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CASE 12.963

REPORT ON THE MERITS

ALEJANDRO NISSEN PESSOLANI
PARAGUAY

Approved by the Commission at its session No. 2190 held on October 29, 2020

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I. INTRODUCTION

1. On December 27, 2004, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission,” “the Commission,” or “the IACHR”) received a petition lodged by Alejandro Nissen Pessolani (hereinafter “the petitioner” or “the alleged victim”), alleging that the Republic of Paraguay (hereinafter “the Paraguayan State,” “the State,” or “Paraguay”) bears international responsibility as a result of two cases brought against him before the Jury for the Prosecution of Magistrates (Jurado de Enjuiciamiento de Magistrados, hereinafter “JEM”), which decided to remove him from his post as a Criminal Prosecutor.

2. The Commission approved Admissibility Report No. 60/14 on July 24, 2014.¹ On August 18, 2014, the Commission notified the parties of the report and made itself available to them to reach a friendly settlement, but the conditions were not in place to initiate such as proceeding. The parties had the requisite time frames in which to submit additional comments on the merits. All the information the Commission received was duly transmitted to the parties.

II. POSITIONS OF THE PARTIES

A. Petitioner

3. The petitioner indicates that in 2001, when he was Prosecutor for Criminal Unit No. 10, he began to investigate a series of acts of corruption in both the public and private sectors. He indicates that the individuals under investigation included some well-known politicians in the government at the time and others in their family circle. He alleges that “in order to remove him from the Public Prosecutor’s Office, which was investigating them,” two proceedings were instituted against him before the JEM, the body responsible for prosecuting and removing individuals who work as prosecutors in the Public Prosecutor’s Office.

4. The petitioner indicates that the individuals under investigation had asked the Prosecutor General of the State (Fiscal General del Estado, hereinafter “FGE”) to strip him of his prosecutor’s post, and states that the FGE had warned him about these pressures. He notes that it was in this context that two proceedings were instituted against him, under procedures governed by Laws 1.084 and 1.752.

First proceeding

5. The petitioner states that on March 12, 2002, Cristian Paolo Ortiz filed a complaint against him for poor performance of his duties, a complaint that did not meet the requirements under the law. The petitioner specifies that the complainant had not posted the necessary bond, because he had provided as proof of his economic solvency a property that had been seized by order of the court in the investigation against him. The petitioner states that he complained to the JEM that Mr. Ortiz’s complaint “was simply intended to remove him from that case and from [his] prosecutor’s post so that emphasis would no longer be placed on investigations of that type,” but the JEM decided to initiate its processing of the complaint, on May 22, 2002.

6. He claims that said proceeding violated Article 8 of the American Convention. In that respect, he maintains that even before the investigation against him was launched, the President of the JEM, without the vote of the other members of the Jury, first requested and then urged the alleged victim to turn over the file of the investigation into the supposedly illegal origin of the automobile owned by the Office of the President of the Republic. The petitioner contends that this is why he challenged the President of the JEM and other members, but since it is the JEM itself that rules on the challenge, it was rejected. He claims that he was also suspended from his duties by the President of the JEM, who, along with other JEM magistrates, was also being investigated by the petitioner for crimes of corruption.

¹ IACHR. Report No. 60/14, Petition 1415-04, Admissibility, Alejandro Nissen Pessolani, Paraguay, July 24, 2014. The Commission declared the petition to be admissible with regard to Articles 2, 8, 9, and 25 of the American Convention, in conjunction with Article 1(1) thereof. The Commission also found the petition inadmissible with respect to Article 10 of the American Convention.

7. The petitioner alleges that he had access to the draft of a final judgment that had been drawn up against him, presumably by order of the Prosecutor General of the State. He therefore made it available to the press and, on October 30, 2002, submitted the draft to a notary public for notarization.

8. He claims that the JEM issued Judgment No. 2/03 in his case on April 7, 2003, seven months after expiration of the 180-day period provided for in Law No. 1084, the same day on which the petitioner made a formal accusation and a request for parliamentary impeachment of the President of the JEM in the investigation into trafficking in vehicles. He maintains that the JEM decided to remove him from his post. He also alleges that the JEM convicted him for acts other than those denounced and that these were not discussed in the evidentiary hearing, in violation of the principle of consistency and guarantees of due process. He indicates that he filed a petition for clarification, which was rejected. He points out that, in view of that rejection, he brought an action of unconstitutionality before the Supreme Court of Justice (hereinafter “the Supreme Court” or “CSJ”) to have the JEM’s judgment suspended.

9. He states that although the judgment against him was not final, on April 28, 2003, an Interim Prosecutor for Criminal Unit No. 10 was appointed, who withdrew the investigations he had been handling. He claims that the process took place without his participation or that of the staff members of the unit, which was permanently dismantled. He alleges that the unit was searched by about 12 staff members of the Prosecutor General’s Office, who took all the files with them. He indicates that he appealed the decision on the appointment, in order to continue the investigations, but that he did not receive any response from the FGE to this or other requests.

10. He indicates that on May 16, 2003, the Supreme Court issued Interlocutory Decree No. 552, suspending the effects of the JEM’s judgment until the CSJ issued its ruling on the action of unconstitutionality. The petitioner states that on that same day, he resumed his duties as a prosecutor.

11. He states that the Supreme Court rejected the action of unconstitutionality against Judgment No. 2/03 of the JEM on June 16, 2004, through CSJ Agreement and Judgment No. 915. He claims that the only action that can be brought against a JEM judgment under domestic law is an action of unconstitutionality; therefore, he considers that domestic remedies have been exhausted.

Second proceeding

12. The petitioner indicates that the Dures, a married couple who were being investigated by the alleged victim for wrongful acts against the public treasury, lodged the second complaint against him, in April 2003, claiming poor performance owing to a clear-cut bias. He states that on May 16, 2003, a few hours after having resumed his duties, the JEM decided to grant the petition and suspend him. He alleges that the JEM granted the petition in view of the suspension of the effects of Judgment No. 2/03. In this regard, he claims that this decision violated the principle of presumption of innocence and due process, since it prevented him from taking part in the proceeding.

13. He notes that in response to the JEM’s request to suspend him in this second case, on May 20, 2003, the CSJ decided that the petitioner would be suspended without pay until the final ruling was made. He maintains that due to the pressure of public opinion, the CSJ retracted its decision in part and ordered that he be paid 50 percent of his salary. He indicates that this situation affected his family.

14. He states that a nine-member jury acquitted him through Final Judgment No. 11-04 of April 29, 2004. He claims that he filed a petition for clarification so that the JEM would rule on costs and that on May 13, 2004, it decided that “each party should bear its own costs.”

15. The petitioner maintains that the State allowed special juries and tribunals, dependents, and interested parties to be directly involved in the preordained result of his removal. He indicates that the justice operators who judged him should have removed themselves from the proceedings, since they were being investigated by the alleged victim. In addition, the petitioner indicates that the JEM issued a ruling without providing the necessary legal reasoning; evidence of that is that the sanction decision lays out facts that are different than those in the complaints, as it includes his alleged failure to comply with Administrative Resolution No. 68/2001.

The petitioner also argues that his right to presumption of innocence was violated, as the Supreme Court ruled that his wages were to be suspended, by means of a decision that could not be appealed, thus violating Article 8 of the Convention.

B. State

16. The State did not submit observations during this stage, and therefore this section is based on the arguments on the merits that it put forward during the admissibility stage.

17. The State indicates that on March 12, 2002, Cristian Paolo Ortiz lodged a formal charge and requested the alleged victim's prosecution, on grounds established in Article 14 of Law No. 1084/97 for poor performance of his duties, specifically as noted in subparagraphs (b), (g), (m), and (p).

18. It indicates that on March 18, 2002, the JEM initiated the prosecution of the alleged victim and served him with the formal charge, which he responded to on April 16, 2002, and that on May 22, 2002, the JEM ordered the opening of the evidentiary stage. It adds that the JEM admitted the documentary evidence in the form of reports and testimony offered by the complainant party as well as evidence in the form of legal instruments, testimony, confessions, and reports offered by the defense.

19. The State contends that on April 7, 2003, the JEM decided to remove Mr. Nissen Pessolani from his position of Criminal Prosecutor for poor performance of his duties, in accordance with subparagraphs (b), (g), and (n) of Article 14 of Law No. 1084, and communicated the decision to the Chambers of the National Congress, the CSJ, and the Council of Magistrates. According to the State, the JEM considered that the alleged victim had told the complainant who had been under investigation that "in the event he does not cooperate there is the possibility of a 10-year sentence"; also, that he allegedly had "provided information and made comments and declarations to the press and third parties that went beyond the sensitive parameters of criminal investigation in its preliminary stage"; and that he allegedly had illegally ordered "an expert from the Public Prosecutor's Office to do his work in the context of a proceeding" conducted before the JEM, which would constitute expert involvement outside of a criminal trial or proceeding for which he was responsible.

20. The State indicates that on April 10, 2003, the alleged victim filed a petition for clarification and reversal of the decision, asking that the JEM, "in the exercise of its prerogative, declare null and void the communications transmitted in relation to said resolution." The State indicates that on April 22, 2003, the JEM decided not to grant the petitions for clarification and reversal, arguing that the preconditions for allowing the appeal did not exist, given that the appellant was requesting clarification of matters that were clearly laid out in Article 31 of Law No. 1084. The State indicates that, in view of this situation, the petitioner brought an action of unconstitutionality against that decision, which was amended on April 25 of that same year and rejected on June 16, 2004, by the CSJ.

21. The State maintains that the petitioner was accused of poor performance of his duties and that "the appropriate procedural stages" were implemented during the proceedings. It specifies that the petitioner used "the procedural devices provided by law to appeal each and every one of the decisions" of the JEM that were unfavorable to him, and therefore that the rules of due process had been followed. The State argues that the fact that the judgment went against the petitioner does not mean that the decision was arbitrary or illegal. It adds that the vote of the CSJ sitting *en banc* (nine members) was unanimous in rejecting the action of unconstitutionality.

