INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF AGUINAGA AILLÓN *v.* ECUADOR

JUDGMENT OF JANUARY 30, 2023
(Merits, reparations and costs)

In the case of *Aguinaga Aillón v Ecuador,*

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

Ricardo C. Pérez Manrique, President,
Eduardo Ferrer Mac-Gregor Poisot, Vice President,
Humberto Antonio Sierra Porto,
Nancy Hernández López,
Verónica Gómez,
Patricia Pérez Goldberg, and
Rodrigo Mudrovitsch;

also present,

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

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

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I
INTRODUCTION OF THE CASE AND CAUSE OF ACTION

1. *The case submitted to the Court.* – On May 20, 2021, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted to the jurisdiction of the Court the case of Carlos Julio Aguinaga Aillón versus the Republic of Ecuador (hereinafter "the State" or "Ecuador"). According to the Commission, the case addresses a body of violations committed in the framework of the process led by the National Congress, which culminated in the dismissal of Carlos Julio Aguinaga Aillón from his position as member of the Supreme Electoral Tribunal (*Tribunal Supremo Electoral de Ecuador*, hereinafter "TSE"). The Commission found, more specifically, that through this process, the State had violated the right to judicial guarantees and the right to judicial protection, as well the principles of freedom from ex post facto laws and judicial independence.

2. *Proceedings before the Commission*. – The following proceedings took place before the Commission:

a) *Petition.* – On May 26, 2005, the representatives of the alleged victim (hereinafter "the representatives) filed the opening petition with the Commission.[1]

b) *Admissibility Report.* – The Commission approved Admissibility Report No. 42/13 on July 11, 2013, holding the petition admissible.[2]

c) *Report on the Merits.* – The Commission approved its Report on the Merits No. 112/18 (hereinafter "Report on the Merits") on October 5, 2018, drawing a set of conclusions and extending several recommendations to the State.

d) *Notification to the State*. – The Commission notified the State of the Report on the Merits on November 20, 2018, and granted the State a term of two months to report back on adoption of the recommendations. The State received a total of nine time extensions, after which its request for an additional extension was denied by the Commission.

3. *Submission to the Court*. – The Commission submitted the case to the Court on May 20, 2021, with the full set of facts and alleged human rights violations.[3] It noted that this was necessary to obtain justice and redress for the alleged victim. This Court notes with concern that more than 15 years elapsed after the originating petition was lodged with the Commission, before the case was submitted to the Court.

4. *Requests by the Commission.* – The Commission asked the Court to adjudge and declare that Ecuador was internationally liable for violating the rights enshrined in Articles 8(1), 8(2)(b), 8(2)(c), 8(2)(h), 9 and 25(1) of the American Convention, read in conjunction with Articles 1(1) and 2 thereof, and order the State to comply with the measures of reparation and recommendations set forth in the report.

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[1] The alleged victim was represented by Mario Melo Cevallos and Sofia Pazmiño Yánez.

[2] The parties were notified of the report on August 14, 2013.

[3] The Commission appointed then-Commissioner Antonia Urrejola Noguera as its delegate before the Court. It also named then-Assistant Executive Secretary Marisol Blanchard Vera, Jorge Humberto Meza Flores, and Christian González Chacón as legal advisers.

II
PROCEEDINGS BEFORE THE COURT

5. *Notification to the State and to the representatives.* – The representatives and the State were notified on June 17, 2021, that the case had been submitted.

6. *Brief with pleadings, motions and evidence.* – On August 16, 2021, the representatives filed their brief of pleadings, motions and evidence (hereinafter "pleadings and motions brief"), pursuant to Articles 25 and 40 of the Rules of Procedure**.** The representatives agreed with the substance of the Commission's claims and argued further that Mr. Aguinaga Aillón's right to participate in government had been violated; they asked that Ecuador be ordered to adopt several measures of redress in addition to those requested by the Commission.

7. *Brief of the preliminary objection and reply.* – The State submitted its brief with a preliminary objection and its reply to the submission of the case, the Report on the Merits, and the pleadings and motions brief (hereinafter "answering brief") on November 17, 2021, under the provisions of Article 41 of the Court's Rules of Procedure.[4]

8. *Comments on the preliminary objection.* – The representatives and the Inter-American Commission lodged their comments on the preliminary objection on January 20, 2022.

9. *Public hearing*. – The President of the Court issued an order on July 19, 2022, summoning the parties and the Commission to a public hearing on the preliminary objection and possible merits, reparations, and costs, and to hear the parties' final oral arguments and the Commission's observations.[5] The public hearing was held via videoconference, in keeping with the Court's Rules of Procedure, on September 8, 2022, during the Court's 151st session.[6] In the public hearing, the State offered a partial recognition of responsibility and retracted the preliminary objection it had raised in its answering brief (*infra* para. 14).

10. *Final written arguments and observations.* – The parties submitted their final written arguments, and the Commission, its final written observations, on October 7, 2022. The State submitted annexes along with its final written arguments.

11. *Observations on the annexes to the final arguments.* - The representatives delivered their observations on the annexes to the State's final written arguments on October 27, 2022. The Commission reported on the same day that it had no comments on the annexes to the State's final written arguments.

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[4] The State named María Fernanda Álvarez Alcívar, Fernanda Narváez, Carlos Espín Arias and Alonso Fonseca Garcés as its agents in the case.

[5] *Cf. Case of Aguinaga Aillón v. Ecuador*. Notice of hearing. Order of the President of the Inter-American Court of Human Rights, July 19, 2022. Available in Spanish at: https://www.corteidh.or.cr/docs/asuntos/aguinaga_aillon_19_07_22.pdf

[6] Present at the hearing were: (a) for the Inter-American Commission: Jorge Meza Flores and Karin Mansel; (b) for the representatives: Mario Melo Cevallos, Sofía Pazmiño Yáñez and Cristina Melo, and (c) for the State: María Fernanda Álvarez Alcívar, Carlos Espín Arias, Amparo Esparza Paula and Alonso Fonseca Garcés.

12. *Deliberation of the case*. - The Court deliberated on this judgment on January 25, 26 and 30, 2023.

III
JURISDICTION

13. The Court is competent to hear the instant case pursuant to Article 62(3) of the Convention, as Ecuador ratified the American Convention on Human Rights on December 28, 1977, and recognized the contentious jurisdiction of the Court on July 24, 1984.

IV
RECOGNITION OF RESPONSIBILITY

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

14. The ***State*** said in the public hearing that it partially acknowledged its international liability in the case "for violating Article 8 and Article 25 of the American Convention in injury of Carlos Aguinaga." It also said that it would retract its preliminary objection. Its final written arguments reconfirmed this recognition of international responsibility "for violation of Articles 8 and 25 of the American Convention in injury of Carlos Aguinaga." The acknowledgment applied to: "(a) dismissal from his position as a member of the Supreme Electoral Tribunal by resolution of the National Congress" and "(b) lack of a mechanism for appealing the resolution consistent with the provisions of Article 25 of the American Convention." The State also asked that its recognition of responsibility "be weighed in the same good faith with which it is being extended, and thus given useful effect."

15. The ***Commission*** welcomed the State's recognition of international responsibility as extended in the public hearing. It clarified that the Article 8 recognition covered the way in which Mr. Aguinaga Aillón had been dismissed, which under the terms of the Ecuadorian Constitution, should have entailed an impeachment process. It added that the State had acknowledged responsibility for violation of Article 25 of the Convention on the grounds that the motion for constitutional review did not meet the standards set for challenging the resolution to dismiss Mr. Aguinaga Aillón. The Commission said, therefore, that this "acquiescence is a contribution toward honoring the dignity of the victims and offering redress. However, because this recognition is only partial and generic, the Commission will submit its observations on the questions items that remain in dispute." The ***representatives*** made no specific comments on the State's recognition of responsibility.

B. Considerations of the Court

16. In keeping with Articles 62 and 64 of the Rules of Procedure, and in the exercise of its powers of international judicial protection of human rights, which is a matter of international public order, the Court must ensure that acts of acquiescence be acceptable for the purposes sought by the inter-American system.[7] The Court will now discuss the situation raised by the case at hand.

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[7] *Cf. Case of Kimel v. Argentina. Merits, Reparations and Costs.* Judgment of May 2, 2008. Series C No. 177, para. 24, and *Case of Deras García et al. v. Honduras. Merits, Reparations and Costs.* Judgment of August 25, 2022. Series C No. 462, para. 21.

B.1. The facts

17. The ***Court*** affirms in the instant case that the State accepted all the facts set forth in the Report on the Merits concerning "(a) the dismissal from his position as member of the Supreme Electoral Tribunal by resolution of the National Congress" and "(b) the lack of a mechanism for appealing the resolutions in keeping with the standards of Article 25 of the American Convention." The Court understands that the State has thus recognized the facts expounded in paragraphs 37 to 43 of the Report on the Merits in the section on dismissal from the Supreme Electoral Tribunal. The Court notes that the other facts outlined in the Report on the Merits were not included in the act of acquiescence. These facts, given in paragraphs 30 through 36 of the Report on the Merits, are: (i) the context; (ii) the relevant regulatory framework, and (iii) the process by which the alleged victim was appointed to the Supreme Electoral Tribunal.

B.2. The law

18. Cognizant of the violations already acknowledged by the State and the observations by the representatives and the Commission, the Court holds that the dispute has closed concerning the rights enshrined in Article 8 of the Convention, in injury of Carlos Julio Aguinaga Aillón, which were violated by the procedure under which he was dismissed from his position as a member of the TSE. The same is true for the violation of Article 25 of the Convention, as a result of the limits that Order 01-27 of the Supreme Court and Resolution 25-160 of the Constitutional Court placed on the use of the motion for constitutional relief, which undercut Mr. Aguinaga Aillón's rights.

19. The Court therefore deems that the State has acknowledged its international responsibility for violating Articles 8(1), 8(2)(b), 8(2)(c), 8(2)(h) and 25 of the American Convention, read in conjunction with Articles 1(1) and 2 thereof, in injury of Mr. Aguinaga Aillón. The Court notes, in view of the terms in which the State acknowledged responsibility, that the remaining unresolved dispute concerns the alleged violations of the guarantee of judicial independence, the principle of freedom from ex post facto laws, and political rights (raised only by the representatives), enshrined in Articles 8(1), 9 and 23 of the American Convention, read in conjunction with Articles 1(1) and 2 thereof.

B.3. Reparations

20. Still outstanding is the dispute regarding the validity of the specific measures of redress requested by the Commission and the representatives, which the Court will therefore examine.

B.4. Assessment of the acquiescence

21. The State's acquiescence is a partial acceptance of the facts and a partial acknowledgment of the alleged violations. The Court values the recognition of international responsibility as a positive contribution to the development of these proceedings and the observance of the principles that inspire the Convention, as well as to the alleged victim's needs for reparation.[8] The State's recognition produces full legal effects under the terms of Articles 62 and 64 of the Court's Rules of Procedure. The Court also notes that acquiescence to specific, concrete facts and violations may have effects and consequences for its analysis

[8] *Cf. Case of Benavides Cevallos v. Ecuador. Merits, Reparations and Costs.* Judgment of June 19, 1998. Series C No. 38, para. 57, and *Case of Deras García et al. v. Honduras, supra*, para. 26.

of the other alleged facts and violations, considering that they are all part of the same set of circumstances.[9]

22. In the particular circumstances of this case, the Court will gauge the scope of the recognition of responsibility as it evaluates the facts and examines the merits of the alleged rights violations. Because these claims remain in dispute, the Court will deliver a judgment setting forth the events that occurred, based on evidence gathered during the process before it and the acceptance of the facts, as well as legal consequences and applicable reparations. It is also fitting in the instant case to examine the facts concerning the violation of the right to judicial guarantees and the right to judicial protection and, because they were not acknowledged by the State, the alleged violations of the principle of judicial independence, the principle of freedom from ex post facto laws, and the principle of political rights.

23. Finally, the Court would recall that the State raised a preliminary objection in its answering brief. It nevertheless acknowledges the scope of the State's recognition of responsibility in the case at hand, and particularly its stance during the public hearing, when it said, "...the State has retracted its preliminary objection in view of its act of acquiescence," and therefore the Court will not examine the preliminary objection in the understanding that Ecuador has withdrawn it.

V
EVIDENCE

A. Admissibility of documentary evidence

24. The Court received several documents submitted as evidence by the Commission, the representatives and the State (*supra* paras. 5, 6 and 7), and as in other cases, will admit them in the understanding that they were submitted within the procedural time limits (Article 57 of the Rules of Procedure).[10] Moreover, under the terms of the Court's order of July 19, 2022 (*supra*, para. 9), an expert statement delivered in another proceeding was added to the case file as documentary evidence.[11]

25. The Court also received documents annexed to the State's final written arguments,[12] submitted within the specified time limits. The ***representatives*** held, in this regard, that

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[9] *Cf. Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 14, 2014. Series C No. 287, para. 27, and *Case of Palacio Urrutia et al. v. Ecuador, supra*, para. 31.

[10] *Cf.* Documentary evidence may be submitted, in general and pursuant to Article 57(2) of the Rules of Procedure, with the application brief, the pleadings and motions brief, or the answering brief, as applicable, and no evidence may be admitted if presented outside these time limits, except in the cases set forth in Article 57(2) of the Rules of Procedure (that is, force majeure or serious impediment), or in the case of a supervening fact that took place subsequently to these procedural stages. *Cf. Case of Barrios Family v. Venezuela.* Merits, Reparations and Costs. Judgment of November 24, 2011. Series C No. 237, paras. 17 and 18, and *Case of Brítez Arce et al. v. Argentina. Merits, Reparations and Costs.* Judgment of November 16, 2022. Series C No. 474, para. 24.

[11] The expert statement delivered in the *Case of Quintana Coello et al. v. Ecuador* by Param Cumaraswamy.

[12] Annex 1: Judgment 472-2001-RA of the Constitutional Court, published in the Official Gazette, No. 517 of February 19, 2002; annex 2: Judgment 100-2001-TP of the Constitutional Court, published in the Official Gazette, No. 364 of July 9, 2001; annex 3: Judgment 769-2003-RA of the Constitutional Court, published in the Official Gazette, No. 334 of May 13, 2004; annex 4: Basic Law on Elections and Political Organizations of the Republic of Ecuador (Democratic Code), enacted in the Supplement to the Official Gazette, No. 578 of April 27, 2009; annex 5: Basic Regulations for the Operation of the National Council of Elections and the Provincial

annexes one, two, and three, pertaining to the Ecuador's Constitutional Court verdicts 472-2001-RA, 100-2001-TP and 769-2003-RA, do not address the judicial powers of the TSE to enforce electoral law, and therefore are not relevant to the case. They further commented on annexes four and five, noting that these laws were not in effect at the time the events of the instant case occurred. The ***Commission*** had no comment on the annexes.

26. The Court notes, regarding the documents submitted as annexes one, two, and three, that the State has not justified the reason why, under the terms of Article 57(2) of the Rules of Procedure of the Court, these annexes should be admitted on an exceptional basis, as they are dated prior to the answering brief. The documents are therefore deemed time-barred and inadmissible. The Court also notes that annexes four, five, six, seven, eight, nine and ten are already contained in the Court's case file, as they were submitted as annexes ten, eight, five, one, six and seven, respectively, of the State's answering brief. It is therefore unnecessary to discuss the admissibility of the annexes identified with the numbers four, five, six, seven, eight, nine, and ten, that the State attached to its final written arguments, under the terms of Article 57(2) of the Rules of Procedure.

B. Admissibility of evidence by witnesses and expert witnesses

27. This Court holds admissible the statements rendered in the public hearing[13] and before a public attestor,[14] as they are relevant to the cause of action set in the President's order for submission in the instant case.[15]

VI
FACTS

28. The Court will first consider the scope of the State's recognition of responsibility as it outlines the facts of the case, based on the corpus of facts developed in the Report on the Merits, additional facts narrated by the representatives in their pleadings and motions brief and the evidence contained in the case file, in the following order: (a) the relevant factual framework, (b) background, (c) the process by which Mr. Aguinaga Aillón was appointed to the Supreme Electoral Tribunal, (d) the removal of Mr. Aguinaga Aillón from the Supreme Electoral Tribunal, and (e) the remedies available to counter congressional resolution 25-160.

A. Relevant regulatory framework

Boards of Elections, published in the Official Gazette, No. 115 of January 25, 1999; annex 6: Law on Political Parties, published in the Official Gazette, No. 196 of November 1, 2000; annex 7: Law on Elections, enacted in the Official Gazette, No. 117 of July 11, 2002; annex 8: Basic Law for the Control of Electoral Expenditures and Electoral Advertising, enacted in the Supplement to the Official Gazette No. 41 of March 22, 2000; annex 9: Enabling Regulations for the Law on Elections, issued under resolution 001, published in the Supplement to the Official Gazette No. 39 of March 20, 2000, and annex 10: Rules of Operation for National and Provincial Electoral Organizations, enacted in the Official Gazette No. 366 of July 11, 2001.

[13] The Court received statements in the public hearing by alleged victim Carlos Julio Aguinaga Aillón and by expert witnesses Ruth Hidalgo, brought by the representatives, and Diego Jadán-Heredia, brought by the State. In response to a request made by the Court in the public hearing, on September 1, 2022, the expert witnesses submitted written accounts of their statements, which have been added to the evidence file on the case.

[14] Expert witness Medardo Oleas Rodríguez delivered a statement before a public attestor, which the Court received on September 1, 2022 (evidence file, folios 2745 to 2773).

[15] *Cf. Case of Aguinaga Aillón v. Ecuador. Notice of hearing*. Order of the President of the Inter-American Court of Human Rights, July 19, 2022.

29. The 1998 Constitution of the Republic of Ecuador reads:

Article 119

The institutions of the State, their agencies and departments, and public officials shall have only the powers that are set out in the Constitution and by law, and shall have the obligation to coordinate their actions towards the achievement of the common good. Those institutions so identified by the Constitution and the law shall enjoy organizational and functional autonomy.

[…]

Article 130

The National Congress shall have the following duties and powers:

[…]

To institute impeachment proceedings, at the request of one-fourth of the members of the National Congress, against the President and the Vice President of the Republic, ministers of state, the Comptroller General and Solicitor General, the Ombudsman, the Prosecutor General; superintendents, members of the Constitutional Court and the Supreme Electoral Tribunal, during their term of office and up to one year after their terms have concluded.

The President and Vice President may be subject to impeachment only for the commission of crimes against state security or crimes of extortion, bribery, embezzlement and malfeasance, and they may be censured or dismissed from office only by affirmative vote of two-thirds of the members of Congress. Criminal proceedings are not a requirement for the process to take place.

The other public officers named in this article may be subject to impeachment proceedings for constitutional or legal offenses committed in the performance of their duties. The Congress may censure them if they are found guilty by a majority of its members.

The censure shall produce immediate dismissal from office, with the exception of ministers of state, whose tenure in office shall be determined by the President.

If the censure proceedings should produce evidence of criminal liability by the public officer, the matter shall be turned over to the courts.

11. To appoint […] members of the Constitutional Court and the Supreme Electoral Tribunal, […] to receive their recusal or resignation, and to appoint their replacements.

When new appointments are to be made from a three-person slate, the names of the candidates must be submitted within 20 days after the vacancy occurred. If the slates are not received within this period, the Congress shall proceed with appointments without a slate.

The National Congress shall make its appointments within 30 days after it receives each slate. Otherwise, the person named at the top of the slate shall be held as appointed.

Article 199

The organs of the judiciary shall be independent in the exercise of their duties and powers. No State function may interfere in matters inherent to the judiciary. Judges and justices shall be independent in the performance of their judicial powers even from other judicial bodies; they shall be subject only to the Constitution and laws.

Article 209

The Supreme Electoral Tribunal, headquartered in Quito and with nationwide jurisdiction, is a public law legal entity. It shall enjoy administrative and financial autonomy to organize and perform its duties of organizing, directing, monitoring, and guaranteeing electoral processes, and issue opinions on statements of account submitted by political parties, political movements, organizations and candidates, concerning the amounts, origin and use of resources employed in electoral campaigns.

Its organization, duties and powers shall be set by law.

It shall be made up of seven regular members, each with alternates, to represent the political parties, movements or alliances that won the highest numbers of votes in the most recent multi-candidate national elections, and these organizations shall submit slates from which the National Congress will elect regular and alternate members.

Members shall be appointed by majority vote of the members of Congress, shall remain in office four years, and shall be eligible for re-election.

[…]

Article 276

The Constitutional Court shall have the power:

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

2. To hear and rule on the unconstitutionality of the administrative acts of all public authorities. The declaration of unconstitutionality shall result in the annulment of the act, although the administrative body may adopt measures necessary to bring it into compliance with the Constitution.

[…]

Article 277

Constitutional motions may be lodged by:

[…]

5. One thousand citizens in the exercise of their political rights, or any individual having received a favorable report from the Ombudsman to the effect that the matter is admissible, in the cases of numerals one and two of this article.[16]

30. The 2000 Law on Elections provided:

Article 13

Electoral organizations hold exclusive authority to settle all matters concerning the enforcement of this law; complaints brought by political participants through their legal representatives, agents or attorneys-in-fact, depending on the case, and the candidates; and the application of sanctions established herein.

Article 17

Members of the Supreme Electoral Tribunal shall enjoy immunity during their term of office, as will members of the provincial boards of elections, from the day the call to elections is published, until 30 days following the verification of the vote count.

[…]

They may not be prosecuted or held in custody, except by prior decision of the Supreme Court in the case of members of the Supreme Electoral Tribunal, or the Provincial High Court of the relevant jurisdiction, in the case of members of provincial boards and poll workers.

[…]

This immunity shall not protect them in case of electoral offenses as set forth in this law, or if caught *in flagrante delicto*.

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[16] *Cf.* Constitution of the Republic of Ecuador, August 11, 1998, Articles 119, 130, 199, 209, 276 and 277 (evidence file, folios 2276, 2278, 2292, 2294, 2307 and 2308).

Article 20

The Supreme Electoral Tribunal, as the highest electoral body, shall:

[…]

(m) Serve as the sole body for settling complaints brought against civil authorities on electoral matters;

[…]

(s) Perform all other duties established by law.

[…]

Article 134.

No authority outside of the electoral organization may intervene directly or indirectly in the operation of the electoral bodies. Therefore, law enforcement agencies may act only in response to orders issued by the presidents and members of the Supreme Electoral Tribunal and the provincial boards of elections and the presidents of polling stations.

[…]

Article 143

Electoral offenses as set forth herein, with the exception of those that are punishable under the Criminal Code, shall be tried by the Supreme Court if they involve members of the Supreme Electoral Tribunal and other persons subject to the jurisdiction of the Supreme Court; by the Supreme Electoral Tribunal in the case of members of provincial electoral boards and other persons subject to the jurisdiction of the provincial high courts, and by the provincial electoral boards in the case of members of polling stations and any other person.

[…]

Article 155.

The following shall be penalized with dismissal from office and suspension of political rights for one year:

[…]

(e) Any authority, officer or civil servant not associated with the electoral organization who interferes with the operation of the electoral organizations.[17]

31. The 1968 Law on the Administrative Jurisdiction reads:

Article 6

The following matters are not under the administrative court system:

[…]

(c) matters that arise from political acts of government

[…]

(d) rulings delivered by electoral organizations.[18]

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[17] *Cf.* Law on Elections, published in the Official Gazette No. 117 of July 11, 2000, Articles 13, 17, 20, 134, 143 and 155 (evidence file, folios 2107 to 2109, 2132, 2133 and 2135).

[18] *Cf.* Law on the Administrative Jurisdiction, Article 6 (evidence file, folio 2009).

B. Background

32. Ecuador had seven different presidents during the years from 1996 to 2007. None of them completed the four-year term mandated in the Constitution. From the time Abdalá Bucaram was elected president in 1996 until Rafael Correa took office in 2007, Ecuador had the following presidents, in chronological order: Abdalá Bucaram (1996 - 1997), Rosalía Arteaga (February 1997), Fabián Alarcón (February 1997 – August 1998), Jamil Mahuad (August 1998 – January 2000), Gustavo Noboa (January 2000 – January 2003), Lucio Gutiérrez (January 2003 – April 2005) and Alfredo Palacio (April 2005 – January 2007).[19]

33. Over the years, structural reforms and changes to the composition of the high courts have been frequent in Ecuador. The high courts have at times been taken over by political authorities, such that, "[i]n Ecuador, the independence of the Supreme Court of Justice has been compromised and the institution exploited throughout its history."[20]

34. This case occurred in the context of dismissals from the Constitutional Court, the Supreme Electoral Tribunal and the Supreme Court of Ecuador, in November and December, 2004. The Court has already addressed these dismissals in the cases of T*he Supreme Court of Justice (Quintana Coello et al.) v. Ecuador* and *The Constitutional Court (Camba Campos et al.) v. Ecuador.*[21] The dismissals were conducted by the National Congress over the course of 14 days in an atmosphere of political instability (*infra* paras. 82 to 86). The instant case will focus on dismissals of the members of the Supreme Electoral Tribunal.

C. The process by which Mr. Aguinaga Aillón was appointed to the Supreme Electoral Tribunal

35. Article 209 of the 1998 Constitution states that the Supreme Electoral Tribunal is to be made up of seven regular members and seven alternates, representing the political parties that won the highest number of votes in multi-candidate elections; the parties submit to the National Congress the slates from which the regular and alternate members are to be selected.[22]

36. The National Congress named regular and alternate members of the TSE for the term running from 1998 through 2003 on December 2, 1998. The congressional resolution appointed Carlos Julio Aguinaga Aillón to serve as a regular member of the TSE.[23]

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[19] *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador. Preliminary Objection, Merits, Reparations and Costs.* Judgment of August 23, 2013. Series C No. 266, para. 39, and *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, para. 40.

[20] *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador, supra*, para. 40, and *Case of the Constitutional Court (Camba Campos et al.) v. Ecuador*, *supra*, para. 41.

[21] *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador,* paras. 42 to 62, and *Case of the Constitutional Court (Camba Campos et al.) v. Ecuador*, *supra*, paras. 43 to 48.

[22] *Cf.* Constitution of the Republic of Ecuador, August 11, 1998, Article 209 (evidence file, folio 2294).

[23] *Cf.* Resolution of appointment of Mr. Aguinaga Aillón as a member of the TSE, December 2, 1998 (evidence file, folio 1783).

