CONCURRING OPINION OF JUDGE EDUARDO FERRER MAC-GREGOR POISOT ON THE JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS IN THE *CASE OF THE SUPREME COURT OF JUSTICE (QUINTANA COELLO ET AL.) V. ECUADOR*, AUGUST 23, 2013

I. INTRODUCTION: THE ROLE OF JUDICIAL INDEPENDENCE IN A CONSTITUTIONAL AND DEMOCRATIC STATE GOVERNED BY THE RULE OF LAW

1. This case highlights the importance of one of the defining principles of the constitutional and democratic State governed by the rule of law: the independence of judges. In general terms, we can begin by affirming that a judge is independent if he takes decisions based solely on the case before him, without being influenced by particular considerations related to the parties that are not relevant to the specific matter, and if he rules without having regard to his own interests or to those of the individual or body that appointed him.[1]

2. To accomplish that objective, institutional guarantees must be provided to enable judges to exercise this independence. These guarantees include security of tenure in their positions, adequate remuneration and a system for appointments and removal from office.[2] Indeed, with regard to judicial independence *The Federalist No. 78* notes that "nothing contributes as effectively to its firmness and independence as tenure in office, the standard being good behavior for continuance in office of the judicial magistracy."[3] However, such guarantees will never be sufficient if a judge does not wish to exercise these.[4]

3. Now, from an institutional perspective, judicial independence is inherent to the principle of the separation of powers. Both elements, in turn, are essential to an understanding of the authentic rule of law. As to the principle of separation of powers, it is often said that nowadays this cannot be conceived in an absolute or rigid manner; rather, in the modern concept, it implies a distribution of the State's functions through an appropriate organization of mutual and reciprocal relations and controls between the powers. Thus, rather than unlimited separation, what this principle really seeks to prevent is the concentration of powers.[5]

4. From its remotest historical origins, the separation of powers has always implied, in relation to the judiciary, the independence of this branch of government from the executive

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[1] MacDonald, Roderick A. and Kong, Hoi, "Judicial Independence as a constitutional virtue", in Michel Rosenfeld and Andras Sajo, The Oxford Handbook of Comparative Constitutional Law, Oxford University Press, 2012, p. 832. In similar vein Chaires Zaragoza, Jorge, "*La independencia del poder judicial*", *Boletin Mexicano of Derecho* Comparado, new series, year XXXVII, No. 110, May -August 2004, p. 532.

[2] Ernst, Carlos, "*Independencia judicial y democracia*", in Jorge Malem, Jesús Orozco and Rodolfo Vázquez (comps.), *La función judicial. Ética y democracia*, Barcelona, Gedisa, 2003, p. 236.

[3] Hamilton, A., Madison, J. and Jay, J., *The Federalist,* translation by Gustavo R. Velasco, Mexico, Merits of Cultura Económica, 1ª rep., 2004, pp. 331 and 335.

[4] MacDonald, Roderick A. and Kong, Hoi, *op. cit.*, p. 834.

[5] Kelsen, Hans, General Theory of Law and State, translation by Anders Wedberg, Cambridge, Harvard University Press, 2009, p. 282.

power. Judicial independence has always been understood as a necessary outcome of the separation of powers, aimed at ensuring that judges are able to withstand pressures or attacks both from the legislative and the executive powers. Thus, since its inception, judicial independence has embodied the essence of the separation of powers. The independence of the judicial function can be conceived as an irreplaceable component of a democratic State governed by the rule of law, which also implies other contiguous requirements, such as a regulated, well-ordered and coherent procedural system, which acts as guarantor of the juridical security and human rights of individuals.[6]

5. At the same time, the independence of the judicial power *vis à vis* the executive power may be conceived as a constitutional mechanism that impedes or hinders the arbitrary and unlawful exercise of power, and that obstructs or prevents its abuse or illegal exercise.[7] It therefore makes sense to ensure that the administration of justice is never a manifestation of political power, and that it is never in any way subject to the State organs that exercise that power, since it would be pointless to dictate standards that limit the actions of those who govern, if later, in the contentious phase of Law, these could influence the outcome of litigation.[8]

6. Certainly, the role of judicial independence in the democratic State under the rule of law could not be overlooked by the Inter-American Democratic Charter (cited in the Judgment)[9]; after reaffirming that representative democracy is an essential element for stability, peace and development in the region, the Charter establishes the following in Article 3:

> Essential elements of representative democracy include, *inter alia*, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government (underlining added).

7. Thus, the Inter-American Democratic Charter not only recognizes respect for human rights and fundamental freedoms as essential elements of representative democracy, and as elements inherent to electoral democracy; it also requires the separation of powers and independence of the branches of government, particularly the jurisdictional role in this case. The role of judges in the democratic governance of States implies acknowledging their genuine separation and independence from the rest, i.e. from the executive power, not only in the personal aspect, corresponding to each member of the judiciary, but also *in the institutional aspect*, as a separate body of authority among the components of the State.

8. The Inter-American Court of Human Rights (hereinafter "Inter-American Court") has emphasized the democratic roots of judicial independence in several judgments and advisory opinions, and has also used the Inter-American Democratic Charter to explain the importance of judicial independence in the region's constitutional systems. In this regard I believe it is important to mention that the separation of powers is closely associated not

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6 *Cf.* Díaz, Elías, *Estado de derecho y sociedad democrática*, Madrid, Taurus, 1998, p. 48.

7 *Cf.* Bobbio, Norberto, *Liberalismo y democracia*, translation by Jose F. Fernandez Santillán, Mexico, Fondo de Cultura Económica, 2001, pp. 19-20.

8 *Cf.* Díez-Picazo, Luis María, "*Notas de derecho comparado sobre la independencia judicial*", *Revista Española of Derecho Constitucional*, No. 34, January-April 1992, p. 19-20.

9 Para. 179 of the Judgment.

only with the consolidation of the democratic system, but also with the desire to preserve individual freedoms and human rights, avoid the concentration of power which can turn into tyranny and oppression, and allow for the effective and efficient fulfillment of the purposes assigned to each branch of government. However, the separation of powers not only implies a specialization of the state's roles, according to how these have been assigned; it also implies the existence of a system of "checks and balances", through which reciprocal control and oversight is exercised by each branch of government. Thus, the separation of powers implies the exercise of limited power, subject to regulation, and organized in different bodies which are responsible for different functions, with the essential objective of guaranteeing the freedom of individuals before the State, within a framework of participatory and pluralist democracy.[10]

9. In the very important case of the *Constitutional Court v. Peru*, the Inter-American Court considered that one of the main purposes of the separation of powers is precisely to guarantee the independence of judges. It determined that, for those purposes, different political systems have developed strict procedures, both for the appointment and the removal of judges. In this regard, it referred to the "United Nations Basic Principles on the Independence of the Judiciary,"[11] which establish that:

> The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.[12]

10. Regarding the possibility of removing judges, it emphasized that the same "Principles" establish that:

> A charge or complaint made against a judge in his judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.[13]

11. Thus, in that landmark ruling, the Inter-American Court emphasized that the authority in charge of the process to remove a judge must act impartially in the procedure established for this purpose and allow the latter to exercise the right of defense. The Court also stressed that, under the rule of law, the independence of all judges must be guaranteed and, "in particular", that of constitutional judges, given the nature of the matters submitted to their consideration. Referring to the European Court, it specified that the independence of any judge presumes that there is an appropriate appointment process, and fixed term in the position and a guarantee against external pressures.[14]

12. The important point to emphasize here is that the Inter-American Court has held that judicial independence *constitutes an institutional guarantee in a democratic system* that goes hand in hand with *the principle of separation of powers*, now enshrined in Article 3 of

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[10] Regarding these concepts, see Constitutional Court of Colombia, Judgment C-141 of February 26, 2010.

