

INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF NISSEN PESSOLANI V. PARAGUAY

JUDGMENT OF NOVEMBER 21, 2022

(Merits, Reparations, and Costs)

In the case of *Nissen Pessolani v. Paraguay*,

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

Ricardo C. Pérez Manrique, President;
Humberto Antonio Sierra Porto, Vice President;
Eduardo Ferrer Mac-Gregor Poisot, Judge;
Nancy Hernández López, Judge;
Verónica Gómez, Judge;
Patricia Pérez Goldberg, Judge, and
Rodrigo Mudrovitsch, 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, 65 and 67 of the Rules of Procedure of the Court (hereinafter “the Rules of Procedure” or “the Rules of Procedure of the Court”), delivers this judgment, structured as follows:

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I
INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. *The case submitted to the Court.* - On March 11, 2021, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted to the jurisdiction of the Court the case of *Alejandro Nissen Pessolani against the Republic of Paraguay* (hereinafter also "the State" or "Paraguay"). The Commission indicated that the case is related to the alleged responsibility of the State for the violation of a series of judicial guarantees in the framework of a process followed against Alejandro Nissen Pessolani by the Jury for the Impeachment of Magistrates (hereinafter also "JEM") that determined the removal of his position as Criminal Prosecutor.

2. *Procedure before the Commission.* - The procedure before the Commission was as follows:

- a) *Petition.* - On December 27, 2004, the Commission received the initial petition filed by Alejandro Nissen Pessolani.
- b) *Admissibility report.* - On July 24, 2014, the Commission approved Admissibility Report No. 60/14. Said Report was notified to the parties on August 18, 2014.
- c) *Merits Report.* - On October 29, 2020, the Commission approved the Merits Report No. 301/20. It concluded that Paraguay was responsible for the violation of the rights to judicial guarantees, principle of legality, freedom of expression and judicial protection, enshrined in Articles 8(1), 8(2)(b), 8(2)(c), 8(2)(h), 9, 13(1), 13(2), 23(1)(c) and 25(1) of the American Convention in relation to the obligations established in Articles 1(1) and 2 thereof, to the detriment of Alejandro Nissen Pessolani, and various recommendations were made to the State.
- d) *Notification to the State.* - On December 11, 2020, the Commission notified the State with Merits Report No. 301/20, granting it a period of two months to report on compliance with the recommendations. In its response, Paraguay rejected the Commission's conclusions and recommendations, considering that the State's actions in the context of the facts of this case were in accordance with the applicable legal and constitutional rules. By virtue of the foregoing, the Commission decided to submit the case to the Inter-American Court "taking into account the need to obtain justice and reparation for the [alleged] victim."

3. *Submission to the Court.* - On March 11, 2021, the Commission¹ submitted the totality of the facts and human rights violations described in the Merits Report No. 301/20 to the jurisdiction of the Inter-American Court. This Court notes with concern that more than sixteen years elapsed between lodging the initial petition to the Commission and submitting the case to the Court.

4. *Requests of the Commission.* - Based on the above, the Commission asked the Court to declare the international responsibility of the State for the same violations indicated in its Merits Report (*supra* para. 2(c)). Likewise, the Commission requested

¹ As its delegate before the Court, the Commission appointed Commissioner Edgar Stuardo Ralón Orellana and the then Deputy Executive Secretary Marisol Blanchard Vera, as well as Jorge Humberto Meza Flores, then specialist of the Executive Secretariat and Daniela Saavedra, specialist of the Executive Secretariat of the Commission as legal advisors.

that the Court order the State to comply with the reparations included in said Report, which are detailed in Chapter VII of this Judgment.

II PROCEEDINGS BEFORE THE COURT

5. *Notification to the State and the representative.* - The submission of the case was notified to the State² and the representatives of the alleged victim³ on April 12, 2021.

6. *Brief with pleadings, motions and evidence.* - The representatives of the alleged victim (hereinafter, "the Representatives") filed the brief with pleadings, motions, and evidence (hereinafter, "pleadings and motions brief") on June 13, 2021. Effectively, this concurred with the contents of the Merits Report and requested reparations complementary to those requested by the Commission. In addition, the alleged victim requested, through his representation, to avail himself of the Victims' Legal Assistance Fund of the Inter-American Court (hereinafter "the Victims' Legal Assistance Fund" or "the Fund").

7. *Answering brief.* - The State filed its Answering Brief to the Commission's submission and Merits Report and pleadings and motions brief (hereinafter "answering brief") on September 29, 2021. In said brief, the State requested that "a complete dismissal be ordered with respect to the alleged violations of Articles 8, 9, 13, 23 and 25 of the American Convention in relation to Articles 1 and 2 of the same text in this case" and that all of the claims and reparations requested in the case be rejected.

8. *Legal Assistance Fund.* - By Note of the Clerk of the Court dated March 7, 2022, the alleged victim's request to avail himself of the Victims' Legal Assistance Fund was declared admissible.

9. *Public Hearing.* - By Order of March 29, 2022, the Presidency of the Court summoned the parties and the Commission to a public hearing on the merits and possible reparations and costs in this case.⁴ The public hearing was held on May 9 and 10, 2022, within the framework of the 148th Regular Session, held in San José, Costa Rica.⁵ During the hearing, statements were received from three witnesses offered by the representative and an expert witness offered by the State, and the Judges of the Court requested certain information and explanations from the parties and the Commission.

² As Main Prosecutor, State appointed Juan Rafael Caballero González, Prosecutor General of the Republic, and Roberto Benítez Fernández, then General Director of Human Rights of the Ministry of Foreign Affairs, as Alternate Prosecutor. Subsequently, the Alternate Prosecutor was replaced by appointing Jorge Brizuela, Director General of Human Rights of the Ministry of Foreign Affairs.

³ The alleged victim is represented in the proceedings before the Court by attorney Jacinto Santa María.

⁴ Cf. *Case of Nissen Pessolani v. Paraguay*. Resolution of the President of the Inter-American Court of Human Rights. March 29, 2022. Available at https://www.corteidh.or.cr/docs/asuntos/nissen_pessolani_29_03_22.pdf. On April 28, 2022, the Court declared the appeal for reconsideration filed by the State against the Presidential Resolution of March 29, 2022, to be inadmissible. Available at https://www.corteidh.or.cr/docs/asuntos/nissen_pessolani_28_04_22.pdf.

⁵ The following parties appeared at the hearing: (a) for the Inter American Commission: Carlos Bernal Pulido, Commissioner, and Carla Leiva, counsel; (b) for the representation of the alleged victim, Alejandro Nissen Pessolani and Jacinto Santa María; and (c) for the State of Paraguay: Miguel Ángel Villalba Rodríguez, Andrea María Arriola Ortega, Jorge Brizuela, José Félix Estigarribia, Raquel Cáceres Noguera, Rodolfo Barrios Duba, Belén Diana Franco, Mario Fabián Silva, and Sergio Benítez.

10. *Amicus Curiae*. - The Court received a brief of *amicus curiae* filed by the Due Process of Law Foundation ("DPLF").⁶

11. *Final written arguments and observations*. - On June 13, 2022, the Inter-American Commission, the representative, and the State submitted their final observations and final arguments, respectively. The representative and the State accompanied their final arguments with annexed documents. On June 24, 2022, the representative and the State submitted, respectively, their comments to the annexes included in the counterpart's final arguments. On the same date, the Commission indicated that it had no observations on the annexes presented.

12. *Expenditures in application of the Victims' Legal Assistance Fund*. - On September 26, 2022, the State was informed of the expenditures made in application of the Victims' Legal Assistance Fund in this case and, in accordance with Article 5 of the Rules of the Court on the operation of the aforementioned Fund, was granted a period of time to submit any observations it deemed pertinent. On October 7, 2022, the State submitted its observations.

13. *Deliberation of the case*. - The Court deliberated this Judgment, in virtual form, on November 21, 2022.

III JURISDICTION

14. The Court has jurisdiction to hear the instant case, in the terms of Article 62(3) of the Convention, because Paraguay has been a State Party to the Convention since August 24, 1989, and recognized the contentious jurisdiction of this Court on March 11, 1993.

IV EVIDENCE

A. Admissibility of documentary evidence

15. The Court received numerous documents presented as evidence by the Commission and the parties together with their main briefs (*supra* para. 1, 6 and 7), which, as in other cases, are admitted on the understanding that they were submitted at the opportune procedural moment (Article 57 of the Rules of Procedure).⁷

16. The **representation of the alleged victim** submitted two annexes with her closing arguments: a table with an update of the labor settlement calculation and a copy of the alleged victim's remuneration record. The **State**, in its observations, argued that "the final arguments stage is not a time that constitutes an opportunity to incorporate

⁶ The brief was signed by Katya Salazar, Úrsula Indacochea, and Hannah J. Ahern. The brief analyzes the right to freedom of expression of prosecutors and its limitations.

⁷ In accordance with article 57(2) of the Rules of Procedure, documentary evidence in general may be presented together with the briefs, requests, and arguments or answers the case, as appropriate, and evidence submitted outside of these procedural moments is not admissible except in the exceptions set out in said article 57(2) of the Rules of Procedure (namely, force majeure, serious impediment) or except in the case of a supervening event, meaning one that occurred after the aforementioned procedural moments. *Cf. Case of the Barrios Family v. Venezuela*. Merits, reparations, and costs. Judgment of November 24, 2011. Series C No. 237, para. 17 and 18, and *Case of Mina Cuero v. Ecuador. Preliminary objections, Merits, Reparations, and Costs*. Judgment of September 7, 2022. Series C No. 462, para. 20.

new strategies or, as in this case, new amounts of compensation allegedly due to Mr. Nissen Pessolani as reparation for pecuniary damages." The State did not expressly refer to the admissibility of Annex 2 submitted by the representative. The **Commission** indicated that it had no comments on the aforementioned annexes.

17. The **Court** recalls that, in accordance with Article 57(1) of the Rules of Procedure, the procedural moment to present documentary evidence is generally alongside the pleadings, requests and arguments or response, as appropriate. In the instant case, the information presented by the representative in their annexes refers to facts or situations prior to the presentation of the brief with pleadings and arguments. This makes said documents extemporaneous and, therefore, inadmissible, in following with Article 57(2) of the Rules of Procedure of the Court.

18. Furthermore, the **State**, together with its closing arguments, submitted an annex containing a copy of the file "Atty. Alejandro Nissen, Capital Criminal Prosecutor s/ impeachment" before the Jury for the Impeachment of Magistrates. The alleged victim's representatives did not submit any observations on this document. Regarding this point, the **Court** emphasizes that this annex was submitted in response to an express request made by this Court during the public hearing, and is therefore admissible in accordance with the provisions of Article 58(b) of its Rules of Procedure.

B. Admission of testimonial and expert evidence.

19. During the public hearing, the testimonies of Margarita Ostertag Nissen, Luis Bareiro, and Luis Talavera Alegre were received, as well as the expert opinion of Osvaldo Alfredo Gozaíni. Likewise, affidavits were received from seven witnesses⁸ and an expert witness.⁹

20. In its written closing arguments, the **State** referred to the testimony of Margarita Ostertag, claiming that she was questioned on issues that she could only have had tangential knowledge, and that should have been clarified by the alleged victim. In this vein, the State claimed that a "strange procedural strategy" had been applied, impeding it from interrogating the alleged victim. In fact, it said that Mr. Nissen Pessolani abstained from testifying in his capacity as the alleged victim; nevertheless, he responded to the questions asked by the judges at the end of the hearing. Turning to the witness Luis Talavera, the State claimed that he met with the representative during the break in the hearing, before testifying. Regarding the witnesses who testified by affidavit, the State alleged that "they were surprising given their minimal connection with the facts that gave rise to this case: one of them stated that he had not interviewed or spoken with Mr. Nissen Pessolani; another one is his colleague and friend, so the only thing he contributed was basic information about himself. Finally, a third witness only provided general opinions on what he remembers about the case that is publicly known information."

21. Regarding the testimony of witness Margarita Ostertag and the fact that no testimony was provided by the alleged victim, this **Court** recalls that it is up to each

⁸ The written statements of Guillermo Domaniczky, Augusto Barreto, José Casañas Levi, and Ricardo Lataza, offered by the representative, were received. The written testimonies of Oscar Germán Latorre Cañete, Matilde Elena Moreno Irigotia, and Enrique Antonio Fortunato Sosa Elizeche, offered by the State, were also received.

⁹ The expert opinion of Carlos Ayala Corao, offered by the Commission, was received.

party to determine its litigation strategy, and the opposing party may pose the objections it deems appropriate in accordance with the Rules of Procedure.

22. Regarding the alleged communication between the party and the witness Luis Talavera prior to his testimony at the hearing, the Court's Rules of Procedure establish in Article 51(6) that declarants may not be present during the testimony of another alleged victim, witness, or expert witness at a hearing before the Court. In the instant case, the witness Luis Talavera was outside the courtroom until the time of his testimony, so there was no violation of this Court's Rules of Procedure.

23. Meanwhile, as the arguments made regarding the other statements, they refer to their evidentiary value and not to the admissibility of the evidence. Consequently, the Court will take into account the observations made by the State when assessing this evidence, together with the rest of the body of evidence.

24. Moreover, in following with the request by the President of the Court at the hearing, the State submitted the written version of Osvaldo Alfredo Gozaíni's expert report alongside its final arguments. In its observations, the **representation of the alleged victim** considered that said expert report "was not conducted with a neutral and objective approach." In this regard, this **Court** considers that the allegations presented by the representative refer to the evidentiary value of the expert opinion and not to its admissibility.

25. Thus, the Court deems it pertinent to admit the statements made in a public hearing and before a notary public, as well as the written version of the expert opinion, as long as they comply with the purpose defined by the Presidency in the Order that provided they be received.

V FACTS

26. In view of the points raised by the parties and the Commission, the relevant facts of the case will be presented below in the following order: A) relevant regulatory framework; B) the appointment of Alejandro Nissen Pessolani and his performance as Public Prosecutor; C) the disciplinary procedure applied against Public Prosecutor Nissen Pessolani; D) the second complaint filed against Public Prosecutor Nissen Pessolani; and E) the unconstitutionality action filed by the alleged victim.

A. Relevant regulatory framework

27. The impeachment and the removal of Magistrates and Public Prosecutors is defined in the Political Constitution of Paraguay, as follows:

Article 253. IMPEACHMENT AND REMOVAL OF MAGISTRATES

Judicial Magistrates may only be tried and removed for committing crimes, or for malfeasance of their functions specified in the law, by the decision of a Jury of Impeachment [Enjuiciamiento] of Magistrates. It will be composed of two ministers of the Supreme Court of Justice, two members of the Council of the Magistrature, two Senators and two Representatives; these last four must be lawyers. The law will regulate the functioning of the Jury of Impeachment [Enjuiciamiento] of Magistrates.

Article 270. PROSECUTORS

Prosecutors are appointed in the same way that this Constitution establishes for the judges. They remain in their duties and are removed by the same procedures.

Additionally, they have the same incompatibilities and immunities as those determined for the members of the Judicial Branch.¹⁰

28. Meanwhile, the regulation for the Impeachment of Magistrates at the time of the facts was established in Law No. 1084.¹¹ The main articles applicable to the instant case are transcribed below.

Article 1. The Jury for the Impeachment of Magistrates, hereinafter, "the Jury," shall elect from among its members, in order and by means of secret ballot, its President and Vice-President, who shall remain in office for one year, with the possibility for re-election.

During the same proceeding, the appointed President shall take an oath or pledge to perform his or her duties and work as provided under the Constitution and by law. Immediately thereafter, the members shall do the same before the President.

Article 3. The members of the Jury shall be designated, respectively, by simple majority of votes of the members of the Supreme Court of Justice, the Chamber of Senators, the Chamber of Representatives, and the Council of Magistrates.

The members of the Jury shall remain in office until they have served the period for which they were elected or designated.

Article 11. In accordance with the procedures established in this law, the Jury is responsible for prosecuting members of Appeals Courts of any jurisdiction, of other judges, and of those who work as State Attorneys and Prosecutors in the Office of the Public Prosecutor.

Article 12: The commission of crimes or poor performance of the duties defined in this law are grounds for impeachment.

Article 14. The following constitutes poor performance of duties warranting the removal from office of judicial magistrates, prosecutors, state attorneys, and justices of the peace:

[...]

b) repeated and serious breach of the obligations established in the National Constitution, Procedural Codes, and other laws on the exercise of their duties;

c) failing to maintain personal independence in the exercise of their duties and submitting, without any law requiring them to, to orders and instructions from higher-ranked magistrates or from officials from other branches or agencies of the State;

[...]

g) demonstrating a manifest bias or ignorance of the law in trials, manifested through repeated acts;

[...]

n) giving information or issuing declarations or comments to...third parties about the trials they are handling, when they might affect their processing, or affect the honor or reputation or the presumption of innocence established in the National Constitution; or causing controversy about ongoing trials;

[...]

p) receiving gifts or accepting promises or other benefits, directly or indirectly, from persons who in any way may play a role or have an interest in the trials they are handling; [...]

¹⁰ Constitution of the Republic of Paraguay of June 20, 1992. Text available at https://www.bacn.gov.py/CONSTITUCION_ORIGINAL_FIRMADA.pdf.

¹¹ Cf. Law No. 1084 regulating the procedure for the impeachment and removal of magistrates of June 19, 1997 (case file of evidence, folios 201 to 209). Currently, the procedure is regulated by Law No. 3759 of July 2, 2009.

Article 16. The trial shall be initiated before the Jury for the Impeachment of Magistrates upon a charge being brought by the litigant or the professional concerned; this may be file personally or through a proxy with special power of attorney; upon a charge brought by the Supreme Court of Justice, the Ministry of Justice and Labor, the Office of the Public Prosecutor, the Chamber of Senators, the Chamber of Representatives, and the Council of Magistrates; and by the Jury itself acting of its own accord.

The aforementioned individuals and entities may limit themselves to lodging a formal complaint with the Office of the Prosecutor General of the State, which, if it sees fit to do so, shall bring the appropriate charge.

Article 18. The complaint having been presented before him, the Prosecutor General of the State, after studying the merits of the accusations against the accused, shall, if warranted, bring the charge before the Jury.

He may also order a preliminary discovery period related to the facts being alleged, to verify their seriousness. If these procedural steps do not produce clear evidence that grounds for removal exist, the charge shall not be brought and the case shall be closed, with the complainant notified.

Article 19. The brief brought before "the Jury" to advance the impeachment shall include:

- a) The subject matter of the impeachment;
- b) The name and actual and legal residence of the accuser;
- c) The name and legal residence of the defendant;
- d) A well-documented statement of the facts on which the case is based;
- e) The legal provisions that have been infringed;
- f) A clear and precise prayer for relief; and,
- g) Verification of the particulars required under Article 17 for the individual complainant, whether a litigant or professional.

With the same brief, the complainant shall;

- a) Attach all documents that are in the person's power and related to the charge, or indicate where such documents may be found;
- b) Offer evidence that supports the claim and request any measures necessary to produce the evidence; and.
- c) Attach a copy for notification to the other party.

Article 21. Proceedings to determine liability shall be governed by the provisions of this law and, subsidiarily, by the provisions of the Code of Civil Procedure and supplementary laws, where applicable. During substantiation of the proceedings, however, the following provisions must be observed:

- a) No issue introduced in the proceedings to determine liability has been the subject of a previous ruling, with the exception of reasoned recusals;
- b) All means of evidence provided for in the Civil Procedure Law shall be admitted;
- c) All time periods are final for the parties;
- d) in the case of hearings and notifications for which no time period has been determined, the time period shall be three business days;
- e) Under no circumstances will the court records be removed by the parties;
- f) Any final judgments, resolutions, and orders that the Jury may issue cannot be appealed to any other body, save for that established in Article 33. Petitions for clarification and reversal may be admitted, and the Jury shall rule on them by the fifth day, by means of a reasoned decision;
- g) Any charges and appeals brought in the public hearing of the proceeding shall be resolved during that hearing;
- h) The Jury shall have the authority to move the proceeding forward and determine at any stage of the case the procedural steps that may be necessary to shed light on the facts;
- i) The substantiation hearing shall be oral and recorded on tape;

- j) These shall subsequently be entered into the record and added to the case file;
- k) The proceedings to determine liability are exempt from any type of tax payment;
- l) The proceeding shall move forward at the request of a party or of the Jury's own accord.

Article 31. The Jury shall render a final judgment within a period of 30 days from the time the procedural decisions are enforceable and within 180 days from the start of the trial.

The Jury's decision may consist of only removal or acquittal of the accused party. In the case of removal, said decision shall be communicated to the Chambers of Congress, the Supreme Court of Justice, and the Council of Magistrates. The Jury shall decide on the costs of the proceeding.

Article 33. In addition to an appeal for reversal and clarification against the final verdict of the Jury, an action of unconstitutionality may also be brought, which shall be decided on by the Court sitting en banc.

B. Alejandro Nissen Pessolani's appointment and his performance as Criminal Prosecutor

29. Mr. Nissen Pessolani was appointed Criminal Prosecutor by Decree No. 542 of July 15, 1999, issued by the Supreme Court of Justice. On November 4, 1999, by means of Certified Document No. 700, he was appointed Criminal Prosecutor of the Public Prosecutor's Office by the Council of Magistrates. On April 23, 2001, by Order No. 410, the Attorney General of the State appointed him as Public Prosecutor in charge of the Criminal Offenses against the Public Treasury. Prosecutor Nissen Pessolani was not part of the Anti-Corruption Unit,¹² although he did investigate acts related to the illegal trafficking of stolen vehicles involving high-ranking public sector officials.

B.1. Case No. 1534, "[B.V.] et al. on tax evasion, extortion, et al."

30. According to the alleged victim's statement during the public hearing,¹³ this case was initiated as a result of a newspaper article that caught his attention and motivated him to begin an investigation into the alleged sale to the Presidency of the Republic of a car that was stolen in Brazil. He indicated that, at that time, during the administration of Attorney General A.C.V. (1996-2000), "I would inform him, and he would grant me authorization to investigate." Subsequently, this case was admitted through the reception desk and was titled "[B.V.] et al. on tax evasion, extortion, et al." and

¹² The foregoing is evident both from the witness statement given before a notary public by Matilde Elena Moreno Inrigotia on April 29, 2022 (case file of evidence, folio 4192) and from the alleged victim's own statement during the public hearing where she indicated, in response to a question from one of the judges: "In my journey through the Prosecutor's Office [...] I was first appointed regular prosecutor, that is what it is called, then the Prosecutor General of the State appointed me, apart from that ordinary work, specialized in punishable acts against the public treasury and then also in punishable acts against drug trafficking." In the same speech, he indicated that the corruption investigations were carried out on his own initiative in response to "a commitment that I assumed, that I swore to do when I was assigned as prosecutor."