22. The State contends that the petitioner cannot use the IACHR as a judicial instance of last resort to try to reverse court decisions in proceedings in which he participated fully—decisions that are final and enforceable.

III. DETERMINATIONS OF FACT

A. Relevant legal framework

23. As will be explained in detail in the next section, the alleged victim was removed from office as a result of a disciplinary proceeding before the Jury for the Prosecution of Magistrates, which is regulated in the National Constitution of Paraguay and in Law No. 1084 of the 1997 Procedures for the Prosecution and Removal of Magistrates.

24. The Paraguayan Constitution establishes the following:

Article 253 – THE PROSECUTION AND REMOVAL OF MAGISTRATES

Judicial magistrates may be prosecuted and removed only for the commission of crimes or for poor performance of their duties, as defined in the law, by decision of a Jury for the Prosecution of Magistrates. This shall be composed of two members of the Supreme Court of Justice, two members of the Council of Magistrates, two senators, and two deputies; these last four must be lawyers. The functioning of the Jury for the Prosecution of Magistrates shall be regulated by law.

25. With regard to public prosecutors, the Constitution indicates the following:

Article 270 – PUBLIC PROSECUTORS

Public prosecutors are designated in the same manner as this Constitution establishes for judges. Their term of office and procedures for removal are the same. In addition, they have the same provisions on conflict of interests and immunity as those established for members of the judicial branch.

26. Law No. 1084 establishes the composition and procedures of the Jury for the Prosecution of Magistrates, as well as the grounds for discipline.

27. Article 1 indicates the following:

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

During the same act, the President-designate shall take an oath or pledge to perform his or her duties and work in accordance with the provisions of the Constitution and the laws. Immediately thereafter, the members shall do the same before the President.

28. Article 3 indicates the following:

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

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

29. Article 11 determines the following:

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

30. Article 12 provides that:

The commission of crimes or the poor performance of duties as defined in this law are grounds for prosecution.

31. Article 14 indicates that:

The following constitutes poor performance of duties warranting the removal from office of judicial magistrates, prosecutors, public prosecutors, and justices of the peace:

- b) repeated and serious noncompliance with the obligations established in the National Constitution, Procedural Codes, and other laws on the exercise of their duties;
- c) failing to maintain personal independence in the exercise of their duties and submitting, without any law requiring them to, to orders and instructions from higher-ranked magistrates or from officials from other branches or agencies of the State;
- g) demonstration of a clear-cut bias or ignorance of the law in trials, manifested through repeated acts;
- n) [giving] information or [issuing] declarations or comments to...third parties about the trials they are handling, when they might affect their processing, or affect the honor or reputation or the presumption of innocence established in the National Constitution; or [sustaining] polemics about ongoing trials;
- p) receipt of gifts or acceptance of promises or other benefits, directly or indirectly, from persons who in any way may play a role or have an interest in the proceedings they are handling...

32. Article 16 specifies that:

The proceeding shall be initiated before the Jury for the Prosecution of Magistrates upon a charge being brought by the litigant or the professional concerned, who may do so personally or through a proxy with special power of attorney; upon a charge being brought by the Supreme Court of Justice, the Ministry of Justice and Labor, the Office of the Public Prosecutor, the Chamber of Senators, the Chamber of Deputies, and the Council of Magistrates; and by the Jury itself acting of its own accord.

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

33. Article 18 establishes the following:

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

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

34. Article 19 indicates the following:

The brief brought before “the Jury” to advance the prosecution shall include:

- a) the target of the prosecution;
- b) the name and actual and legal residence of the accuser;
- c) the name and legal residence of the accused;
- d) a well-documented statement of the facts on which the case is based;
- e) the legal provisions that have been infringed;
- f) a clear and precise petition; and
- g) verification of the particulars required under Article 17 for the individual complainant, whether a litigant or professional.

With the same brief, the complainant shall:

- a) attach all documents related to the charge within his or her power, or indicate where these may be found;

- b) offer evidence that supports the claim and request the necessary measures for the evidence to be produced; and
- c) attach a copy for notification to the other party.

35. Article 21 indicates the following:

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

- a) no issue introduced in the proceedings to determine liability has been the subject of a previous ruling, with the exception of reasoned challenges;
- b) all means of evidence established in the Civil Procedural Law shall be admitted;
- c) all time periods are final for the parties;
- d) in the case of hearings and notifications for which no time period has been determined, the time period shall be three business days;
- e) under no circumstances shall records be withdrawn by the parties;
- f) any final judgments, resolutions, and orders that the Jury may decree cannot be appealed to any other body, save for that which is established in Article 33. Petitions for clarification and reversal may be admitted, and the Jury shall rule on them by the fifth day, by means of a reasoned decision;
- g) any charges and appeals brought in the public hearing of the proceeding shall be resolved during that hearing;
- h) the Jury shall have the authority to move the proceeding forward and determine at any stage of the case the procedural steps that may be necessary to shed light on the facts;
- i) the substantiation hearing shall be oral and recorded on tape;
- j) these shall subsequently be entered into the record and added to the case file;
- k) the proceedings to determine liability are exempt from any type of tax payment;
- l) the proceeding shall move forward at the request of a party or of the Jury's own accord.

36. Article 31 stipulates the following:

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

The Jury's decision may consist of only removal or acquittal of the accused.

In the case of removal, said decision shall be communicated to the Chambers of Congress, the Supreme Court of Justice, and the Council of Magistrates.

The Jury shall decide on the costs of the proceeding.

37. Article 33 provides that:

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

B. Facts of the case

1. Alejandro Nissen Pessolani's appointment and the investigations undertaken

38. The petitioner indicated that Mr. Nissen Pessolani was designated Criminal Prosecutor of the Public Prosecutor's Office by the Council of Magistrates, by means of Certified Document No. 700 of November 4, 1999.²

² Annex xx, Initial petition of December 27, 2004.

39. The alleged victim indicated that as part of his duties, he was investigating cases involving acts of corruption, for example the case of a BMW automobile that was stolen in Brazil and later acquired by the then-President of Paraguay; the investigation of the former head of the General Customs Office and other high-level officials for illicit enrichment; and other cases related to luxury vehicles that were being stolen in Brazil and later registered under the name of authorities or relatives of Paraguayan politicians.³

2. First disciplinary case brought against the alleged victim

40. On March 12, 2002, Cristian Paolo Ortiz lodged a complaint with the Prosecutor General's Office against the alleged victim for poor performance of duties, citing grounds established in Articles 12 and 14, subparagraphs (b), (g), (n), and (p), of Law No. 1084, the contents of which were transcribed in paragraphs.⁴

41. Specifically, the complaint indicated that:

The prosecutor has carried out his investigation in Case 9936 by means of acts that border on criminal illegality, by offering benefits related to procedures (abbreviated proceedings, suspension of the case) and/or penalties (lighter punishment) in exchange for some statement that would involve third parties, without regard for whether it is true....

That in the steps he took, Prosecutor Nissen never investigated exculpatory facts; despite having the obligation under this circumstance, he shows such a serious lack of objectivity that in reference to the accused he refers to...persons who have swindled the country (Notice of detention of the accused Lucio Sánchez, request for precautionary measure, Order No. 23 of February 7, 2002)....

The use of acts of intimidation such as the threat of higher penalties for not cooperating with him also represents a lack of objectivity....

He applies the money laundering law where it is not appropriate. This can be noted in the "collaborations." In the abbreviated proceeding and at the start of the statements, which constitutes recurring ignorance in the application of laws....

The information and statements provided by Prosecutor Alejandro Nissen with regard to Cases 9936 and 1534 are innumerable; the particulars can be corroborated simply by requesting newspaper editions and tapes from television stations, in all cases the information affects the honor, the reputation, the presumption of innocence both of me personally, as well as the others who are accused...."⁵

42. As the records in the case file indicate, the Jury for the Prosecution that signed the sanction decision was made up of associate justices Marcelino Gauto Bejarano, Luis Caballero Krauer, Esteban Samaniego Aleman, Francisco José de Vargas, Luis Mendoza Correa, and Antonio Fretes.⁶

43. The Commission notes that it does not have the documentation related to the case pursued against the alleged victim. The decision of April 7, 2003, refers to some of the steps taken, statements provided, and documents and evidence submitted by the alleged victim prior to the ruling being issued.

44. On April 7, 2003, the JEM determined that the grounds laid out in subparagraphs (b), (g), (y), and (n) of Article 14 of Law No. 1084 apply to the alleged victim. These referred, respectively, to "repeated and serious noncompliance with the obligations established in the National Constitution, Procedural Codes, and other laws on the exercise of their duties"; "demonstration of a clear-cut bias or ignorance of the law in trials, manifested

³ Annex xx, Press reports: Diario Color ABC, March 31, 2003; Diario Noticias Judiciales, April 13, 2003; Diario Color ABC, April 8, 2004, Attached to the initial petition of December 27, 2004.

⁴ Annex xx, Complaint against Mr. Alejandro Nissen Pessolani, March 12, 2002, Attached to the initial petition of December 27, 2004.

⁵ Annex xx, Complaint against Mr. Alejandro Nissen Pessolani, March 12, 2002, Attached to the initial petition of December 27, 2004.

