

**PARTIALLY DISSENTING OPINION OF JUDGE EDUARDO FERRER MAC-GREGOR
POISOT ON THE JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS
IN THE CASE OF THE CONSTITUTIONAL TRIBUNAL (CAMBA CAMPOS ET AL.) v.
ECUADOR, OF AUGUST 28, 2013**

I. PREAMBLE

1. The separation of powers is a substantive element of constitutional democracy. Judicial independence (in its individual and collective aspects) represents an inseparable element for the consolidation – and very existence – of a genuine constitutional and democratic rule of law. The context of this case is of particular importance, because it relates to the “collective removal of the judges” (in the space of two weeks) of the three high courts of Ecuador; that is, the members of the Constitutional Tribunal, the Supreme Court of Justice, and the Electoral Tribunal.

2. As emphasized in this *Judgment on preliminary objections, merits, reparations and costs* (hereinafter “the Judgment”),¹ this collective dismissal “constitutes an attack not only on judicial independence, but also on the democratic order,” which “constitutes a totally unacceptable and inopportune course of action” resulting in “a destabilization of the existing democratic order. And, it is stressed that “the separation of powers is closely related not only to the consolidation of the democratic regime, but also seeks to preserve the human rights and freedoms of the people.”²

3. In the Judgment, the Inter-American Court of Human Rights (hereinafter “the ICourtHR” or “the Inter-American Court”) declared the respondent State internationally responsible for the violation of the rights to judicial guarantees and judicial protection established in Articles 8(1), and the pertinent parts of Article 8(2) and Article 8(4), in relation to Articles 1(1) and 25(1) of the American Convention on Human Rights (hereinafter “the American Convention” or “the Pact of San José”), as well as for the violation of Article 8(1), in relation to Article 23(1)(c) and Article 1(1) of the American Convention, based on the arbitrary impairment of the permanence of the victims in the exercise of judicial office, and the consequent harm to judicial independence and the guarantee of impartiality.

4. I am essentially in agreement with what was decided in this important Judgment. My dissent is focused on the seventh operative paragraph of the Judgment,³ because I consider that the ICourtHR should have made an autonomous analysis of the violation of Article 9 of the Pact of San José (Freedom from *Ex Post Facto* Laws or the principle of legality) and declared that this principle had been violated. This is because, on the one hand, the State had expressly acknowledged its international responsibility in relation to the principle of legality, “because there were no grounds established by law for the removal from office of the presumed victims”⁴ and, on the other hand, because there was evidence of the “abuse

¹ *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador. Preliminary objections, merits, reparations and costs*). Judgment of August 28, 2013, Series C No. 268.

² *Ibidem*, paras. 207, 212 and 221.

³ “7. It is not required to make a ruling on the alleged violation of Article 9 of the American Convention on Human Rights, in the terms of paragraphs 223 and 224 of this Judgment.”

⁴ This partial acknowledgment of responsibility by the State was indicated in relation to the violation of Article 9 of the American Convention based on the termination of the members of the Constitutional Tribunal.

of power” and the arbitrary nature of the sanction imposed on the members of the Constitutional Tribunal of Ecuador who were removed from office and, subsequently, subjected to impeachment proceedings, which culminated in the admissibility of the motion of censure that resulted in the “immediate dismissal” under domestic law; impeachment proceedings regarding which, in the Judgment, the members of the Inter-American Court unanimously declared that a series of human rights had been violated, which constitute treaty-based due process and judicial protection established Articles 8(1), 8(2), 8(4) and 25(1), in relation to Article 1(1) of the Pact of San José.

5. Indeed, as was clearly studied in the Judgment “dismissal cannot be an arbitrary measure,”⁵ and “the purpose of an impeachment proceeding by the National Congress could not be the dismissal of a member of the Constitutional Tribunal based on a review of the constitutionality or legality of the judgments adopted by that body. This is due to the separation of powers and the exclusive competence of the Constitutional Tribunal to review the formal and/or substantial constitutionality of the laws enacted by the National Congress,”⁶ pursuant to the domestic legal framework existing at that time.

6. The ICourtHR found it “opportune to ratify the fundamental criteria” contained the important precedent of the case of the *Constitutional Court v. Peru*,⁷ almost a decade ago, where, for the first time, it dealt with the issue of violations of rights that are part of due process of law in the impeachment of judges in light of the American Convention and the international standards. This is the second time in the history of the inter-American jurisdiction that it decides matters relating to impeachment, judicial independence, and due process. It is relevant to underscore that, in the Judgment the ICourtHR found it appropriate to follow the guidelines adopted on that occasion, which reflects a continuity in its case law, even though the judges who, today, are members of this inter-American court are completely different; and even though, the instant case has very important characteristics, particularly since they occurred in the above-mentioned context of the “collective termination of judges” of the three high courts, which has special relevance for the institutional aspect of judicial independence and its relationship with democracy.

7. Based on the foregoing consideration, I find it opportune, under Article 66(2) of the American Convention,⁸ to attach this opinion to the Judgment, in order to clarify the important implications that the matter has, in general, for judicial independence in Latin America; to state why I consider that the other judicial guarantees that were alleged should be examined, and to provide the reasons for my dissent from the seventh operative paragraph of the Judgment. Accordingly, I will examine the following issues: (i) the function of judicial independence under the constitutional and democratic rule of law (paras. 8-20);

During the public hearing, the State affirmed that “although it is true that the National Congress could make a constitutional and legal analysis, this should have included clear mechanisms to submit to review the tenure and the duration of the functions of the former members of the Constitutional Tribunal. The absence of legal certainty concerning the grounds for removing the former members obliges the State to acknowledge its international responsibility in this regard.” Para. 14 of the Judgment.

⁵ Para. 200 of the Judgment.

⁶ Para. 204 of the Judgment.

⁷ *Case of the Constitutional Court v. Peru. Merits, reparations and costs.* Judgment of January 31, 2001. Series C No. 71.

⁸ Article 66(2) of the American Convention establishes: “If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment.” See also Articles 24(3) of the Inter-American Court’s Statute and 32(1)(a), 65(2) and 67(4) of its Rules of Procedure.

(ii) the importance of the context in the instant case (paras. 21-26); (iii) judicial independence in the Inter-American Court's case law concerning the removal of judges (paras. 27-51); (iv) the different concepts of judicial independence: institutional and personal (paras. 52-61); (v) the institutional aspect of judicial independence in this case and its relationship with democracy (paras. 62-71); (vi) the jurisdictional nature of impeachment and the different rights related to the Convention's provisions on due process of law, political rights, and judicial protection that were violated (paras. 72-96); (vii) the failure to make a specific analysis of the rights established in Article 8(2) of the Pact of San José (paras. 97-102) and, lastly, (viii) my dissent owing to the failure to analyze the principle of legality established in Article 9 of the American Convention, and its violation owing to the sanction imposed on the victims (paras. 103-140).

II. THE FUNCTION OF JUDICIAL INDEPENDENCE UNDER THE CONSTITUTIONAL AND DEMOCRATIC RULE OF LAW

8. This case underlines the importance of one of the main defining factors of the constitutional and democratic rule of law, which is that of the independence of judges. In general terms, it can be said, first, that a judge is independent if he takes his decisions based only on the case, without being influenced by specific considerations relating to the parties that are not relevant for the particular matter, and if he takes his decision free of considerations relating to his own interest or to the interests of the persons or body that appointed him.⁹

9. To achieve this objective, institutional guarantees can be established that permit a judge to exercise his independence. These guarantees include tenure, a secure remuneration, and the method and form of appointment and the termination of his or her functions.¹⁰ Indeed, in the *Federalista LXXVIII* it is said that nothing can contribute as effectively to his rigor and independence as tenure, and good conduct should be the rule for the duration of judges in office.¹¹ However, these guarantees will never be sufficient if the judge does not wish to exercise them.¹²

10. However, from an institutional perspective, judicial independence is consubstantial with the principle of the separation of powers; while both elements are essential for understanding an authentic rule of law. Regarding the principle of the separation of public powers, it is common to assert that, nowadays, this cannot be conceived in an absolute and rigid manner; rather the modern concept entails a distribution of the State's functions by means of the appropriate organization of mutual and reciprocal relationships and controls

⁹ MacDonald, Roderick A. and Kong, Hoi, "Judicial Independence as a constitutional virtue", in Michel Rosenfeld and Andrés Sajó, *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, 2012, p. 832. Similarly, Chaires Zaragoza, Jorge, "La independencia del poder judicial", *Boletín Mexicano de Derecho Comparado*, new series, year XXXVII, No. 110, May-August 2004, p. 532.

¹⁰ Ernst, Carlos, "Independencia judicial and democracia", in Jorge Malem, Jesús Orozco and Rodolfo Vázquez (comps.), *La función judicial. Ética and democracia*, Barcelona, Gedisa, 2003, p. 236.

¹¹ Hamilton, A., Madison, J. and Jay, J., *El federalista*, translated by Gustavo R. Velasco, Mexico, Fondo de Cultura Económica, 1st re-edition, 2004, pp. 331 and 335.

¹² MacDonald, Roderick A. and Kong, Hoi, *op. cit.*, p. 834.

among the powers. Thus, instead of their absolute separation, what this principle really seeks is to avoid a concentration of powers.¹³

11. Since its most remote historical origins, the separation of powers has always signified the independence of the Judiciary in relation to the political power. The independence of the Judiciary has always been understood as a necessary consequence of the separation of powers designed to ensure the resistance of judges to pressures or attacks by either the Legislature or the Executive. Thus, from the start, the independence of judges constituted an essential element of the separation of powers. The independence of the judicial function can be conceived as a crucial factor for the democratic rule of law that, also, involves other related requirements, such as a regular, ordered and coherent procedural system, that is guarantor of legal certainty and the human rights of the individual.¹⁴

12. Furthermore, the independence of a Judiciary with regard to the political powers may be conceived as one of the constitutional mechanisms that prevents or obstructs the arbitrary and illegitimate exercise of power, and halts or thwarts its abuse or its illegal exercise.¹⁵ Hence, it makes sense to ensure that the imparting of justice should never be a manifestation of political power, or be subjected in any way to the organs of the State that exercise this power, because it would be useless to enact laws that limit the activity of those who govern if, later, during the contentious phases of law, they could influence the decisions taken in litigations.¹⁶

13. Evidently, the function of judicial independence in the democratic rule of law could not be overlooked by the Inter-American Democratic Charter (cited in the Judgment),¹⁷ in which, after reaffirming representative democracy as an essential element for the stability, peace, and development of the region, it establishes the following in its 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).

14. Thus, the Inter-American Democratic Charter does not merely recognize respect for human rights and fundamental freedoms as essential elements of representative democracy, and as elements of electoral democracy, but also requires the separation and independence of the branches of government, among which, in this case, the one relating to the jurisdictional function should be underscored. The role of judges in the democratic governance of the State includes recognizing to them a genuine separation and independence from others; in other words, from the political powers, not only in the personal aspect that corresponds to each member of the judiciary, *but also in its*

¹³ Kelsen, Hans, *General Theory of Law and State*, translated by Anders Wedberg, Cambridge, Harvard University Press, 2009, p. 282.

¹⁴ Cf. Díaz, Elías, *Estado de derecho and sociedad democrática*, Madrid, Taurus, 1998, p. 48.

¹⁵ Cf. Bobbio, Norberto, *Liberalismo and democracia*, translated by José F. Fernández Santillán, Mexico, Fondo de Cultura Económica, 2001, pp. 19-20.

¹⁶ Cf. Díez-Picazo, Luis María, "Notas de derecho comparado sobre independencia judicial", *Revista Española de Derecho Constitucional*, No. 34, January-April 1992, pp. 19-20.

¹⁷ Para. 221 of the Judgment.

institutional aspect, as a separate authority among the authorities of which the State is composed.

15. The ICourTHR has emphasized the democratic roots of judicial independence in various 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 that it is important to mention that the separation of powers is closely related not only to the consolidation of the democratic system, but also seeks to preserve the human rights and freedoms of the individual, to avoid the concentration of power that can become tyranny and oppression, and also to permit satisfactory and effective achievement of the goals assigned to each branch of government. However, the separation of powers entails not only a specialization of the State's work in accordance with the way such powers have been assigned, but also implies the existence of a system of "checks and balances" that enable reciprocal control and monitoring among each branch of power. Thus, the separation of powers reveals the exercise of a limited power, as well as one that is susceptible to control, organized in diverse entities responsible for different functions, with the essential goal of ensuring the freedom of the individual vis-à-vis the State within a framework of participative and pluralist democracy.¹⁸

16. In the very significant case of the *Constitutional Court v. Peru*, the ICourTHR considered that one of the main purposes of the separation of public powers is precisely the guarantee of the independence of judges and noted that, to this end, the different political systems have created strict procedures, both for their appointment, and for their dismissal. In this regard, it cited the "United Nations Basic Principles on the Independence of the Judiciary,"¹⁹ which establishes 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.²⁰

17. Regarding the possibility of removing judges, it underlined that these same "Principles" stipulate:

A charge or complaint made against a judge in his/her 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.²¹

18. Hence, in this significant judgment, the Inter-American Court emphasized that the authority responsible for the procedure to dismiss a judge must be impartial in the proceeding established to this end and permit the exercise of the right of defense. It then underscored that, under the rule of law, it is necessary to ensure the independence of any judge and, "especially," that of the constitutional judge owing to the nature of the matters submitted to his or her consideration. Referring to the European Court, it specified that the

¹⁸ Regarding these concepts, see Constitutional Court of Colombia, Judgment C-141 of February 26, 2010.

¹⁹ Adopted by the Seventh Congress of the United Nations on the Prevention of Crime and the Treatment of Offenders held in Milan from 26 August to 6 September 1985, and confirmed by the General Assembly in its resolutions 40/32 of 29 November 1985, and 40/146 of 13 December 1985.

²⁰ Principle 1, *Ibidem*.

²¹ Principle 17, *Ibidem*.

independence of any judge supposes that there is an appropriate appointment procedure, an established term of the mandate, and guarantees against external pressures.²²

19. At this time, the point that I wish to emphasize is that the ICourHR has maintained that judicial independence *constitutes an institutional guarantee under a democratic system that is connected to the principle of the separation of powers*, which is now embodied in Article 3 of the Inter-American Democratic Charter. In this case, also, it should be taken into account that it was the Constitutional Tribunal, which the victims formed part of in their capacity as judges, that was the democratic institution required to ensure the rule of law.

20. It could even be considered whether it is possible to constitute a sort of right of the defendants to the democratic conditions of public institutions, based not only on the said Article 3, but also on Article 29 of the Convention,²³ which would be supported by the State's international obligation to exercise its powers in accordance with the rule of law, the separation of powers and, evidently, the independence of the judges, as has been proposed in other cases in which the Court has decided similar issues.²⁴ A standard of this type would go beyond the concept of democracy in interpretive terms, as the ICourHR has indicated, in the sense that "the just requirements of democracy must [...] guide the interpretation of the Convention and, in particular, of those provisions that are significantly related to the preservation and functioning of the democratic institutions."²⁵

II. THE IMPORTANCE OF THE CONTEXT IN THIS CASE

21. In keeping with the proven facts in this case, the dismissal of the members of the three high courts of Ecuador; that is, the Constitutional Tribunal, the Supreme Court of Justice, and the Supreme Electoral Tribunal occurred as a result of a political arrangement between the President of the Republic at the time, Lucio Gutiérrez, who it was sought to impeach for the offense of embezzlement, and the Ecuadorian Roldosista Party. Meanwhile, the leader of that party, the former President of the Republic, Abdalá Bucaram, sought the annulment of several criminal proceedings that were being processed before the Supreme Court.²⁶

²² *Case of the Constitutional Court v. Peru. Merits, reparations and costs.* Judgment of January 31, 2001. Series C No. 71, paras. 73-75.

²³ "Article 29. *Restrictions regarding interpretation*

No provision of this Convention shall 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."

²⁴ *Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of August 5, 2008. Series C No. 182, para. 222.

²⁵ *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.