37. The TSE held its inaugural session on December 3, 1998, electing Mr. Aguinaga Aillón Vice President,[24] and he was elected President on December 7, 2000.[25] The National Congress re-elected Mr. Aguinaga Aillón to serve as a regular member of the TSE on January 9, 2003, for an additional four-year term,[26] and he took office on January 14, 2003.[27]

D. Dismissal of Mr. Aguinaga from the Supreme Electoral Tribunal

38. The opposition parties in the National Congress were engaged on November 9, 2004, in preparing impeachment proceedings against the President of Ecuador for the crime of embezzlement. The administration counteracted the impeachment proceedings by building a congressional majority and working out political agreements with several parties, including the Ecuadorian Roldosist Party (*Partido Roldosista Ecuatoriano*, hereinafter PRE). The leader of the PRE, former President of Ecuador Abdalá Bucaram Ortiz, sought the suspension of several criminal trials currently pending before the Supreme Court, for which he was under an arrest warrant and was a fugitive in Panama.[28]

39. President Lucio Gutiérrez announced on November 23, 2004, that the administration would send the Congress a proposal to reorganize the Constitutional Court, the Supreme Electoral Tribunal, and the Supreme Court.[29]

40. The National Congress issued Resolution 25-160 on November 25, 2004, removing the regular members from their positions on the Supreme Electoral Tribunal and the Constitutional Court. The "whereas" clauses of the congressional resolution read as follows:

> [...]
>
> That the people of Ecuador are unanimous in demanding the end of the situation of institutional chaos prevailing in the public institutions;
> That the regular and alternate members of the Constitutional Court were appointed illegally;
>
> That the regular and alternate members of the Supreme Electoral Tribunal were appointed without consideration of the provisions of Article 209 of the Constitution and laws of Ecuador [...][30].

41. The Congress therefore ordered, as applied to this case:

> [...]

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24 *Cf.* Certification, November 15, 1999 (evidence file, folio 1785).

25 *Cf.* Certification, February 1, 2001 (evidence file, folio 1787).

26 *Cf.* Resolution of appointment as a regular member, January 9, 2003 (evidence file, folio 1789).

27 *Cf.* Record of investiture, January 14, 2003 (evidence file, folio 1791).

28 *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador, supra*, para. 64, and *Case of the Constitutional Court (Camba Campos et al.) v. Ecuador*, *supra*, para. 55.

29 *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador, supra*, para. 65, and *Case of the Constitutional Court (Camba Campos et al.) v. Ecuador, supra*, para. 56.

30 *Cf.* Resolution R-25-160 of the National Congress, November 25, 2004, published in the Official Gazette No. 378 (evidence file, folios 1795 and 1796).

> 1.- To declare that the titular members of the Constitutional Tribunal and their alternates were appointed in an illegal manner and to proceed to appoint them pursuant to the provisions of the Constitution of the Republic and the law, from the names provided on the slates duly received by the National Congress.
>
> To designate the two titular members of the Constitutional Tribunal and their alternates that the National Congress must appoint directly. Those appointed must be sworn in before the Speaker and/or either of the Deputy Speakers of the National Congress and shall remain in office until they are legally replaced in January 2007.
>
> 2. To declare dismissal of the regular and alternate members of the Supreme Electoral Tribunal because they were appointed without consideration for the provisions of Article 209 of the Constitution of Ecuador, regarding the means of appointment, and to proceed to appoint members pursuant to this constitutional text, based on the outcome of the October 20, 2002, elections.
>
> 3. This resolution shall enter into force immediately, without prejudice to its publication in the official gazette [...].[31]

42. On November 26, 2004, the Congress appointed new regular and alternate members to the Supreme Electoral Tribunal. The Congress also issued Resolutions R-25-161, 162, 163, 164, 165, 166, 167, 168 and 169, appointing regular and alternate members to the Constitutional Court.[32] Finally, the Congress adopted Resolution R-25-181, formally dismissing all the justices from the Supreme Court, including pro tem judges, and appointing new justices.[33]

E. Remedies available to challenge Congressional Resolution 25-160

43. The Supreme Court issued Ruling 01-027 on June 27, 2001, holding that it could not admit the motions for constitutional relief and should deny them outright when addressing, inter alia, "[l]egislative acts issued by a public authority, such as organic and ordinary laws, decree-laws, executive orders, ordinances, statutes, regulations and decisions that are binding (*erga omnes*), because, in order to suspend their effects owing to violation of the Constitution, in substance or in form, the action on unconstitutionality is the appropriate mechanism, and this must be filed before the Constitutional Court.[34]

44. The Constitutional Court, made up of the regular members appointed after the Congress adopted Resolution 25-160, adopted a ruling on December 2, 2004, in response to a request from the President "to prevent trial judges from admitting constitutional motions against Congressional Resolution 25-160, adopted by the […] National Congress on November 25, 2004." The ruling held that:

> […] the only admissible action to suspend the effects of a congressional resolution, including No. 25-160 adopted by the National Congress on November 25, 2004, for the alleged violation of the Constitution, in substance or in form, is a motion of unconstitutionality that must be filed before the Constitutional Court […], and if any such constitutional remedy against this resolution should be filed in the country's lower courts, it must be rejected outright by the judges and not admitted, because otherwise they would be hearing a case contrary to an

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31 *Cf.* Resolution R-25-160 of the National Congress, November 25, 2004, published in the Official Gazette No. 378 (evidence file, folios 1,795 and 1,796).

32 *Cf. Case of the Constitutional Court (Camba Campos et al.) v. Ecuador, supra*, paras. 63 and 64.

33 *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador, supra*, paras. 83 to 86.

34 *Cf.* Ruling of the Supreme Court delivered on July 27, 2001 (evidence file, folio 1804).

explicit law and this would be liable to judicial action."[35]

45. Several of the dismissed regular members of the Constitutional Court lodged constitutional motions that were denied under the terms of the December 2, 2004 ruling.[36] Mr. Aguinaga Aillón did not lodge a constitutional motion.[37]

VII
MERITS

46. The Court will examine the scope of the State's international responsibility in the instant case for the dismissal of Carlos Julio Aguinaga Aillón as a regular member of the Supreme Electoral Tribunal of Ecuador under National Congress Resolution 25-160 (*supra* paras. 40 and 41). The Court takes note that the State recognized its international responsibility for violating the right to judicial guarantees and the right to judicial protection enshrined in Articles 8 and 25 of the American Convention, read in conjunction with Articles 1(1) and 2 thereof, in injury of Mr. Aguinaga Aillón. The Court will nevertheless address the arguments on violation of these rights, for the reasons discussed above (*supra* para. 22). The Court will also examine whether the State is responsible for violating Mr. Aguinaga Aillón's guarantee of judicial independence, freedom from ex post facto laws, right to participate in government, and right to work, protected under Articles 8(1), 9, 23(1)(c) and 26 of the American Convention, for all of which the State has not acknowledged international responsibility.

VII-1
RIGHT TO JUDICIAL GUARANTEES, RIGHT TO PARTICIPATE IN GOVERNMENT, RIGHT TO WORK, AND RIGHT TO JUDICIAL PROTECTION, READ IN CONJUNCTION WITH THE OBLIGATION TO RESPECT RIGHTS AND THE OBLIGATION TO ADOPT DOMESTIC LEGAL EFFECTS

A. Arguments of the parties and observations of the Commission

A.1. Arguments on judicial independence, judicial guarantees, freedom from ex post facto laws, and right to participate in government

47. Before giving its arguments of law, the ***Commission*** pointed out that, regardless of the organizational placement of the TSE in the government's institutional structure, it was an authority that exercised materially judicial duties. This meant that Mr. Aguinaga Aillón performed judicial duties in the field of elections and therefore was subject to reinforced guarantees of judicial irremovability, according to which judges can be dismissed only upon completion of their term of office or for causes attributed to their behavior through a process that respects the guarantees of due process. The Commission noted, in this case, that Mr. Aguinaga Aillón had been dismissed from his position as a member of the Supreme Electoral Tribunal per a decision by the legislature explicitly intended to correct an appointment that was allegedly contrary to the legal system. It explained that "the punitive nature of this act of state and the resulting decision on applicable guarantees did not arise, as in other cases, from a formal process,"

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35 *Cf.* Resolution of the Constitutional Court, December 2, 2004, published in the Official Gazette No. 477 (evidence file, folios 1809).

36 *Cf. Case of the Constitutional Court (Camba Campos et al.) v. Ecuador, supra*, para. 102.

37 *Cf.* Statement in public hearing by Mr. Aguinaga Aillón, September 8, 2022, during the 151st session.

but rather was the adoption of a de facto sanction. The case should therefore be analyzed in light of the guarantees enshrined in Articles 8 and 9 of the Convention.

48. The Commission also emphasized that disciplinary processes pursued against justice operators should be respectful of the principle of judicial independence. The Commission argued that "the right to judicial independence enshrined in Article 8(1) of the Convention is violated" when the job tenure of judges is arbitrarily jeopardized. The Commission thus argued that the State had dismissed Mr. Aguinaga Aillón from his position arbitrarily via a procedure not established in domestic legislation, providing no opportunity whatsoever to be heard or to offer a defense, and through the use of powers not available to the National Congress. The Commission argued that this was a violation of the principle of judicial independence, the principle of freedom from ex post facto laws, and the right of access to a competent authority previously established by law, in the terms of Articles 8(1) and 9 of the American Convention, read in conjunction with Article 1(1) thereof, in injury of Mr. Aguinaga Aillón. The Commission also concluded that the State had violated Articles 8(2)(b) and 8(2)(c) of the American Convention, read in conjunction with Article 1(1) thereof, in injury of Mr. Aguinaga Aillón.

49. The ***representatives*** argued that the duties of the Supreme Electoral Tribunal were judicial, as is clear in the 2000 Law on Elections. They held, accordingly, that the members of the TSE were covered by the guarantees derived from judicial independence, including proper appointment processes and judicial irremovability and the guarantee against external pressures. They added that, as the Court has said, there is a direct relationship between the guarantee of judicial stability and irremovability, and the right to remain in public service with equal protection of the right to participate in government under Article 23 of the Convention. The representatives argued, in this specific case, that Mr. Aguinaga Aillón had been dismissed by the action of an institution that was not qualified to do so, using a procedure not established in the domestic legal system, which should thus be considered an arbitrary dismissal that also unduly prejudiced his right to remain in office under conditions of equality and the principle of freedom from ex post facto laws. The representatives therefore concluded that State was responsible for violating Articles 8(1), 9, and 23(1) of the American Convention.

50. They argued that at the time of the facts, there had been only two procedures available to the National Congress for dismissing members of the Supreme Electoral Tribunal: (a) impeachment and (b) investigation. Both procedures, following due process, could culminate in the dismissal of members. Neither process had been pursued in Mr. Aguinaga's case, but instead, the dismissal was immediate, resulting from a resolution adopted by an internal vote in the National Congress. There had been no advance notice, no disciplinary action was taken against him, the alleged victim had not been heard and was thus unable to exercise his right to defense, and no grounds were given for the decision. The representatives concluded that the minimum guarantees set forth in Article 8(2)(b) and (c) of the American Convention had been violated in injury of Mr. Aguinaga. They further clarified the nature of the TSE in their final written arguments, holding that Mr. Aguinaga Aillón should have been granted the same guarantees as judges generally.

51. The ***State*** acknowledged its international responsibility for violating Article 8 of the Convention. It argued, however, that under the 1998 Constitution, the TSE was legally an administrative body. For this reason, it explained, the Court's analysis of the instant case required a detailed analysis of the arguments and consequences on judicial independence in comparison with the cases of *The Supreme Court of Justice (Quintana Coello et al.) v. Ecuador* and *The Constitutional Court (Camba Campos et al.) v. Ecuador.*

The State then discussed the substance of the case, pointing out that there was no evidence that agents of the State had committed any action or omission when proceedings were initiated to impeach Mr. Aguinaga Aillón, and therefore the State was not responsible for violating Article 9 of the Convention. The State also held that there had been no violation of Mr. Aguinaga Aillón's rights under Article 23 of the Convention regarding his participation in the conduct of public affairs or his participation in elections. It noted, specifically that Mr. Aguinaga could still have been appointed to a position as a public official at any level of responsibility or could have participated freely in electoral processes in Ecuador.

A.2. Arguments on the right to appeal the decision and the right to judicial protection

52. The ***Commission*** said that Mr. Aguinaga Aillón had no mechanism available for challenging the decision on his dismissal, for two basic reasons. First, given that the dismissal procedure had not been established by law, there were no remedies available to challenge it. Second, the State had issued an order to block the possibility of lodging a remedy of *amparo* against the congressional resolution. The only available remedy would have been a motion of *amparo* for constitutional relief, to be adjudged by the new Constitutional Court appointed as a consequence of the same congressional resolution, 25-060, but this automatically nullified any possibility of obtaining an impartial, effective decision, because such a case would have challenged the constitutionality of the very action by which the court itself had been appointed. The Commission found, therefore, that the State had violated Articles 8(2)(h) and 25(1) of the American Convention, read in conjunction with the obligations set forth in Articles 1(1) and 2 thereof, in injury of Mr. Aguinaga Aillón.

53. The ***representatives*** said that a remedy of *amparo* offered no effective protection because two resolutions had blocked the possibility of lodging such a remedy. The first was Supreme Court Order 01-027, of June 27, 2001, limiting the scope of constitutional motions and stipulating that they were out of order and should be denied outright if lodged against acts of government. The second was a decision by the Constitutional Court finding that the only remedy available for suspending the effects of Congressional Resolution 25-160 (dismissal of the members) was a constitutional motion. The representatives argued that this order made the remedy itself ineffective, because the members of the Constitutional Court had also been dismissed. This eliminated all impartiality and made it materially impossible to lodge such a remedy. They held, therefore, that Mr. Aguinaga Aillón had no access to an effective judicial remedy to protect his rights, which in turn was a violation of Convention Article 25.

54. The ***State*** admitted its international responsibility for violation of Articles 8 and 25 of the Convention.

B. Considerations of the Court

55. The State acknowledged its international responsibility for having violated Articles 8 and 25 by dismissing Mr. Aguinaga Aillón from his position as a member of the TSE, and because no mechanism existed to appeal the decision by which this dismissal had been effected (*supra* para. 14). It held, nonetheless, that the TSE was an administrative body by nature, not a judicial institution, and that the claims by the Commission and the representatives that the dismissal was a violation of judicial independence did not apply to the instant case. The Court, for this reason and in view of the broad implications of the State's argument for the analysis of the case, will begin its discussion of the merits by

judging whether the principle of judicial independence was applicable to the members of Ecuador's TSE at the time of the facts.

56. It cautions that, pursuant to Article 209 of Ecuador's 1998 Constitution, one of the tasks of the TSE was to "[i]ssue opinions on statements of account submitted by political parties, political movements, organizations and candidates, concerning the amounts, origin and use of resources employed in electoral campaigns."[38] Moreover, the 2000 Law on Elections empowered the TSE to settle disputes on the application of this law,[39] to "[s]erve as the sole body for settling complaints brought against civil authorities on electoral matters,"[40] and to adjudicate offenses "in the case of members of provincial electoral boards and other persons subject to the jurisdiction of the provincial high courts […]."[41] The Law on the Administrative Jurisdiction specified that "[r]ulings delivered by electoral organizations" were not under the administrative court system.[42]

57. Expert witness Ruth Hidalgo stated in her declaration: "[…] [t]he Supreme Electoral Tribunal at that time held material jurisdiction and was authorized to rule on electoral accounts; it adjudicated electoral offenses as provided by the Law on Elections and the Law on Electoral Expenditures in effect in 2004, […] it handled motions of grievance and motions of review, examined statements of account and ruled on offenses by political parties." Expert witness Oleas Rodríguez said, "the Electoral Law assigned exclusive jurisdiction to the electoral organizations, and their decisions were binding; it stated that the members of these bodies were legally mandated to perform their duties, and they could be sanctioned with suspension of political rights if they failed to do so."[43] Expert witness Diego Jadán Heredia said in the public hearing that it was the task of the TSE to announce the outcome of elections, and its announcements were final and unappealable.[44]

58. The Court also cautions that, under the Law on Elections, members of the TSE enjoyed "immunity during their term of office" and "[t]hey may not be prosecuted or held in custody, except by prior decision of the Supreme Court […]."[45] The law also stipulated that "[n]o authority from outside the electoral organization may intervene directly or indirectly in the operation of the electoral bodies,"[46] and similarly, that any authority not associated with the electoral organizations who interfered with elections

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38 *Cf.* Constitution of the Republic of Ecuador, August 11, 1998, Article 209 (evidence file, folio 2294).

39 *Cf.* Law on Elections, published in the Official Gazette No. 117 of July 11, 2000, Article 13 (evidence file, folio 2106).

40 *Cf.* Law on Elections, published in the Official Gazette No. 117 of July 11, 2000, Article 20 (evidence file, folio 2108).

41 *Cf.* Law on Elections, published in the Official Gazette No. 117 of July 11, 2000, Article 143 (evidence file, folio 2133).

42 *Cf.* Law on the Administrative Jurisdiction, Article 6 (evidence file, folio 2009).

43 *Cf.* Written expert witness statement by Medardo Oleas Rodríguez, delivered by affidavit before a public attestor, pg. 3 (evidence file, folio 2756).

44 *Cf.* Expert witness statement by Diego Jadán Heredia, delivered at public hearing on September 8, 2022, during the 151st regular session.

45 *Cf.* Law on Elections, published in the Official Gazette No. 117 of July 11, 2000, Article 17 (evidence file, folio 2107).

46 *Cf.* Law on Elections, published in the Official Gazette No. 117 of July 11, 2000, Article 134 (evidence file, folio 2132).

could be sanctioned with "dismissal from office and suspension of political rights."[47] Expert witness Oleas Rodríguez explained that, as in the case of the Constitutional Court and the Supreme Court, members of the TSE could be dismissed only "following impeachment proceedings," which the Congress was empowered to conduct under Article 130 of the Constitution.[48]

59. This Court holds, therefore, that although the TSE did perform administrative, organizational, and management duties for electoral processes,[49] it was also tasked with hearing and adjudging matters pertaining to electoral justice. The Court concludes that the TSE conducted materially judicial functions in the sphere of elections, and its members, such as Mr. Aguinaga Aillón, therefore enjoyed the same guarantees of judicial independence as judges generally, given the materially judicial nature of their duties.

B.1 Judicial independence, judicial guarantees, the right to participate in government, and the right to work

60. In view of all this, and considering the State's recognition of responsibility, the Court will now examine whether the procedure followed by the National Congress was consistent with the obligations set forth in the American Convention for judicial independence in connection with the right to judicial guarantees and the right to participate in government. The Court will begin by reiterating the fundamental standards on judicial independence developed in its own case law. On the basis of these standards, it will then proceed to examine the breaches of Mr. Aguinaga Aillón's right to judicial guarantees and give its views on the alleged violations of the principle of freedom from ex post facto laws and his right to participate in government.

1. Judicial independence

61. This Court has ruled on multiple occasions concerning the importance of judicial independence under the rule of law.[50] It has held, in its settled case law, that this is one

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47 *Cf.* Law on Elections, published in the Official Gazette No. 117 of July 11, 2000, Article 155(e) (evidence file, folio 2135).

48 *Cf.* Written expert witness statement by Medardo Oleas Rodríguez, delivered by affidavit before a public attestor, pg. 5 (evidence file, folio 2758).

49 *Cf.* Written expert witness statement by Diego Jadán-Heredia, delivered by affidavit before a public attestor, pp. 3 and 4 (evidence file, folios 2723 and 2723).

50 *Cf. Inter alia*, *Case of the Constitutional Court v. Peru. Merits, Reparations and Costs.* Judgment of January 31, 2001. Series C No. 71, paras. 73 to 75; *Case of Palamara Iribarne v. Chile. Merits, Reparations and Costs.* Judgment of November 22, 2005. Series C No. 135, paras. 145 and 156; *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, paras. 43 to 45, 84 and 138; *Case of Reverón Trujillo v. Venezuela. Preliminary Objection, Merits, Reparations and Costs.* Judgment of June 30, 2009. Series C No. 197, paras. 67, 68, 70 to 81; *Case of Chocrón Chocrón v. Venezuela. Preliminary Objection, Merits, Reparations and Costs.* Judgment of July 1, 2011. Series C No. 227, paras. 97 to 100; *Case of Atala Riffo and daughters v. Chile. Merits, Reparations and Costs.* Judgment of February 24, 2012. Series C No. 239, para. 186; *Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador. Preliminary Objection, Merits, Reparations and Costs.* Judgment of August 23, 2013. Series C No. 266, paras. 144 to 154; *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, paras. 188 to 198; *Case of Argüelles et al. v. Argentina. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 20, 2014. Series C No. 288, para. 147; *Case of López Lone et al. v. Honduras. Preliminary Objection, Merits, Reparations and Costs.* Judgment of October 5, 2015. Series C No. 302, paras. 190 to 199; *Case of Valencia Hinojosa et al. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 29, 2016. Series C No. 327, para. 105; *Case of Acosta et al. v. Nicaragua. Preliminary Objections, Merits, Reparations and Costs.* Judgment of March

of the "basic pillars of the guarantees of due process,"[51] so that when a judge's tenure in office is disrupted arbitrarily, the right to judicial independence established in Article 8(1) of the Convention is violated.[52]

62. The Court has stated that one of the principal purposes of the separation of public powers is indeed to guarantee the independence of judicial authorities.[53] It has also stressed that the autonomous exercise of judicial work must be guaranteed by the State both in its institutional aspect, that is, regarding the judiciary as a system, and its individual aspect, that is to say, concerning the person of the specific judge. The purpose of such protection lies in preventing the judicial system in general, and its members in particular, from finding themselves subjected to possible undue limitations in the exercise of their functions by bodies alien to the judiciary or even by persons holding review or appellate positions.[54]

63. Consequently, there is a direct relationship between the institutional dimension of judicial independence, and the right of judges to accede to and remain in their posts under general conditions of equality.[55] The Court has therefore held that judicial independence produces the following guarantees for the office of judicial authorities: (i) an appropriate appointment process, (ii) stability and irremovability in office, and (iii) protection from external pressures.[56]

64. The Court would also address the implications of the guarantee of job stability and irremovability for these authorities, as follows: (i) removal from office may be effected exclusively on allowable grounds, whether through a process that offers judicial guarantees, or because the term of office has ended; (ii) judges may be dismissed only for serious disciplinary breaches or incompetence, and (iii) all actions against judges must be settled pursuant to established standards of judicial conduct and by means of

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25, 2017. Series C No. 334, para. 171; *Case of San Miguel Sosa et al. v. Venezuela. Merits, Reparations and Costs.* Judgment of February 8, 2018. Series C No. 348, para. 207; *Case of Colindres Schonenberg v. El Salvador. Merits, Reparations and Costs.* Judgment of February 4, 2019. Series C No. 373, paras. 68 and 69; *Case of Villaseñor Velarde et al. v. Guatemala. Merits, Reparations and Costs.* Judgment of February 5, 2019. Series C No. 374, paras. 75, 83 and 84; *Case of Rico v. Argentina. Preliminary Objection and Merits.* Judgment of September 2, 2019. Series C No. 383, paras. 54, 55 and 56; *Case of Urrutia Laubreaux v. Chile. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 27, 2020. Series C No. 409, paras. 104 to 110; *Case of Cordero Bernal v. Peru. Preliminary Objection and Merits.* Judgment of February 16, 2021. Series C No. 421, paras. 71 and 72; and *Case of Ríos Avalos et al. v. Paraguay. Merits, Reparations and Costs.* Judgment of August 19, 2021. Series C No. 429, para. 85.

[51] *Cf. Case of Reverón Trujillo v. Venezuela*, *supra*, para. 68, and *Case of Ríos Avalos et al. v. Paraguay*, *supra,* para. 85. See also, Universal Declaration of Human Rights, Article 10; International Covenant on Civil and Political Rights, Article 14.1; European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6.1, and African Charter on Human and Peoples' Rights, Article 26.

[52] *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, *supra*, para. 155, and *Case of Ríos Avalos et al. v. Paraguay*, *supra,* para. 85.

[53] *Cf. Case of the Constitutional Court v. Peru*, *supra*, para. 73, and *Case of Ríos Avalos et al. v. Paraguay*, para. 86.

[54] *Cf. Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, *supra*, para. 55, and *Case of Ríos Avalos et al. v. Paraguay*, para. 86.

[55] *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, *supra*, para. 154, and *Case of Ríos Avalos et al. v. Paraguay*, *supra,* para. 87.

[56] *Cf. Case of the Constitutional Court v. Peru*, *supra*, para. 75; *Case of Reverón Trujillo v. Venezuela*, *supra*, para. 70, and *Case of Ríos Avalos et al. v. Paraguay*, *supra,* para. 87.

fair, objective, impartial proceedings, under the Constitution or laws.[57] This is mandatory, because the fact that judges may be removed from office at will arouses objective concerns about whether they are able to perform their duties without fear of reprisal.[58]

65. All this is based on the important role played by the judiciary in a democracy[59] as the guarantor of human rights,[60] which is why judges must be independent, especially from other branches of government, and this independence must be explicit and safeguarded;[61] otherwise, their work could be so hindered as to render them unable to adjudge, declare and ultimately sanction the arbitrary nature of acts that could entail

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57 *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, *supra*, para. 155; *Case of López Lone et al. v. Honduras*, *supra*, para. 192, and *Case of Ríos Avalos et al. v. Paraguay*, *supra,* para. 88.

58 *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, *supra*, para. 44, and *Case of Ríos Avalos et al. v. Paraguay*, *supra,* para. 88.

59 *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador, supra*, para. 154, and *Case of Ríos Avalos et al. v. Paraguay*, *supra,* para. 89. The United Nations General Assembly has declared, in this regard, that "the independence of the judicial system, together with its impartiality and integrity, is an essential prerequisite for upholding the rule of law." United Nations General Assembly Resolution A/RES/67/1, September 24, 2012. The then-United Nations Commission on Human Rights stated in 2002 that the "essential elements of democracy" included respect for human rights and fundamental freedoms and the independence of the judiciary. United Nations Commission on Human Rights, "Further measures to promote and consolidate democracy," Resolution of the 58th session, U.N. Doc. E/CN.4/RES/2002/46, April 23, 2002, para. 1. The Human Rights Council has also held that the independence of the judicial system "is an essential prerequisite for the protection of human rights and fundamental freedoms, for upholding the rule of law and democracy." Human Rights Council, "Integrity of the judicial system," A/HRC/37/L.11/Rev.1, and "Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers," A/HRC/44/L.7, July 10, 2020. The European Court of Human Rights has held, similarly, that "judicial independence [is] one of the most important values underpinning the effective functioning of democracies." ECtHR, *Oleksandr Volkov v. Ukraine* - 21722/11. Judgment of January 9, 2013, para. 199.

60 Then-United Nations Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, stated, "[i]n any democratic society, judges are the guardians of rights and fundamental freedoms. Judges and courts undertake the judicial protection of human rights, ensure the right of appeal, combat impunity and ensure the right to reparation." Commission on Human Rights, Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, Doc. E/CN.4/2004/60, December 31, 2003, para. 30.