[11] Adopted by the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders, held in Milan in August 26 - September 6, 1985, and ratified by the General Assembly in Resolutions 40/32 of November 29, 1985 and 40/146 of December 13, 1985.

[12] Principle 1, *Idem.*

[13] Principle 17, *Idem.*

[14] *Case of the Constitutional Court v. Peru. Merits, Reparations and Costs.* Judgment of January 31, 2001. Series C No. 71, paras. 73-75.

the Inter-American Democratic Charter. In the instant case, it should also be borne in mind that the Supreme Court of Justice, of which the victims formed part in their capacity as judges, is itself a democratic institution called upon to uphold the rule of law.

13. It is also worth considering whether it is possible to configure a sort of right of defendants within the democratic conditions of public institutions, based not only on the aforementioned Article 3 of the Democratic Charter, but also on Article 29 of the American Convention;[15] this would be consistent with the international obligations of the States regarding the exercise of power according to the rule of law, the separation of powers and, of course, the independence of judges, as argued in other cases in which the Inter-American Court has clarified analogous issues.[16] A principle of this scope would go beyond the concept of democracy, in interpretative terms, as the Inter-American Court has stated inasmuch as "the just demands of democracy must […] guide the interpretation of the Convention and, in particular, the interpretation of those provisions that bear a critical relationship to the preservation and functioning of democratic institutions."[17]

14. In this initial context, which underscores the essentially democratic dimension of judicial independence, I consider it appropriate to examine and clarify certain primordial questions in this reasoned opinion: (i) the importance of context in this case (paras. 15-19); (ii) judicial independence in the Inter-American Court's case law on the dismissal of judges (paras. 20-44); (iii) different concepts of judicial independence, particularly the institutional and personal independence of each judge (paras. 45-54); (iv) the institutional facet of judicial independence and its relationship to democracy (paras. 55-76), and (v) the lack of analysis of violations of other judicial guarantees and the principle of legality (paras. 77-93).

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15 "Article 29. *Restrictions Regarding Interpretation*

No provision of this Convention may be interpreted as:

a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;

b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;

c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or

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."

16 *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. 222.

17 *Cf. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights).* Advisory Opinion OC-5/85, para. 44.

II. THE IMPORTANCE OF CONTEXT IN THIS CASE

15. According to the proven facts of this case, the dismissal of the members of Ecuador's three High Courts, namely, the Supreme Court, the Constitutional Tribunal and the Supreme Electoral Tribunal, occurred as a result of a political arrangement between the then President of the Republic, Lucio Gutiérrez, who was facing impeachment for embezzlement, and the *Partido Roldosista Ecuatoriano*. The leader of this party, former President Abdalá Bucaram, in turn, was seeking the annulment of several criminal proceedings brought against him before the Supreme Court.

16. Thus, on November 23, 2004, President Gutiérrez Borbúa announced his government's intention to promote, via Congress, the reorganization of the Constitutional Tribunal, the Supreme Electoral Tribunal and the Supreme Court of Justice. On November 25, 2004 the National Congress approved a resolution declaring that the full and alternate members of the Constitutional Tribunal had been illegally appointed in 2003 and terminating the appointments of all its full and alternate members, some of whom were subsequently impeached by Congress a few days later. Congress also decided to declare the termination of the duties of the full judges of the Supreme Electoral Tribunal and their substitutes, on the grounds that they had been appointed without observing the provisions of Article 209 of the Constitution.

17. On December 1, a first attempt was made to impeach some members of the Constitutional Tribunal, but without securing the necessary votes for their dismissal. For this reason, on December 5, 2004 President Gutiérrez Borbúa summoned the National Congress to a special session on December 8, at which the required number of votes was obtained to censure the former members of the Constitutional Tribunal in an impeachment proceeding. As a second point on the agenda, the Congress also dismissed all the judges of the Supreme Court of Justice, incorrectly applying Transitory Provision 25 of the 1998 Constitution, according to which officials and members of institutions appointed by the National Congress, as of August 10, 1998, for a four-year term, would remain in office until January 2003. These decisions were subsequently revoked by the National Congress, although this did not result in the reinstatement of the dismissed members.

18. It is important to emphasize that the United Nations Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, participated in the settlement of this political and social crisis by issuing several recommendations and monitoring their implementation. At the time, he pointed out that the removal of the judges of the Constitutional Tribunal affected the right of defense and other principles of due process.[18] In relation to the dismissal of the Supreme Court judges, he recognized that the National Congress did not have the authority to remove judges, or to appoint substitutes.[19]

19. The importance of taking into account the context lies in the fact that is crucial when deciding which institutional design to implement in a certain place, in order to insulate the judiciary from undue influences.[20] Among the factors that can influence the effective

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[18] Report E/CN.4/2005/60/Add.4 of March 29, 2005, p. 3. See also Reports A/60/321 of August 31, 2005 and A/HCR/11/41 of March 24, 2009.

[19] *Idem.*

[20] MacDonald, Roderick A. and Kong, Hoi, *op. cit*., p. 846. Similarly, Linares considers that an assessment of judicial independence in a country requires a qualitative knowledge of the political actors and of the relevant

exercise of judicial independence are: a) the presence of an authoritarian regime, b) the existence of cultural patterns that could undermine the usefulness of the courts as a mechanism for settling disputes, c) the commitment of civil society and politicians to judicial independence, and d) the judicial tradition, whether based on continental European or Common Law.[21] Indeed, it has been noted that, in Latin America in general, democracy continues to be weak and that strong executive powers have been a constant source of attacks on judicial independence.[22]

III. JUDICIAL INDEPENDENCE IN THE JURISPRUDENCE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS RELATED TO THE REMOVAL OF JUDGES

20. In the case of the *Constitutional Court v. Peru*, the Inter-American Court considered the resolution issued by Congress on May 28, 1997, in which some judges of Peru's Constitutional Court were dismissed for alleged irregularities in the processing of a petition for clarification of a judgment that declared the non-applicability of Law No. 26,657. In this case, the Inter-American Court ruled that the guarantees of Article 8 of the American Convention provided for both in Part 1 and in Part 2, in addition to being applicable to criminal matters are applicable to matters of a civil, labor, fiscal or any other nature, and therefore due legal process is applicable.[23]

21. The Court also pointed out that any public authority, whether administrative, legislative or judicial which, through its decisions, determines individual rights and obligations, has the obligation to observe the guarantees of due legal process.[24] Similarly, it specified that one of the main purposes of the separation of powers is to guarantee judicial independence and, to this end, different strict procedures have been devised for both the appointment and removal of judges.[25] The authority that carries out this procedure must behave impartially and allow judges to exercise their right of defense.[26]

22. The Court also established that the independence of all judges presumes that there is an appropriate appointment process, a fixed term in the position and a guarantee against external pressures.[27]

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matters on which power is exercised. Linares, Sebastián, "*La independencia judicial: conceptualización y medición*", in German Burgos S. (ed.), *Independence Judicial in America Latina. ¿De quién? ¿Para qué? ¿Cómo?* ILSA, Bogota, 1ª ed., 2003, pp. 121, 122.

21 MacDonald, Roderick A. and Kong, Hoi, *ibid.*

22 Horan, Jennifer E. and Meinhold, Stephen S., "Separation of powers and the Ecuadorian Supreme Court: exploring presidential-judicial conflict in a post-transition democracy", *The Social Science Journal*, 2012, vol. 29, pp. 232-234.

23 *Case of the Constitutional Court v. Peru. Merits, Reparations and Costs*. Judgment of January 31, 2001, Series C, No. 71, para. 70.

24 *Ibid.* para. 71.

25 *Ibid.* para. 73.

26 *Ibid.* para. 74.

27 *Ibid.* para. 75.