⁶ Annex xx, Jury for the Prosecution, Resolution of April 7, 2003, Attached to the initial petition of December 27, 2004.

through repeated acts”; and “[giving] information or [issuing] statements or comments to... third parties about the trials they are handling, when they might affect their processing, or affect the honor or reputation or the presumption of innocence established in the National Constitution; or [sustaining] polemics about ongoing trials.” The JEM thus decided:

1. TO REMOVE lawyer ALEJANDRO NISSEN PESSOLANI from the post of criminal prosecutor of the capital of the Republic, for poor performance of his duties....
2. COMMUNICATE to the Chambers of Congress, the Supreme Court of Justice, and the Council of Magistrates.
3. IMPOSE costs on the losing party....⁷

45. The judgment indicated the following:

...By his sole decision, the accused took it upon himself to continue intervening in Case No. 9936, failing to heed Resolution No. 68, issued on February 2, 2001, by the Office of the Prosecutor General of the State, which ordered the distribution of cases by rotation and assigned cases to each prosecutorial unit for 30-day periods. This Jury thus finds that the accused has directly and inexcusably met the grounds for removal established in Article 14, subparagraph (b), of Law No. 1.084/97, as his continued and repeated intervention in Case No. 9936 means that he engaged in “repeated and serious noncompliance with the obligations established in the National Constitution, Procedural Codes, and other laws on the exercise of [his] duties....

...That is has been possible to establish, based on the statements made by all the witnesses for the prosecution and the defense, that in fact the accused—throughout the course of the investigation he was handling—has provided information and made comments and statements to the press and third parties that went beyond the sensitive parameters of criminal investigation in its preliminary stage, thus affecting the honor, the reputation, or the presumption of innocence guaranteed to all citizens.... In addition, with the newspaper editions, magnetic tapes (cassettes), and audiovisual tapes (videocassettes) sent to this jury by various written and oral media outlets, it is possible to verify that the accused is dangerously prone to revealing to the public the preliminary steps he is taking in the cases he is responsible for investigating. It is alarming, from this representative of the public prosecution, that this seems to be evident and repeated, and it amounts to an undue tendency to go beyond and preempt procedural steps that are planned or have been taken, publicizing procedures of an exceptional nature that may have been ordered or are being planned, such as searches, surrenders, or technical expertise; testimony he has received or expects to receive; the content of documents placed in his care, etc. He has unreservedly informed the public about such matters, through the mass media.... This jury thus concludes that the accused Criminal Prosecutor has met the grounds for removal established in Article 14 subparagraph (n) of Law No. 1.084/97.⁸

46. In addition, the Jury for the Prosecution of Magistrates determined the following:

That for each of the arguments raised above, this Jury believes that the grounds for removal are clearly demonstrated at trial. But we should direct our attention to some “procedural steps taken by the accused” during this very proceeding that also constitute grounds for removal. To that end, we refer to pages 76 to 81 of the record, where an expert opinion has been added, prepared by Miguel Angel Lemir, Expert of the Public Prosecutor’s Office.... Expert Lemir was ordered to perform this task by Criminal Prosecutor Nissen...in fact, the accused was able to obtain a photocopy of a document presented by his accuser to this Jury and, understanding that the signature included on that document is not authenticated, per se, he availed himself

⁷ Annex xx, Jury for the Prosecution, Judgment S.D. N°02/03 of April 7, 2003, Attached to the initial petition of December 27, 2004.

⁸ Annex xx, Jury for the Prosecution, Judgment S.D. N°02/03 of April 7, 2003, Attached to the initial petition of December 27, 2004.

of an Expert from the Public Prosecutor's Office and ordered him to perform that task. At no time did the accused report that situation to this Jury, which by law is in charge of his prosecution. What is very serious is that Alejandro Nissen Pessolani never reported his suspicion about his accuser's signature to "this Jury"; much less did he request that experts be appointed to determine whether or not the document was authentic.

Likewise, that by "ordering" an expert from the Public Prosecutor's Office to perform his task in the context of "a proceeding before this Jury," the accused has arrogated to himself powers that belong solely to the Jury for the Prosecution of Magistrates. He has proceeded to order an expert opinion outside a preexisting criminal investigation for which he is responsible. His unawareness of or noncompliance with the law leads us to conclude that the accused, by his own voluntary and spontaneous actions, has met the grounds for removal established in Article 14, subparagraph (g), of Law No. 1.084/97⁹

47. The alleged victim filed a petition for clarification of the sanction decision. The Commission does not have any information about that petition.

48. On April 22, 2003, the JEM decided not to grant the petition for clarification, finding that "the preconditions required for allowing the appeal did not exist, given that the appellant was requesting clarification of matters that were clearly laid out in Article 31 of Law No. 1084."¹⁰

3. Second complaint filed against the alleged victim

49. On April 4, 2003, Mr. Luis Humberto Arévalo, representing Silverio Dure Velázquez and Matilde Melgarejo de Dure, filed a complaint against the alleged victim for poor performance of duties in Case No. 14069, alleging the grounds established in subparagraphs (b), (c), (g), and (n) of Article 14 of Law No. 1084.¹¹

50. On April 29, 2004, the JEM decided to acquit the alleged victim, stating that "the existence of devious conduct or prohibited or erroneous action had not been determined" in the case in question.¹²

51. The alleged victim brought a petition for clarification of the judgment of April 29, 2004. The Commission does not have any information about that petition.

52. On May 13, 2004, the JEM ruled on the petition for clarification and indicated that the facts in place clearly showed that each party should bear its own costs. It thus decided:

- 1) TO GRANT the petition for clarification presented by Lawyer Alejandro Nissen Pessolani, Criminal Prosecutor in the Capital, and as a result, order that S.D. No. 11/04 of April 29, 2004, be amended, in the sense that each party should bear its own costs.
- 2) MAKE A NOTE OF, record, and communicate [the decision].¹³

4. Action of unconstitutionality brought by the alleged victim

53. On April 22, 2003, the alleged victim brought an action of unconstitutionality against Judgment S.D. No. 02/03 of April 7, 2003, alleging that it violated various due process guarantees, the right to work, and the right to employment security.¹⁴ In that respect, he indicated that he was convicted for something different than what

⁹ Annex xx, Jury for the Prosecution, Judgment S.D. No. 02/03 of April 7, 2003, Attached to the initial petition of December 27, 2004.

¹⁰ Annex xx, Jury for the Prosecution, Judgment S.D. No. 03/03 of April 22, 2003, Attached to the State's brief of October 11, 2006.

¹¹ Annex xx, Complaint of April 4, 2003, presented to the Jury for the Prosecution of Magistrates, Attached to the initial petition of December 27, 2004.

¹² Annex xx, Jury for the Prosecution of Magistrates, Judgment S.D. No. 11/04 of April 29, 2004, Attached to the initial petition of December 27, 2004.

¹³ Annex xx, Jury for the Prosecution of Magistrates, Judgment S.D. No. 13/04 of May 13, 2004, Attached to the initial petition of December 27, 2004.

¹⁴ Annex xx, Action of unconstitutionality brought before the Supreme Court, April 22, 2003, Attached to the initial petition of December 27, 2004.

he had been accused of, and that the JEM had ruled on a matter that had not been raised in the initial complaint, overstepping its judicial authority.¹⁵ He also indicated that the conduct related to the use of the money laundering law, which he addressed in his defense, was not analyzed in the sanction decision.¹⁶ He also stated that his right to a defense was violated, given that the jury, in analyzing the conduct laid out by the accused, concluded that his behavior constituted poor performance.¹⁷ He also argued that the JEM did not evaluate the facts, either of the right being invoked or the evidence being offered, “as the comments attributed to him were not specified, nor were the media outlets in which these comments were allegedly disseminated.”¹⁸

54. Along the same lines, he reported that on April 26, 2002, the President of the JEM requested that the Office of the Prosecutor General of the State send a certified copy of Resolution No. 68, contravening the disciplinary proceeding to his detriment and going beyond the initial complaint that had been filed, since that resolution was later used to determine poor performance of duties.¹⁹ In addition, he stated that the proceeding exceeded the 180-day period provided for in Article 31 of Law No. 1084, as the case began on March 18, 2002, and ended on April 7, 2003—in other words, it lasted for 384 days—and that the summary phase took 173 days.²⁰

55. On another matter, he reported that months before his removal, he was able to obtain the draft disciplinary judgment that had been drawn up in the Public Prosecutor’s Office, and so on October 30, 2002, he proceeded to give that document to a notary public; later, he verified that the draft was the same as Judgment S.D. No. 02/03 of April 7, 2003, issued by the JEM.²¹ Finally, he indicated that he did not have independent, impartial judges, and to that effect he attached press reports that showed conversations allegedly held between the President of the JEM and a representative of the executive branch about his termination.²²

56. On April 25, 2003, Mr. Nissen Pessolani amended his action of unconstitutionality challenging JEM Judgment S.D. No. 03/03 of April 22, 2003, which ruled against the petition for clarification that he had filed. Likewise, on May 4, 2004, he filed a new amendment, indicating that he had asked the JEM repeatedly for copies of the news material on which its sanction decision was based and a report on the relevance of that evidence, but that these requests were not addressed.²³

57. On June 16, 2004, the Supreme Court rejected the action of unconstitutionality, arguing that:

...the records having been analyzed, especially the judgments being challenged as unconstitutional, no violation whatsoever of a constitutional or a legal nature can be seen. In point of fact, with regard to the alleged violation of the right to a defense at trial, the members of the Jury for the Prosecution of Magistrates made an objective assessment of the evidence provided both by the accuser and the accused.

...In terms of the principle of consistency, although it is true that the initial document of complaint did not indicate directly that the accused, by intervening in Case No. 9936, was infringing on Resolution No. 68 issued by the Office of the Prosecutor General of the State, the record shows that the Jury for the Prosecution of Magistrates acted in accordance with the

¹⁵ Annex xx, Action of unconstitutionality brought before the Supreme Court, April 22, 2003, Attached to the initial petition of December 27, 2004.

¹⁶ Annex xx, Action of unconstitutionality brought before the Supreme Court, April 22, 2003, Attached to the initial petition of December 27, 2004.