²⁶ *Cf. paras. 55, 56, 211 and 219 of the Judgment.*

22. Thus, on November 23, 2004, President Gutiérrez Borbúa announced the Government's intention of proposing to Congress the reorganization of the Constitutional Tribunal, the Supreme Electoral Tribunal and the Supreme Court of Justice. On November 25, 2004, the National Congress, by a resolution, decided that the titular members of the Constitutional Tribunal and their alternates had been appointed illegally in 2003, and terminated the functions of all the titular members and their alternates, some of whom were impeached by Congress several days later. In addition, Congress determined the termination of the titular judges of the Supreme Electoral Tribunal and their alternates, because they had been appointed without taking into account the provisions of article 209 of the Constitution.

23. On December 1, 2004, a first attempt was made to impeach some members of the Constitutional Tribunal, without obtaining the necessary votes to remove them. Accordingly, on December 5, President Gutiérrez Borbúa called for a special session of the National Congress which was held on December 8, during which the required votes were obtained to censure the former members of the Constitutional Tribunal in an impeachment proceeding. As a second item on the agenda, the judges of the Supreme Court of Justice were also terminated, unduly applying the twenty-fifth transitory provision of the 1998 Constitution, according to which officials and members of bodies appointed by the National Congress for a four-year period, as of August 10, 1998, would remain in office until January 2003. These decisions would subsequently be reversed by the National Congress, but this did not entail the reinstatement of the members who had been removed.

24. It is important to stress that the United Nations Special Rapporteur on the independence of judges and lawyers at that time, Leandro Despouy, participated in the settlement of this political and social crisis by recommending different solutions and an evaluation of their implementation. At that time, he indicated that, in the case of the removal of the judges of the Constitutional Tribunal, the right of defense and other principles of due process had been infringed.²⁷ Regarding the removal of the judges of the Supreme Court of Justice, he indicated that the National Congress was not empowered to do this, and neither was it authorized to appoint substitutes.²⁸

25. The importance of taking into account the context is that this is a determinant factor when deciding the institutional structure to be implemented in a specific place in order to isolate judges from undue influences.²⁹ The factors that can have an impact on the effective exercise of judicial independence include: (a) the existence of an authoritarian regime; (b) the existence of cultural patterns that may minimize the usefulness of the jurisdiction as a mechanism to settle disputes; (c) the commitment of civil society to judicial independence, and policies that promote this, and (d) the legal tradition, either continental European or common law.³⁰ In point of fact, in the case of Latin American in general, it has been said

²⁷ U.N. document E/CN.4/2005/60/Add.4 of 29 March 2005, p. 3. See also U.N. documents A/60/321 of 31 August 2005 and A/HCR/11/41 of 24 March 2009.

²⁸ *Ibidem*.

²⁹ MacDonald, Roderick A. and Kong, Hoi, *op. cit.*, p. 846. Similarly, Linares considers that the study of independence in a country requires a qualitative knowledge of the political agents and relevant issues on which power is exercised. Linares, Sebastián, "Independencia judicial: conceptualización y medición", in Germán Burgos S. (ed.), *Independencia Judicial en América Latina. ¿De quién? ¿Para qué? ¿Cómo?*, ILSA, Bogotá, 1ª ed., 2003, pp. 121 and 122.

³⁰ MacDonald, Roderick A. and Kong, Hoi, *Ibidem*.

that democracy continues to be weak and strong Executives Branches have been a constant source of attacks on judicial independence.³¹

26. In this specific case, among the proven facts, the ICourHR considered that, at times during Ecuador's history, "the high courts were intervened by the political authorities," and that according to "expert witness Mónica Rodríguez, proposed by the State, '[i]n Ecuador, the independence of the Supreme Court of Justice has been compromised and the institution exploited throughout its history.'"³²

IV. JUDICIAL INDEPENDENCE IN THE CASE LAW OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS IN RELATION TO THE REMOVAL OF JUDGES

27. In the case of the *Constitutional Court v. Peru*, the ICourHR examined the congressional resolution of May 28, 1997, removing some of the judges of the country's Constitutional Court for presumed irregularities in the processing of the clarification of a judgment that declared the inapplicability of Law No. 26,657. In that case, the Inter-American Court determined that the guarantees established in both paragraphs 1 and 2 of Article 8 of the American Convention were applicable in civil, labor, fiscal or any other matter, as well as criminal matters, so that due process of law was required.³³

28. In addition, it indicated that any authority, whether administrative, legislative or judicial that, by means of its decisions, determines rights and obligations of the individual, is obliged to comply with due process.³⁴ Likewise, it clarified that one of the main purposes of the separation of powers is the guarantee of judicial independence, and to this end, rigorous procedures of different kinds have been conceived for both the appointment and the removal of judges.³⁵ The authority that executes this procedure must be impartial and allow the exercise of the right of defense.³⁶

29. The Court also stipulated that the independence of any judge supposes that there is an adequate appointment procedure, with an established term of office, and a guarantee against external pressure.³⁷

30. Regarding impeachment, in which the sanction of dismissal is applied,³⁸ it established that "any person subject to a trial of any nature before an organ of the State must be guaranteed that the said organ is competent, independent and impartial, and acts

³¹ 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.

³² Para. 41 of the Judgment.

³³ *Case of the Constitutional Court v. Peru. Merits, reparations and costs.* Judgment of January 31, 2001. Series C, No. 71, para. 70.

³⁴ *Ibidem*, para. 71.

³⁵ *Ibidem*, para. 73.

³⁶ *Ibidem*, para. 74.

³⁷ *Ibidem*, para. 75.

³⁸ *Ibidem*, paras. 67 and 68.

in accordance with the legally established procedure to hear and decide the case submitted to it.”³⁹ And, of special importance for the instant case, it considered:

69. Although Article 8 of the American Convention is entitled “Judicial Guarantees” [in the Spanish version - “Right to a Fair Trial” in the English version], its application is not strictly limited to judicial remedies, “but rather the procedural requirements that should 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. The Court has already established that, although this article does not establish minimum guarantees in matters relating to the determination of rights and obligations of a civil, labor, fiscal or any other nature, the full range of minimum guarantees stipulated in the second paragraph of this article are also applicable in those areas and, therefore, in this type of matter, the individual also has the overall right to the due process applicable in criminal matters⁴⁰ (underlining added).⁴¹

31. Furthermore, it found that the remedy of *amparo* that was filed against the removal decision was not decided within a reasonable time or by an impartial judge.⁴²

32. In the case *Apitz Barbera et al. v. Venezuela*, the ICourTHR examined the dismissal of the former provisional judges of the First Contentious Administrative Court, because they had committed an inexcusable judicial error of granting a *precautionary amparo* that suspended the effects of an administrative decision that had denied the registration of a sale. In that case, the Inter-American Court observed that States are obliged to ensure that provisional judges are independent and, consequently, must grant them certain stability and permanence in office, because the temporary nature of their posting is not equivalent to removal at any time. In addition, the temporary nature should not entail any changes in the system of guarantees of the performance of the judge and the safeguard of the defendants.⁴³ Indeed, for the ICourTHR, an appropriate appointment procedure and an established term of office are ways of guaranteeing the independence of judges.⁴⁴

33. Moreover, the Court repeated that the authority in charge of the proceeding to dismiss a judge must act impartially in the procedure established to this end, and permit the exercise of the right of defense,⁴⁵ in addition to being an independent court.⁴⁶ It also recalled that *all the organs that exercise functions of a substantially jurisdictional nature* are obliged to adopt just decision based on full respect for the guarantees of due process established in Article 8 of the American Convention.⁴⁷

³⁹ *Ibidem*, para. 77.

⁴⁰ *Cf. Case of Paniagua Morales et al. v. Guatemala. Merits.* Judgment of March 8, 1998. Series C No. 37, para. 149.

⁴¹ Para. 167 of the judgment that prompts this opinion, in relation to the minimum guarantees established in Article 8(2) of the American Convention, also refers to the precedent of the *Case of Baena Ricardo et al. Merits, reparations and costs.* Judgment of February 2, 2001. Series C No. 72, paras. 125 to 129.

⁴² *Case of the Constitutional Tribunal v. Peru, Merits, reparations and costs,* Judgment of January 31, 2001. Series C, No. 71, paras. 93 and 96.

⁴³ *Case of Apitz Barbera et al. (“First Contentious Administrative Court”) v. Venezuela.* Preliminary objection, merits, reparations and costs. Judgment of August 5, 2008. Series C No. 182, para. 43.

⁴⁴ *Ibidem*, para. 138.

⁴⁵ *Ibidem*, para. 44.

⁴⁶ *Ibidem*, para. 137.

⁴⁷ *Ibidem*, para. 46.

34. Regarding judicial independence, the ICourtHR reiterated the importance that this has for the separation of powers, and the State's obligation to guarantee its institutional aspect, in relation to the Judiciary as a system, as well as with regard to its individual aspect; that is, with regard to the person of the specific judge.⁴⁸ Furthermore, impartiality requires that the judge who intervenes in a particular dispute approaches the facts of the case, subjectively, without any prejudice and, also, offering sufficient objective guarantees that allow any doubts that the defendant or the community may have about the absence of impartiality to be overcome.⁴⁹

35. The ICourtHR also argued that, under international law, the valid reasons to proceed to suspend or remove a judge may be, *inter alia*, improper conduct or ineptitude. And judges cannot be removed merely because a decision they made was annulled following an appeal or review by a higher judicial organ.⁵⁰ In addition, it considered that the State had failed to comply with its obligation to provide the grounds for the sanction of dismissal because it did not analyze whether the inexcusable judicial error constituted a disciplinary offense.⁵¹

36. Regarding the victims' request for evidence in order to clarify a specific aspect of the case, the ICourtHR decided that the disciplinary organ should have provided at least some response, accepting or refusing to produce this evidence, or even ordering that the parties themselves provide it.⁵²

37. In the case of *Reverón Trujillo v. Venezuela*, the ICourtHR examined the arbitrary removal of a judge from the provisional position she occupied on February 6, 2002. On October 13, 2004, the Political and Administrative Chamber of the Supreme Court of Justice decreed the annulment of the decision to dismiss her, considering that it was not in keeping with the law, but did not order the reinstatement of the presumed victim, or the payment of the salary and social benefits that she had ceased to receive.

38. In that case, the Inter-American Court indicated that judges, contrary to other public officials, have increased guarantees, owing to the necessary independence of the Judiciary. It reiterated the importance that this has for the separation of powers, and also repeated the State's obligation to ensure its institutional aspect; that is, in relation to the Judiciary as a system, as well as in relation to its individual aspect; in other words, in relation to the person of the specific judge.⁵³

39. It also insisted on the guarantees that result from judicial independence: an adequate appointment procedure, tenure, and a guarantee against external pressures.⁵⁴ It recalled that the authority in charge of the removal procedure must act independently and impartially during the proceeding established to this end, and permit the right of defense.⁵⁵

⁴⁸ *Ibidem*, para. 55.

⁴⁹ *Ibidem*, para. 56.

⁵⁰ *Ibidem*, para. 84.

⁵¹ *Ibidem*, paras. 86 and 91.

⁵² *Ibidem*, para. 94.

⁵³ *Case of Reverón Trujillo v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of June 30, 2009. Series C No. 197, para. 67.

⁵⁴ *Ibidem*, para. 70.

⁵⁵ *Ibidem*, para. 78.

Tenure is a guarantee of judicial independence; and is itself composed of the following guarantees: permanence in office, an adequate promotion procedure, and no unjustified dismissal, or removal at will.⁵⁶ In addition, tenure should ensure the reinstatement in office of any judge who may be arbitrarily deprived of this.⁵⁷ This does not mean that provisional judges have an unlimited permanence in their functions, but they should be guaranteed a certain term in office.⁵⁸ In other words, they should have the certainty of permanence for a set time, which protects them from pressure from different sectors.⁵⁹

40. In the same way, the ICourthR argued that Article 8(1) recognizes that “[e]very person has a right to a hearing [...] by an independent [...] judge or court.” The terms in which this article is drafted indicate that the subject of the right is the defendant, the person situated in front of the judge who will decide the case that has been submitted to him. Two obligations arise from this right: the first of the judge, and the second of the State. The judge has the obligation to be independent; an obligation that he meets when he judges only in accordance with – and based on – the law. Meanwhile, the State has the obligation to respect and ensure, pursuant to Article 1(1) of the Convention, the right to a hearing by an independent judge. The obligation of respect consists in the negative obligation of the public authorities to abstain from interfering unduly in the Judiciary or with its members; in other words, in relation to the specific judge. The obligation of guarantee consists in preventing the said interferences and investigating and punishing those who commit them. In addition, the obligation of prevention consists in the adoption, pursuant to Article 2 of the American Convention, of an appropriate legal framework that ensures an adequate appointment procedure, the tenure of judges, and the other requirements.

41. Now, the said State obligations give rise, in turn, to rights for the judges and for all other citizens. For example, the guarantee of an adequate appointment procedure for judges necessarily entails the right of the citizen to have access to public office in equal conditions; the guarantee of not being subject to removal at will signifies that, in the case of judges, the disciplinary and punishment procedures must necessarily respect the guarantees of due process, and those subject to such procedures must be provided, among other matters, with an effective remedy; the guarantee of stability should translate into an appropriate employment regime for judges, in which transfers, promotions, and other conditions are sufficiently controlled and respected.

42. Lastly, in the case of *Chocrón Chocrón v. Venezuela*, the ICourthR examined the arbitrary dismissal of the provisional criminal judge of first instance from the Judicial Circumscription of the Metropolitan Area of Caracas, without the minimum guarantees of due process and without adequate grounds, without the possibility of being heard, and of exercising her right of defense, and without having been provided with an effective judicial remedy to contest the violations of her rights, all as a result of the absence of guarantees in the Judiciary’s transition process.

43. The Inter-American Court reiterated that one of the main purposes of the separation of public powers is the guarantee of the independence of judges. The objective of protection stems from the need to avoid the judicial system, in general, and its members, in particular, being subjected to possible undue constraints in the exercise of their functions

⁵⁶ *Ibidem*, para. 79.

⁵⁷ *Ibidem*, para. 81.

⁵⁸ *Ibidem*, paras. 115 and 116.

⁵⁹ *Ibidem*, para. 117.

by organs outside the Judiciary, or even by those judges who exercise functions of review and appeal.⁶⁰

44. The Court insisted once again on the guarantees that result from judicial independence: an adequate appointment procedure, tenure, and the guarantee against external pressure, and stated that the authority in charge of the procedure to remove a judge must act with independence and impartiality in the proceeding established to that end, and permit the exercise of the right of defenses. This is because the removal of judges at will leads to the objective doubt of the observer about their real possibility of deciding specific disputes without fear of reprisal.⁶¹

45. The ICourtHR reiterated that, even though titular and provisional judges have the same guarantees, they do not provide equal protection for the two types of judge, because provisional and temporary judges are, by definition, appointed in a different way and do not have an unlimited permanence in office. Thus, provisional and temporary judges have not proved that they have the qualifications and aptitude to exercise the office with the guarantees of transparency imposed by public competition. However, this does not mean that provisional and temporary judges should not have an appointment procedure because, according to the United Nations Basic Principles on the Independence of the Judiciary: “[a]ny method of judicial selection shall safeguard against judicial appointments for improper motives.”

46. In addition, the Inter-American Court stated that, in the same way in which the State is obliged to guarantee an adequate appointment procedure for provisional judges, it must guarantee them a certain stability in office. In this way, in the case of provisional judges, the guarantee of stability translates into the requirement that they can enjoy all the benefits of tenure until the resolutive condition that ends their mandate.

47. The ICourtHR also indicated that the stability of provisional judges is closely linked to the guarantee against external pressure, because if provisional judges do not have certainty about their permanence for a specific time, they will be vulnerable to pressure from different sectors, above all from those who have the power to decide on dismissals or promotions in the Judiciary.⁶²

48. The Inter-American Court also stated that provisional appointments should be exceptional in nature and not the rule, and that they should not be extended indefinitely.⁶³

49. It also indicated that any public authority, whether administrative, legislative or judicial, whose decisions may affect the rights of the individual, is required to adopt these decisions with full respect for the guarantees of due process of law. In addition, it reiterated that, any organ of the State that exercises functions of a *substantially jurisdictional nature*, is obliged to adopt decisions that abide by the guarantees of due process of law in the terms of Article 8 of the American Convention.⁶⁴

⁶⁰ Case of *Chocrón Chocrón v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of July 1, 2011. Series C No. 227, para. 97.