¹³ At the public hearing, in response to a question from one of the judges, the alleged victim indicated "case 1534 was initiated as a consequence of the investigation of the stolen car of the President of the Republic, that case or that investigation or that fact, that *noticia criminis* as it is called, that news arose from a newspaper publication that caught my attention and I began to investigate." Likewise, in his testimony by affidavit, former State Prosecutor General Oscar Germán Latorre stated that "the most emblematic case that Alejandro Nissen had was the investigation for the sale to the Presidency of the Republic of a BMW car stolen in Brazil, which did not have public officials as suspects, but rather those who sold the car" (Testimonial declaration rendered before a notary public by Oscar Germán Latorre Cañete on April 29, 2022, case file of evidence, folio 4207).

Prosecutor Nissen continued investigating it. The intervention of Prosecutor Nissen Pessolani in this case was confirmed after the fact by means of Order No. 112 of February 13, 2001.¹⁴

B.2. Case No. 9936 "[L.S.] et al. s/ Reduction, Smuggling, Reproduction and Use of Official Documents with False Contents, Fraud, Criminal Association, and Money Laundering."

31. In the framework of the investigation of case no. 1534 of "[B.V.] et al. on charges of tax evasion, exaction and other offenses," new data on vehicle trafficking arose, which led the judge in the case to order an itemization and return of the indictment document. As a result, case no. 9336 entitled "[L.S.] et al. s/ Reduction, Smuggling, Reproduction and Use of Official Documents with False Contents, Swindling, Criminal Association and Money Laundering" in which C.P.O., was accused, among others. Prosecutor Nissen Pessolani continued to investigate this new case. Thus, the indictment against C.P.O. was issued by the Prosecutor on January 3, 2002. The assignment of this case is a controverted fact. According to the State, based, among other elements, on the statement of Oscar Germán Latorre, "if the Prosecutor Alejandro Nissen had acted correctly, he should have filed the complaint for this new fact at the reception desk and it should have been assigned to the Criminal Prosecution Unit on duty."¹⁵

32. In accordance with Order No. 68 of February 2, 2001, the Prosecutor General's Office established a new case distribution system for the prosecutorial units for punishable acts for the City of Asuncion as of February 5, 2001. Previously, cases were assigned through a double system, both by rotation and randomly. With Order No. 68 it was determined that all reports and complaints should enter through the Public Prosecutor's Office reception desk and should be distributed by rotation to the units of the Public Prosecutor's Office. The shift system involved 30-day periods per Prosecution Unit. Within this period, "the members of the unit would go on duty successively for five days of duty until the indicated period was completed."¹⁶

33. According to the representatives' allegations, the intervention of Prosecutor Pessolani in the case was legitimized by means of the order issued by the State Prosecutor General's Office No. 580 of May 22, 2002, rejecting a challenge filed by C.P.O. against Prosecutor Nissen Pessolani.¹⁷ During the public hearing, the alleged victim testified that between the publication of Order No. 68 and Order No. 580, he continued to carry out investigative acts within the case.

C. Disciplinary proceedings against Prosecutor Nissen Pessolani

¹⁴ Cf. Witness statement rendered before a notary public by Oscar Germán Latorre Cañete on April 29, 2022 (case file of evidence, folio 4209). According to Mr. Nissen Pessolani's statement at the public hearing, this investigation was carried out by means of a special authorization from the then State Prosecutor General, A.C.V., who gave him permission to carry it out and to subsequently enter it through the reception desk.

¹⁵ Witness statement rendered before a notary public by Oscar Germán Latorre Cañete on April 29, 2022 (case file of evidence, folio 4213).

¹⁶ Cf. Order No. 68 of the Prosecutor General's Office of February 2, 2001, establishing a new case distribution system for the prosecutorial units for common punishable acts for the city of Asunción (case file of evidence, folios 3192 to 3198). Although this resolution established that the new shift system would be applied according to a calendar that took into account only the Prosecutor Units No. 1 to No. 8, the alleged victim clarified during the public hearing that this system was also applied to his Prosecutor Unit (No. 10).

¹⁷ Cf. Order No. 580 issued by the Prosecutor General's Office on May 22, 2002 (case file of evidence, folios 3275 to 3277).

34. On March 12, 2002, C.P.O., who was under investigation for the alleged crime of falsifying official documents before customs to allegedly launder stolen vehicles in Brazil and Argentina, as well as for the crimes of fraud, tax evasion, criminal association and money laundering in case no. 9936, filed a complaint against Mr. Nissen Pessolani for poor performance of his duties. He alleged that the Prosecutor had incurred in the grounds set out in articles 12 and 14 subparagraphs (b), (g), (n) and (p) of Law No. 1084. Among other arguments, he accused him of concealing acts from the parties, offering procedural benefits in exchange for statements involving third parties, not investigating exculpatory acts, intimidating acts, misapplication of the law and giving information to the media that affected the honor and reputation of the accused parties.¹⁸

35. On March 18, 2002, by order signed only by the president of the JEM, the impeachment was deemed to have been initiated,¹⁹ and on April 2, 2002, the complaint filed by Mr. C.P.O. against Mr. Nissen Pessolani for alleged poor performance of his duties in office was transferred.²⁰ As a result of this process, on March 26, 2002, the prosecuting party requested that the State Prosecutor General's Office remove Prosecutor Nissen from his position as criminal prosecutor in cases No. 9936 and No. 1534 for an alleged "manifest lack of objectivity on the part of the denounced Prosecutor."²¹ This request was dismissed on May 22, 2002.²²

36. On April 5, 2002, Mr. Nissen Pessolani filed an appeal asking the Court to reverse its decision of March 18, 2002. He argued that the complaint before the JEM did not meet the requirements of the law, since it did not demonstrate any judicial bond having been posted, stating that the only purpose was to remove him from the case.²³ The appeal was dismissed by means of an interlocutory judgment issued by the JEM on May 7, 2002.²⁴

37. On April 16, 2002, Mr. Nissen Pessolani answered the lawsuit, denying each of the charges.²⁵ On April 23, 2002, he also denounced a crime of production of a non-authentic document, false report, attempt to frustrate the criminal execution by the party filing the claim (C.P.O.)²⁶; and he accompanied his brief with an opinion made by an expert witness registered at the Supreme Court of Justice. According to this opinion, the

¹⁸ Cf. Accusation filed by C.P.O. for malfeasance in office against Public Prosecutor Alejandro Nissen Pessolani before the JEM on March 12, 2002 (case file of evidence, folios 8 to 15).

¹⁹ Cf. Providence of the president of the JEM of March 18, 2002 (case file of evidence, folio 3020).

²⁰ Cf. Notification of the JEM signed by its president and addressed to Alejandro Nissen Pessolani of the proceedings "[C.P.O.] c/Alejandro Niseen [sic] Pessolani Capital Public Prosecutor for criminal matters s/ impeachment" of April 2, 2002 (case file of evidence, folio 3032).

²¹ Application submitted by C.P.O. to the State Prosecutor General on March 26, 2002 (case file of evidence, folio 3068).

²² Cf. Order No. 580 of the Prosecutor General's Office rejecting the recusal of the Criminal Prosecutor, Attorney Alejandro Nissen of May 22, 2002 (case file of evidence, folios 3275 to 3277).

²³ Cf. Appeal filed by Alejandro Nissen Pessolani before the JEM on April 5, 2002 (case file of evidence, folios 3040 to 3046).

²⁴ Cf. Interlocutory Order No. 7/2002 issued by the JEM in the case C.P.O. v. Attorney Alejandro Nissen Pessolani, Criminal Prosecutor of Prosecution Unit No. 10 of the Capital City on May 7, 2002 (case file of evidence, folios 3190 and 3191).

²⁵ Cf. Statement of defense filed by Alejandro Nissen Pessolani before the JEM on April 16, 2002 (case file of evidence, folios 3070 to 3110).

²⁶ Cf. Complaint filed by Alejandro Nissen Pessolani against C.P.O. for the crime of production of non-authentic document, false denunciation and attempted frustration of criminal execution before the JEM on April 23, 2002 (case file of evidence, folios 3134 to 3138).

complainant's signature in the reply to the appeal for reversal was false.²⁷ Mr. C.P.O. denied these allegations and requested that Prosecutor Nissen Pessolani be suspended.²⁸ Subsequently, the complainant appeared to acknowledge that the signatures on file were his own.²⁹

38. On May 31, 2002, Mr. Nissen Pessolani challenged four members of the JEM, including its president, for alleged bias.³⁰ Thus, on June 4, 2002, the hearing scheduled for that date was suspended.³¹ The challenge was ultimately rejected as unfounded on July 30, 2002,³² and the hearing was held on August 13, 2002.³³

39. On August 20, 2002, Luis Talavera Alegre, member of the JEM, filed a brief requesting suspension of the impeachment and the nullity of the trial. He alleged that the procedure was initiated through an order of the president of the Jury and not by a resolution of the members, as set out in the regulations, and therefore considered that this was an irregular and illegal act that led to the nullity of the entire procedure.³⁴ This nullity motion was rejected by the JEM on March 25, 2003. The motion was considered time-barred and the passage of time amounted to the tacit confirmation of the allegedly void act.³⁵ Subsequently, Luis Talavera Alegre excused himself from hearing the case³⁶ and was replaced by Senator E.M.S.A.³⁷

²⁷ Cf. Calligraphic expert opinion signed by the expert M.A.L.E. (case file of evidence, folios 3122 to 3133). The nature of this document and the basis for its issue is a disputed fact in this case. The document is addressed to the Prosecutor in Criminal Matters of Unit No. 10 Attorney Alejandro Nissen" and it is stated that it was made "in response to your note dated April 19, 2002, requesting that I perform a handwriting appraisal, within the Trial in Reference." The opinion concludes with the following sentence: "I request that the Prosecutor consider the task entrusted to me in this case as having been completed, from here on out leaving the use of this work for any purposes he considers pertinent, at his discretion." According to the State, the alleged victim ordered an official expert to carry out an expert opinion and incorporated it in his own. According to the representative, Mr. Nissen Pessolani requested that an independent expert make an opinion, who, among other professional activities, also performed expert work for the Public Prosecutor's Office. Questioned by one of the judges during the public hearing, Mr. Nissen Pessolani indicated that he did not remember having paid the expert, but clarified that the State did not make any payment for this expert opinion.

²⁸ Cf. Brief filed by C.P.O. before the JEM on April 25, 2002 (case file of evidence, folios 3140 to 3142).

²⁹ Cf. Act of appearance of the Secretary of the JEM of April 25, 2002 (case file of evidence, folio 3146).

³⁰ Cf. Recusal letter submitted by Alejandro Nissen Pessolani to the president of the JEM on May 31, 2002 (case file of evidence, folios 3297 to 3311).

³¹ Cf. Note detailing that the hearing had not been carried out, by the Secretary of the JEM of June 4, 2002 (case file of evidence, folio 3363).

³² Cf. Interlocutory Order No. 10/02 issued by the JEM on the recusal motion filed by Attorney Alejandro Nissen Pessolani on July 30, 2002 (case file of evidence, folios 3745 to 3746).

³³ Cf. Act of public and oral hearing No. 200 made before the JEM on August 13, 2002 (case file of evidence, folios 3408 to 3462).

³⁴ Cf. Brief submitted by Luis Talavera Alegre before the president of the JEM on August 20, 2002 (case file of evidence, folio 3406).

³⁵ Cf. Interlocutory Order No. 06/03 issued by the JEM on March 25, 2003 (case file of evidence, folios 3574 and 3575).

³⁶ Cf. Excuse filed before the president of the JEM by Luis Talavera Alegre on March 25, 2003 (case file of evidence, folio 3576),

³⁷ Cf. Note from the president of the Chamber of Senators to the vice-president of the JEM dated March 31, 2003 (case file of evidence, folio 3582).

40. On September 9, 2002, Mr. Nissen Pessolani filed his pleadings brief, requesting his acquittal.³⁸ On April 7, 2003, the JEM, by means of judgment No. 02/03, resolved "to remove Mr. Nissen Pessolani [...] for poor performance of his duties, in accordance with to subparagraphs (b), (g) and (n) of Article 14 of Law No. 1084/97 [...]." It found, in effect, that the defendant continued to intervene in the criminal case, disregarding the new provisions on the distribution of cases in turn, and that he exerted pressure on declarants and defendants in the proceedings; that throughout the course of the investigation under his charge, the defendant sought information and made statements to the press and third parties that transcended "the delicate framework of confidentiality that the criminal investigation has in its preliminary period, thus affecting the honor, reputation, and presumption of innocence" of the accused party and that during the process before the JEM, the defendant displayed behaviors that constitute grounds for removal, upon requesting that an expert from the Public Prosecutor's Office perform an expert analysis of the signature of his accuser, without having denounced before the JEM any suspicion about the authenticity of the document.³⁹ The judgment was signed by the JEM Vice President and five other members.

41. On April 10, 2003, Mr. Nissen Pessolani filed an appeal for clarification and reversal against judgment No. /03. It requested clarification of the circumstance of the communication of the judgment to the Chambers of Congress, the Supreme Court of Justice and the Council of Magistrates.⁴⁰ Such appeal was declared inadmissible on April 22, 2003 by judgment No. 03/03. The JEM argued that the appeal was not admissible "given that the appellant requested clarifications on matters that were manifestly set forth in Article 31 of Law No. 1084."⁴¹

42. During the trial, several media outlets covered the trial and denounced alleged political pressures on the members of the JEM.⁴² The press also reported on an investigation initiated in December 2002 by Prosecutor Nissen into an allegedly stolen vehicle that was apparently owned by the president of the JEM.⁴³ Subsequently, it was also reported that another JEM member was involved in an investigation into possession of a stolen car.⁴⁴

³⁸ Cf. Closing brief and conclusion of the defense submitted by Alejandro Nissen Pessolani to the president of the JEM on September 9, 2002 (case file of evidence, folios 3486 to 3566).

³⁹ Cf. Judgment No. 02/03 issued by the JEM on April 7, 2003 (case file of evidence, folios 3592 to 3618).

⁴⁰ Cf. Appeal for clarification and reversal filed by Alejandro Nissen Pessolani before the JEM on April 10, 2003 (case file of evidence, folio 3632).

⁴¹ Order No. 03/03 issued by the JEM on April 22, 2003 (case file of evidence, folio 3636 and 3637).

⁴² Cf. "[R.] implement to keep Prosecutor Nissen from investigating" ABC Color newspaper of March 31, 2003. This article reports on a conversation between the former secretary of the presidency with the president of JEM about the opinions needed to dismiss Prosecutor Nissen (case file of evidence, folio 4); "Nissen procedure in the Jury was irregular from the start," Judicial news of April 13, 2003 (case file of evidence, folio 5); "[L.] called for removal of the prosecutor who was investigating corrupt politicians," ABC Color newspaper of unreadable date 2003 (case file of evidence, folio 6); "Jury attempts to remove the prosecutor that ordered the arrest of Argaña, court registrar," ABC color newspaper of July 31, 2002 (case file of evidence, folio 2725); "Jury made up of pro-Argaña members insists on removing Prosecutor Nissen," ABC newspaper of August 15, 2002 (case file of evidence, page 2928); "Reported Prosecutors looking into legal action to stop pressure on them," La Nación newspaper, undated (case file of evidence, page 2930).

⁴³ Cf. "Investigation of [G.H.] for possession of a stolen car", ABC newspaper of April 4, 2003 (case file of evidence, folio 2726) and "Charge [G.H] with "mau" vehicle possession, ABC newspaper of April 8, 2003 (case file of evidence, folio 2727).

⁴⁴ Cf. Newspaper article "Justice department to decide whether there will be a public, oral trial, or not for [C.K.]" ABC newspaper, October 31, 2003 (case file of evidence, folio 2747).

D. Second complaint filed against Prosecutor Nissen Pessolani

43. On April 4, 2003, L.H.A., in his capacity as representative of S.D.V. and M.M.D., filed a complaint against Mr. Nissen Pessolani for poor performance of duties in Case No. 14069, alleging the grounds established in subparagraphs (b), (c), (g) and (n) of Article 14 of Law No. 1084.⁴⁵

44. On May 16, 2003, the JEM issued order 12/03 admitting the complaint, initiating the second proceeding and requesting that the Supreme Court of Justice issue a preventive suspension of Prosecutor Nissen Pessolani.⁴⁶ By means of Official Letter No. 45/03 of May 16, 2003, the JEM informed the President of the Supreme Court of the preventive suspension of Prosecutor Nissen. Said Official Letter was notified to him on May 19, 2003, which did not specify that the suspension was without pay.⁴⁷ Indeed, in application of Decree No. 552 of the Supreme Court, his dismissal was suspended due to the effect of having filed an action of unconstitutionality against the JEM's judgment issued in the first proceeding (*supra* parrs. 34 a 42). However, on May 20, 2003, the alleged victim received the notification of Resolution No. 1182 of the Supreme Court of Justice, by means of which he was suspended without pay "until final resolution of the case."⁴⁸

45. On the same day, Mr. Nissen Pessolani filed an appeal for reversal against Resolution No. 1182. On June 10, 2003, the Supreme Court of Justice, by means of Resolution No. 1194, partially revoked its previous decision, ordering payment of the basic part of the alleged victim's salary, but not of the supplementary part of her remuneration as a prosecutor.⁴⁹

46. By judgment of April 29, 2004, the JEM acquitted the alleged victim.⁵⁰ Mr. Nissen Pessolani filed an appeal for clarification regarding the EMB's decision on costs, which was declared admissible on May 13, 2004.⁵¹

E. Unconstitutionality action filed by the alleged victim

47. On April 22, 2003, Mr. Nissen Pessolani filed an action of unconstitutionality against the Judgment S.D. No. 02/03 of April 7, 2003 of the JEM (*supra* para. 40), alleging that it violated several guarantees of due process, right to work and labor stability. In particular, he alleged that the JEM ruled and convicted him on the basis of an issue not raised by the initial complaint; he also claimed that the judgment incurred in contradictions and that elements of his defense were not taken into account in the sanctioning decision. Likewise, he indicated that there was a violation of his right to defense since his being a defendant was used against him to describe the alleged poor performance of his duties. On the other hand, he alleged that the JEM did not make a

⁴⁵ Cf. Complaint filed by L.H.A. before the JEM on April 4, 2003 (case file of evidence, folios 47 to 64).

⁴⁶ Cf. Interlocutory Order No. 12/03 issued by the JEM on May 16, 2003 (case file of evidence, folios 2736 to 2738).

⁴⁷ Cf. Letter No. 45/03 of the JEM of May 16, 2003 (case file of evidence, folio 2735).

⁴⁸ Order No. 1182 issued by the Supreme Court of Justice on May 20, 2003 (case file of evidence, folio 2740).

⁴⁹ Cf. Order No. 1194 issued by the Supreme Court of Justice on June 10, 2003 (case file of evidence, folios 2742 to 2744).

⁵⁰ Cf. Judgment No. 11/04 issued by the JEM on April 29, 2004 (case file of evidence, folios 66 to 80).

⁵¹ Cf. Judgment No. 13/04 issued by the JEM on May 13, 2004 (case file of evidence, folios 82 to 83).

correct evaluation of the facts, of the right invoked, or of the evidence offered and that the proceeding extended beyond the 180-day term provided for by Article 31 of Law No. 1084. He added that, months before his removal, he was able to obtain a draft of the judgment that was apparently drafted in the Public Prosecutor's Office, which coincided with the content of the final judgment issued by the JEM. Finally, his claim considered that it did not have independent and impartial judges.⁵²

48. In the appeal, Mr. Nissen Pessolani requested application of article 559 of the Code of Civil Procedure⁵³ to suspend the effects of the judgment issued by the JEM.⁵⁴ On May 16, 2003, by means of Order No. 552, the Supreme Court established the suspensive effect on the JEM's judgment,⁵⁵ a decision that was notified to the Prosecutor General on May 19, 2003.⁵⁶

49. By letter dated April 25, 2003, Mr. Nissen Pessolani extended his action of unconstitutionality against the JEM's ruling No. 03/03 of April 22, 2003, which denied his appeal for clarification and reversal⁵⁷ (*supra* para. 41). On May 4, 2004, he filed a new amendment, indicating that he had asked the JEM repeatedly for copies of the news material on which its sanction decision was based but that his request was never addressed.⁵⁸

50. On June 16, 2004, in Agreement and Judgment No. 915, the Supreme Court of Justice rejected the action of unconstitutionality, arguing that there were no violations to the right to defense, to the principle of congruence, or in the evaluation of evidence.⁵⁹ With this rejection, the removal of Prosecutor Nissen became final.

VI MERITS

51. This case relates to the alleged responsibility of the State for the alleged violation of the rights of Prosecutor Alejandro Nissen Pessolani in the context of a disciplinary proceeding against him by the Jury for the Impeachment of Magistrates that culminated

⁵² Cf. Action of unconstitutionality filed before the Supreme Court of Justice by Alejandro Nissen Pessolani against Ruling No. 02/03 issued by the JEM on April 22, 2003 (case file of evidence, folios 85 to 119).

⁵³ "Art.559.- Effects of the application. The filing of the application will have suspensive effects in the case of a final judgment or an interlocutory judgment with the force of such. In other cases it shall not have that effect, unless, at the request of a party, the Supreme Court so orders in order to avoid irreparable damage."

⁵⁴ In the petition he requested "To issue an official letter to the Jury of Impeachment of Magistrates and to the Prosecutor General's Office, to the Chambers of Congress and to the Council of the Magistrature, in order to communicate the suspension of the effects of the Judgment issued, pursuant to Article 559 of the C.P.C." (Action of unconstitutionality filed before the Supreme Court of Justice by Alejandro Nissen Pessolani against the Supreme Court of Justice). No. 02/03 issued by the JEM on April 22, 2003, case file of evidence, folio 118).

⁵⁵ Cf. Interlocutory Order No. 552 issued by the Supreme Court of Justice on May 16, 2003 in the framework of the Action of Unconstitutionality in the trial: C.P.O. v. Attorney Alejandro Nissen, Criminal Prosecutor of the Capital S/ prosecution (case file of evidence, folios 3969 to 3972).

⁵⁶ Cf. Act of Notification from the Secretariat of the Supreme Court of Justice to the Prosecutor General's Office of May 19, 2003 (case file of evidence, folio 3975).