23. As regards the impeachment process in this case, in which the sanction of dismissal[28] was applied, the Court indicated that "any person subject to a proceeding of any nature before an organ of the State must be guaranteed that this organ is competent, independent and impartial and that it acts in accordance with the procedure established by law for hearing and deciding the case submitted to it."[29]

24. As to the application for *amparo* filed against the decision on dismissal, it considered that this was not decided within a reasonable period, or by an impartial judge.[30]

25. In the *Case of Apitz Barbera et al. v. Venezuela*, the Inter-American Court considered the case of the dismissal of the provisional former judges of the First Court of Administrative Disputes, for having allegedly committed the inexcusable judicial error of granting an *amparo* that suspended the effects of an administrative act that had denied a request for the registration of a land sale. In this case, the Inter-American Court noted that the States are bound to ensure that provisional judges can be independent and therefore must grant them some sort of stability and permanence in office, for to be provisional is not equivalent to being discretionally removable from office. Similarly, it considered that provisional tenure should not imply any change in the safeguards instituted to guarantee the good performance of the judges and to benefit the parties to a case.[31] Indeed, the Inter-American Court considers that an adequate appointment process and a fixed term of office are some of the ways to guarantee the independence of judges.[32]

26. Furthermore, the Court reiterated that the authority in charge of the procedure to remove a judge must act impartially and allow the judge to exercise the right of defense[33], in order to be considered an independent tribunal.[34] Similarly, it recalled that *all the organs that exercise functions of a substantially jurisdictional nature* have the obligation to adopt just decisions based on full respect for the guarantees of due process established in Article 8 of the American Convention.[35]

27. Regarding the issue of judicial independence, the Inter-American Court emphasized its importance for the separation of powers, together with the State's obligation to guarantee its institutional aspect, in other words, in relation to the Judiciary as a system, as well as in connection with its individual aspect, that is to say, regarding the person of the specific judge.[36] At the same time, impartiality demands that the judge acting in a specific dispute approach the facts of the case subjectively, free of all prejudice, and also offer

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28 *Ibid.* paras. 67 and 68.

29 *Ibid.* para. 77.

30 *Ibid.* paras. 93 and 96.

31 *Case 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. 43.

32 *Ibid.* para. 138.

33 *Ibid.* para. 44.

34 *Ibid.* para. 137.

35 *Ibid.* para. 46.

36 *Ibid.* para. 55.

sufficient objective guarantees to exclude any doubts that might be harbored by the parties or by the community as to his or her lack of impartiality.[37]

28. The Inter-American Court also argued that under international law the valid grounds for suspending or removing a judge may include, *inter alia*, misconduct or incompetence. However, judges cannot be removed solely on the grounds that one of their decisions has been overturned on appeal or review by a higher judicial body.[38] Similarly, it considered that the State failed in its duty to provide reasons for the penalty of dismissal from office, because it did not analyze whether or not the inexcusable judicial error constituted a disciplinary offense.[39]

29. In relation to the victims' request for evidence for the purpose of clarifying a decisive aspect of the case, the Inter-American Court considered that the disciplinary body, at the very least, should have ruled by allowing or denying that request for evidence or even by ordering the parties to submit such evidence.[40]

30. In the *Case of Reverón Trujillo v. Venezuela*, the Inter-American Court considered the arbitrary dismissal from office of a provisional judge, on February 6, 2002. On October 13, 2004 the Political-Administrative Chamber of the Supreme Court of Justice ordered the annulment of the act of dismissal, considering that it was not lawful, but it did not order the alleged victim's reinstatement in office, or the payment of the salaries and social benefits she did not receive.

31. In this case, the Inter-American Court pointed out that judges, unlike other public officials, enjoy strengthened guarantees so as to ensure the necessary independence of the judiciary. It reiterated the importance of judicial independence for the separation of powers, and for the State's obligation to guarantee both the institutional aspect of the judicial power as a system, and also in connection with its individual aspect, that is, with regard to the specific judge as an individual.[41]

32. The Court also emphasized the guarantees derived from judicial independence: an appropriate appointment process, tenure in office and guarantees against external pressures.[42] It recalled that the authority in charge of the process for the dismissal of judges must act independently and impartially in the proceedings established for that purpose and allow the exercise of the right of defense.[43] Tenure in office is a guarantee of judicial independence which, in turn, is comprised of the following guarantees: continuance in office, an appropriate system of promotion and no unjustified dismissal or discretionary removal.[44] Furthermore, the guarantee of tenure must allow for the reinstatement of a judge who has been arbitrarily removed from office.[45] This does not mean to say that

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37 *Ibid.* para. 56.

38 *Ibid.* para. 84.

39 *Ibid.* paras. 86 and 91.

40 *Ibid.* para. 94.

41 *Case Reverón Trujillo v. Venezuela. Preliminary Objection, Merits, Reparations and Costs.* Judgment of June 30, 2009. Series C No. 197, para. 67.

42 *Ibid.* para. 70.

43 *Ibid.* para. 78.

44 *Ibid.* para. 79.

45 *Ibid.* para. 81.

provisional or temporary judges should have unlimited tenure in office, but rather that they should be guaranteed a certain stability in their positions.[46] In other words, they must have security of tenure during a particular period in order to protect them from the pressures of different sectors.[47]

33. Similarly, the Inter-American Court argued that Article 8(1) establishes that "[e]very person has the right to a hearing […] by an independent judge or tribunal […]." The wording of this Article indicates that the subject of that right is the defendant, the person facing the judge who will decide the case submitted to him. Two obligations arise from this right. The first pertains to the judge and the second to the State. A judge has the obligation to be independent, a duty that is fulfilled only when he acts according to—and guided by — the Law. The State, for its part, has the obligation to respect and guarantee the right to be heard by an independent judge, pursuant to Article 1(1) of the American Convention. The obligation to respect this right entails the negative obligation of public authorities to refrain from any undue interference with the Judiciary or with any of its members, that is, with an individual judge. The obligation to guarantee this right entails preventing such interference and investigating and punishing those who commit these acts. Moreover, the duty of prevention involves the adoption, pursuant to Article 2 of the Convention, of an appropriate regulatory framework that guarantees judges an appropriate appointment process, tenure in office and other conditions.

34. Now, from the State's aforementioned obligations other rights arise, in turn, for judges or for other citizens. For example, the guarantee of an appropriate appointment process for judges necessarily involves the right of citizens to have access to public office under conditions of equality; the guarantee of not being subject to discretionary removal implies that disciplinary and punitive processes for judges must necessarily respect the guarantees of due process and must offer them an effective remedy; the guarantee of tenure in office must be reflected in adequate conditions of service for judges, in which transfers, promotions and other conditions are sufficiently controlled and respected.

35. Finally, in the *Case Chocrón Chocrón v. Venezuela*, the Inter-American Court considered the arbitrary dismissal of a temporary judge of the First Instance Court of the Caracas Metropolitan Area Criminal Judicial Circuit, without affording her the minimum guarantees of due process and without adequate justification, without giving her an opportunity to be heard and to exercise her right of defense, and without allowing her any effective judicial remedy against the alleged violations of her rights, all as a consequence of the absence of guarantees in the transition process of the Judiciary

36. The Inter-American Court reiterated that one of the main objectives of the separation of powers is to guarantee the independence of judges. The purpose of this protection is to prevent the judicial system in general and its members in particular from being subject to possible undue restrictions in the exercise of their duties, imposed by bodies outside the Judiciary or even by those judges who perform review or appellate functions.[48]

37. The Court emphasized, once again, the guarantees stemming from judicial independence: an appropriate appointment process, secure tenure in office and guarantees

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[46] *Ibid.* paras. 115 and 116.

[47] *Ibid.* para. 117.