61 *Cf. Case of Palamara Iribarne v. Chile*, *supra*, para. 145, and *Case of Ríos Avalos et al. v. Paraguay*, *supra*, para. 89. The European Court of Human Rights has stated, "[t]he mission of the judiciary in a democratic state is to guarantee the very existence of the rule of law." ECtHR, *Harabin v. Slovakia,* no. 58688/11, Judgment of November 20, 2012, para. 133. It has held that the courts of law in a democratic society must be free of any political pressure. Its settled case law has consistently ruled that judicial independence necessarily requires assured irremovability of judicial authorities, who must have "guarantees to shield them from outside pressures," and this, in turn, requires consideration of the means by which they are appointed and the length of their mandate. *Cf. Inter alia,* ECtHR, *Ringeisen v. Austria*, no. 2614/65, 16 July 1971, para. 95; *Le Compte, Van Leuven and De Meyêre v. Belgium* [GS], no. 6878/75, 23 June 1981, para. 55; *X v. United Kingdom*, no. 7215/75, 5 November 1981, para. 53; *Piersack v. Belgium*, no. 8692/79, 1 October 1982, para. 27; *Campbell and Fell v. United Kingdom*, no. 7819/77, 28 June 1984, paras. 78 and 80; *Langborger v. Sweden* [GS], no. 11179/84, 22 June 1989, para. 32; *Stran Greek Refineries and Stratis Andreadis v. Greece*, no. 13427/87, 9 December 1994, para. 49; *Bryan v. United Kingdom*, no. 19178/91, 22 November 1995, para. 37; *Findlay v. United Kingdom*, no. 22107/93, 25 February 1997, para. 73; *Papageorgiou v. Greece*, no. 97/1996/716/913, 22 October 1997, para. 37; *Incal v. Turkey* [GS], no. 41/1997/826/1031, 9 June 9, 1998, para. 65; *Galstyan v. Armenia*, no. 26986/03, 15 November 2007, para. 62; *Guja v. Moldavia* [GS], no. 14277/04, 12 February 2008, para. 86; *Henryk Urban and Ryszard Urban v. Poland*, no. 23614/08, 30 November 2010, para. 45; *Khrykin v. Russia*, no. 33186/08, 19 April 2011, para. 30; *Fruni v. Slovakia*, no. 8014/07, 21 June 2011, para. 145; *Oleksandr Volkov v. Ukraine,* no. 21722/11, 9 January 2013, para. 103; *Maktouf and Damjanović v. Bosnia and Herzegovina* [GS], no. 2312/08 and 34179/08, 18 July 2013, para. 49; *Baka v. Hungary* [GS], no. 20261/12, 23 June 2016, para. 108; *Denisov v. Ukraine* [GS], no. 76639/11, 25 September 2018, para. 60; *Gudmundur Andri Ástrádsson v. Iceland* [GS], no. 26374/18, 1 December 2020, para. 232, and *Xhonxhaj v. Albania*, no. 15227/19, February 9, para. 298.

violations of those rights, or to order relevant redress.[62]

66. The Court has also found that the guarantee of judicial independence "includes a guarantee against external pressures, and therefore the State must refrain from undue interference with the Judicial Branch or its members" and take action to prevent such interference from being committed by persons or entities outside the judiciary. Likewise, the Court has held that "the United Nations Basic Principles [on the Independence of the Judiciary] provides that the Judiciary 'shall decide matters before them [...] without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.'" Moreover, "the Principles establish that '[t]here shall not be any inappropriate or unwarranted interference with the judicial process.'"[63]

67. Dating back to *Velásquez Rodríguez v. Honduras*, this Court has held that the obligation to guarantee, pursuant to Article 1(1) of the Convention implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights.[64] As part of this duty to guarantee, judicial independence stands out as an essential feature in the organization of the government apparatus, without which the State is unable to ensure the free and full enjoyment of rights.[65] A corollary to this precept is that judicial independence is indispensable for the protection and effective guarantee of human rights.[66]

68. It is unquestionable that absent judicial independence, there can be no rule of law, nor can democracy exist (Article 3 of the Inter-American Democratic Charter[67]), because judges must have appropriate and sufficient guarantees to perform their duties of resolving the conflicts that arise in society, in keeping with the legal framework. The lack

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62 The Court has held that judicial independence "is not a 'privilege' for judges or an end in itself, but has a clear rationale for enabling judges to discharge their duties effectively." *Cf. Case of Villaseñor Velarde et al. v. Guatemala*, *Merits, Reparations and Costs.* Judgment of February 5, 2019. Series C No. 374, para. 130.

63 *Cf. Case of Villaseñor Velarde et al. v. Guatemala, supra,* para. 84.

64 *Cf. Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4, para. 166.

65 Former United Nations Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, said, "as the enforcement of human rights ultimately depends upon the proper administration of justice, an independent, competent and impartial justice system is paramount if it is to uphold the rule of law." *Cf*. Commission on Human Rights, Report of the Special Rapporteur on the independence of judges and lawyers, Doc. A/HRC/26/32, April 28, 2014, para. 3 See also, Commission on Human Rights, Report of the Special Rapporteur on Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers, Param Cumaraswamy, Doc. E/CN.4/1995/39, February 6, 1995, para. 100, and y General Assembly, Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, Doc. A/69/2/94, August 11, 2014, para. 28. Moreover, the Consultative Council of European Judges has stated, "[j]udicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial[; j]udges are 'charged with the ultimate decision over life, freedoms, rights, duties and property of citizens.'" *Cf.* Consultative Council of European Judges, Opinion No. 1 for the attention of the Committee of Ministers of the Council of Europe on standards concerning the independence of the judiciary and the irremovability of judges (Recommendation No R (94) 12 on the independence, efficiency and role of judges and the relevance of its standards and any other international standards to current problems in these fields), November 23, 2011, para. 10.

66 *Cf. Habeas corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights).* Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, para. 30; *Case of Reverón Trujillo v Venezuela*, *supra*, para. 68, and *Case of Villaseñor Velarde et al. v. Guatemala*, *supra*, para. 75.

67 *Cf.* General Assembly of the OAS, Inter-American Democratic Charter, Resolution AG/RES. 1 (XXVIII-E/0(1), September 11, 2001.

of independence and of respect for judicial authority is synonymous with arbitrariness.

69. Not only is judicial independence broadly guaranteed both internationally[68] and regionally,[69] but it has also been proclaimed in the constitutions of the States that have recognized the contentious jurisdiction of the Inter-American Court, whether expressly or through the inclusion of specific safeguards intended to protect it.[70]

70. Similarly, the Court finds it fitting to stress that the guarantee of judicial independence for electoral organizations is an indispensable feature of a democratic

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[68] *Cf.* United Nations Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan, August 26, to September 6, 1985, endorsed by the General Assembly in Resolution 40/32 of November 29, 1985 and Resolution 40/146 of December 13, 1985, Principles 1, 2, 12 and 18, and the Bangalore Principles of Judicial Conduct, drafted by the Judicial Group on Strengthening Judicial Integrity, made up of chief justices and senior judges, at the invitation of the United Nations International Center for the Prevention of Crime, and in the framework of the Global Program Against Corruption, annexed to Resolution 2006/23 of July 27, 2006, of the United Nations Council on Economic and Social Rights, Principle 1 and Application 1.1. The Human Rights Committee has stated, "States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making." Human Rights Committee, General Comment No. 32, Article 14. Right to equality before courts and tribunals and to fair trial, August 23, 2007, Doc. CCPR/C/GC/32, August 23, 2007, para. 19.

[69] *Cf.* Council of Europe, Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges, adopted on October 13, 1994, principles I.1., I.2,b. and d., and I.3, and European Charter on the statute for judges (DAJ/DOC (98) 23), 1998, para. 1.1. See also, Consultative Council of European Judges, Opinion No. 1 for the attention of the Committee of Ministers of the Council of Europe on standards concerning the independence of the judiciary and the irremovability of judges (Recommendation No R (94) 12 on the independence, efficiency and role of judges and the relevance of its standards and any other international standards to current problems in these fields) 1998, para. 60; Opinion no. 3 to the attention of the Committee of Ministers of the Council of Europe "incompatible behaviour and impartiality, 2002, para. 16, and Magna Carta of Judges (Fundamental Principles), adopted at the 11th plenary meeting, Strasbourg, November 17, 2010, principle 10. The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa stipulate that "[t]he independence of judicial bodies and judicial officers shall be [...] respected by the government, its agencies and authorities." See also, *African Commission on Human and Peoples' Rights*, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted as part of the Commission's annual activity report at the second ordinary session of the Assembly of Heads of State and Government of the African Union, held in Maputo from July 4 to 12, 2003, principles A.4.a. and l. See also, Minimum Standards of Judicial Independence, adopted by the International Bar Association in 1982; Conference of Chief Justices of Asia and the Pacific, Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region, approved in 1995 by the Sixth Conference, principle 3; Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence, adopted on June 19, 1998 by representatives of the Commonwealth Parliamentary Association, Commonwealth Magistrates and Judges Association and the Commonwealth Legal Education Association, guidelines II, VI and VII; Iberoamerican Summit of Presidents of Supreme Courts and Tribunals of Justice, Statute of the Iberoamerican Judge, approved by the Sixth Summit, May 23, 24 and 25, 2001, Santa Cruz de Tenerife, Canary Islands, Spain, Articles 1, 2 and 14; Burgh House Principles on the Independence of the International Judiciary, adopted by the Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals, in association with the Project on International Courts and Tribunals, in 2004, and the *Declaración de Principios Mínimos sobre la Independencia de los Poderes Judiciales y de los Jueces en América Latina*, Campeche Declaration, adopted by the Latin American Judicial Federation (*Federación Latinoamericana de Magistrados*), in 2008.

[70] *Cf.* Constitution of Argentina, Articles 109 and114, numeral 6; Constitution of the Plurinational State of Bolivia, Article 178; Constitution of the Federative Republic of Brazil, Articles 95 and 103-B, paragraph 4, numeral I; Constitution of the Republic of Chile, Article 73; Constitution of Colombia, Articles 228 and 230; Constitution of the Republic of Costa Rica, Article 154; Constitution of the Republic of Ecuador, Articles 168, numeral 1, and 431; Constitution of El Salvador, Article 172; Constitution of the Republic of Guatemala, Article 203; Constitution of the Republic of Haiti, Article 177; Constitution of the Republic of Honduras, Articles 303 and 307; Constitution of the United Mexican States, Article 94; Constitution of the Republic of Nicaragua, Article 166; Constitution of the Republic of Panama, Article 207; Constitution of Peru, Articles 139, numeral 2, and 146; Constitution of the Dominican Republic, Article 151; Constitution of the Republic of Suriname, Article 10, and Constitution of the Eastern Republic of Uruguay, Article 118.

system, as these institutions are part of the very backbone of the electoral system and are the mechanism for judicial review that guarantees the conduct of free, fair, dependable elections. The protection and preservation of independence for electoral tribunals prevents branches of government, especially the executive, from interfering unduly in the mechanisms of judicial review that safeguard the exercise of political rights, both for voters and for candidates in electoral contests. This is why the protection of judicial independence for electoral organizations serves as a guarantee for the exercise of political rights, that is, the right to have effective participation in the leadership of public matters, to vote, to be elected, and to have generally equal access to public office.

71. The Court therefore finds that the mechanism for selection and dismissal of electoral judges must be consistent with the overall democratic political system.[71] The violation of independence for the electoral courts undermines not only electoral justice, but also the effective exercise of representative democracy, which is the foundation of the rule of law.[72] When other branches of government take over electoral organizations, the institutional framework of democracy is undermined across the board, which poses a risk for the control of political power and the guarantee of human rights, as it debilitates the institutional guarantees that provide controls over the arbitrary exercise of power. Judicial mechanisms able to safeguard the protection of political rights cease to exist, which is why guarantees of irremovability and stability of electoral judges must be buttressed. The Court therefore deems that any weakening or regression in the guarantees of independence, stability and irremovability of electoral tribunals is a violation of the Convention, as it could produce a systematic, similarly regressive impact on the rule of law, institutional guarantees, and the exercise of fundamental rights overall. The protection of judicial independence in this sphere is particularly critical today, given current trends in the world and the region toward erosion of democracy, where formal powers are being used to promote anti-democratic values, hollowing out institutions and leaving only their appearance intact.

72. The Court cautions, in this regard, that the United Nations Human Rights Committee has stated in General Comment No. 25 on the right to participate in public affairs and the right to vote that there should be "independent scrutiny of the voting and counting process and access to judicial review or other equivalent process so that electors have confidence in the security of the ballot and the counting of the votes."[73] Moreover, the Venice Commission's Code of Good Practice in Electoral Matters states that the protection of political rights requires the presence of an effective system of

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[71] Article 4 of the Inter-American Democratic Charter states: "Transparency in government activities, probity, responsible public administration on the part of governments, respect for social rights, and freedom of expression and of the press are essential components of the exercise of democracy. The constitutional subordination of all state institutions to the legally constituted civilian authority and respect for the rule of law on the part of all institutions and sectors of society are equally essential to democracy." *Cf.* General Assembly of the OAS, Inter-American Democratic Charter, Resolution AG/RES. 1 (XXVIII-E/0(1), September 11, 2001.

[72] Article 2 of the Inter-American Democratic Charter states: "The effective exercise of representative democracy is the basis for the rule of law and of the constitutional regimes of the member states of the Organization of American States. Representative democracy is strengthened and deepened by permanent, ethical, and responsible participation of the citizenry within a legal framework conforming to the respective constitutional order." *Cf.* General Assembly of the OAS, Inter-American Democratic Charter, Resolution AG/RES. 1 (XXVIII-E/0(1), September 11, 2001.

[73] *Cf.* Human Rights Committee, General Comment No. 25 (57), August 27, 1996, adopted pursuant to Article 40(4) of the International Covenant on Civil and Political Rights (CCPR/C/21/Rev.1/Add.7), para. 20.

appeal, because "[i]f the electoral law provisions are to be more than just words on a page, failure to comply with the electoral law must be open to challenge."[74]

73. Finally, the European Court of Human Rights (hereinafter ECtHR) has held that the right to free elections contains positive obligations that require "the existence of a domestic system for the effective examination of individual complaints and appeals in matters concerning electoral rights."[75] It said, in this regard, that the existence of such a system is one of the essential guarantees of free and fair elections, and constitutes an important device in achieving the fulfillment of the State's positive duty under Article 3 of Protocol No. 1.[76] It continued along the same lines, finding that for the examination of appeals to be effective, safeguards must be in place to avoid any arbitrariness. These safeguards demand that a petitioner's grievances must be settled through procedures that offer appropriate, sufficient guarantees to ensure that they are examined conscientiously in keeping with the content of the right to free elections.[77]

2. Right to judicial guarantees

74. The Court has stated that Convention Article 8 sets guidelines for due process of law, consisting of the procedural requirements that will allow individuals to defend their rights effectively in the face of any type of government act that could constitute a violation.[78] Convention Article 8(1) calls for "due guarantees" to be respected in the determination of the rights and obligations of all persons, whether of a criminal, civil, labor, fiscal or any nature, to ensure due process depending on the procedure involved.[79]

75. Failure to extend one of these guarantees constitutes a violation of this article of the Convention.[80] The Court has further maintained that the guarantees established in Article 8(1) of the Convention are also applicable when non-judicial public authorities adopt decisions that violate a person's rights,[81] notwithstanding the fact that, although the guarantees pertaining to a judicial body cannot be demanded of such authorities, they must nevertheless honor guarantees designed to prevent them from making arbitrary decisions.[82]

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74 *Cf.* European Commission for Democracy Through Law (Venice Commission) Code of Good Practice in Electoral Matters, Guideline 3.3 and explanatory report para. 92.

75 *Cf.* ECtHR, *Mugemangango v. Belgium* [G.S], no. 310/15, 10 July 2020, para. 69, and *Davydov and Others v. Russia*, no. 75947/11, 30 May 2017, para. 274.

76 *Cf.* ECtHR, *Mugemangango v. Belgium* [G.S], no. 310/15, 10 July 2020, para. 69, and *Davydov and Others v. Russia*, no. 75947/11, 30 May 2017, para. 274.

77 *Cf.* ECtHR, *Mugemangango v. Belgium* [G.S], no. 310/15, 10 July 2020, para. 70, *Kovach v. Ukraine*, no. 39424/02, 7 May 2008, paras. 54 a 55; *Kerimova v. Azerbaijan*, no. 20799/06, 30 September 2010, paras. 44 to 45, and *Riza and Others v. Bulgaria*, no. 48555/10 and 48377/10, 13 October 2015, para. 143.

78 *Cf. Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8, American Convention on Human Rights).* Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 27, and *Case of Colindres Schonenberg v. El Salvador, supra*, para. 63.

79 *Cf. Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b), American Convention on Human Rights).* Advisory Opinion OC-11/90 of August 10, 1990. Series C No. 11, para. 28, and *Case of Colindres Schonenberg v. El Salvador, supra, para. 64.*

80 *Cf. Case of Claude Reyes et al. v. Chile. Merits, Reparations and Costs.* Judgment of September 19, 2006. Series C No. 151, para. 119, and *Case of Colindres Schonenberg v. El Salvador, supra* para. 64.

81 *Cf. Case of the Constitutional Court v. Peru, supra,* Judgment of January 31, 2001, para. 71, and *Case of Colindres Schonenberg v. El Salvador, supra,* para. 65.

82 *Cf. Case of Claude Reyes et al. v. Chile, supra*, para. 119, and *Case of Colindres Schonenberg v. El Salvador, supra,* para. 65.

76. Article 8(2) of the Convention establishes the minimum guarantees that must be ensured by the States in keeping with due process of law.[83] 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, insofar as applicable, to administrative proceedings before state authorities and to non-criminal judicial proceedings in the constitutional, administrative and labor sphere.[84] It has further stated that in these and other matters, "the individual also has the overall right to the due process applicable in criminal matters."[85] Thus, 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.[86]

77. Mr. Aguinaga Aillón's dismissal by decision of the National Congress was a violation of his rights, as the consequence was his immediate removal from his position as a member of the TSE. The Court will now examine whether it was consistent with the guarantees of due process set forth in Article 8 of the American Convention.

2(1). Authority of the National Congress to order dismissal

78. The Court has established that Article 8(1) of the Convention guarantees that decisions determining the rights of individuals should be made by competent authorities as provided under domestic law. It must therefore consider whether the Congress was competent to dismiss Mr. Aguinaga Aillón from his office on the TSE.

79. The Court will caution, in the first place, that Article 130 of Ecuador's 1998 Constitution empowered the Congress to hold impeachment proceedings on TSE members. It also made TSE subject to potential impeachment proceedings "for constitutional or legal offenses committed in the performance of their duties" and that "Congress may censure them if they are found guilty by a majority of its members." The article went on to say, "censure shall produce immediate dismissal from office."[87]

80. The Court cautions, in the second place, that the grounds for dismissal of TSE members, set forth in National Congress Resolution 25-160 of November 25, 2004, were that "the regular and alternate members of the Supreme Electoral Tribunal were appointed without consideration for the provisions of Constitution Article 209 or the laws of Ecuador."[88] This shows clearly that the National Congress dismissed the TSE officers on the argument

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83 *Cf. Case of Baena Ricardo et al. v. Panama. Merits, Reparations and Costs.* Judgment of February 2, 2001. Series C No. 72, para. 137, and *Case of Moya Solís v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of June 3, 2021. Series C No. 425, para. 68.

84 *Cf. Case of the Constitutional Court v. Peru, supra*, para. 70, and *Case of Moya Solís v. Peru, supra*, para. 68.

85 *Cf. Case of the Constitutional Court v. Peru, supra*, para. 70, and *Case of Moya Solís v. Peru, supra,* para. 68.

86 *Cf. Case of Maldonado Ordóñez v. Guatemala, supra*, para. 75, and *Case of Moya Solís v. Peru, supra,* para. 68.

87 *Cf.* Constitution of the Republic of Ecuador, August 11, 1998, Article 130 (evidence file, folios 2278 and 2279).

88 *Cf.* Resolution R-25-160 of the National Congress, November 25, 2004, published in the Official Gazette No. 378 (evidence file, folios 1795 and 1796).

that they had originally been appointed by an illegal vote, albeit without specifying any regulation or law providing a legal basis for declaring the dismissal.

81. The Court also notes that the question of whether the congressional appointment had been illegal should have been settled through a judicial procedure by lodging a motion of injury in the administrative courts; if Congress held that the act of appointment had been irregular, it should have taken the case before that jurisdiction to determine whether the appointment was unlawful.[89] Similarly, the evidence brought before this Court shows that the only avenue for dismissal of TSE members was through impeachment proceedings under the terms of Article 130, numeral 9 of the Constitution. However, "[n]o prosecutorial investigation was underway against the Supreme Electoral Tribunal or any of its members, nor was there an impeachment process […]."[90]

82. The Court would like, in the third place, to reiterate its discussion about the institutional character and objective dimension of judicial independence given in the cases of *The Supreme Court of Justice (Quintana Coello et al.) v. Ecuador* and *The Constitutional Court (Camba Campos et al.) v. Ecuador.*[91] The Court believes that the circumstances of this case are analogous to those of the other two cases, as the removal of the TSE members occurred as part of a mass dismissal of judges, particularly from the high courts in Ecuador at the time of the facts, which struck a blow not only against judicial independence, but also against the democratic order.

83. The Court must revisit the context in which the facts of Mr. Aguinaga Aillón's dismissal occurred, as this is useful for understanding the reasons or grounds that led to the decision. It is particularly important in the legal analysis of a case to bear in mind the reasons or explanation for a given act by governmental authorities, because any intended purpose other than those provided in the law or regulation that empowers such authorities could point to the conclusion that an action can be considered arbitrary.

84. The Court would recall the facts summarized in chapter VI of this judgment, that at the time the judges were dismissed, Ecuador was going through a period of political instability that had seen the removal of several presidents and multiple amendments of the Constitution as a way to resolve the political crisis. Furthermore, the administration in power at the time was allied with the political party headed by former President Bucaram, which suggests the possible reasons or purpose for wanting to remove the justices of the Supreme Court and the members of the Constitutional Court, that is, the interest in putting a stop to criminal proceedings being conducted by the Supreme Court against former President Bucaram.[92]

85. Furthermore, the Court recalls that within a period of 14 days, not only were the members of the TSE dismissed, but so were the justices on the Supreme Court and the Constitutional Tribunal, which constitutes an abrupt, totally unacceptable course of action. All these facts undermined judicial independence. The Court can thus conclude,

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89 *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, *supra,* para. 175.

90 *Cf.* Written version of the expert witness statement by Ruth Hidalgo, delivered at public hearing on September 8, 2022, during the 151st regular session (evidence file, folios 2733 and 2734).

91 *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador, supra,* paras. 170 to 179, and *Case of the Constitutional Court (Camba Campos et al.) v. Ecuador*, *supra*, paras. 207 to 227.

92 *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, para. 174, and *Case of the Constitutional Court (Camba Campos et al.) v. Ecuador*, para. 211.

at the very least, that Ecuador at that time was experiencing a climate of instability in important State institutions. Moreover, the judges were blocked from lodging a remedy of *amparo* to challenge any decisions that Congress might make against them. The Court emphasizes that these factors support the affirmation that a mass, arbitrary dismissal of judges is unacceptable given its negative impact on the institutional dimension of judicial independence.[93]

86. The Court draws attention to the conclusions of expert witness Medardo Oleas regarding the facts specific to the dismissal of the TSE members:

> 1.- The removal and arbitrary dismissal from the country's high courts—the Supreme Court, the Constitutional Court and the Supreme Electoral Tribunal—disrupted the institutions of democracy and created a political crisis unprecedented in Ecuador's history as a republic, and among other things, it left the Constitutional Court and the Supreme Court vacant for several months;
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> […]
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> 5.- It broke into the established order and consisted of clearly political interests, and the executive built a coalition with the congressional majority to place compatible personnel and authorities on the Constitutional Court, which was a body for constitutional oversight; the Supreme Electoral Tribunal, that had a dual role to organize elections for the highest State dignitaries, starting with the President and the Vice President, members of Congress and others, to settle challenges and electoral grievances, to review accounts and order sanctions; and the Supreme Court, a body of the Judicial Branch;
>
> […]
>
> 7.- The terms of office were abruptly ended for members of the Constitutional Court and the Supreme Electoral Tribunal, who had already been appointed by the National Congress itself and had been performing the duties designated in the Constitution and laws regulating them. The Supreme Court justices […] were dismissed illegally and unconstitutionally, as they had no set term of office for their positions under the provisions of the Constitution in effect at the time.[94]

87. The Court emphasizes the text of Article 3 of the Inter-American Democratic Charter: "[e]ssential elements of representative democracy include, inter alia, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, […] and the separation of powers and independence of the branches of government." The dismissal of all the members of the TSE brought destabilization of the democratic order present in Ecuador at that time, because it created a rupture in the separation of powers and independence of the branches of government by attacking all three of the country's high courts. The Court adds that the separation of powers is closely related to consolidation of the democratic system and furthermore, seeks to preserve citizen freedoms and human rights.

88. It therefore concludes that, although the National Congress as a body was competent to dismiss the judges from the Supreme Electoral Tribunal, it could do so only in the framework of powers given it under the Constitution and laws. It thus acted outside the bounds of its powers when it adopted Resolution 25-160 by which Mr. Aguinaga Aillón was dismissed. For this reason, and in view of the State's recognition of responsibility, the Court concludes that the State violated Mr. Aguinaga Aillón's right for the decision determining his

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93 *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, para. 174, and *Case of the Constitutional Court (Camba Campos et al.) v. Ecuador*, para. 211.

94 *Cf.* Written expert witness statement by Medardo Oleas Rodríguez, delivered by affidavit before a public attestor, pg. 5 (evidence file, folio 2765 and 2765).

rights to be made by a competent authority pursuant to domestic law, in keeping with the guarantee of judicial independence that includes safeguarding stability and irremovability from office under the terms of Article 8(1) of the American Convention, read in conjunction with Article 1(1) thereof.

89. Having found that the body that carried out the process was not competent to do so, and proceeding as it has in other cases,[95] the Court deems it unnecessary to examine other Article 8 guarantees. This obviates an analysis of the arguments submitted by the Commission and the representatives concerning the alleged violation of other judicial guarantees. As it stated in the *Supreme Court of Justice (Quintana Coello et al.) v. Ecuador* case, the Court finds that, due to the type of damage caused to the separation of powers and the arbitrary nature of the action by the National Congress, there is no need to undertake a detailed analysis of the parties' arguments regarding whether the dismissal decision was a punitive act, and therefore it will not examine other issues related to the possible scope of the principle of freedom from ex post facto laws (Article 9 of the Convention) in the instant case.

90. Nonetheless, and in view of Ecuador's recognition of responsibility, the Court concludes that the State is responsible for violating the right to defense and the right of the accused to receive prior notification in detail of the charges against him, under Articles 8(2)(b) and 8(2)(c) of the American Convention, read in conjunction with Article 1(1) thereof, in injury of Aguinaga Aillón.

