the Convention.

111. The **State** considered that the process of evaluation and ratification of judges and prosecutors is different from a disciplinary process and cannot be compared, since its purpose is to evaluate the suitability and conduct of the magistrates to continue to carry out their jurisdictional or fiscal function, which seeks to determine which person has the necessary qualities to continue in the position, taking into consideration its significance, relevance and sensitivity. It added that the purpose of the disciplinary process is to find administrative responsibilities and, consequently, to establish sanctions of the same nature. Although the aforementioned processes may result in the termination of the judicial or prosecutorial role, this is not foundation to consider that the former has a disciplinary nature.

112. The State considered that non-ratification is not a punishment, but rather a consequence of a performance evaluation applied every seven years to every magistrate. It does not arise from the accusation of a functional misconduct or administrative offense but begins periodically due to the fact of having served for a period of seven years. It affirmed that this process makes it possible to ensure the tenure of suitable magistrates and to remove those who do not have the qualities to perform such a noble public service role. It indicated that the aforementioned process enjoys the guarantees of due process.

113. It argued that the 1993 Constitution did not incorporate as a requirement the substantiation of decisions issued by the CNM, with respect to the evaluation and ratification processes, since said requirement was limited in order to highlight the differences between ratification and the penalty of dismissal. In addition, the Constitutional Court adopted in its case law at the time, that the decision issued by the CNM materialized through a decision of conscience based on certain criteria.<sup>106</sup> It added that due to developments in regulation and case law, Peru

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a materially disciplinary and punitive nature. The representative of Jean Díaz and Marta Rodríguez reproduced the same arguments put forward by the Commission in the Merits Report.

<sup>106</sup> According to the State, the ratification or non-ratification of magistrates, the responsibility of the National Council of the Judiciary, is a very unique situation. This characteristic derives from the way in which the decision is made based on a conviction of conscience and its expression in a secret and undeliberated vote, although this decision must be based on certain criteria (cf. The Organic Law of the CNM and its Regulations); however, it does not carry the idea of a sanction but only the withdrawal of confidence in the exercise of the role. This means that, necessarily, the application – and entitlement – of all the guarantees included in the right to due process have to be modulated, and this is reduced only to the possibility of a hearing.

developed the obligation to substantiate the CNM's decisions in regard to ratification.<sup>107</sup> According to the State, during the evaluation and ratification processes of the alleged victims, there did exist a legal framework that determined the criteria to be evaluated, which corresponded to a ratification process and not to a disciplinary process that had to establish the progressive nature of offenses or other issue of a disciplinary nature. The decision made by the Plenary of the CNM regarding the ratification of the magistrate was not a simple discretionary statement, since said decisions were issued on the basis of previously established criteria and reports issued by the Permanent Commission for Evaluation and Ratification of CNM Judges and Prosecutors. The State indicated that the use of criteria that include "indeterminate legal concepts" grants a margin of appreciation to an authority, be it judicial, or as in the specific administrative case (CNM) to determine the content and extension of the concept applicable to a particular or specific situation.

**A.2. Regarding the right to know in advance and in detail the accusation made and to have adequate time and means to prepare a defense**

114. The **Commission** considered that, in the evaluation and ratification procedure, the CNM did not present charges or accusations against the alleged victims, nor were they informed about complaints or accusations against them that would allow them to present evidence or defense in regard to them. The regulatory framework did not foresee the presentation of charges or an accusation, and the interview that was carried out, which was attended by some of the alleged victims, could not be understood as an adequate defense mechanism in the aforementioned circumstances of not knowing the specific reasons by which their non-ratification could be ordered. It added, in relation to the principle of legality, that the criteria established by law for the evaluation process, in the abstract, fail to correct the absence of an individual notification with a real possibility of defense. By virtue of this, the Commission considered that the State violated Articles 8(2)(b) and 8(2)(c) of the American Convention, in relation to Articles 1(1) and 2 of the same instrument to the detriment of the alleged victims.

115. Regarding **Jorge Luis Cuya Lavy, the representatives** argued that the Process of Evaluation and Ratification of Judges of the Judiciary and Prosecutors of the Public Prosecution Service did not foresee the presentation of charges or a precise accusation for pre-established acts as disciplinary offenses, which would allow the magistrates to know the reasons that could subsequently substantiate the National Council of the Judiciary's decision to ratify them or not, and, where appropriate, defend themselves. Mr. Cuya Lavy was never informed of the existence of charges or other types of accusations against him for which he would be evaluated and against which he needed to defend himself. Nor did he have the time necessary to offer the evidence in his favor that he deemed appropriate. The non-ratification decision did not provide any substantiation as to the reasons for such a decision. Consequently, they concluded that the State violated Articles 8(2)(b) and 8(2)(c) of the American Convention, in relation to Article 1(1) of the same instrument, to the detriment of Jorge Luis Cuya Lavy.

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<sup>107</sup> The State argued that with the enactment of the Constitutional Procedural Code - Law No. 28237, published in the Official Gazette 'El Peruano' on May 31, 2004, and which entered into force six months after its publication, it follows *contrario sensu* that the constitutional processes regarding final resolutions of the CNM, when these are unsubstantiated and/or when they have been issued without hearing the interested party; thus establishing the requirement to substantiate said resolutions. The CNM established the mandatory substantiation of the Resolutions issued within the framework of the evaluation and ratification processes, with the issuance of the Regulation approved by means of CNM Resolution No. 1019-2005-CNM146, of July 1, 2005. Similarly, through CNM Resolution No. 039-2006-PCNM, of July 13, 2006, article 32 of CNM Resolution No. 1019-2005-CNM was modified, in the sense that the decision of ratification or non-ratification is the result of a substantiated decision. According to the State all future regulations issued by the CNM established the obligation to substantiate decisions. The case law criterion of the Constitutional Court through the binding precedent contained in the Resolution of August 12, 2005, File No. 3361-2004-AA/TC, indicated the obligatory nature of the substantiation of resolutions issued by the CNM, establishing that said criterion would be effective for events occurring after the aforementioned precedent. Subsequently, the Constitutional Court established a new precedent contained in the Resolution of February 11, 2009, File No. 01412-2007-PA/TC, in which it indicated that the CNM resolutions regarding the ratification of judges and prosecutors must be substantiated, regardless of the time they were issued.

116. Regarding **Walter Antonio Valenzuela Cerna, the representatives** recalled that the alleged victim was dismissed without knowing in advance the motive for the accusation and referred to statements by the Commission in its Merits Report. Similarly, they pointed out that during the evaluation and ratification process there was no guarantee of the conditions for the alleged victim to be able to defend his interests and rights effectively. Firstly, Mr. Valenzuela Cerna was not allowed to know the content of the charges or accusation against him. Second, he was not informed about the allegations and/or complaints made against him in order to allow him to present evidence or a defense. The representatives noted that the latter violated the adversarial principle, which prevented a greater balance between the parties in the defense of their rights and interests. Due to the foregoing, the alleged victim was unable to defend himself, showing a lack of impartiality and a presumption of guilt by the CNM. All of this in violation of Articles 8(2)(b) and 8(2)(c) of the Convention, in relation to Articles 1(1) of the same instrument.

117. The State argued that the current regulations<sup>108</sup> established how said process should be carried out and specified what guarantees were acknowledged for the judges and prosecutors evaluated. The alleged victims were aware of the aspects that the CNM evaluated since there is a direct relationship between the provisions of the Rules of Procedure and the criteria and parameters with which the alleged victims were evaluated and subsequently not ratified. The criteria on the process were similarly regulated in articles 2, 3, 4, and 5 of the aforementioned regulations, in such a way that the regulations did provide criteria that would allow the magistrate to know the reasons justifying the CNM's decision to ratify them or not.<sup>109</sup> It argued that the alleged victims were informed of the beginning of the evaluation and ratification process, in accordance with the regulations, therefore, they not only knew in advance which topics could be the subject of questions in the interview, but were also empowered to send the information provided for in the aforementioned regulations to the CNM. Although there was no presentation of charges or accusation, in view of the nature of the process of evaluation and ratification of magistrates, the alleged victims were able to know which aspects would be evaluated by the CNM,<sup>110</sup> in accordance with national regulations. In addition, the State indicated that the interview within a process of evaluation and ratification of judges and prosecutors constitutes one of the guarantees that includes the right to due process.<sup>111</sup> The State concluded that although the design of the evaluation and ratification process, as provided for in the normative framework in force at the time of the non-ratification of all the alleged victims, did not anticipate the presentation of charges or an accusation (because it is not possible to equate a disciplinary process to an evaluation and ratification process), it did provide the means for them to know the guidelines and criteria that the CNM considered in order to decide on their ratification or non-ratification.

### **A.3. Political Rights**

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<sup>108</sup> The State pointed to the Regulations for the Process of Evaluation and Ratification of Judges of the Judiciary and Prosecutors of the Public Prosecution, CNM Resolution No. 043-2000-CNM and CNM Resolution No. 241-2002-CNM, *supra*.

<sup>109</sup> The State argued that the alleged victims did have the possibility of accessing the file, according to a decision of the Constitutional Court of August 12, 2005, which indicated "from the generic argument it follows that every magistrate subject to ratification has the right to access: (a) a copy of the personal interview, as the hearing is of a public nature, through the record of the public act carried out, and not only the video thereof; (b) the copy of the part of the minutes of the Plenary Session of the CNM that contains the voting and non-ratification agreement of the evaluated magistrate; and, (c) the copy of the Report of the Permanent Commission of Evaluation and Ratification. Similar to the criterion adopted by the new Regulation of Evaluation and Ratification of Judges of the Judiciary and Prosecutors of the Public Prosecution, by establishing, in its statement of substantiation and in its third supplementary and final provision that the magistrate may request copies of the elements of the file and the final report. In addition, he referred to the ruling of the Constitutional Court of January 27, 2003, File No. 1941-2002-AA/TC.

<sup>110</sup> The State noted that the reports and complaints that the judges and prosecutors would have, in accordance with the regulatory framework, are duly notified in a timely manner, and the judges and prosecutors had the opportunity to hear them (within a corresponding disciplinary procedure).

<sup>111</sup> This was stated by the Constitutional Court in the Judgment of January 27, 2003, in File No. 1941-2002-AA/TC., which interpreted the Regulations approved by Resolution No. 043-2000-CNM.

118. The **Commission** considered that the right to judicial independence enshrined in Article 8(1) of the American Convention was violated in conjunction with the right of access and tenure under general conditions of equality to a public office established in Article 23(1)(c), since the alleged victims were removed from their position through an arbitrary process in which violations of both due process and the principle of legality were committed. The Commission concluded that the State violated Article 23(1)(c) of the American Convention, in relation to Article 1(1) of the same instrument, to the detriment of Jorge Luis Cuya Lavy, Jean Aubert Díaz Alvarado, Marta Silvana Rodríguez Ricse and Walter Antonio Valenzuela Cerna.

119. Regarding **Jorge Luis Cuya Lavy, the representatives** considered that when the dismissal was carried out through a procedure that violated Articles 8, 9 and 25 of the Convention, the State violated the human right to access to a public office under conditions of equality, provided for in article 23(1)(c). Therefore, the dismissal was arbitrary, since the disciplinary process failed to comply with judicial guarantees, the principle of legality and the right to judicial protection.

120. Regarding Walter Antonio Valenzuela Cerna, the representatives argued that the inability to access new positions in the judiciary under equal conditions violated Article 23(1)(c) of the Convention. They argued that the non-ratification eliminated the legitimate expectation of promotion in the public profession of judge and denied continued and future access to public positions in the Judiciary, under conditions of equality. This situation gave rise to discriminatory treatment, he was never informed of the reasons for the non-ratification, depriving the alleged victim of economic income, which represented his personal and family support.

121. The **State** argued that in this case it has been established that the conditions of equality of access to public office were met, at the end of the completion of the alleged victims' position, which was carried out through a ratification process that is duly regulated in Peruvian regulations, whose constitutional purposes have been repeatedly specified by the Constitutional Court (the highest interpreter of the Constitution). In such circumstances, the State did not violate Article 23(1)(c) of the Convention, in relation to Article 1(1) of the same instrument, to the detriment of the alleged victims.

#### **A. Considerations of the Court**

122. The Court recalls that, in this case, the removal of two judges and two prosecutors from their positions is being examined as a result of an evaluation and ratification process carried out by the National Council of the Judiciary. For this reason, it will proceed to analyze: (1) the specific guarantees to safeguard the judicial independence of the judges and their applicability to prosecutors due to the nature of the duties they undertake; (2) duty of substantiation; (3) the right to know in advance and in detail the accusation made and to have the time and adequate means to prepare the defense, and (4) political rights.

##### ***B.1. The specific guarantees to safeguard the judicial independence of judges and their applicability to prosecutors due to the nature of the duties they undertake***

123. This Court has established that the judges have specific guarantees due to the necessary independence of the Judiciary, which has been understood as essential for the exercise of their duties. In this sense, this Court has affirmed that one of the main objectives of the separation of public powers is the guarantee of judicial independence.<sup>112</sup> Similarly, the Court has indicated that the guarantees of the stability and tenure of judges derives from judicial independence and are

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<sup>112</sup> Cf. *Case of the Constitutional Court v. Peru. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 71, para. 73, and *Case of Ríos Avalos et al. v. Paraguay. Merits, Reparations and Costs*. Judgment of August 19, 2021. Series C No. 429, para. 86.



aimed at safeguarding their independence. This is also applicable to prosecutors due to the nature of the duties that they undertake,<sup>113</sup> as well as the guarantees to an adequate appointment process and to be protected against external pressures that protect both the work of judges and that of the prosecutors.<sup>114</sup>

124. Regarding the role of the judges, the Court has indicated that said autonomous exercise must be guaranteed by the State both in its institutional facet, that is, in relation to the Judiciary as a system, as well as in its individual aspect, that is, in relation to the specific judge as a person. The objective of protection is to prevent the judicial system, in general, and its members, in particular, from being subjected to possible undue restrictions in the exercise of their duties by bodies outside the Judiciary, or even by those who exercise review or appeal functions.<sup>115</sup>

125. Regarding the guarantee of tenure of judges, this Court recalls that in the Statute of the Ibero-American Judge, Article 14 states the following:

Article 14. PRINCIPLE OF NON-REMOVAL FROM OFFICE. As a guarantee of their independence, judges cannot be removed from the moment in which they acquire the said status and join the judicial career in the terms established by the Constitution. Nevertheless, they can be suspended or separated from office owing to physical or mental incapacity, or negative evaluation of their professional performance in the cases established by law, or separated from office in case of criminal or disciplinary responsibility by legally established bodies, by means of procedures guaranteeing respect for due process and, in particular, the rights to a hearing, defense, contradiction and legal remedies, as appropriate.<sup>116</sup>

126. Additionally, it reiterates that the United Nations Basic Principles regarding the Independence of the Judiciary establish that judges may only be suspended or removed from office due to incapacity or behavior that disqualifies them from continuing to perform their duties and that any procedure for the adoption of disciplinary measures, suspension or removal from office will be resolved in accordance with the established norms of judicial behavior.<sup>117</sup>

127. Finally, the current Special Rapporteur on the independence of judges and lawyers stated that "judges may be subject to disciplinary proceedings only in the cases previously provided for in the constitution or the law and in accordance with the established procedure."<sup>118</sup> In addition, it pointed out that "the rule [s] should be formulated in a sufficiently precise manner to allow them to regulate their conduct and foresee the consequences that the performance of a specific action would entail"<sup>119</sup>.

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<sup>113</sup> Cf. *Case of Martínez Esquivia v. Colombia*, *supra*, paras. 95 and 96, and *Case of Casa Nina v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 24, 2020. Series C No. 419, para. 69.

