

INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF CORDERO BERNAL V. PERU

JUDGMENT OF FEBRUARY 16, 2021

(Preliminary objection and merits)

In the *Case of Cordero Bernal v. Peru*,

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

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

also present,

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

pursuant to 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” or “the Court’s Rules of Procedure”), delivers this judgment, structured as follows:

TABLE OF CONTENTS

| | |
|---|-----------|
| I INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE | 3 |
| II PROCEEDINGS BEFORE THE COURT | 4 |
| III JURISDICTION | 5 |
| IV PRELIMINARY OBJECTION | 5 |
| A. Alleged lack of jurisdiction <i>ratione materiae</i> of the Inter-American Court to review domestic decisions ("fourth instance" objection) | 5 |
| A.1. Arguments of the State, observations of the Commission and of the representatives | 5 |
| A.2. Considerations of the Court | 6 |
| V EVIDENCE | 6 |
| A. Admissibility of the documentary evidence | 6 |
| B. Admissibility of the statements offered | 7 |
| VI FACTS | 8 |
| A. Legal framework applicable to disciplinary proceedings against judges in Peru in force at the time of the facts | 8 |
| B. Appointment of Héctor Fidel Cordero Bernal as Fourth Criminal Judge of the city of Huánuco | 9 |
| C. Decision to grant unconditional release to two defendants | 10 |
| D. Disciplinary proceeding | 11 |
| D.1 Procedure before the Office for Control of Judges (OCMA) | 11 |
| D.2 Procedure before the National Council of the Judiciary (CNM) | 12 |
| E. Amparo procedure | 13 |
| F. Criminal proceedings | 14 |
| G. Appeal for annulment | 15 |
| VII MERITS | 16 |
| VII-1 JUDICIAL GUARANTEES, PRINCIPLE OF LEGALITY AND POLITICAL RIGHTS, IN RELATION TO THE OBLIGATIONS TO RESPECT AND TO ENSURE RIGHTS AND TO ADOPT DOMESTIC LEGAL PROVISIONS | 16 |
| A. Arguments of the parties and of the Commission | 16 |
| B. Considerations of the Court | 18 |
| B.1 The guarantee of judicial independence in relation to the principle of legality, political rights and the guarantee of duly substantiated decisions | 18 |
| B.2 The principle of the application of the most favorable punitive law | 24 |
| B.5 Conclusion | 25 |
| VII-2 JUDICIAL PROTECTION IN RELATION TO THE OBLIGATIONS TO RESPECT AND TO ENSURE THE RIGHTS AND TO ADOPT DOMESTIC LEGAL PROVISIONS | 25 |
| A. Arguments of the parties and of the Commission | 25 |
| B. Considerations of the Court | 25 |
| VIII OPERATIVE PARAGRAPHS | 27 |

I
INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. *The case submitted to the Court.* On August 16, 2019, the Inter-American Commission on Human Rights (hereinafter “the Commission”), submitted the case of Cordero Bernal against the Republic of Peru (hereinafter “the State,” “Peru” or “the Peruvian State”) to the Court. According to the Commission, the case relates to the presumed violations of the American Convention on Human Rights that were committed during the disciplinary proceedings against Héctor Fidel Cordero Bernal, which resulted in his dismissal as Fourth Criminal Judge of the city of Huánuco, Peru, in 1996. The Commission considered that the disciplinary proceedings instituted against the presumed victim had violated the principle of judicial independence and the right to duly substantiated decisions because the dismissal was the result of Mr. Cordero Bernal’s decision to grant unconditional release to two defendants, and the disciplinary ruling was not adequately substantiated. The Commission also alleged that the principle of legality had been violated owing to the extreme breadth and imprecision of the grounds on which the presumed victim was dismissed, and the principle of the most favorable law because, in the Commission’s opinion, two laws were in force and the disciplinary body chose to apply the one least favorable to Mr. Cordero Bernal’s interests. Lastly, the Commission found that the State had violated the rights to appeal a ruling and to judicial protection because there was no administrative or judicial remedy that permitted the comprehensive review of the punitive decision.
2. *Procedure before the Commission.* The procedure before the Commission was as follows:
 - a. *Petition.* On November 11, 1998, Hector Fidel Cordero Bernal lodged a petition before the Inter-American Commission.
 - b. *Admissibility Report.* On July 22, 2011, the Commission declared the case admissible in Report No. 112/11.
 - c. *Merits Report.* On October 5, 2018, the Commission adopted Merits Report No. 115/18 under Article 50 of the Convention (hereinafter “the Merits Report” or “Report No. 115/18”).
 - d. *Notification to the State.* The Merits Report was notified to the State on November 16, 2018, granting it two months to provide information on compliance with the recommendations. On February 13, 2019, the Commission granted the State a three-month extension to comply with the recommendations of the Merits Report and, on May 16 that year, it granted a second three-month extension. The Commission decided not to grant a third extension and to submit the case to the jurisdiction of the Inter-American Court.
3. *Submission to the Court.* On August 16, 2019, the Commission submitted to the Inter-American Court all the facts and alleged human rights violations described in Report No. 115/18, “owing to the need to obtain justice for the [presumed] victim.”¹
4. *The Inter-American Commission’s requests.* The Commission asked the Court to

¹ The Commission appointed Commissioner Joel Hernández and then Executive Secretary Paulo Abrão as its delegates. It also designated Jorge Meza Flores and Christian González Chacón, IACHR Executive Secretariat lawyers as its legal advisers.

declare the Peruvian State responsible for the violation of the rights to judicial guarantees, the principle of legality, political rights and judicial protection contained in Articles 8(1), 8(2)(h), 9, 23(1)(c) and 25(1) of the American Convention, in relation to the obligations established in Articles 1(1) and 2 of this instrument. The Court notes with concern that more than twenty years have passed from the moment when the initial petition was lodged until the case was submitted to the Court.

II PROCEEDINGS BEFORE THE COURT

5. *Notification to the State and to the presumed victim.* The submission of the case was notified to the State and to the presumed victim on September 19, 2019.

6. *Brief with pleadings, motions and evidence.* On November 5, 2019, the presumed victim presented his brief with pleadings, motions and evidence (hereinafter “pleadings and motions brief”), pursuant to Articles 25 and 40 of the Court’s Rules of Procedure. He asked that the Court determine the responsibility of the Peruvian State for the violation of the rights to judicial guarantees, the principle of legality, political rights and judicial protection established in Articles 8(1), 8(2)(h), 9, 23(1)(c) and 25(1) of the American Convention. He also asked that the Court order the Peruvian State to pay compensation for the harm suffered. He stressed that, as a result of the judicial proceedings, his right to health had been impaired. He indicated that he now had difficulty to speak and to move and that his reinstatement as a judge was not possible owing to his health situation.

7. *Answering brief.* On February 5, 2020, the State² presented its brief answering the submission of the case and the pleadings and motions brief (hereinafter “the answering brief”), in which it filed a preliminary objection and contested the alleged violations and the requests for measures of reparation presented by the Commission and the presumed victim.

8. *Observations on the preliminary objection.* Based on Court Decisions 1/20 of March 17, 2020,³ and 2/20 of April 16, 2020,⁴ the Court decided to suspend the calculation of all time frames due to the emergency situation created by the COVID-19 pandemic. Accordingly, the deadline for presenting observations on the preliminary objection was extended until June 19, 2020. On April 9, 2020, the Inter-American Commission presented its observation on the preliminary objection filed by the State. The representatives⁵ presented their observations on the preliminary objection on June 17, 2020.

9. *Final written procedure.* In an order of September 15, 2020,⁶ the President of the Court, based on the situation resulting from the COVID-19 pandemic and pursuant to the powers granted by Article 50(1) of the Rules of Procedure, decided not to call a public hearing in this case, to require the State to forward documentation as helpful evidence,⁷ to request

² The State of Peru appointed Carlos Miguel Reaño Balarezo, Supranational Special Legal Representative, as its Agent in this case, and the lawyers, Silvana Lucía Gómez Salazar and María Eugenia Neyra Surco, as its deputy agents.

³ Available at: http://www.corteidh.or.cr/docs/comunicados/cp_18_2020.pdf

⁴ Available at: http://www.corteidh.or.cr/docs/comunicados/cp_28_2020.pdf

⁵ Mr. Cordero Bernal represented himself during the initial processing of this case before the Inter-American Court. As of February 13, 2020, the presumed victim’s representation was assumed by the lawyers, Pilar Carla Piccinini Gómez and Sandra Lorena Haro Colomé, inter-American public defenders.

⁶ Cf. Case of Cordero Bernal v. Peru. Order of the President of the Inter-American Court of Human Rights of September 15, 2020. Available at: http://www.corteidh.or.cr/docs/asuntos/corderobernal_15_09_20.pdf

⁷ The State was asked to forward: (a) the 1998 Peruvian Constitution; (b) the Organic Law of the Judiciary of June 2, 1993; (c) the Organic Law of the National Council of the Judiciary (Law No. 26397); (d) Law No. 26933,

that three testimonial statements and two expert opinions be submitted by affidavit, and to require the statement of the presumed victim by a videoconference,⁸ which took place on October 8, 2020, during the Court's 137th regular session.

10. *Final written arguments and observations.* On December 7, 2020, the representatives and the State forwarded their final written arguments with attached documentation, and the Commission presented its final written observations. On the instructions of the President of the Court, the presumed victim's representatives and the Inter-American Commission were asked to send any considerations they deemed pertinent on the documentation forwarded by the State. On December 16, 2020, the representatives forwarded their comments in this regard and the Commission indicated that it had no comments to make.

11. *Helpful evidence and information.* On January 12 and 28, 2021, on the instructions of the President of the Court, the State was asked to present helpful documentation.⁹ The State presented the documents on January 25 and February 3, 2021. The representatives' observations were submitted on January 28 and February 9, and those of the Commission on January 29 and February 9, 2021 (*infra* para. 23).

12. *Deliberation of the case.* The Court deliberated this judgment in a virtual session on February 15 and 16, 2021.¹⁰

III JURISDICTION

13. The Inter-American Court has jurisdiction to hear this case pursuant to Article 62(3) of the Convention because Peru ratified the American Convention on Human Rights on July 12, 1978, and accepted the Court's contentious jurisdiction on January 21, 1981.

IV PRELIMINARY OBJECTION

14. In this case, Peru presented a preliminary objection on the Inter-American Court's lack of jurisdiction to assume a role of fourth instance, and this will be addressed below.

A. Alleged lack of jurisdiction *ratione materiae* of the Inter-American Court to review domestic decisions ("fourth instance" objection)

A.1. Arguments of the State, observations of the Commission and of the representatives

15. The **State** indicated that it had filed this preliminary objection at the admissibility stage

and (e) the Procedural Rules for Disciplinary Proceedings of the National Council of the Judiciary of August 17, 1995.

⁸ The presumed victim's statement was ordered as helpful evidence following a request by his representatives. The request was based on Mr. Cordero Bernal's right to be heard and because, since he had represented himself during the initial processing of this case before the Court, his statement had not been requested because "it was evident that he could attend the corresponding hearing." *Cf.* Helpful evidence procedure – petition (merits file, folios 419 to 423).

⁹ The State was asked to send information on the actual status of the post occupied by Hector Fidel Cordero Bernal at the time of his dismissal and on the salary earned by specialized judges in Peru during the period from 1995 to 2005.

¹⁰ Due to the exceptional circumstances caused by the COVID-19 pandemic, this judgment was deliberated and adopted during the 139th regular session, which was held virtually with the use of technology in keeping with the provisions of the Court's Rules of Procedure.

before the Inter-American Commission. It also underscored that the Court did not have jurisdiction to rule on discrepancies between the parties on the assessment of the evidence or the application of domestic law unless this concerned matters relating to compliance with the State's international human rights obligations. It asked the Court to "assess the amparo proceedings in order to verify that it was held with full respect for the guarantees of due process, providing Mr. Cordero Bernal with the opportunity to appeal the judicial decisions against him and thereby obtain a ruling from the highest constitutional court in Peru; namely, the Constitutional Court."

16. The **Commission** recalled that, in this case, a series of violations of due process and the principle of legality had been alleged in the proceedings that culminated in the presumed victim's dismissal from office. In other words, the case did not refer to disagreements with domestic decisions. It also considered that the analysis of the reasons that led to the determination of the violations indicated in its Merits Report corresponded to the merits of the matter and could never be decided by a preliminary objection.

17. The **representatives** asked the Court to reject the preliminary objection filed by the State outright because it was without merit. In this regard, they indicated that the Inter-American Court had the authority to oversee whether the decisions of the domestic administration of justice were in keeping with the duties and obligations described in the American Convention.

A.2. Considerations of the Court

18. The Court has indicated that determination of whether the actions of judicial bodies constitute a violation of a State's international obligations may lead to the Court having to examine the respective domestic proceedings to establish their compatibility with the American Convention. However, this Court is not a fourth instance for judicial review, and does not examine the assessment of the evidence made by the domestic judges. Consequently, when analyzing the compatibility of the domestic proceedings with the American Convention, the Court only has competence to decide on the content of judicial decisions that contravene the Convention in a way that is clearly arbitrary.¹¹

19. In this specific case, the Court notes that the intention of the Commission and the presumed victim is not limited to a review of the rulings of the domestic courts owing to a possible error in the assessment of the evidence, the determination of the facts or the application of domestic law. To the contrary, it is alleged that various rights recognized in the American Convention have been violated in the context of the decisions taken by the domestic authorities, in both the administrative and the judicial jurisdictions. Accordingly, in order to determine whether the said violations truly occurred, it is essential to examine the decisions issued by the different administrative and judicial authorities to determine their compatibility with the State's international obligations, which, ultimately, constitutes a matter relating to the merits that cannot be decided by a preliminary objection. Consequently, the Court declares the preliminary objection presented by the State inadmissible.

V EVIDENCE

A. Admissibility of the documentary evidence

¹¹ Cf. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*. Judgment of November 19, 1999. Series C No. 63, para. 222, and *Case of Casa Nina v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 24, 2020. Series C No. 419, para. 20.

20. The Court received diverse documents presented as evidence by the Commission and the parties with their principal briefs (*supra* paras. 3, 6 and 7). As in other cases, the Court admits those documents submitted at the proper moment (Article 57 of the Rules of Procedure),¹² by the parties and the Commission, the admissibility of which was not contested or challenged, and the authenticity of which was not questioned.¹³

21. The Court also received documents attached to the State's final written arguments (*supra* para. 11).¹⁴ The representatives presented observations on those documents and indicated that they were not forwarded at the proper procedural moment. The Court notes that it had not requested the said documents, that they were not presented at the procedural moment established for providing documentary evidence, and that they did not constitute supervening evidence. Therefore, they will not be taken into consideration.

22. The Court also notes that the representatives attached documents to their brief of June 17, 2020, requesting that the Court receive the presumed victim's statement.¹⁵ The State, in its final written arguments indicated that the said documents "should be rejected because they were not offered as evidence at the appropriate procedural stage." The Court finds that the first of these documents, corresponding to a certification of hospitalization, had already been submitted by the presumed victim as an attachment to the pleadings and motions brief; regarding the second document – the discharge report – the Court finds that the State is correct, so that it will not be considered when deciding this matter.

23. In an order of the President of September 15, 2020, as helpful evidence, the State was asked to forward a copy of the laws to which this case refers. The State, in a brief received by the Court's Secretariat on September 29, forwarded the documents requested. On January 12 and 28, 2021, the State was asked to present additional helpful documentation. The State presented the requested information on January 25 and February 3, 2021 (*supra* paras. 9 and 11). These documents were incorporated into the body of evidence.

B. Admissibility of the statements offered

24. The Court finds it pertinent to admit the expert opinions provided by affidavit,¹⁶ as well as the statement of the presumed victim provided by videoconference, insofar as they are in keeping with the purpose defined in the order requiring them and the purpose of this case.

¹² Generally and pursuant to Article 57(2) of the Rules of Procedure, the documentary evidence may be presented together with the briefs submitting the case, or with pleadings and motions, or with the answering brief, as applicable. Evidence submitted at times other than these procedural occasions is not admissible, save in the exceptions established in the said Article 57(2) of the Rules of Procedure (*force majeure*, grave impediment) or in the case of a supervening fact – in other words, a fact that has occurred following the said procedural moments.

¹³ Cf. Article 57 of the Rules of Procedure; also *Case of Velásquez Rodríguez v. Honduras. Merits*. Judgment of July 29, 1988. Series C No. 4, para. 140, and *Case of Casa Nina v. Peru, supra*, para. 35.

¹⁴ The State attached two documents; the first corresponded to a newspaper article entitled: "IDL: *La lucha anticorrupción y la reorganización interna son parte de las tareas pendientes del Poder Judicial*" [Combating corruption and an internal reorganization are the Judiciary's pending tasks]. The second was an article entitled: "CNM: *Ratificando el poder*" [Ratifying powers], published in the *Ideele* journal.