¹⁷ Annex xx, Action of unconstitutionality brought before the Supreme Court, April 22, 2003, Attached to the initial petition of December 27, 2004.

¹⁸ Annex xx, Action of unconstitutionality brought before the Supreme Court, April 22, 2003, Attached to the initial petition of December 27, 2004.

¹⁹ Annex xx, Action of unconstitutionality brought before the Supreme Court, April 22, 2003, Attached to the initial petition of December 27, 2004.

²⁰ Annex xx, Action of unconstitutionality brought before the Supreme Court, April 22, 2003, Attached to the initial petition of December 27, 2004.

²¹ Annex xx, Action of unconstitutionality brought before the Supreme Court, April 22, 2003, Attached to the initial petition of December 27, 2004.

²² Annex xx, Action of unconstitutionality brought before the Supreme Court, April 22, 2003, Attached to the initial petition of December 27, 2004.

²³ Annex xx, Brief to amend the action of unconstitutionality brought before the Supreme Court, May 4, 2004, Attached to the initial petition of December 27, 2004.

provisions governing the process, specifically Article 21, subparagraph (h), which gives it the authority to order, at any stage in the proceedings, any procedural steps that may be necessary to shed light on the facts.

...With regard to the assessment of the evidence done by the magistrates judging the case, it should be noted that the resolution being challenged shows clearly that they analyzed and evaluated, in accordance with the principle of sound judgment, the various witness statements provided in the records to reach the conclusions at which they arrived.²⁴

IV. ANALYSIS OF LAW

1. General considerations on applicable guarantees and the principle of judicial independence

58. Both the Inter-American Commission and the Inter-American Court have repeatedly held that, in general, the guarantees established in Article 8 of the American Convention are not limited to criminal proceedings but apply to proceedings of any other nature.²⁵ In the case of sanction proceedings specifically, both bodies of the human rights system have indicated that the guarantees established in Article 8(2) of the American Convention apply analogously,²⁶ as does the principle of legality and freedom from ex post facto laws established in Article 9 of the same instrument.²⁷ In terms of other proceedings in which rights or interests may be addressed, the “due guarantees” established in Article 8(1) of the American Convention apply, including the right to sufficient grounds for decisions.²⁸ The determination of what are the “due guarantees” in a specific proceeding to determine a person’s rights should be made in accordance with the nature of the process and the legal rights at play.²⁹

59. Accordingly, to determine what guarantees the State has the obligation to grant in the case at hand, it is necessary to refer to the nature of the proceeding in question.

60. This case involves a proceeding held before the Jury for the Prosecution of Magistrates, which concluded with the decision to remove the alleged victim from his post as Prosecutor. In this regard, the Commission considers that this was a sanction proceeding that involved the punitive power of the State, and that therefore the applicable guarantees include those that apply analogously to a criminal proceeding. Specifically, for the purpose of analyzing this case, the relevant guarantees are those established in Articles 8(1), 8(2), and 9 of the American Convention.

61. In addition to the punitive aspect, it is relevant to lay out some general considerations about reinforced guarantees in cases involving the dismissal of prosecutors.

62. The principle of the independence of justice operators is an essential requirement in a democratic system and a condition *sine qua non* for the protection of human rights.³⁰ It is enshrined as one of the due process

²⁴ Annex xx, Supreme Court, Agreement and Judgment No. 915 of June 16, 2004, Attached to the initial petition of December 27, 2004.

²⁵ IACHR, Report No. 65/11, Case 12.600, Merits, Hugo Quintana Coello et al., “Justices of the Supreme Court,” Ecuador, March 31, 2011, para. 102.

²⁶ I/A Court H.R., *Case of Baena-Ricardo et al. v. Panama*, Merits, Reparations, and Costs, Judgment of February 2, Series C. No. 72, paras. 126-127. See also: IACHR, Access to Justice as a Guarantee of Economic, Social, and Cultural Rights. A Review of the Standards Adopted by the Inter-American System of Human Rights, OEA/Ser.L/V/II.129, September 7, 2007, paras. 98-123; and Case No. 12.828, Report 112/12, Marcel Granier et al., Venezuela, Merits, November 9, 2012, para. 188.

²⁷ I/A Court H.R., *Case of Baena-Ricardo et al. v. Panama*, Merits, Reparations, and Costs, Judgment of February 2, Series C. No. 72, para. 106.

²⁸ IACHR, Report No. 43/15, Case 12.632, Merits (Publication), Adriana Beatriz Gallo, Ana María Careaga, and Silvia Maluf de Christin, Argentina, July 28, 2015, para. 136; I/A Court H.R., *Case of Barbani Duarte et al. v. Uruguay*, Merits, Reparations, and Costs, Judgment of October 13, 2011, Series C. No. 234, para. 118; and *Case of Claude Reyes et al. v. Chile*, Merits, Reparations, and Costs, Judgment of September 19, 2006, Series C No. 151, para. 118.

²⁹ I/A Court H.R., *Case of Barbani Duarte et al. v. Uruguay*, Merits, Reparations, and Costs, Judgment of October 13, 2011, Series C. No. 234, paras. 118-119.

³⁰ IACHR, Report on the Merits 12.816, Report No. 103/13, November 5, 2013, para. 112, citing United Nations, Human Rights Committee, General Comment No. 32, CCPR/C/GC/32, August 23, 2007, para.19. Along these lines, see I/A Court H.R., *Habeas corpus in Emergency* [continúa...]

guarantees protected by Article 8(1) of the American Convention; that principle, in turn, gives rise to “reinforced” guarantees³¹ which the States must provide judges to ensure their independence.³² The bodies of the inter-American system have interpreted the principle of independence in the sense of incorporating the following guarantees: a proper appointment process, tenure in the position, and a guarantee against external pressures.³³

63. The Commission reiterates that States should ensure that all persons who exercise duties as justice operators, including prosecutors, have reinforced guarantees of tenure, understanding that, with the exception of serious disciplinary offenses, employment security should be respected in line with the time period or conditions established in the appointment.

64. In view of the parties’ positions and the facts that have been established, and taking these general considerations into account, the Commission will undertake a legal analysis in the following order: i) the right to a competent, independent, and impartial tribunal (Article 8(1) of the Convention); ii) the right of defense and the principle of consistency (Article 8(2)(c) and (f) of the Convention); iii) the right to duly reasoned decisions, the principle of legality, and the right to freedom of expression (Articles 8(1), 9, and 13 of the Convention); iv) the right to appeal the judgment to a higher court and the right to judicial protection (Articles 8(2)(h) and 25 of the Convention); and v) the right to participate in government (Article 23 of the Convention).

2. The right to a competent, independent, and impartial tribunal³⁴

65. Article 8(1) of the Convention establishes the right to a hearing “by a competent...tribunal...previously established by law.” Hence, “everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.” The aim here is to avoid trials in special or ad hoc tribunals.³⁵

66. States have the authority to design and organize their internal disciplinary proceedings. These proceedings should adhere to preestablished procedures that spell out the authorities and procedural rules that apply.³⁶ This guarantee is met when the disciplinary authority originates in a law established before the proceedings in question³⁷ and, conversely, the standard is breached when the disciplinary body lacks jurisdiction established by law.³⁸ Precisely because of the important role played by the bodies responsible for appointments, promotions, and disciplinary measures, and the objectivity necessary for them to act, the Commission has

Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Advisory Opinion OC-8/87 of January 30, 1987, Series A No. 8, para. 30. See also IACHR, Democracy and Human Rights in Venezuela, Chapter III, Independence and Separation of Public Powers, December 30, 2009, para. 180.

³¹ I/A Court H.R., *Case of Reverón Trujillo v. Venezuela*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of June 30, 2009, Series C No. 197, para. 67; IACHR, Democracy and Human Rights in Venezuela, Chapter III, Independence and Separation of Public Powers, December 30, 2009, para. 85; IACHR, Second Report on the Situation of Human Rights Defenders in the Americas, December 31, 2011, para. 359.

³² Thus, for example, the Inter-American Court has indicated that the State’s obligations to parties before the courts give rise, in turn, to “rights for the judges”; among other things, the Court has noted that “the guarantee that they will not be subject to a discretionary removal implies that the disciplinary and punishing processes of judges must necessarily respect the guarantees of...due process and shall offer those affected an effective remedy.” I/A Court H.R., *Case of Reverón Trujillo v. Venezuela*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of June 30, 2009, Series C No. 197, para. 147.

³³ IACHR, OEA/Ser.L/V/II.Doc. 44, Guarantees for the Independence of Justice Operators: Towards Strengthening Access to Justice and the Rule of Law in the Americas, December 5, 2013, paras. 56, 109, and 184; I/A Court H.R., *Case of López Lone et al. v. Honduras*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of October 5, 2015, Series C No. 302, para. 191.

³⁴ Article 8(1) of the Convention establishes the following: “Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.”

³⁵ I/A Court H.R., *Case of Barreto Leiva v. Venezuela*, Merits, Reparations, and Costs, Judgment of November 17, 2009, Series C No. 206, para. 75.

³⁶ IACHR, Guarantees for the Independence of Justice Operators: Towards Strengthening Access to Justice and the Rule of Law in the Americas, December 5, 2013, para. 196.

³⁷ I/A Court H.R., *Case of Apitz Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of August 5, 2008, Series C No. 182, para. 53.