<sup>114</sup> Cf. *Case of Martínez Esquivia v. Colombia*, *supra*, para. 88, and *Case of Casa Nina v. Peru*, *supra*, para. 72. In this regard, this Court recalls that the criteria expressed is also supported by various instruments and pronouncements in the international arena, such as the United Nations Guidelines on the role of prosecutors and the United Nations Special Rapporteurship on the independence of judges and lawyers. At European level, the Council of Europe and the joint report issued by the Consultative Council of European Judges and the Consultative Council of European Prosecutors on "Judges and prosecutors in a democratic society", called the "Bordeaux Declaration". The European Court of Human Rights has also ruled in this regard. In addition, the African System highlights the Principles and Guidelines on the Right to a Fair Trial and Legal Aid in Africa. Cf. *Case of Martínez Esquivia v. Colombia*, *supra*, paras. 89 to 93.

<sup>115</sup> Cf. *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela. Preliminary Objection, Merits, Reparations and Costs*. Judgment of August 5, 2008. Series C No. 182, para. 55, and *Case of Ríos Avalos et al. v. Paraguay*, *supra*, para. 86.

<sup>116</sup> Cf. *Case of Cordero Bernal v. Peru. Preliminary Objections and Merits*. Judgment of February 16, 2021. Series C No. 421, para. 73.

<sup>117</sup> Cf. *Case of Reverón Trujillo v. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of June 30, 2009. Series C No. 197, para. 77, and *Case of Urrutia Laubreauxvs. Chile*, *supra*, para. 109.

<sup>118</sup> It is also worth noting that, the then Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, indicated in reports submitted in 2013 and 2014 that, although judges may be subject to disciplinary proceedings for conduct that brings judicial office into disrepute or that violate judicial ethics, disciplinary offenses that refer in general terms to "threat or harm to the correct administration of justice, [...] risk undermining the independence of the judiciary." Cf. *Case of Cordero Bernal v. Peru*, *supra*, para. 76.

<sup>119</sup> Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, Diego García Sayán, Doc. A/75/172, July 17, 2020, para. 12 and 13. Available at: <https://www.undocs.org/es/A/75/172>

128. With regard to the specific role of prosecutors, this Court has highlighted that they perform the duties of judicial officers and, as such, they need to enjoy guarantees of job stability, among others, as a basic condition of their independence for the due compliance of their procedural role. Therefore, they are protected by the guarantees of an appropriate appointment, of tenure in office and protection against external pressure. Otherwise, the independence and objectivity that are required in their role would be jeopardized as principles aimed at ensuring that the investigations carried out and the claims made before the jurisdictional bodies are directed exclusively to the achieving justice in each specific case, consistent with the scope of Article 8 of the Convention.<sup>120</sup> In this regard, it should be added that the Court has specified that the lack of guarantee of non-removability of prosecutors, making them vulnerable to reprisals for the decisions they take, entails a violation of the independence guaranteed, precisely, by Article 8(1) of the Convention.<sup>121</sup> In this regard, this Court refers to the judgments of the cases *Martínez Esquivia v. Colombia* and *Casa Nina v. Peru* in which it established that the independence recognized for prosecutors constitutes the guarantee that they will not be subject to political pressure or undue interference in their actions, or retaliation for the decisions that they have objectively assumed, which precisely requires the guarantee of stability and tenure in office.<sup>122</sup>

129. By virtue of the foregoing considerations, this Court reiterates that the guarantee of stability and tenure in office, for judges and prosecutors implies, in turn, (i) that removal from their positions must exclusively obey grounds permitted, either through a process that complies with judicial guarantees or because they have completed the term of their mandate; (ii) that judges and prosecutors can only be dismissed for serious misconduct or incompetence; and (iii) that all proceedings must be decided in accordance with the established norms of judicial behavior and through fair procedures that ensure objectivity and impartiality according to the Constitution or the law.<sup>123</sup>

130. Meanwhile, in this case, the Commission and the representatives argued that the process to which the alleged victims were subjected is punitive and disciplinary in nature. The State argued that the process of evaluation and ratification of judges and prosecutors is different from a disciplinary process,<sup>124</sup> since its purpose is to evaluate the suitability and conduct of the magistrates to continue in the performing their jurisdictional or prosecutorial role, and seeks to determine which person has the necessary qualities to continue in the position.

131. To resolve this issue, the Court refers to the decision in the case of *Moya Solís v. Peru*, since in that case Ms. Moya Solís was also subjected to an evaluation process, and this Court established that:

this process evaluated the performance of the alleged victim, in order to establish whether she was ratified in her position or dismissed. The State alleged that evaluation processes differ from disciplinary processes, since the former seek to evaluate the officer from time to time, while the latter seek to establish whether the officer committed an administrative infringement. However, both processes are aimed at evaluating an officer's conduct and suitability, either periodically or as a result of an alleged infringement. In addition, when an evaluation process concludes that the officer's performance rating was not satisfactory and the

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<sup>120</sup> Cf. *Case of Martínez Esquivia v. Colombia*, *supra*, para. 88 and 94, and *Case of Casa Nina v. Peru*, *supra*, para. 72 and 78.

<sup>121</sup> Cf. *Case of Valencia Hinojosa et al. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 29, 2016. Series C No. 327, para. 110 and 119, and *Case of Casa Nina v. Peru*, *supra*, para. 72.

<sup>122</sup> Cf. *Case of Martínez Esquivia v. Colombia*, *supra*, para. 96, and *Case of Casa Nina v. Peru*, *supra*, para. 80.

<sup>123</sup> Cf. *Case of Reverón Trujillo v. Venezuela*, *supra*, para. 77, and *Case of Ríos Avalos et al. v. Paraguay*, *supra*, para. 88.

<sup>124</sup> According to expert witness Rodrigo Uprimny Yepes, "it is possible to affirm that there are three possible processes: (i) sanctioning processes, aimed at determining whether or not the official committed a serious offense; (ii) those processes aimed at determining if for a certain reason, even if it is not due to his fraud or fault, the official lacks the capacity to continue in office, (iii) the so-called confirmation processes." Cf. Expert opinion of Rodrigo Uprimny Yepes submitted by affidavit to be presented before the Court on March 4, 2021 (evidence file, fs. 3314 to 3335).

officer must therefore be removed from their position, it becomes a materially punitive process, since the dismissal of the person evaluated is a penalty for poor performance.<sup>125</sup>

132. Furthermore, this Court pointed out that “in the opinion of the Court, to a process of evaluation or ratification, insofar as it involves the possibility of dismissal of the officials evaluated in cases of incompetence or poor performance, the guarantees of due process characteristic of disciplinary processes are applicable, although their scope may be different in content or intensity.”<sup>126</sup>

133. In this regard, Article 8 of the Convention establishes the guidelines of due legal process, which refers to the set of requirements that must be observed in the procedural instances so that individuals are in a position to adequately defend their rights before any act of the State that may impair them. In this sense, in its established case law, this Court has indicated that it is required of any public authority, whether administrative, legislative or judicial, whose decisions may affect the rights of individuals, to adopt said decisions with full respect for the guarantees of due legal process.<sup>127</sup>

134. Once it has been determined that the evaluation and ratification process followed by the alleged victims is materially punitive and that, therefore, the guarantees of due process inherent to disciplinary processes are applicable, it is necessary to determine whether or not said process complied with the essential guarantees for judges and prosecutors related to: (a) the duty to substantiate decisions (article 8(1)); (b) the right to know in advance and in detail the accusation made and to have adequate time and means for a defense (article 8(2)(b) and 8(2)(c), and (c) political rights (article 23(1)(c)) .

## **B.2. Duty to substantiate decisions**

135. In this case, the Commission and the representatives of the alleged victims alleged the violation of the right to duly substantiated decisions (Article 8(1)) and of the principle of legality (Article 9). The Court deems it pertinent to analyze these alleged violations jointly, as it has done in previous cases when it comes to processes evaluating judicial officials.

136. In relation to the right to expect duly substantiated decisions, the Court has repeatedly indicated that the substantiation “is the externalization of the reasoned justification that allows a conclusion to be reached”<sup>128</sup> and that it implies a rational exposition of the reasons that lead the judge to make a decision.<sup>129</sup> The duty to state grounds is a guarantee that emerges from Article 8(1) of the Convention, linked to the proper administration of justice, since it protects the right of citizens to be judged for the reasons provided for in law and gives credibility to legal decisions in a democratic society.<sup>130</sup>

137. Thus, substantiation shows the parties that they have been heard and, in those cases in which the decisions are actionable, provides the possibility of criticizing the decision and obtaining a new examination before higher courts. In accordance with the foregoing, the argumentation of a ruling and of certain administrative acts must make it possible to know the facts, motives and norms on which the authority based its decision, in order to rule out any indication of

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<sup>125</sup> Cf. *Case of Moya Solís v. Peru. Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentencia de 3 junio de 2021. Serie C No. 425, párr. 69.

<sup>126</sup> Cf. *Case of Moya Solís v. Peru, supra*, para. 70.

<sup>127</sup> *Case of the Constitutional Court v. Peru, supra*, para. 69 and 71, and *Case of Ríos Avalos et al. v. Paraguay, supra*, para. 95.

<sup>128</sup> Cf. *Case of Chaparro Álvarez y Lapo Íñiguez. v. Ecuador. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 21, 2007. Series C No. 170, para. 107, and *Case of Cordero Bernal v. Peru, supra*, para. 79.

<sup>129</sup> Cf. *Case of Amrhein et al. v. Costa Rica. Preliminary Objection, Merits, Reparations and Costs*. Judgment of April 25, 2018. Series C No. 354, para. 268, and *Case of Cordero Bernal v. Peru, supra*, para. 79.

<sup>130</sup> Cf. *Case of Apitz Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela, supra*, para. 77, and *Case of Cordero Bernal v. Peru, supra*, para. 79.

arbitrariness.<sup>131</sup>.

138. In this case, the Court recalls that Jorge Cuya entered the judicial profession in 1994 and held different positions and, in particular, on November 21, 1994, he was appointed Judge of the Third Specialized Civil Court of the Northern Cone; Walter Valenzuela, entered the judicial profession, effectively, in 1985 and held various positions, and in particular, on October 6, 1994, he was appointed Specialized Civil Judge of the Judicial District of Lima; and Jean Díaz and Marta Rodríguez were appointed on May 24, 1989 and on May 6, 1987, respectively, Deputy Provincial Prosecutors of the Huancayo Provincial Combined Prosecutor's Office of the Junín Judicial District. The alleged victims were summoned by the CNM and at the end of the process, the CNM issued the non-ratification resolutions, which are not individualized, nor do they have the proper substantiation, canceling their appointment and the corresponding titles:

- a) Resolution No. 500-2002-CNM of November 20, 2002, in which Mr. Cuya Lavy was not ratified as judge, in the operative part established "One. - Not ratify in their positions the following magistrates of the Judiciary and prosecutor of the Public Prosecution Service". [...] "Two. - Cancel the titles of appointments issued in favor of the non-ratified judges and prosecutor, mentioned in the previous article".<sup>132</sup>
- b) Resolution No. 095-2001 of July 13, 2001, in which Mr. Díaz Alvarado and Ms. Rodríguez Ricse were not ratified in their positions as prosecutors, in the operative part established "One.- To render without effect the appointments, canceling the titles issued to the judges and prosecutors mentioned below, for not having been ratified in their positions".<sup>133</sup>
- c) Resolution No. 415-2002 - CNM of August 28, 2002, in which Mr. Valenzuela Cerna was not ratified in his position as judge, in the operative part established: "One.- Not ratify the following magistrates in their positions"[...]" Two.- Cancel the titles of appointment issued in favor of the Members and Prosecutors that have not been ratified."<sup>134</sup>

139. During the proceedings before the Commission, the State admitted that the evaluation processes "[...] had as a characteristic that non-substantiated resolutions were issued [...]".<sup>135</sup> The foregoing was reiterated by the State in its answer to the Court, referring to the right to due substantive reasoning, Peru admitted that the 1993 Constitution did not incorporate as a requirement the substantiation of resolutions issued by the CNM, regarding the processes of evaluation and ratification. In addition, it argued that the Constitutional Court also adopted this position repeatedly in its case law at the time and specified that the CNM's decision was produced through a decision of conscience based on certain criteria.

140. From the foregoing, it can be inferred that effectively under these criteria the non-ratification decisions were issued against the alleged victims, where the regulation did not require the CNM to provide reasons for its decisions. It is evident that in this case, the non-ratification decisions issued by the CNM regarding the alleged victims did not comply with the duty to substantiate the decisions, which constitutes a violation of the due guarantees prescribed by Article 8(1) of the Convention.

141. Furthermore, the representatives of the alleged victims and the Commission argued that the grounds for knowing the conduct to be evaluated by the CNM had not been defined nor which conduct could be considered as serious offenses that would lead to non-ratification, which in his opinion would constitute a violation of the principle of legality. Article 9 of the American Convention

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<sup>131</sup> Cf. *Case of Claude Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151, para. 122, and *Case of Cordero Bernal v. Peru*, *supra*, para. 80.

<sup>132</sup> Cf. Resolution N° 500-2002-CNM, issued by the National Council of the Judiciary, of November 20, 2002, *supra*.

<sup>133</sup> Cf. Resolution of the National Council of the Judiciary No. 095-2001-CNM, of July 13, 2001, *supra*.

<sup>134</sup> Cf. Resolution N° 415-2002-CNM of the National Council of the Judiciary, of August 28, 2002, *supra*.

<sup>135</sup> Cf. Report 199-2012 JUS/PPES of the State of September 6, 2012, (evidence file, fs. 3167 to 3180).

establishes that "[n]o one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed" and that "A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed." This Court has interpreted that these mandates are applicable not only to the criminal sphere, but that their scope extends to administrative sanctioning matters.<sup>136</sup>

142. In relation to the scope of this principle in the evaluation processes of judicial officials, the Court recently indicated in the case of *Moya Solís v. Peru* that:

[...] However, the Court finds that, in the case of processes of evaluation or ratification of public officers, the right to know in advance and in detail the accusation made implies that the persons evaluated have precise knowledge of the general evaluation criteria used by the competent authority to determine their tenure in office. The above implies the ability to establish whether the breach identified by the authority is of such magnitude that it may lead to their non-ratification, which is also essential for the exercise of the right to defense.<sup>137</sup>

143. In this regard, Article 30 of the Organic Law of the CNM referred to Article 21 of the same law, indicating that the CNM "evaluates the conduct and suitability in the performance of the position, considering the jurisdictional output, merits, reports of the Bar Associations and Societies, information accumulated on his conduct, granting a personal interview in each case" (*supra* para. 70). In view of this legal provision, the Permanent Commission for the Evaluation and Ratification of Judges of the Judiciary and Prosecutors of the Public Prosecution Service of the CNM (hereinafter "Permanent Commission of the CNM") prepared the parameters of evaluation and ratification of the judges and prosecutors. In addition, it should be noted that the regulations approved by Resolution No. 043-2000-CNM were applied to Mr. Díaz and Ms. Rodríguez, and the regulations approved by Resolution No. 241-2002-CNM were applied to Messrs. Cuya and Valenzuela.