¹⁵ The documents forwarded by the representatives corresponded to a certification of hospitalization and a report on Mr. Cordero Bernal's discharge of June 2019.

¹⁶ The Court received the affidavits of three witnesses proposed by the State: Inés Felipa Villa Bonilla, Marielka Nepo Linares and Víctor Alberto Corante Morales; and of one expert witness proposed by the State: Ramón Huapaya Tapia (evidence file, folios 1766 to 1876). In the brief submitted the case, the Inter-American Commission offered an expert opinion, but later withdrew the offer.

25. The State, in its final written arguments, included some considerations on the reception of the presumed victim's statement.¹⁷ The Court finds that the State's arguments were not designed to question the admissibility of the statement, but rather to comment on the procedure itself and that, in any case, the State had not contested the evidentiary procedure at the proper procedural moment. Therefore, the presumed victim's statement will be assessed together with the body of evidence.

VI FACTS

26. According to the Inter-American Commission, the purpose of this case is the alleged violation of Mr. Cordero Bernal's rights that presumably occurred in the context of a disciplinary proceeding that concluded with his dismissal as Fourth Criminal Judge of the city of Huánuco, Peru, in 1996. The dismissal procedure was the result of a decision in which Mr. Cordero Bernal granted unconditional release to two defendants. Taking into account the factual framework established in the Merits Report, the arguments presented by the parties and by the Commission, and the body of evidence, the Court will set forth the proven facts as follows: first, it will refer to (A) the legal framework applicable to disciplinary proceedings against judges in Peru in force at the time of the facts. Then, it will refer to (B) the appointment of Héctor Fidel Cordero Bernal as Fourth Criminal Judge of the city of Huánuco and (C) his decision to grant unconditional release to two defendants. Subsequently, it will refer to (D) the disciplinary proceedings; (E) the amparo procedure; (F) the criminal proceedings, and (G) the appeal for annulment in this matter.

A. Legal framework applicable to disciplinary proceedings against judges in Peru in force at the time of the facts

27. The disciplinary proceeding applied to Mr. Cordero Bernal was regulated by the Organic Law of the Judiciary (Supreme Decree 017 of 1993), the Peruvian Constitution (December 1993), and the Organic Law of the National Council of the Judiciary (Law 26397 of 1994).

28. The Organic Law of the Judiciary of June 2, 1993, established that it corresponded to the Judiciary's Office for Control of Judges to apply disciplinary sanctions to judges and paralegals, with the exception of the sanctions of separation and dismissal, which had to be proposed to the Executive Council of the Judiciary.¹⁸ As disciplinary sanctions, the law identified: admonition, fine, suspension, separation and dismissal, and indicated the cases in which each was applicable.¹⁹ Regarding suspension and dismissal, it stipulated:

Article 210. SUSPENSION. Suspension is applicable to the judge or official against whom an arrest warrant has been issued, or charges have been brought requesting a prison sentence, in proceedings for an intentional offense.

It is also applicable to the judge who has committed a serious act that, without being a crime, compromises the dignity of the office or devalues it in the opinion of the public or when the judge

¹⁷ The State indicated its "disagreement with the statement (at the request of the RPV [representatives of the presumed victim]) that Mr. Cordero Bernal made during the videoconference and that resulted in moment of emotional tension when he answered the questions of his RPV and the State." It also indicated that the procedure resulted in "a presentation that was ethically unnecessary for the presumed victim" in which the answers to the State's questions could not be fully understood, so that the procedure did not comply with the purpose for which it had been proposed. Consequently, it asked the Court to consider "noting the health status of deponents, especially if there are indications that their health is deteriorated; it should also note whether their statement will really contribute to providing further information on the facts of the case."

¹⁸ Cf. Article 106. Organic Law of the Judiciary, June 2, 1993 (evidence file, folio 1691).

¹⁹ Cf. Articles 206 to 211. Organic Law of the Judiciary, June 2, 1993 (evidence file, folio 1713).

commits another serious violation, after having been sanctioned three times with a fine.

The suspension is decided by the bodies established in this law. It is without pay and cannot be for more than two months.

Article 211. DISMISSAL. Dismissal is imposed by the bodies stipulated in this law, and requires the vote of more than half the total members of the respective body.

Dismissal is applicable in the case of a judge who seriously violates judicial responsibility; who has committed a serious act that, without being a crime, compromises the dignity of the office and devalues it in the opinion of the public, provided that he has previously been sanctioned with suspension; who has been convicted of an offense against sexual liberty; who has acted while legally prohibited, in full knowledge of this circumstance; who has been sentenced to prison for an intentional offense; who reoffends in the case of an act that results in suspension, and in the other cases established by law.

29. Furthermore, Article 212 of the Organic Law of the Judiciary indicated that it was not appropriate to punish "differences of opinion or criteria in decisions taken in proceedings."²⁰

30. Subsequently, the Peruvian Constitution of December 29, 1993, created the National Council of the Judiciary and assigned it the function of applying the sanction of dismissal to the judges of all instances.²¹ The Constitution also established that decisions of the National Council of the Judiciary concerning the evaluation and ratification of judges could not be reviewed.²²

31. On November 25, 1994, the Organic Law of the National Council of the Judiciary was enacted. This law reiterated the provisions of the Constitution, to the effect that it was the function of the National Council of the Judiciary to apply the sanction of dismissal to judges of all instances.²³ In addition, it established the grounds for which the sanction of dismissal was applicable:

Article 31. The sanction of dismissal referred to in paragraph (c) of Article 21 of this law is applicable for the following reasons:

1. Being subject to a prison sentence for an intentional offense.
2. Committing a serious act that, without being a crime, compromises the dignity of the office and devalues it in the opinion of the public.
3. Reoffending in the case of an act that constitutes grounds for suspension, as established in the relevant law.
4. Intervening in procedures or proceedings in the knowledge that this is prohibited or subject to legal impediment.

32. Based on the foregoing, at the time of the facts, a judicial disciplinary procedure existed that involved two authorities: the Office for Control of Judges proposed the sanction of dismissal of judges to the National Council of the Judiciary, and the latter was responsible for deciding whether to impose this sanction after following the procedure regulated by law.

B. Appointment of Héctor Fidel Cordero Bernal as Fourth Criminal Judge of the city of Huánuco

²⁰ Cf. Article 212. Organic Law of the Judiciary, June 2, 1993 (evidence file, folio 1713).

²¹ Cf. Article 153. Peruvian Constitution, December 29, 1993 (evidence file, folio 1529).

²² Cf. Article 142. Peruvian Constitution, December 29, 1993 (evidence file, folio 1527).

²³ Cf. Articles 2 and 21.c). Organic Law of the National Council of the Judiciary, November 25, 1994 (evidence file, folios 1634 and 1639).

33. Hector Fidel Cordero Bernal was admitted to the Judiciary in November 1993, as Provisional Judge of the Civil Court in the province of Leoncio Prado.²⁴ On November 15, 1994, Mr. Cordero Bernal was appointed Provisional Judge of the Fourth Criminal Court of the province of Huánuco by the President of the Superior Court of Justice of Huánuco.²⁵

34. On June 22, 1995, the President of the Superior Court of Justice of Huánuco asked Mr. Cordero Bernal to take charge of the First Criminal Court of the Superior Court of Huánuco, during the provisional judge's leave of absence.²⁶ The latter was under investigation owing to alleged irregularities.²⁷

35. On July 17, 1995, Mr. Cordero Bernal's assignment to the First Criminal Court of the Superior Court of Huánuco ended.²⁸

C. Decision to grant unconditional release to two defendants

36. When Mr. Cordero Bernal took over the First Criminal Court of Huánuco, he started to hear criminal investigation No. 7395, which involved the investigation of two individuals who had been flying a small aircraft registered to Colombia over Peruvian territory when they were intercepted by the Peruvian Air Force. An order was issued for the arrest of these individuals and they were subjected to criminal proceedings for the crime of illicit drug-trafficking.²⁹

37. On June 30, 1995, the defendants requested their unconditional release³⁰ in a brief acknowledged by the clerk of the court on July 3 that year.³¹ In a ruling of July 11, 1995,³² Mr. Cordero Bernal declared that the defendant's request was justified pursuant to article 201 of the Code of Criminal Procedure,³³ which allowed this decision to be taken if, during the

²⁴ The decision indicated that the appointment of Mr. Cordero Bernal would be "until the proceedings initiated prior to the entry into force of the new Code of Civil Procedure had culminated, and could not be for more than one year." Decision of November 3, 1993, signed by the President of the Superior Court of Huánuco (evidence file, folio 1039). The said court was closed down on November 14, 1994. Cf. Official communication No. 692-94-DA-GG/PJ of November 16, 1994, signed by the delegate of the Judiciary in Huánuco (evidence file, folio 1041).

²⁵ Cf. Administrative decision No. 025-94-PCSJH of November 15, 1994, of the Superior Court of Justice of Huánuco (evidence file, folio 5). The "Record of the disciplinary measures against Héctor Fidel Cordero Bernal, in the posts he has occupied in this judicial district of Huánuco and Pasco" dated October 27, 1995, reveals that two disciplinary measures were adopted against Mr. Cordero Bernal during his mandate as judge: one admonition for irregularities in case file No. 334-94 of July 1, 1994, and communication No. 302-94 of September 6, 1994; and one fine of 5% of his monthly salary (court hearing No. 186-94, decision of December 2, 1994). Cf. The State's answering brief (merits file, folio 238) and "Record of the disciplinary measures against Héctor Fidel Cordero Bernal in the posts he has occupied" (evidence file, folio 1429).

²⁶ Cf. Communication No. 755-95-PCSJ, June 22, 1995 (evidence file, folio 7) and Decision of June 21, 1995 (evidence file, folio 1280).

²⁷ The decision to dismiss Mr. Cordero Bernal indicated that "irregularities were committed in granting sixty days leave of absence [to the person in charge] that are being [investigated]." National Council of the Judiciary, Decision No. 008-96-PCNM of August 14, 1996 (evidence file, folio 10).

²⁸ Cf. Communication No. 870-95-PCSJH of July 17, 1995, signed by the President of the Superior Court of Huánuco-Pasco (evidence file, folio 1045).

²⁹ Cf. Attestation No. 002-DINANDRO-BPSL-UI of March 29, 1995, related to the offense of illicit drug-trafficking (evidence file, folios 1106 to 1120); Decision No. 01 of March 31, 1995, of the First Criminal Court of Huánuco (evidence file, folios 1125 to 1127) and Communication No. 890-95 of April 10, 1995, of the Judge of the First Criminal Court of Huánuco (evidence file, folio 1133).

³⁰ Cf. Brief of June 30, 1995, in which the defendants requested unconditional release (evidence file, folios 1149 to 1153).

³¹ Cf. The Judiciary's Office for Control of Judges. Report of July 21, 1995 (evidence file, folio 1089).

³² Cf. Order of July 11, 1995, issued by the Judge of the First Criminal Court of Huánuco (evidence file, folios 1155 to 1162).

³³ Article 201 of the Peruvian Code of Criminal Procedure in force at the time of the facts and transcribed in

investigation, the innocence of the defendant was fully demonstrated. In the opinion of then Judge Cordero Bernal, there was insufficient evidence to prove the criminal responsibility of the defendants for the crime of illicit drug-trafficking.³⁴ On July 17 that year, the President of the Superior Court of Justice of Huánuco required the Third Criminal Judge of Huánuco to take charge of the First Criminal Court, thereby terminating Mr. Cordero Bernal's assignment.³⁵

D. Disciplinary proceeding

D.1 Procedure before the Office for Control of Judges (OCMA)

38. Following the issue of the decision granting unconditional release, the Judiciary's Office for Control of Judges (hereinafter "the OCMA") opened a disciplinary proceeding against Mr. Cordero Bernal.³⁶ On concluding the investigation stage, the judge in charge of the case issued a report describing irregularities in his appointment to the First Criminal Court of Huánuco and in his decision granting unconditional release to two defendants.

39. Regarding the irregularities in the appointment of Mr. Cordero Bernal, the report indicated, among other matters, that: (i) the minutes of the session of the Full Chamber of the Superior Court of Justice of Huánuco of June 21, 1995, in which the decision was taken to appoint Mr. Cordero Bernal, had not been transcribed in the book intended for that purpose, "and this had only been done on July 19 [...]" with an entry that had only been signed by the President of the Court and the administrative clerk; (ii) the summary of the said session of the Full Chamber and statements taken by the investigator revealed that the decision taken was that of assigning to the First Criminal Court a judge from the furthest court, and this corresponded to the Fifth Criminal Judge and not to Mr. Cordero Bernal, and (iii) the decision appointing Mr. Cordero "was signed after the informant arrived at the seat of the court."³⁷

40. In addition, regarding the ruling granting two defendants unconditional release, the report found, *inter alia*, that: (i) Mr. Cordero Bernal did not undertake any substantive procedure during the proceedings; (ii) when he granted the unconditional release, the four-

the Commission's Merits Report established: "If, at any stage of the investigation hearings, it is fully proven that the person charged is innocent, the judge *ex officio* or at the request of the defendant must order his or her unconditional release and the corresponding order shall be implemented immediately, and the respective record shall be forwarded to the Correctional Court when there are other defendants who must continue detained. If the case is only against the person who will be released, the principal case file shall be forwarded. In this case, if the Court approves, the person consulted shall order the closure of the proceeding. If he does not approve the order, he shall require the recapture of the individual unduly released, and may impose the sanctions or order the relevant actions if the release has been malicious" (merits file, folios 11 and 12).

³⁴ Cf. Order of July 11, 1995, issued by Hector Fidel Cordero Bernal, Judge of the First Criminal Court of Huánuco (evidence file, folios 1055 and 1056). The prosecutor in charge of the case filed an appeal against Mr. Cordero Bernal's decision to grant unconditional release to the two defendants. In his appeal, the prosecutor requested a copy of all the proceedings in order to refer this to the Senior Public Prosecutor and to the Prosecutor General. Following this request, Mr. Cordero Bernal consulted the President of the First Superior Criminal Chamber with regard to the order granting unconditional release. The latter decided not to approve the order and required the capture of the individuals who had been unduly released (evidence file, folio 1180).

³⁵ Cf. Communication No. 870-95-PCSJH of July 17, 1995, signed by the President of the Superior Court of Huánuco-Pasco (evidence file, folio 1045).

³⁶ The OCMA ordered a visit to the Fourth Criminal Court of the Superior Court of Justice of Huánuco. During this visit, the judge in charge of the case required the presence of Mr. Cordero Bernal in the Decisions Chamber of the Superior Court of Justice of Huánuco to provide him with information on the investigation that was underway and to take his statement. Cf. Decision No. 017-95 of July 17, 1995, issued by the Head of the Judiciary's Office for Control of Judges (evidence file, folio 1216); Communication of July 19, 1995, requiring the statement of Hector Fidel Cordero Bernal (evidence file, folio 1218) and Statement of Hector Fidel Cordero Bernal of July 19, 1995 (evidence file, folios 1257 to 1262).

³⁷ Cf. The Judiciary's Office for Control of Judges, report of July 21, 1995 (evidence file, folios 1095 and 1096).

month time frame for the investigation had not expired; (iii) the defendants had admitted that they had stolen a small aircraft registered to Colombia and had entered Peruvian territory irregularly; (iv) Mr. Cordero Bernal's assessment of the evidence was "incongruous" because, even though there were sufficient indications that the defendants had entered Peruvian territory to transport drugs, he believed the defendants' assertion that they entered the country to exchange two corpses.³⁸

41. Based on the foregoing, the investigating judge concluded that Mr. Cordero Bernal had "not only seriously infringed the Judiciary's respectability, but had also compromised the dignity of the office, devaluing it in the opinion of the public, so that he should be dismissed from his position, pursuant to article 211 of the Organic Law of the Judiciary, without prejudice to a copy of the proceedings being forwarded to the acting provincial prosecutor [...] so that the latter may proceed in keeping with his functions [...]."³⁹ The investigator also concluded that the sanction of dismissal should also be applied to the President and Secretary of the Chamber of the Superior Court of Justice of Huánuco due to their participation in those facts, and also that a disciplinary proceeding should be opened against the person occupying the post of judge of the First Criminal Court of Huánuco before Mr. Cordero Bernal was appointed to that post.⁴⁰

42. In a decision of August 3, 1995, the Principal Member – Judicial Head of the OCMA issued the investigation report and proposed the dismissal. The decision referred to both the irregularities in the appointment of Mr. Cordero Bernal as the judge of the First Criminal Court of Huánuco, and to the functional irregularities related to the decision to grant unconditional release to two defendants. The OCMA based the proposal to dismiss Mr. Cordero Bernal on article 211 of the Organic Law of the Judiciary and article 33 of the Organic Law of the National Council of the Judiciary.⁴¹ The decision also proposed the dismissal of the then President and Secretary of the Superior Court of Justice of Huánuco,⁴² and to forward a copy of the proceedings to the Prosecutor General.⁴³

43. On October 18, 1995, the President of the Executive Council of the Judiciary approved the proposal to dismiss Mr. Cordero Bernal and asked the National Council of the Judiciary (hereinafter "the CNM") to proceed to dismiss him.⁴⁴

D.2 Procedure before the National Council of the Judiciary (CNM)

44. On December 4, 1995, Mr. Cordero Bernal presented his brief answering the charges before the CNM and justified the decision adopted.⁴⁵ On December 11, 1995, he presented an expanded version of his defense and justified his request not to be submitted to a disciplinary proceeding on the basis of the principles of legality, impartiality and presumption of innocence,

³⁸ Cf. The Judiciary's Office for Control of Judges, Report of July 21, 1995 (evidence file, folios 1099 to 1103).