3. Right to participate in government

91. Article 23(1)(c) of the Convention establishes the right to have access to a position in the public service, under general conditions of equality. The Court has held that access under conditions of equality is an insufficient guarantee if it is not accompanied by the effective protection of tenure in the position,[96] which indicates that the procedures for appointment, promotion, suspension and dismissal of public officers must be objective and reasonable, that is, they must respect the applicable guarantees of due process.[97]

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95 The Court has held similarly, in cases involving the military criminal courts, that it does not need to examine additional arguments on independence, impartiality or other guarantees regarding a judge who has already been found to lack jurisdiction. *Cf*. *Case of Cabrera García and Montiel Flores v. Mexico. Preliminary Objection, Merits, Reparations and Costs.* Judgment of November 26, 2010, Series C No. 220, para. 201; *Case of Rosendo Cantú et al. v. Mexico. Preliminary Objection, Merits, Reparations and Costs.* Judgment of August 31, 2010. Series C No. 216, para. 161; *Case of Fernández Ortega et al. v. Mexico. Preliminary Objection, Merits, Reparations and Costs.* Judgment of August 30, 2010. Series C No. 215, para. 177; *Case of Usón Ramírez v. Venezuela. Preliminary Objection, Merits, Reparations and Costs.* Judgment of November 20, 2009. Series C No. 207, para. 124, and *Case of Cantoral Benavides v. Peru. Merits.* Judgment of August 18, 2000. Series C No. 69, para. 115; *(Quintana Coello et al.) v. Ecuador, supra,* para. 181, and *Colindres Schonenberg v. El Salvador, supra,* para. 91.

96 *Cf. Case of Reverón Trujillo v. Venezuela, supra*, para. 138, and *Case of Nissen Pessolani v. Paraguay. Merits, Reparations and Costs.* Judgment of November 21, 2022. Series C No. 477, para. 95.

97 *Cf. Case of Moya Solís v. Peru, supra*, para. 108 and *Case of Nissen Pessolani v. Paraguay, supra,* para. 95.

92. This Court, ruling previously on cases of arbitrary dismissal of judges[98] and prosecutors,[99] has held that this right is part of the guarantee of stability or irremovability from office.[100] It can be considered respected and guaranteed when the criteria and procedures for appointment, promotion, suspension and dismissal are reasonable and objective and when individuals are not subject to discrimination in the exercise of the right.[101] The Court has held, in this regard, that equal opportunity in access and tenure ensures freedom from any political interference or pressure.[102]

93. Mr. Aguinaga Aillón was removed from office on the TSE as a consequence of the proceedings held against him. The Court finds that this dismissal was arbitrary because it was conducted by a body that was not authorized to do so, via a procedure that was not legally established. This arbitrary dismissal therefore undercut Mr. Aguinaga Aillón's right to remain in office under conditions of equality, in violation of Article 23(1)(c) of the American Convention.

4. Right to work

94. The Court notes that neither the Commission nor the representatives expressly argued violation of Article 26 of the Convention. Based on the principle of *iura novit curia,*[103] however, the Court will rule on violation of the right to work, particularly the right to job stability, in injury of of Mr. Aguinaga Aillón.

95. It finds that, for the purposes of its examination of the right to job stability, it will need to consider whether these violations occurred simultaneously with the other violations discussed above.[104] The Court has understood that civil and political rights, as well as economic, social, cultural and environmental rights (hereinafter ESCERs), are indivisible, and the recognition and enjoyment thereof must inevitably be guided by the principles of universality, indivisibility, interdependence, and interrelationship.[105] This means that the two categories of rights must be understood integrally and jointly as human rights, without any specific hierarchy, and be enforceable in all cases before competent authorities.[106]

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98 *Cf. Inter alia, Case of Reverón Trujillo v. Venezuela, supra*, para. 138 and *Case of Cuya Lavy et al. v. Peru, supra,* para. 160.

99 *Cf. Case of Martínez Esquivia v. Colombia*. *Preliminary Objections, Merits and Reparations.* Judgment of October 6, 2020. Series C No. 412, para. 116; *Case of Casa Nina v. Peru, supra*, para. 97; *Case of Moya Solís v. Peru, supra*, para. 109; *Case of Cuya Lavy et al. v. Peru, supra,* para. 160; *Case of Nissen Pessolani v. Paraguay, supra,* para. 96.

100 *Cf. Case of Martínez Esquivia v. Colombia, supra,* paras. 95 and 96; *Case of Casa Nina v. Peru, supra*, para. 69; *Case of Moya Solís v. Peru, supra*, para. 109, and *Case of Cuya Lavy et al. v. Peru, supra,* para. 160.

101 *Cf. Case of Reverón Trujillo v. Venezuela, supra*, para. 138 and *Case of Cuya Lavy et al. v. Peru, supra,* para. 160.

102 *Cf. Case of Reverón Trujillo v. Venezuela, supra*, para. 73, and *Case of Colindres Schonenberg v. El Salvador*, *supra*, para. 94.

103 *Cf. Case of Velásquez Rodríguez v. Honduras, supra*, para. 163 and *Case of Nissen Pessolani v. Paraguay, supra*, para. 99.

104 *Cf.* Case of *Lagos del Campo v. Peru. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 31, 2017. Series C No. 340, para. 143, and *Case of Nissen Pessolani v. Paraguay, supra*, para. 100.

105 *Cf. Case of Lagos del Campo v. Peru, supra*, para. 141 and *Case of Nissen Pessolani v. Paraguay, supra*, para. 100.

106 *Cf. Case of Lagos del Campo v. Peru, supra*, and *Case of Nissen Pessolani v. Paraguay, supra*, para. 100.

96. It must also be taken into account that human rights are interdependent and indivisible, which is why the hypothesis that ESCERs are beyond the jurisdictional control of this Court is inadmissible.[107]

97. The Court has maintained that the right to work is protected under Article 26 of the Convention.[108] It has cautioned that Articles 45(b) and (c),[109] 46[110] and 34(g)[111] of the OAS Charter set out provisions that point to the right to work. More specifically, the Court has noted that Article 45(b) of the OAS Charter provides that work is "a right and a social duty, it gives dignity to the one who performs it, and it should be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working." The Court has thus found that the reference to the right to work is sufficiently specific to infer that it is present and recognized in the OAS Charter.

98. The Court, in considering the content and scope of this right, recalls that Article XIV of the American Declaration of the Rights and Duties of Man states, "[e]very person has the right to work, under proper conditions, and to follow his vocation freely […]." Article 6 of the Protocol of San Salvador states, "[e]veryone has the right to work, which includes the opportunity to secure the means for living a dignified and decent existence by performing a freely elected or accepted lawful activity." The same concept appears in the world system,

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107 *Cf. Case of Guevara Díaz v. Costa Rica. Merits, Reparations and Costs.* Judgment of June 22, 2022. Series C No. 453, para. 57.

108 *Cf. Case of Lagos del Campo v. Peru, supra*, paras. 142 and 145, *Case of Dismissed Employees of Petroperú et al. v. Peru,* Preliminary Objections, Merits, Reparations and Costs, Judgment of November 23, 2017, Series C No. 344, para. 192; *Case of San Miguel Sosa et al. v. Venezuela,* Merits, Reparations and Costs, Judgment of February 8, 2018, Series C No. 348, para. 220; *Case of Casa Nina v. Peru,* Preliminary Objections, Merits, Reparations and Costs, Judgment of November 24, 2020, Series C No. 419, paras. 103-110; *Case of Palacio Urrutia et al. v. Ecuador*. Merits, Reparations and Costs, Judgment of November 24, 2021, Series C No. 446, paras. 153-160; *Case of the National Federation of Maritime and Port Workers (FEMAPOR) v. Peru, Preliminary Objections, Merits and Reparations,* Judgment of February 1, 2022; Series C No. 448, paras. 107-111; *Case of Pavez Pavez vs. Chile*, Merits, Reparations and Costs, Judgment of February 4, 2022; Series C No. 449, paras. 88-90; *Case of Guevara Díaz v. Costa Rica*, Merits, Reparations and Costs, Judgment of June 22, 2022; Series C No. 453, paras. 55-74; *Case of the Former Employees of the Judiciary v. Guatemala, Preliminary Objections, Merits and Reparations,* Judgment of November 17, 2021; Series C No. 445, paras. 128-133, and *Case of Nissen Pessolani v. Paraguay, supra*, para. 101.

109 Article 45 of the OAS Charter. The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms: […] (b) Work is a right and a social duty, it gives dignity to the one who performs it, and it should be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working; (c) Employers and workers, both rural and urban, have the right to associate themselves freely for the defense and promotion of their interests, including the right to collective bargaining and the workers' right to strike, and recognition of the juridical personality of associations and the protection of their freedom and independence, all in accordance with applicable laws […].

110 Article 46 of the OAS Charter. The Member States recognize that, in order to facilitate the process of Latin American regional integration, it is necessary to harmonize the social legislation of the developing countries, especially in the labor and social security fields, so that the rights of the workers shall be equally protected, and they agree to make the greatest efforts possible to achieve this goal.

111 Article 34 of the OAS Charter. The Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development. To achieve them, they likewise agree to devote their utmost efforts to accomplishing the following basic goals: […] g) Fair wages, employment opportunities, and acceptable working conditions for all.

where the Universal Declaration of Human Rights says, "[e]veryone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment." The International Covenant on Economic, Social and Cultural Rights (hereinafter the ICESCR) says, "[t]he States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right."

99. The Court has further noted, regarding the content of this right, that labor stability as part of the right to work does not mean permanent, unrestricted job tenure. Instead, it means that this right is to be respected by, among other things, granting worker protection so that cases of dismissal or arbitrary termination occur on justified grounds, such that employers must demonstrate sufficient cause with all due guarantees, and the worker should be able to challenge the decision before domestic authorities who should verify whether the stated grounds are arbitrary or unlawful.[112]

100. The Court already concluded above that the TSE performed in a judicial capacity in the sphere of elections, and its members, such as Mr. Aguinaga Aillón, therefore enjoyed the same guarantees of judicial independence as judges generally, given the materially judicial nature of their duties (*supra* para. 59). Judges, when serving in the role of justice operators, must have guarantees of job stability as the most basic condition of the independence they need for their work. The Court concluded in the case at hand that the decision of the National Congress to dismiss Mr. Aguinaga Aillón from his post as a member of the TSE was arbitrary because it was made outside the bounds of congressional power. It did not satisfy the requirements of guaranteeing due process and thus also constituted a violation of the right to job stability as part of the right to work, which pertained to him as an employee of the TSE during his entire term of office.

101. Therefore, the State is responsible for violating the right to job stability enshrined in Article 26 of the Convention, read in conjunction with Article 1(1) thereof, in injury of Mr. Aguinaga Aillón.

5. Conclusion regarding judicial guarantees, judicial independence, the right to participate in government, and the right to work

102. In view of these points, the Court concludes that the National Congress exceeded its authority when it dismissed Mr. Aguinaga Aillón from his position as a member of the TSE, and thus violated his right to be heard by a competent authority in keeping with the principle of judicial independence. Because his dismissal was arbitrary, it violated his right to hold his position under conditions of equality, and his right to work. Moreover, because the dismissal took place in the context of a mass, arbitrary dismissal of Ecuador's high courts, the Court reiterates that the State breached the principle of judicial independence and separation of powers. The State therefore violated Articles 8(1), 23(1)(c) and 26 the Convention, read in conjunction with Article 1(1) thereof, in injury of Mr. Aguinaga Aillón. In view of the State's recognition of responsibility, the Court also concludes that the State violated Articles 8(2)(b) and 8(2)(c) of the American Convention, read in conjunction with Article 1(1) thereof, in injury of Mr. Aguinaga Aillón.

[112] *Cf. Case of Lagos del Campo v. Peru, supra,* para. 150 and *Case of Nissen Pessolani v. Paraguay, supra*, para. 102.

B.2. Right to judicial protection

103. The Court has noted that Article 25(1) of the Convention includes an obligation for States Parties to guarantee that all persons subject to their jurisdiction have access to a simple, expeditious, effective remedy against acts that violate their fundamental rights.[113] The Court has further asserted that if a remedy is to be considered effective, it is not sufficient for it to be provided under the Constitution or laws or for it to be formally admissible, but rather it must be truly effective for determining whether there has been a violation of human rights and providing redress. A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective.[114] This may happen when, for example, a remedy has proven useless in practice because the judicial body lacks the means to enforce its judgments, or in any other situation in which justice is being denied.[115] The process should produce real protection of the right recognized in the judicial ruling by means of enforcement.[116]

104. The Court has also understood Article 8(1) of the Convention to mean that the State must guarantee that a decision reached through the proper channels should meet the purpose for which the procedure was intended. This does not suggest that claims will always be upheld, but that the State must guarantee that the procedure is able to produce the result for which it was created.[117] In earlier cases of congressional dismissal of judges, the Court has held that the dismissal procedures undertaken before the Congress, subject to legal provisions that should be observed rigorously, may themselves be subject to a judicial appeal on due process of law.[118] It said specifically, in the *Constitutional Court v. Peru* case, "[t]his control does not imply an evaluation of the acts of a strictly political nature that the Constitution attributes to the Legislature."[119]

105. The Court recalls in the instant case that on December 2, 2004, the Constitutional Court delivered a ruling that ordered any judge receiving a request for a remedy of *amparo* against the decision to dismiss the members of the TSE or similar legislative acts to "deny them outright and hold them inadmissible, as otherwise, they would be hearing a case in violation of an express law, which would result in legal liability." The Court notes that this decision was adopted under an "Order" of the Constitutional Court sitting en banc, the members of which has been appointed subsequent to Resolution 25-160 of the National Congress, by which the members sitting on the court until November 25, 2004 had been removed (*supra* para. 44).

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[113] *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 Colindres Schonenberg v. El Salvador*, *supra,* para. 101.

[114] *Cf. Case of Ivcher Bronstein v. Peru. Merits, Reparations and Costs.* Judgment of February 06, 2001; Series C No. 7, para. 137, and *Case of Colindres Schonenberg v. El Salvador, supra,* para. 101.

[115] *Cf. Case of Las Palmeras v. Colombia. Merits.* Judgment of November 29, 2001. Series C No. 96, para. 58, and *Case of Colindres Schonenberg v. El Salvador, supra,* para. 101.

[116] *Cf. Case of Baena Ricardo et al. v. Panama. Competence.* Judgment of November 28, 2003; Series C No. 104, para. 73, and *Case of Colindres Schonenberg v. El Salvador*, *supra,* para. 101.

[117] *Cf.* Cf. *Case of Barbani Duarte et al. v. Uruguay. Merits, Reparations, and Costs.* Judgment of October 13, 2011; Series C No. 234, para. 122, and *Case of Colindres Schonenberg v. El Salvador*, *supra,* para. 102.

[118] *Cf. Case of the Constitutional Court v. Peru, supra,* para. 94, and *Case of Colindres Schonenberg v. El Salvador, supra,* para. 103.

[119] *Cf. Case of the Constitutional Court v. Peru, supra,* para. 94, and *Case of Colindres Schonenberg v. El Salvador, supra,* para. 103.

106. The Court cautions that the remedy available to Mr. Aguinaga Aillón, by express mandate of the Constitutional Court, would have been an action of unconstitutionality. Under the provisions of the Ecuadorian Constitution in effect at the time, however, such a motion could be lodged either if it had the backing and signatures of 1000 people in the "enjoyment of their political rights," or if it had received a favorable report of the Ombudsman. Moreover, the cause of such an action was to examine whether a provision or administrative act were consistent with the Constitution, in substance and in style, but it held out no possibility to redress a right that had been breached; this would have been available only under a motion of *amparo*, which was not available to Mr. Aguinaga Aillón.

107. Because it was impossible to lodge a motion of *amparo*, Mr. Aguinaga Aillón was prevented from taking any action whatsoever against his dismissal from the TSE. Mr. Aguinaga Aillón told this Court:

> […] it was impossible for me, for the members of the Constitutional Court, or for the members of the Supreme Court to [take any legal action] because on December 2, 2004, the new Constitutional Court that had replaced the now dismissed Constitutional Court adopted a decision ordering all the judges and courts in the country to deny motions of *amparo* challenging Resolution R-25-160, and that if they did admit such a motion, they would be breaking an explicit law and would be subject to prosecution, and as a result, the doors to effective judicial protection of our rights and interests were closed.[120.]

108. The Court finds that, because there was no effective judicial remedy available to protect their rights that had been abridged, and in view of the State's recognition of responsibility, the State violated Article 25(1) of the Convention, read in conjunction with Articles 1(1) and 2 thereof, in injury of Mr. Aguinaga Aillón.

109. The Court also notes that the legal consequences of the impossibility of challenging the ruling, under the terms argued by the Commission, were addressed above in the discussion on Article 25 of the Convention. In view of the State's recognition of responsibility, the Court concludes that the State is responsible for violating Article 8(2)(h) of Convention, read in conjunction with Articles 1(1) and 2 thereof, in injury of Mr. Aguinaga Aillón.

VIII
REPARATIONS

110. Pursuant to the provisions of Article 63(1) of the American Convention, the Court has held that every violation of an international obligation which results in harm creates a duty to make adequate reparation, and that this provision reflects a customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility.[121]

111. Reparation of harm brought about by the violation of an international obligation means full restitution (*restitutio in integrum*) whenever possible, which includes the restoration of the prior situation. If this is not possible, as in most cases of human rights violations, the Court will order measures to guarantee the rights that have been violated and to redress the consequences of the violations.[122] It has seen the need to award

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120 *Cf.* Statement in public hearing by Mr. Aguinaga Aillón, September 8, 2022, during the 151st session.

121 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and Costs.* Judgment of July 21, 1989. Series C No. 7, para. 25, and *Case of Nissen Pessolani v. Paraguay, supra*, para. 105.

122 *Cf.* Case of *Velásquez Rodríguez v. Honduras*. Reparations and Costs, *supra*, paras. 25 and 2, and *Case of Nissen Pessolani v. Paraguay, supra,* para. 106.

different measures of reparation in order to provide comprehensive redress for the harm; thus, in addition to pecuniary compensation, the measures of restitution, rehabilitation and satisfaction, as well as guarantees of non-repetition, are particularly relevant to the harm caused.[123]

112. This Court has established that reparations must have a causal nexus with the facts of the case, the declared violations, the proven damage, as well as the measures requested to repair the damage. Therefore, the Court must observe such congruence in order to adjudge and declare according to law.[124]

113. In view of the violations of the American Convention declared in the preceding chapter, and in light of the standards established in the Court's case law on the nature and scope of the obligation to redress,[125] the Court will examine the claims submitted by the Commission and the representatives, as well as the State's arguments, and in the following paragraphs order measures of reparation for these violations.

A. Injured party

114. The Court, under the terms of article 63(1) of the Convention, holds as an injured party anyone who has been declared the victim of violation of a right recognized therein. The Court therefore holds Carlos Julio Aguinaga Aillón as an "injured party" and a victim of the violations declared in chapter VII of this judgment, and he will be the beneficiary of reparations ordered by this Court.

B. Measures of restitution

115. The ***Commission*** held that the State should "[r]einstate Carlos Julio Aguinaga Aillón to a position similar to that previously held, with the same remuneration, social benefits and rank comparable to those he would be entitled to today had he not been removed, for the period of time remaining to his mandate." It also said that if for well-founded reasons reinstatement was not possible, the State should "pay alternative compensation."

116. The ***representatives*** said that the institution from which Mr. Aguinaga Aillón had been dismissed ceased to exist with the enactment of the 2008 Constitution, and therefore, reinstatement to his position as a member of the TSE would not be a valid option. They asked for monetary damages instead.

117. The ***State*** argued in its final written pleadings that "there was no violation of international standards for which State responsibility had been incurred," and therefore, there were no grounds for granting the measure requested by Mr. Aguinaga.

118. The ***Court*** ruled in the instant case that Mr. Aguinaga Aillón had been dismissed as the result of a decision that violated the right to judicial guarantees, judicial independence, the right to participate in government, the right to work, and the right to

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123 *Cf. Case of the 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 Nissen Pessolani v. Paraguay, supra,* para. 106.

124 *Cf. Case of Ticona Estrada v. Bolivia. Merits, Reparations and Costs.* Judgment of November 27, 2008. Series C No. 191, para. 110, and *Case of Nissen Pessolani v. Paraguay, supra,* para. 107.

125 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and Costs, supra*, paras. 25 to 27, *Case of Deras García et al. v. Honduras, supra*, para. 94, and *Case of Nissen Pessolani v. Paraguay, supra,* para. 108.

judicial protection (*supra* paras. 55 to 109). It cautions that the guarantee of tenure or stability in the position and to labor stability would entail reinstatement to the position from which he had been arbitrarily removed. However, when the 2008 Constitution was enacted, the tasks of the TSE were distributed between the National Electoral Council and the Electoral Administrative Tribunal.[126] The Court finds that, with the introduction of these changes in the constitutional design of the state, it has now become impossible to reinstate Mr. Aguinaga Aillón to his position as a member of the TSE, or any comparable position of similar compensation and qualifications.

119. The Court recalls from its case law,[127] however, that when it is impossible to reinstate judges removed from their positions arbitrarily, they are granted compensatory damages because they are unable to resume their judicial duties. The Court therefore will order compensation, aside from any pecuniary and nonpecuniary damages it may address. It orders compensation to the victim of USD$ 60,000.00 (sixty thousand United States dollars). The amount should be paid within one year of the date of notification of this judgment.

C. Measures of satisfaction

120. The ***representatives*** asked for the State to be ordered to publish the official summary of this judgment in a widely circulated national newspaper, using legible type, and for the full judgment to be posted on the official websites of the Constitutional Court, the National Assembly, the National Electoral Council and the National Court of Justice. The ***State*** argued that the measures of satisfaction requested by the representatives were inappropriate because the instant case did not show violation of international standards that would incur international State responsibility. The ***Commission*** made no specific requests on this point.

121. The Court orders, as it has in other cases,[128] that the State must publish the following material within six months of the date of notification of judgment, using suitable, legible typeface: (a) the official summary of the instant judgment to be prepared by the Court, one time only, in the Official Gazette; (b) the official summary of the instant judgment to be prepared by the Court, one time only, in a widely circulated national media outlet, using suitable, legible typeface, and (c) the instant judgment in its entirety, available for one full year on the official websites of the Constitutional Court, the National Assembly, the National Electoral Council and the National Court of Justice. The State must report to this Court as soon as it has proceeded with each of the publications ordered, without awaiting the one-year term to submit its first report as stipulated in operative paragraph nine of the instant judgment.

D. Other measures requested

122. The ***representatives*** asked for the State of Ecuador to hold a public event recognizing its international responsibility in a full session of the legislature. They also asked the Court, as a guarantee of nonrepetition, to order training programs on judicial

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126 *Cf.* Constitution of the Republic of Ecuador, October 20, 2008, Article 217 (evidence file, folio 2489).

127 *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. 246, and *Case of Nissen Pessolani v. Paraguay, supra,* para. 113.

128 *Cf. Case of Cantoral Benavides v. Peru. Reparations and Costs. Judgment of December 3, 2001*. Series C No. 88, para. 79, and *Case of Nissen Pessolani v. Paraguay, supra,* para. 115.

independence for the National Assembly and the Council for Citizen Participation and Social Oversight, intended to equip government employees with specialized knowledge of inter-American standards on the dismissal of high-level judicial officers. The ***State*** argued that Mr. Aguinaga Aillón's duties in his position as a member of the TSE were not equivalent to those of a judge, and the training on judicial independence was therefore inappropriate because it was unrelated to the issue addressed by the case at hand.

123. The ***Court*** recalls that the facts of the instant case took place in a setting of political instability, which had led to the removal of the justices from the Supreme Court and dismissal of the members of the Constitutional Court and the TSE. The Court also cautions that Ecuador has amended the regulations in place at the time of the facts and has reorganized the government institutions that were affected by and involved in this case. Because the surrounding circumstances have changed, and in view of the regulatory and institutional reforms, the Court finds that it would be unnecessary to hold training for State authorities under the terms proposed by the representatives. The Court also finds that the measures of redress already ordered herein are sufficient, well suited to the violations declared, and useful for preventing similar situations from arising in the future. It will not order the adoption of additional measures of reparation for this reason.

E. Compensatory damages

E(1). Pecuniary damages

124. The ***Commission*** asked for full redress for the human rights violations declared in the Report on the Merits, including the measures of compensation and satisfaction necessary to offset the material and nonmaterial damage experienced by Mr. Aguinaga.

125. The ***representatives*** asked for payment of monetary compensation for the damages associated with the total earnings Mr. Aguinaga Aillón failed to receive from the time he was dismissed until the end of his designated term of office, that is, from November 25, 2004 through January 14, 2007. They asked that the calculation of pecuniary damages take into account "salary, additional payments, official entertainment allowances, bonuses, foreign travel for seminars, conferences, election observation missions or other activities, per diem, allowances and other services that Mr. Aguinaga Aillón would have been entitled to." They calculated material damages of USD 302,998.95 on this basis. The representatives also said that this amount should be paid with accrued interest corresponding to the 17 years that had elapsed since litigation in the inter-American system had begun.

126. The ***State*** argued that, in accordance with the case law of the Inter-American Court, reparations may not entail inappropriate enrichment of the victim, as their ultimate purpose is only to provide full redress for the damage declared. It argued, therefore, that injured parties cannot request indemnification for amounts that were not taken from their assets, such as entertainment allowances, the cost of foreign travel to seminars, and per diem. Such expenditures, it claimed, constitute "potential outlays" and not real amounts that the person failed to receive, and therefore asked that the claims for these items be disallowed from any compensation granted.

127. The ***Court*** has held in its case law that pecuniary damages cover loss or detriment to the victims' income, expenses incurred as a result of the facts of the case and

monetary consequences that have a causal nexus with the facts.[129]

128. The Court points to an expert witness report submitted by the representatives to back their claim concerning payment of pecuniary damages for Mr. Aguinaga Aillón, with an accounting analysis to determine the amount of lost earnings due to compensation foregone by the victim from the time he was dismissed from his job on November 25, 2004, until his assigned term of office ended on January 14, 2007. The calculation was based on several items, including salary payments, bonuses, vacation days not taken, years of service and social benefits.[130] The report set the material redress for income that Mr. Aguinaga Aillón failed to receive over this period at USD 302,998.65 (three hundred two thousand nine hundred ninety-eight United States dollars and sixty-five cents). The Court notes that the State offered no specific views on the amount of lost earnings calculated in the expert report submitted by the representatives.

129. The amount of overdue interest calculated in the expert report submitted by the representatives brings the total to USD 481,148.63 (four hundred eighty-one thousand one hundred forty-eight United States dollars and sixty-three cents). The Court would note that the amount in overdue interest was calculated by the representatives as of the time Mr. Aguinaga Aillón was removed from his position on the TSE by applying the Code of Resolution of the Monetary Board, Book One Volume V. The Court holds that the representatives have not demonstrated, in view of the provision cited above, how the overdue interest payment should be calculated for the failure to disburse salary and other payments when Mr. Aguinaga Aillón was dismissed from his position as a member of the TSE.