⁵⁷ Cf. An extension of unconstitutionality action filed by Alejandro Nissen Pessolani before the Supreme Court of Justice on April 25, 2003 (case file of evidence, folios 121 to 124).

⁵⁸ Cf. Complaint filed by Alejandro Nissen Pessolani before the Chief Justice of the Supreme Court of Justice for concealment of evidence used by the J.E.M. on May 4, 2004 (case file of evidence, folio 4113).

⁵⁹ Cf. Agreement and Judgment No. 915 issued by the Supreme Court of Justice on June 16, 2004 (case file of evidence, folios 126 to 130).

in his removal from the position of Criminal Prosecutor. To this effect, and taking into account the arguments of the parties and the Commission, this Court will proceed to analyze the merits in the following order: 1) the right to a competent, independent, and impartial judge; 2) the right to judicial protection; 3) political rights; and 4) the right to job security.

VI-1

THE RIGHT TO A COMPETENT, INDEPENDENT, AND IMPARTIAL TRIBUNAL⁶⁰

A. Motions by the parties and the Commission

52. With respect to the right to have a natural judge previously established in the law, the **Commission** considered that, in the instant case, the rules for formation of the Jury for the Impeachment of Magistrates were previously established in the law and the steps for the election of its President were clearly described, so it considered that the right to have a natural judge was not in controversy. Regarding the right to have an independent judge, the Commission emphasized that although the mixed composition of the JEM, being composed of eight members, four of whom are Senators and Representatives, is problematic, in this specific case, it does not have sufficient information to indicate that the members of the JEM have a subordinate or dependent relationship with the parties in the process, or that they lacked guarantees of stability that would result in a lack of independence.

53. As to the guarantee of impartiality of the judge, the Commission noted that Mr. Nissen Pessolani alleged that the president of the JEM, as well as other member representatives and senators, had an interest in getting involved and retaliating against him for the corruption cases he was investigating, and that this was denounced before the Supreme Court of Justice when the action of unconstitutionality was filed. However, this argument was not addressed by the Supreme Court in its ruling. In addition, the alleged victim filed a challenge against several members of the JEM and the sanctioning process culminated on the same day that the alleged victim filed the indictment against the president of the JEM in the context of a case under investigation. Thus, the Commission considered that these aspects would be problematic because "they could denote a situation of retaliation against a prosecutor for the investigations he was carrying out against political authorities." However, it indicated that since there was no record in the file of the appeal for reversal, or its resolution, it consequently did not have the elements needed to pronounce on a violation of the guarantee of impartiality. In its concluding observations and following the request made by the president of the Court during the public hearing to clarify his allegations regarding lack of impartiality, the Commission noted that the president of the JEM had in his possession automobiles that had been reported stolen and were being investigated by Prosecutor Nissen. Thus, the participation of the JEM president during the process, despite not signing the judgment, implied a lack of independence and impartiality. It also considered that Mr. L.C.K., a member of the JEM who did sign the judgment, was appointed by the President of the Republic, who was also one of the main parties involved in a case investigated by Prosecutor Nissen. In addition, he indicated that this member of the JEM was also under investigation by the Public Prosecutor's Office, and therefore considered that his participation also seriously violated the guarantee of impartiality.

54. The **representative** alleged that there were sufficient elements to consider the partiality of the president and several members of the JEM. In particular, he alleged that

⁶⁰ Article 8(1) of the American Convention.

Prosecutor Nissen Pessolani himself was prosecuting the president of the JEM for alleged possession of a stolen car. Also, that the president of the JEM showed a "striking interest" in knowing details of the investigation against C.P.O. just days before his impeachment request against Prosecutor Nissen was filed. On the other hand, he alleged that the president initiated the trial against Prosecutor Nissen Pessolani via a unipersonal order, when this should have been done by the JEM plenary. He also claimed that several members of the JEM should have been recused from the case, since they had a close relationship with the then president of the Republic, who was the owner of a vehicle whose ownership was being investigated by Prosecutor Pessolani. In addition, he considered that another member of the JEM, L.C.K, also had a conflict of interest, as he was also involved in the investigation for the possession of another stolen and laundered car.

55. The **State** argued that, as recognized by the Commission, in the specific case, there was a competent court that acted impartially and independently. As to the JEM composition, he added that its two senators and two representatives necessarily must be lawyers and although they are appointed by the respective legislative chambers, "they exercise their duties in the JEM with total and absolute independence, not receiving any mandate from these legislative bodies, nor from their authorities and members." He added that, with respect to the composition of the JEM, the Commission argued there was only a potential risk factor, which could not be interpreted as a violation *per se* by the Paraguayan State. As to the impartiality of the members of the JEM, he stressed that its president, who was the object of recusal, did not sign the judgment of April 7, 2003. In his closing arguments, he stressed that the participation of the legislative body in the composition of the JEM is not decisive, since half of the JEM is made up of members appointed by the Supreme Court of Justice and by the Council of Magistrates, which also includes practicing lawyers and faculty members of Law Schools.

B. Considerations of the Court

56. In order to proceed with the respective analysis, it is essential to recall the case law of this Court regarding the specific guarantees to safeguard judicial independence and their applicability to prosecutors (1). Subsequently, the arguments regarding the right to a competent and independent judge will be analyzed (2), as well as the guarantee of an impartial judge (3).

B.1. Specific guarantees to safeguard judicial independence and their applicability to prosecutors due to the nature of their duties

57. This Court has already established that the guarantee of stability and irremovability of judges, aimed at safeguarding their independence, is applicable to prosecutors based on the nature of their responsibilities.⁶¹ In this regard, with respect to the specific role of prosecutors, this Court has referred on several occasions to the need for States to guarantee an independent and impartial investigation of human rights violations and, in general, in the criminal sphere.⁶² The Court has emphasized that the authorities in

⁶¹ Cf. *Case of Martínez Esquivia v. Colombia. Preliminary objections, Merits, and Reparations*. Judgment of October 6, 2020. Series C No. 412, paras. 95 and 96; *Case of Casa Nina v. Peru. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of November 24, 2020. Series C No. 419, paras. 69, and *Case of Cuya Lavy et al. v. Peru. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of September 28, 2021. Series C No. 438, para. 123.

⁶² Cfr. *inter alia*, *Case of Bueno Alves v. Argentina. Merits, Reparations, and Costs*. Judgment of May 11, 2007. Series C No. 164, para. 108; *Case of Casa Nina v. Peru, supra*, para. 70.

charge of the investigation must enjoy *de jure* and *de facto* independence, which requires "not only hierarchical or institutional independence, but also actual independence."⁶³

58. This Court has emphasized that prosecutors perform the functions of administrators of justice and, as such, they must enjoy job security guarantees, among others, as an elementary condition of their independence for the due fulfillment of their procedural functions. Therefore, they are protected by the guarantees of a proper appointment, to be irremovable from their duties and to be protected against external pressures. Otherwise, this would jeopardize the independence and objectivity that are required in their function as principles aimed at ensuring that the investigations carried out and the claims made before the jurisdictional bodies are directed exclusively to the achievement of justice in the specific case, in coherence with the scope of Article 8 of the Convention.⁶⁴ In this regard, it should be added that the Court has specified that the failure to guarantee the irremovability of prosecutors, which makes them vulnerable to retaliations for their decisions, would result in a violation of the independence guaranteed, precisely, by Article 8(1) of the Convention.⁶⁵ In this regard, this Court refers to the judgments in the cases of *Martínez Esquivia v. Colombia* and *Casa of Nina v. Peru* in which it established that the independence recognized to prosecutors is a guarantee that they will not be subject to political pressure or undue interference in their actions, and they will not suffer reprisals for decisions they have objectively made, and this specifically requires the guarantee of stability and irremovability.⁶⁶ The Constitution of Paraguay itself recognizes, in Article 270, that prosecutors enjoy the same guarantees, incompatibilities, and immunities as those determined for members of the Judiciary.

59. By virtue of the foregoing considerations, this Court reiterates that the guarantee of stability and irremovability in office, for prosecutors, implies, in turn, (i) that removal from office must be based exclusively on permissible causes, either by means of a process that complies with judicial guarantees or because they have completed their term of office; (ii) that prosecutors may only be dismissed for grave disciplinary offenses or incapacity; and (iii) that all proceedings shall be determined in accordance with established standards of judicial conduct and to fair procedures that guarantee objectivity and impartiality according to the constitution or law.⁶⁷

B.2. The right to a competent and independent judge

60. The process that culminated in the removal of Mr. Nissen Pessolani was conducted by the Jury for the Impeachment of Magistrates, pursuant to Articles 253 and 270 of the Constitution of Paraguay. Said Jury has a mixed nature since, in accordance with the provisions of Article 253 of the Constitution, it is composed of two ministers of the

⁶³ Cf. *Case of Baldeón García v. Peru. Merits, Reparations, and Costs*. Judgment of April 6, 2006. Series C No. 147, para. 95; *Case of Casa Nina v. Peru, supra*, para. 70.

⁶⁴ Cf. *Case of Martínez Esquivia v. Colombia, supra*, paras. 88 and 94, and *Case of Cuyo Lavy et al. v. Peru, supra*, para. 128.

⁶⁵ Cf. *Case of Valencia Hinojosa et al. v. Ecuador. Preliminary objections, merits, reparations, and costs*. Judgment of November 29, 2016. Series C No. 327, paras. 110 and 119, and *Case of Cuya Lavy et al v. Peru, supra*, para. 128.

⁶⁶ Cf. *Case of Martínez Esquivia v. Colombia, supra*, para. 96, and *Case of Nina v. Peru, supra*, para. 72. See also, *Case of Cuya Lavy et al v. Peru, supra*, para. 128.

⁶⁷ 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 Cuya Lavy et al. v. Peru, supra*, para. 129.

Supreme Court of Justice, two members of the Council of the Judiciary, two senators and two representatives (*supra* paragraph. 27).

61. This Court has already heard cases related to the dismissal of judicial authorities through mixed composition bodies, in which parliamentarians participate, and has analyzed the possible interference that these could cause to the principle of judicial independence.⁶⁸ Along the same lines, this Court stated that the guarantees of due process established in the American Convention are applicable in the substantiation of this type of proceedings.⁶⁹ Article 8 of the Convention establishes the guidelines of the due legal process, which is made up of a set of requirements that must be observed in order to be able to speak of effective and appropriate judicial guarantees so that a person may defend himself adequately in the face of any kind of act of the State that affects his rights.⁷⁰ In this sense, in its settled case law, this Court has stated that any public authority, whether administrative, legislative or judicial, whose decisions may affect the rights of individuals, is required to adopt these decisions with full respect for the guarantees of due process of law.⁷¹

62. In this regard, it is important to analyze the particularities of the Paraguayan Jury for the Impeachment of Magistrates. Regarding the composition of this body, the JEM has a mixed nature since it is composed of eight members: four from the Judicial Branch and four from the Legislative Branch. This shows that the proportion of jurors coming from the Legislative Branch is not a majority and is modulated by the requirement expressly established by Article 253 of the Constitution that jurors coming from the Legislative Branch must be lawyers. Likewise, the procedure and operation of the JEM is regulated by Law No. 1084 and, supplementarily, by the rules of the Civil Procedural Code.⁷² Law No. 1084 contains taxable grounds as grounds for indictment and subsequent conviction, contained in Article 12 of Law No. 1084: commission of crimes or poor performance of duties. In turn, the cause of poor performance of duties is described in Article 14, which lists 19 conducts. Law No. 1084 also establishes a procedure initiated by complaint, but which is conducted *ex officio*. The accusation is communicated to the accused party, who may present their answer and, if there are disputed facts, evidence can be presented. In addition, the procedure involves an oral and public hearing where the evidence is substantiated, and the parties present their arguments. Subsequently, it is established that the jury must render a final judgment.

⁶⁸ Cf., *inter alia*, *Case of the Constitutional Court v. Peru. Merits, Reparations, and Costs*. Judgment of January 31, 2001. Series C No. 71, paras. 71 to 85; *Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of August 28, 2013. Series C No. 268, paras. 165 a 222; *Case of Colindres Schonenberg v. El Salvador. Merits, Reparations, and Costs*. Judgment of February 4, 2019. Series C No. 373, paras. 88 to 90; *Case of Rico v. Argentina. Preliminary Objections and Merits*. Judgment of September 2, 2019. Series C No. 383, paras. 52 to 73, and *Case of Ríos Avalos et al. v. Paraguay. Merits, Reparations, and Costs*. Judgment of August 19, 2021. Series C No. 429, paras. 118 to 134.

⁶⁹ Cf. *Case of the Constitutional Court v. Peru*, *supra*, para. 77, and *Case of Ríos Avalos et al. v. Paraguay*, *supra*, para. 95.

⁷⁰ Cf. *Case of the Constitutional Court v. Peru*, *supra*, para. 69, and *Case of Habbal et al. v. Argentina. Preliminary Objections and Merits*. Judgment of August 31, 2022. Series C No. 463, para. 59.

⁷¹ Cf. *Case of the Constitutional Court v. Peru*, *supra*, para. 71, and *Case of Former Employees of the Judiciary v. Guatemala. Preliminary Objections, Merits, and Reparations*. Judgment of November 17, 2021. Series C No. 445, para. 65.

⁷² Cf. Article 21 of Law no. 1084: "The liability trial procedure shall be governed by the provisions of this law and, supplementarily, by the rules of the Code of Civil Procedure and complementary laws, insofar as they are applicable [...]"

63. In view of the foregoing, the Court finds that, due to the composition of the jury, it is not possible to affirm that the process before the JEM has not provided procedural mechanisms to ensure the guarantees of due process. On the contrary, in the opinion of this Court, the elements to which reference has been made allow us to affirm that the exercise of the Jury's duties took place within a framework of previous, clear, and objective criteria contained in the law and the Constitution that limit the activity of the jury and reinforce the control exercised. In light of the foregoing, the Court considers that it was not verified that the process before the Jury for the Impeachment of Magistrates in its normative configuration has violated the principle of judicial independence, nor the right of the alleged victim to have a competent and independent court.

B.3. Alleged violation of the guarantee of an impartial judge

64. This Court has established that impartiality demands that the judge acting in a specific dispute approach the facts of the case subjectively, free of all prejudice and also offer sufficient objective guarantees to eliminate any doubt the parties or the community might entertain as to his or her lack of impartiality.⁷³ This guarantee implies that the members of the Court have no direct interest in, a pre-established viewpoint on, or a preference for one of the parties, and that they are not involved in the dispute,⁷⁴ but that they act only and exclusively in accordance with —and on the basis of— the Law.⁷⁵

65. Personal or subjective impartiality is to be presumed unless there is evidence to the contrary, and consists, for example, of a showing that a member of the court or the competent authority is personally biased or prejudiced against the litigants. Meanwhile, what is known as the objective approach test consists of determining whether the judge in question offered sufficient elements of conviction to exclude any legitimate misgivings or well-grounded suspicion of partiality regarding his or her person.⁷⁶ Furthermore, the Court has pointed out that challenging is a procedural means of protecting the right to a hearing by an impartial body, while at the same time it seeks to lend credibility to the duty performed by said jurisdiction.⁷⁷

66. As stated in this Ruling, in proceedings brought against judicial authorities, which may eventually lead to their removal, the guarantee of irremovability that protects them, in order to safeguard their independence, requires that such proceedings be processed and decided with objectivity and impartiality, i.e., as required by the guarantees of due process (*supra* paras. 57 a 59).

67. In the instant case, the representative alleged that the president of the JEM, as well as other representatives and senators who are members of the Jury, had an interest

⁷³ 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. 56, and *Case of Manuela et al. v. El Salvador. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of November 2, 2021. Series C No. 441, para. 131.

⁷⁴ Cf. *Case of Palamara Iribarne v. Chile. Merits, Reparations, and Costs.* Judgment of November 22, 2005. Series C No. 135, para. 146, and *Case of Manuela et al. v. El Salvador, supra*, para. 131.

⁷⁵ *Case of Apitz Barbera et al. ("First Court of Administrative disputes") v. Venezuela, supra*, para. 56, and *Case of Ríos Avalos et al. v. Paraguay, supra*, para. 118.

⁷⁶ Cf. *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela, supra*, para. 56, and *Manuela et al. v. El Salvador, supra*, para. 131.

⁷⁷ Cf. *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela, supra*, para. 63, and *Case of Ríos Avalos et al. v. Paraguay, supra*, para. 119.

in getting involved and intending to retaliate for the cases that Prosecutor Nissen Pessolani was investigating, in addition to there being a political interest to remove him. In the Merits Report, the Commission indicated that it did not have the evidence to rule on a violation of the guarantee of impartiality.⁷⁸ Subsequently, and taking into account the evidence provided by the representative in his brief with pleadings and arguments, and by the State in its response, it considered that there were new elements that demonstrated the violation of the aforementioned guarantee. The State, for its part, argued to deny such lack of impartiality in its response and in its final written arguments. The Court understands that the elements mentioned by the representative in brief with pleadings and arguments, and taken up by the Commission in its final observations regarding the alleged lack of impartiality of some members of the JEM, in addition to being directly related to the factual framework contained in the Commission's Merits Report, constitute a controversial issue, regarding which the parties have had the opportunity to argue what is relevant and which is of interest for resolving the case in question.

68. In this regard, this Court notes that, at the time of the facts, Paraguay was experiencing political instability as a result of several corruption scandals. In this regard, the State itself in its final written arguments referred to the Annual Report of the Inter-American Commission and the Third Report on the situation of human rights in Paraguay, where corruption is mentioned among "the crimes that the State must condemn and that have apparently gone unpunished." In this context, some of the investigations developed by Prosecutor Nissen Pessolani were related to the possession of stolen vehicles by political figures (*supra* para. 29).

69. In particular, in the framework of case no. 9936, Prosecutor Nissen Pessolani was investigating L.A.C.A.C., son of a former vice-president of the Republic,⁷⁹ and on March 9, 2002 ordered his arrest along with others under investigation.⁸⁰ This case aroused the particular interest of the then president of the JEM. In fact, on March 8, 2002, before the complaint against Mr. Nissen Pessolani was filed before the JEM, its president, by means of Record No. 22/02 requested that the Prosecutor provide him with the copies of the case file "[L.S.] et al. s/reduction et al."⁸¹ This request was reiterated in official letter no. 23/02 of March 12, 2002, where it was indicated "under warning that failure to do so will be understood as contempt of the authority of this Jury."⁸² In his testimony at the public hearing, witness Luis Talavera Alegre, who was a member of the JEM at the

⁷⁸ In particular, the Commission pointed out that there was no record in the file of the challenge filed by Mr. Nissen Pessolani or its resolution.

⁷⁹ Cf. Newspaper article "Prosecutor orders the arrest of one of the [A.]" La Nación newspaper of March 9, 2002 (case file of evidence, folio 2707) and Newspaper article "Arrest ordered for [A.] for the alleged reduction of a stolen car." La Nación newspaper of March 9, 2002 (case file of evidence, folio 2708). This article states "Criminal Prosecutor Alejandro Nissen Pessolani yesterday ordered the prosecution and arrest of [L.A.C.A.C.], one of the sons of the murdered Vice President [L.M.A.], because it was discovered that he bought and allegedly forged the title of a luxury car based on the false certificate that was used to do the same with the presidential BMW mau." This newspaper article was also submitted as evidence by the State as an annex to its brief in response (case file of evidence, folio 2932).

⁸⁰ Cf. Newspaper article "Ordenan detención de [P.], [A.] y otros por reducción", news of March 9, 2002 (case file of evidence, folio 2946).

⁸¹ Cf. Letter No. 22/02 issued by the president of the JEM on March 8, 2002 (case file of evidence, folio 149).

⁸² Letter No. 23/02 issued by the president of the JEM on March 12, 2002 (case file of evidence, folio 150).

time of the events, indicated that these requirements were not brought to the attention of the rest of the Jury.

70. Also, during the course of the proceedings before the JEM, the press disclosed that Prosecutor Nissen Pessolani had been investigating the alleged possession of a stolen vehicle by the president of the JEM since December 2002.⁸³

71. On the other hand, according to witness Talavera Alegre, the initiation of proceedings against Prosecutor Nissen Pessolani as a result of the complaint filed by C.P.O. was not brought to the attention of the rest of the Jury, which can be considered as another indication of the personal interest that the president of the JEM had in the case. Thus, the measure ordering the initiation of an impeachment against the prosecutor was only signed by the president of the JEM,⁸⁴ which is contrary to Article 11 of Law 1084, since the power to order an impeachment is an exclusive power of the Jury.⁸⁵ However, this irregularity was not denounced by the alleged victim in the appeal for reversal against this measure.⁸⁶ It was not until August 20, 2002, that Luis Talavera Alegre, then member of the Jury, filed a brief requesting the nullity of the impeachment due to the irregularity of its initial act.⁸⁷ However, taking into account that this brief was submitted more than five months after the event and that, after this measure, the other members of the Jury signed the orders, the JEM considered that there was a tacit confirmation of the act and that, consequently, there was no need to decree nullity of the proceeding.⁸⁸

72. This Court holds as a proven fact that the president of the JEM was in possession of a vehicle under investigation by Prosecutor Nissen and, moreover, had requested details of the investigations of the cases prior to hearing Prosecutor Nissen's disciplinary case before the JEM. In spite of this, he did not recuse himself from hearing the case against Mr. Nissen Pessolani. From elements of the case file, it is evident that he only abstained from signing judgment No. 02/03 of April 7, 2003⁸⁹; however, he participated in the other acts of the proceeding, including signing the measure initiating the process⁹⁰

⁸³ Cf. Newspaper article "[G.D.] investigated for holding a mau car" ABC newspaper, April 4, 2003 (case file of evidence, folio 2726). Newspaper article "[G.D.] accused of having a mau car" ABC newspaper, April 8, 2003 (case file of evidence, folio 2727). This article reports that "The president of the Chamber of Deputies and of the Jury for the Impeachment of Magistrates, [G.D], was charged yesterday for the possession of a luxurious "mau" vehicle by the prosecutor Alejandro Nissen, 10 minutes before Prosecutor was notified of his removal."

⁸⁴ Cf. Providence signed by the president of the JEM on March 18, 2002 (case file of evidence, folio 3020).

⁸⁵ Cf. Article 11 of Law no. 1084 "It is incumbent upon the Jury, in accordance with the procedure established in the present law, to try the members of the Courts of Appeal of any jurisdiction, other Judges and those who exercise the Public Prosecutor's Office as Agents and Prosecuting Attorneys." By way of contrast, the initial act of the second proceeding before the JEM against Mr. Nissen Pessolani was signed by five members of the JEM, including the then President O.G.D. (Interlocutory Order No. 12/03 issued by the Jury for the Impeachment of Magistrates of May 16, 2003 in the case "[L.H.A.] v. Ab. Alejandro Nissen, Agent Public Prosecutor in Criminal Matters of the Capital City s/Impeachment, case file of evidence, folios 4368 to 4370).