³⁹ The Judiciary's Office for Control of Judges, Report of July 21, 1995 (evidence file, folio 1103).

⁴⁰ The Judiciary's Office for Control of Judges, Report of July 21, 1995 (evidence file, folio 1103).

⁴¹ Article 33 of the Organic Law of the National Council of the Judiciary established that this body should "investigate the actions of judges and prosecutors of the other courts, respectively, in order to determine the application of the sanction of dismissal, without prejudice to the powers that correspond to other organs" (evidence file, folio 1643).

⁴² Cf. The Judiciary's Office for Control of Judges, Report of August 3, 1995 (evidence file, folio 1068).

⁴³ Cf. The Judiciary's Office for Control of Judges, Report of August 3, 1995 (evidence file, folio 1068).

⁴⁴ Cf. Executive Council of the Judiciary. Decision of October 18, 1995 (evidence file, folio 1351).

⁴⁵ Cf. Brief answering the charges presented by Mr. Cordero Bernal on December 4, 1995 (evidence file, folios 1367 to 1363).

and because he had a clean professional record.⁴⁶

45. On May 14, 1996, the CNM issued Decision No. 051-96-CNM and declared the disciplinary proceeding against Mr. Cordero Bernal open due to "serious irregularities in the exercise of his functions."⁴⁷

46. On May 29, 1996, Mr. Cordero Bernal presented another brief answering the charges and indicated that the decision under investigation was an act of a jurisdictional nature. He stressed that the final decision in the criminal proceedings for illicit drug-trafficking had determined that the defendants were not guilty, and this was consequent with his decision.⁴⁸

47. On August 14, 1996, the CNM issued Decision No. 008-96-PCNM ordering the dismissal of Mr. Cordero Bernal, required the cancellation of his appointment, and the recording of the decision in his personal file.⁴⁹ Among other matters, the decision indicated that "the conduction of the judge merits disciplinary sanction because no rational support is to be found for the premature unconditional release that he granted, and that conduct is defined as an offense and one of a serious nature, and therefore falls within the circumstances of article 31, paragraph 2, of Law No. twenty-six thousand three hundred and ninety-seven; that is, a serious act that, without being a crime, compromises the dignity of the office and devalues it in the opinion of the public."

E. Amparo procedure

48. On September 9, 1996, Mr. Cordero Bernal filed an application for amparo against the National Council of the Judiciary. He requested the annulment of the decision ordering his dismissal. According to Mr. Cordero Bernal, even though the Organic Law of the National Council of the Judiciary and the Constitution established that the decisions of the CNM could not be contested, the application for amparo was admissible owing to infringement of the right to due process. He also argued that the guarantee of tenure for judges had been ignored.⁵⁰

49. On November 27, 1996, in a first instance judgment, the First Public Law Court declared the application for amparo inadmissible.⁵¹ The court found that the decision ordering Mr. Cordero Bernal's dismissal contained "a full examination of the administrative disciplinary proceeding" that "allowed it to be concluded that this was sufficiently substantiated and, therefore, had been issued observing the constitutional requirement analyzed, which means that this decision cannot be contested and the application for amparo that seeks to challenge it is inadmissible."⁵² Consequently and according to the court, the dismissal decision could not be reviewed because it had been issued without infringing due process. The decision was

⁴⁶ Cf. Expanded brief answering the charges presented by Mr. Cordero Bernal on December 11, 1995 (evidence file, folios 60 and 61).

⁴⁷ National Council of the Judiciary. Decision No. 051-96-CNM of May 14, 1996 (evidence file, folio 63).

⁴⁸ Cf. Brief answering the charges presented by Mr. Cordero Bernal on May 29, 1996 (evidence file, folios 66 to 73).

⁴⁹ Cf. National Council of the Judiciary. Decision No. 008-96-PCNM of August 14, 1996 (evidence file, folios 9 to 13).

⁵⁰ Cf. Application for amparo filed by Mr. Cordero Bernal before the Public Law Court on September 9, 1996 (evidence file, folios 75 to 83).

⁵¹ Cf. The First Public Law Court. Decision of November 27, 1996 (evidence file, folios 1380 to 1383).

⁵² The First Public Law Court. Decision of November 27, 1996 (evidence file, folio 1383).

appealed by a brief presented on December 10, 1996.⁵³

50. On September 24, 1997, the Transitory Corporative Public Law Chamber issued a second instance judgment confirming the decision to declare the application for amparo inadmissible.⁵⁴ It argued that, according to article 142 of the Peruvian Constitution, the decisions of the CNM concerning the evaluation and ratification of judges could not be reviewed. Mr. Cordero Bernal filed the corresponding remedies.⁵⁵ On May 8, 1998, the Constitutional Court considered that the disciplinary proceeding "was conducted pursuant to the essential standards of due process, rejecting the plaintiff's argument that the contested decision lacked substantiation owing to its very wording [...]." Based on the foregoing, in the Court's opinion, the application for amparo was admissible. Therefore, it analyzed the merits of the matter and rejected the application because it did not find a violation of due process.⁵⁶

F. Criminal proceedings

51. In a decision of June 30, 1997, the Executive Committee of the Public Prosecution Service declared well-founded a complaint for the offenses of breach of trust and complicity filed against Mr. Cordero Bernal, decided to open criminal proceedings against him, and forwarded the case file to the Supreme Prosecutor for execution of that decision.⁵⁷

52. Following the processing of the criminal proceedings, on September 24, 1999, the Superior Court of Justice of Huánuco-Pasco delivered judgment acquitting Mr. Cordero Bernal of the offense of complicity and convicting him of the offense of breach of trust.⁵⁸ Both the accused and the prosecutor appealed this decision.⁵⁹ The Public Prosecutor filed an appeal for annulment.⁶⁰ On December 15, 1999, a second instance judgment declared that the first instance judgment was null and void in relation to the acquittal for the offense of complicity and required a new judgment to be issued on the charges of the offenses of complicity and breach of trust, because all the evidence had not been analyzed.⁶¹

53. On January 21, 2000, the Superior Court of Justice of Huánuco-Pasco issued a new judgment acquitting Mr. Cordero Bernal of the offense of complicity and convicting him of the offense of breach of trust.⁶² The parties appealed this decision.⁶³ In second instance, on March 30, 2000, the first instance decision was again declared null and void considering that, owing

⁵³ Cf. Remedy of appeal of December 10, 1996 (evidence file, folios 1385 to 1387).

⁵⁴ Cf. Transitory Corporative Public Law Chamber. Judgment of September 24, 1997 (evidence file, folio 90).

⁵⁵ Cf. Special remedy of October 16, 1997, filed by Hector Fidel Cordero Bernal (evidence file, folio 1389 to 1893) and brief of Mr. Cordero Bernal of March 31, 1998, requesting the President of the Constitutional Court to declare admissible the application for amparo he had filed against Decision No. 008-96-PCNM of August 14, 1996 (evidence file, folio 95 to 99). On June 16, 1998, Mr. Cordero Bernal presented a brief expanding the appeal presented on March 31, 1998 (evidence file, folios 101 to 103).

⁵⁶ Cf. Constitutional Court. Judgment of May 8, 1998 (evidence file, folios 92 and 93).

⁵⁷ Cf. Executive Committee of the Public Prosecution Service. Decision No. 702-97-MP-CEMP of July 30, 1997 (evidence file, folios 105 to 107).

⁵⁸ Cf. Superior Court of Justice of Huánuco. Judgment of September 24, 1999 (evidence file, folios 38 to 48).

⁵⁹ Cf. Remedy of appeal filed after the reading of the judgment, September 24, 1999 (evidence file, folio 143). Appeal filed by the Superior Prosecutor, October 28, 1999 (evidence file, folio 146).

⁶⁰ Cf. The Public Attorney. Appeal for annulment, September 27, 1999 (evidence file, folios 148 and 149).

⁶¹ Cf. Superior Court of Justice of Huánuco. Judgment of December 15, 1999 (evidence file, folios 151 to 154).

⁶² Cf. Superior Court of Justice of Huánuco. Judgment of January 21, 2000 (evidence file, folios 156 to 171).

⁶³ Cf. Remedy of appeal filed after the reading of the judgment, January 21, 2000 (evidence file, folios 173 and 174).

to the seriousness of the offense, the case should have been examined in greater depth.⁶⁴

54. On July 19, 2000, the Superior Court of Justice of Huánuco-Pasco issued another judgment acquitting the presumed victim of the offense of complicity and convicting him of the offense of breach of trust.⁶⁵ The parties appealed this decision.⁶⁶ On December 26, 2000, a second instance judgment declared that judgment null and void and ordered the issue of a new judgment.⁶⁷

55. On June 21, 2005, the Superior Court of Justice of Huánuco-Pasco issued a judgment acquitting Mr. Cordero Bernal of both the offenses of which he had been accused.⁶⁸ It also required the annulment of his police and criminal record. This decision was appealed by the Superior Prosecutor who requested that the first instance judgment be declared null and void because the responsibility of the accused had been proved.⁶⁹

56. On August 22, 2005, a second instance judgment confirmed the decision of June 21 that year,⁷⁰ considering that the decision granting unconditional release was a jurisdictional act that could have been amended by a higher authority as, indeed, occurred. In addition, the judgment indicated that the active subject of the offense of complicity could not be a judge and that "the offense of breach of trust is not committed through negligence."⁷¹ On August 25, 2005, the Decentralized Anti-corruption Prosecutor of the Judicial District of Huánuco-Pasco filed an appeal for annulment, which was declared inadmissible on September 1, 2005.⁷²

G. Appeal for annulment

57. On November 17, 2005, Mr. Cordero Bernal filed an appeal for annulment against the CNM's decision of August 14, 1996, and requested his reinstatement in office. He argued that a judgment had been issued acquitting him and that, when the sanction of dismissal had been imposed on him, two laws were in force and the one less favorable to his interests had been applied.⁷³

58. On December 30, 2005, the CNM issued Decision No. 1198-2005-CNM declaring the annulment inappropriate and the request for reinstatement to the post inadmissible. It indicated that the presumed victim had not filed an appeal for review against the contested decision and, therefore, the decision had the effects of *res judicata*, and also that criminal responsibility should not be confused with disciplinary responsibility. It also indicated that the CNM's functions did not include reinstating dismissed judges to the exercise of their office.⁷⁴

59. On January 25, 2006, Mr. Cordero Bernal filed an appeal against Decision No. 1198-

⁶⁴ Cf. Judgment of March 30, 2000 (evidence file, folio 176).

⁶⁵ Cf. Superior Court of Justice of Huánuco. Judgment of July 19, 2000 (evidence file, folios 178 to 187).

⁶⁶ Cf. Remedy of appeal filed after the reading of the judgment, July 19, 2000 (evidence file, folio 190).

⁶⁷ Cf. Judgment of September 26, 2000 (evidence file, folios 192 and 193).

⁶⁸ Cf. Superior Court of Justice of Huánuco. Judgment of June 21, 2005 (evidence file, folios 195 to 203).

⁶⁹ Cf. Superior Prosecutor. Appeal against judgment, July 12, 2005 (evidence file, folio 205).

⁷⁰ Cf. Decision confirming judgment, August 22, 2005 (evidence file, folios 207 to 209).

⁷¹ Cf. Decision confirming judgment, August 22, 2005 (evidence file, folio 208).

⁷² Cf. First Superior Criminal Chamber of Huánuco. Decision of September 1, 2005 (evidence file, folio 213).

⁷³ Cf. Appeal for annulment of Decision No. 008-96/PCNM of the National Council of the Judiciary, November 17, 2005 (evidence file, folios 215 to 220).

⁷⁴ Cf. National Council of the Judiciary, Decision 1198-2005-CNM, December 30, 2005 (evidence file, folios 222 to 224).

2005-CNM. He repeated the arguments set out in his brief of November 17, 2005, and indicated that he had not filed an appeal for review because he was subject to criminal proceedings.⁷⁵

60. On February 20, 2006, in Decision No. 078-2006-CNM, the CNM declared the appeal for review inadmissible due to the statute of limitations. It indicated that since the appeal was for review and since the CNM was a single instance organ, the appeal should have been filed within 10 days of notification of the decision.⁷⁶

VII MERITS

61. This case relates to the disciplinary proceeding instituted against Hector Fidel Cordero Bernal because he had granted unconditional release to two defendants. This proceedings culminated in his dismissal as Provisional Judge of the Fourth Criminal Court of the province of Huánuco, Peru. The Inter-American Commission, the presumed victim and his representatives alleged that the disciplinary proceeding had not respected judicial guarantees, the principle of legality, political rights, and the rights to appeal a ruling and to judicial protection established in Articles 8(1), 8(2)(h)), 9, 23(1)(c) and 25(1) of the American Convention, in relation to the obligations contained in Articles 1(1) and 2 of this instrument. The Inter-American Commission argued that, in this case, the absence of a duly substantiated decision had constituted an international wrongful act insofar as "it was mandatory for the disciplinary authority to provide a duly substantiated decision that clearly established the reasons why the ruling issued by Mr. Cordero Bernal – despite the fact that it had been corrected by the available legal remedies – required disciplinary control because it revealed his lack of competence and suitability as a judge to the point of meriting the most severe sanction."⁷⁷ For its part, the State contested the arguments according to which it was responsible for violating Mr. Cordero Bernal's rights.

62. This Court must now assess whether or not the disciplinary proceeding undertaken against Mr. Cordero Bernal and the decision taken to dismiss him were in keeping with the system of guarantees established in the Convention, and whether the sanction imposed was proportionate to the conduct of the then judge. Also, the Commission has asked the Court to rule on the legality of the norm on which the proceeding was based and on the CNM's decision – in particular, on whether it was unsubstantiated, thereby affecting judicial independence from the perspective of tenure. To decide this matter, the Court will examine: (1) the alleged violation of judicial guarantees, the principle of legality and political rights and (2) the alleged violation of the rights to appeal against a judgment and to judicial protection.

VII-1 JUDICIAL GUARANTEES, PRINCIPLE OF LEGALITY AND POLITICAL RIGHTS, IN RELATION TO THE OBLIGATIONS TO RESPECT AND TO ENSURE RIGHTS AND TO ADOPT DOMESTIC LEGAL PROVISIONS⁷⁸

A. Arguments of the parties and of the Commission

⁷⁵ Cf. Appeal filed by Mr. Cordero Bernal, January 25, 2006 (evidence file, folios 226 to 230).

⁷⁶ Cf. National Council of the Judiciary, Decision 078-2006-CNM, February 20, 2006 (evidence file, folios 232 and 233).

⁷⁷ Inter-American Commission on Human Rights. Merits Report No. 115/18 (merits file, folio 26).

⁷⁸ Articles 8, 9 and 23 of the American Convention, in relation to Articles 1(1) and 2 of this instrument.

63. The **Commission** argued that the guarantees established in Article 8 of the American Convention were not limited to criminal proceedings, but were also applicable to other types of proceedings, especially sanction proceedings, because these form part of the exercise of the State's punitive powers. In this regard, it argued that, because the case refers to a process that resulted in a sanction of dismissal, the guarantees of due process were applicable in relation to the principle of judicial independence. It indicated that the said principle resulted in the enhanced guarantees that States should provide to judges in order to ensure their independence and that those guarantees included irremovability.

64. The Commission also argued that the decision imposing a disciplinary sanction on Mr. Cordero Bernal did not include a reasoning that proved his lack of competence and suitability, but "merely indicated that the decision issued [...] was irrational and devoid of common sense." It therefore considered that the State had violated the right to a duly substantiated decision in relation to the principle of judicial independence. Regarding the right to appeal the decision, it argued that this was also part of the right to due process in sanction proceedings and that "it entailed an examination of both the facts and law of the decision under appeal by a different and higher judge or court."