[48] Case *Chocrón Chocrón v. Venezuela. Preliminary Objection, Merits, Reparations and Costs.* Judgment of July 1, 2011. Series C No. 227, para. 97.

against external pressures. It also reaffirmed that the authority in charge of removing a judge must act independently and impartially in the procedure established for that purpose and allow the exercise of the right of defense. This is so, because the discretionary removal of judges raises the objective doubt of the observer regarding the real possibility of judges deciding specific disputes without fear of reprisals.[49]

38. The Inter-American Court reiterated that, although provisional and permanent judges must have the same guarantees, these guarantees do not entail equal protection for both types of judge, because provisional and temporary judges are, by definition, elected in a different way and do not have indefinite tenure in their post. In this regard, it recognized that provisional and temporary judges have not demonstrated the qualities and aptitude to exercise their duties with the guarantees of transparency imposed by competitive examinations. However, this does not mean that provisional and temporary judges should not have some kind of appointment procedure because, according to the Basic Principles "[a]ny method of judicial selection shall safeguard against judicial appointments for improper motives."

39. The Inter-American Court further indicated that just as the State is required to guarantee an appropriate appointment procedure for provisional judges, it must also guarantee them certain tenure in their posts. Thus, in the case of provisional judges, the guarantee of tenure translates into a requirement that they enjoy all the inherent benefits of secure tenure until the resolutive condition occurs that puts a legal end to their mandate.

40. Furthermore, the Inter-American Court stated that the tenure of provisional judges is closely related to the guarantee against external pressures because, if temporary judges do not have security of tenure during a pre-determined period, they will be vulnerable to pressure from different sectors, particularly those who have the authority to decide on dismissals or promotions in the Judiciary.[50]

41. Also, the Inter-American Court held that provisional appointments must be the exception and not the rule, and that provisional appointments cannot be prolonged indefinitely.[51]

42. Similarly, the Court stated that any public authority, whether administrative, legislative or judicial, whose decisions may affect the rights of individuals are required to adopt said decisions with full respect for the guarantees of due legal process. It also reiterated that any State body that exercises function of a *substantially jurisdictional nature*, has the obligation to adopt decisions that respect the guarantees of due legal process under the terms of Article 8 of the American Convention.[52]

43. The Inter-American Court further emphasized that the authority to annul the appointment of judges based on "comments" must be minimally justified and regulated, at least specifying the facts that support those comments, and that the respective grounds are not of a disciplinary or punitive nature. If a disciplinary sanction is involved, the need for justification would be even greater, given that the purpose of disciplinary oversight is to assess the conduct, suitability and performance of the judge as a public official and,

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[49] *Ibid.* para. 99.

[50] *Ibid.* paras. 104 to 106.

[51] *Ibid.* para. 107.

[52] *Ibid.* para. 115.

therefore, to analyze the seriousness of the conduct and the proportionality of the sanction.[53]

44. In the Judgment that prompts this reasoned opinion, the Inter-American Court also considered its jurisprudential position on judicial independence[54] with reference to the standards issued by the Human Rights Committee and the United Nations Basic Principles on the Independence of the Judiciary, the criteria of the European Court of Human Rights and the Council of Europe's recommendations on the Independence, Efficiency and Role of Judges, as well as the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.[55]

IV. DIFFERENT CONCEPTS OF JUDICIAL INDEPENDENCE: INSTITUTIONAL AND PERSONAL

45. There are different concepts of judicial independence which the Inter-American Court has developed in its doctrine and in its case law. Here, it is important to focus on the aspects related to its institutional and personal aspects.

46. According to Linares "we can analytically distinguish two aspects of judicial independence: one negative and another positive. The first involves the ability to avoid different sources of coercion and loyalties, while the second involves the application of the law—and all its sources— in deciding a specific case."[56]

47. For his part, Chaires distinguishes between objective-institutional independence and subjective-functional independence. [57] The first is associated with the absence of external pressures with respect to the judiciary.[58] The second concerns the mechanisms aimed at ensuring that a judge's action is, as far as possible, consistent with the law.[59]

48. Judicial independence has also been conceived as a value or as a guarantee. In its characterization as a value, its significance coincides with what is termed "functional independence" (also known as "substantive" or "decisional"). This concept of judicial independence translates into the basic rule of the system whereby a judge, in exercising his jurisdictional role, must be subject only to the law, i.e. to the current system of sources of law. On the other hand, in its characterization as a guarantee, judicial independence embodies a set of juridical mechanisms which seek to safeguard and fulfill the value mentioned, which is protected by other principles such as the separation of powers, the natural judge, impartiality, exclusivity, etc.[60]

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53 *Ibid.* para. 120.

54 Paragraph 144 of the Judgment establishes that "In its case law, the Court has indicated that the scope of judicial guarantees and effective judicial protection for judges must be examined in relation to the standards on judicial independence."

55 Paragraphs 144 to 154 of the Judgment.

56 Linares, Sebastián, *op. cit.,* p. 116.

57 Chaires Zaragoza, Jorge, *op. cit.*, p. 531.

58 *Ibid.* p. 534.

59 *Ibid.* p. 536.

60 *Cf.* Díez Picazo, *op. cit*., p. 20 and 21.

49. Within the concept of judicial independence as a guarantee, we can identify several facets. The first of these is the so-called "personal independence" which protects each judge as an individual and embodies the characteristics of his constitutional status, protecting him from possible pressures by the State's political bodies —especially Parliament and the Executive Branch. Also, in more recent times, a guarantee of judicial independence in its "collective" and "internal" aspects has emerged. Collective judicial independence tends to protect the Judiciary as a whole against the other powers of the State, while the internal aspect protects the judge as an individual even from the rest of the judicial system.[61]

50. With respect to the Inter-American Court's case law —as is evident in the preceding section— this contemplates both the independence of the Judiciary as an expression of the principle of the separation of powers in a democratic system, and the independence of judges as their right to exercise their duties and even as a right of citizens to have access to justice and judicial guarantees.

51. Thus, as stated in the preceding section, the Inter-American Court has established that one of the main purposes of the separation of the branches of government is to guarantee the independence of judges. [62] This autonomous exercise must be guaranteed by the State, both in its institutional aspect, in other words, in relation to the Judiciary as a system, as well as in connection with its individual aspect, that is to say, regarding the person of the specific judge. The purpose of protection is to prevent the judicial system in general and its members in particular from being subject to possible undue restrictions in the exercise of their duties, imposed by bodies outside the Judiciary or even by those judges who perform review or appellate functions.[63] The objective of the principle of separation of powers is accomplished in two ways, corresponding to the two aspects mentioned: the institutional and the individual. When the State is required to protect the Judiciary as a system, there is a tendency to guarantee its external independence. When it is required to provide individual protection to a specific judge, there is a tendency to guarantee its internal independence.

52. Similarly, the Inter-American Court has held that Article 8(1) of the Convention acknowledges that "[e]very person has the right to a hearing […] by an independent judge or tribunal […]." The terms in which this article is worded indicate that the subject of that right is the defendant, the person facing the judge who will decide the case submitted to him.[64] Two obligations emerge from that right, referred to in the study of the Inter-American Court's case law: the first corresponding to the judge and the second to the State.[65]

53. Now, the Inter-American Court has also stated that the aforementioned obligations of the State result, at the same time, in rights for judges or for all other citizens. For example, the guarantee of an adequate appointment process necessarily involves the right of citizens to have access to public service in equal conditions; the guarantee that they will

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[61] *Cf.* Díez Picazo, *op. cit.,* p. 21.

[62] *Case of the Constitutional Court v. Peru. Merits, Reparations and Costs.* Judgment of January 31, 2001. Series C No. 71, para. 73.

[63] *Case Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182. para. 55.

[64] *Case Reverón Trujillo v. Venezuela. Preliminary Objection, Merits, Reparations and Costs.* Judgment of June 30, 2009. Series C No. 197, para. 148.