144. The second article of each one of the evaluation and ratification regulations indicated that, by means of a sworn statement, those summoned had to report on: their sanctions, if they had been prosecuted for being charged with criminal, civil or disciplinary responsibility, indicating, if applicable, the sanction applied; date of entry to social and sports clubs; if they were related by consanguinity, by affinity or by marriage with workers or officials working in the Judiciary, the Public Prosecution Service, as well as other related bodies in the field of influence; and if they possessed physical and mental aptitude (*supra* para. 76). Article three of each of the regulations indicated the criteria to be evaluated, such as attendance and punctuality at the workplace; number of licenses granted, as well as unannounced or unwarranted absences; absences from the place where the position is held; jurisdictional output; List of judges and prosecutors who are in charge of criminal proceedings with expired terms and the number of each, as well as those who have pending cases in their Office (*supra* para. 75). In addition, in the case of judges and prosecutors who have studied at the Academy of the judiciary, it will send the Permanent Commission of the CNM information on the courses and grades obtained by the judges and prosecutors evaluated.<sup>138</sup>

145. Similarly, in accordance with article four of the regulations, the CNM Standing Committee could request documentation and information related to banking or tax by taking the pertinent steps in accordance with the regulations provided for that purpose. In addition, if it is required to analyze the equity growth of those evaluated, said commission could be advised by specialists, according to article nine of each of the regulations.<sup>139</sup>

<sup>136</sup> Cf. *Case of Baena Ricardo et al. v. Panama. Merits, Reparations and Costs*. Judgment of February 2, 2001. Series C No. 72, para. 106, and *Case of Moya Solís v. Peru*, *supra*, para. 87.

<sup>137</sup> Cf. *Case of Moya Solís v. Peru*, *supra*, para. 71.

<sup>138</sup> Cf. Regulations for the evaluation and ratification procedure of Judges of the Judiciary and Prosecutors of the Public Prosecution, Resolution 043-2000-CNM y Resolution No. 241-2002-CNM, article 3, *supra*.

<sup>139</sup> Cf. Regulations for the evaluation and ratification procedure of Judges of the Judiciary and Prosecutors of the Public Prosecution, Resolution 043-2000-CNM y Resolution No. 241-2002-CNM, Articles 4 and 9, *supra*.

146. It should be noted that, as the procedure was regulated, the commission in charge evaluated all the documentation and information received, ordered it, processed, and analyzed it. After which, at the end of the ratification process, the Permanent Commission for Comprehensive Evaluation and Ratification of the CNM prepared the report that was submitted to the plenary session of the CNM, so that it could decide whether to ratify the magistrate evaluated, or not. The Court has verified, according to the reports, that the alleged victims were given a qualitative assessment, according to the criteria evaluated by the judges: suitability (with the following indicators: jurisdictional output, professional training, qualifications from the Judicial Academy), and conduct (with the following indicators: police, criminal and judicial records, public complaints,<sup>140</sup> information from the Bar Associations, asset and income history and other information). Regarding the criteria evaluated for prosecutors, the qualitative assessment was divided into 1) jurisdictional output, 2) professional training, 3) professional behavior.

147. From all of the foregoing, it can be inferred that Messrs. Cuya, Valenzuela, Díaz, and Ms. Rodríguez were aware of the regulations that governed the evaluation and ratification procedure, and three of them submitted the required statements in this regard, except Mr. Valenzuela. It is evident that in this case the CNM decisions were issued taking into account the reports of the Permanent Commission of Evaluation and Ratification of Judges and Prosecutors of the CNM, which in turn were prepared based on the criteria established in the regulations current at the time of the events. Consequently, the alleged victims were aware of the normatively established evaluation criteria related to the evaluation of their conduct, suitability and performance in the position, for which reason this Court does not find that in this case the State is responsible for the violation of the principle of legality.

148. Furthermore, as previously indicated, the alleged victims did not present specific allegations in a timely manner in relation to the violation of Article 11 of the Convention. However, the representative of Mr. Díaz and Ms. Rodríguez in their final arguments pointed out that “the dignity of the human person is configured as a constituent legal principle of fundamental rights, it is the ontological presupposition through which [t]he State will not only act respecting the autonomy of the human being and fundamental rights as limits to its intervention; rather, it must provide the minimum causes so that the individual himself can achieve the development of his personality and the free choice of his life plans, which is called the ‘life project’.”<sup>141</sup>

149. This Court considers that said assertions are related to their privacy, since the alleged victims did not know the reasons for their removal from office due to the lack of substantiation for the CNM's decisions, according to the situation presented at the time of the events. In this way, the alleged victims were identified as officials who were not ratified because of their conduct or because of their incapacity, without stating the reasons that justified the decision adopted by the CNM. In this regard, the Court has indicated that the right to privacy “recognizes that everyone has the right to its respect, prohibits any illegal attack against honor or reputation, and imposes

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<sup>140</sup> Both evaluation and ratification regulations established on citizen participation that: “Any duly identified citizen or duly represented public or private institution or body may inform the Council of the existence of facts that detract from the dignity of the position, functional misconduct or lack of suitability for the position of the judge or prosecutor submitted for ratification [...] This information and documentation will be confidential.” Cf. Regulations for the Evaluation and Ratification Process of Judges of the Judiciary and Prosecutors of the Public Prosecution, approved through Resolution 043-2000-CNM and Resolution No. 241-2002-CNM, general provisions, section XI, *supra*.

<sup>141</sup> Similarly, Mr. Cuya, in his statement given before the Court, stated that “It struck a blow that through the press, radio, television, written press, the members of the Council of the Judiciary gave interviews, and you all there in the Brief of Motions, Pleadings and Evidence have an interview with Dr. Flores Paredes, paediatrician, member of the Council, who said that those not ratified were a group of officials who were in two problems, one, alleged acts of corruption or lack of professional suitability. What does it mean? Either someone was corrupt, or someone was unprepared, unfit for the position, so that affected me personally [...]”. For his part, Mr. Valenzuela Cerna in his statement stated that “[...] a judge who in t[his] case, for example, the stigma that they did not ratify me because I have surely been a corrupt judge, in short, negligent, or incapable [...]” Statements by Jorge Luis Cuya Lavy and Walter Antonio Valenzuela Cerna given before the Court at the public hearing held on March 8 and 9, 2021.

on the States the duty to provide the protection of the law against such attacks. In general terms, this Court has indicated that the right to privacy is related to self-esteem and worth, while reputation refers to the opinion that others have of a person."<sup>142</sup> In consideration of the foregoing and in application of the principle of *iura novit curia* ('the court knows the law'), this Court considers that the lack of substantiation for the CNM decisions for the non-ratification of Messrs. Cuya, Valenzuela and Díaz and Ms. Rodríguez also caused an impairment of the right to privacy of the aforementioned alleged victims, provided for in Article 11(1) of the Convention.

150. Lastly, this Court considers that in this specific case the regulations of the evaluation and ratification procedure did not require the CNM to substantiate its decisions, which was incompatible with the purposes of the American Convention, since the decisions did not show a reasoned justification that would allow understanding of the reasons that led the judge to make a decision not to ratify the alleged victims. Therefore, the Court considers that the regulations applied in this case violate Article 2 of the Convention, in relation to Article 8(1) thereof.

151. Consequently, the Court considers that the State failed in its duty to substantiate the non-ratification decisions enshrined in Article 8(1) of the American Convention, in relation to the obligations established in Articles 1(1) and 2 of the same instrument, to the detriment by Jorge Luis Cuya Lavy, Jean Aubert Díaz Alvarado, Marta Silvana Rodríguez Ricse and Walter Antonio Valenzuela Cerna. Similarly, the Court considers that the State is responsible for not protecting the right to privacy contained in Article 11(1) of the Convention, in relation to Article 1(1) of the same instrument, to the detriment of Jean Aubert Díaz Alvarado, Marta Silvana Rodríguez Ricse, Walter Antonio Valenzuela Cerna and Jorge Luis Cuya Lavy.

### ***B.3. Regarding the right to know in advance and in detail the accusation made and to have adequate time and means to prepare a defense***

152. Article 8(2) of the Convention establishes the minimum guarantees that must be ensured by the States based on due legal process.<sup>143</sup> The Court has ruled in its case law on the scope of this article and has established that it is not limited to criminal proceedings, but has extended it, as appropriate, to administrative proceedings before state authorities and to non-criminal judicial proceedings in the constitutional, administrative and labor sphere.<sup>144</sup> Similarly, it has indicated that, both in these and in other types of matters, "the individual also has the right, in general, to due process that is applied in criminal matters."<sup>145</sup> This indicates that the guarantees of Article 8(2) of the Convention are not exclusive to criminal proceedings but can be applied to proceedings of a punitive nature. The issue in each case is to determine the minimum guarantees that concern a specific non-criminal punitive process, in accordance with its nature and scope.<sup>146</sup>

153. In the case of evaluation or ratification processes for public officials, the Court reiterates the previously indicated right to know in advance and in detail the accusation made implies that the persons evaluated have precise knowledge of the general evaluation criteria used by the competent authority to determine their tenure in office. The above implies the ability to establish whether the breach identified by the authority is of such magnitude that it may lead to non-ratification, which is also essential for the exercise of the right to defense (*supra* para. 142).

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<sup>142</sup> Cf. *Case of Tristán Donoso v. Panamá. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193, para. 57, and *Case of Álvarez Ramos v. Venezuela. Preliminary Objection, Merits, Reparations and Costs*. Judgment of August 30, 2019. Series C No. 380, para. 102.

<sup>143</sup> Cf. *Case of Baena Ricardo et al. v. Panama*, *supra*, para. 137, and *Case of Moya Solís v. Peru*, *supra*, para. 68.

<sup>144</sup> Cf. *Case of the Constitutional Court v. Peru*, *supra*; *Case of Baena Ricardo et al. v. Panama*, *supra*; *Case of Ivcher Bronstein v. Peru. Merits, Reparations and Costs*. Judgment of February 6, 2001. Series C No. 74; *Case of Vélez Loo v. Panama. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 23, 2010. Series C No. 218; *Case of the Constitutional Court (Camba Campos et al.) v. Ecuador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 28, 2013. Series C No. 268, and *Case of Maldonado Ordóñez v. Guatemala. Preliminary Objection, Merits, Reparations and Costs*. Judgment of May 3, 2016. Series C No. 311, and *Case of Moya Solís v. Peru*, *supra*.

<sup>145</sup> Cf. *Case of the Constitutional Court v. Peru*, *supra*, para. 70, and *Case of Moya Solís v. Peru*, *supra*, para. 68.

<sup>146</sup> Cf. *Case of Maldonado Ordóñez v. Guatemala*, *supra*, para. 75, and *Case of Moya Solís v. Peru*, *supra*, para. 68.

154. Moreover, according to this Court's case law, the right to have adequate time and means to prepare a defense obliges the State to allow the individual access to knowledge of the proceedings brought against them and implies that the adversarial principle must be respected, which guarantees the person's participation in analyzing the evidence.<sup>147</sup> In addition, the appropriate means of presenting the defense include all the materials and evidence used, as well as the exculpatory documents.<sup>148</sup> In relation to the processes for evaluation of public officials, the Court finds that this guarantee implies that the person evaluated has the right to know the reasons the competent authorities consider that there is incompetence or non-compliance, to offer arguments aimed at refuting the authorities' position before a final decision and, in general, to offer evidence of the adequacy of their performance.<sup>149</sup>

155. In this section, it is necessary to examine whether the State has violated the rights to know in advance and in detail the accusation made and to have adequate time and means to prepare a defense enshrined in Article 8(2), paragraphs (b) and (c) of the American Convention, as alleged by the Commission and the representatives.

156. On this issue, as already indicated, as the procedure applied to the alleged victims was regulated, the commission in charge assessed all the documentation and information received, ordered, processed, and analyzed it. After which, the Permanent Commission of Comprehensive Evaluation and Ratification of the CNM prepared the report that was presented to the plenary session of the CNM, so that it could decide on whether to ratify the evaluated officer or not. The Court has verified, according to the reports, that the alleged victims underwent a qualitative assessment, according to the evaluation criteria for judges (suitability and conduct) and for prosecutors (jurisdictional output, professional training, and professional behavior) and graded marks (*supra* para. 146).

157. In this sense, for the Court, the right to know in advance and in detail the accusation made, in the case of evaluation and ratification processes of judges and prosecutors, implied that the evaluated persons had knowledge of, whether prior to the issuance of the ratification decision or not, the report issued by the CNM Permanent Commission for the Evaluation and Ratification of Judges and Prosecutors that would serve as a basis for the competent authority to determine their tenure in office. This allowed the judges evaluated to have knowledge of the breach of their obligations identified by the authority, which is also essential for the exercise of the right to defense.<sup>150</sup>

158. In this case, the alleged victims did not have the opportunity to hear the report issued by the Permanent Commission for the Evaluation and Ratification of Judges and Prosecutors of the CNM and, therefore, they were not able to disprove said report or present defense evidence. For this reason, this Court considers that the State is responsible for the violation of the rights to know in advance and in detail the accusation made and to have adequate time and means to prepare a defense, contained in Articles 8(2)b) and 8(2)c) of the American Convention, in relation to Article 1(1) of the same Convention, to the detriment of Messrs. Cuya, Valenzuela, Díaz, and Ms. Rodríguez.

#### **B.4. Political rights**

159. Article 23(1)(c) of the Convention establishes the right to access public office under general conditions of equality. In this regard, this Court has interpreted that access under conditions of

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<sup>147</sup> Cf. *Mutatis Mutandi, Case of Palamara Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135, para. 178, and *Case of Moya Solís v. Peru*, *supra*, para. 72.

<sup>148</sup> *Mutatis Mutandi, Case of Álvarez Ramos v. Venezuela*, *supra*, para. 154, and *Case of Moya Solís v. Peru*, *supra*, para. 72.

<sup>149</sup> Cf. *Case of Moya Solís v. Peru*, *supra*, para. 72.

<sup>150</sup> Cf. *Mutatis Mutandi Case of Moya Solís v. Peru*, *supra*, para. 71.



equality is an insufficient guarantee if it is not accompanied by the effective protection of tenure in the office achieved,<sup>151</sup> which indicates that the procedures for appointment, promotion, suspension and dismissal of public officials must be objective and reasonable, that is, they must respect the applicable guarantees of due process.<sup>152</sup>

160. This Court has repeatedly ruled on this right in relation to processes of dismissal of judges<sup>153</sup> and prosecutors<sup>154</sup> and has considered that it is related to the guarantee of stability or tenure in office.<sup>155</sup> Thus, the respect and guarantee of this right is fulfilled when the criteria and procedures for appointment, promotion, suspension and dismissal of judges and prosecutors are reasonable and objective, and exercise of said procedures does not discriminate against individuals.<sup>156</sup>

161. Having established the foregoing, the Court finds that, as evidenced in this case, the removal of Messrs. Cuya Lavy, Valenzuela Cerna, Díaz Alvarado, and Ms. Rodríguez Ricse ignored the guarantees of due process, which arbitrarily affected their tenure in their positions as judges and prosecutors, respectively. Consequently, this Court considers that the State unduly affected their right to remain in office under conditions of equality, in violation of the right enshrined in Article 23(1)(c) of the American Convention, in relation to Article 1(1) of the same Convention, to the detriment of Messrs. Cuya Lavy, Valenzuela Cerna, Díaz Alvarado and Ms. Rodríguez Ricse.

### C. Conclusion

162. In view of the foregoing, the Court concludes that the State failed in its duty to substantiate the non-ratification decisions enshrined in Article 8(1) of the American Convention, in relation to the obligations established in Articles 1(1) and 2 of the same instrument, to the detriment of Jorge Luis Cuya Lavy, Jean Aubert Díaz Alvarado, Marta Silvana Rodríguez Ricse and Walter Antonio Valenzuela Cerna. Similarly, the Court considers that, by failing to protect the privacy of Jean Aubert Díaz Alvarado, Marta Silvana Rodríguez Ricse, Walter Antonio Valenzuela Cerna and Jorge Luis Cuya Lavy, the State is responsible for the violation of Article 11(1) of the Convention, in relation to article 1(1) of the same instrument.