65. In relation to political rights, the Commission indicated that, according to the American Convention, judges have a right to access public office in equal conditions and that when their tenure is affected, this violates Article 23, in relation to the principle of judicial independence established in Article 8(1) of the American Convention.

66. Lastly, with regard to the principle of legality, the Commission argued that the violation of this principle was revealed by the legal imprecision of the sanction applied to Mr. Cordero Bernal; by the failure to apply the law that was most favorable to his interests, and by the contradictions arising from the use of the same facts to substantiate the criminal proceedings and the administrative disciplinary proceeding.

67. The **representatives** stressed that the principle of judicial independence involved an adequate process of appointment, irremovability from office, and a guarantee against external pressure. They also reiterated the Commission's arguments that the substantiation of the decision by which Mr. Cordero Bernal was dismissed did not meet the standards for judicial independence and political rights. Regarding the principle of legality, they argued that its violation arose from the breadth of the definition of the disciplinary offense; that a law existed that was more favorable to the interests of the presumed victim, and that both the disciplinary and the criminal proceedings were based on the same facts.

68. The **State** referred to the guarantees of irremovability from office and the prohibition to freely remove judges, and argued that such guarantees were in force, except in the case of conducts that were clearly open to censure – such as serious disciplinary offenses or incompetence – established in an objective and impartial disciplinary proceeding. It argued that, in this case, "the principle of judicial independence was respected because Mr. Cordero Bernal was dismissed [...] owing to a disciplinary offense or incompetence, defined as an offense in the laws in force; in other words, in this case, he was not freely removed from office." It also argued that the dismissal decision was sufficiently substantiated.

69. Lastly, with regard to the principle of legality, the State argued that the degree of precision required for a norm depended on the subject matter and that certain levels of indeterminacy did not necessarily entail a violation of the American Convention. It also indicated that there was no conflict between the two laws. Finally, it underlined that the text of the law that included the administrative sanction could not exclude criminal prosecution,

because the reason why Mr. Cordero Bernal was dismissed did not signify the exclusion of criminal responsibility.

B. Considerations of the Court

70. The Court recalls that, in this case, it is examining the dismissal of a provisional judge, temporarily appointed to the First Criminal Court of the Superior Court of Huánuco; a dismissal that occurred as a result of a disciplinary proceeding against him. It will therefore proceed to examine: (1) the guarantee of judicial independence in relation to the principle of legality, political rights and the guarantee of duly substantiated decisions, and (2) the principle of the application of the most favorable punitive law.

B.1 The guarantee of judicial independence in relation to the principle of legality, political rights and the guarantee of duly substantiated decisions

71. This Court has established that judges have specific guarantees owing to the independence required by the Judiciary, which has been understood to be essential for the exercise of their function. In this regard, it has asserted that one of the main purposes of the separation of public powers is the guarantee of judicial independence. This autonomous exercise must be guaranteed by the State in both its institutional aspect, that is in relation to the Judiciary as a system, and in its individual aspect; in other words, in relation to the person of the specific judge.⁷⁹ The purpose of this protection is to prevent the judicial system, in general, and its members, in particular, from being subject to potential undue restrictions in the exercise of their function by organs outside the Judiciary, or even by those who exercise functions of review or appeal.⁸⁰

72. The Court has also indicated that judicial independence gives rise to guarantees: (a) to tenure and irremovability from office; (b) to an adequate process of appointment, and (c) to be protected from external pressures.⁸¹ Regarding the guarantee of tenure and irremovability from office, the Court has considered that this, in turn, means that: (i) the separation of judges from office must be exclusively as a result of the permitted grounds, either through procedures that comply with judicial guarantees or because the mandate has concluded; (ii) judges may only be dismissed on serious grounds of misconduct or incompetence, and (iii) any procedure must be decided pursuant to the established rules on judicial conduct and in accordance with fair procedures ensuring objectivity and impartiality

⁷⁹ The Consultative Council of European Judges (CCJE), in its Opinion No. 3 (2002) on "Principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality" emphasized that "the independence of the judge is an essential principle and is the right of the citizens of each State, including its judges. It has both an institutional and an individual aspect. [...]" Consultative Council of European Judges (CCJE). Opinion No. 3 (2002), para. 16. Available at: <https://rm.coe.int/168070098d>.

⁸⁰ Cf. *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of August 5, 2008. Series C No. 182, para. 55, and *Case of Martínez Esquivia v. Colombia. Preliminary objections, merits and reparations*. Judgment of October 6, 2020. Series C No. 412, para. 84.

⁸¹ Cf. *Case of Colindres Schonenberg v. El Salvador. Merits, reparations and costs*. Judgment of February 4, 2019. Series C No. 373, para. 68 and *Case of the Constitutional Court v. Peru. Merits, reparations and costs*. Judgment of January 31, 2001, para. 75. See also: *mutatis Mutandis, Case of Martínez Esquivia v. Colombia, supra*, para. 95. On this matter, the Court of Justice of the European Union, in a judgment of June 24, 2019, indicated: "In particular, that freedom of the judges from all external intervention or pressure, which is essential, requires, as the Court has held on several occasions, certain guarantees appropriate for protecting the individuals who have the task of adjudicating in a dispute, such as guarantees against removal from office." Court of Justice of the European Union. Judgment of June 24, 2019, C-619/18, ECLI:EU:C:2019:531, paragraph 75. Available at: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=215341&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1961447>.

set out in the Constitution or the law.⁸²

73. Regarding this matter, article 14 of the Statute of the Ibero-American Judge indicates the following:

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

74. Regarding the facts that are the purpose of this case, the Court recalls that Mr. Cordero Bernal was appointed Provisional Judge of the Fourth Criminal Court of the province of Huánuco by a decision of November 15, 1994, issued by the Superior Court of Justice of that province. That decision did not specify the terms of his appointment. Then, he was dismissed by a decision of August 14, 1996, of the National Council of the Judiciary because he had committed the disciplinary offense contained in article 31.2 of the Organic Law of the National Council of the Judiciary, which established the sanction of dismissal for “[c]ommitting a serious act that, without being a crime, compromises the dignity of the office and devalues it in the opinion of the public.” Thus, in this case the guarantees of the tenure and irremovability of judges appointed on a provisional basis is relevant.

75. This Court has established that the separation from office of provisional judges should be for reasons established by law, whether these are: (i) the occurrence of the resolutive condition to which the appointment or designation was subject, or the expiry of a predetermined period owing to the holding and conclusion of a public competition, based on which the permanent replacement of the provisional judge was appointed or designated, or (ii) serious disciplinary offenses or proven incompetence, as defined in paragraph 72 of this judgment.⁸³

76. For her part, the then Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, indicated in reports submitted in 2013 and 2014 that, although judges may be subject to disciplinary proceedings for conducts that bring judicial office into disrepute or that violate judicial ethics,⁸⁴ disciplinary offenses that refer in general terms to “threat or

⁸² Cf. *Case of Reverón Trujillo v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of June 30, 2009. Series C No. 197, para. 77, and *Case of Martínez Esquivia v. Colombia, supra*, para. 85. Several international bodies and courts have also ruled on the guarantee of stability and non-removal from office, as well as the United Nations Basic Principles on the Independence of the Judiciary and the Statute of the Ibero-American Judge. This Court has incorporated its criteria and, also, has asserted that the free removal of judges gives rise to an objective doubt about their real possibility of deciding specific disputes without fear of reprisals. Cf. Human Rights Committee, General Comment No. 32, *Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, August 23, 2007, para. 20; Human Rights Committee, *Soratha Bandaranayake v. Sri Lanka* (Communication No. 1376/2005), UN Doc. CCPR/C/93/D/1376/2005, Views adopted on July 24, 2008, para. 7.3; Court of Justice of the European Union, *supra*; Consultative Council of European Judges (CCJE), Opinion No. 1 (2001), paras. 16 and 6, and Principles 12, 17, 18 and 19 of the United Nations Basic Principles on the Independence of the Judiciary.

⁸³ Cf. *Case of Apitz Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela, supra*, para. 43, and *Case of Álvarez Ramos v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of August 30, 2019. Series C No. 380, para. 148. See also: *mutatis mutandis*, *Case of Martínez Esquivia v. Colombia, supra*, para. 99, and *Case of Casa Nina v. Peru, supra*, para. 81.

⁸⁴ In this regard, the Special Rapporteur indicated: “judges should not be removed or punished for bona fide errors or for disagreeing with a particular interpretation of the law. Judges and prosecutors can be justifiably disciplined, suspended or removed from office for persistent failure to perform their duties, habitual intemperance, wilful misconduct in office, conduct which brings judicial office into disrepute or substantial violation of judicial ethics.” Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul.

harm to the correct administration of justice, [...] risk undermining the independence of the judiciary.”⁸⁵

77. In this case, the Court finds that the disciplinary proceeding against Mr. Cordero Bernal were conducted pursuant to the procedure established in the Constitution and the law and based on legally established grounds. These grounds were of an open nature and related to a serious act that compromised the dignity of the office. The Court reiterates that the precision of a disciplinary norm may differ from that required by the principle of legality in criminal matters, owing to the nature of the disputes that each one is called on to decide.⁸⁶ Therefore, the problems of the imprecision of a disciplinary offense cannot be examined in abstract, but rather in light of the grounds established by the judge when applying it. In the Court’s opinion, the application of an open disciplinary offense does not constitute, in principle, a violation of the right to due process, provided that the relevant jurisprudential parameters are respected.

78. Accordingly, the Court has established that the rules for the disciplinary prosecution of judges must seek to protect the judicial function by evaluating the performance of the judges in the exercise of their functions. Accordingly, “when applying open or indeterminate disciplinary norms that require considering concepts such as the decorum and the dignity of the administration of justice, it is essential to take into account the effects that the conduct examined could have on the exercise of the judicial function, either positively by the establishment of normative criteria for its application, or by means of an adequate interpretation and statement of reasons by the judges when applying them. To the contrary, the scope of these disciplinary measures would be subject to the private of moral beliefs of the judges.”⁸⁷ Accordingly, in the absence of normative criteria that guide the conduct of the judge, the statement of reasons of the sanctioning ruling clarifies open or indeterminate disciplinary offenses. Therefore, to determine whether, in a specific case, judicial independence has been violated owing to the dismissal of a judge based on the application of an open disciplinary offense, the Court has found it necessary to examine the substantiation of the decision imposing a disciplinary sanction on a judge.⁸⁸

79. Regarding the obligation to provide a statement of reasons for a decision, the Court has indicated repeatedly that this “is the externalization of the reasoned justification that allows a conclusion to be reached”⁸⁹ and entails a rational presentation of the grounds that led the judge to take a decision.⁹⁰ The obligation to substantiate decisions is a guarantee that

UN Doc. A/HRC/26/32, April 28, 2014, paras. 84 and 87. Available at: <https://undocs.org/A/HRC/26/32>.

⁸⁵ Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul. Mission to El Salvador. UN Doc. A/HRC/23/43/Add.1, para. 76. Available at: <https://undocs.org/A/HRC/23/43/Add.1>.

⁸⁶ Cf. *Case of Urrutia Laubreaux v. Chile. Preliminary objections, merits, reparations and costs*. Judgment of August 27, 2020. Series C No. 409, para. 129, and *Case of López Lone et al. v. Honduras. Preliminary objection, merits, reparations and costs*. Judgment of October 5, 2015. Series C No. 302, para. 257.

⁸⁷ *Case of López Lone et al. v. Honduras, supra*, para. 273.

⁸⁸ In this regard, in the *Case of López Lone et al. v. Honduras*, this Court noted that: “as indicated by expert witness Ibáñez, ‘it is impossible to codify all assumptions’ in disciplinary matters, so that ‘ultimately, there must always be a relatively open clause concerning professional duties.’ However, in these assumptions and when open or indeterminate disciplinary offenses are used, it is fundamental to provide a statement of reasons when applying them, because it is incumbent on the disciplinary court to interpret these norms respecting the principle of legality and observing the greatest rigor when verifying the existence of punishable conduct.” *Case of López Lone et al. v. Honduras, supra*, para. 270.

⁸⁹ *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary objection, merits, reparations and costs*. Judgment of November 21, 2007. Series C No. 170, para. 107, and *Case of Rosadio Villavicencio v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of October 14, 2019. Series C No. 388, para. 154.

⁹⁰ Cf. *Case of Amrhein et al. v. Costa Rica. Preliminary objections, merits, reparations and costs*. Judgment of

emanates from Article 8(1) of the Convention, linked to the correct administration of justice, because it protects the right of the individual to be tried for the reasons established by law and gives credibility to legal decisions in a democratic society.⁹¹

80. The reasoning shows the parties that they have been heard and, in those cases in which the decision can be appealed, provides the grounds for criticizing the decision and achieving a fresh examination before higher instances. Consequently, the reasons for a ruling and for certain administrative acts should reveal the facts, grounds and laws on which the authority based itself to take its decision; thereby ruling out any indication of arbitrariness.⁹²

81. In this regard, recently, in the *case of Casa Nina v. Peru*, this Court established that a dismissal based on service needs pointed to an indeterminate legal concept, "in other words, relating to an aspect of the reality the limits of which were not clearly established in its text"⁹³ and that, therefore, its application should have responded to circumstances that were clearly emphasized by the authority, which meant making a reasoned analysis in the specific case.

82. Accordingly, the Court must establish whether the decision imposing the sanction of dismissal on Mr. Cordero Bernal was adequately substantiated. To this end, it is necessary to decide whether the arguments made by the National Council of the Judiciary provided content to the norm that was applied. Also, given that the case related to the dismissal of a judge, it is necessary to determine whether the decision took into account the effects that the conduct examined could have on the exercise of the judicial function, by an adequate reasoning and interpretation, as well as the seriousness of the conduct and proportionality of the sanction.⁹⁴

83. The Court finds that, in the context of the disciplinary proceeding instituted against Mr. Cordero Bernal, one report and two decisions were issued that described the factual and legal grounds that substantiated the proposal and subsequent decision of dismissal. These were the investigation report of July 21, 1995, signed by Inés Villa Bonilla, OCMA investigator; the OCMA decision of August 3, 1995, containing the investigation report, and the proposal of dismissal, and the decision of the National Council of the Judiciary of August 14, 1996, dismissing Mr. Cordero Bernal. These three documents all indicate: (i) that the appointment of Mr. Cordero Bernal to the First Criminal Court of Huánuco was irregular, and (ii) that Mr. Cordero Bernal's decision to grant unconditional release to two defendants did not take into account the particular circumstances of the case or an adequate assessment of the evidence.⁹⁵ The alleged irregularities in Mr. Cordero's appointment provided the grounds for disciplinary proceedings filed against other persons; while the irregularities related to the decision to grant

April 25, 2018. Series C No. 354, para. 268, and *Case of Rosadio Villavicencio v. Peru*, *supra*, para. 154.

⁹¹ Cf. *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, *supra*, para. 77, and *Case of Casa Nina v. Peru*, *supra*, para. 89.

⁹² Cf. *Case of Claude Reyes et al. v. Chile. Merits, reparations and costs*. Judgment of September 19, 2006. Series C No. 151, para. 122, and *Case of Casa Nina v. Peru*, *supra*, para. 89.

⁹³ *Case of Casa Nina v. Peru*, *supra*, para. 93.

⁹⁴ Cf. *Case of Chocrón Chocrón v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of July 1, 2011. Series C No. 227, para. 120, and *Case of López Lone et al. v. Honduras*, *supra*, para. 267.

⁹⁵ That decision was categorized as premature by the authorities in charge of the investigation. This was because the defendants had entered Peruvian air space without authorization, which entailed the presumed perpetration of an offense that had not been investigated; also, because they had justified their presence by facts that could signify the perpetration of other offenses that had not been investigated either. In addition, Mr. Cordero Bernal ordered unconditional release only eleven days after this had been requested, before the expiry of the ordinary four-month time frame for an investigation and before the investigation procedures aimed at verifying the identity of the defendants had been completed. Cf. National Council of the Judiciary. Decision No. 008-96-PCNM of August 14, 1996 (evidence file, folios 9 to 13).

unconditional release led the National Council of the Judiciary to affirm that this decision had no rational substantiation and was serious.

84. In this Court's opinion, the reasoning of the CNM's decision, which referred to the investigation reports, revealed a detailed analysis of the facts that led to the dismissal decision and of the reasons that allowed this conduct to be classified as a serious disciplinary offense. Although those facts were related to a judicial decision, the Court notes that the reasoning of the decision of the National Council of the Judiciary did not question the decision itself, but rather the decision-making process which, in the CNM's opinion, did not make a rational analysis of the facts and the applicable norms and, for that reason, gave rise to a decision without any rational or logical substantiation.