⁶¹ *Ibidem*, para. 99.

⁶² *Ibidem*, paras. 104 to 106.

⁶³ *Ibidem*, para. 107.

⁶⁴ *Ibidem*, para. 115.

50. Furthermore, the ICourTHR stipulated that the authority to annul the appointment of judges based on “observations” must be minimally justified and regulated, at least as regards the exact description of the facts that support these observations; also that the respective motivation shall not be of a disciplinary or punitive nature, because, if it was a disciplinary sanction, the requirement of motivation would be even greater, since disciplinary control is designed to assess the conduct, aptness and performance of the judge as a public official and, consequently, it would be necessary to analyze the seriousness of the conduct and the proportionality of the sanction.⁶⁵

51. In the judgment that inspires this separate opinion, the Inter-American Court considered its case law on judicial independence,⁶⁶ and especially on guarantees in impeachment proceedings,⁶⁷ based also on the relevant standards of 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 recommendations of the Council of Europe on the independence, efficiency and role of judges, as well as on the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.⁶⁸

V. DIFFERENT CONCEPTS OF JUDICIAL INDEPENDENCE: INSTITUTIONAL AND PERSONAL

52. Different concepts of judicial independence have been developed by both legal doctrine and the case law of the Inter-American Court and, in this case, it is important to stress its institutional and personal aspects.

53. According to Linares, “analytically, we are able to distinguish two dimensions of judicial independence: a negative one and a positive one. The former consists in the ability to avoid different sources of coercion and loyalty, while the latter consists in the application of law – and all its sources – to decide a specific case.”⁶⁹

54. Meanwhile, Chaires distinguishes between objective-institutional and subjective-functional independence.⁷⁰ The former is identified with the absence of external pressures on this power;⁷¹ the latter to the mechanisms to ensure that the decisions of the judge abide by the law to the greatest extent possible.⁷²

55. Judicial independence has also been conceived based on its distinction as a value or guarantee. With regard to judicial independence as a value, its significance coincides with what is called “functional independence” (also known as “substantive” or “decisional” independence). This notion of judicial independence gives rise to the basic rule of the legal system according to which the judge, in exercise of the jurisdictional function, must be subject only to legality; that is, the system of sources of law in force. In addition, judicial

⁶⁵ *Ibidem*, para. 120.

⁶⁶ Paras. 188 to 199 of the Judgment.

⁶⁷ Paras. 165 to 169 of the Judgment.

⁶⁸ Paras. 188 to 199 of the Judgment.

⁶⁹ Linares, Sebastián, *op. cit.*, p. 116.

⁷⁰ Chaires Zaragoza, Jorge, *op. cit.*, p. 531.

⁷¹ *Ibidem*, p. 534.

⁷² *Ibidem*, p. 536.

independence, as a guarantee, is a series of legal mechanisms designed to safeguard and to achieve the said value, which is protected by other principles such as the above-mentioned separation of powers, the ordinary judge, impartiality, exclusivity, etc.⁷³

56. Several different elements can also be distinguished within the concept of judicial independence as a guarantee. The first of these is the so-called “personal independence,” which is the one that protects each judge individually and which consists in the series of characteristics of his constitutional status that protects him from eventual pressure from the State organs of a political nature – Parliament and the Executive Branch. In addition, more recently, the “collective” and “internal” elements of judicial independence as a guarantee have been identified. Collective judicial independence tends to protect the judiciary as a whole vis-à-vis the other powers of the State, while individual judicial independence protects the judge considered personally vis-à-vis the rest of the judicial structure.⁷⁴

57. Regarding the case law of the ICourtHR — as can be seen in the preceding section — this has developed both the independence of the Judiciary as an expression of the principle of the separation of powers in a democratic system, and also the independence of the judges as a right they possess in the exercise of their functions, and even as a right of the citizen of access to justice and to judicial guarantees.

58. Thus, as indicated in the preceding section, the ICourtHR has established that one of the main purposes of the separation of the powers is to guarantee the independence of judges.⁷⁵ The State must ensure the autonomous exercise of both the institutional aspect, that is with regard to the Judiciary as a system, and also in relation to its individual aspect; that is, in relation to the person of the specific judge. The objective of the protection is to avoid the judicial system, in general, and its members, in particular, being subjected to possible undue constraints in the exercise of their function by organs outside the Judiciary or even by those judges who exercise functions relating to review or appeal.⁷⁶ The purpose of the principle of the separation of powers is satisfied in two ways, which correspond to these two aspects: the institutional and the individual. When the State is obliged to protect the Judiciary as a system, it guarantees its external independence. When it is obliged to provide protection to the person of the specific judge, it guarantees its internal independence.

59. The ICourtHR has also maintained that, since Article 8(1) of the Convention recognizes that “[e]very person has a right to a hearing [...] by an independent [...] judge or court,” the terms in which this article was drafted indicate that the subject of law is the defendant, the person placed in front of the judge who will decide the case that has been submitted to him.⁷⁷ The two obligations referred to when examining the case law of the

⁷³ Cf. Díez Picazo, *op. cit.*, pp. 20 and 21.

⁷⁴ Cf. Díez Picazo, *op. cit.*, p. 21.

⁷⁵ *Case of the Constitutional Court v. Peru. Merits, reparations and costs.* Judgment of January 31, 2001. Series C No. 71, para. 73.

⁷⁶ *Case of Apitz Barbera et al. (“First Contentious Administrative Court”) v. Venezuela.* Preliminary objection, merits, reparations and costs. Judgment of August 5, 2008. Series C No. 182. para. 55.

⁷⁷ *Case of Reverón Trujillo v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of June 30, 2009. Series C No. 197, para. 148.

ICourtHR arise from this right: the first that of the judge, and the second that of the State.⁷⁸

60. Now, the ICourtHR has also determined that, in turn, the said obligations of the State give rise to rights for judges or for other citizens. For example, the guarantee of an adequate procedure for the appointment of judges necessarily entails the right of the citizen to accede to public office in equal conditions; the guarantee not to be subject to removal at will results in the disciplinary and sanctioning proceedings for judges necessarily respecting the guarantees of due process of law, and those prejudiced being offered an effective remedy; the guarantee of tenure should result in an adequate employment regime for the judge in which, *inter alia*, transfers, promotions and other conditions are sufficiently controlled and respected.⁷⁹

61. The ICourtHR, in this specific case, found that “the objective dimension is related to essential aspects of the rule of law, such as the principle of the separation of powers, and the important role played by the judicial function in a democracy. Consequently, this objective dimension transcends the figure of the judge and has a collective impact on society. In addition, a direct relationship exists between the objective dimension of judicial independence and the right of judges to accede to and remain in office under general terms of equality, as an expression of their guarantee of stability.”⁸⁰ Therefore, “when the permanence of judges in office is arbitrarily affected, the right to judicial independence established in Article 8(1) of the American Convention is violated, in conjunction with the right of access to and permanence in public service, under general conditions of equality, established in Article 23(1)(c) of the American Convention.”⁸¹ On this point, it is relevant to emphasize that this interactive interpretation of Articles 8(1) and 23(1)(c) of the American Convention allows the ICourtHR to complement its case law in the case of *Reverón Trujillo* by clarifying that the institutional guarantee of judicial independence derived from Article 8(1) of the American Convention, results in a subjective right of the judge that his permanence in public office is not affected arbitrarily, under Article 23(1)(c) of the Pact of San José.

VI. THE INSTITUTIONAL ASPECT OF JUDICIAL INDEPENDENCE IN THIS CASE AND ITS RELATIONSHIP WITH DEMOCRACY

62. In this case, the Inter-American Commission on Human Rights argued that it was difficult for the National Congress to be able to guarantee independence, since, by nature, it was a political body and, in particular, since it responded to interests of the Government and of parliamentary majorities, with the result that Congress did not guarantee the right to an independent judge, in its individual aspect, nor acted as such. In addition, the Commission argued that, with regard to the impeachment of the members of the Constitutional Tribunal, the expression “constitutional or statutory offenses,” and the formulation of grounds for removal did not provide clear, certain and sufficiently determined standards to safeguard the principle of judicial independence. In addition, the Commission and the victims’ representatives noted that the call to impeachment on December 1, 2004, was made after the statutory time frame had expired. Also the victims

⁷⁸ *Ibidem*, para. 146.

⁷⁹ *Ibidem*, para. 147.

⁸⁰ Para. 198 of the Judgment.

⁸¹ Para. 199 of the Judgment.

were summoned to it with only six days' notice and, in the case of the second vote on the impeachment proceeding of December 8, 2004, the victims were not notified, and did not have the possibility of taking part in the proceeding or exercising their right of defense.

63. In this regard, the Judgment expressly examined the institutional aspect of judicial independence, in order to determine to what extent the collective termination of the judges of the three high courts of Ecuador constituted "an attack not only on judicial independence but also against the democratic order."⁸² The ICourtHR reached the conclusion that the members of the Constitutional Tribunal were removed by a resolution of the National Congress, even though it was not empowered to do this, without any legal grounds, and without being heard. It also verified irregularities in the impeachment proceedings, which, in addition, were based on jurisdictional decisions adopted by the members of the Constitutional Tribunal, which was even prohibited by domestic law.

64. The resolution by which it was agreed to terminate the members of the Constitutional Tribunal was the result of a political alliance aimed at creating a judicial apparatus that was favorable to the political majority of the time, as well as to prevent the criminal proceedings against the President in office and a former President. Thus, the resolution of Congress was not adopted based exclusively on the assessment of specific factual information and in order to comply with the laws in force, but had a completely different purpose related to the abuse of power. As the judgment stated:⁸³

[T]he alliance of the Government in power at the time with the political party headed by former President Bucaram provides an indication of the possible reasons or purpose for wanting to remove the justices of the Supreme Court and the members of the Constitutional Tribunal; particularly, the existence of an interest in annulling the criminal proceedings that the Supreme Court was hearing against former President Bucaram (underlining added).

65. Indeed, the main violations in the instant case constitute an abrupt and totally unacceptable course of action of the political authorities, as the Judgment states,⁸⁴ against a basic pillar of the democratic rule of law such as the Judiciary and an authentically independent Constitutional Tribunal. The actions that attacked this essential principle of constitutional democracy represented a disregard for any manifestation of that independence and, therefore, for the principle of the separation of public powers, which is also a cornerstone of the entire protection of the human rights of the individual. A single fact that was found to be proved in this matter is sufficient to reveal the parliamentary abuse of power in this case. This is that, within the space of 14 days, not only the Supreme Court of Ecuador was dismissed, but also the country's Electoral Tribunal and Constitutional Tribunal, as a result of the political and institutional context in this case, within a framework that was evidently contrary to the democratic rule of law.

66. The Judgment reaches this conclusion to which this opinion has also been referring. Thus, in paragraph 221, it cites Article 3 of the Inter-American Democratic Charter, concluding that the dismissal of all the members of the Constitutional Tribunal entailed a destabilization of the existing democratic order in Ecuador, because it involved a rupture of the separation and independence of the public powers by the attack on the three high courts of Ecuador at that time.

⁸² Para. 207 of the Judgment.

⁸³ Para. 211 of the Judgment.

⁸⁴ Para. 212 of the Judgment.

67. Nevertheless, I consider that the Judgment should have placed greater emphasis on the anti-democratic attack that the public authorities made on the Constitutional Tribunal in this case. Thus, even though the ICourtHR declared the violation of Article 8(1) of the American Convention, owing to the violation of the right to be heard and to the guarantee of competence to the detriment of the eight victims as a result of their arbitrary termination and the impeachment proceedings; it should also have analyzed the violation of Article 8 in greater depth, from the perspective of the safeguard that the inter-American system professes for the democratic rule of law and, in particular, the independence of the judges who ensure its functioning, and who make it resistant to the assault of the political authorities. In addition, the Judgment should have made greater progress in the jurisprudential development of the Inter-American Democratic Charter, specifically in relation to the content of Article 3. The contentious function of the Inter-American Court consists in deciding the disputes that the Inter-American Commission and the parties submit to it in a specific case. It is undoubtable that it also has the mission to be guarantor of the principles that compose the inter-American human rights system. It can achieve this by guiding, by means of interpretation, the meaning of the said principles in order to clarify them. Thus, deciding the dispute between the parties and the implications of the law is one of the mandates of the inter-American jurisdiction, but not the only one, because it is also responsible for interpreting the American Convention, the importance of which is increased owing to the very few cases it hears.

68. The proven facts reveal a violation on many fronts of the judicial independence protected by the American Convention, as it is enhanced by the Inter-American Democratic Charter; especially as regards its aspect of the institutional independence of the members of the Constitutional Tribunal of Ecuador. And also the institutional independence of the Constitutional Tribunal, in its capacity as guarantor of the country's democratic system, based on the legal and constitutional framework of Ecuador in force when the judges terminated by the National Congress were originally appointed. In this regard, these aspects should have been related more strongly to the inter-American case law on judicial independence that has been mentioned previously in this opinion and, in this regard, an emphatic reprimand should have been issued owing to the flagrant abuse of political power that occurred in this case against the Constitutional Tribunal and its independence.

69. Indeed, at the session of November 25, 2004, during which resolution No. R-025-2005 was approved, which terminated the members of the Constitutional Tribunal because of supposed problems in the way in which they had been appointed, Congress failed to cite any norm as legal grounds for declaring the termination and, in the instant case, nor did the State indicate the norm on which the said decision was based. Even though the "single list" voting mechanism was not expressly established in Ecuador's domestic laws, no legislative, administrative or judicial actions were filed to contest that mechanism following the appointment of the judges on March 19, 2003.

70. Thus, a serious lack of logical congruence by Congress can be seen, because it waited more than 18 months to rectify the supposed irregularity, the explanation for which was eminently political, given the crisis of the powers of the State at the exact moment in which the dismissal of both the Constitutional Tribunal and the other high courts of the State occurred. Even though Congress could have impeached the judges – as it finally did, with the irregularities that will be emphasized below in this opinion – no legal grounds can be noted that empowered Congress to review and repeat the first vote, and then to decide

– as it ended up doing – the approval of the motion of censure with the consequent immediate removal from office of the judges.⁸⁵

71. The instant case reveals the conditions in which the termination and the impeachment of the members of the Constitutional Tribunal took place, violating the stability of their posts, in the context of external pressures associated with the infringement of the institutional and personal aspects of judicial independence. The proven facts, which reflect an authentic political assault and attack on the basic principles of the democratic rule of law postulated by the inter-American human rights system, reveals the need to emphasize the limits that this international system imposes, not only with regard to the personal aspect of judicial independence, but also with regard to institutional judicial independence, in favor of the eight victims as a group, who composed the Constitutional Tribunal of Ecuador, illegally terminated and tried by the National Congress.

VII. THE SUBSTANTIALLY JURISDICTIONAL NATURE OF IMPEACHMENT AND THE VIOLATIONS OF DIFFERENT RIGHTS OF DUE PROCESS UNDER THE CONVENTION (ART. 8), POLITICAL RIGHTS (ART. 23) AND JUDICIAL PROTECTION (ART. 25)

A) Substantially jurisdictional nature of impeachment

72. Traditional legal doctrine distinguishes between “legal control” and “political control.”⁸⁶ Both types of control form part of “institutionalized controls”; however, the former are objectively determined controls; that is, they are based on legal reasons and on a pre-existing canon that is not available to the organ exercising the control. Thus, legal control applies pre-established limitations; it is a necessary control, because the controlling organ must exercise this control when it is asked to and, if appropriate, issue a sanction; and it is exercised by an independent and impartial body, endowed with exclusive technical competence to decide matters of law. The latter – political control – is subjective in nature, because there is no fixed and predetermined canon of assessment, since it is based on the assessment freely made by the controlling organ, based on reasons of opportunity; it is exercised voluntarily, because the controlling organ or subject is free to exercise the control or not to do so, and it does not necessarily entail the issue of a sanction; and the political body, or the empowered authority or subject is in a situation of supremacy or hierarchy.⁸⁷

73. If we follow Aragón’s characterization and we take into account the references that the ICourtHR has cited in relation to the impeachment of judges⁸⁸ — as happens in numerous countries of the region, where this is carried out by the Legislature⁸⁹ — it follows

⁸⁵ According to article 130(9) of the 1998 Constitution of Ecuador.