130. The Court therefore finds it reasonable to order the State to pay an indemnity of USD 302,998.65 (three hundred two thousand, nine hundred ninety-eight United States dollars and sixty-five cents) to Mr. Aguinaga Aillón for lost earnings for the compensation he failed to receive when he was removed from his position on November 25, 2004, until the date his term of office would have expired, January 14, 2007. The Court cautions that the case file does not show that Mr. Aguinaga Aillón held any other job in the public sector after he was dismissed from the TSE, nor that the State has claimed otherwise, and therefore the State must pay this amount fully.[131] This amount should be paid within one year of the date of notification of this judgment, in the terms set forth under operative paragraph eight.

E(2). Nonpecuniary damages

131. The ***Commission*** requested full redress for the human rights violations declared in the Report on the Merits, including necessary measures of indemnification and satisfaction for the pecuniary and nonpecuniary damage experienced by Mr. Aguinaga Aillón.

132. The ***representatives*** asked the Court to recognize pecuniary recompense for the damage to Mr. Aguinaga Aillón's life plans when his professional development and his role as a public personage were interrupted as a result of his arbitrary removal from his

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129 *Cf. Case of Bámaca Velásquez v. Guatemala. Reparations and Costs. Judgment of February 22, 2002*. Series C No. 91, para. 43, and *Case of Nissen Pessolani v. Paraguay, supra,* para. 126.

130 *Cf.* Expert accounting report by Carla Renata Martínez Yerovi, August 12, 2021 (evidence file, folios 2043 to 2054).

131 *Cf. Mutatis mutandi*, *Nissen Pessolani*, para. 127.

position. They asked the Court for "fair redress determined in equity" that would reflect the damage to Mr. Aguinaga Aillón's personal and professional reputation. The representatives submitted a clinical psychological report to back their claims of nonpecuniary damage, stating that the facts of the case had triggered "exclusion and persecution" of Mr. Aguinaga Aillón "in connection with his political, electoral and professional career," as well as a "[personal] sensation of reputational loss."

133. The ***State*** argued that Mr. Aguinaga Aillón had shown no evidence that his removal from office as a member of the TSE in 2004 had prejudiced his political career. It argued, moreover, that it was unreasonable to blame the State for the curtailment of a political career given that such activities are subject to a multiplicity of factors that are "unstable" and "uncontrollable."

134. The ***Court*** recalls that its case law has clearly stated that damage to a person's life plan is a separate concept from lost earnings and consequential damages.[132] Harm to the life plan relates to the complete realization of the person concerned based on their vocation, aptitudes, circumstances, potential and aspirations that allow them to establish certain reasonable expectations and achieve them.[133] This is why the life plan is expressed in terms of expectations for personal, professional, and family development, attainable under normal conditions.[134].

135. The Court has also held that damage to life plans entails the loss or serious impairment of opportunities for personal development, in ways that are either impossible or very difficult to repair.[135] The Court has also ordered compensation for this type of harm,[136] along with other measures. In the case at hand, the argument of damage to Mr. Aguinaga Aillón's life plan points to an interruption in his professional development as a result of his dismissal from the TSE. The Court finds that the arbitrary dismissal of Mr. Aguinaga Aillón caused impairment to the development of his personal and professional life, and to his state of mind.

136. The Court therefore orders the State to make payment in equity of USD 15,000.00 (fifteen thousand United States dollars) to Mr. Aguinaga Aillón, to be disbursed within one year of the delivery of this judgment, under the terms given in operative paragraph eight hereof.

F. Costs and expenses

137. The ***representatives*** reported that they had incurred expenditures as they processed the case before the inter-American system. They had made outlays for the public hearing, transmission of documents, office supplies, document duplication, transportation, lodging, food, and honoraria for experts and attorneys. They asked that the amount to cover the costs and expenses of the process be set in equity. The ***State***

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132 *Cf. Case of Loayza Tamayo v. Peru. Reparations and Costs. Judgment of November 27, 1998*, Series C, No. 42, para. 147, and *Case of Casa Nina v. Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2020.* Series C, No.419, para. 154.

133 *Cf. Case of Loayza Tamayo v. Peru, supra*, para. 147, and *Case of Casa Nina v. Peru, supra,* para. 154.

134 *Cf. Case of Tibi v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 7, 2004*, Series C, No. 114, para. 245, and *Case of Casa Nina v. Peru, supra,* para. 154.

135 *Cf. Case of Loayza Tamayo v. Peru, supra*, para. 150, and *Case of Casa Nina v. Peru, supra,* para. 154.

136 *Cf. Case of the Las Dos Erres Massacre v. Guatemala, supra*, and Case of *Casa Nina v. Peru, supra,* para. 154.

argued that because no violation had been declared that entailed State responsibility, it would not be appropriate to order costs and expenses for Mr. Aguinaga Aillón. They added that, because these alleged outlays pertained to activities for processing the case, the representatives should be required to back their claims with vouchers, but this had not happened in the instant case.

138. The case file contained no evidentiary material on costs and expenses incurred by the representatives for processing the case before the inter-American system, nor had there been a request for a specific amount. Nevertheless, the Count finds that these proceedings necessarily required monetary outlays and therefore orders the State to pay Mario Melo Cevallos and Sofía Pazmiño Yañez, who had served as representatives for Mr. Aguinaga Aillón in this case, the amount of USD 15,000.00 (fifteen thousand United States dollars) for costs and expenses, divided equally between the two of them. The Court may also order the State to further reimburse the victim or his representative for reasonable expenses incurred during the procedural stage of monitoring compliance with the judgment.

G. Method of compliance with the payments ordered

139. The State must release payment of the compensation for reinstatement, pecuniary and nonpecuniary damages and reimbursement of costs and expenses ordered in this judgment directly to the individuals named herein within one year of the date of notification of the judgment, with the understanding that it may complete the payments sooner, in the terms given below.

140. If the beneficiaries have passed away or should pass away prior to payment of their due compensation, the money shall be delivered directly to their heirs under the terms of applicable domestic legislation.

141. The State must meet its monetary obligations by means of payment in United States dollars.

142. If for causes attributable to the beneficiaries of the compensation or their heirs it should prove impossible to pay the amounts established within the required term, the State shall deposit the amounts in their names into an account or certificate of deposit in a sound Ecuadorian financial institution, in United States dollars, under the most favorable financial conditions allowed by law and by banking practice. If the compensation has not been claimed after ten years, the money shall revert to the State with interest. If this type of instrument should be unavailable, the State shall safeguard the funds, keeping them available within the country for the ten-year term.

143. The amounts allocated under this judgment as reinstatement, satisfaction, compensation for pecuniary and nonpecuniary damage and reimbursement of costs and expenses shall be disbursed in their entirety to the assigned individuals, as ordered in this judgment, with no deductions for potential fiscal fees.

144. If the State should fall behind on these payments, it must pay interest on the amount owed, based on overdue interest rates in effect for banks in Ecuador.

IX
OPERATIVE PARAGRAPHS

181. Therefore,

THE COURT

DECIDES,

Unanimously:

1. To accept the State's recognition of responsibility pursuant to paragraphs 16 to 23 of this judgment.

DECLARES,

Unanimously, that:

2. The State is responsible for violating the rights to judicial guarantees, enshrined in Articles 8(1), 8(2)(b), and 8(2)(c) of the American Convention on Human Rights, read in conjunction with Article 1(1) thereof, and the resulting injury to judicial independence, in injury of Carlos Julio Aguinaga Aillón, pursuant to paragraphs 16 to 23 and 55 to 90 of this judgment.

Unanimously, that:

3. The State is responsible for violating the right to participate in government enshrined in Article 23 of the American Convention on Human Rights, read in conjunction with Article 1(1) thereof, in injury of Carlos Julio Aguinaga Aillón, pursuant to paragraphs 91 to 93 of this judgment.

By a vote of five in favor to two opposed, that:

4. The State is responsible for violating the right to work enshrined in Article 26 of the American Convention on Human Rights, read in conjunction with Article 1(1) thereof, in injury of Carlos Julio Aguinaga Aillón pursuant to paragraphs 94 to 101 of this judgment.

Dissenting votes were cast by Judge Humberto Antonio Sierra Porto and Judge Patricia Pérez Goldberg.

Unanimously, that:

5. The State is responsible for violating the right to judicial protection and the right to appeal a ruling enshrined in Articles 25 and 8(2)(h) of the American Convention on Human Rights, read in conjunction with Articles 1(1) and 2 thereof, in injury of Carlos Julio Aguinaga Aillón, pursuant to paragraphs 16 to 23 and 103 to 109 of this judgment.

AND ORDERS

Unanimously that:

6. This judgment constitutes per se a form of reparation.

7. The State shall release the publications set out in paragraph 121 within six months of the date of notification of this judgment.

8. The State shall pay the amounts set in paragraphs 119, 130 and 136 of this judgment in pecuniary and nonpecuniary damages and reimbursement of costs and expenses, pursuant to paragraphs 139 to 144.

9. The State shall, within one year of the date of notification of this judgment, submit to the Court a report on the measures adopted to comply therewith, notwithstanding the provisions of paragraph 121 of this judgment.

10. The Court will monitor full compliance with this judgment, in exercise of its authority as established in the American Convention on Human Rights, and shall declare this case closed when the State has fully complied with all the measures ordered herein.

Judge Eduardo Ferrer Mac-Gregor Poisot with Judge Rodrigo Mudrovitsch, Judge Humberto Antonio Sierra Porto, and Judge Patricia Pérez Goldberg submitted individual concurring and partially dissenting opinions.

Done in Spanish in the city of San Jose, Costa Rica, January 30, 2023.

I/A Court HR. *Case of Aguinaga Aillón v. Ecuador. Merits, Reparations and Costs.* Judgment of January 30, 2023.

Ricardo C. Pérez Manrique
President

Eduardo Ferrer Mac-Gregor Poisot

Humberto Antonio Sierra Porto

Nancy Hernández López

Verónica Gómez

Patricia Pérez Goldberg

Rodrigo Mudrovitsch

Pablo Saavedra Alessandri
Registrar

So ordered,

Ricardo C. Pérez Manrique
President

Pablo Saavedra Alessandri
Registrar

CONCURRING AND PARTIALLY DISSENTING OPINION BY JUDGES EDUARDO FERRER MAC-GREGOR POISOT AND RODRIGO MUDROVITSCH

CASE OF AGUINAGA AILLÓN v. ECUADOR

JUDGMENT OF JANUARY 30, 2023
(Merits, Reparations and Costs)

I. INTRODUCTION

1. The setting for the events of this case was a "mass dismissal of judges" from Ecuador's three high courts, which took place in November and December, 2004. Over the course of 14 days, the judges were removed fro the Supreme Court, the Constitutional Court, and the Supreme Electoral Tribunal (hereinafter "TSE") and had no access to effective recourse, all of which had a significant deleterious impact on the institutions of judicial independence and its relationship to democracy and the rule of law.

2. The judgment in the *Aguinaga Aillón v. Ecuador* case (hereinafter "the judgment")[1]—the facts and context of which are associated with two rulings delivered a decade ago[2]—marks an important contribution to the body of case law on judicial independence. It joins the extensive case law by the Inter-American Court of Human Rights (hereinafter "the IA Court" or "the Inter-American Court") on judicial independence that has been developed in certain landmark cases such as the *Constitutional Court v. Peru* (2001) and has been reiterated and strengthened for over 20 years.[3]

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[1] *Cf. Aguinaga Aillón v. Ecuador. Merits, Reparations and Costs.* Judgment of January 30, 2023.

[2] *Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador. Preliminary Objection, Merits, Reparations and Costs.* Judgment of August 23, 2013. Series C No. 266; and *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.

[3] *Cf. Case of the Constitutional Court v. Peru. Merits, Reparations and Costs.* Judgment of January 31, 2001. Series C No. 71, paras. 73 to 75; *Case of Palamara Iribarne v. Chile. Merits, Reparations and Costs.* Judgment of November 22, 2005. Series C No. 135, paras. 145 and 156; *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, paras. 43 to 45, 84 and 138; *Case of Reverón Trujillo v. Venezuela. Preliminary Objection, Merits, Reparations and Costs.* Judgment of June 30, 2009. Series C No. 197, paras. 67, 68, 70 to 81; *Case of Chocrón Chocrón v. Venezuela. Preliminary Objection, Merits, Reparations and Costs.* Judgment of July 1, 2011. Series C No. 227, paras. 97 to 100; *Case of Atala Riffo and daughters v. Chile. Merits, Reparations and Costs.* Judgment of February 24, 2012. Series C No. 239, para. 186; *Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador. Preliminary Objection, Merits, Reparations and Costs.* Judgment of August 23, 2013. Series C No. 266, paras. 144 to 154; *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, paras. 188 to 198; *Case of Argüelles et al. v. Argentina. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 20, 2014. Series C No. 288, para. 147; *Case of López Lone et al. v. Honduras. Preliminary Objection, Merits, Reparations and Costs.* Judgment of October 5, 2015. Series C No. 302, paras. 190 to 199; *Case of Valencia Hinojosa*

3. The Court in this case addresses for the first time the dismissal of a judge from the perspective of the right to work from the standpoint of job stability, protected by Article 26 of the American Convention on Human Rights (hereinafter "the Convention"). The Court reiterates that justice operators also need to be given "job stability" as a differentiated, reinforced guarantee of judicial independence, unlike the guarantee of stability or tenure in their position (Article 23(1)(c) of the Convention[4]). As we have held in the past, every right has its own particular sphere of protection, which is why multiple rights can apply simultaneously; they are not mutually exclusive under a comprehensive, overall view of the protections of persons.[5]

4. We concur with the judgment's declaration that the State is responsible for violating the right to judicial guarantees, the right to judicial protection, the right to participate in government, and the right to work enshrined in Articles 8, 23, 25 and 26 of the Convention, read in conjunction with the State's obligation to respect the rights set forth in Article 1. The judgment, however, does not address the legal implications of such an act of dismissal—which was grossly arbitrary in the specific context of the mass removal of judges from the three highest courts—from the standpoint of Convention Article 9, and we feel that this omission weakens the analysis of the case.

5. The majority held that, "...due to the type of damage caused to the separation of powers and the arbitrary nature of the action by the National Congress, there is no need to undertake a detailed analysis of the parties' arguments regarding whether the dismissal decision was a punitive act, and therefore..." the judgment did not examine "the possible scope of the principle of freedom from ex post facto laws" given in Article 9 of the Convention.[6] We believe that the Court should in fact have undertaken an analysis of the arguments and motions put forth by the Inter-American Commission and the representatives of the victim, declaring violation of the principle of freedom from ex post facto laws because the act by which the Congress removed the victim from his position as a member of the TSE took place outside the bounds of the Constitution and laws, which constituted a "de facto sanction." The Congress dismissed the victim under an ad hoc procedure not provided under the Constitution or laws of Ecuador.

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et al. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 29, 2016. Series C No. 327, para. 105; *Case of Acosta et al. v. Nicaragua. Preliminary Objections, Merits, Reparations and Costs.* Judgment of March 25, 2017. Series C No. 334, para. 171; *Case of San Miguel Sosa et al. v. Venezuela. Merits, Reparations and Costs.* Judgment of February 8, 2018. Series C No. 348, para. 207; *Case of Colindres Schonenberg v. El Salvador. Merits, Reparations and Costs.* Judgment of February 4, 2019. Series C No. 373, paras. 68 and 69; *Case of Villaseñor Velarde et al. v. Guatemala. Merits, Reparations and Costs.* Judgment of February 5, 2019. Series C No. 374, paras. 75, 83 and 84; *Case of Rico v. Argentina. Preliminary Objection and Merits.* Judgment of September 2, 2019. Series C No. 383, paras. 54, 55 and 56; *Case of Urrutia Laubreaux v. Chile. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 27, 2020. Series C No. 409, paras. 104 to 110; *Case of Cordero Bernal v. Peru. Preliminary Objection and Merits.* Judgment of February 16, 2021. Series C No. 421, paras. 71 and 72; *Case of Ríos Avalos et al. v. Paraguay. Merits, Reparations and Costs.* Judgment of August 19, 2021. Series C No. 429, para. 85; *Case of Cuya Lavy et al. v. Peru. Preliminary Objections, Merits, Reparations and Costs.* Judgment of September 28, 2021. Series C No. 438, para. 123, and *Case of Nissen Pessolani v. Paraguay*. *Merits, Reparations and Costs.* Judgment of November 21, 2022. Series C No. 477, para. 57.

[4] *Cf*. *Case of Aguinaga Aillón v. Ecuador*, *supra*, para. 89.

[5] *Cf.* Our joint reasoned opinion in the *Case of Benites Cabrera et al. v. Peru. Preliminary Objections, Merits, Reparations and Costs.* Judgment of October 4, 2022. Series C No. 465, paras. 33 to 43.

[6] *Cf*. *Case of Aguinaga Aillón v. Ecuador*, *supra*, para. 89.

6. The *punitive nature* of the dismissal can be seen clearly from the facts and context of the case, because the massive layoff of judges from the three highest courts was motivated by the "political accords" between then-President Lucio Gutiérrez (against whom the opposition parties were preparing an impeachment trial for the crime of embezzlement) and the parliamentary majority of the Ecuadorian Roldosista Party, led by former President Abdalá Bucaram Ortiz. All this clearly reveals, in the words of the judgment, "the interest in putting a stop to criminal proceedings being conducted by the Supreme Court against former President Bucaram."[7] It is very clear what truly led to the dismissal of the judges from the three high courts and the (nearly immediate) appointment of other judges for the purpose of institutional appropriation of the top echelons of the judiciary.

7. We found it fitting, in view of these considerations and in the terms of Article 66(2) of the American Convention,[8] to attach this concurring opinion to the judgment, and thus emphasize certain matters concerning the essentially democratic dimension of judicial independence, which are particularly significant in the case of a board of elections, and express our respectful disagreement with the majority for its decision not to undertake an analysis of the arguments by the Inter-American Commission and the representatives of the victim on violation of the principle of freedom from ex post facto laws contained in Article 9 of the Convention.

8. Along these lines and in the interest of greater clarity, this opinion will (II) explain the context in which the facts of the case unfolded; this approach is necessary to understand the legal consequences of the State's acts and omissions that infringed Carlos Julio Aguinaga Aillón's rights as a member of the Supreme Electoral Tribunal (paras. 9 to 13); (III) focus on the key points of the the Court's opinions regarding judicial independence, which are especially relevant to the case of an electoral court because of their intrinsic connection with the democratic system and the exercise of political rights (paras. 14 to 20); (IV) discuss why this case is particularly important and novel in its approach to violation of the right to work in cases of the arbitrary dismissal of judges (paras. 21 to 25); (V) express our respectful dissent with the decision not to analyze violation of the principle of freedom from ex post facto laws, explicitly raised and requested by the Inter-American Commission and the representatives of the victim (paras. 26 to 41); and finally, (VI) give a brief conclusion to the views expressed herein (paras. 42 to 46).

II. CONTEXT

9. The circumstances behind the facts need to be discussed to facilitate a full understanding of the human rights violations in the instant case.

10. The facts of the specific case, that is, the dismissal of Mr. Aguinaga Aillón from his position on the Supreme Electoral Tribunal (hereinafter "TSE") occurred as part of the removal of the members of the high courts of Ecuador in 2004, in a setting of overt political instability. This context, already discussed by the Court in the cases of *the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador* and *the Constitutional Court (Camba Campos et al.) v. Ecuador,* was reiterated in the instant

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[7] *Cf*. *Case of Aguinaga Aillón v. Ecuador*, *supra*, paras. 37 and 84.

[8] Article 66(2) of the Convention reads: "[i]f the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment." Also, see Articles 24(3) of the Statute and Articles 32(1)(a), 65(2) and 67(4) of the Rules of Procedure of the Court.

case.[9] As the Court emphasized in these prior cases, Ecuador had seven presidents in the years from 1996 to 2007, none of whom completed the four-year term of office. The judiciary was not immune from this instability and "at times [was] taken over by political authorities, such that, [in] Ecuador, the independence of the Supreme Court of Justice has been compromised and the institution exploited throughout its history."[10]

11. Moreover, and more importantly, before Mr. Aguinaga Aillón's dismissal, the opposition parties in Congress were already making preparations to launch impeachment proceedings for the crime of embezzlement. The administration built a parliamentary majority with other parties to counteract the impeachment. The leader of one of these parties hoped to quash several criminal trials currently on the docket of the Supreme Court against a former president who, prompted by these trials, was a fugitive in Panama at the time.[11] This parliamentary accord, led by individuals from inside the executive and legislative branches of Ecuador, was the motivation for the move by the administration of then-President Lucio Gutiérrez to reorganize the judiciary, leading to the adoption of the congressional resolutions that removed the judges from the TSE, the Supreme Court and the Constitutional Court, and immediately appointed their replacements. The Court's judgment said:

> 84. The Court would recall the facts summarized in chapter VI of this judgment, that at the time the judges were dismissed, Ecuador was going through a period of political instability that had seen the removal of several Presidents and multiple amendments of the Constitution as a way to resolve the political crisis. Furthermore, the alliance of the government in power with the political party headed by former President Bucaram provides an indication of the possible reasons or purpose for wanting to remove the justices of the Supreme Court and the members of the Constitutional Court, that is, the interest in putting a stop to criminal proceedings being conducted by the Supreme Court against former President Bucaram.
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> 85. Furthermore, the Court recalls that within a period of 14 days, not only were the members of the TSE dismissed, but so were the justices on the Supreme Court and the Constitutional Tribunal, which constitutes an abrupt, totally unacceptable course of action. All these facts undermined judicial independence. The Court can thus conclude, at the very least, that at the time Ecuador was experiencing a climate of instability in important State institutions. Moreover, the judges were blocked from lodging a remedy of *amparo* to challenge any decisions that Congress might make against them. The Court emphasizes that these factors support the affirmation that a mass, arbitrary dismissal of judges is unacceptable given its negative impact on judicial independence at the institutional level.[12]

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[9] *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador, supra*, paras. 42 to 62; *Case of the Constitutional Court (Camba Campos et al.) v. Ecuador, supra,* paras. 43 to 48, and *Case of Aguinaga Aillón v. Ecuador, supra,* paras. 32 to 34 and 38.

[10] *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador, supra,* para. 40; *Case of the Constitutional Court (Camba Campos et al.) v. Ecuador, supra,* para. 41; and *Case of Aguinaga Aillón v. Ecuador, supra,* para. 33.

[11] *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador, supra*, para. 64, *Case of the Constitutional Court (Camba Campos et al.) v. Ecuador, supra*, para. 55, and *Case of Aguinaga Aillón v. Ecuador*, *supra*, para. 38.

[12] *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador, supra, para. 174, Case of the Constitutional Court (Camba Campos et al.) v. Ecuador, supra, para. 211;* and *Case of Aguinaga Aillón v. Ecuador, supra,* paras. 84 and 85.

12. All this shows clearly that the dismissal of Mr. Aguinaga Aillón via Congressional Resolution 25-160 took place at a time of overt actions by Congress in a climate that was politically contaminated because of criminal trials being pursued against several members of Ecuador's political class. These trials would eventually be heard by the judiciary.

13. Thus, as explained in the above paragraphs, the dismissal of Mr. Aguinaga Aillón, and generally, the 2004 reform process, must be seen in context to provide a better picture of the motivations that led to the dismissal of the judges and other officers on the high courts. The motivations leading authorities to dismiss or remove judges cannot be ignored when seeking to understand fully the problem at hand. The judgment does perform this analysis, in general terms, to explain the breach of judicial independence, but as we will see below, it omits one factor of analysis that should have received a differentiated view because of the punitive nature of the congressional resolution by which the victim was removed from his position on the TSE.

III. JUDICIAL INDEPENDENCE

14. The judgment reaffirms the Court's case law concerning the importance of judicial independence as "one of the basic pillars of the guarantees of due process," protected under Article 8(1) of the Convention in its dual sense: institutionally, which entails protection of the judicial branch as a system from undue interference; and individually, as protection for judges in particular.

15. The judgment reiterates that arbitrary interference with the tenure of judges in their positions is a violation of Article 8(1) of the Convention and that judicial independence redounds to specific guarantees for their protection, including: (i) an appropriate appointment process, (ii) stability and irremovability in office, and (iii) the right to be protected from external pressures.[13] This case thus reiterates the regulatory standard developed by the Court to protect the stability and irremovability of judges in their position:

> The Court would also address the implications of the guarantee of job stability and irremovability for these authorities, as follows: (i) removal from office may be effected exclusively on allowable grounds, whether through a process that offers judicial guarantees, or because the term of office has ended; (ii) judges may be dismissed only for serious disciplinary breaches or incompetence, and (iii) all actions against judges must be settled pursuant to established standards of judicial conduct and by means of fair, objective, impartial proceedings, under the Constitution or laws. This is mandatory, because the fact that judges may be removed from office at will arouses objective concerns about whether they are able to perform their duties without fear of reprisal.[14]

16. It is important, within this conceptual framework, to underscore that the judgment upholds the relationship between protection of judicial independence and the preservation of other fundamental values in the body politic, such as democracy. The judgment states that protection of judges is instrumental as a building block of democracy, as it is the judicial branch that stands as a guarantor to shield human

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13 *Cf. Case of Aguinaga Aillón v. Ecuador*, *supra*, para. 63.

14 *Cf. Case of Aguinaga Aillón v. Ecuador*, *supra*, para. 64.

rights from abuses of power. This is why safeguarding the independence of the judiciary is also a way to guarantee protection of individual human rights. Protecting the independence of the judicial branch from interference by other branches of government, and protecting judges in particular from arbitrary removal or pressure, are thus prerequisites for the effective exercise of the other rights recognized and protected by the Convention.[15]

17. The judgment also holds that protection of judicial independence is a cornerstone for the effective exercise of all rights, *but it takes on special nuance in the field of elections.* The guarantee of judicial independence for judges ruling on electoral matters is intrinsically linked to the continued life of democracy. The judgment holds that the protection of electoral agencies—and thus of the judges serving on them—is significant for democracy, as these courts are integral to the backbone of the electoral system, and it is through this judicial system that disputes over electoral laws are settled. This is why the ability of electoral judges to settle electoral disputes free from interference is one of the components in the full, effective exercise of political rights, including the right to have effective participation in the leadership of public matters, to vote, to be elected, and to have generally equal access to public office.[16]

18. The latter point is worth reiterating because the Court held in the judgment that specifically because of its importance for democracy, the mechanism for selecting and removing electoral judges should reflect the principles of a democratic system, and this calls for reinforced protection of these judges' rights. The statement is based on the standards of judicial independence that were discussed above and also reflects recent observations on threats now facing the democracies of our region. We have seen how efforts have been made in several countries to weaken or appropriate the institutions responsible for organizing elections, or to undermine the independence of judicial bodies specialized in settling disputes on electoral matters. This why the protection of the integrity of boards of elections as a system, and of electoral judges as individuals, is an essential principle for safeguarding the exercise of democracy and the effectiveness of political rights.[17]

19. Therefore, and on the basis of these considerations, the judgment correctly concludes that the dismissal of Mr. Aguinaga Aillón by means of Resolution 25-160, adopted by the National Congress outside the bounds of its constitutionally-given powers, is a violation of judicial independence because it did not respect the guarantees set forth in Article 8(1) of the Convention.