³⁸ I/A Court H.R., *Case of López Lone et al. v. Honduras*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of October 5, 2015, Series C No. 302, para. 221.

considered it advisable for States to establish an independent body whose functions include appointments, promotions, and dismissals.³⁹

67. In terms of disciplinary proceedings carried out by legislative bodies, the guarantee of impartiality (Article 8(1) of the Convention) continues to be fully applicable, as the crucial point in determining the respective guarantees is the punitive nature of the powers being exercised by the respective authority, all the more so when the severity of the punishment calls for removal from office. The guarantee of impartiality implies that the members of the Jury for the Prosecution “have no direct interest in, a pre-established viewpoint on, or a preference for one of the parties, and that they are not involved in the controversy.”⁴⁰ An assessment of impartiality must consider the personal conviction and behavior of a particular judge in a given case—the subjective approach—as well as, from an objective standpoint, whether the process afforded sufficient guarantees to exclude any legitimate doubt in this respect.⁴¹ The right to have an impartial tribunal constitutes a guarantee that a decision will be adopted based on reasons provided by the law and not on other criteria outside the legal framework. This is especially relevant when it comes to sanctions and is reinforced when it comes to sanctions of judges, taking into account the principle of judicial independence, as described above.

68. As to the right to have a competent tribunal previously established by law, the Commission notes that the section on the facts of the case sets out the legal framework applicable to the constitution of the Jury for the Prosecution of Magistrates. The Commission further notes that in the case at hand, the rules on composition had been previously established by law, and the steps to elect the President were clearly described. The Commission observes that the President is designated by simple majority of the members from the Supreme Court, the Council of Magistrates, the Chamber of the Senate, and the Chamber of Deputies, all of whom must be lawyers. In this regard, the right to a competent tribunal implies that objective rules on its composition must be in place before the fact and must be adhered to in the instant case, something that is not disputed.

69. With regard to the right to an independent tribunal, the Commission observes, with regard to its characteristics and composition, that the Jury for the Prosecution of Magistrates is made up of eight members, of whom four are Senators or Deputies. The Commission considers the legislative branch having a decisive say in punitive proceedings against justice operators to be problematic and to constitute, per se, a source of risk to the independent exercise of such a function, since such proceedings do not offer the proper institutional guarantees or suitability that the judiciary would.⁴² However, both the Commission and the Court have taken up cases in which the legislative branch has been granted substantive adjudicatory authority in punitive proceedings against judges. In those cases, the analysis as to whether or not it acted independently was conducted based on the circumstances of each specific case.⁴³ Along these lines, the Commission observes that, beyond the risks already mentioned, the petitioner questioned the independence of the JEM in generic terms, and therefore the Commission lacks sufficient information that would indicate that the members of the JEM were subordinated or dependent upon the parties in the case or whether they lacked guarantees of tenure that could translate into a lack of independence.

70. With regard to the guarantee of impartiality of the court, the Commission observes that the petitioner alleged that the President of the JEM, as well as other deputies and senators who were members, had an interest in intervening and retaliating because of the corruption cases the petitioner had been investigating. The IACHR notes that the petitioner made this allegation before the Supreme Court, when he filed the action of unconstitutionality, but that the Supreme Court did not respond to this claim. Along these same lines, the Commission observes that the alleged victim filed a challenge against the President of the JEM and other members of the jury, alleging improper actions, but that this challenge was rejected by the JEM itself. The petitioner also indicates that his sanction proceeding concluded the same day he lodged a formal accusation against the President of the JEM, Oscar González Daher, in the context of a case he was investigating. The

³⁹ IACHR, Second Report on the Situation of Human Rights Defenders in the Americas, para. 375.

⁴⁰ I/A Court H.R., *Case of Palamara Iribarne v. Chile*, Merits, Reparations, and Costs, Judgment of November 22, Series C No. 135, para. 146.

⁴¹ See European Court of Human Rights, *Case of Thomann v. Switzerland*, Judgment of June 10, 1996, Reports of Judgments and Decisions 1996-III, p. 815, para. 30.

⁴² IACHR, Report No. 72/17, Case 13.019, Merits, Eduardo Rico, Argentina, July 5, 2017, para. 100.

⁴³ See, for example, *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador*, and *Case of the Constitutional Court v. Peru*, both of which were taken up by the Commission and subsequently by the Inter-American Court.

Commission considers that such aspects would be problematic when it comes to analyzing the impartiality of the JEM, because they could suggest a situation of retaliation against a prosecutor for investigations he was carrying out against political authorities.

71. Despite the foregoing, the case file does not include either the challenge that was filed or the decision on the matter. The Commission also observes that Judgment S.D. No. 02/03 of April 7, 2003, which determined the alleged victim's dismissal, was not signed by the President of the JEM, Oscar González Daher. Based on the above considerations, the Commission considers that it does not have the elements at hand to determine whether there has been a violation of the guarantee of impartiality.

3. The right of defense and the principle of consistency⁴⁴ and reasonable time⁴⁵

72. The Inter-American Court has established that under Article 8 of the Convention, the right to an adequate defense is a component of due process, and for this right to be observed, a defendant must be able to defend his interests or rights effectively and in full procedural equality with other defendants⁴⁶ and be fully informed of the charges against him.⁴⁷

73. When determining the scope of the guarantees contained in Article 8(2) of the Convention, the Court has indicated that the role of the "indictment" must be considered in criminal due process vis-à-vis the right to a defense. The material description of the attributed conduct contains the factual information included in the indictment, which is the indispensable reference for the exercise of the defense of the accused and the consequent consideration of the judge in the verdict. Therefore, the defendant has the right to know, through a clear, detailed, and precise description, the facts he is being charged with. Their legal classification may be modified during the process by the prosecutor or the judge, without this violating the right to a defense, when the facts themselves remain invariable and the procedural guarantees included in the law for the change to the new classification are observed. The so-called "principle of coherence or correlation between the indictment and the conviction" implies that the judgment may fall only upon the facts or circumstances included in the indictment.⁴⁸

74. In this regard, the Inter-American Court has held that because the principle of coherence or correlation is an indispensable corollary of the right to a defense, it constitutes a fundamental guarantee of due process, under the obligations laid out in subparagraphs (b) and (c) of Article 8(2) of the Convention.

75. In terms of reasonable time, the Inter-American Court has indicated that the right of access to justice implies that the settlement of the dispute should be produced within a reasonable time, because a prolonged delay can constitute, in itself, a violation of the right to a fair trial.⁴⁹ The Court has established that four elements must be considered to determine whether a time period is reasonable: a) the complexity of the matter,

⁴⁴ Article 8(2) of the Convention establishes, in its pertinent sections: "Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: ...b. prior notification in detail to the accused of the charges against him; c. adequate time and means for the preparation of his defense; d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel; ...f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts."

⁴⁵ Article 8(1) of the Convention establishes that every person "has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."

⁴⁶ I/A Court H.R., *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03 of September 17, 2003, Series A No. 18, para. 121.

⁴⁷ IACHR, *Guarantees for the Independence of Justice Operators: Towards Strengthening Access to Justice and the Rule of Law in the Americas*, December 5, 2013, para. 219.

⁴⁸ I/A Court H.R., *Case of Fermín Ramírez v. Guatemala*, Merits, Reparations, and Costs, Judgment of June 20, 2005, Series C No. 126, para. 67.

⁴⁹ I/A Court H.R., *Case of Heliodoro Portugal v. Panama*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of August 12, 2008, Series C No. 186, para. 148, and *Case of Salvador Chiriboga v. Ecuador*, Preliminary Objection and Merits, Judgment of May 6, 2008, Series C No. 179, para. 59.

b) the procedural activity of the interested party, c) the conduct of the judicial authorities, and d) the impairment to the legal situation of the person involved in the proceedings.⁵⁰

76. With regard to the right to a defense and the principle of consistency, the Commission notes that the charge brought against the alleged victim on March 12, 2002, for poor performance of duties stated that in the context of Case No. 9936, he met the grounds established in Article 14, subparagraphs (b), (g), (n), and (p) of Law No. 1084. The charge indicated, with respect to subparagraph (b), that Mr. Nissen Pessolani broke procedural rules to take a statement, failed to investigate exculpatory facts, and engaged in acts of intimidation by threatening higher penalties. With regard to subparagraph (g), the accuser stated that the alleged victim applied the money laundering law when that was not appropriate. Regarding subparagraph (n), the accuser maintained that the information and statements made by Mr. Nissen were innumerable and that this could be corroborated simply by requesting newspaper editions and tapes from television stations. Finally, in terms of subparagraph (p), the accuser specified that the then-prosecutor offered procedural benefits in exchange for statements. As can be seen in the JEM ruling of April 7, 2003, the alleged victim answered the formal charge on April 16, 2002, denying each of the counts attributed to him. The ruling in question determined that the alleged victim met the grounds established in subparagraphs (b), (g), and (n) of Article 14 of Law No. 1084.

77. The Commission observes that in its judgment of April 7, 2003, the Jury for the Prosecution of Magistrates modified the factual basis of the indictment, failing to observe the principle of consistency. Specifically, with regard to the grounds established in Article 14, subparagraph (n), the Commission notes that the JEM held that the alleged victim “provided information and made comments and declarations to the press...that went beyond the sensitive parameters of criminal investigation in its preliminary stage” and affected those involved. However, in analyzing subparagraphs (b) and (g) of Article 14, the JEM added facts that were different than those set forth in the formal charge, which in its opinion constituted the grounds mentioned above.

78. First, with respect to subparagraph (b), the JEM maintained that by intervening in Case No. 9936, Mr. Nissen Pessolani failed to comply with Resolution No. 68 of February 2, 2001, issued by the Office of the Prosecutor General of the State, which referred to the distribution of cases on a rotational basis. That aspect was not included in the initial charge.

79. Second, in ruling on subparagraph (g), the JEM argued that it “should address” some of the steps the alleged victim took in the context of the sanction proceeding, which also constituted grounds for removal. To that effect, it concluded that Mr. Nissen had arrogated to himself powers that belonged solely to the JEM, for having included in the case file of the proceedings against him an expert witness statement regarding a document presented by his accuser that allegedly included an unverified signature. That procedural action, as is evident, is also not covered in the charge.