⁸⁶ Among others, see Valadés, Diego, *El control del poder*, Mexico, UNAM, 1998 (3ra. ed., Porrúa-UNAM, 2006); and Aragón, Manuel, *Constitución, democracia y control*, Mexico, UNAM, 2002, especially pp. 136 to 141.

⁸⁷ Aragón, Manuel, *op. cit.*, pp. 130, 131, 136-137.

⁸⁸ *Case of the Constitutional Court v. Peru. Merits, reparations and costs*. Judgment of January 31, 2001. Series C No. 71, especially paras. 71 to 77.

⁸⁹ This occurs in various countries that have signed the American Convention, where the impeachment of judges of the high courts is carried out by the Legislature (in a constitutional proceeding of one or two chambers, depending on the country). However, it is relevant not to lose sight of what was said by expert witness Despouy in his statement during the public hearing on March 18, 2013: “...today, the word impeachment is above all a historical reminder of the fact that it used to be the political power, in this case, Congress, generally the Senate in many countries, that made a ruling, those that took the decision, or even the chamber of members of congress and senators that operated as an indictment chamber and a trial chamber; but, today, evolution has determined with growing strength the need to establish independent autonomous bodies” (underlining added).

that impeachment constitutes “legal control” as regards the function it performs. Even though it is true that the organ carrying out the impeachment, the type of offenses penalized,⁹⁰ and the sanctions that can be imposed are political in nature,⁹¹ in the exercise of this function, Congress must act as an independent and impartial organ, complying with the guarantees of due process. Hence, the control exercised by Congress by means of impeachment is of a jurisdictional nature, as an important sector of legal doctrine has accepted.⁹² Indeed, as Aragon himself asserts, the jurisdictional nature of the organ is a consequence of the type of control and not vice versa.⁹³ Thus, I consider that we should not confuse the nature of the organ with the nature of the function it exercises in the case of the impeachment of judges. Furthermore, when characterizing the “political control” to which he refers, Aragón cites examples such as that exercised by the electoral body, or that carried out by parliament, or the government over the local entities or the autonomous communities; without referring to the specific element of “impeachment” at any time.⁹⁴

74. Impeachment takes its inspiration historically from the institution of impeachment in the 1787 Constitution of the United States of America (Article I, section III, paragraph c), according to which the federal Senate “shall try all impeachments” of senior officials of the three branches of Government for political offenses, especially of the federal Constitution. The judgment only entails the removal from office and disqualification from holding office of the official in question. However, since the United States Constitution protects the tenure of federal judges (Article III, section 1), this has taken away its incentive to act against the Judiciary when it is recalled that the records show that it has only tried twice, unsuccessfully, to impeach a federal judge.⁹⁵ In this regard, it is interesting to recall the characteristics attributed to the Senate in *El Federalista LXV* when it acts in an impeachment proceeding, which are those of the “judicial nature of the Senate”⁹⁶ and of an “independent and impartial court.”⁹⁷

75. Meanwhile, Joseph Story, when commenting on the United States Constitution, and addressing the issue of impeachment began his reflection with the following eloquent words: “The great objects, to be attained in the selection of a tribunal for the trial of

⁹⁰ We should not lose sight of the fact that, according to international standards, tenure is one of the main guarantees of judicial independence, and can only be infringed in exceptional circumstances, as a result of disciplinary measures established by law, applied by an independent body using a specialized procedure that complies with the guarantees of due process, subject to judicial control. Misconduct or ineptitude are causes for the removal of judges, but not judicial errors. A/HCR/11/41 of 24 March 2008 of the United Nations Special Rapporteur on the independence of judges and lawyers, paras. 52-64.

⁹¹ Fix-Zamudio, Héctor, *Estudio de la defensa de la Constitución en el ordenamiento mexicano*, 2ª ed., México, Porrúa/UNAM, 2011, pp. 190-191.

⁹² Fix-Zamudio, *op. cit.*, p. 191. Sabsay, Daniel Alberto, “El juicio político a la Corte Suprema en la República argentina”, *Anuario Iberoamericano de Justicia Constitucional*, 2004, No. 8, p. 506. Arteaga Nava, Elisur, *Derecho Constitucional*, Mexico, Oxford University Press, 1999, pp. 701 ss. Huerta Ochoa, Carla, *Mecanismos constitucionales para el control del poder político*, México, UNAM, 2ª ed., 2001, p. 30. González Oropeza, Manuel, “Juicio político”, in Carbonell, Miguel (coord.), *Diccionario de Derecho Constitucional*, Mexico, Porrúa/UNAM, 2002, p. 335. Orozco Henríquez, J. Jesús, “Artículo 110”, *Constitución Política de los Estados Unidos Mexicanos. Comentada y concordada*, 18ª ed., México, Porrúa/UNAM, t. IV, 2004, p. 195.

⁹³ *Ibidem*, p. 137.

⁹⁴ Aragón, Manuel, *op. cit.*, pp. 173-174.

⁹⁵ The last time that a federal judge was subjected to impeachment was long ago, in 1805. Cf. Artola, Miguel, *Constitucionalismo en la historia*, Barcelona, Ed. Crítica, 2005, pp. 252-253.

⁹⁶ Hamilton, A., Madison, J. and Jay, J., *op. cit.*, pp. 277.

⁹⁷ *Ibidem*, p. 278.

impeachments, are, impartiality, integrity, intelligence, and independence. If either of these is wanting, the trial must be radically imperfect. To ensure impartiality, the body must be in some degree removed from popular power and passions, from the influence of sectional prejudice, and from the more dangerous influence of mere party spirit."⁹⁸

76. Furthermore, the jurisdictional nature of the function exercised by Congress in impeachment proceedings does not infringe the separation of powers, because it does not prevent one branch of power from exercising functions that, in principle, correspond to another. As Loewenstein explains, this is an exceptional case in which Congress exercises judicial functions.⁹⁹

77. Meanwhile, a contemporary understanding of impeachment should consider it to be a real "constitutional guarantee" in the actual conception of constitutional procedural law.¹⁰⁰ The only way to understand the "control" exercised by Congress by means of this proceeding is in a sense that accords with the constitutional rule of law; that is, as a vehicle for implementing limitations to power in order to avoid its abuse.¹⁰¹ But, if this is the purpose of impeachment, the very least that can be required of the body conducting it is precisely that its implementation does not convert it into a weapon against the constitutional State itself, which would occur if it was the Legislature that exceeded its powers of prosecution and incurred in an abuse of power against those who it was prosecuting. As one author has indicated, "the dangerous aspect of the matter is that impeachment is very useful for carrying out dismissals in order to remove from the chambers all the minority legislators who do not obey the orders of the majority group or alliance. But also, owing to the way in which it is conceived, it leaves in the hands of those who have a sufficient majority in the legislative organs the *possibility of easily annulling the other public organs, bringing them to a halt, dominating them and, finally, ending their independence*"¹⁰² (italics added).

78. Although the organ with competence to hear and decide an impeachment proceeding is a political organ (in those countries where the Legislature has this power), the whole process must be conducted with legal meticulousness, in accordance with the provisions of the Constitution, and the legal norms that regulate it,¹⁰³ as well as with the relevant standards established in the Convention. Impeachment involves a trial similar to a judicial proceeding, in the sense that the legislative chamber that is conducting the hearing in some way becomes a professional judge. It involves legal control insofar as it is regulated by law, and also jurisdictional control because it cannot be understood to be exempt of the formal and substantial element of due process. Thus, González Oropeza had defined impeachment as the "proceeding to establish the individual or official responsibility of a public servant

⁹⁸ Story, Joseph, *Commentaries on the Constitution of the United States*, Cambridge/Boston, 1833, Volume II, Chapter X: The Senate, para. 743

⁹⁹ Loewenstein, Karl, *Teoría de la Constitución*, translated by Alfredo Gallego Anabitarte, Barcelona, Ariel, 2ª ed., 1976, p. 297.

¹⁰⁰ Fix-Zamudio, Héctor, *Estudio de la defensa de la Constitución en el ordenamiento mexicano*, 2ª ed., México, Porrúa/UNAM, 2011, p. 191; Ferrer Mac-Gregor, Eduardo, *Panorámica del derecho procesal constitucional and convencional*, Madrid, Marcial Pons-UNAM, 2013.

¹⁰¹ Cf. Aragón, Manuel, *op. cit.*, pp. 121-122.

¹⁰² Valdés S., Clemente, *El juicio político. La impunidad, los encubrimientos y otras formas de opresión*, México, Ediciones Coyoacán, 2000, p. 190.

¹⁰³ Cf. Carpizo, Jorge, "Algunas garantías procesal-constitucionales en México", in the author's book, *Temas constitucionales*, 2ª ed., Mexico, Porrúa/UNAM, 2003, pp. 229-230.

[that] entails the practical exercise of a jurisdictional function by an organ with political functions, but respecting the essential formalities of a jurisdictional proceeding.”¹⁰⁴

79. Consequently, in reality, impeachment involves mixed control: “political control” only as regards the institutional status of the organ conducting it, the offenses and the sanctions to be imposed; “legal control” because the monitoring action is subject to the law, and it is jurisdictional as regards the nature of the function and the human rights of due process of those who are tried. If those who are put on trial are members of the State’s Judiciary – or of any of the high jurisdictional organs – there are also other significant elements to consider, such as the principles of the separation of powers and, as I have expounded above, the institutional aspect of the independence of judges, which entail important practical consequences.

80. Indeed, it is only by acknowledging the “jurisdictional nature” of the function of Congress in relation to impeachment that it is possible to ensure judicial independence.¹⁰⁵ Hence, if we wish to protect judicial independence we must consider that impeachment is an exceptional means to remove judges, and not a mechanism at the service of the parliamentary majorities to try and control the Judiciary. In other words, if it is understood that impeachment is an exceptional mechanism for the removal of judges, the exceptional nature of which seeks to protect them against undue removal, it is only fitting to continue the jurisprudential line of the ICourthR, in the sense that, in the exercise of its function, Congress must act independently and impartially and provide the person impeached with the guarantees of due process. To the contrary, what, in principle, sought to be a guarantee of judicial independence – an exceptional proceeding for removal on limited grounds – may become a mechanism at the service of the Government in power to control or to intimidate the Judiciary.¹⁰⁶ Expert witness Despouy had a similar opinion, when he indicated that “[when] a political entity exercises jurisdictional functions [...], there is a greater risk that the basic principles of due process will be violated; hence, international jurisprudence requires the guarantee of tenure, or that the decisions are made, above all, based on predetermined grounds that are reasoned; the decisions must be well-founded; the reasons must evidently be serious because, to the contrary, [a judge] could be removed for conduct that has no significance from the point of view of his performance.”¹⁰⁷

81. As one sector of legal doctrine has recognized, the possibility that Congress may remove judges for very lax criteria and without the appropriate guarantees of due process, jeopardizes the faculty of the courts to exercise the control of constitutionality – and we should also add the control of conformity with the Convention – in order to protect minority rights.¹⁰⁸ Indeed, to enable judges to feel free to interpret the law without waiting for the reaction of Congress, limits must be established for the Legislature to impeach and remove

¹⁰⁴ González Oropeza, Manuel, “Juicio político”, *op. cit.*, p. 335.

¹⁰⁵ On this point expert witness Despouy indicated that, in an impeachment proceeding, “the guarantees of due process of law” must be respected and “especialmente, en el caso de jueces de los Tribunales Supremos de Justicia y también, como en este caso, los miembros del Tribunal Constitucional” (Statement during the public hearing on March 18, 2013).

¹⁰⁶ Redish, Martin H, “Response: Good Behavior, Judicial Independence, and the Foundations of American Constitutionalism”, *Yale Law Journal*, vol. 136, 2006-2007, p. 148-149 and 156.

¹⁰⁷ Statement of expert witness Despouy during the public hearing on March 18, 2013.

¹⁰⁸ *Ibidem*, p. 141.

judges.¹⁰⁹ Consequently, any reasoning concerning the analysis of an alleged violation of the judicial independence and judicial guarantees of judges subjected to impeachment by the Legislature, must analyze different standards, in the context of the detailed scrutiny required by the greater guarantees enjoyed by judges under the constitutional and democratic rule of law.

B) Following the precedent of the 2001 case of the Constitutional Court v. Peru (applicability "in general" to impeachment of the rights established in Article 8(2))

82. According to a long line of the case law of the Inter-American Court, the guarantees established in Article 8(2) of the American Convention are applicable to any action of any branch of the State in which the rights of the individual are affected. This was also recognized with regard to the impeachment in the oft-cited case of the *Constitutional Court v. Peru*. And, specifically in the present case, the ICourTHR found it "opportune to ratify the fundamental criteria contained"¹¹⁰ in this 2001 precedent, and thus "ratif[e]d the following criteria mentioned in that case":¹¹¹

68. Respect for human rights constitutes a limit to a State's activity, and this is true for any organ or official in a situation of power, due to its official nature, with regard to other persons. Consequently, any form of exercising public power that violates the rights recognized in the Convention is unlawful. This is even more important when the State exercises its power to sanction, because this not only presumes that the authorities act with total respect for the legal system, but it also involves granting the minimum guarantees of due process to all persons who are subject to its jurisdiction, as established in the Convention.

69. Although Article 8 of the American Convention is entitled "Judicial Guarantees" [in the Spanish version - "Right to a Fair Trial" in the English version], its application is not strictly limited to judicial remedies, "but rather the procedural requirements that should be observed in order to be able to speak of effective and appropriate judicial guarantees"¹¹² so that a person may defend himself adequately in the face of any kind of act of the State that affects his rights.

70. The Court has already established that, although this article does not establish minimum guarantees in matters relating to the determination of rights and obligations of a civil, labor, fiscal or any other nature, the full range of minimum guarantees stipulated in the second paragraph of this article are also applicable in those areas and, therefore, in this type of matter, the individual also has the overall right to the due process applicable in criminal matters.¹¹³

71. Although the jurisdictional function belongs, in particular, to the Judiciary under the separation of powers that exists in the rule of law, other public organs or authorities may exercise functions of the same type.¹¹⁴ In other words, when the Convention refers to the right of everyone to be heard by a competent judge or court to "determine his rights," this expression refers to any public authority, whether administrative, legislative or judicial, which, through its decisions determines individual rights and obligations. For that reason, this Court considers that any State organ that exercises functions of a materially jurisdictional nature has the obligation to adopt decisions that are in consonance with the guarantees of due legal process in the terms of Article 8 of the American Convention.

[...]

¹⁰⁹ Perlin, Adam A., "The Impeachment of Samuel Chase: Redefining Judicial Independence", *Rutgers Law Review*, vol. 62:3, 2010, pp. 729, 788.

¹¹⁰ Para. 165 of the Judgment.

¹¹¹ Para. 166 of the Judgment.

¹¹² Cf. *Judicial guarantees in States of Emergency* (Arts. 27.2, 25 and 8 American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 27.

¹¹³ Cf. *Case of Paniagua Morales et al.* Judgment of March 8, 1998. Series C No. 37, para. 149.

¹¹⁴ Cf. *Eur. Court H.R., Campbell and Fell, judgement of 28 June 1984, Series A no. 80*, para. 76, and *Eur. Court H.R., case of X v. the United Kingdom, judgement of 5 November 1981, Series A no. 46*, para. 53.

75. This Court considers that, under the rule of law, the independence of all judges and, in particular, that of constitutional judges, must be guaranteed owing to the nature of the matters submitted to their consideration. As the European Court has indicated, the independence of any judge presumes that there is an appropriate appointment process,¹¹⁵ a fixed term in the position,¹¹⁶ and a guarantee against external pressures.¹¹⁷

[...]