85. In particular, with regard to the order of unconditional freedom and the consequent disciplinary responsibility of Mr. Cordero Bernal, the CNM established:

SEVENTH. That, despite these precedents, the judge in this proceeding granted the two defendants the benefit of unconditional release processed in a separate motion; that the said decision cannot be substantiated based on the established facts, or on the statements of the defendants because these are implausible; that the correct and reasonable course of action would have been to continue and conclude the judicial investigation in the principal case file, reserving the ruling on the responsibility of the defendants to the end of the investigation process and not to interrupt it as has been done. EIGHTH. That the defense presented by the judge in this proceeding and the documents he has submitted refer, first, to his argument that this disciplinary proceeding "refers exclusively to acts of a jurisdictional nature"; second, that in the order granting the benefit of unconditional release his "action was in keeping with the law and the facts and evidence examined in the respective investigation"; third, that the representative of the Public Prosecution Service "did not offer or provide evidence, merely exercising the remedies established by law for the decision to be reviewed by higher authorities"; fourth, that, in this way, "the plural instance was implemented that constitutes a principle and guarantee of the administration of justice"; fifth, that the prosecutor did not question his actions as the judge of the proceedings; sixth, that it is not true that there had been connivance with the President of the Superior Court of Huánuco because, as a lower judge, he was subject to the supervision of the President of the Court and had to obey the directives issued by that authority; seventh, that it was not true that the burden of proof had been reversed since this was a drug-trafficking crime or that the presumption of innocence was eliminated owing to the coincidental presence of indications, a criterion that infringes article 2.24.e) of the Constitution; eighth, that the assessment of the content of the criminal case file made by the officials of the Office for Control of Judges was subjective; ninth, lastly, that in his final report, the judge of the case, Oriol San Martín, had ruled on the "absence of criminal responsibility of the defendants," thereby proving him right. NINTH. That those defense arguments duly analyzed do not change the opinion of the Office for Control of Judges and of the Executive Council of the Judiciary which have requested the dismissal of the defendant, or the result of the assessment of the facts and of the decision that is the subject of this proceeding, because the irregularity detected in this case is the irrational nature of the decision granting release; that is, the impossibility of finding a sensible substantiating reason and, especially, a legal reason, which are the minimum or elementary requirements for the exercise of the jurisdictional function; that, it is not matter of discussing the reasons for a decision such as the defendant does in his defense; to the contrary, it has been clearly established that this is not the purpose of this proceeding because, for it to be possible to make an analysis of the reasons for a decision, it is a condition *sine qua non* that the said decision has a rational legal content, which the order granting unconditional release requested by the defendants does not have; that the defendant's argument that the representative of the Public Prosecution Service appealed the decision without questioning the defendant's action is a misleading argument because it modifies the subject of the analysis of the rationality of the decision granting premature unconditional release to the defendants whose situation was clearly that they had violated Peruvian territorial space to move a large amount of foreign currency and as illegal drugs had been found, while the excuse that their trip was to transfer corpses could not be considered valid; that, the opinion of the judge who subsequently took over the criminal case, when drafting the final report that the defendants were not criminally responsible, a situation that the defendant wants to assert in his favor, is contradicted by the subsequent accusation of the Superior Prosecutor on folio eight hundred and seventy-nine of the criminal file provided and by the consequent indictment issued by the Full Chamber of the Superior Court of Huánuco on folio eight hundred and eighty-one, so that opinion of the criminal judge has no effect whatsoever as regards this disciplinary proceeding; that, in addition, the order granting unconditional release was revoked by the Full Chamber (folio four hundred and eight), ordering the recapture of the defendants and refraining from

issuing a disciplinary sanction against the judge because an investigation was underway by the Office for Control of Judges [...]

86. The Court notes that the Investigation Report and the decisions of the OCMA and the CNM describe in detail the irregularities in which Mr. Cordero Bernal allegedly incurred by taking the decision by which he granted unconditional release to two defendants. According to the disciplinary organs, that decision was not in keeping with the supposed provisions established in the laws of Peru for granting this benefit because, in this way, a premature conclusion was brought to the criminal proceedings "against two defendants whose situation was clearly that they had violated Peruvian territorial space to move a large amount of foreign currency."⁹⁶ These irregularities reveal misconduct by the judge who had not conducted any procedure of a substantive nature during the proceedings; took the decision to grant unconditional release prior to the expiry of the corresponding legal time frame, and had not assessed all the evidence (*supra* para. 40). In the opinion of the CNM that conduct was serious and compromised the dignity of the office because it had no rational legal support, which was the minimum requirement for any jurisdictional decision. In this regard, the Court notes that the CNM assessed the gravity of the judge's conduct – that is, he adopted an irrational decision – as well as its impact on the judicial function. Based on this assessment, it proceeded to adopt the decision of dismissal.

87. The foregoing arguments reveal the detailed examination made by the CNM of both Mr. Cordero Bernal's arguments and the factual and legal presumptions and reasons why his conduct merited dismissal. The report prepared by the disciplinary authority revealed the reasons that led the CNM to determine that Mr. Cordero Bernal's conduct was not only serious, but also compromised the dignity of the office, and devalued it in the opinion of the public, because it was irrational and had public impact.

88. That said, this Court takes into account that the decision by which Mr. Cordero Bernal granted unconditional release to two defendants, was not totally unsubstantiated. However, it plainly appears to have been precipitated, given that the case referred to the violation of Peruvian air space in a foreign aircraft that appeared to have been stolen, with almost US\$400,000 on board, with two foreigners who provided extremely incoherent explanations. In addition, the aircraft had been forced to land by gunfire.⁹⁷ Moreover, the judge was not under pressure due to a peremptory time limit; however, despite this, he took the decision to close the proceedings after a few days, in a court to which he had been appointed provisionally for a short time, in a case that had relatively uncommon characteristics and in which he had not ordered any measures. The Court understands that the sanction imposed in these circumstances was appropriate to the serious lack of prudence of the conduct, and consequently, did not violate the principle of proportionality.

89. Based on the above, the Court concludes that the CNM's decision was duly substantiated and was not arbitrary and, consequently, neither the guarantees of due process nor the principle of legality established in the Convention were violated.

90. Furthermore, in light of the fact that in this case, a judge's tenure was not arbitrarily affected, there was no violation of the right to judicial independence (Article 8(1) of the Convention), in relation to the right to have access to and permanence in public office, under general conditions of equality established in Article 23(1)(c) of the Convention).

⁹⁶ National Council of the Judiciary, Decision No. 008-96-PCNM of August 14, 1996 (evidence file, folio 12).

⁹⁷ Cf. Answering brief of the State (merits file, folio 269), and Order of July 11, 1995, issued by the judge of the First Criminal Court of Huánuco (evidence file, folio 1155).

91. Regarding the alleged violation of the right to appeal the ruling before a higher court, the Court refers to the analysis of the arguments relating to the right to judicial protection, in which it will examine the application for amparo filed by Mr. Cordero Bernal, as it has in previous decisions on this same matter.⁹⁸

B.2 The principle of the application of the most favorable law

92. The **Commission** and the **representatives** argued that Article 9 of the Convention had also been violated because, at the time of the facts, two laws existed that established different legal consequences and the one that was less favorable to the interests of the presumed victim was applied. The Commission argued that the laws in force were the Organic Law of the Judiciary (LOPJ) of June 2, 1993, which established the condition of suspension prior to the application of the sanction of dismissal, and the Organic Law of the National Council of the Judiciary (LOCNM) of December 5, 1994, that allowed the sanction of dismissal to be applied as the first option. Mr. Cordero Bernal was appointed to the First Criminal Court of the Superior Court of Huánuco on June 22, 1995; on July 11, 1995, he had presumably committed the conduct that was categorized as a disciplinary offense and, on August 16, 1995, his dismissal was ordered.

93. The Court recalls that Article 9 of the Convention refers to the principle of legality and the principle of the application of the most favorable law. Regarding the latter, the article indicates that “[a] heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed” and that “[i]f subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.” The Court has understood that the most favorable law should be interpreted as that which: (i) establishes a lighter punishment, or (ii) creates new grounds for justification, for innocence, or for an impediment to the implementation of the punishment, and that this did not constitute an exhaustive list.⁹⁹ Even though the Court has not ruled expressly on the application of the principle of the most favorable criminal law to disciplinary matters, in its case law on Article 9 of the Convention it has made no distinctions between the scope of the guarantees it contains; rather, it has indicated repeatedly that this article, without any distinction between its contents, is applicable with regard to administrative sanctions.¹⁰⁰

94. In the instant case, although the Commission argued that the LOPJ was in force at the time of the facts and, if it had been applied, would have allowed Mr. Cordero Bernal to be penalized with suspension, the Court finds that the LOCNM is a subsequent law that ordered the abrogation of any conflicting provisions.¹⁰¹ Therefore, the LOPJ remained in force in relation to the dismissal of paralegals, while it was abrogated in relation to the dismissal of judges, a matter that was then regulated by the LOCNM. This conclusion was supported by the expert witness proposed by the State who underlined that “based on criteria of hierarchy, temporality and specialty, it should be understood that article 31 of the LOCNM is the only

⁹⁸ Cf. *Case of López Lone et al. v. Honduras, supra*, paras. 246 to 250, and *Case of Rico v. Argentina. Preliminary objection and merits*. Judgment of September 2, 2019. Series C No. 383, para. 84.

⁹⁹ Cf. *Mutatis mutandis, Case of Ricardo Canese v. Paraguay. Merits, reparations and costs*. Judgment of August 31, 2004. Series C No. 111, para. 179.

¹⁰⁰ For example, in the *case of López Lone v. Honduras* the Court indicated: “Article 9 of the American Convention, which establishes the principle of legality, is applicable to matters pertaining to administrative sanctions.” *Case of López Lone et al. v. Honduras, supra*, para. 257.

¹⁰¹ “Tenth. Abrogate Legislative Decree No. 25, article 226 of the Organic Law of the Judiciary and all the legal provisions that contradict this law.” Final and Transitory Provisions. Organic Law of the National Council of the Judiciary, November 25, 1994 (evidence file, folio 1646).

provision applicable to the dismissal of judges. Therefore, two laws that could have been applicable did not exist. To the contrary, there was only one: article 31 of the LOCNM.¹⁰²

95. On this basis, the law in force for the dismissal of judges at the time of the facts was the Organic Law of the National Council of the Judiciary. Moreover, this law was enacted prior to the conduct of which Mr. Cordero Bernal was accused. Consequently, it is not appropriate for the Court to analyze the scope and application of the principle of the application of the most favorable law in this specific case because, when the sanction was imposed, two laws were not in force.

B.5 Conclusion

96. Pursuant to the foregoing conclusions, the Court finds that as the decision by which the National Council of the Judiciary dismissed Mr. Cordero Bernal was duly substantiated, and that it was adopted in keeping with the law in force at the time of the facts concerning the dismissal of judges, the State is not responsible for the violation of the right to judicial guarantees in relation to the guarantee of tenure of judges, the principle of legality and the right to have access, under general conditions of equality, to public office established in Articles 8(1), 9 and 23(1) of the American Convention, in relation to Articles 1(1) and 2 of this instrument, to the detriment of Hector Fidel Cordero Bernal.

VII-2

JUDICIAL PROTECTION, IN RELATION TO THE OBLIGATIONS TO RESPECT AND TO ENSURE THE RIGHTS AND TO ADOPT DOMESTIC LEGAL PROVISIONS¹⁰³

A. Arguments of the parties and of the Commission

97. The **Commission** argued that the Constitutions and laws of Peru established that the decisions of the National Council of the Judiciary could not be appealed and that the application for amparo was only admissible in cases of violations of due process. It therefore concluded that there was neither an administrative nor judicial remedy to obtain a review of the dismissal ruling. It also indicated that the content of the amparo decisions revealed that the competent organs did not fully examine either the factual or the legal aspects of the decision to dismiss the presumed victim, restricting their competence to matters of due process.

98. The **representatives** agreed with the arguments presented by the Inter-American Commission.

99. The **State** argued that, as two independent organs had intervened in the proceeding that resulted in the dismissal (the OCMA and the CNM), this "justified the fact that a judicial review was not required because, otherwise, this would limit the significance and effectiveness of the corresponding decisions issued by the CNM, particularly when the latter had been constitutionally created especially to evaluate whether or not a judge should be dismissed when the law established this and pursuant to a rigorous procedure." The State also argued that the final decisions concerning the dismissal of judges could be contested in court by the application for amparo, and indicated that this was an appropriate procedure to avoid arbitrary actions and to examine the violation of fundamental rights such as to due process.

B. Considerations of the Court

¹⁰² Expert opinion provided by Ramón Alberto Huapaya Tapia (evidence file, folio 1856).

¹⁰³ Article 25 of the American Convention, in relation to Articles 1(1) and 2 of this instrument.

100. In relation to Article 25(1) of the Convention, this Court has indicated that it establishes the obligations of the States Parties to ensure to all persons the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate their fundamental rights.¹⁰⁴ Regarding the effectiveness of the remedy, the Court has established that it is not sufficient that this be established by the Constitution or the law, or that it be formally admissible; rather, it must be truly appropriate to establish whether a human rights violation has been committed and to provide the necessary means to redress this. Remedies that, due to the general situation of the country or even the particular circumstances of any given case, prove illusory cannot be considered effective. This may happen when, for example, they prove to be useless in practice because the means to execute decisions are lacking, or in any other situation in which justice is denied.¹⁰⁵

101. Additionally, when evaluating the effectiveness of remedies, the Court must verify whether the decisions that were taken have truly contributed to ending a situation that violated rights, to ensure the non-repetition of the harmful acts, and the free and full exercise of the rights protected by the Convention.¹⁰⁶ Consequently, the Court does not assess the effectiveness of the remedies filed based on an eventual decision favorable to the victim.

102. The analysis of the arguments presented by the Commission and the representatives reveals that the dispute in this case relates to the effectiveness of the application for amparo against the decisions of the National Council of the Judiciary. In this regard, the Court finds that the Peruvian Constitution established that the decisions of the National Council of the Judiciary were not subject to review and the judges interpreted that the only admissible measure to contest them was the application for amparo for violations of due process. Indeed, in this specific case, Mr. Cordero Bernal filed an application for amparo which was declared inadmissible in first and second instance, considering that the decision by which he was dismissed revealed a thorough examination of the disciplinary proceeding and was sufficiently substantiated.¹⁰⁷ Subsequently, the Constitutional Court considered that the disciplinary proceeding guaranteed due process and declared the application unfounded.

103. In this case, the judges of the amparo procedure examined the decision adopted by the CNM and concluded that it was duly substantiated and that the right to due process had not been violated. This means that it indicated that the judges examined Mr. Cordero's claims and determined that they were not admissible. In this Court's opinion, the conclusions reached by the judges of the amparo procedure were not manifestly arbitrary or unreasonable; also, as indicated in the preceding paragraphs, the analysis of whether a remedy is effective does not depend on an eventual decision favorable to the interests of the presumed victims.

104. Consequently, the Court finds that the State of Peru did not violate the right to judicial protection contained in Article 25(1) of the American Convention on Human Rights, in relation to Articles 1(1) and 2 of this instrument, to the detriment of Hector Fidel Cordero Bernal.

¹⁰⁴ 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 Casa Nina v. Peru, supra*, para. 116.

¹⁰⁵ Cf. *Case of Las Palmeras v. Colombia. Merits*. Judgment of December 6, 2001. Series C No. 90, para. 58, and *Case of Martínez Esquivia v. Colombia, supra*, para. 130.

¹⁰⁶ Cf. *Case of Ramírez Escobar et al. v. Guatemala. Merits, reparations and costs*. Judgment of March 9, 2018. Series C No. 351, para. 252, and *Case of López Mendoza v. Venezuela. Merits, reparations and costs*. Judgment of September 1, 2011. Series C No. 233, para. 184.

¹⁰⁷ Cf. Decision of November 27, 1996, issued by the First Public Law Court (evidence file, folios 1380 to 1383).

VIII
OPERATIVE PARAGRAPHS

105. Therefore,

THE COURT DECIDES,

Unanimously,

1. To reject the preliminary objection of “fourth instance,” pursuant to paragraphs 18 to 19 of this judgment.

DECLARES,

By five votes to two, that:

2. The State is not responsible for the violation of the rights recognized in Articles 8, 9 and 23 of the American Convention on Human Rights, in relation to the obligations to respect and to ensure those rights and to adopt domestic legislative provisions established in Articles 1(1) and 2 of this instrument, pursuant to paragraphs 70 to 96 of this judgment.

Dissenting Judges L. Patricio Pazmiño Freire and Eduardo Ferrer Mac-Gregor Poisot.

By five votes to two, that:

3. The State is not responsible for the violation of the right recognized in Article 25 of the American Convention on Human Rights, in relation to the obligations to respect and to ensure that right and to adopt domestic legislative provisions established in Articles 1(1) and 2 of this instrument, pursuant to paragraphs 100 to 104 of this judgment.