[65] *Ibid.* para. 146.

not be subject to discretionary removal implies that the disciplinary and punitive processes applicable to judges must necessarily respect the guarantees of due process and must offer those affected an effective remedy; the guarantee of tenure must translate into adequate conditions of service for judges, in which transfers, promotions and other conditions are sufficiently well-controlled and respected.[66]

54. In this specific case, the Inter-American Court considered that "the objective dimension is related to aspects that are essential for the rule of law, such as the principle of separation of powers, and important role played by the Judiciary in a democracy. Consequently, this objective dimension transcends the figure of the judge and collectively affects society as a whole. Likewise, there is a direct connection between the objective dimension of judicial independence and the right of judges to have access to and remain in office, under general conditions of equality, as an expression of their guaranteed tenure."[67] Thus, "when a judge's tenure is affected in an arbitrary manner, the right to judicial independence enshrined in Article 8(1) of the American Convention is violated, in conjunction with the right to access and remain in public office, on general terms of equality, established in Article 23(1) (c) of the American Convention."[68] On this point it is important to stress that this interactive interpretation between Articles 8(1) and 23(1)(c) of the American Convention allows the Inter-American Court to complement its jurisprudence in the case of *Reverón Trujillo* by specifying that the institutional guarantee of judicial independence, derived from Article 8(1) of the American Convention, translates into a subjective right of the judge to not have his tenure in public office affected in an arbitrary way, within the context of Article 23(1)(c) of the Pact of San Jose.

V. THE INSTITUTIONAL ASPECT OF JUDICIAL INDEPENDENCE IN THIS CASE AND ITS RELATIONSHIP TO DEMOCRACY

55. In this case, the Inter-American Commission argued that in the absence of relevant procedures clearly established by law, it could be inferred that the National Congress acted without offering the necessary guarantees of independence in dismissing the victims. For their part, the representatives concluded that the removal of the judges before completion of their constitutional term, and by decision of an incompetent body, constituted a violation of judicial independence. They also pointed out that, having assumed the role of an "ad hoc" judge, Congress had an obligation to guarantee a person's right to be heard by an independent judge. Therefore, they argued that the National Congress could hardly guarantee independence, being a political body by nature, and even less so in this case because it responded to the interests of the government and parliamentary majorities.

56. As to the nature of the resolution to dismiss the judges, the Inter-American Commission pointed out that these types of decisions, issued in the absence of a precise legal framework, foster doubts about the ends they pursue, resulting in an implicit sanction of the judicial officials in reprisal for the manner in which they had discharged their duties. In other words, the dismissal was an action aimed at sanctioning the conduct or performance of the Supreme Court justices since the provision invoked by the National Congress was not applicable to the victims. For their part, the representatives argued that

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66 *Ibid.* para. 147.

67 Para. 154 of the Judgment.

68 *Ibid.* para. 155.

the process which concluded with the judges' dismissal was, in reality, punitive because during the parliamentary sessions Congress used arguments related to the exercise of public office by Ecuador's highest court. With this action, the National Congress sought to give the appearance that this was not a punitive procedure, but rather the application of a provision that was not observed, thereby equating the judges to any other public official with a fixed term and designated by Congress.

57. Contrary to what the State claimed, in this case no legal grounds were found for the termination of the judges' term in office. This claim would even be inconsistent with the State's expression of acquiescence at the public hearing in this case, given that the decision taken by the National Congress could indeed have been understood as an "*ad-hoc* procedure of a punitive nature."[69]

58. Bearing in mind the foregoing, in its Judgment the Inter-American Court concluded that Congress was not authorized to dismiss the Supreme Court justices, given that the new Constitution had removed its power to do so. It also noted that a proceeding already existed which stipulated the process and grounds on which a judge could be dismissed. Thus, it determined that "it is evident that Congress was not the competent authority to decide on the dismissal of Supreme Court judges."[70] Then, in order to determine the scope of the violations in this case, the Inter-American Court analyzed the aforementioned "ad-hoc" mechanism used by Congress to dismiss the judges.[71]

59. The Inter-American Court subsequently determined that the judges were dismissed by means of a resolution of the National Congress, which lacked the proper jurisdiction to do so, through the erroneous and arbitrary application of a legal provision and without being granted the right to be heard. The resolution through which the judges were dismissed was the result of a political alliance that was intended to establish a Supreme Court sympathetic to the political majority at that time, and to impede criminal proceedings against the acting President and a former President. The Court confirmed that Congress's resolution was not adopted by virtue of an exclusive assessment of specific factual evidence in order to ensure full compliance with the existing legislation, but that it pursued a completely different objective, *related to the abuse of power.*[72]

60. Indeed, as stated in the Judgment, the main violations in this case were due to a totally unacceptable and untimely political action,[73] against a basic pillar of a democratic State governed by the rule of law, that is, against a truly independent Judiciary and Supreme Court of Justice. The action which undermined this essential principle of constitutional democracy, showed a disregard for all the manifestations of that independence and, therefore, for the principle of separation of the branches of government, which also forms the basis for the full protection of individual human rights. A single fact proven in this matter is sufficient to show Congress's abuse of power: the fact that within a period of 14 days, it dismissed not only the Supreme Court, but also the Constitutional Tribunal and the Electoral Tribunal of Ecuador, as a consequence of the political and

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69 *Ibid.* para. 13.

70 *Ibid.* para. 162.

71 *Ibid.* paras. 163 to 169.

72 *Ibid.* para. 177.

73 *Ibid.* para. 175.

institutional context in this case, within a framework clearly contrary to the democratic rule of law.

61. This is the conclusion reached in the Judgment, to which this opinion refers. Thus, in paragraph 179, it cites Article 3 of the Inter-American Democratic Charter, concluding that the dismissal of all the members of the Supreme Court of Justice implied the destabilization of the democratic order in Ecuador, because a rupture occurred in the separation and independence of the branches of government when an attack was made on the country's three High Courts at that time.

62. However, I consider that the Judgment should have placed greater and more detailed emphasis on the antidemocratic attack proffered by the political powers against the Supreme Court of Justice in this case. Although the Inter-American Court declared the violation of Article 8(1) of the American Convention, for infringing the right to a hearing and the guarantee of a competent tribunal to the detriment of the 27 victims, "because they were dismissed from office by an incompetent body that did not grant them an opportunity to be heard";[74] and Article 8(1) in conjunction with Article 23(1)(c) "given the arbitrary effects on the tenure in office of the judiciary and the consequent effects on judicial independence,"[75] it should also have elaborated on the violation of Article 8 from the perspective of the safeguards that the Inter-American System affords to the democratic State governed by the rule of law and, in particular, to the independence of judges who operate it and who make it resistant to the attacks of the political powers.

63. Likewise, the Judgment should have included a more exhaustive jurisprudential analysis of the Inter-American Democratic Charter itself, specifically in relation to Article 3. The Inter-American Court's contentious role consists of settling disputes submitted to it by the Inter-American Commission and the parties in a particular case; clearly, it also has the mission to act as guarantor of the principles that comprise the Inter-American System of Human Rights. This mission is accomplished by providing guidance through the interpretation of the meaning of those principles, in order to clarify them. Therefore, ruling on a dispute between the parties and the scope of the law is one of the tasks of the Inter-American jurisdiction, but it is not the only one: the Court also has an interpretive role as regards the American Convention, one that increases in importance given the very limited number of cases it hears.

64. Based on the proven facts it is clear that a multi-frontal attack was made on judicial independence as protected under the American Convention and reinforced by the Inter-American Democratic Charter, specifically in relation to the institutional facet of the independence of the judges of Ecuador's Supreme Court of Justice. Thus, the institutional independence of the Supreme Court of Justice, in its role as guarantor of its own domestic democratic system, was based on Ecuador's constitutional and legal framework in force at the time when the judges dismissed by the National Congress were originally designated. In this regard, the Court should have linked these aspects more firmly with the Inter-American jurisprudence on judicial independence, already mentioned in this opinion, and should have emphatically condemned the flagrant abuse of political power that occurred in this case against the Supreme Court of Justice and its independence.