77. Regarding the exercise of the authority of Congress to conduct impeachment proceedings, which engages the responsibility of a public official, the Court believes that it should be recalled 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. (Underlining added)

83. The actual members of the ICourTHR have ratified what was stated in the 2001 precedent, which, in my opinion, has great significance today if we consider a continuation in the line of case law on due process under the Convention that the Inter-American Court has been developing since then; so that the rights established in Article 8(2) of the American Convention — in principle addressed at the “minimum guarantees” in criminal proceedings — also extend to the civil, labor, fiscal, or any other order; in other words, the minimum guarantees established in Article 8(2) of the American Convention are applicable to those orders also and, consequently, in that type of matter also there is, “in general,” a right to the due process of law that applies in criminal matters.¹¹⁸ To reinforce this position, in the Judgment in the instant case,¹¹⁹ the Inter-American Court also based itself on the case of *Baena Ricardo et al. v. Panama*, which indicates, *inter alia*, “that the series of minimum guarantees established in paragraph 2 of Article 8 of the Convention apply to the spheres mentioned in paragraph 1 of this article; that is the determination of rights and obligations of a civil, labor, fiscal, or any other nature. This reveals the broad scope of due process; the individual has the right to due process understood in the terms of Article 8(1) and 8(2), in both criminal matters and in all these other spheres.”¹²⁰

84. It should be stressed that, in the Judgment that prompts this opinion, the ICourTHR does not make a specific analysis of the meaning that the 2001 precedent attributes to the expression “in general,”¹²¹ which is fundamental in order to determine whether each and every one of the “minimum guarantees” established in Article 8(2) apply to spheres other than criminal matters and, specifically, if they all apply to impeachment. However, the Judgment declared the violation of Article 8(2) (for different forms of adequate defense) and 8(4) (the guarantee of *ne bis in idem*). I consider that, in the future, the Inter-American Court will have to clarify, precisely, the full applicability — or case by case — of the

¹¹⁵ Cf. *Eur. Court H.R., Langborger case, decision of 27 January 1989, Series A no. 155*, para. 32, and *Eur. Court H.R., Campbell and Fell, supra note 47*, para. 78.

¹¹⁶ Cf. *Eur. Court H.R., Langborger case, supra note 51*, para. 32; *Eur. Court H.R., Campbell and Fell, supra note 47*, para. 78; and *Eur. Court H.R., Le Compte, Van Leuven and De Meyere, judgement of 23 June 1981, Series A no. 43*, para. 55.

¹¹⁷ Cf. *Eur. Court H.R., Langborger case, supra note 51*, para. 32; *Eur. Court H.R., Campbell and Fell, supra note 47*, para. 78, and *Eur. Court H.R., Piersack judgement of 1 October 1982, Series A no. 53*, para. 27.

¹¹⁸ *Case of the Constitutional Court v. Peru. Merits, reparations and costs.* Judgment of January 31, 2001. Series C No. 71, para. 70.

¹¹⁹ Para. 167 of the Judgment.

¹²⁰ *Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs.* Judgment of February 2, 2001. Series C No. 72, para. 125.

¹²¹ *Case of the Constitutional Court v. Peru. Merits, reparations and costs.* Judgment of January 31, 2001. Series C No. 71, para. 70.

“minimum guarantees” established in Article 8(2) for the other non-criminal procedures and proceedings; a matter of extreme importance for understanding due process under the Convention, and over and above the specific case of impeachment.

85. As established in the Judgment, when the Court considers its own most representative precedents, it must be understood that judges can only be removed based on serious disciplinary offenses or incompetence, and in accordance with proceedings with due guarantees, or when their mandate has ended. Removal can never be the result of an arbitrary measure, and this must be examined in light of the existing domestic context and the circumstances of the specific case.¹²²

C) The violation of different rights established in Articles 8 of the American Convention, as well as of Articles 23(1)(c) and 25 of the Pact of San José in this case

86. In the instant case, in order to reveal the different violations of due process in the impeachment proceedings filed against the members of the Constitutional Tribunal, it is sufficient to refer to the proven facts and to the domestic law in force and applicable in this respect, which is outlined in the Judgment.

87. At the time of the facts, articles 92 and 93 of the Organic Law on the Legislative Function indicated that the time frame for filing impeachment proceedings after the presentation of the respective motion was 5 to 10 days in cases of ordinary sessions of Congress and 30 days in the case of special sessions, and that this period could be extended for up to 60 days. However, when the impeachment proceeding started, these time frames had expired. Also, when Congress decided on the impeachments, the context of political crisis persisted during which the arbitrary decision to terminate the members of the Constitutional Tribunal was taken on November 25, 2004.

88. As the Judgment records, one of the serious irregularities was that, on December 1, 2004, four motions of censure had already been submitted to a vote and had not obtained sufficient affirmative votes. Despite this, on December 8, 2004, Congress decided to hold the votes again. Although, in one of the votes that was held for a second time, it was indicated that this was done owing to the presumed undue joinder of two of the motions of censure, when re-opening the said motions of censure to a vote no legal grounds were given to justify this new vote.

89. Regarding the vote held on December 8, 2004, and just to mention the most visible inconsistencies: (a) the session was called by the President of the Republic as a special session, even though Congress was not in recess; (b) the vote was held even though, during the session on December 1, a similar vote had been held and the motions had not obtained sufficient votes, based on which it had been declared that the “the motion is rejected”; (c) the session on December 1, 2004, had been closed without the members of Congress filing an appeal for reconsideration concerning the presumed inadmissibility of joinder of the two motions of censure, and thus it was inadmissible to hold the vote again on December 8; (d) the vote on the removal of the judges was held in the session during which the termination of all the justices of the Supreme Court of Justice was declared, without having been announced previously on the agenda, and (e) the statements made by the members of Congress during that session made no mention of specific facts or evidence related to the accusations against the members of the Constitutional Tribunal.

¹²² Para. 200 of the Judgment.

90. In relation to the legal grounds applicable to impeachment that were in force at the time of the facts, article 130(9) of the Ecuadorian Constitution indicated that the members of the Constitutional Tribunal:

[...] could be impeached for statutory or constitutional offenses, committed in the performance of their functions. Congress may censure them in the case of a declaration of guilt, by a majority of its members. The censure shall result in the immediate removal of the official (underlining added).

91. While article 199 of the Constitution stipulated that:

The organs of the judiciary shall be independent in the exercise of their obligations and attributes. No function of the State may interfere in matters within their competence.

The justices and judges shall be independent in the exercise of their jurisdictional powers and even vis-à-vis the other organs of the Judiciary; they shall only be subject to the Constitution and the law.

92. Meanwhile, article 9 of the 1997 Law on Constitutional Control established that the members the Constitutional Tribunal:

(...) shall not be held responsible for the votes they emit or for the opinions they express in the exercise of the attributes of their office.

93. In these conditions, the applicable domestic law at the time of the facts recognized the mechanism of impeachment for the members of the Constitutional Chamber in relation to their office, but its purpose could not be for the National Congress to review the control of legality or constitutionality made in the judgments delivered by the Constitutional Tribunal, based on the principle of the separation of powers and the Constitutional Tribunal's exclusive competence in this area. In addition, the Constitution established the term of office of the judges as an uninterrupted period of four years (articles 275 and 276 of the Ecuadorian Constitution in force at that time).¹²³

94. Despite this, the six motions of censure that were presented against the judges were directly related to judgments that the Constitutional Tribunal had handed down; in

¹²³ Cf. Constitution of the Republic of Ecuador of August 11, 1998.

"Art. 275. The Constitutional Tribunal with national jurisdiction, shall have its seat in Quito. It shall be composed of nine members, who shall have their respective substitutes. They shall perform their functions for four years and may be re-elected. The organic law shall determine the rules for their organization and functioning, and the procedures for their actions."

"Art. 276.- The Constitutional Tribunal shall have competence:

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

2. To hear and decide on the unconstitutionality of the administrative acts of all public authorities. The declaration of unconstitutionality shall result in the annulment of the act, without prejudice to the administrative organ adopting the necessary measures to preserve respect for the constitutional norms.

3. To examine decisions that deny *habeas corpus*, *habeas corpus data*, and *amparo*, and cases of appeal established in the action for *amparo*.

4. To rule on objections of unconstitutionality by the President of the Republic, in the law drafting process.

5. To rule on conformity with the Constitution, and international treaties and conventions prior to their approval by the National Congress.

6. To decide disputes concerning competence or attributes assigned by the Constitution.

7. To exercise the other attributes conferred on it by the Constitution and the laws. The decisions of the Judiciary shall not be susceptible to control by the Constitutional Tribunal

particular, the decisions in the case of the “fourteenth salary” and the case of the “D’Hondt method.” This is illustrated by one of the motions of censure that requested impeachment supposedly because, in the decision on the “D’Hondt method,” there had been a presumed:

Personal interest and to benefit those who had enabled their election to the Constitutional Tribunal [...] prejudicing and placing at a disadvantage all the other political parties that exist in the country [and ...] ignoring the formula for calculating proportional representation that permitted plural and democratic political representation [...] based on which] they have jeopardized the next elections, with this dangerous attack on the democratic life of the country, as well as on the rights and freedoms guaranteed in the Constitution.¹²⁴

95. As the Judgment notes,¹²⁵ Ecuadorian law was sufficiently clear in the sense that the opinions given in the judgments delivered by the judges could not be grounds for their removal. The congressional records for December 1 and 8, 2004, allow it to be concluded that there was no mention of specific facts related to the supposed “serious offenses” committed by the judges; rather, reference was only made to their decisions, which were based on legal grounds and delivered within the framework of their competence.

96. Based on the above-mentioned reasons, legal grounds and factual evidence, it can be clearly understood that, in the Judgment, the Inter-American Court declared the respondent State internationally responsible for the violation of different rights established in Article 8(1) and (2), as well as in Article 8(4) (*ne bis in idem*),¹²⁶ in relation to Article 1(1) of the American Convention; and even, of Article 8(1) on relation to Article 23(1)(c) and Article 1(1) of the Pact of San José, owing to the arbitrary termination of the permanence in the exercise of judicial functions, and the consequent infringement of judicial independence and the guarantee of impartiality. The Court also declared the State’s international responsibility for the violation of Article 25(1), in relation to Article 1(1) of this instrument, because the victims were prevented from filing the “remedy of *amparo*,” owing to the decision issued by the new Constitutional Tribunal.

VIII. THE FAILURE TO MAKE A SPECIFIC ANALYSIS OF THE RIGHTS ESTABLISHED IN ARTICLE 8(2) OF THE AMERICAN CONVENTION CITED BY THE COMMISSION AND ALLEGED BY THE PARTIES

97. The ICourtHR failed to make a detailed examination of different judicial guarantees cited by the Inter-American Commission and alleged by the victims established in Article 8(2), considered that “[h]aving determined that the organ that carried out the termination was not competent, it is not necessary to analyze the other guarantees established in Article 8(1) of the Convention, because this determination signifies that the decision adopted by Congress was totally unacceptable.”¹²⁷

98. I consider that the Inter-American Court could have analyzed the specific violations of other rights established in Article 8(2) of the American Convention, because the National

¹²⁴ Cf. National Congress record, 24-326, session of December 1, 2004.

¹²⁵ Para. 208 of the Judgment.

¹²⁶ The ICourtHR found that Article 8(4) of the Pact of San José had been violated, considering that, pursuant to domestic law, the impeachment proceedings held against the judges had concluded on December 1, 2004, and according to the explicit certification issued by the Secretariat of Congress that the motions of censure had been rejected because they had not obtained sufficient votes; because the “re-opening of the vote signified a new proceeding” in the session of Congress on December 8 that year. See, especially, paragraphs 184 to 186 of the Judgment.

¹²⁷ Para. 223 of the Judgment.

Congress did have competence to conduct impeachment proceedings; in other words, the ICourTHR only considered the lack of competence with regard to the decision to terminate the judges on November 25, 2004, and not the competence of Congress with regard to the impeachment proceedings, regarding which specific violations were alleged of other judicial guarantees that were not examined in the Judgment.

99. In my opinion, the ICourTHR should have taken advantage of this opportunity to consolidate its case law concerning the due process of law applicable to the impeachment of judges. And this, because it has few opportunities to rule on the issue, and because of the institutional weakness in which the Judiciaries and constitutional courts of the region find themselves in the face of ambush by the political authorities, which, unfortunately, is not infrequent. As I have indicated previously (*supra* para. 67), nowadays, the Inter-American Court has an interpretive function *erga omnes* of the American Convention with exceeds the specific case, a situation of special importance bearing in mind the limited number of cases that it decides, owing to the design of the inter-American human rights system; a situation that differs greatly from that of the European system, especially following the entry into force of Protocol 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms under which the European Commission was eliminated and direct access was permitted to the European Court.¹²⁸ Thus, the binding expansion of the “interpreted provision of the Convention”¹²⁹ acquires particular relevance in inter-American justice, above and beyond the specific case (*res interpretata*), constituting one more element in the construction of a *ius constitutionale commune americanum* — or, at least and for the time being, *latinoamericanum*¹³⁰ — which permits ensuring a minimum standard of regional applicability of the American Convention in favor of human rights and dignity.

100. In the same way that the Inter-American Court analyzed the violations to the right to a hearing and some components of the right of defense, the Court could also have made a specific examination of alleged violations to other rights established in Article 8(2) of the American Convention expressly mentioned by the Inter-American Commission and alleged by the representatives of the victims, rather than evading their examination by considering that, since the Congress was not competent to terminate the judges, it was not necessary to make this analysis because the decision was “totally unacceptable.”¹³¹ Precisely because it was a decision of the National Congress that was characterized as unacceptable, the ICourTHR should have ruled on the other arguments relating to the rights under Article 8(2) of the Pact of San José and, especially, when it had examined the right to a hearing and some components of the right of defense and declared that they had been violated.

101. Indeed, on the one hand, Congress *was competent to conduct the impeachment proceedings*; and, on the other, it should not be overlooked that, in other cases, even

¹²⁸ According to its 2012 Annual Report, the European Court of Human Rights had 128,100 cases pending a decision. Cf. *European Court of Human Rights. Annual Report 2012*, Strasbourg, 2013, pp. 4, 6, 7 and 150.

¹²⁹ Cf. *Case of Gelman v. Uruguay. Monitoring compliance with judgment*. Order of March 20, 2013, para. 67 and ff. The ICourTHR has established that the “interpreted provision of the Convention” is binding in both the specific case (*res judicata*) and with general effects for the other States Parties to the American Convention (*res interpretata*). This is of particular importance for the “control of conformity with the Convention” that must be carried out by all the national authorities in keeping with their respective competences, and the corresponding procedural regulations, and is also useful for compliance with the decisions of the Inter-American Court.

¹³⁰ Cf. von Bogdandy, Armin, Morales Antoniazzi, Mariela, and Ferrer Mac-Gregor, Eduardo (coords.), *Ius Constitutionale Commune en Derechos Humanos en América Latina*, Mexico, Porrúa-IMDPC-Max Planck Institute for Comparative Public Law and International Law, 2013.

¹³¹ Para. 223 of the Judgment.

though the ICourTHR has declared a specific violation, this has not been an obstacle to consider it pertinent to establish other implications of the State's international responsibility and, at times, to declare additional or complementary violations.¹³² This was justified in the instant case, taking into account the "abrupt" nature of the termination of the titular judges of the main high courts of Ecuador and the dramatic impairment of the institutional aspect of judicial independence that was declared in the Judgment; hence, I consider that the Inter-American Court should not have avoided responding to the said allegations regarding due process under the Convention in the impeachment proceedings against the judges.

102. The need for thoroughness in the arguments, for example on the different components of the victims' right of defense in the impeachment proceedings, would have been particularly relevant, because it was highly probable that it would culminate in the autonomous declaration of the violation of the rights considered in themselves. Moreover, it should not be forgotten that the right to due process of law is, in fact, constituted by a series of inseparable and essential elements,¹³³ so that it is not respected unless they are all satisfied, in an integral manner. Thus, the examination of the other judicial guarantees, which it was alleged had been violated, would eventually have established more robust standards of protection for judge, justices or magistrates, subjected to impeachment by congresses, which those congresses should never consider that they are exempt from complying with.