20. As the judgment says, the National Congress was empowered by the Constitution to initiate impeachment proceedings against members of the TSE on certain specific grounds also defined in the Constitution. The members of the TSE, however, were dismissed for alleged illegalities in the process by which they were appointed around two years prior to the enactment of Resolution 25-160. The Court therefore concluded that the dismissal of Mr. Aguinaga Aillón was a violation of Article 8(1) of the Convention and, consequently, of the guarantee of stability and irremovability to which he was entitled under the principle of judicial independence.[18]

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15 *Cf. Case of Aguinaga Aillón v. Ecuador*, *supra*, paras. 65 to 66.

16 *Cf. Case of Aguinaga Aillón v. Ecuador*, *supra*, para. 70.

17 *Cf. Case of Aguinaga Aillón v. Ecuador*, *supra*, para. 71.

18 *Cf. Case of Aguinaga Aillón v. Ecuador*, *supra*, para. 88.

IV. VIOLATION OF THE RIGHT TO WORK

21. This judgment for the first time addresses violation of the right to work in the case of a judge dismissed arbitrarily from a judicial post, as in the case of Mr. Aguinaga Aillón. It thus joins the jurisprudential arena of protection of labor rights, first addressed by the Court in the case of *Lagos del Campo v. Peru.*[19] The judgment reiterates that the right to work is protected under Article 26 of the Convention and that this protection includes employment stability.[20] The Court recalls in the judgment that job stability is a right that grants worker protection, meaning that employment may be terminated only on justified grounds, such that "employers must demonstrate sufficient cause with all due guarantees, and the worker should be able to challenge the decision before domestic authorities who should verify whether the stated grounds are arbitrary or unlawful."[21]

22. When judges serve within the justice system, they are entitled to job stability as an essential, reinforced condition for independence in the discharge of their duties. This standard is important for two reasons. First, it reaffirms the precepts developed in the case of *Nissen Pessolani v. Paraguay,*[22] in which the independence of prosecutors to perform their duties is linked to protection of job stability. Second, and along the same lines, it holds that the dismissal of a judge via an arbitrary procedure is a violation of the right to work.

23. This view amounts to a recognition of the specific nature of labor rights applicable to public servants, including those who hold high positions. The declaration that Mr. Aguinaga Aillón's right to job stability had been violated because his dismissal was so patently arbitrary is therefore a contribution to inter-American case law and shows how the different human rights protected by the American Convention are closely interwoven.

24. As we explained in another recent case,[23] the comprehensive, overall dimension of rights that derive from the American Convention calls for an analysis of the facts through the lens of simultaneous applicability of all the relevant articles, on the assumption that the most appropriate hermeneutics of the American Convention view the text in its entirety, and thus, claiming one human right can never impair the others. In that earlier opinion, we distinguished among the different spheres of protection of these rights and held that job stability from the perspective of Article 23(1)(c) of the Convention is grounded in the very fact of being a public officer, while job stability from the perspective Article 26 is based on the essence of "being a worker," regardless of whether the person works in the public or private sector. A public officer is clearly a worker, but not every worker is a public officer. This is why we uphold dual protection, based on both Article 23(1)(c) (right to public service) and Article 26 (right to work) in the case of workers in the exercise of public service who are affected by arbitrary dismissal.

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[19] *Cf.* Case of *Lagos del Campo v Peru. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 31, 2017. Series C No. 340, para. 143.

[20] *Cf. Case of Aguinaga Aillón v. Ecuador*, *supra*, para. 97.

[21] *Cf. Case of Aguinaga Aillón v. Ecuador*, *supra*, para. 99.

[22] *Cf. Case of Nissen Pessolani v. Paraguay supra,* para. 103.

[23] *Cf. Joint separate opinion by Judge Eduardo Ferrer Mac-Gregor Poisot and Judge Rodrigo Mudrovitsch in the case of Benites Cabrera et al. v. Peru, supra*, paras. 7 and 33.

25. This case, therefore, finds violation of not only the right to have access to public service under general conditions of equality, as enshrined in Article 23(1)(c) of the Convention (due to the association with the guarantee of "stability and irremovability in the position"), but also the right to "job stability" as part of the judges' right to work, protected under Article 26 of the Convention.

V. OUR DISSENTING OPINION: FAILURE TO ADDRESS VIOLATION OF THE PRINCIPLE OF FREEDOM FROM EX POST FACTO LAWS

26. While we find much to applaud in the judgment, we believe that it fell short regarding a central point: violation of the principle of freedom from ex post facto laws. Both the Commission and the representatives of the victim argued that the State had violated Article 9 of the Convention when it sanctioned Mr. Aguinaga Aillón at the time of his dismissal from his position, based on no grounds previously defined in Ecuadorian laws or regulations. The Inter-American Commission argued that "the punitive nature of this act of state and the resulting decision on applicable guarantees did not arise, as in other cases, from a formal process..."[24]

27. The position of the Inter-American Commission is not surprising, since the State itself recognized in the case of *The Supreme Court of Justice (Quintana Coello et al.) v. Ecuador* that the justices on the Supreme Court had been dismissed on no grounds and via an ad hoc procedure. The State of Ecuador said in that case:

> With respect to the State's acknowledgment of the violation of Article 9 of the Convention, based on the fact that Ecuadorian law did not establish specific grounds for dismissing the judges from office, "which, through the National Congress's resolution could have been understood as an ad-hoc proceeding of a punitive nature," the Court considers that said acquiescence does not address several arguments presented by the Commission and the representatives on this matter (*infra* paras. 127 and 128). For example, the representatives mentioned the existence of a proceeding for sanctioning Supreme Court justices and stated that the grounds for such sanctions were very broad and undefined [...]" [25] (emphasis added).

28. In the two cases, *Quintana Coello* and *Camba Campos,* the State acknowledged its international responsibility for violating Article 9 of the American Convention when the judges were dismissed. The State added in the latter case (*Camba Campos*) that it accepted international responsibility for violating this right "because there were no grounds established by law for the removal from office of the presumed victims." The State said, "although it is true that the National Congress could make a constitutional and legal analysis, this should have included clear mechanisms to submit to review the tenure and the duration of the terms of the former members of the Constitutional Tribunal. The absence of legal certainty concerning the grounds for removing the former members obliges the State to acknowledge its international responsibility in this regard"[26] (emphasis added).

29. The Court majority found in the instant case on dismissal of the victim from the TSE that because the National Congress lacked authority to remove Mr. Aguinaga

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[24] *Cf. Case of Aguinaga Aillón v. Ecuador*, *supra*, para. 47.

[25] *Cf*. *Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador, supra*, para. 21.

[26] *Cf*. *Case of the Constitutional Court (Camba Campos et al.) v. Ecuador, supra*, para. 14.

Aillón from office, there was no need to question whether the dismissal decision was a punitive act and subject to Article 9 of the Convention.[27] We believe that the majority neglected a central point of the case when it decided not to examine whether this was a sanction—as indeed it was—and fully analyze its consequences. This omission by the majority weakened the legal analysis of the violations against Mr. Aguinaga Aillón, which in our view, were the result of a punitive decision by the Congress, openly contrary to the reinforced guarantees that the Convention provides to justice operators.

30. We take a position contrary to that of the judgment and consider it essential to understand that, while the congressional decision did not comprise a criminal sanction, nor was it an administrative sanction per se, the dismissal of the TSE members took place at a time of political turmoil. Its purpose was to change the membership of the highest-level decision-making bodies on the Constitutional Court, the Supreme Court and the Supreme Electoral Tribunal, with the intention of favoring the interests of certain political groups and warding off prosecution of the then-president, in the understanding that criminal proceedings against a former president underway in the Supreme Court would eventually culminate in a ruling by the high courts.

31. It seems clear to us that Mr. Aguinaga Aillón's dismissal, like that of the other justices and officers who were removed from the high courts, constituted materially *a masked form of sanction* that damaged the professional, financial, and personal lives of the people involved. We therefore hold, as did the Commission and the representatives, and as the State itself acknowledged in the two earlier cases (*Quintana Coello* and *Camba Campos*), that the legislative act by which Mr. Aguinaga Aillón was dismissed was *punitive in nature*, and thus *constituted an expression of the punitive power of the State* that should have been examined under Article 9 of the Convention, bearing in mind that, in light of this Court's case law, the precept applies not only to criminal proceedings, but also to punitive processes.[28]

32. The Court previously set the conditions for applying Article 9 to administrative or disciplinary action, as in the case of *Baena Ricardo v. Panama*, when it pointed to the similar effects on the rights of the accused and noted that both administrative and punitive sanctions undermine, remove, or alter individual rights. There is no question in this case that the ad hoc process not only intended to restrict the victim's rights, but succeeded in doing so by bringing about the dismissal of Mr. Aguinaga Aillón, and this is why the standards of freedom from ex post facto laws enshrined in this article of the Convention are fully applicable to the case at hand.

33. The judgment, following the lead of the two earlier cases from a decade ago, recognizes that "the alliance of the government in power with the political party headed by former President Bucaram provides an indication of the possible reasons or purpose for wanting to remove the justices of the Supreme Court and the members of the Constitutional Court, that is, the interest in putting a stop to criminal proceedings being conducted by the Supreme Court against former President

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[27] *Cf. Case of Aguinaga Aillón v. Ecuador*, *supra*, para. 89.

[28] *Cf. Case of Baena Ricardo et al. (270 workers) v. Panama. Merits, Reparations and Costs.* Judgment of February 2, 2001. Series C No. 72, para. 106.

Bucaram."[29]

34. The judgment in the *Quinta Coello et al.* case, which took place in the same context as the instant case, said, "the resolution by means of which the judges were dismissed was the result of a political alliance that was intended to create a Supreme Court sympathetic to the political majority existing at that time and to impede criminal proceedings against the acting president and a former president."[30] This was the decisive argument that led the Inter-American Court to conclude in the case that "abuse of power" was present as one of the features of the violation against the institutional dimension of judicial independence.

35. The State itself, in the case of *Quintana Coello et al.,* admitted to violation of Article 9 of the American Convention, noting that the action by the National Congress "could have been understood as an ad-hoc proceeding of a punitive nature."[31]

36. We therefore believe that the Court should have ruled on the matter as argued and expressly pled by the Inter-American Commission and the representatives of the victim regarding violation of Article 9 of the Convention, given the seriousness of the facts and considering the true motivations that led to the dismissal of the members of Ecuador's high courts at the time. It is worth noting that the judgment itself points to "an abrupt, totally unacceptable course of action" by the National Congress, and that in view of the facts, "a mass, arbitrary dismissal of judges is unacceptable given its negative impact on the institutional dimension of judicial independence."[32]

37. If indeed the point of departure for the dismissal proceedings was *materially punitive*, the judgment should have held that Resolution 25-160 defined no grounds for removal from office of the TSE members, but that in fact they were dismissed because their appointment two years prior had allegedly been illegal. The 1998 Constitution empowered the National Congress to remove TSE members from office *by means of impeachment proceedings, or via prosecution*, but not for having been appointed illegally. This meant that they were removed on grounds and through proceedings different from those set by law, and this should have been examined in light of the principle of freedom from ex post facto laws.

38. Article 9 of the American Convention states, "[n]o one shall be convicted of any act or omission that did not constitute a criminal offense under the applicable law," and, "[a] heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed." The Court has interpreted that these mandates apply not only in criminal proceedings, *but that their scope also includes administrative sanctions.*[33] This standard can extend by analogy to de facto punitive proceedings such as the one conducted against Mr. Aguinaga Aillón.

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[29] *Cf. Case of Aguinaga Aillón v. Ecuador*, *supra*, para. 84; *Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador,* para. 174, and *Case of the Constitutional Court (Camba Campos et al.) v. Ecuador,* para. 211.

[30] *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador,* para. 177.

[31] *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador, supra,* para. 13.

[32] *Cf. Case of Aguinaga Aillón v. Ecuador*, *supra*, para. 85.

[33] *Cf. Case of Baena Ricardo et al. v. Panama, supra,* para. 106, and *Case of Urrutia Laubreaux v. Chile. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 27, 2020. Series C No. 409, para. 129.

39. The judgment ought to have examined the true motives behind the dismissal of the victim,[34] and if the procedure were found to serve a punitive purpose, it could have been held to be "a de facto punitive procedure," given its nature and the purposes it pursued, which in our view, was in fact the case for Mr. Aguinaga Aillón.

40. Legislative sanctions such as those applied in the instant case can unquestionably have effects similar to those of administrative or criminal sanctions, as they all undermine, remove, or alter individual rights. In a democratic system, no precaution must be spared when applying this type of sanction, to ensure that it is done is strict compliance with the rights of persons and following a careful study to verify the presence of unlawful conduct.

41. Rules and regulations on sanctions need to be on the books and be known or accessible before any prohibited action or omission is committed and before attempts are made to punish it.[35] We believe in this case that Mr. Aguinaga Aillón, who was not removed from his post by Congress via impeachment proceedings or criminal prosecution, was dismissed without any grounds that had been established in advance and was subject to a procedure not provided for by law, and this is a clear breach of the principle of freedom from ex post facto laws under Article 9 of the American Convention.

VI. CONCLUSION

42. This case enriches the Inter-American Court's case law on judicial independence, which is a centerpiece of due process. The judgment holds that a mass, arbitrary dismissal of all the judicial personnel who sat on Ecuador's three high courts, over the course of two weeks, absent any effective means of appeal, "constitutes an abrupt, totally unacceptable course of action" which had a negative impact on the institutional dimension of judicial independence.[36].

43. Mr. Aguinaga Aillón's dismissal from the TSE is closely intertwined with the cases of *Supreme Court of Justice (Quintana Coello et al.)*, and *Constitutional Court (Camba Campos et al.)*, on which this inter-American Court ruled a decade ago, but it also has a degree of specificity because of the abridgment of judicial independence on an electoral tribunal.

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[34] The Court has already examined, based on the context and the "misuse of power," the real intentions of certain acts of authority and how these intentions injure rights protected by the American Convention. *Mutatis mutandis*, *Case of Granier et al. (Radio Caracas Television) v. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of June 22, 2015. Series C No. 293, para. 189, and *Case of San Miguel Sosa et al. v. Venezuela. Merits, Reparations and Costs.* Judgment of February 8, 2018. Series C No. 348, para. 122. Judge Eduardo Ferrer Mac-Gregor, in a concurring opinion on the case of *Quintana Coello,* said: "[t]he deviation of power implies that a state organ oversteps the boundaries or limits of its assigned task, a definition that requires it to have the power or authority to take the respective decision." Judge Eduardo Ferrer Mac-Gregor expressed similar views on the misuse of power and the true motivations behind violations in the *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, paras. 120 to 140.

[35] *Cf. Case of Baena Ricardo et al. v. Panama, supra,* para. 106, and *Case of Maldonado Ordóñez v. Guatemala*, *supra*, para. 89.

[36] *Cf. Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, *supra*, para. 174; *Case of the Constitutional Court (Camba Campos et al.) v. Ecuador, supra,* para. 211, and *Case of Aguinaga Aillón v. Ecuador*, *supra*, para. 85.

44. The removal of all the members of the Supreme Electoral Tribunal, in addition to comprising a "destabilization of democratic order" by causing a rupture in the separation and independence of the branches of government, also deals a substantial blow to the democratic system itself, in light of the Inter-American Democratic Charter. This is why the guarantee of judicial independence for electoral tribunals is essential, for these bodies are "the very backbone of the electoral system and are the mechanism for judicial review that guarantees the conduct of free, fair, dependable elections,"[37] and at the same time are independent bodies that safeguard the ability of citizens to assert their political rights.

45. This specificity also underscores the importance of job stability as an expression of the judges' right to work and of the consequences that derive therefrom. This is the first case that extends direct protection to the right to work based on the arbitrary dismissal of judicial personnel, in light of Article 26 of the Convention, and it therefore further enriches inter-American case law on the subject.[38]

46. The judgment, however, failed to offer an analysis of the arguments submitted by the Inter-American Commission and the representatives of the victim concerning violation of Article 9 of the Convention, even though Mr. Aguinaga Aillón's dismissal was undeniably a de facto punishment, as the facts and context of the case clearly show. As we have maintained in this opinion, the legislative act by which the victim was dismissed was *punitive in nature*, and as such it was *a manifestation of the punitive power of the State* that should have been examined in keeping with the provisions of Article 9 of the Convention. The National Congress removed the victim from office through an ad hoc rationale and procedure not provided in Ecuador's laws and Constitution, and we believe that the Inter-American Court missed the opportunity to perform this analysis and declare violation of the principle of freedom from ex post facto laws.

Eduardo Ferrer Mac-Gregor Poisot
Judge

Rodrigo Mudrovitsch
Judge

Pablo Saavedra Alessandri
Registrar

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37 *Cf*. *Case of Aguinaga Aillón v. Ecuador*, *supra*, para. 70.

38 The Inter-American Court had earlier ruled on violation of job stability for prosecutors, holding that it was contrary to the right to work protected under Article 26 of the Convention. *Cf*. Case of *Nissen Pessolani v. Paraguay, supra,* paras. 99 to 104.

PARTIALLY DISSENTING OPINION BY
JUDGE HUMBERTO ANTONIO SIERRA PORTO

CASE OF AGUINAGA AILLÓN *v.* ECUADOR

JUDGMENT OF January 30, 2023
(Merits, Reparations and Costs)

1. This opinion is offered with all due respect for the majority decisions of the Inter-American Court of Human Rights (hereinafter the Court), to explain my disagreement with operative paragraph four, which finds the State of Ecuador (hereinafter "the State" or "Ecuador") internationally responsible for violating the right to work, in injury of Carlos Julio Aguinaga Aillón.

2. This opinion stands alongside the position I have already taken in my partially dissenting opinions in the cases of *Lagos del Campo v. Peru,*[1] *Dismissed Employees of Petroperú et al. v. Peru,*[2] *San Miguel Sosa et al. v. Venezuela,*[3] *Muelle Flores v. Peru,*[4] *Hernández v. Argentina,*[5] *ANCEJUB-SUNAT v. Peru,*[6] *Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina,*[7] *Employees of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil,*[8] *Casa Nina v. Peru*,[9] *Guachalá Chimbo v. Ecuador,*[10] *and FEMAPOR v. Peru,*[11] *Guevara Díaz v. Costa Rica,*[12] *Mina Cuero*

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1 *Cf. Case of Lagos del Campo v. Peru. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 31, 2017. Series C No. 340. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

2 *Cf*. *Case of Dismissed Employees of Petroperú et al. v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 23, 2017. Series C No. 344. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

3 *Cf*. *Case of San Miguel Sosa et al. v. Venezuela. Merits, Reparations and Costs.* Judgment of February 8, 2018. Series C No. 348. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

4 *Cf*. *Case of Muelle Flores v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of March 6, 2019. Series C No. 375. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

5 *Cf*. *Case of Hernández v. Argentina. Preliminary Objection, Merits, Reparations and Costs.* Judgment of November 22, 2019. Series C No. 395. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

6 *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. 39. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

7 *Cf*. *Case of Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina. Merits, Reparations and Costs.* Judgment of February 6, 2020. Series C No. 400. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

8 *Cf*. *Case of the Employees of the Fireworks Factory of Santo Antônio de Jesus v. Brazil*. *Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 15, 2020. Series C No. 407. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

9 *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.

10 *Cf*. *Guachalá Chimbó et al. v. Ecuador. Merits, Reparations and Costs.* Judgment of March 26, 2021. Series C No. 423. Concurring and partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

11 *Cf*. *Case of the National Federation of Maritime and Port Workers (FEMAPOR) v. Peru. Preliminary Objections, Merits and Reparations.* Judgment of February 1, 2022. Series C No. 448. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

12 *Cf*. *Case of Guevara Díaz v. Costa Rica. Merits, Reparations and Costs.* Judgment of June 22, 2022. Series C No. 453. Concurring and partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

v. Ecuador,[13] *Valencia Campos et al. v. Bolivia,*[14] *Brítez Arce et al. v. Argentina,*[15] *and Nissen Pessonali v. Paraguay;*[16] also as in my concurring opinions in the cases of *Gonzales Lluy et al. v. Ecuador,*[17] *Poblete Vilches et al. v. Chile,*[18] *Cuscul Pivaral et al. v. Guatemala,*[19] *Buzos Miskitos v. Honduras,*[20] *Vera Rojas et al. v. Chile,*[21] *Manuela et al. v. El Salvador,*[22] *the Former Employees of the Judiciary v. Guatemala,*[23] *Palacio Urrutia v. Ecuador*[24] and *Pavez Pavez v. Chile,*[25] concerning the enforceability of economic, social, cultural and environmental rights (hereinafter "ESCERs") via Article 26 of the American Convention on Human Rights (hereinafter "the Convention").

3. In my previous opinions, I outlined the reasons why I believe there are logical and legal inconsistencies in the jurisprudential position taken by the majority of the Court on the direct, autonomous enforceability of ESCERs under Article 26 of the Convention. This majority position overlooks the rules of interpretation of the Vienna Convention on the Law of Treaties,[26] alters the nature of the obligation of progressivity,[27] ignores the will of the states as set forth in the Protocol of San Salvador,[28] and undermines the Court's legitimacy,[29] to mention only a few of the arguments. My purpose here, however, is to demonstrate the irrelevance of the analysis of Article 26, as this case specifically addresses a public official serving an entity that performed materially judicial duties, and as a consequence, could be covered thoroughly enough on the basis of Convention Article

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13 *Cf. Case of Mina Cuero v. Ecuador. Preliminary Objection, Merits, Reparations and Costs.* Judgment of September 7, 2022. Series C No. 464. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

14 *Cf. Case of Valencia Campos et al. v. Bolivia. Preliminary Objection, Merits, Reparations and Costs.* Judgment of October 18, 2022. Series C No. 469. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

15 *Cf. Case of Brítez Arce v. Argentina. Merits, Reparations and Costs.* Judgment of November 16, 2022. Series C No. 474. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

16 *Cf. Case of Nissen Pessolani v. Paraguay.* Merits, Reparations and Costs. Judgment of November 21, 2022. Series C No. 477. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

17 *Cf. Case of Gonzales Lluy et al. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs.* Judgment of September 1, 2015. Series C No. 298. Concurring opinion of Judge Humberto Antonio Sierra Porto.

18 Cf. *Case of Poblete Vilches et al. v. Chile. Merits, Reparations and Costs.* Judgment of March 8, 2018. Series C No. 349. Concurring opinion of Judge Humberto Antonio Sierra Porto.

19 *Cf. Case of Cuscul Pivaral et al. v. Guatemala. Preliminary Objection, Merits, Reparations and Costs.* Judgment of August 23, 2018. Series C No. 359. Concurring opinion of Judge Humberto Antonio Sierra Porto.

20 *Cf. Case of the Buzos Miskitos (Lemoth Morris et al.) v. Honduras.* Judgment of August 31, 2021. Series C No. 432. Concurring opinion of Judge Humberto Antonio Sierra Porto.

21 *Cf. Case of Vera Rojas et al. v. Chile. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 1, 2021. Series C No. 439. Concurring opinion of Judge Humberto Antonio Sierra Porto.

22 *Cf. Case of Manuela et al. v. El Salvador. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 2, 2021. Series C No. 441. Concurring opinion of Judge Humberto Antonio Sierra Porto.

23 *Cf. Case of the Former Employees of the Judiciary v. Guatemala. Preliminary Objections, Merits and Reparations,* Judgment of November 17, 2021. Series C No. 445. Concurring opinion of Judge Humberto Antonio Sierra Porto.

24 *Cf. Case of Palacio Urrutia et al. v. Ecuador. Merits, Reparations and Costs.* Judgment of November 24, 2021. Series C No. 446. Concurring opinion of Judge Humberto Antonio Sierra Porto.

25 *Cf. Case of Pavez Pavez v. Chile. Merits, Reparations and Costs.* Judgment of February 4, 2022. Series C No. 449. Concurring opinion of Judge Humberto Antonio Sierra Porto.

26 *Cf. Case of Muelle Flores v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of March 6, 2019. Series C No. 375. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

27 *Cf. Case of Cuscul Pivaral et al. v. Guatemala. Preliminary Objection, Merits, Reparations and Costs.* Judgment of August 23, 2018. Series C No. 359. Concurring opinion of Judge Humberto Antonio Sierra Porto.

28 *Cf. Case of Poblete Vilches et al. v. Chile. Merits, Reparations and Costs.* Judgment of March 8, 2018. Series C No. 349. Concurring opinion of Judge Humberto Antonio Sierra Porto.

29 *Cf. Case of Dismissed Employees of Petroperú et al. v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2017. Series C No. 344. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

23; this is consistent with the position I already held in my partially dissenting opinions in the cases of *Mina Cuero v. Ecuador*[30] *and Nissen Pessonali v. Paraguay.*[31]

4. In the instant case, in addition to laying grounds for violation of judicial guarantees and judicial protection, with which I fully agree, the Court felt that there had been a violation of the right to remain in the job under general conditions of equality, as in Article 23(1)(c) and the right to work, particularly regarding the employment stability guaranteed in Article 26 of the Convention. The Court has drawn on the principle of *iura novit curia* in holding that the arbitrary dismissal of Mr. Aguinaga Aillón from his position as a member of the Supreme Electoral Tribunal (hereinafter "TSE") was also a violation of the right to job stability as part of the right to work.[32]

5. The Court furthermore considered the right to remain in the job under general conditions of equality, finding that the dismissal of Mr. Aguinaga Aillón *"[…] was arbitrary because it was conducted by a body that was not authorized to do so, via a procedure that was not legally established."*[33] The Court also found violation of the right to job stability, finding *"in the case at hand that the decision of the National Congress to dismiss Mr. Aguinaga Aillón from his post as a member of the TSE was arbitrary because it was made outside the bounds of congressional power. It did not satisfy the requirements of guaranteeing due process and thus also constituted a violation of the right to job stability as part of the right to work, which pertained to him as an employee of the TSE during his entire term of office."*[34] It is therefore clear that although the Court found the procedure not legally established and added that the process did not respect the guarantees of due process, nevertheless, both claims were built materially on the same arguments of fact and law, using two different legal foundations—first Article 23(1)(c) and then Article 26 of the Convention.