⁸⁶ Cf. Appeal filed by Alejandro Nissen Pessolani before the JEM on April 5, 2002 (case file of evidence, folios 3040 to 3046). This appeal only raised the problem that the economic solvency of the complainant had not been accredited.

⁸⁷ Cf. Brief submitted by Luis Talavera Alegre before the president of the JEM of Magistrates on August 20, 2002 (case file of evidence, folio 3406).

⁸⁸ Cf. Interlocutory Order No. 06/03 issued by the JEM on March 25, 2003 (case file of evidence, folios 3574 and 3575).

⁸⁹ Cf. Judgment No. 02/03 issued by the JEM on April 7, 2003 (case file of evidence, folio 3618).

⁹⁰ Cf. Providence issued by the president of the JEM on March 18, 2002 (case file of evidence, folio 3020).

and acting as president of the oral and public hearing,⁹¹ where he interrogated witnesses, among other activities. The foregoing constitutes a conflict of interest, in the sense that there was a situation within the private sphere of the president of the JEM, consisting in the fact that he was in possession of an apparently stolen vehicle, a fact that was being investigated by Prosecutor Nissen Pessolani, who in turn was being investigated by a jury that the former was a member of, presided over, and acted in the process with a view to his dismissal.

73. During the proceedings, the press also echoed questions about the impartiality of the members of the Jury,⁹² the political interests in the dismissal,⁹³ and the irregularity of the process carried out against Prosecutor Nissen Pessolani.⁹⁴ In an editorial published by the ABC newspaper on August 16, 2002, it was stated that the trials before the Impeachment Jury give no greater indication of impartiality and do not even try to keep up appearances.⁹⁵ It was also later revealed that another JEM member was being investigated for possession of a stolen vehicle.⁹⁶ In spite of the above, he did not recuse himself from hearing the case and participated in the entire process, including the issuance of the final judgment.

⁹¹ Cf. Minutes from public and oral hearing No. 200 made before the JEM on August 13, 2002 (case file of evidence, folio 3462).

⁹² Cf. Newspaper article "[G.D.] uses the Jury to protect the family [A.]" ABC newspaper, March 10, 2002 (case file of evidence, folio 2711). This note indicates that "Before 24 hours had passed since the arrest warrant against the notary [L.A.A.C.], for his alleged responsibility in an act of reduction, the president of the Jury for the Impeachment of Magistrates, [O.G.D.], sent an official letter to the prosecutor Alejandro Nissen to ask him to send him the prosecutor's file. The attitude of the judging body constitutes direct pressure against the prosecutor from the Public Prosecutor's Office." Newspaper article "Jury continues pressuring the prosecutor who accused the court clerk [A.]" ABC newspaper, March 13, 2002 (case file of evidence, folio 2713). Newspaper article "Jury made up of pro-Argaña members insists on removing Prosecutor Nissen," ABC newspaper, August 15, 2002 (case file of evidence, folios 2723 and 2928). Newspaper article "Jury tries to remove the prosecutor who ordered the arrest of the court clerk [A.]" ABC newspaper, July 31, 2002 (case file of evidence, folio 2725). Newspaper article "Nissen, the prosecutor who investigated several big wigs, removed from office" Noticias newspaper, April 8, 2003 (case file of evidence, folio 2729).

⁹³ Cf. Newspaper article "[L.] pushed for removal of the prosecutor investigating corrupt politicians" ABC newspaper, April 8, 2004 (case file of evidence, folio 6). This news item refers to the fact that Prosecutor Nissen received, on October 29, 2003, a draft resolution similar to the one drafted by the JEM to support his indictment; Newspaper article "Defendants challenge Nissen's removal to then nullify their cases" ABC newspaper, August 16, 2002 (case file of evidence, folios 2716 and 2950). Newspaper article "Political vengeance against Nissen Nissen", Última Hora Newspaper, April 8, 2003. This note indicates "Prosecutor was removed by the JEM for investigating politicians and parliamentarians" (case file of evidence, folio 2752).

⁹⁴ Cf. Newspaper article "Concern about the proceedings against Prosecutor Alejandro Nissen" ABC newspaper of September 19, 2002 (case file of evidence, folio 2758). This note refers to a communiqué from the Council for the Promotion of the National Integrity System (CISNI) in which it expressed its concern about the prosecution of Prosecutor Nissen. Newspaper article "Nissen proceedings have been irregular within the Jury from the very beginning," Judicial News, April 13, 2003 (case file of evidence, folio 5).

⁹⁵ Newspaper article "Dangerous role of the Jury in the Impeachment of Magistrates" ABC newspaper, August 16, 2002 (case file of evidence, folio 2948). This note was submitted by the State as an annex to its response.

⁹⁶ Cf. Newspaper article "Justice department defines whether there will be an oral and public trial against [C.K.]" ABC newspaper of October 31, 2004 (case file of evidence, folio 2747). This note indicates that C.K., who was a member of the JEM investigating Nissen Pessolani, was charged by another Prosecutor for the alleged commission of the crimes of reduction, production of non-authentic documents, and mediate production of public documents with false content, as a result of the possession of a "mau" Mercedes Benz automobile.

74. Prosecutor Nissen Pessolani filed a recusal motion against four members of the JEM, including its president.⁹⁷ However, the Jury rejected it "for lacking grounds and for having violated the modifying rule of article 10 of the Law that governs the Jury."⁹⁸ In fact, this rule limited the number of jurors who could be challenged to three.

75. Moreover, within the framework of the proceedings before the Inter-American Commission, the Director of Human Rights of the Public Prosecutor's Office submitted a note to the Ministry of Foreign Affairs, referring to the petition filed by Mr. Nissen Pessolani before the Commission. It was indicated that, after an examination of the file, "it can be easily deduced that Society's Representative, Attorney Alejandro Nissen Pessolani has been subject to persecution and political pressure by the Jury for the Impeachment of Magistrates during the entire process against him, with the intention of being removed from all the investigation cases under his charge, leading to his dismissal."⁹⁹

76. The joint analysis of the elements described above allows us to conclude that there were conflicts of interest capable of affecting the impartiality of at least two members of the Jury for the Impeachment of Magistrates and the existence of political pressures in the trial of Prosecutor Nissen Pessolani. Therefore, the Court considers that, based on the evidence in the file, the presumption of subjective impartiality is undermined. Likewise, these elements had an impact on the functioning of the Jury as a whole, thus affecting its functional impartiality. Consequently, this Court considers that, in the instant case, the right to an impartial tribunal, guaranteed by Article 8(1) of the American Convention, to the detriment of Alejandro Nissen Pessolani, was violated.

77. This violation of the guarantee of impartiality, due to its seriousness, implies that the entire proceedings carried out by the JEM against Mr. Nissen Pessolani are flawed and implied the arbitrariness of his dismissal. Therefore, this Court does not consider it necessary to analyze the other violations of due process and other related rights alleged by the representative and the Commission.

VI-2 RIGHT TO JUDICIAL PROTECTION¹⁰⁰

A. Motions by the parties and the Commission

78. The **Commission** recalled that Article 21 of Law no. 1084 established that the final rulings of the JEM are "not subject to appeal before another body. However, an appeal for clarification and reversal may be filed before the JEM itself. The Commission observed that, due to its nature and legal configuration, the appeal for clarification and reversal does not allow for a comprehensive review of the JEM's resolutions, and therefore does not constitute a suitable appeal to ensure the double compliance of a sanctioning judgment.

⁹⁷ Cf. Challenge letter submitted by Alejandro Nissen Pessolani to the president of the Impeachment Jury on May 31, 2002 (case file of evidence, folios 3297 to 3311).

⁹⁸ Interlocutory Order No. 10/02 of July 30, 2022 issued by the Jury for the Impeachment of Magistrates on the recusal motion filed by Attorney Alejandro Nissen Pessolani (case file of evidence, folio 3746).

⁹⁹ Note No. 116 issued by the Director of Human Rights of the Public Prosecutor's Office, addressed to the Ministry of Foreign Affairs on September 18, 2006 (case file of evidence, folios 2766 to 2768).

¹⁰⁰ Article 25(1) of the American Convention.

79. With respect to the action of unconstitutionality filed by the alleged victim against the JEM ruling, the Commission noted that, although there is no record that the judges who participated in the JEM were signatories, it is problematic that this appeal was resolved by the Plenary of the Supreme Court, which is also home to two members of the JEM. It also considered that the action of unconstitutionality "is a remedy that in principle does not allow a comprehensive review or examination of both factual or evidentiary aspects in relation to the decision to dismiss the alleged victim, limiting the scope of its jurisdiction to issues of due process, without in any case being a remedy that would have been effective to enable the protection of the rights of the alleged victim."

80. Thus, the Commission considered that the alleged victim did not have a remedy that would allow for a comprehensive review to challenge the decision to dismiss him, nor an effective judicial remedy to achieve the protection of the rights he considered to have been violated. Therefore, it concluded that the State is responsible for the violation of the rights established in Articles 8(2)(h) and 25(1) of the Convention in relation to Articles 1(1) and 2 thereof, to the detriment of Mr. Nissen Pessolani.

81. The **representative** argued that appeals for clarification and reversal provided for by Article 33 of Law No. 1084 are resolved by the Jury itself, so it does not respond to the right to appeal before a Judge or Superior Court. It also argued that the action of unconstitutionality provided for by the same article "was neither sufficient nor effective to reverse the serious defects of the procedure, since it did not allow for a comprehensive review of the ruling [...]." He added that the Members of the Court, when analyzing the action, did not realize that during the trial process "there were very serious violations of the defendant's constitutional guarantees," which demonstrates the inadequacy and ineffectiveness of the unconstitutionality action in this case as a remedy to obtain a comprehensive review of the jury's decision.

82. The **State** claimed that the alleged victim filed an appeal for clarification against the final judgment of the JEM, which was studied and resolved on April 22, 2003. In view of the dissatisfaction with the content of the judgment, it availed itself of his right to file an action of unconstitutionality against it, which was extended against the clarifying judgment. Therefore, it considered that the alleged victim did have the right to appeal the JEM's judgment.

83. Regarding the action of unconstitutionality, he clarified that the ministers of the Court who have ruled in the JEM do not participate in the judgment of the actions of unconstitutionality in which these resolutions are challenged. He also emphasized that the Supreme Court's judgment "addressed all the grievances expressed by Mr. Nissen Pessolani against the JEM's judgment and its clarification, having studied in detail whether said judgments were in accordance with the principle of consistency and other constitutional principles, and that these resolutions were indeed in accordance with the National Constitution, Article 17 of which reproduces the rights and guarantees of due process contained in the [American Convention]."

84. Regarding the right to an effective judicial remedy and the right to defense, the State considered that the alleged victim, in the framework of the application filed against him, had procedural remedies available and made use of them in the exercise of his right to defense. Thus, Mr. Nissen Pessolani filed an appeal for reversal, a motion for nullity, a complaint for the alleged crime of non-authentic document and a motion for recusal. Likewise, he indicated that during the process, Mr. Nissen Pessolani "was given the

opportunity to be heard, to hear evidence, to challenge magistrates, to bring actions and to file appeals, like any other magistrate who has been tried before the JEM [...].”

B. Considerations of the Court

85. Although the Commission stated that the lack of suitable and effective remedies implied, in the specific case, a violation of judicial guarantees and the right to appeal the judgment, this Court will analyze the allegations only from the perspective of Article 25(1) of the Convention, in view of the previous decision (*supra* para. 77). This Court has pointed out, in relation to Article 25(1) of the Convention, that said norm contemplates the obligation of the States Parties to guarantee, to all persons under their jurisdiction, effective judicial remedies to human rights violations.¹⁰¹ Such effectiveness implies that, in addition to the formal existence of remedies, they provide results or responses to violations of rights enshrined in the Convention, the Constitution, or the regulations.¹⁰² This implies that the remedy must be appropriate to address the violation and its application by the competent authority must be effective.¹⁰³ Likewise, this Court has established that an effective judicial remedy means that the analysis by the competent authority of a judicial recourse cannot be reduced to a mere formality; instead, it must examine the reasons invoked by the applicant and make express statements regarding the same.¹⁰⁴ The aforementioned does not imply that the effectiveness of a remedy is evaluated based on whether it produces a favorable outcome for the application.¹⁰⁵

86. Likewise, in accordance with its most recent case law, the Court has considered that the resolution notifying the disciplinary sanction adopted, as well as the resolution notifying the initiation of the investigation and the charges, must establish the remedies to which the interested party is entitled, the deadline for filing them, and the authority having jurisdiction to hear them. This is because access to judicial guarantees requires that individuals whose rights may be affected fully understand the available remedies and how to take action. The Court understands that sanctioning matters are generally technical, and if the sanctioned person is not aware of the available remedies, their lack of knowledge can become a barrier to accessing the means of appeal provided in domestic legislation.¹⁰⁶

87. From analyzing the arguments presented by the Commission and the representative, it is clear that the controversy in this case is related to the adequacy and effectiveness of the appeal for clarification and reversal, as well as the action of unconstitutionality. In effect, with respect to the rulings of the JEM, Article 21 paragraph (f) of Law 1084 states: "the final judgments, resolutions and orders issued by the Jury

¹⁰¹ Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 1, para. 91, and *Case of Mina Cuero v. Ecuador. Preliminary objections, Merits, Reparations, and costs*. Judgment of September 7, 2022. Series C No. 462, para. 116.

¹⁰² Cf. *Judicial Guarantees in States of Emergency (Arts. 27(2), 25, and 8 of the American Convention on Human Rights.)* Advisory opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 24, and *Case of Mina Cuero v. Ecuador, supra*, para. 116.

¹⁰³ Cf. *Advisory opinion OC-9/87, supra*, para. 24, and *Case of Mina Cuero v. Ecuador, supra*, para. 116.

¹⁰⁴ Cf. *Case of López Álvarez v. Honduras. Merits, Reparations, and costs*. Judgment of February 1, 2006. Series C No. 141, para. 96, and *Case of Habbal et al. v. Argentina, supra*, para. 108.

¹⁰⁵ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits, supra*, para. 67, and *Case of Mina Cuero v. Ecuador, supra*, para. 116.

¹⁰⁶ Cf. *Case of Mina Cuero v. Ecuador, supra*, para. 92.

are not subject to appeal before another body, except as provided in Article 33. Petitions for clarification and reversal are admitted, which will be resolved by the Jury within five days, by means of a well-founded order." For its part, Article 33 establishes: "against the final judgment of the Jury, in addition to the appeal for clarification and reversal, an action of unconstitutionality may be filed, which shall be resolved by the plenary of the Court." None of these remedies was specified in the JEM's ruling as a means of appealing the removal decision. However, both appeals were filed by Mr. Nissen Pessolani and were rejected.

88. The remedy of reconsideration¹⁰⁷ and clarification¹⁰⁸, by its nature and legal configuration, does not allow a comprehensive review of the resolutions of the JEM, nor does it allow allegations of violations of due process rights, so it cannot be considered a suitable remedy.

89. The unconstitutionality action was filed by Mr. Nissen Pessolani before the Supreme Court of Justice on April 22, 2003. In it, the alleged victim claimed that Judgment No. 02/03 of the JEM violated his right to defend himself in a trial, the guarantees of due process, the principle of equality before the law, the right to work and to job security, the division of powers, and the guarantee to be judged by competent, independent, and impartial Courts and Judges.¹⁰⁹ Likewise, by means of a brief filed on April 25, 2003, it broadened the action of unconstitutionality against the judgment that declared the appeal for clarification and reinstatement without merit. In the processing of this action of unconstitutionality, no judge who was a member of the JEM participated; likewise, the recusal presented by the alleged victim was processed and two judges who were disqualified from hearing the case were replaced. Finally, by means of Judgment No. 915, the Supreme Court of Justice rejected the action of unconstitutionality.¹¹⁰

90. The Supreme Court's judgment made a reference to the different arguments presented by Mr. Nissen Pessolani. In effect, it referred in general terms to the alleged violations of the right to defense, the principle of congruence and the alleged arbitrariness of the latter. However, this decision did not address the allegations of partiality of the president and other members of the JEM and, thus, did not allow to remedy the evident violation of due process previously examined by the Court (*supra* para. 76).

91. Thus, taking into account the violation of the guarantee of an impartial judge, as stated in the previous chapter (*supra* paras. 64 to 76), the Court considers that Mr. Nissen Pessolani did not have an effective judicial remedy that would allow for the review of the judgment by which he was removed from office. Indeed, an effective appeal cannot be reduced to a mere formality, but must examine the reasons invoked by the applicant and expressly state them. Thus, this Court considers that, although the

¹⁰⁷ According to Article 390 of the Code of Civil Procedure, "the remedy of reconsideration only proceeds against orders of mere formality and against interlocutory orders that do not cause irreparable harm, so that the same judge or court that issued them may revoke them by a ruling to the contrary."

¹⁰⁸ According to Article 387 of the Code of Civil Procedure, the purpose of this appeal is that the judge or court "a) corrects any material error; b) clarifies any obscure expression, without altering the substance of the decision; and c) makes up for any omission in which it may have incurred on some of the claims deduced and discussed in the litigation." It is clearly stated that "in no case shall the substance of the decision be altered."

¹⁰⁹ Cf. Action of unconstitutionality filed by Alejandro Nissen Pessolani before the Supreme Court of Justice against Judgment No. 02/03 of the JEM on April 22, 2004 (case file of evidence, folios 86 to 119).

¹¹⁰ Cf. Judgment No. 915 issued by the Supreme Court of Justice on June 16, 2004 (case file of evidence, folios 126 to 130).

unconstitutionality action was designed to protect constitutional rights, in this case, the failure to consider all of the allegations presented by the appellant, especially regarding the alleged violations of due process, prevented the unconstitutionality action from being an effective remedy to protect the rights of the alleged victim. Therefore, it is concluded that the remedy of unconstitutionality, in the specific case, was not effective and, therefore, Article 25 (1) of the Convention was violated in relation to Article 1(1) thereof, to the detriment of Alejandro Nissen Pessolani.

VI-3 POLITICAL RIGHTS¹¹¹

A. Motions by the parties and the Commission

92. The **Commission** recalled that, in the instant case, the alleged victim was removed from his position as a prosecutor in a proceeding in which, according to its arguments, "violations of both due process and the principle of legality were committed." In such circumstances, the Commission concluded that the State also violated the right to equal access to public office by arbitrarily affecting administrators of justice remaining in their positions.

93. The **representative** claimed that, subsequent to his impeachment, in 2005, Mr. Nissen Pessolani entered the competition for the position of State Prosecutor General, but that despite having been shortlisted after an initial evaluation, his name was eliminated from the list of candidates. He argued that the media attributed this to his dismissal by the JEM and that although Mr. Nissen Pessolani asked the president of the Council of the Magistracy for explanations regarding his exclusion from the list of candidates, he never received an answer.

94. The **State** argued that the dismissal of Mr. Nissen Pessolani was not arbitrary, but was the result of a reliable finding of poor performance of his duties. It also claimed that Mr. Nissen Pessolani was subjected to a disciplinary process in which the rights of defense and due process were respected. Therefore, it considered that the political rights of the alleged victim were not violated.

B. Considerations of the Court

95. Article 23(1)(c) of the Convention establishes the right to access public service under general conditions of equality. In this regard, this Court has interpreted that the access in equal conditions would constitute an insufficient guarantee if it were not accompanied by the effective protection of remaining in the position that had been achieved.¹¹² This implies that procedures for appointment, promotion, suspension and dismissal of public officers must be objective and reasonable, that is, they must respect the applicable guarantees of due process.¹¹³

¹¹¹ Article 23 of the American Convention.

¹¹² Cf. *Case of Reverón Trujillo v. Venezuela. Preliminary objections, Merits, Reparations, and costs*. Judgment of June 30, 2009. Series C No. 197, para. 138, and *Case of Mina Cuero v. Ecuador, supra*, para. 107.

¹¹³ Cf. *Case of Moya Solís v. Peru. Preliminary objections, Merits, Reparations, and Costs*. Judgment of June 3, 2021. Series C No. 425, para. 108, and *Case of Mina Cuero v. Ecuador, supra*, para. 107.

96. This Court has repeatedly addressed this right in relation to the dismissal processes of judges¹¹⁴ and prosecutors,¹¹⁵ and has considered that it is related to the guarantee of stability or irremovability in the position.¹¹⁶ Thus, the respect and guarantee of this right is fulfilled when the criteria and procedures for appointment, promotion, suspension and dismissal of judges and prosecutors are reasonable and objective, and exercise of said procedures does not discriminate against individuals.¹¹⁷

97. Having established the foregoing, the Court finds that, as evidenced in the instant case (*above* paras. 76 and 91), the removal of Mr. Nissen Pessolani from his position as Prosecutor through the trial by the JEM disregarded the guarantees of due process, which arbitrarily affected his remaining in his position as Prosecutor. Consequently, this Court considers that the State unduly affected his right to remain in office under conditions of equality, in violation of the right enshrined in Article 23(1)(c) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Mr. Alejandro Nissen Pessolani.

98. Regarding the allegations presented by the representative on the alleged violation of the alleged victim's rights when he was eliminated from the lists of candidates for the position of State Prosecutor General in 2005, this Court notes that they refer to facts that are not part of the factual framework defined by the Commission in its Merits Report, and therefore, it will not rule on them.

VI-4 RIGHT TO JOB SECURITY¹¹⁸

99. The Court notes that neither the Commission nor the representative expressly alleged a violation of Article 26 of the Convention in the instant case. However, by virtue of the principle *iura novit curia*,¹¹⁹ the Court will rule on the violation of the right to job security to the detriment of the alleged victim.

100. The Court finds that, to analyze the violation of the right to job security, it is necessary to consider the position of simultaneity with the violations of the other rights as described above. In this regard, the Court has recognized that civil and political rights, as well as economic, social, cultural and environmental rights, are inseparable, so that their recognition and enjoyment are unfailingly guided by the principles of universality,

¹¹⁴ Cf. *Inter alia*, *Case of Reverón Trujillo v. Venezuela*, *supra*, para. 138; *Case of Colindres Schonenberg v. El Salvador*, *supra*, para. 93; *Case of Moya Solís v. Peru*, *supra*, para. 109, and *Case of Cuyo Lavy et al. v. Peru*, *supra*, para. 160.