163. Furthermore, the Court concludes that the State is responsible for the violation of the rights to know in advance and in detail the accusation made and to have adequate time and means to prepare a defense, contained in Articles 8(2)(b) and 8(2)(c) of the American Convention, in relation to Article 1(1) of the same Convention, to the detriment of Messrs. Cuya, Díaz, Valenzuela, and Ms. Rodríguez.

164. Finally, this Court concludes that the State unduly affected the right to remain in office under conditions of equality, in violation of the right enshrined in Article 23(1)(c) of the American Convention, in relation to Article 1(1) of the same Convention, to the detriment of Messrs. Cuya Lavy, Valenzuela Cerna, Díaz Alvarado and Ms. Rodríguez Ricse.

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<sup>151</sup> Cf. *Case of Reverón Trujillo v. Venezuela*, *supra*, para. 138, and *Case of Moya Solís v. Peru*, *supra*, para. 108.

<sup>152</sup> Cf. *Case of Moya Solís v. Peru*, *supra*, para. 108.

<sup>153</sup> Cf. *Case of Reverón Trujillo v. Venezuela*, *supra*, para. 138; *Case of Colindres Schonenberg v. El Salvador. Merits, Reparations and Costs*. Judgment of February 4, 2019. Series C No. 373, para. 93, and *Case of Moya Solís v. Peru*, *supra*, para. 109.

<sup>154</sup> Cf. *Case of Martínez Esquivia v. Colombia*, *supra*, para. 115; *Case of Casa Nina v. Peru*, *supra*, para. 97, and *Case of Moya Solís v. Peru*, *supra*, para. 109.

<sup>155</sup> It should be remembered that in the case of *Martínez Esquivia v. Colombia*, this Court concluded that the guarantee of stability and tenure of judges, aimed at safeguarding their independence, is applicable to prosecutors due to the nature of the functions they perform. Cf. *Case of Martínez Esquivia v. Colombia*, *supra*, para. 95 and 96. See also, *Case of Casa Nina v. Perú*, *supra*, para. 69 and *Case of Moya Solís v. Peru*, *supra*, para. 109.

<sup>156</sup> Cf. *Case of Reverón Trujillo v. Venezuela*, *supra*, para. 138, and *Case of Moya Solís v. Peru*, *supra*, para. 109.

165. Lastly, this Court concludes that the State did not violate the principle of legality enshrined in Article 9 of the American Convention, to the detriment of Messrs. Cuya Lavy, Valenzuela Cerna, Díaz Alvarado, and Ms. Rodríguez Ricse.

## VIII-2

### **RIGHT TO JUDICIAL PROTECTION, IN RELATION TO THE OBLIGATIONS TO RESPECT AND GUARANTEE RIGHTS and THE DUTY TO ADOPT DOMESTIC LAW PROVISIONS OF THE AMERICAN CONVENTION<sup>157</sup>**

#### **A. Arguments of the Commission and the parties**

166. The Commission pointed out that, in the current regulatory framework in the petitioners' evaluation and ratification procedure, it was established that the CNM's decisions were not reviewable in court, and that they could not be contested. Despite this, the Commission pointed out that the alleged victims Cuya Lavy,<sup>158</sup> Díaz Alvarado and Rodríguez Ricse<sup>159</sup> filed a writ of amparo against the CNM's decisions regarding their non-ratifications, which did not have the desired result. The Commission found that the alleged victims did not have a remedy for comprehensive review of the decision, nor did they have an effective judicial remedy provided for in the American Convention to protect the rights they considered violated. The Commission concluded that the State violated the right to appeal the judgment and the right to judicial protection established in Articles 8(2)(h) and 25(1) of the Convention, in relation to Articles 1(1) and 2 of the same instrument to the detriment of the alleged victims.

167. Regarding **Jorge Luis Cuya Lavy, the representatives** argued that the non-ratification resolutions issued by the CNM were not reviewable or actionable in the judicial sphere. They pointed out that Peruvian legislation did not foresee any ordinary, effective, and accessible remedy that would guarantee the appellant a comprehensive review of the decision. They concluded that the State violated the right to appeal the ruling and the right to judicial protection established in Articles 8(2)(h) and 25(1) of the Convention, in relation to Articles 1(1) and 2 of the same treaty, to the detriment of Mr. Cuya.

168. Regarding **Walter Antonio Valenzuela Cerna, the representatives** argued that there was a violation of due process when the various remedies filed and the constitutional actions for amparo were resolved *ipso facto*. They added that this way of processing and resolving appeals is ineffective and therefore incompatible with the right to judicial protection. They affirmed that the appeals filed by Mr. Valenzuela Cerna were denied by the 1993 Peruvian Constitution, the Organic Law of the Judiciary Council, and the various regulations of the evaluation and ratification process. They concluded that the State violated Articles 8(2)(h) and 25(1) of the Convention, in relation to Articles 1(1) and 2 of the said instrument to the detriment of Mr. Valenzuela.

169. The State referred to: (a) Inclusion of due process guarantees in the ratification procedure and substantiation for non-ratification decisions: through interpretations made by the Constitutional Court and the development of the regulations, they were providing guarantees with due process in the administrative proceedings and thus, from 2005 onwards, the former CNM had the obligation to substantiate its decisions, a criterion that was shared by the Constitutional Court in its change of jurisprudential criteria that imposed said obligation on the former CNM, (b) unquestionable nature of the decisions of the former CNM: national case law, and successive

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<sup>157</sup> Articles 1(1), 2 and 25(1) of the American Convention.

<sup>158</sup> In the case of Jorge Luis Cuya Lavy, the appeal for amparo was denied on the grounds that the CNM decisions regarding the evaluation and ratification of judges are not reviewable. Finally, the extraordinary appeal was declared inadmissible, considering that only exceptionally can the function of ratification be reviewed, in cases of irregular exercise.

<sup>159</sup> According to the Commission, in the case of Mr. Díaz Alvarado and Ms. Rodríguez Ricse, both were not ratified in 2001 and each filed a writ of amparo in 2006, when said possibility was enabled due to a change in case law in December 2004. The Constitutional Court dismissed the appeals, considering that the actions were prescribed because the 60-day period provided for in Article 44 of the Constitutional Code of Procedure had expired in excess.

regulatory modifications established that the resolutions referring to the ratification of magistrates could be subject to jurisdictional review through an amparo process, (c) effectiveness of the process of amparo against the decisions of the former CNM: the process of amparo against decisions of the CNM, proceeds when these affect the constitutional rights of the judges and prosecutors evaluated.<sup>160</sup> The State concluded that it is possible to use the amparo processes as an effective mechanism to achieve reinstatement, in the event that the evaluation and ratification processes violate due process. And these mechanisms were accessible in the case of the alleged victims, and (d) origin of administrative remedies against decisions of the former CNM: the State concluded that there is a remedy allowing for the original decisions to be reviewable by judges and prosecutors, through of an administrative appeal, and this constitutes a way of guaranteeing the right to challenge, which is not exactly the same as the right of second appeal, although they are related.

## B. Considerations of the Court

170. This Court has indicated that Article 25(1) of the Convention establishes the obligation of the States Parties to guarantee, to all persons under their jurisdiction, a simple, quick and effective judicial remedy against acts that violate their fundamental rights.<sup>161</sup> Taking this into account, the Court has indicated that, under the terms of Article 25 of the Convention, it is possible to identify two specific obligations of the State. The first, to establish normatively and ensure the due application of effective remedies before the competent authorities that protect all persons under their jurisdiction against acts that violate their fundamental rights or that entail the determination of their rights and obligations. The second is to guarantee the means to execute the respective decisions and final judgments issued by said competent authorities, in such a way that the declared or recognized rights are effectively protected.<sup>162</sup> The right established in Article 25 is closely linked with the general obligation of Article 1(1) of the Convention, by attributing protection functions to the domestic law of the States Parties.<sup>163</sup> In view of the foregoing, the State has the responsibility not only to design and establish an effective remedy, but also to ensure the proper application of said remedy by its judicial authorities<sup>164</sup>.

171. With specific regard to the effectiveness of the remedy, this Court has established that the meaning of the protection of the article is the real possibility of accessing a judicial remedy, for a competent authority capable of issuing a binding decision to determine whether or not there has been a violation of any right that the person claiming considers to have and that, if a violation is found, the remedy will be useful to restore the interested party to the enjoyment of their right

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<sup>160</sup> The State indicated that it should "bear in mind that the Constitutional Court of Peru has interpreted that it is possible to file –and consider as well-founded– a writ of amparo against the National Council of the Judiciary for a process of ratifying magistrates. This can happen for various reasons, such as, for example, if said ratification was carried out without respecting the term established by the Constitution"; as well as when it has not been substantiated, when due process was not respected, when the magistrate was not granted a prior hearing. Next, the State referred to two rulings in which the amparo process constituted an effective remedy for the protection of fundamental rights and guarantees of due process, within the framework of an evaluation and ratification procedure. Resolution No. 1141-2005-CNM, of November 22, 2005, through which, by virtue of the Judgment issued in the processing of File No. 40073-2003 (Amparo), it was decided to reinstate Mr. Justino Jesús Gallegos Zanabria to the position of Combined Judge of El Collao, Ilave, of the Judicial District of Puno. It also mentioned Resolution No. 1148-2005-CNM, of November 30, 2005, in which, by virtue of the Judgment issued in the proceedings of File No. 55908-2003 (Title Judge of the First Combined Court of the Supreme Court of Justice of Puno, of November 18, 2005, it decided to reinstate Mr. Daniel Antonio Cerna Bazán to the position of Supreme Criminal Prosecutor of La Libertad.

<sup>161</sup> Cf. *Case of Mejía Idrovo v. Ecuador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 5, 2011, Series C No. 228, para. 95, and *Case of Ríos Avalos et al. v. Paraguay, supra*, para. 145.

<sup>162</sup> Cf. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits, supra*, para. 237, and *Case of Ríos Avalos et al. v. Paraguay, supra*, para. 148.

<sup>163</sup> Cf. *Case of Castillo Páez v. Peru. Merits*. Judgment of November 3, 1997. Series C No. 34, para. 83, and *Case of Casa Nina v. Peru, supra*, para. 116.

<sup>164</sup> Cf. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits, supra*, para. 237, and *Case of Casa Nina v. Peru, supra*, para. 116.

and repair it.<sup>165</sup> In this sense, this Court does not evaluate the effectiveness of the remedies filed based on a possible resolution favorable to the victim's interests.<sup>166</sup>

172. At the time of the events, the National Council of the Judiciary's decisions in matters of evaluations and ratifications of judges and prosecutors issued by the CNM in accordance with article 142 of the 1993 Constitution were not reviewable in court and article 154(3) of the aforementioned also established that said decisions could not be challenged.<sup>167</sup> In addition, Article 30 of the Law of the Council of the Judiciary, Law No. 26397, established that the decision adopted was not subject to any appeal.<sup>168</sup> Similarly, Article 2 of the Organic Law of the CNM, prohibited any kind of review or challenge of its decisions, as well as in the regulations for the Evaluation of Judges of the Judiciary and Prosecutors of the Public Prosecution Service (Resolutions No. 043-2000 CNM and No. 241-2002-CNM), which, in Article 17, established that all of its decisions were not able to be challenged or reversed (*supra* para. 68, 70 and 77).

173. The State acknowledged in its reply that "it should be remembered that the CNM's decisions regarding the ratification of judges and prosecutors were conceived as unable to be challenged, precisely to provide the former CNM with the necessary independence to, based on the reports collected, take the decision to ratify judges and prosecutors or not, based on objective criteria of conduct and suitability and without external interference." It added that although Article 142 of the 1993 Political Constitution was initially interpreted as indicating that neither the decisions of the National Board of Elections in electoral matters nor those of the CNM in matters of evaluation and ratification of Judges could be reviewed in court, the interpretation of said constitutional provision has been changing and for several years it has been possible to review the ratification processes to avoid arbitrary behavior by the members of the CNM. The State pointed out that the Constitutional Court, through Resolution of November 7, 2002 No. 2409-2002-AA/TC, established a series of criteria regarding effective judicial remedy, and determined that the pronouncements of the CNM can be reviewed in court.

174. Considering the foregoing, the regulatory framework in force in Peru at the time the CNM's non-ratification decisions were issued against the alleged victims prevented judicial review of evaluations and ratifications by judges and prosecutors, since these decisions could not be challenged administratively and could not be appealed in court, and subsequently, according to the State's argument, it was possible to challenge them through the writ of amparo, under certain conditions.

175. In this case, Messrs. Cuya Lavy and Díaz Alvarado and Ms. Rodríguez Ricse filed writs of amparo against the CNM decisions that determined their non-ratification.<sup>169</sup> The Court will now refer to the writs of amparo filed by the three alleged victims. It should be remembered that, when evaluating the effectiveness of the remedies, the Court must observe whether the decisions

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<sup>165</sup> Cf. *Judicial Guarantees in States of Emergency* (arts. 27.2, 25 and 8 American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A, No. 9, para. 24, and *Case of Ríos Avalos et al. v. Paraguay*, *supra*, para. 149.

<sup>166</sup> Cf. *Cas Cf. Case of Velásquez Rodríguez v. Honduras. Merits*, *supra*, para. 67, and *Case of Cordero Bernal v. Peru*, *supra*, para. 100.

<sup>167</sup> Article 154. -The functions of the National Council of the Judiciary [...], in paragraph 3 it was established, "[a]pply the sanction of dismissal to the judges of the Supreme Court and supreme prosecutors; and, ex officio or at the request of the Supreme Court or the Board of Supreme Prosecutors, respectively, to the judges and prosecutors of all instances. In the case of supreme judges and supreme prosecutors, the application of reprimand or suspension of up to one hundred and twenty (120) calendar days will also be possible, applying criteria of reasonableness and proportionality. The final resolution must be substantiated and with a prior hearing of the interested party. It cannot be contested." Political Constitution of Peru, enacted on December 29, 1993, article 154.3, *supra*.

<sup>168</sup> In addition, Article 17 of the Regulations for Resolution No. 043-2000 and the Regulations for Resolution No. 241-2002 established that [against the result of the ratification vote, no reconsideration by the Counsellors. There is no appeal against it or its execution. Judicial review of the process or its results is not appropriate, as established by the Political Constitution.

<sup>169</sup> Mr. Valenzuela filed a writ of amparo against the CNM resolution of non-ratification so that the agreement of the CNM plenary session by which the process was convened would be declared inapplicable (*supra* para. 89).

taken have effectively contributed to putting an end to a situation that violates rights, to ensure the non-repetition of harmful acts, and to guarantee the free and full exercise of the rights protected by the Convention.<sup>170</sup> The foregoing, as already indicated, does not imply that the effectiveness of a remedy is evaluated based on whether it produces a favorable result for the victim (*supra* para. 171).

176. On December 4, 2002, Mr. Cuya filed a writ of amparo before the Specialized Civil Court of Lima, in which he raised the ineffectiveness and inapplicability of the effects of the agreement of the Plenary Council of the Judiciary and the decision of non-ratification and requested the reinstatement to the previous state of the effects of the aforementioned resolution and his restitution to the position of Specialized Civil Judge of the Northern Cone of Lima. On December 5, 2002, the court declared the lawsuit inadmissible, based on decisions of non-ratification of judges and prosecutors issued by the CNM being unable to be challenged or appealed, in accordance with article 142 of the 1993 Constitution. On December 16, 2002, the alleged victim filed an appeal against said decision before the Specialized Civil Judge of Lima, this was granted and the file was forwarded to the Third Civil Chamber of the Supreme Court of Justice, Lima and on June 21, March 2003 it annulled the decision that declared the claim inadmissible, but did not decide on the merits of the matter that should be considered. He filed an appeal for constitutional grievance before the Constitutional Court and on July 15, 2003, it declared the amparo action unfounded, arguing that the non-ratification was an act of non-confidence by the magistrate and did not require substantiation (*supra* paras. 86 and 87)

177. Similarly, the prosecutors, Mr. Jean Aubert Díaz Alvarado and Ms. Marta Silvana Rodríguez Ricse, were not ratified in their positions by Resolution No. 095-2001 of the CNM of July 13, 2001. However, due to normative changes of the CNM Regulation and legislative changes with the entry into force of the Constitutional Procedural Code on December 1, 2004 and the case law changes produced in 2005 in which the filing of the writ of amparo against the decisions of the CNM was allowed (*supra* para 79), the aforementioned alleged victims filed writs of amparo.