6. I think that, as I said in my partially dissenting opinion in the Case of *Mina Cuero v. Ecuador,* the correct approach would have been to apply Article 23 only. As the judgment rightly states, Article 23(1)(c) of the Convention provides, "1. Every citizen shall enjoy the following rights and opportunities: […] c. to have access, under general conditions of equality, to the public service of his country." I therefore believe that once again the Court made the right decision when it included analysis of this article and declared violation of the right to have access to the public service under conditions of equality, as it is clear that, because this was a position on the TSE that also materially entailed judicial duties, Mr. Aguinaga Aillón was indeed working in the public service. The Court also rightly followed the provisions given in the United Nations Human Rights Committee's General Comment No. 25,[35] to the effect that Article 23(1)(c) establishes the right not only to have access to a public service position, but also to hold that position under general conditions of equality and to remain in that position. The implication is

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30 *Cf.* Case of *Mina Cuero v. Ecuador. Preliminary Objection, Merits, Reparations and Costs.* Judgment of September 7, 2022. Series C No. 464. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

31 *Case of Nissen Pessolani v. Paraguay. Merits, Reparations and Costs.* Judgment of November 21, 2022. Series C No. 477. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

32 *Cf.* Case of *Aguinaga Aillón v. Ecuador*. *Merits, Reparations and Costs.* Judgment of January 30, 2023. Series C No. 483, para. 100.

33 *Cf. Case of Aguinaga Aillón v. Ecuador. Merits, Reparations and Costs.* Judgment of January 30, 2023. Series C No. 483, para. 93.

34 *Cf.* Case of *Aguinaga Aillón v. Ecuador*. *Merits, Reparations and Costs.* Judgment of January 30, 2023. Series C No. 483, para. 100.

35 *Cf*. United Nations. Human Rights Committee. General Comment No. 25, Article 25: The right to participate in public affairs, voting rights and the right of equal access to public service, CCPR/C/21/Rev. 1/Add. 7, July 12, 1996, para. 23.

that reasonable criteria and procedures and clear objectives should be respected and guaranteed for appointment, promotion, suspension and dismissal, and that people must not be the target of discrimination in the implementation of these procedures.[36] This was the essence of the obligation that was infringed in this case, because Mr. Aguinaga Aillón was dismissed from his position by an authority that was acting outside the bounds of its competence and using a procedure that had no legal footing.

7. This distinction is not strictly a matter of form; as I have said in previous opinions, using Convention Article 26 to hold the State responsible is legally inappropriate and undermines the legitimacy of the overall decision. Thus, holding the State of Ecuador responsible based solely on Article 23(1)(c) of the Convention not only provided a more accurate response to the facts affecting Mr. Aguinaga Aillón and allowed the Court to mark progress in its case law on the scope of the right contained in the American Convention, but also would have avoided undermining the effectiveness of the decision by overlooking the inconsistencies of direct enforcement of Convention Article 26. It is thus demonstrated once again that the use of this provision of the Convention serves only to reaffirm a line of jurisprudence on the ESCERs, regardless of whether this is relevant or necessary for the purposes of guaranteeing justice in the specific case at hand.

Humberto A. Sierra Porto
Judge

Pablo Saavedra Alessandri
Registrar

[36] *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. 206.

CONCURRING AND PARTIALLY DISSENTING OPINION OF

JUDGE PATRICIA PÉREZ GOLDBERG

INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF AGUINAGA AILLÓN *v.* ECUADOR

JUDGMENT OF JANUARY 30, 2023

(Merits, Reparations and Costs)

I am delivering this opinion,[1] with all due respect for the majority decision of the Inter-American Court of Human Rights (hereinafter "the Court"), to reiterate my stance that it is improper to hold the State of Ecuador internationally responsible for violating the individual right to work, specifically the right to job stability, based on Article 26 of the American Convention on Human Rights (hereinafter "the Convention").

I will first address the invocation of the principle of *iura novit curia* and then discuss the merits of the case.

I. Invocation of Article 26 of the Convention, in view of the principle of *iura novit curia*

1. It is first necessary to clarify that neither the Inter-American Commission on Human Rights (hereinafter "the Commission") nor the representatives expressly argued violation of Article 26 of the Convention.[2] The Court nevertheless decided to rule on violation of the right to work, and more specifically, the right to job stability, in injury of the alleged victim, under the principle of *iura novit curia*.

2. This principle is recognized to have its origins in Roman law and has particularly permeated the procedural systems in the countries of this region. This is based the understanding that an inherent feature of the operation of justice is that the courts "can-must" identify relevant regulations or principles for ruling on a case, when the failure of the parties to claim these provisions could lead to a mistaken decision or a hypothesis of denial of justice.

3. Although international judicial practice has made uneven use of this principle, the Inter-American system stands out for invoking it habitually. The former Permanent Court of International Justice,[3] the International Court of Justice[4] and the European Court of Human Rights[5] have also weighed the scope of this

[1] Article 65.2 of the Rules of Procedure of the Court states: "Any Judge who has taken part in the consideration of a case is entitled to append a separate reasoned opinion to the judgment, concurring or dissenting. These opinions shall be submitted within a time limit to be fixed by the Presidency so that the other Judges may take cognizance thereof before notice of the judgment is served. Said opinions shall only refer to the issues covered in the judgment."
[2] *Cf*. Paragraph 94.
[3] *Lotus*, judgment Nº 9, 1927, Series A, Nº1, page 31.
[4] *Fisheries Jurisdiction (United Kingdom v. Iceland),* judgment of 25 July, 1974, paragraphs 17-18; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* judgment of 27 June, 1986, paragraph 29.
[5] *Handyside v. United Kingdom*, judgment of 7 December 1976, Series A No. 24, paragraph 41; *Guerra and others v. Italy*, judgment of 19 February 1998, Reports 1998-I, p.13, paragraph 44; *Philis v. Greece*,

principle but have used it on a more restricted basis.

4. In the case at hand, the Court gave no grounds to justify its decision to invoke this principle, merely citing its judgments on the *Velásquez Rodríguez v. Honduras* and *Nissen Pessolani v. Paraguay* cases, both of which applied the principle,[6] although its brief mention of these cases was not sufficient argument to justify its use of this judicial device. Such a tactic constitutes argument by authority but does not qualify as grounds.

5. The Court does have the power to invoke this principle but is not exempt from the need to justify its use or to apply it moderately and cautiously. It should be understood, first, that the law is always constrained by the facts,[7] because the task of identifying and applying the law must be performed on the basis of the corpus of facts set out in the Report on the Merits; second, the Court must proceed in such a way as not to undermine equality of arms and, more particularly, the States' right to defense.

6. As Judge Sierra Porto stated earlier in his partially dissenting opinion in the case of *Lagos del Campo v. Peru,*[8] this is a power that must obey certain criteria of reasonableness and relevance, as when "a human rights violation

judgment of 27 August 1991, Series A No. 209, p. 19, paragraph 56; *Powell and Rayner v. United Kingdom,* judgment of 21 February 1990, Series A No. 172, p. 13, paragraph 29; *Scoppola v. Italy* (No. 2), judgment of 17 September 2009, p. 17, paragraph 5; *Celikbilek v. Turkey*, judgment of 31 May 2005, paragraphs 100-105.

[6] The I/H Court, unlike other international courts, has made frequent use of this power, as can be seen in its judgments on the following cases: *Velásquez Rodríguez v. Honduras*, judgment of July 29, 1988; *Godínez Cruz v. Honduras,* judgment of January 20, 1989; *Blake v. Guatemala,* judgment of January 24, 1998; *Durand and Ugarte v. Peru,* judgment of August 16, 2000; *Hilaire, Constantine and Benjamín et al. v. Trinidad and Tobago*, judgment of June 21, 2002; *Castillo Petruzzi et al. v. Peru,* judgment of May 30, 1999; *Cantos v. Argentina*, judgment of November 28, 2002; *Five Pensioners v. Peru*, judgment of February 28, 2003; *Myrna Mack Chang v. Guatemala*, judgment of November 25, 2003; *Maritza Urrutia v. Guatemala*, judgment of November 27, 2003; *Gómez Paquiyauri Brothers v. Peru*, judgment of July 8, 2004; *Juvenile Reeducation Institute v. Paraguay*, judgment of September 2, 2004; *Moiwana Community v. Suriname*, judgment of June 15, 2005; *Acosta Calderón v. Ecuador,* judgment of June 24, 2005; *The Girls Yean and Bosico v. Dominican Republic,* judgment of September 8, 2005; *Mapiripán Massacre v. Colombia*, judgment of September 15, 2005; *García Asto and Ramírez Rojas v. Peru*, judgment of November 25, 2005; *Sawhoyamaxa Indigenous Community v. Paraguay,* judgment of March 29, 2006; *Ituango Massacres v. Colombia,* judgment of July 1, 2006; *Ximenes Lopes v. Brazil,* judgment of July 4, 2006; *Bueno Alves v. Argentina,* judgment of May 11, 2007; *Kimel v. Argentina,* judgment of May 2, 2008; *Heliodoro Portugal v. Panama,* judgment of August 12, 2008; *Bayarri v. Argentina,* judgment of October 30, 2008; *González et al. ("Campo Algodonero") v. Mexico*, request to expand the number of alleged victims and refusal to submit documentary evidence, January 19, 2009; *Escher et al. v. Brazil*, judgment of July 6, 2009; *Usón Ramírez v. Venezuela,* judgment of November 20, 2009; *Vélez Loor v. Panama,* judgment of November 23, 2010; *Vera Vera et al. v. Ecuador,* judgment of May 19, 2011; *Contreras et al. v. El Salvador,* judgment of August 31, 2011; *Grande v. Argentina*, judgment of August 31, 2011; *Furlán and family v. Argentina*, judgment of August 31, 2012; *Gudiel Álvarez et al. ("Diario Militar") v. Guatemala,* judgment of November 2, 2012; *Suárez Peralta v. Ecuador*, judgment of May 21, 2013; *Landaeta Mejías Brothers et al. v. Venezuela,* judgment of August 27, 2014; *Expelled Dominicans and Haitians v. Dominican Republic,* judgment of August 28, 2014; *Human Rights Defender et al. v. Guatemala,* judgment of August 28, 2014; *Rochac Hernández et al. v. El Salvador,* judgment of October 14, 2014; *Cruz Sánchez et al. v. Peru,* judgment of April 17, 2015; *Peasant Community of Santa Barbara v. Peru,* judgment of September 1, 2015; *Kaliña and Lokono Peoples v. Suriname*, judgment of November 25, 2015; *I. V. v. Bolivia,* judgment of November 30, 2016; *Acosta et al. v. Nicaragua*, judgment of March 25, 2017; *Lagos del Campo v. Peru*, judgment of August 31, 2017; *Vereda La Esperanza v. Colombia,* judgment of August 31, 2017; *San Miguel Sosa et al. v. Venezuela*, judgment of February 8, 2018; *Women Victims of Sexual Torture in Atenco v. Mexico,* judgment of November 28, 2018; *Muelle Flores v. Peru*, judgment of March 6, 2019; *Rodríguez Revolorio et al. v. Guatemala*, judgment of October 14, 2019; *Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina*, judgment of February 6, 2020; *Hernández v. Argentina,* judgment of November 22, 2019; *Cuya Lavy et al. v. Peru*, judgment of September 28, 2021; *Former Employees of the Judiciary v. Guatemala*, judgment of November 17, 2021; *Casierra Quiñonez et al. v. Ecuador*, judgment of May 11, 2022 and *Nissen Pessolani v. Paraguay*, judgment of November 21, 2022.

[7] *Cf*. Case of *González et al. (Campo Algodonero) v. Mexico*, para. 32.

[8] He reiterated this view in his opinions on the cases of *Rodríguez Revolorio et al. v. Guatemala* and *Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina*.

is evident or when the representatives or the Commission have committed a serious omission or error, such that the Court rectifies a possible injustice, but this principle should not be used to surprise a State with a violation that it had no way of anticipating and that it was unable to contest, not even at the time of the facts."

7. Neither of these exceptional hypotheses obtains in the case at hand. Instead, the facts brought before this Court revealed that the decision by the National Congress to remove Mr. Aguinaga Aillón from the TSE was arbitrary because it was made outside the framework of congressional powers and did not offer the guarantees of due process.

8. The legal debate before the Court therefore addressed whether there had in fact been a violation of the right enshrined in Article 23(1)(c) of the Convention.

9. The Court examined the evidence submitted in the process and decided to declare the State of Ecuador internationally responsible for violating that article. The State was informed from the beginning that this provision would be claimed by the victim and had the opportunity to counter the arguments being made. This provision fully covered the corpus of facts brought before the Court, which—notwithstanding subsequent arguments about the Court's jurisdiction—made it unnecessary and irrelevant to raise *iura novit curia* as a principle to declare, based on very same facts, breach of Article 26 of the Convention.

10. In the instant case, then, the exceptions available to justify the use of the *iura novit curia* principle were not present, and the Court therefore could not declare that the victim's right to work had been violated. The State was clearly rendered unable to counter this argument from the standpoint of either facts or law; as a result, the right to due process that all courts must guarantee was denied.

II. Lack of jurisdiction to declare autonomous violation of the right to work, based on Article 26 of the American Convention

I will begin my explanation of the reasons why the Court lacks competence for this purpose by pointing to the "law of treaties" which inspires and governs the interpretation of international treaties, including the American Convention. I will then discuss the *travaux préparatoires* of the Convention, which shed light on the scope of Article 26. Finally, I will look at the origin and content of the Protocol of San Salvador (hereinafter "the Protocol") and close by setting out my arguments against the majority decision in the case at hand.

A. The law of treaties

1. The law of treaties, as we know, covers obligations that arise from the express consent of the States. If the States agree and consent to a particular subject, their will should be made explicit as set forth in Article 2(a) of the Vienna Convention on the Law of Treaties (hereinafter VCLT).[9]

2. Under international agreements of this kind, the States may consent to create courts of justice to apply and interpret the treaty provisions and, in subsequent instruments, may broaden the powers of these bodies.

[9] "[T]reaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."

International courts must therefore exercise their powers in the framework set by the applicable treaties. Such legal instruments are the foundation for the court and set the boundaries for its work. From the democratic standpoint, this is consistent with due respect for the domestic deliberative processes by which a country decides to ratify a treaty, and with the type of interpretation produced by international courts. Such hermeneutic exercise revolves around the provisions of international law and are not based on a constitution.

3. Therefore, and in view of the fact that the Court in this case found violation of the right to job stability as part of the right to work, based on the provisions of Convention Article 26, it is worth asking whether the Count in fact has the power to proceed in such a way.

4. The law of treaties tells us that it does not. Article 1(1) of the Convention is clear, stating that the States Parties "undertake to respect the rights and freedoms recognized **herein** and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination..." The articles on the jurisdiction and functions of the Court are also crystal-clear in stating that the Court is subject to the provisions of the American Convention. Specifically, Article 62(3) says, "[t]he jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions **of this Convention** that are submitted to it [...]" and, along the same lines, Article 63(1) says, "[i]f the Court finds that there has been a violation of a right or freedom protected **by this Convention**, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated."[10]

5. Chapter III of the Convention, "Economic, Social and Cultural Rights," consists of a single paragraph, Article 26, entitled "Progressive Development." Under the terms of this article, as the title suggests, "[t]he States Parties undertake to adopt **measures**, both internally and through international cooperation, especially those of an economic and technical nature, **with a view to achieving progressively**, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires."[11].

6. Notwithstanding the following discussion, a reading of this article would suggest that, unlike the case of the civil and political rights specified and developed in Chapter II of the Convention, this text sets an obligation of means for the States Parties, that is, to adopt the actions, measures or public policies necessary to achieve "progressively" the full realization of the rights provided in this article.

7. Indeed, under Article 76(1) and 77(1) of the Convention, the States Parties agreed on mechanisms to modify the terms of the Convention by means of either amendment or an additional protocol. It was under this latter article that the "Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights" was adopted in 1988, for the purpose of progressively drawing other rights and freedoms into the protection system of the Convention. I will discuss this point below.

[10] Emphasis added.
[11] Emphasis added.

8. This is why the decision to invoke Article 26 of the Convention as covering all the ESCERs provided in the OAS Charter would ignore the commitment adopted by the States that have ratified the American Convention.

B. *Travaux préparatoires* of the American Convention

1. The Fifth Meeting of Consultation of Ministers of Foreign Affairs of the Organization of American States (hereinafter the OAS), held in 1959, decided to promote the development of a human rights convention and tasked the Inter-American Council of Jurists to prepare a draft[12] for this purpose.[13] The Council of Jurists took into account the experiences of the European human rights system and the universal human rights system. Economic, social and cultural rights were included in chapter II of the draft (under the title "Economic, social and cultural rights") in the following terms:

> Article 21.
> 1. The States recognize the capacity of their inhabitants to enjoy economic, social and cultural rights.
> 2. At the same time they recognize that the exercise of these rights shall be subject only to the limitations imposed by law, to the degree compatible with the nature of such rights, and for the exclusive purpose of advancing the general welfare of a democratic society.[14]

2. Chapter II of the draft contained several articles additional to this general clause,[15] specifically protecting an array of economic, social and cultural rights: the right of peoples freely to determine their political, economic, social and cultural way of life (Article 20), the right to employment (Articles 22 and 23), the right to organize labor unions (Article 24), the right to social security (Article 25), the right to education (Article 27, 28 and 30) and cultural rights (Article 29).

3. The wording of Article 21 as quoted above was also proposed in the draft Convention on Human Rights submitted by the Government of Chile,[16] which served as one of the base documents for the Convention. Uruguay suggested a different text in its own draft Convention on Human Rights, more similar to the wording of the International Covenant on Economic, Social and Cultural Rights, Article 2:

> Chapter II: Replacement text on economic, social and cultural rights
> […]
> Article 24.
> 1. Each State Party to the present Convention undertakes to take steps, individually and through cooperation with the others, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present chapter, by the adoption of legislative measures and other means.
> 2. The States Parties to the present Convention recognize that, in the enjoyment of those rights provided by the State in conformity with the present chapter, the State may subject such rights only to such limitations as are determined by law, only in so far as this may be compatible with

[12] Approved on September 8, 1959, by Resolution XX of the Inter-American Council of Jurists, Doc. CIJ-41, 1959.
[13] *Cf. Inter-American Yearbook on Human Rights* 1968, OAS, Washington D.C., 1973, pg. 97.
[14] *Cf. Draft Convention on Human Rights*, approved by the Fourth Meeting of the Inter-American Council of Jurists, Final Act, Santiago Chile, September, 1959, Doc. CIJ-43, in: Inter-American Yearbook on Human Rights, 1968, OAS, Washington D.C., 1973, pg. 245.
[15] *Cf. Draft Convention on Human Rights*, approved by the Fourth Meeting of the Inter-American Council of Jurists, Final Act, Santiago Chile, September, 1959, Doc. CIJ-43, in: Inter-American Yearbook on Human Rights, 1968, OAS, Washington D.C., 1973, pp. 245-248.
[16] *Cf. Draft Convention on Human Rights submitted by the Government of Chile to the Second Special Inter-American Conference*, Río de Janeiro, 1965, Doc. 35, in: Inter-American Yearbook on Human Rights, 1968, OAS, Washington D.C., 1973, pg. 285.

> the nature of these rights and solely for the purpose of caring for the general welfare in a democratic society.[17]

4. The 1965 Second Special Inter-American Conference then entrusted the OAS Council to update and complete the "Draft Convention on Human Rights" developed by the Inter-American Council of Jurists in 1959, taking into consideration the drafts submitted by Chile and Uruguay and the position of the Inter-American Commission on Human Rights. It also entrusted the OAS Council to submit the draft to the governments so they could provide any observations they considered relevant and to convene an Inter-American Specialized Conference to examine the draft and the observations submitted, and to approve the Convention.

5. The OAS Council asked the Inter-American Commission for its views, and the Commission issued an opinion to the Council. [18] The Inter-American Commission reacted to the discussion on economic, social and cultural rights in its second opinion, as follows:

> The Commission believes that, initially, the Convention should contemplate only those rights and freedoms in regard to which the American states are now in a position to extend international protection which goes beyond the limits of their domestic competence. In examining the chapter on economic, social and cultural rights in the IACJ draft and in those presented by the Uruguayan and Chilean governments, the Commission had serious doubts as to the appropriateness of including those rights in the present convention, since, in the light of the experience of the Council of Europe and the United Nations, it considered that those rights, because of their nature, should be covered by a special system of international protection.[19]

The Inter-American Commission added:

> However, the Commission believes that in view of the importance of the economic, social and cultural rights, the future Inter-American Convention on Human Rights should contain provisions by which **the States Parties to the Convention will acknowledge the need to incorporate gradually into their domestic legislation such measures as are required to fully implement those rights.**[20] The Commission also considers that consideration of the system for the international protection of the economic, social and cultural rights should begin as soon as possible. The Commission is prepared to begin examining this system of protection if the governments of the member states agree that it do so.[21]

6. The Commission therefore suggested that the articles on economic, social and cultural rights proposed in the draft by the Inter-American Council of Jurists be reformulated. It proposed the following text:

> Article 21.
> 1. The States Parties to this Convention recognize the need to adopt and, as appropriate, strengthen the guarantees to permit full protection of the other rights set forth in the American Declaration of the Rights and Duties of Man which are not included in the preceding articles.
> 2. The Contracting States also declare their intention of including and, as appropriate, maintaining and perfecting, in their domestic legislation, the provisions most conducive to the exercise of the right to employment and the fair and equitable remuneration of work, the establishment of humane working conditions; the protection of children, mothers and families; as well as to the establishment of preventive and social-security measures that will ensure health, disability and unemployment protection, the attainment of better living standards, and access to education and to the means for cultural improvement.

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[17] *Cf. Draft Convention on Human Rights submitted by the Government of Uruguay to the Second Special Inter-American Conference*, Río de Janeiro, 1965, Doc. 49, in: Inter-American Yearbook on Human Rights, 1968, OAS, Washington D.C., 1973, pg. 303.
[18] The first part of the report was submitted on November 4, 1966, and the second, on April 10, 1967.
[19] *Cf. Opinion of the Inter-American Commission on Human Rights on the draft Convention on Human Rights approved by the Inter-American Council of Jurists, Part II,* OAS/Ser.L/V/II.16/doc.8, in: Inter-American Yearbook on Human Rights, 1968, OAS, Washington D.C., 1973, pg. 335.
[20] Emphasis added.
[21] *Cf. Opinion of the Inter-American Commission on Human Rights on the draft Convention on Human Rights approved by the Inter-American Council of Jurists, Part II,* OAS/Ser.L/V/II.16/doc.8, in: Inter-American Yearbook on Human Rights, 1968, OAS, Washington D.C., 1973, pg. 335.

Article 22.
The Contracting States shall report periodically to the Commission on Human Rights on the measures they have taken to achieve the purposes set forth in the preceding article. The Commission shall make appropriate recommendations and, when such measures have been widely accepted, shall promote the conclusion of a special convention, or additional protocols to this Convention or in such other instrument as considered appropriate.[22]

7. The OAS Council adopted a resolution on June 12, 1968, asking the Inter-American Commission to develop a final working document on the draft Convention, which the Commission issued as the "Draft Inter-American Convention on Protection of Human Rights." The document was approved and adopted by the Inter-American Specialized Conference.[23]

8. The Inter-American Specialized Conference on Human Rights was then convened from November 7 through 22, 1969, in San José, Costa Rica, to evaluate the draft.[24] The provisions on economic, social and cultural rights read as follows:

Article 25.
1. The States Parties to this Convention recognize the need to devote their greatest efforts for their domestic legislation to adopt and, if pertinent, guarantee the other rights set forth in the American Declaration of the Rights and Duties of Man which are not included in the preceding articles.
2. The States Parties also express their intention to enshrine and, where applicable, to maintain and improve, in their domestic legislations, whatever provisions are most appropriate for: a substantial, self-sustained increase in the per capita national product; equitable distribution of national income; appropriate, equitable tax systems; modernization of rural life and reforms that will lead to equitable, effective land tenure systems, improved agricultural productivity, expansion of land use, diversification of production and better systems for the industrialization and marketing of agricultural goods, and strengthening and expanding the means to achieve these ends; expedited, diversified industrialization, especially of capital goods and intermediate products; domestic price stability in harmony with sustained economic development and the achievement of social justice; fair wages, employment opportunities and acceptable working conditions for all; swift eradication of illiteracy and expansion of opportunities for all in the field of education; protection of human potential by extending and applying modern know-how in medical science; proper nutrition, especially by means of expedited national efforts to boost the production and supply of foodstuffs; suitable housing for all sectors of the population; urban conditions that facilitate a healthy, productive, decent life; promotion of private initiative and investment in harmony with the action of the public sector, and the expansion and diversification of exports.

Article 26.
The States Parties shall report periodically to the Commission on Human Rights on the measures they have taken to achieve the purposes set forth in the foregoing article. The Commission shall make appropriate recommendations and, when such measures have been widely accepted, shall promote the conclusion of a special convention or additional protocols to this Convention or such other instrument as considered appropriate.

Article 41.
1. The States Parties undertake to submit regular reports to the Commission on the measures they have taken to guarantee the observation of the rights given in Article 25.
2. The Commission will set the timetable for these reports.
3. In the case of a report that should originally be submitted to the United Nations specialized agencies or the Organization of American States, the State Party shall abide by the provisions of paragraph 1 above by sending a copy of the same report to the Commission.[25]

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[22] *Cf. Opinion of the Inter-American Commission on Human Rights on the draft Convention on Human Rights approved by the Inter-American Council of Jurists, Part II,* OAS/Ser.L/V/II.16/doc.8, in: Inter-American Yearbook on Human Rights, 1968, OAS, Washington D.C., 1973, pg. 335.
[23] *Cf. Resolution of the OAS Council, October 2, 1968.*
[24] *Cf. Inter-American Specialized Conference on Human Rights, Act and Documents,* OEA/Ser.K/XVI/1.2, pp. 1-3 [available in Spanish only].
[25] *Cf. Inter-American Specialized Conference on Human Rights, Act and Documents,* OEA/Ser.K/XVI/1.2, pp. 23 and 28-29 [available in Spanish only].

9. The proposal was reviewed and discussed by the different delegations. Uruguay[26] submitted a comment on Article 25(2) above, that "its content does not seem appropriate to a convention, but it may not be politically practical to object to the inclusion of the text."

10. The delegation from Chile[27] found that "the provisions that merit the most reworking of style and substance are those that have been retained in the draft on economic, social and cultural rights." It explained that this was because "all direct mention of these rights has been removed." It then added, along the same lines, that "indirectly, Article 25 paragraph 1 provides insufficient recognition." It therefore said:

> According to sound legal technique, however, the draft convention should contain appropriate wording on these rights, making it possible to monitor their application.
> […]
> If the idea of drafting a single convention is upheld, following the approach of the United Nations and the Council of Europe, it would follow that economic, social and cultural rights should be itemized, also defining in detail the means for promoting and monitoring them.
> […]
> In any case, a provision should be included on economic, social and cultural rights, establishing them as legally binding to some degree (insofar as the nature of these rights allows) in terms of compliance and enforcement. This would require consideration of a clause similar to that of Article 2, paragraph 1 of the United Nations covenant on the same subject.[28]

11. The delegation of the Dominican Republic[29] expressed a similar view on Article 25 paragraph 1 of the text, saying, "the obligations of the States Parties should be stipulated clearly, without trying to include other obligations by making vague allusion to them." It also suggested that certain points in Articles 25, 26 and 41 be reworded.