¹¹⁵ Cf. *Case of Martínez Esquivia v. Colombia*, *supra*, para. 115; *Case of Casa Nina v. Peru*, *supra*, para. 97; *Case of Moya Solís v. Peru*, *supra*, para. 109, and *Case of Cuyo Lavy et al. v. Peru*, *supra*, para. 160.

¹¹⁶ It should be recalled that in the case of *Martínez Esquivia v. Colombia* this Court concluded that the guarantee of job security and irremovability of judges, aimed at safeguarding their independence, is applicable to prosecutors due to the nature of the functions they perform. Cf. *Case of Martínez Esquivia v. Colombia*, *supra*, paras. 95 and 96. See also, *Case of Casa Nina v. Peru*, *supra*, para. 69; *Case of Moya Solís v. Peru*, *supra*, para. 109, and *Case of Cuyo Lavy et al. v. Peru*, *supra*, para. 160.

¹¹⁷ Cf. *Case of Reverón Trujillo v. Venezuela*, *supra*, para. 138, and *Case of Cuyo Lavy et al. v. Peru*, *supra*, para. 160.

¹¹⁸ Article 26 of the Convention.

¹¹⁹ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*. Judgment of July 29, 1988. Series C No. 4, para. 163, and *Case of Mina Cuero v. Ecuador*, *supra*, para. 110.

indivisibility, interdependence and interrelation.¹²⁰ This indicates that both categories of rights should be understood integrally and indivisibly as human rights, without any hierarchy between them, enforceable in all cases before the competent authorities.¹²¹

101. The Court recalls that the right to work has been recognized and protected through Article 26 of the Convention in different precedents.¹²² Regarding the specific labor rights protected by the aforementioned Article 26, the Court has pointed out that the terms of this precept indicate that they are those rights derived from the economic, social, educational, scientific, and cultural standards contained in the Charter of the Organization of American States (hereinafter "OAS Charter.")¹²³ In this sense, Articles 45(b) and (c)¹²⁴, 46¹²⁵ and 34(g)¹²⁶ of the Charter establish rules that refer to the right to work. Additionally, the Court has indicated in its Advisory Opinion OC-10/89, that the Member States have understood that the American Declaration contains and defines the fundamental human rights referred to in the Charter. Thus the Charter of the Organization cannot be interpreted and applied as far as human rights are concerned without relating its norms, consistent with the practice of the organs of the OAS, to the

¹²⁰ Cf. *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations, and costs*. Judgment of August 31, 2017. Series C No. 340, paras. 141, and *Case of Guevara Díaz v. Costa Rica. Merits, Reparations, and costs*. Judgment of June 22, 2022. Series C No. 453, paras. 56.

¹²¹ Cf. *Case of Acevedo-Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller") v. Peru. Preliminary objections, Merits, Reparations, and costs*. Judgment of July 1, 2009. Series C No. 198, para. 101; *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objections, Merits, Reparations, and costs*. Judgment of August 23, 2018. Series C No. 359, para. 85.

¹²² Cf. *Case of Lagos del Campo v. Peru, supra*, paras. 142 and 145. In a similar vein: *Case of Dismissed Employees of Petroperú et al. v. Peru, supra*, paras. 142 and 143; *Case of San Miguel Sosa et al. v. Venezuela. Merits, Reparations, and Costs*. Judgment of February 8, 2018. Series C No. 348, para. 220; *Case of Spoltore v. Argentina. Preliminary objections, Merits, Reparations, and costs*. Judgment of June 9, 2020. Series C No. 404, para. 84; *Case of the Employees of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brasil. Preliminary objections, Merits, Reparations, and Costs*. Judgment of July 15, 2020. Series C No. 407, para. 155; *Case of Casa Nina v. Peru, supra*, para. 104, and *Case of Former Employees of the Judiciary v. Guatemala, supra*, para. 128, *Case of Pavez Pavez v. Chile. Merits, Reparations, and costs*. Judgment of February 4, 2022. Series C No. 449, para. *Case of Mina Cuero v. Ecuador, supra*, para. 135.

¹²³ Cf. *Case of Lagos del Campo v. Peru, supra*, para. 143, and *Case of Mina Cuero v. Ecuador, supra*, para. 128.

¹²⁴ Article 45 of the OAS Charter – The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms: [...] (b) Work is a right and a social duty, it gives dignity to the one who performs it, and it should be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working; (c) Employers and workers, both rural and urban, have the right to associate themselves freely for the defense and promotion of their interests, including the right to collective bargaining and the workers' right to strike, and recognition of the juridical personality of associations and the protection of their freedom and independence, all in accordance with applicable laws [...].

¹²⁵ Article 46 of the OAS Charter. – The Member States recognize that, in order to facilitate the process of Latin American regional integration, it is necessary to harmonize the social legislation of the developing countries, especially in the labor and social security fields, so that the rights of the workers shall be equally protected, and they agree to make the greatest efforts possible to achieve this goal."

¹²⁶ Article 34(g) of the OAS Charter – The Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development. To achieve them, they likewise agree to depopinion their utmost efforts to accomplishing the following basic goals: To achieve these objectives, they also agree to dedicate their utmost efforts to the attainment of the following basic goals: [...] (g) Fair wages, employment opportunities, and acceptable working conditions for all.

corresponding provisions of the Declaration.¹²⁷ In this regard, Article XIV of the aforementioned Declaration provides that "every person has the right to work, under proper conditions, and to follow his vocation freely [...]." Likewise, Article 29(d) of the American Convention expressly provides that "[n]o provision of this Convention may be interpreted as: [...] (d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have." Furthermore, the Court indicated that the *corpus iuris international*¹²⁸ establishes the referred right.¹²⁹

102. Additionally, the Court has clarified that job security does not mean remaining in the position with no limitations, but rather, refers to respect of this right, among other measures, by granting due guarantees of protection to the worker so that if he or she is dismissed, it be with justification, which means that the employer must provide sufficient reasons to impose this sanction with the due guarantees, and that the worker may appeal this decision before the domestic authorities, who must verify that the justification given is not arbitrary or unlawful.¹³⁰ Likewise, the Court has indicated in the *Case of San Miguel Sosa et al. v. Venezuela* that the State fails to fulfill its obligation to guarantee the right to work and, consequently, job security, when it does not protect its state officials from arbitrary terminations of their employment relationships.¹³¹

103. As has been referred to in this Judgment, when performing the duties of administrators of justice, prosecutors must enjoy job security guarantees as a basic condition of their independence to properly fulfill their duties (*above* para. 58). In the instant case, the Court concluded that the JEM's decision to remove then Prosecutor Nissen Pessolani was arbitrary, as it did not comply with the guarantees of due process, which also constituted a violation of the right to job security, as part of the right to work, which as an employee of the Public Prosecutor's Office of Paraguay, he was entitled to during the time he held the position.

104. In accordance with the foregoing, the State is responsible for the violation of the right to job security, as recognized in Article 26 of the Convention.

VII REPARATIONS

105. Based on the Article 63(1) of the American Convention, the Court has indicated that every violation of an international obligation which results in harm creates a duty to make adequate reparation, and that this provision includes a customary norm that

¹²⁷ Cf. *Interpretation of the American Declaration of the Rights and Duties of Man in the Framework of Article 64 of the American Convention on Human Rights*. Advisory opinion OC-10/89 of July 14, 1989. Series A No. 10, para. 43, and *Case of Pavez Pavez v. Chile*, *supra*, para. 87.

¹²⁸ For example: Article 6 of the International Covenant on Economic, Social, and Cultural Rights, Article 23 of the Universal Declaration of Human Rights, Articles 7 and 8 of the Social Charter of the Americas, Articles 6 and 7 of the Additional Protocol to the American Convention on Economic, Social, and Cultural Rights, Article 11 of the Convention on the Elimination of All Forms of Discrimination against Women, Article 32.1 of the Convention on the Rights of the Child, as well as Article 1 of the European Social Charter and Article 15 of the African Charter on Human and Peoples' Rights.

¹²⁹ Cf. *Case of Lagos del Campo v. Peru*, *supra*, para. 145, and *Case of Pavez Pavez v. Chile*, *supra*, para. 87.

¹³⁰ Cf. *Case of Lagos del Campo v. Peru*, *supra*, para. 150, and *Case of Mina Cuero v. Ecuador*, *supra*, para. 134.

¹³¹ Cf. *Case of San Miguel Sosa et al. v. Venezuela*, *supra*, para. 221. See also, *Case of Mina Cuero v. Ecuador*, *supra*, para. 134.

constitutes one of the main principles of contemporary International Law in relation to a State's liability.¹³²

106. In this regard, reparation of harm brought about by the violation of an international obligation consists in full restitution (*restitutio in integrum*), which includes the restoration of the prior situation. If this is not feasible, as occurs in most cases of human rights violations, this Court must rule that the injured party be ensured the enjoyment of his right or freedom that was violated.¹³³ Therefore, the Court has considered the need to provide different types of reparation so as to fully redress the damages, therefore in addition to pecuniary measures, other measures such as satisfaction, restitution, rehabilitation, and guarantees of non-repetition have special relevance due to the gravity of the infringements and collective nature of the damage caused.¹³⁴

107. This Court has established that reparations must have a causal nexus with the facts of the case, the alleged violations, the proven damages, as well as with the measures requested to repair the resulting damages. Therefore, the Court must observe such coincidence in order to make a judgment in accordance with the law.¹³⁵

108. Taking into account the violations of the American Convention declared in the preceding chapters, in light of the criteria established in the Court's case law in relation to the scope and content of the obligation to make reparations,¹³⁶ the Court will analyze the claims presented by the Commission and the representatives, as well as the arguments of the State in this regard, with the aim of subsequently implementing measures to remedy such violations.

A. Injured party

109. Pursuant to Article 63(1) of the Convention, this Court considers the injured party to be anyone who has been declared a victim of the violation of any right in this Judgment. Therefore, this Court considers Alejandro Nissen Pessolani to be the "injured party," who, as a victim of the violations declared in Chapter VI, will be the beneficiary of the reparations ordered by the Court.

B. Measures of restitution

110. The **Commission** requested the reinstatement of Mr. Nissen Pessolani "in a position similar to the one he held with the same remuneration, social benefits, and rank comparable to the one he would have held today if he had not been dismissed." In the event that the victim does not wish to be reincorporated or that there are objective reasons that prevent this reincorporation, the Commission requested that compensation be ordered to be paid separately from the reparations for pecuniary and moral damages.

¹³² Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and Costs*. Judgment of July 21, 1989. Series C No. 7, para. 25, and *Case of Cortez Espinoza v. Ecuador. Preliminary objections, Merits, Reparations, and Costs*. Judgment of October 18, 2022. Series C No. 468, para. 164.

¹³³ Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs, supra*, para. 26, and *Case of Cortez Espinoza v. Ecuador, supra*, para. 165.

¹³⁴ Cf. *Case of the "Las Dos Erres" Massacre v. Guatemala. Preliminary objection, Merits, Reparations and costs*. Judgment of November 24, 2009. Series C No. 211, para. 226, y *Case of Cortez Espinoza v. Ecuador, supra*, para. 165.

¹³⁵ Cf. *Case of Ticona Estrada v. Bolivia. Merits, Reparations, and Costs*. Judgment of November 27, 2008. Series C No. 191, para. 110, and *Case of Cortez Espinoza v. Ecuador, supra*, para. 166.

¹³⁶ Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs, supra*, paras. 25 and 26, and *Case of Cortez Espinoza v. Ecuador, supra*, para. 167.

111. The **representative** requested "the exclusion from all background records of Mr. [...] Nissen Pessolani, information related to his having been dismissed for poor performance of his duties." In the final written arguments, he indicated that "given the current impossibility of restoring Mr. Nissen to his functions as Prosecutor, [it] requested the fixing of an alternative compensation [...] of US\$ 100,000 (one hundred thousand US dollars)."

112. The **State**, in its answer and in its final written arguments, argued that "Mr. Nissen Pessolani has not requested his reinstatement," so that "even if the [J]udgment were favorable to Mr. Nissen Pessolani, this would not be a consequence to be considered." Likewise, with respect to the request of the alleged victim's representation to exclude Mr. Nissen Pessolani's sanction from all background records, he argued that "these requests exceed the dimensions of the case."

113. According to this Court's case law, in the event of an arbitrary removal of a judge, he/she must be reinstated. Indeed, it is considered that immediate reinstatement in the event of arbitrary removal constitutes the least harmful measure to satisfy both the needs of good service and the guarantee of irremovability inherent to judicial independence.¹³⁷ This measure of reparation also applies to prosecutors when they are removed from their post in violation of judicial guarantees based on the considerations previously indicated in this judgment.¹³⁸ However, it should be taken into account that the victim did not request his reinstatement, but rather that compensation be fixed. From this account, the State shall pay Mr. Nissen Pessolani an indemnity that this Court fixes, in equity, at USD\$30,000.00 (thirty thousand United States dollars). This sum shall be paid to Mr. Nissen Pessolani within a maximum period of one year from the date of notification of this Judgment.

114. Regarding the request to exclude the information that he had been dismissed for poor performance of his duties from all of Mr. Nissen Pessolani's background records, this Court determined that the sanction, in violation of due process, was arbitrary. Therefore, the Court considers that the State must adopt, within six months, all judicial, administrative, and any other measures to remove all mention of Mr. Nissen Pessolani's conviction from any existing public record.

C. Measures of satisfaction

115. The **Court** orders, as it has done in other cases,¹³⁹ that the State publish, within six months of notification of this Judgment, in a legible and appropriate font size: (a) the official summary of this Judgment prepared by the Court, once only, in the Official Gazette; (b) the official summary of this Judgment prepared by the Court, once only, in a media outlet of wide national circulation; and (c) this Judgment in its entirety, available for a period of one year, on the websites of the Jury for the Impeachment of Magistrates and of the Public Ministry in a manner accessible to the public and from the home page of the website. The State must inform this Court immediately once it proceeds to make

¹³⁷ Cf. *Case of Reverón Trujillo v. Venezuela*, *supra*, para. 122, and *Case of Martínez Esquivia v. Colombia*, *supra*, para. 154.

¹³⁸ Cf. *Martínez Esquivia v. Colombia*, *supra*, para. 154.

¹³⁹ Cf. *Case of Cantoral Benavides v. Peru. Reparations and costs*. Judgment of December 3, 2001. Series C No. 88, para. 79, and *Case of Cortez Espinoza v. Ecuador*, *supra*, para. 169.

each of the publications ordered, regardless of the one-year term it has to present its first has been provided indicated in operative paragraph of this Judgment.

D. Other measures requested

116. The **Commission** requested that the JEM be trained "in relation to the guarantee of defense, the principle of legality, and freedom of expression that are relevant in the exercise of its disciplinary function." It also requested "[a]dopting the legislative, administrative or any other measures necessary to ensure that disciplinary proceedings against prosecutors are compatible with the due process standards of administrators of justice." Specifically, it requested that measures be taken "so that the processes guarantee the right to appeal the sanctioning ruling and judicial protection."

117. In its concluding observations, it considered that, taking into account the nature of the case, the Court could "reflect on the imposition of punitive damages in the face of state behavior that manifestly impairs essential elements of democratic constitutionalism such as the independence of judges and prosecutors.

118. The **representative** requested both in its Brief of Requests and Arguments and in its closing arguments, to "[i]mplement the recommendations of an institutional nature included by the Commission in its Merits Report, in order to avoid the repetition of [the] facts."

119. The **State** declared that "the JEM regulates and provides training to its officials on a daily basis." It also considered that the claim to award punitive damages is not only contrary to the case law of the Court, but also to public international law.

120. With regard to the requests for training, the **Court** notes that the violations of rights declared in this Judgment did not derive from deficiencies in the training or professionalization of those who are members of public authorities or administrators of justice. Consequently, such measures do not have a causal nexus with the facts of the case, and therefore it is not appropriate to grant the request.

121. The Court also recalls that in the instant case, the State's failure to adopt provisions of domestic law was not established. Therefore, the Court does not consider it pertinent to order general measures for the modification of the internal regulations.

122. With respect to punitive damages, the Court reiterates the compensatory nature of the indemnities, whose nature and amount depend on the damage caused, and therefore cannot mean either enrichment or impoverishment for the victims or their successors (*infra* paragraph 126). Likewise, it has rejected claims for compensations in amounts meant to deter or to serve as an example.¹⁴⁰ Therefore, the Court considers these claims to be inadmissible.

E. Compensation

¹⁴⁰ Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and Costs*, *supra*, para. 38, and *Case of Bayarri v. Argentina. Preliminary objection, merits, reparations, and costs*. Judgment of October 30, 2008. Series C No. 187, para. 161.

123. The **Committee** requested "providing reparation for the consequences of the violations established in the [Merits Report] including both pecuniary and nonpecuniary damages."

124. The **representative** requested the payment of "the sum of USD\$ 4,443,048.00 [...] in the form of economic reparation, including lost wages for 17 years, labor indemnity, compensation for damages, interest and costs." In his final written pleadings, he requested as compensation for pecuniary damages "the payment of his lost wages, for 17 years, [...] if possible, including interest for 17 years." In turn, in said document he requested an indemnity of "US\$ 400,000 (four hundred thousand United States dollars), as compensation for damage to Mr. Nissen Pessolani's Life Project," as well as US\$ 50,000 (fifty thousand United States dollars) as "compensation for moral damages for the victim's suffering, with a strong impact on his family."

125. The **State** alleged both in its response and in its closing arguments, that the compensation requested by Mr. Nissen Pessolani would imply "unjustly enriching himself at the expense of the Paraguayan people," and that "he would not have been able to save that amount even if he had continued uninterruptedly in office." It also indicated that any calculation of compensation should be made in the country's legal tender. He argued that Mr. Nissen Pessolani "did not set forth in a reasoned and argued manner" the calculation of his compensation. He further alleged "that the additional and complementary remunerations [...] are temporary benefits, optional and inherent to the position, [...] and] corresponded to him only while he held the position of fiscal agent." He also questioned that "it applies a usurious interest rate [...] totally alien to the Paraguayan financial market and to the practice of [the Inter-American Court]." He added that from the moment he left the Public Prosecutor's Office, Mr. Nissen Pessolani "has dedicated himself to his professional practice and has not been unemployed," stating that "he has been hired throughout all these years as a lawyer and advisor to different State agencies." Regarding consequential damages, it considered that the claim "lacks, in general, documentary support and several items lack a direct causal nexus with the disputed facts." In relation to non-pecuniary damage, he noted that "there is nothing in the [Merits Report] or in the [Statement of Claims and Arguments] to assert that Mr. Nissen Pessolani suffered any injury to his name or honor other than what emerges from the impeachment process."

E.1. Pecuniary damage

126. In its case law, this **Court** has established that pecuniary damages involve the loss or detriment to the victim's income, the expenses incurred as a result of the facts, and the monetary consequences that have a causal nexus with the facts of the case.¹⁴¹ Likewise, case law has reiterated the compensatory nature of the indemnities, whose nature and amount depend on the damage caused. This means that they are not supposed to enrich or impoverish the victim or his heirs.¹⁴² Regarding non-pecuniary damage, the Court has established that it may include "both the suffering and distress caused to the direct victims and their next of kin, and the impairment of values that are

¹⁴¹ Cf. *Case of Bámaca Velásquez v. Guatemala. Reparations and Costs*. Judgment of February 22, 2002. Series C No. 91, para. 43, and *Case of Cortez Espinoza v. Interlocutory Order No. 181*.

¹⁴² Cf. *Case of the "White Van" (Paniagua-Morales et al.) v. Guatemala. Reparations and Costs*. Judgment of May 25, 2001. Series C No. 76, para. 79, and *Case of Mina Cuero v. Ecuador, supra*, para. 158.

highly significant to them, as well as other sufferings that cannot be assessed in financial terms."¹⁴³

127. Throughout the international proceedings, the representative presented several claims for compensation for pecuniary damages, including different ways of calculating lost wages, with amounts ranging from USD\$397,257 to USD\$4,443,048. This Court determined that the dismissal of Mr. Nissen Pessolani was arbitrary, for which he is entitled to back wages. According to the representative and the evidence presented by the State, Mr. Nissen Pessolani's monthly salary as a prosecutor was, at the time of his dismissal, 11,503,600 guaraníes (eleven million five hundred and three thousand six hundred guaraníes).¹⁴⁴ It was proven that Mr. Pessolani was dismissed on June 16, 2004. However, according to the victim's wife's statement during the public hearing, after his dismissal "he worked at the Ministry of Public Works, where he created an Internal Affairs Unit. Then he worked at ESSAP for a few months and from there he was commissioned to an Anticorruption Secretariat and today he works for SENATUR." Likewise, the State, in its annexes to the Answer, submitted a report from the General Directorate of Legal Affairs of the Civil Service Secretariat, which established the functions, categories, positions and remuneration received by Mr. Nissen Pessolani in the public sector from 2003 to date. Thus, these periods during which Mr. Nissen Pessolani was gainfully employed in the public sector should be excluded for the calculation of the back pay. Therefore, only the periods between his dismissal (June 16, 2004) and the date of issuance of this Judgment will be taken into account, discounting the amounts he has already received from the State for work performed in the Public Sector.¹⁴⁵ Thus, the payment of the sum of USD\$ 243,000.00 (two hundred and forty-three thousand United States dollars) is ordered for pecuniary damages.

E.2. Damage to the life project

128. Regarding the amounts requested for damages to the life project, this Court emphasizes that the arguments justifying the payment of this item were presented for the first time in the final arguments brief, and are therefore untimely.

¹⁴³ Cf. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and Costs*. Judgment of May 26, 2001. Series C No. 77, para. 84, and *Case of Mina Cuero v. Ecuador, supra*, para. 163.

¹⁴⁴ According to the allegations of the representative and the documents presented by the State itself, Mr. Nissen Pessolani received a monthly salary of 7,878,600 guaraníes and 3,625,000 guaraníes per month in representation expenses. (Cf. Report DGAJ No. 114/2021 of the General Directorate of Legal Affairs, dated September 20, 2021, case file of evidence, folios 4159 to 4169).

¹⁴⁵ According to the DGAJ Report No. 114/2021 of the General Directorate of Legal Affairs, dated September 20, 2021 (case file of evidence, folios 4159 to 4169), Mr. Pessolani has received the following amounts for salaries or compensations in the public sector:

- Ministry of Public Works and Communications: 164,851,200 guaraníes during 2008, 2010, 2011 and 2012.
- Presidency of the Republic: 81,644,920 guaraníes for the years 2019 to 2021.
- Ministry of Public Works and Communications: 296,792,400 guaraníes for the years 2010 to 2011.
- ESSAP: 60,011,024 guaraníes corresponding to the years 2012 to 2103.
- National Secretariat of Tourism: 236,770,268 guaraníes corresponding to the years 2019 to 2021.