80. The Commission thus observes that if disciplinary bodies can in fact carry out investigations or procedural steps to examine the conduct of those subject to its review, it is necessary to ensure that the right of defense can be exercised, a matter that is especially important when the case involves justice operators and when the most severe punishment is removal from office. In this specific case, based on what has been laid out, the factual basis established in the formal charge was modified without Mr. Nissen Pessolani being able to mount a defense in regard to the matter. This substantial modification brought with it the possibility of imposing—as indeed occurred—the maximum punishment in a proceeding of this type, which is dismissal.

81. With regard to reasonable time, the Commission notes that Article 31 of Law No. 1084 provides that a final judgment must be issued within 180 days of the proceeding being initiated. The case file shows that the JEM began prosecution of the alleged victim by issuing a notification on March 18, 2002. It is also evident that the judgment was issued on April 7, 2003, in other words, 384 days after the case was begun. Subsequent to that, the petition of unconstitutionality lodged by the petitioner was ruled on by the Supreme Court on June 16, 2004. The Commission deems that the JEM’s failure to comply with the legal time frames in which to issue a judgment, in a case that was not highly complex, violates the reasonable time guarantee.

⁵⁰ IACHR, Report No. 75/15, Case 12.923, Merits, Rocío San Miguel Sosa and Others, Venezuela, October 28, 2015, para. 200; I/A Court H.R., *Case of Kawas Fernández v. Honduras*, Merits, Reparations, and Costs, Judgment of April 3, 2009, Series C No. 196, para. 112.

Based on the foregoing considerations, the IACHR considers that the Paraguayan State is responsible for violating the rights established in Article 8(1) and 8(2)(b) and (c) of the American Convention, in conjunction with Article 1(1) thereof, to the detriment of Alejandro Nissen Pessolani.

4. The right to reasoned decisions,⁵¹ the principle of legality,⁵² and the right to freedom of expression⁵³

82. The principle of legality recognized in Article 9 of the Convention governs the actions of State bodies that arise from the exercise of the State's punitive power.⁵⁴ That principle applies to disciplinary proceedings, which are "an expression of the punitive powers of the State," as they entail impairment or alteration of people's rights as a consequence of a wrongful conduct.⁵⁵

83. The Commission has indicated that compliance with the principle of legality allows people to effectively determine their conduct in accordance with the law.⁵⁶ As the IACHR has stated, "The principle of legality has a specific role in the definition of crimes; on the one hand, it guarantees individual liberty and safety by preestablishing the behavior that is penalized clearly and unambiguously and, on the other hand, it protects legal certainty."⁵⁷

84. The precision of a norm establishing a sanction of a disciplinary nature may be different from that required in a criminal matter, owing to the nature of the disputes that each one is designed to resolve.⁵⁸ However, it must be predictable, "either because the punishable conduct is expressly and clearly established, precisely, clearly and previously, by law, or because the law delegates its imposition to the judge or to an infra-legal norm, under objective criteria that limit the scope of discretion."⁵⁹

85. The obligation to provide grounds for decisions translates into the "reasoned justification" that allows the judge to reach a conclusion.⁶⁰ That guarantee is closely related to the principle of legality, since on the premise that disciplinary grounds should be established in the State's legal framework, in keeping with the standards described above, the justification for a ruling should disclose "the facts, reasons, and provisions the authority relied on in reaching its decision."⁶¹ In that sense, the justification for the punitive decision is what explains how the facts that were the basis of the proceeding align with or fall within the scope of the grounds invoked.

⁵¹ Article 8(1) of the Convention establishes the following: "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."

⁵² Article 9 of the Convention establishes the following: "No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom."

⁵³ Article 13 of the Convention establishes: "1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice."

⁵⁴ IACHR, Criminalization of the Work of Human Rights Defenders, OEA/Ser.L/V/Doc.49/15, December 31, 2015, para. 253.

⁵⁵ I/A Court H.R., *Case of López Lone et al. v. Honduras*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of October 5, 2015, Series C No. 302, para. 257; *Case of Maldonado Ordoñez v. Guatemala*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of May 3, 2016, Series C No. 311, para. 89; and *Case of Baena-Ricardo et al. v. Panama*, Merits, Reparations, and Costs, Judgment of February 2, 2001, Serie C. No. 72, paras. 106 and 108.

⁵⁶ IACHR, Report on Terrorism and Human Rights, OEA/SERL/V/II.116, Doc. 5 rev. 1 corr., October 22, 2002, para. 225, and Executive Summary, para. 17.

⁵⁷ IACHR, Application and submissions to the Inter-American Court of Human Rights in the *Case of De la Cruz Flores v. Peru*; referred to in: I/A Court H.R., *Case of De la Cruz Flores v. Peru*, Judgment of November 18, 2004, Merits, Reparations, and Costs, Series C. No. 115, para. 74.

⁵⁸ I/A Court H.R., *Case of López Lone et al. v. Honduras*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of October 5, 2015, Series C No. 302, para. 257.

⁵⁹ I/A Court H.R., *Case of López Lone et al. v. Honduras*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of October 5, 2015, Series C No. 302, para. 259.

⁶⁰ I/A Court H.R., *Case of Maldonado Ordoñez v. Guatemala*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of May 3, 2016, Series C No. 311, para. 87.

⁶¹ IACHR, Report No. 103/13, Case 12.816, Report on the Merits, Adán Guillermo Lopez Lone et al., Honduras, OEA/Ser.L/V/II.149, Doc. 27, November 5, 2013, para. 145.

On this point, in *De la Cruz Flores v. Perú*, the Court stressed the need that in all punitive decisions there be a link between the conduct of which the person is accused and the provision on which the decision is based.⁶²

86. In terms of the applicable penalty, the “principle of maximum severity” of the punishment of dismissal of a justice operator implies that it is only appropriate for “clearly punishable” conduct, “based on the most serious grounds of misconduct or incompetence.”⁶³ Thus, for example, the protection of judicial independence requires that the dismissal of judges be considered the last resort in judicial disciplinary matters.⁶⁴ In its report “Guarantees for the Independence of Justice Operators,” the IACHR indicated the following: “Under international law, the penalty of suspension or removal must be applied only in the case of the most serious misconduct. As the Council of Europe recommended with respect to disciplinary offences, the disciplinary measures should become stricter as the seriousness of the offence increases, and can include removal of cases from a judge, assigning the judge other tasks, economic sanctions and suspension.”⁶⁵ Moreover, the Court has indicated that the tenure of justice operators implies that dismissal is due to very serious conduct, while other sanctions may be used in the case of negligence or lack of capacity.⁶⁶

87. With respect to the right to freedom of expression, inter-American case law has held that the entitlement to this right enshrined in the American Convention cannot be confined to a specific profession or group of persons, or to the realm of freedom of the press. This broad perspective includes, of course, prosecutors, who do not forfeit their basic rights upon taking office; instead they enjoy the same freedom of expression that every other person enjoys.⁶⁷

88. Inter-American case law has also established that the exercise of this right by public officials has certain connotations and specific characteristics.⁶⁸ The Court has maintained, for example, that the critical democratic role of freedom of expression demands that, in certain cases, public officials make statements on matters of public interest in the performance of their legal duties, especially concerning investigations into acts of corruption. In other words, under certain circumstances, the exercise of their freedom of expression is not just a right but a duty.⁶⁹

89. Likewise, since the adoption of Advisory Opinion OC-5/85 and repeatedly in case law, the Inter-American Court has indicated that freedom of expression, particularly in matters of public interest, “is a cornerstone upon which the very existence of a democratic society rests.” The Court has stated, “Without an effective guarantee of freedom of expression the democratic [system] is weakened and there is a breakdown of pluralism and tolerance; the mechanisms of control and complaint that citizens have may become inoperable and, indeed, a fertile ground is created for authoritarian systems to take root.”⁷⁰

⁶² I/A Court H.R., *Case of De la Cruz Flores v. Peru*, Merits, Reparations, and Costs, Judgment of November 18, 2004, Series C. No. 115, para. 84.

⁶³ I/A Court H.R., *Case of López Lone et al. v. Honduras*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of October 5, 2015, Series C No. 302, para. 259.

⁶⁴ I/A Court H.R., *Case of López Lone et al. v. Honduras*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of October 5, 2015, Series C No. 302, para. 259; IACHR, Report No. 38/16, Case 12.768, Merits, Omar Francisco Canales Ciliezar, Honduras, August 31, 2016, para. 71 and ff. See also IACHR, *Guarantees for the Independence of Justice Operators: Towards Strengthening Access to Justice and the Rule of Law in the Americas*, December 5, 2013, para. 211. In that report, the IACHR held that “laws that establish administrative disciplinary measures such as dismissal must be subjected to the strictest test of legality. Such laws not only provide for extremely serious penalties and curtail the exercise of rights, but also create an exception to the principle of judicial stability and can compromise the principles of judicial independence and autonomy.”

⁶⁵ IACHR, *Guarantees for the Independence of Justice Operators: Towards Strengthening Access to Justice and the Rule of Law in the Americas*, December 5, 2013, para. 217.

⁶⁶ I/A Court H.R., *Case of López Lone et al. v. Honduras*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of October 5, 2015, Series C No. 302, para. 199.

⁶⁷ IACHR, Report No. 103/13, Case 12.816, Report on the Merits, Adán Guillermo López Lone et al., Honduras, OEA/Ser.L/V/II.149, Doc. 27, November 5, 2013, para. 201; IACHR, Report No. 21/18, Case 12.955, Merits, Daniel Urrutia Laubreaux, Chile, February 24, 2018, para. 84.

⁶⁸ IACHR, Annual Report 2009, Report of the Special Rapporteur for Freedom of Expression, OEA/Ser.L/V/II Doc. 51, December 30, 2009, Chapter III, para. 202 and ff.

⁶⁹ I/A Court H.R., *Case of Ríos et al. v. Venezuela*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of January 28, 2009, Series C No. 194, para. 139; *Case of Perozo et al. v. Venezuela*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of January 28, 2009, Serie C No. 195, para. 151.