IX. DISSENT: THE NEED TO ANALYZE AND TO DECLARE THE AUTONOMOUS VIOLATION OF THE PRINCIPLE OF LEGALITY (ARTICLES 9 AND 1(1) OF THE AMERICAN CONVENTION)

A) Introduction and difference with the case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador

103. As I stated at the start of this opinion, I dissent from the majority opinion with regard to the seventh operative paragraph of the Judgment.¹³⁴ Indeed, I consider that the Inter-American Court should have made a specific analysis of the arguments concerning the violation of the principle of legality established in Article 9 of the American Convention, and have declared that, in this case, the said right was violated autonomously to the detriment of the eight victims.

¹³² In the *Case of Kimel* the ICourTHR included considerations of the proportionality of the restriction to the victim's freedom of expression. Even though, based strictly on the analysis of legality the Inter-American Court declared the respective violation, it included an analysis of the other components of the considerations on proportionality. Cf. *Case of Kimel v. Argentina. Merits, reparations and costs*. Judgment of May 2, 2008 Series C No. 177, paras. 81 to 94. In addition, in the *Case of the Pueblo Bello Massacre*, even though the ICourTHR indicated the lack of competence of the military criminal jurisdiction to examine the facts, it analyzed how, during the intervention of this jurisdiction, the investigation was not conducted with due diligence. The Inter-American Court indicated that the "limited investigative measures, and also the speed with which they were carried out, reveal little or no interest of the military criminal jurisdiction in conducting a serious and exhaustive investigation into the events that had occurred." It is worth emphasizing that the ICourTHR also examined the effectiveness of the intervention of other systems of justice, such as the disciplinary jurisdiction. Cf. *Case of the Pueblo Bello Massacre v. Colombia*. Judgment of January 31, 2006. Series C No. 140, paras. 192 to 204.

¹³³ Cf. García Ramírez, Sergio, *El debido proceso. Criterios de la jurisprudencia interamericana*, Mexico, Porrúa, 2012, p. 23.

¹³⁴ "7. It is not required to make a ruling on the alleged violation of Article 9 of the American Convention on Human Rights, in the terms of paragraphs **¡Error! No se encuentra el origen de la referencia.** and **¡Error! No se encuentra el origen de la referencia.** of this Judgment.

104. In principle, it should not be overlooked that, in this case (related to an arbitrary termination and irregular impeachment proceedings against the victims), the State acknowledged expressly its responsibility with regard to the violation of Article 9 of the Pact of San José in relation to the termination of the victims as members of the Constitutional Tribunal. Indeed, the State indicated that this article had been violated:¹³⁵

because there were no grounds established by law for the removal from office of the presumed victims [...] although it is true that the National Congress could make a constitutional and legal analysis, this should have included clear mechanisms to submit to review the tenure and the duration of the terms of the former members of the Constitutional Tribunal. The absence of legal certainty concerning the grounds for removing the former members obliges the State to acknowledge its international responsibility in this regard.

105. It is true that it was difficult to understand the scope of the acknowledgement of international responsibility on this point from the State's declaration. First, in this case, there were grounds for removing the members of the Constitutional Tribunal, on the basis of which impeachment proceedings could be conducted against them. It is also true that the State did not acknowledge any violation related to the impeachment proceedings that were held, because it limited its acquiescence to the facts of the termination resulting from the resolution of the National Congress of November 25, 2004.

106. Nevertheless, I believe that there is a substantial difference between what was decided in the case of *the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*¹³⁶ and the instant case, which is the reason I differed from the majority opinion on this aspect. In particular, it should be recalled that, in that case, the ICourtHR considered that the organ that terminated the justices did not have competence; whereas, in the case of the Constitutional Tribunal, which prompts this partially dissenting opinion, the litigation was not focused exclusively on the termination of the judges, but also on the alleged violations in relation to the impeachment proceeding, which the National Congress was competent to conduct. In other words, in the case of *the Supreme Court of Justice*, the Court did not analyze the possible existence of an act that warranted a sanction, because Congress did not have competence to terminate the justices of the Supreme Court, a competence that it did have to impeach the members of the Constitutional Tribunal as analyzed in the Judgment.

107. Indeed, contrary to the case of *the Supreme Court of Justice*, in the instant case that inspires this opinion, impeachment proceedings were held against the members of the Constitutional Tribunal who had previously been removed by a congressional resolution. And, in this regard, the ICourtHR based its assessment on the assumption that Congress had competence to conduct these impeachment proceedings. This variable allowed the ICourtHR to determine that, when deciding the sanction, the unstated purpose was related to an "abuse of power." Thus, the Judgment expressly states:¹³⁷

Therefore, the apparent legality and justification of these decisions concealed the intention of a parliamentary majority to exercise greater control over the Constitutional Tribunal and to facilitate the termination of the justices of the Supreme Court. The Court has verified that the resolutions of Congress were not adopted based on the exclusive assessment of specific factual information and in order to ensure proper compliance with the laws in force, but sought a very different end related to

¹³⁵ Para. 14 of the Judgment.

¹³⁶ *Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2013. Series C, No. 266.

¹³⁷ Para. 219 of the Judgment.

an abuse of power aimed at obtaining control of the judicial function by different procedures; in this case, the termination and the impeachment proceedings (underlining added).

108. To the contrary, in the case of *the Supreme Court of Justice*, it was not possible to reach this conclusion because the concept of “abuse of power” requires the respective organ to have competence to adopt the measure regarding which the “unstated” reasons are analyzed.¹³⁸ Meanwhile, in the case of the Constitutional Tribunal, the National Congress did have competence to hold the impeachment proceedings.

109. Nevertheless, I consider that, in both the case of *the Supreme Court of Justice v. Ecuador (Quintana Coello et al.)*¹³⁹ and in this case of the Constitutional Tribunal, the ICourTHR could have analyzed the violation of Article 9 of the Pact of San José, despite the lack of competence of the National Congress to terminate the justices of the Supreme Court of Justice and the lack of competence to determine the legality of the appointment of the members of the Constitutional Tribunal. Indeed, irrespective of whether Congress was incompetent to carry out the removals, it should not be overlooked that, in the case of *the Supreme Court of Justice*, the State acknowledged that it had held an *ad hoc* sanction proceeding while, in the instant case, the State acknowledged the violation of Article 9 of the American Convention, because it considered that “it did not have grounds determined by law to remove the presumed victims from office,” and owing to “the absence of legal certainty with regard to the grounds for the removal of the former judges.” In this situation, since it was clearly an *ad hoc* proceeding and given the State’s acquiescence in this case, I consider that the possible violation of the principle of legality could have been analyzed in the case of both terminations.

110. In my opinion, in the Judgment that prompts this opinion, the “abuse of power” could have been examined with greater precision and from a different viewpoint. Not only from the perspective of the institutional aspect of judicial independence – as occurs in the Judgment¹⁴⁰ – but, in particular, by an analysis of the principle of legality established in Article 9 of the American Convention. This is because the State acknowledged its international responsibility with regard to the violation of this principle,¹⁴¹ and also because, in the Judgment, the ICourTHR – when analyzing the scope of the State’s partial acknowledgement of responsibility – considered that “some of the disputes on this point remain.”¹⁴² Hence, I find insufficient the justification given in the Judgment to establish that “it is not necessary to make a detailed analysis of the arguments of the parties concerning whether the termination decision constituted a punitive act, and other aspects related to the possible implications that the principle of legality would have had in this case.”¹⁴³

111. Given the evident “harm to the separation of powers and the arbitrary nature of the actions of Congress” that the Judgment expressly indicates,¹⁴⁴ the competence of the

¹³⁸ Cf. *Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2013. Series C, No. 266, para. 162.

¹³⁹ Cf. My Concurring Opinion in the *Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2013. Series C No. 266.

¹⁴⁰ Paras. 188 to 199, and 207 to 221 of the Judgment.

¹⁴¹ Para. 14 of the Judgment.

¹⁴² Para. 22 of the Judgment.

¹⁴³ Para. 223 of the Judgment.

¹⁴⁴ *Ibidem*.

National Congress to impeach the members of the Constitutional Tribunal,¹⁴⁵ and the Court's conclusion of the "abuse of power" that occurred in this case,¹⁴⁶ I consider that it was essential to analyze the violation of the principle of legality with regard to the impeachment proceedings and to conclude that Article 9 of the Pact of San José had been violated; hence, my dissent from the seventh operative paragraph of the Judgment.¹⁴⁷ I will now explain my position in greater depth.

B) The punitive nature of a decision in order to be able to apply Article 9 of the American Convention in a specific case

1. Case law of the Inter-American Court

112. According to the case law of the Inter-American Court, the principle of legality established in Article 9 of the American Convention is applicable, in principle, to criminal matters. However, the ICourtHR itself has also considered it applicable to matters relating to administrative sanctions.

113. Thus, in the case of *Baena Ricardo v. Panama*,¹⁴⁸ the Inter-American Court considered:

106. With regard to the foregoing, it is desirable to analyze whether Article 9 of the Convention is applicable to the matters of administrative sanction, in addition, evidently, to being applicable to criminal matters. The terms used in this article seem to refer exclusively to the latter. However, it is necessary to take into account that administrative sanctions, as well as criminal sanctions, constitute an expression of the State's punitive power and that, on occasions, the nature of the former is similar to that of the latter. They both entail impairment, deprivation or alteration of the rights of the individual, as a consequence of unlawful conduct. Therefore, in a democratic system it is necessary to take extreme care to ensure that the said measures are adopted with strict respect for the basic rights of the individual, and subject to a careful verification of the existence of the unlawful conduct. In addition, and to ensure legal certainty, it is essential that the punitive norm, whether criminal or administrative, exists and is known or can be known, before the act or omission occurs that violates it and for which punishment is intended. The definition of an act as being unlawful, and the determination of its legal effects must precede the conduct of the individual who is considered to be an offender. Otherwise, the individual would be unable to adjust his or her behavior in accordance with a valid and certain legal system that expresses the reproach of society and its consequences. These are the grounds for the principles of legality and the non-retroactivity of an unfavorable punitive norm.¹⁴⁹ (Underlining added)

114. Furthermore, the ICourtHR has stated that the principle of legality constitutes one of the central elements of criminal prosecution in a democratic society by establishing that "no one may be sentenced for acts or omissions that, at the time they were committed,

¹⁴⁵ According to Article 130(9) of the 1998 Ecuadorian Constitution; Cf. paras. 67 and 201 of the Judgment.

¹⁴⁶ Cf. para. 219 of the Judgment.

¹⁴⁷ To the contrary, in the case of *the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, the National Congress did not have competence to terminate the justices of the Supreme Court, while it did have competence to conduct impeachment proceedings against the members of the Constitutional Tribunal. This absence of punitive competence, in principle, made it unnecessary for the Court to declare the existence of an implicit sanction and an abuse of power in the case of *the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*. Consequently, in that case, my opinion was concurring and not dissenting; Cf. my Concurring Opinion in the Case of *the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador. Preliminary objection, merits, reparations and costs*. Judgment of August 23, 2013. Series C No. 266, especially para. 89.

¹⁴⁸ *Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs*. Judgment of February 2, 2001. Series C, No. 72, para. 106.

¹⁴⁹ Cf., *inter alia*, Eur. Court H.R. *Ezelin judgement of 26 April 1991, Series A no. 202*, para. 45; and Eur. Court H.R. *Müller and Others judgement of 24 May 1988, Series A no. 133*, para. 29.

were not illegal under the applicable law.” This principle governs the actions of all the organs of the State, within their respective competences, particularly when the time comes to exercise punitive powers.¹⁵⁰ The Inter-American Court has also indicated that the principle of non-retroactivity is also intended to prevent an individual from being punished for an act that, when committed, was not an offense or that was not punishable or could not be prosecuted.¹⁵¹ Additionally, the ICourtHR has established that the application of an administrative sanction or punishment that is substantially different to that established by law violates the principle of legality, because it is based on extensive interpretations of the criminal law.¹⁵²

115. Consequently, there are two additional arguments that allow us to subsume what happened with regard to the impeachment proceedings into Article 9 of the American Convention. First, it should be considered that the “principle of legality” contains not only aspects relating to the existence of a prior law and sanction that explicitly mentions the literal meaning of the principle,¹⁵³ but also the guarantee of the principle of criminalization. The principle of criminalization means that the punitive law must define with sufficient detail the elements that constitute the offense.¹⁵⁴ Thus, not only must the guarantees of due process of law be applied in impeachment proceedings, but also the need for grounds for removal that are sufficiently clear must be considered included in the principle of legality, in order to avoid or prevent the risk of abusive interpretations.¹⁵⁵ And, as I have

¹⁵⁰ Cf. *Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs*, para. 107, and *Case of Fermín Ramírez v. Guatemala. Merits, reparations and costs*, para. 90; *Case of Mohamed v. Argentina*, para. 130.

¹⁵¹ Cf. *Case of Ricardo Canese v. Paraguay. Merits, reparations and costs*. Judgment of August 31, 2004. Series C No. 111, para. 175, and *Case of García Asto and Ramírez Rojas v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of November 25, 2005. Series C No. 137, para. 191, and *Case of Mohamed v. Argentina*, para. 131.

¹⁵² Cf. *Case of Vélez Loo v. Panama. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2010. Series C No. 218, para. 187.

¹⁵³ Cf. *Case of Vélez Loo v. Panama. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2010. Series C No. 218, para. 183 (“in the interest of legal certainty, it is essential that the punitive norm, whether criminal or administrative, exists and is known or may be known, before the act or omission that violates it, and which it is intended to punish. The definition of an act as illegal, and the establishment of its legal effects must precede the conduct of the individual who is considered an offender. Otherwise, the individual would be unable to adapt his or her behavior in accordance with a valid and certain legal system that expresses the reproach of society and its consequences. These are the grounds for the principles of legality and of the non-retroactivity of an unfavorable punitive norm”). See also *Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs*. Judgment of February 2, 2001. Series C No. 72, para. 106; *Case of Yvon Neptune v. Haiti. Merits, reparations and costs*. Judgment of May 6, 2008. Series C No. 180, para. 125, and *Case of García Asto and Ramírez Rojas v. Peru*. Judgment of November 25, 2005. Series C No. 137, para. 191.

¹⁵⁴ Regarding criminal offenses, in the *Case of García Asto and Ramírez Rojas v. Peru*, the ICourtHR established that “definitions of crimes must clearly describe the criminalized conduct, establishing its elements, and the factors that distinguish it from other forms of conduct that are either not punishable or punishable with non-criminal measures. The American Convention requires States to make every effort to apply criminal sanctions with strict respect for the basic rights of the individual, after carefully ascertaining the actual existence of illegal conduct. In this regard, it is incumbent on the criminal judge, when applying criminal law, to abide strictly by its provisions and to be extremely rigorous when relating the conduct of the accused to the definition of the offense, in order not to punish acts that are not punishable under the legal system”; *Case of García Asto and Ramírez Rojas v. Peru*. Judgment of November 25, 2005. Series C No. 137, paras. 188 to 190. See also *Case of Fermín Ramírez v. Guatemala. Merits, reparations and costs*. Judgment of June 20, 2005. Series C No. 126, para. 90; *Case of Lori Berenson Mejía v. Peru. Merits, reparations and costs*. Judgment of November 25, 2004. Series C No. 119, para. 125; *Case of De la Cruz Flores v. Peru. Merits, reparations and costs*. Judgment of November 18, 2004. Series C No. 115, paras. 79, 81 and 82, and *Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs*. Judgment of February 2, 2001. Series C No. 72, para. 106.