178. On November 12, 2006, Mr. Jean Aubert Díaz Alvarado filed a writ of amparo before the Puente Piedra, Santa Rosa and Ancón Combined Court, which on December 12, 2006 was declared inadmissible on the grounds that "a constitutional action is inadmissible, having notice of writs that question definitive decisions of the National Council of the Judiciary in matters of dismissal and ratification of judges and prosecutors, which have been substantiated and with a prior hearing of the party concerned." Said resolution added that Mr. Díaz "admits to having been interviewed in the process prior to his non-ratification, without question, having voluntarily submitted to said administrative process that cannot be questioned through the amparo process; consequently, he was granted the right of defense and due process as protected by the Political Constitution." Said decision was appealed by the alleged victim, and on August 3, 2007, the Second Civil Chamber of the Supreme Court of Northern Lima declared the appeal inadmissible, indicating that he presented his claim after the period of 60 working days from the date of the impairment, and before a body not competent by reason of the territory. Lastly, Mr. Díaz filed an appeal for constitutional grievance before the Constitutional Court against the previous decision, which was declared invalid on December 19, 2007 because it had been filed after the deadline without being an ongoing impairment (*supra* paras. 97 and 98).

179. On December 11, 2006, Ms. Rodríguez Ricse filed a writ of amparo against the decision of non-ratification. On December 18, 2006, the Combined Court of Puente Piedra, Santa Rosa and Ancón declared the writ of amparo inadmissible. Ms. Rodríguez filed an appeal in which she requested repeal of the contested decision, on June 22, 2007, the First Civil Specialized Chamber of the Supreme Court of Northern Lima declared the appeal inadmissible, arguing the late submission of the writ of amparo. Finally, Ms. Rodríguez filed a constitutional grievance before the

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<sup>170</sup> Cf. *Case of Ramírez Escobar et al. v. Guatemala. Merits, Reparations and Costs*. Judgment of March 9, 2018. Series C No. 351, para. 252, and *Case of Cordero Bernal v. Peru, supra*, para. 101.

Constitutional Court against the previous decision. On December 20, 2007, the Constitutional Court declared the appeal for constitutional grievance inadmissible, indicating that the action was submitted late and that the ongoing nature of the impairment was not proven (*supra* paras. 102 to 104).

180. Consequently, it first follows that the writ of amparo presented by Mr. Cuya did not turn out to be a suitable and effective mechanism to protect the guarantee of stability in office, as it did not obtain a ruling on the merits directed to annul the decision that ordered his non-ratification in office. This situation was reaffirmed by the decision of the Constitutional Court that did not allow the review of the situation, declaring the writ of amparo unfounded.

181. Secondly, the amparo remedies filed by Mr. Díaz Alvarado and Ms. Rodríguez Ricse were also ineffective at protecting the guarantee of stability in office, since no decision on the merits was obtained. The appeals were declared inadmissible on the grounds that the CNM's decisions cannot be reviewed in court. Subsequently, the Constitutional Court declared the appeals filed as late submissions without taking into account the new case law and normative criteria produced in 2005, which the State itself argued.

182. In addition, the Court considers that the regulations applicable in this case at the time of the issuance of the CNM's non-ratification decisions against the alleged victims prevented judicial review in matters of evaluations and ratifications by the judges and the prosecutors, the decisions were unable to be challenged administratively and unable to be appealed in court, which was incompatible with the American Convention, since the regulation did not allow the alleged victims to access justice through a remedy that would allow them to protect their rights. Based on the foregoing, the Court considers that the normative framework in force in Peru applied in this case violates Article 2 of the American Convention in relation to Article 25(1) of the same instrument, although as the State argued, the possibility of challenge to CNM decisions through the writ of amparo under certain conditions now exists.

183. Consequently, the Court concludes that the State is responsible for the violation of the judicial protection established in Article 25(1) of the American Convention, in relation to the obligations established in Articles 1(1) and 2 of the same instrument, to the detriment of Jorge Luis Cuya Lavy, Jean Aubert Díaz Alvarado, Marta Silvana Rodríguez Ricse. Finally, the Court considers it unnecessary to analyze the allegations concerning Article 8(2)(h) of the Convention, since, given the events in this case, the respective analysis was carried out regarding the alleged violation of the right to judicial protection.

### **C. Conclusion**

184. The Court concludes that the State is responsible for the violation of the judicial protection established in Article 25(1) of the American Convention, in relation to the obligations established in Articles 1(1) and 2 of the same instrument, to the detriment of Jorge Luis Cuya Lavy, Jean Aubert Díaz Alvarado and Marta Silvana Rodríguez Ricse.

## **IX REPARATIONS APPLICATION OF ARTICLE 63(1) OF THE AMERICAN CONVENTION**

185. Based on the provisions of Article 63(1) of the American Convention, the Court has indicated that any violation of an international obligation that has produced harm entails the duty

to appropriately repair it, and that this provision contains a customary norm that constitutes one of the fundamental principles of contemporary International Law on State responsibility.<sup>171</sup>

186. Reparation of the harm caused by the violation of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists in the restoration of the previous condition. If this is not feasible, as happens in most cases of human rights violations, this Court will determine measures to guarantee the violated rights and repair the consequences resulting from those the violations.<sup>172</sup> Therefore, the Court has considered the need to grant various measures of reparation, in order to compensate the damages in a comprehensive manner, so that in addition to pecuniary compensation, the measures of restitution, rehabilitation, satisfaction and guarantees of non-repetition have special relevance for the harm caused.<sup>173</sup>

187. This Court has established that the reparations must have a causal link with the facts of the case, the violations declared, the harm attributed, as well as the measures requested to repair the respective damages. Therefore, the Court must observe said concurrence in order to issue due judgment, in accordance with the law.<sup>174</sup>

188. In consideration of the violations declared in the previous chapter, this Court will proceed to analyze the claims of the Commission and the representatives, as well as the arguments of the State, in light of the criteria established in the Court's case law in relation to the nature and scope of the obligation to repair, in order to provide the measures aimed at repairing the harm caused to the victims.<sup>175</sup>

#### **A. Injured party**

189. This Court reiterates that the injured party, under the terms of Article 63(1) of the Convention, is considered to be a victim of the violation of any right recognized therein. Therefore, this Court considers as "injured party" Jorge Luis Cuya Lavy, Jean Aubert Díaz Alvarado, Marta Silvana Rodríguez Ricse, and Walter Antonio Valenzuela Cerna, who, in their capacity as victims of the violations declared in chapter VIII of this Judgment, will be considered beneficiaries of the reparations ordered by the Court.

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

##### **B.1 Measures of restitution**

190. The **Commission** requested that the victims be reinstated to a position similar to that held, with the same remuneration, social benefits and rank comparable to that which would correspond to them today if they had not been removed. In the event that this is not the will of the alleged victims or that there are objective reasons that prevent their reinstatement, the State must pay compensation, which is independent of the reparations relating to pecuniary and non-pecuniary damage.

191. The **representatives** requested that the State order:

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<sup>171</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and Costs*. Judgment of July 21, 1989. Series C No. 7, para. 26, and *Case of Garzón Guzmán v. Ecuador, supra*, para. 95.

<sup>172</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and Costs, supra*, and *Case of Garzón Guzmán v. Ecuador, supra*, para. 96.

<sup>173</sup> Cf. *Case of 'Las Dos Erres' Massacre v. Guatemala. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 24, 2009. Series C No. 211, para. 226, and *Case of Bedoya Lima v. Colombia, supra*, para. 164.

<sup>174</sup> Cf. *Case of Ticona Estrada et al. v. Bolivia. Merits, Reparations and Costs*. Judgment of November 27, 2008. Series C No. 191, para. 110, and *Case of Bedoya Lima v. Colombia, supra*, para. 165.

<sup>175</sup> Cf. *Case of Andrade Salmón v. Bolivia. Merits, Reparations and Costs*. Judgment of December 1, 2016. Series C No. 330, para. 189, and *Case of Bedoya Lima v. Colombia, supra*, para. 166.

- a) **Regarding Mr. Cuya:** (a) Annulment of Resolution No. 500-2002-CNM of November 20, 2002, which implies: (i) "rehabilitate" Mr. Cuya to hold the position of Specialized Civil Judge, after the re-establishment of the validity of the titles of appointment, and (ii) rejoin in the position of Specialized Judge of the Supreme Court of the Judicial District of Lima, Supreme Court that would correspond to him if he had not been arbitrarily dismissed. That is, to promote the reinstatement to the position of origin and promotion to the immediate higher level in the judicial profession as compensation for the loss of 17 years of opportunity for promotion in the judicial profession, and (b) Remove the name of the victim from public records and databases in which it appears as disqualified to perform public functions.
- b) **Regarding Mr. Valenzuela,** his active reinstatement to the position he held and, if this is not possible, grant a pension in his favor with the benefits that it entails, such as retirement, medical insurance, medications and psychological care.
- c) **Regarding Mr. Jean Aubert Díaz Alvarado and Ms. Marta Silvana Rodríguez,** their reinstatement as Deputy Provincial Prosecutor of the Junín Judicial District.

192. The **State** referred to its observations<sup>176</sup> regarding recommendations 1 and 2 (*supra* para. 190 and *infra* para. 208 and 220) of the Commission in the Merits Report. Regarding the restitution measures, it argued that eventually it would be up to the National Board of Justice to assume the reinstatement of the titles of appointment that were canceled at the time, as well as to initiate new evaluation and ratification processes.

193. Additionally, regarding Mr. Cuya Lavy's request that his name be removed from the registry or database recording him as disqualified, he reported that, due to the case law development of the Constitutional Court, it was established that the non-ratification decision is not a sanction and therefore should not lead to the impediment of re-entry to the profession as judge or prosecutor. However, it clarified that the Constitutional Court indicated that "such magistrates are not prevented from applying again to the Judiciary or to the Public Prosecution Service." Furthermore, the State considered that "there is no prohibition on reentry to the profession and that, therefore, there is no purpose to rule on this reparation requested by the alleged victim." In addition, it detailed the following:

- a) **Regarding Mr. Cuya Lavy,** it explained that, if the alleged victim wanted to reach an understanding about his reinstatement, the State would evaluate and consider the option. However, it stated that it would not be possible to promote him to his post "by way of compensation", because according to the design of the judicial career in Peru there is no automatic promotion, but rather that he must meet the requirements and pass the public tender.
- b) **Regarding Mr. Valenzuela,** it specified that he has had a retirement pension since 2002, corresponding to the "social security regime of Decree-Law No. 20530".
- c) **Regarding Mr. Díaz Alvarado and Ms. Rodríguez Ricse:** they did not expressly request annulment of the decision of non-ratification, but it can be inferred as implicit that they requested their reinstatement.

194. With regard to Messrs. Cuya Lavy, Valenzuela Cerna, M. Díaz Alvarado and Ms. Rodríguez Ricse, in consideration of the allegations by their representatives and in view of the State's position, the Court considers that the immediate reinstatement of said victims, at least to the position they held at the time of being removed from the Judiciary and the Public Prosecution Service, respectively, is, in principle, the measure that would be appropriate and that best satisfies

<sup>176</sup> The observations of the State are: "[i]n relation to the first recommendation, the Peruvian State indicates that prior to the reinstatement of the presumed victims in a position similar to the one they held, the former CNM was in charge of reinstating the titles of the alleged victims. Similarly, with respect to the second recommendation, it should be considered that, with the former CNM having been in charge of the Evaluation and Ratification Processes of the alleged victims, it would be one of the main entities linked to the aforementioned second recommendation. However, this institution was suspended and replaced by the JNJ."



the full restitution of the reparation of the harm caused. However, due to the passage of time, more than 19 years and 20 years, respectively, since Messrs. Cuya and Valenzuela and Mr. Díaz and Ms. Rodríguez were not ratified in their positions, in the present case the Court will not order their reinstatement as a measure of restitution.

195. Consequently, the Court considers it pertinent to order compensation, which will be independent of the compensation it sets related to pecuniary and non-pecuniary damages. The State must pay, within a period of one year, an indemnity for this concept, which is fixed in equity, to the amount of USD 80,000.00 (eighty thousand United States dollars), which the State must deliver to each of the following victims: Messrs. Cuya Lavy and Díaz Alvarado, and the sum of USD 60,000.00 (sixty thousand United States dollars), which the State must deliver to each of the following victims: Mr. Valenzuela Cerna and Ms. Rodríguez Ricse, because both have been enjoying a retirement pension since their removal from their positions, since September 2002 and since July 2001, respectively.

### ***B.2 Measures of satisfaction***

196. The **representatives** of Messrs. Cuya Lavy and Valenzuela Cerna requested the State be ordered to publish the judgment, and the representatives of Mr. Valenzuela also requested its publication on an official website.

197. The **State** indicated that, if a violation is declared, it does not object to the request for publication of the Judgment in the Official Gazette and in another newspaper with wide national circulation.

198. The **Commission** did not rule on the representatives' request

199. The **Court** deems it pertinent to order, as it has done in other cases,<sup>177</sup> that the State, within six months from the notification of this Judgment, in a legible and adequate font size, make the following publications : a) the official summary of the Judgment prepared by the Court, once only, in the Official Gazette and in a newspaper with wide national circulation, and b) this Judgment in its entirety, available for at least a period of one year, on a State website in the Prosecution Service of Justice and Human Rights, in a manner accessible to the public. The State must immediately inform this Court once it proceeds to make each one of the publications ordered, regardless of the period of one year to present its first report provided in the operative part of this Judgment.

### **C. Non-repetition measures**

200. The **Commission** requested that the State adopt the necessary non-repetition measures to prevent similar events from occurring in the future and ensure the application of the rules of due process within the framework of the evaluation and ratification processes of judges and prosecutors, ordering the legislative and other measures necessary to ensure that the aforementioned processes comply with the standards described in the Merits Report. In particular, it considered that the State should make the necessary legislative and practical modifications to: (i) Ensure that the evaluation and ratification processes of judges and prosecutors are subject to legal review and do not constitute a vote of confidence; (ii) Duly regulate the offenses committed that give rise to the non-ratification of a judge or prosecutor, based on objective criteria and in a proportional manner; (iii) Allow judges and prosecutors to defend themselves against specific charges against them in light of said objective criteria, such as recourse to appeal to a higher authority within the framework of the process against them, so that they can rely on a review

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<sup>177</sup> Cf. *Case of Cantoral Benavides v. Peru. Reparations and Costs*. Judgment of December 3, 2001. Series C No. 88, para. 79, and *Case of Garzón Guzmán v. Ecuador, supra*, para. 121.

hearing of the imposed sanction by a higher court, independently of the judicial remedy for possible violations of due process, and (iv) Ensure that the judicial remedy for possible violations of due process in this type of procedure is accessible and simple and allows a ruling on the merits.