Dissenting Judges L. Patricio Pazmiño Freire and Eduardo Ferrer Mac-Gregor Poisot.

By five votes to two, that:

4. Since the international responsibility of the State has not been established, there is no need to rule on reparations, costs and expenses.

Dissenting Judges L. Patricio Pazmiño Freire and Eduardo Ferrer Mac-Gregor Poisot.

AND ESTABLISHES:

Unanimously, that:

5. The Secretariat of the Court shall notify this judgment to the Republic of Peru, the representatives of Mr. Cordero Bernal and the Inter-American Commission on Human Rights.

By five votes to two:

6. The case file be closed.

Dissenting Judges L. Patricio Pazmiño Freire and Eduardo Ferrer Mac-Gregor Poisot.

Judges L. Patricio Pazmiño Freire and Eduardo Ferrer Mac-Gregor Poisot advised the Court of their dissenting opinions which are attached to this judgment.

DONE, at San José, Costa Rica, on February 16, 2021, in the Spanish language.

I/A Court HR. Case of Cordero Bernal v. Peru. Preliminary objection and merits. Judgment of February 16, 2021.

Elizabeth Odio Benito
President

L. Patricio Pazmiño Freire

Eduardo Vio Grossi

Humberto Antonio Sierra Porto

Eduardo Ferrer Mac-Gregor Poisot

Eugenio Raúl Zaffaroni

Ricardo C. Pérez Manrique

Pablo Saavedra Alessandri
Secretary

So ordered,

Elizabeth Odio Benito
President

Pablo Saavedra Alessandri
Secretary

**DISSENTING OPINION OF
JUDGE L. PATRICIO PAZMIÑO FREIRE
CASE OF CORDERO BERNAL V. PERU
JUDGMENT OF FEBRUARY 16, 2021**

1. With my usual respect for the decisions of the Court, I wish to set out the reasons why I dissented from the majority decision that the Peruvian State had not violated the rights recognized in Articles 8(1), 9, 23(1)(c) and 25(1) of the American Convention on Human Rights (hereinafter “the Convention”) of Hector Fidel Cordero Bernal.

2. Although I agree with the considerations expressed in paragraph 72 of the judgment regarding the guarantees accorded to judges based on the principle of judicial independence, which include the guarantee of tenure and irremovability, I believe that, based on this guarantee, the Court should have declared the violations alleged by the Commission and the presumed victim’s representatives.

3. My position is based on the fact that Mr. Cordero Bernal was dismissed pursuant to the disciplinary grounds established in article 31.2 of the Organic Law of the National Council of the Judiciary, which established:

Article 31. . The sanction of dismissal referred to in paragraph (c) of Article 21 of this law is applicable for the following reasons:

[...] Committing a serious act that, without being a crime, compromises the dignity of the office and devalues it in the opinion of the public. [...]

4. In my opinion, the wording of this article does not give any indication whatsoever as to the type of acts that could be considered serious. In addition, the phrases “compromises the dignity of the office” and “devalues it in the opinion of the public” are extremely vague and permit the person responsible for exercising disciplinary powers to exercise considerable discretion. Therefore, they do not provide any type of guarantee against the possibility of being used arbitrarily.¹

5. Even though it is true that the Court has established that the precision required of a disciplinary norm differs from that required in criminal matters, owing to the nature of the disputes that each one is called on to decide,² it is also true that the Court has indicated repeatedly that the guarantee of the tenure of judges signifies that they may only be dismissed or removed from office for conducts that are clearly reprehensible; that is, for serious reasons related to misconduct or incompetence. Also, the possibility of dismissal should be based on the principle of the most serious offenses. Indeed, the protection of judicial independence requires that the dismissal of judges be considered as the *última ratio* in judicial disciplinary matters.³

6. Consequently, I consider that the National Council of the Judiciary, when sanctioning Mr. Cordero Bernal based on article 31.2 of the Organic Law of the National Council of the

¹ Cf. *Case of Urrutia Laubreaux v. Chile. Preliminary objections, merits, reparations and costs.* Judgment of August 27, 2020. Series C No. 409, para. 134.

² Cf. *Case of Maldonado Ordóñez v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of May 3, 2016. Series C No. 311, para. 86, and *Case of Urrutia Laubreaux v. Chile. Preliminary objections, merits, reparations and costs.* Judgment of August 27, 2020. Series C No. 409, para. 129.

³ Cf. *Case of López Lone et al. v. Honduras. Preliminary objection, merits, reparations and costs.* Judgment of October 5, 2015. Series C No. 302, para. 259.

Judiciary, used a norm that permitted a discretionality that was incompatible with the level of predictability that a norm should have that is aimed at providing a disciplinary sanction for the conduct of a judge, in violation of the principle of legality and judicial independence.

7. In addition, given that the Court has indicated that when the tenure of judges has been affected arbitrarily, the right of access to and permanence, under general conditions of equality, in public office is also violated,⁴ I also consider that it should have declared the violation of Article 23(1)(c) of the Convention. This is because access under conditions of equality to public office is an insufficient guarantee if it is not accompanied by the effective protection of permanence in that office.⁵ In this regard, the Human Rights Committee has also interpreted that this guarantee of protection includes both access to and permanence in conditions of equality and non-discrimination in relation to suspension and dismissal proceedings.⁶ I also consider that if the Court had established that the principle of legality and the right to judicial independence had been violated in this case, it would not have been necessary to analyze the alleged violation of the right to substantiate decisions contained in Article 8 of the American Convention.

8. Lastly, regarding the alleged violation of Article 25(1) of the Convention, I agree with the majority that the analysis of the arguments presented by the Commission and the representatives reveals that the dispute in this case is related to the effectiveness of the application for amparo against the decisions of the National Council of the Judiciary.⁷ However, since the Peruvian Constitution established that the decisions of the National Council of the Judiciary could not be contested and the judges interpreted that the only remedy against them was the application for amparo based on violations of due process,⁸ I consider that, even though there was a remedy, this was not adequate to contest violations of other fundamental rights; therefore, to this extent, the remedy was not effective. For this reason, I consider that the violation of Article 25(1) of the American Convention should have been declared.

9. Based on the above, the undersigned is unable to agree with the criteria adopted in the judgment to decide that the State was not responsible for violation of rights recognized in the American Convention and alleged by the Commission and the representatives.

L. Patricio Pazmiño Freire
Judge

Pablo Saavedra Alessandri
Secretary

⁴ 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. 155, and *Case of López Lone et al. v. Honduras, supra*, para. 192.

⁵ Cf. *Case of Reverón Trujillo v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of June 30, 2009. Series C No. 197, para. 138, and *Case of Colindres Schonenberg v. El Salvador. Merits, reparations and costs.* Judgment of February 4, 2019. Series C No. 373, para. 93.

⁶ Cf. Human Rights Committee, *Case of Pastukhov v. Belarus* (Communication 814/1998), UN Doc. CCPR/C/78/D/814/1998, August 5, 2003, paras. 7.3 and 9, and *Case of Adrien Mundy Busyo et al. v. Democratic Republic of the Congo* (Communication 933/2000), UN Doc. CCPR/C/78/D/933/2000, July 31, 2003, para. 5.2. See also: *Case of Chocrón Chocrón v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2011. Series C No. 227, para. 135.

⁷ Cf. *Case of Cordero Bernal v. Peru. Preliminary objection and merits.* Judgment of February 16, 2021. Series C No. 421, para. 102.

⁸ Cf. *Case of Cordero Bernal v. Peru. Preliminary objection and merits, supra.*

**DISSENTING OPINION OF
JUDGE EDUARDO FERRER MAC-GREGOR POISOT**

CASE OF CORDERO BERNAL V. PERU

**JUDGMENT OF FEBRUARY 16, 2021
(PRELIMINARY OBJECTION AND MERITS)**

INTRODUCTION

1. With the greatest respect, I dissent from the decision taken in this judgment. I consider that an opportunity was lost to reaffirm inter-American case law concerning judicial independence and to explore in detail the level of reasoning that is required in an administrative proceeding to sanction a judge involving open or indeterminate disciplinary offenses.

2. My dissent focuses on the conclusion adopted by the majority on the absence of State responsibility for the violations alleged by the Inter-American Commission on Human Rights and Mr. Cordero Bernal, thereby closing the case. I consider that the majority should have considered a different analysis to the way in which the case was approached by way of the examination of *judicial independence and the principle of legality*, and by *due process and the effectiveness of the application for amparo*.

3. The purpose of the instant case was the administrative disciplinary proceeding that was instituted, and that concluded with the dismissal of a judge owing to the delivery of a decision that was strictly jurisdictional granting unconditional release to two defendants. This domestic ruling was the reason for his dismissal because the National Council of the Judiciary (hereinafter "the CNM") considered that the conduct was "serious" and, pursuant to domestic law, the CNM's decision could not be reviewed by a court. The application for amparo was the only remedy admissible as we will see below. It is worth noting that, after eight years had passed, Mr. Cordero Bernal was acquitted of the offenses of "complicity" and "breach of trust" that he had been accused of, based on the same facts that were the grounds for the disciplinary proceeding leading to his dismissal.

4. The majority opinion considered that the decision issued by the CNM was duly substantiated and, consequently, this provided context to the categorization of the action of then Judge Cordero Bernal as serious. On this basis, in the judgment, the Court did not declare the State's international responsibility for the violation of Articles 8, 9 and 23 of the American Convention on Human Rights (hereinafter "the American Convention" or "the Pact of San José").¹

5. On the contrary, as I will explain below, I consider that it should have analyzed judicial independence — in its aspect of an enhanced guarantee of the tenure of judges — and the principle of legality together. Indeed, the problem of the imprecision of the disciplinary offense applied to Mr. Cordero Bernal is related not only to the alleged violation of the principle of judicial independence in relation to the guarantee of tenure, but also to the alleged violation of the principle of legality. This is because as it relates to disciplinary sanctions imposed on judges, compliance with the principle of legality is of vital importance insofar as it constitutes

¹ Cf. *Case of Cordero Bernal v. Peru. Preliminary objection and merits*. Judgment of February 16, 2021. Series C No. 421, paras. 86 to 91 and 96.

a guarantee for their independence;² therefore, I considered that the analysis of the alleged violation of those rights should have been made together.

6. Regarding the principle of legality, when open or indeterminate disciplinary offenses exist, such as those applied in this case to impose the sanction of dismissal, it requires prior normative or jurisprudential criteria that is predictable so that the sanctioning bodies can specify and provide content to the said open concepts, a situation that I consider did not occur in this case. The CNM's decision merely gave an account of the facts that originated the ruling made by Judge Cordero Bernal, without it being possible to note an explanation of the relationship between the facts and the law (which contained the indeterminate concepts) on which the sanction was based, or that an analysis of proportionality had been made as to whether the sanction of dismissal was the appropriate measure.

7. The majority opinion also declared that neither due process nor judicial protection contained Articles 8 and 25 of the Pact of San José had been violated. It should be clarified that, under domestic law, the CNM's decision was not subject to review by a court and the only possible remedy was the application for amparo – and only for violations of due process and not with regard to other fundamental rights, such as those alleged by Mr. Cordero Bernal related to the guarantees of the tenure and irremovability of judges.

8. Based on the preceding conclusions, I consider it necessary, pursuant to Article 66(2) of the American Convention,³ to attach this dissenting opinion to the judgment in order to provide a different reasoning to the majority opinion. To this end, I will set out some considerations on the following elements: (i) the inter-American standard regarding the use of open and indeterminate disciplinary offenses in judicial disciplinary proceedings (*paras. 9 to 21*); (ii) judicial independence and the principle of legality in the Cordero Bernal case (*paras. 22 to 44*); (iii) due process and judicial protection in the instant case (*paras. 45 to 53*); and (iv) conclusions (*paras. 54 to 57*).

I. THE INTER-AMERICAN STANDARD REGARDING THE USE OF OPEN OR INDETERMINATE DISCIPLINARY OFFENSES IN JUDICIAL DISCIPLINARY PROCEEDINGS

9. I consider that the case of *López Lone et al. v. Honduras*, which the Inter-American Court of Human Rights (hereinafter "the IACtHR" or "the Inter-American Court") decided in 2015, is especially relevant. In that case, the Court established important standards with regard to how the principle of legality should be approached in disciplinary proceedings involving judges, in particular when open or indeterminate disciplinary offenses are applied.

10. In the case of *López Lone et al.*, the Inter-American Court addressed the State's international responsibility with regard to the principle of legality from two points of view: (a) the sanctions imposed on the victims, and (b) punishable conducts in the disciplinary norms.⁴

11. Regarding the first point, it considered that "the grounds for removing judges from

² Cf. *Mutatis mutandis*, *Case of Urrutia Laubreaux v. Chile. Preliminary objections, merits, reparations and costs*. Judgment of August 27, 2020. Series C No. 409, para. 131, and Bangalore Principles of judicial conduct. Principles 1.1 to 1.6.

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

⁴ Cf. *Case of López Lone et al. v. Honduras. Preliminary objection, merits, reparations and costs*. Judgment of October 5, 2015. Series C No. 302, para. 258.

their posts must be clear and established by law” and “[t]aking into account that dismissal or removal from office is the most restrictive and severe disciplinary measure that can be adopted, the possibility of its application must be predictable: [(i)] because the punishable conduct is expressly and clearly established by law, precisely, rigorously and previously, or [(ii)] because the law delegates its imposition to the judge or to an infra-legal norm, under objective criteria that limit the scope of discretion.”⁵ Moreover, the IACtHR added “that some degree of imprecision does not result, *per se*, in a violation of the Convention; in other words, the fact that a law grants some discretionary power is not incompatible with the degree of predictability required.” However, the Inter-American Court conditioned this “imprecision of the law” indicating that “the scope of the discretion and the way in which it should be exercised [must be] indicated with sufficient clarity in order to provide adequate protection against arbitrary interference.”⁶

12. In that case, the Inter-American Court noted that, in principle, the law and its regulations that were applicable to the case established a system of sanctions (ranked according to the gravity of the offense) under which dismissal was applied both for serious offenses, but also for offenses classified as minor or less serious in case of non-compliance with or serious or reiterated violation of certain obligations. Thus, the IACtHR considered that the regulatory framework affected the predictability of the sanction because it permitted the dismissal of a judge based on non-compliance with any of the obligations or incompatibilities of his office when the court understood that it involved serious non-compliance; thus, it granted excessive discretionary power to the body responsible for applying the sanction.⁷

13. Accordingly, with regard to the sanctions imposed on the victims, the IACtHR did not assess whether or not the domestic norms were open in relation to the conducts that the norm should have defined; rather, on this point, international responsibility was circumscribed to the fact that “the disciplinary norms applicable to the cases of the [...] victims granted excessive discretionary powers to the court *in the establishment of the sanction of dismissal*” [italics added].

14. That said, regarding the second element – punishable conducts in disciplinary laws – the IACtHR considered that “[i]n the case of disciplinary sanctions imposed on judges, the requirement of including a statement of reasons is even greater than in other disciplinary proceedings, because the purpose of the disciplinary control is to assess the conduct, suitability, and performance of the judge as a public official and, consequently, the seriousness of the conduct and the proportionality of the sanction require analysis. In the disciplinary sphere, it is essential to indicate the offense precisely and to develop arguments that allow it to be concluded that the offending conducts are sufficiently serious to justify removing the judge from his post.”⁸

15. In particular, regarding the use of open or indeterminate disciplinary offenses, it indicated: “[...] in these assumptions [...] it is fundamental to provide a statement of reasons [...] because it is incumbent on the disciplinary court to interpret these norms *respecting the principle of legality and observing the greatest rigor when verifying the existence of*

⁵ Cf. *Case of López Lone et al. v. Honduras. Preliminary objection, merits, reparations and costs*. Judgment of October 5, 2015. Series C No. 302, para. 259.

⁶ Cf. *Case of López Lone et al. v. Honduras. Preliminary objection, merits, reparations and costs*. Judgment of October 5, 2015. Series C No. 302, para. 264.

⁷ Cf. *Case of López Lone et al. v. Honduras. Preliminary objection, merits, reparations and costs*. Judgment of October 5, 2015. Series C No. 302, paras. 263 and 264.

⁸ Cf. *Case of López Lone et al. v. Honduras. Preliminary objection, merits, reparations and costs*. Judgment of October 5, 2015. Series C No. 302, para. 267.

*punishable conduct.*⁹ [italics added].