¹⁵⁵ In this regard, the ICourtHR has indicated that “administrative sanctions are, like criminal sanctions, an expression of the State’s punitive power and, at times, they are similar to these in nature. They both entail

mentioned, this also encompasses – without any doubt, from my point of view – the guarantee of the criminalization of all offenses of legal and public significance. The second argument to affirm that the institution of impeachment must be subsumed in Article 9 of the Pact of San José relates to what I have explained previously: granting Congress such broad and important powers as the removal of the members of the Constitutional Tribunal can only be compatible with the necessary constitutional checks and balance, if it is exercised based on specific grounds considered as a mechanism of protection against the attempts of the National Congress to resort to interpretations that consist in an abuse of power, that exceeds the admissible limits of the interpretation of the law (in this regard see, *supra* para. 15).

116. In other words, in order to be in conformity with the American Convention, the criteria for impeaching judges or members of the Constitutional Tribunal should have been clear and explicit. Hence, the connection between the separation of powers, judicial independence, and the principle of legality is fundamental in order to bring the mechanism of the impeachment of judges into line with what should be its only acceptable configuration under the Convention: that of an eventual non-arbitrary sanction, to be applied with the guarantees consubstantial with the rule of law, as required also by Article 3 of the Inter-American Democratic Charter (see *supra* para. 13).¹⁵⁶

117. In this regard, the ICourTHR has considered that the principle of legality entails a clear definition of criminal conduct, which establishes its elements, and allows it to be distinguished from non-punishable conduct or unlawful conduct punishable with non-criminal measures. Ambiguity in the definition of disciplinary or criminal offenses gives rise to doubts and opens the way to the discretion of the authority, which is particularly undesirable when establishing the criminal responsibility of the individual and sanctioning this with penalties that have a severe impact on fundamental rights, such as life or freedom. Norms that fail to strictly delimit criminal conducts violate the principle of legality established in Article 9 of the American Convention.¹⁵⁷

2. In this case

118. Some factual clarifications must be made in order to understand the possible application of the principle of legality in this case. In this regard, it should be stressed that the termination of the judges on November 25, 2004, and the impeachment proceedings that were held subsequently, were not of a criminal nature. However, and as indicated previously, there is no dispute about the punitive nature of impeachment, so that there is

impairment, deprivation or alteration of the rights of the individual, as a result of an unlawful conduct. Therefore, in a democratic system it is necessary to take maximum care to ensure that the said measures are adopted strictly respecting the basic rights of the individual and following a careful verification that the unlawful conduct actually existed"; Cf. *Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs*. Judgment of February 2, 2001. Series C No. 72, para. 106.

¹⁵⁶ This article establishes that essential elements of representative democracy are respect for human rights, access to and "the exercise of power in accordance with the rule of law, [...] and the separation of powers and independence of the branches of government."

¹⁵⁷ *Kimel v. Argentina. Merits, reparations and costs*. Judgment of May 2, 2008 Series C No. 177, para. 63. Cf. *Case of Castillo Petruzzi et al. v. Peru. Merits, reparations and costs*. Judgment of May 30, 1999. Series C No. 52, para. 121, and *Case of Lori Berenson Mejía v. Peru. Merits, reparations and costs*. Judgment of November 25, 2004. Series C No. 119, para. 125. The Court has also stressed that laws that establish restrictions "must use precise criteria and not grant unfettered discretionality to those responsible for their enforcement." Cf. *Case of Ricardo Canese v. Paraguay. Merits, reparations and costs*. Judgment of August 31, 2004. Series C No. 111, para. 124.

no discussion about the possible analysis of these facts in light of Article 9 of the American Convention, because, according to the case law of the ICourtHR, the principle of legality functions not only in criminal matters, as established in the preceding section.

119. Indeed, according to article 130(9) of the 1998 Constitution, *the effect of the adoption of the motion of censure was the immediate removal of the official*.¹⁵⁸ In this regard, in the session of December 8, 2004, when the vote was held on the motions of censure, it was concluded that “the motion of censure presented ha[d] been adopted.”¹⁵⁹ Thus, since two of the motions of censure presented against the judges in the session of December 8, 2004, had been adopted, this entailed their removal, a sanction that added to the termination decision taken previously on November 25, by the resolution of the National Congress. Also, based on what was indicated previously (*supra* paras. 115 and 116), I must conclude that, owing to its scope, article 130(9) of the 1998 Ecuadorian Constitution could lead to abusive interpretations by the National Congress, as indeed occurred in this case, because this paragraph contained an extremely general and imprecise definition of the grounds for removal (“The other officials referred to in this paragraph may be impeached *for constitutional or statutory offenses*, committed in the performance of their functions”). In my opinion, this is clearly incompatible with the legal certainty that the principle of legality of Article 9 of the Convention seeks to ensure in the case of situations resulting from an abuse of power (see below paras. 120 to 137).

C) Regarding the concept and scope of the “abuse of power”

120. Analysis of the concept of “abuse of power” — particularly in Spanish legal doctrine — is based on the legal definition: “the exercise of administrative powers for purposes other than those established by law shall constitute abuse of power.”¹⁶⁰ Thus, even though they support this concept, García de Enterría and Fernández state that it is not exhaustive, because, in their opinion, it is not necessary that the purpose sought is only specific to the administrative agent. They affirm that “it is sufficient that this purpose, even though public, should be other than the one conceived and established by the norm that grants the power.”¹⁶¹ They state that, “consequently, what is at stake is the administrative legality and not the morality of the official or of the Administration itself. This is precisely why the abuse of power is not limited to the presumptions in which the real purpose sought is an objective specific to the agent, but extends, as stated, to all the cases in which, abstraction made of the conduct of the agent, it is possible to note the existence of a divergence between the purposes really sought and those that, according to the applicable norm, should guide the administrative decision.”¹⁶²

121. Continuing to develop this position, García de Enterría and Fernández point out the probative problems of their analysis. Indeed, they indicate that “...the main difficulty entailed by the use of the technique of the abuse of power is proving the divergence of purposes that constitutes its essence. It can easily be understood that this evidence may

¹⁵⁸ Paras. 73, 171 and 201 of the Judgment.

¹⁵⁹ National Congress, record 24-001-IV, session of December 8, 2004 (merits file, tome II, folio 649 and 659).

¹⁶⁰ García Enterría, Eduardo and Ramón Fernández, Tomás, *Curso de derecho administrativo I*, Editorial CIVITAS, Madrid, 1981, third edition, chapter VIII, section IV.1.B, p. 394.

¹⁶¹ *Ibidem*, p. 394.

¹⁶² *Ibidem*, p. 394.

not be complete, because it is not easy to presume that the illegal act expressly acknowledges that its purpose is other than the one indicated in the norm."¹⁶³

122. Furthermore, regarding the origin of the expression, it has been indicated that:

"VI. Origin of the expression

The expression *détournement de pouvoir* (abuse of power) was first used by León Aucoc to refer to the policing powers of an administrative agent, who used these powers for reasons other than those established by positive law.

Subsequently, Laferrière systematized and developed the expression to the level at which we know it today. Thus, he defined *détournement de pouvoir* as the irregularity consisting in diverting a legal power from the purpose for which it was established and using it for purposes for which it was not designed."

[...]

"Abuse of power is an offense committed by a public official or agent by issuing an administrative decision with a subjective motive that impairs the purpose of general interest that the legislator had in mind when granting the power. [...] In the abuse of power, the administrative decision has a purpose that is contrary to the general interest, because the agent who issues the decision is guided by subjective or internal motives. While in the case of unreasonableness and arbitrariness, the official may act in pursuit of the purpose of the law, but the means he uses are disproportionate."¹⁶⁴

123. Similarly, it has been maintained that:

"Theoretically, the principle of the abuse of power is applicable in three cases, in all of which the official acts with a different objective to the one sought by the law he or she executes:

a) *The official acts with a personal objective*: under this hypothesis, his actions are guided by revenge, partisanship, profit, etc. In these cases, even though the act responds objectively to the conditions expressly required by the law, it is illegal because it contravenes the purpose of the law;

b) *The official acts in order to benefit one or several third parties*: this happens, also without objectively violating the law, when the official uses administrative powers in order to benefit third parties; for example, if an official is authorized to enter into direct contracts without public competitions and he contracts a certain company because it belongs to his friends and he wants to help them win the contract, etc.

c) *The official acts in order to benefit the administration*: this is a fairly common case, and probably the one in which there is most abuse of power. The official, imbued with an erroneous statist and fiscalist spirit, as the Argentine official usually is owing to the pressure of misguided doctrinaires, seeks to exercise the power of the law to the undue benefit of the administration or of the State. Thus, he tries to collect the most fines, not to discourage non-compliance with municipal ordinances, but to obtain funds for the municipality; he uses the powers granted to him by the state of emergency (internal security) for ordinary purposes of controlling morality, etc."¹⁶⁵

124. For their part, authors such as Atienza and Ruiz Manero explain abuse of power as "... a species within the genus of *"exces de pouvoir," inasmuch as it is a category created to subject discretionary administrative acts to judicial control.*"¹⁶⁶ According to these authors,

¹⁶³ *Ibidem*, p. 395.

¹⁶⁴ Barraza, Javier Indalecio, "La finalidad del acto administrativo y la desviación de poder", *Revista Ius Publicum*, Universidad Santo Tomás, v. 14, No. 29, 2012, pp. 51-52.

¹⁶⁵ Gordillo, Agustín, *Tratado de derecho administrativo y obras selectas*, tome 5, primeras obras, 1st edition, Buenos Aires, FDA, 2012, p. EAA-IV-18; *ibid.*, *El acto administrativo*, 1ª edición, Buenos Aires, Abeledo-Perrot, 1963, reprinted as Libro II of the *Tratado de derecho administrativo y obras selectas, cit.*, available at: <http://www.gordillo.com/tome5.html> and http://www.gordillo.com/pdf_tome5/02/02-capitulo4.pdf

¹⁶⁶ Atienza, Manuel and Ruiz Manero, Juan, "Ilícitos atípicos", Editorial Trotta, Madrid, 2000, chapter IV, section 27, p. 92.

"the abuse of power signifies the use of power exceeding the limits established in the corresponding norm that grants the power."¹⁶⁷ In this regard, the authors present abuse as an alteration between the purpose or consequence of the norm and the result, but on the basis that, in the public sphere, there is no autonomy of action, finding the limit in the exercise of the public function at the service of general interest.¹⁶⁸ In addition, they understand that, in order to assess whether we are in the presence of an abuse of power, it is necessary to recall the legal principles that have led to the establishment of the reasons for the law.¹⁶⁹ Atienza and Ruiz Manero consider that their definition differs from those usually made by legal doctrine, because it goes beyond legal positivism, "...the reference to the law is substituted by the legal principles that justify and that the implementation of the law that confers the corresponding power; namely, the principles that regulate how the result is obtained."¹⁷⁰

125. It should be emphasized that these authors indicate that the abuse of power does not refer only to administrative powers, but that it can also occur in jurisdictional and legislative spheres. Indeed, both judges and legislators have guidelines with objectives established within the framework of different principles from which they may stray, incurring in an abuse of power.¹⁷¹

D) "Abuse of power" in the case law of the Inter-American Court

126. The Inter-American Court has referred to, or used, the mechanism of the "abuse of power" very infrequently, and in a limited way. In fact, in *Advisory Opinion OC-6/86*, it established¹⁷²

18. In reading Article 30 in conjunction with other articles in which the Convention authorizes the application of limitations or restrictions to specific rights or freedoms, it is evident that the following conditions must be concurrently met if such limitations or restrictions are to be implemented:

- a) That the restriction in question be expressly authorized by the Convention and meet the special conditions for such authorization;

¹⁶⁷ *Ibidem*.

¹⁶⁸ *Ibidem*.

¹⁶⁹ Atienza and Ruiz Manero, after providing this explanation, make the following analysis: "Action 'A' carried out by public organ 'O' in the 'X' circumstances supposes an abuse of power if, and only if: there is a regulatory rule that permits organ 'O' to use the rule that grants (public) power, in 'X' circumstances, so that carrying out 'A' produces as a result 'R', an administrative act or legal provision. 'R' produces a certain situation 'E' that, in accordance with the principles that justify the previous permission and other principles of the system, supposes an unjustified harm or an undue benefit, and there is no regulatory rule that prohibits producing 'R' (the legal provision in question), even though there may be a rule designed to avoid 'E'. 'R' is a means for 'E': 3.1) either in a subjective sense, given that, when doing 'A', 'O' did not seek any other discernible purpose than achieving, by means of 'R', the consequence 'E', and that 'R' is objectively appropriate for 'E'; 3.2) or in an objective sense: given that 'R' is objectively appropriate for 'E', even though 'O' did not have this purpose when carrying out 'A'. (4) The balance between the principles mentioned in (2) has sufficient strength to generate a new rule that establishes that in the circumstances 'X' ('X' plus any circumstance that supposes a way of achieving (2) and (3.1) or (3.2) it is prohibited to use the rule that grants power in a way that consequence 'E' is achieved by means of 'R'. Thus, the result 'R' (the legal provision or act in question) must be considered invalid (from a regulatory point of view) to the extent that it leads to 'E'." Atienza, Manuel and Ruiz Manero, Juan, *Ilícitos atípicos*, op. cit, section 29, p. 97.

¹⁷⁰ *Ibidem*, chapter IV, section 32, p. 101.

¹⁷¹ *Ibidem*, chapter IV, section 33, p. 106.

¹⁷² *Advisory Opinion OC-6/86*, of May 9, 1986 (The Word "Laws" in Article 30 of the American Convention on Human Rights), requested by the Government of the Oriental Republic of Uruguay, para. 18.

b) That the ends for which the restriction has been established be legitimate, that is, that they pursue "reasons of general interest" and do not stray from the "purpose for which (they) have been established." This teleological criterion, the analysis of which has not been requested here, establishes control for abuse of power, and

c) That such restrictions be established by laws and applied pursuant to them. (Underlining added)

127. In addition, in *Advisory Opinion OC-8/87*, it was considered:¹⁷³

39. The Court should also point out that since it is improper to suspend guarantees without complying with the conditions referred to in the preceding paragraph, it follows that the specific measures applicable to the rights or freedoms that have been suspended may also not violate these general principles. Such violation would occur, for example, if the measures taken infringed the legal regime of the state of emergency, if they lasted longer than the time limit specified, if they were manifestly irrational, unnecessary or disproportionate, or if, in adopting them, there was a misuse or abuse of power (underlining added).

128. In the case of *Apitz Barbera et al. v. Venezuela*, the ICourTHR alluded to this concept when stating that:¹⁷⁴

In sum, although in this case it has not been proved that the CFRSJ acted with abuse of power, directly pressured by the Executive to dismiss the victims, the Court concludes that, owing to the removal at will of the members of the CFRSJ, the due guarantee did not exist to ensure that the pressure brought to bear on the First Court did not influence the decisions of the disciplinary organ (underlining added).

E) Regarding the use of this mechanisms and the case law of the European Court of Human Rights

129. Taking into account the conceptualization of the abuse of power, it is clear that in order to determine whether this has been constituted in a specific case, it is necessary to analyze the real purpose behind the act. Regarding this aspect, in paragraph 210 of the Judgment, the ICourTHR indicated that:

Thus, in the instant case, the Court finds it necessary to examine the context in which the facts surrounding the removal of the judges from office occurred, because this will be useful to understand the reasons or grounds on which this decision was made. This is because the reason or purpose of a specific decision of the State authorities is relevant for the legal analysis of a case, since a purpose or reason that differs from the norm that grants the State authority the power to act, may reveal whether the action can be considered an arbitrary act.¹⁷⁵ In this regard, the Court bases itself on the

¹⁷³ *Advisory Opinion OC-8/87*, of January 30, 1987 (Habeas Corpus in Emergency Situations (Arts. 27.2, 25(1) and 7.6 American Convention on Human Rights), requested by the Inter-American Commission on Human Rights, para. 39.

¹⁷⁴ *Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of August 5, 2008. Series C No. 182, para. 147.