201. The **representatives** requested:

**a) Mr. Cuya Lavy:** (i) Adopt legislative, normative, administrative and practical measures that guarantee due process within the framework of the evaluation and ratification processes of judges, adapted to the guarantees and rights established in the American Convention and international instruments; (ii) Adopt objective and proportional criteria for evaluation, based on a legal review, previously specifying in the applicable regulations the offenses that give rise to the disapproval or non-ratification of the position of judge and the positions on which the defense relies ; (iii) Have recourse to appeal to a higher authority in the evaluation or sanctioning processes, in order to guarantee a second review by a higher court, without prejudice to the judicial remedy for possible violations of due process, all of the conditions provided for in the internal regulations; (iv) Ensure that judicial remedy regarding ratifications is accessible and simple and allows a substantive pronouncement, simplifying cases of inadmissibility for processing, and (v) Establish that the effects of the non-ratification of a judge or prosecutor have temporary and reasonable effectiveness (maximum 5 years, considering international standards), in such a way as to guarantee access to public office, at the same time suppressing its permanent effects.

**b) Mr. Valenzuela Cerna:** Adopt measures regarding the evaluation of magistrates to guarantee a disciplinary regime for judges in accordance with international standards on the matter, as well as establish objective regulations regarding the evaluation process of members of the judiciary, ensuring that these are related to the performance of the work, leaving aside personal and subjective aspects of each magistrate. In addition, they requested guarantee of the right to stability in office, as well as respect for political rights

202. The **State** argued the following:

**a) Regarding Mr. Cuya Lavy:** (a) It alleged that it has been proven that the ratification procedure is (currently) compatible with inter-American standards and with the guarantees of judicial independence; (b) It indicated that ratification is not an arbitrary procedure, but rather obeys criteria of suitability and good conduct that judges and prosecutors must observe; (c) The current development of the evaluation and ratification procedure considers the existence of a reconsideration remedy and commented that the effectiveness of the writ of amparo was demonstrated to guarantee that the adoption of ratification decisions is in accordance with the guarantees of due process, and (d) It reiterated that, through the case law of the Constitutional Court, it had been determined that the ratification process does not entail a sanction and the prohibition of re-entry to the career of judges or prosecutors was annulled.

**b) Regarding Mr. Valenzuela Cerna:** it clarified that the evaluation measures are not related to the disciplinary procedures of judges and prosecutors, but to the evaluation and ratification procedure, which is provided with guarantees of due process.

203. The **Court** recalls that Article 2 of the Convention obliges the States Parties to adopt, in accordance with their constitutional procedures and the provisions of the Convention, the

legislative or other measures necessary to give effect to the rights and freedoms protected by the Convention.<sup>178</sup>

204. From the information provided by the State, it is indicated that, after the events of this case, Peru has adopted various regulations to regulate the evaluation and ratification procedure that is in force, through the constitutional reform on the establishment and functions of the National Council of the Judiciary, the Organic Law of the JNJ and the Regulation of the Comprehensive Evaluation and Ratification Process of Judges of the Judiciary and Prosecutors of the Public Prosecution Service through Resolution No. 260-2020-JNJ of December 9, 2020 (*supra* para. 80).

205. The Court notes that, according to the allegations of the parties, the victims' own statements, as well as the regulations in force, the prohibition that non-ratified magistrates may re-enter the Judiciary and the Public Prosecution Service still remains, despite the fact that the State has repeatedly indicated that the Constitutional Court in its judgment of January 8, 2006<sup>179</sup> indicated that the right of non-ratified magistrates to re-apply to the Judiciary and the Public Prosecution Service cannot be prevented in any way, since the fact of not having been ratified should not be an impediment to re-enter the judicial profession.

206. In light of the foregoing, the Court considers it necessary for the State to adopt legislative or other measures to adapt its domestic legal system to the provisions of the American Convention, in accordance with the ruling in this judgment in relation to the reinstatement of the non-ratified magistrates to the Judiciary or the Public Prosecution Service and to the possibility of appealing decisions determining the non-ratification of a magistrate. This implies that the State must adopt said measures within a reasonable period of time. Regardless of the reforms that the State must introduce, while the measures are not adopted the State authorities are under the obligation to exercise *ex officio* conventionality control between domestic law and the American Convention, within the framework of their respective competencies and the corresponding procedural regulations. In this task, the domestic authorities must take into account not only the treaty, but also its interpretation by the Inter-American Court, the ultimate interpreter of the Convention.

#### D. Additional Measures

207. Furthermore, the **representatives** of Messrs. Cuya and Valenzuela requested that the State hold a public redress ceremony acknowledging international responsibility and making a public apology. In addition, Mr. Valenzuela's representatives requested that the State: (a) prepare and publish a brochure that summarizes the Court decision; (b) that the State send an official letter to the alleged victim acknowledging the violations committed to his rights and offering a public apology for them, and (c) implement a permanent training program for newly admitted justice officials providing fundamental information on judicial independence, as well as on the free and full exercise of their duties and rights as judicial officials. Regarding the performance of a public act, the **State** argued that it does not oppose the holding of said act, provided that the Court considers that the other measures of reparation ordered are not sufficient and expressly indicates why it should depart from the criteria already developed by the Court. In terms of training, training related to Human Rights and case law related to international standards in the

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<sup>178</sup> Cf. *Case of Gangaram Panday v. Suriname. Preliminary Exceptions*. Judgment of December 4, 1991. Series C No. 12, para. 50, and *Case of Villarroel Merino et al. v. Ecuador. Preliminary objections, Merits, Reparations and Costs*. Judgment of August 24, 2021. Series C No. 430, para. 142.

<sup>179</sup> The State referred to the Constitutional Court judgment of January 8, 2006, in File No. 1333-2006-PA/TC and added to said judgment that "[t]he non-ratification does not imply a sanction, therefore the possibility of applying the prohibition to re-enter the judicial career is incongruous regarding the very nature of the institution, since, [...], this does not constitute a sanction." In addition, in the same sense, the State mentioned the Judgment of January 27, 2003 of the Constitutional Court, in File No. 1941-2002-PA/TC, and the Judgment of August 12, 2005 of the Constitutional Court, in File No. 3361-2004-PA/TC.

matter is provided through the Judicial Academy, the Sub-directorate of Training of the Judiciary and the School of the Public Prosecution Service. It added that magistrates can register or apply for these according to the availability provided by the Judicial Academy and that in many cases they are provided virtually so that they are accessible to magistrates from all over the country. The **Commission** did not present arguments on the measures requested. Regarding the aforementioned measures requested, the **Court** considers that the issuance of this judgment and the measures of satisfaction ordered in this judgment are sufficient, therefore it does not consider it necessary to order the above measures.

## **E. Compensation**

### **E.1 Pecuniary Damage<sup>180</sup>**

208. The **Commission** requested that the State make comprehensive reparations for the violations declared, including both pecuniary damage and non-pecuniary damage.

209. The **representatives** asked that the State pay:

**a) Regarding Mr. Cuya:** Loss of earnings: all the amounts of monthly salaries, educational bonuses, national holidays and Christmas from November 21, 2002 to January 31, 2020 total the sum of USD 718,657.46 (seven hundred eighteen thousand six hundred fifty and seven United States dollars and forty-six cents). To this is added the amount of legal interest, which amounts to the sum of USD 136,873.11 (one hundred thirty-six thousand eight hundred seventy-three United States dollars and eleven cents). Both items make up the sum of USD 855,530.57 (eight hundred fifty-five thousand five hundred thirty United States dollars and fifty-seven cents).

**b) Regarding Mr. Valenzuela:** Loss of earnings: which is equivalent to the salaries not received, from August 28, 2002 to date, taking into account the salary that he would have received as a judge at present, which would be equivalent to approximately USD 4,816 (four one thousand eight hundred and sixteen United States dollars). Therefore, they requested the sum of USD 828,894.00 (eight hundred twenty-eight thousand eighthundred ninety-four United States dollars). In addition, that the Court order the State to pay back wages up to the date that Mr. Valenzuela Cerna is reinstated in his position and that the employer's social security contributions be retroactively canceled, so that he does not lose the years of employment and lose his retirement entitlement.

**c) Regarding Mr. Díaz Alvarado and Ms. Rodríguez Ricse:** Loss of earnings: the sum of USD 427,000.00 (four hundred twenty-seven thousand United States dollars) each, equivalent in national currency to S / 1,368,000.00 (180 months at 7,600.00 soles)] for having been illegally terminated. This sum includes S / 3,200.00 soles of remuneration and S / 4,400.00 soles of bonus for fiscal performance that is received month on month, in a fixed and permanent way and freely available. In addition, for pension purposes and the payment of compensation for time of service, the period from July 13, 2001 to the date of reinstatement is recognized as "effective work".

210. The **State** argued that it had not violated any right established in the American Convention, therefore it considered that it did not correspond for the victims to receive compensation for pecuniary damage. Specifically, it noted the following:

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<sup>180</sup> It is noted that Mr. Cuya's representatives, when alleging consequential damages, made reference to expenses related to the upkeep of the family and the representatives of Mr. Valenzuela put forward medical expenses for psychological treatment, which are not related to the purpose of the case and the violations declared. The representatives of Messrs. Cuya and Valenzuela also requested, as part of the consequential damage, the expenses incurred during the judicial process in the domestic sphere, as well as at the international level. Due to the nature of the expenditures, the Court will consider this item in the costs and expenses section.

**a) Regarding Mr. Cuya:** (i) Consequential damage should not include expenses incurred to support the family that are not part of the case. In addition, it pointed out that no receipts have been provided for the expenses incurred. Furthermore, it alleged that it will refer to matters related to the expenses of lawyers' services in the costs and expenses section, and (ii) Loss of earnings: the employment relationship is based on the contract with reciprocal benefits, so there is no remuneration for work not performed.<sup>181</sup> In addition, it stated that the alleged victim's request is based on an assumption, since it cannot be assured that Mr. Cuya Lavy would have continued working as a magistrate from November 2002 onwards.

**b) Regarding Mr. Valenzuela:**<sup>182</sup> Loss of earnings: in addition to the arguments presented in the case of Mr. Cuya Lavy, it stated the need to consider that there have been variations in the salary scale of the positions and that "his generic statements do not allow us to clearly establish" if that amount corresponded to him.

**c) Regarding Mr. Díaz Alvarado and Ms. Rodríguez Ricse:** Loss of earnings: it opposes the sum required, since the continuity in their work as Assistant Prosecutors was a possibility, not a proven fact, since the evaluation and ratification were carried out periodically and there was no certainty that they would always be ratified. In addition, it considered that no payment was due for work not performed.

211. In its case law the Court has established that pecuniary damage involves the loss or detriment of the victims' income, the expenses incurred as a result of the events and the consequences of a pecuniary nature that have a causal link with the facts of the case.<sup>183</sup>

212. This Court notes that Mr. Cuya Lavy's representatives, in substantiating their claim regarding the compensation for loss of earnings corresponding to the period from November 21, 2002 to January 31, 2020, provided a document called "Expert Report", which contains an expert accounting opinion to determine the loss of earnings with respect to the remuneration not received by Jorge Luis Cuya Lavy as a Specialized Civil Judge of the Supreme Court of Northern Lima, signed on February 9, 2020 by a certified public accountant, which contains identical data to those requested by Mr. Cuya. For the corresponding calculation, it took into account different items, including monthly remuneration, composition of remuneration, the bonus for jurisdictional function and operating expenses according to the current jurisdiction, monthly remuneration received at the time of termination, increases in remuneration, National Holidays and Christmas bonus. In addition, as part of the additional evidence the representatives presented several receipts of his remuneration corresponding to the payment for April 2002 and March 2002, indicating that the monthly credit was made up of the remuneration, and the jurisdictional function bonus, to which should be added operating expenses. At the same time, they submitted data extracted from the expert opinion.

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<sup>181</sup> The State indicates that the ratification process in which Mr. Cuya participated was carried out in accordance with the regulations at the time. And that the argument of disqualification from re-entry into the Judiciary does not conform to the truth of what was argued, since the JNJ reported that Mr. Jorge Luis Cuya Lavy, after his non-ratification, did not present an application within the framework of a selection and appointment process held by the former CNM. The state relies on the Constitutional Court's case law of the time that considers that non-ratified magistrates are not prevented from applying again to the Judiciary or the Public Prosecution, and on the Resolution of July 15, 2003 binding precedent by the Constitutional Court in the Judgment of January 8, 2006, File No. 1333-2006-AA.

<sup>182</sup> The State forwarded the evidence requested from Peru regarding Mr. Valenzuela regarding the proof of Remuneration payments - Period 2002, proof of payments of Jurisdictional Bonus, Period 2002 and proof of payments of Operating Expenses, period 2002, and clarified that the amounts were received when Mr. Valenzuela was working, which do not constitute remunerative amounts. The current basic remuneration of a regular specialized judge is S/2,0005.07, as of March 17, 2021.

<sup>183</sup> Cf. *Case of Bámaca Velásquez v. Guatemala. Reparations and Costs. Judgment of February 22, 2002. Series C No. 91, para. 43, and Case of Garzón Guzmán v. Ecuador, supra, para. 130.*

213. In this regard, the State argued that it is not appropriate to pay Mr. Cuya the payment of salary for the time he did not work, and the victim intends to support his request on an assumption, in that sense, "it cannot be said that Mr. Cuya [...] would have inevitably continued as a magistrate from November 2002 onwards, therefore, the expert makes an error by accounting for said period [...] in order to calculate the amount for lost earnings and obtain the amount requested." It objected to the Court assessing the expert opinion provided, as it was not requested by the Court. In addition, the State made several clarifications about the additional evidence presented by the victim.

214. Regarding Mr. Valenzuela, his representatives requested the payment of lost salary from August 28, 2002 until the date of the presentation of the brief of motions and pleadings, based on the salary that he would have received as a judge at present, receiving about USD 4,816.00 (four thousand eight hundred and sixteen United States dollars), as well as the payment of employer social security contributions. The State opposed the victim's request because it would not be possible, given that the salary scale has had variations since Mr. Valenzuela was not ratified, and reported on the salary income from the position of a regular specialized judge and a provisional superior judge as of the date of non-ratification, composed of the items of remuneration, jurisdictional bonuses and operating expenses.

215. Regarding Mr. Díaz Alvarado and Ms. Rodríguez Ricse, the representative reported that they had the same scale ranking, and in the additional evidence he presented a payment slip for the salary he received in June 2001, at the time of his termination, and the items of which it was composed. In this regard, the State presented several clarifications on the additional evidence presented by the victims.

216. The State indicated that the victims, when referring to the compensatory reparations, referred to the salary made up of the "remuneration", the "Operating Expenses", the "Bonus for Jurisdictional Function" and the "Bonus for Fiscal Function" and clarified that operating expenses are intended to cover expenses in carrying out the role of magistrate (Judge or Prosecutor), it being understood that magistrates who are not carrying out the role, should not receive said concept, which is not remunerative, nor pensionable and on said amount the magistrates must render an account to the respective office. It also clarified regarding the jurisdictional bonus and the fiscal function bonus, which are also not remunerative. Said bonuses will be awarded to magistrates in active service. For this reason, the State only reported on the basic remuneration in force on the position held by the victims when they were not ratified in office. The current remuneration is S / 2,005.07 for a Regular Specialized Judge, while the remuneration of a Provisional Superior Judge is S / 3,005.07. The remuneration in the case of Mr. Cuya and Mr. Valenzuela is the same. As for Mr. Díaz and Ms. Rodríguez, who had the same position at the time of the non-ratification, the basic remuneration in force for a Provincial Deputy Prosecutor is S / 1,405.05

217. Lastly, regarding the information provided by the State and the representatives to this Court, Mr. Cuya continued to work and receive income after leaving office, and the last employer recorded is the Office of the Comptroller General of the Republic. Mr. Díaz also continued working in the free exercise of the profession, in some cases his employers were public entities (District Municipality of El Tambo, Regional Government of Junín, Provincial Municipality of Huamanga). According to the information provided by the State regarding Mr. Cuya, the Social Security Normalization Office (hereinafter "ONP") has not processed any request regarding the granting of pension rights and regarding Mr. Díaz, after consultations made, it reported that he has been affiliated with the Private Pension System (SBS) since January 14, 1997 and the SBS indicated that he does not have a pension application as an affiliate. At the time of removal, he was not awarded a severance pension and he does not have any pension to date. Regarding Mr. Valenzuela, he has received a retirement pension since September 2002 and regarding Ms. Rodríguez, she has received a severance pension since July 13, 2001.