16. In that case, the IACtHR considered that the dismissal decisions issued against the victims “lacked adequate reasoning, precisely because they did not explain adequately the relationship between the acts that constituted a punishable conduct or behavior and the norms that were presumably violated.”¹⁰ In addition, it indicated that “[f]aced with the multiplicity of norms cited by the domestic organs that intervened in the disciplinary proceedings [...] this Court considers that it is not incumbent on it to choose those that are best suited to the conducts of the [...] victims in order to determine whether or not they meet *the requirements of precision and clarity called for by the principle of legality for norms of a punitive nature.*” The IACtHR concluded that, at least in that case, “*it is not possible to make a detailed analysis of the requirement of the substantive legality of the norms supposedly violated, owing to the absence of a statement of reasons*” [italics added].¹¹

17. In paragraph 272 of the judgment in the case of *López Lone et al.*, the IACtHR, referring back to paragraph 257,¹² reiterated that “even though it may be admitted that the precision required in matters of disciplinary sanctions is less than in criminal matters, the use of open assumptions or vague concepts [...] requires the establishment of objective criteria that guide the interpretation or content that should be given to such concepts in order to limit discretion in the application of sanctions.”¹³ On that occasion, this ruling was made in relation to punishable conducts.

18. In the opinion of the Inter-American Court:¹⁴

272. Such criteria can be established [i] by law or [ii] by means of interpretation in light of case law that places these concepts within the context, purpose and objective of the norm, in order to avoid the arbitrary use of such assumptions, based on the personal and private opinions or prejudices of the judges when they are applied.

273. In this regard, the Court recalls that the purpose of disciplinary control is to assess the conduct, suitability and performance of the judge as a public official. Thus, the disciplinary regulations for judges should be aimed at protecting the judicial function and, therefore, to assess the performance of the judge in the exercise of his or her functions. Accordingly, when applying open or indeterminate

⁹ Cf. *Case of López Lone et al. v. Honduras. Preliminary objection, merits, reparations and costs.* Judgment of October 5, 2015. Series C No. 302, para. 270.

¹⁰ Cf. *Case of López Lone et al. v. Honduras. Preliminary objection, merits, reparations and costs.* Judgment of October 5, 2015. Series C No. 302, para. 270.

¹¹ Cf. *Case of López Lone et al. v. Honduras. Preliminary objection, merits, reparations and costs.* Judgment of October 5, 2015. Series C No. 302, para. 271.

¹² In this regard, in the said paragraph the Inter-American Court indicated that: “257. The Court has established that Article 9 of the American Convention, which establishes the principle of legality, is applicable to matters pertaining to administrative sanctions. In this regard, it should be recalled that, administrative sanctions, like criminal sanctions, are an expression of the punitive powers of the State and, at times, they are of a similar nature to criminal sanctions because both of them entail impairment, deprivation or alteration of human rights. Consequently, in a democratic system, it is necessary to take special care to ensure that such measures are adopted strictly respecting the basic rights of the individual and following a careful verification of the effective existence of a wrongful conduct. Furthermore, in the interest of legal certainty, it is essential that the norm establishing the sanction exists and is known or can be known before the act or omission occurs that violates it and that it is sought to sanction. Accordingly, the Court considers that the principle of legality also applies to disciplinary matters, even though its scope depends greatly on the matter regulated. The precision of a norm establishing a sanction of a disciplinary nature may be different from that required by the principle of legality in a criminal matter, owing to the nature of the disputes that each one is designed to resolve.”

¹³ Cf. *Case of López Lone et al. v. Honduras. Preliminary objection, merits, reparations and costs.* Judgment of October 5, 2015. Series C No. 302, para. 272.

¹⁴ Cf. *Case of López Lone et al. v. Honduras. Preliminary objection, merits, reparations and costs.* Judgment of October 5, 2015. Series C No. 302, paras. 272 and 273.

disciplinary norms that require considering [indeterminate] concepts, it is essential to take into account the effects that the conduct examined could have on the exercise of the judicial function, **either positively by the establishment of normative criteria for its application or by means of an adequate interpretation and statement of reasons by the judges when applying them.** To the contrary, the scope of these disciplinary measures would be subject to the private or moral beliefs of the judges (bold and italics added).

19. Thus, what the case of *López Lone et al.*, establishes is that: (i) the level of precision called for in criminal laws is not required in disciplinary proceedings; (ii) open or indeterminate disciplinary offenses are permitted; (iii) however, this requires the establishment of objective criteria that guide the interpretation or content that should be given to such concepts in order to evaluate the substantive legality; (iv) these criteria may be established by law or by jurisprudential interpretation. Also, adding to what was indicated in the said case, the objective criteria would need to be established beforehand – in other words, predictable¹⁵ – so that the disciplinary body could have elements for substantiation and interpretation when applying them and providing a statement of reasons. Even though the latter element was not addressed in the case, due to the specific particularities of the matter, it is fundamental to ensure that members of the judiciary have certainty *vis-à-vis* the potential application of open or indeterminate disciplinary offenses.

20. Nevertheless, in my opinion, the statement of reasons in disciplinary proceedings in which the maximum sanctions are applied to members of the judiciary must include specific elements in order to be considered adequate substantiation (such as, including the reasoning behind the pre-existing jurisprudential or interpretive criteria). The IACtHR did not analyze this matter on the occasions of the case of *López Lone et al.*, because, as indicated “there was no statement of reasons.”

21. That the precision of a law of a punitive nature is or may be different – as has been recognized by the Inter-American Court – from that required by the principle of legality in criminal matters (a question related to rigor and clarity), does not automatically exempt the State from the obligation to draw up prior objective criteria and to place a limit on the possible arbitrary application of the said norms, either by law or by interpretation.

II. JUDICIAL INDEPENDENCE AND THE PRINCIPLE OF LEGALITY IN THE CORDERO BERNAL CASE

22. As indicated in the judgment, the IACtHR has stipulated that judicial independence gives rise to guarantees: (a) to tenure and irremovability from office; (b) to an adequate process of appointment, and (c) to be protected from external pressures. Regarding the guarantee of tenure and irremovability from office, the Court has considered that this, in turn, entails: (i) that the separation of judges from office must be exclusively as a result of the permitted causes, either by means of procedures that comply with judicial guarantees or because the mandate has concluded; (ii) that judges may only be dismissed on serious grounds of misconduct or incompetence, and (iii) that any procedure must be decided pursuant to the established rules on judicial conduct and in accordance with fair procedures

¹⁵ In this regard, the consistent case law of the IACtHR in this regard has affirmed that the classification of an act as unlawful and the establishment of its legal effects must pre-exist the conduct of the subject who is considered the offender either in criminal matters or in administrative matters resulting in sanctions. To the contrary, the individual would be unable to tailor his conduct to a legal order in force and certain that expresses social reproach. and its consequences. See, in this regard: *Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs.* Judgment of February 2, 2001. Series C No. 72, para. 106; *Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile. Merits, reparations and costs.* Judgment of May 29, 2014. Series C No. 279, para. 161 and *Case of Argüelles et al. v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of November 20, 2014. Series C No. 288, para. 207.

ensuring objectivity and impartiality set out in the Constitution or the law.¹⁶ Moreover, the judgment indicates that:

75. This Court has established that the separation from office of provisional judge should be for reasons established by law, whether these are: (i) the occurrence of the resolutive condition to which the appointment or designation was subject, or the expiry of a predetermined period owing to the holding and conclusion of a public competition, based on which the permanent replacement of the provisional judge was appointed or designated, or (ii) serious disciplinary offenses or proven incompetence.¹⁷

23. However, the reference in the judgment to the report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, should not be forgotten. In it, the Special Rapporteur indicated that “although judges may be subject to disciplinary proceedings for conducts that bring judicial office into disrepute or that violate judicial ethics, disciplinary offenses relating in general to “threat or harm to the correct administration of justice, [...] risk undermining the independence of the judiciary.”¹⁸ In addition, the same Special Rapporteur has indicated that although compromising the dignity of the office may be a sanctionable conduct, even leading to dismissal, the disciplinary offense cannot be indeterminate. Accordingly, “the law must give detailed guidance on the infractions by judges triggering disciplinary measures, including the gravity of the infraction which determines the kind of disciplinary measure to be applied in the case at hand.”¹⁹

24. That said, in this specific case, the sanction that was applied to Mr. Cordero Bernal was established in article 31.2 of the Organic Law of the National Council of the Judiciary (hereinafter “article 31.2 of the LOC”) of November 25, 1994, which indicated that the sanction of dismissal was in order for “[p]erpetrating a **serious act** that, without being a crime, compromises the **dignity of the office** and **devalues it in the opinion of the public**” [bold added].

25. On reading the said provision, it is clear that it is imprecise, not only as regards what “a serious act” could mean or “conducts that could be classified as serious,” but also what “the dignity of the office” and “devalue [...] in the opinion of the public” could mean. Moreover, the State did not indicate that it had developed objective legal or jurisprudential/interpretive criteria to correct the imprecision of those expressions, whose particularly open wording entailed risks for the independence of the judiciary.

26. It should not be overlooked that both the IACTHR itself and the Special Rapporteur on the independence of judges and lawyers have insisted on the fact that judges can only be removed from their posts for conducts defined precisely by law.²⁰ In this regard, the Special

¹⁶ Cf. *Case of Cordero Bernal v. Peru. Preliminary objection and merits*. Judgment of February 16, 2021. Series C No. 421, para. 72.

¹⁷ Cf. *Case of Cordero Bernal v. Peru. Preliminary objection and merits*. Judgment of February 16, 2021. Series C No. 421, para. 75.

¹⁸ Cf. *Case of Cordero Bernal v. Peru. Preliminary objection and merits*. Judgment of February 16, 2021. Series C No. 421, para. 76.

¹⁹ Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul. Mission to El Salvador. UN Doc. A/HRC/23/43/Add.1, para. 76. Available at: <https://undocs.org/A/HRC/23/43/Add.1>. Similarly, the Consultative Council of European Judges in its Opinion No. 1 (2001) on Standards concerning the independence of the Judiciary and the irremovability of judges, indicated that “it would be useful to prepare standards defining not just the conduct which may lead to removal from office, but also all conduct which may lead to any disciplinary steps or change of status, including for example a move to a different court or area,” para. 60. Available at: <https://rm.coe.int/1680747830>

²⁰ In this regard, the Special Rapporteur on the independence of judges and lawyers has indicated: “the law must give detailed guidance on the infractions by judges triggering disciplinary measures, including the gravity of the infraction which determines the kind of disciplinary measure to be applied in the case at hand.” Human Rights

Rapporteur has indicated that “disciplinary measures to be adopted must be in proportionality to the gravity of the infraction committed by the judge.”²¹

27. Based on the foregoing, with regard to the breadth of Article 31.2 of the LOC, I consider that the majority opinion should have considered that the CNM, when sanctioning Mr. Cordero Bernal using the said provision, applied a norm that was not sufficiently defined, which constituted a violation of the principle of legality, taking into consideration also that the decision did not specify the interpretive criteria used.

28. Unfortunately, in this judgment, on the basis of its considerations in the case of *López Lone et al.*, the Court held that “the precision of a disciplinary sanctioning norm may differ from that required by the principle of legality in criminal matters, owing to the nature of the disputes that each one is called on to decide” so that “the problems of the imprecision of a disciplinary offense cannot be examined in abstract, but rather in light of the grounds established by the judge when applying it.”²² Therefore, it considered that “the Court must establish whether the decision imposing the sanction of dismissal on Mr. Cordero Bernal was adequately substantiated” and “decide whether the arguments made by the National Council of the Judiciary provided content to the norm that was applied,” “whether the decision took into account the effects that the conduct examined could have on the exercise of the judicial function, by an adequate reasoning and interpretation” and “the seriousness of the conduct and proportionality of the sanction.”²³

29. Thus, the majority opinion considered that “the [National Council of the Judiciary’s] decision was duly substantiated and was not arbitrary and, consequently, neither the guarantees of due process nor the principle of legality established in the [American] Convention were violated.”²⁴

30. To reach this conclusion, the majority opinion assessed different matters that revealed the irregularities committed by Mr. Cordero Bernal when he adopted a decision of a jurisdictional nature²⁵ regarding which the judgment considered that it “was not totally

Council. Report of the Special Rapporteur in the independence of judges and lawyers, Leandro Despouy. Doc. UN. A/HRC/11/41, para. 57. Available at: <https://undocs.org/A/HRC/11/41>. Also, on this matter, the judgment in the case of *López Lone v. Honduras* indicates: “the Court reiterates that the guarantee of tenure for judges requires that they may not be dismissed or removed from office, unless they commit acts that are clearly punishable; in other words, based on the most serious grounds of misconduct or incompetence. Therefore, the Court considers that, based on the guarantee of judicial tenure, the grounds for removing judges from their posts must be clear and established by law. [...] Moreover, the possibility of dismissal must abide by the above-mentioned principle of extreme gravity. Indeed, the protection of judicial independence requires that the dismissal of judges be considered as the *ultima ratio* in judicial disciplinary matters.” *Case of López Lone et al. v. Honduras. Preliminary objection, merits, reparations and costs*. Judgment of October 5, 2015. Series C No. 302, para. 259.

²¹ Cf. Human Rights Council. Report of the Special Rapporteur in the independence of judges and lawyers, Leandro Despouy. Doc. UN. A/HRC/11/41, para. 58.

²² Cf. *Case of Cordero Bernal v. Peru. Preliminary objection and merits*. Judgment of February 16, 2021. Series C No. 421, para. 77.

²³ Cf. *Case of Cordero Bernal v. Peru. Preliminary objection and merits*. Judgment of February 16, 2021. Series C No. 421, para. 82.

²⁴ Cf. *Case of Cordero Bernal v. Peru. Preliminary objection and merits*. Judgment of February 16, 2021. Series C No. 421, para. 89.

²⁵ In particular: (i) the National Council of the Judiciary made “a detailed analysis of the facts that led to the dismissal decision and of the reasons that allowed this conduct to be classified as a serious disciplinary offense”; (ii) that the Investigation Report and the decisions of the OCMA and the CNM describe in detail the irregularities in which Mr. Cordero Bernal allegedly incurred by taking the decision granting unconditional release to two defendants”; (iii) that “[a]ccording to the disciplinary bodies, that decision was not in keeping with the supposed provisions established in the laws of Peru for granting this benefit”; (iv) that, by “not conducting any procedure of a substantive nature during the proceedings; [by taking] the decision to grant unconditional release prior to the expiry of the

unsubstantiated.”²⁶ Nevertheless, the Court concluded that “the CNM assessed the gravity of the judge’s conduct; that is, he adopted an irrational decision, as well as its impact on the judicial function. Based on this assessment, it proceeded to adopt the decision of dismissal,”²⁷ and that “[t]he report prepared by the disciplinary authority reveals the reasons that led the CNM to determine that Mr. Cordero Bernal’s conduct was not only serious, but also compromised the dignity of the office, and devalued it in the opinion of the public, because it was irrational and had public impact.”²⁸

31. On this point, the considerations in the case of *López Lone et al.* should be recalled regarding the fact that, in the presence of indeterminate disciplinary offenses and in the absence of norms that develop objective criteria, the statement of reasons – which, from my perspective is reflected in the clear and detailed arguments and reasonings – has special relevance in relation to the obligation of the disciplinary body to indicate how the conduct matches or is circumscribed by the indeterminate elements established in the open disciplinary offense (which, in this case, were the three established in article 31.2 of the LOC, *supra* para. 24); because, in addition to the fact that these indeterminate elements should have been developed previously by law or interpretation, that normative or interpretive development should be present in the disciplinary body’s statement of reasons.

32. According to the majority opinion, “the Investigation Report and the decisions of the OCMA (Office for Control of Judges) and the CNM describe in detail the irregularities in which Mr. Cordero Bernal allegedly incurred,”²⁹ and, therefore, “the CNM’s decision was duly substantiated and was not arbitrary.”³⁰ However, I must underline that, although the Investigation Report and the decisions of the OCMA and the CNM describe the acts and omissions of Mr. Cordero Bernal when adopting his decision and classify them “as serious,” it should not be overlooked that the three decisions merely give an account of the facts that originated Judge Cordero Bernal’s decision *without explaining sufficiently the relationship between the acts and the norm indicated* (in particular the decision of the National Council of the Judiciary in its tenth consideration).³¹ I therefore transcribe some of the pertinent parts of the Investigation Report and of the two decisions in the disciplinary proceedings against Mr. Cordero Bernal.

33. First, the Investigation Report of July 21, 1995, considers:

I) [...] it is validly concluded that, by granting unconditional release to the drug-traffickers, Hector Cordero Bernal [...] has not only seriously compromised the respectability of the Judiciary, but also the

corresponding legal time frame, and not assessing] all the evidence,” this revealed the judge’s misconduct because they were considered irregularities, and (v) “[i]n the opinion of the CNM that conduct was serious and compromised the dignity of the office because it had no rational legal support, which was the minimum requirement for any jurisdictional decision.” *Cf. Case of Cordero Bernal v. Peru. Preliminary objection and merits.* Judgment of February 16, 2021. Series C No. 421, paras. 84, 85 and 86.