For a total of 840.069.812 guaraníes. Thus, if we subtract these amounts paid by the State from Mr. Nissen Pessolani's claim for payment of back wages (for 2,582,170,600 guaraníes), we are left with the sum of 1,742,100,788 guaraníes, which would correspond to USD 243,000.00 (two hundred and forty-three thousand United States dollars).

E.3. Non-pecuniary damages

129. With respect to non-pecuniary damage, considering the circumstances of the instant case and the violations committed, the Court goes on to establish, in equity, the compensation for non-pecuniary damage in favor of the victim. Accordingly, the Court orders, in equity, the payment of the sum of US\$ 15,000.00 (fifteen thousand United States dollars) for non-pecuniary damages in favor of Mr. Nissen Pessolani.

F. Costs and Expenses

130. The **Commission** did not refer to this point.

131. The **representative** included this item in the calculation of the monetary compensation requested. However, the separate calculation of the amount of professional fees was estimated at USD\$211,574.00 (two hundred and eleven thousand five hundred and seventy-four United States dollars) and that of "costs of previous lawsuits" at USD\$6,154.00 (six thousand one hundred and fifty-four United States dollars). In the final written arguments he requested that the amount be established in equity.

132. The **State** claimed that in the calculation "no estimate is made, [nor] is there any accompanying proof or supporting documents." Both in its response and in its final arguments, it argued that "it has no international responsibility in this case and therefore does not accept that it should pay the costs of this international process, nor of the national processes." It added that Mr. Nissen Pessolani himself has indicated that his representatives "have not charged him a single cent in professional fees," and that one of them is deceased, so that "Mr. Nissen Pessolani could not claim, in his personal capacity, the corresponding fees in his favor." Finally, it stated that the representatives "have not had a relevant or continuous participation," nor "has Mr. Nissen Pessolani attached any document that would allow us to presume that he has incurred in the hiring of lawyers or expenses in the previous lawsuits." It is for these reasons that it considered that the amount requested "does not conform to a reasonable request for reparation, for which reason it should be dismissed in its entirety."

133. The **Court** recalls that, according to its case law, costs and expenses are part of the concept of reparation, as the activity carried out by the victims in their search for justice, both nationally and internationally, involves expenditures that must be compensated when the international responsibility of the State is declared through a condemnatory judgment. It is up to the Court to prudently assess the scope of the reimbursement of costs and expenses, which includes the expenses incurred before the authorities of the domestic jurisdiction, as well as those incurred in the course of the proceedings before the Inter-American System, taking into account the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment can be made based on the principle of equity and taking into account the expenses indicated by the parties, as long as the quantum is reasonable.¹⁴⁶

134. This Court has stated that "the claims of the victims or their representatives regarding costs and expenses, and the evidence supporting them, must be presented to the Court at the earliest procedural opportunity granted to them, that is, in the written

¹⁴⁶ Cf. *Case of Garrido and Baigorria v. Argentina. Reparations and Costs*. Judgment of August 27, 1998. Series C No. 39, paras. *Case of Mina Cuero v. Ecuador, supra*, para. 166.

submissions and arguments, without prejudice to the fact that such claims may be updated at a later time, in accordance with the new costs and expenses incurred during the proceedings before this Court."¹⁴⁷ In this regard, the Court considers that it is not sufficient to remit evidentiary documents; rather the parties must provide the reasoning that relates the evidence to the fact under consideration, and, in the case of alleged financial disbursements, the items and their justification must be described clearly.¹⁴⁸

135. Regarding costs and expenses in favor of the victim, the Court notes that the representative did not provide evidence, and the corresponding argumentation does not allow for a complete justification of the amounts requested. However, it considers that the international processing of the case involved expenses for the victim and his representative, and therefore determines that the State should pay, in equity, to Mr. Nissen Pessolani the sum of USD\$15,000.00 (fifteen thousand United States dollars).

136. It should be added that, during the monitoring of compliance with this Judgment, the Court may order the State to reimburse the victims or their representatives for reasonable and properly proven expenditures.¹⁴⁹

G. Reimbursement of expenses to the Victims' Legal Assistance Fund

137. In 2008, the General Assembly of the Organization of American States created the Legal Assistance Fund of the Inter-American Human Rights System, with the "purpose [of] facilitating access to the inter-American human rights system for those individuals who currently do not have the necessary resources to bring their case to the system."¹⁵⁰

138. In a note from the Secretariat of the Court of September 26, 2022, a report was sent to the State on the expenditure made in application of the Victims' Legal Assistance Fund for this case, which amounted to the sum of USD\$5,269.12 (five thousand two hundred and sixty-nine United States Dollars and twelve cents) and, pursuant to Article 5 of the Court's Rules of Procedure on the operation of the Fund, a period of time was granted for Bolivia to submit any observations it deemed pertinent.

139. The **State** submitted its observations in writing dated October 7, 2022 in which it requested the Court "to make a prudent assessment of the need or not for such reimbursement to be paid by the State, taking into account the particularities of the case."

140. In light of Article 5 of the Rules of Procedure of the Fund, due to the violations declared in this judgment and that the requirements for eligibility for the Fund were met, the Court orders that the State reimburse the Fund for the amount of USD\$5,269.12 (five thousand two hundred and sixty-nine United States Dollars and twelve cents) for

¹⁴⁷ Cf. *Case of Garrido and Baigorria v. Argentina. Reparations and Costs*, *supra*, para. 79, and *Case of Mina Cuero v. Ecuador*, *supra*, para. 167.

¹⁴⁸ Cf. *Case of Chaparro Álvarez and Lapo Ñíguez v. Ecuador. Preliminary objections, merits, reparations, and costs*. Judgment of November 21, 2007. Series C No. 170, para. 277, and *Case of Mina Cuero v. Ecuador*, *supra*, para. 167.

¹⁴⁹ Cf. *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia. Merits, Reparations, and Costs*. Judgment of September 1, 2010. Series C No. 217, para. 291, and *Case of Cortez Espinoza v. Ecuador*, *supra*, para. 187.

¹⁵⁰ AG/RES. 2426 (XXXVIII-O/08), Order adopted by the OAS General Assembly during the XXXVIII Regular Session of the OAS, at the fourth plenary session, held on June 3, 2008, "Creation of the Legal Assistance Fund of the Inter-American Human Rights System", Operative paragraph 2(a), and CP/RES. 963 (1728/09), Order adopted on November 11, 2009 by the Permanent Council of the OAS, "Regulations for the Functioning of the Legal Assistance Fund of the Inter-American Human Rights System," Article 1(1).

the necessary expenses incurred. This amount must be reimbursed within six months of notification of this judgment.

H. Method of compliance with the ordered payments

141. The State shall make the payment of the compensation established in this Judgment for restitution, pecuniary and non-pecuniary damages, and reimbursement of costs and expenses, directly to the person indicated therein, within a period of one year from the date of notification of this Judgment, without prejudice to the possibility of advancing full payment within a shorter period, in the terms of the following paragraphs.

142. In the event the beneficiary dies before the amount is paid, such payments will be paid directly to his heirs, in accordance with the applicable domestic law.

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

144. If, for reasons attributable to the beneficiary of the compensation or his heirs, it is not possible to pay the amounts determined within the indicated term, the State shall deposit said amounts to them in an account or certificate of deposit in a financially sound Paraguayan financial institution, in U.S. dollars, and under the most favorable financial conditions permitted by law and banking practice. If the corresponding compensation is not claimed after ten years have elapsed, the amounts will be returned to the State with the accrued interest.

145. The respective amounts set out in this judgment as compensation for pecuniary and non-pecuniary damages, and the reimbursement of costs and expenses, must be paid to said persons in full, in accordance with this judgment, without any reductions arising from possible tax obligations.

146. In the event that the State incurs in default, including the reimbursement to the Victims' Legal Assistance Fund, it shall pay interest on the amount owed corresponding to the default bank interest of the Republic of Paraguay.

**VIII
OPERATIVE PARAGRAPHS**

147. Therefore,

THE COURT

DECLARES,

Unanimously that:

1. The State is responsible for the violation of the guarantee of an impartial judge, enshrined in Article 8(1) of the American Convention on Human Rights, in relation to Article 1(1) of the same instrument, to the detriment of Alejandro Nissen Pessolani, in the terms of paragraphs 64 to 76 of this Judgment.

2. The State is responsible for the violation of the right to judicial protection enshrined in Article 25(1) of the American Convention on Human Rights, in relation to Article 1(1) of the same instrument, to the detriment of Alejandro Nissen Pessolani, in the terms of paragraphs 85 to 91 of this Judgment.

3. The State is responsible for the violation of the right to participate in government under conditions of equality enshrined in Article 23(1)(c) of the American Convention on Human Rights, in relation to Article 1(1) of the same instrument, to the detriment of Alejandro Nissen Pessolani, in the terms of paragraphs 95 to 97 of this Judgment.

By an opinion of five in favor and two against that,

4. The State is responsible for the violation of the right to labor stability enshrined in Article 26 of the American Convention on Human Rights, in relation to Article 1(1) of the same instrument, to the detriment of Alejandro Nissen Pessolani, in the terms of paragraphs 100 to 104 of this Judgment.

Judge Humberto Antonio Sierra Porto and Judge Patricia Pérez Goldberg dissent.

AND ESTABLISHES:

Unanimously that:

5. This judgment constitutes, *per se*, a form of reparation.

6. The State shall promote the necessary measures to eliminate any public record of Alejandro Nissen Pessolani's conviction within six months, in the terms of paragraph 114 of this Judgment.

7. The State, within six months, shall make the publications indicated in paragraph 115 of this Judgment.

8. The State shall pay the amounts set forth in paragraphs 113, 127, 129, and 135 of this Judgment as compensation as a measure of restitution and compensation for pecuniary and non-pecuniary damages, as well as the reimbursement of costs and expenses, in the terms of paragraphs 141 to 146 of this Judgment.

9. The State shall reimburse the Victims' Legal Assistance Fund of the Inter-American Court of Human Rights the amount disbursed during the processing of this case, in the terms of paragraph 140 of this Judgment.

10. The State, within one year from notification of this Judgment, will submit a report to the Court on the measures adopted to comply with it, without prejudice to paragraphs 114, 115, and 140 of this Judgment.

11. The Court will monitor full compliance with this judgment, in the exercise of its powers and in compliance with its duties under the American Convention on Human Rights, and will consider this case closed once the State has fully complied with the provisions hereof.

Judge Humberto Antonio Sierra Porto announced his partially dissenting opinion. Likewise, Judge Patricia Pérez Goldberg announced her concurring and partially dissenting opinion.

Done, at San José, Costa Rica, on November 21, 2022, in the Spanish language.

I/A Court H.R. *Case of Nissen Pessolani v. Paraguay. Merits, reparations, and costs.*
Judgment of November 21, 2022.

I/A Court H.R. *Case of Nissen Pessolani v. Paraguay. Merits, reparations, and costs.*
Judgment of November 21, 2022.

Ricardo C. Pérez Manrique
President

Humberto Antonio Sierra Porto

Eduardo Ferrer Mac-Gregor Poisot

Nancy Hernández López

Verónica Gómez

Patricia Pérez Goldberg

Rodrigo de Bittencourt Mudrovitsch

Pablo Saavedra Alessandri
Secretary

So ordered,

Ricardo C. Pérez Manrique
President

Pablo Saavedra Alessandri
Secretary

PARTIALLY DISSENTING OPINION OF
JUDGE HUMBERTO ANTONIO SIERRA PORTO
CASE OF NISSEN PESSOLANI V. PARAGUAY
JUDGMENT OF SEPTEMBER 7, 2022
(Merits, Reparations, and Costs)

1. With the usual respect for the majority decisions of the Inter-American Court of Human Rights (hereinafter the Court), this opinion aims to explain my dissent regarding operative paragraph 4, in which the international responsibility of the State of Paraguay (hereinafter "the State" or Paraguay) was declared for the violation of the right to job security, to the detriment of Alejandro Nissen Pessolani.

2. This opinion complements the position already expressed in my partially dissenting opinions in the *cases of Lagos del Campo v. Peru*,¹ *Dismissed Employees of Petroperú et al. v. Peru*,² *San Miguel Sosa et al. v. Venezuela*,³ *Muelle Flores v. Peru*,⁴ *Hernández v. Argentina*,⁵ *ANCEJUB-SUNAT v. Peru*,⁶ *Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina*,⁷ *Employees of the Fireworks Factory in Santo Antônio de Jesus and their families v. Brazil*,⁸ *Casa Nina v. Peru*,⁹ *Guachalá*

¹ *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 340. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

² *Case of Dismissed Employees of Petroperú et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2017. Series C No. 344. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

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

⁴ *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

⁵ *Case of Hernández v. Argentina. Preliminary objections, merits, reparations, and costs.* Judgment of November 22, 2019. Series C No. 395. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

⁶ *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru.* Preliminary objections, merits, reparations, and costs. Judgment of November 21, 2019. Series C No. 39. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

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

⁸ *Case of the Employees of the Fireworks Factory in Santo Antônio de Jesus and their families v. Brazil. Preliminary objections, merits, reparations, and costs.* Judgment of July 15, 2020. Series C No. 407. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

⁹ *Case of Casa Nina v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 24, 2020. Series C No. 419. Concurring and partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

Chimbo v. Ecuador,¹⁰ *FEMAPOR v. Peru*,¹¹ *Guevara Díaz v. Costa Rica*,¹² *Mina Cuero v. Ecuador*,¹³ *Benites Cabrera v. Peru*,¹⁴ *Valencia Campos et al. v. Bolivia*,¹⁵ and *Brítez Arce et al. v. Argentina*;¹⁶ as well as in my concurring opinions in the cases *Gonzales Lluy et al. v. Ecuador*,¹⁷ *Poblete Vilches et al. v. Chile*,¹⁸ *Cuscul Pivaral et al. v. Guatemala*,¹⁹ *the Buzos Miskitos v. Honduras*,²⁰ *Vera Rojas et al. v. Chile*,²¹ *Manuela et al. v. El Salvador*,²² *Former Employees of the Judiciary v. Guatemala*,²³ *Palacio Urrutia v. Ecuador*,²⁴ and *Pavez Pavez v. Chile*,²⁵ in relation to the justiciability of economic, social, cultural, and environmental rights (hereinafter "ES CER") through Article 26 of the American Convention on Human Rights (hereinafter "the Convention" or "ACHR").

3. On previous occasions, I have expressed the reasons why I consider that there are logical and legal inconsistencies in the case law position adopted by the majority of the Court regarding the direct and autonomous justiciability of the ESCER through Article 26 of the Convention. This position ignores the rules of interpretation of the Vienna

¹⁰ *Case of Guachalá Chimbo et al. v. Ecuador. Merits, reparations, and costs.* Judgment of March 26, 2021. Series C No. 423. Concurring and partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

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

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

¹³ *Case of Mina Cuero v. Ecuador. Preliminary objections, merits, reparations, and costs.* Judgment of September 7, 2022. Series C No. 464. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

¹⁴ *Case of Benites Cabrera et al. v. Peru. Preliminary objections, merits, reparations, and costs.* Judgment of October 4, 2022. Series C No. 465. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

¹⁵ *Case of Valencia Campos et al. v. Bolivia. Preliminary objections, merits, reparations, and costs.* Judgment of October 18, 2022. Series C No. 469. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

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

¹⁷ *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations, and costs.* Judgment of September 1, 2015. Series C No. 298. Concurring opinion of Judge Humberto Antonio Sierra Porto.

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

¹⁹ *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objections, merits, reparations, and costs.* Judgment of August 23, 2018. Series C No. 359. Concurring opinion of Judge Humberto Antonio Sierra Porto.

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

²¹ *Case of Vera Rojas et al. v. Chile. Preliminary objections, merits, reparations, and costs.* Judgment of September 1, 2021. Series C No. Concurring opinion of Judge Humberto Antonio Sierra Porto.

²² *Case of Manuela et al. v. El Salvador. Preliminary objections, merits, reparations, and costs.* Judgment of November 2, 2021. Series C No. 441. Concurring opinion of Judge Humberto Antonio Sierra Porto.

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

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

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

Convention on the Law of Treaties,²⁶ changes the nature of the obligation of progressivity,²⁷ ignores the will of the States expressed in the Protocol of San Salvador,²⁸ and undermines the legitimacy of the Court,²⁹ just to mention a few arguments. However, my purpose on this occasion is to highlight the irrelevance of the analysis of Article 26 addressing a case that refers specifically to public officials, and that as a consequence could be addressed in sufficient depth on the basis of Article 23 of the Convention, thus reiterating the position already expressed in my partially dissenting opinion in the case *Case of Mina Cuero v. Ecuador*.³⁰

4. In the case, in addition to substantiating the violations of judicial guarantees and judicial protection, which I fully share, the Court considered that there was a violation of the right to remain in public office under conditions of equality of Article 23(1)(c). Making use of the *iura novit curia* principle, the Court stated that the arbitrary removal of the Prosecutor from his position also constituted a violation of his right to job security.³¹

5. In relation to the right to remain in office under equal conditions, the Court considered that *"the removal of Mr. Nissen Pessolani from his position as Prosecutor through the trial by the JEM disregarded the guarantees of due process, which arbitrarily affected his remaining in the position of Prosecutor."*³² On the other hand, to substantiate the violation of the right to job security, the Court concluded that *"the decision of the JEM to remove then prosecutor Nissen Pessolani was arbitrary, as it did not comply with the guarantees of due process, which also constituted a violation of the right to job security, as part of the right to work, which as a worker of the Public Ministry of Paraguay he was entitled to during the time he held his position."*³³ To this effect, it is evident that it consists of the same factual and legal argumentation but with a different normative basis: on one hand, Article 23(1)(c), and on the other hand, Article 26 of the Convention.

6. I believe that, as was stated in my partially dissenting opinion in the case of *Mina Cuero v. Ecuador*, it would have been appropriate to refer exclusively to Article 23. As the judgment correctly points out, Article 23(1)(c) of the ACHR sets forth that *"1. Every citizen shall enjoy the following rights and opportunities: [...] (c) to have access, under general conditions of equality, to the public service of their country."* The Court was right

²⁶ Cf. *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of March 6, 2019. Series C No. 375. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

²⁷ Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objections, merits, reparations, and costs*. Judgment of August 23, 2018. Series C No. 359. Concurring opinion of Judge Humberto Antonio Sierra Porto.

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

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

³⁰ Cf. *Case of Mina Cuero v. Ecuador. Preliminary objections, merits, reparations, and costs*. Judgment of September 7, 2022. Series C No. 464. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

³¹ Cf. *Case of Nissen Pessolani v. Paraguay. Merits, reparations, and costs*. Judgment of November 21, 2022. Series C No. 477, para. 99.

³² *Case of Nissen Pessolani v. Paraguay. Merits, reparations, and costs*. Judgment of November 21, 2022. Series C No. 477, para. 97.

³³ Cf. *Case of Nissen Pessolani v. Paraguay. Merits, reparations, and costs*. Judgment of November 21, 2022. Series C No. 477, para. 103.

on this occasion to include the analysis of this article and declare the violation of the right to access to public service under conditions of equality, since it is evident that, in the case of a position at the Prosecutor's Office, Mr. Nissen Pessolani was a public official. Indeed, as this Court has pointed out, following the provisions of General comment 25 of the United Nations Human Rights Committee,³⁴ Article 23(1)(c) does not only enshrine the right to access public office, but also the right to do so under conditions of equality and to remain in employment. This implies the criteria and processes for appointment, promotion, suspension, and dismissal must be objective and reasonable, and must be respected and guaranteed, and that persons do not suffer discrimination in the course of such procedures.³⁵ This was precisely the breached obligation in the case, as Mr. Nissen Pessolani was dismissed from his position without the fulfillment of a reasonable and objective procedure.

7. The above is not merely a nominal distinction, as I have stated in other separate opinions, using Article 26 of the Convention to declare the State's liability is legally unacceptable and affects the legitimacy of the decision. Therefore, determining Paraguay's liability solely based on Article 23(1)(c) of the American Convention on Human Rights would not only have provided a more precise response to Mr. Nissen Pessolani's factual situation and allowed the Court to advance its case law on the scope of this right in the American Convention, but it would have also avoided affecting the effectiveness of the decision due to the inconsistencies of the direct justiciability of Article 26 of the ACHR. Therefore, once again, it is demonstrated that the use of this treaty provision serves the sole purpose of reaffirming a jurisprudential approach regarding the ESCER, regardless of whether it is relevant or necessary to ensure justice in the specific case.

Humberto Antonio Sierra Porto
Judge

Pablo Saavedra Alessandri
Secretary

³⁴ Cf. United Nations. Human Rights Committee. General Comment No. 25, Article 25: The Right to Participate in Public Affairs and Voting Rights, CCPR/C/21/Rev. 1/Add. 7, July 12, 1996, para. 23.

³⁵ Cf. *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela. Preliminary objections, merits, reparations, and costs.* Judgment of August 5, 2008. Series C No. 182, para. 206.

CONCURRING AND PARTIALLY DISSENTING VOTE OF
JUDGE PATRICIA PEREZ GOLDBERG
INTER-AMERICAN COURT OF HUMAN RIGHTS
CASE OF NISSEN PESSOLANI V. PARAGUAY

JUDGMENT OF NOVEMBER 21, 2022.

(Merits, Reparations, and Costs)

With the usual respect for the majority decision of the Inter-American Court of Human Rights (hereinafter "the Court" or the "Tribunal"), I issue this opinion¹ with the purpose of reiterating my position on the inadmissibility of establishing the international responsibility of the State of Paraguay for the alleged violation of the individual right to job security, based on Article 26 of the American Convention on Human Rights (hereinafter "the Convention" or "the Treaty").

To do so, I will first refer to the application of the principle *iura novit curia* and, subsequently, to the merits of the case.

I. Application of Article 26 of the Convention in accordance with the principle of *iura novit curia*.

1. First, it is necessary to point out that neither the Inter-American Commission on Human Rights (hereinafter "the Commission") nor the representatives expressly alleged a violation of Article 26 of the Convention.² Notwithstanding the foregoing, the Court decided to rule on the violation of the right to job security to the detriment of the alleged victim, by virtue of the principle *iura novit curia*.
2. The Court does not substantiate the reasons that lead it to apply this principle and only limits itself to citing the judgments in the cases of *Velásquez Rodríguez v. Honduras* and *Guachalá Chimbo et al v. Ecuador*, rulings in which the same basis was cited,³ a mention which, indeed, does not constitute

¹ Article 65(2) of the Rules of Procedure of the Inter-American Court of Human Rights: "Any Judge who has taken part in the consideration of a case is entitled to append a separate reasoned opinion to the judgment, concurring or dissenting. These opinions must be submitted within the term set by the Presidency, so that they may be known by the Judges before the notification of the sentence. Said opinions shall only refer to the issues covered in the judgment."