218. The Court, for the purpose of determining the corresponding compensation, will take into account that two of the victims were working as judges, and the other two as prosecutors at the time of the issuance of the non-ratification decision, as well as that two of them received a retirement pension as of the removal from their positions and the various allegations of the representatives, related to their requests and observations of the State in this regard. Furthermore, the Court notes that it was not alleged nor is there evidence as to whether any type of compensation for removal from office was awarded to the victims.

219. In this case, taking into account the time that has elapsed since the victims' removal from office, since it was not possible to order their reinstatement in the position they held, the Court sets, in equity, the following amounts, for concept of pecuniary damage, which must be delivered to each by the State:

- a) USD 300,000.00 (three hundred thousand United States dollars) in favor of Jorge Luis Cuya Lavy;
- b) USD 260,000.00 (two hundred and sixty thousand United States dollars) in favor of Walter Antonio Valenzuela Cerna;
- c) USD 210,000.00 (two hundred and ten thousand United States dollars) in favor of Jean Aubert Díaz Alvarado, and
- d) USD 200,000.00 (two hundred thousand United States dollars) in favor of Marta Silvana Rodríguez Ricse.

### ***E.2 Non-pecuniary damage***

220. The **Commission** requested that the State make comprehensive reparations for the violations declared, including both pecuniary damage and non-pecuniary damage.

221. The **representatives** requested that the State pay:

- a) **Regarding Mr. Cuya:** due to the facts reported and the intensity of the suffering caused, as compensation and for the purpose of comprehensive reparation, they requested the sum of USD 100,000.00 (one hundred thousand United States dollars).<sup>184</sup>
- b) **Regarding Mr. Valenzuela:** the payment of USD 30,000.00 (thirty thousand United States dollars),<sup>185</sup> as compensation and for the purpose of comprehensive reparation.
- c) **Regarding Mr. Díaz Alvarado and Ms. Rodríguez Ricse:** they did not request reparation measures related to non-pecuniary damage.

222. The **State** maintained that it has not violated any right established in the American Convention, for which reason there has been no international state responsibility that requires that a reparation be ordered that includes non-pecuniary damage. The State specifically indicated:

- a) **Regarding Mr. Cuya:** he knew that his position was subject to a ratification process at regular intervals. It considered that it would not be coherent for said result to have generated psychological and even psychiatric damage in the alleged victim, since his non-ratification was one of the possible results.
- b) **Regarding Mr. Valenzuela:** he did not voluntarily participate in the evaluation

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<sup>184</sup> The amount was justified by the fact that the actions of the State produced a total impairment in personal relationships as well as in the integral development of their personal life relating to social, spiritual and professional interaction, in accordance with the development of their living conditions, duly accredited with the documentation.

<sup>185</sup> According to the representatives, the Court has imposed said amount in similar cases and under the same parameters, in paragraph 165 of the Case of Villaseñor Velarde et al. v. Guatemala and in paragraph 325 of the Case of López Lone et al. v. Honduras.

process nor did he attend the interview, therefore it questioned the impact he may have suffered. It considered that the non-ratification did not frustrate his career as a lawyer, since the ban on reentry to the judiciary was lifted in 2006, and consequently, Mr. Valenzuela Cerna had the possibility of applying for a position in the Judiciary.

223. The Court has established in its jurisprudence that non-pecuniary damage can include both the suffering and afflictions caused by the violation as well as the impairment of very significant values for the individuals and any alteration, of a non-pecuniary nature, in the conditions of existence of the victims or their family.<sup>186</sup> Additionally, since it is not possible to assign a precise monetary equivalent to non-pecuniary damage, it can only be compensated, for the purposes of comprehensive reparation to the victims, through the payment of an amount of money or the delivery of goods or appreciable services in money, that the Court determines in reasonable application of the judicial discretion and in terms of equity.<sup>187</sup>

224. In this case, to substantiate the non-pecuniary damage, Mr. Cuya's representatives made reference to the emotional suffering undergone which manifested in anxiety, sadness, anguish, uncertainty and powerlessness in the face of the punitive system, expectation and frustration of not having been ratified in office, as well as the impairment suffered by the process to which he was subjected which prevented him from achieving the realization of his personal vocation. Mr. Valenzuela's representatives made reference to the autonomous effects on psychological wellbeing and private life, being the object of stigmatization and discrimination by public officials, as well as the stress, suffering, frustration and uncertainty caused by the dismissals, and the emotional suffering due to the administrative and judicial proceedings. Regarding those allegations related to the victims' emotional suffering, the Court will only take into account for the determination of non-pecuniary damage those related to the facts of this case and the violations declared in it.

225. Based on the foregoing and taking into account the circumstances of the case, the Court considers that the decision to arbitrarily remove the victims from their office affected their rights to judicial guarantees, privacy, political rights, and judicial protection for which it sets, in equity, the sum of USD 20,000.00 (twenty thousand United States dollars) for non-pecuniary damage, for each of the victims, which must be delivered to Jorge Luis Cuya Lavy, Walter Antonio Valenzuela Cerna, Jean Aubert Díaz Alvarado, and Marta Silvana Rodríguez Ricse

## F. Costs and expenses

226. In their brief of motions, pleadings and evidence, the **representatives** requested the payment of costs and expenses, as indicated below:

**a) Regarding Mr. Cuya:** for the expenses of almost 17 years throughout the internal process and before the inter-American system. They argued that the expenses include the transport to the headquarters of the jurisdictional and administrative authorities, including expenses to travel to the headquarters of the Inter-American Commission in Washington, D.C. They alleged the following expenses: USD 3,306.00 (three thousand three hundred six United States dollars) for the purchase of airline tickets; USD 2,352.00 (two thousand three hundred fifty-two United States dollars) for the expert accounting opinion to determine the loss of profits, and USD 274.06 (two hundred and seventy-four United States dollars and six cents) for miscellaneous expenses for copies, authentications and legalization of signatures, tariffs, shipments by courier. In addition, they considered that, by adding the other items such as courier, photocopying, legal advice and food to the expenses and fees, increase the amount to the final sum of USD 30,000.00 (thirty thousand

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<sup>186</sup> Cf. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and Costs*. Judgment of May 26, 2001. Series C No. 77, para. 84, and *Case of Garzón Guzmán v. Ecuador*, *supra*, para. 96.

<sup>187</sup> Cf. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and Costs*, *supra*, para. 84, and *Case of Bedoya Lima v. Colombia*, *supra*, para. 206.



United States dollars) They indicated that due to the passage of time there is no proof of payment;

**b) Regarding Mr. Valenzuela:** the expenses incurred for the travel: (i) to the headquarters of the jurisdictional and administrative authorities, and (ii) to the hearing before the Inter-American Commission. Proof of payment was not kept. They requested the amount of USD 5,000.00 (five thousand United States dollars).

**c) Regarding Mr. Díaz Alvarado and Ms. Rodríguez Ricse:** they requested, for the representation of each one, the sum of USD 30,000.00 (thirty thousand United States dollars), for the hiring of professional services, travel and tickets to the Inter-American Commission.

227. In this regard, in its answer, the **State** requested that the request not be granted. Regarding each victim, it stated:

**a) Regarding Mr. Cuya:** the representatives made generic statements indicating expenses for transportation, courier service, photocopying, legal advice for his attendance at the Commission, food and other costs, of which they did not provide further details. Nor if Mr. Cuya's expenses to travel to the Commission's headquarters to present the petition, attend hearings and interviews, were directly related to his case, and it notes different inconsistencies, among them, regarding the air tickets provided and the statement Sworn submitted regarding the 2005 ticket, which does not correspond to proof of payment. In addition, they indicated that they did not have proof of each of the alleged expenses. Lastly, it indicated that Mr. Cuya, as a lawyer, was in charge of handling the internal proceedings and was also in charge of processing the petition that he presented to the Commission. It requested that the requested amount not be granted.

**b) Regarding Mr. Valenzuela:** he did not provide receipts for the expenses incurred. He did not explain the detail of the cost involved in judicial proceedings made at the domestic level, the procedure at the international level, the transfers to the jurisdictional and administrative headquarters, as well as hearings arranged by the Commission. Mr. Valenzuela did not evidence all of the requested expenses, so his payment is not appropriate.

**c) Regarding Mr. Díaz Alvarado and Ms. Rodríguez Ricse:** the expenses were not duly evidenced nor were receipts provided, for which reason it opposed the payment of the requested amount.

228. The Court reiterates that, according to its case law,<sup>188</sup> the costs and expenses are part of the concept of reparation, since the activity carried out by the victims in order to obtain justice, both at the national and international level, implies disbursements that must be compensated when the international responsibility of the State is declared by means of a condemnatory judgement. Regarding the reimbursement of costs and expenses, it is for the Court to make a prudent assessment of their scope, which includes the expenses arising before the authorities of the domestic jurisdiction, as well as those incurred during the proceedings before the inter-American system, taking into account the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment made be made based on the principle of equity and taking into account the expenses indicated by the parties, provided their *quantum* is reasonable

229. This Court has indicated that "the claims of the victims or their representatives regarding costs and expenses, and the evidence that supports them, must be presented to the Court at the first procedural moment that they are granted, that is, in the brief of motions and pleadings,

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<sup>188</sup> Cf. *Case of Garrido and Baigorria v. Argentina. Repairs and Costs*. Judgment of August 27, 1998. Series C No. 39, paras. 79 and 82, and *Case of Garzón Guzmán v. Ecuador, supra*, para. 138.

without prejudice to the fact that such claims are updated at a later time, in accordance with the new costs and expenses incurred during the proceedings before this Court.” Similarly, the Court reiterates that “it is not enough to send probative documents, but rather that the parties are required to make an argument that relates the evidence to the fact that is considered represented, and that, as they are alleged financial disbursements, they establish clearly the items and their justification.”<sup>189</sup>

230. In this case, there is no probative support in the file regarding the costs and expenses incurred by Mr. Jean Aubert Díaz Alvarado and Ms. Marta Silvana Rodríguez in the processing of this matter before the Inter-American System. Said victims, as indicated, specified the request indicating a specific amount. In any case, the Court recognizes that such procedures necessarily involved financial expenditures both domestically and before the Inter-American System, for which it determines, in equity, that the State must deliver to the representative of the two victims the sum of USD 15,000.00 (fifteen thousand United States dollars) for costs and expenses for the procedures before the domestic jurisdiction and before the inter-American system. In the case of Mr. Cuya, he presented receipts regarding the expenditures made in the domestic jurisdiction and before the Inter-American Commission, however, they did not verify the total amount requested. The Court recognizes that such procedures necessarily implied financial expenditures, for which reason it determines that the State must deliver to the victim, in equity, the amount of USD 15,000.00 (fifteen thousand United States dollars). Regarding Mr. Valenzuela, he did not present proof of the expenses for the procedures at the internal level and before the Commission. In this regard, this Court recognizes that such procedures necessarily implied financial expenses, for which it determines that the State must deliver to the victim, in equity, the amount of USD 15,000.00 (fifteen thousand United States dollars) for costs and expenses for the procedures before the domestic jurisdiction and the Inter-American Commission. Regarding Messrs. Jorge Luis Cuya Lavy and Walter Antonio Valenzuela Cerna, as established in the proceedings before the Court, the Victims' Legal Assistance Fund was authorized for financial assistance, which is detailed in the following section. It should be added that, at the stage of monitoring compliance with this Judgment, the Court may order that the State reimburse the victim or his representative for the reasonable expenses incurred in said procedural stage.<sup>190</sup>

### **G. Victims' Legal Assistance Fund**

231. In this case, as stated in the President's Resolution of January 28, 2020, on November 4, 2020 “the parties and the Commission were informed that, in accordance with the provisions of Articles 31 of the Rules of Procedure of the Inter-American Court (hereinafter “the Rules of Procedure”) and Articles 2, 3 and 5 of the Regulations of the Victims' Legal Assistance Fund, the request submitted by the representatives of Mr. Cuya Lavy and the representatives of Mr. Valenzuela Cerna to file for the Fund “(supra para. 9) was admissible. In the same Resolution it was determined,

[...] Taking into account that the public hearing in this case will be virtual, this Presidency establishes that the economic assistance that is assigned to cover the expenses that would be caused by the presentation of a testimonial statement and the opinions of two experts (*supra* Considering 4), offered by the representatives of Mr. Valenzuela Cerna, regarding the expenses of making, formalizing and sending the affidavits, as long as such expenses are reasonable. For this purpose, the representatives must submit to the Court a quote for the cost of filing the declarations in the country of residence of the declarants, within the period indicated in operative paragraph 16 and, with the presentation of the final written arguments, at the latest, present the justification and proof of payment that evidence the expenses incurred, this

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<sup>189</sup> Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, *supra*, paras. 275 and 277, and *Case of Garzón Guzmán v. Ecuador*, *supra*, para. 139.

<sup>190</sup> Cf. *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of August 24, 2010. Series C No. 214, para. 331, and *Case of Bedoya Lima v. Colombia*, *supra*, para. 214..

being the last procedural opportunity to do so.<sup>191</sup>

232. Although **Mr. Valenzuela's representatives** submitted several expense receipts, they did not do so in accordance with the requirements established for that purpose.<sup>192</sup> Therefore, the Victims' Legal Assistance Fund was not used, and it is not appropriate to order any reimbursement from the State<sup>193</sup>.

#### **H. Method of complying with the payments ordered**

233. The State must make the payment of the compensation for the restitution measure, pecuniary and non-pecuniary damage, and the reimbursement of costs and expenses established in this Judgment directly to the persons indicated therein, within a period of one year counted as of the notification of this Judgment.

234. In the event that the beneficiaries die before the respective compensation is made to them, this must be made directly to their heirs, in accordance with applicable domestic law.

235. The State must comply with the monetary obligations by paying in United States dollars or its equivalent in national currency, using for the respective calculation the published market exchange rate or calculated by a relevant banking or financial authority, on the date closest to the day of payment.

236. If, due to reasons attributable to the beneficiaries of the compensation or their heirs, it is not possible to pay the amounts established within the indicated period, the State shall deposit said amounts in their favor in an account or certificate of deposit in a solvent Peruvian financial institution, in United States dollars, and under the most favorable financial conditions permitted by law and banking practice. If the corresponding compensation is not claimed within ten years, the amounts will be returned to the State with the accrued interest.

237. The amounts assigned in this Judgment as compensation for the restitution measure, compensation for pecuniary and non-pecuniary damages, and as reimbursement of costs and expenses, shall be delivered to the persons indicated in full, in accordance with the provisions of this Judgment, without reductions derived from possible tax charges.

238. In the event that the State is in arrears, it must pay interest on the amount owed corresponding to the bank interest on arrears in Peru.

### **X OPERATIVE PARAGRAPHS**

239. Therefore,

#### **THE COURT,**

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<sup>191</sup> *Case of Cuya Lavy et al. v. Peru. Order of the President of the Court of January 28, 2021, supra*, Considering clause 52. In addition, in operative paragraphs 15 and 17 it indicated: "Declare the application of the Legal Assistance Fund for Victims of the Inter-American Court admissible in the terms provided in Considering clauses 51 to 54 of this Resolution" and [r]equest the representatives of Mr. Cuya Lavy and the representatives of Mr. Valenzuela Cerna that, at the latest together with their final written arguments, which must be presented on the date indicated in operative paragraph 14, submit the receipts that duly certify the reasonable expenses incurred, as indicated.