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[74] *Ibid.* para. 180.

[75] *Idem.*

65. Indeed, since the Constitution of the Republic of Ecuador of August 11, 1998, contained provisions guaranteeing judicial independence, because it recognized the principle of the separation of powers and the independence of the judiciary in Article 199.[76] Similarly, it established that in public law the branches of government can only exercise the powers established by the Constitution.[77] Moreover, that Constitution did not grant the National Congress the authority to decide matters pertaining to the judiciary.[78]

66. Furthermore, as the proven facts in this case show, Article 129 of the Reforms to the Constitution issued on July 23, 1997, was essentially reproduced in Article 202 of the Constitution adopted by the National Constituent Assembly in 1998. Regarding the appointment and term of office of the judges of the Supreme Court of Justice, it maintained the indefinite term of appointment and the cooptation system to fill vacancies.[79] The aforementioned Article 202 established the following:

> Article 202. The judges of the Supreme Court of Justice shall not be subject to a fixed period in their positions. Their duties shall be terminated for the reasons set forth in the Constitution and in law.
>
> When a vacancy arises, the plenary of the Supreme Court of Justice shall appoint the new judge, with a vote in favor of two-thirds of its members, with due consideration of the criteria of professionalism and judicial career, as provided for by law.
>
> Appointments shall be made, alternately, from professionals who have served in the judiciary, as university professors or in free professional exercise, in that order.

67. As to the dismissal of certain authorities, the Constitution's transitory provisions established that:

> Twenty-five- Officials and members of agencies appointed by the National Congress and the Comptroller General of the State for a four-year period as of August 10, 1998, under the provisions of this Constitution, shall remain in those positions until January.[80]

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[76] Art. 199. - The agencies of the judicial branch shall enjoy independence in the exercise of their duties and powers. No function of the State may interfere in matters of their competence. Judges shall be independent in the exercise of their jurisdictional powers, even in relation to the rest of the judicial organs; they shall be subject only to the Constitution and to the law. *Cf.* Constitution of the Republic of Ecuador of August 11, 1998.

[77] Art. 119.- The institutions of the State, its agencies and branches and its public officials shall not exercise powers other than those established by the Constitution and by law, and have the duty to coordinate their actions in order to achieve the common good. Those institutions specified by the Constitution and by law shall enjoy autonomy in their organization and functions. *Cf.* Constitution of the Republic of Ecuador of August 11, 1998.

[78] Art. 130.-The National Congress shall have the following duties and powers: 1. To swear into Office the President and Vice President of the Republic proclaimed elect by the Supreme Electoral Tribunal. To receive their resignations; to dismiss them, <u>following impeachment</u>; to establish their physical or mental incapacity or abandonment of their duties, and to declare them suspended. […] 4. To reform the Constitution and <u>interpret it in a generally binding manner</u>. 5. To issue, amend and repeal laws <u>and interpret them in a generally binding manner</u>. […] 8. To oversee the actions of the Executive Branch and of the Supreme Electoral Tribunal and request any information considered necessary from public officials. 9. At the request of at least one-quarter of the members of the National Congress, to proceed to the impeachment of the President and Vice-president of the Republic; of Ministers of State; of the Comptroller General and the Attorney General; of the Ombudsman and of the Prosecutor General; of the superintendents, of members of the Constitutional Court and of the Supreme Electoral Tribunal, during the exercise of their duties and until one year after termination. *Cf.* Constitution of the Republic of Ecuador of August 11, 1998.

[79] *Cf.* Constitution of the Republic of Ecuador of August 11, 1998.

[80] *Cf.* Constitution of the Republic of Ecuador of August 11, 1998.

68. As stated in the Judgment, the Supreme Court of Justice, in exercise of its constitutional[81] and legal[82] authority, regulated some aspects of the cooptation procedure in order to ensure effective participation by civil society organizations. It established that, should a vacancy occur, the President of the Supreme Court of Justice would issue a public appeal calling on civil society and the nominating bodies to submit candidates. It also determined that a list of twelve public and private institutions would be drawn up so that these could nominate candidates and submit personal applications. Subsequently, the plenary of the Supreme Court of Justice would appoint a Committee made up of three judges to examine the documentation and present a report on the suitability of the nominees. Furthermore, it ordered that a list of nominees be published so that these could be challenged by civil society. If a challenge should be made, the person challenged would be afforded an opportunity to defend himself.[83] The Commission would then submit a list of eligible candidates and the plenary would vote for the new judge in a public session.[84]

69. On September 22, 2003, the Supreme Court [85] decided to regulate the procedure to hear complaints made against judges.[86] First, it determined that a Commission would be appointed to conduct the procedure, recognized the judge's right to defend himself and granted the Commission the power to present a report before the plenary of the Supreme Court and to decide by the two-thirds of the votes regarding the judge's dismissal.[87]

70. Thus, the National Congress flagrantly disregarded this constitutional and legal system for the lawful removal from office of the Supreme Court justices, in each and every one of its phases and requirements, as evidenced from the proven facts in this case.

71. Indeed, referring only to the culmination of that process by the National Congress, Resolution No. R-25-181, which dismissed the entire Supreme Court of Justice, contains the following 'whereas´ clauses:

> That the current Constitution of the Republic, in force since August 10, 1998, provides in its 25th Transitory Provision that: ´The officials and members of agencies appointed by the National Congress and the Comptroller General of the State for a four-year period as of August 10, 1998, under the provisions of this Constitution, shall remain in those positions until January 2003';
>
> That the current judges of the Supreme Court of Justice were appointed by the National Congress under the 16th Transitory Provision of the previous Constitution of the Republic, published in the supplement of the Official Record No. 142 of September 1, 1997, and so are currently under an expired mandate for not having resigned in January 2003;

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81 *Cf.* Constitution of the Republic of Ecuador of August 11, 1998, art. 202.

82 *Cf.* Resolution Supreme Court of Justice of September 22, 2003.

83 *Cf.* Rules for the exercise of the cooptation system of September 30, 2003.

84 *Cf.* Rules for the exercise of the cooptation system of September 30, 2003.

85 In this regard, Article 13(1) of the Organic Law of Judiciary of September 11, 1974 states that the Supreme Court has the power to: "Appoint or remove the judges of the Superior Courts, and to dismiss judges, officials and employees of the judiciary for gross misconduct or serious incompetence in the fulfillment of their duties or abandonment of the post for more than eight days" "The Supreme Court shall regulate the trial process."

86 *Cf.* Resolution Supreme Court of Justice of September 22, 2003 (file of attachments to the brief of pleadings and motions, volume I, page o 2279).

87 *Cf.* Resolution Supreme Court of Justice of September 22, 2003.

That the Constitution currently in force does not establish a procedure for electing the thirty-one judges of the Supreme Court of Justice, establishing only in Article 202, the proceeding for appointing a judge when a vacancy arises. Also, the Organic Law of the Judiciary, in Article 12 currently in effect, establishes the National Congress as the nominating authority for judges of the Supreme Court of Justice;

That the State has the duty to guarantee the operation of the democratic system and the administration of justice free of corruption.[88]

72. To subsequently declare:

TO TERMINATE the functions of the judges of the Supreme Court of Justice and their respective deputy judges, who failed to resign from office in January 2003, as provided for in Transitory Provision 25 of the current Constitution; and, TO APPOINT in their place, the jurists named below, who shall take the oath of office before the Second Vice President of the National Congress, shall not be subject to fixed terms for the duration of their office, and shall be subject to termination on the grounds prescribed by the Constitution and by law: […]

Within a period not exceeding fifteen days, the National Council of the Judiciary shall be restructured and shall submit, to the National Congress, shortlists of three names for the election of the Minister Prosecutor General of the Nation, the Superior Courts of Justice and the provincial prosecutors.