⁷⁰ I/A Court H.R., *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 of November 13, 1985, Series A No. 5., para 70; *Case of López Lone et al. v.* [continúa...]

90. One of the principal functions of freedom of expression is to facilitate and make it possible for individuals and social actors of various kinds to exercise social oversight of government and other powers that be. As the IACHR has stated, “freedom of expression is one of the most effective ways to denounce corruption,”⁷¹ and it enables citizens to participate not only in making decisions that affect them but also in the oversight of government.⁷² The exercise of freedom of expression therefore plays a fundamental role for investigating and reporting corruption; hence, the State’s duty to create “an environment free from intimidation for the exercise of freedom of expression by those who investigate, report and denounce acts of corruption.”⁷³

91. The Commission has noted that judicial officers who conduct such proceedings are attacked by their authorities or their peers with verbal insults and threats, the use of special judicial proceedings (*antejuicios*), and the filing of complaints. These acts are used as instruments of control and intimidation as the judicial officers pursue their work, especially those who participate in high-impact corruption cases or cases in which major economic interests are at stake.⁷⁴

92. Along the same lines, the IACHR considers that, as public officials, judges, prosecutors, and public defenders enjoy a right to freedom of expression that is quite broad, as this right is necessary to explain to society, for example, certain aspects of national interest and relevance. Specifically, prosecutors in charge of investigating alleged acts of corruption have the right and the duty to inform society, through the press, about the nature of the investigations they are handling and the implications these could have for society and the State as a whole. However, this right is subject to special restrictions related to the guarantees that justice operators must provide in the cases assigned to them.⁷⁵

93. In this context, the Commission has established that States have the obligation to protect justice operators and to create adequate conditions for them to be able to carry out their work of investigating and punishing acts of corruption, guaranteeing their security.⁷⁶

94. The IACHR has also stated that the legitimate protection of the principles of independence and impartiality for justice operators cannot be premised on the notion that an authority must remain silent on all matters of public relevance. Rather, for prosecutors as well as judges, any restrictions must strike a proper balance between the right to expression and the duty to exercise the discretion and prudence necessary to protect the independence and impartiality of their office.⁷⁷ In a 2002 joint declaration, the rapporteurs for freedom of expression of the UN, the IACHR, and the OSCE stated that “judges’ right to freedom of expression [also applicable to prosecutors], and to comment on matters of public concern, should be subject only to such narrow and limited restrictions as are necessary to protect their independence and impartiality.”⁷⁸

95. In its case law related to sanctions on judges for exercising the right to freedom of expression, the European Court has taken the following elements into account: the office held by the applicant; the content of the statements being challenged; the context in which the statements were made; and the nature and severity of the sanctions imposed.⁷⁹

Honduras, Preliminary Objection, Merits, Reparations, and Costs, Judgment of October 5, 2015, Series C No. 302, para. 165; and *Case of Carvajal Carvajal et al. v. Colombia*, Merits, Reparations, and Costs, Judgment of March 13, 2018, Series C No. 352, para. 174.

⁷¹ IACHR, Annual Report 2008, Report of the Office of the Special Rapporteur for Freedom of Expression, Chapter III, OEA/Ser.L/V/II.134 Doc. 5 rev. 1., February 25, 2009, para. 34.

⁷² IACHR, Office of the Special Rapporteur for Freedom of Expression, A Hemispheric Agenda for the Defense of Freedom of Expression, OEA/Ser.L/V/II/CIDH/RELE/INF.4/09, February 25, 2009, para. 54.

⁷³ IACHR, Corruption and Human Rights: Inter-American Standards, OEA/Ser.L/V/II., December 6, 2019, para. 185.

⁷⁴ IACHR, Corruption and Human Rights: Inter-American Standards, OEA/Ser.L/V/II., December 6, 2019, para. 403.

⁷⁵ IACHR, Guarantees for the Independence of Justice Operators: Towards Strengthening Access to Justice and the Rule of Law in the Americas, December 5, 2013, para. 172.

⁷⁶ IACHR, Corruption and Human Rights: Inter-American Standards, OEA/Ser.L/V/II., December 6, 2019, para. 408.

⁷⁷ I/A Court H.R., *Case of López Lone et al. v. Honduras*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of October 5, 2015, Series C No. 302, paras. 157 and 163. IACHR, Report No. 21/18, Case 12.955, Merits, Daniel Urrutia Laubreaux, Chile, February 24, 2018, para. 88.

⁷⁸ Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur for Freedom of Expression, 2002.

⁷⁹ European Court of Human Rights, *Case of Baka v. Hungary*, Application no 20261/12, judgment of June 23, 2016, para. 159; see also European Court of Human Rights, *Case of Wille v. Liechtenstein*, judgment of October 28, 1999, para. 63.

96. The case law of the Commission and the Inter-American Court has indicated that limitations on freedom of expression must be the exception, and to be admissible, they must meet three basic conditions established in Article 13(2) of the Convention: (a) the limitation must have been precisely and clearly defined through formal and material law. The IACHR has maintained that vague or ambiguous legal provisions that grant very broad discretionary powers to the authorities are incompatible with the American Convention, because they can support potential arbitrary acts that are tantamount to prior censorship or that establish disproportionate liabilities for the expression of speech protected by the treaty.⁸⁰ Also, for subsequent liability that restricts freedom of expression to be legitimate, it is not enough for it to simply be spelled out clearly and precisely in a law. It must also be determined (b) whether the objective the limitation pursues is legitimate and justified by the American Convention and (c) whether the limitation is necessary in a democratic society, adequate to meet the objective it pursues, and strictly proportional to the end being sought.⁸¹

97. The IACHR maintains that in every case in which a violation of the duty to exercise prudence is alleged because of a judge's or prosecutor's participation in a matter of public interest, a careful assessment must be done to determine whether the expression of opinion affected the judge's independence and impartiality to such an extent as to warrant a disciplinary sanction. It is up to the State to prove that the purpose of the limitations imposed is strictly to protect these principles, and that the limitations have been interpreted narrowly, as they constitute an exception to the general principle whereby freedom of expression is a broad right guaranteed to every person equally and is especially protected in the case of speech on matters of public interest.⁸²

98. In the case at hand, the Commission observes that the ruling that dismissed Mr. Nissen Pessolani from his position argued that he had "provided information and made comments and statements to the press and third parties that went beyond the sensitive parameters of criminal investigation in its preliminary stage, thus affecting the honor, the reputation, or the presumption of innocence guaranteed to all citizens," and that this conduct constituted the grounds laid out in Article 14 subparagraph (n) of Law No. 1084. In addition, the judgment stated that "with the newspaper editions, magnetic tapes (cassettes), and audiovisual tapes (videocassettes) sent to this jury by different written and oral media outlets, it is possible to verify that the accused is dangerously prone to revealing to the public the preliminary steps he is taking in the cases he is responsible for investigating." Finally, the judgment found it "alarming" that the alleged victim had "an undue tendency" to disclose and inform the public through the media about procedural steps, investigations, testimony, and documents.

99. The Commission notes that the punitive judgment against the alleged victim did not determine, specifically and clearly, the statements he made; the dates, context, and media outlets to which he made them; and how these statements allegedly violated the rights of the individuals involved in the investigations being carried out by Mr. Nissen Pessolani. This lack of specificity of facts and evidence is incompatible with the duty to provide grounds for decisions, as it prevents an understanding of how the JEM made its assessment and does not explain the reasons that determined the alleged victim's dismissal from office.

100. The Commission will also determine whether the penalty of dismissal imposed on Mr. Nissen Pessolani for exercising the right to freedom of expression is legitimate under the above-described terms of the American Convention.

101. The legal provision contained in Article 14 subparagraph (n) of Law No. 1084, used to sanction Mr. Nissen Pessolani, establishes that a prosecutor can be removed from office for "[giving] information or [issuing] statements or comments to...third parties about the trials they are handling, when they might affect their processing, or affect the honor or reputation or the presumption of innocence established in the National

⁸⁰ IACHR, Annual Report 2009, Report of the Special Rapporteur for Freedom of Expression, OEA/Ser.L/V/II.Doc. 51, December 30, 2009, Chapter III, para. 71.

⁸¹ IACHR, Report No. 103/13, Case 12.816, Report on the Merits, Adán Guillermo López Lone et al., Honduras, OEA/Ser.L/V/II.149, Doc. 27, November 5, 2013, para. 203.

⁸² *Mutatis mutandi*, IACHR, Report No. 103/13, Case 12.816, Report on the Merits, Adán Guillermo López Lone et al., Honduras, OEA/Ser.L/V/II.149, Doc. 27, November 5, 2013, para. 214.

Constitution; or [sustaining] polemics about ongoing trials.” The Commission considers that the way this is worded is excessively vague and ambiguous, which runs contrary to the principle of legality. The legal provision does not establish clear parameters that would explain what should be understood concerning the type and content of the information, statements, or comments provided to the press or third parties, or what might be meant by polemics about ongoing trials. In this regard, it has the practical effect of abolishing the prosecutor’s right to express opinions about all matters he is investigating.

102. The Commission understands that the cited legal provision lacks the level of specificity required for regulations that establish limitations and does not make it possible to observe a proper balance between prosecutors’ right to expression and the duty to exercise the discretion and prudence necessary to protect the independence and impartiality of their office.

103. The Commission further observes that this prohibition on expression, expressed in broad and general terms, has a direct impact on the work of prosecutors who are handling investigations related to acts of corruption, as well as on the right and the duty to inform society, through the press, about the nature of the cases they are handling.

104. Based on the foregoing, the Commission concludes that the ambiguity and broad scope of the grounds for removal contemplated in Article 14 subparagraph (n) of Law No. 1084 and applied in the case at hand implies a failure to comply with the requirement of strict legality in the imposition of restrictions on the rights to freedom of expression of Mr. Nissen Pessolani in his capacity as public prosecutor.