<sup>192</sup> It should be noted that Mr. Valenzuela's representatives submitted three invoices for reimbursement by email, corresponding to the formalization of an expert opinion, without meeting the minimum requirements, according to the accounting regulations established by the Fund's accounting, that make them eligible for the fund. Consequently, the Secretariat of the Court did not incur any expenses related to this case.

<sup>193</sup> *Cf. Case of Mota Abarullo et al. v. Venezuela. Merits, Reparations and Costs. Judgment of November 18, 2020. Series C No. 417, para. 176.*

**DECIDES,**

unanimously,

1. To reject the preliminary objection for failure to exhaust domestic remedies raised by the State, in accordance with paragraphs 26 to 37 of this Judgment.
2. To reject the preliminary objection to the fourth instance raised by the State, in accordance with paragraphs 42 and 43 of this Judgment.
3. To reject the preliminary objection regarding the improper inclusion of Article 26 of the American Convention on Human Rights, in accordance with paragraphs 47 and 48 of this Judgment

**DECLARES,**

unanimously, that:

4. The State is responsible for the violation of judicial guarantees, privacy and political rights, enshrined in articles 8(1), 8(2)(b), 8(2)(c), 11(1), and 23(1)(c) of the American Convention on Human Rights, in relation to Articles 1(1) and 2 of the same instrument, to the detriment of Jorge Luis Cuya Lavy, Jean Aubert Díaz Alvarado, Marta Silvana Rodríguez Ricse and Walter Antonio Valenzuela Cerna, pursuant to paragraphs 123 to 134, 138 to 140, 148 to 151, 156 to 158, and 161 to 164 of this Judgment.
5. The State is responsible for the violation of judicial protection, enshrined in Article 25(1) of the American Convention on Human Rights, in relation to Articles 1(1) and 2 of the same instrument, to the detriment of Jorge Luis Cuya Lavy, Jean Aubert Díaz Alvarado and Marta Silvana Rodríguez Ricse, pursuant to paragraphs 172 to 184 of this Judgment.
6. The State is not responsible for the violation of the principle of legality enshrined in Article 9 of the American Convention on Human Rights, pursuant to paragraphs 141 to 147 and 165 of this Judgment.

**AND ESTABLISHES:**

Unanimously, that:

7. This Judgment constitutes, in itself, a form of reparation.
8. The State shall pay compensation for restitution to Jorge Luis Cuya Lavy, Jean Aubert Díaz Alvarado, Marta Silvana Rodríguez Ricse and Walter Antonio Valenzuela Cerna, pursuant to paragraphs 194 to 195 of this Judgment.
9. The State will make the publications indicated in paragraph 199 of this Judgment.
10. The State shall adapt, within a reasonable timeframe, its domestic legal system to the parameter established in this Judgment, pursuant to the provisions of paragraphs 203 to 206 of this Judgment.
11. The State will pay, within a period of one year from the notification of this Judgment, the amounts established in paragraphs 195, 219, 225 and 230 of this Judgment for compensation for restitution, pecuniary and non-pecuniary damage, and for the reimbursement of costs and expenses, pursuant to paragraphs 233 to 238 of this Judgment.

12. The State shall provide the Court, within a period of one year from the notification of this Judgment, with a report on the measures adopted to comply with it.

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

Judges Eduardo Vio Grossi and Humberto Antonio Sierra Porto informed the Court of their concurring opinions.

Done at San José, Costa Rica, on September 28, 2021.

Inter-American Court of Human Rights. *Case of Cuya Lavy et al. v. Peru*. Preliminary objections, merits, reparations and costs. Judgment of September 28, 2021.

Elizabeth Odio Benito  
President

L. Patricio Pazmiño Freire

Eduardo Vio Grossi

Humberto Antonio Sierra Porto

Eduardo Ferrer Mac-Gregor Poisot

Eugenio Raúl Zaffaroni

Ricardo C. Pérez Manrique

Pablo Saavedra Alessandri  
Secretary

So ordered,

Elizabeth Odio Benito  
President

Pablo Saavedra Alessandri  
Secretary

**CONCURRING OPINION OF JUDGE EDUARDO VIO GROSSI,  
INTER-AMERICAN COURT OF HUMAN RIGHTS,  
CASE OF CUYA LAVY ET AL. V. PERU,  
JUDGMENT OF SEPTEMBER 28, 2021,  
(*Preliminary Objections, Merits, Reparations and Costs*).**

This concurring vote is issued with the Judgment in the title <sup>1</sup>, in order to record that the undersigned, sharing the indications in its Operative Point No. 1<sup>2</sup>, does not do so by virtue of those indications, but according to his position supported by various other individual votes<sup>3</sup>, which are ratified by this instrument, and must therefore be understood as an integral part thereof.

Said position consists, fundamentally, among other considerations and in summary, in that domestic remedies must be exhausted by the complainant before the presentation of the corresponding petition before the Inter-American Commission on Human Rights<sup>4</sup>, which the State, in its answer to the request must argue, if so deemed, that this has not occurred and that it is precisely in light of both briefs' indication, that the Commission must rule in order to determine the admissibility of the request, that is, as it was presented.

Therefore, it is in this sense that the undersigned concurs to approve the aforementioned Operative Point No. 1 on the grounds that, having indicated in the respective petitions before the Commission that, as provided in Article 46(a)<sup>5</sup> of the American Convention on Human Rights <sup>6</sup>, domestic remedies had previously been exhausted, the State, in its response brief to such complaints, did not invoke the breach of the requirement in

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<sup>1</sup> Hereinafter the Judgment.

<sup>2</sup> *Dismiss the preliminary objection for failure to exhaust domestic remedies raised by the State, in accordance with paragraphs 26 to 37 of this Judgment*

<sup>3</sup> Individual opinions of Judge Eduardo Vio Grossi on the matter: Dissenting, *Case of Spoltore v. Argentina*, Judgment of June 9, 2020; Dissenting, *Case of López et al. v. Argentina*, November 25, 2019; Concurring, *Case of Gómez Viruela et al. v. Guatemala*, of November 21, 2019; Dissenting, *Case of the National Association of Unemployed and Retired Persons of the National Superintendence of Tax Administration (ANCEJUB-SUNAT) v. Peru*, of November 21, 2019; Dissenting, *Díaz Loreto et al. v. Venezuela*, Judgment of November 19, 2019; Concurrent, *Case of Terrones Silva et al. v. Peru*, of September 26, 2018; Dissenting, *Case of Amrhein et al. v. Costa Rica*, April 25, 2018; Concurrent, *Case of Yarce et al. v. Colombia*, of November 22, 2016; Concurrent, *Case of Herrera Espinoza et al. v. Ecuador*, of September 1, 2016; Concurring, *Case of Velásquez Paiz et al. v. Guatemala*, of November 19, 2015; Dissenting, *Case of the Santa Bárbara Peasant Community v. Peru*, September 1, 2015; Dissenting, *Case of Wong Ho Wing v. Peru*, June 30, 2015; Dissenting, *Case of Cruz Sánchez et al. v. Peru*, of April 17, 2015; Dissenting, *Case of Liakat Ali Alibux v. Suriname*, of January 30, 2014, and Dissenting, *Case of Díaz Peña v. Venezuela*, June 26, 2012.

<sup>4</sup> Hereinafter the Commission.

<sup>5</sup> "Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements: a) that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law;"

<sup>6</sup> Hereinafter, the Convention.

question, so its power to do so was precluded at that time, and its later argument in this regard is not admissible.

Additionally, under the provisions of Articles 27(1) and 2<sup>7</sup>, 28<sup>8</sup>, 29(d)<sup>9</sup>, 30<sup>10</sup> and 31(1)c)<sup>11</sup><sup>12</sup> of the Commission's Rules of Procedure<sup>13</sup> in force at the time of the first petition, such provisions being reiterated in all its following versions, consequently, give an account of the Commission's interpretation of the corresponding convention-based norms.

Eduardo Vio Grossi  
Judge

Pablo Saavedra Alessandri  
Secretary

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<sup>7</sup> "1. The Secretariat of the Commission shall be responsible for the study and initial processing of the petitions that are presented to the Commission and that meet all the requirements established in the Statute and these Regulations.

2. If a petition or communication does not meet the requirements of these Regulations, the Secretary of the Commission may request the petitioner or his representative to complete them."

<sup>8</sup> "The Commission will only take into consideration petitions on alleged human rights violations defined in the American Convention on Human Rights, in relation to a State Party, when they meet the requirements established therein, in the Statute and in these Regulations."

<sup>9</sup> "Petitions addressed to the Commission shall contain the following information: any steps taken to exhaust domestic remedies, or the impossibility of doing so."

<sup>10</sup> "Notwithstanding the provisions of Article 26, if the Commission considers that the petition is inadmissible or incomplete, the petitioner will be notified, requesting that he complete the requirements omitted in the petition."

<sup>11</sup> "The Commission, acting initially through its Secretary, will receive and process the petitions presented to it, in accordance with the rules indicated below: If it accepts, in principle, the admissibility of the petition, it will request information from the government of the State referred to by transcribing the pertinent parts of the petition."

<sup>12</sup> "The request for information shall not prejudice the decision that the Commission ultimately adopts on the admissibility of the petition."

<sup>13</sup> In force to the year 2000.



**CONCURRING OPINION OF  
JUDGE HUMBERTO ANTONIO SIERRA PORTO**

**INTER-AMERICAN COURT OF HUMAN RIGHTS**

**CASE OF CUYA LAVY ET AL. V. PERU**

**JUDGMENT OF SEPTEMBER 28, 2021**

***(Preliminary Objections, Merits, Reparations and Costs)***

1. With the customary respect for the majority decisions of the Inter-American Court of Human Rights (hereinafter the Court), the purpose of this opinion is to point out some discrepancies in relation to the substantive analysis carried out by the Court on the international responsibility of the State of Peru (hereinafter 'the State' or 'Peru'), in relation to the right of public officials to remain in office under conditions of equality and the admissible limits of political rights under Article 23(2) of the American Convention on Human Rights Humans (hereinafter the Convention or ACHR). In this sense, the vote complements the position already expressed in my partially dissenting vote in the case *Casa Nina v. Peru*.<sup>1</sup>

2. In this case, the Court found the violation of the right of access to public office under general conditions of equality (Article 23(1)(c)) to be proven, considering that the decision of the Judiciary Council to dismiss Messrs. Cuya Lavy , Valenzuela Cerna, Díaz Alvarado and Ms. Rodríguez Ricse due to the results obtained in the evaluation and ratification process, arbitrarily affected their right to remain in office. The Court pointed out that due to the materially punitive nature of the ratification and evaluation process, the Judiciary Council was obliged to respect the guarantees of Article 8(1) of the Convention. However, in this case the Court found it proven that the national authority ignored the duty to substantiate reasoning and the right to know the content of the accusation in advance and in detail. Although I agree with this reasoning, I must note that the Court once again ignored the discussion on the scope of Article 23(2) ACHR in its relation to the right of public officials who exercise judicial or prosecutorial functions.

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<sup>1</sup> Cf. *Case of Casa Nina v. Peru*. Preliminary objections, merits, reparations and costs. Judgment of November 24, 2020. Series C No. 419. Concurring and partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

3. In this case, as in the case of *Casa Nina v. Peru*, the position of the Court regarding the stability of judges and prosecutors<sup>2</sup>, in the position is reiterated, without considering the close relationship that this standard has with the limitations on political rights considered in Article 23(2) of the Convention and the restrictive nature assigned to them in case law. In this sense, the Court once again failed to explain the legal arguments on which the difference in treatment is based on the form of appointment in relation to the right of public officials to remain in office under conditions of equality, and the procedural mechanisms through which continuation in the office is conventionally admitted.

4. The Court held "*that the guarantee of stability and tenure in office, for judges and prosecutors, [...] implies, in turn, (i) that the removal from their positions must exclusively obey the grounds permitted, either through a process that complies with judicial guarantees or because they have completed the term of their mandate; (ii) that judges and prosecutors can only be dismissed for serious misconduct or incompetence; and (iii) that all proceedings must be decided in accordance with the established norms of judicial behavior and through fair procedures that ensure objectivity and impartiality according to the Constitution or the law*".<sup>3</sup> Thus, the Court considered that public officials who hold the status of judges and prosecutors, can be removed from office by any authority and in a process whose nature is not defined under the convention, provided that it respects the guarantees of Article 8 of the Convention and refers to serious disciplinary offenses.

5. On the contrary, in relation to the same matter (removal of a public official from office), in the decision of the case of *Petro Urrego v. Colombia*, the Court held that "[...]Article 23(2) of the American Convention clarifies that this instrument does not allow any administrative body to apply a sanction involving a restriction (for example, imposing a sanction of disqualification or dismissal) on a person for social misconduct (in the performance of public service or outside of it) on the exercise of their political rights to elect and be elected. This may only occur through a judicial act (judgment) by a competent judge in the corresponding criminal proceedings."<sup>4</sup> Thus, the Court assumed a position according to which officials elected by popular vote can only be limited in their political rights by removal from office, through a judgment issued by a competent judge in criminal proceedings.

6. Consequently, I consider that it is evident that the Court has given a differentiated treatment to public officials by reason of the form of appointment, with regard to the limitations to their political rights admissible under the convention. However, when referring to administrative officials elected by popular vote (*Case of Petro Urrego* and *Case of López Mendoza*), or when referring to judicial or fiscal officials elected directly or through public competition (*Case of Cuya Lavy* and *Case of Casa Nina*, among others),

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<sup>2</sup> Cf. *Case of López Lone et al. v. Honduras*. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 5, 2015. Series C No. 302, and *Case of Rico v. Argentina*. Preliminary Objections and Merits. Judgment of September 2, 2019. Series C No. 383.

<sup>3</sup> *Case of Cuya Lavy et al. v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 28, 2021. Para. 129.

<sup>4</sup> *Case of Petro Urrego v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 8, 2020. Series C No. 406. Para 96.

the Court has not addressed the issue that Article 23 ACHR does not recognize differences between the political rights of public officials.<sup>5</sup> Thus, it is clear that the Court still does not comply with the argumentative burden required of it, expressing in its case law differences in the degree of protection of the rights of public officials due to their form of appointment, or any other criterion e.g. the nature of the functions they perform.<sup>6</sup>

7. I consider, however, that the ambivalence that is evidenced in the Court's case law regarding the scope of Article 23(2) of the convention and the certainty of the hypotheses considered for the limitation of political rights, must be read reasonably. In this sense, it is my opinion that, implicitly, the sentence reiterates the position according to which judges' and prosecutors' removal from office as a form of limitation of political rights is within the convention even though it is not ordered by a judgment before a competent judge in criminal proceedings. Thus, it must continue to be understood that according to the interpretation of the Court itself, the Convention does not establish an absolute prohibition that prevents, in certain cases, disciplinary law from having effects on public officials' tenure in office.<sup>7</sup>

Humberto Antonio Sierra Porto  
Judge

Pablo Saavedra Alessandri  
Secretary

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<sup>5</sup> Article 23. The Right to Participate in Government 1. Every citizen shall enjoy the following rights and opportunities: a. to take part in the conduct of public affairs, directly or through freely chosen representatives; b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and c. to have access, under general conditions of equality, to the public service of their country.

2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

<sup>6</sup> Cf. *Case of Casa Nina v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2020. Series C No. 419. Concurring and partially dissenting opinion of Judge Humberto Antonio Sierra Porto. Para. 13

<sup>7</sup> Cf. *Case of Casa Nina v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2020. Series C No. 419. Concurring and partially dissenting opinion of Judge Humberto Antonio Sierra Porto. Para. 14