This resolution shall enter into force immediately, regardless of its publication in the Official Record.[89]

73. It should be noted that this resolution was approved with 52 votes in favor and 3 against. Immediately after adopting the resolution, and without it being included on the agenda, a motion for constitutional reform was presented so that Congress would regain its jurisdiction to impeach the Supreme Court of Justice.[90] This motion was approved by 34 votes in favor.[91]

74. According to the proven facts, the judges found out about their dismissal in several ways: some through the press, others through television news broadcasts and others through rumors circulating in the Court. The dismissed Supreme Court justices refused to leave their offices, considering that the National Congress resolution had no "legal validity whatsoever." Consequently, on December 9, 2004, the National Police proceeded to remove the President of the Supreme Court of Justice and some judges who accompanied him from the Palace of Justice. Also, other judges and employees were prevented from entering the building.

75. Once installed, the new Supreme Court of Justice adopted a number of decisions of major political importance to the dominant political force.[92] These decisions included the annulment of the proceedings against former Presidents Abdalá Bucaram and Gustavo Noboa, and against former Vice-president Alberto Dahik.[93]

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88 Resolution 181 of December 8, 2004.

89 Resolution 181 of December 8, 2004.

90 *Cf.* Record 24-001 of December 8, 2004.

91 *Cf.* Record 24-001 of December 8, 2004.

92 *Cf.* Report Special Rapporteur on the independence of the judges and lawyers of August 31, 2005.

93 *Cf.* Report Special Rapporteur on the independence of the judges and lawyers of August 31, 2005.

76. Thus, this case reveals the circumstances in which the dismissal of the Supreme Court justices was confirmed, undermining their tenure in office, in the context of external pressures, with effects on judicial independence in its institutional and personal aspects. The proven facts, which reveal a veritable political onslaught and an attack on the basic principles of a democratic State governed by the rule of law and upheld by the Inter-American Human Rights System, highlight the need to define the limits imposed by this international system, not only regarding judicial independence in its personal aspect, but also in its institutional aspect, in favor of the entire group of 27 victims who comprised the Supreme Court of Justice and who were unlawfully dismissed by the National Congress.

VI. THE LACK OF ANALYSIS OF ALLEGED VIOLATIONS OF VARIOUS JUDICIAL GUARANTEES AND OF THE PRINCIPLE OF LEGALITY

A) Lack of analysis of other judicial guarantees (especially those provided for in Article 8(2) in conjunction with Article 1(1) of the American Convention)

77. In its Judgment, the Inter-American Court omitted an analysis of other judicial guarantees enshrined in Article 8, invoked by the Inter-American Commission and referred to by the victims' representatives, considering that "having determined that the body that carried out the process was not competent, it is unnecessary to examine the other guarantees established in Article 8(1) of the Convention"[94]; and that, given the effects on the separation of powers and the arbitrary nature of the action by Congress, the Inter-American Court considered that "it is unnecessary to analyze in detail the arguments of the parties as to whether or not the decision to dismiss the judges was an action of a punitive nature, and therefore it will not examine its alleged effects on Article 8(2) of the Convention, or other aspects related to the possible scope that the principle of legality (Article 9 of the Convention) might have had in this case."[95]

78. In my opinion, the Inter-American Court could have analyzed this point and taken advantage of this opportunity to consolidate its case law on matters of due process applicable to procedures for the removal of judges. Indeed, just as the Inter-American Court analyzed the violations of the right to a hearing and some components of the right of defense (in light of Article 8(1) of the Pact of San Jose), the Court could also have conducted a specific analysis of the violation of other rights established in Article 8(2) of the American Convention, expressly referred to by the Inter-American Commission and argued by the victims' representatives. This, in consideration of the few opportunities that the Court has to rule on this matter and the institutional weakness that on occasion affects the region's judiciary and constitutional courts, when assailed by the political powers, a situation that unfortunately is not infrequent.

79. As I stated previously (*supra* para. 63), the Inter-American Court currently has an interpretative role *erga omnes* of the American Convention which extends beyond the scope of a particular case. This is of particular importance considering the limited number of cases it decides, owing to the design of the Inter-American System of Human Rights; the situation is very different in the European System, especially since the entry into force of Protocol 11

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94 Para. 181 of the Judgment.

95 *Idem.*

of the European Convention on Human Rights, which abolished the European Commission, allowing direct access to the Strasbourg Court.[96] Thus, under the inter-American system of justice, the extension of the "conventional rule interpreted"[97] beyond a particular case (*res interpretata*) takes on particular significance, constituting yet another element in the construction of a *ius constitutionale commune americanum,* or at least - and for now- *latinoamericanum*—[98], in order to guarantee a minimum standard for the regional applicability of the American Convention in favor of human rights and human dignity.

80. It should not go unnoticed that the Judgment itself, in analyzing the State's partial acknowledgement of international responsibility, considers that "disputes persist on other aspects related to Article 8 of the Convention."[99] Consequently, this should have provided an additional incentive to rule on their merits, as it was also probable that the Judgment would have autonomously declared the violation of the rights not analyzed.

81. Similarly, the Judgment notes that "although it has already been stated that the National Congress did not have jurisdiction to dismiss the Supreme Court judges from office, bearing in mind that the State acknowledged this point and that it is one of the guarantees established in Article 8(1) of the Convention, the Court shall proceed to analyze it". In other words, the Inter-American Court deemed it appropriate to analyze the right to a hearing enshrined in that article of the Pact of San Jose but, by contrast, did not do so in relation to other judicial guarantees contained in Article 8(2) thereof.

82. In this case, precisely because the Judgment expressly described the resolution adopted by the National Congress as "unacceptable" and an "abuse of power"[100], the Inter-American Court should have ruled on the other arguments concerning the rights under Article 8(2) of the Convention. It should also be recalled that in other cases where the Inter-American Court has declared a specific violation, this has not prevented it from considering it pertinent to specify other aspects of the State's international responsibility and, on occasion, to declare additional or complementary violations.[101] This was justified

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96 In the last Annual Report for 2012, the European Court of Human Rights had 128,100 cases pending resolution. *Cf. European Court of Human Rights. Annual Report 2012*, Strasbourg, 2013, pp. 4, 6, 7 and 150.

97 *Cf. Case Gelman v. Uruguay. Monitoring Compliance with Judgment*. Order of March 20, 2013, para. 67 and following paragraphs, the Inter-American Court established that the "conventional rule interpreted" is related either to the particular case (*res judicata*) or to general effects for the other States Parties to the American Convention (*res interpretata*). This is of particular importance for the "conventionality control" that should be exercised by all national authorities, in line with their respective competencies and the corresponding procedural regulations, and is also useful in the implementation of the Inter-American Court's decisions.

98 *Cf.* von Bogdandy, Armin, Morales Antoniazzi, Mariela, and Ferrer Mac-Gregor, Eduardo (coords.), *Ius Constitutionale Commune in Human rights in America Latina,* Mexico, Porrúa-IMDPC-Max Planck Institute for Comparative Public Law and International Law, 2013.