² Cf. Paragraph 99.

³ Unlike other international tribunals, the Court has made recurrent use of this power, as can be seen from an examination of the decisions adopted in the cases of: *Velásquez-Rodríguez v. Honduras*, Judgment of July 29, 1988; *Godínez Cruz v. Honduras*, Judgment of January 20, 1989; *Blake v. Guatemala*, Judgment of January 24, 1998; *Durand and Ugarte v. Peru*, Judgment of August 16, 2000; *Hilaire, Constantine and Benjamín et al. v. Trinidad and Tobago*, Judgment of June 21, 2002; *Castillo Petruzzi et al. v. Peru*, Judgment of May 30, 1999; *Cantos v. Argentina*, Judgment of November 28, 2002; *Five Pensioners v. Peru*, Judgment of February 28, 2003; *Myrna Mack Chang v. Guatemala*, Judgment of November 25, 2003; *Maritza Urrutia v. Guatemala*, Judgment of November 27, 2003; *Gómez Paquiyauri Brothers v. Peru*, Judgment of July 8, 2004; *Juvenile Reeducation Institute v. Paraguay*, Judgment of September 2, 2004; *Moiwana Community v. Suriname*, Judgment of June 15, 2005; *Acosta Calderón v. Ecuador*, Judgment of June 24, 2005; *Girls Yean and Bosico v. Dominican Republic*, Judgment of September 8, 2005; *Mapiripán Massacre v. Colombia*, Judgment of September 15, 2005; *García Asto and Ramírez Rojas v. Peru*, Judgment of November 25, 2005; *Sawhoyamaya Indigenous Community v. Paraguay*, Judgment of March

sufficient grounds for the decision to use said case law.

3. The Court's power to use this principle does not exempt it from justifying its application, nor from using it in a moderate and cautious manner. In this regard, it is relevant, on one hand, to take into account that the facts⁴ always establish a limit to the right, in the sense that the task of identifying and applying rights must be based on the factual framework established in the merits report; and, on the other hand, that it must be ensured that the principle of equality of arms is not affected and, in particular, the right of defense of the States.
4. In this sense, and as previously stated by Judge Sierra Porto in his partially dissenting opinion in the case of *Lagos del Campo v. Peru*,⁵ it is a power that must be used under certain criteria of reasonableness and relevance, such as when "the violation of human rights is manifest or when the representatives or the Commission have committed a serious oversight or error, so that the Court can remedy a possible injustice, but this principle should not be used to surprise a State with a violation that it did not foresee in the least and that it had no opportunity to remedy or dispute, not even on the facts."
5. None of the aforementioned exceptional hypotheses were met in this case. On the contrary, the facts before this Court showed that the removal of Mr. Nissen had been carried out in violation of the rules of due process, which constituted an undue infringement of his right to remain in the position of prosecutor on a basis of equality.
6. Consequently, the legal discussion that took place here was related to the existence of an effective violation -or not- of the right recognized in Article 23(1)(c) of the Convention.
7. Based on the evidence incorporated into the proceedings, the Court decided to declare the international responsibility of the State of Paraguay for the violation of the aforementioned rule. The State was informed from the outset of the victim's invocation of this provision and had the opportunity to dispute

29, 2006; *Case of the Ituango Massacres v. Colombia*, Judgment of July 1, 2006; *Ximenes Lopes v. Brazil*, Judgment of July 4, 2006; *Bueno Alves v. Argentina*, Judgment of May 11, 2007; *Kimel v. Argentina*, Judgment of May 2, 2008; *Heliodoro Portugal v. Panama*, Judgment of August 12, 2008; *Bayarri v. Argentina*, Judgment of October 30, 2008; *González et al ("Cotton Field") v. Mexico*, request for the expansion of alleged victims and refusal to submit documentary evidence, January 19, 2009; *Escher et al. v. Brazil*, Judgment of July 6, 2009; *Usón Ramírez v. Venezuela*, Judgment of November 20, 2009; *Vélez Lóor v. Panama*, Judgment of November 23, 2010; *Vera Vera et al. v. Ecuador*, Judgment of May 19, 2011; *Contreras et al. v. El Salvador*, Judgment of August 31, 2011; *Grande v. Argentina*, Judgment of August 31, 2011; *Furlán and family v. Argentina*, Judgment of August 31, 2012; *Gudiel Álvarez et al. ("Diario Militar") v. Guatemala*, Judgment of November 20, 2012; *Suárez Peralta v. Ecuador*, Judgment of May 21, 2013; *Landaeta Brothers et al. v. Venezuela*, Judgment of August 27, 2014; *Expelled Dominican and Haitians v. Dominican Republic*, Judgment of August 28, 2014; *Human Rights Defender et al. v. Guatemala*, Judgment of August 28, 2014; *Rochac Hernández et al. v. El Salvador*, Judgment of October 14, 2014; *Cruz Sánchez et al. v. Peru*, Judgment of April 17, 2015; *Peasant Community of Santa Barbara v. Peru*, Judgment of September 1, 2015; *Kaliña and Lokono Peoples v. Suriname*, Judgment of November 25, 2015; *I. V. v. Bolivia*, Judgment of November 30, 2016; *Acosta et al. v. Nicaragua*, Judgment of March 25, 2017; *Lagos del Campo v. Peru*, Judgment of August 31, 2017; *Vereda La Esperanza v. Colombia*, Judgment of August 31, 2017; *San Miguel Sosa et al. v. Venezuela*, Judgment of February 8, 2018; *Women Victims of Sexual Torture in Atenco v. Mexico*, Judgment of November 28, 2018; *Muelle Flores v. Peru*, Judgment of March 6, 2019; *Rodríguez Revolorio et al. v. Guatemala*, Judgment of October 14, 2019; *Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina*, Judgment of February 6, 2020; *Hernández v. Argentina*, Judgment of November 22, 2019; *Cuyo Lavy et al. v. Peru*, Judgment of September 28, 2021; *Former Employees of the Judiciary v. Guatemala*, Judgment of November 17, 2021, and *Casierra Quiñonez et al. v. Ecuador*, Judgment of May 11, 2022.

⁴ Cf. *Case of González et al. ("Cotton Field") v. Mexico*, paragraph 32.

⁵ Position reiterated in their opinions regarding the cases of *Rodríguez Revolorio et al. v. Guatemala* and *Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina*.

the allegations made in this regard. In addition, the rule in question fully captured, and in all its extremes, the factual situation submitted to the court, which -without prejudice to what will be said below in relation to the court's lack of jurisdiction- made it unnecessary and impertinent to invoke the *iura novit curia* principle to also declare, on the basis of identical facts, the violation of Article 26 of the Convention.

8. In summary, in the instant case, the exceptional circumstances that justify the application of the *iura novit curia* principle did not exist, and therefore it was not appropriate for the Court to declare the violation of the victim's right to job security. It is evident that it was not possible for the State to foresee or dispute such an extreme, neither from the point of view of the facts nor of the law, which entailed an impact on the due process that every Court is obliged to guarantee.

II. The Court's lack of jurisdiction to declare the autonomous violation of the right to job security based on Article 26 of the Convention.

In order to explain the lack of jurisdiction of this Court in the terms indicated, I will begin by referring to the preparatory work of the Convention, insofar as it sheds light on the scope of the aforementioned provision. Next, I will refer to the origin and content of the Protocol of San Salvador (hereinafter "the Protocol") and, finally, I will explain the reasons that contest the majority's decision in the instant case.

A. Preparatory work for the Convention

1. In 1959, during the Fifth Meeting of Consultation of Ministers of Foreign Affairs of the Organization of American States (hereinafter OAS), the decision was made to encourage the preparation of a Convention on Human Rights, and the Inter-American Council of Jurists was entrusted with preparing a draft⁶ to that effect.⁷ To this end, the Council took into consideration the experiences of the European and Universal Human Rights Systems. The subject of economic, social, and cultural rights was incorporated in Chapter II of the project (entitled "Economic, Social, and Cultural Rights") in the following terms:

Article 21.

1. States recognize the right of all their inhabitants to enjoy economic, social, and cultural rights.
2. At the same time they recognize that the exercise of such rights may be subject to limitations imposed by law only to the extent compatible with the nature of such rights and for the exclusive purpose of promoting the general welfare of a democratic society.⁸

2. In addition to this general clause, Chapter II of the draft provided for a series of other articles⁹ specifically protecting a set of economic, social, and cultural rights, namely: the right of peoples to self-determination of political, economic, social, and cultural statutes (Article 20), the right to work (Articles 22 and 23), the right to unionize (Article 24), the right to social security

⁶ Approved on September 8, 1959, by Resolution No. XX of the Inter-American Council of Jurists; Doc. CIJ-41, 1959.

⁷ Cf. *Inter-American Yearbook of Human Rights* 1968, OAS, Washington D.C., 1973, p. 97.

⁸ Cf. *Draft Convention on Human Rights*, approved by the Fourth Meeting of the Inter-American Council of Jurists, Final Act, Santiago, Chile, September, 1959 Doc. CIJ-43, in: *Inter-American Yearbook of Human Rights*, 1968, OAS, Washington D.C., 1973, pp. 244.

⁹ Cf. *Draft Convention on Human Rights*, approved by the Fourth Meeting of the Inter-American Council of Jurists, Final Act, Santiago, Chile, September, 1959 Doc. CIJ-43, in: *Inter-American Yearbook of Human Rights*, 1968, OAS, Washington D.C., 1973, pp. 244-249.

(Article 25), the right to education (Articles 27, 28 and 30) and cultural rights (Article 29).

3. The wording of the aforementioned Article 21 was also proposed by the Draft Convention on Human Rights presented by the Government of Chile,¹⁰ a document on which the Convention was also based. However, in its Draft Convention on Human Rights, the version proposed by Uruguay was different, resembling the wording contemplated by the International Covenant on Economic, Social, and Cultural Rights, in Article 2:

Chapter II: Substitute article on economic, social and cultural rights

[...]

Article 24.

1. Each State Party to this Convention undertakes to take steps, individually and in cooperation with others and to the maximum of its available resources, with a view to progressively achieving the full realization, by legislative measures as well as by other means, of the rights recognized in this chapter.

2. The States Parties to this Convention recognize that, in the exercise by the State of the rights guaranteed under this chapter, the State may subject such rights only to such limitations as are determined by law only to the extent consistent with the nature of those rights and solely for the purpose of serving the general interest or promoting the general welfare of a democratic society.¹¹

4. Subsequently, the Second Special Inter-American Conference of 1965 instructed the OAS Council to update and complete the "Draft Convention on Human Rights" prepared by the Inter-American Council of Jurists in 1959, taking into account the drafts presented by Chile and Uruguay and considering the criteria of the Inter-American Commission on Human Rights. The OAS Council was also instructed to submit the draft to the governments for their comments and to convene an Inter-American Specialized Conference to analyze the draft and the comments submitted and to approve the Convention.
5. The OAS Council requested the opinion of the Inter-American Commission, which, in turn, issued an opinion that it transmitted to the OAS Council.¹² In its second opinion, and regarding the discussion on economic, social, and cultural rights, the Inter-American Commission stated that:

[...] the Commission believes that, initially, the Convention should contemplate only those rights and freedoms in regard to which the American states are now in a position to extend international protection which goes beyond the limits of their domestic competence. In examining the chapter on economic, social and cultural rights in the IACJ draft and in those presented by the Uruguayan and Chilean governments, the Commission had serious doubts as to the appropriateness of including those rights in the present convention, since, in the light of the experience of the council of Europe and the United Nations, it considered that those rights, because of their nature, should be covered by a special system of international protection.¹³

To the above, the Inter-American Commission added:

However, the Commission believes that, in view of the importance of economic, social, and cultural rights, the future Inter-American Convention on Human Rights should contain provisions in which **the States Parties to the Convention recognize the need to incorporate gradually into their domestic legislation such measures as are required**

¹⁰ Cf. *Draft Convention on Human Rights presented by the Government of Chile to the Second Special Inter-American Conference*, Rio de Janeiro, 1965, doc. 35, in: *Inter-American Yearbook of Human Rights*, 1968, OAS, Washington D.C., 1973, pp. 285.

¹¹ Cf. *Draft Convention on Human Rights presented by the Government of Uruguay to the Second Special Inter-American Conference*, Rio de Janeiro, 1965, doc. 49, in: *Inter-American Yearbook of Human Rights*, 1968, OAS, Washington D.C., 1973, pp. 303.

¹² The first part of the report was sent on November 4, 1966 and the second part on April 10, 1967.

¹³ Cf. *Opinion of the Inter-American Commission on Human Rights regarding the Draft Convention on Human Rights approved by the Inter-American Council of Jurists, Part Two*, OEA/Ser.L/V/II.16/doc.8, in: *Inter-American Yearbook of Human Rights*, 1968, OAS, Washington D.C., 1973, pp. 334.

to fully implement those rights.¹⁴ The Commission also considers that consideration of the system for the international protection of the economic, social and cultural rights should begin as soon as possible. The Commission is prepared to begin examining this system of protection if the governments of the member states agree that it do so.¹⁵

6. Consequently, the Inter-American Commission suggested a restatement of the articles related to economic, social, and cultural rights, as proposed by the draft of the Inter-American Council of Jurists. Thus, the following wording was proposed:

Article 21.

1. The States Parties to this Convention recognize the need to adopt and, as appropriate, strengthen the guarantees to permit full protection of the other rights set forth in the American Declaration of the Rights and Duties of Man which are not included in the preceding articles.

2. The States Parties also declare their intention of including and, as appropriate, maintaining and perfecting, in their domestic legislation, the provisions most conducive to the exercise of the right to employment and the fair and equitable remuneration of work, the establishment of humane working conditions; the protection of children, mothers, and families; as well as to the establishment of preventive and social-security measures that will ensure health, disability, and unemployment protection, the attainment of better living standards, and access to education and to the means for cultural improvement.

Article 22.

The States Parties shall report periodically to the Commission on Human Rights on the measures they have taken to achieve the purposes set forth in the preceding article. The Commission shall make appropriate recommendations and, when such measures have been widely accepted, shall promote the conclusion of a special convention, or additional protocols to this Convention, in order to include them in this Convention or in such other instrument as considered appropriate.¹⁶

7. On June 12, 1968, the OAS Council adopted a resolution in which it requested that the Inter-American Commission develop a definitive working document on the draft Convention, which the Commission then translated into a "Preliminary Draft of Inter-American Convention on the Protection of Human Rights." This document was approved and adopted in the context of the Inter-American Specialized Conference.¹⁷

8. The Inter-American Specialized Conference on Human Rights, held from November 7 to 22, 1969, in San José, Costa Rica, was then convened to evaluate the draft.¹⁸ The regulation on economic, social, and cultural rights was as follows:

Article 25.

1. The States Parties to this Convention recognize the need to devote their best efforts to ensure that the other rights set forth in the American Declaration of the Rights and Duties of Man and not included in the preceding articles are adopted and, as the case may be, guaranteed in their domestic law.

2. The States Parties further express their intention to enshrine and, where appropriate, to maintain and improve, within their domestic legislation, such prescriptions as are most suitable for: substantial and self-sustaining increase in the national product *per capita*; equitable distribution of national income; adequate and equitable taxation systems; modernization of rural life and reforms leading to equitable and effective land tenure regimes, increased agricultural productivity, expansion of land use, diversification of production and improved systems for the industrialization and marketing of agricultural products; and strengthening and expanding the means to achieve these ends; accelerated and diversified industrialization, especially of capital and intermediate goods; stability of the level of domestic prices in harmony

¹⁴ Emphasis added.

¹⁵ Cf. *Opinion of the Inter-American Commission on Human Rights regarding the Draft Convention on Human Rights approved by the Inter-American Council of Jurists, Part Two*, OEA/Ser.L/V/II.16/doc.8, in: *Inter-American Yearbook of Human Rights*, 1968, OAS, Washington D.C., 1973, pp. 334-335.

¹⁶ Cf. *Opinion of the Inter-American Commission on Human Rights regarding the Draft Convention on Human Rights approved by the Inter-American Council of Jurists, Part Two*, OEA/Ser.L/V/II.16/doc.8, in: *Inter-American Yearbook of Human Rights*, 1968, OAS, Washington, D.C., 1973, p. 336.

¹⁷ Cf. *OAS Council Resolution, October 2, 1968*.

¹⁸ Cf. *Inter-American Specialized Conference on Human Rights, Proceedings and Documents*, OEA/Ser.K/XVI/1.2, pp. 1-3.

with sustained economic development and the achievement of social justice; fair wages, employment opportunities and acceptable working conditions for all; rapid eradication of illiteracy and expansion of educational opportunities for all; defense of human potential through the extension and application of modern medical science; adequate nutrition, particularly through the acceleration of national efforts to increase food production and availability; adequate housing for all sectors of the population; urban conditions that enable a healthy, productive, and dignified life; promotion of private initiative and investment in harmony with public sector action; and expansion and diversification of exports.

Article 26.

The States Parties shall report periodically to the Commission on Human Rights on the measures they have adopted for the purposes indicated in the preceding article. The Commission shall make such recommendations as may be appropriate and, where there is general acceptance of such measures, it shall promote holding a special Convention or Protocols supplementary to this Convention in order to incorporate them into the regime of this Convention, or into such other regime as may be deemed appropriate.

Article 41.

1. The States Parties undertake to submit periodic reports to the Commission on the measures adopted to ensure the observance of the rights mentioned in Article 25.
2. The Commission shall determine the frequency of these reports.
3. In the case of a report that is to be submitted originally to one of the Specialized Agencies of the United Nations or the Organization of American States, the State Party shall comply with the requirements of paragraph 1 above by sending a copy of the report to the Commission.¹⁹

9. This proposal was subject to review and discussion by the different delegations. Regarding the aforementioned Article 25(2), Uruguay²⁰ considered that "its content does not seem appropriate for a convention, but perhaps it is not politically convenient to oppose the inclusion of such text."

10. For its part, the delegation of Chile²¹ considered that "the provisions that have been kept in the draft regarding economic, social, and cultural rights are the ones that deserve the most objections in terms of form and substance." This is due to the fact that "all direct mention of such rights has been eliminated." In line with this, the delegation added that "indirectly, in article 25, paragraph 1, there is insufficient acknowledgment." For the same reason, it was pointed out that:

In good legal technique, however, these rights should be given appropriate wording within the draft Convention, so that their application can be monitored.

[...]

The technique followed by the United Nations and the Council of Europe of enumerating economic, social, and cultural rights, setting out in detail the means for their promotion and control, should be suggested if the criterion of drafting a single Convention is maintained.

[...]

In any case, a provision should be included for economic, social, and cultural rights that establishes a certain legal obligation (to the extent permitted by the nature of these rights) in their fulfillment and application. To this end, it would be necessary to contemplate a clause similar to that of article 2, paragraph 1, of the United Nations International Treaty on this matter.²²

11. Similarly, the delegation of the Dominican Republic²³ considered that, regarding article 25(1) of the text, "the obligations of the States Parties must be clearly stipulated and without vaguely trying to incorporate other

¹⁹ Cf. *Inter-American Specialized Conference on Human Rights, Proceedings and Documents*, OEA/Ser.K/XVI/1.2, pp. 23 y 28-29.

²⁰ Cf. *Inter-American Specialized Conference on Human Rights, Proceedings and Documents*, OEA/Ser.K/XVI/1.2, p. 37, para. 10.

²¹ Cf. *Inter-American Specialized Conference on Human Rights, Proceedings and Documents*, OEA/Ser.K/XVI/1.2, pp. 42-43, para. 14-17.

²² Cf. *Inter-American Specialized Conference on Human Rights, Proceedings and Documents*, OEA/Ser.K/XVI/1.2, pp. 42-43, para. 15-17.

²³ Cf. *Inter-American Specialized Conference on Human Rights, Proceedings and Documents*, OEA/Ser.K/XVI/1.2, pp. 69-70.

obligations by allusion." It also suggested reformulating certain aspects of articles 25, 26 and 41.

12. In its turn, the delegation of Mexico²⁴ stated that:

Serious doubts arise as to the advisability of including in the preliminary draft the rights enshrined in Article 25 of the Draft: On the one hand, such a statement could be repetitive, since it is already included in Article 31 of the Protocol of Amendment to the Charter of the OAS. Next, unlike all the other rights mentioned in the draft –which are rights enjoyed by the individual as a person or as a member of a given social group– it is difficult at a given moment to establish precisely which person or persons would be directly affected in the event that the rights contained in the aforementioned article 25 were violated. The same could be said with regard to the degree of difficulty involved in determining which authority, if any, would be responsible for such a violation.

13. In the same vein, the delegation of Brazil²⁵ proposed to make certain amendments to the above-mentioned articles and, to this end, expressed the need to bear in mind that:

Civil and political rights entail an effective judicial protection both domestically and internationally against violations practiced by the organs of the State or their representatives. On the other hand, economic, social, and cultural rights are contemplated in very different degrees and forms by the legislation of the different American States and, although governments wish to recognize them all, their validity depends substantially on the availability of material resources that allow for their implementation.

Article 25 of the draft was inspired by this concept, but its text does not correspond to its intention.

14. Along with these observations, there were others along the same lines, i.e., pointing to the need to amend certain aspects of the proposal, made by Argentina²⁶ and Guatemala.²⁷

15. In the context of the debate held at the Inter-American Specialized Conference on Human Rights, the aforementioned articles 25 and 26 of the Draft were discussed in greater detail, and the following proposal of precepts referring to economic, social, and cultural rights was approved²⁸ and presented to the plenary session:²⁹

Chapter III.
Economic, social, and cultural rights

Article 26. Progressive development

The States Parties undertake to adopt measures, both in the domestic sphere and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires, to the extent of available resources, through legislation or other appropriate means.

Article 27. Control of compliance with obligations

The States Parties shall transmit to the Commission a copy of each of the reports and studies that they submit annually to the Executive Committees of the Inter-American Economic and Social Council and the Inter-American Council for Education, Science, and Culture, in their respective fields, so that the Commission may verify whether the aforementioned obligations,

²⁴ Cf. *Inter-American Specialized Conference on Human Rights, Proceedings and Documents*, OEA/Ser.K/XVI/1.2, p. 101.