12. The delegation from Mexico[30] stated:

> The advisability of including in the draft the rights enshrined in Article 25 of the text raises certain concerns: first, the point could be redundant, as it already appears in Article 31 of Protocol of Reforms to the OAS Charter. Next, unlike the other rights referenced in the draft—which are rights that an individual enjoys as a person or as a member of a given social group—it is difficult at a given moment to determine precisely what person or persons would be directly affected by violation of the rights contained in Article 25. The same could be said about the implicit difficulty of determining, in such a case, what authority is responsible for this type of violation.

13. The delegation from Brazil[31] proposed certain amendments to the articles, noting the need to bear in mind that:

> Civil and political rights derive effective legal protection, both domestically and internationally, against violations committed by organs of the state or their representatives. By contrast, economic, social and cultural rights are set forth in highly diverse measure and forms by the legislation of the different American States, and although the governments may wish to recognize them all, their effective exercise depends substantially on the availability of material resources for implementing them.
> Article 25 of the draft was inspired by this concept, but the text does not match the intention.

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[26] *Cf. Inter-American Specialized Conference on Human Rights, Act and Documents,* OEA/Ser.K/XVI/1.2, pg. 37, para. 10 [available in Spanish only].
[27] *Cf. Inter-American Specialized Conference on Human Rights, Act and Documents,* OEA/Ser.K/XVI/1.2, pp. 42-43, paras. 14-17 [available in Spanish only].
[28] *Cf. Inter-American Specialized Conference on Human Rights, Act and Documents,* OEA/Ser.K/XVI/1.2, pp. 42-43, paras. 15-17 [available in Spanish only].
[29] *Cf. Inter-American Specialized Conference on Human Rights, Act and Documents,* OEA/Ser.K/XVI/1.2, pp. 69-70 [available in Spanish only].
[30] *Cf. Inter-American Specialized Conference on Human Rights, Act and Documents,* OEA/Ser.K/XVI/1.2, pg. 101 [available in Spanish only].
[31] *Cf. Inter-American Specialized Conference on Human Rights, Act and Documents,* OEA/Ser.K/XVI/1.2, pp. 124-125 [available in Spanish only].

14. Other observations were made along the same lines as these, that is, addressing the need to amend certain items in the proposal, as explained by Argentina[32] and Guatemala.[33]

15. Articles 25 and 26 of the draft were discussed further at the Inter-American Specialized Conference on Human Rights, and the following proposal for economic, social and cultural rights was approved[34] and submitted to the plenary session:[35]

> Chapter III.
> Economic, social and cultural rights
>
> Article 26. Progressive development
> The States Parties undertake to adopt measures, both internally and through international economic and technical cooperation, with a view to achieving progressively, by legislation or other appropriate means [and subject to available resources], the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.
>
> Article 27. Oversight of compliance with obligations
> The States Parties shall transmit to the Commission a copy of each of the reports and studies that they submit annually to the Executive Committees of the Inter-American Economic and Social Council and the Inter-American Council for Education, Science, and Culture, in their respective fields, so that the Commission may verify whether the pre-determined obligations are being met, which are the essential foundation for the exercise of other rights enshrined in this Convention.
>
> […]
> Chapter VII. The Inter-American Commission on Human Rights
> […]
> Section 2. Duties
> […]
> Article 43.
> The States Parties shall transmit to the Commission a copy of each of the reports and studies that they submit annually to the Executive Committees of the Inter-American Economic and Social Council and the Inter-American Council for Education, Science, and Culture, in their respective fields, so that the Commission may verify whether the obligations implicit in the economic and social provisions and in the provisions on education, science and culture, set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires, are being met.

16. The final draft was submitted to the vote of the plenary session, which decided to approve Article 26 and strike Article 27, for which no justification was given.[36] The change made to Article 43 was more revealing, as the plenary decided to replace the clause "[…] so that the Commission may **verify** whether the obligations implicit in the economic and social provisions and in the provisions on education, science and culture,[…]" with a text reading "[…] so that the Commission may watch over the **promotion** of the rights implicit in the economic, social, educational, scientific, and cultural standards […]."[37] The text moved from a reinforced mechanism of protection to one targeting special promotion of such rights.

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[32] *Cf. Inter-American Specialized Conference on Human Rights, Act and Documents,* OEA/Ser.K/XVI/1.2, pg. 47 [available in Spanish only].
[33] *Cf. Inter-American Specialized Conference on Human Rights, Act and Documents,* OEA/Ser.K/XVI/1.2, pg. 107 [available in Spanish only].
[34] *Cf. Inter-American Specialized Conference on Human Rights, Act and Documents,* OEA/Ser.K/XVI/1.2, pg. 276 [available in Spanish only].
[35] *Cf. Inter-American Specialized Conference on Human Rights, Act and Documents,* OEA/Ser.K/XVI/1.2, pp. 318 and 384 [available in Spanish only].
[36] *Cf. Inter-American Specialized Conference on Human Rights, Act and Documents,* OEA/Ser.K/XVI/1.2, pg. 448 [available in Spanish only].
[37] *Cf. Inter-American Specialized Conference on Human Rights, Act and Documents,* OEA/Ser.K/XVI/1.2, pg. 454 [available in Spanish only]. Emphasis added.

17. Shortly after the American Convention on Human Rights had been approved, the Inter-American Commission recognized **"the difficulty of establishing criteria that would enable it to measure the states' fulfillment of their obligations**[38] [with respect to economic, social and cultural rights]."[39] This showed that due protection of these rights through the American Convention was not enough and could even be considered incomplete.

18. Thus, the Inter-American Commission shifted the matter to the OAS General Assembly for consideration. It stated the need for the General Assembly:

> […] To reaffirm that the effective protection of human rights also extends to economic, social and cultural rights, and that it is the duty of the governments of the member states to cooperate as fully as possible in the task of hemispheric development, in order to alleviate extreme poverty, and to adopt specific measures which permit fulfillment of this objective.[40].

19. The OAS General Assembly subsequently decided to task the General Secretariat to develop a draft Additional Protocol to the American Convention, defining economic, social and cultural rights.[41] The initiative eventually took the form of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, known as the "Protocol of San Salvador," signed on November 17, 1988, during the 18th regular session of the OAS General Assembly.

C. The Protocol of San Salvador

1. This protocol is the primary Inter-American instrument for the protection, guarantee and promotion of economic, social and cultural rights. As an international treaty, it recognizes a body of State obligations (the obligation to adopt measures, obligation to enact domestic legislation, nondiscrimination, inadmissibility of restrictions) and rights (right to work, right to just, equitable, and satisfactory conditions of work, trade union rights, right to social security, right to health, right to a healthy environment, and the like).

2. Two points should be clarified about the content of the treaty. First, with respect to the enforceability of the rights set forth in the Protocol of San Salvador, Article 19 provides the option of taking action with the Inter-American Commission and, when applicable, before the Inter-American Court through the system of individual petitions, only if the rights established in paragraph (a) of Article 8 (trade union rights) and in Article 13 (right to education) are violated.

3. Article 19 of the Protocol of San Salvador also stipulates that the States Parties, in keeping with the provisions of the article and the corresponding rules to be formulated for that purpose by the General Assembly of the OAS, undertake to submit periodic reports on progressive measures they have taken to ensure due respect for the rights set forth in the Protocol. The current practice has these reports examined by the Working Group for the Protocol of San Salvador (WGPSS), created according to parameters established by the General Assembly of the OAS.[42]

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[38] Emphasis added.
[39] *Cf. Inter-American Commission on Human Rights, Annual Report 1979-1980*, OEA/Ser.L/V/II.50 doc. 13 rev. 1, October 2, 1980, Chapter VI, para. 5.
[40] *Cf. Inter-American Commission on Human Rights, Annual Report 1980-1981*, OEA/Ser.L/V/II.54 doc. 9 rev.1, October 16, 1981, Chapter V, Economic, Social and Cultural Rights, Recommendations, para. 10.
[41] *Cf.* AG/RES. 619 (XII-O/82), November 20, 1982, sole operative paragraph.
[42] *Cf.* AG/RES. 2262 (XXXVII-O/07), June 5, 2007.

4. The WGPSS is the body responsible for defining the indicators that should be included in the reports by the States Parties; its tasks include lending technical cooperation and analyzing and monitoring compliance with the obligations set forth in the Protocol of San Salvador. It does this using the "progress indicators for measuring rights under the Protocol of San Salvador,"[43] useful for measuring compliance with the rights set forth in the protocol and thus track the principle of progressive development of economic, social and cultural rights. In the words of the WGPSS:

> The main objectives of the [...] indicators [is] to help states parties by providing them with useful tools to review the status of the rights contained in the Protocol, identify outstanding issues and agendas based on a participatory dialogue with civil society, and devise strategies for the progressive realization of the rights contained in the Protocol. The aim is to encourage states to undertake a process of evaluating and measuring fulfillment of social rights that goes beyond mere reporting to become a useful instrument for the design and continuous evaluation of public policies within states, with a view to ensuring comprehensive fulfillment of economic, social, and cultural rights. As the standards say, they "*[a]re not intended to record complaints but progress*."[44]

5. The WGPSS model examines three types of indicators for assessing progress: (i) structural,[45] (ii) process,[46] and (iii) outcome,[47] organized into three conceptual categories: (i) incorporation of the right,[48] (ii) financial context and budgetary commitment,[49] and (iii) state capabilities;[50] it adds three cross-cutting principles: (a) equality and nondiscrimination, (b) access to justice, and (c) access to Information and participation.[51] In this framework, the WGPSS stresses:

> States can meet their obligations by choosing from a broad range of courses of action and policies. It is not for the international monitoring system to judge those options that each

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[43] *Cf. Progress indicators for measuring rights under the Protocol of San Salvador.* OEA/Ser.D/XXVI.11 2015.

[44] *Cf. Progress indicators for measuring rights under the Protocol of San Salvador.* OEA/Ser.L/XXV.2.1 and GT/PSS/doc.2/11 rev.2, December 16, 2011, para. 9.

[45] Structural indicators reflect the ratification/adoption of international legal instruments essential for facilitating the realization of a fundamental human right. *Cf. Progress indicators for measuring rights under the Protocol of San Salvador.* OEA/Ser.L/XXV.2.1 and GT/PSS/doc.2/11 rev.2, December 16, 2011, para. 33.

[46] Process indicators seek to measure the quality and extent of the state's efforts to implement rights by tracking the scope, coverage, and content of strategies, plans, programs, or policies, or other specific activities and interventions designed to accomplish the goals necessary for the realization of a given right. *Cf. Progress indicators for measuring rights under the Protocol of San Salvador.* OEA/Ser.L/XXV.2.1 and GT/PSS/doc.2/11 rev.2, December 16, 2011, para. 34.

[47] Outcome indicators capture attainments, individual and collective, that reflect the status of realization of human rights in a given context. *Cf. Progress indicators for measuring rights under the Protocol of San Salvador.* OEA/Ser.L/XXV.2.1 and GT/PSS/doc.2/11 rev.2, December 16, 2011, para. 35.

[48] The idea of the category for incorporation of the right into the legal system, the institutional apparatus and public policies is to collect relevant information on how the right recognized in the Protocol is incorporated in the domestic law books and in public policy and practice. *Cf. Progress indicators for measuring rights under the Protocol of San Salvador.* OEA/Ser.L/XXV.2.1 and GT/PSS/doc.2/11 rev.2, December 16, 2011, para. 37.

[49] The purpose of the category for the basic financial context and budgetary commitment is to assess the effective availability of state funds for public social spending and how they are distributed, whether it be measured in the usual manner (as a percentage of gross domestic product for each social sector) or by other indicators, and the budgetary commitments, which make it possible to assess the importance that the State ascribes to a given right. *Cf. Progress indicators for measuring rights under the Protocol of San Salvador.* OEA/Ser.L/XXV.2.1 and GT/PSS/doc.2/11 rev.2, December 16, 2011, para. 39.

[50] The category on state or institutional capabilities entails a review of how and according to what parameters government (and its various branches and departments) deals with different socially problematized issues. In particular, the question is how it establishes its development strategies and goals, and under what parameters the implementation of the rights contained in the Protocol is inscribed therein. *Cf. Progress indicators for measuring rights under the Protocol of San Salvador.* OEA/Ser.L/XXV.2.1 and GT/PSS/doc.2/11 rev.2, December 16, 2011, para. 40.

[51] *Cf. Progress indicators for measuring rights under the Protocol of San Salvador.* OEA/Ser.L/XXV.2.1 and GT/PSS/doc.2/11 rev.2, December 16, 2011, para. 15.

State, with a degree of discretion and according to participatory mechanisms, has adopted for realizing the rights contained in the Protocol. It will be necessary, however, to determine if those public policies ensure fulfillment of their positive obligations -whether immediate or progressive- under the Protocol.[52]

6. The progress indicators unquestionably serve as a tool, first for assessing the degree of compliance (whether progress or setbacks) of the States from a general perspective, and second, to do so with a particular focus on certain rights. The WGPSS does this by adopting as its focal point the principles of progressivity (and therefore, the obligation of non-regressivity) of economic, social and cultural rights, such that any weakening or worsening in the levels of protection of these rights, without suitable justification, would entail unauthorized regression under the Protocol of San Salvador.[53]

D. Analysis of the instant case

1. The first part of this opinion explained that, although neither the Commission nor the representatives of the victim had argued violation of Article 26 of the Convention, the Court majority held that it had been breached, so declaring under the principle of *iura novit curia.*

2. Specifically, the judgment says that in order to examine this violation, the Court would "need to consider whether these violations occurred simultaneously with the other violations [already] discussed," adding that the "Court has understood that civil and political rights, as well as economic, social, cultural and environmental rights, are indivisible, and the recognition and enjoyment thereof must inevitably be guided by the principles of universality, indivisibility, interdependence, and interrelationship."[54] It goes on to say that both "categories of rights must be understood integrally and jointly as human rights, without any specific hierarchy, and be enforceable in all cases before the competent authorities." This presents two logical difficulties.

3. The first is that it associates a case of simultaneous violation of rights in both categories with the indivisible nature of the two classes of rights. In other words, in this case it is being held that the right set forth in Article 23(1)(c) has been violated, that the right to work was breached at the same time, and that this points to the fact that civil and political rights are inseparable from economic, social, cultural and environmental rights (ESCERs). It is of course true that a single act can violate more than one of the rights recognized in the Convention, but in the instant case, even though only one sphere of protection has been breached (the right to remain in a job under conditions of equality), the judgment declares violation not only of the provision applicable to the facts under analysis (Article 23(1)(c)), but also, in a strained act of interpretation of the Convention (which distorts the text) it also finds that Article 26 has been violated.

4. The second problem is that it is one thing to affirm that there is no hierarchy among rights in the two categories (a correct statement with which I agree), but quite another to hold that they are both equally enforceable before this Court. The one does not follow logically from the other.

5. As I also stated in separate opinions on the cases *Guevara Díaz v. Costa Rica*,

[52] *Cf. Progress indicators for measuring rights under the Protocol of San Salvador.* OEA/Ser.L/XXV.2.1 and GT/PSS/doc.2/11 rev.2, December 16, 2011, para. 23.
[53] *Cf. Progress indicators for measuring rights under the Protocol of San Salvador.* OEA/Ser.L/XXV.2.1 and GT/PSS/doc.2/11 rev.2, December 16, 2011, para. 24.
[54] *Cf*. Paragraph 95.

Mina Cuero v. Ecuador, Benites Cabrera v. Peru, Valencia Campos v. Bolivia, Brítez Arce et al. v. Argentina and *Nissen Pessolani v. Paraguay*, I continue to believe that this Court lacks jurisdiction to hold autonomous violation of ESCERs.

6. The theory that the ESCERs are directly enforceable introduces an array of logical, legal and practical problems that inevitably undermine the reasonable predictability and legal certainty that this Court should guarantee for everyone subject to its proceedings.

7. Indeed, this procedure ignores the requirement for international obligations to arise from the prior, express consent of the States; it fails to explain that the States have not given this Court jurisdiction to rule on ESCERs, as both the Convention and the Protocol clearly state;[55] it seeks to artificially broaden the Court's jurisdiction and it departs from the rules of interpretation of the Convention. In practice, therefore, the content of the Convention is being subverted outside the rules set in place for amending or changing it;[56] in other words, the text is put through a judicial mutation.[57]

8. The first basis given for claiming that the right to work is directly enforceable is an argument of authority, citing several precedent cases, including the judgment on *Lagos del Campo v. Peru* and *Nissen Pessolani v. Paraguay*, which protects the right to work under Article 26 of the Convention.[58]

9. As has been said before, claiming that the ESCERs are not directly enforceable before the Court does not amount to a denial of the existence or the paramount importance of these rights, or the fact that they are interdependent and indivisible with civil and political rights, nor does it suggest that they lack protection or should not be protected. The duty of States is to allow for the autonomy of persons to remain in force, which means that people must have access to primary goods (more broadly than those defined in the political philosophical arena of John Rawls)[59] and be able to develop their capacities, that is, have access to economic, social and cultural rights.[60]

10. The States are under obligation to provide the conditions whereby people can develop their capacities and lead a decent life. Such conditions are created when States guarantee access to ESCERs, and ideally, enshrine them in their constitutions and empower their judges to deliver final, unappealable interpretations of these rights.[61] The States have been moving progressively toward making ESCERs enforceable in the domestic jurisdiction, and the Protocol of San Salvador has marked progress on the subject in the

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[55] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador).
[56] See Articles 76(1) and 77(1) of the Convention.
[57] This does not mean, of course, that the Court's interpretations of the provisions of the Convention should not evolve and progressively clarify the scope of terms used in the text, according to the context of facts that are subsumed in the articles, as occurred, for example, in the cases on sexual orientation as a protected category, communal ownership of indigenous property, and the concept of victim in the inter-American human rights system.
[58] *Cf.* Paragraph 97.
[59] Rawls holds that primary goods are a set of goods necessary "for the framing and execution of a rational plan of life," such as liberty, opportunity, income, wealth and self-respect. Cf. RAWLS, John: *Theory of justice,* Harvard University Press, Cambridge, Massachusetts (1971), pg. 433.
[60] Cf. PÉREZ GOLDBERG, Patricia: *Las mujeres privadas de libertad y el enfoque de capacidades*, Der Ediciones, Santiago (2021), pp. 94-109.
[61] Along the same lines, one of the central postulates of the capability approach (a partial theory of social justice) is that certain basic rights (the ESCERs) should be established in national constitutions everywhere. *Cf*. NUSSBAUM, "Frontiers of justice: disability, nationality, species membership" (2006:314).

international arena, which is a positive development. The mere fact that a given objective is beneficial and desirable, however, does not authorize a court to disregard the regulatory boundaries of its own jurisdiction. The Court, as has been said, has developed major contributions to the protection of human rights based on the application of the *pro persona* principle, and has done so without overreaching its own area of authority.

11. The Court itself offered an argument in favor of its jurisdiction when it said in this very judgment that it "has cautioned that Articles 45(b) and (c), 46 and 34(g) of the OAS Charter set out provisions that point to the right to work."[62] The Charter, however, does not confer jurisdiction on this Court. Furthermore, a reading of the text from which this right would allegedly derive reveals that it applies mainly to program provisions.

12. Articles 45(b) and (c), 46 and 34(g), cited in this judgment, cannot be interpreted separately from the chapeau of the chapter on "Integral Development," that is, Article 30 of the OAS Charter. The article reads:

> Article 30
> "The Member States, inspired by the principles of interAmerican solidarity and cooperation, **pledge themselves to a united effort to ensure**[63] international social justice in their relations and integral development for their peoples, as conditions essential to peace and security. Integral development encompasses the economic, social, educational, cultural, scientific, and technological fields through which the goals that each country sets for accomplishing it should be achieved." [64]

13. Article 34 reads:

> Article 34
> "Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic **objectives** of integral development. To achieve them, **they likewise agree to devote their utmost efforts** to accomplishing the following basic goals:
> […] g) Fair wages, employment opportunities, and acceptable working conditions for all [...].[65]

14. Article 45 reads:

> Article 45
> "Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, **agree to dedicate every effort** to the application of the following **principles and mechanisms**:
> […] b) Work is a right and a social duty, it gives dignity to the one who performs it, and it should be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working;
> (c) Employers and workers, both rural and urban, have the right to associate themselves freely for the defense and promotion of their interests, including the right to collective bargaining and the workers' right to strike, and recognition of the juridical personality of associations and the protection of their freedom and independence, all in accordance with applicable laws[…].[66]

15. It can be held, on this basis, that Article 26 of the Convention contains no subjective rights enforceable before this Court. Instead, it enshrines a

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[62] *Cf.* Paragraph 97.
[63] Emphasis added.
[64] Emphasis added.
[65] Emphasis added.
[66] Emphasis added.

commitment by the States to adopt provisions or measures that will progressively achieve the effective exercise of the rights derived from the relevant provisions of the OAS Charter, "[subject to available resources]," which is consistent with the progressive nature of the obligation, and "by legislation or other appropriate means." In other words, each State Party is committed to work on formulating definitions and moving decisively ahead in these areas, following domestic deliberative procedures.

16. The Court is therefore empowered to hear and decry any failures to abide by this commitment (an obligation of progressivity with no regressivity) to rights that, by interpretation, can be inferred from the Charter, but not as a way to autonomously determine international responsibility of the States for individual violations of these rights.

17. It should also be understood that Article 26 makes mention only of the OAS Charter, but not of the American Declaration, and therefore the Charter should be the source of its analysis to interpret which ESCERs may be implicit therein, for the purpose of supervising observation of this State obligation.

18. A reading of the Charter does not provide a simple menu of rights, nor does it define the content of rights; instead, it sets objectives and goals to be met on the subject. It does make explicit reference to the right to work, however, in contrast to the other ESCERs. It does not develop the scope of the right, or for example, state whether the right to work includes job stability. Even beyond these difficulties of interpretation, it is clear that Article 26 authorizes the Court to provide only the general supervision outlined previously and, going into more detail, the Protocol of San Salvador opens the way for the Court to hold contentious jurisdiction only over two ESCERs. This judgment opted to simply ignore the existence of Article 19 of the Protocol, but this omission does not repeal the article. So long as it remains in force, this article will reveal the express will of the States.

19. Along these same lines, an understanding of Article 26 of the Convention as covering all the ESCERs contained in the OAS Charter would ignore the commitment assumed by the States Parties and would produce uncertainty about the body of rights enforceable before the Court, producing at least two consequences. First, if the States do not know which specific rights they could breach by their actions, they cannot prevent or domestically redress any such violations. Second, any line of argument that ignores the express text of the treaty (the Convention and its Protocol) undermines the legitimacy of the Court's decisions, as it reflects a low standard of reasoning, which subsequently makes it difficult to examine the conduct of domestic authorities by a more stringent standard.

20. This is why it is necessary to distinguish two different arenas of adjudication, which are related but separate. One is in the domestic sphere, where citizens avail themselves of democratic proceedings to build ESCERs into their national legal system, also incorporating international law on the subject, as in the great majority of the Member States of the inter-American human rights system. In such a context, the domestic courts, within their own jurisdictions, exercise their authority for the interpretation and enforcement of these rights, in keeping with their Constitution and laws.

21. The other jurisdiction—different but complementary—is the international system. The Court, in the international jurisdiction, is called upon to decide whether a State, whose responsibility is under challenge, has violated one or more of the rights set forth in the Convention. In light of the normative

design of the text, and in view of Article 26, the Court has the power to declare the international responsibility of a State if it has fallen short of its obligations for progressive development and no regression, but not for violation of the ESCERs considered individually.

22. This view is consistent with my position as expressed in earlier opinions, that the correct doctrine the Court should follow is specifically to consider the economic, social, cultural and environmental dimensions of the rights enshrined in the text of the Convention, and to exercise its adjudicatory jurisdiction on the basis of related actions, if in fact a relationship of this kind can be determined. The declaration of responsibility based on related actions in no case empowers the Court to hold that rights not recognized in the Convention have been violated. Even this type of procedure simply provides a means to identify the appropriate relationships between the ESCERs and the civil and political rights set forth in the Convention.

23. It should also be stated, as I mentioned earlier, that the system of interpretation applicable to the provisions of the Convention should adhere to the rules of interpretation of the VCLT. This means considering such factors of interpretation as good faith, the usual meaning of terms in the context of the treaty, and the object and purpose of the treaty. The latter point, as Cecilia Medina teaches, points to two specific features in the hermeneutics of human rights treaties: "their dynamism and the *pro persona* role, which provide judges with ample scope for a very creative interpretation."[67]

24. One of the most important canons of interpretation in international human rights law is the evolving, *pro persona* interpretation. This standard was followed in several cases, including the Case of the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*,[68] regarding the right to property,[69] or the Case of *Atala Riffo and daughters v. Chile*,[70] on the right to equality and non-discrimination.[71] In the instant case, however, the Court has not applied this standard of interpretation, but instead asserts its jurisdiction over matters that the different instruments have not entrusted to it, that is, to which the States Parties have not consented. In other words, it is an error to wield these hermeneutic tools as a basis to expand the Court's jurisdiction, when there is an explicit provision that sets clear, precise boundaries to it.

25. In short, this approach undermines the legal certainty that an international court must guarantee, as well as the legitimacy of its decisions, because the argument as given simply ignores a provision that expressly limits the Court's jurisdiction to hear cases of alleged violations of ESCERs.

26. The justification and grounds for a judicial decision should properly be that the arguments put forward allow the reader to replicate and understand the reasoning process by which the Court arrived at a particular ruling. The decision that an ESCER is enforceable cannot be based on ignoring the rules of jurisdiction set forth in the Convention and its additional Protocol.

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[67] *Cf.* MEDINA, Cecilia: The American Convention on Human Rights (2nd edition). Crucial Rights for their Theory and Practice. Intersentia Ltd. Cambridge, UK, 2016, p. 54.
[68] I/A Court HR. *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua.* Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79.
[69] In this case, the Court interpreted that Article 21 of the Convention, the right to property, protected the particular characteristics of communal land ownership of indigenous peoples.
[70] I/A Court HR. *Case of Atala Riffo and daughters v. Chile*. Request for Interpretation of the Judgment on Merits, Reparations and Costs. Judgment of November 21, 2012. Series C No. 254.
[71] In this case, the Court judged that sexual orientation and gender identity are categories protected by the American Convention under the notion of "other social condition" set forth in Article 1(1).

27. Unfortunately, and as Medina and David have said, "the position of the majority undermines the effectiveness not only of the Protocol of San Salvador, but also of Article 26 itself,"[72] and this provision of the Convention has a specific content that the Court can and must develop in cases coming before it.

28. None of this should lead to confusing the legal and regulatory resources available to the domestic courts with those pertaining to an international court such as the Inter-American Court of Human Rights. There is no provision in the Convention that empowers the Court to find that the right to work has been violated autonomously.

Patricia Pérez Goldberg
Judge

Pablo Saavedra Alessandri
Registrar

[72] *Cf.* MEDINA and DAVID, "The American Convention on Human Rights" (2022:28). Free back-translation.