99 Paragraph 20 of the Judgment.

100 Paragraph 177 of the Judgment.

101 In the *Case of Kimel,* the Inter-American Court issued a ruling on the proportionality of the restriction of the victim's freedom of expression. Although in its analysis of strict legality the Inter-American Court declared the respective violation, it included an analysis of other components of the principle proportionality. *Cf. Case of Kimel v. Argentina. Merits, Reparations and Costs.* Judgment of May 2, 2008 Series C No. 177, paras. 81-94. Also, in the case of the *Pueblo Bello Massacre*, even though the Inter-American Court pointed out that the military criminal courts did not have jurisdiction to hear the case, it nevertheless analyzed the fact that the military jurisdiction failed to act with due diligence in the investigation. The Inter-American Court stated that the "few investigatory actions, and the speed with which they were carried out, reflect little or no interest of the military criminal jurisdiction in carrying out a serious and exhaustive investigation into the events that occurred." It should be emphasized that the Inter-American Court also analyzed the effectiveness of the intervention of other courts, such

taking into account the specificities of the case. Given the "untimely" dismissal of Ecuador's High Courts and its dramatic effects on the institutional facet of judicial independence declared in the Judgment, I consider that the Inter-American Court should not have avoided responding to those arguments related to conventional due process, involving the dismissal of the Supreme Court justices, with special significance for the democracy defended by the Inter-American System.[102]

83. The need for exhaustive arguments would have been especially relevant, since it was highly probable that the Court would have reached a separate declaration on the violation of these rights had these been considered. We must not forget, also, that the right to due process is really comprised of a set of inseparable and requisite elements;[103] therefore respect for these is inconceivable if they are not satisfied, fully and in their totality. In this regard, the analysis of the other judicial guarantees allegedly violated, would have possibly established more robust standards on due process for judges or magistrates, subjected to dismissal proceedings at the hands of the national Congresses, which should never be considered exempt from compliance.

B) Lack of analysis of the principle of legality (Article 9 in conjunction with Article 1(1) of the American Convention)

84. While I concur with the other members of the Inter-American Court regarding all the operative paragraphs of this Judgment, in the following lines I wish to make some clarifications, in the same tone as the points discussed previously regarding the analysis of Article 8(2) of the Convention, regarding the possibility of having analyzed the possible violation of the principle of legality (Freedom from Ex Post facto Laws) provided for in Article 9 of the American Convention.

85. First, it should be noted that in this case the State of Ecuador acknowledged the violation of Article 9 of the Convention in the following terms:

> Ecuador acknowledges [...] principle of legality in Article 9 of the American Convention, inasmuch as the law contained no specific grounds for removing the judges from office, and that the National Congress's resolution could have been understood as an *ad-hoc* proceeding of a punitive nature. (Underlining added).

86. It is true that the State's declaration made it difficult to understand the scope of its acknowledgment of international responsibility on this point, particularly because the Inter-American Court considered it proven that at the time of the facts, it was the Supreme Court of Justice itself which had the authority to investigate and potentially sanction any judges who might have committed disciplinary infractions. In other words, domestic law did provide grounds and procedures for the removal of judges.

87. Despite the State's acquiescence, in its Judgment the Inter-American Court decided not to analyze whether the National Congress's decision to terminate the Supreme Court

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as the disciplinary tribunal. *Cf. Case of the Pueblo Bello Massacre v. Colombia*. Judgment of January 31, 2006. Series C No. 140, paras. 192-204.

[102] It should not be forgotten that the Preamble of the American Convention establishes its "intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man."

[103] *Cf.* García Ramírez, Sergio, *El debido proceso. Criterios de la jurisprudencia interamericana*, Mexico, Porrúa, 2012, p. 23.

justices on December 8, 2004 was of a punitive nature and, therefore, it did not examine the arguments presented by the Inter-American Commission and the victims' representatives in relation to Article 9 of the Convention. In that regard, as I mentioned previously (*supra* para. 77), paragraph 181 of the Judgment stated that:

> [h]aving determined that the body that undertook the process was not competent, it is unnecessary to examine the other guarantees established in Article 8(1) of the Convention. Therefore, the Court will not examine the arguments presented by the Commission and the representatives regarding the alleged violation of other judicial guarantees. Similarly, given the effects on the separation of powers and the arbitrary nature of the action by Congress, the Court considers it unnecessary to analyze in detail the arguments of the parties as to whether or not the dismissal decision was an action of a punitive nature, and will therefore not examine the alleged effects of Article 8(2) of the Convention, as well as other aspects related to the possible scope that the principle of legality (Article 9 of the Convention) would have had in this case.

88. It should also be emphasized that the Inter-American Court concluded that the events that took place constituted an "abuse of power". Indeed, paragraph 177 of the Judgment states that:

> Bearing in mind the foregoing, the resolution that called for the judges' dismissal was the result of a political alliance, which was intended to create a Supreme Court sympathetic to the political majority existing at that time and to impede criminal proceedings against the acting president and a former president. The Court has confirmed that Congress's resolution was not adopted by virtue of an exclusive assessment of specific factual evidence in order to ensure full compliance with the existing legislation, but that it pursued a completely different objective, related to an abuse of power. An example of this is that the summons to the session of Congress did not mention the imminent possibility of dismissing the judges […].Thus, the Court emphasizes that these elements support the affirmation that a mass and arbitrary dismissal of judges is unacceptable given its negative impact on judicial independence in its institutional aspect. (Underlining added).

89. From my perspective, the difference between this case and the case of the *Constitutional Court (Camba Campos et al.) v. Ecuador*[104] is that the National Congress was not authorized to dismiss the Supreme Court judges, whereas it was authorized to carry out impeachments against members of the Constitutional Tribunal. This lack of authority to sanction made it unnecessary, in principle, to declare the existence of an implicit sanction and a deviation of power in this case. For this reason my opinion in this case is concurrent and not dissenting.

90. The deviation of power implies that a state organ oversteps the boundaries or limits of its assigned task, a definition that requires it to have the power or authority to take the respective decision. In this case, Congress did not have the authority to dismiss the Supreme Court justices. And, since it did not have authority to sanction, I find it reasonable that in its Judgment the Court did not consider it appropriate to investigate in depth whether an implicit sanction existed in this case.

91. Furthermore, Congress's declaration of its lack of jurisdiction was a factor that the Inter-American Court considered in deciding not to analyze the punitive nature of the decision, which was an element for determining whether it was possible to analyze the facts in light of Article 9 of the American Convention which, in fact, also applies to punitive actions, according to the Inter-American Court's case law.[105]

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104 *Case of the Constitutional Court (Camba Campos et al.) v. Ecuador. Preliminary Objections, Merits, Reparations and Costs).* Judgment of August 28, 2013, Series C No. 268.

105 *Cf. Case of Baena Ricardo et al. ("270 Workers v. Panama"). Merits, Reparations and Costs.* Judgment of February 2, 2001. Series C No. 72, especially para. 106.

92. For the Inter-American Court it was sufficient to take into account the context in which the facts occurred, as well as the clear intention to dismiss the judges, not because their term had expired, but rather for the purpose of controlling Ecuador's judicial power at that time. Indeed, the Judgment states that "the resolution by means of which the judges were dismissed was the result of a political alliance that was intended to create a Supreme Court sympathetic to the political majority existing at that time and to impede criminal proceedings against the acting president and a former president."[106] This allowed the Inter-American Court to conclude that the "abuse of power" which occurred in this case was another feature of the violation of the institutional facet of judicial independence.

93. Although I share that view, I consider that regardless of the National Congress's lack of competence to dismiss the victims from their duties as judges of the Supreme Court of Justice, the Inter-American Court should not have overlooked the State's acknowledgement that the action of the National Congress "could have been understood as an *ad-hoc* procedure of a punitive nature."[107] Accordingly, given that it clearly was an *ad-hoc* procedure, the Inter-American Court could have taken this circumstance into account to conduct an independent analysis of the possible violation of the principle of legality enshrined in Article 9 of the American Convention, and not only from the perspective of the institutional aspect of judicial independence.

Eduardo Ferrer Mac-Gregor Poisot
Judge

Pablo Saavedra Alessandri
Secretary

[106] Para. 177 of the Judgment.

[107] Para. 13 of the Judgment.