²⁶ *Cf. Case of Cordero Bernal v. Peru. Preliminary objection and merits.* Judgment of February 16, 2021. Series C No. 421, para. 88.

²⁷ *Cf. Case of Cordero Bernal v. Peru. Preliminary objection and merits.* Judgment of February 16, 2021. Series C No. 421, para. 86.

²⁸ *Cf. Case of Cordero Bernal v. Peru. Preliminary objection and merits.* Judgment of February 16, 2021. Series C No. 421, para. 87.

²⁹ *Cf. Case of Cordero Bernal v. Peru. Preliminary objection and merits.* Judgment of February 16, 2021. Series C No. 421, para. 86.

³⁰ *Cf. Case of Cordero Bernal v. Peru. Preliminary objection and merits.* Judgment of February 16, 2021. Series C No. 421, para. 89.

³¹ *Cf. Mutatis mutandis, Case of López Lone et al. v. Honduras. Preliminary objection, merits, reparations and costs.* Judgment of October 5, 2015. Series C No. 302, para. 265

dignity of the office, devaluing it [...] in the opinion of the public and should therefore be dismissed from his post que [...] ³² [underlining added].

34. The OCMA decision of August 3, 1995, indicates:

CONCLUSION. [...] Héctor Fidel Cordero Bernal, the judge appointed to the First Criminal Court of Huánuco, for the sole purpose of benefiting the defendants in the criminal proceedings he was hearing with unconditional release, an act that was further exacerbated because it concerned a crime of international illicit drug trafficking: That, this type of conduct, which borders on wilful intent, seriously undermines the gravitas of the Judiciary, the image of our institution and the dignity of its members; therefore, a disciplinary sanction must be imposed that is proportionate to the gravity of his acts: That, there should be awareness that the Judiciary is not an institution in which rights may be acquired through corrupt officials and employees; rather, the Judiciary is a power of the State, to which the life, honor and patrimony of the individual are entrusted, trust that must be reaffirmed for the citizenry, always rendering to each individual what legally corresponds to him, and any conduct that contravenes this must be sanctioned ³³ [underlining added].

35. Lastly, the CNM's decision of August 14, 1996:

TENTH: That, consequently, the National Council of the Judiciary, having granted the judge subject to this proceeding the guarantee of the exercise of his right to defend himself, received his statement and the presentation of documents and the pertinent criminal case file, in other words, respecting the principles of due process, reaches the conclusion that the conduct of the defendant judge warrants a disciplinary sanction because no reasonable substantiation whatsoever can be found in the decision to prematurely grant unconditional release and such conduct is defined as an offense and is serious and, therefore, falls within the premise of Article [31.2 of the LOC]; in other words, a serious act that, without being a crime, compromises the dignity of the office and devalues it in the opinion of the public ³⁴ [underlining added].

36. Even though both the Investigation Report and the decision of the OCMA, "classify" the action of Judge Cordero Bernal as serious, a matter referred to by the decision of the CNM, *none of the three refer in detail to the other two elements that are also present – and indeterminate – in Article 31.2 of the LOC which refer to the conduct "compromises the dignity of the office" and "devalues it in the opinion of the public."* To the contrary, the Investigation Report reiterates, in general terms, that the dignity of the office had been compromised, devaluing it "in the opinion of the public" without indicating how the dignity of the office was compromised and, in particular, what is the scope of "public devaluation" in jurisdictional actions. The CNM decision contains similar wording.

37. Furthermore, the words of the CNM should be emphasized when it indicated that "the conduct of the defendant judge [...] is defined as an offense and is serious and, therefore, falls within the premise of Article [31.2 of the LOC]." In this regard, I consider that the majority opinion should have considered and analyzed whether there were sufficient prior objective criteria/elements in the decision of the CNM that were applied to the case to consider that the decision was not adopted arbitrarily. Thus, the indication that the "conduct falls within" the terms of the article cannot be considered sufficient grounds if it is only indicated that "it is serious" without specifying other prior elements concerning the assessment, context and purpose of the norm.

38. Meanwhile, even though the Investigation Report and the OCMA decision include a detailed description of the facts, both of them suffer from the use of vague concepts without explaining their scope. For example, the Investigation Report states that the Judge's irregularities "compromise the respectability of the Judiciary" and the OCMA decision indicates

³² Cf. The Judiciary's Office for Control of Judges, Report of July 21, 1995, Annex 8 (folio 1103).

³³ Cf. The Judiciary's Office for Control of Judges, Report of August 3, 1995, Annex 6 (folios 1064 to 1065).

³⁴ Cf. National Council of the Judiciary, Decision No. 008-96-PCNM of August 14, 1996, Annex 7 (folio 1074).

that it undermines “the image [of the Judiciary] and the dignity of its members.”

39. Lastly, since it is the instance that decides and determines whether a sanction is imposed, it was fundamental that the CNM indicate in detail the jurisprudential or interpretive standards that allowed it to conclude that, when Mr. Cordero Bernal issued his ruling, the results of that action were sufficiently predictable and that, as that organ indicated, the said conduct “fell within” the norm. In addition, it was necessary that it indicate clearly how the other two elements present in Article 31.2 of the LOC had been verified and not merely transcribe the norm and its elements. The core issue is that the greater the discretionality of the norm, the greater the importance of the logical, rational and interpretive statement of reasons of the disciplinary body, both to ensure legal certainty and to eliminate any possible question of the arbitrariness of the decision.

40. On this basis, it was reasonable to understand that, in this case, the principle of legality was violated in relation to judicial independence. On the one hand, because the norm applied to Judge Cordero Bernal was too broad inasmuch as it contained three indeterminate concepts. In addition, the considerations provided on three occasions should have been more thorough as regard arguments and reasonings – in order to clarify the causal nexus between the conduct (fact) and the norm (law) – and, thus, allow the context and purpose of each of the indeterminate elements present in the norm to be understood. Finally, it is also true that, for the sake of legal certainty, in the absence of normative developments that provided objective criteria, it would have been desirable that those indeterminate elements had previously been provided with content via interpretation or case law, in order to ensure a sufficient reasoning when applying open disciplinary offenses.

41. In the presence of disciplinary offenses that use indeterminate concepts and in the absence of domestic provisions or grounds that limit the scope of the disciplinary offenses (for example, by regulations), a sufficient statement of reasons acquires a stricter and more rigorous character. It is not sufficient to describe the facts and the norm that is applied; rather the statement of reasons must necessarily include arguments on what has been understood or how the elements that make up the open disciplinary offense have been developed and how the conduct fits in with how this offense has been understood.

42. Added to the preceding considerations, it should not be overlooked that Mr. Cordero Bernal, was acquitted of the offenses of “complicity” and “breach of trust” in the criminal jurisdiction eight years later, based on the same facts that were grounds for the disciplinary proceeding.

43. It should also be emphasized that, in the judgment, the majority opinion considered that the sanction imposed by the CNM “had not violated the principle of proportionality.”³⁵ In my opinion, neither of the two decisions issued in the case of Mr. Cordero Bernal adequately reveal why the sanction of dismissal was the necessary measure. On this point, the proportionality of the sanction is not weighed in the decisions imposing it on Judge Cordero Bernal.

44. Lastly, it is necessary to call attention to the reference made to the majority opinion in the case of *Casa Nina v. Peru*.³⁶ We should not lose sight of the fact that the considerations made in the instant case are very different from the analysis made in that judgment, because

³⁵ Cf. *Case of Cordero Bernal v. Peru. Preliminary objection and merits*. Judgment of February 16, 2021. Series C No. 421, para. 88.

³⁶ Cf. *Case of Cordero Bernal v. Peru. Preliminary objection and merits*. Judgment of February 16, 2021. Series C No. 421, para. 81.

on that occasion, the IACtHR ruled on a dismissal “based on the needs of public service” of a provisional prosecutor and not on the sanction of dismissal in an administrative disciplinary proceeding.

III. DUE PROCESS AND JUDICIAL PROTECTION IN THE INSTANT CASE

45. As mentioned in the judgment,³⁷ the analysis of the arguments presented by the Commission and Mr. Cordero Bernal’s representatives reveals that the dispute in this case relates to the effectiveness of the application for amparo against the decisions of the National Council of the Judiciary.

46. In this regard, the IACtHR found that the Peruvian Constitution established that the decisions of the National Council of the Judiciary could not be contested and that, at the time of the facts, the judges interpreted that the only admissible remedy was the application for amparo based on violations of due process; therefore, not for alleged violations of other fundamental rights. In this case, for example, Mr. Cordero Bernal argued the violation of the guarantee of irremovability, which was not analyzed.³⁸ However, the majority opinion concluded that “the judges of the amparo procedure examined the decision adopted by the CNM and concluded that it was duly substantiated and that the right to due process had not been violated.”³⁹

47. I disagree with that conclusion. We should recall that the Inter-American Court has indicated that Article 25(1) of the Convention establishes the obligation of the States Parties to ensure to everyone subject to their jurisdiction a simple and prompt remedy, that is rapid and effective against acts that violate their fundamental rights.⁴⁰ On this basis, the IACtHR has indicated that, pursuant to Article 25 of the American Convention, it is possible to identify the State obligation to enact and to ensure the due application of effective remedies before the competent authorities that protect everyone subject to their jurisdiction against acts that violate their fundamental rights or that involve the determination of their rights and obligations.⁴¹ The right established in Article 25 is closely linked to the general obligation of Article 1(1) of the Convention, by attributing protection functions to the domestic law of the States Parties.⁴² Consequently, the State has the responsibility not only to design and enact an effective remedy, but also to ensure due application of that remedy by its judicial authorities.⁴³

³⁷ Cf. *Case of Cordero Bernal v. Peru. Preliminary objection and merits*. Judgment of February 16, 2021. Series C No. 421, para. 102.

³⁸ Cf. *Case of Cordero Bernal v. Peru. Preliminary objection and merits*. Judgment of February 16, 2021. Series C No. 421, para. 48.

³⁹ Cf. *Case of Cordero Bernal v. Peru. Preliminary objection and merits*. Judgment of February 16, 2021. Series C No. 421, para. 103.

⁴⁰ 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 Martínez Esquivia v. Colombia. Preliminary objections, merits and reparations*. Judgment of October 6, 2020. Series C No. 412, para. 130.

⁴¹ Cf. *Case of the “Street Children” (Villagrán Morales et al.) v. Guatemala. Merits*. Judgment of November 19, 1999. Series C No. 63, para. 237, and *Case of Noguera et al. v. Paraguay. Merits, reparations and costs*. Judgment of March 9, 2020. Series C No. 401, para. 79.

⁴² Cf. *Case of Castillo Páez v. Peru. Merits*. Judgment of November 3, 1997. Series C No. 34, para. 83, and *Case of López et al. v. Argentina. Preliminary objections, merits, reparations and costs*. Judgment of November 25, 2019. Series C No. 396, para. 209.

⁴³ Cf. *Case of the “Street Children” (Villagrán Morales et al.) v. Guatemala. Merits*, Judgment of November 19, 1999. Series C No. 63, para. 237, and *Case of López et al. v. Argentina, Preliminary objections, merits, reparations and costs*. Judgment of November 25, 2019. Series C No. 396, para. 209.

48. With specific reference to the effectiveness of the remedy, this Court has established that the meaning of the protection provided by the article is the *real possibility of having a judicial remedy so that a competent and capable authority may issue a binding decision, determine whether or not there has been a violation of any right that the person who files the remedy considers he possesses* and that, if a violation is declared, the remedy is useful to restore the enjoyment of the right to the interested party and to provide redress.⁴⁴ This does not mean that the effectiveness of a remedy is evaluated based on whether it produces a favorable result for the defendant [italics and underlining added].⁴⁵

49. On this basis, the majority opinion should have concluded that, even though a remedy existed under Peruvian law, this was not effective because it limited its admissibility to alleged violations of due process, rather than to the violation of fundamental rights possessed by those who form part of the judiciary, as judges, in a situation of dismissal or disciplinary proceedings.

50. This is even corroborated by the information provided by the State, which indicated that subsequent jurisprudential interpretation had established the effectiveness of the application for amparo to examine any violation of the fundamental rights resulting from the decision to dismiss a judge.⁴⁶ In other words, it can be understood that, at least at the time of the facts, although the application for amparo, as it was defined, protected fundamental rights, in the case of judges, even if they cited other rights, these were not examined because this remedy was only admissible for violations of due process.

51. Nevertheless, the majority opinion merely noted the admissibility of the application for amparo in conformity with the only grounds for which it could be filed and did not examine it further in this case. And this was despite the fact that Mr. Cordero Bernal had argued “infringement of the guarantee of irremovability from office.”

52. In addition, it is worth noting that, pursuant to Article 2 of the American Convention (the violation of which was not argued in this case), the State was obliged to eliminate practices of any nature that entailed a violation of the guarantees established in the Pact of San José. Therefore, the State had failed to adopt the necessary measures to ensure the possibility of filing a simple, prompt and effective remedy before a competent judge or court against acts that violated fundamental rights other than due process which had occurred during a disciplinary proceeding. This failure should have resulted in a violation of Article 2 of the Convention in relation to the right to judicial protection.

53. Based on the above, I consider that although Mr. Cordero Bernal had access to the application for amparo, this did not constitute an effective judicial remedy that allowed him to argue possible acts that violated fundamental rights other than due process before a competent judge or court.

IV. CONCLUSIONS

⁴⁴ Cf. *Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 American Convention on Human Rights)*, Advisory Opinion OC-9/87, October 6, 1987. Series A No. 9, para. 24; *Case of Castañeda Gutman v. Mexico. Preliminary objections, merits, reparations and costs*. Judgment of August 6, 2008. Series C No. 184, para. 100, and *Case of López et al. v. Argentina, Preliminary objections, merits, reparations and costs*. Judgment of November 25, 2019. Series C No. 396, para. 210.

⁴⁵ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*. Judgment of July 29, 1988. Series C No. 4, para. 67, and *Case of López et al. v. Argentina, Preliminary objections, merits, reparations and costs*. Judgment of November 25, 2019. Series C No. 396, para. 210.

⁴⁶ Cf. Answering brief of the State (folio 290) and final written arguments of the State (folio 882).

54. As I have indicated in the preceding paragraphs, I consider that the case of Judge Cordero Bernal could have been addressed from other perspectives, both with regard to judicial independence and to the principle of legality, as well as with regard to due process and judicial protection. The judgment should have declared the violation of Articles 8, 9, 23 and 25, in relation to Articles 1 and 2 of the Pact of San José and established the corresponding measures of reparation, rather than closing the case.

55. I consider that the IACtHR could have reaffirmed its case law on judicial independence and made a more thorough analysis of the level of reasoning required in an administrative disciplinary proceeding when the disciplinary body applies the most severe sanction to a judge based on open and indeterminate disciplinary offenses, because “the requirement of including a statement of reasons is even greater than in other disciplinary proceedings.”⁴⁷ It should not be overlooked that, several years later, Mr. Cordero Bernal was acquitted of the offenses with which he had been charged, which were the same facts that were the grounds for the disciplinary proceeding in which the sanction of dismissal was applied.

56. In an administrative disciplinary proceeding against judges in which the sanction based on indeterminate concepts is applied, a statement of reasons does not suffice with the mere description of the facts and an indication of the norm applied; rather, prior objective standards must exist that the disciplinary body uses to be able to conclude objectively that the conduct falls within the norm. Also, as in this case, if a norm contains more than one open element, the statement of reasons must refer to this in detail. This was even more important in the instant case, because at the time of the facts there was no effective judicial remedy that allowed an analysis of the fundamental rights at stake – but merely with regard to due process – a matter that years later was permitted through domestic case law, as the State indicated in the information provided to the Inter-American Court.

57. Under the constitutional and democratic rule of law great care must be taken to ensure that the disciplinary measures that are adopted strictly respect the basic rights of the individual and follow a meticulous verification of the effective existence of the unlawful conduct.⁴⁸ This is particularly relevant when judicial independence is at issue, as the guarantees of the tenure and irremovability of a judge are involved. The principle of legality governs the actions of the organs of the State in their respective areas of competence, particularly when it is necessary to exercise punitive powers, where the State imposes, with full force, one of the most severe sanctions against the judiciary: dismissal.⁴⁹

Eduardo Ferrer Mac-Gregor Poisot
Judge

Pablo Saavedra Alessandri
Secretary

⁴⁷ Cf. *Case of López Lone et al. v. Honduras. Preliminary objection, merits, reparations and costs*. Judgment of October 5, 2015. Series C No. 302, para. 267.

⁴⁸ Cf. *Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs*. Judgment of February 2, 2001. Series C No. 72, para. 106.

⁴⁹ Cf. *Mutatis mutandis, idem*.