¹⁷⁵ In this regard, the European Court of Human Rights has taken into account the real purpose or grounds that the State authorities had when exercising their functions, in order to determine whether there had been a violation of the European Convention on Human Rights. For example, in the *Case of Gusinskiy v. Russia*, the European Court considered that the restriction of the victim's detention authorized by Article 5.1(c) of the European Convention, was not only applied to make him appear before the competent judicial authority, because it was considered that there were reasonable indications that he had committed an offense, but also in order to oblige him to sell his company to the State. In the *Case of Cebotari v. Moldova*, it declared that Article 18 of the European Convention had been violated because the Government had not been able to convince the Court that it had a reasonable suspicion to consider that the applicant had committed a crime, and the said Court concluded that the real purpose of the criminal proceeding and the detention of the applicant was to pressure him and thus prevent his company "Oferta Plus" from pursuing its application before the Court. Lastly, in the *Case of Lutsenko v. Ukraine*, the European Court determined that the applicant's detention, authorized by Article 5.1(c), had been executed not only in order to ensure his appearance before the competent judicial authority, because there were

fact that the actions of State authorities are protected by a presumption of legal conduct; hence an irregular action by the State authorities must be proved in order to override the presumption of good faith.¹⁷⁶ (underlining added).

130. As can be observed in this paragraph of the Judgment, the ICourTHR cited several precedents of the European Court in the footnote and, in my opinion, they warrant being examined in greater depth. In order to understand these precedents, it should be recalled that Article 18 of the European Convention on Human Rights indicates that “the restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.”

131. Regarding the possibility of applying Article 18 of the European Convention, the Strasbourg Court has indicated that: (i) Article 18 of the Convention does not have an autonomous role; (ii) that the said article can only be applied in conjunction with, or in relation to, the articles of the Convention that establish subjective rights, and (iii) from the wording of Article 18, it is understood that a violation of a right or freedom can occur only when the said right is subject to a restriction permitted under the Convention.

132. In the Judgment that inspires this opinion, the ICourTHR cited the cases of *Gusinskiy v. Russia*, *Cebotari v. Moldova*, and *Lutsenko v. Ukraine*. In this regard, it is worth underscoring that, in the last two cases, the European Court of Human Rights declared the violation of Article 18 of the Convention. Indeed, in the case of *Cebotari v. Moldova* it indicated that:

ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION AND OF ARTICLE 18 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 5

48. The Court reiterates that in order for an arrest on reasonable suspicion to be justified under Article 5 § 1 (c) it is not necessary for the police to have obtained sufficient evidence to bring charges, either at the point of arrest or while the applicant is in custody (see *Brogan and Others v. the United Kingdom*, judgment of 29 November 1988, Series A no. 145-B, pp. 29-30, § 53). Neither is it necessary that the person detained should ultimately have been charged or brought before a court. The object of detention for questioning is to further a criminal investigation by confirming or dispelling suspicions which provide the grounds for detention (see *Murray v. the United Kingdom*, judgment of 28 October 1994, Series A no. 300-A, p. 27, § 55). However, the requirement that the suspicion must be based on reasonable grounds forms an essential part of the safeguard against arbitrary arrest and detention. The fact that a suspicion is held in good faith is insufficient. The words “reasonable suspicion” mean the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence (see *Fox, Campbell and Hartley v. the United Kingdom*, judgment of 30 August 1990, Series A no. 182, pp. 16-17, § 32). The Court stresses in this connection that in the absence of a reasonable suspicion arrest or detention of an individual must never be imposed for the purpose of making him confess or testify against others or to elicit facts or information which may serve to ground a reasonable suspicion against him.

49. The Court further reiterates that Article 18 of the Convention, like Article 14, does not have an autonomous role. It can only be applied in conjunction with other Articles of the Convention. As in the case of Article 14, there may be a violation of Article 18 in connection with another Article, although there is no violation of that Article taken alone. It further follows from the terms of Article 18 that a

reasonable indications that he had committed an offense, but also for other reasons related to the prosecution’s attempt to file charges against the applicant for publicly contesting the accusations against him. Cf. European Court of Human Rights, *Case of Gusinskiy v. Russia*, Judgement of 19 May 2004, paras. 71 to 78; *Case of Cebotari v. Moldova*, Judgement of 13 February 2008, paras. 46 to 53, and *Case of Lutsenko v. Ukraine*, Judgement of 3 July 2012, paras. 100 to 110.

¹⁷⁶ The ICourTHR has indicated that direct evidence, whether testimonial or documentary, is not the only evidence that may legitimately be considered to provide grounds for the judgment. Circumstantial evidence, indications and presumptions may also be used, provided that consistent conclusions concerning the facts can be inferred from them”. *Case of Velásquez Rodríguez v. Honduras*. Merits. Judgment of July 29, 1988. Series C No. 4, para. 130.

violation can only arise where the right or freedom concerned is subject to restrictions permitted under the Convention (*Gusinskiy v. Russia*, cited above, § 73).

[...]

53. The Court recalls that the restriction on the right to liberty under Article 5 § 1(c) must be justified by the purpose of that provision. In the instant case, the Government has failed to satisfy the Court that there was a reasonable suspicion that the applicant had committed an offence, with the result that there was no justification for his arrest and detention. Indeed, having regard to its conclusion in paragraph 141 of the *Oferta Plus* judgment (cited above) the Court can only conclude that the real aim of the criminal proceedings and of the applicant's arrest and detention was to put pressure on him with a view to hindering *Oferta Plus* from pursuing its application before the Court. It therefore finds that the restriction on the applicant's right to liberty was applied for a purpose other than the one prescribed in Article 5 § 1(c). On that account there has been a breach of Article 18 of the Convention taken in conjunction with Article 5 § 1 (underlining added).

133. While in the case *Lutsenko v. Ukraine*, the European Court stated that:

105. The Court notes in this respect that Article 18 of the Convention does not have an autonomous role and can only be applied in conjunction with other Articles of the Convention (*Gusinskiy v. Russia*, no. [70276/01](#), § 75, ECHR 2004-IV). [...]

106. The Court reiterates that the whole structure of the Convention rests on the general assumption that public authorities in the member States act in good faith. Indeed, any public policy or an individual measure may have a "hidden agenda", and the presumption of good faith is rebuttable. However, an applicant alleging that his rights and freedoms were limited for an improper reason must convincingly show that the real aim of the authorities was not the same as that proclaimed (or as can be reasonably inferred from the context). A mere suspicion that the authorities used their powers for some other purpose than those defined in the Convention is not sufficient to prove that Article 18 was breached.[...]

107. When an allegation under Article 18 is made, the Court applies a very exacting standard of proof. As a consequence, there are only few cases where a breach of that Convention provision has been found. Thus, in *Gusinskiy v. Russia* (cited above, § 73–78), the Court accepted that the applicant's liberty had been restricted, *inter alia*, for a purpose other than those mentioned in Article 5. The Court in that case based its findings on an agreement signed between the detainee and a federal Minister for the Press. It was clear from that agreement that the applicant's detention had been applied in order to make him sell his media company to the State. In *Cebotari v. Moldova* (no. [35615/06](#), §§ 46 et seq., 13 November 2007) the Court found a violation of Article 18 of the Convention in circumstances where the applicant's arrest was visibly linked to an application pending before the Court.

108. The Court notes that when it comes to allegations of political or other ulterior motives in the context of criminal prosecution, it is difficult to dissociate the pre-trial detention from the criminal proceedings within which such detention had been ordered. The circumstances of the present case suggest, however, that the applicant's arrest and detention, which were ordered after the investigation against the applicant had been completed, had their own distinguishable features which allow the Court to look into the matter separately from the more general context of politically motivated prosecution of the opposition leader. In the present case, the Court has already established that the grounds advanced by the authorities for the deprivation of the applicant's liberty were not only incompatible with the requirements of Article 5 § 1 but were also against the spirit of the Convention (see paragraphs 66 to 73 above). In this context, the Court observes that the profile of the applicant, one of the opposition leaders who had communicated with the media, plainly attracted considerable public attention. It can also be accepted that being accused of abuse of office, he had the right to reply to such an accusation through the media. The prosecuting authorities seeking the applicant's arrest explicitly indicated the applicant's communication with the media as one of the grounds for his arrest and accused him of distorting public opinion about crimes committed by him, discrediting the prosecuting authorities and influencing the upcoming trial in order to avoid criminal liability (see paragraph 26 above).

109. In the Court's opinion, such reasoning by the prosecuting authorities clearly demonstrates their attempt to punish the applicant for publicly disagreeing with accusations against him and for asserting his innocence, which he had the right to do. In such circumstances, the Court cannot but find that the restriction of the applicant's liberty permitted under Article 5 § 1 (c) was applied not only for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence, but also for other reasons (underlining added).

134. Thus, the European Court's case law cited above allows it to be inferred that the analysis of the real grounds for a decision are related to proving the existence of an abuse in a specific case. In the Judgment that prompts this opinion, the ICourtHR took into account, with particular emphasis, the context of this case, as well as a series of irregularities that allegedly occurred in the session of November 25, 2004.¹⁷⁷

135. In addition, the ICourtHR took into consideration irregularities that had occurred in the impeachment proceedings during the sessions of December 1 and 8, 2004, the latter when a new vote was taken on the impeachment of the judges.¹⁷⁸ All the above allowed the Inter-American Court to conclude that:¹⁷⁹

Taking into account the preceding considerations concerning the sessions of Congress of November 25, December 1 and December 8, 2004, in the instant case the Court observes that the judges were removed by a resolution of the National Congress, which lacked competence in this regard [...], by a decision without any legal grounds [...], and without being heard [...]. Furthermore, a significant number of irregularities occurred during the impeachment proceedings: these proceedings were based on decisions relating to control of constitutionality adopted by the judges, which was prohibited by domestic law [...]. As indicated previously [...], the resolution deciding the termination of the judges was the result of a political alliance put together to create a Constitutional Tribunal that was aligned with the political majority that existed at that time and to prevent criminal proceedings against the President in power and a former President. It is worth underscoring that, the same day that the termination of the judges was declared, the judges who would replace them were appointed. Therefore, the apparent legality and justification of these decisions concealed the intention of a parliamentary majority to exercise greater control over the Constitutional Tribunal and to facilitate the termination of the justices of the Supreme Court. The Court has verified that the resolutions of Congress were not adopted based on the exclusive assessment of specific factual information and in order to ensure proper compliance with the laws in force, but sought a very different end related to an abuse of power aimed at obtaining control of the judicial function by different procedures; in this case, the termination and the impeachment proceedings. This resulted in a destabilization of both the Judiciary and the country in general [...] and intensified the political crisis, with the negative effects that this entailed for the protection of the rights of the population. Consequently, the Court emphasizes that these elements allow it to affirm that a collective and arbitrary termination of judges is unacceptable, owing to the negative impact that this has on the institutional aspect of judicial independence. (Underlining added)

136. In addition to the provisions of the case law of the Strasbourg Court, it is worth mentioning also the Judgment of the Court of First Instance of the European Communities of 25 February 1999, in the matter of *Giannini v. Commission* in which it was concluded that there was "objective, relevant and consistent evidence" indicating that the "contested measures [of the Commission of the European Communities] had been adopted with a view to achieving a purpose other than that of complying in good faith" with a judgment, and that the Commission had committed an "abuse of power."¹⁸⁰

137. Thus, from my perspective, I consider that once it had been concluded in the Judgment that there had been an "abuse of power," and taking into account that the impeachments clearly involved the imposing of a sanction, it was even more necessary to analyze in detail the way in which the type of arbitrary acts that occurred during the said punitive proceeding entailed the violation of Article 9 of the American Convention. And this should have been done, taking into account, also, the State's explicit acknowledgement that the National Congress did not make a legal and constitutional analysis of the grounds

¹⁷⁷ Paras. 210 to 214 of the Judgment.

¹⁷⁸ Paras. 215 to 218 of the Judgment.

¹⁷⁹ Para. 219 of the Judgment.

¹⁸⁰ Judgment of the Court of First Instance of the European Communities of 13 April 2000, *Giannini/Commission* (Case C-153/99 P), European Court Reports, Page I-02891.

when it arbitrarily removed the members of the Constitutional Tribunal from office by an impeachment proceeding as a punitive mechanism; the absence of legal certainty with regard to the grounds for the removal as a guarantee of prevention vis-à-vis arbitrary interpretations, and the abusive motives of the National Congress for invoking the mechanism of impeachment, which results in a conflict between the conformation and application of the mechanism of impeachment in this case, and the principle of legality established in Article 9 of the American Convention.

F) Conclusion

138. Taking into account the context in which this case occurred - “the collective termination of judges” of the three high courts in the space of 14 days; the real reasons for not only the decision to terminate the victims (resolution of the National Congress of November 25, 2004),¹⁸¹ but also the impeachment proceedings against them (sessions of Congress of December 1 and 8, 2004), which concluded with the approval of “the motion of censure submitted”¹⁸² — and the consequent “immediate removal”¹⁸³ — as well as the “abuse of power” that was revealed in the Judgment, I consider that not only should the violation of Article 9 of the American Convention have been examined, but also that it was possible to declare that this article had been violated.

139. This is because, even though the Ecuadorian Constitution established very broad and general grounds, consisting in “statutory or constitutional offenses,”¹⁸⁴ based on which the members of the Constitutional Tribunal could be impeached,¹⁸⁵ they were tried, as determined in the Judgment¹⁸⁶ and as I emphasize in this opinion (*supra* paras. 93 to 95), based on the rulings they had delivered within the framework of the competence of the Constitutional Tribunal as an organ for the control of constitutionality, which was expressly prohibited by domestic law,¹⁸⁷ and meant that the judges were sanctioned for actions that were not expressly indicated by law.¹⁸⁸

¹⁸¹ “Related to an abuse of power aimed at obtaining control of the Judiciary by different procedures: in this case, the termination and the impeachment proceedings. Para. 219 of the Judgment.

¹⁸² National Congress Record 24-001-IV, session of December 8, 2004 (merits file, tome II, folios 649 and 659).

¹⁸³ A sanction that was additional to the termination decision taken previous by a resolution of the National Congress. It should not be overlooked that the censure produced the immediate removal of the officials under Article 130(9) of the Ecuadorian Constitution of 1998 and, in this specific case, it entailed a violation of the rights of the victims, because it represented the removal of the judges from office (which had already occurred previously with the congressional resolution of November 25,) with the negative effects implicit in this situation.

¹⁸⁴ See my previous observations on the principle of criminalization — included in the principle of legality — established in Article 9 of the American Convention, to the effect that not only should the guarantees of due process of law be applied in impeachment proceedings, but also grounds for the removal that are sufficiently clear must be considered included in the principle de legality, in order to avoid or prevent the risk of abusive interpretations (*supra* paras. 115 and 116 of this opinion).

¹⁸⁵ Art. 130(9) of the 1998 Constitution of Ecuador.

¹⁸⁶ Paras. 204 and 205 of the Judgment.

¹⁸⁷ Art. 9 of the 1997 Law on Constitutional Control.

¹⁸⁸ It should not be overlooked that, according to the case law of the ICourtHR, the principle of legality established in Article 9 of the American Convention is not only applicable in criminal matters, but also in relation to administrative sanctions. *Cf. supra* paras. 112 to 119 of this opinion, and especially, *Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs*. Judgment of February 2, 2001. Series C, No. 72, para. 106; see also, Ruiz Robledo, Agustín, *El derecho fundamental a la legalidad punitiva*, Valencia, Tirant Lo Blanch, 2004. For example, the European Court of Human Rights has maintained that “the notion of “penalty” in Article 7 § 1 of the Convention, like those of “civil rights and obligations” and “criminal charge” in Article 6 § 1, has an autonomous

140. Consequently, I consider that the Inter-American Court should have declared the State responsible for the violation of Article 9 of the American Convention, because it failed to respect the principle of legality in the impeachment proceedings conducted against the victims who were members of the Constitutional Tribunal. And, evidently, this constituted an additional factor for finding that the political authorities had clearly violated the institutional aspect of judicial independence in the instant case.

Eduardo Ferrer Mac-Gregor Poisot
Judge

Pablo Saavedra Alessandri
Secretary

meaning [...]. To render the protection offered by Article 7 effective, the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a “penalty” within the meaning of this provision” (Cf. ECHR, *Case of Scoppola v. Italy (no. 2)*, Judgement of 17 September 2009, No. 10249/03, para. 96; *Case of Welch v. the United Kingdom*, Judgement of 9 February 1995, Series A no. 307-A, para. 27).