105. Along the same lines, the Commission underscores that the scant legal reasoning provided in the sanction decision does not lay out an argument that would enable verification that the restriction on freedom of expression was based on a legitimate purpose and that it was suitable, necessary, and strictly proportional to the end being sought. The IACHR considers that a sanction brought against a public prosecutor for exercising the right to freedom of expression required the Jury for the Prosecution of Magistrates, at the very least, to provide a thorough analysis of the restriction and sufficient and proper grounds, aspects that are not seen in the disciplinary ruling. Therefore, the Commission considers that an arbitrary restriction to the exercise of freedom of expression was imposed, through the imposition of a subsequent liability that did not comply with the requirements established in the Convention.

106. In light of the foregoing considerations, the IACHR concludes that the Paraguayan State violated the right to reasoned decisions, the principle of legality, and the right to freedom of expression established in Articles 8(1), 9, 13(1), and 13(2) of the American Convention, in conjunction with Article 1(1) thereof, to the detriment of Alejandro Nissen Pessolani.

5. The right to appeal the judgment to a higher court⁸³ and the right to judicial protection⁸⁴

107. The right of appeal is a part of due process of law, under Article 8(2)(h) of the Convention.⁸⁵ With respect to this guarantee, the United Nations Basic Principles on the Independence of the Judiciary provide, referring to judges, that “decisions in disciplinary, suspension or removal proceedings should be subject to an independent review.”⁸⁶ The Commission has found that this matter extends to justice operators such as prosecutors, who should have certain guarantees of tenure and whose review of a conviction demands the possibility of a comprehensive examination of the decision being appealed,⁸⁷ which requires that it be verified by a higher body that can analyze the issues of fact, evidence, and law on which the contested judgment was

⁸³ Article 8(2)(h) of the American Convention establishes “the right to appeal the judgment to a higher court.”

⁸⁴ Article 25(1) of the Convention provides the following: “Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.”

⁸⁵ I/A Court H.R., *Case of Herrera Ulloa v. Costa Rica*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of July 2, 2004, Series C No. 107, para. 158.

⁸⁶ United Nations, Office of the High Commissioner for Human Rights, Basic Principles on the Independence of the Judiciary, Principle 20.

⁸⁷ I/A Court H.R., *Case of Herrera Ulloa v. Costa Rica*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of July 2, 2004, Series C No. 107, para. 165.

based.⁸⁸ This remedy must be guaranteed before the judgment becomes *res judicata*; it must be resolved within a reasonable period of time, in other words, it must be timely; and it must be effective, in other words, it must provide results or responses to the end that it was intended to serve. Moreover, the remedy must be accessible; hence, the kind of complex formalities that would render this right illusory must not be required.⁸⁹

108. The IACHR has maintained that the State has a general obligation to provide effective judicial recourse to persons who claim to be victims of human rights violations (Article 25), and that remedy must be substantiated in accordance with the rules of due process of law (Article 8.1). For an effective recourse to exist, it is not enough for it to be established by law; rather, it needs to be truly appropriate for establishing whether there has been a human rights violation and for providing whatever is necessary to remedy this.⁹⁰

109. The IACHR calls to mind that the legal framework applicable to this case establishes, in its Article 21, with regard to final judgments issued by the Jury for the Prosecution of Magistrates, that “any final judgments, resolutions, and orders that the Jury may decree cannot be appealed to any other body.” However, a petition for reversal or clarification may be filed before the same Jury. Only an action of unconstitutionality may be examined by another body; such an action is resolved by the Supreme Court *en banc*. The Commission observes that by its nature and legal configuration, a petition for reversal and clarification does not allow for a thorough review of the JEM’s decisions, nor it is an appropriate remedy that ensures the right for the decision to be reviewed by a higher court. Nevertheless, the Commission notes that the alleged victim lodged a petition for reversal and clarification, which was denied on April 22, 2003, as the JEM considered that the appellant had requested clarification of matters that were clearly laid out in Article 31 of Law No. 1084.

110. In addition, the Commission notes that the petitioner filed an action of unconstitutionality with the Supreme Court on April 22, 2003. This action was rejected on June 16, 2004, essentially because “no infringements of rights or constitutional guarantees were observed in the judgment being challenged, nor was there arbitrariness in the decision criteria.” With regard to this appeal, the IACHR notes that although the record does not show that the magistrates who participated in the JEM signed the decision, it is problematic for this appeal to have been resolved by the full Supreme Court, which includes two members of the JEM. The Commission further observes, based on the limited legal framework and the content of the June 14, 2004, decision issued by the Supreme Court, that the action of unconstitutionality is a remedy that in principle does not allow for a thorough review or examination of the facts or the evidence with regard to the decision to dismiss the alleged victim; rather, the scope of its competence is limited to matters of due process, without the remedy being effective to enable protection of the alleged victim’s rights. As laid out above, in ruling on this appeal, the Supreme Court found that the principle of consistency was not affected, because the JEM acted in accordance with Article 21 subparagraph (h), which gives it the authority to order, at any stage in the proceedings, any procedural steps that may be necessary to shed light on the facts. However, as has been explained, without being given the appropriate opportunity and faced with a new factual basis for the charges, Mr. Nissen was not able to exercise his right of defense.

111. Based on the foregoing, and analyzing the totality of the available remedies, the Commission deems that the alleged victim did not have access to a remedy that would allow for a comprehensive review to challenge the decision that ordered his dismissal as a criminal prosecutor, or to an effective judicial recourse, as provided in the American Convention, to ensure protection of the rights he believes were violated.

112. The Commission therefore concludes that the Paraguayan State is responsible for violating the rights established in Articles 8(2)(h) and 25(1) of the American Convention, in conjunction with Articles 1(1) and 2 thereof, to the detriment of Alejandro Nissen Pessolani.

⁸⁸ I/A Court H.R., *Case of Mendoza et al. v. Argentina*, Preliminary Objections, Merits, and Reparations, Judgment of May 14, 2013, Series C No. 260, para. 245.

⁸⁹ IACHR, Report No. 33/14, Case 12.820, Manfred Amrhein et al., Costa Rica, April 4, 2014, para.186 and ff.

⁹⁰ I/A Court H.R., *Case of the Dismissed Congressional Employees (Aguado Alfaro et al) v. Peru*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 24, 2006, Series C No. 158, para. 125; *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment of June 17, 2005, Series C No. 125, para. 61; *Case of the "Five Pensioners" v. Peru*, Judgment of February 28, 2003, Series C No. 98, para. 136.

6. Political rights⁹¹

113. Article 23(1)(c) establishes the right to have access to public service “under general conditions of equality.” The Court has interpreted that article to mean that when a judge’s tenure is arbitrarily impaired, the right to judicial independence is violated, as is the right of access to public service and tenure, under general conditions of equality, established in Article 23(1)(c).⁹² The Commission has held that this standard also applies to prosecutors, as the increased tenure protections for judges are also applicable and should protect prosecutors, to guarantee their independence in performing the duties of their office.⁹³

114. The case at hand has established that Mr. Nissen Pessolani was separated from his post as public prosecutor in a proceeding in which there were violations both to due process and to the principle of legality, in the terms described throughout this report on the merits of the case. It was also established that the disciplinary process was carried out in a manner that is incompatible with the right to freedom of expression. Under such circumstances, and pursuant the criteria mentioned in the previous paragraph, the Commission considers that the State also violated Article 23(1)(c) of the American Convention, in conjunction with Article 1(1) thereof, to the detriment of Mr. Alejandro Nissen Pessolani.

V. CONCLUSIONS AND RECOMMENDATIONS

115. Based on the determinations of fact and of law, the Inter-American Commission concluded that the State is responsible for violating the rights to a fair trial, principle of legality, freedom of expression, and judicial protection, established in Articles 8(1), 8(2)(b), 8(2)(c), 8(2)(h), 9, 13(1), 13(2), 23(1)(c), and 25(1) of the American Convention on Human Rights, in conjunction with the obligations established in Articles 1(1) and 2 thereof, to the detriment of Alejandro Nissen Pessolani.

116. Based on the analysis and conclusions in this report,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS RECOMMENDS THAT THE STATE OF PARAGUAY

1. Reinstatement the victim to a position similar to the one he held before, with the same remuneration, fringe benefits, and equivalent rank to what he would be entitled today if he had not been terminated. If this is not the victim’s wish, or if there are objective reasons that would keep him from being reinstated, the State should pay compensation for this reason, independent of the reparations for material and moral harm included in the second recommendation.

2. Provide full reparation for the consequences of the violations laid out in this report, including both material and non-material harm.

3. Within the Jury for the Prosecution of Magistrates, provide any training related to the right of defense, the principle of legality, and freedom of expression that may be relevant in the exercise of its disciplinary role, along the lines stated in this report.

4. Adopt any legislative, administrative, or other types of measures that may be necessary to ensure that disciplinary proceedings against public prosecutors are compatible with due process standards for justice system operators. Specifically, any necessary measures should be taken so that proceedings can guarantee the right to appeal sanction decisions and ensure judicial protection.

⁹¹ Article 23 of the American Convention establishes the following, in its pertinent sections: “1. Every citizen shall enjoy the following rights and opportunities: ...c. to have access, under general conditions of equality, to the public service of his country. 2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.”

⁹² IACHR, Report No. 72/17, Case 13.019, Merits, Eduardo Rico, Argentina, July 5, 2017, para. 124; I/A Court H.R., *Case of López Lone et al. v. Honduras*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of October 5, 2015, Series C No. 302, para. 192.

⁹³ IACHR, Report No. 116/18, Case 12.975, Merits, Julio Casa Nina, Peru, October 5, 2018, para. 75.