²⁵ Cf. *Cf.* 124-125.

²⁶ Cf. *Inter-American Specialized Conference on Human Rights, Proceedings and Documents*, OEA/Ser.K/XVI/1.2, p. 47.

²⁷ Cf. *Inter-American Specialized Conference on Human Rights, Proceedings and Documents*, OEA/Ser.K/XVI/1.2, p. 107.

²⁸ Cf. *Cf.* 276.

²⁹ Cf. *Inter-American Specialized Conference on Human Rights, Proceedings and Documents*, OEA/Ser.K/XVI/1.2, p. 318 and 384.

which are the indispensable basis for the exercise of the other rights enshrined in this Convention, are being fulfilled.

[...]

Chapter VII. Inter-American Commission on Human Rights

[...]

Section 2. Duties

[...]

Article 43.

The States Parties shall transmit to the Commission a copy of each of the reports and studies that they submit annually to the Executive Committees of the Inter-American Economic and Social Council and the Inter-American Council for Education, Science, and Culture, in their respective fields, in order for it to verify whether the obligations deriving from economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires are being fulfilled.

16. When the final proposal was put to the vote in the plenary session, the plenary decided to approve article 26 and eliminate article 27, without any justification.³⁰ With regard to article 43, the change was more revealing, since it was decided to replace the sentence "[...] in order for it **to verify** whether the obligations deriving from the economic, social, educational, scientific and cultural standards are being fulfilled [...]" by the one that indicates "[...] so that the Commission may look after **promotion** of the rights implicit in the economic, social, educational, scientific and cultural standards [...].³¹ " Consequently, there was a shift from a reinforced protection mechanism to one linked to the special promotion of this type of rights.

17. Shortly after the adoption of the American Convention on Human Rights, the Inter-American Commission recognized "**the difficulty of establishing criteria to measure compliance by States with their obligations**³² [regarding economic, social, and cultural rights]."³³ This showed that the due protection of these rights through the American Convention was not sufficient and could even be considered as incomplete.

18. Thus, the Inter-American Commission brought this issue to the General Assembly of the OAS so that it could be addressed, indicating the need for the organization to:

[...] Reaffirm the criterion that the effective protection of human rights must also encompass social, economic, and cultural rights, noting also that it is the responsibility of the governments of the member states to make the greatest possible efforts to participate fully in hemispheric development cooperation, since it is a fundamental means of helping to alleviate extreme poverty in the Americas, adopting specific measures to that effect.³⁴

19. The OAS General Assembly then decided to entrust the OAS General Secretariat with preparing a preliminary draft of an Additional Protocol to the American Convention defining economic, social, and cultural rights.³⁵ Finally, this initiative was embodied in the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights or "Protocol of San Salvador," signed on November 17, 1988, at the eighteenth regular session of the OAS General Assembly.

³⁰ Cf. *Inter-American Specialized Conference on Human Rights, Proceedings and Documents*, OEA/Ser.K/XVI/1.2, p. 448.

³¹ Cf. *Inter-American Specialized Conference on Human Rights, Proceedings and Documents*, OEA/Ser.K/XVI/1.2, p. 454.

³² Emphasis added.

³³ Cf. *Inter-American Commission on Human Rights, Annual Report 1979-1980*, OEA/Ser.L/V/II.50 doc. 13 rev. 1, October 2, 1980, Chapter VI, para. 5.

³⁴ Cf. *Inter-American Commission on Human Rights, Annual Report 1980-1981*, OEA/Ser.L/V/II.54 doc. 9 rev.1, October 16, 1981, Chapter V, Economic and Social and Cultural Rights, Recommendations, para. 10.

³⁵ Cf. AG/RES. 619 (XII-O/82), of November 20, 1982, sole resolution.

B. Protocol of San Salvador

1. This Protocol is the primary inter-American instrument for the protection, guarantee, and promotion of economic, social, and cultural rights. This international treaty recognizes a series of state obligations (obligation to adopt measures, to adopt provisions of domestic law, non-discrimination, non-admission of restrictions) and rights (right to work, right to fair, equitable, and satisfactory work conditions, trade union rights, right to social security, right to health, right to a healthy environment, among others).
2. When addressing the content of this protocol, it is necessary to make two clarifications. On the one hand, regarding the justiciability of the rights contemplated in the Protocol of San Salvador, according to Article 19, the Protocol only contemplates the possibility that, in event of violation of the rights set out in Article 8(a) (right to organize and join trade unions) and Article 13 (right to education), appeals can be brought to the Inter-American Commission and, eventually, to the Inter-American Court through the system of individual petitions.
3. Moreover, Article 19 of the Protocol of San Salvador provides that the States Parties undertake to submit, in accordance with the provisions of said article and the corresponding standards to be developed to that effect by the General Assembly of the OAS, periodic reports on the progressive measures they have taken to ensure due respect for the rights set forth in this Protocol. These periodic reports are currently analyzed by the Working Group on the Protocol of San Salvador (hereinafter "WGPSS"), constituted in accordance with the parameters established by the General Assembly of the OAS.³⁶
4. The WGPSS is the body in charge of defining the indicators to be included in the reports of the States Parties, providing technical cooperation, as well as analyzing and monitoring compliance with the obligations contained in the Protocol of San Salvador. To this end, it uses the what are called "progress indicators for measuring rights under the Protocol of San Salvador,"³⁷ which make it possible to measure compliance with the rights contemplated in the Protocol and thus recognize the principle of progressivity of economic, social, and cultural rights. In the words of the WGPSS:

The main objectives of the following indicators are to help states parties by providing them with useful tools to review the status of the rights contained in the Protocol, identify outstanding issues and agendas based on a participatory dialogue with civil society, and devise strategies for the progressive realization of the rights contained in the Protocol. The aim is to encourage states to undertake a process of evaluating and measuring fulfillment of social rights that goes beyond mere reporting to become a useful instrument for the design and continuous evaluation of public policies within states, with a view to ensuring comprehensive fulfillment of economic, social, and cultural rights. As the standards say, they "[a]re not intended to record complaints but progress."³⁸

³⁶ Cf. AG/RES. 2262 (XXXVII-O/07) of June 5, 2007.

³⁷ Cf. *Progress indicators for the measurement of rights contemplated in the Protocol of San Salvador*. OEA/Ser.D/XXVI.11 2015.

³⁸ Cf. *Progress indicators for the measurement of rights contemplated in the Protocol of San Salvador*. OEA/Ser.L/XXV.2.1OAS/Ser.L/XXV.2.1 and GT/PSS/doc.2/11 rev.2 of December 16, 2011, para. 9.

5. Thus, within the framework of this progress evaluation model, the WGPSS identifies three types of indicators: (i) structural³⁹; (ii) process⁴⁰; and, (iii) outcome,⁴¹ organized under three conceptual categories: (i) incorporation of the right⁴²; (ii) financial context and budgetary commitment⁴³; and, (iii) state or institutional capacities⁴⁴; and three cross-cutting principles: (a) equality and non-discrimination; (b) access to justice; and, (c) access to information and participation.⁴⁵ In this framework, the WGPSS points out that:

States can meet their obligations by choosing from a broad range of courses of action and policies. It is not for the international monitoring system to judge those options that each State, with a degree of discretion and according to participatory mechanisms, has adopted for realizing the rights contained in the Protocol. It will be necessary, however, to determine if those public policies ensure fulfillment of their positive obligations -whether immediate or progressive- under the Protocol.⁴⁶

6. In short, progress indicators are a tool for analyzing the level of compliance (progress or setbacks) of States from a general perspective and, also, from a particular approach with respect to certain rights. To this end, the WGPSS has as its central axis the principle of progressivity (and, consequently, the obligation of non-regressivity) of economic, social, and cultural rights, in the sense that the precariousness and worsening of the levels of protection of such rights, without adequate justification, will imply a regression prohibited by the Protocol of San Salvador.⁴⁷

C. Analysis of the instant case

1. As explained in the first part of this opinion, although neither the Commission

³⁹ Structural indicators reflect the ratification or approval of basic international legal instruments to facilitate the realization of a fundamental human right. *Cf. Progress indicators for the measurement of rights contemplated in the Protocol of San Salvador*. OEA/Ser.L/XXV.2.1OAS/Ser.L/XXV.2.1 and GT/PSS/doc.2/11 rev.2 of December 16, 2011, para. 33.

⁴⁰ Process indicators seek to measure the quality and magnitude of the State's efforts to implement rights by measuring the scope, coverage, and content of strategies, plans, programs, or policies, or other specific activities and interventions aimed at achieving goals that correspond to the realization of a given right. *Cf. Progress indicators for the measurement of rights contemplated in the Protocol of San Salvador*. OEA/Ser.L/XXV.2.1OAS/Ser.L/XXV.2.1 and GT/PSS/doc.2/11 rev.2 of December 16, 2011, para. 34.

⁴¹ Outcome indicators reflect individual and collective achievements that indicate the state of realization of a human right in a given context. *Cf. Progress indicators for the measurement of rights contemplated in the Protocol of San Salvador*. OEA/Ser.L/XXV.2.1OAS/Ser.L/XXV.2.1 and GT/PSS/doc.2/11 rev.2 of December 16, 2011, para. 35.

⁴² Through the category of the reception of the right in the legal system, in the institutional apparatus and in public policies, the aim is to obtain relevant information on the way in which a right included in the Protocol is incorporated in the domestic regulatory system and in public policies. *Cf. Progress indicators for the measurement of rights contemplated in the Protocol of San Salvador*. OEA/Ser.L/XXV.2.1OAS/Ser.L/XXV.2.1 and GT/PSS/doc.2/11 rev.2 of December 16, 2011, para. 37.

⁴³ Through the category of the basic financial context and budgetary commitments, we seek to evaluate the effective availability of State resources to execute Public Social Expenditure, its distribution measured in the usual way (percentage of Gross Domestic Product for each social sector) or by other indicators and budgetary commitments that allow us to evaluate the importance that the State itself is assigning to a given right. *Cf. Progress indicators for the measurement of rights contemplated in the Protocol of San Salvador*. OEA/Ser.L/XXV.2.1OAS/Ser.L/XXV.2.1 and GT/PSS/doc.2/11 rev.2 of December 16, 2011, para. 39.

⁴⁴ Through the category of state or institutional capacities, it implies reviewing how and under what parameters the State (and its various powers and departments) resolves the set of socially problematized issues. Particularly how they define their development goals and strategies and under what parameters the process of implementing the rights contained in the Protocol is inscribed. *Cf. Progress indicators for the measurement of rights contemplated in the Protocol of San Salvador*. OEA/Ser.L/XXV.2.1OAS/Ser.L/XXV.2.1 and GT/PSS/doc.2/11 rev.2 of December 16, 2011, para. 40.

⁴⁵ *Cf. Progress indicators for the measurement of rights contemplated in the Protocol of San Salvador*. OEA/Ser.L/XXV.2.1OAS/Ser.L/XXV.2.1 and GT/PSS/doc.2/11 rev.2 of December 16, 2011, para. 15.

⁴⁶ *Cf. Progress indicators for the measurement of rights contemplated in the Protocol of San Salvador*. OEA/Ser.L/XXV.2.1OAS/Ser.L/XXV.2.1 and GT/PSS/doc.2/11 rev.2 of December 16, 2011, para. 23.

⁴⁷ *Cf. Progress indicators for the measurement of rights contemplated in the Protocol of San Salvador*. OEA/Ser.L/XXV.2.1OAS/Ser.L/XXV.2.1 and GT/PSS/doc.2/11 rev.2 of December 16, 2011, para. 24.

nor the victim's representatives alleged a violation of Article 26 of the Convention, the majority was of the opinion to declare it to have been violated by virtue of the *iura novit curia* principle.

2. In the relevant section, the judgment states that for the examination of such violation "it is necessary to consider the position of simultaneity with the violations of other rights [...]," pointing out that "in this regard, the Court has recognized that both civil and political rights, as well as economic, social, cultural, and environmental rights, are inseparable, so that their recognition and enjoyment are unfailingly guided by the principles of universality, indivisibility, interdependence, and interrelation."⁴⁸ It then adds that both "must be categories understood in a comprehensive and unified manner as human rights without hierarchies among them and as enforceable in all cases before the competent authorities." There are two problems with this logic.
3. The first lies in the fact that the simultaneous existence of a possible violation of rights of both categories is associated with the indivisible nature of both types of rights. In other words, it is argued that, in the instant case, there has been a violation of the right established in Article 23.1 c) and, at the same time, a violation of the right to work, and that this follows from the inseparable nature of civil and political rights and social, economic, cultural, and environmental rights (hereinafter ESCER). Evidently, the same act can affect more than one right recognized in the Convention, but what happens in this case is that, despite the existence of a single area of protection (the right to remain in a job under equal conditions), not only is there a violation of the rule applicable to the factual situation analyzed (Article 23.1.c), but also, in a forced act of interpretation of the Convention, which operates to distort its text, Article 26 is also declared to have been violated.
4. The second problem is that one thing is for the rights of both categories to lack hierarchy among themselves – a correct assertion that I agree with – and another different thing is for them to be justiciable in the same manner before this Court. The second assertion does not follow from the first.
5. Once again, and as expressed in the opinions issued in the cases of *Guevara Díaz v. Costa Rica*, *Mina Cuero v. Ecuador*, *Benites Cabrera v. Peru* and *Valencia Campos v. Bolivia*, I reiterate that this Court does not have the jurisdiction to declare the autonomous violation of ESCER.
6. The theory of the direct justiciability of the ESCER generates a set of logical, legal, and practical problems, which have affected the reasonable predictability and legal certainty that this Court must guarantee.
7. Indeed, proceeding in this way circumvents the requirement that international obligations must emanate from the prior and express consent of the States; it fails to explicitly determine that the States have not granted jurisdiction to this

⁴⁸ Cf. Paragraph 100.

Court to rule on ESCER -as stated both in the Treaty and its Additional Protocol⁴⁹; it seeks to artificially expand the Court's jurisdiction and departs from the rules of interpretation of the Treaty. Therefore, in practice, the content of the instrument is being altered outside the rules for its modification or amendment,⁵⁰ i.e., leading to a case-law mutation of the text.⁵¹

8. The first basis provided to affirm the direct justiciability of the right to work is an argument of authority, since it states that "it has been recognized and protected through Article 26 of the Convention in different precedents," citing the judgment of the case of *Lagos del Campo v. Peru* and seven decisions subsequent to that ruling.
9. I reiterate that asserting the lack of direct justiciability of ESCER before the Court does not imply disregarding the existence or the immense importance of such rights, the interdependent and indivisible nature they have in relation to civil and political rights, nor does it mean that they are not or should not be protected.
10. It is the obligation of the States to generate the conditions for people to develop their abilities and to live a dignified life. These conditions are created when States guarantee access to ESCER rights, ideally by enshrining them in their respective Constitutions and empowering judges to make a final interpretation thereof.⁵² At the domestic level, States have progressively made ESCER rights justiciable and, at the international level, the Protocol of San Salvador has been a step forward in this area, which is certainly positive. However, the fact that a certain objective is beneficial and desirable does not entitle any Court to disregard the rules that determine its jurisdiction. As has been stated, the Court has made major contributions to the protection of human rights, based on the application of the *pro personae* principle, without exceeding the scope of its powers.
11. Arguments can also be made in favor of the Court's jurisdiction, the affirmation of the Court itself, insofar as it "has indicated that the terms of this provision [Article 26] indicate that these consist of the rights that derive from the economic, social, educational, scientific, and cultural rules contained in the Charter of the Organization of American States (hereinafter "Charter of the OAS")."⁵³ First, such instrument does not confer jurisdiction on this Court. In the second place, from the reading of the norms from which this right would stem, it is evident that, in general terms, they are programmatic provisions.
12. It is not possible to interpret Articles 45(b) and (c), 46 and 34(g) referred to in

⁴⁹ Additional Protocol to the American Convention on Human Rights in the area of economic, social, and cultural rights (Protocol of San Salvador).

⁵⁰ See articles 76(1) and 77(1) of the Convention.

⁵¹ This does not mean that the Court should not interpret the rules of the Treaty in an evolutionary manner, specifying the scope of the terms used therein, according to the context in which the facts to be subsumed in the norm are situated, as has occurred, for example, in the case of sexual orientation as a protected category, of indigenous communal property and of the concept of victim in the Inter-American Human Rights System.

⁵² In this vein, one of the central tenets of the capabilities approach (which is a partial theory of social justice) is that certain basic rights (ESCER rights) be enshrined in national constitutions around the world. Cf. NUSSBAUM, "Frontiers of Justice: Disability, Nationality, Species Membership" (2006:314).

⁵³ Cf. Paragraph 101.

the judgment ⁵⁴ disregarding stated in the chapter on "Progressive Development", i.e., Article 30 of the Charter of the OAS, which provides:

Article 30

"The Member States, inspired by the principles of inter-American solidarity and cooperation, **pledge themselves to a united effort to ensure**⁵⁵ international social justice in their relations and integral development for their peoples, as conditions essential to peace and security. Integral development encompasses the economic, social, educational, cultural, scientific, and technological fields, through which the goals that each country sets for accomplishing it should be achieved."

13. Likewise, Article 34 states that:

Article 34

"The Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic **objectives** of integral development. To achieve them, they likewise agree to devote their utmost efforts to accomplishing the following basic goals: To achieve them, **they likewise agree to devote their utmost efforts** to accomplishing the following **basic goals**:

[...] g) Fair wages, employment opportunities, and acceptable working conditions for all [...]⁵⁶.

14. Article 45 states that:

Article 45

"The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, **agree to dedicate every effort** to the application of the following **principles and mechanisms**:

[...] b) Work is a right and a social duty, it gives dignity to the one who performs it, and it should be performed under conditions that, including a fair wage system, ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working;

c) Employers and workers, both rural and urban, have the right to associate themselves freely for the defense and promotion of their interests, including the right of collective bargaining and the workers' right to strike, and recognition of the juridical personality of associations and the protection of their freedom and independence, all in accordance with applicable laws [...].⁵⁷

15. In short, Article 26 of the Convention does not contain subjective rights that are justiciable before this Court. What it enshrines is the commitment of the States to adopt measures to progressively achieve the realization of the rights derived from the relevant rules of the Charter of the OAS, to the "extent of available resources" (which is congruent with the progressive nature of the obligation) and by "legislative or other appropriate means." In other words, each State Party has an obligation to formulate definitions and move decisively forward on these issues, in accordance with their domestic deliberative procedures.

⁵⁴ Cf. Paragraph 101.

⁵⁵ Emphasis added.

⁵⁶ Emphasis added.

⁵⁷ Emphasis added.

16. Therefore, the Court is empowered to hear and reproach possible breaches of this commitment (obligation of progressivity and non-regression) of the rights that, interpretatively, could be derived from the aforementioned Charter, not to establish autonomously the international responsibility of States for individual violations of such rights.
17. It should also be borne in mind that Article 26 only mentions the OAS Charter and not the American Declaration, so it is this first instrument that must be taken into account to determine which ESCER could be interpretatively derived therefrom in order to supervise observance of the aforementioned duty of the State.
18. However, as can be seen from reading the Charter, it does not provide a catalog of rights nor does it define their content; rather, it formulates objectives, i.e., goals to be achieved in this area. The right to work, and unlike other ESCER, contains express reference. However, its scope is not fully developed; for example, it is not stated whether or not the right to work includes job stability. Beyond these interpretative difficulties, the fact is that Article 26 only empowers the Court to carry out the general supervision already explained and, moreover, the Protocol provides the Court with the opportunity to exercise its contentious jurisdiction only with respect to two ESCER. The instant judgment simply chooses to ignore the existence of Article 19 of the Protocol, but this omission does not operate to repeal the rule. As long as it remains in force, this provision reflects the expression of the will of the States.
19. In line with the above, conceiving Article 26 of the Convention as a rule referring to all ESCER that would be included in the Charter of the OAS disregards the commitment adopted by the States Parties and generates uncertainty with respect to the catalog of rights justiciable before the Court, which has at least two consequences. The first is that, by not knowing the specific rights that could be affected by their actions, States Parties cannot prevent or remedy possible violations domestically. The second is that a rationale that ignores the express text of the Treaty (the Convention and its Protocol) affects the legitimacy of the Tribunal's decisions, since it reflects a low standard of reasoning, which subsequently makes it difficult to examine the conduct of the domestic authorities in the light of a more demanding standard.
20. It is therefore necessary to distinguish two distinct, related, but different levels of adjudication. One is at the national level, where, through democratic procedures, citizens decide to translate ESCER into their respective legal systems, also incorporating international law on this matter, as is the case in the vast majority of member states of the Inter-American Human Rights System. In this context, it is the national courts that -within the scope of their authority- exercise their powers regarding the interpretation and justiciability of these rights, in accordance with their Constitutions and laws.

21. Another different, though complementary, level, is the international one. As an international court, the role of the Court at this level is to determine whether the State, whose responsibility is claimed, has violated one or more of the rights established in the Treaty. In light of the normative design thereof, and in accordance with Article 26, the Court is empowered to establish the international responsibility of the State if it has failed to comply with the obligations of progressive development and non-regression, not of the ESCER considered individually.
22. This assertion is in line with what has already been expressed in previous opinions, in that the correct doctrine that the Court should follow is, precisely, to consider the economic, social, cultural, and environmental dimensions of the rights recognized in the conventional rules, and to exercise its adjudicative jurisdiction by way of their relationship, when a relationship to this effect can indeed be established.
23. This approach affects the legal certainty that an international court should guarantee and the legitimacy of its decisions, since the argument provided simply ignores a rule that does not grant the Court jurisdiction to address potential violations of ESCER.
24. The reasoning of a court judgment should allow the reader to reproduce and understand the reasoning used by the Court to arrive at a specific decision. The determination to uphold the justiciability of an ESCER cannot be built on the basis of ignoring the jurisdictional rules set forth in the Treaty and its additional Protocol.
25. Unfortunately, and as Medina and David have expressed, "the position of the majority undermines the effectiveness not only of the Protocol of San Salvador but also of Article 26 itself,"⁵⁸ a treaty provision that has a specific content that the Court can and must develop in the cases it is called upon to hear.
26. This should not lead to confusion between the normative repertoires available, on the one hand, to national courts and, on the other, to an international court such as the Inter-American Court of Human Rights. There is no rule in the Treaty that empowers it to declare an autonomous violation of the right to work.

Patricia Pérez Goldberg
Judge

Pablo Saavedra Alessandri
Secretary

⁵⁸ Cf. MEDINA and DAVID "The American Convention on Human Rights" (2022:28). Translation provided by the author.